THE NORMALIZATION OF HATE SPEECH

An exchange

Mark Freiman: I certainly agree with the last third of Jim's remarks about the things that we can do, and I also agree that anti-hate legislation does need to have a very high threshold. I also agree that government can't be trusted to be a guarantor; I think an independent judiciary has to be a guarantor. But I still do take issue with the idea that in talking about legal responses to hate speech, we should be ashamed of what we're doing.

Legal responses to hate prevent what's happening in the United States — the normalization of hate and extreme behaviour, and people just say, 'Well, that's just the way it is now.' But it can't be accepted. You can't simply accept this as being normal everyday behaviour. And, finally, and I agree, we're not looking at offensive behaviour, insulting behaviour, micro-aggressions, enforced conformity of thought. Believe me, I am just as disturbed by the academic and intellectual lynching of Michael Marrus as anyone. (Prof. Marrus of the University of Toronto resigned in Sept. 2017 as Senior Fellow at U of T's Massey College, after a remark that was denounced as racially offensive, in a petition signed by 200 students and faculty. Prof. Marrus said he was sorry for his words but "disheartened" by the lack of "due process" and dialogue between him and those who asked for his resignation).

Freiman... contd.: However, there's a special kind of macro-aggression, not micro-aggression, against specific groups that denies their equality, that denies their equal dignity and their entitlement to equal treatment that's a form of incitement to hostility that should be opposed.

I also want to speak about the dangers of freedom of expression taken up not just by the Ann Coulters of the world but also by the Supreme Court of the United States in pursuing an absolutist view of expressive freedom. This (Citizen United vs. Federal Election Commission ruling) isn't the first decision (on free speech), but the last waystation down the road of undermining American democracy, and putting it up for sale to the highest right-wing fascist bidder who is able to buy elections. There is something profoundly disturbing when that's what expressive freedom means, that you can spend as much money, and you can hide the source of the money as you like, in pursuit of elections.

So it is a complicated and nuanced discussion. But we should not shy away from the possibility that sometimes the legal fight against hate speech has to be a fight against the speech itself.

Moderator Haroon Siddiqui: Mark was referring to the U.S. Supreme Court decision in 2010, that freedom of speech includes the right of very rich people to donate endless amounts of money to advance their causes. The Supreme Court of Canada, however, went in the opposite direction, in 2015, in a decision that Jim Turk was citing. In a Saskatchewan case, the court upheld Section 13 of the old Human Rights Code restricting free speech, even while defining very strict limits on what constitutes hate speech.

Azeezah Kanji: The Canadian legal system has shown itself quite poor in understanding, or let alone addressing, Islamo-

phobia. For example, in a Supreme Court case that upheld the definition of terrorism in Canadian law, advocates were arguing that it was Islamophobic because it associated particular expressions of religion with terrorism in a way that demonized Muslims, and the Supreme Court said, 'No, it's not the definition of terrorism that does that, it's Muslims committing terrorist attacks that have created this association between Islam and terrorism.' In a way, it just reproduced Islamophobic ideas about Muslims being the major source of political violence in our societies, whereas we know that both in Europe and the U.S., it's been white supremacists, right-wing and separatist groups that have been responsible for that.

When our legal system itself is espousing racist or Islamophobic ideas, clearly it cannot be the solution to addressing those Islamophobic ideas.

However, I think there is a difference between systemic racism and exceptional expressions of hatred. There's a difference between the state developing counter-radicalization programs that surveil what Muslim students are doing in schools — programs that are based on many racist ideas and impose a chill on freedom of expression — and what Kevin Johnson was calling for, paying people to go and sit and record Muslim students and then give the recordings to him or to police to show that they were being hateful.

There's a difference between those two things. And when people like Kevin Johnson are allowed to make those kinds of requests to the public without any legal censure, that normalizes it and diminishes even our ability to recognize what's systemically racist.

Jim Turk: Let's start with a few things I think we're all in agreement on. Canada is not the United States. We don't have the First Amendment. We have the Charter of Rights and Freedoms with Section 2B, with a very robust understanding of what freedom of expression is, and Section 1, which provides a basis for qualifying that.

As Mark said, we don't have in Canada the absolutist traditions of free speech in the United States. I'm not sure there's anybody on the planet more opposed to the Citizens United decision than me. But that's not what we're talking about here — we're talking about hate speech, and offensive speech and regulating it.

Mark also made reference to things that aren't captured by the law — offensive speech, microaggressions. My own view is, they're very serious, and they have to be dealt with — it's just that the law isn't the way to deal with them.

Azeezah, you were agreeing that it (hate speech) should be extreme, but then you talked about this guy in Mississauga doing these odious things, which I don't think get to the level of what Canadian courts would consider hate speech, but you say, 'Well, he can get away with it without legal censure.' We can't have it both ways — if we want to start imposing legal censure on a lower level of offensive speech, we get into such an overly broad set of possibilities that it really does endanger our democracy.

Kanji: The courts will decide whether what Kevin Johnson said was extreme enough to meet the high-level speech.

Turk: I agree completely. He's been charged, and so now there'll be a determination whether his speech got above that bar.

Mark talked several times about an independent judiciary, and that's very important. Except the judiciary is never fully independent. When it's making a judgment, it has to judge based on what the legislature intended. And in a majoritarian governments... (there has been) a very negative impact on how the courts are interpreting things. So it's not as if we have this independent body that is totally out there to protect all of us – they're appointed by majoritarian governments and they are constrained...

Siddiqui: Except, Jim, the logical extension of what you're saying is that we should do away with the courts and not have any laws.

Turk: I'm not saying that at all. What I'm saying is…

Siddiqui: Why would you trust the courts on everything else, but not on free speech?

Turk: I don't trust the courts on everything else — we live in a democratic society, which in my view is an ongoing conversation. The election of Trudeau or the election of Trump isn't the end. Well, it may be in the case of Trump! The conversation continues. Those of us who are unhappy continue to organize and have to have the rights to do that. So we can be critical of the courts — we have to protect the ability of that continuing. That means those of us who are in minority positions, politically or otherwise, have to have Constitutional protections to ensure that our rights to dissent aren't squashed by a particular government elected at a particular time.

Siddiqui: You say the Charter guarantees free speech — of course it does — the Charter also provides great protections for minorities. So how can we cite one part of the Charter and not the other? How can we ignore that the Supreme Court, which while restricting definitions of hate, has upheld anti-hate laws?

You also said the way to eradicating hate is not to criminalize speech, but that is precisely where we have ended up, ironically. Section 13 of the Human Rights Code is gone, that civilian remedy is gone, and all we are left with is the criminalization of hate speech. How can you square the circle?

Turk: No, no. I said at the very beginning — and this was the same point Mark was making — except for extreme expressions, which are properly criminalized, we can't deal with the much more pervasive forms of hateful speech by criminalizing it. What oppresses most people who are minorities or marginalized in this country is not the Ernst Zundels and Jim Keegstras, it's the day-to-day racist expression, exposures, microaggressions, exclusion, discrimination [that] have to be dealt with, and turning to criminal law is not the way to deal with it.

Kanji: As a racialized woman, I can say that systemic racism is the day-to-day oppression, but the threat of violence from violent Islamophobes, whose speech potentially comes under hate-speech provisions, is also there. And so it's not an either/or — it's not that we either address systemic racism or we address hate speech — the two have to go together.

Ingrid Mattson: The idea that as long as someone doesn't hit you as you're walking down the street but they could belittle you and spew racist things at you, that's not harmful? That's a kind of dichotomous view of the human person and health.

Freiman: When we're dealing with hate propaganda, or incitement to hatred, we're dealing not with interactions on a one-to-one basis but rather with incitement of hatred against a group. Incitement to violence is the subject of 319 Sub-A, whereas Sub-B is the willful promotion of hatred. It's not somebody coming up to you on the street and saying, 'Go back to where you came from.' We're dealing with something quite different.

It's the damage done to society that's really is the subject of the prohibition. It's not a personal wrong that's being done to you. That would be the subject of a different sort of tort.

Kanji: The way that I understood Prof. Mattson's question was that our whole conversation seems to artificially separate systemic conditions of oppression from particular exceptional incidents of violence and that it also seems to separate physical violence from verbal violence.

Perhaps from an abstract perspective, these kinds of distinctions make some semantic or theoretical sense. But from the perspective of people who experience violence — both systemic as well as interpersonal violence that stems out of a systemic context but is also rooted in individual interactions — often those things can't be separated.

Can the law address that? In the current formulation of hate speech, perhaps not. That's a critique of the way that the law itself is formulated — to not be responsive to the experiences of people who are marginalized and oppressed.

Turk: There's no suggestion that verbal expression does not cause harm. That isn't the issue — it does, most assuredly. The question is, what do we do about it? And it's not a question of what we do about violence. Violence is against the law. We're talking about expression. The term 'expressive violence' is used, but that's not violence as the law recognizes violence. And I don't think it's because it's something experienced by the marginalized but by everybody else. The law is a broad club, and to use that broad club against ubiquitous hateful behaviour is impossible to enforce. There are things that we have to deal with not by criminal law — doesn't mean we don't deal with them — it's just that criminal law is not the tool to deal with them.

We as a community have to have obligations. That's why I was pointing to a myriad of things that we can do, and many people in this room do them as part of their daily life.

Siddiqui: Here's an extreme example, and not completely relevant to Canada — what would you have done in the case of the Rwandan radio station that was inciting murder? What should the state do in situation like that?

Turk: That's an almost crystal-clear case of a violation of Section 319 of our Criminal Code. So the police would have to go in…

Audience member: Anthony Palma here. I teach a course on media and religion at UTSC (University of Toronto Scarborough Campus). Timothy Garton Ash, professor of European Studies at Oxford, in his book, *Free Speech: Ten Principles for a Connected World* offers the principle that, "We respect the believer, but not necessarily the content of the belief." Do you find that persuasive? And if so, why, and if not, why not?

Turk: Dick Moon, professor of law at the University of Windsor, who's written about this and talked about this, is with us today — I don't know if you'd like to comment on that, Dick?

Richard Moon: That's a distinction that's often drawn. To attack the believer, could, if extreme, count as hate speech. But attacks on the belief are seen as what would fall within the ordinary scope of public discussion, no matter how offensive, etc.

The problem, however, can be — and we see this with so much Islamophobic speech — is that it takes the form of the false attribution of belief to the members of a group. And so this line sometimes between an attack on belief and attack on believer can become blurred and complicate it.

Audience member: Professor Turk, you've talked about the way allowing a neo-Nazi rally to happen would allow everyone else to see how small and pathetic these ideas are. And then Mr. Freiman, you talked about the normalization of hatred that goes on in America. So is that a real disagreement between the two of you, that allowing racists to express their belief will, on the one hand, normalize racism, or, on the other

hand, allow everyone to see how not widely-held these beliefs are?

Freiman: There's always the issue of cause and effect. I was reading an article that drew the same discussion that Jim briefly alluded to. In European countries, there's far more robust prohibitions on displaying fascist symbols, denying the Holocaust, all manner of things you don't find in North America. Yet the incidents of hate crimes there are much higher than here. The article drew the conclusion that these prohibitions are no more effective in preventing that behaviour than the relatively laissez-faire policies in North America. But, of course, that assumes that there's a cause-and-effect relationship going from the prohibition to what happens in society, rather than perhaps the other way.

In Germany, you can understand why people would be nervous about displays of swastikas and of Holocaust denials in the media for fear of what might happen, whereas until quite recently, we wouldn't worry so much about it in North America. But to me, the lesson of the last little while in the United States is that 'it can't happen here' may not be the best guide for predicting the future.

Turk: The rally of white supremacists, if Mark and I agree, would only be blocked in Canada were it to either be promoting incipient violence or otherwise contravene Section 319. Those of you who saw the coverage of Boston, did many of you come away feeling that, "Jeez, maybe those white supremacists are right — I was impressed with them?" I don't think so.

Kanji: This is probably not a completely representative crowd. We're talking about a country that elected Donald Trump.

Turk: That suggests that Donald Trump is the result … I mean, 'If we had only stopped more free expression, Donald Trump wouldn't have been elected,' I think that trivializes the extent and nature of the racism in the United States. Were it the case that we could deal with that just by more extensive hate speech legislation, I'd actually be happy, but we can't.

Kanji: It's not saying that repressing speech would have prevented the election of Donald Trump. Rather, allowing white supremacist rallies to take place and then seeing the opposition to them is not an effective way of addressing racist speech that was on display, as well as its knock-on effects and side effects in widening the space for expression of beliefs that previously would have been considered extreme and on which people would have felt compelled to restrain themselves.

We also have to think about whose right to express these things do we spend our resources and time defending? Do we spend our resources making sure white supremacists and extreme right-wingers have the space to express their views? That's been the view of some of the defenders of civil liberties who say we need to defend the right of white supremacists to express their speech, because otherwise we constrict freedom of speech in ways that will impair the ability of all people to express themselves, including the marginalized people supposedly being protected. Whereas I think that white supremacists in Canada, as well in the United States, already have a far greater freedom of expression than Muslim activists, Indigenous activists and ,environmental activists whose freedom of speech has been constrained in all kinds of ways.

While we're debating about the right of white supremacists to engage in their rallies, and acting as if this is the forefront of freedom of speech that we need to be defending, we're often overlooking the minoritized and oppressed groups that are facing the sharp edge of the state's repression of freedom of expression (in the name of national security). But their experiences are completely overlooked in the name of saying that we need to keep the space open for white supremacists to express themselves.