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## THE CONDITIONS OF LEGITIMACY: A RESPONSE TO JAMES WEINSTEIN

*Jeremy Waldron\**

### I

Thanks and congratulations are due to Professor Weinstein for his careful elaboration of the legitimacy-based argument against the regulation of hate speech.<sup>1</sup> This is not the first formulation of the argument. Ronald Dworkin set out a briefer version of it in a “Foreword” he contributed to a volume entitled *Extreme Speech and Democracy*, edited by Weinstein and Ivan Hare.<sup>2</sup> But his comments were not very extensive and perhaps they have been underestimated. Weinstein says that this line of argument is “often omitted from the litany of values [relevant to the hate speech debate] recognized by courts and commentators.”<sup>3</sup> Weinstein himself thinks it is “the most powerful argument against hate speech bans.”<sup>4</sup>

There have been gestures towards a political legitimacy argument in the work of other free speech scholars, who considered the significance of the connection between democracy and the foundations of the First Amendment. The first name that springs to mind is that of Alexander Meiklejohn; and some of Robert Post’s writings have continued this theme.<sup>5</sup> Unfortunately that work was not much more than gestural: it did not propound the legitimacy argument in a way that opened it to serious analytic evaluation. But now at last—here—we have a version of the

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1. James Weinstein, *Hate Speech Bans, Democracy, and Political Legitimacy*, 32 CONST. COMMENT. 527 (2017).

2. RONALD DWORKIN, *Foreword*, in *EXTREME SPEECH AND DEMOCRACY*, at v-ix (Ivan Hare and James Weinstein eds., 2009).

3. Weinstein, *supra* note 1, at 528

4. *Id.* at 531

5. See ALEXANDER MEIKLEJOHN, *FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT* (1948); Robert Post, *The Constitutional Status of Commercial Speech*, 48 UCLA L. REV. 1 (2000).

argument that is presented in a sustained and rigorous way, and the debate about free speech and hate speech is the better for it.

I like to think I have contributed something to this increase in rigor by subjecting Dworkin's version of the legitimacy argument to sustained exposition and critique over thirty pages in *The Harm in Hate Speech*, a book based on my 2009 Holmes Lectures at Harvard Law School.<sup>6</sup> I will continue that enterprise in this paper, harping away at some of Weinstein's formulations and questioning a few of the important points that he makes. This is not intended as disrespect, but as tribute to the seriousness of the argument he is making. For I think Weinstein agrees that it is important to ascertain whether the legitimacy argument against the regulation of hate speech is impressionistic only or whether it succeeds in identifying concerns that really ought to engage our attention.

The topic is important but challenging. "Legitimacy" has a rather loose meaning in political philosophy. Its meaning can veer between the normative and the empirical, and between the basis of a state's right to govern and the sentiment among its subjects that they have an obligation to obey. This indeterminacy is partly a function of its neglect in political theory, and we should welcome its being brought up in this context: better some discussion of it in the context of hate speech regulation than no discussion at all. When I began thinking about hate speech regulations, I was particularly struck by Ronald Dworkin's invocation of legitimacy for previously he had been rather dismissive of the topic. In his 1996 book *Freedom's Law*, Dworkin defended judicial review by saying that if a political decision improved democracy, it didn't much matter whether that decision came about through judicial procedures or through full participation. A judicial decision which established a basis for mutual respect, for example, would actually improve democracy by securing one of the conditions without which the moral claims of majority-rule would be non-existent. So there could be no democratic objection to it.<sup>7</sup>

Dworkin seemed to be suggesting that when the conditions of democracy were at stake, procedural legitimacy did not matter.

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6. JEREMY WALDRON, *THE HARM IN HATE SPEECH* 173–203 (2012).

7. RONALD DWORKIN, *FREEDOM'S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION* 15–35 (1996). For a critique of Dworkin's argument, see JEREMY WALDRON, *LAW AND DISAGREEMENT* 282–302 (1999).

And if this were accepted, presumably the same might be said about public debate as well. The fact that a matter was decided without a full public debate would not matter to legitimacy if the decision-procedure that *was* used improved the conditions of democracy. But now, in the argument about hate speech, legitimacy is being taken much more seriously as a procedural value. It matters not just what laws we have but how they were enacted—by whose votes and under what conditions of deliberation. Dworkin and Weinstein are insisting that the enforcement of good laws, however just they are in their content, may be illegitimate if the conditions under which they were enacted did not include unrestricted debate as well as the fair processes of representative democracy.

This twist in Dworkin’s approach to legitimacy is particularly interesting because a case might be made that hate speech laws are actually aimed at securing the conditions of democracy in precisely the fashion that Dworkin indicated in *Freedom’s Law*. He said there that majority-voting is hardly a legitimate mode of political decision among people who have contempt for one another or where there is hatred between various factions. Any partisan of democracy needs to be concerned therefore about actions that are calculated to stir up such hatred and contempt. Since that is precisely the concern of hate speech laws, a case can be made—if we accept Dworkin’s view in *Freedom’s Law*—that hate speech restrictions contribute positively to democratic legitimacy by helping sustain some of the conditions of democracy as well as detracting from democratic legitimacy—if Dworkin and Weinstein are right—by interfering with free speech.

In discussing a similar view held by Alexander Brown,<sup>8</sup> Weinstein says that it is difficult to weigh these opposite legitimacy effects against one another. He thinks one is systemic and the other isn’t—“The work done by these two types of legitimacy is very different”—and this makes balancing difficult.<sup>9</sup> But that does not mean that Brown’s concern can be dismissed or ignored. Back of all the points I am going to make in this essay

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8. ALEXANDER BROWN, *HATE SPEECH LAW: A PHILOSOPHICAL EXAMINATION* (2015).

9. Weinstein, *supra* note 1, at 697. “Legitimacy” does *systemic* work when it is concerned with the overall moral status of a state or legal system; it does *non-systemic* work when it is used to evaluate the status of some particular law or policy or governmental action.

responding to Weinstein is a worry that the argument about political legitimacy is just being wheeled into the hate speech debate opportunistically by people who have never otherwise shown that they take it seriously. I want to make sure that the argument is not just being rigged up for the purposes of the hate speech debate. One way of showing that it is not rigged would be to commit to following the legitimacy principle where it leads—in favor of some hate speech regulation as well as against it.

## II

In this spirit, before addressing the substance of the case that Weinstein makes, I want to identify a few areas where his arguments are potentially misleading or where they exaggerate the concerns that he points to. The gist of his case is that hate speech restrictions placed upon speakers in a polity can sometimes—and do often—have the effect of diminishing the legitimacy of the measures that the speakers are discussing. That case is important and it needs to be addressed head on. But it is best to do so without distractions

A first point is that the case Weinstein is making obviously depends on the nature of the restrictions. A restriction on what may be said is one thing; the total exclusion of an individual from public discourse is another. Proponents of the legitimacy argument are sometimes as loose as they think they can get away with on this matter.<sup>10</sup> So, for example, there are passages where Weinstein appears to imply that hate speech restrictions lead to total exclusion. He talks about the “silencing” effect of hate speech laws.<sup>11</sup> And he quotes himself as having said in an earlier article that legitimacy becomes problematic “[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.”<sup>12</sup>

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10. So for example, Dworkin complains that the effect of hate speech laws is that certain people are “*forbidden to raise a voice* in protest or argument or objection” against some proposals for law. See Weinstein, *supra* note 1, at 579. And Weinstein notes Robert Post’s claim “that hate speech restrictions undermine legitimacy by *excluding* those with bigoted views from participating in the formation of public opinion.” *Id.* at 578 (emphasis added).

11. *Id.* at 579.

12. *Id.* at 529 (quoting James Weinstein, *Participatory Democracy and Free Speech*, 97 VA. L. REV. 491, 498 (2011)).

It is as though such laws were to identify racists (for example) by name and forbid them from voting and from speaking. Maybe such legislation is imaginable: some regimes in recent memory have imposed comprehensive disenfranchisement upon individuals on account of their “hateful” views about socialism or whatever. But I know of nothing called “hate speech legislation” in modern democracies which has or is intended to have this effect. And I don’t think we should take this possibility as our exemplar.

A more helpful formulation is that such legislation means that certain speakers are “forbidden from expressing a particular view.”<sup>13</sup> But even this is hyperbole. Most hate speech laws forbid only speech acts that are intended to have a certain effect—namely the stirring up of hatred in a community against a section of or a group within that community. The self-same proposition uttered patently without such intention or in a manner or in circumstances in which it would not be reasonable for the speaker to have foreseen such an effect is not prohibited. (To this extent, I would like to qualify my concession in *The Harm in Hate Speech* that hate speech restrictions are undoubtedly content-based: they are sort of content-based, but mostly they get at content only by virtue of its intended effect on the community, rather than on the sole basis of the propositions expressed.)<sup>14</sup>

Moreover, most hate speech restrictions add to this a requirement that the speech which is intended to have the effect just mentioned must also be expressed *in a certain manner* before it is liable to prosecution. So, for example, section 18(1) of the UK’s Public Order Act dealing with racial hate speech stipulates that prosecution is possible only against

A person who uses threatening, abusive or insulting words or behaviour, or displays any written material which is threatening, abusive or insulting ... 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.<sup>15</sup>

In other words, the language used has to have a threatening, abusive, and insulting character as well as the specific intent just mentioned. Absent such character or absent such intent, the

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13. *Id.*

14. Compare WALDRON, *supra* note 6, at 150–55.

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

expression of a given view is not prohibited. So it is misleading to say that hate speech restrictions prohibit the expression of certain views per se.

Notice by the way that section 18(1) makes “threatening, abusive or insulting words or behaviour” necessary, not sufficient for the offense. There still must be the intent to stir up racial hatred. It is true that British law also has other provisions—public order provisions, not hate speech provisions—which prohibit the use of threatening or abusive words or behavior, or disorderly behavior “within the hearing or sight of a person likely to be caused harassment, alarm or distress thereby”: that is the effect of section 5 of the Public Order Act.<sup>16</sup> But that is not a hate speech provision and its operation is quite separate—and controversies about it are quite separate—from prohibitions on hate speech. Not everything that restricts speech or protects people from abuse counts as a hate speech restriction, even if it is found in the same omnibus statute. Section 5 is more like a fighting words provision or a public order provision, and the issues raised by regulations with this orientation are quite different from those raised by the hate speech provision. The latter has a specific evil in mind: the proliferation of racial hatred in a community. The former is aimed at a different evil—namely public disorder. If Professor Weinstein wants to make a case that section 5 of the UK’s Public Order Act is over-inclusive either on its face or as applied in recent cases, I will gladly join him. It has nothing to do with our disagreement about hate speech.

I labor this point because Weinstein cites the invocation of section 5 of the Public Order Act in a number of British cases—the cases of Mark Norwood, Harry Hammond, Shawn Holes, and Michael Overd—to illustrate his contention that 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.<sup>17</sup> He believes these cases 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.”<sup>18</sup>

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16. Public Order Act 1986, UK ST 1986, c. 64, pt. I, § 5(1).

17. Weinstein, *supra* note 1, at 554–57.

18. *Id.* at 560.

Weinstein regards the cases cited in this paragraph as crucial for his argument. He says that his discussion of these British examples involves “examination of the actual operation of hate speech laws in force.”<sup>19</sup> Yet none of them involves the use of British hate speech provisions such as section 18(1). They are all about the enforcement of public order provisions which are formulated without reference to the stirring up of racial hatred.

True, in one of the cases that Weinstein cites, the case of Mark Norwood, the violation of section 5 led to an aggravated penalty because the violation was found to be “motivated (wholly or partly) by hostility towards members of a racial or religious group” under sections 28 and 31 of the Crime and Disorder Act 1998.<sup>20</sup> I hope Professor Weinstein will not regard it as pedantic of me to point out that this is a hate crime provision not a hate speech provision. As I said in my book,

though the two ideas—hate speech and hate crimes—do have a distant connection, they really raise quite different issues in our thinking about law. The idea of hate crimes is an idea that definitely does focus on motivation: it treats the harboring of certain motivations in regard to unlawful acts like assault or murder as a distinct element of crime or as an aggravating factor. But in most hate speech legislation, hatred is relevant not as the motivation of certain actions, but as a possible *effect* of certain forms of speech.<sup>21</sup>

Hate crime provisions can involve the aggravation of offenses of all sorts, beatings as well as speakings. There are hate crimes provisions all over American statute books—in forty-five states and in the federal Civil Rights Act. They are controversial, certainly (and I am not sure what Professor Weinstein’s view of them is); but it is a different controversy than the one about hate speech.

No doubt there are hate speech laws in the world expressed less carefully, with less attention to these fastidious distinctions than the British provisions I have cited. But our debate is about hate speech restrictions as such, not about the least well-formulated of them. Just as I will try to make the legitimacy

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19. *Id.* at 554.

20. Weinstein, *supra* note 1, at 554–55 (*quoting* Norwood v. Director of Public Prosecutions, [2003] EWHC 1564 (Admin), <http://www.bailii.org/ew/cases/EWHC/Admin/2003/1564.html>).

21. WALDRON, *supra* note 6, at 35.



argument the best it can be (before refuting it), so opponents of hate speech regulation ought to consider the best case that can be made for regulation of this sort and the best drafting that has emerged from fifty years or more of legislative experience in most advanced democracies before attempting to show that nevertheless such regulations are wrong in principle.

### III

With these points taken care of, let us turn now to the issue of principle. Does the enactment and enforcement of hate speech prohibitions undermine political legitimacy in our society? How is this undermining supposed to work?

Like Weinstein,<sup>22</sup> I shall use the helpful terminology of upstream and downstream laws.<sup>23</sup> Downstream laws are laws that are enacted by the political process; upstream laws are laws that affect the political process. (Of course upstream laws must also have been enacted; they are in that sense downstream also. But I will use “downstream” to refer to laws that are the product of the political process without being intended also to affect the political process.) A downstream law ( $L_d$ ) may be a law against discrimination (say, discrimination against same-sex couples in public accommodations). An upstream law ( $L_u$ ) may be a law prohibiting speech which is calculated to stir up hatred against members of the LGBT community. Weinstein’s position is that the enforcement of  $L_u$  may make a difference to the legitimacy of  $L_d$ . A free and open political debate in the community is so important to political legitimacy that any law such as  $L_u$  that seeks to limit or moderate the contributions that a given citizen,  $P$ , may make to the debate about  $L_d$  compromises the legitimacy of  $L_d$  as enacted in these circumstances.

Now Weinstein has acknowledged that the impact on legitimacy may not be drastic; that is, it may not make  $L_d$  literally unenforceable. He seems to accept the retraction by Ronald Dworkin of a very aggressive initial version of the legitimacy argument, namely, that the enforcement of hate speech laws *destroys* the legitimacy of laws like  $L_d$ .<sup>24</sup> Under pressure Dworkin

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22. Weinstein, *supra* note 1, at 530.

23. The terminology was introduced by Dworkin, in DWORKIN, *supra* note 2, at vii, and followed in WALDRON, *supra* note 6, at 78-79.

24. DWORKIN, *supra* note 2, at vii says that we cannot suppress hate speech “without

had to concede that political legitimacy was a matter of degree, and he retreated to the view that the relevant effect on legitimacy was diminution rather than destruction.<sup>25</sup> Weinstein I think agrees with that. Still, he believes the effect can be considerable, particularly when there are already other difficulties with  $L_d$  and its enforcement.

In one other regard, Weinstein's position is more modest than Dworkin's. Dworkin wanted to say that the enactment and enforcement of a hate speech law may have a general and pervasive impact on downstream political legitimacy. He didn't think it could be limited to an effect on just one law. This is because, as he understood it, a lot of what is forbidden as hate speech is not tailored as an intervention in any particular legislative debate:

A community's legislation and policy are determined more by its moral and cultural environment, the mix of its people's opinions, prejudices, tastes, and attitudes than by editorial columns or party political broadcasts or stump political speeches. It is as unfair to impose a collective decision on someone who has not been allowed to contribute to that moral environment, by expressing his political or social convictions or tastes or prejudices informally, as on someone whose pamphlets against the decision were destroyed by the police.<sup>26</sup>

It follows that the enforcement of hate speech laws against P may make a difference to the legitimacy of  $L_d$  even if P's intervention was not directed at the debate about  $L_d$  in particular. The flip side of this is that the enforcement of a hate speech law ( $L_u$ ) may actually make a difference to the legitimacy of all our enacted laws, because they are all supposed to be enacted (or protected from amendment or repeal) in an atmosphere of free and general debate about social purposes and ideals. It has a wholesale effect, according to Dworkin, partly because of these points about the diffuse nature of public debate and partly because legitimacy might be a systemic attribute—an attribute of

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forfeiting our moral title to force such people to bow to the collective judgments that do make their way into the statute books." See Weinstein, *supra* note 1, at 529 (quoting DWORKIN, *supra* note 2, at vii).

25. Weinstein, *supra* note 1, at 530, cites Dworkin as acknowledging in an e-mail to Waldron 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."

26. DWORKIN, *supra* note 2, at vii.

a whole political system—rather than an attribute of particular laws.<sup>27</sup> I think Weinstein does not accept this. Certainly for the purposes of our argument here, Weinstein is interested in a more focused impact: the retail effect on the legitimacy of  $L_d$  as a result of the enforcement of  $L_u$  in the debate about  $L_d$ . He seems to suggest that the only laws whose legitimacy is affected by hate speech regulation are those directly related to the content of the hate speech under restriction. For example, he says: “laws forbidding people from expressing the view . . . that homosexuality is immoral or disordered, can destroy the moral justification for enforcing laws against sexual-orientation discrimination.”<sup>28</sup>

Weinstein’s position is more focused in another way too. He is interested in the legitimacy effect of the hate speech law on particular people—namely, the people whose interventions in a legislative debate are affected (for example, deterred) by the hate speech law. It is the legitimacy of the downstream law *so far as these people are concerned* that Weinstein wants to focus on. I don’t think he takes a position on whether there is any impact on the legitimacy of enforcing  $L_d$  against people other than  $P$ —for example, people to whom it would never occur to make an intervention of the kind prohibited by  $L_u$  or indeed people who have cheerfully made other less vicious contributions, even if still adversarial, in the debate about  $L_d$ .

I worry that this aspect of Weinstein’s position may get tangled up in Rule-of-Law issues about generality. Hate speech laws are presented as quite general: they forbid *anyone* from stirring up hatred against racial and religious groups and people identified by sexual orientation. Even if they only have to be enforced against a few extremists, they have a potential impact on everyone’s speech. To the extent that this is so, it may be hard to identify the basis for *in personam* illegitimacy of the type that Weinstein’s position suggests.

Anyway, all of this presupposes that we are in possession of a theory of political legitimacy (not specifically invented for this debate) that enables us to make these subtle differentiations. I

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27. As I have already mentioned, Weinstein does not want to acknowledge the systemic impact of hate speech laws on political legitimacy. If he did, he would not be able to rely on an alleged incommensurability between systemic and non-systemic effects systematicity in his response to Alexander Brown. *See supra* text accompanying note 8.

28. Weinstein, *supra* note 1, at 527.

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mean a theory of political legitimacy that is not just rigged to yield this result. I do believe that Dworkin's wholesale position is untenable: I mean his view that the enforcement of a hate speech law diminishes the legitimacy of *all* subsequently enacted downstream laws so far as *all* citizens are concerned. Some readers will think that the best explanation of why Weinstein has focused the legitimacy argument as he does is simply to make it come out as less implausible than Dworkin's wholesale version. The only way of refuting that suspicion would be to show us an independently-justified argument about political legitimacy that would enable us to make these differentiations. Weinstein makes a brave attempt at this task, but (as I shall now show) I think he fails.

## IV

What makes our laws legitimate? I have heard moral philosophers say that the best argument for the legitimacy of our laws (or of any particular law (L)) is a showing that the laws are morally justified or that L in particular is morally justified. Weinstein—I think—accepts this so far as certain rudimentary laws of social order are concerned, such as laws against murder and rape.<sup>29</sup> This is one way in which he begins to narrow things down to his focused position: the enforcement of  $L_u$  does not impact the legitimacy of these rudimentary laws since their legitimacy is purely a matter of content not process.

However, for most of our laws, there is good-faith disagreement in the political community about whether they are justified on their merits. And the problem of legitimacy is to find a basis on which a law may permissibly be enforced even against people who disagree with its content. What we usually say is that the enforceability of L is legitimate because of the way in which L was adopted even in the face of this disagreement. In modern democracies, laws are adopted by debate and voting in constitutionally structured legislatures. The legislatures are populated in their turn by elected representatives. The elected representatives consider bills that are put before them, and they debate their merits. The upshot of those debates is a vote in the various houses of the legislature. These debates and decisions in

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29. Weinstein, *supra* note 1, at 538.

a representative legislature are usually seen as legitimizing the enforcement as law of the bills that survive this process.

Now so far, there is no foothold for an argument about legitimacy based on the impact of hate speech prohibitions. Speech in parliament is usually privileged. I am not aware of any case where a legislator has been prosecuted or threatened with prosecution in respect to the hateful intention of his remarks in a legislative debate. Certainly such an application is far from typical. So how exactly is it that the prohibition of hate speech undermines the legitimacy of the enforcement of a downstream law? I think we have to look at aspects of political procedure that go beyond parliamentary debate. We might consider the possibility of laws enacted by initiative; but I shall put that to one side. The best case for the Weinstein argument looks at the informal public debate that is involved in the election and electoral accountability of legislators and in the debates in the community that complement legislative debates in the parliament.

Legislation is enacted by representatives, but representatives are supposed to be elected in a process that directly involves the people, where the people talk with one another—less formally now than in representative debate in the legislature—and then vote. So perhaps we should consider the impact of upstream laws like hate speech laws on that part of the process. Also legislation is a public matter. When bills are being considered in the legislature and public policy debated more generally in our political institutions, we expect that the formal debate among the elected legislators will be echoed by less formal and more diffuse debate on the issues in civil society. We expect that the two different arenas of debate will influence each other, so that anything that is said in the streets, on the blogs, or in the newspapers might potentially affect things that are said and votes that are cast in the legislature (and vice versa). Of course there is no guarantee. My letter to the newspaper may not be published; there may be no hits on my blog; eyes may be turned away from my graffiti; my spoken words may disappear into the wind; perhaps no one will turn up for the meetings I organize; and the leaflets I distribute may end up in the gutter (from whence they came). Still it is part of our conception of the legitimate political process that it faces like this in both ways.

It is this broader debate that must be the focus of the argument that Weinstein and Dworkin want to make about hate

speech. Weinstein quotes Hans Kelsen as having explained this to us 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 meetings, in newspapers, books, and other vehicles of public opinion. A democracy without public opinion is a contradiction in terms.<sup>30</sup>

Weinstein adds: “It is through public opinion that the people, the ultimate governors in a democratic society, control their representatives between elections.”<sup>31</sup>

But here is where things become difficult. It is one thing to say that public deliberation—chaotic and unformed as it is—is an indispensable part of the political process. It is quite another thing to infer direct conclusions about the legitimacy of the laws from particular aspects of that deliberation. And that is what Weinstein wants to do. He wants to reach a point at which we can say that P has a right to disobey  $L_d$  or a right that it not be enforced against him if the process that led to the enactment of  $L_d$  is tainted in some way (that has to do with P). If the effect of the laws governing public discourse is that P’s intended intervention must be made in a way that doesn’t necessarily correspond to the exact way in which P wanted to intervene, then, according to Weinstein, the moral justification for enforcing (against P or against everyone) some or all of the laws whose enactment is the upshot of the overall process is diminished. This is supposed to be a focused deontic effect (on P’s rights) that flows from the character of the political process that was used. Now, as Weinstein knows, I want to dispute the whole argument. But suppose one were to concede that hate speech laws have a deleterious impact on the quality of the political process; are we then in a position to infer a deontic conclusion about P’s rights? The most I would concede is that something has gone wrong with the character of public debate overall. Individualizing its moral effects to generate particular

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30. Weinstein, *supra* note 1, at 539–40 (quoting HANS KELSEN, *A GENERAL THEORY OF LAW AND STATE* 287–88 (A. Wedberg trans., 1945)).

31. This is almost Weinstein’s only mention of representative democracy or the role of representatives in debating and voting on our laws.

rights is the difficulty. Is there any good political argument that works like this?

Suppose someone is wrongfully disenfranchised. He can speak but it turns out he can't vote. For example, all over the United States at the moment, there are laws restricting access to early voting and rules imposing onerous voter-ID requirements. Some of these may have the effect of making it much harder—perhaps on the day impossible—for a particular voter, let's call him Q, to cast his ballot. This is a deplorable state of affairs (assuming there is no justification for these voting restrictions on the process). But few people believe that any of the laws enacted by the legislature (to whose membership Q's vote might have made the sort of difference that individual votes make in elections) are rendered illegitimate as a result either in general or—if this makes sense—so far as Q is concerned. No one thinks Q now has the right to disobey the laws or not have them enforced against him. His disenfranchisement may make the democracy poorer, and Q certainly has a justified complaint; but nothing follows about legitimacy and enforcement so far as his relation to the laws is concerned. And if this doesn't follow for Q in the relatively formalized context of voting, how can it possibly be true of the slight impact that hate-speech laws have on the manner of P's expression in a diffuse free-wheeling debate? Q, as I said, has a complaint; and maybe P does as well. But Q's complaint doesn't give rise to a legitimacy problem. And if this is true of citizen Q, then Weinstein's contention cannot possibly be true of P.

Even when we talk about the franchise we are never dealing with a perfect voting system. Its flaws and its vicissitudes do not have an individualized impact on political legitimacy. And when we move from the franchise to the swirling maelstrom of informal debate, we have no way of keeping track of who says what to whom, who speaks and who listens. People in their millions say all sorts of things and contribute more or less articulately in all sorts of ways; and the same thing can be said in lots of different ways, often depending on particular political and personal dynamics of a particular situation. Most people say nothing; others only snarl and mutter to their friends. As Dworkin has noted in another context there is no way of equalizing political influence in these debates; there is barely any way of conceiving what political

equality would amount to in this context.<sup>32</sup> The best we can do is to say that everyone may participate as they like, though everyone agrees there are limits on how inflammatory their participation can be. No one has a right that his speech have any particular effect on political outcomes. As I said earlier, most political speech does not. And if—for reasons of social peace—limits are placed on other effects that inflammatory speech may have, I don't think the background public discourse is orderly enough to enable us to infer precise deontic conclusions about the individual rights that flow or do not flow from the political process.

Notice that what I have said doesn't deny that the hate speech laws may have an impact on legitimacy; what I am denying is that they have an impact on the state's right to enforce particular laws against individuals. For all I have said so far, hate speech laws may adversely affect the legitimacy of the political system. But that is a systemic effect, and—for the reasons I have stated—at worst a negligible effect.

As already noted, Weinstein is not happy with this systemic approach to legitimacy. To defend his more focused deontic orientation, he introduces considerations about the equal protection of interests. “[E]ach individual in society is of equal moral worth and therefore is entitled to have his or her interests treated with equal respect by government.”<sup>33</sup> But then we are back with the problem of hyperbole. The impact of hate speech laws is most definitely not to say that the interests of racists are not to be served by our laws: racists have the benefit of health care, education, roads, housing and so on, and none of this is denied to them when they are told that they may not stir up racial hatred. That prohibition may be enforced, but still the interests of those whom it is enforced against may still be served by the political system.

The point can't possibly be about interests. It must be about respect for opinions—and not just respect for the substance of certain opinions, but respect for the manner in which the persons respected would like to express them. Even in this branch of the argument there is a still a danger of hyperbole. The main way in which we express people's opinions in the political process is by

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32. Ronald Dworkin, *What is Equality?—Part 4: Political Equality*, 22 U.S.F.L.R. 1, 812 (1987–1988).

33. Weinstein, *supra* note 1, at 536.



counting their votes, and we do count the votes of those whose free expression is impacted by hate speech laws. Weinstein quotes Dworkin as saying that the possibility of each person's participation in politics is important "to confirm his or her standing as a responsible agent in, rather than a passive victim of, collective action."<sup>34</sup> But again one could say that there is not necessarily any lack of respect for persons in the enforcement of hate speech laws. It is rather that persons are respected as playing a role that carries with it—as Dworkin's language emphasizes—a certain responsibility to the political process overall.

## V

This brings me to the question of the relation between political legitimacy and the *justification* of hate speech restrictions. I believe that if hate speech restrictions are justified—particularly if the justification has itself a positive relation to the integrity of the political process—then even the argument about systemic effects on legitimacy will not go through. After all, if it is only *unjustified* restrictions on speech that affect legitimacy, then it looks as though we will have to settle the question of justification first, before we assess the impact on legitimacy. (So the argument about legitimacy can hardly be cited as a reason for thinking the hate speech laws are wrongful.)

Let us begin by asking: are all restrictions on speech supposed to affect political legitimacy? For example, restrictions on child pornography, true threats, malicious defamation, or incitement? Or only restrictions that are unjustified? Weinstein knows he has to respond to this argument. He says:

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. 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 legislation. Because these particular forms of expression are undoubtedly harmful, and

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34. See Weinstein, *supra* note 1, at 529 (quoting DWORKIN, *supra* note 2, at vii).

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.”<sup>35</sup>

His response is that hate speech laws are distinguished from these other (possibly justified) restrictions by being “viewpoint-based.”<sup>36</sup> I have already expressed some new reservations about this way of describing them.<sup>37</sup> Hate speech restrictions—of the sort we considered in section II—are not based on viewpoint *per se*, but on the manner of their expression and the effect they are intended to have on social peace. Anyway, why should the nature of the restriction—viewpoint-based or non-viewpoint-based—make all the difference here? Someone is still being prevented from saying what he wants to say as he says it. To that effect there is still an impact on the quality of public debate: it is not as it would be if there were no restrictions. And if a citizen thinks of himself as the sort of person who shouts “fuck” or utters threats in political debate or shows dirty pictures during his political orations, then—I don’t know—maybe a case can be made that he is not being respected as such. He is, however, being respected as someone who could be better than that, and as someone who has responsibilities as well as rights in the political process. But that is another matter.

I return then to the position I mentioned at the beginning of our discussion in section I, the position raised by Alexander Brown, among others.<sup>38</sup> There are such things as the conditions of democracy: Dworkin was happy to insist on this when he wasn’t talking about hate speech.<sup>39</sup> In order to sustain a healthy working democracy, a society needs social peace and it is entitled to the assistance of citizens in maintaining that peace—or at least their assistance in not trying to disrupt it. Democracy requires trust among those of different views and different communities, and stirring up hatred is a way of undermining that trust. Also—and I think Dworkin is right about this in *Freedom’s Law*—the moral

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35. Weinstein, *supra* note 1, at 544 (quoting WALDRON, *supra* note 6, at 182–83).

36. *Id.* at 540.

37. See *supra* text accompanying note 14.

38. See *supra* text accompanying note 7.

39. DWORKIN, *supra* note 5, at 33.

conditions for the legitimacy of democracy include a degree of respect that citizens need to have for one another, when they put their fate in others' hands by accepting the outcome of a majority vote. This is not a sensible thing to do when you are a member of a population that is held in contempt by others. So again, we might—at a minimum—require citizens to refrain from trying to whip up some contempt in their interventions in public debate. Well-drafted hate speech laws are calculated to help maintain social peace and secure dignity and respect among members of the community. Weinstein thinks that any such attempt necessarily undermines the conditions of respect that are required for a legitimate democracy. I am grateful for the opportunity to show in these few pages that that is an artificial and one-sided view of the matter.