Discrimination and the foundation of justice: hate speech, affirmative action, institutional opinions

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Part Two

Group-Based Approaches to Discrimination

Hate Speech – Affirmative Action – Institutional Opinions

Chapter V

Hate Speech

The Foundations of Criminal Law – The Dutch Hate Speech Ban – The Genesis of the Protected Categories – Five Dilemmas with Hate Speech Bans as Group Rights – Conclusion & Evaluation

26.
The Foundations of Criminal Law

In this chapter, I present my first case study: the Dutch hate speech ban as codified in articles 137c and 137d of the Criminal Code.[1] The former article prohibits publicly disseminated substantive insults of "a group of persons on account of their race, religion or belief, hetero- or homosexual orientation or physical, psychical or mental handicap."[2] The latter article prohibits public incitement to hatred, discrimination, or violence against a group of persons on account of those same grounds, with gender added.[3] To properly investigate the Dutch group-based approach to hate speech, as codified in these statutes, we first need to find out how criminal law relates to the prevailing foundation of justice in liberal states.

In the preceding chapters, it became evident that this foundation of justice consists of our fundamental rights. However, this apparent elegant simplicity did not guarantee smooth sailing for my research project. The modern human rights discourse, as well as its liberal inspirations, turn-

[1] The Dutch hate speech ban also encompasses article 137e Criminal Code, that I won't consider here. This statute prohibits publishing or distributing the expressions criminalized in the preceding articles, with an exception for factual information, see: Marloes van Noorloos, *Hate Speech Revisited: A Comparative and Historical Perspective on Hate Speech Law in the Netherlands and England & Wales* (Cambridge: Intersentia, 2011), 182.
[2] Ibid., 181–82.
[3] Ibid., 182.

ed out to be interpretated in various ways. Our fundamental rights may therefore be characterized as universal and individual, but group-based approaches to their realization are not deemed illegal or, generally speaking, controversial. To offer something of a guide when implementing fundamental rights, I opted to interpret the five characteristics of the Common Constitutional Pattern, that can also be applied to the Dutch *Rechtsstaat*, through a liberalism of fear. This evaluative framework aims to establish a minimum of state tasks that guarantees commonly shared enjoyment of (a core of) our fundamental rights, while also keeping an eye on the necessary constraints of that same state. Both these concerns, state action and state restraint with regard to our universal and individual rights, come in sharp focus with criminal law as the most formidable instrument in the arsenal of a liberal state. A liberalism of fear is primarily interested in the frontiers of life, like death and suffering. As such, I consider the design and efficacy of the structures which limit the capacity of the state to confer suffering on its subjects through criminal law a litmus test for appraising the overall confinement of the government in a liberal state. In this section, I will only conduct a partial test in this regard and survey the viability of group-based approaches in relation to the basic architecture of the criminal law in these states. This requires me to deliver on the promised return to the criteria that generally determine who is protected through discrimination laws and in what manner. In the subsequent sections, I shall look in more detail at the Dutch hate speech ban, the genesis of the protected categories in these statutes, and the dilemmas with the group-based approach under examination. The chapter ends with a tentative remedy for these dilemmas.

WHO IS PROTECTED THROUGH DISCRIMINATION LAWS?

In the previous chapter, I established that differential treatment in the relationship between citizens might warrant an institutional reaction. Specifically when such treatment is wrongful. This roughly meant that it happens in the social sphere, concerns relative disadvantages on account of personal characteristics, and denies persons a sufficient lower limit of some very basic capabilities. I also proposed a rough sketch of those capabilities

that should, at a minimum, not be inhibited by differential treatment. That being participating in society on an equal footing and making one's own life choices. The institutional reaction to such treatment is mainly shaped through discrimination law. Discrimination scholars have, as said above, discerned three elements of discrimination law: the normative foundation, the rights distributed, and the duties engendered. I already explained how these dimensions can facilitate a group-based approach. Particularly the normative foundations, discernable by inspecting the stated purpose of anti-discrimination measures, turned out to be relevant when investigating group-based approaches to the protection against discrimination.[4]

As group-based approaches are sometimes found in criminal statutes that are conceived or function as anti-discrimination measures, including hate speech bans, it is advantageous to discuss the mechanisms through which the eventual groups are generally selected. The previously introduced Tarunabh Khaitan has discerned four criteria which determine to whom the rights and duties of discrimination laws pertain.[5] In the first place there is the personal grounds-condition. This condition presupposes that the right to invoke a statute if one is discriminated against, as well as the corresponding obligation to forego discrimination, has to have a connection to personal characteristics.[6] However, this criterion does not narrow down the categories of personal characteristics that are protected. This happens through the second and third criterion. The second criterion entails that there needs to be a way to determine the relevant groups for a discrimination law. The members of these groups are to share relevant personal attributes and are, according to the third criterion, "more likely to suffer abiding, pervasive, and substantive disadvantage" than the members of other groups.[7] Especially disadvantaged cognate groups, as said above, are often considered in this regard. Lastly, any discrimination law

[4] Chapter IV, section 25.
[5] Tarunabh Khaitan, *A Theory of Discrimination Law* (Oxford: Oxford University Press, 2015), 25, 42.
[6] Ibid., 27–29.
[7] Ibid., 31, 35–36, 42; Richard Arneson, "What Is Wrongful Discrimination?," *San Diego Law Review* 43, no. 4 (2006): 793–94; Kasper Lippert-Rasmussen, *Born Free and Equal? A Philosophical Inquiry into the Nature of Discrimination* (Oxford: Oxford University Press, 2014), 41, 47–48.

which imposes duties, must distribute the non-remote, tangible benefits of these duties eccentrically. That is to say, not all members of a selected, generally disadvantaged or marginalized group should profit directly.[8] One cannot hold someone under duty, even if one belongs to a group protected through the rights distributed by an anti-discrimination measure, if the underlying interest for the protection of the members of this group, that being materialized disadvantages, is not present.[9] Such are the criteria that determine how discrimination laws distribute their entitlements.

Besides these four criteria, there are also other factors that shape the role of groups in discrimination laws. The most important are the definite prohibitions and obligations adopted through these laws. These pertain to the duties engendered by the resulting statutes, as well as the parties that bear them. There are roughly four types: prohibition of and protection against direct discrimination; prohibition of and protection against indirect discrimination; the obligation to offer reasonable accommodation; and the obligation to cooperate with measures of affirmative action.[10] For the time being, I will sideline these obligations with the exception of the first. Because criminal law almost always, but not exclusively, concerns direct discrimination.[11] More importantly, most hate speech bans solely address direct discrimination. The other obligations will therefore not become relevant until the next chapter and shall be discussed there.

DISCRIMINATION AND CRIMINAL LAW

The question we are left with for this section, after surveying the mechanisms that tailor discrimination laws to certain groups, is whether or not the selection of such groups for protection is compatible with the tenets

[8] Khaitan, *A Theory of Discrimination Law*, 39, 41.
[9] Joseph Raz, "On the Nature of Rights," *Mind* 93, no. 370 (1984): 209, n. 1; Lippert-Rasmussen, *Born Free and Equal?*, 18.
[10] Khaitan, *A Theory of Discrimination Law*, 86; Lippert-Rasmussen, *Born Free and Equal?*, 36.
[11] Aranka Kellermann, "Begrippen en Definities," in *Met Recht Discriminatie Bestrijden*, ed. Carolina de Fey, Aranka Kellermann, and Jacky Nieuwboer (The Hague: Boom Juridische uitgevers, 2004), 28; Jacky Nieuwboer and Carolina de Fey, "Strafrecht," in *Met Recht Discriminatie Bestrijden*, ed. Carolina de Fey, Aranka Kellermann, and Jacky Nieuwboer (The Hague: Boom Juridische uitgevers, 2004), 65–82.

of criminal law. The first and fourth criteria do not seem to be cause for alarm. Criminal statutes can pertain to personal attributes without employing a group-based approach.[12] My own proposal for a general hate speech ban at the end of this chapter is conceived in the same vein. Furthermore, the eccentric benefits distribution is reminiscent of the requirement of generality. This requirement is often assumed to be part of the principle of legality and can be envisioned to contribute to the liberal and *Rechtsstatelijke* concerns with preventing privileges. However, to select some groups and not others for protection through the second and third criteria has the potential to clash with the most basic and vital limitations of criminal law.

Thus we arrive at the matter of the arsenal of the state to effectuate our rights, wherein criminal law is but one arrow from a full quiver.[13] Though this arrow poses the greatest risk of becoming an instrument of state oppression if it strays too far from the boundaries set by the modern human rights discourse in general and the *Rechtsstaat* in particular.[14] That risk is especially acute with regard to persons who belong to currently marginalized groups. Because disadvantaged persons, until very recently, arguably suffered more from criminal law than that they benefited.[15] The legal persecution of persons who were assumed to identify on the spectrum of LGBTI+ comes to mind.[16] Discriminatory assumptions and their consequences can, in addition, be reinforced through such (ab)uses of the criminal code.[17] It is therefore no surprise that one of the early proponents of the *Rechtsstaat*, the previously discussed Von Mohl, already stressed the importance of distinguishing the *Rechtsstaat* from a *Polizeistaat*.[18] Due to the

[12] Khaitan, *A Theory of Discrimination Law*, 23.
[13] Victor Tadros, *The Ends of Harm: The Moral Foundations of Criminal Law* (Oxford: Oxford University Press, 2011), 299, 305.
[14] Ronald Dworkin, "Liberalism," in *Public and Private Morality*, ed. Stuart Hampshire (Cambridge: Cambridge University Press, 1978), 120; Judith Shklar, "The Liberalism of Fear," in *Liberalism and the Moral Life*, ed. Nancy Rosenblum (Cambridge: Harvard University Press, 1989), 37.
[15] Marloes van Noorloos, "Het Strafrecht en de Bescherming van Minderheden: Een Haat-Liefde Verhouding?'," *Nederlands Juristenblad* 90, no. 42 (2015): 2936.
[16] Erwin Dijkstra, "Het Versmade Strafrecht? Een Breder Perspectief op het Toevoegen van Geslachtskenmerken, Genderidentiteit en Genderexpressie aan de AWGB," *Nederlands Juristenblad* 94, no. 17 (2019): 1239, 1241.
[17] Tadros, *The Ends of Harm*, 30.
[18] Chapter IV, section 21; Martin Loughlin, *Foundations of Public Law* (Oxford: Oxford

far-reaching nature of criminal law and the associated risks, it should be the last resort of a liberal state.[19] Accordingly, the limits on the possibility for state interference are more tight here than in other areas of law. These limits constrain, for instance, the ability of the state to pursue goals which surpass the individual suspect and that would be more appropriately served with other legal or governance instruments.[20] Especially hate speech bans are interesting in this regard. As this kind of statute can be said to be increasingly positioned on the junction where criminal law meets more general policy goals that are often less focused on the crucial constraints engendered by the universal and individual nature of fundamental rights.[21] In the remainder of this section, and as a preliminary to my discussion of hate speech bans, I address the latter observations in more detail: why is state action through criminal law so restricted and why does this specifically pertain to policy? Both issues are related to the concerns with power and the individual of liberalism and matter with regard to our rights.

THE INDIVIDUAL AND CRIMINAL LAW

The previously elaborated, consequential nature of criminal law primarily stems from the fact that this area of law is perhaps the most visible manifestation of the state's monopoly on legal violence.[22] An important aspect of this consequential nature is the position of the individual within the criminal justice system. Because that individual stands alone before the entire might of the state and can be punished through that might, if a police investigation is followed by persecution and the subsequent court case

University Press, 2010), 318, 431.

[19] Julian Roberts, *Criminal Justice: A Very Short Introduction* (Oxford: Oxford University Press, 2015), 5; Dworkin, "Liberalism," 120; Ronald Dworkin, *Taking Rights Seriously* (London: Bloomsbury Academic, 2017), 328; Noorloos, *Hate Speech Revisited*, 28. Though a usually accepted view among legal scientists, this statement is not universally endorsed. For a summary of this discussion see: Noorloos, *Hate Speech Revisited*, 132.

[20] Roberts, *Criminal Justice*, 13–14; Matt Cavanagh, *Against Equality of Opportunity* (Oxford: Oxford University Press, 2002), 199–200.

[21] Noorloos, *Hate Speech Revisited*, 45–49; Eric Heinze, *Hate Speech and Democratic Citizenship* (Oxford: Oxford University Press, 2016), 133.

[22] Paul Cliteur and Afshin Ellian, *A New Introduction to Jurisprudence: Legality, Legitimacy and the Foundations of the Law* (New York: Routledge, 2019), 175.

leads to a conviction.[23] The seriousness of this solitary position cannot be overstated.[24] To cite Victor Tadros: "Punishment is probably the most awful thing that modern democratic states systematically do to their own citizens."[25] Criminal law is thus one of the most potent threats to the liberty, equality, and dignity of individuals in a liberal state. Within this area of law, it is therefore even more imperative to guarantee the necessary equality in the relationship between the state and its citizens with appropriate safeguards, and to prevent abuses of power. In contemporary liberal states criminal law is subject to strict limitations. These limitations are mainly found in two features. The criminal law procedure or adjudication process, of course. But also the wording of the possible charges. Charges pertain to the statutes that define what conduct is punishable and, as such, fit for prosecution.[26] Both features are intertwined with our fundamental rights.

The constraints engendered by the adjudication process are by and large not relevant for our exploration of the viability of group-based approaches in criminal law, except for one aspect: the procedural safeguards for the aforementioned solitary individual who stands trial.[27] It is this individual who is accused of a crime and ultimately punished. As such, they merely have to defend their own conduct, be that an action or neglect. In many liberal states, including the Dutch *Rechtsstaat*, the adjudication process is therefore not strictly adversarial. It is (also) supposed to find out the truth regarding the conduct of the individual suspect.[28] The reasoning informing such a design of the adjudication process is that through the prosecution of crimes the state should protect all citizens and not merely victims. This protection emphatically includes the defendant.[29] The neces-

[23] Roberts, *Criminal Justice*, 18; Tadros, *The Ends of Harm*, 303; Shklar, "The Liberalism of Fear," 37.
[24] John Gardner, "Crime: In Proportion and Perspective," in *Fundamentals of Sentencing Theory: Essays in Honour of Andrew von Hirsch*, ed. Andrew Ashworth and Martin Wask (Oxford: Clarendon Press, 1998), 32–33.
[25] Tadros, *The Ends of Harm*, 1.
[26] Ibid., 320, 329–30; Roberts, *Criminal Justice*, 11–12.
[27] Noorloos, *Hate Speech Revisited*, 25.
[28] Roberts, *Criminal Justice*, 7–8. There are more nuances to this aspect of the Dutch adjudication process than this chapter allows for, see: Henk Griffioen and Corien Prins, "Een Dure Plicht," *Nederlands Juristenblad* 87, no. 22 (2012): 1504–9.
[29] Roberts, *Criminal Justice*, 2, 11–12; Tadros, *The Ends of Harm*, 297, 301.

sary individual nature of the adjudication process, though, can cause tension with the generally accepted goals of most criminal justice systems.[30] These goals are as follows: retribution; specific deterrence, that is reforming a particular criminal; and general deterrence or preventing crimes beyond the present case.[31] It is the third goal that mainly poses problems concerning the position of the individual, who – as befits their rights – is at the center of the adjudication process. Because a defendant can hardly be held accountable for the actions others may or may not commit in an unforeseeable future.[32] With regard to hate speech, we will see that states therefore try to criminalize only those expressions that have sufficient potential to cause harm. Some of the harms that are often considered, and which will re-emerge below, are endangering public order or state security, and discriminating societal salient groups or disadvantaging them in other ways.[33] Even so, criminalizing speech in this manner necessitates a leap of faith, as the correlation between speech and harm will often be complex.[34] The preservation of the expedient position of the individual in criminal law therefore also depends on the wording of the charges, the second safeguard that curtails abuses of power through the criminal justice system.

This second constraint of the criminal justice system concerns the formulation of the crimes through which the individual can be held accountable for their conduct. Because, besides the rigor of the adjudication process, the individual also needs to know in advance what behavior is liable to be prosecuted. This way they can plan their actions or inaction accordingly.[35] The previously described first characteristic of the Common Constitutional Pattern, the principle of legality, is therefore vital within the context of criminal law. And specifically the maxims of generality and *lex certa*.[36] The importance of the legibility of criminal statutes can also be ob-

[30] Roberts, *Criminal Justice*, 60.
[31] Ibid., 59–60; Tadros, *The Ends of Harm*, 113.
[32] Heinze, *Hate Speech and Democratic Citizenship*, 133, 139; Tadros, *The Ends of Harm*, 114, 301; Roberts, *Criminal Justice*, 60.
[33] Noorloos, *Hate Speech Revisited*, 39–49.
[34] Ibid., 40.
[35] Joost Nan, *Het Lex Certa-Beginsel* (The Hague: SDU Uitgevers, 2011), 153–56.
[36] Briain Jansen, "Dworkin's Rights Conception of the Rule of Law in Criminal Law: Should Criminal Law Be Extensively Interpreted in Order to Protect Victims' Rights?," *Netherlands Journal of Legal Philosophy* 46, no. 2 (2017): 160; Shahram Dana, "Beyond

served within the relevant jurisprudence from the ECtHR.[37] Despite this broadly accepted significance, some statutes are still rather vague with respect to the behavior that runs the risk of prosecution. Especially in the case of hate speech one can wonder if "[it] is possible to draft a "Hate Speech" law that is not unduly vague or overbroad?"[38] Besides legibility the generality of criminal statutes is also crucial, if the criminal justice system is not to be abused to reinstate privileges or to again facilitate state-mandated oppression. The generality of criminal statutes, in this context roughly meaning that crimes are crimes regardless of who commits them against whom, should therefore be carefully monitored. If hate speech bans are too strictly focused on the protection of some groups and not others, the necessary generality of criminal statutes might arguably be in jeopardy.[39] The dilemmas surrounding hate speech bans when they are effectuated through criminal law will be discussed further below. First, I explore one of the circumstances wherein criminal statutes are wont to become less general and legible: when more general policy goals supplant the aim of protecting our fundamental rights against the worst infringements.

POLICY AND CRIMINAL LAW

Crimes are normally prosecuted with all three goals of criminal law in mind. To indict persons for theft and murder, for example, serves retribution as well as special and general deterrence. However, some crimes are in addition tailored to more general policy goals. This is not unsurmountable within a *Rechtsstaat*. Despite the previously stated reservations, we can observe that policy is inherent in criminal law through the goal of general deterrence. This materializes by means of the potential use of state power through prosecution, adjudication, and punishment. The imminent threat

Retroactivity to Realizing Justice: A Theory on the Principle of Legality in International Criminal Law Sentencing," *Journal of Criminal Law and Criminology* 99, no. 4 (2009): 857, 865; Cliteur and Ellian, *A New Introduction to Jurisprudence*, 46; Shklar, "The Liberalism of Fear," 37.

[37] Nan, *Het Lex Certa-Beginsel*, 128–29.

[38] Nadine Strossen, *Hate: Why We Should Resist It with Free Speech, Not Censorship* (Oxford: Oxford University Press, 2018), 105.

[39] Khaitan, *A Theory of Discrimination Law*, 62.

of criminal law is as potent an influence on people's behavior as an actual trial. However, criminal statutes also establish norms beyond the strict goal of general deterrence. Even those who did not need to be deterred from committing crimes might adjust their demeanor when they become aware of the criminalization of certain forms of extreme conduct.[40]And this is perhaps even more pronounced in the case of our subject: hate speech.[41] But some scholars have observed a shift within criminal law in general and hate speech bans in particular, beyond these indispensable norms and toward a fully-fledged governance instrument.[42] This shift seems to coincide with an increased desire in liberal states for more comprehensive societal regulation. This phenomenon is known as the rise of risk societies.[43] Can criminal law be employed beyond the individual in this sense?[44] The answer to this question will depend on the extent of the boundaries that one believes liberal states have to observe with respect to the criminal justice system. It is therefore useful to briefly investigate the prevailing boundaries of criminality in liberal states. That is to say, what conduct they should be allowed to prosecute. Common ideas on such limitations on state action through criminal law are, perhaps unsurprisingly, related to the more general principles of permissible state action. As a result, we already encountered some of the available principles when I described the *Idealtypen* of discrimination. These *Idealtypen* determined when the state could and should address discrimination in the relationship between citizens.[45]

There are a few different principles which can be employed to determine what behavior liberal states can and cannot oppose through criminal law.[46] Joel Feinberg summarizes the most prominent and influential

[40] Dijkstra, "Het Versmade Strafrecht?," 1244; John Searle, *Making the Social World: The Structure of Human Civilization* (Oxford: Oxford University Press, 2010), 149; Dworkin, "Liberalism," 122.
[41] Searle, *Making the Social World*, 146, 148; Nigel Warburton, *Free Speech: A Very Short Introduction* (Oxford: Oxford University Press, 2009), 46.
[42] Roberts, *Criminal Justice*, 123–24; Warburton, *Free Speech*, 98.
[43] Noorloos, *Hate Speech Revisited*, 7. For a more comprehensive treatment, see: Ulrich Beck, *Risk Society: Towards a New Modernity* (London: Sage Publications, 2013).
[44] Roberts, *Criminal Justice*, 60; Heinze, *Hate Speech and Democratic Citizenship*, 139.
[45] Chapter IV, section 25.
[46] Joel Feinberg, *The Moral Limits of the Criminal Law – Volume 1: Harm to Others* (New York: Oxford University Press, 1984), 7; Noorloos, *Hate Speech Revisited*, 30.

of these: the harm (to others) principle, the offense principle, the paternalism principle, and legal moralism.[47] Moralism and paternalism generally do not carry much persuasion within liberalism or the modern human rights discourse. Nor do they appeal to a liberalism of fear, as this theory is founded on the dignity and rights of the individual, instead of moral or paternalistic policy ambitions. Furthermore, offense is usually considered too broad a category and too low a bar to justify state intervention, especially through criminal law.[48] Which leaves us with the harm principle.

We are already familiar with harm on account of the preceding chapter. As said there, this is the principle most adhered to in liberal states, at least in theory.[49] The definition of harm in the context of criminal law does not need to diverge much from our definition with regard to state action in general. Harm was outlined in that previous definition as a setback of one's interests which prohibits the full enjoyment of our rights in such a way that one misses out on a sufficient lower limit of capabilities.[50] This broad definition, as noted before, still leaves a margin of appreciation. But within the framework of a liberalism of fear, harm is useful to determine what states should do at a minimum to guarantee our rights. In addition, and perhaps more important in the context of our current topic, this definition of harm rules out many of the provisions that I previously mentioned as being unbecoming of the instrument of criminal law. The latter would include offense, and crimes defined through paternalism and legal moralism.[51] This restriction of pursuing policy through criminal law harkens back to the earlier chapters. Liberalism, as a political program, knows what it wants and can achieve. But the liberal movement also acknowledges that state conduct is necessarily limited. Most attempts at too extensive societal regulation through criminal law, specifically when they surpass addressing the worst infringements of our rights, should therefore

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[47] Feinberg, *The Moral Limits of the Criminal Law – Volume 1*, 12–13.
[48] Ibid., 47–49; Noorloos, *Hate Speech Revisited*, 30; Dworkin, "Liberalism," 113, 120–22.
[49] Will Kymlicka, *Contemporary Political Philosophy: An Introduction* (Oxford: Oxford University Press, 2002), 260; Carolyn Evans, "Religious Speech That Undermines Gender Equality," in *Extreme Speech and Democracy*, ed. Ivan Hare and James Weinstein (Oxford: Oxford University Press, 2009), 364; Roberts, *Criminal Justice*, 66.
[50] Chapter IV, section 25.
[51] Noorloos, *Hate Speech Revisited*, 31–32.

be viewed with suspicion.[52] But this does not entirely disqualify criminal law as an instrument to address the specific harms associated with speech.

Policy through criminal law is therefore curtailed, both by the general boundaries of state action as well as the specific limitations regarding the pitfalls of criminal law. But if this area of law does not lend itself readily to more general policies, what goals can it achieve? If we look through the lens of a liberalism of fear, criminal law seems primarily fit to oppose the most reprehensible conduct. Especially severe setbacks with respect to our rights would qualify in this framework. The criminal justice system is, in this regard, an unavoidable evil that is merely to be used to address these kinds of injustices.[53] As a tool of the state to oppose wrongful differential treatment in the relationship between citizens, criminal law is therefore likely to be of limited value. Though it is undeniably indispensable in the worst cases. These observations even led Khaitan to forego criminal law as suitable for discrimination laws. Because the selection of the appropriately disadvantaged (cognate) groups for protection, which characterizes many anti-discrimination measures, clashes with the principle of legality as it pertains to criminal law. Specifically the required generality of criminal statutes could be compromised.[54] These preliminary remarks make the use of criminal law with regard to discrimination in the relationship between citizens a necessary confined affair, and this includes hate speech bans.

27.
The Dutch Hate Speech Ban

In the Introduction to this work, I announced that I will evaluate the three selected Dutch group-based approaches to discrimination with two questions. Firstly, does the instrument chosen in this instance fit the purpose of opposing discrimination? And secondly, is this example of selective state action not irrevocably in conflict with the foundation of jus-

[52] Chapter III, section 18; Martha Nussbaum, "Perfectionist Liberalism and Political Liberalism," *Philosophy & Public Affairs* 39, no. 1 (2011): 5–6.
[53] Shklar, "The Liberalism of Fear," 30.
[54] Khaitan, *A Theory of Discrimination Law*, 62.

tice, that we have constructed hitherto? In the remainder of this chapter, I will try to answer these questions with regard to the Dutch hate speech ban. In this section, I introduce hate speech bans as a concept. Alongside this introduction, I also preview a few initial concerns with employing criminal law to solely combat harmful speech that relates to merely some groups. These concerns are further elaborated in section 29 of this chapter. Closing out this section is an overview of the Dutch hate speech ban itself, as well as its evolving normative foundations. Despite this specific focus, my account here is still intended to be general enough to inform other jurisdictions which currently employ or consider similar measures.[55]

WALKING THE TIGHTROPE OF REGULATING SPEECH

Both the freedom of expression and the criminalization of hate speech have widespread, international pedigrees. One of the reasons being that speech plays an important role in the enjoyment – or lack thereof – of our fundamental rights. Especially for those persons who belong to marginalized groups.[56] Speech can therefore be described as both a necessity in and a danger to liberal states. As a result, regulating speech can prove as hard as walking a tightrope. Let us explore this hazardous walk for ourselves.

The freedom of expression is a prerequisite of both liberalism and democracy. It is instrumental in limiting power and facilitates the possibility of democratically instigated political changes.[57] Furthermore, this right does not simply protect vested interests as is sometimes alleged.[58] Free

[55] For example, the United Kingdom and France, see: Maleiha Malik, "Extreme Speech and Liberalism," in *Extreme Speech and Democracy*, ed. Ivan Hare and James Weinstein (Oxford: Oxford University Press, 2009), 101; Pascal Mbongo, "Hate Speech, Extreme Speech, and Collective Defamation in French Law," in *Extreme Speech and Democracy*, ed. Ivan Hare and James einstein (Oxford: Oxford University Press, 2009), 227.
[56] Henry Sackers, "The Curious History of Group Discrimination in the Netherlands," in *Freedom of Speech under Attack*, ed. Afshin Ellian and Gelijn Molier (The Hague: Eleven International Publishing, 2015), 17–18; Noorloos, *Hate Speech Revisited*, 47–48.
[57] Adam Gopnik, *A Thousand Small Sanities: The Moral Adventure of Liberalism* (London: Riverrun, 2019), 45; Ronald Dworkin, "A New Map of Censorship," in *The Media, Journalism and Democracy*, ed. Margaret Scammell and Holli Semetko (New York: Routledge, 2018), 385.
[58] Warburton, *Free Speech*, 3.

speech is one of the most powerful means for the emancipation of persons belonging to currently marginalized groups, as I show below. Besides their reliance on this right, however, these persons are also the demographic that is most likely to be harmed by speech. This harm comes in roughly two variants: exclusion and public unrest.[59] The former entails that persons can be stigmatized and ostracized through speech. In the worst cases this has led to violence and even genocide.[60] This harm is the most obvious reason why we can characterize hate speech bans in their modern iterations as a species of discrimination law. That is to say, they are an implementation of the required duty of the state to oppose discrimination.[61] The other way in which speech can marginalize persons, or further harm those persons who are already disadvantaged, is through public unrest instigated by speech. Because, when public order breaks down the disadvantaged usually suffer the worst.[62] Thus, if one aims to oppose discrimination and other kinds of marginalization, one has to oppose some forms of speech.

I would postulate, though, that the apparent necessity to curtail some forms of speech, especially when opposing discrimination, does not require a group-based approach to hate speech. Such an approach can arguably even be counterproductive and this is roughly for two reasons. In the first place, one can argue that protecting only some groups, but not others, violates the necessary constraints of a liberal state. Moreover, such an approach can, at the same time, be said to be woefully inadequate to safeguard the underlying interest for all. As such, a group-based approach to hate speech bypasses the protection offered by the nature of our fundamental rights, while refusing to extent the available support to all those who would need it. These statements deserve some further attention.

HATE SPEECH BANS AS GROUP RIGHTS

If hate speech bans are conceived as group rights, they have the potential

[59] For a more in-depth treatment, see: Noorloos, *Hate Speech Revisited*, 39–49.
[60] Robert Sternberg and Karin Sternberg, *The Nature of Hate* (New York: Cambridge University Press, 2008), 100–104, 124–25.
[61] Warburton, *Free Speech*, 55–56.
[62] Noorloos, *Hate Speech Revisited*, 40–44.

to subvert the universal and individual characterization of our fundamental rights, which makes those rights the indispensable protection against inhumanity that they are today.[63] This arguably rings especially true for persons who belong to marginalized groups. I already noted that their struggle for fundamental rights ended not too long ago and in many respects still continues.[64] This is why I regarded the current characterization of our fundamental rights as universal and individual to be their protection against the state and their fellow citizens when the political winds change.[65] If the universal applicability and individual allotment of our fundamental rights is (partly) abandoned to oppose hate speech, this crucial safeguard is weakened.[66] Particularly the employment of criminal law has the potential to prove worrisome in this regard, as was also alluded to in the previous section. Because disadvantaged persons throughout most of history arguably suffered more from the criminal justice system than they benefited.[67]

But there is yet another side to this matter, as was already briefly mentioned in the previous chapters and is reintroduced here. Persons belonging to currently marginalized groups are not only liable to experience active injustice through state action in general and criminal law in particular, but they can also be abandoned by the state when their rights need protection.[68] Does a group-based approach to hate speech allow such passive injustice? If the state identifies the protection of persons against hate speech on the basis of personal characteristics as an interest which it finds necessary to protect through criminal law, then such a statute arguably should pertain to every individual.[69] By demarcating certain groups which

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[63] Chapter III, section 12; Marie-Luisa Frick, *Human Rights and Relative Universalism* (London: Palgrave MacMillan, 2019), 58; Eric Heinze, "Cumulative Jurisprudence and Hate Speech: Sexual Orientation and Analogies to Disability, Age, and Obesity," in *Extreme Speech and Democracy*, ed. Ivan Hare and James Weinstein (Oxford: Oxford University Press, 2009), 280–81.

[64] Introduction, section 3.

[65] Noorloos, *Hate Speech Revisited*, 12.

[66] Shklar, "The Liberalism of Fear," 21.

[67] See in general: Chapter II, section 11.

[68] Judith Shklar, *The Faces of Injustice* (New Haven: Yale University Press, 1990), 3, 5–6, 19, 31, 35, 37, 39.

[69] Heinze, "Cumulative Jurisprudence and Hate Speech," 272–73; Jeremy Waldron, *The Harm in Hate Speech* (Cambridge: Harvard University Press, 2012), 122–23.

deserve protection, a group-based approach to hate speech would neglect individuals who face similar challenges as the protected categories.[70]

Hate speech bans that employ a group-based approach thus jeopardize the safeguard against institutional abuse that is provided by the universal and individual characterization of our fundamental rights, in addition to depriving individuals in similar circumstances from the protection offered to others. As such, the possibility that group-based approaches only create an illusion of justice resurfaces here.[71] If this statement can be substantiated, we are faced with a dangerous illusion at that. And especially for persons who belong to marginalized groups or are otherwise disadvantaged. Because, as said, these persons are – by and large – still reliant on the freedom of expression in their struggle for emancipation, as well as the most in need of protection against hate speech.[72] Consequently, if we take the interests underlying most hate speech bans seriously, it is crucial to consider the flaws inherent in group-based approaches to this matter.

This short overview of the twin dilemma engendered by a group-based approach to hate speech has shown that criminal law cannot only be potentially abused, but also has the capacity to forego the protection of some for others. As a result, we saw once again how and why criminal law has such a great impact on the ability of citizens to enjoy their fundamental rights.[73] Hence the danger if the state crosses the strict boundaries of legitimate state conduct as envisioned by the universal and individual interpretation of the five characteristics of the Common Constitutional Pattern, and exhorted by a liberalism of fear. Both these possibilities, abuse through criminal law as well as neglect, plausibly contribute to the aforementioned illusion of justice. This plausibility requires me to return to the

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[70] Heinze, "Cumulative Jurisprudence and Hate Speech," 274; Martha Fineman, "The Vulnerable Subject: Anchoring Equality in the Human Condition," *Yale Journal of Law and Feminism* 20, no. 1 (2008): 4; Noorloos, *Hate Speech Revisited*, 25. But see also: Stanley Fish, *There's No Such Thing As Free Speech* (Oxford: Oxford University Press, 1994), 77.
[71] Introduction, section 3; Anthony Grayling, *Towards the Light: The Story of the Struggles for Liberty and Rights that Made the Modern West* (London: Bloomsbury, 2014), 189.
[72] Katharine Gelber, "Nussbaum's Capabilities Approach and Freedom of Speech," in *The Capability Approach: Development Practice and Public Policy in the Asia-Pacific Region*, ed. Francesca Panzironi and Katharine Gelber (New York: Routledge, 2012), 44–45; Frick, *Human Rights and Relative Universalism*, 48; Warburton, *Free Speech*, 3.
[73] Tadros, *The Ends of Harm*, 84–85.

foundations of criminal law. Though this time, I will primarily explain why the drawbacks of criminal law as an instrument for more general policy goals are especially apparent with group-based approaches to hate speech.

A DOUBLE-EDGED SWORD

While I introduced the foundations of criminal law above, one thing became increasingly clear: the criminal justice system is as potent as it is constrained. The most relevant of these constraints, for our topic at least, concerned the safeguards for the position of the individual in the adjudication process and in the provisions within criminal statutes. When criminalizing and prosecuting discrimination in the relationship between citizens, the state is still beholden to respect certain boundaries in its own relation to the suspect. These boundaries severely curtail policy through criminal law. The connection between the observations in the beginning of this section and the criminalization of hate speech now becomes clear. The criminalization of hate speech starts from the premise that some speech has the effect that others exclude or join in the exclusion of the targeted persons, as well as that they can be incited to commit violence in their direction. However, this interest is often only partially pursued. That is to say, merely with respect to certain groups. As a result, the line between safeguarding rights and pursuing other policies is less astute with a group-based approach.

Opposing hate speech through criminal law can therefore be a double-edged sword. One edge concerns the danger that certain forms of speech present, as we have seen in the long and dark history of the persecution and marginalization of persons on account of personal characteristics.[74] Criminal law not only punishes offenders in this regard, but also sets the indispensable norm that such speech and its consequences will not be tolerated.[75] However, the other edge of this sword shows the very real dan-

[74] Sternberg and Sternberg, *The Nature of Hate*, 125–59; Victor Klemperer, *LTI: Notizbuch eines Philologen* (Berlin: Aufbau-Verlag, 1947), 10–11.

[75] Dijkstra, "Het Versmade Strafrecht?," 1244–45; Dieter Grimm, "Grundrechte und Soziale Wirklichkeit," in *Grundrechte und Soziale Wirklichkeit*, ed. Winfried Hassemer, Wolfgang Hoffmann-Riem, and Jutta Limbach (Baden-Baden: Nomos, 1982), 39; Dworkin, "Liberalism," 122; Esther Janssen, *Faith in Public Debate: On Freedom of Expression, Hate Speech, and Religion in France & the Netherlands* (Cambridge: Intersentia,

ger that criminal law has the capacity to destroy what it was meant to defend.[76] Since the aforementioned struggle of marginalized groups by and large depended – and still depends – on their freedom of expression and the possibility to sway the opinions of both society and lawmakers, the criminalization of speech should be treated with caution if not outright suspicion.[77] Furthermore, a liberal state can ill afford the luxury of crossing the most essential boundaries of criminal law. Even if it is to oppose discrimination, such as through a group-based approach to hate speech.[78] Criminal law is too dangerous an instrument and too liable to be abused, especially with regard to persons who belong to currently marginalized groups. As such, the concerns of liberalism and the modern human rights discourse arguably require that harm remains the threshold that should be respected when the state aims to interfere in the affairs of citizens in the social sphere through criminal law. The design of criminal statutes should in addition strictly adhere to the legibility and generality of laws as significant features of the principle of legality. Both these requirements, harm as a necessary threshold and the need for faithfulness to the legality principle, curtail more general policies through criminal law.[79] And this arguably includes the opposition to hate speech for certain, delineated groups but no other persons who fit the underlying reasons and interests, and also suffer.

PUBLIC ORDER, DISCRIMINATION, AND A SOCIETAL ATMOSPHERE OF TOLERANCE

Until now, I have mostly discussed somewhat general concerns with hate speech bans. I now turn my focus to the Netherlands. In the remainder of

2015), 461.

[76] Arie-Jan Kwak, "Making the World Safe for Democracy: Freedom of Speech and Modern Democracy," in *Freedom of Speech under Attack*, ed. Afshin Ellian and Gelijn Molier (The Hague: Eleven International Publishing, 2015), 256; Dieter Grimm, *Constitutionalism: Past, Present, and Future* (Oxford: Oxford University Press, 2016), 86.

[77] Dijkstra, "Het Versmade Strafrecht?," 1245; Dworkin, "A New Map of Censorship," 386–87; Evans, "Religious Speech That Undermines Gender Equality," 370.

[78] Roberts, *Criminal Justice*, 5–6, 11–12, 66.

[79] Noorloos, *Hate Speech Revisited*, 33, 37; Joseph Raz, "Free Expression and Personal Identification," in *Free Expression: Essays in Law and Philosophy*, ed. Wil Waluchow (Oxford: Clarendon Press, 1994), 12–15.

this section, I will give an overview of the reasoning, or normative foundations, underpinning the Dutch hate speech ban. These foundations have been shifting since its conception in the 1930's. As such, the existence and the composition of an exhaustive list of protected categories can be *historically* explained, but is not *theoretically* consistent.[80] The circumstances surrounding the choice for the currently protected categories follow in the next section. The lack of theoretical cohesion in the reasoning behind the selection of certain groups for protection through the Dutch hate speech ban, enables me – in the section thereafter – to discern five dilemmas with compiling an exhaustive list of protected groups for such a measure. There I explain the risks of excluding many persons who (can) experience hate speech from the protection against such utterings, and elucidate the pressure that both the state as well as groups and associations can exert on individuals through criminal statutes that utilize group-based approaches.

The aforementioned first iteration of the Dutch hate speech ban in the 1930's criminalized group defamation regardless of the group which was defamed.[81] This measure was primarily focused on public order. Order is an age-old priority of any government. But the emphasis on order in this statute might also be tentatively connected with the underlying foundational value of liberty.[82] After all, public order is necessary to maintain individual liberty on a basic level.[83] As mentioned above, this is perhaps even more important for persons belonging to marginalized groups – al-

[80] Noorloos, *Hate Speech Revisited*, 212, 219.
[81] Aernout Nieuwenhuis, *Over de Grens van de Vrijheid van Meningsuiting* (Nijmegen: Ars Aequi Libri, 2015), 248–49; Aernout Nieuwenhuis, "An Indefinable Hatred: Some Comparative Law Remarks about the Dutch Criminal Offence of Incitement to Hatred," in *Freedom of Speech under Attack*, ed. Afshin Ellian and Gelijn Molier (The Hague: Eleven International Publishing, 2015), 39–40; Janssen, *Faith in Public Debate: On Freedom of Expression, Hate Speech, and Religion in France & the Netherlands*, 402.
[82] Through the legal history of the now defunct Dutch blasphemy law (former article 147 in the Dutch Criminal Code), Paul Cliteur and Tom Herrenberg have shown that the relation between curtailing speech and liberty is a more complicated affair than the confines of this chapter allow for, see: Paul Cliteur and Tom Herrenberg, "On the Life and Times of the Dutch Blasphemy Law (1932-2014)," in *The Fall and Rise of Blasphemy Law*, ed. Paul Cliteur and Tom Herrenberg (Leiden: Leiden University Press, 2016), 75.
[83] Vincent Tassenaar, "Vrijheid en Gelijkheid in Historisch Perspectief," in *De Strijd van Gelijkheid en Vrijheid*, ed. Jasper Doomen and Afshin Ellian (The Hague: Boom Juridische Uitgevers, 2015), 246.

though public order has historically also been used as an excuse for their oppression.[84] As one would expect, we learn from the *travaux préparatoires*, that it were also concerns with the rise of fascism in other European countries, such as Germany, and the accompanying increase in antisemitism that begot the statute.[85] In the grand scheme of things, however, the protection of disadvantaged individuals against discrimination and exclusion was, at best, an indirect concern. This changed in the 1960's and 1970's.[86]

During the 1960's, a counterculture emerged in the Netherlands which greatly endorsed the emancipation of marginalized groups.[87] This movement coincided with the effectuation of the previously discussed ICERD in 1969. This rights covenant compelled party states to adopt legal measures against racial discrimination, including hate speech.[88] As a result, the machinery of parliament was set in motion and the old hate speech ban was replaced with new provisions in the Dutch Criminal Code.[89] Including the articles 137c and 137d. In that iteration, though, these articles only prohibited publicly disseminated substantive insults of groups of persons on account of their race or religion, and public incitement to hatred, discrimination, or violence against groups on account of those same per-

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[84] Owen Fiss, *The Irony of Free Speech* (Cambridge: Harvard University Press, 1996), 16; Noorloos, *Hate Speech Revisited*, 39–42; Dworkin, *Taking Rights Seriously*, 226–27.
[85] *Parliamentary Documentation House of Representatives* 1933/1934, 237, no. 3, 4; Nieuwenhuis, *Over de Grens van de Vrijheid van Meningsuiting*, 249.
[86] *Parliamentary Documentation House of Representatives* 1933/1934, 237, no. 5, 16; Sackers, "The Curious History of Group Discrimination in the Netherlands," 20–22; Nieuwenhuis, *Over de Grens van de Vrijheid van Meningsuiting*, 249–50.
[87] Ilja van den Broek, "Engagement als Deugd: Politieke Journalistiek Tijdens het Kabinet-Den Uyl," in *Journalistieke Cultuur in Nederland*, ed. Jo Bardoel et al. (Amsterdam: Amsterdam University Press, 2002), 71–72.
[88] Patrick Thornberry, "International Convention on the Elimination of All Forms of Racial Discrimination: The Prohibition of 'racist Hate Speech'," in *The United Nations and Freedom of Expression and Information*, ed. Tarlach McGonagle and Yvonne Donders (Cambridge: Cambridge University Press, 2015), 122; Nazila Ghanea, "Intersectionality and the Spectrum of Racist Hate Speech: Proposals to the UN Committee on the Elimination of Racial Discrimination," *Human Rights Quarterly* 35, no. 4 (2013): 941. Though the Dutch hate speech ban arguably does exceed the obligations of the ICERD, see: Gelijn Molier, "Freedom of Speech: 'It's Politics All the Way Down,'" in *Freedom of Speech under Attack*, ed. Afshin Ellian and Gelijn Molier (The Hague: Eleven International Publishing, 2015), 67.
[89] Sackers, "The Curious History of Group Discrimination in the Netherlands," 19–20; Janssen, *Faith in Public Debate*, 442; Noorloos, *Hate Speech Revisited*, 181–82.

sonal characteristics, respectively.[90] As both the demands of the new counter culture and the ICERD concerned the elimination of discrimination, the underlying value of these changes to the Dutch hate speech ban was equality. Thus, at least part of the aim of the new statutes was "to eliminate unjustifiable inequality in Dutch society."[91] Both articles 137c and 137d, however, remained categorized in the Criminal Code as measures to ensure public order, and were still expected to prevent societal conflicts.[92]

Along with the aim of the hate speech ban, the harm that justified such a state intervention through criminal law shifted. The old statute mainly policed the tone of speech in order to prevent disorder. In the new articles 137c and 137d the content of expressions also came under scrutiny.[93] As language creates the framework of everyday life, it can be assumed that harmful speech could very well be one of the main culprits behind the ostracization of disadvantaged persons who may or may not belong to marginalized groups.[94] As a logical consequence of this line of thinking, and while the twentieth century marched on and new categories were added to the exhaustive lists of protected groups, the values underlying the Dutch hate speech ban underwent yet another transformation: besides liberty and equality, dignity now became a leading concept.[95] The crime perpetrated through hate speech, the exclusion of individuals on the basis of personal characteristics, was deemed injurious to the dignity of persons belonging to the protected groups.[96] As such, the required duty of

[90] Accompanying these measures, but beyond the scope of this work, were articles that criminalized facilitating the spread of hate speech and the support of discrimination, see: Chapter V, section 26, note 1; Noorloos, *Hate Speech Revisited*, 182–83, 212, 221.
[91] Sackers, "The Curious History of Group Discrimination in the Netherlands," 20, 22; Tom Herrenberg, "Van Nashville tot Staphorst: Over Homoseksualiteit, Genderidentiteit, en de Uitingsvrijheid van Orthodoxe Gelovigen," *Nederlands Juristenblad* 94, no. 25 (2019): 1798.
[92] *Parliamentary Documentation House of Representatives* 1969/1970, 9724, no. 6, 3.
[93] Nieuwenhuis, *Over de Grens van de Vrijheid van Meningsuiting*, 249; Noorloos, *Hate Speech Revisited* 211.
[94] Heinze, *Hate Speech and Democratic Citizenship*, 128, 138; Heinze, "Cumulative Jurisprudence and Hate Speech," 267.
[95] Janssen, *Faith in Public Debate*, 415. See in general: Waldron, *The Harm in Hate Speech*, 85, 88, 92, 96, 105; Kwak, "Making the World Safe for Democracy," 263; Heinze, *Hate Speech and Democratic Citizenship*, 122.
[96] Noorloos, *Hate Speech Revisited*, 219; Heinze, *Hate Speech and Democratic Citizenship*, 33.

the state came to include the creation of what I would call a societal atmosphere of tolerance.[97] Such an atmosphere would emphatically entail respect for the fundamental rights of all.[98] These shifts in the underlying values throughout the existence of the Dutch hate speech ban, meant that the argumentation concerning the consecutive addition of new delineated groups to the exhaustive lists of articles 137c and 137d varied through time. Alongside these shifts, other rationales also played a role in justifying the criminalization of certain forms of speech and in guiding the interpretation of the relevant provisions. Protecting the democratic political order, for instance.[99] The preceding sketch is therefore merely meant to illustrate the trajectory of the selection – or genesis – of the protected categories.

28.
The Genesis of the Protected Categories

As implied above, the reasoning to justify including only certain, delineated personal characteristics under the aegis of de Dutch hate speech ban is rather haphazard. In this section, I revisit the historical developments that yielded the previously sketched rationales behind the Dutch hate speech ban, in order to explain the selection of the ultimately chosen protected categories. In doing so, I take a closer look at each selected personal characteristic and the circumstances which engendered the protection of these groups and not others that would fit the arguments at the time. But before I do so, I need to spare a few words to

[97] Molier, "Freedom of Speech,'" 67–68; Noorloos, *Hate Speech Revisited*, 306, 312; Nieuwenhuis, *Over de Grens van de Vrijheid van Meningsuiting*, 44–45. I borrowed the phrase 'atmosphere of tolerance' from the work of Van Bemmelen as it was edited by van Veen and cited in Noorloos, *Hate Speech Revisited*, 220. One can argue that this normative foundation employs a too narrow idea of tolerance. In order to attain more toleration with respect to persons belonging to certain societal salient groups, for instance, much speech has become not tolerable, see: Karl Popper, *The Open Society and Its Enemies* (London: Routledge, 2011), 442–43. Chapter VII considers the query regarding whether liberal states need to be neutral or not when it comes to opinions that are intolerant.
[98] Noorloos, *Hate Speech Revisited*, 220.
[99] Gelijn Molier, Bastiaan Rijpkema, and Jip Stam, "Wilders II: Het Onverdraagzaamheidscriterium Toegepast door de Hoge Raad," *Nederlands Juristenblad* 96, no. 42 (2021): 3467; Noorloos, *Hate Speech Revisited*, 225–28.

talk about the kind of protection that is offered to the selected groups.

(A)SYMMETRICAL PROTECTION

The first criterion that determined who are protected by discrimination laws, as explained above, was the personal grounds-condition. This condition does not necessarily exclude individuals from the protection of discrimination laws. Though it has the potential to do so when the relevant statutes employ exhaustive lists with protected categories that extend the benefits of these laws only to some groups but not others.[100] In such a case these grounds severely curtail what differential treatment merits legal scrutiny: only when certain personal characteristics are involved. Such characteristics are often formulated as a universal order; gender, for instance. But in practice, they may solely be applied particularly; only to women, for example.[101] The protection offered through a statute that qualifies as a discrimination law is therefore not only regularly dependent on the selected categories, but within these categories the protection can often be described as asymmetrical.[102] As such, even if a statute is formulated universally and one would expect symmetrical protection, the support offered is asymmetrical when it is limited to cognate groups that are supposed to be relatively disadvantaged.[103] As Khaitan states: "[w]hile [discrimination norms] do provide the guarantee of non-discrimination to all, their […] benefits are not promised to all."[104] With regard to articles 137c and 137d, though, symmetrical protection has been explicitly confirmed by lawmakers and the Dutch Supreme Court.[105] All classes of persons within the selected categories are protected through these provisions, even if they are currently not presumed to be marginalized or disadvantaged.[106] Why do I

[100] Khaitan, *A Theory of Discrimination Law*, 67–68.
[101] Ibid., 29; Lippert-Rasmussen, *Born Free and Equal?*, 21.
[102] Noorloos, *Hate Speech Revisited*, 25–26.
[103] Khaitan, *A Theory of Discrimination Law*, 30, 34–35; Noorloos, *Hate Speech Revisited*, 25–26.
[104] Khaitan, *A Theory of Discrimination Law*, 41.
[105] Marloes van Noorloos, "De Ideeën achter Hate Speech-Wetgeving in Nederland: Een Historisch Perspectief," *Tijdschrift voor Constitutioneel Recht* 3, no. 4 (2012): 357; Noorloos, *Hate Speech Revisited*, 212.
[106] Sackers, "The Curious History of Group Discrimination in the Netherlands," 22.

bring attention to asymmetrical protection, then? Because, asymmetrical protection in practice – even between categories – is one of the problems we regularly encounter with hate speech bans that employ exhaustive lists. And these two kinds of protection will also resurface in later chapters.

In the coming pages, I scrutinize the origins of the exhaustive lists that the Dutch hate speech ban employs and the adjacent dilemmas. These considerations do not imply that there are no good reasons to protect the currently selected categories or even merely some of the cognate groups encompassed by them. Within all four to five categories in the exhaustive lists of articles 137c and 137d, we find persons that are disadvantaged in current Dutch society on account of their personal characteristics, which often tie in with a professed or assumed group membership. And there is every indication that harmful speech is at least partly to blame. These persons will, in addition, also be the first to experience the consequences if harmful speech sows discord between societal salient groups or causes more general disorder.[107] But the need for the protection of these persons does not entail the need for a group-based approach. If anything, our approach should be *more inclusive*, as the same that is true for them, is true for many other persons and groups. For this reason, I will explore the possibility of such a more inclusive approach at the end of this chapter, following our survey of the currently protected categories in the Dutch hate speech ban in this section, and the adjacent dilemmas in the one thereafter.

FOUR TO FIVE CATEGORIES

Harmful speech, which singled out persons and groups on account of their race, descent, or ethnicity, was the occasion for the inception of the current hate speech ban, and religion accompanied this first category from the onset. I have already discussed both these categories and will therefore keep this account relatively brief. The first two protected categories, race and religion, were derived from the obligations of the ICERD and a proposed convention on religious discrimination which never materialized.[108]

[107] Nieuwenhuis, "An Indefinable Hatred," 43, 45, 50.
[108] Noorloos, *Hate Speech Revisited*, 210–11; Nieuwenhuis, *Over de Grens van de Vrijheid van Meningsuiting*, 36.

Defending this first selection in 1971, the government stipulated that not all groups are as vulnerable as to require the protection offered by the expanded hate speech ban.[109] The societal disturbances expected from verbal attacks on these groups were also taken into consideration.[110] Despite the earlier emphasis on vulnerability, the government later added that notwithstanding the robustness of certain religious groups – one could expect, for example, that world religions such as Christianity are less in need of protection in the Netherlands – those groups should still be protected against insults.[111] Furthermore, the protection offered was confirmed to indeed be symmetrical.[112] This arguably means that the vulnerability of the persons within these protected groups cannot quite explain the selection of merely the two chosen categories. The rationales of public order and discrimination would, at least, cover more groups in addition to the one's included.

The next two categories to be added, gender and hetero- and homosexual orientation in 1991, were given yet another justification.[113] The latter category was connected to the previously discussed line of reasoning which reflected the idea of the state as a purveyor of a societal atmosphere of tolerance. The hate speech ban of article 137c concerning substantive insult, so the government's argument ran at this time, is primarily needed to avert the danger that hateful expressions lead to a negative perception of groups.[114] Especially when most people only hear or read about a group, there is a real risk in negative stereotyping through speech. The subsequent affronts to the dignity of such groups would in turn marginalize them.[115] This line of reasoning arguably conflicts with the earlier inclusion of religion and race, if the more prominent and larger cognate groups within these categories are indeed symmetrically protected. Though this shift in

[109] Noorloos, *Hate Speech Revisited*, 212, 304.
[110] *Parliamentary Documentation House of Representatives* 1969/1970, 9724, no. 6, 3.
[111] *Parliamentary Documentation House of Representatives* 1970/71, 9723 & 9724, 4.
[112] Noorloos, *Hate Speech Revisited*, 212.
[113] Ibid., 218.
[114] *Parliamentary Documentation House of Representatives* 1987/1988, 20239, no. 3, 7; Sackers, "The Curious History of Group Discrimination in the Netherlands," 23; Noorloos, *Hate Speech Revisited*, 219.
[115] *Parliamentary Documentation House of Representatives* 1988/1989, 20239, no. 8, 1; Noorloos, *Hate Speech Revisited*, 219–20; Noorloos, "De Ideeën achter Hate Speech-Wetgeving in Nederland," 367.

reasoning would partly clarify the odd position of the government with regard to the category gender and article 137c. Let us review this position.

Gender was added to article 137d on incitement to hatred, discrimination, and violence, but not to article 137c on substantive insult.[116] The argument for this was twofold. First, the government seems to have partly adopted the concerns of the Emancipation Council (*Emancipatieraad*).[117] This governmental advisory body on the subject of women's rights feared that article 137c could impede the freedom of expression. It dreaded in particular that this provision could be used to oppose feminist literature and consequently hamper the emancipation of women. The government agreed that aggression against women should be addressed without mobilizing article 137c, as this had indeed the added benefit of not restricting the freedom of expression more than necessary.[118] In addition to this first argument, the government postulated that the discrimination of women was "caused by already existing views in society with regard to the role of women, which are experienced from birth on."[119] A strange turn of phrase, as this applies to many groups, both included in and excluded from the protection fashioned through article 137c. The cracks in the reasoning to exclude the category gender from the criminalization of substantive insult showed themselves when the judiciary started to count trans and intersex persons among that same category.[120] The plight of these two groups has arguably more in common with the predicament of other persons who identify on the spectrum of LGBTI+. However, they do not share in their protection against substantive insults through article 137c.[121] This omission is all the more baffling as trans and intersex persons have been explicitly added to the Equal Treatment Act (*Algemene Wet Gelijke Behandeling*) as a subcategory of gender in 2019. A statute that already provided them

116 Noorloos, *Hate Speech Revisited*, 218–19.
117 Marloes van Noorloos appears to read the Parliamentary documentation, cited below, differently, see: Ibid., 219.
118 *Parliamentary Documentation House of Representatives* 1987/1988, 20239, no. 3, 3-4; Dijkstra, "Het Versmade Strafrecht?," 1245.
119 *Parliamentary Documentation House of Representatives* 1988/1989, 20239, no. 5, 6; *Parliamentary Documentation House of Representatives* 1988/1989, 20239, no. 8, 1.
120 *Parliamentary Documentation House of Representatives* 2017/2018, 34650, no. 5, p, 4; Dijkstra, "Het Versmade Strafrecht?," 1244.
121 Ibid., 1245.

with protection as part of this category before it was ever made explicit.[122]

The last category was added in 2005 and to both articles 137c and 137d. It was not adopted with a different reason than the previous two. But this extension does show, in my opinion, most clearly the haphazard nature of these additions and that the selection of the categories added is closely related to more general policy goals, instead of the universal protection of our individually applicable fundamental rights. This last explicitly added group consisted of physically and mentally impaired persons. They were categorized as 'physical, psychical or mental disability'.[123] Their inclusion followed the previously established argument of combatting exclusion and opposing discrimination through creating a societal atmosphere of tolerance.[124] Furthermore, this addition was accompanied by a similar change to the aforesaid Equal Treatment Act.[125] However tidy this may seem, this category still appears to be a haphazard addition – exceedingly so. Because this addition was arguably spurred in part by the so-called Rietdijk-affair at the turn of the century. Wim Rietdijk was a philosopher and physicist who openly advocated for the possibility to euthanize children that belong to "categories of mental and physical deficiency" in order to curb population growth. At the time he could not be prosecuted, as impaired persons lacked inclusion on the exhaustive lists of the Dutch hate speech ban.[126] As such, it was not the systematic extension of the logic of

[122] *Parliamentary Documentation House of Representatives* 2017/2018, 34650, no. 5, 2; Dick Houtzager and Annejet Swarte, "Gelijke Behandeling; de Balans Opgemaakt," *Nederlands Tijdschrift voor de Mensenrechten/NJCM-Bulletin* 40, no. 2 (2015): 168–69; Dijkstra, "Het Versmade Strafrecht?," 1243–44.
[123] Noorloos, *Hate Speech Revisited*, 304.
[124] *Parliamentary Documentation House of Representatives* 2001-2002, 28221, no. 3, 1; Noorloos, *Hate Speech Revisited*, 219–20.
[125] Ibid., 230.
[126] *Parliamentary Documentation House of Representatives* 1999/2000 26800-VI, no. 34; *Parliamentary Documentation House of Representatives* 1999/2000, 26800-VI, no. 60; *Parliamentary Documentation Senate* 1999/2000, 26800, no. 5, 125 – 170, 155; *Parliamentary Documentation House of Representative*, 2001/2002, 28221, no. 3, 1; Marianne Kroes, "Hoe (On)Gelijk Is Gelijk: Het Recht op Gelijke Behandeling van Gehandicapten en Chronisch Zieken," in *De Toekomst van Gelijkheid: De Juridische en Maatschappelijke Inbedding van de Gelijkebehandelingsnorm*, ed. Rikki Holtmaat (Utrecht: Kluwer, 2000), 102; Arjen Fortuin, "Rietdijk," *NRC Handelsblad* February 12th 1999, Boeken, 32; René Steenhorst, "Gehandicapten Beter Beschermd: Beledigen en Discriminatie Voortaan Strafbaar," *De Telegraaf* March 29th 2000, 5; Peter De Waard, "Grootste Non-

human dignity, the societal atmosphere of tolerance, or the duties of states that are a *Rechtsstaat*, which led to the inclusion of this group, but presumably slowly growing societal tolerance in combination with a newsworthy affair that stirred controversy. Such haphazard protection against hate speech gives the impression of a political favor instead of a proper right.

29.

Five Dilemmas with Hate Speech Bans as Group Rights

The history of the Dutch hate speech ban, with its scattershot inclusion of new protected categories, has led to an underlying normative foundation which is a mixture of and alternates between liberty, equality, and dignity. If we would attempt a synthesis, we could say that the government is held to create a societal atmosphere of tolerance in order to maintain public order, oppose discrimination, and safeguard the dignity of those who would be excluded through harmful speech.[127] Only a few groups can invoke this protection, though, whereas this reasoning hypothetically includes a lot more personal characteristics, namely of those persons who experience similar issues. Age, affluence, physical condition or appearance, to name a few.[128] These groups now lack such protection. Protecting some groups, but not others, can engender tangible dilemmas.

A. THE DRAWBACKS OF CRIMINAL LAW

Criminal law is, as explained above, the most powerful asset a liberal state wields, in addition to being its most limited instrument.[129] Statutes in the criminal code are therefore ideally confined, amongst other limitations, by

Conformist of Zieke Geest," *DeVolkskrant* May 4th 2020, Ten Eerste, 22. I return to the complications surrounding the Equal Treatment Act in Chapter VI, sections 31 and 32.
[127] Marloes van Noorloos, "Herziening van het Strafrecht over Groepsbelediging en Haatzaaien," *Mediaforum* 27, no. 5 (2015): 167. As said, it is argued that this reasoning is itself intolerant with regard to too much speech, see: Chapter V, section 27, note 97.
[128] Introduction, section 3; Heinze, "Cumulative Jurisprudence and Hate Speech," 275; Lippert-Rasmussen, *Born Free and Equal?*, 39; Sophia Moreau, "What Is Discrimination?," *Philosophy & Public Affairs* 38, no. 2 (2010): 158.
[129] Loughlin, *Foundations of Public Law*, 431.

the maxims of generality and legibility, as well as with regard to more general policy goals. The latter would entail those goals which surpass safeguarding the fundamental rights of every individual, including suspects. The current Dutch hate speech ban seems to ignore such restrictions to a certain extent. The presently employed purpose, a societal atmosphere of tolerance, is not sufficiently connected to our fundamental rights. As protection is not an individual entitlement but a matter of being assumed to belong to a group that is delineated for protection, presumably on other grounds than the realization of our universal and individual rights. Because many persons who are confronted with the same setback of their rights are neglected. The resulting statute is also not general and legible enough.

Employing criminal law in this way collides with the requirements of generality in two ways. The law, and especially criminal law, should – in the first place – aim to pursue the interests it identifies for all citizens.[130] On the surface, discrimination law appears to be different than other criminal statutes in this regard, as not all persons seem in need for protection against discrimination. But appearances can be deceiving.[131] Someone can spend their life without being assaulted, but they are protected against such abuse nonetheless. The same can be said with regard to wrongful differential treatment on account of (assumed) personal characteristics. Within a *Rechtsstaat*, discrimination law can and should therefore protect everyone. Even though some persons will rarely, if ever, encounter discrimination, such as hate speech. Secondly, criminal law should be about the individual and their actions or inaction, and with regard to all their possible victims.[132] To compel the individual to refrain from a certain conduct and even punish such conduct if it does occur, but only with regard to some pre-determined victims, seems to collide with some of the most basic requirements that legitimize the use of the criminal justice system within liberal states.

The instincts which underpin the need for a generally applicable criminal code also show the impact of group-based approaches to hate

[130] Chapter V, section 26.
[131] Khaitan, *A Theory of Discrimination Law*, 29, 38–41; Peter Jones, "Human Rights, Group Rights, and Peoples' Rights," *Human Rights Quarterly* 21, no. 1 (1999): 82; Lippert-Rasmussen, *Born Free and Equal?*, 36.
[132] Lippert-Rasmussen, *Born Free and Equal?*, 182; Heinze, *Hate Speech and Democratic*

speech on the legibility of these statutes. The exclusionary tendencies of humanity and the adjacent demands for justice evolve faster than the rigid lists of articles 137c and 137d allow for.[133] Therefore, we see the judiciary exercise their discretion to make the Dutch hate speech ban more generally applicable. In doing so, they have interpreted the protected categories more broadly in order to protect groups that are admonished on account of personal characteristics which are not explicitly mentioned in these statutes.[134] Isn't this a good thing in light of the previous observation that criminal statutes should protect everybody equally? Probably not. Due to the historical occurrence and continuing possibility of judicial extension of the protected categories, it has arguably become less evident what expressions are considered hate speech.[135] As such, it is more difficult to modify one's actions according to the law. The boundaries of state action through criminal law are thus less well-defined. As a result, the state becomes less predictable to its citizens. This has real-world consequences. As these provisions exert their influence not only through prosecution and punishment, but also through the mere possibility of a run-in with the law.[136] An ill-defined hate speech ban can cause a 'chilling effect' on the freedom of expression. That is to say, people will self-censor in order to avoid the risk of legal troubles.[137] In a grim twist of fate, this chilling effect also has the potential to hamper the efforts of emancipatory movements that, at least in part, depend on disseminating speech. The emancipation of disadvantaged persons, many of whom belong to marginalized groups, can thus be frustrated by a group-based approach to hate speech.

To conclude, the Dutch group-based approach to hate speech can have drawbacks with regard to the tenets of criminal law, specifically for disadvantaged persons. Due to the lack of generality and legibility of the articles 137c and 137d, there could be a chilling effect on speech and this

Citizenship, 133, 139; Tadros, *The Ends of Harm*, 301; Roberts, *Criminal Justice*, 60.

[133] Even though, one can legitimately interpret these lists more broadly, as shown in: Fred Janssens and Aernout Nieuwenhuis, *Uitingsdelicten* (Deventer: Kluwer, 2005), 132.

[134] Molier, "Freedom of Speech," 65.

[135] Nieuwenhuis, *Over de Grens van de Vrijheid van Meningsuiting*, 287.

[136] Searle, *Making the Social World*, 146, 148; Dijkstra, "Het Versmade Strafrecht?," 1244; Warburton, *Free Speech*, 46.

[137] Heinze, *Hate Speech and Democratic Citizenship*, 3, 31–32, 35, 143.

can hamper emancipatory movements. As the principles which necessarily limit state action through criminal law are partly disregarded, there is less protection against abuse of the criminal justice system when the political winds change. Lastly, some of the hate speech out there tends to be unaddressed because it does not fit the exhaustive lists of protected categories.

B. EXCLUSION AND INTERSECTIONALITY

This leads us to our second dilemma with group-based approaches to hate speech: the aforementioned exclusion of those who need such protection, but lack it on account of not belonging to the right group.[138] This exclusion in turn leaves little room for questions of intersectionality.[139] Let us start with the first aspect of this dilemma, the exclusion of those who find themselves at the harsher end of hate speech and its societal consequences on account of personal characteristics that missed out on inclusion in articles 137c and 137d in the Dutch Criminal Code. In the foregoing, I established why differential treatment on the account of one's gender is – at the moment! – different from being born in a leap year.[140] And the same might ring true for many categories which are currently overlooked.[141] For example the elderly, the poor, and – on the international stage – persons who identify on the spectrum of LGBTI+.[142] The selection of certain personal characteristics for the Dutch hate speech ban might therefore appear arbitrary. Or worse than arbitrary, the inclusion of some and exclusion of others could be a corollary of political power. A matter of toleration before emancipation. Many persons within the aforementioned overlooked groups are at the moment arguably disadvantaged, but their claims to protection against harmful speech have no place within the current statutes.[143]

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138 Brian Barry, *Culture & Equality: An Egalitarian Critique of Multiculturalism* (Cambridge: Harvard University Press, 2001), 114.
139 Martha Minow, *Not Only for Myself: Identity, Politics, and the Law* (New York: New Press, 1997), 19, 39, 82.
140 Chapter VI, section 25.
141 Noorloos, *Hate Speech Revisited*, 11, 25–26; Eric Heinze, "View Point Absolutism and Hate Speech," *Modern Law Review* 69, no. 4 (2006): 565–69.
142 Chapter V, section 29, note 128; Introduction, section 1, note 56.
143 Luigi Corrias, "Het Recht als Bescherming van Bepaalde Partijen: Een Rechtsfilosofische Verkenning," *Ars Aequi* 69, no. 1 (2020): 94.

Is it justifiable that the societal atmosphere of tolerance, the interest that summarizes the purposes currently pursued by the government with the Dutch hate speech ban, does not apply to their plight and marginalization?

Furthermore, an exhaustive list of protected categories also fails the challenges presented by the fact that the disadvantages and exclusion of an individual oftentimes pertain to more than one personal characteristic.[144] This so-called question of intersectionality is all the more important due to the evolution of discrimination.[145] Discrimination has become more complex over time and now often concerns the intersection between identities.[146] Instead of plain racism against persons of color, for instance, bigotry can also latch onto someone's migrant status to muddy the waters.[147] The relative straightforwardness of the four to five categories in the Dutch Criminal Code, on account of which certain speech is prohibited, is therefore arguably unfit to meet the complexity of contemporary hate speech. This would again affect some of the most vulnerable. Those whose plight has not yet found grace in the public eye. Another troubling consequence of this shortcoming is the possibility of second-order discrimination.[148]

C. SECOND-ORDER DISCRIMINATION

Discrimination scholar Kasper Lippert-Rasmussen has distinguished two kinds of discrimination: first- and second-order discrimination. First-order discrimination shows affinity with both the legal interpretation and the lay meaning of discrimination: the actions, neglect, and speech resulting from discriminatory assumptions. Morbidly familiar examples would be a sign that prohibits entrance to a shop on account of one's descent, racist violence, and utterings encouraging and justifying the deportation of minorities.[149] Second-order discrimination describes the situation where discrimi-

144 Ghanea, "Intersectionality and the Spectrum of Racist Hate Speech," 943.
145 Ibid., 941–42, 953–54.
146 Ibid., 943; Kimberle Crenshaw, "Mapping the Margins: Intersectionality, Identity Politics, and Violence against Women of Color," *Stanford Law Review* 43, no. 6 (1991): 1241, 1245.
147 Ghanea, "Intersectionality and the Spectrum of Racist Hate Speech," 943, 945, 951.
148 Minow, *Not Only for Myself*, 80.
149 Ali Rattansi, *Racism: A Very Short Introduction* (Oxford: Oxford University Press,

nation by different discriminators is treated differently, predominantly by institutions. This situation appears to have arisen in the Dutch case law on hate speech, with a role for the exhaustive lists of protected categories.[150]

Harmful expressions regarding persons who identify on the spectrum of LGBTI+ seem to be treated differently in some significant, paradigmatic cases when they originate from a place of faith.[151] In Dutch case law we can observe the tendency that "expressions which seem insulting at first can 'lose their insulting character' when judged in relation to their context."[152] Public debate in particular is viewed as a context which vindicates strictly insulting speech. Utterings from a place of faith, even if they would constitute substantive insult with regard to persons who identify on the spectrum of LGBTI+, are regularly viewed as contributions to the public debate from the point of view of suspects, who are subsequently not convicted.[153] That the uttering was meaningful in this way for the suspect is deemed decisive in this regard.[154] As a result, a pastor and a politician, who publicly equated a homosexual orientation with pedophilia and other crimes respectively, were both exonerated. Their words were judged as not gratuitously insulting and to be "recognizably in direct connection to [their] religious views and as such […] meaningful to them in public debate."[155] Despite the legal and judicial requirements being equal, the impression therefore lingers that some individuals might permit themselves larger breaches of the societal atmosphere of tolerance than others, which

2020), 6, 15–16, 136, 144; Waldron, *The Harm in Hate Speech*, 2–5.

150 Lippert-Rasmussen, *Born Free and Equal?*, 44.

151 Aernout Nieuwenhuis, "Democratie, Groepsbelediging en Haatzaaien," *Ars Aequi* 65, no. 11 (2016): 823; Noorloos, *Hate Speech Revisited*, 232. Substantive insults of persons who identify on the spectrum of LGBTI+ can and regularly do lead to a conviction, though, even when coming from a place of faith. This is often due to the tone used, see: Herrenberg, "Van Nashville tot Staphorst," 1799–1800. Despite this observation and the relatively small number of cases, I still consider the point valid as a dilemma with employing a group-based approach to hate speech that needs to be considered.

152 Noorloos, *Hate Speech Revisited*, 183.

153 Gelijn Molier, "De Vrijheid van Meningsuiting: 'Its Politics All the Way Down,'" in *Mag Ik Dit Zeggen? Beschouwingen over de Vrijheid van Meningsuiting*, ed. Afshin Ellian, Gelijn Molier, and Tom Zwart (The Hague: Boom Bestuurskunde, 2011), 214, 217.

154 Ibid., 237.

155 Noorloos, *Hate Speech Revisited*, 231–32; Sackers, "The Curious History of Group Discrimination in the Netherlands," 29–30.

at least partly depends on the origins of their viewpoints.[156]

Second-order discrimination seems to clash with the duties and constraints of liberal states that implemented the Common Constitutional Pattern – specifically in the interpretation of a liberalism of fear – in two ways. In the first place, the necessary boundaries of state action are crossed when criminal law appears to privilege certain individuals on the basis of group membership.[157] If the members of certain groups, especially when they themselves are protected under the hate speech ban, seem to be able to utter harmful expressions to a larger degree, then one of the main remedies for hate speech – that being more speech – is stifled.[158] Furthermore, the permissibility of second-order discrimination also implies that the current provisions cannot deliver on the protection they promise, not even to the delineated groups. Let's say my previous assessment, wherein hate speech against persons who identify on the spectrum of LGBTI+ seems to be of a lesser concern depending on the attitude of who spoke, holds. Then the interest of an atmosphere of tolerance is not fully pursued for that group, depending on the viewpoints of their assailants and whether the judiciary connects these viewpoints to the public debate.[159] Second-order discrimination points us, in turn, to a fourth dilemma with the delineated categories: the institutional entrenchment of group identities.

D. STIGMA AND INSTITUTIONAL ENTRENCHMENT OF GROUPS

In addition to the dilemmas hitherto described, can the architecture of the Dutch hate speech ban also be said to entrench group identities and, in this way, maintain or create stigmas as well as leaving little room to address the diversity within groups. The former happens primarily through the ex-

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156 Molier, "De Vrijheid van Meningsuiting,"' 237; Molier, "Freedom of Speech,"' 65–66, 70.
157 Heinze, *Hate Speech and Democratic Citizenship*, 21–22.
158 Waldron, *The Harm in Hate Speech*, 129; Stanley Fish, *The Trouble with Principle* (Cambridge: Harvard University Press, 1999), 69; Nieuwenhuis, *Over de Grens van de Vrijheid van Meningsuiting*, 58.
159 Sackers, "The Curious History of Group Discrimination in the Netherlands," 32; Minow, *Not Only for Myself*, 80.

haustive lists with protected categories.[160] Because these lists, of which we explored those in articles 137c and 137d of the Dutch Criminal Code, exhibit a static view of society and the societal position of the groups discernable therein.[161] As a consequence, persons who are thought to have the personal characteristics that reference a protected category are stigmatized.[162] The problems which were to be remedied by the hate speech ban are, in the first place, now intimately associated with the protected groups and, as such, become distant to other people. Even though harmful speech can and does affect us all, depending on the time and place that we inhabit.[163] Furthermore, the oppression of individuals, by the state and other societal institutions – as well as private individuals and associations – historically almost always happened to persons as an (assumed) member of a group. It is therefore important to be weary of the state and other societal institutions entrenching some of those same group identities once again.[164]

The dilemmas with the institutional entrenchment of group identities go beyond stigma, though. The universal and individual characterization of our fundamental rights is also compromised.[165] More specifically, one of the main functions of these rights – the protection of the individual against the power of groups and associations, whether they are public or private in nature – is neglected. Because, when entire groups are protected against hate speech, there is little room for institutions to address the diversity within such groups.[166] This kind of entrenchment has therefore the potential to cause a shift of power within the group to the benefit of some of the members – to those that are acknowledged as representatives of the

160 Upendra Baxi, "Voices of Suffering, Fragmented Universality, and the Future of Human Rights," in *The Future of International Human Rights*, ed. Burns Weston and Stephen Marks (New York: Transnational, 1999), 121; Minow, *Not Only for Myself*, 9–10, 64; Barry, *Culture & Equality*, 117.
161 Introduction, section 3; Iris Young, *Justice and the Politics of Difference* (Princeton: Princeton University Press, 2011), 18; Noorloos, *Hate Speech Revisited*, 25.
162 Kymlicka, *Contemporary Political Philosophy*, 373; Minow, *Not Only for Myself*, 35; Florian Coulmas, *Identity: A Very Short Introduction* (Oxford: Oxford University Press, 2019), 76; Michael Sandel, *The Tyranny of Merit: What's Become of the Common Good?* (London: Penguin Books, 2020), 147.
163 Fish, *The Trouble with Principle*, 30, 33; Minow, *Not Only for Myself*, 26–28, 41.
164 Fish, *The Trouble with Principle*, 31.
165 Jones, "Human Rights, Group Rights, and Peoples' Rights," 81–82.
166 Kymlicka, *Contemporary Political Philosophy*, 369.

group by institutions, for instance.[167] As a result, the orthodoxy within the group is less likely to be challenged. It will also be more difficult to change the group dynamic from within, leave the group, or refute one's assumed membership altogether.[168] And this is especially a concern here, as this institutional group entrenchment concerns speech. Because speech is one of the most important instruments to challenge authority and keep our membership of any group voluntary.[169] Consequently, a rule that is designed to protect a marginalized group against larger society, elicits the danger that it serves the internal power struggles and status hierarchies in that group, in addition to the possibility of abuse against its members, professed or assumed.[170] This is another reason why the right to freedom of expression and the right to be protected against discrimination, including hate speech, should be universal and individual in nature.[171] Besides the power balance within groups, we can also tie limiting the protection against hate speech to certain groups to dilemmas regarding the relationship between groups.

E. POWER STRUGGLES BETWEEN GROUPS

There is at the moment no theoretically consistent justification for the current lists of personal characteristics which entitle one to protection against hate speech in the Netherlands, nor for the exclusion of other characteristics that arguably come with similar challenges. The extent of the state's care in this regard seems to comprise a charity instead of a right. A political favor instead of the logical outcome of the demands of our universal and individual fundamental rights.[172] This lack of theoretical cohesion con-

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167 Marlies Galenkamp, *Individualism versus Collectivism: The Concept of Collective Rights* (Rotterdam: RFS, 1993), 120–21; Evans, "Religious Speech that Undermines Gender Equality," 365.

168 Minow, *Not Only for Myself*, 22; Will Kymlicka, *Multicultural Citizenship: A Liberal Theory of Minority Rights* (Oxford: Oxford University Press, 1995), 228, 231; Jones, "Human Rights, Group Rights, and Peoples' Rights," 94–95; Galenkamp, *Individualism versus Collectivism*, 121, 160–61.

169 Barry, *Culture & Equality*, 122.

170 Kymlicka, *Contemporary Political Philosophy*, 340, 343; Barry, *Culture & Equality*, 117.

171 Calvin Massey, "Hate Speech, Cultural Diversity, and the Foundational Paradigms of Free Expression," *UCLA Law Review* 40, no. 1 (1992): 135.

172 Waldron, *The Harm in Hate Speech*, 131–33; Fish, *The Trouble with Principle*, 7, 12.

cerning the pursuit of the interests underlying the Dutch hate speech ban, might potentially engender a struggle between groups, societal salient or otherwise, to attain institutional acknowledgement as marginalized and thus acquire the subsequently available legal protection.[173]

If we contend that the protection against harmful speech on the basis of personal characteristics is an interest that should be pursued by the state, than we should also insist that the resulting protection is systematically implemented and does not depend on the relative standing of one's group. Otherwise, it will be only groups with a modicum of influence and political clout, whose representatives are adept at navigating the hallways of power, who can attain this form of justice.[174] And these dilemmas go beyond the aforementioned danger that governments pursue policies for which criminal law is unfit and privilege certain groups or their representatives. There is also the previously explained risk that toleration, or in any case broad enough societal and political acceptance of a group, precedes legal emancipation instead of vice versa.[175] In the worst case scenario, hate speech bans would enable persons, whose inclusion in society is accepted and as such can wield political power and influence, to disadvantage persons and marginalize groups who have yet to attain this status. This would be a malady that even exceeds the pitfalls of second-order discrimination. But it is not that far-fetched. For a time, the professed opposition against hate speech played such a role as an instrument to reinforce the marginalized societal position of Jehovah's Witnesses in the United States, for example.[176] The inescapable and bleak conclusion from these observations,

[173] Kwak, "Making the World Safe for Democracy," 257–61; Molier, "Freedom of Speech,'" 68; Fish, *The Trouble with Principle*, 101; Kymlicka, *Contemporary Political Philosophy*, 366–67.

[174] Heinze, *Hate Speech and Democratic Citizenship*, 44, 139; Baxi, "Voices of Suffering, Fragmented Universality, and the Future of Human Rights," 116, 123; Malik, "Extreme Speech and Liberalism," 103. Heinze puts it even more forcefully: "Far from identifying the most vulnerable, […] the prohibitionists focus on interest groups that have already mobilized to achieve meaningful levels of political organization, scholarly presence and media attention." See: Heinze, "View Point Absolutism and Hate Speech," 568.

[175] Jonathan Rauch, *Kindly Inquisitors: The New Attacks on Free Thought* (Chicago: University of Chicago Press, 2013), 175.

[176] Waldron, *The Harm in Hate Speech*, 50; Nadine Strossen, "Balancing the Right to Freedom of Expression and Equality," in *Striking a Balance: Hate Speech, Freedom of Expression, and Non-Discrimination*, ed. Sandra Coliver (London: Article 19/University of

which I already alluded to above, is that through exhaustive lists with protected groups, the state could ultimately fail those individuals who need its protection the most.[177] Within and outside the selected categories.

30.
Conclusion & Evaluation

In the preceding, we saw that criminal law is a necessarily constrained, almost modest affair. Because criminal law, even more than other areas of law, has the potential to be abused, as well as to leave some persons without sufficient recourse regarding their suffering. This potential is especially acute with group-based approaches. As a consequence, it became clear that the current Dutch hate speech ban presents merely an illusion of justice. The adoption of a group-based approach to hate speech detracts from the essential safeguard against abuse and oppression that is the universal and individual characterization of our fundamental rights. And the rights protection offered through these laws is also insufficient, as the Dutch hate speech ban pursues the underlying interest merely with regard to some groups, but not others who fit the same reasoning. Both of these pitfalls seem to be the result of the aim to achieve more general policy goals through criminal law instead of a focus on the worst setbacks relating to our fundamental rights. A liberalism of fear would recommend a more inclusive approach without delineated categories in exhaustive lists.

Closing out this chapter on the Dutch hate speech ban, I will first answer the two questions with which I started section 27: whether or not the Dutch hate speech ban serves the purpose of opposing discrimination, and if the employed group-based approach clashes with the central tenets of liberalism and the foundation of the modern human rights discourse. I subsequently discuss one proposed solution to the problems that I discerned while exploring the dilemmas relating to group-based approaches to hate speech. Lastly, I propose a solution of my own that is mindful of both the duty of the state to oppose discrimination, as well as the necessary

Essex, 1992), 303.

[177] Fish, *The Trouble with Principle*, 15; Heinze, *Hate Speech and Democratic Citizenship*, 49.

limitations when using the criminal justice system to address such practices. This solution starts from the premise that, within liberal states, hate speech bans need to pertain to all individuals who find themselves subject to harmful speech on the basis of personal characteristics. Instead of an exhaustive list with protected categories, it would therefore be the occurrence of any such harmful speech which allows as well as obligates a liberal state to intervene. If it could be reformed in this image, the Dutch hate speech ban might have more to offer than the current illusion of justice.

TWO QUESTIONS

I can be brief regarding the first question. Throughout these pages, it became apparent that harmful speech does exist and that it is intimately connected with discrimination. Additionally, the criminalization of personal insults will not always prove adequate, as hate speech towards groups does not always involve a distinct person.[178] Some form of a hate speech ban is therefore fitting to address this aspect of the tragedies connected with discriminatory assumptions and their consequences. At least, if we accept the evidence presented in the cited legal scholarship and parliamentary documentation. Furthermore, because the Dutch hate speech ban is part of the Criminal Code and subject to the confinements of the criminal justice system, this measure can only be employed when there is a tangible suspicion of harmful speech. As such, state interference is connected to realized manifestations of our vulnerabilities regarding discrimination. The Dutch hate speech ban is therefore an instrument that fits the duty of the state to oppose discrimination in the relationship between citizens. It does not follow, though, that the chosen group-based approach to discrimination does not clash with the necessary constraints that the universal and individual characterization of our fundamental rights entail. The Dutch statutes may be (partly) effective, but their current design can perhaps not be justified.

This brings me to the answer to the second question, which has already been alluded to in the preceding sections. Perhaps a kind of hate speech ban might be necessary to address harmful speech but group-based

[178] Noorloos, *Hate Speech Revisited*, 182, 219. Cf. article 266 of the Dutch Criminal Code.

approaches come with real drawbacks. As we learned from Frick's work in Chapter II, to forego the twofold foundation of the modern human rights discourse affects the rights that are ultimately realized. In the previous paragraphs, I chiefly focused my attention on the fact that the Dutch group-based approach to hate speech betrays the safeguards envisioned by the foundation of justice, that we established in the foregoing. However, the lack of attention to those persons that are arguably as much in need of protection against hate speech as the groups that are currently protected – or are susceptible to second-order discrimination – is perhaps as much an affront to the foundation of justice. Because, through this neglect, the Dutch state arguably does not fulfill the minimum of its duties with regard to one of the most basic demands of our fundamental rights. If we return to the line of thinking of a liberalism of fear, we can say that it is a setback with respect to one's rights and correspondingly a dignified life, if one is confronted with hate speech, as well as being the victim of the violence, hatred, or discrimination that can be incited through such expressions. A liberal state that recognizes this setback and aims to act on this but neglects many individuals, simply by restricting its protection to a few categories, does fail the minimum citizens can expect of their state. If one follows the interpretation of the modern human rights discourse that is a liberalism of fear, than liberal states should facilitate for every individual the very basic capability to live a life free of harmful speech, at least to a politically determined and sufficient level of severity. This second answer leaves us with a follow-up question: is there a better way to protect every citizen against hate speech on the basis of personal characteristics?

AN ALTERNATIVE TO GROUP-BASED APPROACHES TO HATE SPEECH

Let us first establish the parameters of the alternative approach to the opposition to hate speech that we are looking for. Within the modern human rights discourse, the individual is the focus in order to avoid a return to state-mandated privileges and disadvantages, be it for some persons or for

groups.[179] Protection against certain expressions as part of the creation of a societal atmosphere of tolerance – with the goal to maintain public order, oppose discrimination, and safeguard the dignity of those who would be excluded through harmful speech – may therefore be a necessary interest to be pursued by the state, but such protection should never pertain to an exhaustive list of delineated categories instead of all individuals.[180] In a liberal state, the protection against wrongful differential treatment on the basis of (assumed) personal characteristics should therefore be formulated as a collective instead of a group right. That being, a universal right jointly held by all those who are accosted on account of their (assumed) attributes.[181] Consequently, the right to be protected against discrimination on the basis of personal characteristics can be effectuated by everyone who needs it. As such, one group of individuals cannot prevail over another group, just because the former has a right the latter does not.[182] Only then can the right to be protected against discrimination be consistent with the other fundamental rights that we possess. As a result, the state can both respect its necessary constraints and fulfill its obligation to oppose discriminatory assumptions and their consequences in the daily lives of all its citizens.

If we apply this solution to the Dutch hate speech ban, we end up with a general right to the protection against harmful speech on the basis of (assumed) personal characteristics. This solution would be preferable to an expansion of the range of protected categories, such as suggested by Esther Janssen, among others. Because the latter remedy merely kicks the problems of a group-based approach to discrimination in general, and hate speech in particular, further down the line.[183] For example, the notable increase in hate speech towards the elderly as a group during the COVID-19 pandemic had not been foreseen in any of the expansions of the Dutch

[179] Martha Fineman, "Vulnerability and Inevitable Inequality," *Oslo Law Review* 4, no. 3 (2017): 146.
[180] Heinze, "Cumulative Jurisprudence and Hate Speech," 272–73; Waldron, *The Harm in Hate Speech*, 122–23.
[181] Jones, "Human Rights, Group Rights, and Peoples' Rights," 82, 89–91, 93–94; Kymlicka, *Contemporary Political Philosophy*, 373–74.
[182] Jones, "Human Rights, Group Rights, and Peoples' Rights," 93.
[183] Esther Janssen, "Strafbaarstelling van Groepsbelediging en Haatzaaien Afschaffen?," *Nederlands Juristenblad* 91, no. 7 (2016): 455–56; Heinze, *Hate Speech and Democratic Citizenship*, 43.

hate speech ban, as I have discussed them in this chapter.[184]

This solution, to make the protection against hate speech on the basis of personal characteristics available for all, also fits a liberalism of fear. To be excluded through harmful speech, or to be at risk of being violated through actions incited by such speech, can be said to be a manifested vulnerability that is connected to the frontiers of life on account of the severity of the consequences and the impact it has on the enjoyment of one's rights. It can therefore be argued that the state has to take action at a sufficient and actionable minimum in order to let all individuals participate in society without being subject to hate speech. And this minimum is important, as opposing harmful speech is not only a case of more state action but also of the state realizing the drawbacks inherent in the use of certain inadvisable approaches to hate speech. The state should act – it is true – but in the right way. Thus, the distinction between a liberalism of fear and the thick- or thin-conception of state tasks is again highlighted.[185]

Such a general hate speech ban has international credibility. Variants of such an approach, accompanied by mere illustrative lists of personal characteristics, are not only common in a number of countries but were also condoned by the Committee of Ministers of the Council of Europe in 1997.[186] Though, as aforesaid, there are also international obligations, entered into by the Netherlands, which require countries to address hate speech *at least* for certain groups.[187] But even in this regard, one can

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[184] Suzanne Meeks, "Gerontology in a Time of Pandemic: An Introduction to the Special Collection," *The Gerontologist* 61, no. 1 (2021): 1. The relevant Dutch statistics also seem to imply that hate speech goes beyond the current categories – or any list at all. Though the available information regarding persons who do not fit the listed categories of the current hate speech ban, including the elderly, is often limited, see: Gregor Walz and Bauke Fiere, *Discriminatiecijfers in 2021* (Rotterdam: Art. 1, 2022), 22, 27.

[185] Chapter III, section 16.

[186] Heinze, "Cumulative Jurisprudence and Hate Speech," 272–74; Eric Heinze, "The Construction and Contingency of the Minority Concept," in *Minority and Group Rights in the New Millennium*, ed. Deirdre Fottrell and Bill Bowring (The Hague: Martinus Nijhoff, 1999), 27, 29–30.

[187] Patrick Thornberry, *The International Convention on the Elimination of All Forms of Racial Discrimination: A Commentary* (Oxford: Oxford University Press, 2018), 267–71. But not always necessarily through criminal law, see: Paul Taylor, *A Commentary on the International Covenant on Civil and Political Rights: The UN Human Rights Committee's Monitoring of ICCPR Rights* (Cambridge: Cambridge University Press, 2020), 579, 585–86.

observe a move towards (at least) an expansion of the categories.[188]

To forego delineated categories or to use an open-ended list would be no panacea, but it could ameliorate or prevent the dilemmas as sketched in the previous section.[189] If such a general hate speech ban would be considered, we can assume that the legal and public debate concerning hate speech would surpass the current discussions about which groups are to be protected, and focus on a more fundamental matter: what speech is harmful and how should it be countered?[190] Thus, we stop fighting yesterday's war and focus solely on the marginalization that people face here and now, but with a necessary degree of flexibility – as we already saw that no-one has been able to predict the trajectory of hate.[191] To rework the Dutch hate speech ban in this way touches on another question: how tolerant can a liberal state in general be with regard to those who publicly disseminate intolerant opinions?[192] I will return to this question in Chapter VII.

Our fundamental matter beyond group-based approaches to hate speech elicits two concerns: is criminal law actually a fruitful way to oppose hate speech? And if it is, how do we prevent full-on censorship while protecting every individual against such speech? These two questions are linked and require a similar solution. As it is the harmful qualities of certain expressions which justify state action, then harm should also be the criterion that curtails the state.[193] Criminal statutes that concern hate speech would be strictly limited to those expressions which pertain to the underlying interest and marginalize individuals on the basis of (assumed) personal characteristics.[194] This is both a content- and form-related criterion:

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188 Jeroen Temperman, "Homofobe en Transfobe Haatuitingen onder het IVBPR en EVRM: Ontwikkelingen en Reflecties," *Tijdschrift voor Religie, Recht en Beleid* 13, no. 1 (2022): 32–33.
189 Minow, *Not Only for Myself*, 64, 80.
190 Ibid., 102.
191 Ibid., 155; Heinze, *Hate Speech and Democratic Citizenship*, 64–65, 153–54. See also: Chapter IV, section 25.
192 Chapter VII; John Rawls, *A Theory of Justice* (Cambridge: Belknap Press of Harvard University Press, 1971), 216–20; Popper, *The Open Society and Its Enemies*, 443, 581 n. 4.
193 Heinze, "Cumulative Jurisprudence and Hate Speech," 272–73, 275–76; Evans, "Religious Speech That Undermines Gender Equality," 357, 364; Nieuwenhuis, "Democratie, Groepsbelediging en Haatzaaien," 824.
194 Heinze, "Cumulative Jurisprudence and Hate Speech," 279.

the content of verbal marginalization is prohibited but the severity of expressions can play a part in the designation of speech as harmful. Within these considerations there is naturally ample room for debate. One can, for instance, discuss the merits of a protection model or a robust model of hate speech.[195] But this solution is not value neutral. Notwithstanding the aforementioned room for variation, it does unambiguously seek affiliation with the foundations of both liberalism and the modern human rights discourse, as is the purpose of my proposal for a liberalism of fear.[196]

If harm is to be our criterion, we also need to accept that criminal law cannot solve the matter of detestable expressions or the differences in societal power and influence which underpin the evil done by these utterings.[197] Because with harm, in the sense that it should be employed within criminal law, as the only basis for and limit on state action we would create a society which is only navigable for the strong.[198] And here the two goals of a liberalism of fear seem to collide: the criminal justice system needs to be curtailed, but it is therefore perhaps unfit to oppose all forms of speech that states can be expected to address at a minimum. To forego criminal law as the be all end all of discrimination law, though, does not mean that this interest has to be neglected nor that other avenues cannot be explored.[199] The right to be protected against discrimination, including hate speech, can also be effectuated through private law and governance.[200] As

[195] Tom Zwart, "Changing Course by Stealth: How the European Court of Human Rights Has Been Moving the Goalposts in the Area of Political Free Speech," in *Freedom of Speech under Attack*, ed. Afshin Ellian and Gelijn Molier (The Hague: Eleven International Publishing, 2015), 128–31.
[196] Heinze, *Hate Speech and Democratic Citizenship*, 22.
[197] Noorloos, *Hate Speech Revisited*, 26, 31; Heinze, *Hate Speech and Democratic Citizenship*, 23; Feinberg, *The Moral Limits of the Criminal Law – Volume 1*, 3.
[198] Patrick Deneen, *Why Liberalism Failed* (New Haven: Yale University Press, 2019), 148.
[199] Martha Fineman, "Beyond Equality and Discrimination," *SMU Law Review Forum* 73, no. 1 (2020): 58; Heinze, *Hate Speech and Democratic Citizenship*, 123, 144; Ronald Dworkin, "Foreword," in *Extreme Speech and Democracy*, ed. Ivan Hare and James Weinstein (Oxford: Oxford University Press, 2009), viii.
[200] Evans, "Religious Speech That Undermines Gender Equality," 371; Heinze, *Hate Speech and Democratic Citizenship*, 29, 129, 134; Janssen, *Faith in Public Debate*, 396; Ian Leigh, "Homophobic Speech, Equality Denial, and Religious Expression," in *Extreme Speech and Democracy*, ed. Ivan Hare and James Weinstein (Oxford: Oxford University Press, 2009), 383.

these kinds of state conduct are less drastic and more versatile than the criminal code, there is a fair chance that these pathways can offer solutions beyond the illusion of justice as dissected in this chapter. But opposing discrimination through private law comes with its own challenges with regard to the foundation of justice in liberal states and my interpretation of a liberalism of fear. These challenges are the subject of the next chapter.