SUPPRESSING SPEECH DOES NOT LEAD TO SOCIAL JUSTICE

Dr. Jim Turk is Distinguished Visiting Professor, and Director of the Centre for Free Expression at Ryerson University. He was Executive Director of the Canadian Association of University Teachers (1998-2014).

In the attempt to eliminate racism and injustice, freedom of expression has come under attack for allowing hateful speech. This paper argues there is no contradiction of freedom of expression and social justice; that they are necessary for each other. It discusses why freedom of expression is rightly one of the Charter's "fundamental" freedoms and why criminalizing offensive speech is harmful to society as well as ineffective, if not counter-productive.

En tentant d'éliminer le racisme et l'injustice, la liberté d'expression a été attaquée pour avoir permis le discours haineux. Cet article soutient qu'il n'y a pas de contradiction entre la liberté d'expression et la justice sociale : elles sont nécessaires l'une pour l'autre. Il explique pourquoi la liberté d'expression est à juste titre l'une des « libertés fondamentales » de la Charte et pourquoi la criminalisation du discours offensant est inefficace et nuisible à la société, voire même contre-productive.

INTRODUCTION

Racism, anti-Indigeneity, Islamophobia, anti-Semitism, homophobia and sexism haunt our country. The question is what to do about them. One approach is to try to use legal regulation to eradicate all expression of these odious views. The objective is to forbid all exterior "signs" of an interior frame of mind.

However attractive the idea of regulating hateful speech may seem in the abstract (and it does seem attractive), *except for very limited and extreme forms of expression*, restricting freedom of expression:

- Undermines democracy and human rights
- Is contrary to Canadian law; and
- Is ineffective in practice — in fact, often counter-productive

I do not suggest that we have to accept hateful speech. We do not and should not. But suppressing it is not the solution.

Free speech and social justice are not in fundamental conflict. They are allied in their opposition to orthodoxy and in their commitment to inclusion and participation.

This is often not recognized because what most people see today is free speech being taken up by White supremacists, neo-Nazis and alt-right heroes like Anne Coulter and Milo Yiannopoulos who would be the first to suppress free speech

were they in power and whose commitment is not to the Charter or the First Amendment but to the hunger of trolls eager to feast on the remains of liberalism.[1]

THE IMPORTANCE OF FREEDOM OF EXPRESSION

Our Charter of Rights and Freedoms, the supreme law of Canada, identifies "freedom of thought, belief, opinion and expression" as one of our four "fundamental" freedoms.

It is not just a right, it is the foundation of human and civil rights.

As the late Nobel Peace Prize recipient and leading Chinese human rights activist, Liu Xiaobo, said on many occasions, "Free expression is the base of human rights, the root of human nature and the mother of truth. To kill free speech is to insult human rights, to stifle human nature and to suppress truth."

Freedom of expression is essential for three distinct reasons: self-realization, aiding the search for truth, and sustaining democracy.

American legal scholar Thomas Emerson has described the first of these:

> The achievement of self-realization commences with development of the mind. But the process of conscious thought by its very nature can have no limits. An individual cannot tell where it may lead nor anticipate its end… [Everyone] in the development of [their] own personality has the right to form [their] own beliefs and opinions. And, it also follows, that [they have] the right to express these beliefs and opinions. Otherwise they are of little account. For expression is an integral part of the development of ideas, of mental exploration and of the affirmation of self."[2]

Regarding the search for truth and advancement of knowledge, there is no shortage of evidence that official censorship has proven consistently harmful. Censorship has obstructed the ability to challenge those in power and to contest dominant groups' exploitation and marginalization of others. It has undermined the advancement of knowledge and understanding.

Finally, free expression rights are the foundation for democracy. Democracy is more than about voting and majorities having their say. It is about ongoing conversation – what many have called "public discourse." Since the discussion and debate that constitute democracy can never result in complete agreement, they are necessarily without end. French philosopher and activist, Claude Lefort puts it well:

> "… modern democracy invites us to replace the notion of a regime governed by laws, of a legitimate power, by the notion of a regime founded upon the legitimacy of a debate as to what is legitimate and what is illegitimate — a debate which is necessarily without any guarantor and without any end."[3]

Robert Post adds that this requires democracy to be "independently maintained as an ongoing structure of communication."[4] Otherwise, we would have a majoritarian dictatorship with no minority rights. This means that, while democratic governments must have the ability to regulate behaviour, the public conversation — the public discourse — that constitutes democracy must necessarily and in important respects be exempt from majoritarian regulation as to content or viewpoint. The logic is simple. If the essence of democracy is "a debate which is necessarily without any guarantor and without any end", restrictions on that continuing debate, necessarily compromise it and the democratic process it makes possible.

State suppression of speech in the name of social justice puts protection of disadvantaged minorities' interests in the hands of the state, which in a democracy, acts in the interests of the majority, not minorities. American Civil Liberties Association General Counsel, David Cole, properly asks, "Why would disadvantaged minorities trust representatives of the majority to decide whose speech should be censored?"[5]

PROTECTION OF FREE SPEECH IN CANADA

Jurisprudence in Canada generally reflects recognition of these important reasons to protect free expression. Even in relation to hate speech, Canadian courts have set a high bar for what violates criminal law.

---

1 I borrowed this description from Jill Lepore, "Inquietude", The New Yorker. October 9, 2017, p. 17.

2 Thomas I. Emerson, "Toward a General Theory of the First Amendment." Yale Law Journal 72 (5) (Apr. 1963), p. 879.

3 Claude Lefort, *Democracy and Political Theory*. New York: Wiley, 1991, p. 39.

4 Robert Post, "Racist Speech, Democracy and the First Amendment", *William and Mary Law Review* 32 (1991), p. 283.

5 David Cole, "Why We Must Still Defend Free Speech." *The New York Review of Books*. September 28, 2017, p. 61. www.nybooks.com/articles/2017/09/28/why-we-must-still-defend-free-speech

In his decision in a Nova Scotia case, *R. v. A.B.*[6] that concerned an individual and two friends who spray-painted racist slogans on a variety of surfaces near Dartmouth Nova Scotia, Judge Jamie Campbell, now a judge on the Nova Scotia Supreme Court, described Canadian law with respect to hate speech — specifically the legal meaning of s. 319(2) of the Criminal Code which proscribes statements made, other than in private conversation, that wilfully promote hatred of an identifiable group:

> "[13] The presence of the word "wilfully" in subsection (2) is significant … The person must have intended that the statements as communicated, promote hatred.
>
> "[15] … it is not illegal simply to say things that are grossly rude, wildly offensive, blatantly false, callously hurtful, or even disgustingly hateful. The law does not make the use of specific words or symbols criminal. Society's condemnation of those things comes from sources other than the criminal law.
>
> "[18] The promotion of racism, anti-Semitism or homophobia to name only three examples, as outrageously offensive as they are to any right thinking person, are not in themselves criminal acts. Racism is not a crime. It is a curse, but not a crime. Even the promotion of racism is protected by free speech. What is criminal is the promotion of hatred.
>
> "[19] … Hatred is an intense and destabilizing emotion. It goes beyond racism. It may naturally develop from the ignorance and fear that underlie and drive racism…Hatred takes it a step further. It is intense, aggressive and dangerous. Hatred is not simply disrespect but vilification and detestation."

Provisions relating to hate speech also exist in three provincial human rights acts[7], although no longer the federal code. But in human rights acts, the understanding of what constitutes "hate speech" is limited to very extreme expression. In its most recent hate speech case in relation to human rights acts (Saskatchewan (Human Rights Commission) v. Whatcott), the Supreme Court upheld the constitutionality of hate speech provisions in human rights law, but only if the bar is set very high, so as not to unduly limit freedom of expression. Justice Rothstein, on behalf of a unanimous court wrote:

> "… the legislative term 'hatred' or 'hatred or contempt' must be interpreted as being restricted to those extreme manifestations of the emotion described by the words 'detestation' and 'vilification' … expression that [in the words of the Saskatchewan Code] 'ridicules, belittles or otherwise affronts the dignity of' does not rise to the level of ardent and extreme feelings constituting hatred required to uphold the constitutionality of a prohibition of expression in human rights legislation… Consequently, they are constitutionally invalid and must be struck from [the Code]."[8]

CRIMINALIZING OFFENSIVE SPEECH IS INEFFECTIVE AND COUNTERPRODUCTIVE

Beyond arguments from principle or law, criminalizing hateful expression in public discourse is largely ineffective, if not counterproductive.

If one believes, as I do, that the views giving rise to hateful expression are systemic in Canadian society, there is little reason to think that suppressing communicative acts will remedy the problem. Further, criminalizing all hateful communicative acts would necessarily entail overbroad restriction, as manifestations of racism or sexism are almost without limit — from the use of vicious epithets to endless microaggressions.

Efforts to suppress all racist or sexist expression in public discourse would impair that discourse without offering effective remedy for the systemic problem.

We only need to look to the many countries in Europe that have more extensive hate speech limitations than Canada. I am aware of no data that suggest the extent and virulence of racism, sexism, anti-Semitism, Islamophobia, or white supremacy are any less in those countries than in Canada as a result.

As well, when we attempt to deal with a systemic problem as if it could be remedied by criminalizing expression, we prevent the public from seeing those holding offensive views for what they are.

The fact that the white supremacist/neo-Nazi rally in Boston in August 2017[9] went ahead did more damage to the racist

6 R. v. A. B., 2012 NSPC 31. www.canlii.org/en/ns/nspc/doc/2012/2012nspc31/2012nspc31.html

7 British Columbia, Alberta and Saskatchewan.

8 *Saskatchewan (Human Rights Commission) v. Whatcott*, [2013] 1 SCR 467, 2013 SCC 11. https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/12876/index.do

9 "Rightwing rally and counter-protest in Boston – in pictures" *The Guardian*. August 20, 2017. www.theguardian.com/us-news/gallery/2017/aug/20/boston-rally

cause than had it been suppressed. For what the public saw was a small, angry, hateful group of a few hundred counterposed to tens of thousands who rallied for equality and social justice. Public discourse is about letting people see, hear and make up their own minds. Suppression of offensive expression denies that right.

Finally, tough laws to restrict hateful speech, imposed in a racist and sexist society, are often used in unintended ways by those who enforce them — victimizing those already marginalized.[10]

WHAT WE SHOULD DO

Having argued that criminalizing and suppressing expression is not what we should do, there are many things we, individually and collectively, can and should do.

Individually, we need to speak out against all forms of racism and other forms of hate whenever and wherever we encounter them. A good place to start is in our everyday lives, where often it is most difficult because it is close and personal -- with family and friends, at work, in school, in social situations. We should not let racist comments, hateful jokes, or discriminatory behaviour stand without comment.

Beyond that, we can use social media and conventional media to make our voices heard more broadly. We can join social justice rallies and counter-demonstrations, or even help organize them.

Even more importantly, we can work to dismantle structural conditions of racism and hate: precarious employment; inadequate housing; our discriminatory criminal justice system; and financial, social and cultural inequality. We can support community organizations that do this work as well as organize politically at the municipal, provincial and federal levels.

Hateful expression is the symptom of the disease. We need to attack the causes. This includes looking inside ourselves. If the problem is systemic, as it is, we are part of it. We need to understand and change our own behaviours and roles in perpetuating hate and the conditions that promote it.

There are many things to be done. Suppressing freedom of expression in public discourse is not one of them.

10 See Henry Louis Gates, Jr., "Let Them Talk" *The New Republic*. September 20, 1993; Edwin Chemerinsky & Howard Gillman, *Free Speech on Campus:* New Haven: Yale University Press, 2017, 106-07.