Free Speech and the Embodied Self

Japa Pallikkathayil

Democratic theories of free speech hold that the right to free speech is grounded in the nature of collective self-governance.[1] As Ronald Dworkin puts it, "The majority has no right to impose its will on someone who is forbidden to raise a voice in protest or argument or objection before the decision is taken" (Dworkin 2009, p. vii).[2] Views of this kind might be thought to be in tension with hate speech regulation. Dworkin argues that when we attempt to put in place laws protecting members of minority groups from various kinds of discrimination, we must not forbid "any expression of attitudes or prejudices that we think nourish such unfairness or inequality, because if we intervene too soon in the process through which collective opinion is formed, we spoil the only democratic justification we have for insisting that everyone obey these laws, even those who hate them" (Dworkin 2009, p. viii).

My aim in this paper is to diffuse the tension Dworkin sees between a democratic justification of the right to free speech and hate speech regulation. I do this by developing an account of how our bodily rights constrain the right to free speech. These constraints suggest two grounds for regulating certain kinds of hate speech. The first reflects the way in which hate speech can be threatening. The second reflects the way in which hate speech involves a problematic intrusion into our mental lives. These arguments, however, will leave open the possibility that some hate speech is immune to regulation, and thus the possibility that Dworkin's argument contains a grain of truth.

I. Hate Speech as Intimidation

This section does not reflect directly on messages of hate, but rather on the way in which messages of hate are often intimately bound up with messages of violence. My aim in this section will be to defend The Argument from Intimidation:

(1) Threats to violate legally-recognized bodily rights are an appropriate object of legal regulation.

(2) Communicative acts doing one or more of the following in a manner that gives individuals reasonable cause to fear for their physical safety constitute threats to violate their legally-recognized bodily rights: (a) advocating or endorsing violence against members of a group in virtue of their group membership; (b) using symbols strongly associated with violence against members of a group.

(3) Therefore, communicative acts of these kinds are an appropriate object of legal regulation.

Let us begin by considering premise (1). I take the basic idea behind premise (1) to be largely uncontroversial. When Dworkin suggests that we must not forbid "any expression of attitudes or prejudices" we should interpret this in a way that is consistent with the following observation. The right to speak is constrained by the legally-recognized rights of others. I may not, for example, graffiti someone else's house with my manifesto. Likewise, my right to speak is properly constrained by your right to your own body. So, of course, I also may not tattoo my manifesto on you without your consent.

Threatening a person is a similar though less direct way of taking control of her body without her consent. Threats aimed at inducing action are perhaps the most familiar kind of threat. Consider, for example, a mugger's threat to kill you if you do not hand over your wallet. The mugger here illicitly uses your life as a bargaining chip even though your life is not hers to control. She thereby prevents you from deliberating in terms of all the options to which you are entitled,

namely keeping both your money and your life. In doing so, she defeats an important part of the point of your rights.

Threats need not be aimed at inducing action in order to have this feature. Suppose we have a disagreement and as we part ways I say, "You better watch your back." This threat aims at intimidation rather than inducement. Here I convey something along the lines of: "I intend to physically harm you in a way that would violate your bodily rights." Given this gloss, the effect of my statement on the options about which you may deliberate is much like that of the mugger's threat. You may now, for example, no longer take for granted your physical safety when walking through my neighborhood. In this way, you are no longer free to deliberate about your choices in the way in your right entitles you.

Although I do not take the argument I am developing to be beholden to First Amendment jurisprudence, it may be helpful to observe the affinity between the grounds for prohibiting threats I have just given and the U.S. Supreme Court's 'true threats' doctrine:

> "True threats" encompass those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals…. The speaker need not actually intend to carry out the threat. Rather, a prohibition on true threats "protect[s] individuals from the fear of violence" and "from the disruption that fear engenders," in addition to protecting people "from the possibility that the threatened violence will occur."[3]

I have emphasized the way in which threats prevent people from relying on their rights and thus the disruptive effect of threats. Although criminalizing threats may also help to protect people from the threatened violence, I take the disruptive effect of threats to be sufficient grounds for prohibition. As we have seen, this effect already constitutes a way of undermining an important part of the point of people's rights.

We will have occasion to further consider what constitutes a threat as we turn to premise (2). Recall that premise (2) identifies two kinds of communicative acts: (a) advocating or endorsing

violence against members of a group in virtue of their group membership, and (b) using symbols strongly associated with violence against members of a group. The premise holds that when these acts are done in a manner that gives individuals reasonable cause to fear for their physical safety they constitute threats to violate their legally-recognized bodily rights.

I am going to begin by considering communicative acts of type (b). Here I will argue for two claims. First, although we generally think of threats as undertaken with the intent to induce or intimidate, one may also negligently cause another to fear for her physical safety. And that too should be regarded as threatening. Second, given this, a much wider range of acts of type (b) may be appropriately subject to legal regulation than has been previously observed.

The Supreme Court's ruling in *Virginia v. Black* will helpfully bring out the issues I want to consider. In that case, the Court held that the government may prohibit cross burning with the intent to intimidate but may not treat cross burning as itself evidence of the intent to intimidate. The Court observes that "a burning cross is not always intended to intimidate. Rather, sometimes the cross burning is a statement of ideology, a symbol of group solidarity. It is a ritual used at Klan gatherings, and it is used to represent the Klan itself." (*Virginia v. Black* 2003). For this reason, the Court holds that the prima facie evidence provision of the statute under consideration blurs the line between constitutionally proscribable intimidation and "political speech at the core of what the First Amendment is designed to protect" (*Virginia v. Black*, 2003).

The Court also indicates that the prima facie evidence provision involved a problematic shifting of the burden of proof from the prosecution to the defendant. That may well be the case and for that reason I am not arguing that the Court erred with respect the statute before it. But I want to examine whether there are grounds for prohibiting speech even if we grant that it is not made with the intent to intimidate so long as it would be reasonable to interpret it as giving those exposed to it reasonable cause to fear for their physical safety.

The Court claims: "It may be true that a cross burning, even at a political rally, arouses a sense of anger or hatred among the vast majority of citizens who see a burning cross. But this sense of anger or hatred is not sufficient to ban all cross burnings" (*Virginia v. Black* 2003). It is curious, however, that the Court focuses here on anger and hatred rather than fear. Given the close association between cross burning and violent acts, it would not be unreasonable for those viewing such a public display and who are members of groups that have been historically targeted by the Klan to fear for their physical safety. Of course, a cross burning at a rally does not target a specific person in the way that cross burnings that involve trespass on private property do. But the Court has already acknowledged that one might act so as to intimidate the members of a large group. There seems to be no reason, then, why one could not unintentionally accomplish the same kind of intimidation.

The Court also emphasizes the political value of cross burning as a form of expression. It symbolizes an ideology and the Klan itself. But recall that I may not tattoo my manifesto on your body without your consent no matter how clearly political my message is. Likewise, why think that I should be allowed to make you reasonably fear for your physical safety in order to make a political point? After all, in doing so I prevent you from relying on your rights.

Notice that this position does not suggest that cross burning be completely prohibited. Klan members might still use a burning cross as part of their own private rituals if they take due care to ensure that those for whom such displays would be a reasonable cause for fear are not subjected to them. It is also potentially possible for public cross-burning displays not to reasonably inspire fear if adequate care is taken to present them as having non-threatening aims – say in the context of a historical reenactment. It is however doubtful whether the Klan itself could ever distance itself sufficiently from its violent past to be able to use cross-burning publicly in a non-threatening manner. And that suggests a potential worry about this position. It is straightforward how I could

express the content of my manifesto without tattooing it on you. But Klan members lose some expressive power if they are unable to use the symbols associated with the Klan's history. And this invites Dworkin's challenge: if the legitimacy of imposing democratically enacted laws on dissenters requires free public discussion of those laws, constraining the expression of Klan members' viewpoints will undermine the legitimacy of the laws on which those viewpoints bear.

I take this challenge to be unsuccessful with respect the kind of expression under consideration because it fails to appreciate the priority of the kind of bodily rights in question in a properly ordered democratic constitution. To see why, it will be helpful to begin by considering more closely the grounds for Dworkin's position. The aspect of the democratic case for free speech that is most relevant to the argument of this section turns on a conception of citizen equality. Dworkin argues:

> It is essential to democratic partnership that citizens be free, in principle, to express any relevant opinion they have no matter how much those opinions are rejected or hated or feared by other citizens. Much of the pressure for censorship in contemporary democracies is generated not by any official attempt to keep secrets from the people, but by the desire of a majority of citizens to silence others whose opinions they despise. That is the ambition of groups, for example, who want laws preventing neo-Nazis from marching or racists from parading in white sheets. But such laws disfigure democracy, because if a majority of citizens has the power to refuse a fellow citizen the right to speak whenever it deems his ideas dangerous or offensive, then he is not an equal in the argumentative competition for power. We must permit every citizen whom we claim bound by our laws an equal voice in the process that produces those laws, even when we rightly detest his convictions. (Dworkin, 2000, pp. 365-366)

Here Dworkin runs together two rather different grounds for restricting speech – opposition to its message and fear engendered by its message. But as far as citizen equality is concerned, the latter ground differs significantly from the former. One cannot be thought to be free to participate as an equal in democratic decision making if one's body is not at least in some core respects one's own to control. But that is precisely the situation brought about by threatening speech, which renders one unable to rely on one's rights.

To appreciate the connection between secure bodily rights and citizen equality, notice that in order to treat you as an equal in 'the argumentative competition for power' I must not treat you as already subject to my command. But since your body is the basic site of your agency in the world, taking control of your body is a way of treating you as if you were subject to my command. As I will note in the next section, there are more direct and less direct ways of taking control of your body. And whether less direct forms of control violate your bodily rights is something that may be the appropriate subject of democratic decision making. But if you are to be able to participate in democratic decision making as an equal, you at the very least need a secure vantage point from which to deliberate. And that requires an effective right against private persons damaging or destroying your body for non-defensive purposes. For this reason, I take the right to this kind of bodily integrity to be constitutionally prior to the right to free speech.

It is worth distinguishing this argument from another that Dworkin considers, namely that the expressions of derogatory opinions about a race, gender, or ethnic group "itself injures citizen equality because it not only offends the citizens who are its targets but damages their own ability to participate in politics as equals. Racist speech, for example, is said to 'silence' the racial minorities who are its target" (Dworkin 2000, p. 366). Dworkin expresses uncertainty about the empirical claim that minorities are in fact silenced by the expression of derogatory opinions. And he argues, "We could not possibly generalize a right to such protection – a fundamentalist Christian, for example, could not be protected that way – without banning speech or the expression of opinion altogether" (Dworkin 2000, p. 366). But it is important to recall that in this section I am not focusing on hate speech as such but rather the way in which hate speech may be threatening. And my concern about threatening speech is not that it silences its targets, although it may do that too. Rather, my concern is that threatening speech prevents its targets from participating in democratic decision-making as equals. If I must deliberate as if my very life is at your disposal, I am not

deliberating as your equal. And that will be so even if it turns out that your threats do not deter me from speaking my mind. Thus the concern about neo-Nazis marching and racists 'parading in white sheets' is not that their views are despicable, although of course they are. Rather the concern is that their expression gives the targets of their hate reasonable cause to fear for their physical safety.

Given this, as I indicated above, a much wider range of acts of type (b) may be appropriately subject to legal regulation than has been previously observed. Displays of the swastika are a good example. Consider the famous case of the neo-Nazis who wanted to march in Skokie, Illinois, home to a significant Jewish population, many of whom were survivors of the Holocaust. The neo-Nazis challenged Skokie's attempt to prevent them from marching in court. When the case was finally returned to the Illinois Supreme Court after a series of appeals, that court ruled in favor of the neo-Nazis. Of particular note was their claim that displaying a swastika is constitutionally protected expression because it does not constitute 'fighting words', i.e. words that are likely to incite to violence those who are exposed to it.[4] But this was the wrong ground on which to seek to exclude those displays from constitutional protection. Whether or not displaying a swastika is likely to incite violence, it is an act of intimidation. And it is so regardless of whether the neo-Nazis actually intend it as such.

With this in mind we can turn our attention to communicative acts of type (a), in which one advocates or endorses violence against members of a group in virtue of their group membership. I take the following example to be instructive. In 2015, Jack Eugene Turner, a resident of Virginia, hung a life-size black mannequin from a noose in a tree in his front yard. He was convicted of violating a Virginia law prohibiting the display of nooses in public places "in a manner having a direct tendency to place another person in reasonable fear or apprehension of death or bodily injury."[5] This law correctly acknowledges that an act of type (b), namely displaying a noose, may be appropriately treated as a threat.[6] While awaiting sentencing for displaying the noose, Turner

"placed a handmade cardboard sign against his house that read, 'Black n----- lives don't matter, got rope'" (Moyer 2016).[7] This is an instance of act type (a). Turner is clearly endorsing violence against black people. Turner's sign is also clearly a political message addressed to the public. But this sign conveys roughly the same message as his original display and is problematic for the same reason. This kind of speech gives those who are its subject reasonable cause to fear for their physical safety. For this reason, I take the Virginia law not to go far enough insofar as it fails to prohibit this kind of speech.[8] Likewise, suppose the neo-Nazis who wanted to march in Skokie agreed not to display swastikas but instead carried signs saying, "Death to Jews!".[9] That would of course be no less an act of intimidation.

One might worry that taking acts of type (a) to be the appropriate object of legal regulation may make it impossible to express a position that ought to be expressible. This position involves advocating a change in the laws while maintaining fidelity to the law as it stands. The Klan might insist, for example, that although they think we should return to a legal circumstance in which black people's bodily rights are not legally protected, the Klan will nonetheless not violate the present laws on this matter.

Taken at face-value, speech expressing this message is not subject to the argument for regulating acts of type (a). That argument focuses on speech that gives people reasonable cause to fear the violation of their legally-recognized bodily rights. But it does not extend to speech that gives people reasonable cause to fear only that the law governing bodily rights will change. So, regulating acts of type (a) in principle leaves open the possibility of expressing nuanced messages of the kind described above.

Note, however, that the meaning of one's words depends heavily on context. Although it may in principle be possible to express the nuanced message without giving people reasonable cause to fear the violation of their legally-recognized bodily rights, one might be unable to do so if one has

a history of engaging in unlawful violence. It may be difficult to credibly express fidelity to the law if one's actions have not borne that out. Consider a convicted murderer attempting to 'just joke' about who his next victims will be. Such a person's history makes it very difficult to pull off such a speech act. Something similar is true of individuals who affiliate with organizations that have a history of unlawful violence. It may be very difficult for them to convey the kind of nuanced message that would not be proscribable. But bearing that kind of expressive burden is just the price of a history of violence.

Before turning to the next section, three features of The Argument from Intimidation merit further attention. First, although I have argued that negligent acts of intimidation are an appropriate object of legal regulation, that is consistent with taking intentional acts of intimidation to constitute more serious crimes. And indeed, it seems entirely appropriate to do so. Thus, the intentions of speakers may still be of significant legal consequence.

Second, suppose it is common knowledge between you and I that I am in no position to carry out an attack.[10] Then nothing I do could constitute even negligently threatening you. In such a circumstance, The Argument from Intimidation does not provide a reason for prohibiting me from advocating or endorsing violence towards you. But this kind of common knowledge rarely if ever obtains. To know that I could not violate your bodily rights you would have to know quite a lot about me. Even the severely disabled can, after all, conspire with or hire others to do their dirty work. Nonetheless, showing this kind of common knowledge obtained would be an appropriate defense to a charge of negligent intimidation.

Finally, one might wonder whether adequate police protection could deprive the kind of speech I have identified as threatening of its credibility. And if so, why not focus on trying to provide such protection rather than regulating the speech?[11] In reply, let me begin by acknowledging that it is of course very important to try to improve police protection, especially for

historically underserved populations. But note what an extraordinary level of police protection would be needed to deprive these threats of their credibility. It is difficult to even envision what it would take for a sign like Turner's not to be reasonably intimidating. And it is even more unclear how that could be accomplished consistently with other important constitutional protections, like rights to due process. But if we were actually in a circumstance in which the state's enforcement of our rights were so complete as to deprive threats of violence of their credibility, premise (2) of The Argument from Intimidation would no longer be true. This, I think, just reflects the familiar point that the same words uttered in very different contexts may mean very different things.

Proscribing the kind of speech identified by The Argument from Intimidation would constitute a radical change in the United States given the state of First Amendment interpretation. And I have not attempted to show that The Argument from Intimidation would pass constitutional muster in the United States.[12] But as I have tried to emphasize, this is an argument about the necessary conditions on legitimate democratic rule that is not beholden to First Amendment interpretation.

II. Hate Speech as Intrusion

In Section I, I focused on a feature of a certain kind of hate speech that may be shared with other kinds of speech, namely, being threatening. In this section, I consider whether speech may be proscribable simply because it expresses antipathy towards individuals in virtue of their possession of certain attributes, like their race or sex. This argument will have two parts. First, I will defend the following premises:

The Argument from Intrusion

(1) 'Public speech' is speech addressed to individuals in their capacity as citizens, government officials, or members of the public at large. 'Private speech' is speech addressed to individuals in any other capacity.

(2) Public speech merits constitutional protection even if it is addressed to an unwilling audience.

(3) Private speech merits constitutional protection only if it is addressed to a willing audience.

I will then turn to giving a positive argument for regulating private speech when it expresses antipathy towards an unwilling audience in virtue of their possession of a certain kind of characteristic.

Let us begin by considering premise (1), which defines public and private speech in terms of who is addressed. Consider an example. Suppose Arthur is standing on the street corner handing out pamphlets about a new ballot initiative. His pamphlet is addressed to the public at large.[13] Beatrice takes a pamphlet and begins to ask Arthur questions about it. Here Beatrice and Arthur address one another as fellow citizens. So, both Arthur's pamphlet and his ensuing conversation with Beatrice are examples of what I am calling public speech. They are contributions to public discourse. In contrast, consider your conversation with the waiter from whom you are ordering lunch. You do not address him in his capacity as a citizen, but instead as the employee of the establishment at which you are dining. Or consider your conversation with your friends about which movie to watch tonight. Here again you do not address your friends in their capacity as fellow citizens, but rather as people who stand in a certain relationship with you.

Premises (2) and (3) refer to willing and unwilling audiences. I take a willing audience to be one that prefers to be addressed or is indifferent to it. And I take an unwilling audience to be one that prefers not to be addressed. The idea of an unwilling audience bears some similarity to the idea

of a captive audience, which has a home in First Amendment interpretation. But the idea of an unwilling audience is primarily tracking one's attitude towards being addressed rather than the ease with which one could avoid being addressed.

Premise (2) makes use of one of the categories marked out by premise (1) and claims that public speech merits constitutional protection even if it is addressed to an unwilling audience. Premise (2) thus aims to address a potential objection to the constitutional protection of public speech. In what follows, I begin by demonstrating the inadequacy of one potential defense of premise (2), and the failure of this defense will clarify why one might be concerned about speech addressed to an unwilling audience. I will then develop a democratic justification of premise (2) that responds to this concern.

A helpful articulation of the inadequate defense of premise (2) is given by Kant, who holds that we have an innate right

> to do to others anything that does not in itself diminish what is theirs, so long as they do not want to accept it – such things as merely communicating his thoughts to them, telling or promising them something, whether what he says is true and sincere or untrue and insincere (*veriloquium aut falsiloquium*); for it is entirely up to them whether they want to believe him or not. (Kant 1996, pp. 393-394)

Understanding this claim requires some articulation of what would 'in itself diminish what is theirs'. Kant provides an example: "the false allegation that a contract has been concluded with someone, made in order to deprive him of what is his" (Kant 1996, p. 394). Given that Kant also holds that we have some kind of innate right to our own bodies, we might also add that threats to violate rights of the sort described in Section I also might be plausibly thought to in itself diminish what belongs to another. These potentially proscribable forms of speech notwithstanding, the right to speak described is quite capacious. Merely communicating my thoughts to another or telling them something are both described as not in themselves diminishing what belongs to another.

Helga Varden helpfully explains the reasoning behind this part of Kant's view: "The utterance of words in space and time does not have the power to hinder anyone else's external freedom, including depriving him of his means. Since words as such cannot exert physical power over people, it is impossible to use them as a means of coercion against another" (Varden 2010, p. 42). Of course, as Varden acknowledges, words can physically affect people – one might be startled or deafened by yelling. But in such cases, "it is not the words or their content that constitutes my wrongdoing, but the noise" (Varden 2010, p. 43).

This suggests the following defense of premise (2). Merely addressing you does not really do anything to you. You may after all simply ignore me. So, even if you would prefer not to be addressed, you have no grounds for complaint if I do.

But this defense of premise (2) overlooks the way in which hearing speech in a language one understands inevitably affects one's thinking. And given one's embodiment, this effect on one's thinking proceeds by way of affecting one's body. To appreciate this point, it may be helpful to begin by first observing the physiological effects particular kinds of speech may have. If I tell you something disturbing, even if you do not believe me, simply hearing what I said might cause your heart to race, leave you with a lingering sense of disquiet, or result in nightmares that disturb your sleep. These are all ways in which the operation of your body is impacted by what I say in virtue of its content rather than its status as mere noise.

To say that speech *can* have physiological consequences is not yet to say that it *always* does. But once one appreciates the former claim, I think it requires very little to move to the latter. Suppose I say, "It's raining." And suppose we grant Kant that it is up to you whether to believe me or not.[14] Still, it is not up to you to whether or not to hear my words as meaningful.[15] When I tell you it is raining, I put that proposition before your mind. I capture your attention and make the proposition I uttered salient to you. And I do that by affecting your brain. Addressing you is thus a

way of acting on your body. Of course, in this case unlike in those above, it is not plausible to think that I have in any way harmed you.[16] But I take it that merely taking control of something that is yours is a way of wronging you whether or not that also harms you. Consider by way of analogy cases of harmless trespass.

What we see, then, is that, contra Varden, words as such can 'exert physical power over people'. This is not yet to say that the kind of physical power that speech exerts over people deprives them of anything to which they have a right. Whether or not that is so depends on whether we take their rights to their bodies to include the right to be free from this way of being acted on. This is not a kind of control that you need in order to be able to participate in democratic decision-making, which as we will see shortly actually presupposes that others must have some right to address you even if you would prefer that they not. But since your body is uncontroversially yours, I suggest we need some compelling reason for taking others to be permitted to act on your body when you would prefer that they not, as they do when you are the unwilling object of address.

A compelling reason for protecting speech addressed to an unwilling audience can be provided if we restrict our attention to public speech and consider its role in democratic governance. States inevitably impose laws on some people who disagree with them. Democratic governance seeks to address the complaint of such individuals by giving them an equal right to participate in the process by which such decisions are made. But this process is not exhausted by voting. One votes on a given slate of proposals or candidates for public office. The development of that slate is itself part of the political process. And voting does not close the political process. The conclusion of a vote settles merely what will happen until the next vote and marks the beginning of a new process of agenda setting. Thus the right to political participation must include not only the right to vote, but also the right to participate in the public discourse that shapes the questions that formal political decision making will eventually take up. If we suppose, then, that we have some compelling reason

to subject people to some form of governance and that the right to participation just described is necessary to address the objections of dissenters, we arrive at a compelling reason for treating public speech as constitutionally protected even if it is addressed to an unwilling audience.

But this line of argument might be thought to suggest a worry about premise (3), which holds that private speech merits constitutional protection only if it is addressed to a willing audience. Private speech may also contribute to shaping the questions that formal political decision making will eventually take up. So why take the right to political participation to be limited to the right to participate in public discourse?

Notice that just about everything I do may contribute in some small way to setting the political agenda. So this line of thought does not suggest a unique ground for protecting speech. And it would be implausible to hold that the way any action of mine might contribute to setting the political agenda suffices to justify constitutional protection of my actions in the face of the objections of those who do not want to interact with me. Even noise ordinances would be constitutionally suspect if that were the case.

The distinction between public and private speech enables us to accommodate the following feature of our situation. Because we must govern together, you must have some ability to address me whether I like it or not. But we are not always 'conducting the business of the state' when we interact. And when we are not, it matters whether I want to hear what you have to say.

One might agree with this sentiment but worry about whether I have drawn the distinction between public and private speech in the right way. Consider two alternative possibilities. The first focuses on the content of the speech and treats as public only speech that clearly engages with political questions. But much that goes into shaping the political agenda is not overtly political. So this characterization would be too narrow. Alternatively, consider focusing on the venue of speech, namely whether the speech occurs in a public or private place. But taking place in public is neither

necessary nor sufficient to capture what it means to participate in the political process of agenda setting. One may do this privately, as for example when one debates the merits of a candidate for office around the dinner table. One may also speak with others publicly but still not be participating in the political process of agenda setting, as when I draw your attention to the wallet you dropped on the sidewalk.

Nonetheless, I take it that there will be many cases in which it is not transparent whether one addresses another in her capacity as a fellow citizen or something else. In these cases, considerations about the content and venue of one's speech may be helpful in providing interpretative context. Given the importance of the right to participate in securing the legitimacy of democratic governance, when in doubt we will generally have good reason to err on the side of classifying speech as public. But just because there are hard cases does not mean that there are no easy cases. The most straightforward kind of private speech is speech that addresses you in virtue of some specific feature of you or your circumstances, as when I point out your dropped wallet.

With this in mind, let us return to considering premise (3). Once we have the distinction between public and private speech in view, the case for protecting private speech cannot be based on the right to political participation required for democratic legitimacy. But a case for constitutional protection for private speech might still be made by reflecting on the proper scope of the state's authority to regulate interactions between consenting adults. The freedom to interact with others in mutually agreeable ways is quite plausibly a pre-political right that only compelling state interests may constrain. And this is no less true of willing communication. Still, I have formulated premise (3) as giving only a necessary condition for constitutional protection of private speech because I will not attempt here to characterize what kind of compelling state interests might be relevant to the regulation of private speech addressed to a willing audience. There are

undoubtedly some, as when willing communication would constitute a conspiracy to commit a crime.

Note one final feature of premise (3). Taking private speech directed at an unwilling audience not to merit constitutional protection does not yet establish that such speech should be prohibited. Rather it simply indicates that the regulation of such speech is the appropriate subject of democratic decision making. The comparison with noise ordinances is instructive here again. Just because making noise is not a constitutionally protected activity does not mean that there are no good reasons for sometimes allowing people to make noise even if it bothers others or imposes costs on them if they want to avoid being bothered in this way. Similarly, the argument thus far leaves open whether and how private speech addressed to an unwilling audience should be regulated.

With all this in mind, we can turn to the second part of The Argument from Intrusion, which articulates a reason for regulating a particular kind of private speech. With respect to a great deal of abusive or insulting speech, I think we face a genuinely open question about how civil we want people to be legally required to be in private speech. We might take a 'sticks and stones' approach to abusive or insulting speech. Or we might decide that some such speech constitutes some kind of minor civil or criminal wrong. I suggest, however, that there is a kind of abusive private speech we have strong reason to prohibit:

(4) 'Injustice-inflected disparagement' is speech that may be reasonably taken to express antipathy towards individuals in virtue of their possession of the kind of characteristic that has been a common basis for unjust treatment.

(5) When injustice-inflected disparagement is addressed to individuals as possessors of the relevant characteristics, it is private speech.

(6) Injustice-inflected disparagement addressed to an unwilling audience involves the use of illicit expressive power to shape the addressee's thinking.

(7) We have strong reason to protect unwilling audiences from having their mental lives intruded upon in this way by private speech.

(8) Therefore, we have strong reason to prohibit injustice-inflected disparagement when it is private speech addressed to an unwilling audience.

Let us consider each of these premises. Premise (4) focuses on expressions of antipathy towards individuals in virtue of their possession of the kind of characteristic that has been a common basis for unjust treatment. I will not attempt an exhaustive list of the relevant kinds of characteristics. But I take race, ethnicity, sex, gender, religion, and sexual orientation to be prime examples of the kinds of characteristics that have historically been the basis for unjust treatment. Note that this does not mean that, say, all racial groups have been historically subjected to unjust treatment. The claim is rather that race is a common basis for unjust treatment.

In a wide range of cases, addressing someone with a slur may reasonably be taken to express antipathy towards that person in virtue of their possession of the relevant kind of characteristic.[17] This kind of speech is typically addressed to an unwilling audience. I take these to be paradigmatic cases of injustice-inflected disparagement. But this category is not limited to these uses of slurs. Consider, as addressed to a black person, the statement: "Do you want some bananas? Go back to the jungle."[18]

Premise (5) applies the conception of private speech articulated in premise (1). When injustice-inflected disparagement is addressed to individuals as possessors of certain characteristics, it is private speech. Note that in light of premise (3), when injustice-inflected disparagement is private speech addressed to an unwilling audience, it does not merit constitutional protection.

Premise (6) holds that injustice-inflected disparagement involves the use of illicit expressive power to shape the addressee's thinking. To see why, consider the difference between expressing antipathy toward a person in virtue of her race and expressing antipathy toward a person in virtue of her large ears. These are both unchosen features. So race's status as unchosen cannot explain why the former expression of antipathy seems so much more concerning. Perhaps the difference lies in the way in which race may constitute a core element of one's identity. But one's profession might likewise constitute a core element of one's identity. And yet antipathy expressed toward a person in virtue of being, say, a philosopher also seems to lack the distinctively concerning character of antipathy expressed toward a person in virtue of her race. Notice, however, that if one's ear size or profession came to be treated as a common basis for unjust treatment, antipathy expressed in virtue of these features would seem much like expressing antipathy toward a person in virtue of her race. For this reason, I take premise (6) to identify a feature of certain types of expression that is already implicit in our thinking about these matters.

Injustice-inflected disparagement relies on characteristics that have the significance they do in virtue of their association with injustice. And although addressees may take steps to avoid being addressed and may ignore what is said when they are addressed, they cannot fail to hear speech in a language they understand as meaningful. Such speech thus makes salient to them a feature of themselves the meaning of which is bound up with injustice. Injustice-inflected disparagement thus involves exercising illicit power over their minds.

This account also explains why injustice-inflected disparagement seems more problematic when addressed to the recently oppressed than to other groups. The relationship between the specific characteristics of the recently oppressed and injustice is extremely salient. Nonetheless, even if one's race, say, has not been recently subjected to injustice, the category of race has the social significance it does in virtue of its association with injustice.

Premise (7) holds that we have strong reason to protect unwilling audiences from having their mental lives intruded upon in this way by private speech. I take the characterization of the speech in premise (6) as exercising illicit expressive power to already make that reason apparent. We have reason to protect people from such exercises of power. But it is worth addressing two considerations that might be thought to mitigate the force of that reason. First, perhaps one might think that people should develop 'thick skins' with respect to disparaging speech and thereby blunt its force. But notice that even if one could condition oneself in ways that would mitigate the downstream effects on one's thinking of being addressed, the problem begins as soon as the speech is understood. Injustice-inflected speech draws attention to one's possession of characteristics that are associated with injustice. And that is an effect on one's thinking that speakers of the relevant language cannot avoid. Try as I might, I cannot hear what you are saying as mere noise.

Second, perhaps one might think that it is incumbent upon potential addressees to avoid being addressed. Given that private speech can take place in public, I think this suggestion overlooks how incredibly burdensome that would be. But the more fundamental response to both this suggestion and the previous one is to ask why I should have to take steps to avoid your use of illicit expressive power – a power that you have only in virtue of the legacy of injustice.

This question, however, raises another. Why take the reason we have to protect people from this kind of illicit expressive power to apply only when the speech in question is private speech? Political protests may, for example, also use slurs and like. Why should we not also protect passersby from having their mental lives shaped by injustice?

A state's laws and institutions may involve a commitment to not using some characteristics as the basis of the distribution of rights or of benefits and burdens because doing so would be unjust. When we are not conducting the business of the state together, our interactions may be appropriately regulated in keeping with this commitment. But democratic legitimacy requires

allowing people who object to this commitment to express their opposition in public speech. Employing a conception of justice to restrict public speech would involve begging the question against those who are opposed to the present public understanding of justice because what constitutes justice and injustice is precisely what is at issue in that context.

For this reason, I do not think that The Argument from Intrusion can do more than justify prohibiting justice-inflected disparagement when it is private speech addressed to an unwilling audience. Premise (7) reflects this. And this suggests that reflection on our bodily rights leaves non-threatening public hate speech immune to regulation. My argument thus leaves open the possibility that Dworkin's argument contains a grain of truth: that enduring leaflets, protest signs, and public lectures involving slurs and the like is an unavoidable cost of respecting the right to participation of prejudiced citizens.

Note, however, that I have not ruled out the possibility of arguments that close this space. We have already observed one such alternative in passing, namely, that hate speech silences its targets in a way that undermines citizen equality. Or perhaps hate speech constitutes a kind of defamation of that sullies its targets' reputations in a constitutionally proscribable way.[19] These arguments may well provide a path to a more thoroughgoing rejection of Dworkin's challenge. But whether or not they succeed, I take the above reflection on bodily rights to blunt the force of that challenge. As I argued in Section I, a democratic theory of free speech affords speech that threatens our legally-recognized bodily rights no constitutional protection even when it is public speech. And hate speech has a threatening character more often than has been recognized. The argument of this section suggests that the democratic settlement of the scope of those bodily rights that do not merit constitutional protection ought to be responsive to the strong reason we have to protect people from the intrusion into their mental lives that private speech involving injustice-inflected

disparagement constitutes. In these ways, our bodily rights constrain the right to free speech in a way that diffuses the tension between a democratic theory of free speech and hate speech regulation.

Works Cited

Cohen, Joshua. "Freedom of Expression," *Philosophy & Public Affairs*, Vol. 22, No. 3 (1993).

Delgado, Richard. "Words That Wound: A Tort Action for Racial Insults, Epithets, and Name Calling," in *Words that Wound: Critical Race Theory, Assaultive Speech, and the First Amendment*, M. Matsuda et. al., eds. (Westview Press, 1993) 89-110.

Dworkin, Ronald. "Forward," in Ivan Hare and James Weinstein, eds., *Extreme Speech and Democracy* (Oxford University Press, 2009) v-xi.

Dworkin, Ronald. "Free Speech, Politics, and the Dimensions of Democracy," *Sovereign Virtue* (Cambridge, MA: Harvard University Press, 2000)

Harvey, Neil. "Rocky Mount man guilty of hanging a noose is jailed over new yard sign," The Roanoke Times, Dec. 2, 2015 https://www.roanoke.com/news/crime/franklin_county/rocky-mount-man-guilty-of-hanging-a-noose-is-jailed/article_0389b2b6-291c-50d3-8b5a-3b2db67e786d.html.

Kant, Immanuel. Mary J. Gregor, ed. and trans., *Practical Philosophy* (Cambridge, Cambridge University Press, 1996).

Korsgaard, Christine M. *The Sources of Normativity* (Cambridge University Press, 1996)

Matsuda, Mari J. "Public Response to Racist Speech: Considering the Victim's Story," in in *Words that Wound: Critical Race Theory, Assaultive Speech, and the First Amendment*, M. Matsuda et. al., eds. (Westview Press, 1993), pp. 17-51 at p. 20.

Meiklejohn, Alexander. *Free Speech and Its Relation to Self-Government* (New York: Harper Brothers Publishers, 1948).

Miller, Michael E. "Nazi chants at Dutch soccer game expose an ugly blot on 'the beautiful game'," *The Washington Post*, April 10, 2015, https://www.washingtonpost.com/news/morning-mix/wp/2015/04/10/nazi-chants-at-dutch-soccer-game-expose-an-ugly-blot-on-the-beautiful-game/?utm_term=.f0cc6f550f07

Moyer, Justin Wm. "Virginia man who displayed noose after Charleston shooting loses court appeal," *The Washington Post*, Nov. 22, 2016. https://www.washingtonpost.com/local/public-safety/virginia-man-who-displayed-noose-after-charleston-shooting-loses-court-appeal/2016/11/22/4567f15c-b0f3-11e6-8616-52b15787add0_story.html?utm_term=.917ef11841c8.

Planned Parenthood of the Columbia/Willamette Inc. v. American Coalition of Life Activists 290 F.3d 1058, 1088 (9th Cir. 2002),

Post, Robert C. "Racist speech, democracy, and the First Amendment," *William and Mary Law Review*, 01/1991, Vol. 32, Issue 2, pp. 267-327

R.A.V. v. City of St. Paul, 505 U.S. 377 (1992).

Va. Code Ann §18.2-423.2 (2009).

Varden, Helga. "A Kantian Conception of Free Speech," in *Free Speech in a Diverse World*, ed. D. Golash (Springer, 2010), pp. 39-55

Virginia v. Black, 538 U.S. 343 (2003)

Weinstein, James. "Extreme Speech, Public Order, and Democracy: Lessons From *The Masses*," in Ivan Hare and James Weinstein, eds., *Extreme Speech and Democracy* (Oxford University Press, 2009) 62-80.

[1] For a classic statement of this kind of view, see Meiklejohn (1948). For recent treatments of hate speech informed by this kind of view, see Post (1991) and Weinstein (2009).
[2] Dworkin also suggests a more abstract version of this argument that would justify a right to free speech in authoritarian regimes as well. See Dworkin (2009), ix. But the details of that argument will not concern me here.
[3] Justice O'Conner, writing for the majority, in *Virginia v. Black*, 538 U.S. 343 (2003) and quoting from the ruling in *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992).
[4] *Village of Skokie v. Nat'l Socialist Party of America*, 69 Ill. 2d 605 (1978)
[5] Va. Code Ann §18.2-423.2 (2009).
[6] The law also requires that the individual displaying the noose act with the intent to intimidate. For the reasons given earlier, I take this aspect of the law to be misguided.
[7] To be clear, Turner spelled out the slur on his sign. *The Washington Post* declined to follow him in this, and I have as well.
[8] Turner was actually arrested for displaying the cardboard sign as well, but only because it was a condition of his release while awaiting sentencing for displaying the noose that he not display any further symbols or messages in his yard. (Harvey 2015).
[9] Consider a disturbing example from a recent soccer match in Utrecht, Netherlands: "'Hamas, Hamas, Jews to the gas,' sang a section of home supporters towards the fans visiting from Amsterdam, a city historic in part for its Jewish community. 'My father was in the commandos, my mother was in the SS, together they burned the Jews, because Jews burn the best!'" (Miller 2015)
[10] I am indebted to an anonymous reviewer for prompting me to consider this issue.
[11] I'm indebted to [omitted for blind review] for prompting me to consider this issue, and to [omitted for blind review] for helpful discussion of it.

[12] It is worth noting a case that is suggestive of a more expansive conception of what constitutes a true threat than First Amendment rulings have generally countenanced. *Planned Parenthood of the Columbia/Willamette Inc. v. American Coalition of Life Activists* 290 F.3d 1058, 1088 (9th Cir. 2002) upheld the finding against American Coalition of Life Activists for publishing 'wanted posters' of abortion providers in a manner that was deemed to constitute a true threat even though the posters themselves did not explicitly contain any threats. The Ninth Circuit held that the context of the posters' publication was important for understanding their meaning.

[13] In general, I take it to be sufficient for being addressed to the public that the speech in question be offered to the public. So, for example, a movie distributed for public consumption in the usual ways counts as being addressed to the public.

[14] I think Kant overstates this point. You may have some choice about whether to trust me. And in the absence of trust, you may have some discretion about how my statement figures into your total body of evidence about the matter. But you are not epistemically free to simply ignore my statement unless you have some good reason for doing so. My statement constrains how you may think about the matter even if it does not compel belief. This is not a constraint that one can shake off at will. But the point I make in the main text holds whether or not one accepts this objection.

[15] Christine M. Korsgaard makes a similar point in a rather different argumentative context (Korsgaard 1996, p. 140).

[16] For a helpful overview of the ways in which speech can harm, see Delgado (1993), pp. 89-110.

[17] I leave open here the possibility of friendly, intra-group uses of slurs.

[18] I draw this from a real case involving a slur. I take the message to be problematic even when the slur is omitted. For a description of the original case, see Cohen (1993), p. 207.

[19] For a helpful discussion of the distinction between individual and group defamation, and some skepticism about the viability of prohibiting hate speech as group defamation, see Weinstein (2009), pp. 58-60.