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Hate Speech, Public Assurance, and the Civic Standing of Speakers and Victims

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Jeremy Waldron and James Weinstein have opened up a promising line of inquiry regarding the legitimacy and propriety of hate speech regulation. In doing so, they have succeeded in reinvigorating a subject that had grown academically formulaic even while becoming alarmingly more salient politically and culturally. Together they have enriched our understanding with their specificity of argumentation, intellectual courage, fair-minded attentiveness to critics and counter-arguments, comparative law perspective, and genuine originality of conception. I find that each has shown me at least one significant problem in the other's analysis, a symmetry that I consider a tribute to both.

I.

I think that Waldron fails to grapple as fully as he needs to with the challenges to his argument posed by the European and Canadian cases discussed in Part Four of Weinstein's article.[1] Those are cases that involve relatively temperate instances of speech the substantive message of which challenges the civic standing of vulnerable minority groups. Waldron's intriguing claim that such minorities in a political community are entitled to the public good of assurance of their civic dignity has much to be said for it. However, it seems to me that this newly conceived public good is especially implicated when the view that certain vulnerable minorities are unworthy of civic status is publicly articulated in a temperate manner, precisely because that manner

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1. James Weinstein, *Hate Speech Bans, Democracy, and Political Legitimacy*, 32 CONST. COMMENT. 527, 552–561 (2017).

of articulation makes the view less easily marginalized. Waldron concedes that extreme outliers do not undercut the requisite public assurance. The danger lies in introducing categorical civic denigration into the way the polity looks, sounds, and feels. That alteration of civic "aesthetics," as Waldron puts it, is most likely to occur when noxious heretical ideas present as respectable, or at least eligible for respectful consideration. Hence the insidious danger of temperate articulation. Relatedly, Waldron's assertion, which plays a key role in his overall argument, that Western democracies have "settled" the question of how race and certain other traits central to identity bear on civic status is problematized more when heretical views relating to demography and political membership are put forward in the form of propositions rather than epithets. Waldron admirably avoids the mistake of conflating the multifarious instances of hate speech into one undifferentiated lump, but I believe that the subset of public utterance consisting of the temperate expression of civically noxious ideas poses more of a challenge to his position than he recognizes.

Waldron properly observes that "our debate is about hate speech restrictions as such, not about the least well-formulated of them." He urges opponents of hate speech regulation such as Weinstein "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."[2] He notes approvingly that Section 18(1) of the UK's Public Order Act outlaws only an especially aggressive subset of hate speech. To justify prosecution under that provision, the offender must employ words or gestures of a certain character: "threatening, abusive or insulting." Moreover, either the speaker must intend by his utterance to stir up racial hatred, or such hatred must be likely to be stirred up "having regard to all the circumstances." Waldron contrasts this "hate speech provision," the type of law he aims to justify, with less circumscribed "public order provisions," such as Section 5 of the same Public Order Act, that extend their prohibitions beyond speakers who are bent on stirring up hatred directly by means of

2. Jeremy Waldron, *The Conditions of Legitimacy: A Response to James Weinstein*, 32 CONST. COMMENT. 697, 703–04 (2017).

extremely aggressive language. The more wide-ranging Section 5,[3] it should be noted, was the basis for what Weinstein argues were the misguided criminal convictions of relatively temperate purveyors of noxious opinions. The clear implication of Waldron's contrasting the two provisions is that speakers whose utterances are reachable only under Section 5 do not constitute a threat to the "precious public good" of "a visible assurance offered by society to all of its members that they will not be subject to abuse, defamation, humiliation, discrimination, and violence on grounds of race, ethnicity, religion, gender, and in some cases sexual orientation."[4]

But is that true? Mark Norwood, described by Weinstein as "a regional co-ordinator of the British National Party, a far-right political organization," was convicted under Section 5 for displaying a poster of the World Trade Center in flames superimposed by a crescent-and-star surrounded by a prohibition sign and the statements "Islam out of Britain" and "Protect the British people."[5] Harry Hammond, an evangelical preacher, was convicted under the same provision for holding a placard in a public square saying "Stop Immorality," "Stop Homosexuality," "Stop Lesbianism," "Jesus is Lord."[6] Weinstein calls this conviction "an egregious example" of abuse of the power to punish hate speech, and so it is. That said, wouldn't British Muslims and homosexuals be justified in considering these public expressions at least as threatening to their civic standing by virtue of how their society "looks"—the visibility of hate—as public utterances that satisfy the intent or likely effects requirements of Section 18 (1) of the Public Order Act?

Interestingly, Weinstein's other examples of hate speech that ought never to have been the subject of punishment are different in a way that suggests Waldron would agree with that assessment. Shawn Holes was convicted and made to pay a large fine for

3. Section five of the Public Order Act of 1986 is not limited to speech designed or likely to stir up racial hatred. Instead, it prohibits both "threatening or abusive speech" and "disorderly behavior" that occurs "within the hearing or sight of a person likely to be caused harassment, alarm or distress thereby." Public Order Act 1986, § 5 (Eng.).

4. Jeremy Waldron, *Dignity and Defamation: The Visibility of Hate*, 123 HARV. L. REV. 1597, 1599 (2010).

5. *See* Norwood v. Dir. of Pub. Pros'ns, [2003] EWHC 1564 (Admin), http://www.bailii.org/ew/cases/EWHC/Admin/2003/1564.html.

6. *See* Hammond v. Dep't of Pub. Pros'ns, [2004] EWHC 69, ¶ 5 (Admin), http://www.bailii.org/ew/cases/EWHC/Admin/2004/69.html.

responding to an interlocutor while speaking in a Glasgow street by opining that "Homosexuals are deserving of the wrath of God, and so are all other sinners, and they are going to a place called hell."[7] Another street preacher, Michael Overd, was convicted in Somerset for invoking Leviticus 20:13 for the proposition that homosexuality is an "abomination." Because that scriptural passage prescribes the death penalty as punishment, the judge found Mr. Overd's exclamation to be in violation of Section 5 of the Public Order Act.[8] Both examples involved oral rather than written denigration of minorities. On that account alone, even were these angry statements to fail a temperance test they would lack the ongoing visibility that Waldron considers the essence of the threat to the public good of civic assurance.[9]

Although Waldron's innovative public good argument adds something new and undeniably pertinent to the hate speech debate, deploying criminal sanctions against speakers as a way to assure vulnerable minorities of their civic standing presents novel challenges. At the end of the day, his is an argument about the importance of maintaining an environment of trust. Although he emphasizes outward manifestations of acceptance rather than inward beliefs, creating and sustaining the requisite civic aesthetic entails nurturing a working consensus about what to say in public that by definition depends on beliefs. That working consensus, if and when it exists, is unlikely to be fully formed. Not only are dissenters likely to resent the prescribed aesthetic, they are capable of subverting it even when their numbers are small.

To put it bluntly, the needed public assurance requires the coercive enforcement, so far as public expression is concerned, of an orthodoxy of sorts regarding the determinants of civic standing. To his credit, Waldron faces up to this feature of his argument and asserts that there is such a thing as effective

7. Mark Hennessy, *Street Preacher Fined for 'Homosexuals Going to Hell' Remark*, IRISH TIMES (Mar. 31, 2010), http://www.irishtimes.com/news/street-preacher-fined-for-homosexuals-going-to-hell-remark-1.646036. *See also Preacher is Fined for Homophobia*, THE SCOTSMAN (Mar. 27, 2010), http://www.scotsman.com/news/preacher-is-fined-for-homophobia-1-1365514.

8. John Bingham, *Preacher Accuses Judge of 'Redacting' the Bible*, THE TELEGRAPH (Mar. 30, 2015), http://www.telegraph.co.uk/news/religion/11505466/Preacher-accuses-judge-of-redacting-the-Bible.html.

9. On the difference between written and spoken communication so far as Waldron's public good of civic assurance is concerned *see* Waldron, *supra* note 4, at 1603–04.

settlement of once divisive disputes over the significance for civic standing of race, ethnicity, religion, and gender, for example. On this topic, the need for foundational commitment trumps the open-ended, designedly dynamic adjustment and evolution of beliefs which is the hallmark of a marketplace of ideas. When settlement has been achieved, Waldron maintains, the regnant orthodoxy can then be enforced to the extent of punishing visible dissent that takes an aggressive form which undermines the assurance that enables civic security and participation.

All of which brings us back to the problem about Waldron with which we began: he supplies no reason to tolerate temperate criticism of the reigning determinants of civic standing any more than intemperate criticism. Admittedly, he does intimate that laws criminalizing intemperate hate speech are more likely to be aimed at preventing bad effects and punishing bad intentions, and thereby less likely to be efforts to "prohibit the expression of certain views per se."[10] However, given the role that a specific kind of orthodoxy plays in his conception of civic assurance, it is not clear why Waldron ought to be particularly troubled by a law that seeks to "prohibit the expression of certain views per se." Furthermore, temperate hate speech can be more subversive than its intemperate counterpart of the assurance of civic dignity that he prizes, so why aren't laws punishing temperate hate speech also best characterized as concerned about effects rather than "views per se?"

An understanding of the freedom of speech that emphasized such objectives as progress in understanding, democratic character building, adaptation to changing conditions, the exposure of corruption, or autonomous self-authorship might deny full (or any) protection to speech that is ill-intentioned, personally targeted, or abusively worded. But Waldron presents his argument about hate speech without allusion to why speech might be especially valuable as a general matter and how the answer to that question bears on which communicative activities fall with the ambit of the freedom of speech. So far as one can tell from his exploration of the subject to date, the distinction Waldron draws between the instances of hate speech that should be subject to criminal sanctions and those which should not derives from his judgment regarding which forms of this noxious

10. Waldron, *supra* note 2, at 702.

genre most subvert the assurance of civic dignity that all members of a well-ordered political community are entitled to. As explained above, I question that judgment regarding subversive potential because I believe that temperate criticism of the requisite foundational orthodoxy regarding civic standing is more subversive than intemperate criticism.

Putting the point in terms of orthodoxy is not Waldron's formulation, though he does speak of foundational commitments and does say that the obsession with viewpoint discrimination in United States free speech law is overdone and simplistic. Nevertheless, his concern for settlement, worry about the damage that unreconciled dissenters can do to civic flourishing, invention of a new public good, and characterization of civic dignity as "a necessary ingredient of public order" all suggest a common-good measure of well-being, one in which a sophisticated and bounded notion of orthodoxy may have a place. If I am reading him correctly on this point, temperate challenges to the civic standing of vulnerable minorities pose more of a problem for Waldron than he appreciates.

II.

James Weinstein differs from Waldron in at least two key respects that bear on how to treat dissenters who might threaten the assurance that is given to vulnerable minorities regarding their civic standing. First, Weinstein relies heavily on the principle against viewpoint discrimination in deciding which forms of hate speech are regulable, in sharp contrast to Waldron's lack of enthusiasm for that principle as it has been elaborated in American law.[11] This leads Weinstein to protect more hate speech than Waldron would, and for different reasons. Second, Weinstein derives from the premise of equal civic standing for all members of the community not only the need for assurance to vulnerable minorities that Waldron emphasizes, but also the need for strong legitimation of antidiscrimination laws, which he believes matter more to the civic standing of vulnerable minorities than the aesthetic environment of assurance that Waldron seeks.

Weinstein maintains that the legitimation of antidiscrimination laws depends on extending to those who

11. *Compare* Weinstein, *supra* note 1, at 545–46, *with* Waldron, *supra* note 2, at 713, and Waldron, *supra* note 4, at 1638–39.

oppose such laws the freedom to criticize them, by employing either temperate or intemperate forms of hate speech if they choose, so long as their messages are not threateningly targeted against particular individuals. In a deft move, he bolsters the argument for that kind of robust free speech right by deriving it from the very premise of equal civic standing that underlies Waldron's public good of assurance. In Weinstein's view, that status generates in each member of the community a right "to participate as an equal in the public conversation about society's collective decisions."[12] This right to participate does not depend on the speaker having views that stand a chance of being adopted: "an individual has an interest in expressing his or her views on a matter of public concern not just in the hope of influencing others 'but also just to confirm his or her standing as a responsible agent in, rather than a passive victim of, collective action.'"[13] In arguing to protect temperate forms of hate speech, Weinstein establishes common ground with Waldron. However, the two differ regarding whether intemperate forms of hate speech deserve protection in certain instances[14] —Weinstein says yes, Waldron says no—and whether the legitimation of antidiscrimination laws is an important reason to protect speech that disputes the civic standing of vulnerable minorities. Weinstein believes it is; Waldron does not.

Weinstein has much to say about legitimation. I find helpful his account of how a person's having been accorded the opportunity to "participate as an equal in the public conversation about society's collective decisions" bears on his willingness as a descriptive matter to obey a law he opposed at the time of passage, his normative obligation to obey such a law, and the morality of society using coercive means to make him comply with that law. I agree with Weinstein that the last of these three dimensions of legitimation is the one that should most concern us for the purpose of evaluating hate speech regulation. I particularly like his argument that a strong enough moral justification for a particular law can outweigh a deficit in enabling equal participation so far as legitimating coercive enforcement is concerned. I also believe that Weinstein is correct to identify cases

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

13. *Id*. at 550 (quoting Ronald Dworkin, *Foreword*, *in* EXTREME SPEECH AND DEMOCRACY, vii (Ivan Hare & James Weinstein eds., 2009)).

14. *Compare id.* at 548–50, 545–46 *with* Waldron, *supra* note 4, at 701–02.

denying claims of exemption from nondiscrimination laws on religious grounds as the domain where having been accorded sufficient speech rights at the time of a law's passage carries the most significance so far as legitimation is concerned.

Waldron questions the cogency of any kind of legitimation test that turns on whether a person subject to a nondiscrimination law has been given the opportunity to "participate as an equal" in the public discussion that led to passage of the law. In his view, political contestation that eventuates in legislation is "a swirling maelstrom of informal debate" about which "we have no way of keeping track of who says what to whom, who speaks, and who listens." He says:

> [T]he 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 . . . . 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.[15]

Because Weinstein's right to equal participation via speech lacks cogency in this way, Waldron concludes, narrowly drawn hate speech laws are not vulnerable on legitimation grounds for having denied speakers equal participation in the public conversation. At least that is so when those laws have "a positive relation to the integrity of the political process" and can be justified in terms of such matters as their capacity to prevent harm and their safeguards against arbitrary or corrupt enforcement. As he puts it: "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."[16]

Does Weinstein have an answer to this powerful critique? If he does, I believe it has to lie in the way he develops and applies the principle against viewpoint regulation. Hate speech regulation is undeniably viewpoint discriminatory. Conventional First Amendment analysis is deeply skeptical of such regulation on that account. In turn, Jeremy Waldron is deeply skeptical of

15. Waldron, *supra* note 4, at 710–11.
16. *Id*. at 712.

conventional First Amendment doctrine on the same account. A first step in deciding who is right is to get clear exactly why, as a philosophical matter, viewpoint discrimination is so disfavored in some circles. Despite its dominant place in the law of the First Amendment, the possible reasons for the principle against viewpoint discrimination have not been developed as thoroughly as one might have supposed. One of the contributions of James Weinstein's article on hate speech in this symposium is its fresh account of why viewpoint discrimination might be problematic.

One of the earliest efforts to explain the principle against viewpoint discrimination was advanced by Judge Learned Hand in a 1920 letter to Professor Zechariah Chafee. Hand said:

> [A]ny State which professes to be controlled by public opinion, cannot take sides against any opinion except that which must express itself in the violation of law. On the contrary, it must regard all other expression of opinion as tolerable, if not good. As soon as it does not, it inevitably assumes that one opinion may control in spite of what might become an opposite opinion. It becomes a State based upon some opinion, as against any opinion which may get itself accepted . . . .[17]

As I understand Waldron, he favors "a State based upon some opinion" regarding the traits that can never diminish a person's civic standing, which is one reason he is skeptical about the principle against viewpoint discrimination.

Geoffrey Stone has proposed a different justification. He suggests that viewpoint discriminatory laws are presumptively invalid because they "distort public debate" and "mutilate[] 'the thinking process of the community.'"[18] That rationale also does not impress Professor Waldron:

> Now, words like "distort" and "mutilate" beg the question, privileging what public debate would be like without intervention. It is worth asking why we should privilege the unregulated process or its output. . . . Stone is surely right to point out that restrictions on group defamation or hate speech are intended to modify the character of public debate. That is the whole point.[19]

17. Letter from Learned Hand to Zechariah Chafee, Jr., Jan. 8, 1920, *reprinted in* Gerald Gunther, *Learned Hand and the Origins of Modern First Amendment Doctrine: Some Fragments of History*, 27 STAN. L. REV. 723, 764–65 (1975).

18. Geoffrey R. Stone, *Content-Neutral Restrictions*, 54 U. CHI. L. REV. 46, 55 (1987).

19. Waldron, *supra* note 4, at 1639.

James Weinstein offers a third and quite distinctive indictment of viewpoint discrimination. He considers the principle against viewpoint discrimination to derive from the premise that each member of the community has equal civic standing. In this account, viewpoint discrimination is not about the quality of public debate or the rightful sources of governmental authority, but rather the equal treatment of individuals. Respect for the civic dignity of each individual speaker may preclude the state from deploying its criminal law, and perhaps other sources of general leverage, to favor the ideas of some speakers over those of others. If that is right, Weinstein's effort to support his case against hate speech regulation need not depend on his imaginative legitimation argument, which Waldron has questioned effectively. Rather, Weinstein has a more straightforward line of support, grounded in his novel rationale for the venerable principle against viewpoint regulation.

One advantage of understanding the principle against viewpoint discrimination as deriving from the commitment to equal civic standing is that it raises the possibility of commensurability between the competing claims of right in the hate speech controversy. Both claims—respectively, to communicate one's disturbing opinions and to be assured of one's rightful place in the polity—sound in civic dignity. Both are claims of individual entitlement to a collective good by virtue of collective commitment. In these respects, the common currency of the competing claims is greater than is true for other possible commensurabilities that Weinstein discusses and finds wanting: 1) that between the good, which may follow from prohibiting hate speech, of assuring minorities of their civic standing, and the good, which may follow from *not* prohibiting hate speech, of contributing to the legitimation of antidiscrimination laws; and 2) that between the system-legitimating effects of tolerating group defamation and the system-delegitimating effects of deterring vulnerable minorities from speaking or otherwise participating in democratic governance.

So what can be said about the competing, possibly commensurable, claims to civic dignity of a speaker who wishes to engage in hateful group defamation and a victim of such speech? Framed this way, with the focus on the civic dignity of the individual person rather than systemic benefits, such as political and legal legitimacy, quality of public discourse, general

knowledge, social stability, progress, or trust, the comparison need not reduce to rival claims of an empirical nature, mostly speculative and often broad-ranging. Instead, we might ask what are the essential components of the concept of civic dignity, and how are they vindicated or violated, conceptually rather than empirically, by regulating or failing to regulate hate speech. Notions about the proper ends and means of government intervention are bound to play a role in this kind of inquiry. If commensurability does indeed exist, a resolution of the hate speech controversy that maximizes the sum of the civic dignity of the parties is a worthy objective, as is a resolution that lexically privileges any components of civic dignity that might be regarded as at the core of the concept.

In the space appropriate for a critical response in a symposium, I cannot do justice to either the importance or the complexity of the task of comparison I have just outlined. I can, however, offer a few discrete observations about some of the variables.

First, I don't think that the obvious moral disparity between the rival claimants to civic dignity in the hate speech controversy ought to influence the comparison. The very notion of civic dignity entails that morally unworthy members of the community are entitled to *civic* status equal to that accorded the most admirable members. That, in part, is what the rule of law is all about.

Second, the most important value at stake in the comparison, as I see it, is freedom of thought. Professor Waldron recognizes this when he insists that a person's ideas cannot be regulated on the basis that they offend others,[20] and also when he makes clear that his proposal to punish hate speech is not designed to change the opinions or attitudes of the speakers, but rather to make their vile opinions less visible, so as to protect the civic self-regard of their targeted victims.[21] Assurance, the good that is claimed by those who would regulate hate speech under Waldron's theory, is important largely because it enables the free thought of the victims—thought undistorted by concerns about personal safety or insecurity about belonging—and through that their capacity to act civically. Even though he does not mention the connection, his

20. *See* Waldron, *supra* note 4, at 1612–14.
21. *Id*. at 1633.

prioritization of freedom of thought supports Waldron's position that only group defamation published with the intention to cause hate and using words designed to threaten or abuse should be subject to criminal sanctions. Temperate expressions of noxious views about the lack of civic standing of minorities may well cause as much or more harm to their civic dignity as does speech that combines such evil ideas with aggressive intentions or words, but objection to the thought itself is more likely to be driving a regulation of hate speech when these additional features are not a precondition for punishment.

Third, the fact that assurance of civic standing is a more fragile and subtle state of affairs than is freedom from formal government sanctions is relevant in comparing the rival claims to civic dignity of the speaker and victim. This disparity is most regrettable but undeniably real. Law can only do what it can do. As a practical matter, it is possible to respect the civic dignity of speakers engaging in hate speech when all that is required is granting them immunity from coercive government sanctions for their speech. (Such speakers, of course, enjoy no immunity from social punishment, should they reveal their nasty opinions beyond their own narrowest circles. Given that, their formal negative liberty may not leave them truly free in a broader sense to think what they will.) Less possible is according the victims of hate speech respect for their civic dignity when what is required is meaningful assurance of their civic standing. We might, of course, define the civic dignity at issue to relate only to be how the hate speech victims are treated by government rather than by the society as a whole. For assurance to do the work Waldron envisions, however, I would think there would have to be substantial buy-in from the public at large, albeit buy-in generated by government policy. As a result, vindicating the civic dignity of minorities assaulted by hate speech is more difficult, practically speaking, than vindicating the civic dignity of speakers who engage in group defamation. I would not give this disparity in what is practically possible a great deal of weight in the comparison, but I do think it should count somewhat in favor of the claims of the speakers.

Fourth, the claim to civic dignity derives, it would seem, from the type of regime that a person lives under. It is not a natural right, if such a thing exists. Perhaps civic dignity is regime-dependent not only in origin but also in specific contours. A

liberal monarchy or oligarchy might be expected to have a different conception of civic dignity than a republic. The United States might have a different conception than Great Britain or France, on account of its cultural self-image, and perhaps even worldwide iconic status, as a participatory democracy. All this could bear on the hate speech issue in that the claim to assurance of civic standing might be understood as particularly important in a regime that entrusts its ordinary citizens with a great deal of political responsibility, not to mention a regime that has a history of systematic exclusion from political responsibility of populations now expected to participate in governance. On the other hand, specific to the form that republican government has taken in this country, at least for a century, is an almost inexplicable prioritization of the freedom of speech. I suppose that could cut two ways: perhaps our understanding of civic dignity needs to guard against overvaluing that particular freedom. But if the governing conception of civic dignity should be regime-specific in part so as to express some sort of collective identity, the claim to speak one's mind however benighted—a stronger claim than to be free to embrace nefarious opinions under wraps—has to be given great weight in any comparison of rival claims in the United States.