

Autonomy, dignity, and hate speech

Mark Mercer
Department of Philosophy
Saint Mary's University
Halifax, NS B3H 3C3
mark.mercer@smu.ca

Not everyone much cares about freedom of expression. Many people, that is, don't mind at all having the police, courts, human rights commissions, and media regulators interfere with the peaceful expression of opinion and emotion. If preventing others from saying certain things, or from saying them in certain ways, promotes what's really important, then, these people say, government should use regulations and laws to prevent people from saying them. Nothing wrong with cease-and-desist orders, fines, and jail time if there's a good chance they'll help with the job.

Well, that might be so, but surely there are more people on the other side, aren't there? Those who don't care much about freedom of expression won't be able to get their way, will they, since they are so greatly outnumbered by those who do care that our country remains free?

Unfortunately, those who do care that people be left alone to express themselves as they wish cannot put up a united front against those unconcerned about or disdainful of freedom of expression, for the do-cares come in two distinct varieties, and the members of one group of them are often hard pressed to distinguish members of the other from the don't-cares or worse. The difference is this: some people who value freedom of expression value it for its own sake, for the place it occupies in a general attitude they have towards fellow citizens and people generally; other people who value freedom of expression don't value it for its own sake, but value it only for its effects in promoting other things, things that they do, in turn, value for

their own sakes. Members of the first group, those who value freedom of expression for its own sake, are not convinced that there's really any practical difference between those who value it only instrumentally and those who are indifferent or hostile to it.

So we have three sides, not two, and, as always, politics can make for strange bedfellows.

To value freedom of expression for its own sake is to value people's autonomy and dignity for their own sakes and to understand that expression and communication are essential to autonomy and that interfering with expression and communication is to insult people's dignity. A person's autonomy is her command of her thoughts, desires, and emotions, her understanding of her personality—including, importantly, her critical evaluation of herself. We are autonomous to the extent that we are who we are for our own reasons, as a result of our own acts of creation or affirmation. Our dignity, then, resides in our being taken seriously by others, and central to being taken seriously is our being understood by people in our own terms.

Manners and comportment, dress, artistic creation, how one's house or lawn or car looks, what one says and how one says it—all these are ways in which we do or could present ourselves to others and to ourselves, ways in which we reveal ourselves or set out the ways in which we prefer to be understood. Interference with any of these constitutes disdain for our autonomy and, thereby, a strike against our dignity.

Now, a person's commitment to freedom of expression in her community might rest on her appreciation of the place of expression in autonomy and the relation between interference in expression and lack of respect for autonomy, but it needn't. A commitment to freedom of

expression might rest on one's appreciation of the usefulness of expression to some separate end.

Those who value freedom of expression instrumentally tend to see expression as useful either to the pursuit and dissemination of knowledge or to the stability of democratic societies. We must be free to express ourselves as we wish, they say, if we are to find and test promising hypotheses and to argue about what the evidence we uncover says. Or we must all be free to express ourselves as we wish if we're not to create a coarse and violent society, the sort of society we might well find ourselves in when those whose views have been censored and marginalized seek alternative ways to bring change.

We can, of course, value freedom of expression both as an essential component of respect for autonomy and for the knowledge and stability it helps to bring. But to value it for its effects is not to value it intrinsically.

If one values freedom of expression only for its effects, one will not mind restrictions on expression that do not diminish its effects. If, for instance, one values freedom of expression for the role it plays in promoting knowledge through critical discussion, one will not mind there being restrictions on expression that do not affect the promoting of knowledge. Should one think, say, that the quest for knowledge would benefit were voices heard that are frequently silenced by bigoted talk, then one might look favourably on strictures on bigoted talk. Should one think that name-calling or rape chants play no role in the quest for knowledge, one might advocate laws against name calling or rape chanting.

One who values freedom of expression for the stability it brings to democratic societies but who discovers that more stability could be had were government to require, say,

newspapers and television stations to air laudatory reports on immigration, might well reassess her commitment to freedom of expression.

The point is simply that if one values something as a tool toward an end, and one finds a better tool, then one's attitude toward the original tool will change. It won't look as shiny as it used to.

And that is why many who value freedom of expression for its own sake are not so sure about the commitment of those who also profess to value it, but value it only instrumentally. "I'm all for freedom of expression, certainly, but we needn't protect freedom for this or that category of expression, given that expressions that fall into those categories are not really useful." To those who value expression for its own sake, "I'm for freedom of expression, but..." is hard to distinguish from "I'm indifferent to freedom of expression."

Now not all who value freedom of expression only for its uses will consent to sit still in face of all my lies and slander about them. It is entirely open to those who value freedom of expression for its use in the creating, testing, and dissemination of knowledge (or in the identification and elimination of error) to say that any restriction on freedom at all is a threat to the pursuit of knowledge. If there are no expressions that lack the potential to contribute to knowledge, then restrictions always threaten to impede the pursuit. This is true even if it's only a matter of our being unable reliably to identify those expressions that make no difference. Likewise, one who values freedom of expression for the stability it brings to democratic societies can say that nothing will do the job of bringing stability as well as freedom of expression.

I should add that everyone, of course, can reject restrictions on expression on the grounds that even the best-intentioned and best-formulated restrictions will be abused regularly enough to make us losers overall.

Let us set these differences and debates aside, though. My purpose in this paper is to participate in a new feud, one that has, surprisingly, arisen within the group that values freedom of expression because of its essential tie to autonomy and dignity. (Those who, as I say, value freedom of expression for its own sake.) Jeremy Waldron, for one, professes to value freedom of expression for its necessary connections to autonomy and dignity, and yet, on grounds of autonomy and, mainly, dignity, holds that restrictions against hate-speech are might be just what pluralistic democracies need. Autonomy and dignity, Waldron says, require a large degree of freedom of expression, but in order to protect the dignity of members of historically marginalized or currently powerless groups, we must as a society, through our laws, be prepared and willing to interfere with certain forms of hateful expression.

Waldron's argument in favour of legal restrictions on the peaceful expression of hatred begins with the thought that a just society is at least a society in which citizens live in the assurance that they will be treated fairly and equitably, not just by government officers but by employers, teachers, shopkeepers, fellow motorists, and everyone else they meet. A just society is at least a society in which citizens feel in their bones that they can rely on being treated fairly and equitably.

But the presence in the everyday environment of hate speech directed toward vulnerable groups is an affront to this assurance. Expressions of hate on walls, on the internet, overheard in the shopping mall, and on the radio and television undermine the assurance individuals should be able to take for granted that they will, indeed, be treated fairly and equitably.

Hate speech communicates to members of vulnerable minorities that their status as free and equal citizens is still up for grabs, that it is not a settled issue that they can rely upon.

Because it undermines the assurance people should feel that they will be treated well, hate speech constitutes a social harm. It puts at risk the sense members of vulnerable minorities have of being included and respected. Laws regarding defamation that refer to characteristics that mark out racial, social, or religious groups would, on the other hand, be useful in upholding against attack the shared sense of the basic elements of each person's status as an equal member of society. Laws against the expression of hate, just by being on the books, communicate to members of vulnerable groups the concern society has for their wellbeing.

Laws against hate speech directed towards members of vulnerable minorities are justified, then, as a means to protect the atmosphere of mutual respect that makes living pleasantly and with dignity possible.

Laws against hate speech can provide the assurance of equality and fair treatment through any of five different effects, Waldron tells us. 1) The penalties for speaking hatefully will cause those who wish to speak hatefully to think twice. Fear of punishment will reduce the amount of hate speech in the community. Less hate speech means a reduced likelihood that members of vulnerable minorities will encounter hate speech and, thereby, have their assurance of equal treatment weakened. 2) As the aggressively hateful give up speaking hatefully for fear of punishment, the social and physical environments will present a less hateful everyday environment. Those who are not front-line haters, then, those, that is, who might take their cue from their surroundings to speak hatefully, will find less encouragement from their environment and fewer models to follow. Hateful expression will decline even

further, and so will the chances that members of vulnerable minorities will meet with it. 3) Just by being on the books they indicate to members of vulnerable minorities that their wellbeing is socially valued. 4) They provide members of vulnerable minorities a means to react lawfully and civilly to those who express hatred toward them, which again assures them that they are socially valued. 5) Finally, when haters are prosecuted under them, they become examples of miscreants or lawbreakers, examples that speak to every one of the value society places on individuals being assured that they are free and equal citizens.

That's an overview of Waldron's argument. Let's look a little more carefully at what is central to it, the idea that protecting dignity requires government interference in the peaceful expression of opinion and emotion.

Waldron says that we all have an obligation of ethics to maintain the general sense in our society that each of us is a free and equal citizen. He adds to this premise two points. The first is that this general sense of freedom and equality for each, though seriously important, is a fragile public good. It is easily lost. The second point is that ethical obligations to seriously important public goods should be sustained by laws, especially when those public goods are fragile.

From those three claims, Waldron infers that we in our democratic society should be legally obligated to maintain the general sense that each of us is a free and equal citizen.

The argument here might parallel arguments that we should be legally obligated not to steal or murder. If we have an obligation of ethics not to remove for our own use other people's property and private property is an important but fragile public good, then we should be legally obligated not to steal. Theft should be countered not just with criticism, but with punishment.

Defamation of individuals because of their membership in certain groups, or hate speech, Waldron continues, when present in the public sphere, undermines the assurance of members of vulnerable minorities that they are free and equal members of society. From this premise and the previous intermediate conclusion, Waldron reaches his main conclusion: We should be legally obligated not to engage in hate speech.

Of course, Waldron means his argument to hold only in the context of robust protections for freedom of speech. A society is far from just unless the freedom to express ourselves enjoys strong legal protection. We must not suppose that hate speech includes every sort of ugly or dangerous talk. Only vile calumnies may be restricted by laws, in order to ensure freedom of expression and our assurance that we possess it. Merely offensive expression must not be forbidden by law.

As well, laws against hate speech must not apply to private conversations or communications, but only to those left in public such that anyone might encounter them. Laws against hate speech can properly apply only to public expression, and especially to semi-permanent expression, such as on posters on exterior walls and websites open to whoever passes by.

Importantly, Waldron insists, the administration of the law should include safeguards so that the law is not used to chill critical discussion on sensitive matters.

Expression, Waldron agrees, should generally enjoy robust protection just because, as those who value it for its own sake say, it is necessary for our autonomy that we express ourselves, and restrictions on expression prevent us from choosing ourselves for our own good reasons. (For that reason, restrictions on expression are assaults on our dignity.) But the matter of preserving conditions of dignity, in turn, makes it legitimate and, indeed, imperative,

to address hate speech through legal mechanisms, including cease-and-desist orders and, even, fines or jail.

Objections to Waldron's argument and its conclusion, that we formulate and apply laws against the peaceful expression of hate, divide into the practical and the principled. I'll begin with the practical objections, before the principled. The principled objections will conclude with an argument that, in the end as in the beginning, what really assaults dignity is not the hatred we might encounter, but government restrictions on what people can say in public.

A very serious practical objection to hate-speech laws lies in the threat of their being abused and in the bad effects even their proper use will have. To begin with, we can be almost sure that the people charged with administering laws against the expression of hate will do a bad job. They will be unable to distinguish vile calumnies from critical or merely offensive expression. (This point has been amply demonstrated by the Canadian experience with laws against hate speech.) Further, even if they are not poorly applied, laws against the expression of hate will have a chilling, deforming effect on public discourse no matter how well written. They cannot help but work against candour in discussion and make people think twice about expressing their thoughts. If informal pressures such as those against the politically incorrect can be effective in tamping down honesty and openness, the pressure of law and punishment will do an even better (that is, worse) job.

Another objection is that the difference between a vile calumny and a simply critical statement rests in the thoughts and intentions of the speaker. Thoughts and intentions in matters of expression and communication are too subtle, diffuse, and amorphous to be matters of sound legislation.

A third objection begins with what should be obvious. What really harms our sense of each other as free and equal citizens is not the occasional vile calumny but the frequent voicing of legitimate claims and questions about sensitive matters. Everyday discussions of race or sex or sexuality or ethnicity or age or manners or religion contain many hurtful or offensive expressions and it is these that damage the sense of worth of members of vulnerable minorities. But these expressions, according to Waldron, should not be subject to regulation. Yet if they must be protected despite their harm, there's no reason to go after infrequent and much less harmful cases of hateful calumny.

Indeed, the fact that it's not hateful expression that is most potentially damaging might explain why those charged with investigating and prosecuting alleged instances of hate speech have been so willing to overreach. Their concern is to prevent the harm they think speech can cause, and the distinction between hate speech and critical or offensive speech cannot be of interest to them.

A final practical objection to making expression a matter of law is that laws against the peaceful expression of hate will encourage people to feign offense and to prosecute people they simply don't like on the hope of hurting them, whether their insincere charges stick or not.

The general point of the practical objections is that there is good reason to think that laws against the peaceful expression of hate will make things worse overall. The costs of the regime of laws and the penalties for failure will outweigh the benefits they bring, even if they bring any benefits.

Principled objections to Waldron's argument and its conclusion engage the argument on the grounds of autonomy and dignity. Let us begin, though, with an object that fails.

Critics of hate-speech laws are right to point out that hate itself is not illegal. We are free to hate whom we wish for whatever reason we wish. Our attitudes are our own business, or so even the slightest concern for autonomy and dignity would have it. Laws against promoting hatred, then, are laws against encouraging people to take up attitudes it is perfectly legal, and should be perfectly legal, to hold. Now it is true that there are laws in our society against promoting certain things. One can be charged with conspiring to rob or defraud someone or with attempting to murder someone, and one can do serious jail time for these crimes though no one was robbed, defrauded, or killed. But these are laws against trying to do that which is itself a crime. That makes them very different from laws against promoting hatred, even if hatred gets promoted. For hating something is not a crime.

The objection might succeed against arguments for hate-speech laws as means to counter the promotion of hatred. Waldron's argument, though, isn't about countering the promotion of hatred. Waldron argues for hate-speech laws as protective of dignity. Since his argument is not that hate-speech laws are warranted because they interfere with the promotion of hatred, the objection is irrelevant to it.

One objection that does touch Waldron's argument concerns how best to secure the general sense that we are all equal and secure members of our society. The objection is that this sense is best sustained by laws against actual wrongful discrimination (in housing, work, education, and health care, for instance) and violence. Our sense that we are equal and secure is sustained by our knowledge that whatever someone says, we may sit where we want to and be considered impartially for any job for which we apply. As long as laws against actual wrongful discrimination and violence are in place and applied, we have what we need. And if such laws are not applied, no law against hate-speech will make us equal and secure.

Another important objection is that laws against the peaceful expression of hate deny the free and equal status of those who would express hate. They, to be equal citizens, must be afforded a fair chance to change minds and to affect the moral climate of society. If we are concerned about the autonomy and dignity of all, we need to leave them free to try to persuade people and to contribute to the everyday world in whatever non-violent ways they choose.

An objection Waldron mentions but dismisses much too quickly is that laws against the peaceful expression of hate will work to make emotionally feeble the people they are supposed to protect. Instead of developing self-respect and autonomy, members of vulnerable minorities will become more needful of protection and favours. This will confirm them in their vulnerability.

In the end, though, the most telling objection pretty well simply repeats the concern for autonomy and dignity to which Waldron appeals. Long before Waldron's recent book, as Waldron notes, both C. Edwin Baker and Ronald Dworkin explained why if we value people's autonomy, we cannot also wish to restrict expression to safeguard dignity. Self-disclosure, we've said and Waldron agrees, is an important part of both our making of ourselves and our making of a place in the world for ourselves. To respect people's projects of making themselves and of making places in the world for themselves is, then, to allow them to engage in projects of self-disclosure. Rules against the peaceful expression of hate prevent societies that have them from enabling people to disclose themselves. Therefore, a society that values personal autonomy, that values the making of one's own place for oneself, will not be a society with rules against the peaceful expression of hate.

That said, though, a basic question remains. Why should we want a society that values personal autonomy? Why, that is, should we want our society to be a liberal one?

Authoritarian and other non- and anti-liberal societies might be just as happy as any liberal society, their citizens just as pleased or content. Well, not everybody in relatively liberal societies wishes them to remain liberal—not everyone, I noted, cares at all that expression be free and protected. There can, of course, be no sound arguments from premises anti-liberals accept to the valorization of liberal society. Some people like broccoli, others don't.

We can, though, say that with each illiberal law or policy, each inroad against freedom of expression, our society not only becomes more illiberal but may well create more of a taste for an authoritarian atmosphere. One of the great dangers of laws against the expression of hate is that they may well tend to create the sort of climate in which those laws can find approval.