

# Mushkat Memorial Essay Prize Submission

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Tolerance, Hate Speech, and Conflicting Human  
Rights

“Tolerance is a value to be held among other values—such as justice, and liberty itself, but also order and truth; it can never always be right to be tolerant; there are occasions on which we should be intolerant.” – Bernard Crick, *Political Theory and Practice*<sup>1</sup>

The recognition that every individual should be free to pursue his or her own conception of what constitutes a good, fulfilling life is the foundation for the type of negative liberty that classical liberalism upholds. This commitment to individual rights prevents the state from unjustly interfering with the affairs of its citizenry, while largely leaving the determination of morality to the individual. In opposition to this paradigm, it is possible to highlight particular circumstances where the full, unconditional adoption of this respect for individuals may leave a society unable to curtail excessive or destructive uses of rights, or to coherently prioritize them to attain a social good. Thus, when examining the notion of tolerance as it relates to human rights, it is clear that a tension exists concerning how far toleration of the behaviour of citizens ought to extend. While some prefer to treat the provisions of human rights documents as natural and absolute, an element of compromise is necessarily introduced when an individual’s liberty tears at the social fabric, and especially in cases where two or more of our human rights are found to conflict with each other. These difficulties necessitate appeals to values aside from our respect for maximizing the autonomy of each individual. They require some form of a limit on the extent to which a right may be enjoyed; a limit that naturally implies a choice, based on both societal values and simple utility. The question that arises then is what criteria are relevant in deciding between which human rights to honour more fully. This contentious balancing act is especially evident in the debate over limitations on freedom of speech, wherein particular societies explicitly define the boundaries of their toleration.

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<sup>1</sup> This quotation appears in Gross & Kinder, 1998, pg. 466.

Disagreement over the suppression of hate speech goes to the heart of the issues involved in reconciling our human rights and societal values. While established human rights in the liberal democratic world recognize the importance of unfettered opportunity to speak without coercion, the equal dignity of all people and their equal right to life can be compromised when free speech is wholly unconditional. When hate speech takes the form of direct and indirect appeals for violence and discrimination against particular groups, human equality and security are jeopardized. Whether we should legislatively curtail free speech to avoid these potential violations, or allow fringe opinions to compete—and presumably fail—in the “marketplace of ideas,” is a debate that has followed different paths in different nations (Ma, 1995, p. 699; Mullender, 2003).<sup>2</sup> Some have sought to silence bigotry by law, while others seem inclined to permit even the most distasteful of opinions, assuming that the reasonable public will reject and refute them (Newman, 2002; Gross & Kinder, 1998).<sup>3</sup> Unsurprisingly, this issue is often understood in ideological terms, wherein the individual’s freedom stands opposed to their society’s interests.

Throughout this essay, I will defend legislative action suppressing hate speech, while elucidating a number of justifications that may be offered for regulating free speech in the name of competing rights and societal values. To this aim, what I call the International Hierarchy, Egalitarian, and Communitarian rationales for limits on speech will be explored. After touching briefly on the comparative jurisprudence surrounding hate speech laws and outlining the cases

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<sup>2</sup>An example, noted by Mullender on p. 564, is found in Germany’s basic law.

<sup>3</sup>Indeed, this was the logic developed by John Stuart Mill in *On Liberty*, wherein he expressed his concern that individuals must not conceive of themselves (and their opinions) as infallible. Mill’s point was that a society must permit distasteful and controversial opinions to be heard, as they serve the dual functions of further clarifying what is seen as truth, and forcing the reasonable public to interrogate the foundations of their beliefs. The underlying assumption of this argument is that the overwhelming majority of people will be able to differentiate truth and fact from bias and bigotry when reassessing their beliefs about the nature and quality of other members of their society. This Millian idea is what Newman refers to as “Brandeis’s liberal faith,” after the United States Supreme Court Justice’s elaboration on “the Founders’ faith in our reasonableness” in his opinion in *Whitney v. California* (1927).

for regulation, I will offer a potential prescription for addressing future instances of hate speech which directly addresses the boundaries of toleration. By looking critically at the “fundamental” and “absolute” nature of the right to free speech, it will be shown why this liberty ought to be modified at the margin to ensure all citizens are permitted to live autonomous, fulfilling lives.

Though it would be premature to say that the issue has been resolved in both the United States and Canada, the hate speech debate has taken drastically different turns in each nation. In the United States, the judiciary has articulated the extent to which the First Amendment protects free speech most clearly in the late 1960s, and again in the early 1990s. In *Brandenburg v. Ohio* and *Street v. New York*, the United States Supreme Court (USSC) ruled that the distastefulness of the content of speech—even when it advocates violence in an abstract sense—is not sufficient to curtail an individual’s right to expression. The Court also established what is now known as the imminent lawless action test, which stipulates that the government may not censor free speech for its content, unless the speaker is aiming to incite, and likely to actually incite, immediate illegal actions (Cornell, I; Cornell, III). This tendency to cause immediate violent reaction was previously described by the court (in *Chaplinsky v. New Hampshire*) as the “fighting words” doctrine, which acknowledged the similarity in outcomes between a verbal and physical assault (Newman, 2002, p. 373; Ma, 1995, p. 706). Subsequently, in the case of *R. A. V. v. City of St. Paul*, the USSC struck down a municipal ordinance banning cross-burning, arguing that the government may not regulate speech based on the specific content of the message. While government may regulate the mode of expression—as the imminent lawless action test makes clear—the message inherent in that expression (even race-based hatred) is protected by the First Amendment (Ma, 1995; Newman, 2002; Cornell, II). This decision highlighted the American court’s commitment to the liberal ideal of the government as a neutral umpire among competing

social interests (Gross & Kinder, 1998). Effectively, the decision endorsed the view that victims of hate speech, though undoubtedly suffering some psychological trauma, would be able to both reject the validity of the message and overcome any suffering it may have caused (Newman, 2002). Thus, in the absence of significant proof of direct and immediate danger, hate speech is afforded constitutional protection as an individual right.

Canadian precedent and legislation upholds a very different synthesis between the clash of free speech and commitments to egalitarianism, multiculturalism and social harmony. Indeed, the constitution is structured so as to allow for “reasonable limits” on individual rights, so long as government restrictions meet the standards set out in the Oakes test (Newman, 2002, p. 383). Succinctly, this requires the government to prove the importance of the social objective it pursues through limitation of rights, the rational connection between limit and objective, the minimization of the limit’s impairment, and whether the benefit of infringement is proportional to the gravity of overturning a constitutional right. In practice then, the Canadian rights regime functions in a more utilitarian fashion than that in America.

Following these guidelines, the Canadian Supreme Court has expressed its willingness to suppress hateful forms of speech out of respect for specific societal goals, such as promoting human dignity, equality, and social justice (Newman, 2002). In the 1990 case of *R. v. Keegstra*, the Court found that although section 319 of the Criminal Code of Canada violated the individual right to freedom of speech, the limits it placed on hate speech were consistent with the Oakes test’s requirements. The Court upheld the laws, already in place, allowing individuals who incite or wilfully promote hatred against any identifiable group of people to be prosecuted and imprisoned. By finding that hate speech adds little to public debate, is not a component of an individual’s self-actualization, and actively harms particular groups psychologically, Chief

Justice Dickson ruled that very little of significant value would be lost by suppressing bigoted and discriminatory expression (Lexum, 1990). Thus the Canadian Court abandoned the neutral state ideal of classical liberalism, and explicitly rejected types of speech that elicit discrimination, discourage individuals' eagerness to engage in public life, compromise their sense of worth, and sustain (presumably learned) hatred in society. While the USSC requires content neutrality and proven imminent danger, the Canadian Supreme Court openly decries hate-mongering. It seeks to actively protect targeted groups from psychological and potential physical harm, and punishes such expressions as are deemed to directly and indirectly hamper social harmony and mutual respect (Lexum, 1990).

Given that the Canadian example seems to surpass the traditional role of the state under liberalism, what justifications can be provided for this action? In order to answer this question, one must look to authors and institutions sceptical of the equal merit of individual rights, and those who question the supremacy of rights over societal values. What emerges are several strands of thought that encourage a resolution of the hate speech debate more in line with the Canadian response.

One rationale for deriving the acceptability of limitations on hate speech may be found in the legal opinions on human rights within international law. To make this line of reasoning clear, we must first emphasize that permitting hate speech, especially in its more aggressive forms, constitutes a potential threat to the bodily security of targeted individuals if speakers or their audiences act upon the message. When examined critically, it becomes clear that both jurisprudence in international law and the content of international treaties and declarations recognize at least a minimum hierarchy between the established human rights. Specifically, one can identify a relatively consistent definition of particular human rights distinguished as "non-

derogable,” or constituting *jus cogens*. This subset of the rights espoused by the UN’s Universal Declaration of Human Rights, and subsequent international treaties, is seen as a “minimum catalogue” of that body’s expansive list of human rights (Meron, 1986, p. 16). The specific contents of this catalogue are telling, and have implications for how a society should approach hate speech.

Generally, the non-derogable rights are identified as the right to life along with freedom from torture, slavery, and retroactive penal measures. These priority rights, identified as the “irreducible core” of recognized human rights, are set out in Article 4 of the UN’s International Covenant on Civil and Political Rights (ICCPR), and are most notably articulated in the International Court of Justice’s ruling in its *Barcelona Traction* case (Meron, 1986, p. 11; Koji, 2001, p. 920). Indeed, both the American and European Conventions on Human Rights acknowledge the non-derogable class of rights as legitimately distinguished from other human rights; notably, freedom of speech (Koji, 2001). The UN supplies further evidence for this distinction in Article 1(3) of its Declaration on the Elimination of All Forms of Intolerance and of Discrimination based on Religion and Belief, wherein the right to practice one’s religion may only be limited to protect the *fundamental* [Meron’s emphasis] rights of others (p. 7). In a similar vein, the Vienna Convention on the Law of Treaties acknowledges the status of particular human rights as *jus cogens*, while adding prolonged arbitrary detention and systematic racial discrimination to the four established non-derogable rights (Meron, 1986; Koji, 2001). The implications of this apparent hierarchy in human rights law are relatively clear: By nature of their “fundamental value” for all, the non-derogable human security rights are granted a sort of primacy not shared with other human rights, and based on political expediency (Koji, 2001, p. 930 & 939).

The relevance of the hierarchy in international human rights for the hate speech debate is fairly straightforward. Although the ranking of rights is inherently subjective, and fraught with cultural and ideological biases, such a prioritization has already been made (Meron, 1986; Koji, 2001). The core security rights have been found to take precedence over what may be tentatively termed the “contingent” human rights, in particular the right to free speech. The UN’s ICCPR recognizes this conditionality in Article 19(3), wherein it stipulates that freedom of expression is accompanied by “special duties and responsibilities,” and may be justly restricted in the name of security, public order, and the rights and reputations of others (UN, 2008, p. 2). With this in mind, the suppression of hate speech can be justified in terms of the greater priority it gives to preventing potential bodily harm to victims. Although admittedly broad in its limitation on freedom of speech (for not all calls to violence elicit actual violence), intolerance towards group-based hatred conforms with the UN’s claim that the right to life must not be interpreted “narrowly,” and that states must take action to “prevent and punish deprivation of life by criminal acts” (UN, 1982, para. 1 & 3). Though this particular language is likely intended as a conduit for socioeconomic rights, it still merits consideration for elaborating upon the duty a state has to *prevent* bodily harm. If we acknowledge this duty as serving to protect a non-derogable right, then it becomes clear that, as in international law, more “contingent” human rights, such as free speech, may be permissibly limited to serve a greater purpose.

A different form of rationale can also be offered for hate speech laws by focusing not on the clash between speech and security rights, but on how speech interacts with equality. This egalitarian approach is well articulated by the critical legal scholarship of authors such as Matsuda, Lawrence, Delgado, and Ma, and contends that by refusing to censor hate speech the government allows gross violations of the equality rights of vulnerable subsections of the

population (Ma, 1995). This critique of American-style absolutism in freedom of speech focuses on the ability of hate speech to act as a weapon against identifiable groups, as it is wielded with the intention to intimidate, diminish, and humiliate individuals based on their personal characteristics (Gross & Kinder, 1998). Despite the denouncement of speech regulation as a “slippery slope” towards greater measures of censorship and control, this egalitarian stance stresses the great harms of constitutionally protected hatred (Ma, 1995, p. 695). Additionally, defenders of the approach counter that absolute freedom of speech is already curtailed when it conflicts with matters of individual reputation, privacy, and intellectual property rights (Gross & Kinder, 1998).

Central to the egalitarian rationale is a seemingly consequentialist evaluation and refutation of favouring free speech over respect for equality of citizens. Delgado invokes this justification when he asserts that the harm of permitting hate speech has three ultimate effects: the degradation, social exculsion, powerlessness, and fear of violence among victims; the disregarded decline in moral standards of hate speakers; and the state-sanctioned perpetuation of discrimination and identity-based socio-political inequalities (Gross & Kinder, 1998). Indeed, Chief Justice Dickson concurred with these very effects when offering his decision in *R. v. Keegstra*. While some may have contested the legitimacy of this assessment at the time, it is important to note that hate crime in Canada has become an increasingly pressing contemporary problem (Newman, 2002, p. 381-382; National Post, 2010).

Elaborating on the harms caused by hate speech, Matsuda highlights the measured effect that race-based discrimination has been found to produce. Included in these effects are post-traumatic stress disorder, hypertension, psychosis, sense of restricted social freedom and self-esteem, withdrawal from education, and even suicide—another tragically contemporary

phenomenon (CNN Politics, 2010; Ma, 1995). The psychological harm emanates not only from the intimidation and “silencing” effects of the hate speech on victimized group members, but also from the acknowledged government stance of tolerating such speech. Additionally, Ma notes that the act of tolerating hate speech is not an equal burden on an enlightened society, rather it falls disproportionately on those who will feel the true impact of the opinions expressed (Ma, 1995, p. 696 & 703). For these reasons, Ma advocates a conceptualization of hate speech regulation as a form of affirmative action. Essentially, this justification sees limits on the speech of the bigoted as a means to place disenfranchised target groups on an equal footing with their “silencers,” in terms of overall expression (Ma, 1995, p. 696). While this is indeed an egalitarian rationale, the conceptualization of hate speech regulations as a form of affirmative action is problematic because it implies a temporal dimension to the preference for suppression (Ma, 1995). If one wishes to justify an enduring ban on expressed hatred, it must be based on a combination of the constitutional right to equality and the harms inflicted, and not on simply amending for past discrimination. The ultimate logic of the egalitarian rationale is that, given the unavoidable clash between equality and speech rights, a society is justified in legislating suppression of hate due to the greater demonstrable harms associated with favouring freedom of expression. This type of logic, namely a favouritism for minimal harm, can also be found in non-hate strands of Canadian Charter jurisprudence; most notably in the Supreme Court’s ruling in *Harper v. Canada (Attorney General)*, wherein the Court opted to favour the right to equal, meaningful political participation over the right to expression by upholding limitations on third party election advertising in the interest of preventing the “electoral unfairness” that would occur if the affluent could freely “dominate the political discourse” (Lexum, 2004, para. 4 & 5). In

essence then, the egalitarian rationale advocates a utilitarian approach to the judicial calculus involved in balancing conflicting rights.

A final rationale for the limitation of individual rights in the name of alternative social goods is found in the Communitarian branch of contemporary political philosophy. Denouncing the atomism and cultural and social insensitivity of the liberal model, authors of the Communitarian persuasion have emphasized how the individual relates to, finds meaning and identity in, and contributes to the society within which they live (Newman, 2002; Morrice, 2000). Central to their argument is the observation that humans are inherently social creatures, and that liberalism ignores the duties that accompany one's belonging to a particular civic order (Nino, 1989; Newman & De Zoysa, 1997; Morrice, 2000). From the political philosophy of Hegel, to more recent reactions against the sanctity of individualism, Communitarian thought seeks to reaffirm the value of acknowledging the collective as an enabling political entity, and a legitimate unit of analysis (Morrice, 2000).

Tracing its historical roots to Hegelian criticism of liberalism's conception of the individual, the state, and the ideal political order, Communitarianism highlights particular problems with unquestioned individualism. To do this, communitarian theory draws upon Hegel's ideas of the self and the State—by which is meant the ethical community. For Hegel, the classical liberal conception of personhood as simply requiring a sphere of guaranteed negative liberty is problematic. This assurance, he claims, does not produce true freedom on its own. While liberalism conceives of the individual as a “rights-bearing legal person,” this characteristic is insufficient to satisfy Hegelian political personhood. Central to Hegel's criticism is the claim that, in order to become an authentic, self-actualizing individual, one must be able to identify as a moral subject participating in a rational community with others (Schwarzenbach, 1991, p. 550-

551). This requires each individual to engage with their society, acknowledging and adapting to the intersubjective understandings, social and moral expectations, and “reciprocal recognitions” of the community at large (p. 553). Participation of this type is essential for Hegel, as genuine, deserved recognition of one’s worth from others is required to affirm our identities and lead satisfying lives. Therefore, permitting a deviation from the shared moral framework as substantial as advocating hate would amount to state endorsement of individuals’ self-alienation from their greater society.

More contemporary Communitarian writers expand upon Hegel’s points. Generally, they argue that atomism and self-interest are antagonistic to the healthy, social existence of the individual, and jeopardize the cohesion, solidarity, and harmony of a society, regardless of the soundness of its individual rights (Morrice, 2000). The objection is made that all political communities will endorse some particular conception of a good life—distinct from an aggregation of individual interests—and that by relegating the state to the role of neutral umpire, liberalism sacrifices the community’s ability to recognize particular manifestations of morality as “intrinsically valuable” (Mullender, 2003, p. 566; Morrice, 2000, p. 237). As an example, the political community would lack the moral authority to claim that embracing multiculturalism is a positive and worthwhile social goal if this form of state impartiality was adhered to in full. For this reason, Communitarians argue that acknowledgement of a specific common good should be used to justify active state establishment of ideals of personal and civic virtue (Nino, 1989; Schwarzenbach, 1991). As Newman (2002) has noted, this is precisely what Chief Justice Dickson accomplished with his ruling upholding the suppression of hate speech (p. 383). By defending mutual respect and social equality as fundamental societal goods, Dickson endorsed an objective view of what ought to constitute a good and proper lifestyle for Canadian citizens.

This view unequivocally placed hate speech outside the sphere of behaviour deserving of toleration, and asserted at least a minimal role for the state as a moral agent.

A distinct but related justification for curtailing individual rights can also be found in the thought of Canadian philosopher Charles Taylor. While liberalism requires that enforced morality conforms to the acceptable standards of all rational individuals, Taylor claims that it is only within a social context that individuals can develop their capacity for reason and morality (Nino, 1989; Morrice, 2000). He asserts that the ascription of rights is meant to protect some capacity of human beings, but that we only acknowledge these rights if the capacity they protect is deemed to be “valuable.” While we feel we have a duty to nurture these valuable capacities, the great majority of them only become valuable through membership in society. For this reason, Taylor sees rights as secondary to the duty of all individuals to “preserve the social context in which capacities develop” (Nino, 1989, p. 40). What this communitarian logic suggests is a “relativization” of duties and individual rights, which allows for determined societal values to play a mitigating role in the free behaviour of citizens (p. 41). This is especially relevant to the debate over hate speech, as the duty to maintain an enabling context for all individuals (equally protecting and encouraging the capacities of citizens) would justify limitations on free speech rights. Thus, while acknowledging that maximizing freedom of expression allows individuals to develop their natural capacities, the Communitarian notes that the excessive focus on *one* capacity, over another, can amount to a disvalue individually and for society (p. 50-51).<sup>4</sup> An individual, by the Communitarian’s wager, owes a debt to the society which protects and develops their own capacities, namely in maintaining the cohesion, harmony, and values of that society, even when some portion of their rights may be infringed. This reciprocity between

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<sup>4</sup>A practical example of this would be the maximization of individual autonomy allowing a person to choose to abuse drugs to the point of sacrificing their intellectual, physical, and moral capacities.

political community and citizen is viewed as the ideal configuration of society to the Communitarian school.

Having elaborated upon a few of the justifications for regulating hate speech despite the right to free expression, one may reasonably wonder where the dividing line must lie. At what point does a message become hateful, and how are we to objectively determine what forms of speech cause true harm? Ought this judgment to be made solely by the sentiments of national legislatures? Can there be a relatively more universal framework for resolving the hate speech debate? To answer these questions we must acknowledge all citizens as entitled to hold the individual rights their society affords them. Whether guaranteed by a nation's commitment to the UN's Universal Declaration of Human Rights, or its own constitutional provisions, the liberal democratic world recognizes all of its citizens as rights-bearing individuals (barring some problematic inequalities for particular minorities and immigrants that are beyond the scope of this essay). This acceptance, I argue, ought to be the minimum "moral starting point" for determining standards in hate speech regulation.<sup>5</sup> Recognition of individuals as rights-bearers not only generates self-respect, but commands respect from fellow citizens and the state (Mullender, 2003). As Rawls perceptively notes, "self-respect is secured by the public affirmation of the status of equal citizenship for all," and, by nature of its supreme value for every human life, it ought not to be distributed unequally (Ci, 2005, p. 256-257). My prescription then is devastatingly simple; Whenever the content of speech blatantly suggests to others that members of a particular group *do not* or *should not* possess the rights afforded to all citizens by law, treaty, or covenant, that speech constitutes hate, detracts from self-respect (and potentially security), and merits some form of regulation. Within this framework, a society would strongly affirm its commitment to mutual respect as a proper conception of the common good—just as most affirm

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<sup>5</sup>I borrow this phrase from Alasdair MacIntyre, as quoted in Morrice, 2000, p. 236.

international peace as intrinsically good—and could achieve a more defensible and equitable balance between freedom of speech and conflicting rights and values. Establishment of this type of hate speech regulation, I argue, is the means to uphold tolerance properly understood.

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