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Why hate has no place in the criminal law

Stephen Guest, University College London, comments on the New Zealand Government's proposed new laws on hate speech

I would love it if New Zealand made one of those progressive stands on matters of freedom and equality that it has been famous for right back into the century before last and dropped all references to 'hate'. Mostly these proposed offences are covered by straightforward harassment and assault. Perhaps there is a need for an 'intimidation-type' offence, the rationale of which is clearly interference with individual freedom although I doubt it. I fear the current proposals capture the mood of the moment — that is, they are populist — and when analysed in later decades will seem both freedom-restricting and contrary to equality properly understood. There might also be a backlash of the Trumpian kind: many people just loathe political correctness rammed down their throats.

LACK OF EXPRESSED OR DISCERNIBLE PRINCIPLES JUSTIFYING THE USE OF CRIMINAL LAW

The proposed offences fail clearly to separate what is merely unpleasant or wrongful behaviour from what is harmful towards the personal freedom of others. I suggest the appropriate relevant principle justifying the criminal law should be that famously asserted in the mid-19th century by John Stuart Mill (*On Liberty* 1859 — see OUP edition 2008, at 21–22). He said that the only reason the state may justifiably use coercion is to prevent harm to others and that all other acts, however unpleasant, should not be the business of the criminal law. The moral justifications for this principle are that it both respects our personal freedom and protects our equal moral status with others. It is also a principle easily understood and widely assumed. In difficult cases, it makes us ask whether the point of a criminal prohibition is to prevent behaviour that *threatens a person's freedom* to act (also see Hart *Law, Liberty and Morality* 1961, and Raz *The Morality of Freedom* 1986).

Hatred in itself does not harm people although it may be a reason for action, a motive, just like the whole range of emotions. But it is an emotion, not an act. Hate, like jealousy, anger, rage, avarice — and, indeed, love — can all be reasons for action and sometimes result in violence. But motives, too, are very personal to us, and rightly represent part of our make-up, as human beings. *We* are the authors of our emotions and *we* should be their controllers. Their content should not be the subject of the criminal law. We consider our motives, our feelings and so on before we act. We have the power to curb our hatred, and suppress our motives. Motive in fact is rarely required in the definition of crimes and this has been true throughout the history of our criminal law. It would be eccentric of us to contemplate, say, criminalising jealousy and, indeed, love.

Mill argued that when coerced by the state into thinking and acting in directed ways, people would be wrongly restricted in choosing the nature of their lives — that is, from living according to their own lights. They would lose their freedom to think independently and express their thoughts in their own way, to be creative and self-initiating, or in his words 'to flower as human beings'. (I say nothing about whether it is possible to abolish hate).

On one point, Mill was famously clear. He emphasised strongly that persuasion, encouragement, and entreaty were entirely appropriate for getting people to behave in necessary and desirable ways, for this after all is what education is for. But he stopped firmly short of the use of criminal coercion for these purposes. For him, people's actions must be authentic — their own — and not directed by state coercive power unless of course it interfered with the freedom of others.

I therefore suggest that there should be no difference between various assaults motivated by hatred and assaults not so motivated. The criminalisation of the assault alone does the job. We would otherwise be employing the criminal law — coercion — to prevent a person hating. That I think is wrong. To preserve our unique status as human beings, our thoughts and our emotions must be our own.

THE INTIMATE CONNECTION BETWEEN THOUGHT AND SPEECH

It is useful to consider, in the light of Mill's view, whether thinking and having emotions is much different from *expressing* our thoughts and emotions, particularly in verbal form but in art form too. From early childhood we learn to form our own convictions, develop our emotional responses from interaction with other people. It is a two-way process, and it is difficult to see how people would develop and mature without that interaction. It is the life-blood of our education. Seen this way, free speech becomes part of the idea of forming our inner life. Not only that, the truism that our inner life should be ours alone, and so should be under our control justifies not only freedom of speech but also justifies our right to privacy. Privacy protects our innermost personal education. Privacy of thoughts, the innermost development of thoughts, 'sorting ourself out', experimenting with ideas before they are ready for the public, private enjoyment (which might include the thoughts of the mentally unstable), all must be protected by rights to speech and to privacy. The idea that freedom of thought may be suppressed, for example, whether through coercion, or indoctrination, or the effect of drugs, or frontal lobotomy seems intuitively wrong to most people. 'Living by your own lights', making decisions for yourself, about what you think, fuels the fundamental and

important distinction between education and the vast spectrum that includes coercion, indoctrination, regimenting, 'following the crowd', brain-washing, and submission.

Probably the perceived distinction between thought and speech is unanalytically and widely thought to form a much wider gulf than there really is because people think 'well, *I* think a lot of things but don't express them'; and, 'I sometimes say things are true that I don't think are true'. But thoughts underlie our speech, and each excites and stimulates the other in ourselves, and others. Criticising, persuading, experimenting, making jokes, being humorous, witty, imaginative, ironic, embarrassing, 'sending up', satirising, and 'insulting' are all part of this interplay between thought and speech. It is not surprising that many professional comedians abhor any suggestion that our thoughts be criminalised. (Anglo-American linguistic philosophy in the 50s and 60s made much of the point that speech and thought were closely related. Speech was believed to be necessary for thought and, conversely, thought was necessary for speech).

THE MEANING OF 'HARM'

I therefore suggest that where state coercion is called for, the requirement of harm (in the modified sense) to others should always be present. It cannot be the purpose of government to take a stand on what people think and express where that does not threaten the freedom of others. Merely being unpleasant, or hateful, to another person, in the absence of abnormal sensitivity, does not necessarily threaten their freedom. It does not necessarily interfere with a person's freedom to 'hurt' their feelings or make them 'suffer' by something that is said or done. Hurt feelings, feelings of being wronged, being dismayed by what other people say or do, or even being shocked, and suffering as a result, in most cases is part of the human condition. It is not odd, nor even unusual to suppose that, as James Marriot pointed out in a recent opinion piece for *The Times* ("If we want to live we have to suffer and weep" *The Times* (online ed, 29 July 2021)), even "[s]uffering will always rise from within us, no matter how many handrails and cushions the present cult of safetyism provides", quoting Schopenhauer's understanding that 'suffering is essential to life'.

Take the recent remark by the University of Auckland vice-chancellor Dawn Freshwater, responding to seven professors who had expressed the view that Māori science "falls far short of what we can define as science". She said that the expression of this view had caused "considerable hurt and dismay" among staff and students (*The New Zealand Herald* (online ed, 29 July 2021)). The use of 'hurt' in this sort of context is enormously exaggerated. What is a policeman, the prosecution, the general public to make of it? No one is 'hurt' by such a remark. 'Dismayed', perhaps, but not 'hurt' as the words did not harm anyone at all. And since the professors' remarks were not directed at any one person it is very difficult to see who could have been hurt or insulted or otherwise.

A useful test for when harm, and acts denoted by harm synonyms such as 'hurt', 'interference with liberty' and other cognates, is to ask, simply, whether someone's right — not necessarily a 'human' right — was infringed. Did members in general of Auckland University have a *right* that these seven professors not express their views? Would any one person, when identified, have a right that such a view not be expressed to them? The answer is quite clearly, 'no'. Even less convincing is the idea that members of Auckland University had a right not to be dismayed. Was anyone's right to be free violated by the expression of these views? Harm is a physical cognate because it imperils operability and thus freedom. In most cases it makes no sense to apply the idea to cases of being hurt 'because of what someone said'.

We should consider, too, whether hating, in itself, is wrong. Is hate an always undesirable and wrongful mental state? Is it wrong, for example, to hate injustice? Would it be clearly wrong to hate someone who sexually violated or carelessly killed your child? It is not clear to me that we necessarily criticize someone merely for hating. It does not seem to me to be such an undesirable emotion that we would wish to abolish it in ordinary life, let alone by the criminal law. Try my proposed test again: do we have a *right* that other people not hate us?

What I say about hate is true of all the emotions. Imagine attempting to abolish other emotions. Jealousy, and spite, and envy, and avarice, are — perhaps pointless — emotions but none of them on their own seems dangerous if they are unaccompanied by an intention to harm other people (see my remarks about 'intention' below). I imagine some of the most hateful (and spiteful, and envious, and avaricious) remarks are uttered between some couples on the verge of splitting up. And love? The impossible tangles involved in trying to find 'hostility' — the opposite of love and formerly a requirement of the offence of assault — in sexual offences against children led to its abolition. The defendant would say 'I wasn't hostile; quite the contrary'. It became clear that merely assault — a touching — of a particular age group and of a particular kind was sufficient.

To me, the idea of abolishing, as opposed to discouraging and even *learning* from such emotions seems consistent with James Marriot's remarks above, that these are just part of the human condition.

Consider the following. Hypothesise a crime that gives weight to assaults of the presence of hatred of an ethnic minority. It might do this either by making the motive of hate pivotal, or by making the intention to disseminate hate pivotal (or perhaps both). In either case, what does the supposedly pivotal role of hate add? Nothing in my view, but criminalised emotions. The hypothesised offence with the hatred removed is just an assault, and that is already an existing offence.

MORE SPECIFIC CRITICISMS OF THE PROPOSED WORDING

The proposal aims to 'protect' certain classes of people, defined by their 'characteristics', such as colour, sexual preferences and so on. I find this unnecessary and unimportant. I suspect it is a well-meaning and serious nod towards certain interest groups. The concerns of these groups are very important indeed, but in my view, those concerns should not be reflected in hate speech legislation. It is not the criminal law to banish hate of particularly unpleasant kinds, and the remedies should be sought much more seriously than at present through liberal means, education being the most obvious and dominant concern. The proposals are:

> The law would change so that a person who intentionally incites, stirs up, maintains or normalises hatred against any specific group of people based on a characteristic listed in Proposal One, would break the law if they did so by being threatening, abusive or insulting, including by inciting violence.

Restrictions of this wide-ranging proposal to preventing only 'violent acts', as Judith Collins has proposed, are too narrow. Threats, abuse, bullying, intimidation, frightening, stalking, and the brilliantly conceived modern offence of harassment (Harassment Act 1997) all cross the line to constitute interference with personal freedom but need not involve *violence*. Collins does, however, nod in the right direction of principle. Perhaps, being naturally conservative, her view errs on the side of a view that most adults are sufficiently robust to take all these less than violent but nevertheless harming activities.

I note that part of the justification is based on the idea of the civil wrong of defamation. But 'defaming *groups*' sounds so implausible, not just because of questions of proof of causation. Take the Auckland University example. Did these seven professors *defame* large numbers of people identified by the Vice-Chancellor as "staff, students and alumni"? In any case, since truth is an absolute defence to defamation, it is difficult to imagine that these professors did not believe that they have made a good case for the truth of their remarks. And establishing causation is problematic. To employ another test for defamation, how do you prove that the seven professors 'lowered the reputation of Māori science in the view of the public'? The analogy is very weak, and not only on the ground of the empirical evidence required.

The idea of causing 'hatred against' is unclear and uncertain to a high degree and so runs counter to principles of interpretation of the criminal law requiring publication and certainty. The main principle at stake is that of *nulla poena sine lege* (no punishment without law) which means that potential criminal liability needs to be announced clearly and succinctly so that people have a reasonable chance of adjusting their behaviour. The *nulla poena* principle requires the interpretation of unclear and uncertain laws to be interpreted in favour of the defendant (the rule of 'lenity', incidentally an important principle of Islamic criminal law). I can incite a person to kill, but to 'hate' and to 'hate against' a 'group' lacks clear direction. In normal speech we don't 'hate against', we just hate. The existing offence of incitement practically always covers the significant cases.

'Stirring up'

'Stirring up' someone to kill, or 'maintaining' an intention in them to kill, or to 'normalise' someone's intention to kill all seem to add further uncertainty to the initial uncertainty. How do you interpret, in favour of a defendant, what 'stirring up' means? It is inherent to its being a metaphor that it is unclear and so open to interpretation, offering very little guidance to police and to the public. Do I stir up something in my tutorial group if we have a heated discussion? 'Stir up' is a feeble — and I suspect dishonest — attempt to convey the impression that the law is getting at preventing harm to others while actually stifling our freedom to think and express our thoughts without a thought to harming others. 'Stir up' is the worst of all possible phrases as it tries to hide the impossible tension between mere thought and emotion, and interference with freedom. 'Encourage' would be better but 'incite' much better still, with the advantage that its use has been tried and tested over centuries. 'Inciting' criminal activity dates its stability back to the middle ages.

'Maintain' and 'normalise'

These words are, I suggest, redundant and again uncertain. I doubt they add anything to the proposed offence. When we believe we are right, and wish to express what we believe, of course we want either to 'maintain' or 'normalise' the view. Perhaps I wish to maintain and normalise my hate for injustice, or of violence against women, or of commercial treatment of animals.

The redundancy of the 'hate' parts of the offence

The main push of the proposal comes in its second part where there is a requirement, not clearly specified, that some of the offences do involve interference with freedom in the form of threatening, or inciting violence, of course. But we have clear criminal laws against all this — the list of assaults. 'Abusive' — sometimes abuse can serve a good purpose. When it threatens (harm) then that is in accordance with the harm principle, so why add 'abuse'? But not 'insulting' for we must be allowed to insult someone. What person really believes they have a right, enforceable through the criminal law, not to be insulted? And a person cannot have a right merely because they believe they have such a right because they might be mistaken in their belief. In that subjective sense of 'insult', I have insulted not a few of my students who unjustifiably thought they expressed in their essays accurate accounts of the law. And, for noting, in England and Wales in 2013, because of its effect on free speech, the word 'insulting' was *removed* from their Public Order Act 1986 in cases where no particular person could be identified who was insulted (Crime and Courts Act 2013, s 5) because of its effect on free speech.

I do not believe that the New Zealand Government can answer my objection that half of what is proposed here is a new set of criminal offences that in reality is designed to prohibit an emotion — hatred. For the reasons I have given, the criminal law ought not to outlaw hatred. All the principled part — as I might say — is contained within the ideas of *threats* and inciting *violence* and the encompassing idea of harm in the Millian, and obvious, sense. The sharp distinction that can be drawn between what is harmful and not was succinctly put by Sedley, LJ in the English and Welsh Court of Appeal in 1999 (*Redmond-Bate v DPP* 1999 EWHC Admin 732):

> Free speech includes not only the inoffensive but the irritating, the contentious, the eccentric, the heretical, the unwelcome and the provocative provided it does not tend to provoke violence. Freedom only to speak inoffensively is not worth having.

'I don't like that, so it should be criminalised'

There is an unhealthy current mood, one that none of the New Zealand political parties nor the New Zealand legislature should encourage as it represents a 'crowd control' mentality, one that — perhaps understandably — has become more common since, I think, the Christchurch massacre. This crowd control mentality thinks, on undemocratic lines, that 'we don't like that, so it should be punishable'. It is undemocratic because it ignores the force of a general principle of equality — the core principle of democracy — that entitles each person to their own private sphere of choice, to repeat, *equally* with everyone else. One of the United Kingdom's most well-known journalists, Matthew Parris, expressed this 'crowd control' mentality well recently when commenting on the English criminal justice system ("There are 3000 lifers who shouldn't be in jail" *The Times* (online ed, 31 July 2021)):

> We're sliding into an acceptance that tendencies, habits of

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imprecision of the words used, a more generous interpretation was arguably available to the Court. One important consequence of the interpretation reached by the High Court was the advantage of providing a straightforward test. In this respect Counsel for the Respondents submitted that the "more likely than not" meaning of "ordinary consequence" provided "... a clear yardstick so as to minimise the costs and delay of making a claim ..." (at [60]). This submission is particularly compelling in light of ongoing conversations about impediments to access to justice.

In a recent speech, Lord Justice Haddon-Cave expresses the view that "[t]he Rule of Law requires that the law is simple, clear and accessible" and questions "whether this increasingly [sic] complexity is the right direction and what it means for fairness and access to justice" (Lord Justice Haddon-Cave, Deputy Senior Presiding Judge, Court of Appeal of England and Wales "English Law and Descent into Complexity" (Gray's Inn Reading, Gresham College, London 17 June 2021)). It is the role of Parliament not the Judiciary to enhance access to justice by drafting statutory provisions which are as far as possible "... simple, clear and accessible". If, however, a generous interpretation of a statutory provision is available and tends to promote access to justice by simplifying the law, this consideration may constitute a makeweight argument supporting the more generous path. ❐

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mind, characteristics, types of person, patterns of behaviour, can be criminalised, rather than particular acts. The act then becomes evidence for the crime, rather than the crime itself.

LACK OF INTEGRITY WITH THE EXISTING LAW

The NZ legislature is contemplating a set of criminal offences that in effect would outlaw certain classes of hateful thoughts, or for breeding or 'normalising' such hateful thoughts. It is significant to appreciate the lack of integrity that the creation of such offences will present in two areas of criminal law that conflict with the present proposals.

First, it is not an offence merely to possess the *intention* to commit an offence. This is an extremely stable principle of the criminal law that has existed not only for centuries (in the English common law before the New Zealand Crimes Act) but exists in many legal systems. It is only where that intention is accompanied by a clear, unequivocal and possibly only penultimate act in preparation to carrying out an offence that an offence is committed under the rules governing inchoate crimes. One should note the important difference between 'hate' and 'intention'. The former does not imply action in the same way that 'intention' does. It does not follow that because someone hates someone, or a group of people, that they have any plan or aim to act in some way towards the object of their hate. But it *does* follow from a person's having an intention to do something that they have a plan to do something, and that they aim to bring about an altered state of affairs. In short, hate is not what philosophers of psychology term a dispositional mental state (that is, shows no disposition to act) whereas intention is such a mental state. If having an intention alone is not a criminal offence, a fortiori neither should hate be, if my argument so far is correct, because one or more of the proposed offences allows for hatred only to be disseminated, not 'carried out'. The failure in integrity of the criminal law that the proposed offences would thereby create is that hate itself would be legally prohibited by the offence, but not the mere intention to do a prohibited act.

Second, being insulted is different from the harm required for nervous shock in the civil law. Recall the 'hurt' caused to members of Auckland University alleged by the Vice-Chancellor. What 'hurt'? She surely meant 'insult' which seems under current proposals to warrant criminal penalty, and which would come nowhere the tests of the civil law. Compare 'insult' to the 'nervous shock' suffered by individuals as the result of negligent behaviour in the civil law (see the cases in tort on this, many involving shocks people confront on being confronted by serious accidents). For nervous shocks, tests require expert evidence by psychiatrists into a form of harm — serious psychological trauma (post-traumatic stress disorder that affects personal freedom). It has been repeatedly and rightly regarded as a form of mental harm rightly analogous to physical injury.

Why should the test for 'shock' — already far removed from 'mental hurt' — require such rigorous tests in the civil law but not for the criminal law? The 'hurt' cannot mean Auckland University staff and students were harmed in any conceivable sense. The New Zealand government cannot seriously be proposing that remarks of this kind interpreted as an 'insult' should be made criminal. It seems absurd that such 'insult' has been caused by 'defamation' on a group whose apparent beliefs about Māori science are different, a defamation what is more that has been 'stirred up' by seven professors.

FINAL REMARK

Rather than add to the increasing number of repressive criminal laws in Western democracies, I strongly urge the New Zealand government to take the bold step of abolishing all references to hate in its criminal law. Abolishing hate, rather than yet further repression with unclear and difficult to enforce laws — misguidedly thought to expand freedom for certain minority groups — would be a step towards a more equal and liberal society. Instead, the already tried and tested laws of the various forms of assault, including incitement, the various inchoate offences, and the laws for terrorist emergencies will, properly considered, be sufficient.

It is to me obvious that there are other ways forward. Education and, probably, a targeted distribution of resources into national and community efforts towards the repairing of unpleasant schisms in New Zealand society. More difficult, yes, more expensive, yes, longer term, yes, but not a dangerous distortion of the principles that in a civilized legal system should provide coherent justification to our criminal law. ❐