



“We Don’t Have to Accept the Harms of Hate Speech”

February 2019

We Don't Have to Accept the Harms of Hate Speech

Canadians rightly embrace freedom of speech. Valuing freedom of speech doesn't mean we must accept the harms of hate speech. As a general principle, human rights do not include a right to exercise them in a way that causes harm to others.ⁱ

Freedom of speech in public settings is not an absolute right. How to regulate hate speech (as well as lesser forms of discriminatory speech in the work place and other regulated/non-private spaces) is a global discussion and challenge. The instant and massive reach of websites and diverse social media platforms has made discriminatory online abuse a critical area of regulation for governments.ⁱⁱ This challenge is further heightened in countries with populist political trends or hostile social media forces aiming to create fear and hate based on racial or religious lines and/or xenophobia.

The arguments for, and against, regulating hate speech have not changed much over the decades that have followed the Holocaust and the building of the international human rights system. What is notable at present is the mounting scientific evidence documenting the harms of racism and other "isms" – and the specific harms of discriminatory speech and hate speech.

The evidence has always been there in the lived experience of our friends, relations, neighbours, co-workers and fellow students who are targeted – such as racialized groups, religious minorities, women, LGBTQI2S communities and people living with disabilities.ⁱⁱⁱ It is evident in our country's history. It is evident in cases brought before human rights tribunals and it is evident in news coverage of discriminatory acts and speech in all parts of the country. It is evident in the history and the experience of the survivors of the Indian Residential School system. The facts were ignored until the former students and the Truth and Reconciliation Commission compelled all Canadians to see what was staring us in the face for more than a hundred years.

The western legal system requires "evidence" and evidence that it has decided to recognize.

Evidence can be the testimony of victims about the psychological and economic harms of specific acts of discrimination. Evidence can also be introduced through experts to broadly document the general harms of discrimination on individuals. Judges can sometimes take “judicial notice” of societal or historical facts like the reality and dynamics of discrimination.

Western social science and medicine recently have doubled down on documenting the harm of discrimination and of hate speech in particular. This growing body of medical, psychological and social science research will be useful to policy makers and lawmakers in aligning education, protection and remedy with the demonstrated harms of discriminatory speech in public spaces. We must always assess the field of legal, educational and program tools to prevent and mitigate the spread of hate speech.

The link between hate speech and its role in promoting actual crimes of violence is also becoming clearer.^{iv} The evidence we have at present should compel us to regularly review the effectiveness of current mechanisms to regulate and mitigate the harms of hate speech.

The harm of hate speech and discriminatory expression is not about hurt feelings or the sting of mere uncivil behaviour. Public policy debate on regulating discriminatory speech, and mitigating its harm, should centre on recognizing and documenting harm; and the obligation of governments to sanction behaviour that causes real harm. We must consider the most effective and appropriate tools to that end – whether these lie in civil and criminal law sanctions or in policies and programs that aim to educate and prevent.

Public and academic debate about the regulation of hate speech is often characterized as involving a clash of two sets of rights. The jurisprudence of the Supreme Court of Canada has leaned towards a balancing of rights without creating a hierarchy among the rights and freedoms guaranteed by the Charter.

One of the ways in which rights are “balanced” is by focusing on situations of harm flowing from the exercise of a Charter protected right as part of the test to determine whether a law that infringes a Charter right can be upheld because the infringement can be justified in a “free and democratic society” (section 1 of the Charter).

While the protected right to hold opinion without interference is an absolute right, freedom

of expression is not. There are prohibitions and limitations attached to freedom of expression in public settings.^v Private expressions of discrimination are not legally sanctioned (although there are situations in family law context where racist or gendered verbal abuse would be relevant to determine some issues). The work place is regulated and the imposition of harm in general by one individual to another is also regulated.

The reason certain discriminatory forms of public speech are regulated is the real harm that imposes on the targeted groups and their members. Psyches, physical health and emotional health can be harmed by racism, sexism, and other “isms”. Law and policy should regulate public expressions of hate aimed at us based on our identity (such as gender, sexual orientation, race, culture, religion) because discrimination, and especially hate speech, does cause real harm.

A spectrum of protections against public speech that harms

The Constitution provides important equality guarantees for citizens against the actions of governments. Federal and provincial human rights laws establish minimum equality rights standards for private actors like employers, service providers and educational institutions. In a very general but not comprehensive way, Canadian law protects the equality rights of individuals, of groups and peoples to live free of discrimination.

The common law, or judge made law, provides additional protection against certain kinds of harmful speech. The common law of defamation and libel is available to impose liability for damages if you savage the reputation of another individual in an untruthful way.

The law is also clear that employers have an obligation to employees to provide a work environment free of discriminatory harassment (and in Ontario, harassment of any kind).

At the furthest end of discriminatory speech and legal sanction is hate speech that is defined and sanctioned by the Criminal Code. This includes: advocating or promoting genocide (section 318); public incitement of hatred against defined identifiable groups where such incitement is likely to lead to a breach of the peace (section 319(1)); and public communications that willfully promote hatred against identifiable groups 319(2)).

In other words, there is a spectrum of protection under Canadian law for a spectrum of public expressions of discriminatory or harmful speech but there is not necessarily a remedy available for every form of discrimination or other harm. These legal protections are a bit of a patchwork quilt that have developed over time in the Constitution, the common law, Quebec civil law, federal and provincial human rights statutes, broader anti-harassment legislation and labour law for example.

Whatever legal remedy or protection against discriminatory speech and other forms of harmful speech we look at, we will see longstanding and very lively debates about the appropriate limitations on freedom of speech. These include debates about whether Canadian law meets our international obligations to protect freedom of speech or alternatively, the right of individuals and groups to live free of discrimination and Canada's international obligations to prohibit hate speech.^{vi}

Canada must continue to act on its international obligations to regulate and sanction the forms of hate based on identity that exist in this country. Canada's dominant forms of hate have their roots in our own particular colonial history (hate aimed at Indigenous peoples for example) as well as hate arising from broader global and historic dynamics - hate targeting individuals based on their gender identity or sexual orientation, hate aimed at people of Arab descent, people of the Islamic and Jewish faiths, etc, etc, etc.

The Power of Digital Media to Propel Hate Speech from Private to Public Expression

Hate comes in every form imaginable. Users of digital media are exposed to a lot of very intense and very public vitriol; much of it is dumbly personal and of no concern to public policy.

Social media platforms also have an extraordinary capacity to lay bare discriminatory beliefs and then propel these into public space. Social media provides access in real time to a kind of window into the public soul and our collective progress as humans in our treatment of each other.

The threat of political forces, both inside and outside any given country, to manipulate

social media to sow division based on xenophobia and discrimination is becoming increasingly evident.^{vii} These are some of the risks that governments must continually assess and manage.

The Harms of Hate Speech are Real

Hate speech is not simply some failing in civility. Lack of civility and hate speech are not synonymous.

Hate speech does more than “hurt feelings” or offend sensibilities - it causes actual harm. Canadians should not accept hate speech as part of some “new normal” of public dialogue.

We have at hand obvious gross human rights violations where there is plenty of evidence of the starring role of hate speech to create and maintain systematic oppression and genocide. Acts of genocide and oppression so horrific that they stand as definitions for the ages demonstrating the and harm that can, point of genocide — genocide, the Indigenous peoples Indigenous children suppression of traditions, languages, spiritualities; and the century plus of abuse (physical, emotional, sexual) driven by the racist ideology underlying the Indian Residential School system. After these cataclysmic failings of human decency, the next phase of hate speech often is to deny the genocide happened despite exhaustive documentation.

The comfort, for those who seek it, of being willfully blind or blissfully ignorant of the harms of hate speech must be torn away.

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Robert Mark Simpson has emphasized the need to employ a harm-prevention framework for assessing anti-hate speech law.^{viii} He takes issue with efforts by Steven Heyman and Jeremy Waldron to justify legal restrictions on hate speech with a heavy reliance on infringement of human dignity as a central harm of hate speech.

For those who do not see cause and effect in the relationship between hate speech

propaganda and real harm to humans (and likewise lesser forms of discriminatory speech), there is a growing scientific literature documenting the harms of discriminatory speech on the health of those it targets.

A few examples are listed below:

- Canadian physician, Kwame McKenzie notes a growing literature showing an association between racism, morbidity and mortality.^{ix}
- A 2008 study found that race-related stress was a significantly more powerful risk factor than stressful life events for psychological distress.^x
- In the aftermath of the hate crime that led to the murder by car of Heather Heyer in Charlottesville in 2017, the American Psychiatric Association issued a news release condemning all acts of violence and racism and noting “Our organization has long recognized that racism and racial discrimination adversely affect mental health and lead to disparities in mental health care.”^{xi}
- Qualitative data collected from interviews led the authors of a study to conclude there is strong support for the argument (made by Richard Delgado) that ‘direct, immediate, and substantial injury’ (p. 57) may be caused whether or not there is a ‘fighting words’ dimension or risk of immediate public disorder, and Parekh, who argues it is a ‘mistake, commonly made, to define hate speech as only that which is likely to lead to public disorder’. Gelber and McNamara (2016) conclude that the harms of hate speech that fall outside these narrow categories “are not trivial” and “have a serious impact on targets, and impede their opportunity to participate fully in society. The isolation and silencing experienced by some interviewees and others’ practices of denying their identity speak to the gravity of these harms, and the incompatibility between targets’ lived experiences and the goals of inclusion and equality embedded in hate speech laws.”^{xii}
- A cross-sectional and longitudinal study involved assessments of the mental health impacts of experiences with racism and found increasing racism was associated with worsening mental health and that those who denied thinking about racism fared the

worst.^{xiii}

- A 2015 journal article co-authored by a legal specialist and a professor of neurology and neuro-surgery suggests there is neuro-biological evidence to support the hypothesis that dehumanization of other humans (associated with the denial and violation of the human rights of victims) has an automatic dampening effect on the neural mechanisms of pain empathy that enable empathy for the pain and suffering of others. The authors conclude that there is neurological evidence to support a conclusion that the field of social neuroscience provides evidence that "both the vagaries of the legal definition or legal fiction of 'personhood' and hate speech that explicitly and implicitly dehumanizes may (in their respective capacities to artificially humanize or dehumanize) manipulate the neural mechanisms of pain". They suggest that dehumanization of specific groups of people is associated with the denial and violation of the human rights of victims; and "that the existence of dehumanizing opinions has an automatic dampening effect on the neural mechanisms of pain empathy that enable empathy for the pain and suffering of others".^{xiv}

Acts of discrimination at the individual level and the State can reinforce one another

Sometimes, the harm of hate speech is made real in a few words. Irwin Cotler makes us stop every time he makes the chilling observation that "the Holocaust did not begin in the gas chambers. It began with words."^{xv}

Academic documentation of the interacting, intersecting nature of discrimination and hate at the individual level with the political arena and with law and policy continues to grow. Barbara Perry and Ryan Scrivens note in a recent article that "hate does not emerge or operate in a vacuum."^{xvi} – "Rather, it is embedded in broader patterns of subjugation and oppression. It is conditioned by structural and cultural practices that leave its subjects vulnerable to victimization."

An absolute right or an under-regulated right to express hate against individuals based on race, culture, sexual orientation, gender identity (or other recognized grounds) creates conditions for mutually reinforcing dynamics between discrimination by individuals and discrimination at a collective level through law and policy incorporating and expressing the

same discriminatory values. We have plenty of examples in our own history in Canada – from the internment of citizens of Japanese heritage to the pattern of gross human rights violations against Indigenous peoples. Is it a question of balancing supposedly competing rights - free speech vs freedom from discrimination? Or is it a question of not using your rights to harm others in ways that also violate their human rights? Anti-hate speech regulation as well as policy and program responses need to be updated and ready to meet today's challenges.

This work continues as it must. The comfort, for those who seek it, of being willfully blind or blissfully ignorant of the harms of hate speech must be torn away. The obvious truth, too often, needs uncovering for many.

Endnotes

ⁱ Within western legal and academic traditions, the harm principle is typically used to justify narrow restrictions on fundamental freedoms and rights. It was famously articulated by John Stuart Mill (1859 *On Liberty*, Chapter 2 "Of the Liberty of Thought and Discussion" and has been debated ever since.

ⁱⁱ Tenove, C., Tworek, H. And McKelvey, F. *Poisoning Democracy: How Canada Can Address Harmful Speech Online*. Public Policy Forum. 2018. Available at <https://ppforum.ca/publications/poisoning-democracy-what-can-be-done-about-harmful-speech-online/>. This study focuses on a broader scope of harmful speech than my focus which is discriminatory speech meaning speech that violates one of the recognized grounds of discrimination either under the Charter of Rights and Freedoms or the similar grounds identified under federal/provincial/territorial human rights statutes.

ⁱⁱⁱ Gelber and McNamara remind us of the early work Mari Matsuda and others on the impacts of racist hate speech: Gelber, K. and McNamara, L. (2015). "The Effects of Civil Hate Speech Laws: Lessons from Australia". *Law & Society Review*. 49: 631-664.

^{iv} Simpson, R.M. (2013). "Dignity, Harm and Hate Speech". *Law and Philosophy*. 32: 701.

^v Ghanea, N. (2013). "Intersectionality and the spectrum of racist hate speech: proposals to the UN Committee on the Elimination of Racial Discrimination". *Human Rights Quarterly*. 35:4. 935 at 936.

^{vi} These minimum human rights standards require UN Member States to ensure there are legal prohibitions against "advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence" (Article 20(2) International Covenant on Civil and Political Rights. Canada has obligations under international human rights law ICCP (Article 19) and CERD (Article 4) to

discourage and sanction intense expressions of discrimination aimed at groups that constitutes hate speech.

^{vii} Tenove et al. *Poisoning Democracy*; Stanley, J. (2018). *How Fascism Works*. Random House. New York.

^{viii} Simpson, R.M. (2013). "Dignity, Harm and Hate Speech". *Law and Philosophy*. 32: 701.

^{ix} McKenzie, K. (2003). "Racism and health: Antiracism is an important health issue". *BMJ* Vol. 326. 65.

^x Utsey, S.O, Giesbrecht, N., & Hook, J.N., & Stanard. (2008). Cultural, sociofamilial, and psychological resources that inhibit psychological distress in African Americans exposed to stressful life events and race-related stress. *Journal of Counseling Psychology*. 55:1.49.

^{xi} August 16, 2017. American Psychiatric Association. "APA Condemns Violence in Charlottesville, Reiterates Impact of Racism on Mental Health".

^{xii} Gelber, K. & McNamara, L.J. (2016). "Evidencing the harms of hate speech". 22: 3. *Social Identities*. 324-34.

^{xiii} Kwate, N. & Goodman, M. (2015). "Cross Sectional and Longitudinal Effects of Racism on Mental Health Among Residents of Black Neighbourhoods in New York City". 105: 4 *American Journal of Public Health*. 711.

^{xiv} Murrow, G. B., & Murrow, R. (2015). A hypothetical neurological association between dehumanization and human rights abuses. *Journal of law and the biosciences*. 2:2. 336.

^{xv} Cotler, I. (2005). "Remarks on Inauguration of the New Holocaust History Museum".
<https://www.yadvashem.org/events/15-march-2005/museum-special-assembly/canada.html>

^{xvi} Perry, B. & Scrivens, R. (2018). "A Climate for Hate? An Exploration of the Right-Wing Extremist Landscape in Canada". *Critical Criminology*. 26:169.