

LECTURE 2: WHAT DOES A WELL-ORDERED SOCIETY LOOK LIKE?

1. Introduction

I have chosen as the title of my second lecture a rather technical philosophical question: What does a well-ordered society look like? The idea of a well-ordered society is “a highly idealized”¹ abstraction from the philosophy of John Rawls. Rawls wants to consider the possibility of a society whose basic structure is regulated (and known to be regulated) by principles of justice and inhabited by people with an effective sense of justice; and he wants to ask certain questions about such an imagined possibility—for example, whether it could come into existence and exist stably in the circumstances of justice under conditions of religious and philosophical diversity, for example, where there is no body of deep foundational ideas affirmed by all of its citizens.²

I am not going to go into any of the technical detail of Rawls’s theory. Instead I want to use a central element of Rawls’s conception of a well-ordered society to cast some light on the *non*-abstract and *non*-technical problem that we talked about yesterday—the problem of what to do about hate speech, particularly when it takes the form of group defamation: the publishing of calumnies of hatred and contempt against some racial, ethnic, or religious group.

A society which permits such publications may *look* quite different from a society that does not. Its hoardings and its lamp-posts may be festooned with depictions of members of racial minorities characterizing them as bestial or subhuman. There may be posters proclaiming that members of these minorities are criminals, perverts or terrorists, or leaflets saying that members of a certain race or followers of a certain religion are threats to decent people and that they should be deported or made to disappear. There may be banners and swastikas celebrating or excusing the genocidal campaigns of the past. There may be signs indicating that the members of the minority in question are not welcome in certain neighborhoods or in polite society generally, and flaming symbols intended to intimidate them if they remain. That’s what a society may look like when group defamation is

¹ See John Rawls, *Political Liberalism* on the use of abstract conceptions (New York: Columbia University Press, pp. 35 and 43-6. (I will use “PL” to refer to this work.)

² PL, 35 ff.

permitted. And my question is: Is that what a *well-ordered* society would look like?

I ask because it is assumed by many liberal constitutionalists, particularly in the United States, that a free society—and a well-ordered society is certainly supposed to be a free society—that a free society will not permit laws or ordinances prohibiting stuff like this, on the ground that any such prohibition is precluded by our commitment to something like the First Amendment principle of free speech. They may acknowledge that the social environment that results from their toleration of hate speech *looks* unpleasant; they may say that they don't like the look of these bill-boards, placards, or flaming crosses any more than we do. But, they say, the society that permits them may still count as well-ordered, even though it presents this ugly appearance, precisely because it represents a society in which racists are allowed to speak their mind like everyone else. Some go further and are inclined to celebrate the diversity and unruliness of the various messages and speeches milling around in the marketplace of ideas. They love its richness and untidiness: let a thousand flowers bloom, they say, even the poisonous ones. For of course some of the ideas are foul and distasteful. But if you blur your eyes a bit, what you see is a glorious splash of moving variegated color—ideas interacting openly and unpredictably with one another. And that is surely a feature of a well-ordered society (even if the men, women and children who are the targets of the foul and distasteful messages have difficulty in maintaining this lofty perspective).

Of course if the racist appearances correspond to a racist reality, then that is different. If the signs saying “Christians only”—or in the more discrete form found in Miami “Churches nearby”—are accompanied by discriminatory practice against Jews, if Muslims are beaten up in the street, if minority members are not protected against the discrimination advocated in racist posters, or if those in power treat people in the unequal and degrading ways that the racist leaflets call for—then there *is* something to worry about. And that would show that the society was not well-ordered. But if it's just signage, they say, there is nothing to worry about.

That's the position I want to test, by focusing on this issue of appearances. The question in my title—what does a well-ordered society look like—is not a coy way of asking what makes a society well-ordered, or what a well-ordered society is *like*. I am interested in how things literally look; I'm interested in the visible environment. How important is the look of things in a well-ordered society? Is it unimportant compared to how things actually are? Or is it an important *part* of how things actually are? And if it is an important part of how things are, what in particular should we be looking for. The colorful unruly diversity of a free market in ideas? Or the absence of visible features that are at odds with the fundamental commitment to justice with which a well-ordered society is supposed to be imbued?

If it is the latter, then can we say—as part of the interpretive exercise we began yesterday—that this is a way of understanding restrictions on hate speech and group defamation—that these are among the ways in which real-world societies try to make themselves more well-ordered (better-ordered) than they would otherwise be?

I am not saying that those who enact hate speech legislation are familiar with Rawlsian ideas, but I am interested in whether hate speech restrictions amount *in effect* to an embrace of Rawls's idea of a well-ordered society, particularly in regard to one element of that conception—an element on which I am going to focus continually this afternoon. A leading feature of Rawls's conception of a well-ordered society is that in such a society “everyone accepts, and knows that everyone else accepts, the very same principles of justice.”³ That is what I want to concentrate on: the assurance of a generalized commitment to the fundamental elements of justice and dignity that a well-ordered society is supposed to furnish to its citizens as part of “the public culture of a democratic society.”⁴ I want to take the measure of this assurance and, to the extent that it is important, consider how comfortable we should be with public and semi-permanent manifestations of racial and ethnic hatred as visible aspects of the civic environment.

2. Rawls on free speech

I am not asking this Rawlsian question in order to get at John Rawls's own views in the free speech / hate speech debate. What he says about free speech, set out mainly in an essay entitled “The Basic Liberties and their Priority” (the final chapter of *Political Liberalism*), is not particularly interesting for our purposes. It doesn't address the specific issue of hate speech or group libel. And it doesn't follow up on the implications of his own characterization of a well-ordered society in the way that I want to. Also it is a bit confusing because unlike almost everything else in *Political Liberalism*, the chapter on “The Basic Liberties and their Priority” is focused on real world constitutions,⁵ with all their flaws and messiness rather than on the utopian abstraction of a “well-ordered society.”⁶

³ PL, p. 35

⁴ Rawls, *Kantian Constructivism in Moral Theory* (1975) in JOHN RAWLS, COLLECTED PAPERS, ed. Samuel Freeman (Harvard University Press, 1999), 303, at 355. See also PL, p. 66: “In such a society, “citizens accept and know that others likewise accept those principles, and this knowledge in turn is publicly recognized.”

⁵ Rawls says that his method in the essay on *The Basic Liberties* is to “survey the constitutions of democratic states and put together a list of liberties normally protected, and ... examine the role of these liberties in those constitutions which have worked well.” PL, 292-3.

⁶ Note, by contrast, the theoretical categories used by Rawls in THE LAW OF PEOPLES. In that work, Rawls uses a different set of categories. He talks of the relations among “reasonable liberal peoples” (with “constitutional liberal democratic” governments) and between them and what he calls “decent peoples” (with “non-democratic but decent governments”) (LP 3-4). These are plainly real-world categories.

Rawls draws mainly upon American experience, for example in his reference to the discussion of seditious libel in *New York Times v Sullivan* (1964)⁷—though he has acknowledged elsewhere that, as things stand, the United States certainly cannot be regarded as a well-ordered society.⁸

There is some speculation in the Rawls literature—for example by George Wright,⁹ Tim Scanlon,¹⁰ Richard Fallon,¹¹ and Richard Delgado¹²—on what his view on hate speech *might* have been, or what the implications are for this issue of other more abstract views that he does hold. But that discussion is mostly inconclusive.

The closest Rawls gets to the issues we are addressing today is in a discussion of seditious libel, where he insists—in line with American free speech orthodoxy—that a well-ordered society will be one in which anything and everything may be published, even things which tend to question the basic principles of a given society. Subversive advocacy, he says, must be permitted. I am not sure whether Rawls thinks this should extend even to advocacy against the fundamentals of justice—for example, to attempts to advocate publicly for the exclusion or subordination of a given group, or their disenfranchisement, segregation, enslavement, concentration, deportation or whatever. He does not discuss this, i.e., he does not consider the status of speech or publication that in its content and tone runs counter to the assurances that citizens are supposed to have of one another’s commitment to equality. I suspect Rawls would not have dissented from First Amendment orthodoxy on this regard; certainly that is what his admiration of the work of Harry Kalven intimates.¹³

⁷ PL, p. ___. Referring to *New York Times v Sullivan* [cite].

⁸ In *Kantian Constructivism and Moral Theory*, in RAWLS, COLLECTED ESSAYS, at 355: “Our society is not well-ordered: the public conception of justice and its understanding of freedom and equality are still in dispute.”

⁹ George Wright, in *Dignity and Conflicts of Constitutional Values: The Case of Free Speech and Equal Protection*, 43 SAN DIEGO L. REV. 527 (2006), concluding that Rawls claim has really “not contributed substantially to the underlying logic of genuine respect or civility, in hate speech or any other context.”

¹⁰ See T. M. Scanlon, *Adjusting Rights and Balancing Values*, 72 FORDHAM L. REV. 1477 (2004) at 1485-6 (considering whether hate speech might be dealt with under the heading of the fair value of liberty).

¹¹ See Richard H. Fallon, *Individual Rights and the Powers of Government*, 27 GEORGIA LAW REVIEW 343 (1993) at 351-2 (arguing that “the basic rights that Rawls derives—including rights to freedom of speech and religious autonomy—are so abstract as to settle few practical questions. Does freedom of speech encompass hate-speech directed at racial or religious minorities? ... To answer questions such as these, a fuller set of considerations must be brought to bear”).

¹² Richard Delgado and Jean Stefancic, in *Four Observations about Hate Speech*, 44 WAKE FOREST L. REV. 353 (2009), at 368, suggest that a Rawlsian should approach hate speech through the difference principle: “one of the parties is more disadvantaged than the other, so ... Rawls’s difference principle suggests that ... we break the tie in the victim’s favor.”

¹³ See PL 342 and 344 ff. Kalven seems to have criticized the decision in *Beauharnais* in THE NEGRO AND THE FIRST AMENDMENT. [check] though he did take a sophisticated of its relation to *New York Times v Sullivan*.

So when I ask what a well-ordered society should look like, I am using a Rawlsian idea and running with it in a direction that may be quite different from that in which Rawls would have run.

3. Political Aesthetics

What should a well-ordered society look like? I suppose we could ask, with equal sense: what should a well-ordered society *sound* like. We might think about the flat steady drone of an interminable but well-ordered exercise of what Rawls calls public reason—respectful and mutually comprehensible speech in matters of common concern. And we might contrast that impression with darker images: the tread of marching feet and ominous chants, or perhaps the incessant genocidal radio broadcasts of *Radio Télévision Libre des Mille Collines* (RTLM) in Rwanda that my NYU colleague, Ted Meron, American representative on the International Criminal Tribunal for Rwanda, sought to privilege as free speech in his dissenting judgment in the *Nahimana* case.¹⁴

I said yesterday that an emphasis on speech is an emphasis on the ephemeral. There I had in mind the occasional angry and politically incorrect use of one or another racial epithet, and I contrasted that—using the figure of slander versus libel—with the relatively enduring expression of public signage or the published word. But it is true on the other hand, that the accepted vocabulary of a culture can become part of its established environment. And certainly the broadcast word can be as much a matter of enduring concern, especially when it insistently and repeatedly demonizes of a minority, as cockroaches and vermin day after day.

So there is the visible and the audible. We might round out the picture with the emphasis by Richard Delgado and Jean Stefancic on tangible aspects of a society's self-presentation. Their book *Understanding Words that Wound* has a chapter entitled “When Hate goes Tangible: Logos, Mascots, Confederate Flags, and Monuments.” And the authors say this:

[S]tatues, monuments, and the like ... perhaps because they are intended to be seen by a large audience, ... contribute to a climate of opinion that is injurious to members of the group singled out. ... [T]angible symbols have a quality that words—at least of the spoken variety—do not: They are enduring. Words disappear as soon as they are spoken. They may resonate in the mind of the victim, causing him or her to recall them over and over

¹⁴ See *Ferdinand Nahimana v. The Prosecutor*, Case No. ICTR-99-52-A, Appeals Chamber (International Criminal Tribunal for Rwanda), partially dissenting judgment of Judge Meron at 374 (see esp. §§4-5 (pp. 375-6) and §§9-21 (pp. 378-81)). Cite to MacKinnon on this. But see Susan Benesch, *Vile Crime or Inalienable Right: Defining Incitement to Genocide*, 48 VA. J. INT'L L. 485 (2008) for a more complicated view.

again. But a flag [or a] monument ... is always there to remind members of the group it spotlights of its unsolicited message.¹⁵

Delgado and Stefancic don't advance the discussion much beyond this in their short book; but I am trying to proceed in the spirit of the concerns voiced that they raise. The tangible, or as I would put it, the visible and semi-permanent audible aspects of racist and sectarian display—these are the manifestations of hate speech and racist attitude that I want to consider in relation to Rawls' idea.

A *general* consideration of what a well-ordered society looks like, sounds like, smells like, and feels like to the touch, might be an exercise in *political aesthetics*—the sort of thing we find in Edmund Burke's observation that "[t]o make us love our country, our country ought to be lovely," and in his talk about "the pleasing illusions, which [make] power gentle and obedience liberal, ... the superadded ideas, furnished from the wardrobe of a moral imagination, which the heart owns, and the understanding ratifies, as necessary to cover the defects of our naked, shivering nature, and ... raise it to dignity in our own estimation." Political aesthetics invites us to think about such things as monuments, cenotaphs, public statues, public architecture. Or ceremonies (coronations, inaugurations, armistice day, etc.) and the settings and choreography for public or political events. Costumes, like wigs, gowns, and uniforms in the administration of justice. The visible display of power, including the presence and bearing and uniform of police and security forces. Flags and banners; And above all, publicly visible signage (even if it is not publicly sponsored). That's political aesthetics—and I think we need to pay more attention to it in political philosophy than we do.¹⁶

Notice that these examples—monuments, ceremonies, uniforms etc—are mostly a matter of official or publicly-sponsored appearances. But in any discussion of hate speech it is speech and publication by private persons, not the state, that we are concerned about. There is of course sometimes a messy interface between public and private, which shows up (for example) in the United States in the First Amendment jurisprudence of church-and-state: I mean, for example, issues about the permitted presence of religious symbols—crosses, crèches, menorahs, depictions of the Ten Commandments—in the town square on public property. We know that it is possible for a society to *look* religious, without in any official or governmental sense *being* religious.¹⁷ There may be temples, steeples, churches, mosques, and synagogues as far as the eye can see, and many of us think

¹⁵ RICHARD DELGADO AND JEAN STEFANCIC, UNDERSTANDING WORDS THAT WOUND (Westview, 2004), p. 142.

¹⁶ See Ajume Wingco's excellent book on VEIL POLITICS IN LIBERAL DEMOCRATIC STATES (Cambridge UP, 2003), the first chapter of which has an admirable account of the presence and importance of monuments in modern society.

¹⁷ Paradox noted by Marx in "On the Jewish Question."

this can be so without any message being conveyed that the society as a whole is committed to any religion. All this may be compatible with a society being well-ordered in the sense of religiously neutral.

I am not saying that this is a simple matter. Some liberals express concern about the appearance in public of private individuals dressed in certain ways—I am thinking of the controversy in countries like France about Muslim women appearing in public with headscarves or veiled or with the full covering of the *burqa*.¹⁸ Nicholas Sarkozy and others who call for a ban on the *burqa* are also interested in our theme: what should a well-ordered society look like—for them, the interest is the appearance that people present to one another?¹⁹ I am not a supporter of the proposal to ban the *burqa*; I think people should be allowed to follow the rules prescribed by their religion for modest dress; they should not be forced into bikinis and skimpy skirts just so the world can be a society of religious conservatives. But the arguments that are used on the other side are not a million miles from the argument that I am pursuing in this lecture. What individuals do, how they present themselves, can add up to an impression that matters from the point of view. Maybe not the *burqa*, but the appearance of large numbers of masked men in white sheets and pointy hats is a problem, protestations about purely private dress codes notwithstanding.

4. Hatred and Law in a Well-Ordered Society.

I am inviting the question: Will hate speech be tolerated by law in a well-ordered society? We have already considered one response: Yes, it will be tolerated as part of the energizing diversity of a free market in ideas. Another response goes as follows: A society cannot *be* well-ordered if people are advocating racial and religious hatred. The idea of a well-ordered society is the idea of a society being fully and effectively governed by a conception of justice. In technical terms, it is full compliance theory rather than partial compliance theory. On this account, discussion of a society with sufficient rancor and division to generate hate speech cannot be a well-ordered society.

Compare what Rawls says about illiberal religions. Intolerant religions—Rawls says—“will cease to exist in the well ordered society of political liberalism.”²⁰ Religions that demand the suppression of other religions, religions that insist on religious establishment, or that demand the adoption of a certain

¹⁸ Doreen Carvajal, *Sarkozy Backs Drive to Eliminate the Burqa*, NYT, June 23, 2009, quotes President Nicholas Sarkozy as saying: “The burqa ... is a sign of the subjugation, of the submission, of women. ... I want to say solemnly that it will not be welcome on our territory.”

¹⁹ The burqa might be compared to a portable private realm carted around in public (like an Edwardian bathing machine).

²⁰ PL 197

comprehensive conception of the good by the whole society—a society cannot be well-ordered unless such religions have, so to speak, died out. So the question of what to do about such religions in a well-ordered society will not arise.

And similarly, a society cannot have become well-ordered unless the bigots and racists have given up their mission and accepted the basic principles of justice and equal respect that were formerly anathema to them. And so the question of what to do about hate speech and group defamation in a well-ordered society does not arise. A well-ordered society will definitely not look racist, on this account; it will not present or exhibit the offensive manifestations that I spoke about at the beginning of my remarks. But this will not be because there are laws against that sort of thing. It will be because the citizens—being citizens of a well-ordered society—have no wish or motivation to express themselves in these terms.

Taking this response one step further, our well-ordered respondent may say: even if it is true that Rawls’s ideal society would not be festooned with racial signage, Islamophobic leaflets and ethnically prejudiced-billboards, *still* nothing of interest follows for the debate about hate speech laws or group defamation laws. A well-ordered society wouldn’t need such laws, because there would be no impulse to do what they forbid. And maybe the lesson for us, in our much-*less-than*-well-ordered society, is that we must hope that hate speech dies out, just withers away, not because of coercive laws limiting freedom of speech, but because of changes of attitude and changes of heart, including changes brought about by public education and (not least) by effective answers to hate speech in the free marketplace of ideas.

I think that this response—I am not blaming it on any one in particular—is misconceived at a number of levels, most notably about the role of law in a well-ordered society. It is true that Rawls’s conception of a well-ordered society is part of what he calls full compliance theory. But, for one thing, it is not at all clear how we are supposed to get there. Consider again the case of intolerant religions. They don’t feature in a well-ordered society. Why? Presumably because they have died out. But Rawls says a little more than that; he says that the basic institutions of a just society “inevitably encourage some ways of life and discourage others, or even exclude them altogether.”²¹ That’s an ambiguous formulation: what does “discourage” mean here, in terms of the operation of institutional arrangements? And what does it mean to exclude certain ways of life altogether?

One thing is for sure. We should not think of a well-ordered society as a utopian fantasy, in which laws are unnecessary because everyone’s attitudes are now utterly just. No one supposes that law can be eliminated from the basic structure of a well-ordered society, or that we can drop the laws about murder or burglary because, by definition, no one in a well-ordered society would ever be

²¹ PL 195.

motivated to engage in those crimes. Rawls's society is not utopian in that fantasy sense; it is steadfastly located in the circumstances of justice, which include the subjective circumstances of anxiety and limited strength of will among the citizens.²² Rawls himself gives us a fine discussion in Chapter Four of *A Theory of Justice* of the role of law, including the role of coercive law and sanctions, in a well-ordered society. He says there that

even in a well-ordered society the coercive powers of government are to some degree necessary for the stability of social cooperation. For although men know that they share a common sense of justice and that each wants to adhere to the existing arrangements, they may nevertheless lack full confidence in one another. ... [T]he existence of effective penal machinery serves as men's security to one another.²³

Maybe in a well-ordered society "sanctions ... may never need to be imposed."²⁴ But that doesn't mean that their existence or the laws providing for them are unnecessary or redundant. Apart from anything else, laws have an important expressive as well as a coercive function; and one would expect that expressive function to be at the fore in a well-ordered society, particularly in connection with the public and visible assurance of just treatment that a society is supposed to provide to all of its members.²⁵

In any case, even if a well-ordered society could dispense with laws prohibiting group defamation, it would be spectacularly dumb to infer from this that the societies we know must be prepared to dispense with those laws, as a necessary way of becoming well-ordered. Societies do not become well-ordered by magic. The expressive and disciplinary work of law may be necessary as an ingredient in the change of heart on the part of its racist citizens that a well-ordered society presupposes. And anyway, as with all issues of justice, the necessity of such laws is a matter of the goods to be secured and the likelihood that they can be secured in the absence of legal intervention. If as I am going to argue, the good to be secured is a *public* good, a general and diffuse assurance to all the inhabitants of a society concerning the most basic elements of justice, then it is natural to think that law would be involved—both in its ability to underpin the provision of public goods and in its Durkheimian ability to express and communicate common

²² See Rawls, TJ, on the circumstances of justice. For "limited strength of will," see Hart, COL.

²³ TJ 212.

²⁴ TJ p. 211.

²⁵ Durkheimian idea: cite to the use of this idea, in connection with hate speech, in THOMAS DAVID JONES, HUMAN RIGHTS: GROUP DEFAMATION, FREEDOM OF EXPRESSION AND THE LAW OF NATIONS (Martin Nijhoff Publishers, 1998) at 88.

commitments. This is particularly likely to be true in the case of societies, like European societies (and I think also the United States), which have not yet entirely shaken off histories of murderous racist oppression.

5. Assurance

Why does it matter what a well-ordered society *looks* like? Why do appearances count? As I have already said, the answer has to do with assurance. Rawls insists throughout his work that a well-ordered society is one “in which everyone accepts, and knows that everyone else accepts, the very same principles of justice.”²⁶

The content of these assurances might vary. In Rawls’s philosophical ideal, a well-ordered society is defined by reference to the whole detailed array of principles that characterize his conception of justice as fairness: what people know and assure each other of, is their joint allegiance to the difference principle, and the details of the first principle, and the exact formulation of the second principle, and the balance between the difference principle and the equal opportunity principle, and the various priority rules and so on. Rawls is of course right to note that one of the reasons why we cannot describe the United States as a well-ordered society in this sense is that there is nothing approaching a consensus about justice at this level of detail. But, in the real world, when people call for the sort of assurance to which hate speech laws might make a contribution, it is not on the controversial *details* of justice, it is on some of the most elementary fundamentals—that all are equally human, and have the dignity of humanity, that all have an elementary entitlement to justice, and all deserve protection from the most egregious forms of violence, exclusion, indignity and subordination. Hate speech or group defamation involves the denial of these fundamentals so far as some group in society is concerned. And it seems to me that if we are imagining a society on the way to becoming well-ordered, these fundamentals must be secured in people’s minds by public guarantees before anything else, even if we are not yet in a position to secure a more detailed consensus on justice.

In a well-ordered society, “[c]itizens accept and know that others likewise accept those [fundamental] principles, and this knowledge in turn is publicly recognized.”²⁷ Why, exactly, is the public and visible conveyance of this knowledge important? I referred earlier to political aesthetics: the decent drapery celebrated by Edmund Burke: to make us love our country, our country must be lovely. But we are not just talking about justice displayed for the sake of an impressive or pretty display (in the way that a society might display the glories of

²⁶ PL, p. 35; also “citizens accept and know that others likewise accept those principles, and this knowledge in turn is publicly recognized” (PL, p. 66).

²⁷ PL, p. 66

its power or the splendor of its culture or the pride of its athletes). We are talking about a display that matters to the individuals who rely on the principles of justice, and the nature and basis of the security they enjoy in that reliance. In a well-ordered society, where people are visibly impressed by signs of one another's commitment to justice, everyone can enjoy a certain assurance as they go about their business. They know that when they leave home in the morning they can reasonably count on not being discriminated against or humiliated or terrorized. They can feel secure in the rights that justice defines; they can face social interactions without the elemental risks that interaction would involve if one could not count on others to act justly; there is security too for one's proper pride and dignity (in other words against soul-shriveling humiliation of various sorts).²⁸ In the landmark Canadian case, *R. v. Keegstra* (1990), Chief Justice Dickson said this about the effect that public expressions of hatred may have on people's lives:

The derision, hostility and abuse encouraged by hate propaganda ... have a severely negative impact on the individual's sense of self-worth and acceptance. This impact may cause target group members to take drastic measures in reaction, perhaps avoiding activities which bring them in contact with non-group members or adopting attitudes and postures directed towards blending in with the majority. Such consequences bear heavily in a nation that prides itself on tolerance and the fostering of human dignity through, among other things, respect for the many racial, religious, and cultural groups in our society.²⁹

The point of the visible self-presentation of a well-ordered society, then, is not just aesthetic; it is the conveying of an assurance to all the citizens that they can count on being treated justly.

However, when a society is defaced with anti-semitic signage, burning crosses, and defamatory racial leaflets, that sort of assurance evaporates. A vigilant police force and a Justice Department may still keep people from being attacked or excluded, but they no longer have the benefit of a general public assurance to this effect, provided and enjoyed as a public good, furnished to all by each. More about the public good aspect in a moment; the structuring principles of this lecture are symphonic, rather than linear.)

Focusing for the moment on the assurance itself, notice how it connects to dignity and reputation in the senses we talked about yesterday. A person's dignity is not just a decorative fact about them. It is a matter of status, and as such it is in

²⁸ DAVID BROMWICH, *POLITICS BY OTHER MEANS: HIGHER EDUCATION AND GROUP THINKING* (Yale University Press, 1994) 157: "The reason President Johnson gave for the moral necessity of the Civil Rights Bill: "A man has a right not to be insulted in front of his children."

²⁹ *R. v. Keegstra* [1990] 3 SCR 697.

large part normative: it is something about a person that commands respect from others and from the state. Moreover, one holds a certain status not just when one happens to have a given set of rights or entitlements, but when the recognition of those rights or entitlements is basic to how one is dealt with. So the element of *assurance* that one will be dealt with on this basis is an intrinsic part of what dignity requires. So it is too with the fundamentals of social reputation. We accord people dignity on account of the sorts of beings human individuals are, and we are gravely concerned when it is said publicly that some people by virtue of their membership in a racial, ethnic or religious group are not really beings of that kind and so not entitled to that dignity in one way or another. Such hateful claims are not just anthropological speculation; they intimate that people should expect to be treated in a degrading manner if the person making the hateful claim and the fellow-travelers that he is appealing to have their way.

Ronald Dworkin has said in various places that we cannot possibly expect people to respect one another: it is only government that has a duty of respect.

[S]urely the law cannot forbid the expression of disrespect. We insist that government treat everyone with respect, but we cannot possibly insist that private individuals do that. Many Americans think that other Americans are guilty of terrible convictions or acts and so are certainly not entitled to equal respect: Wal-Mart executives, hedge fund managers, labor leaders, liberals, people who delight in the death penalty, and so forth. Does Waldron want to ban all expressions of contempt for these groups?³⁰

No he doesn't. That's partly because Waldron distinguishes (as I think Dworkin does not) between two senses of respect that might be in play here: what Stephen Darwall has called appraisal respect (which varies in one's estimation of a person by their virtues and vices, crimes, views, and so on) and recognition-respect (which is fundamental to the dignity of persons and invariant, even commanding how they are to be treated when they are guilty of terrible crimes.)³¹ It is recognition-respect that we are talking about here; and the fact that we might subscribe to different estimations of different persons as a matter of appraisal-respect—something the government is also entitled to do—does not show that we may not reasonably be required to play our part in society's accordance for the basics of recognition-respect for one another.

Let's come back to the assurance that we seek to provide for one another in a well-ordered society. How is this assurance conveyed? I don't think Rawls

³⁰ Ronald Dworkin, "Comments on Jeremy Waldron on Anthony Lewis," communication to Robert Silvers, editor of the *New York Review of Books*, passed on to me by Silvers.

³¹ Stephen L. Darwall, *Two Kinds of Respect*, 88 *ETHICS* 36 (1977) and his *SECOND PERSON STANDPOINT* book.

imagines that there will be billboards proclaiming the difference principle or the list of basic liberties. The creepy totalitarian flavor of that makes us uneasy, and rightly so. There may be some affirmative efforts: I think of the public proclamation of a new constitution, like the South African constitution, seeking to focus everyone's attention on the fact that they now have these rights; or just the mundane business of pamphlets and advertisements ensuring that people know their rights and know how to claim them; etc. I saw a sign the other day on the New York subway, in English and Spanish, telling people that they do not have to put up with unwanted sexual touching in a crowded subway car.

Mostly, however, the assurance is implicit, as though the underlying status of each person as a citizen in good standing goes without saying. Various forums of social, political and commercial interaction are just open to all: it's a matter of course; no one has to say "Muslims welcome" or "African-Americans Allowed." Indeed if they do, there is evidence already of a problem, now or in the recent past. It is tremendously important that the assurance be conveyed in this implicit way so that it can be taken for granted and people, who might otherwise feel insecure, unwanted or despised in social settings can put all that terrible insecurity out of their minds, and concentrate on what matters to them in social interaction—its pleasures and opportunities.

At the same time the necessary implicitness of this assurance makes it tremendously vulnerable. A spate of discriminatory signs appear: maybe they intimate a real intention to discriminate or maybe they don't. But suddenly the stakes have changed for those to whom they are directed. Or think of this: after 9/11, signs go up intimating that Muslims should be accosted as terrorists and suddenly taxicabs in New York City start sporting American flag decals—which I read not as sign of pride or patriotism but of fear that cabs without them will have their Muslim-looking drivers beaten up.

This helps us see what hate speech is about. The point of the bigoted displays that we want to regulate is not just autonomous self-expression. The displays target the assurance on which members of vulnerable minorities rely. Their point is to negate the implicit assurance that a society offers to the members of vulnerable groups—to undermine it, call it in question, taint it with visible expressions of hatred, exclusion and contempt. And so it begins: what was implicitly assured is now visibly challenged, and now there is a whole new set of calculations for a minority member setting out to do business or take a walk with his family.

6. Feminist issues

I have not said anything so far about the application of my analysis to the related issue of pornography, sexist advertising, and the demeaning depiction of women that we find in a more or less inescapable form all over the visible (and the virtual) public environment of our society. Would we characterize as well-ordered a society decorated—on advertising billboards, placards on the subway, and innumerable television screens—in ways that demeans one large class of its citizens, or conveys a degrading message about their sexuality or highlights a particular range of purposes and opportunities held to be appropriate for them to the exclusion of a large number of others, or portrays as normative a kind of subordination in relationships that is at odds with the idea of an autonomous person working out her own destiny under conditions of justice and dignity. And that is to say nothing of the deeper disgrace of pornography and the degradation that this depicts in the real and virtual neighborhoods that it dominates.

I find the visible sexism, the pornographic spectacle, of modern societies a helpful prototype, informing my thought on the concerns we should have about how a well-ordered society presents itself, about the cumulative effect on the visible environment of numerous individual contributions, and about the contribution might reasonably be demanded from citizens to the maintenance of a respectful atmosphere. All this has been useful in crystallizing my thoughts about what it is for a society to embody fundamental disrespect in its visible appearance. I believe that the analysis that I am developing in this lecture and the concepts and distinctions that I am drawing on are applicable to this issue too and that to address the issue of sexist advertising and pornography, and that the attitude that the law should take towards it, we need to put concepts and distinctions just like these ones into play.

So for example, we should refuse to let the issue be presented simply as a matter of pornography causing violence, though that connection is of course very important. The issue is one of public order in the deeper sense that I spoke about yesterday—the dignitary order of society—and it seems to me that women are entitled to ask whether official legal tolerance of pornography is consistent with our commitment to the dignity and equality of women. The connection between dignity and defamation is as important here as it is in the case of hate speech (though the relationship is also more complicated). The idea of group dignity is important, again not necessarily treating the group as a dignified entity in its own right, but looking at the way in which group attributes are twisted, denigrated, and characterized in hateful ways that impact adversely upon the dignity and the perceived public presence of members of the group. The line between defamation and offense is as important in the case of pornography—and probably as difficult—as it is in the area of hate speech. And above all the connection between

dignity and the assurance with which a life is lived on its own terms not others', is worth pursuing too in this regard. I do not have time to pursue these reflections and these analogies in my lecture. As I say, I have no doubt that such pursuit would be fruitful, though I think too it would be complicated and perhaps deepen the controversy surrounding my remarks.

7. Public goods.

Provision of the assurance that I am talking about is like a public good, albeit a silent one. It is implicit rather than explicit, but none the less real—a pervasive, diffuse, general, sustained and reliable underpinning of people's basic dignity and social standing, provided by all for all. A well-ordered society, it seems to me, has a systemic and structural interest in provision of this public good, i.e. in the general and diffuse furnishing of this assurance and the recognition and upholding of the basic dignity on which it is predicated. Like street lighting, it is a public good that redounds to the advantage of individuals³²—those whose dignity is affirmed, when its social underpinnings might be otherwise in question; those whose reliance is vindicated by a sense that there doesn't have to be anything explicit on which to rely. But unlike street lighting, which can be provided by a central utility company, the public good of assurance depends on and arises out of what hundreds or thousands of ordinary citizens do singly and together. It is, as John Rawls puts it, a product of "citizens' joint activity in mutual dependence on the appropriate actions being taken by others."³³ It may not affirmatively require a great deal of the ordinary citizen; that's a point about its implicitness. But just because it is a low-key sort of background thing, the prime responsibility for its provision that falls upon the ordinary citizen is to refrain from doing anything to undermine it or to make the furnishing of this assurance more laborious or more difficult. *And that is the obligation that hate speech laws or group defamation laws are enforcing.*

Those who publish or post up expressions of contempt and hatred of their fellow citizens, those who burn crosses, scrawl swastikas are doing what they can to undermine this assurance. Their actions may not seem all that significant in themselves; an isolated incident here, a forlorn Nazi procession there, some ratty racist little leaflet. But as I said already, precisely because the public good that is under attack is provided in a general, diffuse and implicit way, the flare up of a few particular incidents can have a disproportionate effect. I'll say a little more at the

³² For the distinction between public goods whose ultimate payoff is collectively consumed and public goods that redound ultimately to the benefit of individuals, see Waldron, *Can Communal Goods be Human Rights?* 27 ARCHIVES EUROPÉENNES DE SOCIOLOGIE, 294 (1987) (reprinted in WALDRON, LIBERAL RIGHTS) and RAZ, THE MORALITY OF LAW (OUP 1986), pp. __. Some public goods may have both aspects: see also JW, *Safety and Security*, 85 NEBRASKA LAW REVIEW 454 (2006).

³³ PL, p. 204.

conclusion of this lecture about the social and historical context. But consider this observation by William Peirce Randell, an historian of the Ku Klux Klan, about an isolated incident of cross-burning; I am indebted for this quotation to an article by Cedric Merlin Powell: “Such is the symbolic power of the fiery cross that people in many parts of the country still talk in subdued voices about the cross that was burned one night years ago in the field across the road or on a local hilltop.”³⁴ And Randell also added this about the isolated incident of the burning cross:

What [a cross-burning] is commonly taken to mean is that neighbors one sees every day include some who are Klan members, and that Klaverns supposedly extinct are only dormant, ready to regroup for action when the Klan senses that action is needed. It casts a shadow on many a neighborhood to know that it harbors a potentially hostile element which at any moment may disrupt the illusion of peace.³⁵

Hate speech doesn't just seek to undermine the public good of implicit assurance. It also seeks to establish a rival public good as the wolves call to one another across the peace of a decent society. The publication of hate speech, the appearance of these symbols and scrawls in places for all to see, is a way of providing a focal point for the proliferation and coordination of the attitudes that it express, a public manifestation of hatred by some people to indicate to others that they are not alone in their racism or bigotry. Frank Collin, the leader of the Nazis who sought to march through Skokie said: “We want to reach the good people—get the fierce anti-Semites who have to live among the Jews to come out of the woodwork and stand up for themselves.”³⁶ Hate speech laws aim to block the construction of this rival public good. It is sometimes objected that such laws simply drive hate underground. But that's the whole point—to convey the sense that the bigots are isolated embittered individuals, rather than permitting them to contact and coordinate with one another to undermine society's most fundamental principles.

7. The role of law and the role of individuals.

One last objection to answer: maybe it doesn't matter in the end what a well-ordered society looks like. Surely what is important in the end is upholding the principles of justice, not the visible display of citizens' attitudes. Shouldn't the

³⁴ WILLIAM PEIRCE RANDEL, *THE KU KLUX KLAN: A CENTURY OF INFAMY* 224 (1st ed. 1965), quoted in Cedric Merlin Powell, *The Mythological Marketplace of Ideas: R.A.V., Mitchell, and Beyond*, 12 HARV. BLACKLETTER L. J. 1 (1995), at 32.

³⁵ *Idem.*

³⁶ Quoted in PHILIPPA STRUM, *WHEN THE NAZIS CAME TO SKOKIE: FREEDOM FOR THE SPEECH WE HATE* (University Press of Kansas, 1999), p. 15.

primary vehicle of assurance be the government's resolution to uphold the laws? Isn't the most important thing the government's manifestation of attitude and commitment in this regard? If laws against discrimination are upheld and if people are confident that they will be upheld, what does it matter what private signage is out there? If laws protecting people from violence or from being driven out of their neighborhoods are upheld and if people are confident that they will be upheld, what does it matter whether the odd cross is burned on somebody's lawn? If the laws protecting people against violence and mass murder are upheld and if people are sure that they will be upheld, what does it matter what it says on the placards that neo-Nazis carry through Jewish neighborhoods in an Illinois suburb? It's law enforcement that matters, not the cardboard signs. That's the objection.

But this is a false contrast. In no society is the state able to offer these guarantees on its own account without a complementary assurance that ordinary citizens will play their part in the self-application of the laws.³⁷ Think of the administration of anti-discrimination laws. The law does not have the resources to provide an armed escort for every minority member who wants to approach and enter a school, or university, or other public accommodation without fear of being turned away and humiliated on racial grounds. We know exactly what that looks like: the spectacle of the National Guard being turned out to desegregate a school in Little Rock, Arkansas in 1957. States don't have the coercive resources to do this in any but a very few cases and anyway it is hardly a satisfactory instance of a person getting justice when they have to proceed under armed escort. Even routine enforcement efforts by the Department of Justice against routine discrimination can handle only a handful of cases. By and large, the law has to rely in this area—as in almost every area—on self-application by ordinary citizens. And that means that any citizen who relies upon the *law* is relying indirectly on the voluntary cooperation of their fellow citizens.

That's the reliance we are talking about when we talk of the assurance that is furnished in the visible aspect of a well-ordered society. And that's the concern about the public expression of racist attitudes by members of the public: they are intimations that certain members of the public (and those they are trying to influence) will not play their necessary part in the administration of the laws, if they can get away with it. What's more, they are playing a competing assurance game: they are using public and semi-permanent displays and manifestations to assure those who are inclined not to lay their part in upholding laws against violence and discrimination that they are not alone, that there are plenty of others like them.

³⁷ For discussion of the idea of self-application, see Henry M. Hart, And Albert Sacks, *The Legal Process: Basic Problems in the Making and Application of Law* 120-1 (William N. Eskridge and Philip P. Frickey eds., 1994)

Ronald Dworkin takes the view that all this is a matter for the government. The government is the entity which is required to show and display equal concern and respect for its citizens. But the citizens themselves have no such obligation: they are permitted to show respect for some and concern for their others—respect for their parents and concern for their children which differs from the concern and respect that they manifest to strangers.³⁸ There may be something in this division of private and public responsibility. But as stated it is too simple. Government is not an entity separate from the people, not in the formation of its policies, the enactment of its laws, and certainly not in the discharge of its distinctive responsibilities. The discharge of some governmental responsibilities is impossible without the whole-hearted cooperation of members of the public, and the discharge of other public responsibilities is certainly vulnerable to what private people do in public. Many of the responsibilities of justice are of the former sort, and certainly the responsibility of providing the assurance that Rawls tells us will be a feature of a well-ordered society is of the latter sort. We must not be misled into regarding hate speech and group defamation as essentially private acts with which governments are perversely trying to interfere in the spirit of mind control. Hate speech and group defamation are actions performed in public, with a public orientation, aimed at undermining public goods. We may or may not be opposed to their regulation; but we need at least to recognize them for what they are.

8. Transition and Assurance

We need to draw to a close. I have taken up John Rawls's suggestion that in a well-ordered society, citizens have and can rely upon public assurance of one another's commitments to justice—that this reliance is public knowledge, publicly-conveyed. I have argued that one way of thinking of the point of group defamation laws is that they protect these assurances against egregious forms of denigration and subversion and coordinated defiance. People need these assurances and they need to be protected against displays and manifestations whose point is to undermine the assurances and to begin constructing an assurance of exactly the opposite—an assurance that, whatever the constitution and the laws say, those who discriminate or those who try to drive minorities out of majority neighborhoods will be in good company. I argued that people have a responsibility to participate in the provision of these goods, at least to the extent of not participating in undermining them; and that certainly society is permitted to enforce that responsibility to protect this vital good.

I suspect that one could make a case along these lines *in the abstract*, entirely based on the circumstances of justice, which, as Rawls has insisted, are

³⁸ See e.g. LAW'S EMPIRE.

characteristic of even the most well-ordered society: moderate scarcity, social pluralism (which may include cultural inscrutability), and limited strength of will etc.³⁹ In any such society, people will stand in need of the assurances which, in Rawls's account, it is the function of a well-ordered society to provide.

But the case becomes particularly pressing when we think not just of the abstractions of political philosophy but of the prospects of real-world societies—here on earth—becoming anything like well-ordered. For us, the question is not just an abstract need for assurance that people might have even in the best of social circumstances, but a need for assurance in relation to the history of their society which has been far from well-ordered—indeed hideously ill-ordered—so far as the basic elements of justice and dignity are concerned.

It is often said that there is a historical reason why European countries are more receptive to laws prohibiting group defamation than people in the United States. This is half true: European countries do have to think about these matters against the background of Nazism and the Holocaust (still within living memory). But it is false—and egregiously so—if this is supposed to suggest that Americans have no such burden. Quite the contrary: the United States has historic memory within the last two centuries of one of the most vicious regimes of chattel slavery the world has ever known, upheld by the very Constitution that purported then and still purports to guarantee individual rights; it has living memory of institutionalized racism, segregation and denial of civil rights, in many of its states; living experience—here and now—of shameful patterns of discrimination and racial disadvantage; and above all living memory of racial terrorism—lynching, whipping, church bombing, burning, and all the paraphernalia of Klan symbolism—from 1867 to the present.

This is the background against which people—especially members of formerly subordinated minorities—have to situate public manifestations of race hate, group libel, and the like. It is not merely that the tone and content of such manifestations is at odds with the guarantees supposedly afforded as a public good by the members of a well-ordered society to the members of a well-ordered society. It is that these manifestations intimate a *return* to the all-too-familiar circumstances of murderous injustice that people or their parents or grandparents experienced. Such intimations are directly at odds with the assurances that a well-ordered society is supposed to provide. Those assurances are sought not just in the abstract but in relation to precisely the history that these displays nightmarishly summon up.

³⁹ Rawls get best formulations from TJ.

9. Conclusion

My aim is not directly to advocate such laws in the United States, but to understand the case for them in societies that have them. And certainly whatever case I am making is not Rawlsian, really. As I said, I imagine Rawls, like many of his close friends, was opposed to laws of this kind. But I have used a Rawlsian framework because I think that his abstract conception of a well-ordered society is very useful in deepening our understanding in that country of what might be at stake on one side of the hate speech debate. What's helpful about his conception—what we can take and use perhaps out of the context of his particular body of work—is that it is not enough that a society be effectively regulated by a conception of basic justice and equal dignity: what is important is that citizens have a public assurance that this is so, and that public assurance is provided not just by the government and the laws, but by citizens assuring one another of their willingness to cooperate in the administration of the laws and in the humane and trustful enterprise that elementary justice requires.

As I say, it is not just a matter of protecting people from sporadic insult, offense and wounding words. It is a matter of securing, in a systematic fashion, a particular aspect of civic order under justice: the public good of mutual assurance concerning the fundamentals of justice in any community—particularly one burdened by a history like ours—that aspires now to become a just and well-ordered society.