

# LIBERAL EGALITARIANISM AND RELIGIOUS VILIFICATION LAWS

Equality of persons is a stronger foundation for freedom of speech than fallibility of knowledge argues

**Darryn Jensen**

The conventional liberal terms of discussion on religious vilification laws begin with a commitment to the idea of freedom of speech and pose the question whether any restriction upon that freedom can be justified. A favoured starting point is the argument, associated with John Stuart Mill, that, since all human knowledge is fallible, the open exchange of ideas ought to be free from legal restrictions.<sup>1</sup>

The different perspectives provided recently by Jeremy Shearmur and Steve Edwards have proceeded along these lines. Shearmur would allow *legal* restrictions only ‘when there is good reason to suppose that its publication would reasonably lead to a breach of the peace’.<sup>2</sup> Edwards is critical of this view on the basis that it provides us with ‘no consistent principle’ other than a ‘reasonable person’ standard<sup>3</sup> and that this produces a ‘doctrine for unscientific, irrational bullies’.<sup>4</sup> It seems, on Shearmur’s view, that if a reasonable person would anticipate that *someone* might be offended by a particular type of speech, the state would be justified in restricting speech of that type. The mere existence of sensitivity (or, at least, the appearance of sensitivity) to the subject matter of speech has the capacity to cancel out the freedom of speech over a large range of matters.

One drawback of debating the issue in these terms is that it provides no reason for people who believe that they are possessed of the ‘truth’ (or, at least, believe that they have a better grasp of the ‘truth’ than their fellow citizens) to affirm the notion of freedom of speech in religious matters. The suggestion by Edwards that to limit freedom of speech on any ground other than curbing the use of force or the threat of force is ‘to assault the very foundations of science, logic and rationality’<sup>5</sup> neglects an important question—that is, why precisely should the ‘scientific and sceptical’ attitude be privileged over the attitude that truth may be found in religious revelation? In any event, disputes about the limits of freedom of speech touching upon religious matters are not necessarily disputes between ‘scientific and sceptical’ people

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and people of religious faith. The notorious case of *Islamic Council of Victoria v Catch the Fire Ministries Inc* is testimony to this.<sup>6</sup> The justification for freedom of speech in religious matters must take a different form if it is to hold any legitimacy for many of those who might be either victims or perpetrators of alleged religious vilification. It must be a justification which provides people who believe that they possess a hold on the 'truth' which is not possessed by others that it is right for them to refrain from coercing others. A more appealing form of justification arises from the idea of basic equality between human beings.

### Basic equality

There is a sense in which, in liberal thought, equality is a more basic value than freedom. The idea of freedom takes its content and limitations from the notion that people are endowed with equal dignity and are worthy of equal respect. It follows that nobody is qualified to rule over others in an arbitrary way. Different liberal thinkers have grounded this notion of equality in different ways, but it is a persistent theme in liberal thought. Kant, for example, defined 'right' as 'the sum of conditions under which the choice of one can be united with the choice of another in accordance with a universal law of freedom'.<sup>7</sup> The measure of individual freedom is informed by a requirement that there is *equal* freedom for all. One cannot will that another person should be subject to a rule of conduct if one would not will oneself to be subject to that rule. Hume suggested that rules of conduct (such as those about keeping promises and refraining from interference with the property of others) arose from a 'general sense of common interest'.<sup>8</sup> It is possible for me to observe that 'it will be for my interest to leave another in the possession of his goods, *provided* he will act in the same manner with regard to me'.<sup>9</sup>

This idea of correlativity of rights and obligations, which appears to have been fundamental for both Kant and Hume, has deeper roots. There is an early manifestation of the idea in Locke's *A Letter Concerning Toleration*. Locke's *Letter* is of particular interest in the context of the current discussion because its central concern is the limitations upon the state's power to coerce people in matters of religious belief and worship. When considering Locke's argument, it is important to remember

that Locke was concerned most immediately with toleration between adherents of different branches of the Christian faith. It would be remarkable if the existence of God was not a fundamental premise of his argument.

Locke thought that, since the eternal happiness of a person's soul depended upon that person doing the things which were necessary for the obtaining of God's favour, the doing of those things was 'the highest obligation that lies upon mankind'.<sup>10</sup> Columbia University law professor, Jeremy Waldron, has pointed out that the religious believer's attitude that ordering one's life in accordance with religious truth is of fundamental importance ought to affect the way the religious believer deals with other people. Turning to Locke's major epistemological work, *The Essay Concerning Human Understanding*, Waldron suggested that Locke held to a notion of basic human equality which is grounded in the capacity of human beings for abstraction.<sup>11</sup> Waldron explained the relationship between Locke's conception of equality and the argument for toleration in this way:

When I catch a rabbit, I know that I am *not* dealing with a creature that has the capacity to abstract, and so I know that there is no question of this being one of God's special servants, sent into the world about his business. But if I catch a human in full possession of his faculties, I know that I should be careful how I deal with him. Because creatures capable of abstraction can be conceived as 'all the servants of one Sovereign Master, sent into the World by his order, and about his business,' we must treat them as 'his Property, whose Workmanship they are, made to last during his, not one another's Pleasure' and refrain from destroying or harming or exploiting them.<sup>12</sup>

All force and compulsion in religion was to be avoided in order to eliminate the possibility that one person might interfere with another person's care of her or his own soul. Each person was to be left to decide as an individual which religion is the correct one. Locke said that he did not mean to condemn 'charitable admonitions' or 'affectionate endeavours to reduce men from errors'.<sup>13</sup> He was concerned merely to rule out coercion in matters of religion.

It should be emphasised that the Lockean argument against coercion does not depend upon scepticism about whether any religion is true. Locke's position seems to have been that, for as much as one may believe ardently (on the basis of what one considers to be good grounds) that one's religion is the true faith and other religions are false, one can observe that others possess a similar level of ardour in relation to their own religious beliefs. This observation provides a person who is convinced of the unassailability of one's own religious beliefs with a good reason to be tolerant of those who hold to other beliefs. It is rational to be tolerant because one cannot deny the legitimacy of any claim by others to force one to abandon what one sincerely believes to be the true religion without simultaneously disclaiming one's own claim to coerce those others in matters of religion. Certainly, it is also a rational response to the fact of religious pluralism to concede that one might be mistaken in one's own beliefs or, alternatively, that everyone is mistaken to some degree—so that a duty to be tolerant is founded upon an assumption of fallibility of human knowledge—but this is not the *only* rational response. Furthermore, this response is not available to those who cannot contemplate that their most cherished beliefs might be false.

That observation points us to the reason why the equality-based justification of freedom of religious speech is a better justification than that based upon fallibility of human knowledge. Locke's account of equality is unapologetically theistic. Waldron observed that Lockean equality is 'not fit to be taught as secular doctrine' and makes 'no sense except in the light of a particular account of the relation between man and God'.<sup>14</sup> Nevertheless, for the purposes of the present discussion, this is a strength rather than a weakness. We are concerned with the correlative rights and obligations of people who disagree about God and what he requires from humanity. The argument in favour of freedom of speech must be capable of appealing to those who are sufficiently confident of their own religious belief to favour restrictions upon the speech of others. Lockean equality provides a possible justification for those who believe in God to affirm the same principle of freedom of speech in religious matters as those who insist upon the fallibility of all human knowledge would affirm. There are certainly echoes of the Lockean grounding for

religious toleration in the official teaching of the Roman Catholic Church. A document from the Second Vatican Council, *Dignitatis Humanae* (also known as the Declaration on Religious Freedom), contains this statement:

It is in accordance with their dignity as persons—that is, beings endowed with reason and free will and therefore privileged to bear personal responsibility—that all men should be at once impelled by nature and also bound by a moral obligation to seek the truth, especially religious truth. They are also bound to adhere to the truth, once it is known, and to order their whole lives in accord with the demands of truth. However, men cannot discharge these obligations in a manner in keeping with their own nature unless they enjoy immunity from external coercion as well as psychological freedom.<sup>15</sup>

This is not to say that all believers in revealed religion do actually affirm the principle of freedom of speech in religious matters. Actual events suggest that many do not. Locke was aware of some who would 'arrogate to themselves, and to those of their own sect, some peculiar prerogative covered over with a specious show of deceitful words, but in effect opposite to the civil right of the community'<sup>16</sup>—namely, the Roman Catholics of Locke's day—and who, accordingly, had no right to toleration.

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A nagging question in our day—for which no answer is offered here—is whether the Islamic tradition allows Muslims to affirm freedom of speech in religious matters *from an Islamic perspective*. Notwithstanding these limitations, a justification of freedom of speech in religious matters based on basic human equality remains a better justification than one based upon scientific scepticism because it is *open* to affirmation by those who believe that they know the truth but who can observe that there are others who are similarly convinced of the validity of another version of the truth.

### Reasonable discussion

The proposition which I have sought to defend by reference to the idea of basic human equality is that one cannot assert a freedom to order one's life according to the truth and to persuade others of the validity of that truth (which may, incidentally, require criticising that other person's idea of the truth) without allowing a like freedom to people who have a different idea of truth. Freedom of speech in religious matters, so grounded and understood, is a freedom *for* human beings to seek the truth and order their lives according to the truth so found. Religious vilification laws do not *necessarily* abrogate this freedom. The religious vilification laws which exist in Victoria, Queensland and Tasmania are directed at speech which incites hatred of a group of people on account of their religious beliefs, rather than speech which merely criticises those beliefs.<sup>17</sup> Even if conduct falls *prima facie* within the prohibition, it is excused if it meets certain criteria. Section 11 of the Victorian legislation creates an excuse in relation to conduct which was 'engaged in reasonably and in good faith ... for any genuine academic, artistic, religious or scientific purpose'.<sup>18</sup> Moreover, it seems unlikely that the Islamic Council of Victoria, in making its complaint against Pastors Scot and Nalliah, sought

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to prevent all discussion or debate concerning the beliefs of Islam. The Council's concern seems to have been that the seminar conducted by Pastors Scot and Nalliah was conducted in a way which brought severe ridicule upon Islam and encouraged hatred of Muslims.

The idea of basic equality provides a basis for allowing Locke's 'charitable admonitions' and 'affectionate endeavours to reduce men from errors' but can hardly be used to justify a freedom to encourage 'public contempt for the sacred' and to vilify and ridicule people.<sup>19</sup> In any event, Locke maintained that the duty of religious toleration did not stand in the way of the state's authority

to procure and preserve the 'civil interests' of the community.<sup>20</sup> These 'civil interests' might include maintaining peace between followers of different religious traditions.

If it is a legitimate concern of the state that discussion of religious matters does not descend into vitriol or violence, the types of laws which currently exist in some Australian states would seem to be fairly blunt instruments for achieving that purpose. One troubling aspect of the Victorian legislation is that motive is deemed to be irrelevant to the question of whether conduct amounts to inciting hatred.<sup>21</sup> Whether speech can be said to incite hatred turns upon the *likely effect* of that speech upon the audience to whom that speech is directed.<sup>22</sup> Criticising the beliefs of a group of people does not, of itself, amount to inciting hatred of people who adhere to those beliefs, but whether it does so amount remains a question of fact in each case.<sup>23</sup> While, in the *Islamic Council of Victoria* case, the Court of Appeal allowed an appeal from the first instance decision of Judge Higgins on the basis that his Honour proceeded upon an incorrect view of what it means to 'engage in conduct that incites hatred', there remains a legal possibility that severe criticism of another person's religion might fall foul of the prohibition.

Another troubling aspect of the Victorian legislation is that a speaker's honest belief in the truth of the hatred-inciting statement does not, of itself, provide the speaker with an excuse. She or he must also have acted 'reasonably'. Judge Higgins said that 'good faith' refers to subjective honesty, while 'reasonably' refers to the conduct bearing 'a rational relationship' to one of the protected activities and not being 'disproportionate to what is necessary to carry it out'.<sup>24</sup> His Honour thought the conduct of Pastors Scot and Nalliah was not reasonable because it was 'excessive' and a 'one-sided delivery of a view of the Qur'an and Muslims' beliefs, which were not representative'.<sup>25</sup> In the Court of Appeal, Nettle JA said that an 'open and just multicultural society' ought to tolerate criticism of another person's religion and that this criticism would not fail to be reasonable simply on the basis that it 'may appear ill-informed or misconceived or ignorant or otherwise hurtful' to adherents of the religion which is criticised. Nevertheless, the test of whether conduct was unreasonable remained whether the

conduct was ‘*so* ill-informed or misconceived or ignorant or *so* hurtful as to go beyond the bounds of what tolerance should accommodate’.<sup>26</sup>

There would appear to be two problems with a ‘reasonableness’ requirement so understood. Firstly, whether a ‘reasonableness’ requirement (as opposed to simply a ‘good faith’ requirement) outlaws particular speech appears to turn upon a judgment as to the *degree* of ignorance or wrong-headedness or lack of diplomacy which the speech reflects. It seems that there is a level of ignorance or lack of decorum which is not to be tolerated. The idea of basic equality, on the other hand, requires us to allow an equal freedom of speech to all human beings on the basis that all of them possess at least a basic capacity for moral reasoning. We should be careful that those who are less well informed or less intellectually sophisticated do not fall foul of restrictions that the better informed or more sophisticated are able to avoid by means of their greater erudition and guile. Defining permitted speech in terms of its ‘reasonableness’ is likely to be a greater burden on the first group than on the second and may ultimately act as a gag upon sincerely held, but poorly expressed, beliefs and opinions. Rather than outlawing speech because it is excessive or unbalanced or betrays abysmal ignorance, we can simply allow that speech to have the level of persuasiveness which it deserves. The remedy for those who recognise that the speech is excessive, uninformed or unbalanced is to put the other side of the story in the public arena.

Secondly, a ‘reasonableness’ requirement has the capacity to discourage more than what the legislature apparently intended to forbid. Some commentators have called this the ‘chilling effect’ of the legislation.<sup>27</sup> People who would embark upon a genuine academic, artistic, religious or scientific purpose may self-censor for fear of overstepping the vague line between reasonable and unreasonable conduct. As Patrick Parkinson has pointed out, risk-averse behaviour may be encouraged, not only by the fear of the cost, stress and inconvenience of becoming involved in litigation, but also by the circulation of ‘folklaw’, that is, what laypeople believe the law to be.<sup>28</sup> In this type of environment, it would not be surprising if discussion of religious matters were to take on a muted, sterile quality. Furthermore, the making of a complaint may have

the effect of stifling speech, notwithstanding that the complaint may turn out to lack any legal basis. The law of defamation may sometimes have the same effect upon discussion of matters of public interest, but the law of defamation represents a highly developed compromise between the interest that each person has in her or his *personal reputation* (as opposed to respect for any beliefs or ideas which a person may happen to espouse) and the public interest in vigorous discussion of matters of public interest. That public interest is embodied in a range of defences including truth, fair comment and absolute and qualified privilege.<sup>29</sup>

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### Conclusion

There is much to criticise in the religious vilification laws which are in force in some Australian states. Even so, to argue for their repeal on the basis of their interference with a freedom of speech grounded in the fallibility of all human knowledge is dismissive of the point of view of those who ardently believe that their religion is the true religion. An architecture of freedom of speech which everyone can live with is more likely to arise when we build upon the foundations of equality and not those of scepticism. Since all people can be assumed to be equal in terms of their basic capacity to seek the truth and act upon it, none of us should seek to restrict other people’s search for and expression of what they believe to be the ultimate truth. It follows that we ought to be tolerant even of undiplomatic and ill-informed speech, so long as it does not, by way of threats of violence or other intimidation, deny others of their equal status as beings possessed of a basic capacity for moral reasoning.