

## Reply to Jeremy Waldron

*Ronald Dworkin*

Professor Waldron believes that I beat a “precipitate retreat” from an earlier position in an email to him commenting on an argument he made.<sup>1</sup> He has called my “bluff” and resisted my “browbeating.” I did not intend the email for publication, but I cannot find any retreat there. I had said, in the “Foreword” Waldron cites, that a law criminalizing “hate” speech “spoils the democratic justification we have for insisting that everyone obey.”<sup>2</sup> I said, in the email Waldron decided to quote, that such laws leave us with “something morally to regret” and with “a deficit in legitimacy.” In an earlier book Waldron cites, I said that legitimacy is a matter of degree, and that not every law that is “spoiled” by a defective democratic process justifies citizen rebellion.<sup>3</sup> Claiming that an opponent has retreated is often a useful rhetorical device, but it seems unpersuasive in this case. We can hardly justify a defect in political legitimacy by arguing that it might have been worse.

Waldron appears to accept, at least in this essay, that it is indeed a defect in legitimacy to enforce legislation against those who were not permitted to speak in opposition during the political process that produced that legislation, that this does “spoil” the democratic pedigree of the legislation to some degree. If the legislation in question required everyone to carry health insurance, for example, then suppression of even “vituperative” dissent would put the legitimacy of that law “in question.” He thinks hate speech different, apparently, for two reasons. One of these – that issues of racial dignity have been settled in mature democracies – is doubtful, and Waldron offers it with what seems great hesitation. Well he might: These issues seem much less settled now – in Germany and the Netherlands, for example, as well as in Britain and the United States – than they seemed decades earlier. The other reason Waldron

<sup>1</sup> See Jeremy Waldron, “Hate Speech and Political Legitimacy,” Chapter 16 herein. All references to Waldron are to this chapter.

<sup>2</sup> Ronald Dworkin, “Foreword,” in *Extreme Speech and Democracy* v (Ivan Hare & James Weinstein eds., Oxford University Press 2009).

<sup>3</sup> Ronald Dworkin, *Is Democracy Possible Here?* 97 (Princeton University Press 2006).

offers is interesting, however; it touches a very deep issue in political philosophy. What is the basis of the “equal concern and respect” that coercive government owes those who fall under its dominion?

Waldron seems to assume that *government* owes equal concern and respect to all members of the political community because every *member* of the community does, even as a private individual. He suggests that racists dissent “from the broad abstract principle that individuals must show equal concern and respect to all members of the community.” Given that we ourselves accept that principle, Waldron argues, the phenomenon of hate speech requires balancing. On the one hand, government does compromise legitimacy – it fails to treat racists with the kind of respect any justification of democracy assumes – when it obstructs their participation, on their own terms, in the democratic process. In that sense, hate speech is like vituperative opposition to health care legislation: In both cases, censorship would compromise legitimacy. But hate speech is different because vituperative hate speech also denies some citizens – its targets – the equal concern and respect they are entitled to have *from other citizens*. So balancing is necessary: Censorship of the worst forms of hate speech, at least, is justified on balance because the damage such speech does to the respect owed its targets outweighs the damage done to racists by compromising their democratic rights.

But the “abstract principle” that supposedly grounds this argument is mistaken: It fails to notice the crucial difference between the rights and responsibilities of government – our responsibilities when acting collectively and coercively in politics – and our responsibilities as individuals operating within the structure of coercive law. Government must treat the fate of each citizen as of equal importance. But I need not: I do not owe you or your children the concern, when I act as an individual deploying my own resources, that I show to my own children or to myself. Government may not adopt any ethical conviction – any opinion about the true basis of human dignity – and enforce that view against dissenting citizens. It must recognize a right of ethical independence. But recognizing that right means that no individual citizen may be forced to accept any official ethical conviction or be prevented from expressing one’s own dissenting convictions. It is a popular view, for instance, that atheists cannot be trusted because they have no beliefs that can ground a moral commitment. I find that opinion deeply offensive because it denies my status as a moral agent, and moral agency is a matter that, as Waldron puts it, “people rely on comprehensively and diffusely in almost every aspect of their dealings with others.” No law would be acceptable, no matter how popular, that rested on that ethical opinion. But I have no right that others, who *do* believe I lack that basic dignity, not hold or express that conviction as individuals. Living in a just society – a society whose government respects human dignity – means that I must accept the right of others to hold me in contempt.

So regulating hate speech is not, after all, a matter of balancing. Government may not violate the rights of any citizen to the ethical independence from government

that dignity requires. It is no excuse that it does so to enforce a particular collective opinion about what forms of respect individual human beings owe one another just as human beings; that “excuse” only confirms the mistake. I myself believe that one opinion about that latter issue is correct and others mistaken. But it does not lie within the powers of just government to try to identify and impose that truth.<sup>4</sup> To be sure, life would be more pleasant for some members of the community – and less pleasant for others – if government had that power. But a government is not fully legitimate that claims it.

I have some other, less central, comments about Waldron’s essay. I agree with him, first, that my argument does not suppose that “laws against racial violence or criminal damage” are in any way compromised when expressions of racial hatred are banned. I do not, however, understand why he thinks they might be. He suggests, second, that censorship of “hate” speech is comparable to “time, place, and manner” restrictions on political demonstrations. But the latter are permissible only when they are, as constitutional lawyers put it, “content-neutral.”<sup>5</sup> Justifications for time, place, and manner restrictions are not based on any judgment, as censorship of race speech must be, that the speech restricted is false or offensive.

I am surprised, third, that he seems to argue only for banning the crudest forms of hate speech: speech that declares that some people are no better than the animals “we would normally seek to exterminate, like rats or cockroaches.” That is not the danger; no person or political party that hoped to attract support or attention would speak in that way. If Waldron’s case for censorship of hate speech is to count in actual politics, it must reach what is actually said and feared. “The holocaust was invented by Jews for their own advantage.” “Moslems are all terrorists who should be shunned.” “Islam has contributed nothing of value to the world’s culture.” “The immigration of alien races will destroy the indigenous culture that we, who have developed and embraced that culture, have a right to protect.” “They should all be sent back where they came from.” None of these misbegotten declarations implies that any human being is no better than an animal or should be exterminated like a cockroach. None implies that anyone inherently lacks the status or dignity of a human being. Any argument that hopes to defend the hate speech laws actually in force in European countries must defend censorship of the kind of speech that is actually used to inspire hatred.

Europeans have said to me, on many occasions, that their history is different from and darker than that of the United States, and that if I had been born in Europe, I would share their opinion rather than the reflex First Amendment tic they think an

<sup>4</sup> In *Justice for Hedgehogs* (Harvard University Press 2011), I argue for what I take to be the correct account of what kind of respect people owe each other as individuals, and I describe what I believe to be the ethical, moral, and political consequences of that view. But I also argue there, at some length, for a right of personal independence from coercive government in the ethical as distinct from the moral sphere.

<sup>5</sup> E.g., *Ward v. Rock Against Racism*, 491 U.S. 781, 790–4 (1989).

American disease.<sup>6</sup> They may be right about the impact of history on conviction: A great many distinguished and otherwise liberal European political philosophers do support censorship in this area, although of course others do not. In any case, however, explanation of a conviction's genesis is not an argument for its truth.

<sup>6</sup> Stephen Holmes's comments in this volume take something of the same view. See Stephen Holmes, "Waldron, Machiavelli, and Hate Speech," Chapter 18 herein.