

**The Effects of Government Regulation of Hate Speech
on Freedom of Expression**

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1) Introduction

Freedom of expression is a fundamental right enshrined in section 2(b) of the Canadian Charter of Rights and Freedoms. As such, it is one of the core pillars of a functioning democracy. However, within the Canadian judiciary, the right for individuals to freely express their thoughts and opinions in a public setting has continuously been regulated. This derogates the government's negative obligation not to impede expressions that are otherwise personal opinions. While restricting free speech may appear to obstruct human rights, absolute free speech is not an inherent characteristic of freedom. Certain types of speech such as defamation, threats, and incitement to violence and/or discriminatory treatment are already prosecuted under pre-existing criminal and civil laws. In this way, the Charter guarantees rights and freedoms, as long as the subject is reasonably limited and justifiable in a free society. For this reason, section 2(b) has frequently been curtailed by Parliament to protect identifiable groups from targeted hate speech and discriminatory treatment based on immutable characteristics like race and gender. While parliament's promulgation of hate speech to protect free society appears understandable, the question remains whether Canadians must cede their fundamental right to expression. This essay argues that attempts to define and censor hate speech are unreasonable considering the subjectivity of "hate speech" according to J.L Austin's theory of communication, the lack of moral objectivity, and the risk of government censorship. In essence, it will explore how restrictions on free speech limit both what can be said and what can be said in an open society.

2) The Challenges Of Defining Hate Speech

In the legal context, hate speech falls under hate propaganda. It is characterized as publicly communicated statements that wilfully promote and incite hatred against a person or group based on race, religion, gender, and other similar grounds (Criminal Code, RSC 1985, c. C-46, ss. 319(1), 319(2)). However, hate speech is more complex within society than merely classifying certain expressions; rather, it functions as an evaluative system to analyze the substance of its referents and determine which speech warrants censorship (Brown, 2017). While perhaps intuitive, the nature of speech is inherently subjective, and designating certain expressions as intrinsically hateful is especially challenging. After all, what makes speech harmful? Is it the context, the combination of words, or the negative outcomes that result from the speech?

According to Austin's theory of communication, speech is divided into the following categories: (1) "what is said," (2) "what is meant," and (3) "what are the effects" (Austin, 1962). This theory highlights the fundamental difference between what is expressed and what is intended. When communicating, one uses words and phrases to express their thoughts. Throughout the utterance, the speaker intends to convey a message. From there, the speaker's words produce a reaction from the listener (Maitra & McGowen, 2010). In this way, communication is not immutable; each conversation is permeated by subjectivity and context.

Having established Austin's communication theory, the subjectivity of hate speech becomes evident. This subjectivity complicates the governmental regulation of hate speech. Consider this scenario, two men are talking to each other about politics. The first man looks at

the second, and says, “Islam is a threat to this country.” The second man appears shocked, but later that day he attacks a Muslim woman. Here, the locutionary act refers to the literal content of the speech. The meaning, however, expresses the speaker’s intention. The problem with interpretation is that different people will interact with words differently depending on their opinions and societal backgrounds. For some, the statement “Islam is threatening to this country” is denigrating, while others may simply see it as a critique of the religion. Therefore, to effectively measure the effects of speech, there must be actions that result from it. In this case, the speech impacted the listener, leading to an attack against a Muslim woman even though the speaker did not call for the death of anyone. This example shows that narrowing the definition of hate speech makes it broader in its interpretation and effect (St. Clare, 2018).

3) Government Censorship

The Canadian government has a negative and positive obligation to ensure the safety of its citizens. This duty requires the government to prioritize collective safety over individual rights by promoting social cohesion and protecting citizens from harm (Canada, 2021). This protection from harm includes hate speech that disproportionately targets minorities. By curbing such speech, the government aims to promote a more diverse, inclusive, and equitable society (Department of Justice, 2024).

Nevertheless, given the challenges in arriving at a workable definition of hate speech, it is crucial to consider whether the government is interested in censoring such speech. While the government’s effort to criminalize hate speech is understandable, the question remains who will arbitrate these laws? If the government is given too much power to determine what constitutes

“hate speech”, how do we know that it will reside within this prerogative without going beyond it when it benefits them politically? This could lead to an authoritative power that suppresses dissent and stifles free expression. For instance, earlier this year, the proposed Bill C-63 has recently raised controversy regarding its impact on online freedom of expression. The bill intends to restrict digital users and outlets from expressing ideas that could potentially lead to harm. Critiques argue that it will change the inherent purpose of online discussion and digital communication. In seeking to prevent the harm caused by hate speech, the principle of free speech must be balanced because it allows for the greater proliferation of ideas in an open society.

4) The Impact of Bill C-63 on Democracy

Bill C-63 aims to combat harmful content to create a “safe, inclusive, and open online environment.” For this reason, the Government of Canada outlined the 5 areas subject to regulation: child sexual exploitation, hate speech, non-consensual sharing of nudes, terrorism, and content that encourages violence. The proposed measure requires online communication service providers (OCSP) to block harmful content using algorithms and search engines within 24 hours, making it inaccessible in Canada (Saloum, 2024). If OCSPs do not comply with the act, the Digital Safety Commissioner (DSC) will have the authority to fine offending OCSPs \$10M, or 6% of their total global revenue.

While the proposed bill may create a “safe” online environment free of harmful content, algorithms and search engines could block legitimate content, compromise data confidentiality,

expose user ID, and increase federal intervention on the internet (Buell, 2024). In this way, Bill C-63 threatens to limit the flow of information in Canada and apply national laws to a global resource; thus infringing on the individual right to expression. Moreover, the *Online Harms Act* is ultimately unnecessary given that the *Criminal Code* already criminalizes “harmful” online expression. Section 163 already inhibits the publication of child pornography. Sections 83.21 and 83.22 criminalize that incites terrorist activity. The code also prohibits speech that vilifies and denigrates identifiable groups. Again, although there are positive elements to Bill C-62, government intrusion does not justify the duplication and amendment of already existing laws (Benmoussa et al., 2024).

Furthermore, if passed into law, the Online Harms Act will amend the Criminal Code by adding section 810.012 which promotes the new recognizance and preemptive punishment elements. Sections 810.012 (1) through (10) allows for preemptive action based on the fear that the defendant might commit a crime. This provision is in stark contrast to section 6(1) which maintains the presumption of innocence when facing criminal charges. Under this new section, internet users can be prosecuted simply because a complainant has reason to fear that they are inciting hatred, terrorism, or genocide (Benmoussa et al., 2024). If, after reviewing the complaint, the judge finds that there are reasonable grounds to suspect a potential threat, the court can order the accused to wear an ankle bracelet, stay away from the complainant, refrain from addictive substances, etc... In principle, the *Online Harms Act* endangers the judicial process by undermining both the right to free expression and the presumption of innocence. Rather than minimally impairing and justifying the proportional infringement of rights and freedoms, the proposed bill violates personal liberty.

5) Conclusion

The Online Harms Act poses a significant threat to democracy and social cohesion. Although it attempts to narrow hate speech laws, the subjective nature of “hate” and the risk of government censorship must not be ignored. Without a workable definition of hate speech, it is unreasonable to believe that we have developed an objectively true morality that allows us to determine which speech is permitted to be heard. This subjectivity opens the door to legal ambiguity and potential governmental censorship. While the Canadian Charter of Rights and Freedoms and the Supreme Court limit the abuse of fundamental freedom, stripping Canadians of their liberty does not constitute state protection.

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