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## HATE SPEECH, LEGITIMACY, AND THE FOUNDATIONAL PRINCIPLES OF GOVERNMENT

*Steven H. Shiffrin\**

In a well-documented, intriguing, and intricately argued article, James Weinstein maintains that restrictions on hate speech are problematic because they tend to undermine the legitimacy of anti-discrimination statutes.<sup>1</sup> In so doing, he develops an argument previously made by Ronald Dworkin with sophistication and with greater complexity and needed detail. He argues not only that such restrictions can undermine the legitimacy of anti-discrimination laws with respect to their popular acceptance, but also with respect to the political obligation to obey them and with the morality of their enforcement. The general idea is that persons precluded from opposing a law are not legitimately subject to the law.

This argument seems to be an instance of the tail wagging the dog. If hate speech restrictions are justifiable, then their enforcement cannot undermine the normative legitimacy of anti-discrimination laws.<sup>2</sup> If such restrictions are not justifiable, then the impact on anti-discrimination laws is interesting, but not central to the case against them.<sup>3</sup> In fact, Weinstein argues that the restrictions violate fundamental principles of our government and what many regard as a fundamental principle of free speech. Any legitimate government depends on adherence to the

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

2. I am referring here only to the normative legitimacy of these laws. Weinstein suggests the restrictions also weaken the legitimacy of anti-discrimination laws as perceived. I think his discussion exaggerates the point, but I do not explore that matter here.

3. For powerful material supporting hate speech restrictions, see JEREMY WALDRON, *THE HARM IN HATE SPEECH* (reprt. ed. 2014); MARI J. MATSUDA ET AL., *WORDS THAT WOUND: CRITICAL RACE THEORY, ASSAULTIVE SPEECH, AND THE FIRST AMENDMENT* (1993).

proposition that government must treat all citizens as having equal moral worth, or as Ronald Dworkin put it – with equal respect and concern.<sup>4</sup> In addition, all citizens should be able to participate in the political process as political equals. Weinstein maintains that hate speech restrictions violate both these principles. In addition, he believes that such restrictions violate a First Amendment mandate against point-of-view discrimination.

I will argue that hate speech restrictions do not violate fundamental principles of government, nor are they instances of impermissible point-of-view discrimination. I will maintain that his claims about the legitimacy of anti-discrimination legislation are not as broad or precise as they might appear. And, in conclusion, I will maintain that there are concerns about some hate speech restrictions that are more telling than the matters to which he would call our attention.

#### I. RECONCILING HATE SPEECH RESTRICTIONS WITH FUNDAMENTAL PRINCIPLES OF GOVERNMENT AND FREEDOM OF SPEECH

Weinstein maintains that hate speech restrictions are inconsistent with the view that government must treat all citizens as having equal moral worth. But this confuses respect for persons with respect for the speech with which they wish to engage. Free speech doctrine contains many permissible restrictions on speech, and it is not obvious that they show disrespect for persons. The doctrine permits government to enact speech restrictions involving some forms of advocacy of illegal action, some forms of defamation, obscenity, copyright violations and the like. Whatever the merits of these doctrines, they do not show disrespect for a citizen as a citizen. They do not take the position that a citizen lacks moral worth. At most, they show disrespect for a particular speech choice the citizen would like to make.

So too, the notion that point-of-view discrimination is impermissible is an overgeneralization. Even in the United States, a more precise statement of the law would be that point-of-view discrimination is impermissible except when it is not. So erotic speech directed toward “good old fashioned healthy” interests in sex are protected though appeals to prurient interests in some

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4. RONALD DWORKIN, *A MATTER OF PRINCIPLE* 190 (reprt. ed. 1985).

cases are not.<sup>5</sup> Nasty things said about a person in some contexts are unprotected;<sup>6</sup> nice things said about the same person are protected. Advocacy of illegal action is unprotected in some contexts;<sup>7</sup> advocacy of legal action is protected. Two explanations for these distinctions seem clear. First, the unprotected speech causes harm and the protected speech does not.<sup>8</sup> Second, in some cases, such as obscenity<sup>9</sup> (or fighting words<sup>10</sup>), the speech is regarded as less valuable than other forms of speech. The notion that speech law does not look at the value of speech is falsified not only by obscenity and fighting words doctrine, but also by the view that some forms of sexually oriented speech,<sup>11</sup> commercial speech,<sup>12</sup> and private speech<sup>13</sup> should be less protected than more important political speech.

There is a strong case for the view that racist speech causes harm and lacks substantial constitutional value. As I have written elsewhere, racist speech causes

many well-documented harms: it is an assault on the dignity of people of color; it humiliates and causes emotional distress, sometimes with physical manifestations; it helps spread racial prejudice, not only stigmatizing people of color in the eyes of the societally dominant race but also in the eyes of [many of] the victims themselves, inspiring self-hatred, isolation, and . . . finally, it frequently creates the conditions for violence.<sup>14</sup>

Equally important, like other forms of unprotected speech, racist speech should fall low in the hierarchy of First Amendment values. Most people who would protect such speech recommend that course despite its loathsome character, not because of it. To

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5. *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491 (1985).

6. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974).

7. *Brandenburg v. Ohio*, 395 U.S. 444 (1969).

8. So understood, a restriction on hate speech is not imposed merely because government finds the speech disagreeable, disturbing, or offensive as Weinstein suggests. Weinstein, *supra* note 1, at 529.

9. *Paris Adult Theatre I v. Slaton*, 413 U.S. 49 (1973).

10. *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942).

11. *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986).

12. *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447 (1978).

13. *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749 (1985).

14. STEVEN H. SHIFFRIN, *DISSENT, INJUSTICE, AND THE MEANINGS OF AMERICA* 77 nn.168–69 (2000). These sources do not depend on empirical studies, but the experiences of human beings. When speech lacks a strong connection to the values underlying the First Amendment, at least in my view, a demand for empirical studies before regulation is not defensible. See generally STEVEN H. SHIFFRIN, *WHAT'S WRONG WITH THE FIRST AMENDMENT?* (2016).

be sure, racist speech is not wholly bereft of First Amendment value. For example, it has marketplace value in that it reveals the existence of racists in the society. Nonetheless, its overall contribution to the market is negative in character. That is precisely because of the foundational premise of the system. Racists argue that government (and others) should not treat all citizens with equal respect and concern. If racists have their way, people of color will officially not be equal citizens and will not be treated as equals in private and public spheres. In other words, racists seek to topple the fundamental prerequisites of a legitimate society and government. As I have argued elsewhere, “[i]n this limited context, the best test of truth is the system’s foundational premise of equality, not whether truth can emerge triumphant in the market place of ideas.”<sup>15</sup> To suggest that speech causing substantial harm and designed to overrule the fundamental premise of legitimate society and government should be protected because of its value should be unthinkable.<sup>16</sup>

It follows from this that hate speech restrictions do not deny citizens the equal opportunity to participate in the political process. The equal opportunity to participate does not imply that citizens have the right to engage in speech that is rightly restricted.

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15. SHIFFRIN, *supra* note 14, at 78.

16. To my mind, Weinstein errs when he supposes that hate speech advocates are entitled to pursue their hate speech interests, and recognizing that is required by a fundamental principle of government. *See* Weinstein, *supra* note 1, at 538, 541–42. Nor can I join Weinstein in supposing that the interest in expressing racist views should be protected because they help the speaker confirm his standing as a responsible agent. *Id.* at 21. As we have seen, the expression of racist views is harmful and at odds with the system’s fundamental principle of equality. They do not show case the agent as responsible. *See* Michael C. Dorf, *Liberalism’s Errant Theodicy*, 93 B.U. L. REV. 1469 (2013) (exploring the limits of the responsible agent argument). The speaker’s interest rightly ranks low in the constellation of values. Similarly, the speaker’s interest in “feeling better” in this context ranks low, and the speaker’s interests do not outweigh the harm of the speech. Weinstein, *supra* note 1, at 551.

Weinstein suggests that racist speech, like communist speech does not successfully promote illegitimate government. *Id.* at 578, n.179. I do not agree with the former particularly because the speech further subordinates an already vulnerable group, which government has a responsibility to protect, and the speech plays a role in which White Americans are privileged over Black Americans in myriad ways at local, state, and national levels. In any event, the claim generally underestimates the harm of racist speech. On the other hand, assuming some communists argue for the abolition of free speech, I believe they too are advocating the overturning of a foundational principle of the system. But the harm they create is not comparable to racist speech.

The equal opportunity argument trades on the respect argument which is itself not defensible.<sup>17</sup>

## II. THE LEGITIMACY ARGUMENT

There is a germ of truth in the legitimacy argument. If you are precluded from arguing against a law, that should count as a factor against enforcing the law against you. Of course, citizens are not prevented from arguing against anti-discrimination laws. They might argue that a federal law infringes with local rights and they might argue that a federal or state civil rights law interferes with freedom of association. Weinstein is not contending that persons have been denied the ability to argue against such laws in these ways. He is arguing that European laws preventing hate speech against groups (*even if they do not address anti-discrimination laws*) undermine the legitimacy of anti-discrimination laws.

### A. SYSTEMIC ILLEGITIMACY

With some exceptions, I find this whole line of arguments about legitimacy to be extremely dubious. Anti-discrimination laws are designed to protect vulnerable groups in the society, and it is strongly arguable that governmental claims of legitimacy are strained with respect to many of these groups. Indeed, the legitimacy claim of the American government is hard to maintain. It is now a commonplace that the government represents lobbyists for the rich at the expense of the people. The government itself is structured to assure that the majority cannot rule,<sup>18</sup> as Charles Beard warned long ago.<sup>19</sup> And to take an obvious example, we live in a racist society in which the government not only fails to assure adequate food, clothing, housing, and medical care for African

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17. Weinstein's contention that Britain's ban on promoting racial or ethnic discrimination while permitting the promotion of racial tolerance is impermissible point-of-view discrimination reflects the approach a U.S. court would take to the issue. *See id.* at 545–46. But the law on point-of-view discrimination is checkered, and the better approach would be to recognize that racist speech causes unjustifiable harm and promoting racial tolerance does not.

18. For example, the United States Senate, the Electoral College, the Presidential veto, the gerrymander, and the system of campaign finance.

19. CHARLES A. BEARD, AN ECONOMIC INTERPRETATION OF THE CONSTITUTION (Dover Publ'ns 2004) (1913). If revolution is not justified in the United States, it is not because the government is worthy of our respect. It would either be because of pacifist principles or because revolution would be unsuccessful or cause more harm than good.

Americans (and poor people generally), but it also maintains police departments with cultures designed to cover up the police murders of unarmed Black men. Restrictions of hate speech are designed to reinforce the moral, legal, and political view that African Americans are equal citizens, and to prevent the harms associated with hate speech. Anti-discrimination laws are designed to mitigate the hard edges of illegitimacy in American society.<sup>20</sup> To put it another way, both hate speech restrictions<sup>21</sup> and anti-discrimination laws are not only permissible, but required to make the system more legitimate.

From this perspective, it seems more than a little odd to argue that restrictions on hate speech, which show respect for equal citizenship and help to mitigate the racism of an illegitimate system should not be enacted for fear that such restrictions would undermine the legitimacy of anti-discrimination legislation, legislation which also shows respect for equal citizenship and helps to mitigate the racism of an illegitimate system.

To be fair, Weinstein maintains that he is not talking about systemic illegitimacy, he is talking about the relationship between hate speech restrictions and anti-discrimination legislation without reference to systemic illegitimacy. But systemic legitimacy cannot be hermetically sealed off from the legitimacy of a particular law. If the overall system is illegitimate with respect to a particular group, the claim that an anti-discrimination law designed to help that group is itself illegitimate becomes breathtaking.

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20. Weinstein can be read as supporting Professor Baker's view that legitimacy depends on respect for formal autonomy. Weinstein, *supra* note 1, at 57778, n.175. The dispute between Professor Baker and me cannot be passed off as involving two different conceptions of legitimacy. The dispute was primarily about the nature of autonomy and the extent to which respect for what Baker characterized as formal autonomy as he conceived it was necessary for legitimacy. Baker recognized that infringement of autonomy was necessary in any complex society, but he wanted those infringements to be carefully limited and he did not want a Millian conception of harm coupled with balancing to mark out the acceptable limitations from the unacceptable limitations. Instead, for the most part he maintained that autonomy could only be rightly limited when the autonomous person engaged in coercion or manipulation and he embarked on an attempt to define coercion and manipulation. I argued that Baker's apparatus designed to improve on John Stuart Mill was unsuccessful. Thus, government did not need to forego restrictions on racist speech to maintain legitimacy. Steven H. Shiffrin, *Freedom of Speech and Two Types of Autonomy*, 27 CONST. COMMENT. 337, 338–41 (2011).

21. In the conclusion, I argue that some hate speech restrictions are unwise.

So too, Weinstein seeks to shore up the dam when he concedes that the use of vituperative hate speech that stirs up racial hatred in expressing opposition to an anti-discrimination law does “not seem to destroy, or even substantially diminish” the obligation to obey an anti-discrimination measure.<sup>22</sup> Yet the most influential advocates of restrictions on hate speech do not seek to foreclose opposition to anti-discrimination measures, they seek to prevent the use of virulent hate speech.<sup>23</sup> So Weinstein might be counted out as a general opponent of hate speech restrictions. So to be clear, it is the expression of non-vituperative prejudiced views that Weinstein believes needs to be protected in order to protect the legitimacy of anti-discrimination statutes.

Another qualification by Weinstein seems to give up the ghost with respect to racist speech restrictions. He indicates that the problem of justifying coercion to a free and autonomous person arises only when that person reasonably disagrees with the law.<sup>24</sup> But Weinstein would have to get up very early in the morning to formulate a persuasive case that arguments based in racial prejudice amount to reasonable disagreements with the law. So too, Weinstein later argues that some laws (most criminal laws) are morally imperative and are not rendered illegitimate. Only laws about which there can be reasonable disagreement are subject to his concern about illegitimacy. Yet in a society rife with racial discrimination, it seems clear that anti-discrimination laws are themselves morally imperative.

The significance of this should be clear. Much of the literature on hate speech has focused on racist speech. Weinstein’s argument simply does not apply to the paradigm case of hate speech.

#### B. SEXUAL ORIENTATION AND HATE SPEECH

Weinstein searches for examples, therefore, outside the area of race and ethnicity. He ends up focusing on restrictions involving same-sex sexual conduct. He admits that speech restrictions do not prevent people from opposing laws prohibiting discrimination on the basis of sexual orientation. Instead, they restrict people from saying that gays or lesbians are immoral or

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22. Weinstein, *supra* note 1, at 548.

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

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



disordered. Although Weinstein has found some cases enforcing this in limited contexts, it is not at all clear to me that such restrictions have had much deterrent value, nor is it clear just what the scope of these restrictions are. For example, officials of the Catholic Church have been singing this bad song for centuries and they have not stopped. Moreover, Weinstein opposes these restrictions only when they affect public discourse,<sup>25</sup> and in this European law for the most part follows suit. This leaves broad room for the expression of prejudiced views in the private sphere.

Nonetheless, Weinstein argues that those who have been prevented from expressing the view even in limited public fora that same-sex sexual conduct is immoral or disordered have no political (as opposed to a moral) obligation to obey anti-discrimination laws.<sup>26</sup> By this he means that those restricted need not feel the obligation to obey these laws just because they are laws.<sup>27</sup> One might think that this is a straightforward application of Habermas' thesis that just laws cannot be legitimized without a just process.<sup>28</sup>

But Weinstein's conclusion is overdrawn. It simply begs the question of proper remedy.<sup>29</sup> If one is faced with an improper restriction, the appropriate course would be to seek a restraining order or damages. If one loses and does not receive a remedy, one should try to move in the political system to overturn the restriction. It is not at all obvious that the existence of the restriction confers a license to disobey an anti-discrimination statute. That, however, is what Weinstein maintains. He apparently supposes that but for the hate speech restrictions (blocking speech which itself ordinarily appeals to extremists with a broader potential for alienation), an anti-discrimination law

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25. It strikes me as odd that material with public content would not fall within the category of public discourse, and perhaps Weinstein does not intend to exclude it. *But see* Weinstein, *supra* note 1, at 559–60.

26. *Id.* at 561.

27. *Id.* at 534 n.25, 564 n.136.

28. JÜRGEN HABERMAS, *BETWEEN FACTS AND NORMS* (William Rehg trans., The MIT Press reprint ed. 1998) (1996) (Habermas calls this the co-originality thesis).

29. One would think that the appropriate response to the injustice of process (as well as to unjust laws) would at least depend upon the subjective and objective importance of resistance, the seriousness of the injustice, the effectiveness of the response, and the possible injury to innocent victims associated with the response. *See also supra* note 19. For an intellectual history of the question when and whether violence is an appropriate response to injustice among American radicals, see MARC STEARS, *DEMANDING DEMOCRACY: AMERICAN RADICALS IN SEARCH OF A NEW POLITICS* (2013).

would have been blocked. This supposition is dubious. Weinstein points to no example. So we are left with the claim that a lawful restriction without likely practical consequence licenses some persons (those who were restrained), but not others to disobey a just law. Nor are we presented with any reflection regarding how many other laws would be subject to disobedience licenses because of the existence of bad or imperfect process.<sup>30</sup>

Beyond political obligation, Weinstein recognizes that the crucial question is whether the state can morally enforce the law against those deterred by speech restrictions. That issue for Weinstein preliminarily turns on whether their objections to the law are reasonable.<sup>31</sup> I do not think this question gets the consideration it deserves. On the one hand, one might think that these views (with which I have no sympathy) cannot simply be dismissed as unreasonable given that they have been held for centuries. On the other hand, those views for the most part are Biblically based. The non-Biblical arguments in my view can comfortably be dismissed as unreasonable, and, meanwhile, at least in the United States, the Biblical arguments cannot be accepted as good reasons precisely because the Establishment Clause precludes government from taking theological positions. In European countries, however, lacking an Establishment Clause, I am just not sure whether government can dismiss long held Biblical views as not reasonable.

Without discussing this, Weinstein asserts that anti-discrimination laws on the basis of sexual orientation have substantial enough moral weight to outweigh the concerns of those who were prevented from expressing views relevant to the law. I agree with this conclusion, but there is an *ipse dixit* flavor to the discussion.

At this point, Weinstein comes to the payoff – a case where he contends that the illegitimacy argument is said to bear fruit. The case is a variation on *Elane Photography, LLC v. Willock*.<sup>32</sup> In that case, a commercial photographer refused to photograph a

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30. For similar argumentation, see Jeremy Waldron, *The Conditions of Legitimacy: A Response to James Weinstein*, 32 CONST. COMMENT. 697 (2017).

31. Weinstein, *supra* note 1, at 566–67.

32. Although the corporation is called Elane Photography, LLC, the photographer's name is Elaine Huguenin. *Elane Photography, LLC v. Willock*, 309 P.3d 53, 59 (N.M. 2013). The corporation was closely held between the photographer and her husband. For discussion of the free speech claims in the case, see Steven Shiffrin, *What is Wrong with Compelled Speech?*, 29 J. L. & POL. 499 (2014).

same-sex commitment ceremony primarily because she was religiously opposed to such ceremonies. Weinstein imagines in his variation that the photographer was deterred in a European country from participating in a demonstration opposing among other things anti-discrimination laws based on sexual orientation. He contends that applying the law to her in these circumstances may render the law immoral as applied to her.<sup>33</sup>

In other words, other photographers with religious objections can be compelled to violate their religious beliefs, but not those who were deterred from participating in demonstrations bearing on the anti-discrimination laws. I think the *Willock* case presents a difficult issue. Gays and lesbians should be able to participate in the market on an equal footing with other citizens. At the same time, individuals should not be compelled to violate their religious beliefs in the absence of a powerful showing. It can be argued that someone involved in commerce has an obligation to serve everyone. But this tells evangelical Christians and practitioners of some other religions that they cannot be wedding photographers, not to mention many other occupations. Moreover, in the *Willock* case there were many dozens of commercial photographers available to work at such a ceremony. It is not at all clear why any gay or lesbian couple would want to hire a photographer who religiously opposes same-sex commitment ceremonies.<sup>34</sup> I conclude that commercial photographers should not be compelled to violate their religion in this kind of case even if they were not deterred from protesting an anti-discrimination statute. The legitimacy argument would have no bearing. Indeed, I would be reluctant to adopt a rule that excused some from obeying a law, but not others, based on their willingness to participate in demonstrations, rather than their sincerely held religious beliefs.

### CONCLUSION

Weinstein has offered an intriguing presentation for a position that I do not happen to share. This does not mean that I

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33. Weinstein discusses some other cases involving landlords in Britain, but the record does not show any deterrence of opposition to the legislation and the legal restrictions on the opportunity to do so are far less stringent. Weinstein, *supra* note 1, at 569–74.

34. *Willock* was unaware of the views held by Elane when she tried to hire her. *Willock*, 309 P.3d at 59–60.

endorse all hate speech restrictions. I do think that our Constitution should make room for the narrow prescription of targeted racist insults<sup>35</sup> and of “speech with a message of racial inferiority, that is directed against a historically oppressed group, and that is persecutorial, hateful, and degrading.”<sup>36</sup> I also think it was wrong for the courts to conclude that a march of Nazis in Skokie should be constitutionally protected. If the Nazis had marched in Skokie, there would have been tens of thousands of counter demonstrators and major bloodshed. Allowing them to demonstrate was a river boat gamble.<sup>37</sup>

In the wake of an election in which it is possible that racist speech was a but for cause (along with many others) of the election results, it might be tempting (assuming vagueness concerns could be surmounted) to conclude that the United States should take an even larger page from the direction taken by Canada and countries in Europe. Nonetheless, it is at least arguable that general hate speech restrictions would promote racism rather than effectively combat it. We live in a racist society. It is possible that hate speech restrictions would be conceived as yet another measure to cater to minorities while the needs of white citizens are ignored. It is possible that those who are subjected to sanctions for hate speech will wrap themselves in the American flag and gain sympathy. Whether this line of argument against hate speech restrictions should be accepted depends upon empirical conditions.<sup>38</sup> But it does not assume that hate speech restrictions implicate substantial First Amendment value, nor does it join Weinstein in fearing that they lead to illegitimate legislation, deny respect to citizens, engage in impermissible point-of-view discrimination, or deny the equal opportunity to participate in the political process.

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35. For a detailed discussion of how to apply this principle, see SHIFFRIN, *supra* note 14, at 76 n.161.

36. Matsuda, *supra* note 23, at 2357. I would consider extending Matsuda’s approach beyond the racial context. It should be noted that Matsuda’s definition among other things would not cover scholarly arguments for racial superiority and the like. Apart from what I say in the text, I would protect these communications as well.

37. The gamble worked. The Nazis did not march in Skokie because of the realistic fear of violence. See STEVEN H. SHIFFRIN, WHAT’S WRONG WITH THE FIRST AMENDMENT?, 42–43 (2016).

38. SHIFFRIN, *supra* note 14, at 80–87.