2017

Legitimacy and Hate Speech

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It is a pleasure to participate in this symposium on democratic legitimacy and hate speech regulation. Although I have often contemplated the relationship between First Amendment doctrine and democratic legitimation, I have always done so in the manner of a legal scholar.[1] I have not inquired—as perhaps a moral philosopher might—about what James Weinstein calls "the objective criteria that morally entitle a political entity to govern."[2] I find myself unmoved to speculate about such objective normative criteria, and am instead content to focus on the descriptive conditions necessary for a diverse and heterogeneous population to live together in a relatively peaceable manner under a common system of governance and politics.

Among those conditions is a population's belief that their existing system of governance and politics is legitimate. A moral philosopher may take this belief for granted. She might posit that persons who otherwise disagree may nevertheless "consent to be bound by some decision-procedure . . . that might well involve something less than unanimity."[3] But the essential question for legal scholars is how that consent is actually sustained and maintained in the face of intense conflict. In this comment, therefore, I shall focus on the maintenance of what Weinstein calls "descriptive legitimacy."[4]

In *Hate Speech Bans, Democracy and Political Legitimacy*, Weinstein explores the descriptive legitimacy of individual laws. This is a complicated and largely idiosyncratic question.

* Many thanks to Jesse Hogin for extremely helpful research assistance.

1. ROBERT C. POST, CITIZENS DIVIDED: CAMPAIGN FINANCE REFORM AND THE CONSTITUTION (2014); ROBERT C. POST, DEMOCRACY, EXPERTISE, ACADEMIC FREEDOM: A FIRST AMENDMENT JURISPRUDENCE FOR THE MODERN STATE (reprt. 2013).

2. James Weinstein, *Hate Speech Bans, Democracy, and Political Legitimacy*, 32 CONST. COMMENT. 527, 534 (2017).

3. JEREMY WALDRON, THE DIGNITY OF LEGISLATION 139–40 (1999).

4. Weinstein, *supra* note 2, at 533–34.

Individual laws become descriptively illegitimate primarily because they are mismatched to the mores of the population to which they are applied. Thus the 18th Amendment (establishing Prohibition) was widely regarded as illegitimate throughout the Northeast and the 15th Amendment (prohibiting racial discrimination in voting) was effectively illegitimate throughout the South during the century after its enactment.[5]

It is conceivable that regulations of speech might undermine the descriptive legitimacy of specific laws. If persons were permitted to speak *in favor* of a law's enactment but not *against* its enactment, the law might emerge with attenuated legitimacy. Certainly, we have experienced analogous phenomenon with respect to the executive branch: It is commonly thought, for example, that the legitimacy of the Adams administration was undermined by the Alien and Sedition Acts of 1798, which sharply curtailed criticism of the administration's policies.[6] Similarly the gag rule prohibiting anti-slavery petitions in the House of Representatives in the 1830s and 40s helped to undermine pro-slavery views in the North.[7]

Weinstein argues that hate-speech bans function analogously to undermine the legitimacy of particular laws whose subject matter is related to hate speech, like laws prohibiting discrimination or determining immigration quotas. Whether such bans have this effect depends, in part, on the kinds of communication that they suppress. One of the difficulties of discussing hate-speech laws is the notorious indeterminacy of their reach.[8]

5. Robert C. Post, *Federalism, Positive Law, and the Emergence of the American Administrative State: Prohibition in the Taft Court Era*, 48 WM & MARY L. REV. 1 (2006); *see also* Jeremy Amar-Dolan, *The Voting Rights Act and the Fifteenth Amendment Standard of Review*, 16 U. PA. J. CONST. L. 1477, 1482 (2014); N. Jay Shepherd, *"Abridge" Too Far: Racial Gerrymandering, the Fifteenth Amendment, and* Shaw v. Reno, 14 B.C. THIRD WORLD L. J. 337, 348–49 (1994); Scott Gluck, *Congressional Reaction to Judicial Construction of Section 5 of the Voting Rights Act of 1965*, 29 COLUM. J. L. & SOC. PROBS. 337, 338 (1996).

6. *E.g.*, DAVID MCCULLOUGH, JOHN ADAMS 504–05 (1st Touchstone ed. 2002); THOMAS J. CRAUGHWELL & M. WILLIAM PHELPS, FAILURES OF THE PRESIDENTS 36–37 (2008); MICHAEL A. GENOVESE, ENCYCLOPEDIA OF THE AMERICAN PRESIDENCY 286 (rev. ed. 2009).

7. Jeffrey A. Jenkins & Charles Stewart III, *The Gag Rule, Congressional Politics, and the Growth of Anti-Slavery Popular Politics* (Apr. 16, 2005), http://web.mit.edu /cstewart/www/gag_rule_v12.pdf.

8. Robert C. Post, *Racist Speech, Democracy, and the First Amendment*, 32 WM. & MARY L. REV. 267 (1991).

Thus, Jeremy Waldron errs by interpreting Section 18(1) of the UK's Public Order Act of 1986 to require "specific intent" to "stir up racial hatred."[9] The Act also allows punishment for "threatening, abusive or insulting words" if, "having regard to all the circumstances racial hatred is likely to be stirred up thereby."[10] (By contrast, the 2006 amendment of the Public Order Act forbids words that stir up *religious* hatred *only* if there is *also* specific intent to do so.[11]) It is conceivable that speech opposing the enactment of statutes penalizing racial discrimination or opposing immigration might be understood as abusive and as likely to stir up racial hatred. The recent prosecution and conviction of Geert Wilders in the Netherlands for advocating the curtailment of Moroccan immigration comes disturbingly close to such a scenario.[12]

If hate-speech bans are capaciously interpreted in this way—and Weinstein's fine article shows that the hate-speech laws can be construed in distressingly broad ways—then statutes prohibiting racial discrimination or encouraging immigration may well suffer from diminished legitimacy. I do not argue that persons whose hate speech has been suppressed are under no obligation to obey such statutes, for I am discussing only descriptive legitimacy. My point is rather that persons prevented

9. Jeremy Waldron, *The Conditions of Legitimacy: A Response to James Weinstein*, 32 CONST. COMMENT. 697, 702; Jeremy Waldron, *Hate Speech and Free Speech, Part Two*, N.Y. TIMES: OPINIONATOR (Jun. 18, 2012, 9:15 PM), http://opinionator.blogs.nytimes.com/2012/06/18/hate-speech-and-free-speech-part-two/?_r=0.

10. Public Order Act of 1986, c. 64 § 18(1)(b) (Eng.).

11. Racial and Religious Hatred Act of 2006, c. 1 § 29B(1) (Eng.). The 2006 Act also contains an express provision protecting "freedom of expression" in the context of stirring up religious hatred, Section 29J, which the 1986 Act does not contain in the context of stirring up racial hatred.

12. *See, e.g.*, Nina Siegal, *Geert Wilders, Dutch Politician, Distracts From Hate-Speech Trial With More Vitriol,* N.Y. TIMES (Oct. 31, 2016), *available at* http://www.nytimes.com/2016/11/01/world/europe/geert-wilders-netherlands-hate-trial.html (The trial of Wilders, who is accused of hate speech, "revolves around two sets of remarks made near the time of municipal elections in The Hague in 2014. On March 12 of that year, Mr. Wilders told the Dutch national broadcaster NOS that he hoped the city's residents would 'vote for a more safe and social city, and if it would be possible, fewer Moroccans.' At a rally a week later, he asked, 'Do you want more or fewer Moroccans in this city and in the Netherlands?' The audience responded by chanting, 'Fewer, fewer!' Mr. Wilders responded, 'Well, we'll arrange that, then.'"). *See* Nina Siegal, *Geert Wilders, Dutch Far-Right Politician, is Convicted of Inciting Discrimination*, N.Y. TIMES, (Dec. 9, 2016), *available at* http://www.nytimes.com/2016/12/09/world/europe/geert-wilders-netherlands-trial.html?_r=0.

from expressing opposition to a statute are likely to regard the statute as unfairly enacted.

It is not sufficient to observe that members of a legislative assembly are free to express their opposition to the statute, because persons outside the assembly have been prohibited from influencing the decision of their representatives. Freedom of speech underwrites democratic legitimation when it allows persons to participate in the formation of public opinion and when persons believe that the state will (generally) be responsive to public opinion. A major reason why modern democracies protect freedom of speech is to endow persons with the sense that their government might be responsive to them.

The sense of responsiveness produced by freedom of speech is more ubiquitous and more continuous than that produced by voting. Thus, James Bryce noted long ago that although public "opinion declares itself legally through elections," it "is at work at other times also, and has other methods of declaring itself."[13] Elections are only an "intermittent mechanism," whereas public opinion is "constantly active" and, "in the long run," can exercise "a great and growing influence."[14] Bryce observed that public opinion "rules as a pervading and impalpable power, like the ether which . . . passes through all things. It binds all the parts of the complicated system together and gives them whatever unity of aim and action they possess."[15]

The state risks alienating persons if it truncates their access to this "pervading and impalpable power." That is ultimately the connection between freedom of speech and descriptive democratic legitimacy. Under conditions of intense conflict, persons who have no reason to believe that their speech can

13. 3 JAMES BRYCE, THE AMERICAN COMMONWEALTH 159 (New York, MacMillan & Co. 1888).

14. 3 BRYCE, *supra* note 13, at 159. Goldwin Smith simultaneously made an analogous observation:

> Parliaments are losing much of their importance, because the real deliberation is being transferred from them to the press and the general organs of discussion by which the great questions are virtually decided, parliamentary speeches being little more than reproductions of arguments already used outside the House, and parliamentary divisions little more than registrations of public opinion. It is not easy to say how far, with the spread of public education, this process may go, or what value the parliamentary debate and division list will in the end retain.

Goldwin Smith, *The Machinery of Elective Government*, 20 POPULAR SCI. MONTHLY 628, 629–30 (1882).

15. 3 BRYCE, *supra* note 13, at 30.

influence the shape of public opinion will have less reason to live together in a relatively peaceable manner under a common system of governance and politics. Those who intensely oppose the enactment of antidiscrimination statutes or of statutes allowing immigration, but who are prohibited from articulating their opposition by the implementation of broad hate-speech laws, would have every reason to distrust the legitimacy of statutes ultimately enacted. They have been excluded from the formation of the public opinion to which their representatives are supposed to be responsive. Democratic accountability has been short-circuited.

Of course most hate-speech laws do not function to prevent communications about specific legislation. Indeed, it is sometimes argued that hate-speech laws do not prevent anyone from communicating any ideas at all; they instead merely prevent especially abusive or outrageous *ways* of communicating ideas.[16] The distinction between regulating the *manner* of speech, as distinct from its *matter*, is woven rather deeply into the texture of British law.[17] But it has been rejected in American law on the ground that the manner in which a thought is phrased is inseparably connected to the substance of the thought.[18]

The poet Shelley makes this same point when he speaks of the "vanity of translation."[19] He argues that poetry cannot be

16. *See, e.g.*, Texas v. Johnson, 491 U.S. 397, 430–32 (1989) (Rehnquist, C.J., dissenting).

17. *See* Peter Jones, *Blasphemy, Offensiveness and Law*, 10 BRIT. J.POL. SCI. 129, 141–42 (1980). Jones himself rejects the distinction:

> The failing of the matter-manner distinction is that it supposes that statements are capable of more or less offensive formulations which are nevertheless identical in meaning. The manner of an assertion is treated as though it were so much verbal wrapping paper whose features had no bearing upon the content of the parcel. In certain cases this assumption may not be unjustified. . . . More often, however, manner and matter are so integrally related that it is impossible to distinguish the offensive manner from the offensive matter of a statement. *Id.* at 142–43.

18. Cohen v. California, 403 U.S. 15, 25–26 (1971).

19. 1 PERCY BYSSHE SHELLEY, *A Defense of Poetry*, *in* ESSAYS, LETTERS FROM ABROAD, TRANSLATIONS AND FRAGMENTS 1 (1840). Shelley writes:

> Sounds as well as thoughts have relation both between each other and towards that which they represent, and a perception of the order of those relations has always been found connected with a perception of the order of the relations of thoughts. Hence the language of poets has ever affected a certain uniform and harmonious recurrence of sound, without which it were not poetry, and which is scarcely less indispensable to the communication of its influence, than the words themselves, without reference to that peculiar order. Hence the vanity of translation; it were as wise to cast a violet into a crucible that you might discover

translated, because the content of ideas is indistinguishable from the physical language in which ideas are conveyed. And poets are not the only ones who imagine language in this way.[20] To the extent that language is conceived as thick and material, as resisting translation, hate-speech regulations must be understood as suppressing particular ideas from being communicated. Although we may assume that these ideas do not concern specific pending or potential legislation, we must also assume that they are ideas which can be expressed *only* in the particular outrageous style that hate-speech regulations proscribe. A question posed by this symposium is the relationship between such proscriptions and descriptive legitimacy.

To parse this question, we must imagine a society where persons wish to communicate ideas but are frustrated in their efforts by the operation of hate-speech regulations. We must assume that they can communicate their precise ideas only in the kind of abusive language that hate-speech regulations suppress. If the point of freedom of speech is to allow persons in a heterogeneous society to live together peaceably *because* they are authorized to express their ideas in ways they believe are best designed to influence public opinion, it is no good at all to say to those who have been censored by hate-speech regulations that "the fundamental debate about race is over—won, finished."[21] Such persons by hypothesis do not believe that the debate is over. The point of freedom of speech is in any event not epistemological; it is political. It expresses a guarantee of political equality in the formation of public opinion.

We protect freedom of speech to allow persons of widely varying views to experience as legitimate a government that may nevertheless act in ways that are inconsistent with their own ideas.

> the formal principle of its color and odor, as seek to transfuse from one language into another the creations of a poet. The plant must spring again from its seed, or it will bear no flower—and this is the burden of the curse of Babel.

20. *See, e.g.*, Jacques Derrida & Lawrence Venuti, *What is a "Relevant" Translation?* 27 CRITICAL INQUIRY 174, 183 (2001):

> [T]he fact is that any translating replaces the signifiers constituting the foreign text with another signifying chain, trying to fix a signified that can be no more than an interpretation according to the intelligibilities and interests of the receiving language and culture.

See also DOUGLAS ROBINSON, THE TRANSLATOR'S TURN 240 (1991) (noting that it's impossible to transfer "meaning from one language to another intact, without change, without diminishment . . .").

21. JEREMY WALDRON, THE HARM IN HATE SPEECH 195 (2012).

What maintains descriptive legitimacy in such circumstances is the continuous hope that government actions might be swayed by changes in a public opinion to which persons are given full and open access. If persons are prevented from expressing their own views—however much others might find those views outrageous and intolerable—then they are less likely to experience their government as legitimate. This is what I believe Weinstein has in mind when he says that hate-speech laws do not operate in a "viewpoint neutral"[22] way and hence that they are especially damaging to democratic legitimacy.

The maintenance of "democratic legitimacy" is meant to maximize the likelihood that persons of diverse perspectives can nevertheless live together in peace under a single system of government. It is a precondition for maintaining a political society in the face of profound heterogeneity. Because without a viable political society no values of any kind can be sustained, descriptive democratic legitimacy must rank among the most fundamental values of our system.

Notice that on this account, hate-speech regulation causes *systemic* damage to democratic legitimation. The impact of such regulation does not pertain to individual laws but instead to the risk that persons may come to distrust a political system that holds out the promise of self-determination but that refuses to hear what persons actually have to say. Notice further that this damage is a matter of degree. It will depend on variables such as the number of persons who actually wish to engage in proscribed hate speech, the intensity of their views, and so on. Finally, notice that this variable amount of damage will occur categorically by legally proscribing hate speech.

Of course hate speech itself may damage democratic legitimation. No one doubts that hate speech causes many kinds of harm. A particularly virulent form of harm is the sense among target groups that they are excluded from, or not entitled to participate in, the relevant demos. To the extent that hate speech instills this sense of marginalization and distrust, it also corrodes democratic legitimation. This harm is also systematic, and it is also a matter of degree. The extent of the damage will depend on variables like the number of persons in target groups, the intensity of their sense of exclusion, and so on.

22. Weinstein, *supra* note 2, at 545–56.

In contrast to proscriptions of hate speech, however, this harm is not categorically caused by allowing hate speech. It depends on the ambient legal and social environment and on whether, for example, members of target groups nevertheless feel welcome, as for example by non-discriminatory access to housing, employment, health care, police protection, and so on. If the ambient legal and social environment makes members of target groups feel safe and included, then allowing hate speech will not damage democratic legitimation, regardless of the existence of hate speech.

If this analysis is correct, democratic legitimacy is at stake on both sides of the equation. It is undermined by prohibiting hate speech; but it is also undermined by allowing hate speech, to a degree that is affected by multiple other potential actions of the state. This conclusion suggests that the ultimate effect of hate-speech regulation on democratic legitimacy is a contextual matter that will depend on the particularities of national circumstances.

I have always thought, for example, that one reason why the United States refuses to prohibit hate speech in public discourse—whereas European nations allow much more capacious regulation of such hate speech—is that the need for democratic legitimation is far greater in the United States than in Europe.[23] There is more deference to government regulation in Europe than in the United States, where state action is typically viewed with thinly-veiled hostility. The "democratic deficit" that presently afflicts the EU, for example, would never be tolerated in the United States. That is because the United States is a nation of extreme individualists, where allegiance to the state is frequently tenuous. Freedom of speech is consequently of greater importance here because it creates a safety-valve deemed necessary to prevent persons from becoming too alienated.

It is characteristic of American jurisprudence that it seeks to mitigate the undeniable damage of hate speech in public discourse by punishing hate speech outside of public discourse. In the United States hate speech is typically banned in educational settings, in work environments, and so on. Because communication in schools or in workplaces is not constitutionally characterized as an effort to influence the content of public

23. Robert Post, *Hate Speech*, *in* EXTREME SPEECH AND DEMOCRACY 123 (Ivan Hare & James Weinstein eds., 2009).

opinion, it can be (and is) freely regulated to prevent hate speech.[24] In the United States, the suppression of hate speech thus depends on the constitutional nature of the speech in question.

My instinct is to resist simple and universal prescriptions in the matter of hate speech. We would do well to understand why different legal systems have undertaken such different approaches to this difficult problem. We would do well to understand how constitutional law differently characterizes distinct communicative acts. We would do well to understand such characterizations in light of a broader ecology of national solidarity. My guess is that one cannot begin seriously to address such questions without almost immediately encountering the central role of descriptive legitimacy in the regulation of communication.

24. *See* Post, *supra* note 8; Robert Post, *Sexual Harassment and the First Amendment*, *in* DIRECTIONS IN SEXUAL HARASSMENT LAW 382 (Catharine A. MacKinnon & Reva B. Siegel eds., 2004); Robert C. Post, *Between Governance and Management: The History and Theory of the Public Forum,* 34 UCLA L. REV. 1713 (1987).