

## Freedom of Expression and Emotional Harm

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Emotional harm is no less truly harm than is physical harm. That fact stands as an objection to the argument that since words, drawings, photographs, dances, songs, and the rest cannot by themselves cause physical harm, we ought to be free to express whatever we want however we want to whomever we want. Words, drawings, photographs, dances, songs, and the rest can harm people emotionally, and emotional harm can be just as painful and just as debilitating as physical harm. We who advocate unrestricted freedom of expression, then, have to accept that hurt feelings is sometimes either itself a species of harm or at least a direct cause of harm. We must argue that harm though it is, emotional harm does not, overall, constitute sufficient grounds for suppressing or censoring or punishing expression.

Whether we should consider the risk of emotional harm a reason to regulate, restrict, or punish expression is a matter of what sort of ethos we desire to create and maintain in our society. My proposal is that a social ethos in which the risk of emotional harm caused by expression is simply not taken to be of concern to government officials or police or the courts will serve us well overall in creating a just and decent society, a society in which we as individuals can flourish and find happiness. We are, of course, both as individuals and as members of groups, to take seriously whatever emotional harms are caused by expression. But rather than try to reduce the risk of such harm by having the police or other government agencies suppress potentially harmful expression, we would do best to strive to become the sort of people whose emotions and sense of self worth are not hostage to what people might say.

My argument is in the first place directed against government interference with the peaceful expression and exchange of opinion and emotion. Yet a society that lacks government policies and laws against expression is not automatically a society in which people are free to express themselves. If businesses, universities, and other institutions within a society impose regulations or enact policies that serve to suppress or punish expression, then the people in that society might have little freedom to express themselves, even should they face no government interference. Certainly, much in my argument against government interference applies to institutions of civil society generally. Nonetheless, perhaps within some institutions expression can properly be restrained in particular contexts, particularly when the institution arose or is maintained through the free choices of its creators or members. Still, I think, even the workplace, the shopping centre, and the club, let alone the university, should be friendly to free expression, though it would be a mistake for governments to interfere strongly with private institutions of civil society.

It's also true that a society isn't one in which freedom of expression is well honoured if people have no places in which to express themselves or lack opportunities to do so. Governments must, then, maintain public spaces in which people can, at their pleasure, stand on soap boxes, posts bills, or set up displays. Governments must also ensure that people have access to

communications media, which isn't hard to do these days, now that anyone who wants to can set up a blog or a journal on the internet.

These issues—of the responsibilities institutions of civil society have to freedom of expression and the duties governments have to enable people to have their say—will have to wait, though. Our topic is much narrower: why the fact that what people say can cause others emotional harm is no good reason for government to create laws or policies that would restrict or punish expression.

Let us begin by understanding how expression can be emotionally harmful and why some might think racist expression, for instance, should, on the grounds of the emotional harm it can cause, be restricted or suppressed, and not merely countered by other expression.

When racists speak publicly, their views get heard. They get heard not only by white people, but also by black people, by First Nations' Canadians, by whoever is the target of the racists' speech. Hearing racist views can be debilitating and hearing the solutions the racists propose can be frightening. Neither the emotional scars left after hearing yourself demeaned and mocked nor the fear that you will be treated unfairly or with violence can be healed by critical discussion and argument. Scars and fears aside, an advocate of suppression might continue, people from oppressed groups just ought not be subject to insult or ridicule or calumny.

One might respond that this view wrongly slights the potential of discussion and argument to put things right. People can be helped to get over the pain caused by hearing racist remarks or receiving racist invective. Criticism and truth can go a long way toward removing the debilitating effects of racist speech. All this is true, of course, but there are problems. Not always is criticism and truth effective; moreover, not always is racist speech even met with criticism and truth. The most serious problem with this response is that criticism and truth are not merely unreliable tools with which to put things right after the fact; sometimes they are necessarily ineffective. With the racist words themselves comes the hurt and the harm and no putting things right after the fact can change that. To pretend otherwise would be like thinking that since good medical care can heal broken bones, there's no need for laws to protect people from beatings. Getting over a broken bone is no substitute for remaining intact in the first place.

Emotional harm is harm, and cannot always be put right; and hurt is hurt, whether it is to one's arm or to one's feelings.<sup>1</sup> And yet we ought not, as a society or as individuals, censor or suppress racist or other vile expression, and we ought not punish those who through what they say, draw, or dance hurt or harm others.

The argument for freedom of expression despite the harm expression can cause has two parts. The first appeals to certain ideals embodied in freedom, the second to the bad consequences of suppression. The first part, then, concerns principles, traditional liberal principles, while the second part concerns realities, the consequences we have begun to live as freedom of expression, and other of our civil liberties, has eroded.

Tolerating racist and other vile expression is part of our commitment to treat each other with respect. Respect for the autonomy of others is the traditional liberal ideal at the centre of this

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1 That emotional harm is harm is a point made forcefully by each of the four authors of the essays in Matsuda et al. (1993).

argument.<sup>2</sup> Our commitment isn't, of course, a commitment simply to return respect for respect. It is a commitment to treat respectfully those who abuse us and even those who do us violence. When we sanction or punish people for mistreating us or others, we do so openly and honestly, for we recognize miscreants and criminals to be persons just as we are. Whatever the racist wishes to say, respect for her as a person requires that we don't summon the state to interfere with her saying it. This is because to interfere with her expression of her views would be to neglect her interest in self-expression and self-creation. We understand that were we to be prevented from stating our own views, we would experience a slight to our dignity, to our sense of self; and we recognize that she is no different from us in that respect. The point does not, of course, depend on whether she is deeply committed already to the view she wishes to express or is just parroting some bigoted nonsense she recently overheard, whether she is proud of her stand or about to regret it. In any case, it would be disrespectful of her as a person to prevent her, through force of law, from speaking her mind, for that would be to fail to treat her as an autonomous moral agent, capable of coming to her beliefs and patterns of emotional reaction through her own chosen means.

To rule by law certain opinions or feelings out of bounds is to pronounce them not worth considering and discussing on their merits. But to treat a person respectfully requires taking her opinions and feelings on their merits, and criticizing them directly. Censorship and repression, then, are forms of manipulation, for they seek to bypass the capacity for choice of the person to whom they are applied. Now certainly a person can hold warped or hate-filled views, views we have an interest in changing. But to respect that person, we must attempt to change those views through argument and example. Those of us who would treat people respectfully whatever they believe hold it worse that someone is forced down the right path than that they choose to take the wrong path.

Further, a person's interest in expressing herself points to an important political dimension of censorship and suppression, specifically, the principle of the consent of the governed. To deny a person the means to get his opinions heard publicly is to render him unable to consent to the laws of the land. Not having had his say and his opportunity to influence public opinion, he cannot accept that the laws that govern him were fashioned through a fair procedure. Thus, he cannot accept to be governed by them. His adhering to them can only be a result of his fear of the consequences of breaking them. To suppress racist speech is, then, to fail to uphold the democratic ideal according to which all people subject to the law must be able freely to consent to be subject to it.

To censor or suppress racist speech is, then, to manifest disrespect toward racists. But it is also to manifest disrespect toward those who might hear racist speech, and even toward those whom racist speech is meant to harm.

Consider the people racist speech is intended to hurt and harm. Censorship and suppression intended to protect vulnerable groups might perhaps succeed in doing what it is intended to do (unfortunately, there have been few or no empirical studies of the matter).<sup>3</sup> Still, paternalistic

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2 Ronald Dworkin gives a good account of the nature of respect for the autonomy of others in Sections IV and V of Dworkin (1993).

3 While the effects on people of racist and sexist propaganda have been studied both in and out of the laboratory, rarely have empirical researchers turned their eye on the effects of laws against the

measures such as suppression are disrespectful towards those they are meant to protect and, hence, are illiberal. They deny the people targeted by racist speech knowledge of what those who would denigrate or malign them think of them. They render them unable to evaluate for themselves what is said about them and to fashion for themselves appropriate responses to what they hear. They pronounce them unable to handle other people's opinions.

To censor or suppress racist speech would be to show disrespect toward all who might otherwise hear such speech, for it would be to deny that audience the opportunity to consider and evaluate racist views for themselves. That would be to manipulate that audience into the proper attitudes, for they would not be finding them for themselves. Censorship and suppression render all of us unfree to seek out and to listen to whatever views are current and then to make up our own minds.

Of course, there is no requirement that those the speaker intends to address give the speaker their ear. That someone wishes to speak to us places no duty on us to listen to him, at least not in our capacity as private citizens. Of course, people going about their business might come into contact with ideas or emotions they would rather not be exposed to, and a government might want to do them the favour of reducing the risk that they will by prohibiting the expression of those ideas or emotions. This favour, though, comes with the judgement that they cannot handle what they might otherwise hear. Such a judgement insults their autonomy.

Tolerating racist and other potentially harmful speech is, then, a requirement of respect for others. A commitment to treat people with respect is partly constitutive of liberalism, an attractive and satisfying way of life, and so recommends itself to us on principle.

This point, that freedom of expression is a value partly constitutive of liberalism, needs to be made clearly, for those who would restrict freedom of expression are thereby rejecting liberalism in favour of something else—communitarianism, perhaps, or other forms of collectivism, in which the state has the obligation to promote conformity and a common life within society. These critics suppose that freedom of expression must be *for* something. Freedom of expression, they say, is for criticising those in power or for drawing attention to abuses or dangers or for disseminating information. Since freedom of expression is for this particular end, they reason, expressions outside the realm of what freedom of expression is for may be controlled or restricted in the name of some important social goal. A person who values freedom of expression only instrumentally, if at all, will not much care that expression is restricted or suppressed in areas in which freedom of expression has no good job to do. If suppressing racist expression or ethnic slurs would not much impede the growth of knowledge or whatever, then, say those who don't value freedom of expression intrinsically, let us suppress them; there's nothing lost in suppressing racist speech, so there's nothing to balance against the good of simply not hearing racist speech. If suppressing racist expression would in the bargain serve a noble social goal such as racial equality or better relations among people of different races, then we have excellent reason to suppress racist

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dissemination of racist propaganda. (One good paper on the matter of the harms of racist and sexist speech is Nielsen (2002).) Are such laws actually playing a significant role in bringing members of historically disadvantaged or marginalized groups into the social, economic, and political mainstream of the countries that have them? I know of no study that addresses this question.

expression.<sup>4</sup>

But those of us passionate about freedom of expression as partly constitutive of liberalism want it for its own sake, not (only) for the sake of something else. We simply like that we and others will say what we want to say, and so we are keen that people be free to express themselves without fear of being silenced or punished by an authority. We love freedom of expression for itself as we love many other things for themselves: our friends, political equality, knowledge, that our students become competent and committed intellectuals, the happiness and well being of our fellow citizens or of people generally, social justice, philosophy, the music of Serge Gainsbourg, beauty, our children, our pets, tennis, whatever. For us, freedom of expression is not merely a tool useful (or not) in promoting something valuable. It is, rather, something we value for its own sake on par with many other things we value for their own sakes.

Sometimes, of course, people have to make compromises among those things that matter to them for their own sakes. A person's deep commitment to something can in a case conflict with her deep commitment to another thing. She will then have to choose against something that she likes or loves for its own sake. Such choices are hard. We do not find it easy to forsake something that matters to us and we regret having to do so.

So valuing freedom of expression intrinsically, as partly constitutive of a way of life we prize, is consistent with holding that this or that restriction on expression is justified in light, say, of threats to equality, or the plight of members of a beleaguered and vulnerable minority—or because of something else that matters deeply. One who loves freedom of expression for its own sake, and not simply instrumentally, would, though, be terribly sad to have to advocate restrictions on expression, for to do so would be to forsake a good—but, were the situation dire and the means crucial, advocate restrictions she would. Now, then, we come to the question that must be answered in the second part of the argument: is anywhere the situation dire and the means—restrictions on expression—crucial to rectifying the situation? What about the harm we have said racist speech can cause? Is racist speech not, then, in virtue of that harm, a case in which restrictions on expression recommend themselves even to those political liberals who value

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4 The instrumentalist conception of freedom of expression is, I think, common among public officials, many of whom may not recognize that expression can be valued for its own sake. Writers who are aware of the distinction between valuing freedom of expression for its own sake and for the sake of its conduciveness to something else, but who in fact don't value it for its own sake, include Cass Sunstein, John Garvey, and Jonathan Rauch. Sunstein finds expression useful in resolving political problems through discussion. Garvey finds it useful in helping us to perform the actions we should perform. Both would restrict through law whatever classes of expression put things that matter to us at risk if expressions in those classes fail to help us resolve political problems or perform the actions we should perform. See Sunstein (1993) and Garvey (1996).

Jonathan Rauch, for his part, values freedom of expression for its role in liberal science, which is close to Sunstein's view. Unlike Sunstein, though, Rauch, in (1993), holds that this role would be adversely affected were expression to be restricted to spare people emotional harm.

Of course, those who value freedom of expression for its own sake might also value it instrumentally. One need not choose between Rauch's reasons for rejecting the view that government should restrict or censor expression in order to prevent emotional harm and the reasons I offer.

freedom of expression for its own sake?

First, of course, whether suppressing racist expression will promote important social goals is an empirical question. Given a particular community and an understanding of what constitutes racist expression, it is a matter for empirical research whether laws against such expression, or whether any other forms of suppressing such expression, will have the effect of promoting goals of equality or justice or flourishing. No doubt collecting evidence one way or the other will be difficult. And, importantly, the relevant social or personal factors within a community can change over time and often do change, sometimes quickly, rendering obsolete results that were once perfectly relevant to questions of policy. Still, psychologists and social scientists who study the matter might very well produce valid results useful to contemporary policy makers. In the end, only in light of such results—empirical results that restrictions on racist speech themselves promote the flourishing of individuals from groups toward which such speech is directed—could those of us who love freedom of expression for its own sake and value it as part of our liberal outlook have sufficient reason to endorse policies of restriction and suppression. Would that whatever research there is on this problem were more widely known and discussed! Short of having good empirical information, we ought not imagine we know restrictions and suppression will produce the good we seek.

Sadly, few if any of the restrictions on racist expression currently in place in Canada or in our universities or on our streets or in our workplaces have come about because of empirical results showing that such restrictions have good effects. Take, for instance, the hate propaganda laws in the criminal code of Canada. Or the confiscation by the President of the University of Prince Edward Island of an edition of a student newspaper carrying the *Jyllands-Posten* cartoons, the set of cartoons published in 2006 some of which include caricatures of Mohammed. Or the order the Vice-President Academic of Saint Mary's University, in Halifax, issued to a professor to remove those cartoons from that professor's office door. In none of these cases was empirical evidence that restriction or suppression of offensive materials has good effects used to justify the restrictions or suppression. (The public safety concerns floated in the last two cases, even if sincere, were secondary to concerns about offence and hurt feelings.)

On the other hand, at least one great contemporary liberation movement, that of lesbians and gays, has succeeded as well as it has without the protection of restrictions on homophobic speech. (The restrictions on homophobic speech now in place only came after social attitudes toward lesbians and gays had changed and many barriers to living as a lesbian or a gay man were removed.) In any case, empirical evidence one way or the other regarding the effectiveness of censorship and suppression as a tool of liberation and progress is either lacking or in hiding.

Turn now, then, to the damage to society that suppression of racist speech and other expression is causing. For one, candour has suffered; people are afraid to say what they think or even just to think aloud for fear of ostracism or worse. But candour is indispensable to productive discussion and debate of any social or political problem. Unless we know what is on people's minds we will not be able to identify many of the problems we face or evaluate properly proposed solutions to them. And, of course, restrictions on expression have a chilling effect on research and the dissemination of research.

For another, restrictions on speech, embodying as they do authoritarian attitudes, promote authoritarianism generally. They create a priestly class of censors and other public officials. More and more will this class claim power and less and less will people resist its claims. An inference

essential to priests and authoritarians is this: X is wrong, therefore X ought to be illegal and Xers ought to be punished. To the extent that people in a society employ this inference in their thinking, authoritarianism is the will of the people in that society. It is distressing presently how wide-spread acceptance of that inference is.

It seems to me that the rise of identity politics and its attendant ills—the cult of victimization, for instance, or the promotion of diversity as a good in itself—is both a cause and a result of the authoritarian attitudes underlying censorship and suppression of expression. As restrictions on speech become political goals for various identity groups, more and more classes of expression will fall under the censor’s eye. More and more will individuals look to their group for their sense of self and self-worth, and more and more will they look to leaders and government for protection and spoils. Of course, this creates a dependence on others inimical to ideals of individual strength, responsibility, and achievement.<sup>5</sup>

This argument is, of course, a slippery-slope argument. But that doesn’t in itself make it a weak argument. An argument commits the slippery-slope fallacy only if it gives us no reason to think that in fact the slope is slippery. We see in the recent history of Canadian laws and policies against speech already quite a bit of sliding down the slope. Since the late 1970s, Canada’s criminal code has contained anti-hate propaganda clauses, Sections 319 (1) and (2), making illegal the incitement of hatred toward members of protected groups. At the insistence of politicians who, at the time it was debated in Parliament, worried that the law would adversely affect freedom of expression, it was added that no one accused of inciting hatred can be prosecuted without the consent of the relevant provincial attorney-general. This safeguard against abuse led, though, to the incorporation into the Canadian Human Rights Act of a section against the expression of hatred under which people can be investigated, ordered to be quiet on certain subjects, and punished, without ministerial oversight. This, in turn, led to similar provisions in various provincial human-rights codes.<sup>6</sup> Now, even those provincial human rights commissions, such as Nova Scotia’s, that lack statutory authority to hear hate-speech complaints nonetheless accept them on the grounds that the commission’s mission has evolved beyond the Act that created it. Along the way, regulatory

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5 Jeremy Waldron ridicules the claim that restrictions on speech foster dependencies on government as the view that “we all become better people through tolerating the most hateful and diabolic speech.” See Waldron (2006), p. 23. The claim in question, though, is actually that governments can make us worse people by attempting to protect us from hearing the words of others. Waldron is correct that this claim will move only those who aspire to a high degree of self mastery, to be the sort of person names do not hurt.

6 Early debates regarding Canada’s hate-speech laws are recounted and analyzed in Kaplan (1993).

The section of the Canadian Human Rights Act in question, Section 13, was repealed by the Parliament of Canada in 2013 and will become inactive in July 2014. Parliament heard arguments not so much in favour of freedom of expression, either for its own sake or as a tool, but rather that the section invited abuses. Canadian human rights agencies in the provinces and territories, though, have continued to try to regulate expression, a recent case involving the Ontario Human Rights Tribunal’s acceptance of a complaint against the name of a Nepean football team, the Redskins.

agencies such as the Canadian Radio and Television Commission have acquired more powers to police what people say, and have shown themselves happy to use them. (In March 2011, the Canadian Broadcast Standards Council ruled the song “Money for Nothing,” by Dire Straits, unfit for radio play in Canada owing to its use of the word “faggot,” though the council accepted the view that the song used the word satirically.)<sup>7</sup>

With each slide down this slope, the next slide became more likely. In tandem with increased regulation on speech in pursuit of equality, Canadians have become more and more used to and accepting of government authority over expression. Currently, those who would use the law to stifle expression are demanding that the hate-propaganda section of the Criminal Code be expanded and the requirement that a provincial government minister endorse prosecutions be dropped.<sup>8</sup>

That is the second argument, then, the argument from what has been happening in practice, and what we can reasonably expect to happen, against censorship and suppression even of vile racist expression. Public life suffers when people are not candid. Censorship and suppression require censors and other officials who make decisions for us without our being able to evaluate those decisions. That sort of authoritarianism poses grave dangers to much that we care about. Rather than citizens and neighbours attempting to live our lives and flourish, we become wards of the state, and we wear our grievances as badges of honour and power.

I can see two very different lines of critical response to this defence of wide freedom of expression. The first is simply that my worries about a chilly climate, identity politics, and creeping authoritarianism are inflated. The climate isn’t particularly chilly for any but the real racists, and that’s fine; identity politics is a useful tool on the road to inclusiveness and social justice and will fade away as we near our destination; and authoritarianism is no greater a threat in today’s liberal democracies than it was in previous liberal democracies. Meanwhile, blacks and others suffer real harms from expression, and a mild dose of enforced good manners would spare these people at least a few emotional bruises.

This line of critical response does not deny anything in the first argument, the argument that freedom of speech is a requirement of respectful treatment of others and something that can properly be prized for its own sake. Instead, it challenges my contention that on balance, restrictions on speech is a bad idea by proposing that on balance, a few or, even, many restrictions is a good idea. Until we have relevant empirical studies of the effects of restrictions on speech, neither side will have grounds for supposing the problem of bringing marginalized people into the mainstream of society can or cannot be addressed through law against expression. Even should we have good empirical studies one way or the other, though, the discussion might be a matter of

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7 My examples of the erosion of freedom of expression over the last couple decades have been from my country, Canada. Freedom of expression is under pressure in many other Western and democratic countries, though, if not in the majority of them. The prosecutions of David Irving and Elisabeth Sabaditsch-Wolff in Austria and of Geert Wilders in the Netherlands are three worrying cases from Europe.

8 Michael Boudreau, a professor at St Thomas University, Fredericton, New Brunswick, is a leader in this movement. See Boudreau (2011).



what one dislikes more, the speech or the suppression of the speech.

It's not beside the point to note in the context of this response that much can be done right here and now to bring us closer to the goals of social justice and equality of opportunity without censoring or penalizing hurtful expression. Schooling, housing, policing, jobs, public spaces for recreation and socializing—these are the areas where our efforts will go far to improve people's lives. Success in these areas will do much more good than success in banning hurtful expression ever could.

The second line of critical response is to question whether the ideals of personal responsibility and emotional resilience, of respect for others generally, of democracy rather than rule by judges and commission, are really the ideals we should strive to embody individually and socially. Those who take this line are not troubled by identity politics or authoritarianism. They don't mind identifying the forbidden or obnoxious with the wrong.

Now, the discussion in this paper takes as its audience those who value freedom of expression for itself, who value it as a necessary aspect of respecting the autonomy of others, but who are also concerned that since emotional harm is real harm, they should, on balance, favour government restrictions on racist or other vile expression, despite the disrespect inherent in such restrictions. The paper contains no argument that it's better to value personal responsibility, emotional resilience, and respect for autonomy than to value the peace and social harmony that authoritarian rules and structures might bring. I don't think there could be any such argument.

Does that mean that reasoned persuasion comes to an end at this point? No, but it does shift persuasion from words to example. Those who espouse the worth of the individual person in her particular struggles and successes will convince others only if they can show by example how wonderful it is to live in the light of liberal values.

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