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Hate Speech Bans, Democracy, and Political Legitimacy

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Laws prohibiting discrimination on the basis of characteristics such as race, ethnicity, religion, sex, or sexual orientation are an essential means by which modern liberal democracies promote equality and protect human dignity. Consistent with these laudable goals, most liberal democracies, with the notable exception of the United States, also prohibit hate speech, including expression that demeans people based on characteristics protected by antidiscrimination laws. Ironically, however, hate speech restrictions can undermine the legitimacy of antidiscrimination laws, both in terms of their popular acceptance but even more crucially with respect to the morality of their enforcement. For instance, laws forbidding people from expressing the view, as is the case in several European jurisdictions, that homosexuality is immoral or disordered, can destroy the moral justification of enforcing laws against sexual-orientation discrimination against religious dissenters. Conversely, the ability of Americans to freely oppose antidiscrimination laws by publicly expressing bigoted ideas about groups protected by these laws strengthens the legitimacy of enforcing these provisions even when doing so infringes upon deeply held religious convictions. In explicating this untoward effect of hate speech laws on the legitimacy of antidiscrimination measures, this Article explores more generally the relationship between free speech and political legitimacy, thereby explaining

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and supporting American free speech doctrine's exceptional antipathy to viewpoint-discriminatory laws of any variety.

I. INTRODUCTION

Free speech is highly valued in liberal democracies because it promotes multifarious liberal and democratic values, including respect for individual autonomy and self-realization,[1] exposure of government incompetence and malfeasance,[2] and the promotion of a well-informed electorate.[3] There is, however, another crucial purpose of free speech that curiously is often omitted from the litany of values recognized by courts and commentators:[4] the opportunity for each individual to participate as an equal in the public conversation about society's collective decisions. Ronald Dworkin has offered a particularly lucid and powerful explanation of the importance of this participatory interest: "[I]t is illegitimate," Dworkin contends, "for governments to impose a collective or official decision on dissenting individuals, using the coercive powers of the state, unless that decision has been taken in a manner that respects each individual's status as a free and equal member of the community."[5] In his view, a fair democracy

1. *See, e.g.*, C. Edwin Baker, *Autonomy and Free Speech*, 27 CONST. COMMENT. 251 (2011); Martin Redish, *The Value of Free Speech*, 130 U. PA. L. REV. 591 (1982); Seana Valentine Shiffrin, *A Thinker-Based Approach to Freedom of Expression*, 27 CONST. COMMENT. 283 (2011).

2. *See, e.g.*, Vincent Blasi, *The Checking Value in First Amendment Theory*, 2 AM. B. FOUND. RES. J. 521 (1977).

3. *See, e.g.*, Animal Defenders Int'l v. Sec'y of State for Culture, Media and Sport, [2008] U.K.H.L. 15, ¶ 28 (UK), http://www.5rb.com/wp-content/uploads/2013/10/R-Animal-Defenders-International-v-Culture-Secretary-HL-12-Mar-2008.pdf; ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT (1948). In addition, freedom of expression has famously been defended as promoting truth discovery. *See, e.g.*, JOHN MILTON, AREOPAGITICA—A SPEECH FOR THE LIBERTY OF UNLICENSED PRINTING (1644); JOHN STUART MILL, ON LIBERTY (1859). Despite the vital importance of truth discovery for human progress, it is neither an essentially democratic nor liberal value.

4. For example, a leading constitutional casebook fails to mention this value in an otherwise comprehensive survey of the values underlying the First Amendment's Free Speech Clause. *See* KATHLEEN M. SULLIVAN & NOAH FELDMAN, CONSTITUTIONAL LAW 888–93 (18th ed. 2013). The same is true of judicial explanations of the value of freedom of expression. For instance, Lord Bingham's eloquent defense of the democratic value of free speech in *Animal Defenders International* focuses exclusively on the audience interest in making "a sound choice when, in the course of the democratic process it has a right to choose." *Animal Defenders Int'l*, ¶ 28.

5. RONALD DWORKIN, *Foreword* to EXTREME SPEECH AND DEMOCRACY, vii (Ivan Hare & James Weinstein eds., 2009). Robert Post, whose seminal work has elucidated the vital role of speaker participation in democratic self-governance, has also

requires that each citizen have not just a vote in deciding the will of the majority but also "a voice":

> [A] majority decision is not fair unless everyone has had a fair opportunity to express his or her attitudes or opinions or fears or tastes or presuppositions or prejudices or ideals, not just in the hope of influencing others (though that hope is crucially important), but also just to confirm his or her standing as a responsible agent in, rather than a passive victim of, collective action. The majority has no right to impose its will on someone who is forbidden to raise a voice in protest or argument or objection before the decision is taken.[6]

Dworkin rejects the argument that there should be an exception to this principle based on the claim that no one has a right "to pour the filth of . . . race-hatred into the culture in which we all must live." Rather, he insists that we cannot suppress such expression "without forfeiting our moral title to force such people to bow to the collective judgments that do make their way into the statute books." We may and should, in his view, adopt laws to protect people from "specific and damaging consequences" of racism and other forms of intolerance in employment, education, housing, or the criminal process, among other settings. Yet we must not, he cautions, "try to intervene further upstream, by forbidding any expression of the attitudes or prejudices that we think nourish such unfairness or inequality." For if we intervene prematurely in the process through which collective opinion is formed, "we spoil the only democratic justification we have for insisting that everyone obey these laws, even those who hate and resent them."[7]

Similarly, I have written that "[i]f an individual is excluded from participating in public discourse because the government disagrees with the speaker's views or because it finds the ideas expressed too disturbing or offensive, any decision taken as a result of that discussion would, as to such an excluded citizen, lack

emphasized the connection between free speech and political legitimacy. Post thus explains that "public discourse is comprised of those processes of communication that must remain open to the participation of citizens if democratic legitimacy is to be maintained." Robert Post, *The Constitutional Status of Commercial Speech*, 48 UCLA L. REV. 1, 7 (2000); *see also* C. Edwin Baker, *supra* note 1, at 262–69 (2011); James Weinstein, *Free Speech and Political Legitimacy: A Response to Ed Baker*, 27 CONST. COMMENT. 361, 369–71 (2011).

6. DWORKIN, *supra* note 5, at vii.

7. *Id.* at vii, viii.

legitimacy."[8] So if a person is forbidden from expressing a particular view about a proposed tax increase, whether the nation goes to war, immigration policy, or any matter of public concern, then to that extent and with respect to that citizen "the government is no democracy, but rather an illegitimate autocracy."[9]

Jeremy Waldron has vigorously challenged the view that "upstream" hate speech restrictions deprive "downstream" antidiscrimination measures of legitimacy.[10] Specifically, he questions how literally we should take the claim that legitimacy is "spoiled" by hate speech restrictions. For instance, Waldron asks, does a wealthy landlord really have no obligation to obey a law forbidding him from discriminating against English families of South Asian descent just because there is also a law that prohibits him from publishing virulently anti-Pakistani views? Or does the existence of this restriction make it morally wrong for government officials to enforce these antidiscrimination measures against the landlord?[11] Waldron concludes that the most plausible interpretation of this claim is that "the legitimacy of any given law is itself a matter of degree and that, on the moderate version of Dworkin's argument, the enforcement of hate speech laws *diminishes* the legitimacy of other laws without destroying it altogether."[12] In response to this criticism, Dworkin agreed that "[o]n balance Britain is entitled to enforce such laws, I think, but we are left with a deficit in legitimacy—something to regret under that title—because of the censorship."[13]

But here the agreement ends, for Waldron does not believe that we have much, if anything, to regret on this score. Rather, in his view, most hate speech restrictions in democratic countries "bend over backward" to assure that speakers have a lawful way to "express[] something like the propositional content" of bigoted

8. James Weinstein, *Participatory Democracy and Free Speech*, 97 VA. L. REV. 491, 498 (2011).

9. *Id.*

10. Jeremy Waldron, *Hate Speech and Political Legitimacy* [hereinafter Waldron, *Political Legitimacy*], *in* THE CONTENT AND CONTEXT OF HATE SPEECH 329, 339–40 & n.43 (Michael Herz & Peter Molnar eds., 2012); Jeremy Waldron, THE HARM IN HATE SPEECH (2012) [hereinafter WALDRON, HATE SPEECH].

11. Waldron, *Political Legitimacy*, *supra* note 10, at 332.

12. *Id*. at 333.

13. *Id.* at 334 (quoting email from Ronald Dworkin to Jeremy Waldron, Oct. 4, 2009, 21:34 EST (on file with Waldron)).

views that become illegal only "when expressed as vituperation."[14] He therefore suggests that hate speech bans have only "a minimal effect on legitimacy."[15] In addition, Waldron contends that the weightiness of "protecting the basic social standing . . . of members of vulnerable groups" undercuts the credibility of the claim that hate speech restrictions impair the legitimacy of these laws.[16] Waldron usefully advances the inquiry by being among the first to directly engage, rather than talking past,[17] what to my mind is the most powerful argument against hate speech bans.[18] He is also to be credited with properly criticizing Dworkin and me for not adequately specifying what we meant in claiming that hate speech restrictions can deprive downstream antidiscrimination laws of legitimacy. The primary purpose of this Article is to fill this lacuna by explaining in detail how upstream speech restrictions can deprive downstream laws of legitimacy. I am enormously grateful to Waldron for spurring me to do so.

In several other crucial respects, however, Waldron's critique is deeply flawed. To begin with, he underestimates the extent to

14. *Id.* at 335.

15. *Id.*

16. *Id.* at 336. Dworkin wrote a brief (just over three-page) reply to Waldron's critique confirming that he does believe legitimacy is "a matter of degree." Ronald Dworkin, *Reply to Jeremy Waldron*, *in* THE CONTENT AND CONTEXT OF HATE SPEECH, *supra* note 10, at 341–42. Dworkin does not, however, discuss whether there may be circumstances in which the deficit to legitimacy resulting from a speech restriction might be so severe as to render immoral the enforcement of a downstream law. Rather, the main thrust of his reply objects to Waldron's premise that the cost of legitimacy worked by a speech restriction can be properly balanced against the cost to vulnerable minorities. *Id.* at 342–43.

17. *See e.g.*, Ioanna Tourkochoriti, *Could Hate Speech Be Protected? Group Defamation, Party Bans, Holocaust Denial and the Divide Between (France) Europe and the United States*, 45 COLUM. HUM. RTS. L. REV. 552, 590–93 (2014); Alexander Tsesis, *Dignity and Speech: The Regulation of Hate Speech in a Democracy*, 44 WAKE FOREST L. REV. 497, 501–02, 508, 511, 514, 532 (2009).

18. Subsequent to Waldron, another scholar has also vigorously challenged Dworkin's and my view that hate speech restrictions can deprive antidiscrimination measures of political legitimacy. *See* ALEXANDER BROWN, HATE SPEECH LAW: A PHILOSOPHICAL EXAMINATION (2015). (Brown's critique is discussed in Part IV C, *infra*.) *Cf.* Katharine Gelber, *Freedom of Political Speech, Hate Speech and the Argument from Democracy: The Transformative Contribution of Capabilities Theory*, 9 CONTEMP. POL. THEORY 304, 309–11 (2010) (discussing Robert Post's claim that hate speech laws interfere with systemic legitimacy); Steven H. Shiffrin, *Freedom of Speech and Two Types of Autonomy*, 27 CONST. COMMENT. 337, 339 (2011) (challenging C. Edwin Baker's view that restrictions on hate speech diminish systemic legitimacy). *See infra* text accompanying notes 28–29 (discussing distinction between systemic legitimacy and legitimacy of a particular law); *see also infra* note 165 (discussing the effect of hate speech laws on systemic legitimacy).

which even restrictions on extremely vituperative bigoted speech can diminish the legitimacy of downstream antidiscrimination measures. But much more crucially, he is mistaken in his assumption that such minimal restraint is all that the laws of most democracies actually impose on the ability of speakers to challenge contemporary orthodoxy about such matters as race, religion, and sexual orientation.[19] Far from imposing constraints only on "viciously vituperative" expression of bigoted ideas, hate speech laws and other forms of speech restriction have been employed, for instance, to punish people who without resort to vile epithets or other uncivil language criticized Islam or homosexuality.

In this Article I will argue that in some instances upstream restrictions on hate speech are so severe that they not only diminish but can potentially annihilate the legitimacy of downstream antidiscrimination laws.[20] Specifically, I will discuss the potential of these speech restrictions to destroy any political obligation of those restrained by these laws to obey the downstream antidiscrimination measures. Much more problematically, hate speech restrictions can render immoral the otherwise appropriate application of antidiscrimination laws to dissenters in cases involving competing fundamental interests such as religious liberty. And even in cases where these speech restrictions do not annihilate the legitimacy of these antidiscrimination laws, they can so profoundly diminish their legitimacy as to leave us with something very much to regret. This unfortunate effect on the legitimacy of antidiscrimination laws, in turn, tells strongly against the propriety of hate speech restrictions in a free and democratic society.

Part II explores the relationship between free speech and political legitimacy. It discusses, first, how the opportunity to participate as an equal in the political process is essential to such legitimacy and then explains the vital connection between free speech and democratic participation. Part III considers the effect on the legitimacy of downstream antidiscrimination measures on

19. Although Waldron limits his discussion in both works—cited *supra* note 10—to restrictions on racist speech, I will include in my discussion recent cases dealing with punishment of people for condemning homosexuality as immoral or disordered.

20. In this Article I use the term "annihilate" or "destroy" to signify the complete elimination, as opposed to diminishment short of complete elimination, of the legitimacy of a downstream law worked by an upstream speech restriction.

the assumption that the upstream restrictions on hate speech are, as Waldron claims, limited to highly vituperative hate speech, such as attempts to stir up racial hatred by referring to members of minorities groups as "cockroaches" or "rats." It concludes that the effect of legitimacy resulting from such limited restrictions would be modest, though not as minimal as Waldron claims. Part IV begins by showing that, contrary to the assumption in Part III, in actual practice hate speech restrictions have been used to punish far more than just highly virulent hate speech. Rather, these restrictions have been applied, for instance, to statements that guest-workers should be expelled from a country; that homosexuality is abnormal; or that in today's society the Prophet Mohammad would be considered a child molester. This Part then explores in detail the impact these upstream hate speech restrictions have on the legitimacy of downstream antidiscrimination laws. It argues that in some cases these speech restrictions have the potential to destroy any political obligation dissenters might otherwise have to obey these antidiscrimination measures. Even more perniciously, these speech restrictions have the potential to render immoral the enforcement of antidiscrimination laws against dissenters.

II. FREE SPEECH AND POLITICAL LEGITIMACY

A. POLITICAL LEGITIMACY AND DEMOCRATIC PARTICIPATION

Political legitimacy refers to the conditions that entitle a political entity to govern, and in particular, to use coercion to enforce its laws.[21] Additionally, indeed some would say correlatively,[22] it refers to the conditions that create an obligation

21. *See, e.g.*, Christopher Wellman, *Liberalism, Samaritanism, and Political Legitimacy*, 25 PHIL. & PUB. AFF. 211, 211–12 (1996).

22. *See, e.g.*, MICHAEL HUEMER, THE PROBLEM OF POLITICAL AUTHORITY 12–14 (2012); A. John Simmons, *Justification and Legitimacy*, 109 ETHICS 739, 746 (1999) (arguing that "state legitimacy is the logical correlate of various obligations, including subjects' political obligations"). *But see, e.g.*, Rolf Sartorius, *Political Authority and Political Obligation*, 67 VA. L. REV. 3, 4 (1981) (concluding that "those in political power may often correctly claim a moral right to rule but that those under their power may not, under any philosophically interesting conditions, be said to have a correlative moral obligation to obey the law"); *see also* Wellman, *supra* note 21, at 212 n.1 (contending that "the correlative of a state's moral right to coerce [is not] a citizen's moral duty to obey, but . . . merely a citizen's lack of right to not be coerced").

for people to obey the laws of a political entity.[23] Political legitimacy has both a descriptive and normative sense. Descriptively, the term refers to the people's belief that the political entity asserting authority over them has a right to govern.[24] In addition, it refers to their belief that they have an obligation to obey[25] the laws enacted by this entity.[26] Normatively, political legitimacy refers to the objective criteria that morally entitle a political entity to govern, especially those that generate an obligation to obey the laws and, most crucially, that justify the use of coercion to enforce these laws.[27]

23. In addition to Dworkin and Waldron, other prominent thinkers who have written on this enduringly difficult subject include Hobbs, Locke, Rousseau, Hume, Kant, Mill, Weber, Habermas, Dahl, Rawls, and Raz. *See* Fabienne Peter, *Political Legitimacy*, STANFORD ENCYCLOPEDIA OF PHILOSOPHY (2010).

24. *See, e.g.*, MAX WEBER, THE THEORY OF SOCIAL AND ECONOMIC ORGANIZATION 130–31, 328 (1964).

25. *Id.* at 124; *see also* TOM TYLER, WHY PEOPLE OBEY THE LAW 161 (2d ed. 2006). In an illuminating recent book examining the role of coercion in law, Frederick Schauer carefully examines what it means to "obey the law." *See* FREDERICK SCHAUER, THE FORCE OF LAW 48–54, 42, 48 (2015). Schauer distinguishes obeying a law *just because it is the law*, from obeying a law to avoid legal sanctions. *Id.* at 42, 52 (Obeying a law "qua law" or because of "the very fact of the law," are other common terms for obeying the law for reasons unrelated to the law's sanctions. I take Waldron's specification of a "*political* obligation to obey the law[]," Waldron, *Political Legitimacy*, *supra* note 10, at 332 (emphasis added), to mean obedience just because it is the law.) Schauer also usefully distinguishes *obeying* a law from acting consistently with the law for various "law-independent" reasons, including having no desire to engage in the prohibited behavior (*e.g.*, cannibalism) or because of moral constraints (*e.g.*, not stealing a dearly coveted object because it is wrong to do so). SCHAUER, *supra* note 25, at 49–50. Having thus explicated precisely what it means to obey the law, Schauer then argues at length that there is little reason to believe that people in fact obey the law just because it is the law. *Id.* at 57–74, 94, 131.

26. Descriptive legitimacy in the sense of "the willingness to identify with and accept [a law] which we think mistaken" is sometimes referred to as sociological legitimacy. *See, e.g.*, Frederick Schauer, *Constitutions of Hope and Fear*, 124 YALE L.J. 528, 537–38 & n.34 (2014) (book review). Although Waldron notes that in social science "legitimacy" often means "little more than. . . popular support," Waldron, *Political Legitimacy*, *supra* note 10, at 332, he correctly assumes that Dworkin is using the term in its normative sense (*see infra* note 27) and thus focuses his critique on this sense of the term. In an incisive monograph, Eric Heinze criticizes what in his view is Waldron's overall reliance on sociological notions of legitimacy in discussing hate speech bans. *See* ERIC HEINZE, HATE SPEECH AND DEMOCRATIC CITIZENSHIP 44, 59, 86, 107 n.24, 112 n.148 (2016). In doing so, however, Heinze insufficiently acknowledges Waldron's engagement, noted above, with Dworkin's normative approach on Dworkin's own normative ground. *Id.* at 44.

27. *See, e.g.*, HUEMER, *supra* note 22, at 5–9; Simmons, *supra* note 22, at 746. Waldron assumes that Dworkin means legitimacy as "a normative property—either the existence of a political obligation to obey the laws or the appropriateness of using force to uphold them." Waldron, *Political Legitimacy*, *supra* note 10, at 332. This take on legitimacy is consistent with Waldron's own concept of legitimacy. *See, e.g.*, Jeremy Waldron, *Theoretical Foundations of Liberalism*, 37 PHIL. Q. 127, 133, 135–36, 140 (1987). In

The focus of most of the literature has been on systemic legitimacy, that is, the conditions that make a particular legal system legitimate.[28] Although I will briefly touch on how free speech restrictions can impair systemic legitimacy, this Article will focus on the impact that these restrictions can have on the legitimacy of particular downstream laws. Specifically, I will examine the potential of upstream speech restrictions to undermine, and in some cases even to destroy, (a) the obligation of those restrained by the speech restriction to obey a downstream antidiscrimination law; and (b) the morality of enforcing the downstream measure against those whose participatory rights have been impaired by the upstream speech restriction.[29]

An enormous amount has been written attempting to identify the objective criteria that justify a political entity to govern, as well those that generate an obligation to obey the laws enacted by that entity. The most prevalent theories are ones attempting to ground legitimacy in consent (either actual[30] or hypothetical[31]),

contrast, Post's concern is primarily with descriptive legitimacy. *See* Robert Post, *Equality and Autonomy in First Amendment Jurisprudence*, 95 MICH. L. REV. 1517, 1523 (1997) ("The value of collective self-determination [inheres] in the people's . . . warranted conviction that they are engaged in the process of deciding their own fate."). As is often the case with seemingly sharp conceptual distinctions, however, there is a point at which the descriptive and normative senses of legitimacy converge. Thus Post refers to a "warranted" conviction. *Id. Accord* Weinstein, *supra* note 5, at 362 (arguing that citizens will feel an obligation to obey the law if they have the *warranted* conviction that the legal system is, on the whole, moral). Despite such areas of overlap, I will for the sake of economy and clarity consider the descriptive and normative senses of legitimacy separately in this Article.

28. *See, e.g.*, Baker, *supra* note 1, at 251; Weinstein, *supra* note 5, at 369–70; Post, *supra* note 27, at 1523; *Interview with Robert Post in* THE CONTENT AND CONTEXT OF HATE SPEECH, *supra* note 5, at 25 (arguing that "the state has *pro tanto* ceased to be legitimated" if it excludes people from the process of public opinion formation); *see also* HEINZE, *supra* note 26, at 46 (claiming that it is "the citizen prerogative of non-viewpoint-punitive expression within public discourse" which legitimates states, not qua state, but rather "as democracies").

29. Unlike Waldron and Dworkin, I will consider the impact of speech restrictions on the obligation to obey the law from a descriptive (or sociological) perspective as well as a normative one. With respect to the morality of enforcement, however, the inquiry will be purely normative. *See infra* note 89.

30. *See, e.g.*, Simmons, *supra* note 22.

31. *See, e.g.*, Cynthia Stark, *Hypothetical Consent and Justification*, 97 J. PHIL. 313 (2000); Waldron, *Theoretical Foundations*, *supra* note 27, at 138–46. As Waldron uses the term in this article, legitimacy encompasses the moral justification for imposition or enforcement of the law but not the political obligation to obey the law, which he considers a separate concept. *Id.* at 136. *Cf.* Waldron, *Political Legitimacy*, *supra* note 10, at 332 (referring to legitimacy as "either the existence of a political obligation to obey the laws or the appropriateness of using force to uphold them"). Terminology aside, Waldron finds hypothetical consent not useful as a basis for generating a political obligation to obey the

utilitarianism,[32] fair play,[33] and democracy.[34] It is a particular version of the democratic criterion that I will adopt in this article. Specifically, I will argue that the equal opportunity to participate in the political process, including in the public discussion of collective decisions, is essential to political legitimacy.

As Robert Dahl has explained: "The democratic process is generally believed to be justified on the ground that people are entitled to participate as political equals in making binding decisions, enforced by the state, on matters that have important consequences for their individual and collective interests."[35] Individuals, moreover, are entitled to participate as political equals not just to vindicate their personal interests narrowly defined, but also in deciding what in their judgment is best for society as a whole.[36] As deep and as ubiquitous as this commitment to political equality may be in modern democracies, the connection between an entitlement to participate as political equals and legitimacy is not obvious. The first link in the chain is the fundamental precept, an inheritance from the Enlightenment, that each individual in society is of equal moral worth and therefore is entitled to have his or her interests treated with equal respect by government.[37] The next link implicates the age-old problem of justifying the use of coercion to enforce a law against a free and autonomous person who reasonably disagrees with that

law. Waldron, *Theoretical Foundations*, *supra* note 27, at 138–39. In contrast, he finds hypothetical consent helpful for justifying the imposition of the laws and, in addition, argues that political liberalism provides a solid basis for positing hypothetical consent of the governed. *Id.* at 140–46.

32. *See, e.g.*, Kenneth Binmore, *A Utilitarian Theory of Political Legitimacy*, *in* VALUES AND INSTITUTIONS IN ECONOMIC ANALYSIS 101–32 (Avner Ben-Ner & Louis Putterman eds., 2000).

33. *See, e.g.*, Edward Song, *Acceptance, Fairness, and Political Obligation*, I8 LEGAL THEORY 209 (2012).

34. *See, e.g.*, Joshua Cohen, *Deliberation and Democratic Legitimacy*, *in* THE GOOD POLITY: NORMATIVE ANALYSIS OF THE STATE, (Alan Hamlin & Phillip Petit eds., 1989).

35. ROBERT DAHL, CONTROLLING NUCLEAR WEAPONS: DEMOCRACY VERSUS GUARDIANSHIP 5 (1985).

36. *See generally* JOHN RAWLS, A THEORY OF JUSTICE 348 (1971) (explaining that the freedom of political speech is a basic liberty because it involves "the free public use of our reason in all matters that concern the justice of the basic structure and its social policies").

37. *See, e.g.*, IMMANUEL KANT, METAPHYSICS OF MORALS (1797) (M. Gregor trans., 1991); JOHN LOCKE, SECOND TREATISE OF GOVERNMENT ch.2 §§ 4, 6, 8, 9, 52 (1689) (C.B. Macpherson ed., 1980). See also the statement of Thomas Rainboro during the 1647 Putney debates: "Really I think that the poorest he that is in England has a life to live as the richest he." (quoted in OLD RIGHTS AND NEW 54 (Robert A. Licht ed., 1993)).

law. There may well be no completely satisfactory answer to this conundrum. But because the "democratic process . . . 'equally' respects people as properly having a 'say' in the rules they live under," democracy is "arguably the best that can be done . . . for justifying the legitimacy of the social order."[38]

As a descriptive matter, empirical studies suggest that "an opportunity to take part in [a] decision-making process,"[39] in which citizens are able "to present their views"[40] and are treated with "dignity and respect,"[41] increases the participants' feeling that they "ought to obey the law,"[42] including laws with which they disagree.[43] As a normative matter, the connection between democratic participation and legitimacy becomes vivid if we look at the other side of the coin, that is, to situations in which some citizens have been *denied* an opportunity for equal participation. Selectively denying some individuals an equal opportunity to have their "say" about a proposed law disrespects their equal moral worth; enforcing such a law against dissenters adds injury to insult by disregarding their interests.[44] So even if the opportunity for equal political participation is not a *sufficient* condition to entitle government to use coercion to enforce its laws or to generate even a *prima facie* obligation of citizens to obey these laws, it would seem to be a *necessary* condition for such normative political

38. Baker, *supra* note 1, at 262, 263 (2011).

39. TYLER, *supra* note 25, at 163. The processes considered in these studies were judicial proceedings and interaction with police. Other studies focusing on legitimacy and the political process suggest that citizens having a "voice" in the process by which a law is enacted increases their belief that the law ought to be obeyed. *See* Tom R. Tyler, *Multiculturalism and the Willingness of Citizens to Defer to Law and to Legal Authorities*, 25 LAW & SOC. INQUIRY 983, 995–96, 1007 (2000).

40. TYLER, *supra* note 25, at 147.

41. *Id.* at 178.

42. *Id.* at 161–62. Additionally, these studies find that people's increased belief in their having an obligation to obey the law results in their voluntary compliance with the law. *Id.* at 4, 27, 57, 62, 66. Conversely, "[i]f people have an experience not characterized by fair procedures, their later compliance will be based less strongly on the legitimacy of the legal authorities." *Id.* at 172.

43. *Id.* at 64. Primarily because in his view these studies do not attend carefully enough to what it means to "obey the law," Schauer is extremely skeptical of Tyler's conclusion that people in fact feel an obligation to obey the law just because it is the law, especially laws with which they disagree. *See* SCHAUER, *supra* note 25, at 57–69. Schauer does allow, however, that the studies provide evidence that "a perception of legitimacy increases the likelihood that people will obey laws they think are good but that 'cost' them [something]." *Id.* at 60.

44. In addition, as I have discussed elsewhere, such selective denial of participatory rights tends to diminish the legitimacy of the entire legal system. *See* Weinstein, *supra* note 5, at 369.

legitimacy.[45] This claim, however, requires qualification and explanation.

By way of qualification, the equal opportunity to participate in the political process is a necessary condition of normative legitimacy only with respect to people, both collectively and individually, who are capable of self-governance. Thus the lack of popular participation does not render a government illegitimate in societies (if any) where the people are incapable of self-governance, just as in a democracy it is not illegitimate to exclude from full political participation those incapable of self-governance, such as children or profoundly mentally retarded adults.[46] By way of explanation, even where a government is normatively illegitimate because it does not permit democratic participation to a populace capable of self-government, it does not follow that coercive enforcement of every law is immoral. Such a state of affairs might, to use Waldron's phrase, entitle the people "to rise up in revolution"[47] against such an autocratic regime. But even this profound lack of legitimacy does not make it immoral for the government to use coercion to enforce ordinary criminal laws such as those forbidding murder, arson, or rape.[48] So long as a regime claims that it has a right to govern and asserts a monopoly on the use of violence that such a claim entails, its failure to protect people from ordinary criminal activity would only exacerbate the moral deficit resulting from its unjustified claim of a right to govern.[49] Still, people capable of self-governance living under autocratic regimes might not have, in

45. *Accord* Waldron, *Theoretical Foundations*, *supra* note 27, at 140 (arguing that consent of the governed is a necessary though perhaps not a sufficient condition of political legitimacy in the sense of justifying the morality of the enforcement of the laws); HEINZE, *supra* note 26, at 80 ("The citizen's prerogative of non-viewpoint-punitive expression within public discourse stands not as a sufficient condition, but only as one necessary condition for democratic legitimacy.").

46. *See* JOHN RAWLS, POLITICAL LIBERALISM 18–20 (1993).

47. *See* Waldron, *Political Legitimacy*, *supra* note 10, at 332.

48. *See* HUEMER, *supra* note 22, at 137.

49. This is why Waldron is mistaken that Dworkin's view about the potential of hate speech restrictions to rob downstream laws of legitimacy "seems to imply that it is wrong for the police to pursue, arrest and indict" someone who had assaulted a Muslim cab driver in the wake of the 7/7 London bombings. WALDRON, HATE SPEECH, *supra* note 10, at 185. Thus Dworkin writes that he agrees with Waldron that his argument "does not suppose that 'laws against racial violence or criminal damage' are in any way compromised when expression of racial hatred are banned" and adds that he does "not understand why [Waldron] thinks they might be." Dworkin, *supra* note 16, at 343.

Waldron's words, any "*political* obligation to obey the law,"[50] that is, an obligation to obey the law qua law or just because it is the law.[51] But this does not diminish the *moral* duty of people living in illegitimately autocratic regimes to refrain from unjustifiably inflicting grievous injury on each other.

In contrast to laws that that are morally imperative in any society, laws about which there can be reasonable disagreement are subject to being rendered illegitimate if people capable of self-government are denied the equal opportunity to participate in the process by which they are enacted.[52] And as I shall elaborate, where the morality of a law cannot only be reasonably questioned but also where its moral status is both contestable and highly contentious, the lack of an opportunity to participate can have grave consequences for political legitimacy.

B. DEMOCRATIC PARTICIPATION AND FREE SPEECH

It is easily perceived how denying the right to vote to a particular person, or to a particular group of people, can violate the fundamental democratic precept of formal political equality, and why such a violation can have grave implications for political legitimacy. Curiously, however, it is often not appreciated that restrictions on speech can just as surely violate the commitment to political equality and hence have severe repercussions for legitimacy.[53] Examining the relationship among free speech, public opinion, and democratic self-governance will elucidate how speech restrictions can diminish political legitimacy.

As Hans Kelsen explained in the middle of the last century:

> The will of the community, in a democracy, is always created through a running discussion between majority and minority, through free consideration of arguments for and against a certain regulation of a subject matter. This discussion takes place not only in parliament, but also, and foremost, at political

50. *See* Waldron, *Political Legitimacy*, *supra* note 10, at 332 (emphasis added).

51. *See supra* note 25.

52. *Accord* JEREMY WALDRON, THE DIGNITY OF LEGISLATION (1999).

53. Thus, for example, Fabienne Peter's otherwise useful *Democratic Legitimacy* entry in THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY, *supra* note 23, does not even mention free speech, let alone its relation to the subject of her book. *Cf.* HEINZE, *supra* note 26, at 49, who as if to compensate for such omissions argues that since voting derives from "the more fundamental citizen prerogative of expression within public discourse," the interest in participating in public discourse "surpasses even the necessary procedure of voting as democracy's defining element."

> meetings, in newspapers, books, and other vehicles of public opinion. A democracy without public opinion is a contradiction in terms.[54]

It is through public opinion that the people, the ultimate governors in a democratic society, control their representatives between elections. The speech by which this public opinion is formed—expression that courts and commentators often refer to as "public discourse"[55]—includes more than "political speech in the narrow sense" but embraces more generally "speech concerning the organization and culture of society."[56] It is a commonplace that laws that forbid people from expressing certain viewpoints can impede democracy by depriving the electorate of information needed to make decisions.[57] What is not as well appreciated is that such viewpoint-based speech restrictions on public discourse infringe the fundamental interest in equal political participation of those who want to express these forbidden views. To the extent that such censorship prevents people from expressing what they believe is best for society, it is insulting; in so far the speech restriction impairs their ability to promote or protect their own self-interest, it is also fundamentally unfair.[58]

54. HANS KELSEN, A GENERAL THEORY OF LAW AND STATE 287–88 (A. Wedberg trans., 1945).

55. *See, e.g.*, Cohen v. California, 403 U.S. 15, 22 (1971); Robert C. Post, *The Constitutional Concept of Public Discourse: Outrageous Opinion, Democratic Deliberation, and* Hustler Magazine v. Falwell, 103 HARV. L. REV. 601 (1990); *see also* HEINZE, *supra* note 26, at 22 (explaining that the thesis of the book is that "democracy's legitimating expressive conditions derive from the *citizen's prerogative of non-viewpoint-punitive expression within public discourse*").

56. ERIC BARENDT, FREEDOM OF SPEECH 189 (2005).

57. *See, e.g.*, MEIKLEJOHN, *supra* note 3, at 27; First Nat. Bank of Boston v. Bellotti, 435 U.S. 765, 785–86 (1978).

58. As discussed *supra* note 31, Waldron grounds political legitimacy not in the right of equal political participation as I do but rather in hypothetical consent. Significantly, however, the basis for the hypothetical consent posited by Waldron is liberalism, which as he notes includes a commitment to freedom of speech among a host of other civil liberties. Waldron, *supra* note 27, at 130. So despite our differences concerning the deep normative underpinnings of a free speech principle in a free and democratic society, there is an overlapping consensus in our views that freedom of speech is essential to political legitimacy. Since Waldron has never comprehensively spelled out the scope or weight of the free speech principle that he believes is essential to liberalism, it is not possible to determine with any certainty the extent of this overlapping consensus. Suggesting that this overlap is substantial is that free speech theories based in liberty tend to encompass even more expression than is covered by speaker-oriented participatory democracy theories. *See* Weinstein, *supra* note 5, at 366 (discussing the overlapping consensus regarding political legitimacy between a free speech theory grounded in formal autonomy and one based in participatory democracy but noting greater scope of expression encompassed by

It is the thesis of this Article that the infringement of this fundamental interest of equal political participation can have severe consequences not just for the legitimacy of the legal system but also for individual downstream laws.[59] To flesh out this proposition, I will examine how hate speech restrictions diminish, and in some cases destroy, the legitimacy of downstream antidiscrimination laws.[60] I will include in this examination not just laws that are aimed specifically at hate speech but also broader provisions against breach of the peace that are often applied to expression that many consider hate speech,[61] such as the view that homosexuality is immoral or disordered.[62] In accord with Waldron's assumption that most hate speech laws restrict only the most virulent expression of racist sentiments, I will begin by discussing in Part III the effect that even such limited

the autonomy principle). As I have previously argued, however, an extremely capacious free speech principle such as one grounded in liberty will tend to provide weaker protection of speech within its coverage than afforded by a principle grounded in participatory democracy. *See* James Weinstein, *Fools, Knaves, and the Protection of Commercial Speech: A Response to Professor Redish*, 41 LOY. L.A. L. REV. 133, 156–60 (2007); *see also* Reed v. Town of Gilbert, 135 S. Ct. 2218, 2235 (2015) (Breyer, J., concurring) (discussing how applying strict scrutiny to all laws that discriminate on the basis of the content of speech would likely result in "watering down" the force of protection currently provided by the strict scrutiny). This observation is consistent with Waldron's view that suppression of hate speech does not imperil political legitimacy to the extent that I think such restrictions do.

59. My argument that viewpoint-discriminatory laws have a particularly detrimental effect on political legitimacy is limited to mature, stable democracies. *Accord* HEINZE, supra note 26, at 70 (limiting the "citizen's prerogative of non-viewpoint-punitive expression within public discourse" (*id.* at 46) to "longstanding, stable, and prosperous" democracies). The justification for viewpoint-discriminatory laws, including hate speech bans, and their impact on political legitimacy in emerging or unstable democracies is a more complicated question beyond the scope of this Article.

60. Though my focus will be on hate speech bans, it should be noted that other provisions, such as blasphemy laws and bans on glorifying terrorism or aiding terrorist organizations, also have this potential.

61. In addition, some statutes, such as Britain's sections 28 and 31 of the Crime and Disorder Act 1998, combine hate speech regulation with general public order laws by increasing the penalty for speech causing a breach of the peace if it also constitutes hate speech. *See infra* text accompanying note 110.

62. Whether speech by religious traditionalists condemning homosexual conduct as immoral is "homophobic" expression properly classified as hate speech is "an increasingly contested question." *See* Ian Leigh, *Homophobic Speech, Equality Denial and Religious Expression*, *in* EXTREME SPEECH AND DEMOCRACY 375 (Ivan Hare & James Weinstein eds., 2009). The answer to this question depends, among other things, both upon what precisely is meant by the term "homophobic" and how consistent the religious traditionalist in question is in opposing other conduct biblically condemned as sinful. But as interesting as this question may be, it has little bearing on the effect on political legitimacy of suppressing speech criticizing homosexual conduct.

restrictions have on political legitimacy. I will then examine in Part IV the impact that speech restrictions as they actually exist in many democracies have on legitimacy.

III. POLITICAL LEGITIMACY AND BANS LIMITED TO MOST INFLAMMATORY HATE SPEECH

It can be strongly argued that the use of vile racial, ethnic, religious or homophobic epithets in public discourse does not significantly contribute to the electorate's interest in having access to the full range of perspectives and information relevant to their collective decision making. Waldron takes a similar view with respect to speakers' interests in democratic participation, arguing that bans limited to the most vituperative forms of hate speech would have little or no detrimental effect on political legitimacy, either with regard to political obligation to obey downstream laws or on the propriety of enforcing these laws. He invokes as an example the British hate speech law,[63] which in his view is limited to suppressing particularly vicious forms of hate speech, such as expression by a landlord opposed to antidiscrimination laws referring to Pakistanis as "rats" or "cockroaches" or other animals we would "normally seek to exterminate."[64] Waldron contends that this law, typical in his view of the hate speech laws of other democracies, "bend[s] over backward" to provide "safe haven" for bigots to less vituperatively express the basic "propositional content" of their views, including the publication of racial theories proclaiming that some groups are inherently inferior.[65] For this reason, Waldron concludes that it is "an open question" whether the restriction imposed by the British hate speech law on the bigoted landlord in his scenario "had anything more than a minimal effect"[66] on the landlord's political obligation to obey the law forbidding him from discriminating

63. Sec. 18(1) of the Public Order Act of 1986:

> [A] person who uses threatening, abusive, or insulting words or behaviour, or displays any written material which is threatening, abusive, or insulting, is guilty of an offence if: a) he intends thereby to stir up racial hatred, or; b) having regard to all the circumstances racial hatred is likely to be stirred up thereby.

Public Order Act 1986, UK ST 1986, c. 64, pt. III, § 18.

64. Waldron, *Political Legitimacy*, *supra* note 10, at 335.

65. *Id.* at 334–35.

66. *Id.* at 335.

against Pakistanis or on the morality of enforcing this provision against him.[67]

Whether this assessment is correct depends on the degree to which the speech restriction infringes the landlord's interest in participating as a political equal in making societal collective decisions, especially those that directly affect his interests. This inquiry reveals that Waldron has minimized somewhat the effect that even this limited hate speech restriction has on the legitimacy of downstream legislation.

A. EFFECT ON LEGITIMACY

Waldron insists that banning vicious hate speech "probably has no greater effect on political legitimacy than banning fighting words or these other acknowledged exceptions to the free-speech principle," such as "obscenity" (by which Waldron seems to mean profanity), "individual libel of private persons, disorderly conduct," or child pornography.[68] In support of this conclusion he asks us to imagine that some people are so incensed about a proposed "downstream" law that "they want to shout 'Fuck!' in public, or challenge the legislation's proponents to a fight, . . . or display child pornography" in opposition to the proposed

67. *Id.* at 332.

68. WALDRON, HATE SPEECH, *supra* note 10, at 182, 183. Curiously, Waldron also includes "sedition" on this list of "acknowledged exceptions to the free speech principle," and gives as an example of seditious speech protestors "urg[ing] mutiny by the armed forces" in opposition to "downstream" legislation. I am unaware of any general consensus in contemporary liberal democracies that seditious speech is unprotected expression, and there is definitely no such exception to the American free speech principle. *See* Brandenburg v. Ohio, 395 U.S. 444, 444–45, 447 (In invalidating a statute prohibiting "[a]dvocat[ing] . . . crime, sabotage, violence, or unlawful methods of terrorism as a means of accomplishing industrial or political reform," the Court holds that that "the constitutional guarantee[] of free speech . . . do[es] not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action."); *see also* N.Y. Times Co. v. Sullivan, 376 U.S. 254, 270–76 (1964) (noting that although the Sedition Act of 1798 was never "tested in [the Supreme Court]" before it expired in 1801, there was a "broad [historical] consensus" that the law was "inconsistent with the First Amendment"). More pertinently, imprisoning a demonstrator for merely "urg[ing]," as opposed to inciting or even directly advocating, mutiny in the armed forces in a protest against, say, a proposed conscription law would have serious consequences for the political legitimacy of the conscription law. Waldron's inclusion of sedition as an exception to the free speech principle shows just how difficult it is come up with a *principled* argument for suppressing even the most vituperative forms of hate speech that would not also permit the suppression of other forms of intemperate, potentially dangerous agitation against the status quo that must be protected in a free and democratic society.

legislation.[69] Because these particular forms of expression are undoubtedly harmful, and because these protestors "can express their opposition to the downstream laws without resorting to obscenity . . . or the display of child pornography," Waldron concludes that it is "reasonable" to ask them to do so. For this reason he concludes that "the loss of downstream legitimacy incurred as a result of the banning of speech of these particular kinds is minimal or nonexistent."[70]

As regards a ban on the use of profanity to express outrage against proposed legislation, Waldron too readily discounts the interest that protestors have in using such language in public discourse,[71] while at the same time too facilely assuming such expression is harmful. Still, whatever might be the case with impairment of descriptive legitimacy,[72] Waldron makes a strong argument that such restrictions do not substantially impair legitimacy in the normative sense.[73] Waldron's argument runs off the rails, however, when he declares that "exactly the same points apply to the case of hate speech as well."[74]

Waldron observes that like the use of profanity in public discourse, as well as the other types of commonly forbidden expression he mentions, hate speech is harmful. In addition, as with speakers constrained by these restrictions, "the racist doesn't *need* to use the sort of vicious hate propaganda the law punishes

69. WALDRON, HATE SPEECH, *supra* note 10, at 182.

70. *Id.* at 183.

71. As the United States Supreme Court explained in upholding the First Amendment right of an anti-war protestor to appear in public wearing a jacket bearing the message "Fuck the Draft," "words are often chosen as much for their emotive as their cognitive force." Cohen v. California, 403 U.S. 15, 16, 26 (1971). The Court also noted that forbidding particular words poses "a substantial risk of suppressing ideas in the process." *Id.* at 26. For these reasons, as Judge Learned Hand long ago recognized, the "right to criticize either by temperate reasoning, or by immoderate and indecent invective, . . . is normally the privilege of the individual in countries dependent upon the free expression of opinion as the ultimate source of authority." Masses Pub. Co. v. Patten, 244 F. 535, 539 (S.D.N.Y. 1917).

72. Especially because forbidding the use of profanity in public discourse might substantially impede speakers from expressing the depth of their feelings about a proposed law, such a ban could substantially impair or even destroy any sense of political obligation these protesters might feel to obey a downstream law they passionately oppose.

73. In particular, unless in a particular case the ban on profanity substantially interfered with the ability of someone to express the basic "propositional content" (Waldron, *Political Legitimacy*, *supra* note 10, at 335; *see supra* text accompanying note 14) of his opposition to proposed legislation, it is difficult to see how such a ban would render immoral the otherwise moral use of coercion to enforce the downstream law.

74. WALDRON, HATE SPEECH, *supra* note 10, at 183.

in order to express his opposition to laws against discrimination and so on" because most hate speech laws "define a legitimate mode or a legitimate forum for roughly equivalent expression that will not incur legal sanctions."[75] If the racist landlord's ability to protest a law forbidding housing discrimination were restricted not by a ban on hate speech but by a general ban on comparing people "to animals that we normally seek to exterminate" or by some even broader imposition of civility norms, then for the reasons just discussed with respect to a ban on profanity in public discourse, I would agree that any effect on the normative legitimacy of this downstream law would be "minimal," though perhaps not quite as negligible as Waldron contends.[76] However, the restriction on the landlord's ability in Waldron's scenario to express his views is not imposed by some comprehensive ban on highly vituperative speech but by a restriction that applies only to racist speech.

Unlike a ban on fighting words or profanity or the other restrictions on harmful speech that Waldron mentions,[77] hate speech bans are inherently viewpoint discriminatory. Britain's hate speech law, for instance, restricts only speech that intends to "stir up racial hatred"[78] but not expression promoting racial tolerance. As a result, the discriminatory effect of hate speech laws persists even if the scope of the ban is confined to vituperation. So while in Waldron's scenario the law prevents a landlord agitating against a law forbidding racial or ethnic discrimination in the provision of housing from denouncing Pakistanis as "cockroaches" or "rats," it does not prevent supporters of the antidiscrimination measure from using such epithets to refer to landlords as a class or to those opposing the measure.[79] Because of this viewpoint discriminatory effect, even

75. *Id.*

76. *See supra* notes 71 and 73. In all events, for the reasons discussed therein, it is an overstatement to refer to the impact on normative legitimacy as "nonexistent," as Waldron alternatively does. *See* WALDRON, HATE SPEECH, *supra* note 10, at 183; *see supra* text accompanying note 70. And as a descriptive matter, it is possible that such a ban might substantially diminish or even destroy a landlord's sense of political obligation to obey the antidiscrimination measure. *See supra* note 72.

77. With the exception of "sedition," which is arguably viewpoint based.

78. *See supra* note 63. For an excellent discussion of why hate speech bans are viewpoint discriminatory even as applied to "'hard core' invective," see HEINZE, *supra* note 26, at 20–21.

79. It might be argued that as applied to a discussion about an antidiscrimination measure, the British hate speech provision is viewpoint neutral because it would also

such a limited hate speech restriction is arguably more detrimental to the legitimacy of downstream legislation than a more comprehensive yet viewpoint-neutral ban on vituperative speech.

1. Obligation To Obey the Law (Descriptive)

As discussed in Part II.B, viewpoint-discriminatory bans uniquely implicate the fundamental interest in governing as a political equal of those whose speech is suppressed by the restriction. A law preventing those who oppose an antidiscrimination measure from using epithets to describe the members of a minority group whom the antidiscrimination measure seeks to protect, but effectively imposing no restrictions on the vituperation of those who support such measures, is likely to be perceived as unfair by at least some opponents of the antidiscrimination measure. For this reason, as a descriptive matter, the upstream speech restriction may well substantially diminish or might in some cases even annihilate any sense of obligation that these dissenters may have had to obey the downstream antidiscrimination measure.[80]

2. Obligation To Obey the Law (Normative)

Whether as a normative matter such a discriminatory restriction on the use of highly vituperative language significantly diminishes, or potentially even annihilates, the landlord's obligation to obey the antidiscrimination law is a more difficult question. With respect to this inquiry it should be borne in mind

prevent someone speaking in support of the measure from using vicious epithets attacking the race or ethnicity of landlords or those who support the law. To the extent, however, that the provision prevents disparaging but not complimentary remarks on race or ethnicity, the law is still viewpoint based. But even if the speech restriction could fairly be considered viewpoint-neutral in some theoretical sense, it would be unusual for a supporter of an antidiscrimination measure to use inflammatory speech to "stir up racial hatred," and as such would have a discriminatory effect on those opposing the measure. *Cf.* R.A.V. v. City of St. Paul, 505 U.S. 377, 390–92 (1992) (finding law that forbids only those "fighting words" that arouses "anger, alarm or resentment in others on the basis of race, color, creed, religion or gender" constitutes viewpoint discrimination "in . . . practical operation"). To account for the argument that the application of the British hate speech law is technically viewpoint neutral, I refer to its discriminatory effect in analyzing its impact on legitimacy.

80. I use the adjective "any" advisedly, for as discussed *supra* notes 25 and 43, there is a substantial question whether people commonly obey the law just because it is the law, especially laws with which they disagree.

that the question is not whether the landlord has a *moral* duty not to discriminate on the basis of race or ethnicity in providing housing. There can be no question that such discrimination is wrong.[81] Rather, the pertinent inquiry is whether the selective imposition of civility norms has significantly diminished[82] or even annihilated the landlord's obligation to obey the law just because it is the law,[83] or to use Waldron's formulation, impaired the landlord's "political obligation" to obey the law.[84] The source and weight of a normative political obligation to obey the law is, to say the least, a contentious topic.[85] Indeed, many thoughtful observers deny that we have an obligation to obey a law just because it is the law.[86] For purposes of this analysis, however, and consistent with what I suggested in Part II, I will assume that there is, in the normative sense, at least a *prima facie* political obligation to obey the laws of a society in which one has had opportunity to participate as an equal in the political process.[87] The question then becomes whether the selective imposition of civility norms effectively imposed on the landlord impairs this obligation. The answer depends on whether the discriminatory aspect of the law can be adequately justified.

Use of epithets such as "cockroach" or "rat" to "stir up racial hatred" might be reasonably thought more harmful than the use

81. Nothing in Waldron's scenario suggests that application of the law to this landlord would infringe some weighty countervailing interest such as freedom of religion. *Cf.* cases discussed *infra* text accompanying notes 149–158 involving the observant Christian hoteliers reserving double-bedded rooms for heterosexual married couples.

82. It can be argued that an obligation to obey the law is not a matter of degree. Peter de Marneffe, for instance, remarked in reviewing a draft of this Article that one either has or doesn't have an obligation to obey a law. However, and consistent with the view that an equal opportunity for political participation generates merely a *prima facie* rather than an absolute obligation to obey the law, it seems perfectly sensible to speak of a stronger or weaker obligation to obey a law. As a descriptive matter, the weakening of this sense of obligation would likely lead to less compliance with the law. Normatively, it can make the already contested existence of any obligation to obey a law just because it is the law even more uncertain.

83. *See supra* note 25.

84. *Id.*

85. For an excellent compendium of various views on the subject, see THE DUTY TO OBEY THE LAW (William Edmundson ed., 1999).

86. *See, e.g.*, ROBERT PAUL WOLFF, IN DEFENSE OF ANARCHISM 3–19 (1971); M.B.E. Smith, *Is There a Prima Facie Obligation To Obey the Law?*, 82 YALE L.J. 950 (1973).

87. For a classic and influential argument in favor of a prima facie obligation to obey the laws, see John Rawls, *Legal Obligation and the Duty of Fair Play*, *in* LAW AND PHILOSOPHY, (Sidney Hook ed., 1964). For a more contemporary argument, see HUEMER, *supra* note 22, at 137.

of the same language in almost any other context within public discourse. It is reasonable to assume, as Waldron asserts,[88] that hate speech referring to people as animals we "normally seek to exterminate," contributes to making members of vulnerable racial and ethnic minority groups unsure of their status in society. In addition, when used as a means to "stir up racial hatred," such terms might fray relations between members of minority groups and the rest of society. In contrast, other uses of these terms in public discourse, while grossly offensive, not to mention inimical to productive public discussion, do not pose these risks, or so a legislature could reasonably conclude. Given these reasons for especially targeting vituperative hate speech, together with the landlord's otherwise largely unrestricted opportunity to express his vehement disagreement with the antidiscrimination law, prohibiting him from using particularly vicious epithets that "stir up racial hatred" in expressing this opposition would not seem to destroy, or even substantially diminish, his *prima facie* political obligation to obey the antidiscrimination measure.

3. Morality of Enforcement

It follows from this analysis that a law selectively prohibiting the landlord from using vicious epithets to stir up hatred against Pakistanis in opposition to the antidiscrimination measure does not make it immoral for government to use force to make him comply with this downstream law.[89] In light of the viewpoint-discriminatory effect of the speech restriction and its negative impact on the landlord's interest in equal political participation, the diminishment of normative legitimacy is not as trivial as Waldron supposes. Still, it is not nearly substantial enough to nullify the large moral benefit produced by forbidding the

88. Reasonable though this assertion may be, it should be noted that Waldron does not cite any empirical studies supporting this assertion. Moreover, even if the use of vicious racist epithets in public discourse contributes to some extent to the alienation of minorities, it can be questioned just how significant a factor even the most vile epithets used in public discourse are in causing such alienation as compared to discrimination in housing and employment or harassment by law enforcement officials.

89. There is corresponding to this normative inquiry a descriptive question about the morality of enforcing a law, namely, whether the person against whom it is enforced would consider the enforcement moral. Since this inquiry would be very similar, if not identical, to the question of whether this person feels a political obligation to obey the law, I will for the sake of economy not consider this question separately in this Article. A related descriptive inquiry that I also will not examine is whether the people as a whole, or some substantial number of them, consider a particular application of the law to be moral.

landlord from refusing people housing because of their race or ethnicity.[90]

B. HATE SPEECH AND DEMOCRATIC PARTICIPATION

Waldron tentatively offers another argument supporting the claim that suppressing the vituperative forms of hate speech does not significantly diminish the legitimacy of downstream legislation. He suggests that anyone who vituperatively denies "the fundamentals of justice" such as "elementary racial equality" or the "basic equality of the sexes" is not really engaged in some "great national debate" about racial or sexual equality.[91] This is because the debate about these "relatively settled points or premises of modern social and legal organization" is "over—won, finished." So despite some "outlying dissenters" about the "well-being, dignity, and security of formerly vulnerable minorities," society is "moving forward . . . as though this were no longer a matter of serious or considerable contestation."[92]

I agree that at least in stable and mature democracies the commitment to elementary racial and sex equality, as well as to basic religious tolerance, is largely "settled" in the way Waldron suggests.[93] But it does not follow from this observation that speech contesting these largely settled norms can be suppressed with no

90. This conclusion is in accord with Dworkin's view that although there is a deficit in legitimacy arising from the ban on vituperative racist speech by those who oppose antidiscrimination laws, "[o]n balance Britain is entitled to enforce such laws . . . ." Waldron, *Political Legitimacy*, *supra* note 10, at 335 (quoting email from Ronald Dworkin to Jeremy Waldron, Oct. 4, 2009, 21:34 EST (on file with Waldron)). The conclusion that a ban limited to highly vituperative hate speech would not significantly impair normative legitimacy, either with respect to the obligation to obey the law or the morality of its enforcement, does not necessarily mean, however, that even such narrow provisions should be enacted. As the discussion in Part IV.B will show, hate speech laws have routinely been misapplied to speech not intended by the law to be within its coverage, which not only imposes a heavy burden on those to whom the law was wrongfully applied but likely "chills" the speech of others. But even if laws could with laser-like precision suppress just the most vituperative hate speech while leaving more temperate expression of bigoted ideas untouched, it still would not follow that such a ban is justified. Arguably, the costs in terms of the substantial diminution of descriptive legitimacy combined with the minimal effect on normative legitimacy might in a given democracy outweigh the benefits of such restrictions.

91. Waldron, *Political Legitimacy*, *supra* note 10, at 336–37.

92. *Id.* at 337.

93. This is not quite yet the case with sexual orientation equality. So to the extent that Waldron's "settlement" argument is relevant to assessing the effects of speech restrictions on political legitimacy, this argument would not yet be applicable to suppression of speech contesting equality on the basis of sexual orientation.

cost to legitimacy. This is because an individual has an interest in expressing his or her views on a matter of public concern not just in the hope of influencing others "but also just to confirm his or her standing as a responsible agent in, rather than a passive victim of, collective action."[94]

Suppose that after months of discussion the citizens of a small town come to a firm consensus that they should raise the property tax to support the local high school. Suppose further that this discussion has been so exhaustive and long lasting and the resulting consensus so firm that there can be no doubt that after the final discussion scheduled at tonight's town meeting the citizens will vote overwhelmingly in favor of the tax increase. Still, if the town's lone dissenter was legally forbidden from speaking against the tax increase or from voting at the meeting, the "settled" nature of the issue would not substantially ameliorate,[95] and certainly would not cure, the diminution of legitimacy of the increased tax levy as applied to the dissenter. Although this dissenter may accept that she has no realistic prospect of altering the decision, her exclusion from the decision making process denied her "standing as a responsible agent in, rather than a passive victim of, collective action."

Relatedly, Waldron asserts that those who engage in vituperative hate speech are not really trying to persuade potential bigots of their beliefs but rather are attempting "to create the impression that the equal position of members of vulnerable minorities in a rights-respecting society is less secure than is implied by the society's actual foundational commitments."[96] It is not easy to be charitable to virulent racists, so Waldron's uncharitable characterization of the purpose of their speech is understandable. Still, any fair examination of virulent

94. DWORKIN, *supra* note 5, at vii.

95. While the hope of persuading others is not the only value in having one's say in a discussion of a collective decision, it is still a "crucially important" interest. *Id.* It could therefore be argued that where this hope is nonexistent the impact of denying this say is somewhat less deleterious to downstream legitimacy at least in the normative sense.

96. Waldron, *Political Legitimacy*, *supra* note 10, at 337. This is a persistent though unsupported assertion running through Waldron's work on hate speech. *See, e.g.*, WALDRON, HATE SPEECH, *supra* note 10, at 2, 5, 74. In Waldron's view, a closely related reason that speakers engage in virulent hate speech is to let other already confirmed bigots know "that they are not alone in their racism or bigotry" in order "to contact and coordinate with one another in the enterprise of undermining the assurance that is provided in the name of society's most fundamental principles." *Id.* at 95; *see also id.* at 167.

racist literature and Internet rants reveals that not all of it, perhaps not even most of it, is published for the sole purpose of making vulnerable minority groups feel less secure.[97] For one, it is fairly obvious that some of these diatribes involve the venting of anger, motivated not to so much to make minorities feel bad (though the speaker would no doubt welcome this effect) but to make the speaker feel better. In addition, it cannot seriously be doubted that some of those who engage in hate speech in public discourse at least some of the time are actually trying to increase their ranks by attempting to persuade others of the validity of their views.

This is not to deny, of course, that the primary purpose of *some* vituperative hate speech is precisely to undercut the sense of security among members of vulnerable minority groups. It is worth noting though that when expression is primarily intended to have this effect it is often targeted at individual members of a minority group. An example of such targeted expression is placing a burning cross on a black family's lawn, speech that it not protected even under American free speech doctrine.[98] In contrast, it is not as obvious that such is the primary purpose of expression disseminated to the public at large, such as on a racist website or through other forms of public discourse.[99] Crucially, my

97. *See, e.g.*, *Intro Material for People New to Stormfront*, STORMFRONT (Nov. 6, 2008, 7:46 PM), https://www.stormfront.org/forum/t538924/ (expressing a desire to educate "Whites to see and accept the reality" of the "problems" the group faces); *Our Positions*, W.A.R., http://www.resist.com/positions/ourpositions.htm (last visited Feb. 13, 2016) (explaining the position that The White Aryan Resistance takes on minorities, political issues, and religion); *About Us*, COMM. FOR OPEN DEBATE ON THE HOLOCAUST, http://www.codoh.com/about/ (last visited on Feb. 13, 2016) (declaring that the "aim of this site is promote intellectual freedom with regard to this one historical event called 'Holocaust' . . . . While we no longer believe the gas chamber stories . . . or the 'genocide' theory, we remain open to being convinced we are wrong"); *see also* W. Bradley Wendel, *"Certain Fundamental Truths": A Dialectic on Negative and Positive Liberty in Hate-Speech Cases*, 65 LAW & CONTEMP. PROBS. 33, 34, 66 (2002) (noting efforts of racist organization "to market racism to children with a kids' website featuring white-supremacist games and puzzles—fun for the whole family!" and arguing that hate speech "props up" "socially constructed ideology of racism" by "distancing people of different races and perhaps subconsciously operating to convince them of the truth of racist stereotypes"); Karmen Erjavec & Melita P. Kovačič, *"You Don't Understand This Is a New War!" Analysis of the Hate Speech in News Web Sites' Comments*, 15 MASS COMM. & SOC'Y 899, 905, 909–14 (2012) (study exploring "the values and beliefs of producers of hate speech comments on news websites and their motives and explanations for writing them").

98. *See* R.A.V. v. City of St. Paul, 505 U.S. 377, 380 & n.1 (1992).

99. The purpose of some racist expression, such as a burning a cross at a Ku Klux Klan rally visible to the general public in an area with a significant African American or Asian population, is probably overdetermined, both "symboliz[ing] the supremacist

claim that hate speech bans can compromise political legitimacy is limited to restrictions on public discourse.

The biggest problem with Waldron's critique, however, is not that he somewhat underestimates the effect on legitimacy resulting from bans on even particularly vituperative bigoted expression. It is rather, as I shall now discuss, that he grossly underestimates the extent of the restrictions actually imposed by hate speech laws currently in force in most democratic countries.

IV. HATE SPEECH RESTRICTIONS IN CONTEMPORARY DEMOCRACIES: THEIR SCOPE IN ACTUAL OPERATION

Waldron, it will be recalled, asserts that hate speech bans in democratic countries typically "bend over backward" to assure that speakers have a lawful way to "express[] something like the propositional content" of views that become illegal only "when expressed as vituperation."[100] While that may have been the intent of some legislatures in passing these laws, a survey of these laws as actually applied reveals that there is no such "safe haven"[101] for temperate expression of bigoted ideas. Even more troubling, in some instances these laws have been applied to speech that is arguably not even bigoted. But no matter how this speech is categorized, in too many cases it is speech that must be tolerated in a free and democratic society and whose suppression has grave implications for political legitimacy.

A. HATE SPEECH LAWS IN ACTUAL OPERATION

Glimmerveen & Hagenbeek v. Netherlands[102] is a good example of the actual extent of the restrictions on racist expression imposed by hate speech laws. Johann Glimmerveen was the president of Nederlandse Volks Unie, a far right Dutch political party that advocated for "an ethnical homogeneous

ideology and the solidarity of those who espouse it" (Virginia v. Black, 505 U.S. 343, 377 (2003) (Souter, J. concurring)), as well as attempting to convey to members of these minority groups who happen to see the symbol that their place in society "is less secure than is implied by society's actual foundational commitments." Waldron, *Political Legitimacy*, *supra* note 10, at 336–37.

100. Waldron, *Political Legitimacy*, *supra* note 10, at 335.

101. *Id.*

102. Glimmerveen and Hagenbeek v. Netherlands, App. Nos. 8348/78 and 8406/78, [1980] 23 Y.B. Eur. Conv. on H.R. 366 (Eur. Ct. H.R.), http://www.bailii.org/eu/cases/ECHR/1979/8.html.

population" and against "racial mixing." He was convicted of inciting racial discrimination in violation of a Dutch hate speech law[103] for possessing with intent to distribute leaflets addressed to "white Dutch people" and containing the following message:

> The truth is that the major part of our population since a long time has had enough of the presence in our country of hundreds of thousands of Surinamers, Turks and other so-called guest workers, who, moreover, are not at all needed here and that the authorities as servants of our people merely have to see to it that these undesired aliens leave our country as soon as possible. As soon as the Nederlandse Volks Unie will have gained political power in our country, it will put order into business and, to begin with will remove all Surinamers, Turks and other so-called guest workers from the Netherlands.[104]

Glimmerveen was sentenced to two weeks imprisonment and his leaflets confiscated. After his conviction and sentence were affirmed by the Supreme Court of the Netherlands, Glimmerveen applied to the European Commission on Human Rights, invoking the right to freedom of expression under Article 10 of the Convention on Human Rights.[105] The Commission held his application inadmissible. In holding that the conviction came within Article 10's exception for restrictions "necessary in a democratic society," the Commission relied on Article 17 of the Convention,[106] which forbids any person or group to "engage in

103. Art. 137 (e) of the Dutch Criminal Code prohibits, inter alia,

> [T]he expression of views that may be offensive for a group of people by reason of their race, religion or other convictions or that incite to hatred against or discrimination of or violent behavior towards people by reason of their race, religion or other conviction unless these views are expressed for the purpose of imparting information.

Wetboek van Strafrecht [Sr] [Criminal Code] art. 137(e) (Neth.).

104. *Glimmerveen*, 23 Y.B. Eur. Conv. on H.R. at 368.

105. *Id.* at 376. Article 10 of the Convention, entitled "Freedom of Expression," provides as follows:

> Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers . . . .
>
> The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

EUROPEAN CONVENTION ON HUMAN RIGHTS art. 10, Nov. 4, 1950, 213 U.N.T.S. 222.

106. Article 17, entitled "Prohibition of abuse of rights," provides as follows:

any activity . . . aimed at the destruction of any rights" guaranteed by the Convention. The Commission stated that the purpose of this provision was to "prevent totalitarian groups from exploiting [the Convention] in their own interests."[107]

As odious as Glimmerveen's racist ideas may be, he expressed them with little vituperation and no use of epithets. And there are numerous other cases that belie Waldron's claim that most hate speech laws create a "safe haven" for the expression of the basic "propositional content of views that become objectionable when expressed as vituperation."[108] Indeed, examination of the actual operation of hate speech laws in force in various jurisdictions reveal the mirror image of what Waldron asserts: most hate speech laws make it quite difficult to safely express the basic "propositional content" of bigoted views even when expressed without vituperation or use of vicious epithets. Let's begin this survey with Britain, the locus of Waldron's racist landlord scenario, and which compared to most other European countries has a long and admirable tradition of freedom of speech.

Shortly after the attacks on the World Trade Center on September 11, 2001, Mark Norwood, a regional coordinator of the British National Party, a far-right political organization, placed in the window of his flat in a small English rural town a poster bearing the words: "Islam out of Britain" and "Protect the British people" superimposed on a reproduction of a photograph of the World Trade Center in flames and a crescent and star surrounded by a prohibition sign.[109] Norwood was convicted of making "abusive" and "insulting" statements likely to cause "harassment, alarm or distress" to another person in violation of section 5 of the Public Order Act 1986. He was, moreover, subject to an increased penalty because the violation was found to be "racially or religiously aggravated" under sections 28 and 31 of the Crime and Disorder Act 1998 because "motivated (wholly or partly) by

> Nothing in this Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention.

Id. at art. 17.

107. *Glimmerveen*, 23 Y.B. Eur. Conv. on H.R. at 380.

108. Waldron, *Political Legitimacy*, *supra* note 10, at 335.

109. Norwood v. Director of Public Prosecutions, [2003] EWHC 1564 (Admin), http://www.bailii.org/ew/cases/EWHC/Admin/2003/1564.html.

hostility towards members of a racial or religious group based on their membership in that group."[110] The District Judge fined Norwood £300, which the Divisional Court upheld, finding that this expression "went beyond legitimate protest."[111]

Although the poster that Norwood displayed did not refer to Muslims as "cockroaches" or "rats," or, indeed, by any epithet, the image of the World Trade Center in flames nevertheless rendered the poster, if not precisely "vituperative," at least intemperate, not to mention inflammatory in two senses of the word. The same cannot be said, however, of speech criticizing homosexuality as immoral, but which has nonetheless been suppressed in Britain.

A particularly egregious example is the conviction of Harry Hammond, an evangelical preacher, for holding a placard while he preached in a public square bearing the messages "Stop Immorality," "Stop Homosexuality," "Stop Lesbianism," and "Jesus is Lord."[112] For displaying this sign, Hammond was convicted of making an "insulting" statement that caused "distress" to others in violation of section 5 of the Public Order Act 1986.[113] The trial court held that "[t]here was a pressing social need" for suppressing Hammond's expression because "there is a need to show tolerance towards all sections of society."[114]

110. *Id*. at ¶¶ 1–4, 12–13. The prosecution argued that the poster suggested that Muslims were not welcome in the Britain. Norwood and the Chairman of the BNP testified that it referred to Muslim extremism and was a "slogan against creeping Islamification." *Id*. at ¶ 10.

111. *Id.* at ¶ 37. Norwood appealed to the European Court of Human Rights, which declared his application inadmissible. The Court remarked that such a "general, vehement attack against a religious group, linking the group as a whole with a grave act of terrorism, is incompatible with the values proclaimed and guaranteed by the convention, notably tolerance, social peace and non-discrimination." Norwood v. UK, Appl. No. 23131/03, 16 November 2004. For a thoughtful discussion of the case, see Ivan Hare, *Crosses, Crescents and Sacred Cows: Criminalising Incitement to Religious Hatred* [2006] Public Law 520–37.

112. *See* Hammond v. Department of Public Prosecutions, [2004] EWHC 69, ¶ 5 (Admin), http://www.bailii.org/ew/cases/EWHC/Admin/2004/69.html.

113. At the time Hammond was arrested and convicted, the Act provided in relevant part that

> [A] person is guilty of an offence if he (a) uses threatening, abusive or insulting words or behaviour, or disorderly behaviour, or (b) displays any writing, sign or other visible representation which is threatening, abusive or insulting, within the hearing or sight of a person likely to be caused harassment, alarm or distress thereby.

Public Order Act 1986, UK ST 1986 c. 64 Pt I s. 5. The Act was subsequently amended to remove "insulting." *See infra* note 134.

114. Unlike *Norwood*, which involved a sentence enhanced because of the racial motivation of the expression, Hammond's conviction was not pursuant to a hate speech

Accordingly, the court concluded that the message on Hammond's placard "went beyond legitimate protest."[115] Hammond was fined £300 and his sign was subject to forfeiture.[116] Though "not without hesitation," the Divisional Court dismissed the appeal.[117] The appellate court specifically noted that Hammond's message was "not expressed in intemperate language." Nevertheless, the appellate court "came to the clear conclusion" that because words on the sign "appear to relate homosexuality and lesbianism to immorality" the lower court could conclude that the message was "insulting" within the meaning of the Act.[118]

Another street preacher, Shawn Holes, when speaking on a street in Glasgow about general Christian topics was asked by a member of the audience what he thought about gays. He replied that "homosexuals are deserving of the wrath of God, and so are all other sinners, and they are going to a place called hell." For these remarks, Holes was arrested, placed in a police van and held in jail for the night. The next day he was charged with breach of the peace for "uttering homophobic remarks" "aggravated by religious prejudice" and fined £1,000.[119]

law *per se* but rather was under a general regulation of threatening, abusive or insulting speech. Nonetheless, the quotation in text reveals that as applied to Hammond's expression, the law was effectively operating as a hate speech ban.

115. *See Hammond*, [2004] EWHC 69, ¶ 19.

116. *Id.*

117. *Id.* at ¶ 32–34.

118. *Id.* at ¶ 32. For a fuller discussion of the *Hammond* case, see James Weinstein, *Extreme Speech, Public Order, and Democracy: Lessons from* the Masses, *in* EXTREME SPEECH AND DEMOCRACY 30–37 (Ivan Hare & James Weinstein eds., 2009).

119. Mark Hennessy, *Street Preacher Fined for 'Homosexuals Going to Hell' Remark*, IRISH TIMES (Mar. 31, 2010), http://www.irishtimes.com/news/street-preacher-fined-for-homosexuals-going-to-hell-remark-1.646036. *See also Preacher is Fined for Homophobia*, SCOTSMAN (Mar. 27, 2010), http://www.scotsman.com/news/preacher-is-fined-for-homophobia-1-1365514. Although Holes denied criminality, he pleaded guilty and paid the fine because he needed to leave for America to visit his sick father. *Id.*; *see also* Marian Duggan, *The Politics of Pride: Representing Relegated Sexual Identities in Northern Ireland*, 61 N. IR. LEGAL Q. 163, 174 (2010). A prominent gay activist condemned the suppression of this speech, explaining that "[j]ust as people should have the right to criticise religion, people of faith should have the right to criticise homosexuality. Only incitements to violence should be illegal." Arthur Martin, *Gay Rights Campaigner Peter Tatchell Defends 'Homosexuals Are Sinners' Preacher and Slams £1,000 Fine as Heavy-Handed*, DAILY MAIL (Mar. 30, 2010), http://www.dailymail.co.uk/news/article-1262310/Gay-rights-campaigner-condemns-1-000-fine-preacher-said-homosexuality-sin.html. A number of other street preachers have been arrested in the UK for similarly temperate criticism of homosexual behavior. *See infra* text accompanying note 129.

More recently, in Taunton, Somerset, yet another street preacher, Michael Overd, was convicted of breach of the peace and fined £200 for referring to homosexual conduct as an "abomination," citing Leviticus 20:13. The trial judge acknowledged that Overd did not say anything about a penalty for homosexual conduct. Nonetheless, the judge held that Overd's citation to Leviticus was "threatening" within the meaning of Section 5 of the Public Order Act of 1986 because the passage prescribes the death penalty for homosexual conduct. In the judge's view those wishing to cite the Bible in support of the view that homosexuality is immoral should cite other passages that condemn homosexuality without reference to the death penalty.[120]

In other European democracies, the censorship is even more far-reaching. In Austria, a speaker at an academic conference was fined for saying that the Prophet Mohammad "had a thing for

120. John Bingham, *Preacher Accuses Judge of 'Redacting' the Bible*, TELEGRAPH (Mar. 30, 2015), http://www.telegraph.co.uk/news/religion/11505466/Preacher-accuses-judge-of-redacting-the-Bible.html. The judge expressed his concern that allowing those condemning homosexuality to refer to Leviticus 20:13 would permit them to use this verse as a "code word" to threaten homosexuals. *Id.*

The public square is not the only setting in Britain in which condemnation of homosexuality is legally restricted. In 2004, OFCOM (formally, the Office of Communications, the regulatory body with jurisdiction over television among other media in the UK) upheld a complaint against Revelation TV, a UK-based Christian channel, for what OFCOM described as "four minute polemic about [the presenter's] views on homosexuality in general as well as homosexuality within the Church," sparked by the recent appointment of openly gay Anglican bishops. OFCOM, Program Complaints Bulletin 3 (June 28, 2004), http://stakeholders.ofcom.org.uk/binaries/enforcement/broadcast-bulletins/pcb_12/pcb_pdf12.pdf. A viewer considered the presenter's diatribe "overtly homophobic and offensive" and filed a complaint with OFCOM. Revelation TV responded that although it was "saddened that it had upset a viewer who felt that the presenter had not respected their choice of lifestyle," the presenter, an ordained minister felt "compelled to speak out . . . in love and respect for others, allowing each person to exercise their free will, to choose or not to choose, to take heed of any spiritual guidance offered." In upholding the complaint, OFCOM found that Revelation TV did not present the views of Christians who did not share the presenter's position, and that moreover the presenter's "comments about homosexuals were derogatory." Accordingly, OFCOM found the presenter's comments to be in breach of the "Programme Code dealing with respect for human dignity and avoidance of denigration of others' beliefs." *Id.* In 1999, OFCOM's predecessor, the Independent Television Commission, fined the God Channel, a Christian cable and satellite television station, £20,000 for four breaches of an applicable regulatory code, including for referring to homosexuality as "an abomination." Response to Freedom of Information Request re: Independent Television Commission Determination from Dec. 20, 1999, OFCOM (Jan. 7, 2016), http://stakeholders.ofcom.org.uk/binaries/foi/2016/january/1-312849543_ITC_1999.pdf. *See* Leigh, *supra* note 62, at 383.

little girls,"[121] and a politician was fined and given a suspended prison sentence for saying that in today's society Mohammad would be considered a child molester.[122] Similarly, a politician in Finland was fined for referring to Mohammad as a "pedophile."[123] In France, actress Bridget Bardot was fined for protesting on her website the slaughter of sheep during a Muslim festival and complaining that Muslims were destroying France by "imposing their ways."[124] In Spain, a television station was fined €100,000 for running advertisements showing video clips of scantily-clad, sexually-provocative participants in actual gay pride parades, followed by a superimposed script asking "is this the society that you want?" and ending with the question: "Proud? Of what?"[125]

In evaluating the restriction on expressive activity resulting from hate speech laws, we need to consider not just the cases, such as the ones just discussed, in which the convictions or fines have been upheld, but also cases in which the convictions were overturned on appeal; or in which prosecutions were brought and

121. Brooke Goldstein & Benjamin Ryberg, *The Emerging Face of Lawfare: Legal Maneuvering Designed to Hinder the Exposure of Terrorism and Terror Financing*, 36 FORDHAM INT'L L.J. 634, 642–43 (2013); *see also* Eugene Volokh, *Austrian Court Upholds Conviction for "Denigrating Religious Beliefs,"* VOLOKH CONSPIRACY (Dec. 27, 2011, 12:21 PM), http://www.volokh.com/2011/12/27/austrian-court-upholds-conviction-for-denigrating-religious-beliefs.

122. *See* Jonathan Turley, *Winter of Discontent: Far-Right Politician Convicted of "Humiliating a Religion,"* JONATHAN TURLEY (Jan. 24, 2009), http://jonathanturley.org/2009/01/24/winter-of-discontent-far-right-politician-convicted-of-humiliating-a-religion/.

123. Soeren Kern, *Finland's War on Free Speech*, GATESTONE INST. (June 11, 2012), http://www.gatestoneinstitute.org/3107/finland-free-speech.

124. *Brigitte Bardot Fined £12,000 for Radical Hatred After Claiming Muslims Are Destroying France*, DAILY MAIL (June 3, 2008), http://www.dailymail.co.uk/tvshowbiz/article-1023969/Brigitte-Bardot-fined-12-000-racial-hatred-claiming-Muslims-destroying-France.html. In a recent decision, the Court of Cassation, France's highest appellate court for civil and criminal matters, affirmed sentences imposing substantial fines against protestors urging the boycott of Israeli goods. The protestors had entered several supermarkets wearing shirts bearing the message "Long live Palestine, boycott Israel" and handed out fliers that said that "buying Israeli products means legitimizing crimes in Gaza." They were convicted under a law making it a crime to "provoke discrimination, hatred or violence toward a person or group of people on grounds of their origin, their belonging or their not belonging to an ethnic group, a nation, a race or a certain religion." JTA, *France Court Upholds 'BDS Is Discrimination' Ruling*, FORWARD (Oct. 23, 2015), http://forward.com/news/breaking-news/323207/france-court-upholds-bds-is-discrimination-ruling/; *see also Willem v. France*, App. No. 10883/05, Unreported July 16, 2009 (Eur. Ct. HR), http://hudoc.echr.coe.int/eng?i=003-2803253-3069793 (holding that conviction of French mayor for calling for a boycott of Israeli products did not violate the mayor's Article 10 right to freedom of expression).

125. Matthew C. Hoffman, *Spanish Television Network Fined €100,000 for Criticizing Homosexuality*, LIFE SITE (July 26, 2010), http://www.lifesitenews.com/news/spanish-television-network-fined-100000-for-criticizing-homosexuality.

failed; or where speakers were arrested but not prosecuted. Although the speaker in these cases might ultimately be vindicated, such misapplication of a hate speech ban obviously placed a burden on the person arrested, prosecuted, or convicted. Less obviously, but more significantly from the standpoint of the impairment of the right to democratic participation, the uncertainty created by such misapplication causes others who want to express dissenting views about such matters as race, ethnicity, or sexual orientation to "steer [wide] of the unlawful zone"[126] or perhaps even to refrain from speaking altogether.

Examples of application of laws that have undoubtedly caused such a "chilling effect" include: the conviction and fine of €3,000, overturned on appeal, of a French politician for saying that homosexual behavior was a threat to the survival of humanity and "morally inferior" to heterosexuality;[127] the unsuccessful prosecution of a Catholic bishop in Belgium for stating in a magazine interview that he agreed with Freud that homosexuality was a "blockage in normal psychological development, rendering them abnormal;"[128] the arrest and jailing for seven hours of a street preacher in England for saying that the Bible taught that "homosexuality was a crime against the Creator;"[129] and the filing

126. Baggett v. Bullitt, 377 U.S. 360, 372 (1964) (citation omitted).

127. Paul Belien, O*n Fascism and Homophobia*, BRUSSELS J. (Jan. 28, 2007), http://www.brusselsjournal.com/node/1868.

128. *Belgian Bishop Hauled Before Court for Church Teaching on Homosexuality Cleared of Charges*, ONE NEWS NOW (June 6, 2008), http://onenewsnow.com/church/2008/06/06/belgian-bishop-hauled-before-court-for-church-teaching-on-homosexuality-cleared-of-charges.

129. Martha Evans, *Christian Preacher Arrested for Saying Gays Were Sinful Has Charges Dropped*, TELEGRAPH (May 14, 2010), http://www.telegraph.co.uk/news/uknews/7725797/Christian-preacher-arrested-for-saying-gays-were-sinful-has-charges-dropped.html. Similarly, a street preacher in Birmingham was arrested for quoting the King James Bible's condemnation of homosexuals, along with fornicators, idolaters, adulterers as "unrighteous." The police department was subsequently ordered by a court to pay the preacher damages for this arrest. *See* Steve Doughty, *Payout for Anti-Gay Preacher Over Arrest: Landmark Ruling in Christian's Battle for Free Speech*, DAILY MAIL (Dec. 10, 2010), http://www.dailymail.co.uk/news/article-1337292/Payout-anti-gay-preacher-Anthony-Rollins-Landmark-ruling-free-speech-battle.html; *see also Anti-Gay Leaflets Charge Dropped*, BBC NEWS (Sept. 28, 2006), http://news.bbc.co.uk/2/hi/uk_news/wales/5388626.stm (head of evangelical lobbying group arrested for refusing police order to cease handing out leaflets at the entrance to Cardiff's Mardi Gras gay and lesbian festival that "quoted the Bible and that told gays: 'Turn from your sins and you will be saved.'"); Lizzie Parry, *Arrested for Quoting Winston Churchill*, DAILY MAIL (Apr. 28, 2014), http://www.dailymail.co.uk/news/article-2614834/Arrested-quoting-Winston-Churchill-European-election-candidate-accused-religious-racial-harassment-repeats-wartime-prime-ministers-words-Islam-campaign-speech.html (chairman of a right-wing British

in France of criminal charges, later dropped, against singer/songwriter Bob Dylan for stating in a *Rolling Stone* magazine interview that "[i]f you got a slave master or Klan in your blood, blacks can sense that. That stuff lingers to this day. Just like Jews can sense Nazi blood and the Serbs can sense Croatian blood."[130]

I do not mean to imply that arrests, prosecutions, or convictions of those who temperately express racist ideas or criticize homosexuality represent the typical hate speech case, for they do not.[131] Rather, my point is that there are a sufficiently

political party arrested for failure to obey a police order to stop speaking and subsequently re-arrested "on suspicion of religious or racial harassment" for quoting in a speech in front of the Winchester Guildhall passages from a book by Winston Churchill strongly critical of Islam; the charges were later dropped); Enza Ferreri, *Charges Against Liberty GB Leader Paul Weston are Dropped*, LIBERTY GB (June 11, 2014), http://libertygb.org.uk/v1/index.php/home/root/news-libertygb/6444-charges-against-liberty-gb-leader-paul-weston-are-dropped); Paul Bracchi, *It May Have Been a Victory for Free Speech, But Why Did Breakfast Insult of Muslim's Faith Case Ever Come to Court?*, DAILY MAIL (Dec. 10, 2009), http://www.dailymail.co.uk/news/article-1234680/It-victory-free-speech-did-breakfast-insult-Muslims-faith-case-come-court.html (couple who ran a small hotel charged with religiously aggravated violation of the Public Order Act of 1986 for stating during a breakfast conversation with a guest wearing a hajib that Mohammad was a "warlord" and that the guest was living in bondage; after prosecution costing £20,000, the trial judge dismissed the case).

130. Inti Landauro & Noémie Bisserbe, *France Drops 'Hate Speech' Case Against Bob Dylan*, WALL STREET J. (April 15, 2014), http://www.wsj.com/articles/SB10001424052702303663604579503821936107510. Significantly, the prosecutor dropped the charges not because she determined that Dylan's statement did not constitute "public insult and inciting hate" as charged but because a lengthy investigation determined that Dylan did not authorize the interview to be published in France. *Id.* Consistent with this finding, the publisher of the French edition of *Rolling Stone* was ordered to stand trial for publishing the statement and if convicted faces up to one year in jail and a maximum fine of €45,000. *Id.*

131. *See, e.g.*, *'Ku Klux Klan Golliwog Hanging' Man Jailed*, BBC NEWS (Jan. 8, 2014), http://www.bbc.com/news/uk-england-birmingham-25650201 (man convicted under British hate speech law for posting online videos of himself dressed in Ku Klux Klan regalia while hanging a life-sized "golliwog" doll); R. v. Andrews, [1990] S.C.R. 870 (Can.) (two members of Canadian white supremacist organization convicted for possession of sticker cards with message "Nigger go Home" among other racist and anti-Semitic statements); R. v. Keegstra, [1990] 3 S.C.R. 697 (Can.) (a Canadian school teacher convicted for referring to Jews, among other anti-Semitic slurs, as "child killers,"); Martin Wainwright, *Cabinet Rethinks Race Hate Laws After Jury Frees BNP Leaders*, GUARDIAN (Nov. 11, 2006), http://www.theguardian.com/media/2006/nov/11/broadcasting.farrightpolitics (a leader of the British National Party tried for calling asylum-seekers "cockroaches"); *Åke Green Cleared Over Gay Sermon*, LOCAL (Nov. 29, 2005), https://web.archive.org/web/20120218220008/http://www.domstol.se/Domstolar/hogstadomstolen/Avgoranden/2005/Dom_pa_engelska_B_1050-05.pdf (a Swedish pastor convicted for referring to "sexual abnormalities" such as homosexuality as "a serious cancerous growth on the body of society"); Andrew Higgins, *Danish Opponent of Islam Is Attacked, and Muslims Defend His Right to Speak*, N.Y. TIMES (Feb. 27, 2015), http://www.nytimes.com/2013/02/28/world

large number of such cases to show that most hate speech laws, whatever their intent, manifestly do not in practice provide a "safe haven" for expressing "something like the propositional content" of bigoted views that become illegal only "when expressed as vituperation."[132]

B. EFFECT ON LEGITIMACY

Far from creating a "safe haven" for relatively temperate expression of bigoted views, hate speech laws in many democracies, together with the application of public order provisions, make it risky for anyone even without vituperation to publicly criticize homosexuality as immoral or disordered; to condemn Mohammad for marrying a child; to decry the growing influence of Islam or to denounce it as an immoral religion or one incompatible with democracy; or to urge that immigration of certain ethnic or religious groups be halted or guest workers expelled. To be clear: I am not saying that someone who, for

/europe/lars-hedegaard-anti-islamic-provocateur-receives-support-from-danish-muslims.html?_r=0 (Danish journalist convicted for saying that that "girls in Muslim families are raped by their uncles, their cousins or their dad."). The BNP member was acquitted and the convictions of the Swedish pastor and Danish journalist were reversed on appeal. *BNP Leader Cleared of Race Hate*, BBC NEWS (Nov. 10, 2006), http://news.bbc.co.uk/2/hi/uk_news/england/bradford/6135060.stm; Keith B. Richburg, *Swedish Hate-Speech Verdict Reversed*, WASH. POST (Feb. 12, 2005), http://www.washingtonpost.com/wp-dyn/articles/A17496-2005Feb11.html; Ann Snyder, *Danish Supreme Court Acquits* Hedegaard, LEGAL PROJECT (Apr. 21, 2012), http://www.legal-project.org/blog/2012/04/danish-supreme-court-acquits-hedegaard.

132. Waldron, *Political Legitimacy*, *supra* note 10, at 335. Tellingly, this is true even of the Racial Hatred Act 1995, the Australian provision that Waldron invokes as an exemplar of hate speech laws that "bend over backwards" to create a "safe haven" for expression of the basic "propositional content" of views that become "objectionable when expressed as vituperation." *See, e.g.*, Eatock v. Bolt, 197 F.C.R. 261 (2011) (Austl.) (journalist convicted for writing article criticizing what he saw as the trend of mixed-race, "fair skinned" people emphasizing their Aboriginal roots to gain benefits available to Aborigines); Toben v. Jones, 129 F.C.R. 515 (2003) (Austl.) (defendant convicted for distributing materials that denied the existence of the Holocaust). Neither case involved the use of epithets or other intemperate language. Closer to the kind of vituperation that Waldron claims the Australian law and "most" laws against hate speech are meant to suppress was the expression at issue in *McGlade v. Lightfoot*. 104 F.C.R. 205 (2000) (Austl.). In that case, a legislator was convicted for proclaiming that "Aboriginal people in their native state are the most primitive people on earth. If you want to pick up some aspects of Aboriginal culture which are valid in the 21st Century, that aren't abhorrent, that don't have some of the terrible sexual and killing practices in them, I would be happy to listen to those." *Id.* But even this vile expression, for which the legislator immediately apologized, is considerably less intemperate than Waldron's example of someone proclaiming that those protected by antidiscrimination laws "are not better than the sort of animals we would normally seek to exterminate, like rats or cockroaches." Waldron, *Political Legitimacy*, *supra* note 10, at 335.

instance, without rancor publicly referred to homosexual activity as immoral or as a psychological disorder would likely be arrested, prosecuted or convicted. But given the well-publicized instances of protestors being subject to a state's criminal apparatus for such temperate criticism, it is a fair inference that many people who would have otherwise expressed these views refrained from doing so due to a reasonable apprehension that they too might be subject to these sanctions if they spoke their mind. The detriment to political legitimacy arising from this significant impediment to democratic participation is, pace Waldron, far from "minimal."[133]

To try to assess the extent of this detriment to political legitimacy, I will focus on the effect on downstream antidiscrimination measures worked by the upstream suppression of speech critical of homosexuality. It is these restrictions, with the punishment of anti-Islamic speech a close second, which in my view constitute the most far-reaching and often unjustified repression of political dissent in contemporary democracies. It is true that the restrictions do not prevent citizens from publicly opposing laws forbidding discrimination on the basis of sexual orientation; rather, these laws only constrain people from publicly making particular arguments in opposition that many understandably find offensive and hurtful, not to mention wrong. Still, the view that homosexual conduct is immoral or disordered is precisely the reason that many opposed (and still oppose) extending antidiscrimination laws to cover sexual orientation. The speech restrictions discussed above thereby effectively prevented these citizens from participating in the public discussion of a host of antidiscrimination measures, as well as of proposals to extend marriage to include same-sex couples, in an intellectually honest and authentic manner.[134] In contrast, proponents of these

133. *Id.*

134. It may be that in the United Kingdom at least the most egregious restrictions on anti-homosexual speech are in the past. For instance, the Public Order Act of 1986 has been amended, effective February 2014, to remove "insulting." PUBLIC ORDER ACT 1986, ARCHIBOLD CRIMINAL PLEADING EVIDENCE AND PRACTICE, § 29–41 (Sweet & Maxwell, 63d ed. 2015) (1822). Even before this amendment, at least one of the street preachers arrested for declaring homosexuality sinful had successfully sued for compensation for wrongful arrest. *See supra* note 129. *But see supra* text accompanying note 120 (street preacher arrested and convicted subsequent to this amendment for citing to Leviticus 20:13 in support of his view that homosexual conduct is an "abomination"). This somewhat greater protection of temperate dissent in Britain is commendable. It cannot, however, undo the impairment of equal democratic participation that previously

measures were free to express the full range of reasons for their support. Accordingly, with regard to crucial matters of democratic self-governance, dissenters were deprived of the equal opportunity to participate in the political process.

1. Obligation to Obey the Law (Descriptive)

Some opponents of laws prohibiting discrimination on the basis of sexual orientation who would have otherwise felt at least a *prima facie* obligation to obey these laws just because they are laws, might well due to legal restrictions preventing them from expressing the reasons for opposing these measures feel no such obligation to obey these antidiscrimination measures.[135] Such annihilation of this sense of political obligation, moreover, is not limited to those restrained from expressing their views in opposition to a particular law under consideration. The intense debate about homosexuality that took place in democratic countries for the last several decades often focused not on a particular piece of legislation. Rather, although often sparked by some proposed law or change in policy, this public debate was often a much more diffuse and far-ranging discussion about whether homosexuality should be regarded as equally socially acceptable as heterosexuality. Indeed, in every case discussed above in which someone was arrested, tried, or convicted for saying that homosexuality was immoral or pathological, the speaker was not decrying a particular piece of proposed legislation but was generally opposing what social conservatives often refer to as the "homosexual agenda."

Recently, in most liberal democracies, social conservatives seem to have lost, or are well on the way to losing, this debate. As a result of this profound and relatively rapid change in public opinion, a host of laws prohibiting discrimination on the basis of sexual orientation have been enacted, which in my view is a most welcome development. However, for at least some of those effectively prevented by force of law from expressing their views in the discussion by which the public opinion about homosexuality was formed, it is most likely that their sense of political obligation to obey not just some particular piece of legislation but a host of

existed or repair any resulting diminution to the legitimacy of various downstream antidiscrimination laws enacted during this period.

135. *See supra* notes 39–43 and accompanying text.

downstream antidiscrimination laws has been diminished or even annihilated.

2. Obligation to Obey the Law (Normative)

For those effectively prevented from even temperately expressing in public the view that homosexuality is immoral or disordered, any resulting feeling that they have no political obligation to obey any antidiscrimination law seems both reasonable and apt. This leads me to the troubling conclusion that for many citizens the *political* obligation to obey[136] (as opposed to a *moral* obligation not to engage in the prohibited behavior) a potentially large number of downstream antidiscrimination laws may as a normative matter have been annihilated by upstream speech restrictions. In contrast, and consistent with my conclusion above with respect to Waldron's example of the landlord referring to Pakistani immigrants as "cockroaches," banning the use of vicious epithets such as "fag" in public protests against homosexuality,[137] or publicly referring to homosexuality as "a serious cancerous growth on the body of society,"[138] would not, despite some possibly significant detriment to descriptive legitimacy, as a normative matter obliterate or even significantly diminish anyone's political obligation to obey laws forbidding discrimination on the basis of sexual orientation. This is because, as Waldron observes, bans limited to such highly vituperative speech allow speakers to express the basic "propositional

136. That is, to obey these laws *qua* laws or just because they are laws. *See supra* note 25.

137. *Cf.* Snyder v. Phelps, 562 U.S. 443, 448 (2011) (upholding right of protestors to display signs, including one reading "God Hates Fags," in protest near funeral of United States serviceman killed in the line of duty). Just because banning the use of such epithets in public discourse would not significantly interfere with the political obligation to obey the law as a normative matter does not necessarily mean that doing so would be justified. For one, such a ban might undermine the obligation to obey the law in its descriptive sense. In addition, there is the practical problem of determining which terms are sufficiently vituperative to warrant punishment and which should be allowed as part of public discourse.

138. Högsta Domstolen [HD] [Supreme Court] 2005-11-29 B 1050-05 (Swed.), *translated in Judgment Case No. B 1050-05*, The Supreme Court of Sweden (Nov. 29, 2005), https://web.archive.org/web/20120218220008/http://www.domstol.se/Domstolar/hogstadomstolen/Avgoranden/2005/Dom_pa_engelska_B_1050-05.pdf. It should be noted that this vile reference was made as part of a sermon in church and thus raised freedom of religion issues in addition to freedom of speech concerns.

content" of the ideas they want to convey.[139] In addition, and as discussed above,[140] such bans can be supported by good reasons.

However, between the two poles of highly vituperative and decidedly temperate opposition to homosexuality lies a large range of expression. As the restrictions on criticism of homosexuality move along this spectrum from the vituperative to the temperate, there is a corresponding diminution of the political obligation of those constrained by the speech restriction to obey downstream measures outlawing discrimination on the basis of sexual orientation.

Admittedly, only laws that constrain speech at the "temperate" end of this spectrum can as a normative matter destroy rather than merely diminish the political duty to obey downstream antidiscrimination laws. But as Waldron correctly emphasizes, the effect of speech restrictions on the legitimacy of downstream laws is "a matter of degree." Accordingly, any assessment of the effect of these restrictions on the obligation to obey a downstream law must account not just for the minimal effect resulting from restrictions on extremely vituperative speech, on the one hand, and the possible annihilation of this obligation worked by restrictions on temperate speech, on the other. Rather, this assessment should take into consideration the full range of detrimental effects on legitimacy resulting from speech restrictions between these two poles. Of particular concern are those laws that suppress expression such as the newspaper editorial by a Canadian pastor declaring that "[h]omosexual rights activists and those that defend them, are just as immoral as the pedophiles, drug dealers and pimps that plague our communities."[141] Uncivil and hyperbolic expression such as this is, alas, all too common in public discourse in many contemporary democracies. While selective suppression of such uncivil speech about homosexuality might not as a normative matter annihilate the political obligation of those whose speech was constrained to obey downstream laws forbidding sexual orientation discrimination, it significantly diminishes this obligation.

139. *See* Waldron, *Political Legitimacy*, *supra* note 10, at 335.

140. *See supra* text accompanying note 88.

141. Lund v. Boissoin, 2012 A.B.C.A. 300, ¶ 4 (Can.), http://www.canlii.org/en/ab/abca/doc/2012/2012abca300/2012abca300.pdf.

3. Morality of Enforcement

We come now to the effect of these speech restrictions on legitimacy in its most vital sense—the morality of the use of coercion to enforce a law. While some may question whether we have, normatively speaking, any political obligation to obey the law,[142] few would deny that forcing people to comply with a law with which they disagree requires moral justification, especially when the disagreement, though not necessarily correct, is at least reasonable. As discussed, one powerful (though concededly not always sufficient) justification for the use of coercion to enforce laws against such dissenters is that they had an adequate opportunity to participate in the process by which the law was enacted.[143] So, does an upstream speech restriction which effectively forbids someone from publicly proclaiming, without invective or use of loathsome epithets, that homosexuality is sinful or immoral or results from a psychological disorder, make it immoral to enforce against such a dissenter a downstream law prohibiting discrimination on the basis of sexual orientation? The answer to this question depends on the moral status of such enforcement when the moral deficit created by the upstream speech restriction is accounted for.

Fortunately for legitimacy in its most crucial sense, the enforcement of downstream antidiscrimination laws against those who were prevented by upstream speech restrictions from expressing even temperate criticism of homosexuality usually remains morally justified due to the substantial moral weight of these downstream laws. For instance, most coercive applications of a law prohibiting sexual orientation discrimination in places of public accommodation would remain moral even when the significant moral deficit arising from the constraint of the upstream law is taken into account. This would be true, say, of a restaurant proprietor who in violation of the law refused service to homosexuals, or of a theater owner who refused to admit gay people, even if these proprietors had been prevented from expressing in public discourse the view that homosexuality is sinful or disordered. Crucially, however, where the moral valence of the application of antidiscrimination is equivocal or uncertain, the enforcement of the law might well be rendered immoral by

142. *See, e.g.*, HUEMER, *supra* note 22, at 16–17 (denying that "anyone [is] obligated to obey a law merely because it [is] the law"); *see also supra* note 80.

143. *See supra* text accompanying notes 35–45.

upstream speech restrictions. This situation is most likely to occur where the application of the antidiscrimination measure infringes some particularly strong countervailing individual interest such as freedom of conscience and religion.

To demonstrate this possibility, I offer what I shall call the Evangelical Photographer ("EP") Scenario. Suppose that Elaine, an evangelical Christian who makes her living as a commercial photographer in a European democracy with restrictions on speech critical of homosexuality such as described in Part IV.A, wants to protest a proposed law forbidding discrimination on the basis of sexual orientation in places of public accommodation. She has prepared a sign that she plans to carry in a protest outside the national legislature which reads: "Stop Immorality Now! Say 'No' to the Homosexual Agenda." As Elaine is about to leave for the protest, a member of her congregation accurately advises her that several people in her country have been arrested, and some successfully prosecuted, for making similar statements as part of a public protest. Elaine therefore concludes that displaying such a sign is too risky. Unable safely to express her authentic reasons for opposing the proposed law, she decides not to participate in the protest. Several weeks later, the law is approved by the legislature.

In the many years she has been in business, Elaine has willingly made photographic portraits of gay people, including couples. She has, however, persistently refused requests to photograph same-sex weddings or commitment ceremonies because she does not want to use her skills to document, and does not want to participate in, an activity she believes to be sinful and contrary to God's commandments. Soon after the antidiscrimination law passes, a lesbian couple asks Elaine to photograph their wedding but she declines to do so. As a result, she is summoned to appear before her country's Human Rights Tribunal and is ordered to photograph the wedding. She refuses to comply with the order and is fined €1,000. She is warned that any future violation of the antidiscrimination law will result in harsher penalties, including the possibility of imprisonment. Did the upstream speech restrictions preventing Elaine from publicly expressing her reasons for opposing the antidiscrimination measure render immoral its application to her? I believe this may well be the untoward effect of the speech restrictions.

This scenario is based in part on an actual American case involving a photographer who refused on religious grounds to photograph a same-sex commitment ceremony in violation of a New Mexico law forbidding discrimination on the basis of sexual orientation in places of public accommodation.[144] The case involved a clash of important individual interests. On the one hand, the law not only protects the interests of homosexuals by assuring them access to goods and services in places of public accommodation but also sends an important message affirming the equal right of all people to freely participate in public life regardless of their sexual orientation. It is also significant that the photographer was operating a *commercial* enterprise open to the general public. On the other hand, the application of this law to the photographer substantially burdens her sincerely held religious beliefs. And just as one's sexual orientation is for most people essential to their identity, so for many people are their religious commitments. In addition, some religious people believe that participating in biblically condemned activities may have negative consequences for them in the afterlife.[145] It is not surprising, then, that an American Civil Liberties Union lawyer who filed a brief *supporting* the application of the antidiscrimination law to the photographer admitted that the case involved "difficult choices."[146]

It is in cases like this involving competing moral claims that the interest in equal political participation can become crucial. The photographer in the actual case had a securely protected First Amendment right to publicly oppose the antidiscrimination measure for any reason she wanted to express, including the view that homosexuality is immoral or disordered, and to do so either temperately or vituperatively.[147] With important individual

144. *See* Elane Photography, LLC v. Willock, 309 P.3d 53 (N.M. 2013). The photographer claimed that the application of this antidiscrimination provision to her refusal to photograph a same-sex commitment ceremony violated her rights of free speech and free exercise of religion guaranteed by the First Amendment to the United States Constitution, as well as violating a state law protecting certain exercises of religion liberty.

145. Also relevant to the balance of interests was the ready availability of other photographers willing to photograph the commitment ceremony. *See* Appellant's Brief at 23–24, Elane Photography, LLC v. Willock, 309 P.3d 53 (N.M. 2013) (No. 33, 687), 2012 WL 5990629.

146. Adam Liptak, *Can Photographer Reject Gay Couple's Request?*, N.Y. TIMES, Nov. 19, 2015, at A14.

147. *See* Snyder v. Phelps, 562 U.S. 443, 448 (2011) (upholding right of protestors to display signs, including one reading "God Hates Fags," in protest near funeral of United

interests on both sides, the photographer's opportunity authentically and vigorously to express her opposition to antidiscrimination measure on an equal basis with other citizens arguably becomes a decisive factor, making moral the use of coercion to enforce this law against her.[148] Conversely, because the photographer in the EP scenario was effectively forbidden from expressing her authentic reasons for opposing the antidiscrimination measure, while supporters of the law faced no such constraint, this restriction on her opportunity to participate as a political equal arguably becomes determinative, rendering immoral enforcement of the law against her.

Admittedly, the EP Scenario is in some sense a "worst case" one for political legitimacy, combining as it does a speech restriction that significantly impairs the ability of a person to protest a downstream law that is then applied to her in way that infringes some particularly weighty interest. But regrettably for the legitimacy of antidiscrimination laws in countries with hate speech restrictions, the EP Scenario is not farfetched. Rather, there are already on the books cases that have most of the relevant elements of the Scenario. In Britain, for example, there have been cases in which devout Christian innkeepers have been found liable under antidiscrimination laws for refusing to rent double-bedded rooms to gay couples.

One such case involved Susanne Wilkinson, a proprietor of a bed and breakfast in Berkshire.[149] Wilkinson, who believes that the Bible is the word of God, placed Bibles and displayed biblical tracts in every room of her house, including the ones occupied by guests. In accordance with her beliefs, Wilkinson restricted the use of rooms with double beds to married heterosexual couples. She was sued under the Equality Act (Sexual Orientation) Regulations 2007 ("the Equality Regulations")[150] by Michael

States serviceman killed in the line of duty); *see also supra* note 71; James Weinstein, *An Overview of American Free Speech Doctrine and Its Application to Extreme Speech*, *in* EXTREME SPEECH AND DEMOCRACY 82 (Ivan Hare & James Weinstein eds., 2009).

148. Which is not to say that the decision was necessarily *legally* correct. As I have emphasized, in addition to a crucial normative dimension, the correct answer to any difficult legal case of involves consideration of doctrinal "fit." *See* Weinstein, *supra* note 5, at 380–83.

149. Black v. Wilkinson, [2013] E.W.C.A. Civ. 820 (Eng.), http://www.bailii.org/ew/cases/EWCA/Civ/2013/820.html.

150. The regulations prohibit discrimination on the basis of sexual orientation in the provision to the public of goods, facilities, or services. Equality Act (Sexual Orientation) Regulations, 2007, S.I. 2007/1263, art. 3 (U.K.).

Black and John Morgan, a gay couple not in a civil partnership,[151] for discrimination on the basis of sexual orientation for refusing to let them occupy a double-bedded room in her house.

Wilkinson asserted, among other defenses, that the application of this regulation to her in these circumstances violated her right to freedom of thought, conscience and religion recognized by Article 9 of the European Convention on Human Rights,[152] as well as her right of private and family life recognized by Article 8 of the Convention.[153] The trial court rejected these defenses and ordered Wilkinson to pay £3,600 in damages.[154] Although it affirmed this decision, the Court of Appeal aptly noted that like "the right of a homosexual not to suffer discrimination on the grounds of sexual orientation . . . the freedom to manifest one's religion or belief" is also an "important human right." The Court also observed that neither of these important rights "is intrinsically more important than the other. Neither in principle trumps the other. But the weight to be accorded to each will depend on the particular circumstances of the case."[155]

In a similar case, the Supreme Court of the United Kingdom upheld a discrimination claim against Peter and Hazelmary Bull, who in accordance with their religious beliefs reserved double-bedded rooms in their small private hotel for heterosexual

151. These events took place in 2012, a year before same-sex marriage was recognized in England. Civil partnership had been available to same-sex couples in the United Kingdom since 2004. *See* Department of Trade and Industry, Explanatory Notes to Civil Partnership Act 2004 (c. 33) (U.K.).

152. Article 9 of the Convention provides in pertinent part:

> Everyone has the right to freedom of thought, conscience and religion; this right includes freedom . . . to manifest his religion or belief, in worship, teaching and observance.
>
> Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society . . . for the protection of the rights and freedoms of others.

EUROPEAN CONVENTION ON HUMAN RIGHTS art. 9, Nov. 4, 1950, 213 U.N.T.S. 222.

153. Article 8 of the Convention provides in pertinent part:

> Everyone has the right to respect for his private and family life . . . .
>
> There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society . . . for the protection of the rights and freedoms of others.

Id. at 8.

154. Lizzy Davies, *Christian Who Refused to Let Gay Couple Stay at B&B Ordered to Pay Damages*, GUARDIAN (Oct. 18, 2012), http://www.theguardian.com/world/2012/oct/18/christian-gay-couple-ordered-pay-damages.

155. *Black*, at ¶ 35.

married couples.[156] The Bulls were sued by Steve Preddy and Martyn Hall, two men in a civil partnership, for violation of the Equality Regulations. Though affirming the discrimination claim, the Supreme Court, like the Court of Appeal, recognized the competing fundamental interests at stake. In the lead opinion, Deputy President Hale wrote:

> The issues in discrimination law are difficult enough, but there are also competing human rights in play: on the one hand, the right of Mr and Mrs Bull (under article 9 of the European Convention for the Protection of Human Rights and Fundamental Freedoms) to manifest their religion without unjustified limitation by the state; and on the other hand, the right (under article 14) of Mr Preddy and Mr Hall to enjoy their right (under article 8) to respect for their private lives without unjustified discrimination on grounds of their sexual orientation.[157]

Later in this opinion, Lady Hale, quoting from a judgment of the European Court of Human Rights, refers to the freedom of thought, conscience, and religion as "one of the foundations of a democratic society," noting that its "religious dimension" is "one of the most vital elements that go to make up the identity of believers and their conception of life."[158]

Like the EP scenario, both of these actual cases present a close moral question, pitting fundamental liberty interests "vital . . . to . . . the identity" of the parties against each other. If the defendants in these cases had an opportunity equal to that of those in favor of the Equality Regulations to publicly express their views about the regulation, then in light of the commercial nature of their activity, a strong case could be made that it was, on balance, moral to coercively apply these regulations to them despite the burden on their freedom of conscience and religion. Unfortunately, the defendants in neither of the British cases had such an opportunity. Rather, as documented in Part IV.A, above, if they had protested the promulgation of these Equality Regulations by proclaiming in the public square the view that homosexuality was sinful or immoral, there was a realistic chance that they would have been ordered by the police to stop speaking.

156. Bull v. Hall, [2013] U.K.S.C. 73, https://www.supremecourt.uk/cases/docs/uksc-2012-0065-judgment.pdf.

157. *Id.* at ¶ 5.

158. *Id.* at ¶ 41 (quoting Bayatyan v. Armenia (2011) 54 E.H.R.R. 467, 494 (Grand Chamber)).

And if they had refused such an order, it is virtually certain that they would have been arrested, likely tried and possibly convicted for expressing views that, as the Court of Appeal had earlier decreed, failed to "show tolerance towards all sections of society" and therefore went "beyond legitimate protest."[159]

In any event, whether or not these hoteliers would have in fact been subject to such legal constraints for expressing these views in public, it would have been reasonable for them to fear such consequences and for that reason decide not to publicly protest the law. Accordingly, a powerful argument can be made that these upstream restrictions on the defendants' ability to "participate as political equals" in the public discussion on a matter that had "important consequences for their individual and collective interest"[160] rendered immoral enforcement of the antidiscrimination law against them.

Indeed, the only salient difference between these actual cases and the EP Scenario is that, unlike Elaine, there was no evidence in the record that the British innkeepers ever had any specific desire to protest the antidiscrimination regulations but were deterred from doing so by hate speech laws. This difference obviously has a significant bearing on the legitimacy of the downstream antidiscrimination measures as a descriptive matter. Speech restrictions that have actually deterred people from protesting a proposed law are particularly likely to diminish, perhaps even destroy, any feeling of political obligation these dissenters might have otherwise had to obey the law.[161] It is not clear, however, that this difference should have any bearing on legitimacy as a normative matter, including the morality of the use of coercion to enforce the downstream regulation. Rather, in accord with the objective focus of normative legitimacy, it would seem that the pertinent inquiry is whether dissenters against whom the state is enforcing the law had an equal opportunity along with other citizens to express their views in opposition to the law.

A somewhat less obvious but actually more relevant difference is that upstream speech restrictions in the EP Scenario are more extensive than in the actual British hotelier cases. As

159. Hammond v. Director of Public Prosecutions, [2004] E.W.H.C. 69, ¶ 19 (Admin) (Eng.), http://www.bailii.org/ew/cases/EWHC/Admin/2004/69.html.

160. DAHL, *supra* note 35, at 5.

161. *See supra* notes 39–43 and accompanying text.

unjustified as the application of laws restraining protestors in the public square or on street corners from criticizing homosexuality as immoral may be, Britons are generally free to express these views in other settings, such as books, magazines, newspapers, or Internet blogs.[162] The EP Scenario, in contrast, at least implicitly posited the broader range of restrictions on hate speech, including on anti-homosexual speech, that exist in many other democracies. For this reason, the impairment of Wilkinson's and the Bulls' opportunity for equal participation was not as severe as the restrictions on the photographer's participatory interests in the EP scenario.[163]

Still, the value of expressing one's view on the street corner or in the village square should not be underestimated. Unlike publishing a book or a magazine or even blogging on the Internet, protesting in the street is an effective means available to people with few resources to expose the public to one's views. In addition, unlike other settings for public discourse, which have increasingly become "echo chambers" for opinions with which the audience already agrees, the public square is a place where dissenters can expose people to unfamiliar points of views "in the hope of influencing others."[164]

So while the detriment to the legitimacy of the application Equality Regulations worked by British speech restrictions may not be as great as in the EP Scenario, they are significant enough to possibly change the moral valence of the enforcement of these regulations from positive to negative. But even if these upstream speech restrictions did not render immoral enforcement of the downstream antidiscrimination measure against these innkeepers, they nonetheless diminished the moral justification for infringing their right of conscience and religion. As Ronald

162. Though apparently not on television. See the Revelation TV and God Channel cases discussed *supra* note 120.

163. It might also be argued that the infringement of the right of conscience and religion was more severe in the EP Scenario than in the actual British hotelier cases. This is because a wedding photographer is often effectively a participant in the ceremony, while an innkeeper who provides a double-bedded room to a couple is at most facilitating sexual activity that the hotelier thinks is sinful. There is something particularly onerous about being forced to choose between one's livelihood and participating in a ceremony deeply at odds with one's sincerely held religious beliefs. On the other hand, the British bed and breakfast case required the Christian proprietor to facilitate this activity in her own home, which adds a dimension of personal privacy not present in the EP Scenario.

164. DWORKIN, *supra* note 5, at vii.

Dworkin aptly observed, such substantial impairment of political legitimacy is something to regret.[165]

Of course, it will often not be possible to determine with certainty whether the moral deficit of an upstream speech restriction renders immoral what would be an otherwise moral enforcement of a downstream law. This is because upstream speech restrictions aside, the morality of downstream legislation is frequently an issue about which people can reasonably disagree. This is particularly true, where, as in the EP Scenario and the two British hotelier cases, the enforcement of a law enacted to promote the fundamental interests of some people significantly burdens important interests of others. Such reasonable contestability about the morality of enforcing downstream legislation, however, itself has significance for the moral calculation. For it means that in any situation in which the morality of enforcing a downstream law can reasonably be questioned, any substantial upstream restriction on the opportunity of citizens to have their "say" about the proposed law may well render immoral the enforcement of that law against them.

C. COUNTERVAILING LEGITIMACY ARGUMENTS

Finally, there remains to be considered various arguments that hate speech bans can actually promote political legitimacy,

165. *Id.* Many laws, of course, do not purport to directly bind citizens through coercive means, as is the case, for instance, with laws recognizing same-sex marriage or governing immigration. As a result, upstream speech restrictions cannot deprive these downstream laws of legitimacy in the sense of obligation to obey these laws or the morality of using coercion to enforce these provisions against those whose speech was restricted. Still, selective exclusion of people from participation in the public debate about such issues as same-sex marriage or which immigrants are admitted to the country can have a deleterious effect on legitimacy of the entire legal system. Descriptively, people who have been denied the opportunity to participate as a political equal in a public discussion as crucial to society as the definition of marriage or immigration policy may feel less of an obligation to obey the laws of that society that do directly bind them, or even no duty at all to do so. As a normative matter, in contrast, to the extent that a right of democratic participation generates a duty to obey the laws of that society, even speech restrictions as grievous as some of those discussed in this Article, do not destroy the general duty to obey the laws of that system or entitle people in these countries to "rise up in revolution." *See* Waldron, *Political Legitimacy*, *supra* note 10, at 332. Nonetheless, because these restrictions impede the fundamental interest in the opportunity of equal participation on critical issues, they do to some degree diminish this general obligation, or to use Dahl's term, reduce the legal system's legitimacy "reservoir," on which the morality of the entitlement to govern and the use of coercion depends. *See* Weinstein, *supra* note 5, at 368; ROBERT A. DAHL, POLYARCHY: PARTICIPATION AND OPPOSITION 148–49 (1971).

an effect that accordingly mitigates or perhaps completely offsets the claim that hate speech bans diminish or destroy legitimacy. In a recent book, Alexander Brown deploys such arguments both against Dworkin's claim that hate speech laws can spoil the legitimacy of downstream legislation as well as Post's view that such laws can impair systemic legitimacy.[166]

In his discussion of Dworkin's claim that upstream hate speech restrictions can spoil the legitimacy of downstream antidiscrimination laws, Brown quotes Waldron's response that because hate speech restrictions protect "the basic social standing . . . of members of vulnerable groups . . . the complaint that attempting to secure this dignity damages the legitimacy of other laws may be much less credible as a result." [167] Expanding on Waldron's argument, Brown observes:

> Presumably what makes this complaint much less credible is the belief that a relatively minor reduction in the collective authorization of downstream laws and policies can be justified on the basis of serious considerations that justify the upstream laws. In other words, political legitimacy has greater but not absolute weight in comparison to other goods or values, meaning that a sufficiently large extent of the realization of other goods or values, most notably the assurance of civic dignity, can be of equal or greater value than the realization of political legitimacy.[168]

Brown concedes, however, that a "fairly obvious reply" to this line of argument is that "the goods or values of political legitimacy and the assurance of civic dignity cannot be traded off against each other in this sort of way" because political legitimacy "is not the sort of thing that can be placed on balancing scales with things other than itself."[169] To meet this objection, Brown suggests that political legitimacy, including legitimacy of the legal system, "itself depends upon its being possible, at least in principle, to justify that system to each citizen bound by it on the basis of fundamentals of justice that they cannot reasonably reject."[170] On this view of political legitimacy, Brown continues, it might be argued that members of vulnerable minority groups could

166. BROWN, *supra* note 18, at 201–14.

167. *Id*. at 207, quoting Jeremy Waldron, *Dignity and Defamation: The Visibility of Hate*, 123 HARV. L. REV. 1596, 1646 (2010).

168. *Id*.

169. *Id*.

170. *Id.* at 208.

reasonably reject the justification that hate speech laws "may put at risk the collective authorization and political legitimacy of downstream laws from which you benefit" as a sufficient reason for the state to choose not to "utilize the measures at [its] disposal to curb forms of hate speech that can be corrosive of . . . your reputation, status and dignity as members of society in good standing."[171] In other words, "assurance of civic dignity is constitutive of the realization of political legitimacy."[172] Accordingly, his argument in favor of hate speech restrictions is being made not as a tradeoff between legitimacy and other goods or values but rather "from the sole perspective of political legitimacy."[173]

There are several problems with Brown's attempt to locate legitimacy on both sides of the equation. To begin with, he stacks the deck in formulating the question to be posed hypothetically to vulnerable minorities. If this Article has demonstrated anything, it is that hate speech laws as they actually exist, and of the type that Brown thinks justified, [174] present much more than some "risk" to "collective authorization and legitimacy of downstream laws" from which members of these groups benefit. Nor, contrary to Brown's exposition of Waldron's erroneous view, have they resulted in only "relatively minor reduction in the collective authorization of downstream laws." Rather, as discussed in subsections B and C of this Part, their effect on legitimacy, both in the normative and descriptive sense, is substantial. In light of such significant detriment to political legitimacy, even if one accepts hypothetical consent as the basis of political legitimacy, there is a very real question whether Brown's hypothetical interlocutors could reasonably consider the failure of a jurisdiction to enact broad hate speech prohibitions of the type Brown defends as contrary to "the fundamentals of justice."[175]

171. *Id.*

172. *Id.*

173. *Id.*

174. Thus far beyond the ban on highly vituperative hate speech that Waldron thinks might be justified, Brown defends bans on group defamation (*sensu stricto*) and on incitement to racial hatred, *id.* at 214. Despite the seemingly limited scope of such laws, they have, as I have demonstrated, been used to impair, and perhaps in some cases destroy, the legitimacy of downstream antidiscrimination laws. *See* subparts A and B of this Part.

175. Concededly, even if as an objective matter such a view was unreasonable and therefore the failure to enact hate speech laws did not impair legitimacy in the normative sense, that failure might well impair descriptive legitimacy for some members of vulnerable minority groups.

Second, even on the assumption that failure to enact hate speech laws does compromise legitimacy, it is, as Brown notes, the legitimacy of "the legal system" that has been diminished, not the obligation to obey or the morality of an enforcement of a particular law or laws. The diminution[176] in legitimacy that Brown claims would result from not enacting hate speech laws might be a good rebuttal to the claim that hate speech laws diminish systemic legitimacy. This is because the allegedly competing legitimacy concerns would then be commensurable to the extent that they are both systemic.[177] It is difficult, however, to weigh a loss to systemic legitimacy against a detriment to the legitimacy of a particular law. The work done by these two types of legitimacy is very different. The concern of systemic legitimacy is, as Brown notes, identification with the legal system. In contrast, the concern about the legitimacy of a particular law that I have emphasized in this Article is whether it is moral for the state to use force to make dissenters comply with a law with which they can reasonably disagree.

Making the comparison even more difficult is that the legitimacy problem that Brown identifies is grounded in hypothetical consent, while the diminution and possible annihilation of the legitimacy that I have identified results from the exclusion of dissenters from participation in the collective decision making by which the law was enacted.[178] In sum, because

176. I am assuming that Brown is not claiming that the effect on systemic legitimacy resulting from failure to enact hate speech bans is so catastrophic as to justify members of vulnerable minority groups to "rise up in revolution." *See* Waldron, *Political Legitimacy*, *supra* note 10, at 332. Rather, I read him as arguing, as I claim is the case for hate speech bans, that the failure to enact such merely reduces that society's legitimacy "reservoir." *See supra* note 165.

177. *Id.*

178. A similar problem inheres in Steven Shiffrin's attempt to offset with a countervailing concern Baker's claim that hate speech bans compromise the legitimacy of the legal system because they disrespect the formal autonomy of racist speakers. "It is a little odd," Shiffrin objects, "to be told that injustice must be maintained in order to protect the legitimacy of the government." Since racist speech might "create unjust conditions for . . . people of color," banning such expression "can make the government *more* legitimate." Shiffrin, *supra* note 18, at 338–39 (emphasis added), critiquing Baker, *supra* note 1; *see also supra* text accompanying note 38. Baker believes that the basis of political legitimacy is respect for formal autonomy, *see* Baker, *supra* note 1, at 254, while Shiffrin focuses on substantive autonomy; *see* Shiffrin *supra* note 18, at 339. This leads Baker and Shiffrin to use the term "legitimacy" in very different ways. For Baker, the term embraces a specific set of "conditions" the legal order must meet "to create real obligations" for people to obey the law, and to "justify use of otherwise immoral force or coercion to enforce the law." Baker, *supra* note 1, at 262. Shiffrin, in contrast, seems to use the term much more

the diminution of systemic legitimacy that Brown claims to have identified is so markedly different both in its basis and function than impairment of the legitimacy of the downstream laws that Dworkin and I discuss, his attempt to recast Waldron's argument about the harm to civic dignity as a countervailing legitimacy concern adds nothing to the force of Waldron's critique.[179]

In contrast, Brown's response to Post invokes a commensurable legitimacy concern.[180] Responding to Post's claim that hate speech restrictions undermine the legitimacy of the legal system by excluding those with bigoted views from participating in the formation of public opinion, Brown maintains that hate

generally to mean a just society, *see* Shiffrin *supra* note 18, at 339 n.8, citing STEVEN H. SHIFFRIN, DISSENT, INJUSTICE AND THE MEANING OF AMERICA 91–93 (1999), that is worthy of "our respect." *Id.* at 165 n.1. Unlike Brown's proffering of a systemic legitimacy concern to offset diminution of legitimacy of a particular law, Shiffrin and Baker are both concerned with systemic legitimacy. Still, in light of their very different conceptions of both the basis of political legitimacy and the work it is supposed to do, it is not clear how one should go about weighing these legitimacy concerns against each other. Shiffrin makes another argument worth noting about the relationship between hate speech and legitimacy. Consistent with the view of political legitimacy that I adopt in this Article, Shiffrin writes that legitimacy "must start from the premise that all citizens are worthy of equal concern and respect." *Id*. at 78. He then asserts that racist speech, "such as that of the Klan, therefore promotes governmental illegitimacy and makes a negative 'contribution' to public political dialogue." *Id*. It is not clear if Shiffrin is claiming that hate speech like this actually diminishes political legitimacy. The answer depends on what Shiffrin means by "promote." It is true that racist speech expresses a world view, and often urges governmental policies, that are anathema to equal concern and respect that government owes each citizen, and thus "promotes" illegitimacy in the sense of advocating for such a condition. But even the expression of the most virulent racist ideology does not necessarily "promote" illegitimacy in the sense of actually impairing or diminishing political legitimacy any more than avid communist propaganda urging the dictatorship of the proletariat necessarily impairs or diminishes democracy.

179. It is worth noting in this regard, that in criticizing Dworkin's and my claim that hate speech laws can deprive downstream legislation of legitimacy, Waldron does not seek to characterize hate speech laws as promoting political legitimacy. In another argument, but one which does not posit competing legitimacy concerns, Brown claims that because antidiscrimination laws are "a matter of fundamental right and not discretionary privilege" "democratic justification" of such downstream laws "is simply not the sort of thing that can validate upstream decisions not to enact . . . hate speech law[s]." BROWN, *supra* note 18, at 205. I agree that the moral weight of basic antidiscrimination laws is such that even viewpoint-based exclusion of those who want to oppose such laws cannot, in most applications, destroy the legitimacy of these laws. *See supra* Part IV.B.3. But as I also show in that subsection, in situations where application of these laws will impair some fundamental interest of the dissenter, the lack of democratic justification can make the application immoral. In addition, as Dworkin emphasized, and my analysis in Part IV.B supports, even if when the enforcement of an antidiscrimination law is, on balance, moral, "we are left with a deficit in legitimacy—something we regret under that title—because of the censorship." *See supra* text accompanying note 13.

180. BROWN, *supra* note 18, at 194–204.

speech can have a similar exclusionary effect on members of groups attacked by hate speech. He argues that "out of fear for their personal safety or livelihood or as a result of an impaired sense of their status, . . . victims of hate speech tend to refrain from participating in the formation of public opinion."[181] Turning then directly to the issue of political legitimacy, he continues:

> If infringements of formal and substantive equality [resulting from hate speech bans] can alienate citizens and impair the forms of identification that are necessary for democratic legitimacy, then surely the same can be said of unequal communicative relationships in which some citizens are denied real opportunities to partake of public discourse by and through the speech of other citizens. The more that minority citizens are silenced or marginalized by the hate speech of others, the less likely it is that they will identify with the state in the manner required by democratic legitimacy.[182]

Brown acknowledges this argument faces the objection that there is "a paucity of evidence" to support the claim that hate speech silences members of minority groups in this way.[183] Despite this acknowledgment, Brown does not offer any evidence to support his "silencing effect" argument. Rather, he argues for "the adoption of a type of precautionary approach to silencing" in light of "*the possibility* . . . that a proportion of the individuals targeted by hate speech will not participate in the formation of public opinion" and because of "the conditions of uncertainty that surround" this possible antidemocratic outcome.[184]

As I have previously explained in critiquing such "silencing effect" arguments, even if it could be definitively shown that bigoted speech prevented others from participating in public discourse, it is not clear what principle would justify shutting up

181. *Id*. at 198-99.

182. *Id.* at 203.

183. *Id.* at 198, citing James Weinstein, *Hate Speech, Viewpoint Neutrality and the American Concept of Democracy*, *in* THE BOUNDARIES OF FREEDOM OF EXPRESSION AND ORDER IN A DEMOCRATIC SOCIETY 158 (Thomas Hensley ed., 2001). Brown says that I would demand "undeniable and overwhelming evidence" of such a silencing effect before I would entertain suppressing hate speech on this ground. BROWN, *supra* note 18, at 199. This overstates the evidentiary burden that I would urge. What I wrote was rather that in the absence of "persuasive evidence" for banning racist speech on this ground "the suspicion arises that the true motivation for such a law is abhorrence of racist ideology." Weinstein, *supra* note 183, at 158–59.

184. BROWN, *supra* note 18, at 199 (emphasis added).

A (or a group of *As*) so that *B* (or a group of *Bs*) can speak.[185] Or put in terms of political legitimacy, why should *A's* sense of alienation and lack of identification with the state be of lesser concern than *B's*?[186] Brown's invocation of the precautionary principle in lieu of evidence, however, turns a problematic though plausible argument into a plainly indefensible one.

The view that bigots can be forbidden by force of law from expressing their views—which will, if the law has any effect at all, undoubtedly have a "silencing effect" on them—to avoid *the possibility* that some unspecified "proportion of the individuals targeted by [the] hate speech" *might be* deterred from speaking is simply impossible to square with the basic premise underlying participatory democracy that all citizens should have the equal opportunity[187] to engage in the formation of public opinion regardless of the viewpoint they want to express.[188] Invocation of the precautionary principle in this situation thus seems like a pretext to disfavor morally repugnant viewpoints.

To conclude this discussion, I will build on some of Brown's better arguments to try to identify a countervailing legitimacy concern sufficiently similar in type and character to the legitimacy that I have argued is diminished or destroyed with respect to downstream legislation, and which, therefore could, at least theoretically, offset this deficit. Suppose, for instance, that in a certain democratic country the legislature is considering whether to grant an exemption from its drug laws to members of an indigenous population to use a substance traditionally employed

185. *See* JAMES WEINSTEIN, HATE SPEECH PORNOGRAPHY AND THE RADICAL ATTACK ON AMERICAN FREE SPEECH DOCTRINE 134 (1999). Brown seems to agree with me that an official abhorrence of racist ideology would not supply an adequate principle. *See* BROWN, *supra* note 18, at 199, citing Weinstein, *supra* note 183, at 158–59.

186. A finding, based on persuasive evidence, that substantially more people will be silenced by hate speech than by laws banning such expression arguably might provide an adequate justification for deciding to impose the "silencing effect" on those wanting to engage in the hate speech. One situation in which this might occur is if there is a relatively small group of people wanting to engage in hate speech which at the same time will likely silence a particularly large number of people. I am grateful to Jill Hasday for suggesting this possibility to me.

187. Consistent with the discussion in Part I.B, above, I am referring here to the equal opportunity to influence public opinion as a formal not a substantive matter.

188. To the contrary, the unjustifiable asymmetry inherent in this argument raises the suspicion that the view is motivated not by some neutral aspiration to make public discourse more inclusive, but rather by a desire to exclude from the formation of public opinion those who want to offensively challenge society's basic commitment to equality on the basis of race, sex, religion, or sexual orientation.

by this group in its religious ceremonies. Suppose that it is also the case that hate speech against this group, long subject to discrimination by the European settlors and their descendants, is so rampant and virulent that many members of this vulnerable minority group are "out of fear for their personal safety or livelihood" reasonably deterred by the hate speech from publicly supporting the exemption. If the exemption is not passed, then members of this indigenous community might well feel, and aptly so, that they have no political obligation to obey a law against ingesting the drug as part of their religious ceremony. And since religious exemptions for such drug use is an issue about which there can be reasonable disagreement, this lack of opportunity for these citizens to express their support for the exemption in the public discussion about the propriety of the exemption might well render immoral what would have otherwise been the moral application of the drug prohibition to them.

But whether upstream hate speech restrictions will result in such diminution or even destruction of the legitimacy of the application to certain people of downstream legislation is an empirical question that must be straightforwardly addressed, not avoided by invocation of the "precautionary principle" or similar deflections. Moreover, even if the likelihood such detriment to political legitimacy could be persuasively demonstrated,[189] this would not necessarily justify banning hate speech in the name of promoting political legitimacy. It must be further demonstrated that the gain in legitimacy produced by the hate speech ban at least marginally exceeds the detriment to legitimacy caused by the speech restriction.[190]

189. What precisely the standard of proof should be is a difficult and contentious issue. *See supra* note 183.

190. In addition, it would have to be demonstrated that were no non-speech restrictive means by which the government could ameliorate the "silencing effect" of the hate speech. *See infra* Part V. Heinze disagrees with my view that hate speech laws might be justified if they are strictly necessary to prevent others being excluded from public discourse. *See* HEINZE, *supra* note 26, at 5–6. In his view such bans "*never promote the state's democracy*." *Id.* at 5. But if such a law resulted in a net gain in democratic participation by preventing hate speech from deterring members of minority groups, who reasonably feared violence of other forms of reprisal, from participating in public discourse, it would seem that the law does, in fact, "promote the state's democracy."

V. CONCLUSION

In this Article I have argued that by impairing the opportunity for dissenters to participate as equals in the public debate about such matters as race, ethnicity, immigration, and sexual orientation, hate speech laws and public order provisions in force in many liberal democracies have significantly diminished political legitimacy, in both the descriptive and normative sense. Specifically, for those inhibited by these laws from expressing their opposition to antidiscrimination measures, these upstream speech restrictions have diminished, and in some instances may have destroyed, their political obligation to obey these downstream laws. Even more troubling, these inhibitions on equal political participation may have in some cases rendered immoral what would have otherwise been a moral use of force to make these dissenters comply with these antidiscrimination laws.

The question remains, however, what this detriment to legitimacy tells us about the propriety of hate speech laws in a free and democratic society. Such diminishment, or in some cases even annihilation, of the legitimacy of downstream laws obviously weighs against such upstream constraints. Particularly unfortunate is the detrimental effect that hate speech restrictions can have on the morality of enforcing antidiscrimination measures, a cornerstone of the modern liberal democratic state. And it is sad irony that speech restrictions meant to protect vulnerable minorities undermine the legitimacy of laws forbidding discrimination against members of these groups. Even such baleful consequences, however, do not prove that hate speech provisions are inappropriate in a free and democratic society. It does, however, mean that such laws are unjustified if there are means available other than speech suppression to remedy the harm caused by hate speech that would not so drastically undermine political legitimacy.

One of several strengths of Jeremy Waldron's work on hate speech is that it clearly identifies a potential harm not previously emphasized or carefully examined in the literature: making members of vulnerable minority groups unsure of their "basic social standing."[191] It would be tragic if we had to choose between

191. Unlike other justifications for banning hate speech, this rationale does not involve suppressing speech because of its power to persuade others to view members of minority groups a certain way, a type of justification that sits uneasily with the

assuring that members of vulnerable minority groups are not made to feel insecure about their status in society, on the one hand, and promoting the morality of the enforcement of various laws in this society, including laws meant to protect minority group members from discrimination, on the other. Fortunately, no such choice is required. There are means other than speech suppression by which minorities can be reassured of their status in society, including massive demonstrations by other citizens firmly rejecting the bigoted ideas.[192] Or if such "counter speech" is not forthcoming or is insufficient, government can refute these ideas by adding its own voice to the discussion. And perhaps most crucially, and of particular relevance here, such assurance is confirmed and solidified by the enactment and enforcement of antidiscrimination measures, and perhaps even more so, by the widespread social acceptance of the propriety of these measures.[193] In contrast, there are no alternative means available for restoring the legitimacy of a downstream coercive measure diminished or annihilated by an upstream speech restriction. This asymmetry regarding the availability of alternative means weighs heavily against the propriety of hate speech laws in a free and democratic society.

presupposition that people in a democracy must be trusted to make up their own minds about how to see the world and people in it.

192. *See, e.g.*, E.J. Montini, *Time for Us to Thank the Anti-Islam Protestors*, AZ. REPUBLIC, June 7, 2015, at 1F (describing how a group of about 250 anti-Muslim protestors, many wearing T-shirts profanely denouncing Islam, sparked a much larger counter-demonstration composed of members of approximately twenty faith-based organizations, which prompted an Imam to tell the counter-demonstrators, "You made goodness victorious. Thank you.").

193. A situation in which government officials do not condemn alienating hate speech because they want to curry favor with people sympathetic to such speech and, in addition, are unenthusiastic about enforcing antidiscrimination measures would support the propriety of hate speech laws. (I am grateful to Jill Hasday for posing this question to me.) By the same token, the failure to exhaust non-speech repressive measures for combating the alienating effects of hate speech detracts from the propriety of hate speech bans.