**Sanitizing or Civilizing the Airwaves?
Towards a Regulatory Ethic for the Moral Regulation of Expression
in Public Affairs Programming**

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Abstract

In Canada, broadcast regulation includes policies governing harmful expression. As a form of moral regulation, such interventions must be restrained, particularly in a democratic communicative environment, which requires that the need for civility be balanced against the need for free speech in order to foster a public sphere that is accessible to all who wish to participate. Theories concerning notions of excess (Mariana Valverde's theory of moral capital) and harm (John Stuart Mill's principle of liberty) as means of justifying moral regulation of expression are explored and put aside in favour of Jürgen Habermas's ideal speech situation, which proposes an ideal environment for successful communication to occur. When applied to public affairs programming, the heart of the public sphere in broadcasting, this theory instructs that qualities of accountability, civility and respect can be used as the ethical basis for developing guidance as to when regulation of broadcast commentary is justified.

Disclaimer

For the past six years, I have been the Senior Policy Analyst responsible for social policy in broadcasting at the CRTC, Canada's broadcast regulator. The desire to explore the subject matter contained in this thesis arises not only from personal interest but also from my professional experience; furthermore, much of the knowledge and expertise I have developed in my professional capacity has informed this academic project. However, the views expressed herein are solely mine and do not represent or reflect the views of the CRTC.

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Chapter 1

The Challenge of Moral Regulation in Canadian Broadcasting

A licensee shall not broadcast ... any abusive comment that, when taken in context, tends to or is likely to expose an individual or a group or class of individuals to hatred or contempt on the basis of race, national or ethnic origin, colour, religion, sex, sexual orientation, age or mental or physical disability.

- CRTC Regulation for Radio and TV

The Focus and Purpose of This Thesis

The regulations and policies enacted by the Canadian Radio-television and Telecommunications Commission (CRTC), Canada's broadcast regulator, fall into three broad categories: those relating to technical matters such as engineering standards; those relating to cultural policy objectives embodied in Canadian content regulation; and, those relating to the nature and accessibility of programming. The latter category encompasses a broad variety of social concerns, including closed captioning for the hearing impaired and described video for the visually impaired; setting standards for violence on television, offensive language, pornography, advertising to children, and alcohol advertising; and ethnic and Aboriginal broadcasting, cultural diversity, and the portrayal of women and people with disabilities. The regulations and policies developed in these areas are motivated in general by the objectives of the Broadcasting Act, which states that programming should be of high standard, respectful of equality rights, and reflective of Canadian values as well as contribute to Canada's social, economic, and cultural fabric. The Act further specifies that programming should cater to all ages, tastes, and interests and provide exposure to differing opinions on matters of public concern. Finally, it affirms that in pursuing these objectives, the broadcast regulator is not to engage in

ensorship or intervene in the day-to-day programming decisions made by licensees. In other words, the CRTC must respect freedom of expression as upheld by the Canadian Charter of Rights and Freedoms.¹

Some of the policies developed by the CRTC in this context are, in effect, social policies. That is, they are attempts to create, through broadcasting, a certain kind of society in Canada, one marked by such qualities as equality and civility. These social policies are generally imposed equally on all licensees. They are enforced through a range of measures that could be placed along a continuum from passive to active regulation, ranging from voluntary standards generated within the industry to legally-binding commitments. Some social policies have shifted across this continuum over time, especially when the passive approach has not yielded satisfactory results. A recent example of such movement has been the CRTC's efforts to ensure the reflection of Canada's ethnocultural and Aboriginal diversity on mainstream television (Public Notice CRTC 2005-24). In general, the CRTC has lacked middle-range enforcement tools to support its social policies – having few options between public apologies and license suspension or cancellation. It cannot, for example, impose fines on broadcasters for failure to meet social policy objectives.

This weakness has been particularly noticeable in the case of social policies involving what sociologists call “moral regulation.” Although definitions vary, moral regulation involves not only the attempt to shape morals but also the application of a certain ethic or moral code in deciding right and wrong behaviour. In contrast to social policies such as closed captioning, which are based on rights of access and technical

¹ These objectives are found in the Broadcasting Act at sections 3(1)(g), 3(1)(d)(iii), 3(1)(d)(ii), 3(1)(d)(i), 3(1)(i)(i), 3(1)(i)(iv) and 2(3), respectively.

capability, restrictions on pornography or offensive language would control on-air behaviour and require the regulator to draw some kind of moral line in the sand. For that reason, their enforcement through weak measures is unlikely to be successful, while the use of strong ones is likely to seem excessive.² For any regulator of expression, even the use of moderate measures is problematic unless the basis of the regulator's ethical criteria are clear and generally acceptable to all concerned, including both the broadcasters and the "concerned public" responsible for policing adherence to such behavioural standards.

The present thesis focuses on one particular area of moral regulation within the broader spectrum of social policy-making by the CRTC; namely, its attempt to eliminate the most harmful kinds of expression on the air. This concern has most recently arisen in information-oriented programming formats, ranging from traditional "controversial" broadcasting to talk radio. At its most extreme, "abusive commentary" promotes hatred and contempt and as such is specifically prohibited by the CRTC. However, there are many forms of commentary that some might consider harmful that, while falling short of inciting hatred, can undermine full participation in the broadcast public sphere. Even determining when a broadcast is, in fact, inciting hatred is difficult. How far must these forms of harm go before the general desire for freedom of expression should give way to the need for a reasonably respectful forum of public exchange and debate?

Chapters 2 and 3 of this thesis will examine three ethical perspectives that might provide a reasonably workable approach for regulators of expression in seeking to

² Measures available to the CRTC to deal with repeated non-compliance problems include: short-term licence renewal, issuance of a mandatory order (to comply with the regulations), suspension, revocation or non-renewal of licence. The CRTC has itself stated that "the latter measures are rarely used, and in the Commission's view, should generally be confined to cases where it is satisfied that none of the other available measures would be effective" (para 134, Decision CRTC 2004-271).

determine when commentary has become unacceptably harmful to the point of requiring regulatory intervention. The first perspective will be Mariana Valverde's theory of moral capital, which supposes a need to manage *excess* and the harm to society that apparently results from such excess. The key question here will be whether the concept Valverde identifies provides a means of placing limits on the management of excess or whether, from her perspective, any offending, as distinct from harmful, expression would be considered unacceptable. Moral capital as a theory, however, does not appear to consider that the desire for state interference in such basic democratic principles like freedom of expression must always be tempered. This suggests that it would be useful to reconsider the classic argument of John Stuart Mill as to when state interference with human freedoms is justifiable. Mill's principle of liberty provides a classic perspective on the circumstances in which the state has the right to interfere with the liberty of the individual. Unlike Valverde's theory, which would allow the state to infringe on personal freedom in order to promote social good, Mill argued that restrictions should only be placed on freedom of action to prevent harm from being done to others. Considering that Mill teaches us that the greatest good we can pursue is that of allowing each individual to pursue their own good in their own way, fostering a communicative environment wherein conditions for this "good" are not prevented from thriving becomes key. On the surface, therefore, Mill's principle may provide a more workable way of balancing freedom of expression against the desire for a "safe," civil public sphere. The question that arises, however, is whether even Mill's approach is still too broad to assist in determining circumstances in which some kinds of harm may need to be tolerated if freedom of expression is not to be unduly undermined. In the final chapter, therefore,

consideration will be given to Jürgen Habermas's theory regarding communicative rationality. Despite various criticisms levelled against it, Habermas's description of the ideal speech situation, which he proposes as the ideal environment for (successful) communication to occur, provides a more instructive starting point for providing guidance as to when regulation of broadcast commentary is justified.

To set the stage for these analyses, it is first necessary to get a better idea, through a number of case studies, of the various factors involved in attempts to regulate expression considered to be harmful to the point of being abusive, as the CRTC defines it; to consider more carefully the nature of moral regulation and the social pressures that lie behind it; and, finally, to demonstrate the need for a flexible, but reasonably concrete, ethic for determining when harmful broadcast commentary calls for regulation.

Case Number One: CHOI-FM

On July 13, 2004, a rather unusual event occurred in Canadian broadcasting. CHOI-FM, a popular French-language commercial radio station in Québec City, had its licence taken away. This decision by the CRTC marked the first time a Canadian broadcaster's licence was not renewed because of its verbal content (Decision CRTC 2004-271). Morning show host shock-jocks Jeff Fillion and André Arthur were alleged to have been regularly using their microphone as a platform for engaging in harassment and personal attacks against both public figures and private citizens; making hateful and contemptuous statements towards Blacks and people with disabilities; and revelling in sexist and other offensive comments. Based on an investigation of these allegations, CHOI-FM was found to be in violation of various provisions of the Broadcasting Act, including the requirements that programming be of high standard and contribute to

Canada's social fabric; the CRTC's prohibition against abusive comment; and its own conditions of licence.³

This decision was not made easily. Attempts had been made by the CRTC to change CHOI's pattern of behaviour over a four-year period. Ultimately, the station did not improve its conduct and indicated at its licence renewal hearing in February 2004 that it had no intention of doing so. Given that it has few regulatory tools to deal with such extreme behaviour, such as the ability to impose fines, the CRTC was left with little recourse but to disallow the renewal CHOI-FM's licence. In so doing, it set an important precedent for future regulation of morally problematic programming.

For months afterward, English and French newspapers were filled with headlines such as, "A stain on Canada," "The CRTC has gone too far," and "Should we pull the plug on the CRTC?" These editorials accused the CRTC of promoting a nanny state and worse; one labelled the CRTC a group of "censorial "culture guardians" more reminiscent of old Soviet values than those of a modern democratic country like Canada" (Green, 2004:9). Public protests followed, facilitated by Genex, the owner of CHOI, which sent 50 busloads of its supporters to Parliament Hill, along with a petition to reinstate the station, signed by 154,000 fans (Hoy, 2004:A17). Ultimately, Genex appealed the CRTC's decision to the federal courts on the grounds that it was an undue infringement of freedom of expression.

³ CHOI-FM was said to have made relentless use of the microphone for personal attacks and vendettas and to have violated people's privacy and dignity (especially that of Sophie Chiasson, a Québec TV weather personality, who went on to win a civil defamation suit against the station), both of which violated its own Code of Ethics. Earlier CRTC decisions further found CHOI-FM to have contravened several aspects of the Sex Role Portrayal Code. Both codes were conditions of licence for CHOI.

In September 2005, the Federal Court of Appeal upheld the CRTC's decision, affirming the broadcast regulator's ability to limit freedom of expression. In providing the Court's reasons for its judgment, Mr. Justice Létourneau stated that freedom of speech does indeed have limits:

The appellant makes much of the guarantee of freedom of expression in paragraph 2(b) of the Charter [of Rights and Freedoms] and seems to want to treat it as unqualified, something that the courts have never recognized. I do not think I am mistaken in saying that freedom of expression, freedom of opinion and freedom of speech do not mean freedom of defamation, freedom of oppression and freedom of opprobrium (paragraph 221).

This is a strong stance that articulates well the often-stated argument that freedom of expression is not an absolute. How, then, does a regulator go about determining when expression crosses the line into defamation, oppression and opprobrium? Certainly, defamation is dealt with in other laws. But how does a broadcast regulator go about determining when speech or expression constitutes oppression or opprobrium?

Expression that oppresses or disgraces is less a matter of what is said or whether it is accurate or true, as in the case of defamation, than of *how* it is said. Its identification depends on a moral judgment as to what is acceptable. The Court's decision provided little guidance on this matter.

Case Number Two: Al Jazeera

In 2003 two Canadian cable providers applied to the CRTC to add Al Jazeera, the Arabic-language 24-hour news service from Qatar, sometimes referred to as the CNN of the Middle East, to the list of non-Canadian services that are eligible for digital distribution in Canada. This "eligibility list" is designed to ensure that non-Canadian services do not compete with Canadian services for audience share. It does not result in

the imposition of any regulatory obligations, such as Canadian content or content standards, on those foreign services; it merely allows distributors to offer these services to their subscribers (Public Notice CRTC 2000-173). As the CRTC's 2004 decision explained, given that Canada had no Arabic-language 24-hour news service at the time of the request, Al Jazeera passed the standard competitiveness test normally used to determine whether services can be placed on the list. However, due to a pattern of past comments that would be characterized as falling under the definition of hatred or contempt if broadcast in Canada (such as advocating that all Jews are dogs and pigs and should be shot), many members of the Canadian Jewish community and the general public expressed grave concern about allowing Al Jazeera unrestricted access to the air-waves. At the same time, however, many people from Arabic-speaking communities and civil liberties groups argued that since such comments were limited to one or two programs, Arabic-speaking Canadians should not be denied access to an entire service because of the problems with those one or two shows.

Ultimately, the CRTC determined that the service had value in terms of its ability to provide service to an underserved community in Canada. Mindful, however, of a pattern of comments that would, if broadcast in Canada, likely be found hateful or contemptuous towards an identifiable group, the CRTC took the unprecedented step of imposing an abusive comment regulation on a foreign service: it made any cable or satellite distributor choosing to distribute the service in Canada responsible for ensuring that abusive comment did not persist on Al Jazeera (Public Notice CRTC 2004-51).⁴ As

⁴ The CRTC did so by granting distributors authority to alter or delete the signal as they would see fit for the purposes of managing problematic programs or portions of

Michael Hennessey, then president of the Canadian Cable Television Association, put it, the decision “sets a frightening precedent and virtually ensures that no distributor will ever carry this service in Canada,” as no distributor appears willing to risk CRTC sanctions if they fail to manage abusive comment (CCTA, 2004).

Not only does this decision set a new precedent for foreign services, it is an illustration of the severity of the potential consequences associated with the abusive comment regulation. Furthermore, it is a decision that represents a timely example of the legitimate fear some may have in terms of a government body exercising restraint with its power to regulate expression. The Al Jazeera case illustrates the risk of potentially overzealous regulation. Al Jazeera had not even been broadcast in Canada, had not been given the chance to demonstrate whether it could play by the Canadian rules.

Case Number Three: Mojo Radio Vancouver

In 2004 CHMJ, known at the time as Mojo Radio Vancouver or “Talk Radio for Guys,” also came under CRTC scrutiny for abusive commentary. In Broadcasting Decision 2004-196, the CRTC found a broadcast of the *Tom Leykis Show* on CHMJ to be in violation of the abusive comment regulation. A syndicated American “shock-jock” call-in program ostensibly about current events, the show primarily focused on dispensing misogynist advice about the best way to date and treat women for the purpose of pursuing sex without the complications of relationships. One broadcast in particular was called to the attention of the CRTC by a listener complaint about a portion of the program that, upon investigation, was discovered to be a promotional segment for the

programs, an authority never before given to distributors for the purpose of managing morally problematic content.

overall show. The segment featured a caller who appeared to be bragging about anally raping his girlfriend while she was unconscious. The CRTC concluded that the use of this clip as promotional material could be regarded as encouraging callers to share similar exploits, thus sanctioning and promoting violence against women.

While examining the logger tape of the episode in question, the CRTC came across what it found to be four other segments that were also problematic. These segments, labelled (b) through (e) in the Commission's decision, covered a variety of topics, namely: a discussion about how to keep women insecure in order to manage their "bitchiness" (segment b); a story shared by a man who tricked his girlfriend into having an abortion (segment c); a call from a 12-year-old boy thanking the host for his advice on how to treat women (segment d); and, a call from a woman wishing to discuss how fat and unattractive she feels she is (segment e). The decision only articulated reasons for why two of these additional segments exposed women to hatred or contempt and did so only in very general terms:

The Commission considers that the additional program segments ... also contained content that, given its context, tended to expose women to hatred or contempt ... For example, it considers that program segment (b) is particularly contemptuous and abusive of women, as the denigration is clearly articulated and generalized so as to apply to all women, through the combination of its imagery of violence, including sexual violence, and the "advice" that women are seemingly only worthy of psychological manipulation for the purposes of sex. Program segment (d) also runs afoul of section 3(b) of the Regulations, as the segment was likely to expose women to contempt through its clear encouragement to children to be contemptuous of, and abusive to, women (para 19-20).

While the comments in the addressed segments no doubt fulfill the above criteria of abusiveness, those in the other two segments were arguably merely tasteless and crude discussions about women that did not seem to include the element of violence. A case

could be made that these comments included degrading commentary, which would run afoul of the Sex-role Portrayal Code's provision against degradation and exploitation of women (Clause 4). Why these are also considered to be abusive, as a specifically defined harm, is not made clear in the CRTC's decision. This lack of clarity may explain why the station's owner, Corus Radio Company, concluded that the *Tom Leykis Show*, while being the most popular one in the station's line-up, was too burdensome in terms of ensuring its adherence to CRTC regulations and cancelled the program (Cassaday: 2004).

Each of these cases attempts to illustrate that in order to qualify as "abusive comment," a comment or pictorial representation must not merely be offensive or generally harmful. It must be abusive to the point that it is likely to or in fact exposes an identifiable group (based on the list of groups in the above-quoted provision) to hatred or contempt. As legal terms, hatred and contempt have been interpreted in the courts to be quite narrow concepts.⁵ While the line between the two is not entirely clear, statements must be clearly advocating hate, violence, genocide, expulsion, or similar degrading or

⁵ Specifically, with respect to "hatred," the Supreme Court of Canada in *R. v. Keegstra* said: "...the term 'hatred' connotes emotion of an intense and extreme nature that is clearly associated with vilification and detestation...Hatred is predicated on destruction, and hatred against identifiable groups therefore thrives on insensitivity, bigotry and destruction of both the target group and of the values of our society. Hatred in this sense is a most extreme emotion that belies reason; an emotion that, if exercised against members of an identifiable group, implies that those individuals are to be despised, scorned, denied respect and made subject to ill-treatment on the basis of group affiliation" (S.C.J., 1990, No. 131). In *Canada (Human Rights Commission) v. Taylor*, the Court relied on the following passage from a Human Rights Tribunal case that distinguished "contempt" from "hatred" in the following way: "...To say that one 'hates' another means in effect that one finds no redeeming qualities in the latter. It is a term, however, which does not necessarily involve the mental process of 'looking down' on another or others. It is quite possible to 'hate' someone who one feels is superior to one in intelligence, wealth or power. ... 'Contempt' is by contrast a term which suggests a mental process of 'looking down' upon or treating as inferior the object of one's feelings..." (S.C.J., 1990, No. 129).

exclusionary treatment of an identifiable group, on the basis of their membership in that group, in order to be considered abusive comment.

To illustrate, consider the following example. Imagine a commentator in a public affairs radio program discussing the role of women in modern religion says that “I think not allowing women to be Catholic priests is stupid.” A Catholic group files a complaint to the CRTC, charging that the offending comment is contemptuous of the Catholic religion. They argue that this comment is disrespectful and generates misunderstanding about their faith. While it is fair to say that the comment is not particularly respectful on its face, the intention of the comment was clearly to challenge a practice of the Church, not respect it, and thus is not really a question of being respectful. One can question an institution’s practice without leading to disrespect for the entire institution or for those who are members of that institution. Further, there is no direct path that an instance of disrespect leads to harm, particularly a harm that rises to the point of exposing Catholics to hatred or contempt. The comment may be disrespectful, but it is not abusive, as it is merely an observation, an expression of opinion, lacking in malice or aggression. It does not advocate (either implicitly or explicitly) that Catholics are worthy of the listeners’ hatred or contempt; in fact, it instead attempts to seek understanding of an alternative point of view. Seeking understanding is the essence of successful communication (Smith, 1986:639-40). It is not necessary that such understanding be limited only to sophisticated, eloquent or gently expressed opinions.

By being set out in the CRTC’s Regulations (which are clear legal requirements, as compared to most social policies, which are often articulated in somewhat less binding policies and industry codes) the consequences of broadcasting abusive comment are

straightforward in the sense that if a broadcast is found to be abusive, a violation of the Regulations results, and if a pattern continues in this path, licensees will be required to defend that pattern at licence renewal or face significant sanctions, as the above cases indicate. However, the case studies also indicate that not only is applying such a rule challenging, it can be misinterpreted, over-interpreted or otherwise overzealously applied. In other words, the application of such a rule requires ethical or moral guidance.

What is Moral Regulation?

Moral regulation can mistakenly be regarded simply as the regulation of “morals,” with the implication being that regulation generally somehow does not involve moral choices. A more comprehensive approach, however, would be to regard moral regulation as any attempt to bring about “good” or “right” behaviour and prevent “bad” or “wrong” behaviour *where these terms are understood in a moral context*. The distinction between “good behaviour” and “morally good behaviour” might be illustrated by the following example. In Canada, motorists are expected to drive on the right hand side of the road and are subjected to fines and other penalties if they do not. But in some other countries, the rules of the road require driving on the left. One set of rules are no “morally” better than the other because no negative consequences necessarily follow no matter which set is chosen. In the case of regulations requiring (or not) people to fasten their seat belts, on the other hand, the choice is a moral one. This is because either course of action entails certain negative consequences, even if the effects of not buckling up (potential injuries and death) are much greater than those of being required to buckle up (loss of personal freedom). Decisions between different courses of action or behaviour become moral decisions precisely where those decisions cannot rule out all possible negative

consequences. It is in these situations involving a dilemma of consequences that moral codes or ethics such as utilitarianism – choosing what would yield the greatest happiness of the greatest number – come into play.

It would not make sense to apply any such ethic to the case of whether to drive on the left- or right-hand side of the road, but certainly would make sense in the case of buckling up. It would also make sense to use some kind of ethic in situations involving harmful commentary on the airwaves, especially if the assumption is that “harm” can vary greatly. Under what conditions should a regulator seek to prevent or at least punish harmful expression? The answer is by no means obvious since it involves weighing the consequences of different levels of harmful expression against the consequences of a regulatory body trying to limit such commentary in public exchanges.

What Accounts for Moral Regulation?

Regulating expression on moral grounds is risky business. If philosophers have never agreed as to what makes an act moral or immoral, how could a broadcast regulator pronounce on the morality of broadcasters’ behaviour? What ethical standard should it bring to bear on broadcast speech? And how far should a regulator go in applying any such standard? What limits should be placed on its interference with freedom of expression on moral grounds? These questions are particularly pertinent in the current Canadian broadcasting environment with its 200-plus channel universe.⁶ Despite all the

⁶ The plethora of choices the Canadian system now offers is represented by the close to 200 Canadian television channels available on every topic, taste and language imaginable, augmented by ever-increasing lists of non-Canadian services in English, French and third languages (not to mention the array of radio services across the country). There is something for everyone, including: services for specific cultures, ethnicities, religions, and regions; content organized around specific genres, and niches of

choice provided among a multitude of perspectives and modes of expression, audiences still tend to demand that some level of decency be respected in programming. Believing that the airwaves are regulated because they are a public good, many citizens feel that they have a right to expect that certain standards be met. For example, as part of its 2001 critique of the Canadian broadcast industry's self-regulatory system, MediaWatch conducted an opinion poll of 750 Canadians about attitudes towards a range of harmful and offensive programming. It found that "the most general concern was about a lack of morals on the media landscape. Violence, bad language and ignorant or rude behaviour were most frequently cited as giving offence" (Coulter et al, 58-60). This poll supported MediaWatch's demand for a system more reflective of community standards. Why do such demands persist?

One possible answer can be found in the work of turn-of-the century sociologist Emile Durkheim. According to Charles Marske, in his work to discover a sociology of morals, Durkheim was concerned with understanding the ways in which control over social and individual action occurs (1987:1). In particular, Durkheim wanted to discover whether the advancing division of labour resulting from modern industrialization was normal and healthy. As Marske explains, for Durkheim, "the evolution from traditionalism to modernity...paradoxically expands the role of the state while simultaneously increasing the level of individualism in society" (1). Durkheim believed

those genres, such as history, biography, documentaries, news and public affairs, drama, weather, sports, science, fashion, and sex & sexuality; "lifestyle" services for women, men, families and gays & lesbians; and even oddities such as a channel for pet lovers (CRTC, Broadcasting Policy Monitoring Report 2005). More choice results in more competition, which in turn requires continued regulation to manage that competition. Changing technology (such as the transition from an analog to digital environment) adds additional regulatory demands to this environment (Public Notice CRTC 2006-23).

that the transition from traditional to modern society carried with it the need for a new collective morality, one involving a respect for human individuality. Although responsibility for achieving this morality was assigned to various groups, the state was thought to play a crucial role. For Durkheim, the main goal of the state is to “persevere in calling the individual to a moral way of life” (Marske, 279). Only the state could guarantee that individuality, as opposed to mere individualism, is respected and fostered in society.

Among those influenced by Durkheim’s view of the responsibility of the state in managing collective morality are Philip Corrigan and Derek Sayer, who coined the term “moral regulation” in *The Great Arch: English State Formation as Cultural Revolution* (1985). Like Durkheim, they see moral regulation as a response by the state to social anxiety over the transition from a traditional society, in which morals were defined by the church and enforced by the state, to a modern one, in which the individual is paramount. “State formation in the modern period,” they write, “involves a deepening emphasis on bonding and controlling all the members of society” (quoted by Emy, 1987: 215). For Corrigan and Sayer, it is the process of bonding that distinguishes moral regulation from other kinds of regulation.

Bonding, in the sense of being a uniting force, implies acknowledging and fostering an ideological connection amongst members of a group, at an emotional “gut feeling” level, where moral views on such things as offensive language and concerns about the impact of media violence on children reside for the average person. This is not to say that the average person does not consider his or her moral positions on such issues at a cognitive level, but rather that positions about the moral rightness or wrongness of

moral expression tend to start at the emotional level, as Kenneth Thompson and Anita Sharma suggest, become entrenched at the ideological level, and may never proceed to the stage of being defended rationally. Through my experience as the senior policy analyst for social policy at the CRTC, I have seen many complaints about program content wherein the complainant expresses offence and concludes by saying that the content in question simply has “no place on the airwaves.” This “gut feeling” – that the offending program is somehow inherently or intrinsically wrong at a moral level – is often provided in place of a rationale for why the program is otherwise problematic. It is reflective of what Thompson and Sharma characterize as a societal reaction to being exposed to values or modes of expression that are not reflective of a perceived common moral language or standard, and thus “feelings of moral unease and being at risk” arise (453). As such, moral regulation, by attempting to “act on conduct that is deemed intrinsically bad or wrong,” engages moral discourses for the purpose of constructing a “moralized subject and an object or target, which is acted upon by means of moralizing practices” (Hunt, 1997:6-7). In other words, moral regulation attempts to respond to the moral concerns expressed by the “concerned public” in order to present or instil a united stance on a particular issue deemed to be a social good. Whether intervening in moral expression in fact bonds society in the process is another question, contingent on both the intention and the outcome of the particular intervention itself. What is pertinent is that this bonding feature is specific to moral regulation.

To illustrate, let us go back to the traffic example as one that is not moral regulation. The regulatory choice of mandating that traffic be on the right side of the road versus the left side is clearly not a moral one, because what matters is simply that all

drivers follow the same rule, to ensure the efficient management of traffic. While one could argue that by mandating that all people drive in the same direction they are united together into a cohesive group of “traffic,” they are not bonded over any particular social good. Nor do drivers need to take a stance on the rule in order to follow it. Rather, they work together to respect the rule to ensure that all are able to move from point A to point B efficiently and safely. Even if a lobby group formed to demand that all traffic adopt the British way of driving on the left hand side of the road, its campaign would be hard pressed to find a moral basis because there is nothing intrinsically good or bad about driving on one side of the road or the other. Instead, each practice is simply a preference that has evolved to become the norm for traffic in each society.

When the CRTC embarks on a policy intervention to address morally problematic expression in programming content, this kind of regulation can be considered to be moral regulation because it attempts to legitimate certain kinds of moral expression and behaviour, while discouraging others. This supports Hannu Ruonavaara’s view that “...moral regulation is a legitimating activity; its function is to make certain social arrangements seem justified and natural” (1997:280). Thus, not only is moral regulation about social control and bonding, it aims to do so by attempting to legitimize particular moral positions. This legitimization process can be seen in many of the CRTC’s social policy projects. It does not simply pronounce a particular issue to be problematic; rather, the CRTC tends to invest years in time and resources researching the issue, canvassing the general public and experts alike, surveying and sometimes commissioning formal

research, all in order to have as much evidence and support available to be able to legitimize the position it imposes on broadcasters.⁷

Ruonavaara further argues that the specific aim of moral regulation is to change the identity of the regulated, “albeit via peaceful means such as education, propaganda, and enlightenment” (289). Talk of social control and changing identity calls to mind dark, insidious images from a Big Brother dystopia. However, it is important to understand that moral regulation is not automatically a conservative, dictatorial, or backward-looking form of controlling the masses. Instead, it is a response to anxiety about differing reflections of morality in an increasingly complex, pluralistic society. In short, moral regulation attempts to present or instil a united stance on a particular issue deemed to be a social good.

The Need for an Ethic for the Regulation of Broadcast Commentary

Understanding moral regulation to be a state-driven process is useful, but Corrigan and Sayer’s formulation does not, on its own, establish a framework for understanding the pressure for moral regulation of broadcasting in particular. Perhaps this pressure arises from what Karol Jacubowicz identifies as society’s quest for a “representative communicative democracy;” that is, one which includes “the ability of every group or social force to seek to affect policy making on matters of importance to them” (1993: 48). For Jacubowicz, the “old” democratic communication paradigm of the 1960s was based on a number of fallacies, such as thinking that the same communication needs and capabilities are shared equally by all members of society, or that increased

⁷ For instance, the CRTC’s Gender Portrayal Policy, which includes the Sex Role Portrayal Code, evolved over a 20-year period, including extensive research, public hearings and consultations (Public Notice CRTC 1992-58).

choice, diversity, and democratic communication will automatically emerge as new technologies arise (38-43). The development of a “new” democratic paradigm explains, in part, why demand for content standards persists. At the same time, however, the current broadcasting environment has its obstacles to representative communicative democracy. According to Jacobowicz, these include the logic of the commercial system, the gradual emergence of an international public sphere, and the gradual disappearance of a national public sphere (46-47).

Applying Jacobowicz’s perspective to the moral regulation of expression on the airwaves, the pursuit of social policies through the regulation of Canadian broadcasting can be seen as a response to the “viewer as consumer” logic that has resulted from the transformation of broadcasting into an international industry almost exclusively driven by commercial goals. Under that logic, viewers or listeners, when offended as consumers, can choose to watch or listen to something else or not tune in at all. In contrast, audiences/citizens as participants in a communicative democracy seek accountability from broadcasters via demands for content standards set by the broadcast regulator on their behalf.

Despite Linda Trimble’s observation that social policy in broadcasting appears “antithetical to the CRTC’s managerial approach to regulation...[which] emphasize[s] management of industry structure and avoidance of interference in programming content” (1992:138), moral regulation arises in response to societal concern over the moral health of this omnipresent and ever-influential mass medium, a concern predominately articulated to the CRTC by the “concerned public.”

Who is this concerned public? In his research on how public agendas are set in electoral politics, W. Russell Neuman explains that the public opinion that influences government decision-making often comes from a variety of “interest publics,” composed of “a smallish sub-group of informed and concerned citizens who actively discuss the issue among themselves, attempt to influence others, and bring their opinions to the attention of the authorities” (1986:32). The submissions to the CRTC from the concerned public – Neuman’s interest publics – such as advocacy groups, are often the first to raise concerns with the CRTC, and serve to inform the debate by educating the industry and the CRTC about the consequences of not addressing a particular issue. Groups like MediaWatch (an advocacy group concerned with the portrayal of women and girls in the media) and the Centre for Research Action on Race Relations (an organization concerned with the coverage and portrayal of ethnocultural minorities in the media) have made their cases at various public hearings throughout the years, combined with sustained pressure via the complaints process, especially when it comes to allegations of abusive comment or concerns about other forms of harmful expression. In this way, the concerned public participates in the setting of the social policy agenda.

In addition to setting the social policy agenda, the “public,” consisting of those who tend to take the time to write letters of complaint to various authorities, is responsible for monitoring the broadcasters’ performance via the complaints process. Note that these de facto monitors are not always the “concerned public” per se, in that complainants concerned with a particular broadcast incident are often individuals unaffiliated to a particular cause, but rather can often be characterized as individuals who have been offended in some manner. These audiences are concerned about the moral

impact of a particular kind of expression on a particular group within society (such as children) and/or society as a whole, such as violence on television, profanity, vulgarity, sexual explicitness, or racial or gender stereotyping. In effect, Canadian television viewers and radio listeners are the eyes and ears of the CRTC, while the CRTC is the final arbiter that decides whether there is ultimately any merit in intervening.

This form of public input in standards-setting can be understood as a Durkheimian expression of a new collective morality (22). In this dizzying modern environment of consumer choices – an environment that is largely driven by profit motives – the most popular programming will not always consist of the most pristine content. In the CHOI-FM case, Jeff Fillion and André Arthur were the most popular hosts at the station, and in the listening region, precisely due to their seemingly reckless regard for morality. Accordingly, those who were offended or injured by those hosts' on-air comments turned to the state in the hope that it would restore some level of social solidarity on the airwaves, in the form of respect for their moral views and what they believed to be the morals of the vast majority of Canadians.

In this context, regulatory responses to citizens' demands can be seen as an attempt to foster a more accessible broadcasting environment. Under a Jacobowiczian model, democracy in broadcasting is undermined when citizens are either offended by content and thus do not feel comfortable or safe to engage with the medium fully or when they are misrepresented or marginalized. At a minimum, reducing these types of barriers increases chances that those who wish to participate in public debate are able to do so because the (concerned) public, by having access to the regulatory process, presses for

regulations that set minimum standards for communicative exchanges in broadcasting at the society-wide level.

While the notion of the public sphere is not easily defined, at a minimum, it can be understood as a free, open, accessible space for communicative exchanges. Therefore, it depends on substantial freedom of expression to function. There are limits, even by Jacobowicz's account, as to how far a regulator of such spaces should go to achieve a comfortable environment for participation in public discussion. In other words, a democratic communicative environment must balance the need for civility against the need for free speech. To achieve this balance, the regulator needs certain guidelines as to when expression can be said to have offended or marginalized individuals or groups to the point of effectively excluding them from the public sphere. The Broadcasting Act provides some general guidance in this regard in stating that programming should be of "high standard" and should safeguard, enrich and strengthen the country's social fabric. While this terminology may be useful in gauging a broadcaster's overall performance, it is actually too strong as a guide to regulatory intervention in the case of specific programs. It would also involve proving a negative to be applicable – showing that a program was *not* of high standard, or did *not* enrich the social fabric. One can easily speculate how quickly the current plethora of voices and views could be limited if high standard alone was to serve as the ethical guide. Everything from irreverent or "tasteless" entertainment to legitimate, if unpopular, criticism could be threatened.

The CRTC's regulation of abusive comment attempts to identify a specific type of harmful expression that is not of high standard. It prohibits any comment or pictorial representation that exposes an individual or group to hatred or contempt on the basis of

certain kinds of status, such as sex, race or religion. But why stop at hateful or contemptuous expression? Any number of profane, rude, obnoxious, or tasteless comments could be of less than “high standard.” It would also be difficult to argue that such comments contribute to Canada’s social fabric. Why not prohibit those kinds of comments as well?

While it would be impractical to police broadcasting to that extent, freedom of expression does, nonetheless, come with responsibilities in a democratic communicative environment. What, then, should be the basis for drawing some kind of dividing line between acceptable and unacceptable expression? Without some such line, broadcasters cannot exercise their right to free expression responsibly and the regulator cannot provide guidance as how this right should be balanced against the desire for a free and open public sphere. The main goal of this thesis is to discover whether there is a practical criterion for drawing the line between acceptable and unacceptable expression in a democratic broadcasting environment.

Even if some such criterion were discovered, the question would still remain as to how to enforce any regulatory decisions based upon it. Recalling Ruonavaara’s argument that the aim of moral regulation is to change the identity of the regulated, in broadcasting, this might take the form of trying to alter a broadcaster’s image to include good corporate citizenship. But it could also be argued that this is merely one strategy of moral regulation and not always the most efficient one. Moreover, even if the goal of moral regulation is to transform the ethics of broadcasters, a regulator cannot do so effectively before first sorting out its own ethical perspective. How far can broadcasters go before freedom of expression needs to be reined in? Regulators like the CRTC cannot begin

thinking of changing broadcasters' identities until they can first answer this question with conviction and clarity.

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Chapter 2

Managing Moral Excess or Preventing Social Harm? Understanding the Desire for the Moral Regulation of Expression

Introduction

Mariana Valverde, a professor of criminology at the University of Toronto, has theorized about moral regulation in the context of Victorian England and France. She sees such regulation as operating within society, rather than simply being imposed by the state or professional groups dedicated to improving society. Given that moral regulation projects governing expression in Canadian broadcasting are developed and enacted in response to public concerns, Valverde's theoretical perspective provides a useful starting point in seeking a philosophical justification for regulatory attempts to manage harmful expression.

Valverde suggests that moral regulation contributes to the accumulation of what she terms "moral capital." The pursuit of moral capital is driven by a desire to manage "excess" and the harm to society that is thought to result from such excess. The concept of moral capital could thus conceivably explain the motivation to engage in some types of moral regulation, on the part of the concerned public that demands it and by the regulator, acting on behalf of the state, that responds to such demands. It will be argued, however, that this concept of moral capital provides only a partially satisfactory rationale for the moral regulation of communication. The notion of excess upon which moral capital as a theory rests does not consider the harm that can also occur through state interference itself.

In contrast, John Stuart Mill's principle of liberty, developed at the height of Victorian industrialism, provides a useful reminder of the need to weigh the circumstances in which state interference with the liberty of the individual might be justifiable. His principle of liberty rests on the importance of the "intellectual" (and thus, he says, the "moral") development of a democratic society, a notion which is not entirely alien from the concept of moral capital. For Mill, however, society benefits most from this process of development if people are free to exchange, discuss, debate, alter and improve their thoughts and opinions. What might be called the Millsian position, as distinct from what Mill may or may not have intended, has been generally understood as the claim that the liberty of action of the individual should only be restricted when it causes harm to others. In other words, whereas the notion of moral capital would conceivably justify moral regulation on the grounds of the positive good that it would do, Mill would consider it justifiable only on the basis of the harm that it prevents. Though an advance upon what Valverde identifies in some respects, Mill's position is also problematic, especially in the context of broadcasting. What kinds of "harm" are sufficient to justify regulatory action, given that prevention is always harmful to individual liberty? In the final analysis, it will be argued that while Mill's philosophy offers some indication as to where to begin in identifying some features of the dividing line between acceptable and unacceptable expression (a form of moral regulation of communication), neither Valverde nor Mill provide sufficient guidance regarding the complex behaviours associated with the airwaves.

Managing the Threat of Excess – a Valveridian Approach

Various scholars, including Neil Saccamano, Dana Villa, and Margaret Jacob, have critiqued Jürgen Habermas's seemingly rigid conception of the ideal public sphere as a space for only certain members of the citizenry – those who are educated, wealthy, informed, and historically, male. In reality, as Jacob recognizes in her historical examination of the emergence of public spheres throughout Europe, the “vulgar masses,” although necessarily a part of the public sphere, introduce a perceived instability into the ideal of the public sphere as a space of civilized, “enlightened” exchange. In other words, elites, as those who control entry into this communicative space, have possessed a fear of allowing unruly, uncivilized elements “that could never be properly restricted” to participate in public discourse (Jacob, 1994:105).

Valverde's theory of moral capital is proposed as a means of characterizing the desire on the part of quasi-elite members of civil society as one of managing the moral character of these “vulgar masses” in their everyday lives, for the purpose of ensuring the collective morality of society as a whole is maintained. Drawing from sociologist Pierre Bourdieu's work regarding the circuit and accumulation of cultural capital (and its interaction with economic and social capital), Valverde considers that moral capital follows a parallel process, wherein “moral dispositions and ‘habits’ are constituted and naturalized” (Valverde, 1994(2):216). In explaining how moral capital might be located within Bourdieu's circulation of cultural and economic capital, Valverde attempts to extend his analysis to show that “the endpoint and final cause of the circuit of cultural capital is not an amount of commodities but rather an intangible and continually self-reproducing capital embodied in the soul,” namely moral character (219).

Before elaborating Valverde's proposal, it is important to briefly identify some key concepts underlying Bourdieu's circulation of capital that influence Valverde's formulation. In particular, as Calhoun, LiPuma and Postone explain, the basic unit of Bourdieu's analysis is capital in all its forms, a form of power conceived as "the capacity to exercise control over one's own future and that of others" (1993:4). The role and interaction of these different kinds of capital is instructive in terms of understanding the "subtle dimensions of cultural socialization and transmission that cannot be easily quantified in monetary terms" (Swartz, 1997:78). Accordingly, Bourdieu's analysis is focused on understanding the social process that creates, certifies and maximizes forms of cultural capital.

Bourdieu considers the socialization process to be steered by the interplay among different kinds of capital and the way in which capital is accumulated by individuals and societies. Cultural capital, for example, can be described as a symbolic form of capital or power representing the "cultural" resources of both a society and an individual, such as "verbal facility, general cultural awareness, aesthetic preferences, and educational credentials" (Swartz, 75). Cultural capital is inherently unequal in its distribution among potential recipients, based on familial, socio-economic and other cultural background factors that might affect a person's interest and motivation to pursue the accumulation of higher levels of cultural capital, such as a university education. This results in class distinctions being influenced by aspirations, expectations, and cultural style rather than just by the ability to afford tuition (198-99). In other words, while economic capital will often (if not always) dominate class status, the more cultural capital you have, the more power you have to influence and control your own future and those of others around you,

by the ability to articulately engage in debates to sway opinions or lead demands for change, for example, regardless of your class status. All of these resources – wealth, knowledge, religious background, work ethic derived from particular cultural beliefs, and so on – interact in the field of social relations, but Bourdieu only considers such resources to be capital “when they function as a social relation of power by becoming objects of struggle as valued resources” to be pursued (43).

Valverde has tried to push Bourdieu’s theory one step further in developing the concept of moral capital by arguing that class is just one outcome of the social formation process resulting from capitalism. In her view, the development of moral/ethical identity at the society-wide level is also influenced by the movement of moral capital. However, moral capital is not quantifiable in the way that cultural or economic capital can be, because, in her view, being moral “is not so much a set of visible actions as the cultivation of a particular subjectivity requiring constant [self]-supervision” (20), as compared with having wealth or the markings of culture. Instead, the intangible resource that results from the circulation of moral capital is what Valverde calls “character.”

For Valverde, while it is the interaction among economic, cultural and moral capital that sustains state power, power that the state uses to “administer” people/society, it is at the level of civil society where efforts to amass moral capital are most concentrated, albeit via cooperation among private and public institutions (218). For her, moral regulation, which aims “not so much to change behaviour as to generate certain ethical subjectivities that appear as inherently moral,” is the means through which this cooperation occurs, in the sense that specific actors in civil society press the state for

moral regulation projects with the aim of increasing morally good behaviour in those presumed to be most in need of it (1994(1):216).

Moral reformers are the key to this cooperation. Moral reformers are specific groups of people “authorized” to press for moral regulation, usually belonging to professional groups, like social workers and their precursors, philanthropists engaged in charity work to improve the lives of the urban poor. Moral reform work “was and is based on a consensus about the inability of economics and culture alone to maintain the social and moral fabric of bourgeois society” (222). As professionals who lobby for moral regulation and often engage in it themselves, moral reformers are moral authorities that certify whether certain activities/behaviours can contribute to the pursuit of moral capital, “just as cultural capital usually requires certification by academic or artistic authorities” (216). Ultimately, Valverde argues, the work of moral reformers is motivated by “the felt need for specific institutions and regulations ensuring the continued reproduction of the nation’s moral capital” (222).

They seek to improve the character of a moral regulation project’s targets, who – according to the moral reformers – require assistance in generating moral capital to counterbalance the harms brought about by economic “excess.” Valverde examines philanthropic efforts in Victorian England and France targeting the character of the urban poor to help illustrate her argument. Although not concisely articulated, Valverde uses the term “character” in this context to refer to “the poor’s moral currency” (231). Character, then, can essentially be understood as the measure of a person’s level of moral goodness, while moral capital is the means through which such goodness is acquired.

Good moral character is all the poor had left to work with to improve their circumstances, since moral reformers of the era concluded that it was not an issue of lack of money that had turned average poor people into a vulgar mass of degraded, degenerate, anti-social, quasi-criminal people living in slum-like conditions, but a lack of moral fortitude. For example, urban hygiene pamphlets emphasized the theme that “dirtiness produced vice and immorality as surely as rotten garbage produced disease” (224).

Valverde argues that the collective character of the new “subspecies” of poverty – those living in urban squalor as a result of mass industrialism – had become dehumanized by a loss of morality, at least according to the moral reformers. This new poor was perceived as “a new/old race of barbarians threatening to destroy not just themselves but the combined moral and cultural capital of European civilization” (224). Thus, charity workers and philanthropists set out to teach people living in these conditions to improve their ways, not only by educating them on how to maintain a clean house (for example), but how to be morally upright in the process, such as lecturing housewives that their house could not be truly clean if they “allowed” their husbands to drink or did not prevent their children from stealing.

Extreme poverty, due to the vulgarity that supposedly coincides with such conditions, is thus considered to be a sure indicator of vice, or poor moral character. However, the poor are not alone in being vulnerable to a loss of moral capital. Valverde says that the twin to this belief is the middle-class view that the “morally debilitating effects of static wealth need to be counteracted by the bracing effects of hard work, deferred gratification, and investment,” dating back to the Protestant Reformation,

wherein the idea arose that “being a capitalist may have become morally praiseworthy, but being rich continued and continues to pose moral problems” (217). The problem that being rich causes, if that wealth is not balanced by a humble attitude and a lot of hard work, even in current times, is a somewhat expanded understanding of “excess.” In this context, excess is “a middle-class view, turned into “common sense” by the combined action of Christianity and popular culture, to the effect that those who have too much wealth (especially if unearned) are morally suspect” (217). Presumably, other forms of status and power can also be abused in the pursuit of money, resulting in behaviours that are not always reflective of middle-class morality. For moral reformers, excess, whether it be an excess of poverty or an excess of wealth, is the indicator that individual or collective character is in danger of being compromised. How, then, might the concept of excess be understood in terms of questions of morally questionable expression?

Valverde explains that modern moral reformers are concerned with their society’s collective character and thus they brand as immoral certain expressions of artistic and intellectual elites, perhaps because those expressions, in sometimes challenging the status quo, flaunt the power and influence these elites’ cultural capital affords them. This labelling is a “recurring symbol of what can go wrong when the accumulation of intellectual/cultural capital runs amok” (216). The implication of this is that only the injection of moral capital can ensure good character. It is not enough to have accumulated other forms of capital; indeed, Valverde suggests that too much economic or cultural capital puts character at risk. The excess resulting from this accumulation, however expressed, becomes the target of moral reform activity, whether expressed through ill-mannered, anti-social or deviant behaviour, or through public expressions that

shock with their bold flaunting of excess, such as flamboyant behaviour, boundary-pushing modes of dress, lyrics in songs or stage performances, or anti-establishment-oriented works of art. According to what Valverde identifies, then, by generating moral capital – “that intangible resource known as character” – excess from cultural and economic capital is managed or held in check (218). In theory, this phenomenon can be extended to include morally suspect efforts on the part of talk radio hosts. While not necessarily rich, hosts of public affairs-oriented programming hold powerful positions through the privilege of holding the microphone and are, in effect, gatekeepers to the public sphere in broadcasting. Holding such a privileged position of influence surely requires good moral character, which can be equated with moral virtue – knowing right from wrong and being able to function as a productive, contributing member of society as a result of possessing such virtue. Some hosts, despite their often populist approach, are sometimes accused of “abusing” their power position through the use of anything from colourful, impolite language to harm-inciting ideas to attract or entertain “the vulgar masses,” seemingly for the purpose of increasing ratings.

On this basis, the pursuit of collective moral capital by civil society for the purposes of managing excess is a potentially useful analysis for seeking understanding about the moral regulation of complex systems like broadcasting. As set out in Chapter 1, the supervision of the Canadian broadcasting system can be seen as a microcosm of interaction of the cultural, economic and social, wherein the implementation of the cultural, economic and social objectives of the Broadcasting Act involves a balancing act to manage these sometimes competing objectives. Thompson and Sharma acknowledge that “governments have always recognized the cultural importance of the media and they

have always been subject to an unusual degree of state regulation” (1998:436). They characterize such interventions as falling along a continuum from proactive intervention, such as through national cultural policies and financial investment, to restrictive approaches, via censorship, moral codes, and licensing regulations (436). Indeed, this mix of regulation is a tightly woven circulation of cultural, economic and social policy, with each type of policy having distinct goals that, in being pursued, must at the same time not unduly hinder one another in order to be achieved.

Those aspects of broadcasting that contribute to the public sphere add a particular level of complexity to regulation, as such programming involves democratic communicative exchanges. How might the pursuit of moral capital provide regulators of expression with guidance as to when to interfere with such exchanges? Given that the goal of the theory of moral capital is to manage excess and the harm to society’s collective character that apparently results from such excess, the implication is that despite the pressures of economic goals, the moral fabric of society must be maintained. Accordingly, exchanges in the public sphere should not be so “excessive” that they dilute or diminish the circulation of moral capital. In other words, such exchanges should possess qualities that are akin to good character, such as civility, respectfulness, tolerance, and fair-mindedness. How, it could be asked, can regulators like the CRTC justify trying to ensure that the public sphere on the airwaves is characterized by these qualities, without limiting broadcasters’ ability to provide attractive, profitable programs to a variety of audiences and tastes? The answer, Valverde might suggest, is that without such qualities, public debate arising from this arena would erode rather than promote moral capital. It would lead to antagonism rather than understanding, divisiveness rather

than cooperation. Thus, without some form of regulation, the public sphere reduces the moral capital on which society depends.

How might such an ethic operate in practice? Certainly, the case studies of specific broadcasts outlined in Chapter 1 can be considered to illustrate qualities that could be said to not promote good character above and beyond the findings of abusive comment. For example, in the case of the *Tom Leykis Show* on Mojo Radio Vancouver, while the CRTC was only concerned with the most harmful kinds of expression found within the program, namely abusive comments that are likely to expose women to hatred or contempt, under Valverde's approach, the entire show would likely not be fit for the airwaves, as it would not increase society's moral capital for its seemingly total lack of good-character oriented qualities.

As previously described, while this program is a syndicated American "shock-jock" call-in program ostensibly about current events, the show primarily focused on dispensing misogynist advice about the best way to date and treat women for the purpose of pursuing sex without the complications of relationships. The broadcast scrutinized by the CRTC in Decision 2004-196 paints a picture of a world where it is acceptable to treat women not only as objects to be pursued and possessed, but also as objects requiring ridicule, manipulation, and derision in order to control them. For example, the host counsels a caller named George that he has to stop complimenting his girlfriend, as doing so only gives her "ammunition to be a bitch." Instead, the solution is to "keep her insecure...make her doubt her own self worth" through such actions as sleeping with other "hot chicks." After all, Tom Leykis concludes, "women like that make dinner for you." This broadcast represents the opposite of qualities such as respectfulness, fair-

mindedness and tolerance for fully half of the population. Furthermore, the choice of words used is impolite at best. For example, the repeated use of the term “bitch” is promoted as an appropriate euphemism for women, such as when the host counselled a young caller that women are bitches that cannot be trusted or when he allowed, and even encouraged, callers to describe their girlfriends as bitches. Crude and tasteless imagery was frequently employed as well, such as his comparisons of female genitalia with “layers and layers of meat” in need of surgery in order to make them visually appealing.

The case study concerning CHOI serves to illustrate another scenario that amounts to a decidedly uncivil way to engage debate in the public sphere. In addition to what the CRTC characterized in Decision 2004-271 as offensive, vulgar, blasphemous, malicious, false and discriminatory content, the seemingly relentless, aggressive tone employed by the controversial hosts at CHOI to attack individuals and public figures merely because they are public figures does little to foster healthy, informed debate. Such attacks as those against Sophie Chiasson, a French-language television host, have the potential to unfairly poison public perceptions of these people when instead one of the roles of public affairs programming is to inform and bring to light legitimate concerns about public figures, such as corruption in politics. Over a series of broadcasts, Ms. Chiasson’s body, integrity and intelligence were the subject of hosts’ unsubstantiated venom. She was named a consummate liar, a cat in heat, a leech, an airhead, an idiot and accused of using sex to further her career. The CHOI hosts considered their barrage against Ms. Chiasson as comedic and legitimate because she chose a profession in the public eye. Thus, Ms. Chiasson was attacked for no reason other than being a public figure. She did not do anything that warranted scrutiny, such as betraying the public’s

trust in her position as a weather personality, nor was she involved in any scandal that could conceivably be in the public interest. The situation with CHOI was further exacerbated by what the CRTC characterized as the station's unwillingness "to recognize the seriousness of the complaints made against it" about these broadcasts (Decision 2004-271, para 14). Certainly, allowing the use of the airwaves in such a manner would leave little room for a public sphere wherein anyone who entered it was at risk of such random attacks.

The various types of behaviour illustrated above are extreme expressions of excess, both in terms of the reckless disregard applied to the privilege of using public property – the airwaves – to disseminate views and in terms of the stations' tacit approval of allowing such broadcasts to go on for the sake of economic return, more or less unchecked until the regulator got involved. These cases beg for ethical guidelines to minimize this type of expression, as according to Valverde's proposition, such expressions of poor moral character degrade collective moral capital in the public sphere. Certainly, if such broadcasts were the norm for public affairs oriented programming, there would be little contribution made by the broadcasting system in terms of fostering an environment of civility and respect in which democratic communicative exchanges are more likely to arise. It is clear that rules are necessary for maintaining some commonly agreed upon standard of civility and respect over the air to ensure that the kind of public debate that ultimately increases society's moral capital can be fostered, i.e., a public sphere that at the same time both mirrors and fosters good character.⁸

⁸ Interestingly, in the case of Mojo Radio, the station realized that it could not justifiably continue to broadcast such a program that so clearly went against common broadcast standards set out in a variety of self-regulatory codes. In the case of CHOI, the station

Valverde's theory thus creates a scenario where many kinds of expression, not just the most harmful (like abusive comment), could be justifiably be limited. This is also the heart of the problem with the theory of moral capital, as it does not seem to provide a means of placing limits or boundaries on the management of excess. While certain norms reflecting civility and the like are indeed necessary, room must be left to allow for the fullest possible range of journalistic and creative expression, as the Broadcasting Act recognizes. Since the notion of excess is subjective, it is not entirely easy to define and therefore it becomes very difficult to set parameters, practically speaking, as to how to respond to problems of excess. Moreover, the moral capital model, which seems to rest so squarely on this notion of excess, does not leave room for the important role the principle of freedom of expression has in allowing a marketplace of ideas to flourish such that individuals are able to improve their character by debating, discussing, reacting and challenging those seemingly excessive modes of expression. In essence, as a justification for moral regulation of broadcasting, the pursuit of moral capital for the purposes of curbing excess provides no guidance in terms of restraining regulatory interference. It is conceivable that any type of morally questionable television or radio content could be sanctioned as a question of taste. The cases above are clearly extreme examples, but any number of other broadcasts that engage in morally ambiguous talk, such as sexual innuendo or juvenile jokes about bodily functions, abound in modern broadcasting. Are they to be sanctioned, too, for their tastelessness alone? How far must a regulator go to ensure collective good character under the moral capital scenario?

developed its own code of ethics to maintain some basic level of civility, but ultimately failed to maintain its own standards.

Ultimately, Valverde indicates that setting general rules for the public sphere is justified because rules are necessary for creating an environment that fosters the kind of public debate that ultimately increases society's moral capital, i.e., a public sphere that is civil, respectful, tolerant, polite. In other words, one that at the same time both mirrors and fosters good character. The weakness is that this approach provides no guidance as to what these rules should be. Further, this approach, if not properly confined, suggests that there might be no limit as to how far regulators of expression could extend their reach. It implies that if the regulator is responsible for mandating that all exchanges be "civilized" because it is morally beneficial to do so, there would be nothing to prevent a regulator from defining and enforcing codes of conduct for social niceties such as good manners, sanitized language or the use of formal speech. In effect, such an approach would allow so much latitude to the regulator that over-zealous intervention would be the likely result. It is now necessary, then, to turn to another philosophy to attempt to define appropriate regulatory limits to govern the interference with a freedom so basic as broadcast expression in the public sphere.

Preventing Harm as the Key to Regulatory Restraint? A Quasi-Millsian Approach

While Valverde's theory indicates that some rules are necessary in the public sphere in order to promote a particular social good or ideal, attempting to define rules on the basis of supporting that desire does not appear to be the best approach in terms of guiding and restraining regulatory interference in that space. To be more consistent with democratic values such as freedom of expression, perhaps any rules a regulator chooses to enact in governing the public sphere should instead be concerned with something more specific, such as ensuring people are not "harming" one another, rather than broadly

aiming to improve the character of all involved. In other words, in seeking a regulatory ethic for broadcast expression, a more manageable approach might be to shift the unit of analysis from what a Valveridian would consider the public sphere should do for society (promote moral capital) to how it should operate for those involved (avoid direct harm to participants). The classic perspective of John Stuart Mill as to when state interference with human freedoms is justifiable can assist in bringing about this shift in focus.

At the outset of *On Liberty*, first published in 1859, the influential nineteenth-century British social philosopher and parliamentarian John Stuart Mill wrote, “all that makes existence valuable to any one, depends on the enforcement of restraints upon the actions of other people” (Mill, 1963:131). The apparent implication of this claim is that government intervention is necessary for ensuring that civilized society is able to flourish. Mill proposed the radical idea that this “necessity to intervene” must be restrained for a very specific purpose – for the protection of the liberty of the individual:

The object of this Essay is to assert one very simple principle, as entitled to govern absolutely the dealings of society with the individual in the way of compulsion and control, whether the means used be physical force in the form of legal penalties, or the moral coercion of public opinion. That principle is, that the sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of action of any of their number, is self-protection. That the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others. His own good, either physical or moral, is not sufficient warrant (135).

Accordingly, the philosophy that should preoccupy legislators each time they consider exercising their power over the individuals that make up democratic societies is to only interfere with their liberty for the purposes of preventing harm to others; what legislators or society consider to be for the individual’s own good, moral or otherwise, is not a good enough reason to compel or control individuals.

Mill's philosophy is grounded in a concern for allowing individuality to flourish, which he believed to be the pre-condition for a progressive society, a consistent theme emphasized throughout *On Liberty*. A concise expression of this theme by Mill is his observation that "every single human improvement which has taken place either in the human mind or in institutions, may be traced distinctly to [moments when] the yoke of authority was broken," or when a society was otherwise released from "mental despotism" – the control of people's thoughts and opinions (159). For Mill, this mental despotism (interference with human liberty by the state) harms individuality when it targets the following "regions of liberty:" the "inward domain of consciousness," referring to conscience, thought, feeling and sentiment on any subject; "liberty of tastes and pursuits," namely, being able to choose to do whatever it is we like, provided it does not harm others; and, the "freedom to unite among people," for any purpose not involving harm to others (137-8). The essence of these liberties is to be able to develop one's individuality through the exercise of one's intellect.

This exercise can only be properly conducted through discussion and debate. One cannot know whether one is right or wrong, morally or intellectually, until one's idea or position is compared, contrasted and tested against those of others (144-45). Indeed, intellect and morality must be pursued with vigour, as "no one's opinions deserve the name of knowledge, except so far as he has...gone through...the same mental process which would have been required of him in carrying on active controversy with opponents" (169).

In short, "liberty, as a principle, has no application to any state of things anterior to the time when mankind have become capable of being improved by free and equal

discussion” (136). In other words, the prerequisite for individual progress, which in turn contributes to societal progress, is the ability to exchange, discuss, debate and revise opinions, perspectives and ideas freely, such that we are able to “pursue our own good in our own way,” rather than be told by the state what is best for us (137).

Mill immediately cautions, though, that this right is not an abstract ideal and thus introduces his utilitarian caveat:

It is proper to state that I forego any advantage which could be derived to my argument from the idea of abstract right, as a thing independent of utility. I regard utility as the ultimate appeal on all ethical questions; but it must be utility in the largest sense, grounded on the permanent interests of man as a progressive being (136).

Mill’s principle of utility refers to what he calls “the greatest-happiness principle.” As he explains in another essay, *Utilitarianism*, this principle “holds that actions are right in proportion as they tend to promote happiness, wrong as they tend to produce the reverse of happiness” (249).⁹ In other words, “utilitarianism requires that benefits be maximized (and burdens minimized)” (Lyons, 1994:104).

Based on the foregoing, then, Mill’s theory of liberty can be stated as follows: the liberty of action of the individual, including those participating in the public sphere, whose ability to develop freely is essential to a progressive society, ought only to be interfered with for the purpose of preventing harm.¹⁰ Bearing in mind that Mill wants us to apply this principle with utility in determining when to intervene, this must mean that “harm” is not an absolute in the sense that if an action results in harm to others, the extent

⁹ Mill goes on to explain that “by happiness is intended pleasure and the absence of pain; by unhappiness, pain and the privation of pleasure” (249).

¹⁰ As David Lyons so succinctly expresses it, liberty in this context “concerns harm to others, not welfare generally, and coercive intervention, not government action generally” (1994:84).

to which the state should intervene to prevent that harm must be determined according to the extent that the greatest happiness to the greatest number can be achieved by that intervention. Unduly interfering with other rights or liberties must be avoided.

What, then, constitutes harm to others? Mill referred to harm in a number of different ways throughout *On Liberty*, including that which is calculated to produce evil in someone else; an action that affects prejudicially the interests of others; damage, or the probability of damage, to the interests of others; and, an act hurtful to others. It is clear that “harm,” for Mill, deals with that directed at others, as opposed to hurting only oneself by one’s actions, such as a casual marijuana habit wherein a person may be able to consume the drug, and thus do damage to his body, but without impacting those around him by remaining an otherwise law-abiding citizen, a good worker, etc., but there is otherwise quite a range of potential harms that can be contemplated by Mill’s various statements. An action that affects the interests of others, for example, like posting a sign that proclaims “no girls allowed” at a sports facility, affects girls’ ability to pursue sports interests. This may not cause the girls a specific physical harm, but it is not morally right to exclude them from pursuing their own interests, and the uncontested proliferation of such signs could cause psychological harm.

Scholars like D. G. Brown have observed that these statements of what constitutes harm offer some definiteness in the sense that harm concerns an act hurtful to others but also some vagueness in the sense that this necessarily involves weighing the probability of damage to another’s interests. He suggests that *Utilitarianism* provides assistance to address this quandary concerning the range of harm contemplated by Mill. Brown

specifically draws our attention to what Mill says in that essay about what constitutes actions that harm others:

Encroachment on their rights; infliction on them of any loss or damage not justified by his own rights; falsehood or duplicity in dealing with them; unfair or ungenerous use of advantages over them; even selfish abstinence from defending them against injury – these are fit objects of moral reprobation, and in grave cases, of moral retribution and punishment. ... When, by conduct of this sort, a person is led to violate a distinct and assignable obligation to any other person or persons, the case is taken out of the self-regarding class and becomes amenable to moral disapprobation in the proper sense of the term... Whenever, in short, there is a definite damage, or a definite risk of damage, either to an individual or to the public, the case is taken out of the province of liberty and placed in that of morality or law (as quoted in Brown, 1972:148-9).

By emphasizing both the “risk” of damage, something that could happen, and the prevention of the fulfillment of obligations, something that should happen, Brown asserts that Mill intends that interference can be justified not only to deal with those actions that have caused harm but also to enact rules to prevent harm from arising. An example of preventing harm from arising is that of regulations governing the safe storage of firearms and ammunition, which are intended to reduce the chances that any member belonging to a household containing a gun will accidentally or unintentionally discharge a loaded weapon.

David Lyons, who supports Brown’s interpretations, terms Mill’s notion of preventing harm to others as a “general harm prevention principle,” which is also based on the idea that Mill’s liberty principle includes conduct that *threatens* to cause harm, not just action that *does* cause harm (90). This is consistent with Mill’s explanation in *On Liberty* of harm by inaction, wherein he states that “a person may cause evil to others not only by his actions but by his inaction, and in either case he is justly accountable to them for the injury” (Mill, 137). To illustrate, consider the example of a witness failing to call

for help to rescue someone from a burning car. Is the witness responsible for the dying person? Before jumping to any conclusions, Mill warns that inaction, as a form of harm that can justify interference with liberty, requires caution in the sense that it must be applied with utility in mind: “To make any one answerable for doing evil to others, is the rule; to make him answerable for not preventing evil, is, comparatively speaking, the exception” (137). Therefore, the circumstances must be carefully considered before interfering. Perhaps the person witnessing the car-fire did not call for help for specific reasons – maybe he did not have access to a phone; perhaps he was injured himself; or perhaps the person in the car did not want help as she was trying to commit suicide, and specifically instructed the witness not to call for help. Each reason changes the situation; the context in which “inaction” occurs must be clearly understood before determining whether to hold a person accountable for preventing, or not preventing, harm from occurring.

In summary, Mill’s notion of harm is not so easily limited to those actions that have caused some sort of direct damage or injury to other people. Liberty of action of the individual can also be interfered with for the purpose of preventing harm to others, including by requiring people to take steps to prevent harm from arising and by making people accountable for failing to act to prevent harm, when necessary.

Given that the liberty to express opinions and engage in the exchange of ideas – freedom of expression – continues to be critical in modern democratic communicative environments, Mill’s views on how his principle of liberty applies to freedom of expression is particularly pertinent in attempting to determine what constitutes acceptable

expression in Canadian broadcasting. How would a Millsian determine when and if expression causes harm to the point of requiring regulatory intervention?

The principle of liberty and freedom of expression

Mill devoted an entire chapter in *On Liberty* to the importance of freedom of expression as a liberty that should not be interfered with by the state or others in society. For Mill, “silencing the expression of an opinion...is robbing the human race” of the chance to discover alternative ideas, to challenge accepted views, to expand knowledge, to discover truth as far as it can be discovered, recognizing that it is subjective over time and space), and thus to evolve intellectually as a progressive society (142-150). One can’t really “know” anything, he says, unless one is able to express and debate his or her thoughts freely with others (145). To aide this process, all sides of a view must be accessible (162). Therefore, *On Liberty* defends the right to express any opinion, no matter how immoral, offensive or tasteless society considers it to be. For Mill, it is “obvious that law and authority have no business with restraining” this type of expression (178).

Mill offers only one exception wherein expression of opinion can be punished or interfered with, namely when “the circumstances in which they are expressed are such as to constitute their expression a positive instigation to some mischievous act” (180). Examples of inciting actions that are harmful to others in this way include yelling “fire” in a crowded room when there is not actually a fire (thus potentially causing a stampede of panic), directing a group of people to start a riot, or encouraging the attack of a particular person or group of people. For Mill, this type of “harmful” action-inciting speech constitutes the only circumstance wherein expression interferes with the liberty of

others, to the point that intervention is required. What is particularly important about this exception is that it acknowledges the importance of the circumstances, or setting and context, in which utterances arise. In other words, this exception indicates that a society can acknowledge or determine that there are likely to be instances wherein speech should be expected to be appropriate to its circumstances, and if the consequences of a specific utterance are harmful in a given circumstance, intervention may be justified. What is now required, then, is to determine whether Mill's philosophy provides a basis for earmarking a modern democratic communicative environment like broadcasting as a space that might generate circumstances requiring such intervention.

K. C. O'Rourke observes that because many Millsian commentators have concluded that his chapter in *On Liberty*, with its championing of freedom of expression all but absolutely as well as its lengthy discussions on such complex ideas as the nature of truth, is based on something other than other than Mill's principle of liberty, he thought it important to determine whether this is actually the case (2001:1).¹¹ Given that the quest for fostering individuality so dominates the rest of *On Liberty*, O'Rourke argues that the case for freedom of expression made by Mill is in fact "based primarily on the key role that it has to play in the development and maintenance of individuality in society, rather than political unity or the importance of the discovery of truth, as is traditionally interpreted" (abstract).

The overriding thrust of O'Rourke's interpretation is that *On Liberty* "places a priority on the right to hear all opinions over the right to express all opinions...and that

¹¹ With respect to his discussions on the nature of truth, Mill emphasized examples of the persecution of figures in history now considered great for the very ideas for which they were persecuted, such as Jesus Christ and Socrates.

right to hear is grounded in the notion of individuality,” and thus is at the heart of Mill’s argument for both his principle of liberty and freedom of thought and discussion (4).

O’Rourke comes to this conclusion – that the right to hear supersedes the right to be heard – precisely because of Mill’s emphasis on the importance of being able to question, discuss and debate any issue, for the goal of fostering intellectual development, as described above.

For O’Rourke, this emphasis on the hearer means that “people must be free to hear what can be said on all sides of a question if they are to develop intellectually and individually” (108). He argues that because of Mill’s exception concerning expressions that incite harmful actions, this constitutes an added burden of responsibility on the speaker, and thus this burden means that

the freedom to express opinions exists primarily for the sake of the hearer, rather than for the sake of the individual speaker: if those who hear are disposed towards interfering with the liberty of others, then the speaker may be blameworthy (127).

O’Rourke argues that the hearer’s right to hear is more important for fulfilling the promise of fostering individuality and a progressive society than that of the right of the speaker to speak because to deny a person this right to hear is to make decisions for them about what they require to develop their own opinions. He says that “to do so is to equate one’s own certainty with absolute certainty, with regard to both the truth of the issue at hand and the usefulness of holding that particular opinion,” two things Mill vigorously argues cannot be determined by the state, namely, the truth of a view and the usefulness of an opinion (108). Only unconstrained discussion can seek out these things and thus the state has no place in sanctioning a particular version of the truth or in decreeing only useful opinions are worthy of expression.

Certainly, this process of discovery cannot truly happen without access to a wide variety of expression of “speakers” in concert with exchange among speakers and hearers. For O’Rourke to suggest that the process of questioning, challenging, and revising one’s own ideas is something that rests primarily on the shoulders of the hearer, as the person taking in all the resources needed to exercise their intellectual development, neglects the importance Mill places on the very exchange required to develop intellectually. However, not all communicative situations place the speaker and the hearer on equal footing. In cases where the speaker has privileged access to speak and the hearer has limited opportunities to respond, question and challenge the speaker, as in the case of broadcasting, then O’Rourke’s argument – that the right of the hearer is paramount – is potentially valid. It indicates that the speaker’s right to freedom of expression can be adjusted to the place and context in which a problematic utterance occurs, when the place and/or context limit the hearer’s right, an interpretation consistent with Mill’s recognition that there will be circumstances or places in which certain speech situations must be restricted, such as making it an offence to yell fire in a crowded theatre.

According to Mill, then, because of the importance he places on the intellectual (and moral) development of the individual for a progressive society, expression must not be hindered except when it incites harmful actions in others. However, harm prevention, such as taking steps to avoid harm and making people accountable for failing to prevent harm, also constitutes a reasonable justification for interfering with the liberty of others, namely when the circumstances are such that intervention is needed to prevent harm. Does it follow, then, that regulators of expression can also interfere with the liberty of the

speaker to prevent harm to the hearer when the circumstances are such that the speaker cannot easily or readily be challenged by the hearer? This is a difficult question to answer but at a minimum it does acknowledge a key factor – the setting or circumstances and context in which exchanges arise.

Furthermore, in order to be free to hear what can be said on all sides of a question, participants in the public sphere would likely benefit from rules that restrict those who would otherwise overpower other voices and perspectives merely by the volume of their voice or the aggression of their words. Indeed, it could even be argued that preventing person A from shouting person B down does not limit person A's freedom of expression. Rather, in this scenario, person A is being provided with guidelines as to how to go about expressing his or her ideas, as compared to the Valverdian approach of imposing guidelines as to what is proper to say.

To test these assumptions, we must now turn to an exploration of cases wherein morally problematic expression has been limited on the basis of circumstances, namely the setting (broadcasting) and the context (format and subject matter of particular kinds of public affairs programs), in order to determine whether Mill can in fact assist in the formulation of some guidelines for regulated public discourse.

Limiting the broadcast of harmful expression

The clearest case of preventing harm in the moral regulation of Canadian broadcasting is the prohibition against abusive comment, as described in Chapter 1. In its recent landmark CHOI decision, wherein that station became the first to fail to have its licence to broadcast renewed due to its hateful and contemptuous program content, the CRTC stated the following harms of abusive comment, which refers to exposing an

identifiable group to hatred or contempt, not to any comments that are abusive on their own:

One harm caused by remarks that could expose a person or group to hatred or contempt is the emotional damage caused by the remarks, which may be of grave psychological and social consequences for the person or members of the targeted group. The derision, hostility and abuse encouraged by such remarks have a severely negative impact on the targeted group or individual's self-worth, human dignity and social acceptance within society. This harm undermines the equality rights of those targeted, whereas the broadcasting policy for Canada states that those rights should be reflected in the programming offered by the Canadian broadcasting system.

[The abusive comment regulation] is necessary not only to avoid harm to the persons targeted, but also to ensure that Canadian values are respected for all Canadians. The broadcast of remarks that could expose individuals or groups to hatred or contempt can attract individuals to its cause and in the process create serious discord between various groups in Canadian society to the detriment of all of Canadian society. This harm undermines the cultural, political and social fabric of Canada which the Canadian broadcasting system is expressly meant to safeguard, enrich and strengthen. It also undermines the multicultural and multiracial nature of Canadian society, which the programming of the Canadian broadcasting system should reflect. Protection from the harms of abusive comment is for the benefit of all Canadians (paras 34-35).

While there are many observations that can be drawn from this passage, for the purposes of this discussion it is important to note that this reasoning is a departure from previous key CRTC decisions concerning abusive comment and high standard. Prior to the CHOI case, the CRTC relied on the view that freedom of expression is not to be infringed except in the clearest of cases. This is most clearly articulated in a short-term licence renewal decision of another Québec City radio station, CHRC, which also employed controversial talk-show host André Arthur. In its August 1990 decision, the CRTC found the station to have failed to meet its obligations concerning high standard (among other things) (Decision CRTC 90-772). The CRTC set out its approach in that decision in the following way:

The Commission is therefore wholly committed to exercising the strongest possible bias in favour of freedom of expression. This freedom not only constitutes an essential characteristic of democracy, but one of its more important guarantees as well. Central to the Commission's approach is the premise advanced by the philosopher John Stuart Mill in his essay 'On Liberty':

He who knows only his own side of the case, knows little of that.

Print media are privately owned and provide, in theory, for unlimited access. Frequencies are, in contrast, both a public property and a scarce resource. These features undoubtedly have an essential bearing upon the exercise of freedom of expression over the airwaves and this translates into a unique framework. ...

...The Commission must examine the particular circumstances of each individual case, taking into account the vital freedom of fair and vigorous comment. Moreover, the Commission is not prepared to conclude that the limits to freedom of expression have been overstepped in cases other than those of the most flagrant excess; in grey areas, where it is not obvious that the requirement of high standard has been breached, the Commission will settle in favour of freedom of expression. The aim is to provide a minimum level of protection to persons in situations where freedom of expression, a very powerful freedom when exercised using the public airwaves, comes at their expense [original emphasis].

This position, that freedom of expression is an essential objective, one that must only be infringed in the clearest of cases, has been reaffirmed in subsequent decisions, time and again, including the short-term licence renewal of radio station CKRS Chicoutimi in 1996 and CHOI's 2002 short-term licence renewal. In contrast, through its emphasis on the need to balance amongst a variety of the Broadcasting Act's objectives wherein freedom of expression is one value among many, the 2004 CHOI decision represents a new approach to applying the abusive comment regulation.

In the context of the present discussion, the reasoning employed by this new approach affirms that there are harms to both the targets and to society as a whole at stake in contemplating the harms brought about by abusive comments, harms that have the potential to interfere with social progress by not being consistent with other Canadian

values. In this way, the CRTC has articulated the purpose of the abusive comment regulation.

Is the greatest good to the greatest number served by this articulation of the purpose of abusive comment, as the CRTC posits, when it says it is protecting all Canadians from the harm of abusive comment by protecting Canadian values? Generally speaking, the desire to protect Canadian values indicates a desire to serve the greatest good to the greatest number. However, a Millsian might find that the reasoning employed in the CHOI decision – namely that “the broadcast of remarks that could expose individuals or groups to hatred or contempt can attract individuals to its cause” – implies that (a) anyone found to be expressing abusive comments is in fact supporting a particular cause and (b) that those comments are so powerful as to attract hearers to that cause. However, the comments found to be hateful and contemptuous of Blacks and persons with disabilities made by a talk show host on CHOI held no indication whatsoever that the talk show host belonged to any particular anti-Black or anti-disabilities movement or cause. There is no indication in the CRTC’s decision that it made such an assumption; however, a Millsian could interpret this application of abusive comment to mean that in order to justify intervening with this sort of expression, a regulator would be required to be of the view that hearers generally are not capable of questioning or challenging what they hear in their own minds, wherein they decide to take action in some way to support a cause or adopt it as their own view.

A Millsian would also conclude that the statement in paragraph 35 of the CHOI decision concerning the harm of attracting individuals to a cause indicates a desire to control opinion, which would – for a Millsian – constitute dampening the intellectual and

moral development that is required for a progressive society, which is surely as much of a Canadian value as any other. As such, the harm intending to be avoided in this case (abusive comment) is far outweighed by the harm that could be caused by defining unacceptable expression as that which is not consistent with Canadian values.

Certainly, the abusive comment regulation is a concept that echoes the Criminal Code provisions regarding hate speech, as well as the Charter of Rights and Freedoms provisions concerning equality rights.¹² However, intervening in communication on these principles does not seem to sit well with Mill's views on freedom of expression, at least at first impression, as his theory rests on the ability to be "free to hear what can be said against our opinions," no matter how offensive or immoral they may be, like discriminatory comments directed towards a specific group within society, which are counter to equality rights (123).

Looking at the abusive comment regulation in this way, it is worth asking whether it has removed the Millsian responsibility individuals and society have to challenge opinions and views, including those that don't benefit society. Burying those often very offensive and potentially harmful opinions does little to enlighten those who carry them, or perhaps more important (since those who carry them may not wish to be enlightened), to enlighten those who might be influenced by them. I say potentially in acknowledgement of the damage that hatred or contempt has the potential to reap. For its part, CRTC decisions indicate that it relies on the likelihood that damage can occur in the

¹² The Charter defines equality rights as follows: "Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability" (Section 15(1)).

form of social harms, such as those harms concerning an individual or group's dignity, security and sense of self-worth.

In Canadian society freedom of expression is not an absolute, in that it comes with certain responsibilities, such the requirement to adhere to those laws governing libel, child pornography, false advertising, and so on. These are specific harms generated by the actions of others. The Criminal Code provisions regarding hate crimes in particular enshrine this responsibility in exercising freedom of expression. The desire to limit hate speech is understandable in a society that is as multicultural as ours. The clash of ideas and perspectives that comes with so many cultures, religions, language groups, and ethnicities living "under one roof," and the resulting plethora of diverse ideas and perspectives from this melange, is what makes Canada so rich. Managing that diversity is also one of Canada's strengths. But do restrictions to the expression of hate and contempt in broadcasting (as defined in the abusive comment regulation, which is slightly broader than hate speech as contemplated in the Criminal Code) achieve some level of social harmony, one that still allows for pluralistic views and perspectives, or is ethnic and racial tension suppressed from broader public view and left to fester behind closed doors? Certainly, by effectively preventing a service like Al Jazeera from being available due to the potential for hate speech in one or two of its programs, as noted in Chapter 1, an essential perspective on the issues and events that fuel geo-political tension and conflict in the Arab world is lost to us. On the other hand, the fact remains that the broadcasting environment, by its very nature of being a one-way medium, hinders the exchange required to achieve social harmony. Moreover, the abusive comment regulation can be understood as a type of rule consistent with the notion that the person in

control of the microphone should not be shouting down or shutting out other perspectives through his maliciously expressed bigotry.

In summary, then, a Millsian approach to examining the role of the state in preventing harm identifies some key principles to work with in seeking justification for moral regulation of broadcasting. First, freedom of expression is a necessary liberty required for social and moral development of a progressive (and democratic) society. Second, the right of the hearer to be able to have access to a range of opinions and ideas is paramount in contemplating state interference with freedom of expression in situations, as is the case with broadcasting, wherein the hearer is limited in his or her ability to challenge, defend and expand the ideas and opinions expressed over the airwaves. Third, the only reason for interfering with the liberty of others, especially their freedom of expression, is to prevent harm. That harm concerns both inciting actual harm to others and preventing harmful actions from arising. Therefore, some rules of behaviour that reflect these principles can be expected by participants to ensure these principles are fostered. For example, one a possible rule arising from this Millsian approach is the notion that “shouting someone down” should not be permissible, to the extent that such scenarios prevent further exchange. Another might be to ban harm-inciting expression, as the abusive comment regulation does.

While such rules are useful and necessary, the problem with this approach rests with the third point – preventing harm. Basing a justification for the regulation of acceptable expression on the notion of limiting the incitement of harmful actions is a start; however, preventing harmful actions is too vague a notion to be able to extract consistent guidance for the regulator and those being regulated, particularly if the test of

preventing harm is concerned with harm to Canadian values. As an example of preventing harm, comments that attract people to “undesirable causes” (as distinct from illegal ones) or create discord among groups can be difficult to identify and could lead to situations wherein the regulator is called upon to make judgement calls about broadcasts that “could harm” or be inconsistent with any number of Canadian values.

Conclusions

In this chapter, notions of excess and harm have been examined in an effort to determine how moral regulation of expression in broadcasting can be justified. Both ideas can be used to contemplate the impact of broadcast content on (some members of) society. In particular, they help to understand the desire to influence the practices of the public sphere, such as promoting a social good by pursuing collective moral capital, or avoiding direct harm to participants in communicative exchanges. However, neither the Valveridan approach, nor the quasi-Millsian approach to a lesser extent, provides adequate guidance in the use of moral regulation to hinder or enhance opportunities for the hearer to access public discussion and debate in broadcasting, something responsible regulators should be cognisant of, in recognition of the importance of broadcasting as a democratic communicative space. Since social policy in broadcasting attempts to govern the actions of the speaker in response to the concerns of the hearer (as expressed by both the concerned public and other “every day” complainants), exactly what expectations should a regulator like the CRTC have of broadcasters in meeting such lofty goals as high standard and intellectual harmony?

If the greatest good we can pursue is that of allowing each individual to pursue their own good in their own way provided that their actions do not harm others, fostering

a communicative environment wherein that process can thrive is key. At a minimum, the regulator should not be interfering with the exchange of opinions and ideas upon which the intellectual and social development needed in a democratic society rests. However, given the nature of broadcasting as a relatively one-way communicative medium, the privileged few broadcasters who make up the broadcasting system have an increased responsibility in managing the expression of opinions and ideas they broadcast to their audiences, to the extent that the way those views are expressed prevent some level of social understanding to be achieved, something that might normally be managed through the ability of audiences to challenge those opinions in other communicative environments. By what guidelines should broadcasters' ability to manage harmful content in this one-way environment be judged?

The Millsian analysis presented in this chapter indicates that circumstances, namely, the limited exchange possible in broadcasting, and context matter in determining whether to interfere. What remains to be recognized is the fact that in considering context, not all exchanges in that limited environment necessarily lead to intellectual and social development. How can we ensure that the hearer's access to those spaces – at least those that have potential for contributing to the democratic communicative environment – is not hindered? With this in mind, if the regulator wishes to respect the development of a democratic communicative environment such that concerned citizens can influence the development of policy that matters to them, in theory, the Habermasian vision of an ideal speech situation may provide assistance in determining what the hearer's expectations of broadcasters should be – and by extension, the regulator's, whose responsibility is to act

on behalf of the public interest – when considering whether problematic programming in the public sphere causes harm to the point of requiring regulatory intervention.

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Chapter 3

Preserving a Space for Communicative Rationality as the Justification for Moral Regulation of Broadcasting: A Quasi-Habermasian Approach

Introduction

Contemporary German philosopher and Frankfurt School social theorist Jürgen Habermas has made groundbreaking contributions to many fields of study, perhaps most notably to communication theory, through his extensive work concerning the public sphere, hermeneutics, and his theory of communicative action. First set out in 1968 in *Knowledge and Human Interests*, and fully matured by 1981 in a two-volume book entitled *Theory of Communicative Action*, the philosophy of Habermas's theory of communicative action is grounded in "...the basic figure in communication theory, namely that of subjects capable of speech and action reaching understanding about something in the world" (Habermas, 1991:218). Somewhat similar to Mill's views on the necessity of freedom of expression for the intellectual and moral development of a progressive society, Habermas proposes that this understanding, so necessary for the development of society, can be realized through the rational potential of speech:

This goal of reaching universal understanding has to make itself felt as a tendency permeating society as a whole, because and in so far as the latter makes use of the mechanism of reaching understanding for its own coordinating purposes (219).

Drawing from Karl Marx (and revising Marxian ideas about the organization of society with assistance from Max Weber), Habermas's theory separates "the sphere of technical rules, technical control, and productive forces from that of social norms, human reciprocity, and communications," in order to map out the "modes of communication and intersubjectivity through which emancipatory values are formulated and gain social

consensus” (Antonio, 1989:727). These emancipatory values include freedom from political and social coercion, freedom from exploitation and freedom from inequality. As David Ingram explains, Habermas hypothesizes that modern (Western) societies, which claim to embody these values, depend on rational communication for the “coordination, integration, and socialization of persons inhabiting [those] societies” (1993:306). For Habermas, these goals amount to communicative commitments, which “compel us (however weakly and conditionally) to establish equal democratic rights even if they do not compel the establishment of any particular institutional embodiment of them” (311).

In contemplating the appropriateness of the moral regulation of expression in broadcasting, with its aim of attempting to “make normal” certain moral or ethical subjectivities, it is reasonable that the regulator should be expected to be cognisant of the impact its social policy interventions may have on these communicative commitments. This is particularly so in terms of making judgements about what constitutes acceptable or unacceptable expression, and thus what sort of intervention is required to either promote acceptable expression or discourage unacceptable expression. At a minimum, it is plausible that regulators of communication should seek to ensure that their interventions do not hinder the communicative commitments Habermas contemplates. Moreover, as these commitments speak to ideals of enabling society to engage in an “ongoing social dialogue” for the purposes of coming to new understandings about whatever social or moral challenges society is facing, broadcasters should be expected to ensure these communicative commitments are not violated (Antonio:723). In this regard, it is worth contemplating whether Habermas’s theory can contribute to achieving the representative communicative democratic goal of enabling concerned citizens to engage

in public discussion and debate, and thus to influence policy making efforts, a goal Jacobowicz argues is essential to achieving Western democratic ideals about democracy via communication (1993:48). Accordingly, this chapter will explore whether the theory of communicative action can provide some indicators to guide regulators in determining what constitutes unacceptable expression so as to ensure that their interventions do not hinder citizens' participation in this ongoing social dialogue.

The theory of communicative action

Gerard Delanty explains that Habermas' theory of communicative action relies on rational discourse, which is a "reflective process [for the purpose of reaching] consensus for the rational organization of society" (1997:33). Rational discourse requires that participants be competent enough to be able to conduct a "successful" conversation. If participants are able to master the rules required to be competent speakers, the reflective process arising from rational discourse will increase the chances that mutual understanding – the goal of "successful communication" – will occur (Smith, 639-40). Therefore, the theory of communicative action first involves competent speech. As Habermas explains, processes of socialization involve speech acts, which are the "linkages for interaction" resulting from competent speech. Speech acts are:

the creative mechanism in socialization – initially as the mechanism of action coordination and social integration, but then also as the medium both of socialization and through which cultural traditions continue to be handed down (218).

Habermas thus assigns a great deal of responsibility to competent speakers. What are the qualifications required to engage in this socializing role? Ingram explains that the ability to interact as competent speakers involves having "mutual expectations regarding

personal accountability for one's actions, needs, and identity" when people participate in rational exchange for the purpose of trying to reach some level of understanding (306). These mutual expectations – called "validity claims" – include that participants must speak in a comprehensible fashion, be honest in what they are saying, be willing to provide justification for their claims, and not be intending to deceive other participants in the conversation. Before elaborating on these validity claims, though, it is important to understand that this "communicative interaction" involves a process of coordination, integration, and socialization within established democratic principles – a process that cannot be forcibly fulfilled. Accordingly, for "successful" communication to occur, wherein some level of understanding is achieved, it must be allowed to proceed without coercion. From this assertion arises the second key feature of Habermas's theory, the "ideal speech situation."

Uncoerced communication is realized by the ideal speech situation, one in which there are no external constraints preventing participants from assessing evidence and argument, and in which each participant has an equal and open chance of entering into discussion (Giddens, 1990:131). In this environment, competent speech can be achieved, which then paves the way for successful communication.

The ideal speech situation sets out the minimum conditions necessary to achieve the ideal of unconstrained, undistorted communication. As Habermas explains, a speech situation is ideal when

communications not only are not impeded by external contingent influences but also not by constraints resulting from the structure of communication itself. The ideal speech situation excludes systematic distortion of communication (as quoted in Burleson et al 1979: 422).

Brant Burleson and Susan Kline identify four structural features of Habermas's ideal speech situation that should eliminate the distortions that prevent understanding from being achieved. First, anybody who wishes must be able to initiate and carry on a conversation; second, all involved in that conversation must be equally able to contribute with "assertions, challenges, explanations, interpretations" regarding what's being discussed; third, participants must be free to express their intentions, attitudes and feelings, without fear of ridicule or reprisal; and fourth, all involved in the conversation "must be equal with respect to power" (423).

The ideal speech situation, with its emphasis on equal, open and uncoerced access to communication, provides a potential model for achieving Jacubowicz's vision of a communicative democratic environment. How can this ideal speech situation model be realized? Essentially, as Robert Antonio explains, in order for the ideal speech situation to arise, "competent participants in speech situations must understand the difference between true and false statements and that true statements are those that would be reached if there were unconstrained discussion" (1989:732). This is accomplished when participants in this process are able to defend Habermas's validity claims, namely that what participants say can be found to be meaningful, true, justified and sincere. Each of these four claims must be realized in order for successful communication to occur.

Anthony Giddens summarizes each validity claim as follows. "Meaningful" means that what is said is intelligible or comprehensible, or "that it obeys certain syntactical and semantic rules so that there is a 'meaning' which can be understood by the other." In other words, when entering into a conversation, all parties are able to understand one another when they speak the same language, and more or less follow the

accepted rules of grammar and commonly accepted interpretations of vocabulary that make the language being used intelligible to whomever is hearing it. “True” refers to the idea that the propositional content of what is said consists of “factual assertions which the speaker makes,” to the extent that the speaker believes those facts to be true.

Presumably, the speaker is prepared to present evidence to verify those assertions, and consider counter-evidence, as well. In turn, “justified” means that the speaker is justified in saying whatever is said such that they can be “expected to justify or back up the statement that was made.” This involves being willing and able to respond to the question, “what do you mean by what you just said?” Finally, “sincere” means that “the speaker does not intend to deceive the listener,” in that the speaker enters in to the conversation with no intention to trick or manipulate the hearer (128-9).

For Habermas, these claims function in many everyday conversations at something of a subconscious level. For example, imagine that I walk into a shoe store and ask the salesperson if there are any sales on today. She understands my question because we both speak English and my use of the language to pose my question is more or less correct. She responds by saying that if I buy one pair of shoes, I can buy a second pair for 50% off. To make sure I understand, I ask her, “does this mean that both pairs will be 50% off?” She replies, or justifies her initial statement, saying “no, the saving applies only to the second pair of shoes purchased.” I comment, somewhat suspiciously, that the sale sounds like a great deal. She points to a sign containing the details of the sale to back up her assertion that this is in fact the deal available to me, confirming her statements are true and thus providing all facts available to assure me that the offer is sincere. This kind of conversation is part of the normal exchange of everyday life, and

the validity claims in operation are taken for granted. For Habermas, because adherence to these claims is expected by all entering into those conversations for seeking understanding, there is an expectation of mutual accountability wherein all parties are expected to know what they're saying, why they are saying it, and be able to back up what they're saying if need be (Burleson et al, 417). In this way, participants can proceed toward seeking understanding.

This brings us to a third key feature of the theory of communicative action, which deals with the goal of the theory itself – communicative rationality, or understanding. Habermas considers consensus to be essential to achieving understanding. He acknowledges its importance in the following way:

All consensus achieved within discourse rests on the power of negation held by independent subjects, who, by entering into an interpersonal relationship, reciprocally acknowledge the accountability of the other, whereby such competence is taken to mean that they orient their actions toward validity claims (218).

There has been considerable discussion among Habermasian scholars about the precise role of consensus in the theory of communicative action. For example, Delanty argues that consensus is essentially synonymous with mutual understanding, such that discourse itself constitutes consensual agreement (46). Does this mean that successful communication is achieved only when all parties in a conversation come to agree on the same point by enacting Habermas's validity claims? This seems too high a bar to meet, but conceivably would solve the challenge of trying to coordinate and socialize society. If everyone agrees on the solution to a particular social problem, it seems that progress would naturally follow, with no resistance whatsoever. Of course, this seems to be rather idealistic and possibly naïve, considering the many ways communicative situations are, in

reality, manipulated, controlled and dominated by those with power to influence debate, such as politicians and political parties, well-financed lobby groups, and the gatekeepers and owners of mass media entities, to name a few. Instead, Ingram suggests that we consider Habermas's consensus to be more about a compromise-driven outcome that everyone can be happy with; in essence, some level of "better" understanding. He cautions that

One must be careful not to construe consent (consensus) as a criterion specifying true or just outcomes. ... So long as parties to the debate have roughly equal opportunities to influence public opinion and are genuinely motivated by concern for the public good, the compromise outcomes that typically arise...will satisfy minimal (if not maximal) conditions of social rationality and fairness (295).

In this sense, then, rather than interpreting consensus to mean total agreement, this interpretation indicates that consensus requires that all those who choose to participate agree to be accountable for their speech actions, such that they respect the validity claims of the ideal speech situation, assuming that all involved are striving for the same thing (rationality and fairness). Margaret Canovan agrees with this interpretation, as it places emphasis on accountability in seeking understanding. In this regard, she rightly observes that Habermas's theory

seems to give grounds for the hope that disputes even about intractable matters such as morality and politics can be settled by rational discourse, provided that the discourse is not blocked by the distortions induced by domination, ideology, and repression (106).

In her view, this interpretation is attractive because "...it explicitly recognizes and allows for differences and dialogues between plural human beings," as the ideal speech situation is essentially "a condition of communication and interaction among plural individuals with different points of view" (106). Looking at communicative rationality/ understanding in this way, Canovan suggests that if the ideal speech situation can be

mastered, ideas of truth, freedom and justice – hallmarks of a communicative democratic environment – can emerge (105).

Steven Smith, however, warns that “Habermas’ commitment to radical democracy presupposes that the powers of rational speech and argument are equally possessed by all human beings,” which of course they are not (640). On this basis, any regulation of communicative spaces, moral or otherwise, should be guided towards creating an environment wherein all who wish to attempt to participate in rational speech and argument are able to do so, rather than trying to ensure that all discussion is in fact rational, an impossible goal that would necessarily require serious impingements of freedom of expression in the chasing of it. Of course, “the mere opportunity to participate cannot ensure either the rationality or the desirability of the outcome” (640), but it is not the role of the state to dictate the outcomes of discourse. Rather, its role is to ensure that conditions for free and open discussion are able to arise (or at least are not prevented from arising). Being responsible for determining those conditions implies that the state is inevitably going to have to consider whether there are any limits to participation, by setting out the minimum rules of acceptable behaviour, which we see in the desire to regulate acceptable expression.

Applying the theory of communicative action to broadcasting

Due to these concerns, in my view, Habermas’ conception of the mutual understanding necessary to achieve successful communication needs to be modified somewhat if the theory of communicative action is to be applied to the broadcasting environment. It is not an environment readily conducive to the ideal speech situation, with its implication that participants are able to argue and counter-argue their points, nor

is it realistic to expect that a compromise is achievable in any one broadcast.

Furthermore, not only is Smith correct to say that the powers of rational speech and argument differ for different people, but there is a corollary to his argument, namely that rationality is not always a desirable or necessary goal for those that do possess these abilities in every speech situation. Not everyone is interested in being rational all of the time, nor is the goal of rationality necessary for all conversations, exchanges or broadcasts. Instead, what can reasonably expected to be sought is “better” understanding.

These challenges also suggest that not all types of broadcasting are readily applicable to Habermas’s theory. One genre of programming that is most likely to apply is public affairs programming. This is so because it is the most significant broadcast form in which audiences are able to gather informed, trusted opinions about current events and issues directly affecting their daily lives and the world around them. On this basis, if news can be understood as programming that “tells us what to think about,” as Andrew Osler argues, public affairs programming can be understood as programming that attempts to influence us as to *how* to think about the news of the day and other issues of public interest (1993:40). This is accomplished through what Osler characterizes as egalitarian means, in the sense that public affairs programming is characterized by interaction and exchange with a variety of opinion-makers and opinion-holders. These parties provide varying levels of discussion and analysis, rather than just the straight delivery of the “facts” by news authorities, albeit in a controlled environment where the host generally holds the balance of power (78). Specifically, Donald Mullally defines public affairs programming as broadcasts that “...deal with questions of public policy, with the conduct of governmental affairs, with the actions of public figures, and with the

comments of public figures on the course of contemporary history” (1969:70). As such, public affairs programs can be understood as those directed at the exchange of opinions for the purpose of providing analysis and interpretation on matters of direct relevance to the functioning of society, whether political, cultural, social or economic. For all of these reasons, public affairs programming is the most obvious broadcast forum for fulfilling the goals of a democratic communicative environment and thus comprises the heart of the public sphere in broadcasting.¹³

Public affairs programs encompass a variety of formats, including talk or panel shows, town halls, opinion panels, and call-in shows (what the CRTC refers to as open-line programming). In practice, public affairs encompasses a wide range of sophistication, from tempered, calm, polite group discussions about current events on programs like Studio 2 on TVOntario or Ontario Today on CBC Radio, to sensational, personality-driven open-line radio talk shows. In the latter category, the hosts are often controversial personalities who specialize in provoking and even shocking their guests and listeners, such as “man of the people” radio personality Lowell Green, talk radio host at 580 CFRA in Ottawa, Ontario, who has been investigated numerous times by the private broadcasters’ self-regulatory body, the Canadian Broadcast Standards Council, regarding allegations concerning treatment of callers and use of discriminatory language, among other things.

¹³ Other types of programming may make certain contributions to the communicative environment in terms of facilitating the search for “better understanding,” like drama, of which the CRTC itself has said “it is through television drama that most Canadians participate in their national culture and share in the evolution of social values and stories of human passion” (Public Notice CRTC 2003-54). However, elucidating such contributions requires a separate exploration, which is outside the scope of this thesis.

In any case, what is common to all public affairs programming is that in the process of gathering and presenting views and opinions from guests or callers, the host aims to discern what he or she considers to be, or should be, on the minds of the audience/public. In this manner, the host, either alone or in combination with the guest experts or pundits featured in any given show, aims to impart an authority over public opinion that justifies their right to be the one holding the microphone. As a result, public affairs programming both replicates and influences exchanges in the broader public sphere. Accordingly, as this type of programming has the ability to influence and direct public discussion and debate, it is reasonable to expect that certain communicative responsibilities should be met in exchange for the privilege of being in such an influential position on the airwaves.

How, then, might Habermas's validity claims apply to public affairs in broadcasting? At the outset, it is safe to say that the participants involved in public affairs programs expect the first validity claim concerning meaningful content to be respected. Programming from this genre would not serve its purpose if it were not made up of intelligible, comprehensible dialogue, so it is safe to say that since any understanding at all would not arise without adherence to this claim, public affairs generally satisfies it to the extent that each broadcaster intends to make its programming comprehensible. The other claims, that programming must be true, justified and sincere, require further consideration.

In public affairs programming, the remaining three validity claims (ideally) operate in the following way. First, participants expect the factual assertions made by at least the hosts and expert guests to be "true," to the best of their knowledge. By virtue of

discussing and analysing current events, it is reasonable to expect that those engaging in the discussion are doing so because they are reasonably armed with sufficient factual assertions to build a basis for their arguments and opinions, in order to move the discussion forward. However, since public affairs programming encompasses a wide range of formats and levels of sophistication, it is important to acknowledge that not all public affairs programming is created equally. Some programs of this nature deliberately seek out hosts and/or guests more for the level of controversy they are likely to generate than for the level of expertise they bring to the table. As a result, some caution must be exercised in terms of evaluating the likelihood that this claim will be equally fulfilled throughout the range of available public affairs formats. On the other hand, the public affairs genre epitomizes the justifiability claim through its emphasis on discussion, debate, and the provision of in-depth analysis. It is the role of the host to ensure that guests or callers justify their points such that they are able to clarify what they mean and are able to defend the angles and interpretations they make. This process is a defining feature of public affairs and is, arguably, what tends to make it so informative. Finally, participants in public affairs programs also expect a significant level of sincerity, in the sense of an absence of any intention to deceive on the part of all involved. All parties are invited to participate on the assumption that they have legitimate perspectives to share and are doing so for a higher purpose, namely, to inform, enlighten or to share insights. While such programming influences how we think about issues, it is not meant to do so in a deceptive or manipulate way.

Based on this analysis, participants have significantly high expectations that public affairs programming will generally adhere to all of the communicative principles

expressed by Habermas's validity claims in order to contribute to a speech situation wherein the quest for better understanding can proceed. This application of Habermas's theory aims to emphasize that one can expect some form of communicative rationality in at least public affairs programming in the broadcast environment. If this hypothesis is correct, then perhaps the way to foster, or at least not hinder, access to democratic communicative spaces is to weigh decisions to intervene based on whether such interventions will maximize the potential for the ideal speech situation to be realized. This implies that guidelines or standards can be developed to create an environment supportive of the ideal speech situation. In other words, if certain kinds of on-air behaviour prevent Habermas's validity claims from being enacted, that behaviour should be discouraged. Ideally, this can be accomplished non-coercively through the encouragement of certain standards.

Towards a Habermasian approach for developing guidelines for the regulation of acceptable expression in Canadian broadcasting

For the purposes of seeking some philosophical assistance to guide moral regulators of broadcasting, at what point does unacceptable expression threaten validity claims from being realized such that some level of understanding is prevented from being achieved, and thus requires regulatory intervention? Habermas's theory of communicative action, as set out and somewhat modified herein, provides several key ideas in understanding the role of communication in advancing society, concepts that moral regulators of broadcasting can use as principles to assist in the development of standards or guidelines for acceptable expression.

First, recalling that Habermas contemplates that competent speakers are involved in the type of communicative interactions where some level of understanding is being sought, such speakers have mutual expectations that all involved will be personally accountable for their actions. Accordingly, the creation of any guidelines starts with an assumption of competence on the part of those involved. Certainly, competence is a minimal expectation in return for the privilege of having a license to broadcast over public airwaves. As emphasized above, one way to ensure competence is to exercise personal accountability for what is being said. In particular, in a communicative democratic environment, it is arguable that the more a speaker has a monopoly on speech, the more responsibility is involved in ensuring accountability is exercised. Second, Habermas emphasizes the importance of uncoerced communication. As explained above, in a non-coercive environment, participants are not constrained from assessing evidence and arguments and are free to express their views without fear of ridicule or reprisal. In other words, a lack of coercion implies an environment grounded in civility and mutual respect. Based on these two concepts, if qualities of accountability, civility and mutual respect are fostered, participants can proceed towards seeking better understanding.

Perhaps, then, these qualities or principles can be used to formulate a number of guidelines to assist in establishing the parameters of acceptable expression in public affairs programming. For example, in order to ensure that the first validity claim can operate, it is critical that the credibility of those making factual assertions be made clear to all involved in order to give participants the opportunity to assess the legitimacy of the factual assertions being made. A factual assertion about the challenges of child care is more likely to be considered legitimate if the person making the assertion is an expert in

the field or otherwise has direct experience in child-rearing. Along with those behind the scenes making choices about which guests and expert sources to include in a program, it is the responsibility of the host to ensure that claims made are supported with transparent evidence, and thus represent a basic form of accountability on the part of the programmer. Recognizing that time, space and format will require the exercising of editorial judgement in enacting the following, at least two rules or guidelines arise from the principle of accountability: rule number one might state that the credentials of experts/guests must be transparent while rule number two might state that evidence must be supplied to support claims being made by hosts or guests.

Recalling that with respect to the third validity claim, opportunities must be provided in public affairs programs to ensure that participants have the chance to clarify their points and defend or justify the interpretations they are making, principles of civility and respect can assist in ensuring that such opportunities are present via a number of rules. For example, rule number three might prohibit “shouting another person down,” something considered in Chapter 2, because hurling insults or otherwise aggressively belittling another speaker is inappropriate insofar as such behaviour can prevent the target of such remarks from clarifying or defending his or her points, particularly if such aggression drowns out any such attempts on the part of the targeted person to speak. In the absence of such civility, the justifiability claim would have little hope of being fulfilled.

Another aspect of justifiability to consider arises in the case of call-in shows. Hosts of call-in shows are typically setting the agenda for an episode’s subject matter on the basis of their own opinions on a given topic. Thus, insofar as they are attempting to

represent a general viewpoint, or a view they consider to be commonly held, hosts need to concentrate on providing justification for their own viewpoints. Accordingly, rule number four might state that the more a speaker holds such a monopoly over speech, the more they should be expected to present and defend their own viewpoint, instead of resorting to attacking those of others.

Similarly, while not tied to any particular validity claim, the ideal speech situation is not likely to be found in scenarios so lacking in civility and respect that a caller to an open-line program is embarrassed or harassed when they instead expected to be contributing to the discussion. Thus, rule number five would ban such coercive behaviour.

How might guidelines such as these apply, in practice? One such scenario to contemplate is when the airwaves in a democratic society such as Canada – with its respect for freedom of expression, thought and opinions and its need for uncoerced, open exchanges such that citizens can participate in democratic communicative exchanges in an informed, productive way – are used as a delivery system of hate, intolerance, and disregard for basic rights to human dignity. The CRTC’s abusive comment regulation, which prohibits content that “when taken in context, tends to or is likely to expose an individual or a group or class of individuals to hatred or contempt” on the basis of their membership in a protected group, namely race, national or ethnic origin, colour, religion, sex, sexual orientation, age or mental or physical disability, is intended to prevent the airwaves from becoming such a delivery system. This regulation is meant to deal with extreme cases and is readily justifiable from a Habermasian perspective because, as set out in Chapter 2, the regulation aims to prevent the harm of excluding marginalized

groups from participation in the communicative environment (along with broader social harms that result from exposing groups of people to hatred and contempt).

Communicative rationality cannot proceed when the airwaves are used in this manner.

As such, a rule designed to prevent blatant exclusion like the abusive comment regulation is a good first step. However, the pursuit of “successful communication” or better understanding will necessarily face lesser obstacles than hate speech.

Indeed, in the case of CHOI, the broadcasts that gave rise to the CRTC’s investigations were not only problematic because of the broadcast of abusive comment. For example, with respect to the first two rules concerning accountability, transparent credentials and supplying evidence to support claims, consider the following example illustrated in the CRTC’s CHOI decision, from a statement by host André Arthur:

But they’re still proud in Laval to accept foreign students. They forget to say that those foreign students, by definition, with some exceptions, are all children of the most disgusting political leaders in the world, people who are sucking their countries dry, people who kill to gain power and torture to keep it. People we call cannibals, people who are extremely cruel (Broadcasting Decision 2004-271, para 56).

No evidence was provided to substantiate this claim during the broadcast.¹⁴ Instead, the “fact” used in Arthur’s position was a stereotype, namely that all foreign students (particularly those of Black or Muslim background, as Arthur identified earlier in the broadcast) are children of cruel, cannibalistic dictators. Furthermore, it appears from the lengthier text of the conversation quoted in the CRTC decision that Arthur did not consider other views on the matter, either from his co-host, from sources other than his

¹⁴ Note that well after the fact, at the CRTC hearing, a professor from Laval University submitted an intervention stating that he did have some students in his classes who were the sons of African dictators. CHOI argued that Arthur’s statements were “valid and therefore acceptable” despite this information not being provided during the broadcast in question (para 59).

own mind, or from callers to the show. He did not explain how he was in a position to possess such knowledge.

Although not explicitly stated in the decision, it is fair to say that the categorical, overstated nature of the statements, i.e., “foreign students...are *all* children of the most disgusting political leaders...” [emphasis added] misrepresented the reality of the situation being discussed by Arthur. Unsubstantiated statements such as these are problematic not only with respect to comments that are likely to expose people to hatred or contempt, of course, but for any comments that can influence public opinion, particularly given that the microphone tends to lend authority to those making their statements. In this sense, when opinions are expressed in such a manner by someone in a position of authority like a host of a call-in show, it is reasonable to expect that participants are likely to trust the validity of these opinions. If principles of accountability are not respected, this trust in public affairs programming in general will be eroded, reducing the contribution broadcasting makes to discussions on matters of public interest or concern.

Certainly, accountability was a concern for the CRTC in the case of Al Jazeera. The offending comments almost exclusively arose in public affairs programs, namely in circumstances where guests, interviewees and callers were given a platform to express hatred towards Jews. Defenders of the service felt that since it was not Al Jazeera employees themselves that made these comments, that somehow the harm was mitigated or that Al Jazeera was not being derelict in terms of being accountable for the content of its programs (Broadcasting Public Notice 2004-51, paras 23, 31). While no evidence was provided one way or another to determine whether the hosts of the programs in question

invited, tolerated or challenged these comments, it is fair to say that the volume of the anti-Semitic comments suggests that there was little interest on the part of the hosts in providing evidence to counter or otherwise mitigate these statements. At a minimum, it is understandable that a regulator would question whether a person wishing to challenge such statements would be given a reasonable opportunity to do so in a program that tolerates unsubstantiated attacks on entire groups of people.¹⁵

As for guidelines that support principles of civility and respect, such as not attacking others as a proxy for expressing one's own views as contemplated in rule number four, the hosts at CHOI appeared relentless in their use of the airwaves to attack others. In defending its attacks of Sophie Chiasson, CHOI argued that "critiquing the body and presentation of a weather channel host is permitted in the context of a public debate" about show-business because anyone engaging in this business is before the public, and in effect, "fair game" (para 63). If the goal of that broadcast was in fact to have a "debate" about show-business, the hosts could very easily have made whatever points they were attempting to make without relentlessly attacking Ms. Chiasson. Certainly, no attempt was made to allow her to defend herself. Instead, the effect of the broadcast was to conclude that Ms. Chiasson and only Ms. Chiasson used her appearance and sex to obtain work in the industry. In the absence of a guideline preventing such attacks, a likely result could be that any person might fear speaking out in public or otherwise participating in any visible way in public life. In the case of CHOI, if

¹⁵ Given that this was a case concerning a foreign service under no obligation to abide by Canadian standards, the desire for accountability becomes much less attainable in the case of foreign services.

respected, such a guideline would very likely have forced the hosts to revise their approach to such so-called debates.

Finally, rule number five, which contemplates banning scenarios so lacking in civility and respect that a caller to an open-line program is embarrassed or harassed when they instead expected to be contributing to the discussion, can be considered in the context of the Mojo Radio Vancouver case study. In the case of the *Tom Leykis Show*, one person called in to the program seeking advice about how to be more attractive to her partner. The host proceeded to invite her to send in naked pictures of herself while engaged in sexual acts so that he and his staff could judge for themselves. The caller understandably becomes uncomfortable with these requests and the call is ended. While such a program would not likely constitute a typical public affairs program, it is a good illustration of the unlikelihood that any sort of communicative rationality can be achieved in circumstances where callers seeking to participate in a conversation are embarrassed in such a manner.

How does one implement guidelines to prevent the kinds of utterances or pictorial representations that could limit the ability of audiences to achieve understanding, without engaging in full-scale censorship, or without spreading a chill on freedom of speech, as seen in the US in recent years as a result of the fallout of the response by the Federal Communications Commission to what it considers rising indecency in mainstream programming? The strictness with which such rules are applied would depend on whether they are fashioned as conditions of licence or as an expectation that licensees have reasonable respect for them via self-regulatory codes and standards. In either scenario, a variety of challenges are likely to arise in applying these types of rules. For

example, rules designed to ensure accountability would have to take into account the limited time and space available in any given program to provide sufficient support for the claims being made. Further, concerns about shouting others down shouldn't be over-interpreted to the point that heated debate or legitimate criticism is restricted, as public affairs programs make up the key forum in the broadcast arena for the airing of critical views. As for rules concerning civility and respect, in general, such rules should not be constructed or enforced so as to inadvertently limit creativity. Not all public affairs programs are created equally; format, style, focus and even the personalities of the hosts will vary from program to program, from station to station. As such, these sorts of requirements, while universally necessary, would not be palatable or effective if they were used to unduly sanitize language or otherwise restrict people's ability to express themselves in colourful ways. Moreover, the targets of difficult or uncomfortable questions, such as politicians or their representatives, should not be able to use civility and respect guidelines as a shield for avoiding answers to the tough questions.

At a minimum, these qualities – accountability, civility and respect – seek to foster something more than “good character.” They represent a basic means of fostering conditions wherein people are able to enter into the kind of communicative environment that welcomes meaningful exchanges that can contribute to a society's quest for better understanding about matters of importance to them. Under conditions characterized by accountability, civility and respect, social dialogue can proceed in an open, inclusive, non-coercive way.

Conclusions

As described in Chapter 1, the CRTC, as an agent of the state, is responsible for fostering a broadcasting system that is able to fulfil the many objectives of the Broadcasting Act, including that the system must contribute to the development of Canada's social fabric while respecting Canadian values. The programming provided by broadcasters must be of high standard, be varied and comprehensive, serve all ages, interests and tastes, and provide opportunities for the public to be exposed to differing views on matters of public concern. The CRTC is charged with ensuring these objectives are met by broadcasters on the understanding that in doing so it must respect their freedom of expression and creative and journalistic independence.

The goal of this thesis, as set out in Chapter 1, has been to discover a regulatory ethic that can assist in providing guidance as to when moral regulation of harmful expression is justifiable. In such an environment as that envisioned by the creators of the Broadcasting Act, moral regulation of expression should be primarily concerned with ensuring that interventions motivated by a desire to serve myriad social goods do not unduly constrain discourses in the process. Many types of moral regulation of expression aim to address social concerns arising in the democratic communicative environment through the development of standards agreed upon by all involved (regulator, concerned public, broadcasters). By and large, these standards are enforced through self-regulatory measures in order to increase chances that those standards are adhered to without the need to resort to the more blunt regulatory instruments available to the CRTC, such as non-renewal of a broadcast license in extreme cases. This passive regulatory approach indicates that the vast majority of social policies undertaken by the CRTC are relatively unproblematic philosophically, in that many serve to increase access to the democratic

communicative environment by nurturing conditions that maximize participation, whether through limiting depictions of violence that distort understanding, or by fostering conditions that increase the chances that marginalized groups of people within society are able to participate through ensuring their voices are included in the broadcast milieu in an equitable manner.

On the other hand, the abusive comment regulation represents the most active form of moral regulation of expression, not because it is frequently enforced, but rather because the enforcement of it can result in severe consequences, as the case studies explored in this thesis illustrate. The intent of the abusive comment regulation is to prevent a specific kind of harm from occurring over the airwaves – the exclusion of marginalized groups via hatred or contempt. On a broader level, though, the existence of this regulation signifies a desire to prevent a greater harm. That greater harm is to allow so much unacceptable expression that people are unable to participate in public discussion, debate, and exchange. In the case of abusive comment, the more serious harm to society in not placing some limitations on expression occurs when marginalized groups of people are prevented from having the same access to communicative environments that the general population does. In the case of less extreme forms of harmful expression, limitations are also necessary to prevent situations wherein anyone choosing to engage in social dialogue is prevented from being able to proceed towards better understanding due to the behaviours of those holding a monopoly on speech. This arises when people are shut out through fear of being verbally attacked, ridiculed, harassed or otherwise pushed out of the communicative environment and thus are prevented from participating equitably in that space. These harms are the consequences

of unacceptable expression. As Peter Cook and Myles Ruggles acknowledge, then, there is indeed “a public interest in constraining particular public speech acts in pursuit of a broader collective freedom of speech” (1992:13).

Engaging in the regulation of harmful expression has its limits, however. The ongoing challenge for regulators of communication is to articulate those limits in such a way as to manage the expectations of the concerned public pressing for restrictions on speech. It may be tempting to extend notions of accountability, civility and respect on their own to include the justification of limiting tasteless or offensive language, off-colour humour, sexual innuendo or gossip. While such forms of expression are unlikely to be found in traditional public affairs programming, many would argue that they are increasingly commonplace in entertainment-oriented programs. As a result, the accessibility of those programs to the general public and “vulnerable” groups, namely children, could be used as an argument for limiting such “problematic” speech acts. Encouraging the ultimate form of self-regulation – the on/off switch – may be acceptable for the latter scenarios, but exercising individual choice as a means of managing problematic content would not satisfy Jacobowicz’s criterion for a democratic communicative environment wherein any group can participate in discussions about matters concerning them or matters of importance to them.

The broadcasting system would benefit from reflecting this Jacobowiczian access philosophy as a whole. Not necessarily in every episode of every type of program every day, but at least in those environments wherein some level of understanding is expected to be sought. Audiences are not tuning in to *Ed the Sock* or *Monster Truck Rally* to engage in or be informed about public debate the way they do when they seek out public

affairs programs. While the rules proposed in this chapter may not be the right ones, the attempt has been made to demonstrate that the goals of the ideal speech situation for public sphere-oriented programming provide a sound basis for making determinations about what should reasonably be expected of broadcasters in terms of their responsibilities in contributing to a democratic communicative environment. In this manner, these goals become the ethic by which moral regulatory standards can be applied. The concerned public still remains responsible for identifying specific scenarios or types of concerns that arise in programming generally for the purpose of setting standards reflective of values they view as important in a broadcast environment, but if they do so with some reasonable communicative ground rules in mind, perhaps their expectations can be more effectively met, without regulators being placed in a position of doing the greater harm of unduly limiting forms of expression that directly impact exchanges that contribute to the development of individuals and society.

In the final analysis, engaging in moral regulation of expression with an ethic of supporting an environment that increases the chances that successful communication can occur, rather than solely being concerned with preventing harm or seeking to manage excesses of a commercialized television and radio culture, constitutes a responsive and responsible approach to the regulation of communicative spaces in a democratic society wherein it is the regulator's duty to ensure this space exists as openly as possible. In this manner, the views, tastes and interests of all Canadians are more likely to be reflected, at least in public sphere-oriented programs. The more people can participate successfully, wherein freedom of expression is maximized, the more they can direct their society's discourses. In a controlled environment like broadcasting, where a monopoly on speech

exists, the benefits of freedom of expression are maximized when public-sphere oriented exchanges in this environment are governed by core characteristics of accountability, civility and respect. In other words, this quasi-Habermasian approach orients the regulator's role in the moral regulation of expression primarily towards how things are said rather than what is being said.

In conclusion, Habermas's theory of communicative action can assist regulators in understanding what the audience's expectations of broadcasters are in terms of those types of programming wherein better understanding is sought. How to translate this into practical guidance for broadcasters, who are responsible for all programming they air, is another matter. The ideal speech situation must be recognized for what it is – an ideal to strive towards, and one that does not need to be applied to all broadcast situations in order to assist in maximizing opportunities for access to the democratic communicative environment. The Habermasian ideal speech situation explored in this chapter helps to judge the application of those moral regulatory interventions that directly limit expression in a particular circumstance, and may assist in “balancing” the various objectives of the Broadcasting Act, with its sometimes competing objectives of respecting freedom of expression, preserving Canadian values and the country's social fabric, respecting equality rights, and so on.

By relying on principles of communicative rationality as a basis for an ethic for determining acceptable expression, rather than concentrating on managing excess or preventing harm, regulators of expression can temper their interventions based on the kind of communicative values that can preserve a communicative environment necessary for modern democratic societies, instead of taking on more extreme “nanny state”

characteristics, such as pursuing standards for the good of the country's collective character.

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