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## RETHERORIZING ACTIONABLE INJURIES IN CIVIL LAWSUITS INVOLVING TARGETED HATE SPEECH: HATE SPEECH AS DEGRADATION AND HUMILIATION

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## I. INTRODUCTION

Mari Matsuda once wrote, “However we choose to respond to racist speech, let us present a competing ideology, one that has existed in tension with racism since the birth of our nation: there is inherent worth in each human being, and each is entitled to a life of dignity.”<sup>1</sup> My focus in this article is on how civil lawsuits might provide legal redress for instances of targeted hate speech that impair a life of dignity on the part of plaintiffs.

The term “hate speech” is an opaque idiom with multiple meanings covering a heterogeneous collection of expressive phenomena.<sup>2</sup> My specific concern here is with vituperation (bitter and abusive language) or vilification (viciously disparaging or insulting language) that makes reference to the victim’s race, ethnicity, nationality, citizenship status, religion, sexual orientation, gender identity, disability, or other protected characteristic,<sup>3</sup> and

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1. Mari Matsuda, *Public Response to Racist Speech: Considering the Victim’s Story*, 87 MICH. L. REV. 2320, 2381 (1989).

2. See generally Alexander Brown, *What is Hate Speech? Part 1: The Myth of Hate*, 36 L. & PHIL. 419 (2017); Alexander Brown, *What is Hate Speech? Part 2: Family Resemblances*, 36 L. & PHIL. 561 (2017).

3. For a detailed discussion of the numerous characteristics that governments could potentially deem “protected” for the purposes of hate speech law, see generally Alexander Brown, *The “Who?” Question in the Hate Speech Debate: Part 1: Consistency, Practical, and Formal Approaches*, 29 CAN. J.L. & JURIS. 275 (2016); Alexander Brown, *The “Who?” Question in the Hate Speech Debate: Part 2: Functional and Democratic Approaches*, 30 CAN. J.L. & JURIS. 23 (2017).

which is directly addressed to, or targeted at, the victim,<sup>4</sup> whether in face-to-face offline interactions or in online interactions.<sup>5</sup>

In the article, I provide an analysis of the sort of dignity that I believe courts should recognize in civil lawsuits involving targeted hate speech. I shall place an emphasis not merely on human dignity but also on the expression of human dignity—expression of human dignity both in people’s inward feelings and attitudes and in their outward behavior or dignified bearing. What is more, I will understand dignity to include not only human dignity, but also civic dignity, which is a matter of people’s worth as members of society in good standing, and their own confidence in that worth. In addition to this, I argue that in trying to determine whether or not a plaintiff’s dignity has been infringed or violated, courts should look to the presence of *degradation* or *humiliation*. I also attempt to flesh out as fully as possible what would be required for targeted hate speech to count as degradation or humiliation of the plaintiff. In doing so, I propose two legal tests, each of which include both objective and subjective elements. In many of these ways, therefore, I am recommending substantial reform of current legal doctrine.

The article is structured as follows. I begin by summarizing the case law and jurisprudence around torts used—or that have been suggested for use—in cases of targeted hate speech, focusing on the United States and South Africa (Part II). I argue that the tort of intentional infliction of emotional

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4. Several legal scholars have drawn distinctions between targeted hate speech (speech which is immediate, instant, and directly addressed to, or targeted at, particular individuals) and non-targeted hate speech (speech which is indirect, diffuse, generalized, and impersonal). *See, e.g.*, KENT GREENAWALT, *FIGHTING WORDS: INDIVIDUALS, COMMUNITIES AND LIBERTIES OF SPEECH* 63 (1995); ERIC HEINZE, *Cumulative Jurisprudence and Hate Speech: Sexual Orientation and Analogies to Disability, Age, and Obesity*, in *EXTREME SPEECH AND DEMOCRACY* 282 (I. Hare & J. Weinstein eds., 2009); THOMAS W. PEARD, *Regulating Racist Speech on Campus*, in *CIVILITY AND ITS DISCONTENTS: CIVIC VIRTUE, TOLERATION, AND CULTURAL FRAGMENTATION* 142 (Christine T. Sistare ed., 2004); STEVEN H. SHIFFRIN, *DISSSENT, INJUSTICE, AND THE MEANINGS OF AMERICA* 76-77 (1999); NICHOLAS WOLFSON, *HATE SPEECH, SEX SPEECH, FREE SPEECH* 60 (1997); Alan E. Brownstein, *Hate Speech and Harassment: The Constitutionality of Campus Codes that Prohibit Racial Insults*, 3 *WM. & MARY BILL RTS. J.* 179, 179 (1994); Richard Delgado & Jean Stefancic, *Four Observations About Hate Speech*, 44 *WAKE FOREST L. REV.* 353, 362-63 (2009); Caleb Yong, *Does Freedom of Speech Include Hate Speech?*, 17 *RES PUBLICA* 385, 394-96 (2011).

5. For a wider discussion of whether or not online hate speech differs from offline hate speech and how, see Alexander Brown, *What is So Special About Online (as Compared to Offline) Hate Speech?*, *ETHNICITIES* (forthcoming), <http://journals.sagepub.com/doi/abs/10.1177/1468796817709846>.

distress (United States), Richard Delgado's proposed tort of racial insult,<sup>6</sup> and the delict of *injuria* (South Africa) still have a long way to go in terms of clarifying the sense in which targeted hate speech may constitute an infringement of, or impairment to, a life of dignity on the part of the plaintiff. In other words, each of these torts has significant potential for useful application to cases involving targeted hate speech, but each runs into problems because of a failure to identify with adequate clarity both the nature of the interest whose interference warrants redress, that is, dignity, and the precise way in which the interest is harmed, that is, the precise way in which dignity is infringed or impaired.

My aim in the remainder of the article is to supply this clarity in ways that are both theoretically informative and practicable for courts. To that end, I first undertake some additional theorizing about the nature of dignity that I think could underpin the concept of a life of dignity, relevant to cases involving targeted hate speech (Part III).

Following on from that, I propose two legal tests—a test for whether the speech degraded the plaintiff and a test for whether it humiliated the plaintiff—which I believe could be usefully employed by courts to determine whether or not the plaintiff's life of dignity has been violated by targeted hate speech (Part IV). Both of these tests are hybrid objective-subjective legal tests, meaning that a cause of action would require that degradation or humiliation have occurred both as metaphysical and as psychological states of affair.

In addition, I try to show how the two tests for degradation and humiliation could be used, in particular, to support, clarify, and augment civil court adjudications involving the tort of intentional infliction of emotional distress, Delgado's proposed tort of racial insult, and the delict of *injuria* (Part V).

Finally, I explain some further features of the two tests for degradation and humiliation, relating to scope of application, how the tests bear on determinations of the extent of damages, including aggravated damages, and the place of consent as a possible defense. I also try to make what I hope are some salutary comments on the important issue of freedom of expression (Part VI).

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6. Richard Delgado, *Words That Wound: A Tort Action for Racial Insults, Epithets, and Name-Calling*, 17 HARV. CIV. RTS. CIV. L. L. REV. 133, 134 (1982).

## II. CIVIL LAWSUITS INVOLVING TARGETED HATE SPEECH

Hate speech laws around the world offer victims of hate speech various means of legal redress.<sup>7</sup> Much has been written about criminal laws banning group libel or incitement to hatred, for example.<sup>8</sup> A great deal of attention has also been paid to cross-burning statutes,<sup>9</sup> and to campus speech codes.<sup>10</sup> By

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7. For an overview of the variety of such laws, see ALEXANDER BROWN, *HATE SPEECH LAW: A PHILOSOPHICAL EXAMINATION* 19-38 (2015).

8. See, e.g., ERIK BLEICH, *THE FREEDOM TO BE RACIST? HOW THE UNITED STATES AND EUROPE STRUGGLE TO PRESERVE FREEDOM AND COMBAT RACISM* (2011); BROWN, *supra* note 7, at 19-38; ERIC HEINZE, *HATE SPEECH AND DEMOCRATIC CITIZENSHIP* (2016); ROBERT POST, *Interview*, in *THE CONTENT AND CONTEXT OF HATE SPEECH: RETHINKING REGULATION AND RESPONSES* 11 (Michael Herz et al. eds., 2012); JEREMY WALDRON, *THE HARM IN HATE SPEECH* (2012); JAMES WEINSTEIN, *Hate Speech, Viewpoint Neutrality, and the American Concept of Democracy*, in *THE BOUNDARIES OF FREEDOM OF EXPRESSION AND ORDER IN A DEMOCRATIC SOCIETY* (Thomas Hensley ed., 2001); JAMES WEINSTEIN, *HATE SPEECH, PORNOGRAPHY AND RADICAL ATTACKS ON FREE SPEECH DOCTRINE* 51-66 (1999); Sanjeev Anand, *Expressions of Racial Hatred and Criminal Law*, 40 *CRIM. L. Q.* 215, 215-42 (1997); Peter J. Belton, *Control of Group Defamation: A Comparative Study of Law and Its Limitations*, 34 *TULANE L. REV.* 299, 301-42 (1960); Geoffrey Bindman, *Outlawing Hate Speech*, 89 *L. SOC'Y GAZETTE* 17 (1992); Alan Borovoy et al., *Language as Violence v. Freedom of Expression: Canadian and American Perspectives on Group Defamation*, 37 *BUFFALO L. REV.* 337, 340 (1988-9); Alexander Brown, *Hate Speech Laws, Legitimacy, and Precaution: A Reply to James Weinstein*, 32 *CONST. COMMENT.* 599 (2017); David Riesman, *Democracy and Defamation: Control of Group Libel*, 42 *COLUMBIA L. REV.* 727, 734-56 (1942); Nadine Strossen, *Incitement to Hatred: Should There Be a Limit?*, 25 *S. ILL. UNIV. L. J.* 243, 245-80 (2001); Nadine Strossen, *Interview*, in *THE CONTENT AND CONTEXT OF HATE SPEECH: RETHINKING REGULATION AND RESPONSES* (M. Herz & P. Molnar eds., 2012); Jeremy Waldron, *2009 Oliver Wendell Holmes Lectures: Dignity and Defamation: The Visibility of Hate*, 123 *HARV. L. REV.* 1596, 1602-05 (2010).

9. See, e.g., Akhil Reed Amar, *The Case of the Missing Amendments: R.A.V. v. City of St. Paul*, 106 *HARV. L. REV.* 124, 124-61 (1992); Ivan Hare, *Inflammatory Speech: Cross Burning and the First Amendment*, *PUB. L.* 408 (2003); Roger C. Hartley, *Cross Burning—Hate Speech as Free Speech: A Comment on Virginia v. Black*, 54 *CATH. UNIV. L. REV.* 1, 1-52 (2004); Charles Lawrence III, *Cross Burning and the Sound of Silence: Anti-Subordination Theory and the First Amendment*, 37 *VILL. L. REV.* 787, 787-804 (1992).

10. See, e.g., DONALD A. DOWNS, *RESTORING FREE SPEECH AND LIBERTY ON CAMPUS* (2005); TIMOTHY C. SHIELL, *CAMPUS HATE SPEECH ON TRIAL*, (2nd ed., 2009); Larry Alexander, *Banning Hate: Speech and the Sticks and Stones*

comparison much less has been written about civil lawsuits as means of redress.<sup>11</sup> This is surprising given that two of the earliest articles on hate speech law written by critical race theorists focused primarily on civil lawsuits.<sup>12</sup>

In this part, I shall examine two torts and one delict that have been, or could be, used by plaintiffs to seek repair for dignitary injuries caused by targeted hate speech. I shall argue that the abstract tests already used by courts to interpret these remedies are not fit for purpose. Using these tests courts either have or are at risk of summarily discounting the injuries caused by targeted hate speech as actionable injuries of the relevant sort, and of failing to recognize the conduct of the defendant as wrongful conduct of the relevant sort.

### *A. Intentional Infliction of Emotional Distress*

In the mid-1960s James Jay Brown and Carl L. Stern suggested that the tort of intentional infliction of emotional distress could become a useful legal remedy for the psychological harms caused by targeted hate speech.<sup>13</sup> Similar

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*Defense*, 13 CONST. COMMENT. 71, 71-100 (1996); Andrew Altman, *Liberalism and Campus Hate Speech: A Philosophical Examination*, 103 ETHICS 302, 302-17 (1993); Susan Brison, *The Autonomy Defense of Free Speech*, 108 ETHICS 312, 312-39 (1998); Jeanne M. Craddock, *Words That Injure, Laws That Silence: Campus Hate Speech Codes and the Threat to American Education*, 22 FLA. ST. UNIV. L. 1047, 1047-89 (1995); Richard Delgado, *Campus Antiracism Rules: Constitutional Narratives in Collision*, 85 NORTHWESTERN UNIV. L. REV. 343, 343-87 (1991); Donald A. Downs, *Codes Say Darnedest Things*, 81 QUILL 19, 19 (1993); Charles Lawrence III, *If He Hollers Let Him Go: Regulating Racist Speech on Campus*, 1990 DUKE L.J. 431, 431-83 (1990); Rodney Smolla, *Academic Freedom, Hate Speech, and the Idea of a University*, 53 L. & CONTEMP. PROBS. 195, 195-225 (1990); Nadine Strossen, *Regulating Racist Speech on Campus: A Modest Proposal*, 1990 DUKE L. J. 484, 484-573 (1990).

11. See, e.g., Delgado, *supra* note 6, at 133-82; Jean C. Love, *Discriminatory Speech and the Tort of Intentional Infliction of Emotional Distress*, 47 WASH. & LEE L. REV. 123, 123-60 (1990); Matsuda, *supra* note 1, at 2320-81; Camille Nelson, *Considering Tortious Racism*, 9 DEPAUL J. HEALTH CARE L. 905, 905-971 (2005). Cf., Marjorie Heins, *Banning Words: A Comment on "Words That Wound,"* 18 HARV. CIV. RTS. CIV. L. L. REV. 585, 585-92 (1983); Eugene Volokh, *Freedom of Speech and Intentional Infliction of Emotional Distress Tort*, CARDOZO L. REV. DE NOVO 300, 300-312 (2010).

12. See generally Delgado, *supra* note 6; Matsuda, *supra* note 1.

13. James Jay Brown & Carl L. Stern, *Group Defamation in the U.S.A.*, 13 CLEVELAND ST. L. REV. 7, 29 (1964).

optimism was later expressed by Matsuda,<sup>14</sup> and, to a lesser extent, by Delgado.<sup>15</sup> This confidence in the tort was not entirely misplaced: some victims of racist hate speech have successfully sued for damages using the tort of intentional infliction of emotional distress. *Wiggs v. Courshon*,<sup>16</sup> *Contreras v. Crown Zellerbach, Inc.*,<sup>17</sup> *Agarwal v. Johnson*,<sup>18</sup> *Wilmington v. J.I. Case Co.*,<sup>19</sup> and *Wade v. Orange County Sheriff's Office*<sup>20</sup> are early success stories, depending on one's perspective. Of course, one potentially relevant factor in these decisions was that the racist abuse had occurred in the context of the workplace where standard assumptions about the epistemic, developmental, and political values of freedom of expression may have less traction, and where the doctrines of "hostile working environment" and "captive audience" come into play.

Nevertheless, at present several major obstacles confront anyone seeking recovery for the tort of intentional infliction of emotional distress in cases of targeted hate speech. The first sticking point has been a particular interpretation by courts of §46(1) comment (d) of *The Restatement of Torts (Second)*: the tort of intentional infliction of emotional distress "does not extend to mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities" but only to "[e]xtreme and outrageous conduct."<sup>21</sup> Courts have often regarded the use of racial slurs or similar hate abuse as falling short of extreme and outrageous conduct.<sup>22</sup> Consider *Bradshaw v.*

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14. Matsuda, *supra* note 1, at 2336.

15. See Delgado, *supra* note 6, at 133.

16. 355 F. Supp. 206, 210-11 (S.D. Fla. 1973) (involving a black lawyer and his family who were racially abused with the words "black son of a bitch" and "bunch of niggers" by a restaurant waitress following a dispute over a food order).

17. 88 Wash. 2d 735, 741-743 (Wash. 1977) (involving a lawsuit brought by a Mexican American against his employer for damages relating to humiliation and embarrassment caused by the racial jokes, slurs and comments of his fellow employees).

18. 25 Cal.3d 932, 954-55 (1979) (involving a lawsuit brought by a man of East Indian ethnicity for damages relating to the intentional infliction of emotional distress caused by the use of a racist epithet).

19. 793 F.2d 909 (8th Cir. 1986) (involving an African American welder who suffered several years of racial harassment in the workplace).

20. 844 F.2d 951 (2d Cir. 1988) (involving a lawsuit brought by an African American sheriff's deputy for emotional distress and humiliation caused by racial harassment at work).

21. RESTATEMENT (SECOND) OF TORTS § 46 (AM. L. INST. 1979).

22. See, e.g., RICHARD DELGADO & JEAN STEFANCIC, UNDERSTANDING WORDS THAT WOUND 12-16 (2004); MARTHA CHAMALLAS & JENNIFER

*Swagerty*,<sup>23</sup> *Ugalde v. W.A. McKenzie Asphalt Co.*,<sup>24</sup> and *Walker v. Thompson*.<sup>25</sup>

Second, the availability of federal recourse against discrimination and harassment in the workplace—under Title VII of the Civil Rights Act of 1964—may discourage courts from entertaining private actions for intentional infliction of emotional distress in the workplace. Courts might assume that the relevant federal laws provide alternative, more appropriate ways for individuals to pursue their grievances, even though these laws make plain that they do not debar civil proceedings.<sup>26</sup>

Third, courts require evidence of substantial emotional distress, such as professionally diagnosed emotional, psychological, or physiological ill-effects, caused by the defendant’s speech. For example, in *Turner v. Wong*<sup>27</sup> a coffee shop patron, who also happened to be African-American, attempted to return a donut to the owner, the defendant, because she believed it was stale. In response the owner repeatedly called the plaintiff a “black nigger from Philadelphia” in front of the other patrons.<sup>28</sup> Significantly, the court rejected the claim for intentional infliction of emotional distress *inter alia* on the grounds that the “plaintiff here never sought medical, psychological or other professional treatment” and that the “plaintiff’s claimed distress never manifested itself physically or objectively by way of headaches, loss of sleep, inability to perform her daily functions, or any condition that was professionally diagnosed.”<sup>29</sup>

Finally, even lawsuits that are successful at the state level can suffer reversal by the United States Supreme Court on First Amendment grounds. In *Snyder v. Phelps*,<sup>30</sup> for example, the Court held that “[w]hat Westboro said,

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WRIGGINS, THE MEASURE OF INJURY: RACE, GENDER, AND TORT LAW 63-88 (2010).

23. 563 P.2d 511, 514 (Kan. Ct. App. 1977) (involving a black lawyer racially abused with the slurs “nigger” and “knot-headed boy”).

24. 990 F.2d 239, 243-44 (5th Cir. 1993) (involving a supervisor who repeatedly uttered epithets toward a Mexican American employee).

25. 214 F.3d 615, 629-30 (5th Cir. 2000) (involving an employee who was subjected to a daily barrage of demeaning, racist remarks and comments in the workplace).

26. CHAMALLAS & WRIGGINS, *supra* note 22, at 81.

27. *Turner v. Wong*, 832 A.2d 340 (N.J. Super. Ct. App. Div. 2003).

28. *Id.* at 346.

29. *Id.* at 349.

30. 562 U.S. 443, 445-46 (2011) (involving a lawsuit for intentional infliction of emotional distress brought by the father of a deceased US serviceman against members of the Westboro Baptist Church).

in the whole context of how and where it chose to say it, is entitled to ‘special protection’ under the First Amendment and that protection cannot be overcome by a jury finding that the picketing was outrageous.”<sup>31</sup>

Nevertheless, none of these obstacles is insurmountable. Not all courts have rejected racist verbal abuse or similar hate speech from the class of extreme and outrageous conduct. Consider *Taylor v. Metzger*.<sup>32</sup> In this case the Burlington County Sheriff, Henry Metzger, addressed an African American sheriff’s officer with the words “There’s the jungle bunny” during an official firearms training event.<sup>33</sup> Judge Handler opined:

We recognize that many jurisdictions have held that a supervisor’s utterance of racial slurs toward his subordinates is not, as a matter of law, extreme and outrageous conduct that would give rise to an intentional infliction of emotional distress cause of action. . . . We disagree. In this day and age, in this society and culture, and in this State, an ugly, vicious racial slur uttered by a high-ranking public official, who should know better and is required to do better, cannot, in light of this State’s strong and steadfast public policy against invidious discrimination, be viewed as a picayune insult. That view would be blind and impervious to the lessons of history.<sup>34</sup>

Likewise, in *Turley v. ISG Lackawanna Inc.* the Second Circuit upheld a damages award based on the fact that the plaintiff had suffered years of extreme and outrageous racist abuse at work.<sup>35</sup> This included: being called “boy,” “nigger,” “that fucking nigger,” “monkey”; having a “dancing gorilla” sign and the letters “KKK” placed at his workstation; having monkey noises made in his presence; having black grease applied to his work chair, door handles, and machine controls accompanied by the comment “it must have been the boon that’s doing it”; having his work chair destroyed followed by the declaration “That nigger ain’t sitting in this chair.”<sup>36</sup>

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31. *Id.* at 458.

32. 152 N.J. 490, 513 (N.J. 1998) (involving a lawsuit brought by an African American county sheriff’s officer against her employer for use of a derogatory racist term against her).

33. *Id.*

34. *Id.* at 510.

35. 774 F.3d 140, 168 (2nd Cir. 2014) (involving an African American steel worker who had suffered years of racist abuse at the hands of fellow employees and supervisors).

36. *Turley v. ISG Lackawanna Inc.*, 960 F. Supp. 2d 425, 433-34 (W.D.N.Y. 2013).

In *Turner v Manhattan Bowery Management Corporation*, a court accepted as extreme and outrageous conduct “daily use of the [‘]N[’] word, negative references to Hispanics [‘]being too Black,[’] and [‘]acting Black,[’] sending African-Americans to less desirable work locations, and unfairly distributing the work assignment of [‘]free days[’] of driving the trucks to the Bronx for maintenance based on race.”<sup>37</sup>

Yet it is not all plain sailing for the tort. In *Gaiters v. Lynn*, the Fourth Circuit reviewed several cases “involving racial slurs and innuendo,” and potentially implicating the extreme and outrageous conduct test, but found that “[n]o clear guiding principle emerges from these cases; the question is inescapably one of legal judgment based upon total context.”<sup>38</sup> In effect, the Court was flagging up the need for a more substantive interpretation of the extreme and outrageous conduct test: a derivative test that would support more systematic, coherent, and consistent applications of the idea of extreme and outrageous conduct.

Interestingly, in *Taylor v. Metzger*, Judge Handler proffered as one possible interpretation of the extreme and outrageous conduct test another part of § 46(1), namely, comment (d): conduct must be “so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community.”<sup>39</sup> Potentially, however, if courts were to appeal to the notion of what is intolerable in a civilized community, then the tort of intentional infliction of emotional distress would become less a tool for the prevention of harm than an instrument for the imposition of civility norms about the appropriate tone of public speech.<sup>40</sup> Of course, if the civilized community test is itself infused with other constitutional values, such as freedom of expression, then this might not be problematic. But the worry here is that the test would become a cover for the suppression of anything deemed “uncivilized” because merely offensive.

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37. *Turner v. Bower Mgt. Corp.*, 2015 N.Y. Misc. LEXIS 4532, at \*23-24 (N.Y. 2015) (involving an African American maintenance worker who had been the victim racial abuse as well as discriminatory allocation of tasks).

38. *Gaiters v. Lynn*, 831 F.2d 51, 53 (4th Cir. 1987) (involving a lawsuit brought by an African American security guard against a country signer for allegedly racially disparaging comments made by the latter toward the former in front of a crowd during a live performance).

39. *Taylor*, 152 N.J. at 509.

40. See, e.g., ROBERT POST, *Hate Speech*, in *EXTREME SPEECH AND DEMOCRACY* 135 (I. Hare & J. Weinstein eds., 2009); Robert Post, *Racist Speech, Democracy, and the First Amendment*, 32 WM. & MARY L. REV. 267, 273-74, 286 (1991).

Now it might be countered here that the role of the civilized community test is simply to provide courts with a rule of thumb that helps them to identify modes of expression which are *most likely* to produce emotional distress, or modes of expression which tend to produce the *most intense* forms of emotional distress. No doubt it can be pointed out that the civilized community test sometimes fails to track the likelihood or intensity of emotional distress. But this observation merely shines a spotlight on the empirical assumptions underpinning the use of the test; it is not to demonstrate that harm prevention has been downgraded from a fundamental purpose to a subordinate purpose, or to show that the real goal of the test is the imposition of civility norms. Nevertheless, as well as asking whether the civilized community test is a reliable proxy for the level of threat to emotional tranquility or well-being we must also ask two more basic questions. Does emotional distress exhaust the actionable injuries in cases of targeted hate speech? And, is there some other viable interpretation of the extreme and outrageous conduct test besides the civilized community test?

### *B. A Tort of Racial Insult*

One reason for thinking that emotional distress does not encompass the full range of harms wrought by targeted hate speech—and even that emotional distress is not the be-all and end-all of hate speech litigation—is that certain forms of hate speech can affront the plaintiff’s *dignity*.<sup>41</sup> In *Taylor*, Judge Handler writes intriguingly, “In addition to the harms of immediate emotional distress and infringement of dignity, racial insults inflict psychological harm upon the victim.”<sup>42</sup> The implication here is that “infringement of dignity” is a separate actionable harm, and perhaps one of sufficient gravity to justify restrictions on freedom of expression. Nevertheless, what does infringement of dignity consist of? What does it mean to say that the use of targeted racial insults, for example, may constitute an infringement of the plaintiff’s dignity?

Richard Delgado addressed this question in his powerful article *Words That Wound: A Tort Action for Racial Insults, Epithets, and Name-Calling*.<sup>43</sup> In it, he points to the difficulty of proving and measuring emotional distress in suits for intentional infliction of emotional distress, not least in cases involving the use of racial insults.<sup>44</sup> His response was to propose a new tort

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41. Delgado, *supra* note 6, at 166; *see also Taylor*, 152 N.J. at 509.

42. 152 N.J. at 519.

43. Delgado, *supra* note 6.

44. *Id.* at 151, 166.

of racial insult on the basis that “[i]f racial invective is aimed at a victim, an infringement of the plaintiff’s dignity, at the least, has occurred.”<sup>45</sup> He makes it clear that even though the tort of racial insult would allow for recovery of damages for emotional distress,<sup>46</sup> it would also allow for recovery of damages in the absence of emotional distress, based on the infringement of an interest in dignity alone.<sup>47</sup> As he puts it,

A tort for racial insults contains an indisputable element of harm, the affront to dignity. Professor Michelman and others have argued that the intangible quality of novel interests should not, by itself, preclude valuing them for purposes of compensation. Juries always can assign a value to such interests and their infringement.<sup>48</sup>

By “indisputable,” Delgado may have in mind something like *not open to dispute on facts surrounding emotional distress and other psychological or physiological ill-effects suffered by the plaintiff*. But what, then, is the cause of action? He further clarifies that “[t]he cause of action suggested here is limited to language intended to demean by reference to race, which is understood as demeaning by reference to race, and which a reasonable person would recognize as a racial insult.”<sup>49</sup> However, Delgado also proffers little guidance on what he intends by “demeaning.”

In fact, this could signify at least three things. First, it could mean that to racially insult another person is to treat them in a way that does not befit or that violates their dignity; to do something that is beneath their inherent worth or value as a human being. This is to simply stipulate what it means to violate the dignity of another person, of course. In that case, Delgado would need to defend that stipulation as against alternatives according to which racially insulting another person does *not* constitute a violation of dignity, whereas restricting the speaker’s freedom of expression certainly does.

Second, it could mean that racial insults cause a diminution or loss of dignity on the part of the victim. One difficulty with this interpretation, however, is that we tend to think of the existential or metaphysical property of dignity as possessed by people unconditionally, as a quality that cannot be diminished even by the worst treatment.<sup>50</sup>

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45. *Id.* at 171.

46. *Id.* at 167.

47. *Id.*

48. *Id.* at 166.

49. *Id.* at 167.

50. *Id.* at 166.

Third, it could mean that the racial insult is intended to cause, and does cause, a loss or reduction of the victim's own feeling or sense of dignity. This feeling or sense is, of course, a psychological or emotional state, and, as such, reintroduces the prospect of disputes as to fact.

Finally, perhaps Delgado means simply that the racial insult amounts to a denial of the victim's dignity. But even on this interpretation the reader is still left without a properly detailed account of what, more exactly, is involved in denying the victim's dignity—an account that could be operationalized by the courts.

### C. *Injuria*

Consider next the South African common law delict or civil wrong of *iniuria* or *injuria*.<sup>51</sup> Although *injuria*—like the tort of intentional infliction of emotional distress but unlike Delgado's tort of racial insult—is not limited to cases of racial insult or even to hate speech in general, it has occasionally been used by victims of targeted, face-to-face racial abuse as a means of legal redress.<sup>52</sup> What is more—unlike the tort of intentional infliction of emotional distress but like Delgado's tort of racial insult—it is not incumbent upon the plaintiff in cases of *injuria* to provide evidence of professionally diagnosed emotional, psychological, or physiological ill-effects caused by the defendant's conduct.<sup>53</sup>

So, for example, in *Ciliza v Minister of Police and Another* and *Mbatha v. Van Staden*, the courts held that in South Africa the word “kaffir” has a clearly recognized meaning as derogatory and disparaging, and so, normally speaking, for a white South African to address a black person with the word, or call a black person “kaffir,” will constitute an *injuria*.<sup>54</sup> This sort of

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51. I shall not discuss here the South African common law criminal offense of *crimen injuria*. See, e.g., Jonathan Burchell, *Protecting Dignity Under Common Law and the Constitution: The Significance of Crimen Iniuria in South African Criminal Law*, 27 S. AFR. J. CRIM. JUST. 250 (2014) (discussing the idea of dignity as a fundamental right under South African law).

52. Burchell, *supra* note 51, at 252 n. 11; see also *Ciliza v. Minister of Police and Another* 1976 (4) SA 243 (N) at 247 (S. Afr.); *Mbatha v. Van Staden* 1982 (2) SA 260 (N) at 262 (S. Afr.).

53. Burchell, *supra* note 51, at 252 n. 11.

54. *Ciliza*, 1976 (4) SA 243 (N) at 247 (involving a lawsuit for *injuria* after the defendant, a white policeman, had used the word “kaffir” in addressing the plaintiff, who was a black man); *Mbatha*, (2) SA 260 (N) at 262 (involving a lawsuit for *injuria* after the defendant, a white man, had repeatedly called the plaintiff, a

targeted hate speech is deemed an unlawful aggression upon the plaintiff's dignity, irrespective of whether or not emotional distress was caused.

Courts have also shown a willingness to apply the delict of *injuria* to cases where the defendant has used insults that refer to other sorts of protected characteristics. In *Ryan v Petrus*, for instance, the High Court of South Africa (Eastern Cape Division) awarded *injuria* damages to the plaintiff (Ryan) on the basis that the defendant (Petrus), the son of a man with whom Ryan was having an extra-marital affair, had launched a verbal tirade at Ryan containing the abusive terms "kaffir," "bitch," and "whore," and that the tirade had constituted an unlawful aggression upon Ryan's dignity.<sup>55</sup> Here Ryan was not required to supply evidence of emotional or psychological ill-effects.<sup>56</sup>

So, if emotional distress is not required, what are the core elements of *injuria*? Hitherto courts in South Africa have understood the cause of action for *injuria* as necessitating hybrid objective-subject enquiry.<sup>57</sup> It must be shown not only that the defendant intended to impair or violate the plaintiff's dignity but also that (objectively) the defendant's conduct was wrongful, such that it would have impaired or violated the dignity of a reasonable person of ordinary sensitivities, or, in other words, that society must regard the infringement to be a violation of dignity (in conformity with the tenets of the Constitution), and, finally, that (subjectively) the plaintiff actually feels or has the sense that his or her dignity has been impaired or violated.<sup>58</sup>

If the plaintiff's testimony, perhaps corroborated by what he or she told friends and family at the time about how he or she felt, takes care of the subjective element,<sup>59</sup> what of the objective element? The courts must ask: would a reasonable person of ordinary sensibilities find that his or her dignity had been impaired or violated under the circumstances? In practice, courts in South Africa would simply consider, without hearing evidence, whether in

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black man, a "kaffir" and assaulted him following an argument about a parking place, abuse that continued even while at the police station).

55. *Ryan v. Petrus* 2010 (1) SA 169 (ECG) at 175 (S. Afr.) (involving an appeal against a magistrate's court decision not to award damages for *injuria* in a case involving the use of various derogatory epithets).

56. *Id.*

57. *See, e.g., Delange v. Costa* (2) SA 857 (A) (1989) at 860-62 (S. Afr.) (involving a lawsuit for *injuria* based on receipt of a letter questioning the motives of an olive farmer). For further discussion of the core elements of *injuria*, see JOHANN NEETHLING ET AL., *LAW OF DELICT*, 399-430 (7th ed., 2015).

58. *See, e.g., Delange*, (2) SA 857 (A) at 860-62; NEETHLING ET AL., *supra* note 57, at 399-430.

59. *Id.*

their view the society or community would regard the harm as wrongful for the purpose of delictual liability whilst at the same time bearing in mind the constitutionally protected right to dignity and dignity as a constitutional value articulated in the relevant jurisprudence. And they might well view the circumstances of somebody using racial epithets against another person as dignitary impairment based on this wrongfulness enquiry. However, all of this immediately raises a more philosophically demanding question: what is it about these circumstances that *should* make them qualify as dignitary impairment? Or, put more simply, what does dignitary impairment consist of, philosophically speaking?

### III. DIGNITY

The aforementioned two torts and one delict, then, still have a long way to go in terms of clarifying the sense in which targeted hate speech may constitute an infringement of, or impairment to, a life of dignity on the part of the plaintiff. In this part, I shall try to present an analysis of the nature of dignity that I think will help to kick-start this process of clarification, although it will not be sufficient by itself. (If victims of targeted hate speech are going to be able to use civil lawsuits as a means of redress for dignitary violations, then the courts will ultimately need some legal tests that help them to operationalize the nature of dignitary violation. I shall return to this in part IV.)

In particular, I believe that there are two main kinds of dignity relevant to the contention that targeted hate speech can infringe or impair dignity. The first is human dignity; the second is civic dignity. I shall take them in order.

#### A. Human Dignity

Any plausible analysis of human dignity must begin, I think, by tackling head-on a puzzle identified by the American philosopher Herbert Spiegelberg.<sup>60</sup> On the one hand, it is typical to think of human dignity as something that is unassailable or irremovable in the sense that no matter how badly a person is treated, his or her tormentors cannot diminish or take away his or her human dignity.<sup>61</sup> On the other hand, it can also make sense to speak of a person's dignity being impaired or of someone suffering indignities or

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60. Herbert Spiegelberg, *Human Dignity: A Challenge to Contemporary Philosophy*, 9 *WORLD FUTURES: J. GEN. EVOLUTION* 39, 44 (1971).

61. *Id.* at 39-64.

losing his or her dignity, even if temporarily.<sup>62</sup> It also makes sense to speak of people trying to win gain back their dignity.<sup>63</sup> Indeed, it is sometimes said of hate speech that it impairs dignity, and that people who demand legal protection against hate speech are seeking to regain their dignity.<sup>64</sup> But if human beings possess an unassailable dignity, how can it be intelligible to speak of impairments of, and the struggle to win back, human dignity? Surely to assert one's right not to be racially insulted is a sign of a person's dignity.

Spiegelberg proffers the following solution to his own puzzle. He draws a distinction between three dimensions of human dignity: (a) dignity itself, (b) the expression of such dignity in inward feelings and attitudes as well as in outward behavior and disposition, and (c) the recognition of, or respect for, dignity—both (a) and (b)—by other people.<sup>65</sup> Human dignity in itself is an existential or metaphysical property, and, like other such properties (e.g., aesthetic beauty, truthfulness, divinity, sanctity, sublimity), it is studied through a combination of philosophical analysis and specially adapted human senses.<sup>66</sup> The expression of human dignity, by contrast, is an artifact of ordinary human experience.<sup>67</sup> It is not only a matter of how human beings represent the fact of their special worth to themselves inwardly, such as by having a sense of, or quiet confidence in, the fact of their own worth or value as human beings. It is also a matter of how they perform their dignity outwardly, such as in their traits and dispositions of dignified bearing and in their overt claims, expectations, and demands for a certain standard of treatment by others.<sup>68</sup> The inward expression of human dignity may be discoverable through what Abraham Edel calls a “phenomenological psychology” of “the discernable qualities of human feeling,”<sup>69</sup> whereas the outward or behavioral phenomena could be charted using sociological and ethnographic methodologies.<sup>70</sup> Respect for human dignity and respect for the

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62. *Id.*

63. *Id.*

64. RICHARD L. ABEL, *SPEAKING RESPECT, RESPECTING SPEECH* 48 (Univ. Chi. Press 1998).

65. Spiegelberg, *supra* note 60, at 54.

66. *See, e.g., Id.*

67. *Id.*

68. *Id.* at 39, 54.

69. Abraham Edel, *Humanist Ethics and the Meaning of Human Dignity*, in *MORAL PROBLEMS IN CONTEMPORARY SOCIETY* 231 (Paul Kurtz ed., 1969).

70. *See generally* ROGER BROWNSWORD ET AL., *THE CAMBRIDGE HANDBOOK OF HUMAN DIGNITY: INTERDISCIPLINARY PERSPECTIVES* (Marcus Duwell et al. eds., 2014).

expression of human dignity by others is a matter of how we are treated by other people in response to the aforementioned aspects of dignity.<sup>71</sup>

Building on this analysis, Spiegelberg argues that it can make perfect sense to speak of “violations” of human dignity, human dignity as “unassailable,” and persons “struggling for,” “losing,” or “suffering impairments to” their human dignity, provided that we have in mind the right dimension of human dignity in each case.<sup>72</sup> When we speak of “violations” of human dignity we have in mind the fact that other persons have failed to recognize human dignity in itself.<sup>73</sup> Yet we may rightly insist that human dignity is “unassailable” by virtue of the fact that human dignity itself cannot be diminished by these sorts of violations.<sup>74</sup> However, sometimes when we speak of people “losing,” “suffering impairments to,” or “struggling for” their human dignity we mean they have suffered failures or lapses in their expression of human dignity, in their inward attitude or outward behavior of human dignity.<sup>75</sup> Finally, there is the issue of recognition of, or respect for, human dignity by other people. This is, in a sense, the sharp end of dignity, where our expectations about how we ought to be treated meet reality. To say that we have a right to dignity is, under the terms of this dimension, to say that we have a right to proper respect from other people.

How might these observations help to clarify the dignitary bases of civil lawsuits involving targeted hate speech? Well, there is already a literature on how certain forms of hate speech can constitute a violation of human dignity itself, dimension (a), and how this might provide a *pro tanto* warrant for particular types of hate speech bans, including not least in the field of criminal law.<sup>76</sup> There is also a literature on how certain torts, including the Roman tort of *injuria*, vindicate or protect human dignity, dimension (c), by ensuring people received proper respect from other people.<sup>77</sup> However, in what follows

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71. Spiegelberg, *supra* note 60, at 39, 54.

72. *Id.*

73. *Id.*

74. *Id.*

75. *Id.* at 54-5.

76. See, e.g., Brown, *supra* note 7, at 91-105; ANTHONY CORTESE, OPPOSING HATE SPEECH 16 (2006); STEVEN J. HEYMAN, FREE SPEECH AND HUMAN DIGNITY 164-183 (2008); Angelo Corlett & Robert Francescotti, *Foundations of a Theory of Hate Speech*, 48 WAYNE L. REV. 1071, 1097 (2002); Bhikhu Parekh, *Hate Speech: Is There a Case for Banning?*, 12 PUB. POL’Y RES. 213, 217 (2005-6); R. George Wright, *Dignity and Conflicts of Constitutional Values: The Case of Free Speech and Equal Protection*, 43 SAN DIEGO L. REV. 527, 544-49 (2006).

77. In the words of Peter Birks, for example, “[t]he tort the Romans called *injuria* . . . [involved] contemptuous harassment of another . . . [and protected] not

I wish to shine a light on the second of Spiegelberg's dimensions, namely, the expression of human dignity, or dimension (b), which so far has received much less attention. In particular, I want to show how it can provide a normative anchor for the application of certain dignitary torts and delicts to cases of targeted hate speech, not instead of but alongside the other dimensions.

In order to do so, however, I first need to say more about the core features of the expression of human dignity. The first feature is having a feeling, sense, or appreciation of one's own worth or value as a human being.<sup>78</sup> Arguably what is special about human beings is not merely the fact that they have an inherent worth or dignity but the fact that they are capable of recognizing this worth in themselves, and revering it. Then again, it would be wrong to think of this recognition as taking an identical form across all human beings. There may be individuals for whom having a sense of their own worth as a human being is best described as a feeling or sensation belonging to their emotional psyche. For others, it might be something more cognitive or with propositional content, such as a belief, perhaps arrived at and maintained over time through conscious and deliberate mental processes or exercises. Such people think it through rather than feel it. Moreover, people may come to feel, sense, or believe that they have worth or value as human beings through different life events and may come to possess different reasons for believing in their worth or value as human beings. All of this being said, Spiegelberg is clear that "[a] 'sense of dignity' presupposes indeed that there is an inherent dignity to which one is or is not sensitive."<sup>79</sup>

The second relevant feature of the expression of dignity is dignified bearing.<sup>80</sup> This can have both psychological and behavioral aspects, but in general it is rightly conceived as dispositional, a matter of tendency.<sup>81</sup> Aurel Kolnai's characterization of "[d]ignity as the quality of that which is 'dignified'"<sup>82</sup> provides a good starting point for understanding the details of this complex disposition (or cluster of dispositions).

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an interest in emotional calm, but the victim's right to his or her proper respect." Peter Birks, *Harassment and Hubris: The Right to an Equality of Respect*, 32 IRISH JURIST 1, 11 (1997)

78. Spiegelberg, *supra* note 60, at 39, 54.

79. *Id.* at 54.

80. *Id.*

81. *Id.*

82. Aurel Kolnai, *Dignity*, 51 PHILOSOPHY 251, 251 (1976).

Here, then, are the features typifying Dignity that most vividly occur to me. First—the qualities of composure, calmness, restraint, reserve, and emotions or passions subdued and securely controlled without being negated or dissolved (*verhaltene Leidenschaft* in German). Secondly—the qualities of distinctness, delimitation, and distance; of something that conveys the idea of being intangible, invulnerable, inaccessible to destructive or corruptive or subversive interference. Dignity is thus comparable, metaphorically, to something like ‘tempered steel’. Thirdly, in consonance therewith, Dignity also tends to connote the features of self-contained serenity, of a certain inward and toned-down but yet translucent and perceptible power of self-assertion: the dignified type of character is chary of emphatic activity rather than sullenly passive, perhaps impassive rather than impassible, patient rather than anxiously defensive, and devoid but not incapable of aggressiveness.<sup>83</sup>

A person with dignified bearing, in other words, is able to exhibit behavioral and attitudinal dispositions or traits that we associate with self-control, self-possession, and confidence. Such a person displays composure and serenity in the face of aggression but without showing meekness or submissiveness.<sup>84</sup> Furthermore, it is due to the fact that these are not invulnerable dispositions or traits, in the sense that they can be adversely affected by what other people do, that we can speak intelligibly of a person’s dignity being impaired, injured, or threatened.

That there is a relationship between these two features of the expression of human dignity—the inward and the outward—would be hard to deny. For example, it would seem that a genuine dignified bearing can only be the external behavior of a person who *truly* does have a sense of their own worth as a human being. It is not the sort of thing that can be mere pretense. As Avishai Margalit puts it, dignified bearing is not a “presentation” but rather “attest[s] to” or consists in a “representation” of the fact of a person’s sense of their worth as a human being.<sup>85</sup> Thus, it would seem very difficult for someone to cling on to their dignified bearing having lost their sense of human worth. Or, in the words of Michael Meyer, “one’s loss of a sense of

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83. *Id.* at 253-4.

84. They are also the sorts of traits and dispositions familiar to virtue ethics. They are exemplified in ways of being rather than in lists of specified types of act or omission.

85. AVISHAI MARGALIT, *THE DECENT SOCIETY* 51-53 (Naomi Goldblum trans., 1996).

dignity may indeed be one psychological condition leading to one's failure to express dignity."<sup>86</sup> Nevertheless, both Margalit and Meyer insist—and rightly so—that having a dignified bearing is not the same as, identical to, or to be conflated with, possessing a sense of one's worth as a human being.<sup>87</sup>

What, then, is the potential impact of being subjected to targeted hate speech on a person's expression of human dignity? Note, the question is not about the potential impact of being the victim of hate speech on a person's self-esteem; that is, their appraisal or estimation of themselves as being a better or worse person or possessing greater or fewer meritorious qualities than other people. Rather, the question is about the impact on a person's sense of their worth as a human being and on their dignified bearing. For example, would it be possible for a young black person to be called "a monkey" enough times, and by enough people, that they wind up believing they are worthless, less than human? And, would it also be possible for such a person to lose their cool every time a classmate addressed them as "nigger"? It seems so. That targeted hate speech can, and does, have these sorts of dignitary consequences is certainly something that Delgado appealed to as part of his justification for the introduction of a new tort of racial insult.<sup>88</sup> Citing the ground-breaking study on prejudice by Gordon Allport, Delgado claimed that "[m]inority children possess even fewer means for coping with racial insults than do adults. 'A child who finds himself rejected and attacked . . . is not likely to develop dignity and poise.'"<sup>89</sup>

But what of adults? Using field observations and in-depth interviews of 100 participants recruited from Northern California, Laura Beth Nielsen found that strong emotional reactions to being targeted by hate speech were less common than the seemingly more dignified behavior of walking away.<sup>90</sup> She explains:

Participants report a variety of feelings about racist hate speech in public. Although only 17% of people of color who had been targets of racist speech reported being afraid or fearful, and the same number reported feeling anger, very few targets responded in any way; the

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86. Michael J. Meyer, *Dignity, Rights, and Self-Control*, 99 ETHICS 520, 527 (1989).

87. *See generally id.*; MARGALIT, *supra* note 85, at 527.

88. *See* Delgado, *supra* note 6, at 182.

89. *Id.* at 147. *Cf.* Gordon Allport, *THE NATURE OF PREJUDICE* 139 (25th ed., 1954).

90. Laura Beth Nielsen, *Subtle, Pervasive, Harmful: Racist and Sexist Remarks in Public as Hate Speech*, 58 J. SOC. ISSUES 265, 277 (2002).

most common reactions were to ignore the remark and simply leave the situation (49%). A few targets reported sadness.<sup>91</sup>

At first glance, this seems to suggest that on average adults tend to be capable of responding to targeted hate speech in dignified ways. Yet, it very much depends on the context whether the dignified thing to do in the face of a targeted racist insult is to simply walk away and say nothing. Meyer offers an example in which a black person is confronted with a group of bigots who are racially abusive.<sup>92</sup> He claims that it would be less dignified for the person to respond with the differential request “Would you please take that back” than it would be to exercise self-restraint by walking away.<sup>93</sup> But potentially, responding with something much stronger would be *more* dignified than walking away in some instances. In extreme cases walking away might actually be a sign of a person lacking a sense of worth as a human being. On the other hand, someone who gets extremely agitated or rails in anger whenever they are targeted by hate speech might be thought to have lost their dignity, as well as their head. Indeed, it may be that an attempt to hit back against one’s tormentors with hate speech of one’s own—“You called me a nigger; well hear this, you’re a dirty Jew, how do you like that?”—is also evidence of a loss of dignified bearing or self-possession. In that scenario, targeted hate speech impairs dignity by dint of provoking yet further, undignified hate speech.

Nevertheless, what Nielsen’s study seems to suggest is that it might be relatively uncommon for people to react to racial insults in ways that we would certainly say are undignified or testify to the disturbance of dignified bearing. Why does this matter? It matters because it chimes with the idea that civil lawsuits are most appropriately used in relatively extreme cases of targeted hate speech.

But how do we move from these observations about the expression of human dignity to a better specification of the above-discussed causes of action for civil lawsuits involving targeted hate speech? One crude strategy would be to simply say that the relevant cause of action is constituted by the impairment of the plaintiff’s expression of human dignity. In other words, the level of hate speech must reach a point where it becomes very difficult for the plaintiff to maintain a sense of their worth as a human being and/or very difficult to maintain the sort of dignified response that is normally displayed in the face of less extreme hate speech.

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91. *Id.* at 277.

92. Meyer, *supra* note 86, at 522.

93. *Id.* at 523.

However, this strategy seems to be missing out something crucial *vis-à-vis* wrongful conduct. It is conventional for a cause of action to include something about the conduct itself, in addition to the reaction of the victim, or the effect on the victim, that marks it out as wrongful conduct of the relevant sort.<sup>94</sup> Wrongful conduct can be understood in different ways, of course, but certainly one way is in terms of wrongdoing, that is, conduct that runs contrary to, or is invasive of, people's fundamental rights.<sup>95</sup> These observations suggest an amendment to the current strategy. Perhaps what we should say is that people have a fundamental right to the expression of human dignity, and conduct is wrongful insofar as it is contrary to, or invasive of, that right. Associated with this right is a first-order duty prohibiting the wrongful conduct as well as a second-order duty to repair or compensate dignitary injuries caused by the breach of the first-order duty.

Evaluating hate speech in terms of whether or not it infringes dignitary rights is certainly not new. Steven Heyman, for example, believes that people have certain fundamental rights, including "rights of personality" and "the right to recognition," which are founded on, flow out of, or derive from, their inherent dignity as human beings.<sup>96</sup> According to Heyman, some instances of hate speech constitute infringements of these fundamental rights. Consider *Gomez v. Hug*.<sup>97</sup> In this case the defendant (Hug), a member of the Board of County Commissioners of Shawnee County, had referred to the plaintiff (Gomez), a supervisor of Shawnee County fairgrounds and who also happened to be of Hispanic ethnicity, as a "fucking spic," in front of both Gomez and Gomez's immediate superior, and had then proceeded to directly address Gomez with the words, "You are a fucking spic" and "You are nothing but a fucking Mexican greaser, nothing but a pile of shit."<sup>98</sup> According to Heyman, cases like this can involve an infringement of rights of personality—such as "[w]hen the speech degrades an individual in front of others" or "because of the 'outrage' they inflict on the victim's sense of honor."<sup>99</sup> Or, to take another example, when hate speakers express ideas

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94. See generally RESTATEMENT (SECOND) OF TORTS § 441.

95. See, e.g., JULES L. COLEMAN, RISKS AND WRONGS 335 (1992).

96. See, e.g., HEYMAN, *supra* note 76, at 51-55, 171 (2008); see also Geri J. Yonover, *Anti-Semitism and Holocaust Denial in the Academy: A Tort Remedy*, 101 DICK. L. REV. 71, 91 (1996).

97. 645 P.2d 916 (Kan. App. 2d 1982) (involving a lawsuit *inter alia* for intentional infliction of emotional distress brought against a member of the Board of County Commissioners of Shawnee County for referring to the plaintiff as a "fucking spic").

98. *Id.* at 918.

99. HEYMAN, *supra* note 76, at 145.

based on the denial of the humanity, or an affirmation of the subhuman status, of certain groups of persons by reference to their race, say, they infringe these persons' right to be recognized as persons.<sup>100</sup> Heyman argues that even if the tort of intentional infliction of emotional distress is inapplicable in cases where hate speech does not actually cause emotional distress, such hate speech nevertheless "should be banned."<sup>101</sup>

However, when thinking about the sorts of conceptual tools that can be put into practice or operationalized by the courts in civil lawsuits involving targeted hate speech, it strikes me as important—necessary even—to specify the nature of the relevant wrongful conduct in less abstract terms than "infringes the fundamental right to the expression of human dignity," "violates rights of personality," or "affronts the right to recognition." Put crudely, we need to give judges something to work with that bridges the gap between current legal doctrine, such as the idea of extreme and outrageous conduct,<sup>102</sup> and more abstract, philosophical ideas such as the fundamental right to the expression of human dignity.<sup>103</sup> Even if more abstract, philosophical ideas are an essential part of the story, in order to be useful the story must also shed light on the mechanics by which injuries to people's expression of human dignity typically occur in cases involving targeted hate speech. To these ends, in Part IV, I set out two types of wrongful conduct: degradation and humiliation. Before doing so, however, I need to address the second main kind of dignity that is relevant to the discussion.

### *B. Civic Dignity*

The analysis of civic dignity also begins with a puzzle, this time due to the legal and political philosopher Jeremy Waldron. Waldron argues that there is a perplexing difference between the ancient use of the concept of dignity, which emphasizes a person's role (*personae*) in society and the hierarchy of social ranks or statuses, and the modern use of this concept, which seems to be about equality rather than hierarchy.<sup>104</sup> Waldron's solution is to claim that "the modern notion of *human* dignity involves an upwards equalization of rank, so that we now try to accord to every human being something of the dignity, rank, and expectation of respect that was formerly

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100. *Id.* at 170-2, 274, n.33.

101. *Id.* at 145.

102. *See supra* Part II.A.

103. *See supra* Part II.C.

104. Jeremy Waldron, *Dignity, Rank, and Rights*, in 29 THE TANNER LECTURES ON HUMAN VALUES (Susan Young ed., 2011).

accorded to nobility.”<sup>105</sup> As evidence of this upwards equalization of rank, he cites the fact that the modern concepts of human dignity and human rights entail the sort of equal protection of the rights to bodily integrity and privacy, and the universal prohibition of humiliating or degrading treatment of prisoners, that was once granted only to the nobility.<sup>106</sup>

If the modern idea of dignity formally means a high and equal rank or status, what is the currency of this status? At this stage, Waldron appeals to the notion of “social and legal status” or “sociolegal status” for short.<sup>107</sup> When he speaks of “social status” he has in mind such things as the esteem in which one is held by fellow citizens and the various signs of respect received by them.<sup>108</sup> By “legal status” he is referring to what it means to be a full rights-bearing member of society and to partake in the fundamental benefits and privileges of a system of law.<sup>109</sup> To say that people enjoy high sociolegal status in a society is to say they enjoy “civic dignity,” as Waldron calls it.<sup>110</sup>

How does civic dignity relate to the issue of civil lawsuits involving targeted hate speech? Interestingly, Waldron himself chooses to downplay the connections. For example, he draws a distinction between civil and criminal defamation law, and associates threats to civic dignity only with the latter.<sup>111</sup> He claims that whereas civil defamation law is concerned with “the intricate detail of each person’s reputation and its movement up or down the scale of social estimation,”<sup>112</sup> criminal defamation law is “oriented to protecting the basic social standing . . . of members of vulnerable groups.”<sup>113</sup> However, defamatory remarks are not the only threats to people’s civic dignity. Consider also vituperation and vilification.<sup>114</sup> And the sorts of civil proceedings which might be used to protect people against threats to their civic dignity are not limited to the tort of defamation.<sup>115</sup> There is also the tort of intentional infliction of emotional distress, Delgado’s proposed new tort of racial insult, and the delict of *injuria* (see Part II above).

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105. *Id.* at 229.

106. *Id.* at 231-32.

107. Waldron, *Dignity and Defamation*, *supra* note 8, at 1612.

108. *Id.*

109. *Id.* at 1610-11.

110. *Id.* at 1600, 1607, 1613.

111. *Id.* at 1602-05.

112. *Id.* at 1607.

113. *Id.* at 1646.

114. *See supra* Part II.

115. Waldron, *Dignity and Defamation*, *supra* note 8, at 1646.

Interestingly, when critical race theorists have sought to justify these sorts of civil remedies they too have sometimes made an explicit appeal to the way in which racist insults threaten people's sociolegal status.<sup>116</sup> In the words of Delgado, "[t]he wrong of this dignitary affront consists of the expression of a judgment that the victim of the racial slur is entitled to less than that to which all other citizens are entitled."<sup>117</sup> So, there is every reason to consider the ways in which targeted hate speech—calling someone a “nigger” to his face as a term of bitter abuse, for example—might also constitute an attack on the victim's civic dignity as a member of society in good standing, albeit different in kind to defamation.<sup>118</sup>

Once again, however, the idea of attacking someone's civic dignity operates at a high level of generality, and may not be as helpful to courts in evaluating the circumstances of given cases as it could be. We also need to identify particular types of wrongful conduct that could be taken as instances of attacking someone's civic dignity. Here too I shall appeal to the idea of degradation and humiliation. My hope is that this strategy will also fit with widespread intuitions about what an attack on someone's civic dignity might look like in practice. Even Waldron, despite being more concerned with group defamation than viciously vituperative language, sometimes speaks of “humiliating attacks” on people's civic dignity.<sup>119</sup>

#### IV. TESTS FOR DEGRADATION AND HUMILIATION

In this part I want to focus on two types of wrongful conduct that may, amongst other things, violate people's human dignity in itself and cause impairments of, or injuries to, people's expression of human dignity (inward and outward), or that may constitute attacks on people's civic dignity, or their sense or feeling of confidence in their civic dignity, especially in cases involving targeted hate speech. These are degradation and humiliation.

In doing so, I am tapping into a broader legal tradition of recognizing degradation and humiliation. I partly have in mind other forms of hate speech law, such as criminal laws banning hate propaganda.<sup>120</sup> In *R. v. Keegstra*,<sup>121</sup>

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116. *Id.*

117. *See* Delgado, *supra* note 6, at 144.

118. *See also, e.g.*, Richard Delgado, *Review of The Harm in Hate Speech by Jeremy Waldron*, 47 *LAW & SOC'Y REV.* 232, 233 (2013); Brown, *supra* note 7, at 142-48.

119. Waldron, *Dignity and Defamation*, *supra* note 8, at 1646, 1649, 1613-14.

120. *See* Criminal Code, R.S.C. 1985, c C-46 (Can.).

121. [1990] 3 S.C.R. 697 (Can.).

for instance, a school teacher was prosecuted under § 319(2) of the Canadian Criminal Code, which bans willful promotion of hatred against an identifiable group, for communicating anti-Semitic statements to his students, including described Jews as “child killers,” “treacherous,” and “subversive,” and using exams to test his student’s knowledge of these characterizations.<sup>122</sup> Speaking to the objectives of the ban, Chief Justice Dickson opined that “a response of humiliation and degradation from an individual targeted by hate propaganda is to be expected.”<sup>123</sup> But I also have in mind very different areas of law. Consider the protection and promotion of human rights against humiliating or degrading treatment which are a familiar feature of international law.<sup>124</sup>

That being said, I am in no way suggesting that the purpose of the tort of intentional infliction of emotional distress, a tort of racial insult, or the delict of *injuria* are to be reimagined as providing people with a means of legal redress against what William Miller calls “Humiliation with a big H,” that is, humiliation of the sort that is exemplified in death camps, torture, and so on.<sup>125</sup> Likewise, I depart from Margalit, who identifies humiliation with “loss of basic control” in the form of negative freedom; that is, “radical intervention in a human being’s ability to move about,” as exemplified by “being bound, being imprisoned, and being drugged.”<sup>126</sup>

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122. *Id.* at 714.

123. *Id.* at 746.

124. Consider the right against the indignity of torture or to cruel, inhuman, or degrading treatment or punishment set out in Art. 5 of the Universal Declaration of Human Rights, Art. 7 of the International Covenant on Civil and Political Rights, Art. 5 of the American Convention on Human Rights, and Art. 3 of the European Convention on Human Rights.

125. WILLIAM IAN MILLER, *HUMILIATION AND OTHER ESSAYS ON HONOR, SOCIAL DISCOMFORT, AND VIOLENCE* 133 (1993).

126. MARGALIT, *supra* note 85, at 144-47. Part of the reason for Margalit’s restrictive account of humiliation is that he is seeking to provide not an account of humiliation in general but, more specifically, an account of humiliation of citizens by state institutions and institutional practices. *Id.* at 277. Then again, could not an institution that routinely causes people to lose control of their state of mind or bodily responses to stimuli, such as by reducing people to quivering wrecks, without ever hampering their “ability to move about,” potentially be engaged in humiliation? Conversely, it seems possible for an institutional regime such as a prison or interrogation team to radically constrain the ability of prisoners to move about but without necessarily humiliating those prisoners. Consider a prisoner of war who undergoes the worst physical suffering and degradation but who nevertheless through a feat of self-possession is able to not let himself be humiliated by maintaining a dignified bearing. Indeed, he may even believe himself to have humiliated his tormentors by his self-possession.

Yet, by the same token, neither do I wish to argue that these two torts and one delict are to be reinterpreted as merely shielding people from what Miller calls “humiliation with a small h: the humiliations of day-to-day interaction; the little falls and barely perceptible attacks on our self-esteem and self-respect we all face.”<sup>127</sup> The point is that being degraded or humiliated with reference to the color of one’s skin, for example, is not something “we all face.” Nor are the potential impairments of, or injuries to, the expression of human dignity “little” or “barely perceptible” in the case of targeted hate speech. What I want to argue, therefore, is that civil actions for intentional infliction of emotional distress, racial insult, and *injuria* could be retheorized as helping people to repair the damage caused by degradation or humiliation with a special d/h.

Nevertheless, it is not enough simply to propose that the right not to be degraded and the right not to be humiliated—rights which arguably derive from a set of more fundamental rights, such as the right to dignity in itself, the right to the expression of human dignity, and the right to civic dignity—should be put at the forefront of how courts interpret wrongful conduct in cases involving targeted hate speech.<sup>128</sup> What is needed, I believe, are substantive legal tests that can be employed by courts in systematic, coherent, and consistent ways to evaluate given sets of circumstances.

What type of legal tests would befit degradation and humiliation? Because degradation and humiliation are partly existential or metaphysical states of affair, it seems natural to initially reach for objective legal tests. Such tests specify what states of affair would count as degradation and humiliation, irrespective of whether or not the plaintiff feels that they have been degraded or humiliated. One form of objective test appeals directly to philosophical analyses of what it means to be degraded or humiliated. These analyses set out certain formal features or characteristics of the concepts. Of course, since degradation and humiliation are normative or evaluative concepts, the analyses will inevitably draw on other, more abstract moral or ethical ideas about human worth and what gives value to life.<sup>129</sup> These two concepts are, I believe, derivative of ideas of human dignity in itself, the expression of human dignity, civic dignity, and confidence in civic dignity, for example.

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127. WILLIAM IAN MILLER, *HUMILIATION AND OTHER ESSAYS ON HONOR, SOCIAL DISCOMFORT, AND VIOLENCE* 133 (1993).

128. *See, e.g.*, Charles Lawrence III et al., *Introduction, in WORDS THAT WOUND: CRITICAL RACE THEORY, ASSAULTIVE SPEECH, AND THE FIRST AMENDMENT 15* (M. Matsuda et al. eds., 1993).

129. *See, e.g.*, RONALD DWORKIN, *JUSTICE FOR HEDGEHOGS* (2011).

Another form of objective test appeals to the familiar legal fiction of what would cause a reasonable person of ordinary sensibilities to feel degraded or humiliated. This too is, at heart, not a sociological test but a normative one: it sets out the court's view (reflecting the wider community's view) of how a person should feel if targeted by hate speech.<sup>130</sup> Is *this* how an ideal human actor would feel under the circumstances? Or, would someone who did feel degraded or humiliated under the circumstances have, as Margalit puts it, "a sound reason for feeling" degraded or humiliated?<sup>131</sup> Once again, that reason is likely to be rooted in deeper moral or ethical ideas, such as ideas of dignity, as well as in the contextual circumstances of the society.

Then again, degradation and humiliation are also partly psychological states of affair, which will require subjective legal tests. If an objective test of whether or not targeted hate speech counts as degradation or humiliation does not depend on whether the plaintiff felt degraded or humiliated, a subjective test is precisely the opposite. These feelings or sensations may be complex in nature. For some people, they will be implicitly held, things of which they are only dimly conscious and only become conscious when asked; whereas for other people these feelings will hit them like a bolt of lightning and will be at the forefront of their mind. At any rate, the important point is that the feeling or sensation of being degraded or humiliated is not the same as the existential or metaphysical state of being degraded or humiliated. A person can be degraded or humiliated in the existential or metaphysical sense without feeling the least bit degraded or humiliated, such as might happen if the true illocutionary force of the words—words that degrade or humiliate—are beyond their grasp. Conversely, a person might feel degraded or humiliated despite the situation not being one in which a reasonable person

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130. Note also that even though an objective test is not focused on the state of mind of the actual victim, this does not mean to say that the test ignores important facts about the type of victim. In a case where a white person has called a black person "nigger," for instance, to ask how a reasonable person of ordinary sensibilities would feel is not to ask how a non-black person would feel under the circumstances but how a reasonable black person of ordinary sensibilities would feel. This is because the circumstances must include the wider context in which the word "nigger" operates—not least the history of slavery and ongoing oppression of African Americans in the United States. Furthermore, it would misconceive the test to seek out empirical evidence from social studies on how black people tend on average to feel when faced with racial insults. The question is whether it would be reasonable or unreasonable for a black person to feel degraded or humiliated, whether feeling that way would befit an ideal human actor, who just happens to be black and on the receiving end of racist abuse.

131. MARGALIT, *supra* note 85, at 9.

of ordinary sensibilities would feel degraded or humiliated, as when a person adopts, without valid reason, a posture of hypersensitivity.

I believe that the legal tests of degradation and humiliation should honor the complex nature of these phenomena, and should, therefore, include both objective elements which can track the metaphysical dimensions of degradation and humiliation, and subjective elements which can target the psychological dimensions, whilst at the same time reflecting more abstract ideas of human dignity and civic dignity as well as the relevant social context.

### *A. Degradation*

My proposed legal test of degradation is comprised of four main elements. The first tries to capture the core of what it means to degrade another person. Now in archaic English usage the word “degrade” referred to the removal of a position of authority or title, or some related form of lowering of social status or rank, normally as a punishment.<sup>132</sup> Consider speech and other symbolic actions involved in rites, rituals, or ceremonies of degrading knights, peers, military generals, and bishops, for example. However, I do not have in mind degradation in this archaic or literal sense. Instead, I want to focus on hate speech that degrades in the sense of assessing, judging, or ranking another person as having inferior basic worth, as having not the basic worth of a human being but the basic worth of a subhuman or nonhuman being, or as having inferior civic status,<sup>133</sup> or else in the sense of rejecting, repudiating or denying another person’s claim to human dignity in itself or to civic dignity. This is reflected in the first element.

- (1) The defendant intentionally judged as inferior or else denied the plaintiff’s basic worth (as a human being) or their civic status, or both.

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132. *Degrade*, MERRIAM-WEBSTER’S COLLEGIATE DICTIONARY (11th ed., 2014).

133. See, e.g., Rae Langton, *Speech Acts and Unspeakable Acts*, 22 PHILOSOPHY AND PUBLIC AFFAIRS 293-330 (1993); Rae Langton, *Beyond Belief: Pragmatics in Hate Speech and Pornography*, in SPEECH AND HARM: CONTROVERSIES OVER FREE SPEECH 76-77 (I. Maitra & M. McGowan eds., 2012); Rae Langton et al., *Language and Race*, in ROUTLEDGE COMPANION TO THE PHILOSOPHY OF LANGUAGE 758 (G. Russell & D. Graff Fara eds., 2012); Ishani Maitra, *Subordinating Speech*, in SPEECH AND HARM: CONTROVERSIES OVER FREE SPEECH 94-95 (I. Maitra & M. McGowan eds., 2012); Brown, *supra* note 7, at 75-86.

Consider as an illustration of assessing, judging, or ranking as inferior another person's civic status the following hypothetical case. A recent immigrant to London, who also happens to be Jewish, has been newly employed at a textile company as a night shift production manager, overseeing the manufacturing process. During one night shift errors are made by some of the workers resulting in an entire batch of cloth being cut to the wrong sizes. The next day the production manager is called into the owner's office who yells in his face. "I'll tell you what happened last night you dumb Yid. You failed in your responsibilities. You're a lousy production manager, that's for sure. But worse than that, I think you're trying to run me out of business; you're trying to screw me so you can start up your own business you piece of shit Jew. They told me not to hire Jews, and they were right god damn it. Sure, you can make the line work when you want to, but you can't be trusted. You're not one of us, and you don't belong in this country. And you sure as hell don't deserve the opportunities this country has given you, you sly son of a bitch Kike." This case seems to involve the speech act of assessing, judging, or ranking the Jewish man not merely as a second-rate production manager but also as a second-class citizen primarily based on his belonging to a certain racial/ethnic/religious group.

Judging someone as having inferior basic worth takes a somewhat similar form. No hate speaker can actually lower human dignity in itself; people possess it unconditionally, simply by virtue of being human beings. But to call someone a "nigger" might be to perform the act of grading or ranking someone in the sense of saying, "I hereby judge this person to have inferior or lower basic worth." This act of passing judgment as to basic worth might take the form of judging, for example, that someone lacks the inherent worth and value beyond comparison that is possessed by human beings but instead has an inferior sort of basic worth such as price. The basic measurement of their worth is likened to the price of a slave or piece of property. A speaker can perform this act of passing judgment even if it leaves a person's metaphysical or existential human worth unchanged.

As for the act of rejecting, repudiating, or denying another person's claim to human dignity or civic dignity, this can happen in various ways. Some vituperative language might implicitly repudiate the plaintiff's dignity by depersonalizing them. To call someone a "chink," for example, could be to cast them not as a person in their own right, and therefore possessed of inherent worth, but as a mere representative of a faceless group. Vilificatory language could also repudiate by belittling or dehumanizing the plaintiff. To call someone a "cripple" or "retard," for instance, may be to deny that they measure up to a certain ideal of what it means to be truly human.

Since these senses of “degrade” are crucial to my analysis of (1), let me pause here to clarify what I mean and, indeed, what I do not mean. In his *How to do Things With Words*, the British philosopher of language J. L. Austin set forth, amongst other things, an account of “illocutionary” and “perlocutionary” speech acts.<sup>134</sup> Illocutionary acts can be performed by the utterance itself (along with the speaker’s intention and perhaps conventions surrounding the speech) whether or not the utterance also causes changes in the person targeted or hearer, either in their state of mind or behavior.<sup>135</sup> Perlocutionary acts, by contrast, are acts defined in terms of their achieving certain (psychological) effects on the hearer.<sup>136</sup> I believe that the speech acts of degrading or humiliating another person through speech must be composed of, or constituted by, a combination of both illocutionary and perlocutionary acts. They must involve not only the illocutionary acts of ranking or judging someone to have inferior basic worth or civic status but also the perlocutionary acts of actually making someone feel that they have inferior basic worth or civic status.

I shall return to the relevant perlocutionary effects when I introduce elements (3) and (4) below. But for now, I want to dig deeper into the nature of the illocutionary acts described in (1). Austin gives the English verbs “to demote,” “to excommunicate,” and “to degrade” as examples of a particular type of illocutionary speech act which he called “exercitives.”<sup>137</sup> “An exercitive is the giving of a decision in favour of or against a certain course of action, or advocacy of it.”<sup>138</sup> That is to say, “[i]t is a decision that something is to be so, as distinct from a judgement that it is so.”<sup>139</sup> Consider if the factory owner had used the words, “I’m putting you back to the line you God damn Yid” or “You’re finished at this company Moses,” to perform the illocutionary act of demoting or firing the Jewish man. Or if the head of government had said, “I approve this new law,” and in so doing had performed the illocutionary act of stripping all Jewish people of their status as citizens and giving them the low status of subjects of the state. However, my own analysis of (1) does not rely upon these archaic or literal senses of “degrade,” and so I do not appeal to Austin’s class of exercitives. They do not fit the model of dignitary harm. Instead, I want to emphasize senses of

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134. J.L. AUSTIN, *HOW TO DO THINGS WITH WORDS* (1975), esp. Lectures 8-10.

135. *Id.*

136. *Id.*

137. *Id.*

138. *Id.* at 154.

139. *Id.*

the English verb “to degrade” in which it means intentionally *ranking* or *judging* as inferior, or else intentionally *denying*, another person’s basic worth or their civic standing.<sup>140</sup>

Importantly, Austin also cites the English verbs “to rate,” “to grade,” and “to rank” as examples of another type of illocutionary speech act: “verdictives.”<sup>141</sup> “Verdictives consist in the delivering of a finding, official or unofficial, upon evidence or reasons as to value or fact so far as these are distinguishable.”<sup>142</sup> He also cites the English verbs “to deny,” “to object to,” and “to repudiate” as examples of yet another type of illocutionary speech act: “expositives.”<sup>143</sup> “Expositives are used in acts of exposition involving the expounding of views, the conducting of arguments, and the clarifying of usages and of references.”<sup>144</sup> Drawing on these other types of illocutionary speech acts, or something like them,<sup>145</sup> what I am suggesting is that we should understand targeted hate speech of the sort that is most relevant to civil lawsuits as the performance of types of verdictive and/or expositive speech acts. These are speech acts of intentionally giving a verdict that the plaintiffs have inferior basic worth or civic status (judging) or intentionally expounding a view that they lack the dignity of human beings or a high and equal sociolegal status (denying). These are also, in my view, most plausibly viewed as authoritative illocutions, in the sense that one requires authority in order to perform them successfully.<sup>146</sup>

Let me also make it clear what I mean by “intentionally.” I mean that the defendant did not accidentally use the relevant words in such a way as to rank as inferior or else deny the plaintiff’s basic worth or civic status, but instead used the words with deliberate intent to perform these illocutionary speech acts. This means that the speaker’s intention is a relevant factor when determining whether dignity has been impaired. In short, intention to degrade is part of the assessment of whether the degradation is actionable. Many civil wrongs require proof of intent, and the two torts and one delict discussed in Part II are all “intentional torts” in that sense. This aspect is retained in my proposed reimagining of these civil law remedies utilizing the tests of degradation and humiliation.

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140. *Degrade*, MERRIAM-WEBSTER’S COLLEGIATE DICTIONARY (11th ed., 2014).

141. AUSTIN, *supra* note 134, at 152.

142. *Id.* at 152.

143. *Id.* at 161.

144. *Id.* at 160.

145. *See generally* John R. Searle, *A Classification of Illocutionary Acts*, 5 LANGUAGE IN SOC’Y 1, 1-23 (1976).

146. *See generally* Langton, *Speech Acts*, *supra* note 133, at 304.

Moreover, proving intent to rank as inferior or else deny the plaintiff's basic worth or civic status is likely to be done in courtrooms by piecing together a range of different kinds of evidence. First, consider evidence in the form of letters, emails, or statements made by the defendant, either before or after the event, stating that they intended to degrade the plaintiff in these ways. Second, there may be evidence of the defendant's general feeling or attitude of hatred toward, or contempt for, the group to which the plaintiff belonged, such as in the form of statements made about the group. Third, there could be evidence of a pattern of similar actions, suggesting that this particular degrading was not an accident. Finally, in the absence of direct evidence on the defendant's state of mind or previous actions, the court might infer the defendant's intention from the very nature of what was said, how it was said, and the context or circumstances in which it was said. If the defendant was clear and meticulous in stating his or her verdict that certain attributes of the plaintiff marked the plaintiff as possessing a lower basic worth or lower civic status, then this might indicate that the defendant had the intention to degrade the plaintiff in that particular way. Similarly, if the defendant waited for another person to come into the room before calling the plaintiff a "stupid nigger," say, this might be evidence of intention to humiliate. See elements (5) and (6) below.

However, I believe that a cause of action will not be established if just anyone ranks or judges as inferior or denies another person's basic worth or civic status. It matters that the defendant had some sort of authority or standing to perform the judging and denying. It is true, of course, that anyone can offer a verdict that someone else has inferior basic worth or civic status (judging) or expound a view that someone lacks the dignity of human beings or a high and equal sociolegal status (denying). But I believe that in order to count as degradation, and to be a cause of civil action, the sort of judging and denying involved in cases of degradation through targeted hate speech must involve *authoritative* judging or denying. So, I add a second condition.

(2) The degrading performed in (1) was allied to the fact that the defendant had the authority or standing to judge as inferior or deny the plaintiff's basic worth (as a human being), their civic status, or both.

What can be the source of such authority? When a racist judge hands down a sentence to a black defendant he performs the exercise of *sentencing*. His authority to perform the act is the authority of an *institutionalized role* or *official position*. But suppose he also takes the opportunity in his sentencing remarks to use racial epithets and racist propaganda that ranks or judges the defendant as inferior in basic worth or

civic status, not simply in virtue of the defendant's unlawful conduct but also because of his race, implying that his race makes him predisposed to criminality and only worthy of incarceration and never redemption. Here the judge performs an expositive or verdictive type of speech act: expounding a view or giving a verdict that the defendant is inferior (judging, ranking, denying). What is more, his position as a judge may *seem* to lend a *quasi-official* and/or *epistemic* authority to his speech act. It could be that people in the courtroom recognize his authority to judge, rank, or deny the defendant's basic worth based on a further (erroneous?) assumption that his experience as a judge in dealing with humanity in its myriad forms, good and bad, gives him some type of special insight into how human beings ought to be ranked.

Indeed, according to Ishani Maitra, ordinary hate speakers can also acquire the capacity to authoritatively judge or rank their victims as inferior based on the silence of other people.<sup>147</sup> She gives the example of an Arab woman sitting in a crowded subway car minding her own business. Unprompted, an older white male approaches her and utters, "Fucking terrorist, go home. We don't need your kind here." The other passengers in the subway car hear the older man's rant but say nothing. Neither does the Arab woman.<sup>148</sup> Maitra's intuition is that the hate speaker succeeds in authoritatively ranking the Arab woman as inferior in the context of that conversation.<sup>149</sup> Maitra claims that to the extent that the other people are free to reject the older man's claims about the woman but fail to do so by remaining silent, this constitutes their "licensing" the older man's act of ranking.<sup>150</sup> We might think of this as a sort of *popular* authority. Of course, the fact that this event occurs in public might also mean that the speaker not merely degrades but also humiliates the Arab woman. I shall consider this below.

As indicated above, I also believe that wrongful degrading should only ground torts and delicts where there is a realized threat to the victim's sense of human dignity or appreciation of their own civic dignity. In other words, the act of authoritatively judging or denying the plaintiff must have a psychological impact on the plaintiff in order to count as true degradation. Therefore, I add a third condition.

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147. See Maitra, *Subordinating Speech*, *supra* note 133.

148. See *id.*, at 115. Unfortunately, this hypothetical example played out for real on a New York subway car in the aftermath of the Trump presidential election win in 2016. See Laura Dimon et al., *Drunk Men Screaming 'Trump' Attack Muslim Straphanger, Cops Say*, NEW YORK DAILY NEWS, Dec. 3, 2016.

149. Maitra, *Subordinating Speech*, *supra* note 133, at 115.

150. *Id.* at 115-16.

(3) The plaintiff had a feeling or sense that they were being degraded, and this was as a direct result of the degrading performed in (1) and (2).

What is the psychological process involved here? Perhaps in the face of the dissonance between how they regard themselves and how hate speakers are authoritatively ranking them as inferior, some victims may let go of their positive self-impression. This could be letting go of their sense of human dignity, or it could be losing confidence that they enjoy a certain high sociolegal status. If someone with a physical-neurological disability such as cerebral palsy or a mental impairment such as severe dyslexia, for instance, is called a “cripple” or “retard” and told in no uncertain terms that they are less than fully human, this might not merely degrade the victim in the objective sense of (1) but also degrade the victim in a psychological sense, to lower or depress their sense of dignity as a human being. (Notice that here we are in the terrain of a fundamental right to the expression of human dignity.)

When these sorts of psychological effects occur, it is plausible to speak of someone having the feeling or sensation of being degraded. But to count as wrongful degrading, especially in cases of targeted hate speech, it is not enough for there to be a clear and present danger of these effects. The plaintiff must have actually suffered these effects and as a direct consequence of the defendant’s conduct.

Furthermore, someone’s experience of personal shame, embarrassment, or loss of self-esteem, such as might arise when their personal merit is attacked, does not qualify under the legal test of degradation. Suppose a black employee is told on a daily basis by his white superior that he is “fucking lazy”—the superior does not say this to any white employees, even those who appear to be working less hard. Should it turn out to be the case that all this speech does is crush the black employee’s self-perception that he possesses a certain level of merit or excellence—damaging, for example, his sense that he exhibits professional virtues or lives up to an ideal standard of conduct in the workplace—then this is not the same as having a sense of being degraded. So long as the black employee does not feel that his human dignity or civic dignity has been degraded, actionable injuries relating to degradation are not in play.

Things are different, however, if the black employee internalizes the comments as being about black people in general and if, as a further consequence, he experiences a diminution in his sense of his human dignity or a loss in his appreciation of his civic dignity as a black person, and this in

turn leaves him feeling not merely that his self-esteem has been damaged but that his human dignity or civic dignity has been degraded.<sup>151</sup>

In addition to having an impact on the plaintiff's inward expression of dignity or confidence in their civic dignity, I believe that degradation of the sort that could be grounds for torts and delicts must include impact on the plaintiff's outward expression of dignity or dignified bearing. Hence, I add this fourth condition.

(4) The plaintiff experienced, even if momentarily, a lapse in, or failure of, dignified bearing, and this was as a direct result of the degrading performed in (1) and (2).

By lapses in dignified bearing—even momentary lapses—I mean some form of loss of psychological or physiological self-control and self-possession, or falling below a minimum threshold thereof. This might be evidenced by severe blushing, physically shaking or trembling, the welling up of tears, flying into a rage, running away, cowering, clamming up, turning pale, profuse sweating, and so on.

The idea that being on the receiving end of targeted hate speech can cause unwelcome psychological and even physiological reactions has been emphasized by critical race theorists. Charles Lawrence III, for example, has written of how being verbally attacked with face-to-face racial insults “produces an instinctive, defensive psychological reaction,” such as “[f]ear, rage, shock, and flight.”<sup>152</sup> Lawrence’s insights also extend to reactions that may block someone from speaking back—the so-called silencing effect.<sup>153</sup>

The wider point I want to emphasize is that many of the aforementioned reactions can signify, or testify to, lapses in, or failures of, dignified bearing. People targeted by hate speech are often in a lose-lose situation as far as dignified bearing is concerned. If hate speakers see that their victims are saying or doing nothing but simply standing there looking visibly shaken, then hate speakers might take satisfaction from having rattled them. Yet if the victims react angrily and shout back equally vile insults, then hate

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151. The difference between the appreciation or sense of one’s own civic dignity or human dignity, on the one hand, and what I have called self-esteem, on the other hand, echoes to some extent distinctions that have also been drawn between different kinds of self-respect. See e.g., Stephen L. Darwall, *Two Kinds of Respect*, 88 ETHICS 36, 36-49 (1977); Robin S. Dillion, *Self Respect: Moral, Emotional, Political*, 107 ETHICS 226, 226-249 (1997); MARGALIT, *supra* note 85, at 44-48; David Middleton, *Three Types of Self-Respect*, 12 RES PUBLICA 59, 59-76 (2006).

152. See Lawrence, *supra* note 10, at 452.

153. *Id.*

speakers can point to how undignified their victims are. Remaining dignified in the face of hate speech is a difficult line to walk and is part of the reason why certain people adopt this sort of speech in the first place. My proposal is that a cause of action involving degradation should depend on the speech in question causing the plaintiff to experience a lapse in dignified bearing.

But what about people who, due to the way their cultural communities or individual families raise them and perhaps due to their innate temperaments, are able to maintain their dignified bearing at all times? What if these people have been gifted the psychological wherewithal to never experience lapses in dignified bearing, no matter the hateful abuse they receive? Do they get cheated out of tort relief because of their conditioned ability to exercise extreme forbearance?

My response is this: given that the test can be met even if the lapse is momentary, in actuality there might be very few people alive who could genuinely experience being degraded by targeted hate speech under the conditions set out in (1) through (3) and yet not experience the slightest lapse in dignified bearing.

As well as being important in its own right, (4) also provides additional, corroborating evidence in cases where plaintiffs claim to have had a feeling or sense that they were being degraded, but this has been put into doubt by the defense team. If other witnesses testify to the fact that the plaintiff left a room blushing, in tears, or looking angry, disturbed, or shaken, for instance, this may lend further credence to the plaintiff's claim that they felt degraded.

### *B. Humiliation*

My proposed legal test of humiliation includes each of the elements of degradation, not least (1), namely, that the defendant intentionally judged or ranked as inferior or denied the plaintiff's basic worth or their civic status. Indeed, the word "humiliation" is derived from the Latin word *humus* or "earth,"<sup>154</sup> and implies the idea of bringing a person back down to earth from a lofty position. But to count as wrongful humiliation I believe that two additional elements are also required. The first springs from the intuitive idea that humiliation is something that necessarily occurs *in front of other people*.

(5) The defendant not merely degraded the plaintiff in the manner described in (1) and (2) but also did so in public or as a public event, and with the intention to humiliate the plaintiff.

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154. *Humus*, HARPER'S LATIN DICTIONARY (1907).

By “in public” I do not have in mind “public places” as specified in the Supreme Court’s public forum doctrine.<sup>155</sup> Rather, I mean, more simply, in front of (that is, within sight or hearing of) at least one other person in addition to the defendant and the plaintiff.<sup>156</sup> This could involve ranking people as morally inferior in public. Take the case of a college lecturer who, during a homophobic diatribe, points to a particular student sitting in the front row of a packed lecture theatre and says, “Jones, tell the class why you engage in these homosexual acts that spread disease and promote pedophilia, and why you choose to live as a sexual deviant rather than seeking medical treatment for your illness.” In other instances, this can be about publicly refusing someone’s attempt to gain recognition of an equal civic status. An Afghan asylum-seeker goes to the local food market with some vouchers he has been given by local authorities to purchase food. In front of other customers, the cashier says to him, “We know what you are, you ain’t persecuted, you’re bogus. Afraid to go back to your country? I doubt it. More like you’re an Islamist and a terrorist.” But in both of these instances of targeted hate speech, the act of humiliating the victim depends on the public nature of the verbal attacks. Thus, suppose an accountancy firm executive makes one of the company’s female employees, who is thought to be a lesbian, the butt of anti-lesbian comments and jokes that belittle her in the eyes of other colleagues. But, suppose both the executive and the other colleagues are extremely adept at maintaining the secret nature of the attacks, and together give no outward sign or clue whatsoever in their behavior that they are in fact laughing at her behind her back. She is degraded by the jokes perhaps, but not humiliated by them.

Finally, I believe that wrongful humiliation should also require that the defendant caused the plaintiff to feel humiliated. So, I add a sixth condition.

- (6) The plaintiff had a feeling or sense of being humiliated, over and above any sense of being degraded involved in (3), and this was as a direct result of the public degrading performed in (5).

Feeling humiliated is a complex dysphoria that typically manifests itself in intense discomfort arising from the consciousness that one is being made low in front of others. Suppose a fan of a transgender model posts on

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155. See *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 817-18 (1985).

156. See, e.g., Anthony Quinton, *Humiliation*, 64 SOCIAL RESEARCH 77, 80-81 (1997); See also Walter J. Torres & Raymond M. Bergner, *Humiliation: Its Nature and Consequences*, 38 J. AM. ACAD. PSYCHIATRY & L. 195 (2010).

YouTube a video of the model performing on a catwalk in New York, and adds a positive comment about how she looks. Soon after, another video appears on YouTube with an almost identical title showing someone imitating the transgender model only with exaggerated male features including a deep voice, a beard, and inflated male genitalia. A link to the copycat video is posted in the comments section of the original video. The transgender model comes across both the original video and the copycat parody and feels utterly humiliated. In that scenario, she would have a cause of action. However, in the event that she did not feel humiliated—perhaps because she is simply not concerned about the parody appearing on YouTube, and is, in fact, gratified by the amount of publicity she is now getting because of what happened—she would not have a cause of action for humiliation.

More generally, courts should recognize that the intensity of humiliation (if there is humiliation) might be a function of the degree or extent of degradation, the type of public situation, and the type of audience. Feelings of humiliation can be heightened or exacerbated, for example, when the abasement occurs in front of people whose good opinion is especially important to the person being abased. Suppose a Muslim father is travelling on a bus with his two daughters, who happen to be wearing hijabs, on their way to a family picnic when a group of men turn around and start to call him a “sand nigger,” “raghead,” “terrorist,” “rapist,” and “pedophile” with reference to what they perceive to be his religious ethnicity. Because it matters deeply to him that he is esteemed by his children, the feeling of humiliation may be all the more intense.

Note, however, that the feeling of being humiliated is akin to but not the same as feelings of embarrassment. A person can be made to feel embarrassed without necessarily feeling humiliated. Embarrassment is a feeling of self-consciousness or unease, often in socially awkward situations, arising from one’s awareness that one has done or said something inappropriate.<sup>157</sup> Humiliation involves a sense of public debasement, that one’s basic worth or civic status has been ranked as inferior, challenged, or denied in front of others.

## V. APPLICATIONS

I have now provided a practical account, as well as a theoretical account, of what it means to infringe a life of dignity by setting out new legal tests of degradation and humiliation. How might the foregoing account be useful to

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157. *Embarrassment*, OXFORD ENGLISH LIVING DICTIONARIES.

courts in how they understand and apply the two torts and one delict discussed in Part II, especially in cases involving targeted hate speech?

*A. Intentional Infliction of Emotional Distress*

I begin with the tort of intentional infliction of emotional distress. I propose that courts can, and should, where appropriate, interpret the abstract test of extreme and outrageous conduct using the above legal tests of degradation and humiliation. In short, to say that the defendant's conduct was "extreme and outrageous" can be interpreted as involving degradation or humiliation of the plaintiff. Moreover, the phenomenon of "emotional distress" is interpreted broadly to encompass the distress of feeling degraded or humiliated, and the distress of suffering a lapse in dignified bearing. This means that there is no longer a requirement to demonstrate that the plaintiff's distress manifested itself, say, by way of headaches, loss of sleep, inability to perform daily functions, or any condition that was professionally diagnosed.

In fact, I believe that this proposal does not go significantly beyond the interpretations already offered by some courts in cases involving intentional infliction of emotional distress and targeted hate speech. In *Contreras v. Crown Zellerbach, Inc.*, the court explicitly recognized "continuous humiliation" through "racial jokes, slurs and comments" as one of the types of conduct that can exemplify extreme and outrageous conduct.<sup>158</sup> In *Turley v. ISG Lackawanna Inc.*, the court made reference to "the ongoing and severe indignity, humiliation, and torment to which the plaintiff was subjected over a substantial period of time."<sup>159</sup> And in *Wiggs v. Courshon*, the court acknowledged "evidence" that the plaintiff's had suffered "humiliation."<sup>160</sup> Drawing on my legal tests of degradation and humiliation the courts would have a set of substantive benchmarks with which to evaluate putative evidence of extreme and outrageous conduct, including when assessing the testimony of witnesses (as to what happened) and of the plaintiff (as to how they felt).

To give one concrete illustration of how my legal tests for degradation and humiliation might assist courts with this tort, consider once again element (2) of degradation: that the degrading performed in (1) was allied to the fact that the defendant had the authority or standing to judge or rank as inferior or deny the plaintiff's basic worth, their civic status, or both. This element could shed light on a certain dimension of cases involving targeted hate speech in

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158. *Contreras v. Crown Zellerbach Corp.*, 565 P.2d 1173, 1174-76 (1977).

159. *Turley v. ISG Lackawanna, Inc.*, 774 F.3d 140, 161 (2d Cir. 2014).

160. *Wiggs v. Courshon*, 355 F. Supp. 206, 209 (S.D. Fla. 1973).

the workplace that has been invoked by courts in justifying why the conduct in question counts as extreme and outrageous.

In *Gomez v. Hug*, for instance, Judge Wahl found that a lower court had erred in determining, as a matter of law, that Gomez had no cause of action for intentional infliction of emotional distress by Hug.<sup>161</sup> In doing so Judge Wahl highlighted the relevance of the “relative positions” of Gomez and Hug.

The relative positions of Gomez and Hug are important here. Hug was the employer. Gomez was the employee. Hug spoke from the position of a county commissioner. These remarks had been made to Gomez by Hug over a period of several days. The tirade unleashed upon Gomez on April 21, 1978, was terrifying to him. He was afraid of Hug, afraid for his job, afraid for his family. Each party argues a different meaning from these statements of Gomez’ fear. It is an issue for the trier of fact.<sup>162</sup>

The very same aspect or dimension is underscored in *Taylor v. Metzger*. Here the court recognized racist speech as extreme and outrageous conduct to some extent because of the “power dynamics” in play.<sup>163</sup> In the words of Judge Handler:

We not hold that a single racial slur spoken by a stranger on the street could amount to extreme and outrageous conduct. But, a jury could reasonably conclude that the power dynamics of the workplace contribute to the extremity and the outrageousness of defendant’s conduct. We do not hold that a single racial slur spoken by a stranger on the street could amount to extreme and outrageous conduct.<sup>164</sup>

Alas, neither Judge Wahl nor Judge Handley pause to explain how or why the “relative positions” and “power dynamics” of a workplace contribute to the extremity and outrageousness of a defendant’s conduct. But I believe that it is possible to make good sense of this by appealing to element (2) of degradation and humiliation. Thus, I interpret the presence or absence of relative position and power dynamics as relevant to the question of whether or not the defendant authoritatively ranked or judged the plaintiff as inferior using racial slurs or other targeted hate speech, for example. Of course, this

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161. *Gomez v. Hug*, 645 P.2d 916, 917-18, 922 (Kan. Ct. App. 1982).

162. *Id.*

163. *Taylor v. Metzger*, 706 A.2d 685, 695 (N.J. 1998).

164. *Id.*

in turn relies on some connection between the speaker's power and their authority to rank other people. It may be, for example, that a boss believes, and others accept (rightly or wrongly), that the mere fact of his being the boss, and perhaps also his experience in managing lots of very different people over a prolonged period of time, lends authority (semi-official or epistemological) to his act of ranking, judging, or denying the dignity of his employees.

### *B. A Tort of Racial Insult*

Delgado's tort of racial insult purports to provide an avenue for redress in cases of an "affront to dignity."<sup>165</sup> However, Delgado also makes it clear that the cause of action depends on more than merely addressing someone with a racial insult.<sup>166</sup> He explains that the plaintiff should be required to prove that

Language was addressed to him or her by the defendant that was intended to demean through reference to race; that the plaintiff understood as intended to demean through reference to race; and that a reasonable person would recognize as a racial insult.<sup>167</sup>

Nevertheless, this statement of the basic elements of the offense not only gives little guidance as to what, more exactly, it means to demean another person using a racial insult, but also ignores what I believe is a crucial element for a just cause of action: that the plaintiff was actually demeaned. Interestingly, in *Turner v. Wong*, the plaintiff did not provide evidence of any professionally diagnosed psychological problems, but instead based her claim for damages on the fact that she "felt humiliated and mortified because of the racial insults."<sup>168</sup>

I believe that the proposed tort would be improved if the parts relating to "demean through reference to race" were substantiated with my legal tests of degradation and humiliation. This means that the plaintiff should be required to show that the defendant's conduct amounted to either wrongful degradation, as per elements (1) to (4) or wrongful humiliation, as per elements (1) to (6). For example, Turner would have to show that when the owner of the coffee shop (Wong) repeatedly called her a "black nigger from

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165. Delgado, *supra* note 6, at 166.

166. *Id.* at 167.

167. *Id.* at 179.

168. *Turner v. Wong*, 832 A.2d 340, 349 (N.J. Super. Ct. App. Div. 2003).

Philadelphia” in front of the other patrons,<sup>169</sup> he publicly ranked as inferior or rejected her basic worth, her civic status, or both, and, what is more, was speaking from a position of authority or standing. The plaintiff might call on expert testimony from a linguist concerning how exactly the racial insult “nigger” would have been degrading under the circumstances. A socio-linguistic expert could testify about how, as the owner of his store, Wong had the power to say what he liked and the power to ask people to leave his store if they did not like what he had to say—a power he exercised to keep other patrons silent. And a philosopher of language might also testify that in the end it was the silence of the other patrons that granted him the capacity to authoritatively degrade and humiliate Turner.

Interestingly, citing cases involving workplace superiors using racial insults against employees, Delgado identifies “abuse of a position of power or authority” as being potentially relevant to the tort of racial insult as “aggravating circumstances.”<sup>170</sup> As defined by *Black’s Law Dictionary*, “aggravating circumstances” means “[a]ny circumstance attending the commission of a crime or tort which increases its guilt or enormity or adds to its injurious consequences, but which is above and beyond the essential constituents of the crime or tort itself.”<sup>171</sup> However, I would argue that authority should be treated as a *constituent element* of a tort that is being used to provide redress to victims of targeted hate speech, at least where it is being claimed that the civil wrong is comprised of degradation or humiliation.

### C. *Injuria*

With regard to the delict of *injuria*, I also propose that courts should, where appropriate, be open to interpreting what it means to impair the plaintiff’s dignity, especially in cases involving targeted hate speech, in terms of my legal tests of degradation and humiliation. Once again, this suggestion would not be alien to the courts. In *Brenner v. Botha*,<sup>172</sup> for example, Judge Boshoff held that “[i]n cases of verbal injury, otherwise than in cases of defamation, the words complained of must impair the plaintiff’s dignity and

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169. *Id.* at 346.

170. Delgado, *supra* note 6, at 180.

171. *Aggravation*, BLACK’S LAW DICTIONARY 60 (5th ed., 1979).

172. *See Brenner v. Botha* 1956 (3) SA 257 (T) (S.Afr.) (involving a civil lawsuit for *injuria* after the defendant, who was the plaintiff’s employer, said to her, amongst other things, “You are too useless you cannot even measure material,” “I want to be sick when I see your face,” and, “You bloody bitch,” in response to the plaintiff making a mistake measuring material).

must be insulting in the sense that they must amount to degrading, humiliating or ignominious treatment.”<sup>173</sup> Whereas Judge Boshoff provided no concrete guidance on what does and does not rise to the level of “degrading, humiliating or ignominious treatment,” my legal tests are designed to provide a clear framework for evaluating the circumstances of given cases.

The applicability of the legal tests of degradation or humiliation will depend, amongst other things, on whether the *injuria* occurs in public. The doctrine of *injuria* itself is inclusive of various ways of impairing the plaintiff’s dignity and does not presuppose that the impairment is done in front of other people, although it can be.<sup>174</sup> (But note, in contrast to defamation which involves negative comments made about the plaintiff to a third party, in cases of *injuria* the comments are always addressed to the plaintiff rather than to third parties, even when there are witnesses.) And so, in some instances interpreting *injuria* in terms of the degradation test will be appropriate, whilst in others the humiliation test becomes applicable.

Suppose two motorists are arguing over who should take up a particular parking space, and in the argument one of them arrogantly addresses the other as “kaffir.” Addressing a person using a racial epithet like “kaffir” can be an obvious way of degrading that person in a society marked by a history of Apartheid and continuing racial prejudice, inequality, discrimination, *de facto* segregation, and violence. It is not hard to imagine how even today for a white person to call a black person “kaffir,” in circumstances where nobody stands up to object, could amount to authoritatively ranking as inferior or abasing that person; that is, judging that person as not a *citizen in good standing* but a *black African*, and doing so with the license of a silent audience. This in turn could easily diminish that person’s appreciation of their own civic status, for instance. If it is done in front of onlookers, however, then it may become humiliating. For example, the plaintiff might testify to experiencing a feeling of humiliation and witnesses might corroborate this by testifying to the fact that the victim blushed, trembled, or lost his cool upon being called “kaffir.”

The legal tests of degradation and humiliation can also be applied to bitter verbal abuse relating to other protected characteristics, such as in instances of misogynistic terms of abuse like “bitch” or “whore.” Thus, in *Brenner v. Botha*, Judge Boshoff opined that the term “‘bloody bitch’ used in

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173. *Id.* at 261-62.

174. “[P]ublication of the insulting behaviour to third persons is unnecessary to constitute an *iniuria*: publication to the plaintiff alone is sufficient.” JOHANN NEETHLING ET AL., *LAW OF DELICT* 321 (5th ed. 2006).

the context complained of by the plaintiff was certainly offensive and intended to humiliate the plaintiff.”<sup>175</sup> Similarly, in *Ryan v. Petrus*—in which the defendant (Petrus) had said to Ryan “You bitch. You are a screw. You screw my dad, and you and my dad make a cunt of my mother. . . . [Y]ou are a whore”—Judge Pickering reached the following conclusion:

The use of the word ‘*hoer*’ or ‘*whore*’ also clearly constitutes an unlawful aggression upon appellant’s dignity. ‘*Whore*’ is defined in the Concise Oxford English Dictionary as meaning ‘*prostitute*’ and ‘*prostitute*’ is defined in turn as meaning ‘*a person, typically a woman, who engages in sexual activity for payment*’. In my view, to call any woman, who is not a prostitute, a whore, regardless of whether or not that woman is conducting an adulterous affair, is, absent any innocuous context, to degrade and humiliate her.<sup>176</sup>

In finding on behalf of the plaintiff Judge Pickering also pointed to the following:

Plaintiff testified that she had been deeply hurt and humiliated by the insults hurled at her. She stated that the fact that she was involved in an adulterous affair did not give defendant license to speak to her in such a manner. Her dignity, she said, had been impaired.<sup>177</sup>

Judge Pickering’s justification for finding on behalf of the plaintiff would have been improved had he systematically utilized elements of the tests of degradation and humiliation.<sup>178</sup> He might have suggested, for instance, that when Petrus called Ryan a “whore” he also ranked her as an inferior human being, as per element (1). He might also have pointed to the fact that Petrus’ father, with whom Ryan was having an extra-marital affair, was present at the time of the incident, and that Petrus’ father’s failure to step in to defend Ryan licensed or authorized Petrus to degrade Ryan in this way, as per

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175. *Brenner*, (3) SA at 262.

176. *Ryan v. Petrus* 2010 (1) SA 169 (ECG) at 175 (S. Afr.).

177. *Id.* at 172.

178. There is a further question whether the case would have been better handled under the tort of defamation. Judge Pickering rejected this alternative reading partly because, as the lower court determined, it could not be shown that Ryan’s personal reputation was lowered, it being common knowledge that she was involved in an adulterous affair with defendant’s father, and partly because Ryan “testified that she had been deeply hurt and humiliated by the insults hurled at her.” *Id.*

element (2). Finally, he might have alluded to the possibility that to be degraded in front of her lover made the whole situation extremely humiliating for the plaintiff, as per elements (5) and (6).

## VI. FURTHER FEATURES OF THE TESTS

Thus far I have sought to provide a new framework for how courts might handle civil lawsuits involving targeted hate speech. At the level of theory, I have suggested that the grounding aim is to protect plaintiffs' fundamental rights to human dignity, the expression of dignity, civic dignity, and confidence in their civic dignity. At the level of practice, I have proposed two legal tests for degradation and humiliation that could be used by courts to interpret the more abstract tests already associated with the tort of intentional infliction of emotional distress (extreme and outrageous conduct), Delgado's tort of racial insult (insults that demean through reference to race), and the delict of *injuria* (impairing the plaintiff's dignity). I have also described the core elements of degradation and humiliation respectively—elements which I believe would provide courts with fitting and justiciable touchstones with which to evaluate the circumstances of given cases involving targeted hate speech.

In this part I want to set out some further features of the tests, which speak to how they should work in practice when nuanced differences between cases come to the fore, and to address the important issue of freedom of expression.

### A. Psychological Ill-effects

I want to be clear that suffering psychological ill-effects in the form of emotional distress, for example, is only a necessary element of tortious liability where the tort of intentional infliction of emotional distress is concerned.<sup>179</sup> Emotional distress is not a necessary element of tortious liability when it comes to Delgado's tort of racial insult and the delict of *injuria*.<sup>180</sup> Consequently, I have not included emotional distress *per se* as a necessary element of the two proposed tests for degradation and humiliation. To be sure, I have added subjective elements, namely, that the plaintiff felt degraded or humiliated and that the plaintiff experienced a lapse in dignified bearing. And as far as the tort of intentional infliction of emotional distress is concerned, these elements could be classed as forms of emotional distress. But when it comes to Delgado's tort of racial insult and the delict of *injuria*,

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179. *Id.*

180. *See* Bailey v. City of Chicago, 779 F.3d 689, 696 (7th Cir. 2015).

they need not be so classed. To explain, Delgado's tort of racial insult requires *inter alia* that the racial insult must be capable of being "understood as demeaning by reference to race."<sup>181</sup> What I am proposing is simply that this feature be interpreted using the tests for degradation and humiliation, including their subjective as well as objective elements. Similarly, the delict of *injuria* requires not only that the defendant's conduct was such that it would have impaired or violated the dignity of a reasonable person of ordinary sensitivities, but also that the plaintiff actually feels or has the sense that their dignity has been impaired or violated.<sup>182</sup> Once again, I am proposing that these features be interpreted using the tests for degradation and humiliation including their subjective and objective elements.

### *B. Non-exclusivity*

I also want to make it clear that I do *not* intend the tests of degradation and humiliation to be exclusive, necessary, and solely determinative in cases involving targeted hate speech. I do *not* mean to say that being the victim of targeted hate speech can be a cause of action under the two torts and one delict only if the words degraded or humiliated the plaintiff. Even if one or both of these two tests cannot be met, there might be other ways of giving substance to the relevant causes of action in cases involving targeted hate speech. For example, a plaintiff might be able to show that the hate speech was in some other way outrageous, affronted dignity in some other way, harmed some other vital interest, or caused some other form of emotional distress besides a sense of degradation or humiliation. Consider forms of hate speech that are more threatening than degrading or humiliating and that tend to cause alarm or fear rather than feelings of being degraded or humiliated. Indeed, in *Taylor*, the court held that the plaintiff suffered "psychological harm" in the form of mood changes, insomnia, nightmares, and flashbacks.<sup>183</sup> She was also diagnosed as suffering post-traumatic stress disorder, was treated for anxiety, underwent psychotherapy, and took to wearing a bulletproof vest out of fear.<sup>184</sup> In these cases, the tort of intentional infliction of emotional distress might be better analyzed in more conventional ways. For that matter, there may be instances of targeted hate speech that are much better handled with other torts entirely, such as the tort of defamation, when

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181. See Delgado, *supra* note 6, at 180.

182. *Id.* at 167.

183. See NEETHLING, *supra* note 174 at 369.

184. See *Taylor*, 706 A.2d at 696, 699.

false statements of fact are made that damage the plaintiff's personal estimation or reputation in the eyes of others.

In addition, I do *not* claim to have provided an exhaustive framework for interpreting the two torts and one delict in every type of case, including cases other than targeted hate speech. Perhaps in cases that do not involve this sort of speech, alternative forms of analysis and other legal tests may be more appropriate and useful.

Even so, I wish to make it clear that, in my view, when degradation and humiliation are in play, then they can at least suffice to ground causes of action for these two torts and one delict in cases of targeted hate speech.

### *C. Level of Damages and Aggravating Factors*

I also need to clarify that instances of humiliation should command higher rates of damages than instances of degradation when either the tort of racial insult or the delict of *injuria* is in play. This is because humiliation is *degradation plus*; it is a more serious infringement of a life of dignity because it contains all the elements of degradation with additional dignity infringing elements. With regards to intentional infliction of emotional distress, the extent of damages will track the degree of psychological and physiological harm caused by the wrongful conduct.<sup>185</sup> Perhaps, in many circumstances, humiliation will give rise to greater harm than degradation, but this might not always be the case. If not, however, it is still open to the court to award aggravating or punitive damages for humiliation.

Turning then to the issue of aggravating or punitive damages, I believe that courts should also be willing in cases involving targeted hate speech to increase damages on three grounds not yet discussed here. (Of course, this may require courts in South Africa to accept certain tort doctrines not currently accepted.) First, consider the aggravating factor of cruelty. Aggravated or punitive damages might apply where injuries have been aggravated by the wrongdoer's callous indifference toward, or complete lack of empathy for, the plaintiff's injuries. This might be relevant in cases where there is evidence that the defendant has joked about or made light of degrading or humiliating the plaintiff or has claimed that the plaintiff deserved it or has intimated that the plaintiff was "putting it on."

A second aggravating factor might be abuse of position, over and above the required authority element of degradation and humiliation. Aggravated or punitive damages might apply where the defendant has been shown to have

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185. *See, e.g.,* Murphy v. Islamic Rep. of Iran, 740 F.Supp.2d 51, 79 (D.D.C. 2010).

breached a duty prohibiting exploiting another person's particular susceptibility to degradation or humiliation at the hands of the defendant. This might be particularly relevant, say, to a college professor, priest, doctor, care worker, therapist, prison officer, or judge—people who are not merely figures of authority capable of degrading or humiliating the plaintiff but who are in contact with the plaintiff in ways and in settings where the plaintiff is especially vulnerable to being degraded or humiliated. This maybe because of what these people know about the plaintiff, what they discuss or experience together, or because the plaintiff is particularly dependent on the defendant.<sup>186</sup>

Third, acts of humiliation might appear especially heinous when the humiliatee was, in some sense, trapped or cornered by the humiliator; when the humiliatee was a captive audience. I take this to mean not that the humiliatee is literally unable to avoid or escape the situation in the sense of being physically tied down. Rather, it is a matter of the humiliatee being unable to take practical steps to avoid the speech in question whilst at the same time not incurring harm to significant interests. In one's own home, at places of work, on public transport, on parts of college campuses, at funerals, or even on Twitter feeds or Facebook profile pages—these are all spaces in which humiliation might take place ostensibly because the humiliatee cannot easily avoid these places or could not have been reasonably expected to do so.<sup>187</sup> Some writers have toyed with the idea of restricting what may even count as “hate speech” to speech that is addressed to a captive audience.<sup>188</sup> But this strikes me as an artificial and unnecessary contraction of the concept of hate speech. It is enough, I think, to point out that hate speech is *often* used against captive audiences. Defenders of hate speech laws of various kinds have frequently appealed to the captive audience doctrine.<sup>189</sup> What I am

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186. See Delgado, *supra* note 6, at 180.

187. There can be many ways in which people are made captive, of course. To borrow an example from Judith Butler, a person could be made captive by the combination of being in her home, being blind, and being asked a question that she cannot answer because she is blind. On Butler's reading, the blind woman is trapped by language as much as anything. See JUDITH BUTLER, *EXCITABLE SPEECH: A POLITICS OF THE PERFORMATIVE* 9 (1997).

188. David Brink, *Millian Principles, Freedom of Expression, and Hate Speech*, 7 *LEGAL THEORY* 119, 135 (2001).

189. Much has been said about the appropriateness of extending the idea of captive audiences to hate speech when it amounts to discriminatory intimidation of people in their homes or on residential streets, for example. Thus, it has been suggested that cross burning can involve a violation of the privacy rights of captive audiences. See, e.g., Edward J. Eberle, *Hate Speech, Offensive Speech, and Public*

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*Discourse in America*, 29 WAKE FOREST L. REV. 1135, 1211-12 (1994); HEYMAN, *supra* note 76, at 165-66. Likewise, it has been argued that Nazi marches may not be an attack *in* Jewish homes but they are an attack *at* their homes and a violation of privacy rights. *See e.g.*, Rosalie Berger Levinson, *Targeted Hate Speech and the First Amendment: How the Supreme Court Should Have Decided Snyder*, 46 FOREST SUFFOLK U.L. REV. 45, 67 (2013). In a similar vein, it has been claimed that to print cartoons depicting a hand-drawn pig wearing a Muslim head-dress with the name “Muhammad” sketched across its torso and to post them on the external walls of the homes of Palestinians “living under the regime of belligerent occupation” is to harm a captive audience. *See, e.g.*, Amnon Reichman, *The Passionate Expression of Hate: Constitutional Protections, Emotional Harm and Comparative Law*, 31 FORDHAM INT’L L. J. 76, 120 (2007). In relation to the workplace, it has been argued that employees who are subjected to gender-based and other forms of hate speech which create a hostile working environment ought to be considered a captive audience. *See, e.g.*, Marcy Strauss, *Sexist Speech in the Workplace*, 25 FOREST HARV. C.R.-C.L. L. REV. 1, 35-37, 45-46 (1990); Marcy Strauss, *Redefining the Captive Audience Doctrine*, 19 HASTINGS CONST. L. Q. 85, 89-103 (1991); J. M. Balkin, *Some Realism about Pluralism: Legal Realist Approaches to the First Amendment*, 1990 DUKE L.J. 375, 423-24 (1990); J. M. Balkin, *Free Speech and Hostile Environments*, 99 COLUM. L. REV. 2295, 2312 (1999); Richard H. Fallon Jr., *Sexual Harassment, Content Neutrality, and the First Amendment Dog That Didn’t Bark*, 1 SUP CT. REV. 1, 43, 54 (1994); Delgado & Stefancic, *supra* note 4, at 362. Similar arguments have also been applied to students in classrooms on university campuses. *See, e.g.*, Jack M. Battaglia, *Regulation of Hate Speech by Educational Institutions: A Proposed Policy*, 31 SANTA CLARA L. REV. 345, 376 (1991); Caroline Mala Corbin, *The First Amendment Right Against Compelled Listening*, 89 B.U. L. REV. 939, 962-63 (2009); Melissa Weberman, *University Hate Speech Policies and the Captive Audience Doctrine*, 36 OHIO NORTHERN U.L. REV. 553, 583-89 (2010). Note, however, that it has also been suggested that the captive audience doctrine only applies to classroom hate speech when uttered by a professor or teacher. *See* WOJCIECH SADURSKI, FREEDOM OF SPEECH AND ITS LIMITS 186 (1999). This more nuanced view could draw support from *Martin v. Parrish*, 805 F.2d 583 (5th Cir. 1986) and *Bonnell v. Lorenzo*, 241 F.3d 800 (6th Cir. 2001). In these cases, the courts held that the captive audience doctrine did apply to the abusive, in-class speech of university professors and teachers. Others extend the doctrine to hate speech occurring in other parts of the university campus. For example, halls of residency or dormitories. *See e.g.*, Mari Matsuda, *Public Response to Racist Speech*, 87 MICH. L. REV. 2320, 2372-73 (1989); Lawrence, *supra* note 10, at 456; Jack Battaglia, *Regulation of Hate Speech by Educational Institutions*, 31 SANTA CLARA L. REV. 345, 376 (1991); Calvin R. Massey, *Hate Speech, Cultural Diversity, and the Foundational Paradigms of Free Expression*, 40 UCLA L. REV. 103, 177 (1992); SHIELL, *supra* note 10, at 110-11; Caroline Corbin, *The First Amendment Right Against Compelled Listening*, 89 B.U. L. REV. 939, 963 (2009);

suggesting now is that if a plaintiff was a captive audience to targeted hate speech, this could be an aggravating factor in the award of damages in civil lawsuits involving the two torts and one delict discussed in this article.

#### *D. Defenses*

Having considered aggravating factors, it is also appropriate to consider possible defenses against the two torts and one delict when my tests for degradation and humiliation are in play. Even though a defendant's use of targeted hate speech may still be judged to be morally wrong (in the eyes of the community), if the plaintiff had consented to it or consented to the risk of it, then perhaps the defendant should not be considered to have committed a tort and should not be held liable for damages.

To illustrate the issue of consent, there is much discussion around whether or not the word "nigger" is a racial insult under all circumstances. Some people hold that even when used among African Americans in the context of hip-hop culture it remains a racial insult.<sup>190</sup> Others disagree, of course. They say that in this context music artists have been able to resignify and rehabilitate the term "nigger" or "nigga" to give it a new and in *some* ways more empowering meaning, as something suggesting the type of person who does not back down, does not take prisoners, and is not to be trifled

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Weberman, *supra* note 189, at 576-79. Or the walkways, thoroughfares and corridors which students use to move between dormitories and classes. *See e.g.*, Lawrence, *supra* note 10, at 457; Weberman, *supra* note 189, at 583; SHIELL, *supra* note 10, at 110-11, 155. Or university sporting arenas. *See id.* at 110-11. *Cf.* Gregory Matthews Jacobs, *Curbing Their Enthusiasm: A Proposal to Regulate Offensive Speech at Public University Basketball Games*, 55 CATHOLIC U. L. R. 547, 564-81 (2006). Of course, there is no suggestion that every space on campus is apt to create captive audiences. Consider a case in which a student organization invites a university professor to present his controversial views on the innate differences between "the white" and "the black" races in the form of an extra-curricular lecture which students are free to attend or not attend and which takes place in a room on campus that the student organization has paid to hire out. It might be argued that the audience members are not captive "because they can simply choose not to attend the lecture." Charles H. Jones, *Regulating Campus Hate Speech: Is it Constitutional?*, NCCD FOCUS 4 (1992). For an attempt to extend the doctrine of captive audiences to cases of hate speech on the Internet and the Web, see Alexander Brown, *Averting Your Eyes in the Information Age: Hate Speech, the Internet, and the Captive Audience Doctrine*, CHARL. L. REV. (forthcoming).

190. *See, e.g.*, RANDALL KENNEDY, NIGGER: THE STRANGE CAREER OF A TROUBLESOME WORD (2002).

with.<sup>191</sup> But it seems to me that what could also be special about the use of “nigger” or “nigga” in hip-hop culture is that people who take themselves to be part of, or participants in, this culture have implicitly granted one another permission or consent to use these terms. They may even have consented to the use of these terms with their original, highly derogatory meanings. If someone consents to be a participant, they are consenting to the risk of being called “nigger” in ways that they might actually find degrading and humiliating.

Contrast this with a scenario in which a wealthy, middle-class, college-educated African American uses the term “nigger” to degrade a poor, unemployed African American who accidentally bumps into him on the sidewalk; or in which the latter uses the terms “Oreo,” “Uncle Tom,” or “coconut” in an attempt to degrade the former. In these instances, the epithets are not being used as part of a shared or commonly created culture, and the victim has not consented to the risk of being called “nigger” or “Uncle Tom.”

But why does consent make a difference? It makes a difference because to use a term to degrade another person is one thing; to do so with permission is at least to respect what is arguably one of the distinctive capacities of citizens and of human beings: the capacity to give or withhold permission for how others treat one and to do so in accordance with some overall vision of how one wants other people to relate to oneself, and how one wants to relate to them. In that sense, using targeted hate speech to degrade another person, but with their consent, may, in certain dimensions, degrade their basic worth or their civic status, but it might also show proper respect for them as people capable of giving or withholding consent.

#### *E. Freedom of Expression*

Finally, I offer a few comments on the important issue of freedom of expression. It is certainly true that dignity can be invoked as an underpinning, albeit highly abstract, justification for the fundamental right to freedom of expression. Indeed, some legal systems—Germany, for example—presuppose that showing respect for people’s human dignity means respecting their fundamental rights, including the right to freedom of expression.<sup>192</sup> Yet as writers like Heyman have pointed out, dignity can also be a justificatory basis for other fundamental rights, such as rights of personality and the right to recognition, and these rights might in turn support

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191. Cf. BUTLER, *supra* note 187.

192. See, e.g., EDWARD J. EBERLE, *DIGNITY AND LIBERTY: CONSTITUTIONAL VISIONS IN GERMANY AND THE UNITED STATES* (2002).

certain kinds of hate speech restrictions.<sup>193</sup> Here I want to make the importantly different point that dignity can be an *object of* as well as a *justification for* fundamental rights: that there are such things as fundamental rights to dignity and fundamental rights to the expression of dignity, for instance, and these rights can also place limits on the right to freedom of expression.

In saying this, I do not mean to deny something that Kent Greenawalt suggested many years ago, that “[i]f government declares out of bounds social opinions that a person firmly holds or wishes to explore, he is likely to suffer frustration and affront to his sense of dignity.”<sup>194</sup> Given all this, the operative question becomes whether a legal and political regime that vindicates the use of certain torts in restricting targeted hate speech in the name of protecting the plaintiff’s right to a life of dignity is doing enough to minimize any affront this might also cause to the defendant’s sense of dignity, such as by ensuring that the torts in question are narrowly framed to meet their objectives.

It is worth recalling that in 1982 Marjorie Heins criticized Delgado for significantly underestimating the First Amendment barrier to his proposed new tort of racial insult.<sup>195</sup> As she put it,

A governmental restriction on the content of speech (and a tort action is a restriction often more oppressive than criminal sanctions) will be sustained only if it “is a precisely drawn means of serving a compelling state interest.” . . . Although eliminating racism is certainly a compelling state interest, Delgado would be hard put to demonstrate that the broad-ranging tort he proposes is a precisely drawn means of achieving the goal. In fact, he makes no attempt to show that as a matter of psychology punishing name-calling is a means of changing deeply-held attitudes.<sup>196</sup>

I believe, however, that Hein’s criticism would have much less force against any tort or delict that is formulated and/or applied by the courts using my legal tests of degradation and humiliation. For one thing, if courts were to require plaintiffs who are seeking redress in cases of targeted hate speech to prove degradation or humiliation (defined harms), this would raise the bar

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193. HEYMAN, *supra* note 76.

194. KENT GREENAWALT, *SPEECH, CRIME, AND THE USES OF LANGUAGE* 28 (1989).

195. Heins, *supra* note 11, at 585.

196. *Id.* at 586-87.

for successful civil lawsuits considerably. This is to a certain extent because the tests are hybrid objective-subjective tests. It would not be enough to show that the words used were objectively degrading or humiliating. But neither would it be enough to show that the plaintiff experienced a feeling or sense of being degraded or humiliated, and suffered a lapse in dignified bearing. Moreover, the tests require high levels of wrongful conduct. First, the requirement of intention is a common feature of the two torts and one delict. This feature is carried over into tests for degradation and humiliation (see elements (1) and (5) above). This means that the tests are not satisfied where the defendant had not intended to degrade or humiliate the plaintiff.<sup>197</sup> Second, there needs to be evidence of authoritatively ranking as inferior or else denying the plaintiff's basic worth as a human being or their civic status. Merely attacking the plaintiff's personal merit in ways that leads to a loss of self-esteem would not be enough. In addition to these elements of wrongful conduct, there must be evidence of a power dynamic, such that the speaker has the authority to degrade the plaintiff. Not all targeted hate speech will exhibit this. Together, all of the above elements will limit the applicability of the two causes of action in ways that significantly protect freedom of expression.

Also, once we understand that the compelling state interest served by the two torts and one delict is protecting people's fundamental rights to human

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197. Note, in this respect the legal tests for degradation and humiliation depart from ordinary or intuitive understandings of these concepts. Several writers have insisted that humiliation, for example, can be done unintentionally. *See, e.g.*, MARGALIT, *supra* note 85, at 10; Quinton, *supra* note 171, at 81. Consider, for example, the humiliation suffered by the university students in the much-discussed University of Pennsylvania "water buffalo" case. In this case Jacobowitz shouted from his window, "[s]hut up, you water buffalo" to a group of black sorority members who were making noise outside of the dorm. According to Margalit, in one sense of the word, "humiliation" can mean "rejection of persons of the Family of Man," including "relating to humans as if they were not human." MARGALIT, *supra* note 85, at 108. And so, because Jacobowitz shouted the words in public, in front of other students in the dorm, and to the extent that the words amounted to a rejection of the women as human beings, by calling them "water buffalo," then on this analysis we may well be dealing with an instance of humiliation, even if it was not intended as such. However, if in fact Jacobowitz chose the term "water buffalo" as an English equivalent of the Hebrew slang expression "behema," which is used to refer to a loud, rowdy person, and if he simply wanted the girls to be quiet, then potentially there was no intention to use a racial slur or humiliate. As such, I would judge this case as failing the legal test of humiliation, and so, under my proposed analyses, there would be no cause of action for the tort of intentional infliction of emotional distress, the tort of racial insult, or the delict of *injuria*.

dignity, the expression of human dignity, civic dignity, and confidence in their civic dignity, it becomes no longer necessary to prove—if it can be proved—that punishing name-calling is a highly effective tool for changing deeply-held attitudes. For, irrespective of whether or not the two torts and one delict can in fact serve what Delgado calls “the teaching function of the law,”<sup>198</sup> they can, and should, serve the function of repairing transgressions against the plaintiff’s life of dignity.

However, it might be objected at this stage that in constructing the two tests for degradation and humiliation so narrowly—partially to ensure that when defendants are sued for acts of degradation or humiliation the courts can be confident that degradation or humiliation have actually occurred but also partially to ensure that any restrictions on freedom of expression are kept to a minimum—I have gone too far. It might be clear that in the context of the United States constructing the tests very narrowly is necessitated by First Amendment free speech doctrine. But is this appropriate outside of the United States? Specifically, is it appropriate in the context of South Africa?

It seems to me that the narrow framing, partly in the name of protecting freedom of expression, is warranted in South Africa, despite nuances in its free speech doctrine. To explain, the South African Bill of Rights “enshrines” fundamental rights to both freedom and dignity.<sup>199</sup> In particular, § 10 specifies that everyone has “the right to have their dignity respected and protected” but, then again, § 16 also declares that “[e]veryone has the right to freedom of expression.”<sup>200</sup> Both rights come into play in civil lawsuits for *injuria*, and there is no sense in which the constitution permits the total sacrifice of one for the sake of the other.

Now, it is certainly true that § 16(2)(c) of the South African Bill of Rights also specifies a constitutional limitation on the right to freedom of expression in respect of “advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm.”<sup>201</sup> Moreover, all law is subject to the Bill of Rights, so even the tort of *injuria* must be tested against § 16(2)(c). Indeed, the Bill of Rights provides for the development of common law in accordance with its values and objectives. Nevertheless, civil lawsuits for *injuria* typically concern the use of racist and other hateful insults and the violation of the plaintiff’s dignity, as opposed to advocacy of hatred

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198. Delgado, *supra* note 6, at 148-49.

199. *See* S. AFR. CONST., 1996 § 7.

200. *Id.* at § 16.

201. *Id.*

that constitutes incitement to cause harm.<sup>202</sup> So it is far from obvious that § 16(2)(c) could be straightforwardly applied to typical cases of *injuria* involving racist insults. So this leaves the fundamental right to freedom of expression to be placed in balance and not simply defeated by the right to dignity. Indeed, the Constitutional Court of South Africa has argued that the right to freedom of expression is especially important given its country's history of apartheid, in which the majority of the population was subject to both censorship and disenfranchisement.<sup>203</sup> "It could actually be contended with much force that the public interest in the open market-place of ideas is all the more important to us in [South Africa] because our democracy is not yet firmly established and must feel its way."<sup>204</sup>

That being said, it still might be insisted that constitutional guarantees of freedom expression in South Africa remain less demanding than the First Amendment, especially where hate speech is concerned. If this is true, then perhaps the authority element, (2), of the tests for degradation and humiliation that I have identified would be required in the United States, but may not be strictly required in South Africa.

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202. For comparisons between the constitutional rights regimes in the United States and South Africa, see MARK S. KENDE, *CONSTITUTIONAL RIGHTS IN TWO WORLDS: SOUTH AFRICA AND THE UNITED STATES* (2009). For more on the state of hate speech regulations and free speech doctrine in South Africa, see Christa Van Wyk, *Hate Speech in South Africa*, <http://www.stopracism.ca/content/hate-speech-south-africa>.

203. *S v. Mamabolo* 2001 (3) SA 409 (CC) at 429 para. 37 (S. Afr.).

204. *Id.*