

24.150 Liberalism, Toleration, and Freedom of Speech, Fall 2023

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Waldron, continued



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Screenshot for "#099 - What's the Harm in Hate Speech? (Jeremy Waldron)" on YouTube. © Renegade Ape. All rights reserved. This content is excluded from our Creative Commons license. For more information, see <https://ocw.mit.edu/help/faq-fair-use/>.

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What is it that people in a well-ordered society need assurance of?

...how they are likely to be treated, for example, by the hundreds or thousands of strangers they encounter or are exposed to in everyday life...[later:] that they can count on being treated justly.

the fundamentals of justice: that all are equally human, and have the dignity of humanity, that all have an elementary entitlement to justice, and that all deserve protection from the most egregious forms of violence, exclusion, indignity, and subordination.

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A challenge

Maybe the lesson for us, in our much-less-than-well-ordered society, is that we must hope that hate speech dies out, just withers away, not because of coercive laws limiting free speech, but because of changes of heart brought about perhaps by public education and (not least) by effective answers to hate speech in the free marketplace of ideas.

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Waldron's response

Societies do not become well-ordered by magic. The expressive and disciplinary work of law may be necessary as an ingredient in the change of heart within its racist citizens that a well-ordered society presupposes. And anyway, as with all issues of justice, the necessity of such laws is a matter of the goods to be secured and the likelihood that they can be secured in the absence of legal intervention. If, as I am going to argue, the good to be secured is a public good, a general and diffuse assurance to all the inhabitants of a society concerning the most basic elements of justice, then it is natural to think that the law would be involved.

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Waldron's argument summarized

Definition: a *public good* is one that is (i) *non-excludable* and (ii) *non-rivalrous*.

Non-excludable: If the good is provided at all, it is not possible to prevent some from using it.

Non-rivalrous: Use of the good by some does not make it less available to others.

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Waldron's argument summarized

Definition: a *public good* is one that is (i) *non-excludable* and (ii) *non-rivalrous*.

Which of these are public goods?

Taylor Swift vinyl lps.

Clean air.

Yellowstone National Park.

Wikipedia.

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Waldron's argument summarized

P1. "Assurances of justice" are a public good.

P2. If assurances of justice are a public good, laws punishing activities that undermine them are legitimate.

P3. Public hate speech undermines assurances of justice.

C. Therefore, Laws punishing hate speech are legitimate.

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Waldron's argument summarized

P1. "Assurances of justice" are a public good.

P2. If assurances of justice are a public good, laws punishing activities that undermine them are legitimate.

P3. Public hate speech undermines assurances of justice.

C. Therefore, Laws punishing hate speech are legitimate.

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Waldron's argument summarized

P2. If assurances of justice are a public good, laws punishing activities that undermine them are legitimate.

Compare: if clean air is a public good, laws punishing pollution are legitimate.

-the key is non-excludability: it means no one can profit from doing their part to keep the air clean. Without financial incentive, people will not do their part...

...Unless there is another incentive: to avoid government punishment.

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Waldron's argument summarized

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P2. If assurances of justice are a public good, laws punishing activities that undermine them are legitimate.

P3. Public hate speech undermines assurances of justice.

C. Therefore, Laws punishing hate speech are legitimate.

Thoughts on the argument?

Q3. 'As long as the government actually prevents or punishes, for example, racial discrimination and violence, it does not need to also prevent or punish expressions of racism (that are not, in the circumstances in which they are expressed, incitement to immediate lawless action).' What is Waldron's response?

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In no society is the state able to offer these guarantees (against violence etc) on its own account without a complementary assurance that ordinary citizens will play their part in the self-application of the laws.

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ch. 7



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The democratic legitimacy argument against hate speech

Dworkin: “majority decision is not fair unless everyone has had a fair opportunity to express his or her attitudes or opinions ..., 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.”

Dworkin, Ronald. From “A New Map of Censorship.” *Index on Censorship* 23, no. 1–2 (1994): 96–15. © Writers and Scholars International Ltd. All rights reserved. This content is excluded from our Creative Commons license. For more information, see <https://ocw.mit.edu/help/faq-fair-use/>.

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The democratic legitimacy argument against hate speech

Q1. What does “law L is legitimate” mean?

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The democratic legitimacy argument against hate speech

A law is legitimate = (i) citizens have a moral duty to obey the law; and
(ii) the government is morally permitted to punish people for breaking it.

Note (i) is complicated. You have a moral duty not to murder, whether or not laws against murder are legitimate. But you have a moral duty to drive on the right, only because that's the law around here.

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Waldron's questions/objections.

A. Does the argument prove too much?

P1. If it is not the case that "everyone [in a State's jurisdiction] has had a fair opportunity to express his or her attitudes or opinions," then no law passed by that State (under those conditions) is legitimate.

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P2. If there are laws punishing **any** speech, then it is not the case that everyone has had a fair opportunity etc.

C. So if there are laws punishing **any** speech, no law passed by the State (when those restrictions speech were/are in force) is legitimate.

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What is the argument?

P1. If it is not the case that "everyone [in a State's jurisdiction] has had a fair opportunity to express his or her attitudes or opinions," then no law passed by that State (under those conditions) is legitimate.

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P2. If there are laws punishing hate speech, then it is not the case that everyone has had a fair opportunity etc.

C. So if there are laws punishing hate speech, no law passed by the State (when the hate speech laws were/are in force) is legitimate.

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Waldron's questions/objections.

B. Is the first premise true?

P1. If it is not the case that "everyone [in a State's jurisdiction] has had a fair opportunity to express his or her attitudes or opinions," then no law passed by that State (under those conditions) is legitimate.

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Waldron's questions/objections.

B. Is the first premise true?

"Some skinheads beat up a Muslim minicab driver after the London bombings of July 7, 2005; Dworkin's view seems to imply that it is wrong for the police to pursue, arrest, and indict these assailants because Britain has religious hate speech laws that take away the legitimacy of downstream laws against assault. The police must stand by and not intervene, because any intervention would be wrong.

That's what "deprived of legitimacy" means."

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Waldron's questions/objections.

2. On p. 190 Waldron writes that most hate speech laws "bend over backwards to ensure that there is a lawful way of expressing something like the propositional content of views that become objectionable when expressed as vituperation." He doesn't give any examples. So suppose Martians fleeing a catastrophe on their home planet have landed and established a colony on an unoccupied island, one unclaimed by any terrestrial nation. They are sophisticated enough to have a language, which some Americans have learned to speak (some Martians have also learned English). Do you think Waldron would regard either of the following as hate speech? If so, can you think of a way to re-phrase them so that he'd regard them as lawful?

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Waldron's questions/objections.

C. Is the second premise true?

P2. If there are laws punishing hate speech, then it is not the case that everyone has had a fair opportunity etc.

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Waldron's questions/objections.

"Those Martians are idiots, if they ever visit this country they shouldn't be allowed to drive, they'd be a danger to the rest of us."

"Martians shouldn't be trusted to be doctors or lawyers in this country, they're not up to doing those jobs well."

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