RACISM STIFLES THE FREE SPEECH OF ITS TARGETS

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Conversations about the relationship between anti-hate speech provisions and freedom of speech often assume a tension between the two: measures to counter hate are represented as imposing restrictions on the ability of people to express themselves freely. The problem with that is that it focuses primarily on the freedom of expression of the *sources* of hate speech, while ignoring the freedom of expression of the targets.

Les conversations sur la relation entre les dispositions sur le discours haineux et la liberté d'expression supposent souvent une tension entre les deux : les mesures visant à contrer la haine sont présentées comme imposant des restrictions à la capacité des personnes de s'exprimer librement. Le problème est que ces conversations se concentrent principalement sur la liberté d'expression des sources de discours haineux, tout en ignorant la liberté d'expression des personnes ciblées par ces discours.

Conversations about the relationship between anti-hate speech provisions and freedom of speech often assume a tension between the two: measures to counter hate (whether anti-racism, anti-misogyny, or anti-homophobia) are seen as imposing restrictions on the ability of people to express themselves freely. In this dominant framing, oriented around the tension between anti-racism and freedom of speech, the two are represented as competing values: protecting people from hate speech is depicted as restricting or eroding the freedom of speech of people targeted by such laws.

In some cases, fears about the suffocation of free speech by the state have been stoked to discredit anti-racism measures, even where no credible threat to freedom of expression exists. This was the case, for example, with much of the rhetoric around M-103, a recent parliamentary motion that was passed in the House of Commons to study the problem of Islamophobia and systemic racism. People opposed to the study warned that it would stifle the ability to voice criticisms of Islam – even though, as civil liberties organizations like the Canadian Civil Liberties Association and Canadian Journalists for Free Expression, assured the public, M-103 produced no changes to Canadian law and imposed no plausible restriction on freedom of speech. This quixotic crusade against M-103 was transparently disingenuous as a defence of free speech, since many of its most prominent proponents had previously embraced measures seriously undermining speech rights in Canada; the politicians who campaigned most furiously against the motion have been some of the staunchest supporters of laws curtailing freedom of expression in the name of national security (discussed in some detail below).

In other cases, particularly where legal punishment for speech deemed hateful is possibly involved, there *are* potential costs to freedom of expression. However, the problem with the dominant framing — which pits anti-hate speech against free

speech — is that it focuses purely or primarily on the freedom of expression of the sources of hate speech, while ignoring the freedom of expression of the targets of hate speech. In the case of racially hateful speech, for example, this means ignoring the racialized people and racialized communities that bear the brunt of the negative effects of racist speech.

But as the Supreme Court of Canada has recognized, hate speech itself may restrict the freedom of expression of its targets. In its unanimous judgement in *Saskatchewan Human Rights Commission v Whatcott*, a 2013 case concerning homophobic hate literature, the Supreme Court observed: "hate propaganda opposes the targeted group's ability to find self-fulfillment by articulating their thoughts and ideas. It impacts on that group's ability to respond to the substantive ideas under debate, thereby placing a serious barrier to their full participation in our democracy… It does this not only by attempting to marginalize the group so that their reply will be ignored: it also forces the group to argue for their basic humanity or social standing, as a precondition to participating in the deliberative aspects of our democracy." Indeed, a recent Environics survey found that one-sixth of Muslims in Canada — including one-third of Canadian-born Muslims, and one-quarter of Muslims under 35 — felt inhibited from expressing their political or social opinions because of the surrounding climate of Islamophobia and racism. And so, discouraging or restricting or punishing hate speech might actually expand the scope of expressive freedom for marginalized groups targeted by hate. In other words, restrictions on hate speech might not only impose costs for freedom of expression; they might also produce gains.

By excluding or intimidating marginalized communities from full and equal participation in public discourse, hate speech vitiates the free speech of its targets. And so, legal restrictions on hate speech might not only impose costs for freedom of expression (for the haters); they might also produce gains (for the hated).

A recent example of a hate speech case in Ontario illustrates how hateful speech can imperil the ability of its targets to express themselves freely. Kevin Johnston, who was notorious for posting video diatribes against Muslims and Islam — which he had called "as evil as it gets," and a "military doctrine" that needs to be banned — was recently charged under the Criminal Code for "wilful promotion of hatred." Shortly before being charged, Johnston had posted a video on his website offering a $1,000 reward, which he subsequently increased to $2,500, for anyone who could provide a recording of Muslim students "spewing hate speech" during their Friday prayers at school.

Effectively, Johnston was encouraging individuals to engage in their own surveillance of Muslim prayer services, to watch them and record them for hostile scrutiny. Such privatized surveillance would obviously impose on the Muslim students' ability to express themselves freely to their fellow students — especially in a context where the definition of what is considered "hate speech" or dangerous speech from Muslims is so broad, often including speech that is simply politically unpopular or critical. What makes bounties like the one offered by Johnston for Friday prayer videos so particularly chilling for Muslim communities is the knowledge that Muslims' speech is *already* under exceptional suspicion of being dangerous, and is *already* under exceptional surveillance by the state — even while White supremacist and extreme right-wing groups more directly advocating and preparing for violence (in some cases conducting border patrols and mosque stake-outs, and even engaging in live-fire paramilitary exercises,[1]) are not subjected to similar scrutiny and pre-emptive repression.

The Anti-Terrorism Act, 2015 (more popularly known as Bill C-51), for instance, included several provisions that would chill and restrict and even punish free speech, through measures such as preventive arrest and detention. (The 2015 Anti-Terrorism Act is currently operative as law in Canada; many of the threats it poses to freedom of expression and other fundamental rights are not resolved by the revisions to the legislation that are currently being considered with Bill C-59, as highlighted by multiple civil liberties organizations.[2]) Lawyers Clayton Ruby and Nader Hasan describe the type of scenario that could come under The Anti-Terrorism Act's expanded powers of preventive arrest:

> Six Muslim young adults stand in front of a mosque late at night in heated discussion in some foreign language. They may be debating the merits of a new Drake album. They may be talking about video games, or sports, or girls, or advocating the overthrow of the Harper government. Who knows? There is no evidence one way or the other. Just stereotypes. But the new standard for arrest and detention — reason to suspect that they *may* commit an act — is so low that an officer may be inclined to arrest and detain them in order to investigate further … Yesterday, the Muslim men were freely exercising constitutional rights to freedom of expression and assembly. Today they are arrestable.[3]

1 www.vice.com/en_ca/article/new9wd/the-birth-of-canadas-armed-anti-islamic-patriot-group; www.vice.com/en_ca/article/8x43g5/an-ultranationalistic-group-patrolling-canadas-border-with-the-us.

2 http://iclmg.ca/open-letter-to-the-federal-government-on-c-59-new-national-security-bill-fails-to-reverse-c-51-and-introduces-serious-new-problems/.

3 www.policyalternatives.ca/publications/monitor/bill-c-51-legal-primer.

There are many other measures imposed in the name of national security that repress the free expression of securitized communities, even if they involve less overt coercion and violence than police powers of arrest and detention. For example, "counter-radicalization" programs (also known as "countering violence extremism") — which target individuals, including students, for state intervention on the basis of signs supposed to indicate movement towards "violent extremism" — have tended to stigmatize and suppress forms of political and religious expression wrongly, and discriminatorily, construed as precursors to violence.[4] The United Nations Special Rapporteur on Freedom of Expression recently warned that state counter-radicalization initiatives "are used increasingly to justify profiling, surveillance and other activities that treat certain communities as de facto suspects … thereby deterring robust debate and information-sharing," and that such initiatives "have in some cases impacted negatively on academic freedom and open debate in schools and universities, undermining the freedom of expression rights of children and young people."[5]

The terrain of expressive freedom is not an even playing field in Canada. Communities subjected to racism experience a matrix of particular constraints on their ability to express themselves freely; the silencing effects of hate speech further stifle the expression of groups already marginalized in public life and public discourse by racial profiling, stereotyping, and under-representation in mainstream media. "The harm that expressions of racial hatred do is harm in the first instance to the groups who are denounced or bestialized in pamphlets, billboards, talk radio, and blogs," writes New York University law professor Jeremy Waldron, in his book *The Harm in Hate Speech*. "Maybe we should admire some [ACLU] lawyer who says he hates what the racist says but defends to the death his right to say it, but … [t]he [real] question is about the direct targets of the abuse. Can their lives be led, can their children be brought up, can their hopes be maintained and their worst fears dispelled, in a social environment polluted by these materials?" The focus on anti-hate speech laws and other anti-oppression measures as primarily a *threat* to free speech privileges the perspectives of the haters at the expense of the hated, further tilting the field of expressive freedom to the advantage of the relatively privileged.

4 www.un.org/apps/news/story.asp?NewsID=53841#.WhIYokqnE2w. This has been documented for counter-radicalization or countering violent extremism programs in Britain and the United States, which are at more mature stages of development that Canada's more embryonic counter-radicalization programs.

5 www.osce.org/fom/237966?download=true