Free Speech & its Limits

A Study of the Rippling Effects of Hate Speech Laws in Canada

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Abstract

This dissertation critically examines the loopholes in Canada's hate speech legislation and its adjudication processes within courts and tribunals. It argues that Canadian hate speech laws are founded on expansive notions of harm, creating a slippery slope where protected expressions can also face restrictions. This dissertation argues that the current hate speech legal framework in Canada overlooks speech as an exceptional social phenomenon that is inextricable from human creativity, which is inherently polysemous, versatile, and interpretive, especially concerning sociopolitical, ideological, and cultural viewpoints. The core argument of this dissertation is that given the characteristics and complexities of speech and the lack of evidence that can link an alleged hate speech to its harm, hate speech cases are adjudicated through a common sense or deference to legislative judgment approach, and not through deductive and evidence-based reasoning. By closely analyzing hate speech cases, this dissertation demonstrates that in Canada the adjudication of hate speech cases is excessively subjective and inconsistent. This dissertation examines the rippling effects of Canada's hate speech legal regime by uncovering the intertwining of hate speech laws with politics, leading to the rise of a phenomenon termed 'speech scare' that imposes societal and cultural pressures on free expression, especially on controversial topics. Finally, the dissertation examines the discourse of online hate speech, revealing how excessive pressure for online communication moderation can have more detrimental effects on the right to freedom of expression and the right to privacy.

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Introduction

On September 2, 2009, a rare and significant decision was issued by the Canadian Human Rights Tribunal (CHRT). The occasion was the hearing in *Warman v. Marc Lemire,*[1] and at issue were charges of communication of 'hate messages over the Internet,' in breach of section 13 of the Canadian Human Rights Act. Section 13—which was repealed in 2013—prohibited any telecommunication that *likely exposed* 'a person or persons to hatred or contempt by reason of the fact that that person or those persons belonged to minority groups identified on the basis of race, religion, gender, disability, or sexual orientation.'[2] The accused, Marc Lemire, was allegedly a member and/or creator of several websites and forums on which like-minded participants posted their prejudicial opinions about immigrants and people of colour in Canada. The accuser, Richard Warman—who was an employee of the Human Rights Commission between 2002 and 2004—participated in those forums under pseudonyms and traced participants who, in his opinion, communicated in breach of the former section 13.[3] The significance of *Lemire* lies in what transpired at the Tribunal and in the aftermath of the case.

After a lengthy hearing at the CHRT, Athanasios Hadjis, the Tribunal's adjudicator in *Lemire,*[4] dismissed the case, concluding that section 13 of the *Canadian*

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[1] *Warman v. Marc Lemire,* 2009 CHRT 26 [hereafter *Lemire* (2009)].

[2] *Canadian Human Rights Act*, R.S.C., 1985, c. H-6, s. 13. (Repealed 2013, c. 40, s. 1). Hereafter section 13 of CHRA. See Appendix III for the full text of the repealed section 13.

[3] Brean (13 Jan 2012). Also see Gillis. (21 April 2008).

[4] *Lemire* (2009).

Human Rights Act, in conjunction with its subsections, infringed Lemire's protected right to freedom of expression.[5] This was unprecedented, particularly since Hadjis was not a judge and the Tribunal was not a court. More importantly, the constitutionality of section 13 was already affirmed by the Supreme Court of Canada in a number of hate speech cases.[6] Notwithstanding these facts, Hadjis 'declined to issue any remedial order against' Lemire on the ground that 'the restrictions imposed by section 13(1)' did 'not constitute a reasonable limit' on the accused's right to freedom of expression.[7] Hadjis' reasoning on section 13 resulted in havoc within the Human Rights Commissions and Tribunals. The Canadian Human Rights Commission (CHRC) applied to the Federal Court for a judicial review of the tribunal's decision.[8] The Federal Court reviewed Hadjis' decision and upheld that section 13 was constitutional. The Court then ordered Lemire to pay compensation to the CHRC. By the time Lemire filed for an appeal on the Federal Court's decision, however, section 13 had come under legislative scrutiny and review. In 2008, Liberal MP Keith Martin introduced M-446 motion for repeal of the section,[9] which was then turned into a Bill that successfully went through three readings and

[5] Ibid.

[6] For example, in *Canada (Human Rights Commission) v. Taylor*, 1990 CanLII 26 (SCC), [1990] 3 SCR 892.

[7] *Lemire* (2009).

[8] *Canada (Human Rights Commission) v. Warman*, 2012 FC 1162, [2014].

[9] Brean (22 March 2008). Also see Gillis (21 April 2008) and House of Commons of Canada (31 January 2008) l Notice Paper, 39-2, No 41 at 11.

received royal assent.[10] In 2013, after 33 years of being in effect, section 13 was removed from the *Canadian Human Rights Act*.[11]

Neither *Lemire* nor the former section 13 of the *Canadian Human Rights Act* should be taken as exceptions in the context of freedom of expression and its limits in Canada. In fact, the term 'likely to expose' that triggered legislative concern over section 13 and led to its removal, is still central in sections 7, 3, 14 of the *Human Rights Acts* in British Columbia, Alberta, and Saskatchewan respectively.[12] While section 319(2) in Canada's *Criminal Code* prohibits the wilful promotion of hatred, section 319(1) uses ambiguous term 'likely.'

> 319.(1) Every one who, by communicating statements in any public place, incites hatred against any identifiable group where such incitement is *likely* to lead to a breach of the peace is guilty of an indictable offence and is liable to imprisonment for a term not exceeding two years; or an offence punishable on summary conviction.
>
> (2) Every one who, by communicating statements, other than in private conversation, wilfully promotes hatred against any identifiable group is guilty of

[10] *An Act to Amend the Canadian Human Rights Act (Protecting Freedom)*, SC 2013, c. 37, s. 2, repealing *Canadian Human Rights Act*, RSC 1985, c. H-6, s. 13.

[11] *Canadian Human Rights Act*, R.S., 1985, c.H-6.

[12] *British Columbia Human Rights Code*, R.S.B.C. 1996, c. 210, s. 7.; *Alberta Human Rights Act*, R.S.A. 2000, c. A-25.5, s. 3.; *Saskatchewan Human Rights Code*, S.S. 1979, c. S-24.1, s. 14.; See Appendices IV–VI for full text of these codes.

> an indictable offence and is liable to imprisonment for a term not exceeding two years; or an offence punishable on summary conviction.[13]

Both the criminal and human rights codes lack clear definitions of *hate speech*, *hatred, contempt, incite,* or *expose*. The tasks of interpreting the law and its core concepts are left to adjudicators of hate speech cases in courts and tribunals. The adjudicator is also tasked with the application of the law in accordance with sections 1 and 2 of the *Canadian Charter of Rights and Freedoms* ('the *Charter*'). While section 2 of the *Charter* guarantees 'freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication,' section 1 subjects those rights to *reasonable limits* prescribed by law.

> The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such *reasonable limits* prescribed by law as can be demonstrably justified in a free and democratic society.[14]

The *Charter* also does not provide a clear delineation of reasonable limits. The decision on the limit to the accused's right to free expression is left to adjudicators who preside over hate speech cases in courts and tribunals.

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[13] *Criminal Code*, R.S.C., 1985, c. C-46, s. 319 (Canada), emphasis added. See full text in Appendix II.

[14] Section 1 of the *Canadian Charter of Rights and Freedoms,* s 2(a), Part I of the *Constitution Act,* 1982*,* being Schedule B of the *Canada Act* 1982 (UK), 1982, c 11, emphasis added. Hereafter, the *Charter*.

Free speech is said to be *the* most important feature of a democratic society. The importance of this fundamental freedom is universally recognized and emphasized across the board, by old and new thinkers, by judges at the lowest and highest courts, by politicians of all ideologies, and ironically even by dictators pretending to value such liberty. The *Charter* itself opens with this fundamental right and states that everyone must have 'freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication.'[15] The Supreme Court has consistently underscored the significance of free expression. The following encapsulates the Court's perspective on freedom of expression.

> It is difficult to imagine a guaranteed right more important to a democratic society than freedom of expression. Indeed, a democracy cannot exist without that freedom to express new ideas and to put forward opinions about the functioning of public institutions. The concept of free and uninhibited speech permeates all truly democratic societies and institutions. The vital importance of the concept cannot be over-emphasized. No doubt that was the reason why the framers of the *Charter* set forth s. 2(b) in absolute terms which distinguishes it, for example, from s. 8 of the *Charter*, which guarantees the qualified right to be secure from unreasonable search. It seems that the rights enshrined in s. 2(b) should therefore only be restricted in the clearest of *circumstances*.[16]

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[15] Section 2(b), the *Charter.*

[16] *Edmonton Journal v. Alberta (Attorney General),* 1989 CanLII 20 (SCC), [1989] 2 SCR 1326, emphasis added.

In the past several decades since the enactment of the 1970 Hate Propaganda Act[17] that ensued with addition of related sections to federal and provincial human rights codes, numerous hate speech cases have been brought to courts and tribunals under the criminal law and human rights codes respectively. Upon a cursory review of such cases, it becomes apparent that the circumstantial aspects are not always clear but rather require interpretation.

This dissertation critiques the deficiencies and shortcomings in the law and adjudication process of hate speech cases. The primary argument presented in this thesis is that speech—particularly expressions of sociopolitical, ideological, and cultural opinions—is structurally and socio-linguistically too complex for prohibition and adjudication. I argue that complexities of hate speech as a social phenomenon have hindered the legal system from developing a clear and consistent constitution of hate speech. This foundational problem has in turn led to inadequate hate speech laws, excessively subjective adjudication, and characteristically inconsistent judgments. I argue that these structural issues in Canada's hate speech legal regime not only undermine the individual's right to free expression but reinforce structural inequalities that negatively affect vulnerable minorities with less access to power.

This dissertation is a sociological discussion that draws upon historical, philosophical, legal, sociological, and cultural studies, aimed at achieving the following objectives: (1) to examine the limits of free speech under the classical harm principle and

[17] See full text of Hate Propaganda Act in Appendix II.

other expanded notions of harm; (2) to explore some of the structural, sociolinguistic, and semiotic complexities that make speech a unique social phenomenon that is resistant to prohibition and adjudication; and (3) to examine some of the consequences and ramifications that have ensued the legal system pertaining to hate speech. This dissertation is organized in four chapters. The first two chapters offer background information and theoretical discussions that provide a broader context for the subject at hand. Chapters 3 and 4 then analyze some of the outcomes of the legal framework concerning hate speech. The outcomes I have in mind are those which I divide into two categories, namely 'consequences' and 'ramifications.' In my view, consequences are apparent and include but are not limited to the laws' chilling effect on freedom of expression, self-censorship, excessively subjective adjudication, and inconsistent judgments. Ramifications, on the other hand, are those outcomes that are not apparent since they develop over time through the interaction of law, politics, and culture. Ramifications of the current hate speech legal regime include but are not limited to an exacerbation of the chilling effect, imposed censorship, structural inequalities, speech scare, more hate speech on encrypted cyber spaces, and invasion of the right to privacy by tech companies that have taken up the task of monitoring online communication. A summary of each chapter is provided below.

Chapter 1

Although Canada is a liberal democratic country, it has struggled to fully embrace the central tenets of classical liberalism, which prioritize protecting individual freedom and

the right to express oneself. Despite its relatively brief history, Canada has frequently passed, repealed, and substituted laws related to public participation, often motivated by a perceived need to address the harms of certain forms of public communication. Chapter 1 provides a historical survey of speech-related legislation in Canada from Confederation to the present day, demonstrating how different conceptions of harm have led to limits on freedom of thought and expression. Section 1.1 examines how these laws came to be seen as incompatible with Canada's liberal democratic values, leading to their eventual removal. However, they were soon replaced by a new set of laws that were just as illiberal as their predecessors. Section 1.1 also discusses the events and circumstances that led to the development of the latest hate speech laws in Canada, which aim to protect marginalized groups from the harms of hate speech.

Section 1.2 explores the scope of the right to free expression, comparing the harm principle in classical liberalism with the *reasonable limits* allowed by the *Charter*.[18] This section argues that the unspecified and open-ended *reasonable limits* based on expanded notions of harm would allow restriction of all types of expressions, even those that ought to be protected under the *Charter*. This section will argue that extended notions of harm make linking alleged hate speech to evidence of harm challenging since evidence may be nonexistent or inconclusive. It argues that faced with such challenges, adjudicators of hate speech cases have to either adjudicate through a common sense approach or defer to legislative judgment, which means that lawmakers are presumed to have had evidence of

[18] The *Charter*.

the harms of hate speech, justifying its prohibition. The deferring to legislative judgment approach, therefore, necessitates a careful look at the evidence upon which Parliament based its enactment of Canada's first hate speech law in 1970. Section 1.3, therefore, engages in close reading of the justifications included in the 1965 *Report to the Minister of Justice of the Special Committee on Hate Propaganda in Canada* ('the Report'),[19] which became the impetus for enactment of the Hate Propaganda Act of 1970.

The last section of this chapter, section 1.4, will argue that limiting the right to free expression based on expanded notions of harm has set Canada on a slippery slope. Under this approach, different types of speech can be caught based on different understandings and/or allegation of hate speech, to a point where even expressions that are important for maintaining the liberal nature of Canadian society are at risk of being branded as hate speech and therefore chilled.

Chapter 2

Chapter 2 analyzes the two central concepts, *speech* and *hate*, in hate speech laws. The task of defining hate speech and its related concepts is the responsibility of the adjudicator in courts and tribunals. To a large extent, some of the consequences and ramifications of hate speech laws stem from the complexities embedded in these concepts that do not allow for the needed clarity to be included in the law and be utilized by adjudicators of hate speech cases. An alleged hate speech, for instance, may not be as straightforward as

[19] *Report to the Minister of Justice of the Special Committee on Hate Propaganda in Canada* (1965) [hereafter Report (1965)].

a direct threat of violence, explicit harassment, or fraudulent activity. In fact, alleged hate speech often carries cultural, ideological, and sociopolitical implications, the interpretations of which can vary among different audiences and/or adjudicators. The type of speech I am referring to is separate from direct harassment, explicit advocacy of violence, or fraudulent behavior. When I argue that speech is a structurally and sociolinguistically complex social phenomenon that resists single judgment, I am not referring to speech that clearly incites violence or involves direct harassment. Instead, I am referring to speech that expresses ideological, religious, cultural, and/or political views, as exemplified by the adjudicated cases discussed in this dissertation. Chapter 2 intends to highlight the complexities of hate speech and show why speech is an exceptional social phenomenon that resists prohibition and adjudication.

Chapter 2 first delves into a rich body of literature in the philosophy of language, linguistics, and sociolinguistics studies that treats *speech* as a social phenomenon. In particular, the works of Austin, Searle, and Kockelman are useful here.[20] While Austin postulates the structural precariousness of speech through his categorization of speech acts into locutionary, illocutionary, and perlocutionary, he argues that the overlapping of these acts along with various sociocultural, political, and linguistic conventions, and historical events, makes speech a complex and difficult phenomenon to interpret and understand. Searle, on the other hand, accepts Austin's speech act theory and difficulties pertaining to interpretation of speech, but suggests that any given speech should be taken

[20] Austin (1962); Searle (1989) and (1999); Kockelman (2010).

at face value and as the manifestation of the speaker's intention. The issue of *intentionality*, however, is challenged in the work of Kockelman and others, who regard *intention* as an even more complex issue to decipher since it is closely linked to not just the speaker's mental state but to a host of external factors and the state of affairs. This brings section 2.1 to another body of scholarship under linguistics and sociolinguistic studies that examine the use of language and speech within a broader context, but collectively agree that external factors influencing speech cannot be separated from the meanings a given speech tries to convey.[21] Section 2.1 also draws on theories by Foucault and Hall, to situate speech as an act within a 'circuit of culture'[22] and relations of power.[23]

Section 2.2, then, treats *hate* as a manipulatable, extendable, and constructible concept that has been exploited by those in power across history and geographical borders. This section traces hate as a concept—manifested in misology (hatred of debate, reasoning, enlightenment, and tolerance toward others' opinions), misanthropy (hatred of humankind), misogyny (hatred of women), racism (hatred of other races), and more. It aims to demonstrate how the perception of hate has shifted over time, ultimately becoming a tool of colonization under the regime of capitalism and colonialism. Section 2.2 traces racial hatred, for instance, to the colonial era of the 19th century in which race emerged in the work of colonial scientists who categorized human beings based on their

[21] Gumperz (1982) and (1983); Chomsky (1986) and (2005); Yang et al. (2017); Sharifian & Palmer (2007).

[22] Hall (1997).

[23] Foucault (1982) and (2005).

skin colour.[24] In Canada, such 'scientific' claims further solidified structural hatred through racist classification practices in colour-coding its population under statistical and legal regimes. The objective of this section is to demonstrate that the emphasis on hate speech at the individual level detracts from the persistence of structural hatred that remains significant.

Chapter 3

Chapter 3 engages in a close and comparative reading of *Elmasry and Habib v. Roger's Publishing and MacQueen* ('*Elmasry*'),[25] with several other cases. *Elmasry* is a good candidate for demonstrating the excessive subjectivity prevalent in the adjudication of hate speech cases in Canada for the following reasons: (a) the case attracted a significant amount of media attention as the defendant—i.e., *Maclean's*—is a major media outlet that belonged to the largest media corporation in Canada; (b) this fact alone compounded the speech on trial with the issue of freedom of press and further overshadowed the objectivity of the adjudication; and (c) the case also carried a cultural dimension because the speech in question positioned Western cultures against Islamic cultures.

Chapter 3 is organized in four sections. Section 3.1 offers a brief description of *Elmasry*. At issue in *Elmasry* were accusations of Islamophobia that, according to the complaining party, exposed Muslims in British Columbia to hatred and contempt. Since the case was about Islamophobia spread by the media, section 3.2 includes a brief

[24] Galton (1883); Gobineau (1915).

[25] *Elmasry and Habib v. Roger's Publishing and MacQueen (No. 4)*, 2008 BCHRT 378.

literature review on the advent of Islamophobia in the mainstream media in the post 9/11 crisis and up to the time of *Elmasry,* in 2008.[26] The literature review in section 3.2 serves a single objective, which is to demonstrate the prevalence of Islamophobia in the media and then examine how it was treated by the British Columbia Human Rights Tribunal ('the Tribunal') that adjudicated the case. The literature review in section 3.2 does not serve as an examination of the root causes or consequences of Islamophobia. Section 3.3 then provides descriptions of the Tribunal's procedures and testimonies of witnesses. To demonstrate the excessively subjective adjudication of hate speech cases, section 3.4 engages in an in-depth analysis of the case, the Tribunal's treatment of the evidence, and its reasons for dismissing the case.

Chapter 4

In three sections, Chapter 4 examines some of the negative outcomes of hate speech laws in Canada. One such outcome that will be examined in section 4.1 is the chilling effect of the law on freedom of expression and its manifestation in self-censorship as an intended outcome of the law. The chilling effect is a metaphor that was first used in 1952 by a US Supreme Court judge in a First Amendment case, *Wieman et al. v. Updegraff et al.*,[27] and referenced by a Canadian Supreme Court judge, Justice McLachlin, in *R. v. Keegstra*,[28] to convey the deterring effect of the law on *the legal exercise of the right* to free

[26] Bleich et al. (2018a) and (2018b); Kanji (2018); Sharify-Funk (21 Dec 2010); Zine (nd)*;* Abrahamian (2003); Geddes (28 April 2009).

[27] *Wieman et al. v. Updegraff et al.* 344 U.S. 183 (1952).

[28] *R. v. Keegstra,* 1990 CanLII 24 (SCC), [1990] 3 SCR 697.

expression. While the chilling effect argument has persistently remained current in Canadian hate speech discourse, section 4.1 argues that the doctrine has been interpreted as the law having a deterring effect on *illegal speech*, even if it also deters speech that is legal but 'close to the line.' Section 4.1 examines two consequences of the law: (1) the chilling or deterring effect of the law not just on illegal speech but also on legal speech that is 'close to the line'; and (2) inconsistency in the adjudication of hate speech cases that allows for further enforcement of structural inequality.

Sections 4.2 and 4.3 shift the attention to speech caught at the intersection of law and politics to examine some of the ramifications that have developed under Canada's hate speech legal regime. Section 4.2 focuses on the intersection of Canada's hate speech legal regime and hate speech politics and offers a new framework by introducing the term *speech scare.* Speech scare refers to a complex system of societal, political, and cultural pressures upon free expression by spreading fear of hate speech and of speaking freely on controversial topics. Some of the tactics used to spread fear within this framework include but are not limited to smear campaigns, false accusations of hate speech, and content production that heightens fear and anxiety about the threats of hate speech with the aim of influencing policy. This section relies on scholarship with case studies, reports, and events to provide examples.

In Section 4.3, I examine critical moments that present themselves in significant events and bolster speech scare to allow stakeholders and entities to push for more restrictions on online communication. This section argues that despite the claims made in reports, surveys, and polls produced by such stakeholders and entities, catching online

hate speech is more challenging and even, to a large extent, an impossibility. Section 4.3 argues that, due to the generality of hate speech laws, the lack of a clear definition of online hate speech, the involvement of commercial tech companies, the sheer volume of data, the characteristics of online communication, and faulty machine algorithms, monitoring, adjudicating, and removing online hate speech create more problems than solutions. Section 4.3 also explores some potentially irreversible consequences of suppressing online communication and recent efforts to regulate online content. These effects can include, among other things, more invasive data harvesting by social media and tech companies, the removal of lawful content, infringements on the right to free expression and privacy, the migration of online communication to encrypted cyberspaces, and an increase in hate speech within echo chambers of the dark web.

A Brief Reflection

It should be emphasized here that examining and critiquing Canada's hate speech legal regime is not a defense of grotesque antisemitism, Islamophobia, homophobia, sexism, ableism, anti-immigrant, or other forms of hateful/prejudicial expressions. Indeed, this dissertation does not advocate for hate speech. While this dissertation adopts a sociological perspective, emphasizing the gaps in the current hate speech legal framework, it explicitly acknowledges that advocating for an unconditional and absolute right to freedom of expression is not its objective. Such a stance would be overly simplistic and potentially irresponsible. It is evident that speech can escalate to an extreme and perilous level, especially when it directly encourages violence and poses a risk of prompting the

audience to act on such incitement. Moreover, evidence shows that violence and atrocities have historically been accompanied by speech and propaganda that either set the stage for such atrocities or provide justifications for them. There is indeed a strong consensus among academics and others working on this subject that there should be some limits imposed on the right to freedom of expression. The challenge and disagreements, however, lie in determining where such limits should be placed.

The dilemma of free speech and its limits relates to the harms of hate speech to its target but also to its impacts on the audience. Sections 1.3.1 and 1.4 in this dissertation discuss prohibition of hate speech based on its harms on the target. Here, it is useful to include a brief discussion about restrictions on expression based on their potential negative impacts on the audience. There are at least two schools of thought on restricting speech for its negative impact on the audience's attitude and worldview. One suggests that the limit to free speech should be based on a clearly defined notion of harm that takes the protection of the target into account by considering the impact of the speech on its audience, who may react violently toward the target.[29] According to this school of thought, limiting the right to freedom of expression is a worthy compromise when the negative impact of speech manifests in violent reaction of the audience leading up to injuries and harm to those targeted by the speech. On the other side of the debate are those who advocate for hate speech laws based on the *likelihood* or *presumption* that hate

[29] This line of argument is often guided by the Millian harm principle, which is discussed in section 1.2 of Chapter 1, and throughout this dissertation.

speech may negatively impact the audience's *perceptions*, *thoughts*, *attitudes*, and/or *worldview* towards those targeted by speech.

The relationship between speech and its impact on the audience's perceptions, thoughts, attitudes, and worldview is significant in at least three aspects: (1) it involves the autonomy and the right of the individual to freely access and hear diverse ideas without interference from the state and other powerful entities; (2) it encompasses the role of morality in the law and the government's limitations within a liberal democracy. Let us look at these aspects in turn.

Autonomy is the principle that individuals have the inherent right to make their own choices and decisions, form their beliefs and values, and lead the life they desire. In the context of our discussion, autonomy implies that individuals have the right to access information and ideas without hindrance or censorship by the government or other entities. The right to autonomy is a significant value in a liberal society such as Canada, where individuals have the right to access ideas and make their own judgments. The right to access and hear ideas freely ensures that people can explore diverse perspectives, engage in critical thinking, and contribute to public discourse as they see fit. When the state and other authorities restrict or control public access to information and ideas without a compelling reason but based on a presumption of a negative impact on the listener's thoughts, attitudes, and worldview, they violate the individual's right to autonomy.

According to the constitutional scholar Jamie Cameron, prior restriction on public expression that is not based on strong evidence and compelling reason is pre-emptive

since it takes place 'in advance and without knowing whether the exercise of freedom will be harmful, valuable, neither, or both.'[30] She considers such restriction 'constitutionally suspect.'[31]

> Restraint works most often by decree and without challenge, because its purpose is to ban content with little or no process. By its very definition, prior restraint represents a disproportionate response to perceptions that expression is harmful. Accordingly, it must be considered constitutionally suspect in every case.[32]

Such restriction is also based on the assumption that speech impacts every member of the audience the same way. Speech is an exceptional social phenomenon since its expression and reception are inextricable from human creativity, hence it is polysemous, versatile, and interpretive.[33] This means that the interpretation of speech—particularly when it contains sociopolitical, ideological, and cultural views—varies from one listener to another. It is possible that prejudicial speech may persuade some members of the audience against the target, but it is also equally plausible that it may deepen the sensibility and sympathy of the audience in favor of the target. This is because no one can really predict how such an impact would manifest or how long it would last. Hence, allowing the government to restrict speech based on unknown and unpredictable possibilities

[30] Cameron, (2022), 56.

[31] Ibid.

[32] Ibid.

[33] See section 2.1 of Chapter 2 of this dissertation that conceptualizes *speech* as a social phenomenon.

undermines the right of the individual to freely access information and process it as they see fit. This brings us to the second aspect, namely, the government's role and limitations on imposing morality on society.

One of the fundamental building blocks of a liberal democracy is the respect for diversity and a plurality of ideas. This foundational aspect of a liberal democracy dictates that the role of morality in the law should be limited. This is because morality is neither static nor singular but refers to what different individuals and social groups consider right or wrong at different times. Mill, who advocated for restricting the imposition of moral values in legislation to specific instances where actions may cause harm to others, emphasized the value of pluralism as a hallmark of liberalism. Thus, individuals have the freedom to choose their beliefs without being imposed upon by the morality and beliefs of the ruling authority or the majority. The emphasis on limiting the integration of morality into the law is indeed crucial to a liberal society. This stands as a significant aspect that distinguishes a liberal society from totalitarian or autocratic ones, where the law heavily reflects the moral values of the ruling authority.

Given the importance of the right to freedom of expression, the right to freely access ideas and form beliefs, and the nuances of these rights and their limits, how should we reconcile these fundamental rights with other liberal values such as pluralism and the right to live in a discrimination-free society? While this dissertation does not attempt to provide a definitive answer, it aims to offer a scholarly examination of the loopholes in the current legislative remedy and its administration. Identifying and acknowledging

these problems is indeed crucial, as it marks the initial step toward finding the right solution.

This research was guided by critical discourse analysis and qualitative analysis of many aspects of the subject matter, including the legal landscape, justifications underpinning hate speech laws, case law and hate speech jurisprudence, related political actions, politics, and the socio-cultural backdrop that have collectively shaped the current hate speech legal framework.

Key Terms

This dissertation utilizes several terms, some of which may not be familiar to the reader. To ensure clarity, brief explanations of these terms are provided beforehand and are included below. Further elaboration on each term will be provided in their corresponding sections.

Free speech and ***freedom of expression:*** throughout this thesis, the term *freedom of expression* is used when discussions center on the protected right in the Canadian legal context, as it is a more legally recognizable term in Canada. Otherwise, the terms free speech and freedom of expression are used interchangeably and convey the same meaning.

Hate speech: the term *hate speech* is not used in criminal or human rights codes, but it is commonly used in courts and tribunals to refer to prohibited speech under both sets of codes. Searching for the term on CanLII, an online repository of legal cases in Canada, returns 2,425 instances in 1,657 cases.[34] Throughout this dissertation the terms *hate speech* refers to all forms of prohibited expression and communication under Canada's criminal and human rights codes. However, despite genuine efforts to define hate speech, a clear definition that can distinguish hate speech from other types of offensive speech is still lacking. Even *the hallmarks of hate message* as outlined in hate speech jurisprudence remain contested within the legal framework.[35] In this dissertation, hate speech refers to

[34] As of February 6th, 2023.

[35] Developed in *Warman v. Kouba*, 2006 CHRT 50. A discussion on the hallmarks of hate message is included in Chapter 2 of this dissertation.

expressions of sociopolitical, ideological, and cultural opinions that are prohibited under Canada's hate speech laws.

Hate speech laws: throughout this paper the term *hate speech laws* is used as a general term to refer to the criminal and human rights codes that prohibit *hate speech*, unless the discussion is specific to any sections of the criminal or human rights code.

Excessive subjectivity: the term is not to be taken as the common *subjectivity* that is inevitably present in all legal and non-legal judgments. Here the term *excessive subjectivity* serves to highlight the dominant characteristic of the adjudication of hate speech cases. The term is used to describe the act of interpretation that results in the conclusion or judgement that cannot be deduced inferentially based on a set of uniform standards applicable across hate speech cases. Excessive subjectivity here means the interpretation that allows for a predetermined judgment based on the adjudicator's own worldview or point of view. In other words, the adjudicator's judgment Y of fact X can be excessively subjective if Y does not necessarily follow from X. Excessive subjectivity in the interpretation of hate speech laws and their application to a given case at hand is characterized by decisions that are influenced by the adjudicator's own views or common sense on series of sociopolitical issues.

In his theory of interpretation, the legal philosopher Ronald Dworkin argued that in certain cases, the act of interpretation can be pervasive and endless, extending to the underlying principles and values. In such cases he referred to the act of interpretation as being 'interpretive all the way down,' where there is no ultimate stopping point or fixed

set of principles that can provide a definitive answer. Here, the term *excessive subjectivity* should be understood as the level of interpretation that is not based on objective reasoning and evidence, but rather endless and varying based on the common sense and perspective of the adjudicator that may change from one case to another.

It is important to clarify that the term *excessive subjectivity* should not be interpreted in the same way as, for instance, an abstract piece of art is interpreted. The adjudication of hate speech cases takes place within the strict parameters of legislation, case law/jurisprudence, and the specific case being considered. However, one way to conceptualize this term within the legal context is to imagine a spectrum. On one end of the spectrum is the *but-for* test, which involves deductive legal reasoning—as used in the adjudication of labor discrimination cases—and on the other end is an abstract ink drawing that can be imagined and interpreted in various ways, akin to the Rorschach test. In this context, the term *excessive subjectivity* falls nowhere close to the *but-for* test, because the adjudication of hate speech cases adopts a common-sense approach rather than a deductive reasoning approach. In this context, the term *excessive subjectivity* is positioned towards the second half of the spectrum and closer to the abstract drawing end, while still acknowledging that the adjudication operates within the legal parameters mentioned above.

Hate speech legal regime: this term refers to a collective legal system that includes legislative judgement based on a set of non-evidentiary justifications; unclear hate speech laws that lack a clear definition of hate speech; unclear demarcation of limits to freedom

of expression; excessively subjective adjudication of hate speech cases; and characteristically inconsistent judgments in hate speech cases.

Hate speech politics: this term refers to tactical activities of different entities, groups, and/or individuals that aim to control and/or influence the content of the public sphere, through different means available to them. Such means include but are not limited to influencing legislation, content production, accusations of hate speech, defunding, spreading fear of hate speech and public communication on controversialized issues; censorship, etc. Hate speech politics aims to suppress and silence critical expressions perceived as contrary to a group's interests.

Speech scare: this is a term I developed to refer to a complex system of societal, political, and cultural pressures that are imposed upon public communication through legal, cultural, political, and economic means, promoting a widespread fear of the potential risks of speaking freely, especially on issues that have become too controversial for public debate. Speech scare also encompasses a widespread fear and anxiety over perceived threats of hate speech to create a sense of urgency and a belief that urgent actions are necessary to address the perceived threats. At this level, speech scare involves exaggeration of the prevalence of hate speech and its perceived threats through media coverage, content production, and public campaigns aimed at curbing public communication.

1

Canada on a Slippery Slope

Canada is a liberal country governed by democratic principles. However, throughout its relatively short history, Canada has not been able to fully commit to the core tenet of classical liberalism: the liberty of thought and expression. Various reasons lie behind this, one of which is the utilitarian approach of balancing this core value with other liberal values, such as multiculturalism, diversity, and inclusivity. While one can argue in favour of complete commitment to freedom of expression, as it can safeguard other liberal values, some argue against this by claiming that if no other liberty is entirely unrestricted, why should freedom of expression be an exception? In Chapter 2, we will explore why speech stands out as a unique exception among human behavior and makes any restrictions and adjudication impractical.

This chapter aims to provide some context that highlights the government's approach towards the liberal principle of freedom of thought and expression. Section 1.1 provides a historical overview of speech legislation in Canada at different times since Confederation, and highlights how under different notions of harm, liberty of thought and expression became the subject of legislative control and limit. This section discusses how, over time, these laws were recognized as conflicting with the individual rights enshrined in Canada's aspirations of liberal democracy and were subsequently repealed. However, shortly after, they were replaced by another set of laws that were as illiberal as the previous ones. Section 1.1 also includes an overview of a series of events and

circumstances that led to the implementation of the most recent laws regarding hate speech in Canada.

Section 1.2 will examine the limits of the right to free expression as determined by the harm principle in classical liberalism and contrasts them with the limits to free expression imposed by expanded notions of harm. This section argues that the unspecified and open-ended *reasonable limits* based on expanded notions of harm would allow restriction of all types of expressions, even those that ought to be protected under the *Charter*. This section shows that extended notions of harm make linking alleged hate speech to evidence of harm challenging since evidence may be nonexistent or inconclusive. It argues that faced with such challenges, adjudicators of hate speech cases have to either adjudicate through a common sense approach or defer to legislative judgment, which means that lawmakers are presumed to have had evidence of the harms of hate speech, justifying its prohibition. The deferring to legislative judgment approach, therefore, necessitates a careful look at the evidence upon which Parliament based its enactment of Canada's first hate speech law in 1970. Section 1.3, therefore, engages in close reading of the justifications included in the 1965 *Report to the Minister of Justice of the Special Committee on Hate Propaganda in Canada* (the Report),[36] which became the impetus for enactment of the Hate Propaganda Act of 1970.

The final section of this chapter, section 1.4, will argue that subjecting the right to free expression to undefined and un-demarcated limits has set Canada on a slippery

[36] Report (1965).

slope. I will argue that under this approach, different types of speech can be caught based on different understandings and/or allegations of hate speech, to a point where even expressions that are important for maintaining the liberal nature of Canadian society are at risk of being branded as hate speech and therefore chilled.

1.1 Freedom of Expression in Canadian Law

Since 1867, Canada has adopted the main principles of classical liberalism, a key part of which is the individual's right to certain civil liberties. In the pre-Confederation Canada, the Royal Proclamation of 1763 served as the constitution for the colonial authorities, who were more concerned about securing territorial control than individual liberties.[37] Even after Confederation, the implicit and narrow interpretation of the Constitution Act of 1867 applied the concept of personhood not to all people, but only to men of French and English ancestry. In fact, most of the population—including women of all backgrounds, First Nations, non-White immigrants, and Catholics from non-Anglo/French backgrounds did not enjoy the codified civil and political liberties in the Constitution Act. Over the years, individual liberty was further denied to many by other pieces of legislation, including Canada's Indian Act (1876–present) that subjected the indigenous population to paternalistic control of the state and significantly limited their civil, political, and cultural expressions; the Residential School Amendment (1884–1948) that was an attempt to forcefully assimilate indigenous children, denied them from

[37] George III. (1763). Royal Proclamation of 1763. London, England: His Majesty's Stationery Office.

learning their mother language and practicing their own cultural norms; section 98 of Canada's *Criminal Code* (1919–1936), which granted the government the authority to prosecute individuals who held or expressed ideas that were deemed opposing or critical to the government; [38] and Quebec's Padlock Law Act Respecting Communistic Propaganda (1937–1957) that authorized the Quebec government to shut down any property that was used for communist related activities and prosecute anyone possessing communist literature.

In particular, section 98 of the *Criminal Code* was introduced in the wake of labour unrest that resulted in the Winnipeg General Strike in 1919. Accompanying section 98 was section 41 of the Immigration Act that allowed the deportation of immigrants based on their political beliefs, suspicion of believing in communism, or if they were deemed to have engaged in subversive advocacy of other kinds.[39] Section 98 of the *Criminal Code* prohibited membership in 'unlawful associations,' defined as associations advocating use of force in pursuit of governmental or economic reform, with membership defined broadly to include even verbal support or the distribution of literature; violation of this section carried a maximum sentence of twenty years in prison.[40]

Under section 98, the public sphere, too, underwent a siege, as properties and spaces were subject to raids and automatic confiscations, and forfeited to the Crown if

[38] See full text of Section 98 in Appendix I.

[39] Molinaro (2018), 9; Balawyder (1972), 33.

[40] *Criminal Code*, R.S.C., 1985, c. C-46, s. 98. (Repealed, 2014, c. 25, s. 15). See full text of Section 98 in Appendix I.

they were suspected of being used for certain kinds of public gatherings and/or anti-government discussions. Individuals who rented a hall for meetings on prohibited topics were liable to a fine of $5,000,[41] the modern-day equivalent of about $59,000.[42]

When in 1936 the federal government disallowed section 98 of the *Criminal Code*, Quebec Premier Maurice Duplessis established a replacement law that became known as the notorious Padlock Act.[43] This act gave the Quebec government the power to 'padlock' or close premises which were suspected of being a venue for communism. It also authorized the government to prosecute anyone who propagated not only 'communist' ideas—though the term 'communist' was not defined in the Act—but all expressions deemed subversive to the ruling class.[44] The Padlock Act particularly targeted social groups such as Jehovah's Witnesses, Jews, communists, trade unionists, and anyone who was suspected of subversion.[45] The Padlock Act also authorized local sheriffs to padlock properties that were suspected of being used for such purposes.[46]

Section 12 of the Padlock Act made it unlawful to 'print, to publish, in any manner whatsoever, or to distribute in the Province any newspaper, periodical, pamphlet, circular, document or writing whatsoever, propagating, or tending to propagate communism or

[41] Molinaro (2015), 330.

[42] Used the Consumer Price Index in the following formula to calculate the modern value: Modern Value = Historical Value x (CPI today / CPI in the historical year).

[43] Lamberston (2005), 45.

[44] Ibid, 45–46.

[45] Ibid, 34, 46.

[46] Ibid, 34, 46.

bolshevism.'[47] The press and individuals objected to the Padlock Act and demanded that the federal government interfere and repeal it. In its editorial of 27 March 1937, the *Winnipeg Free Press* called the legislation 'the most oppressive law against radicals ever directed and passed in this country.'[48] The editorial argued that the absence of clear definition of the terms 'communism' or 'bolshevism' was an excuse for arbitrary arrests and public suppression. [49] Faced with continuous criticism, Duplessis persistently defended the Act. In one of his speeches in 1939, he equated Communism with 'the worst murder in the world—the murder of the body, the murder of the soul, the murder of the heart and the murder of the intelligence.'[50] Duplessis' figurative equation of communist advocacy with murder broadened the notion of *harm* and gave the state a surplus authority to justify arrests and charges against those who expressed communist ideas. With such authority, the government engaged in legal harassment of those who, he deemed, 'deserved prosecution for trying to infiltrate themselves and their seditious ideas in the Province of Quebec.'[51] The era of persecution ended in 1957, through the landmark case of *Switzman v Elbling*, in which the Supreme Court of Canada struck down section 12 of the Act Respecting Communistic Propaganda, stating that 'the right to free expression'

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[47] *Act Respecting Communistic Propaganda of the Province of Quebec*, R.S.Q. 1941, c. 52.
Cited in *Switzman v. Elbling and A.G. of Quebec*, 1957 CanLII 2 (SCC), [1957] SCR 285.

[48] Balawyder (1972), 202. Also see Molinaro (2017), 226 and Lamberston (2005), 46.

[49] Ibid.

[50] Forsey (1939). Also, partially quoted in Balawyder (1972), 202.

[51] Hutchinson (2011), 51.

on all political, economic, and social issues 'are essential to a parliamentary democracy such as ours.'[52]

Another important case that changed the course of prosecutions of dissenting communication was *Boucher v. The King* in 1950, in which a Jehovah's Witness, Aimé Boucher, was charged with sedition for distributing anti-Catholic literature.[53] In *Boucher,* the Supreme Court considered the sedition charges against Boucher absurd and concluded that 'unless there is the intention to incite to violence or resistance to or defiance of constituted authority,' expressions of different social classes and individuals that 'promote feelings of ill-will and hostility' should not be considered seditious.[54] The Court also evaluated the speech in question based on Millian harm principle. On this issue, Justice Ivan Cleveland Rand discarded the old concept of sedition—that he considered to belong to a time when political authority was drawn from 'Divine providence'—in favour of the modern 19th century Millian civil liberty doctrine and reasoned for the need in maintaining a liberal approach in order to avoid falling back to authoritative forms of governance.

> No modern authority which holds that the mere effect of tending to create discontent or disaffection among His Majesty's subjects or ill-will or hostility between groups of them, but not tending to issue in illegal conduct, constitutes the crime, and this for obvious reasons. Freedom in thought and speech and

[52] *Switzman v. Elbling and A.G. of Quebec*, 1957 CanLII 2 (SCC), [1957] SCR 285.

[53] *Boucher v. the King,* 1950 CanLII 2 (SCC), [1951] SCR 265.

[54] Ibid, 266.

> disagreement in ideas and beliefs, on every conceivable subject, are of the essence of our life. The clash of critical discussion on political, social and religious subjects has too deeply become the stuff of daily experience to suggest that mere ill-will as a product of controversy can strike down the latter with illegality.[55]

In it, the Court also adopted the protection of freedom of expression to be limited only when it incites violence. The decisions in *Boucher* resulted in changes to the definition of sedition in the *Criminal Code*,[56] and put a stop to charges of sedition based on public expressions of discontent, hostility, or controversial expressions.

Though the decision in *Boucher* was an expansion of civil liberties, it stirred discontent among some minority groups. The Canadian Jewish Congress ('the CJC'), for instance, deemed the removal of the formerly held definition of sedition, which covered speech that incited violence, as a lapse in protection of Jewish community.[57] As far as the CJC was concerned, the removal of such definition left no legal means against expressions of antisemitism. In the 1950s, the ubiquity of antisemitism was a serious concern in Canada that was home to a sizable Jewish minority, most of whom had fled the Nazi

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[55] Ibid, 288.

[56] The current law on sedition is mostly related to offences against the government and public order. It reads: 'seditious conspiracy is an agreement between two or more persons to carry out a seditious intention. Marginal note: Seditious intention (4) Without limiting the generality of the meaning of the expression seditious intention, every one shall be presumed to have a seditious intention who (a) teaches or advocates, or (b) publishes or circulates any writing that advocates, the use, without the authority of law, of force as a means of accomplishing a governmental change within Canada.' *Criminal Code*, R.S.C., 1985, c. C-46, s. 59 and *Criminal Code* (R.S.C., 1985, c. C-46), https://laws-lois.justice.gc.ca/eng/acts/c-46/section-59.html and https://laws-lois.justice.gc.ca/eng/acts/c-46/page-10.html.

[57] Kayfetz (1973); Report (1965).

atrocities in Europe.[58] Amid antisemitic sentiments and racist treatment of the Jewish minority in Canada, discussion on amendments to Canada's *Criminal Code* began shortly after the changes in the definition of sedition in the *Criminal Code*.

According to Ben Kayfetz, a former executive director of the CJC, every year from March 1953 to 1965, representatives of the CJC approached the Ministry of Justice and presented their case for legislative protection of the Jewish minority against antisemitism in Canada. The CJC initially asked that 'a formerly held definition of sedition involving the incitement to violence be restored to the law.'[59] Despite arguments made by the representatives of the CJC, their proposal and suggestions for reversing the sedition section of the *Criminal Code* were rejected for twelve consecutive years.[60] Over the next twelve years, the CJC consistently approached lawmakers and submitted its requests to various Ministers of Justice. Finally in 1965, the majority Liberal government welcomed the idea of new legislation to combat hate propaganda in Canada.[61] In January of the same year, Guy Favreau, the then-Minister of Justice, announced the appointment of the Special Committee on Hate Propaganda ('the Committee'). The Committee was tasked with studying the problem of hate propaganda in Canada and submitting a report with recommendations for legislative action.[62] The Committee began its work by ordering two

[58] Report (1965); Kayfetz (1973).

[59] Report (1965), 258; Kayfetz (1973), 87.

[60] Kayfetz (1973), 5. Also described in the Report (1965).

[61] Kayfetz (1973), 5–8.

[62] Report (1965), 1. The Committee consisted of eight members: Saul Hayes, who was, at the time, the executive vice-president of the Canadian Jewish Congress; Harvey Yarosky, who was a

separate studies. One was conducted by Mark R. MacGuigan, a law professor at the time—and later the Minister of Justice and Attorney General—who provided a historical survey of sedition and related offences in Canada, the UK, and US. The second study, which was written by Harry Kaufmann, a professor of social psychology, consisted of a survey of the literature in 'the field of hate propaganda and group conflict' between the end of World War II and 1965.[63] Kaufmann's chapter is entitled 'Social Psychology Analysis of Hate Propaganda—A Survey of the Literature' which is divided into eleven chapters, two parts, a postscript, and a bibliography.[64]

Ten months later, the Committee submitted the *Report to the Minister of Justice of the Special Committee on Hate Propaganda in Canada* (the Report) to the Ministry of Justice. Following the Committee's submission of the Report in November 1965, Bill S-49 was introduced to the 27th Parliament in 1966. On November 7th and March 20th of 1966, the Bill was given its first and second readings respectively. As the 27th Parliament came to an end on April 23rd of the same year, and given that the Minister of Justice, Guy Favreau, passed away, the Bill was not considered further. In November 1969, the new

lawyer practicing in Montreal; Shane MacKay, the executive editor of Winnipeg Free Press; Maxwell Cohen, who was the Dean of the Faculty of Law at McGill University; J. A. Corry, the principal at Queen's University; L'Abbe Gerard Dion, a priest who was teaching at Laval University; Mark R. MacGuigan, an Associated Professor of Law at the University of Toronto; and Pierre-Elliott Trudeau, who was then an Associate Professor of Law at the University of Montreal.

[63] Report (1965), 3.

[64] Ibid, 171–251.

Minister of Justice, John N. Turner, tabled the Bill during the 28th Parliament under Bill C-3, which proposed three new offences in the *Criminal Code*:

> First, the offence of advocating or promoting genocide; second, the offence of public incitement of hatred and contempt likely to lead to a breach of the peace; third, wilful promotion of hatred or contempt.[65]

The bill received the full backing of the Liberal majority but was opposed by some Conservative MPs.[66] Among the Conservative MPs, Eldon M. Woolliams from Calgary North, while agreeing with the first offence, advocacy of genocide, being added to the *Criminal Code*, expressed his opposition on the second and third offence and stated that 'there's a world of difference between promoting contempt and advocating genocide.'[67] Quoting an article published in the *Globe and Mail,* Woolliams emphasized that if the second and third offences were added to the *Criminal Code*, 'the law could become one of the most iniquitous and oppressive pieces of legislation in the books. There are several volatile issues in Canada.'[68]

> Language is one: religious differences between Protestants and Catholics constitute another. Walk into an urban renewal area in almost any city and you'll

[65] Canadian Parliament, House of Commons, Debates, 28th Parliament, 2nd Session, 3 Oct 1969 to 21 Nov 1969.

[66] Ibid, 882.

[67] Ibid, 885.

[68] Ibid, 888.

find residents who are trigger-tense. The greatest potential the bill has is for backfiring.[69]

With the majority in the House, the Liberal government succeeded in its efforts and Bill C-3 was passed in the 28th Parliament and was followed by the addition of the Hate Propaganda Act to the country's *Criminal Code* in 1970. In subsequent years, sections that prohibit hate speech were added to Canada's federal and provincial *Human Rights Acts*. Although significantly different in their function and application, both the criminal and human rights codes use identical terms such as *hatred, contempt,* and *likely*. They are also similar in their lacking to provide clarity about the constitution of these terms. Furthermore, under both criminal and human rights codes, the legal test to determine whether certain speech qualifies as hate speech is identical. The legal test will be discussed in Chapters 3 and 4, where case law analyses are provided.

Since 1970, numerous hate speech cases, charged under Canada's *Criminal Code* or in violation of federal or provincial *Human Rights Acts*, have been brought to courts and/or tribunals across Canada.[70] The three leading cases that began to signify Canada's hate speech laws were: *R. v. Keegstra,* pertaining to section 319(2) of the *Criminal Code*

[69] Ibid.

[70] The total number of hate speech cases filed or tried across Canada could not be obtained. Correspondence with the CHRC did not result in obtaining information in this regard. There are, however, a number of case law repositories that have made transcripts of cases heard at tribunals and courts accessible—i.e., CanLII, West-Law, Nexis, Lexis Advance etc. Key term search—i.e., 'hate speech,' 'hate propaganda,' 'Hate Propaganda Act,' 'section 13,' 'Islamophobia,' 'antisemitism,' 'anti-gay,' etc.—on these repositories indicates that since the early 1980s over 1500 hate speech cases were brought to courts and tribunals across Canada.

and cited in 573 cases;[71] *R. v. Zundel,* pertaining to the old section 181 of the *Criminal Code* and cited in 411 cases;[72] and *Canada (Human Rights Commission) v. Taylor* in violation of section 3 and subsection 13(1) of the Canadian *Human Rights Act*, and cited in 400 cases.[73] Whereas *Keegstra* and *Zundel* were tried in courts, *Taylor* was the first hate speech complaint that was adjudicated by the CHRT under the section 13 of the *Canadian Human Rights Act* that prohibited telephony communication of hate speech. As online communication started to gain momentum in the 1990s, section 13 was amended to be applied to communication of hate speech on the Internet.[74] Section 13 was repealed in 2013.

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[71] *R. v. Keegstra,* 1984 CanLII 1313 (AB KB); *R. v. Keegstra,* 1990 CanLII 24 (SCC), [1990] 3 SCR 697.

[72] *R. v. Zundel*, 1992 CanLII 75 (SCC), [1992] 2 SCR 731; *R. v. Zundel*, 1987 CanLII 121 (ON CA; *R. v. Zundel*, 1990 CanLII 11025 (ON CA).

The Attorney General decision to pursue charges related to hate speech means that it has sometimes been an impediment. The Ontario Attorney General refused consent to the prosecution of Zundel under s. 319(2). Since the case could not be prosecuted under section 319 of the Criminal Code, it was commenced under the old section 181. The old Section 181 of the Criminal Code dealt with false messages or stories that were likely to injure or alarm any person or to incite public mischief. It made it a criminal offence to wilfully publish, circulate or broadcast any such message or tale. Section 181 of the Criminal Code was a provision that prohibited the spreading of false news, with penalties of imprisonment or fines for those convicted. The provision was originally introduced in 1892 with the intention of preventing the dissemination of false information that could incite public unrest or harm the reputation of individuals or institutions. However, over time, Section 181 was criticized as being overly broad and potentially infringing on free expression. The provision was repealed in 1983 and replaced with a narrower provision in the Criminal Code section 181(1), which read: 'Every one who wilfully publishes a statement, tale, or news that he knows is false and that causes or is likely to cause injury or mischief to a public interest is guilty of an indictable offence and liable to imprisonment for a term not exceeding two years.' https://laws-lois.justice.gc.ca/eng/acts/c-46/section-181.html

[73] *Canada (Human Rights Commission) v. Taylor,* 1979 CanLII 3882 (CHRT); *Canada (Human Rights Commission) v. Taylor (No. 1),* 1980 CanLII 3955 (FC)*; Canada (Human Rights Commission) v. Taylor,* 1990 CanLII 26 (SCC), [1990] 3 SCR 892.

[74] Full text of the repealed section 13 of CHRA is included in Appendix III of this dissertation.

The administration and processing of human rights cases may vary due to the differences in the structure of human rights bodies at the federal, provincial, and territorial levels of government in Canada.[75] In provinces that have both a human rights commission and a human rights tribunal, hate speech complaints may be submitted to the commission, which investigates them and determines whether to involve its respective tribunal/board of inquiry/board of adjudication or dismiss them. At the federal level, a hate speech complaint can be submitted to the Canadian Human Rights Commission, where it will be investigated and decided whether it should be sent to the Canadian Human Rights Tribunal. Whereas in British Columbia, a complaint can be submitted directly to the BC Human Rights Tribunal.[76] At the respective tribunal then, 'an independent panel will hear the views of both parties before a final decision is made.'[77]

Information on the total number of hate speech cases received and/or decided by tribunals across Canada is difficult to obtain. In 2008, the constitutional scholar Richard

[75] The Canadian Human Rights Commission and Canadian Human Rights Tribunal (separate); Alberta: Alberta Human Rights Commission and Tribunal (combined); British Columbia: British Columbia Human Rights Tribunal (no commission); Manitoba: Manitoba Human Rights Commission and Tribunal (combined); - New Brunswick: New Brunswick Human Rights Commission and Tribunal (combined); Newfoundland and Labrador: Human Rights Commission of Newfoundland and Labrador; Northwest Territories: Northwest Territories Human Rights Commission and Adjudication - Panel (combined); Nova Scotia: Nova Scotia Human Rights Commission and Board of Inquiry (separate); Nunavut: Nunavut Human Rights Tribunal (combined); Ontario: Ontario Human Rights Commission and Human Rights Tribunal of Ontario (separate); Prince Edward Island: Prince Edward Island Human Rights Commission and Board of Inquiry (separate); Quebec: Commission des droits de la personne et des droits de la jeunesse and Tribunal des droits de la personne (separate); Saskatchewan: Saskatchewan Human Rights Commission and Tribunal (combined); Yukon: Yukon Human Rights Commission and Board of Adjudication (combined).

[76] As of March 31, 2003, there is no human rights commission in BC.

[77] Government of Canada (June 23, 2021), Combatting Hate Speech and Hate Crimes.

Moon was asked by CHRC to write a report on online hate speech with a focus on section 13 of CHRA. According to Moon, between January 2001 and September 2008, the Canadian Human Right Commission received 73 complaints under the former section 13 of the Canadian Human Rights Act.[78]

> Of these, 32 were closed or dismissed by the CHRC, and 34 were referred to the Canadian Human Rights Tribunal (CHRT) for adjudication. At the time of data collection in September 2008, 2 of the complaints were being investigated by the CHRC, and 5 were awaiting decision. Among the 34 complaints referred to the CHRT, 10 were resolved before adjudication. As of September 2008, 8 of the remaining 24 complaints were awaiting conciliation/adjudication. The CHRT found that Section 13 had been breached in 16 cases and imposed a cease and desist order, with monetary penalties imposed in several cases.[79]

From 2006 to 2014, the CHRC found itself in the middle of controversies and media scrutiny related to a series of cases, particularly *Warman v. Marc Lemire*.[80] In *Lemire,* Marc Lemire was accused of violating section 13 of the *Canadian Human Rights Act*.[81] The case gained extensive media coverage and triggered public and legislative scrutiny about section 13 and its potential to infringe the right to free expression. Section

[78] Moon (October 2008), 12.

[79] Ibid, 12.

[80] Brean (2012).

[81] *Lemir* (2009).

13 prohibited communication of 'any matter that is *likely to expose* a person or persons to hatred or contempt by reason of the fact that that person or those persons are identifiable on the basis of a prohibited ground of discrimination.'[82] Initially, section 13 prohibited such communications made via telephone but after 9/11, the section was expanded to also include communication over the Internet.

In his 2008 report, Moon offered his first recommendation about section 13 and the role of CHRC pertaining to hate speech.

> The first recommendation is that section 13 of the CHRA be repealed, so that the CHRC and the Canadian Human Rights Tribunal (CHRT) no longer deal with hate speech, and in particular hate speech on the Internet. Hate speech should continue to be prohibited under the *Criminal Code* but this prohibition should be confined to expression that advocates, justifies or threatens violence.[83]

In response to this part of Moon's report, the CHRC wrote:

> Human rights codes and consequently commissions and tribunals should have a role in matters of hate expression. Recognizing the harm of hate speech through a finding of discrimination has important social value and potential for other forms of response even if censorship is accepted as an exceptionally narrow legal

[82] See Appendix III for full text of the repealed section 13 of CHRA, emphasis added.

[83] Moon (October 2008), 2.

remedy. As Professor Moon points out, human rights laws offer broad public interest remedies beyond those available to courts under criminal law.[84]

In 2008, Liberal MP Keith Martin, who took issue with the use of the term 'likely to expose' in the said section, tabled M-446 motion for removal of section 13.[85] The motion to remove section 13 from the Canadian Human Rights Act received the support of the majority of MPs in Parliament, and eventually received Royal Assent on June 26, 2013.[86]

The removal of section 13 created a gap in curbing online hate speech, which remained an issue that was revisited in March 2019, when Parliament assigned the Standing Committee on Justice and Human Rights (SCJHR) to study and present its recommendations on how the government should tackle online hate speech. Subsequently, in June 2019, the SCJHR produced a report and presented it to the 42nd Parliament.[87] On 23 June 2021, David Lametti, Minister of Justice and Attorney General of Canada, along with Steven Guilbeault, Minister of Canadian Heritage, and Bill Blair,

[84] Ontario Human Rights Commission (January 2009).

[85] Brean (22 March 2008). Also see Gillis. (21 April 2008).

[86] Canadian Human Rights Commission (March 01, 2014).

[87] Canadian Parliament, House of Common (June 2019). *Taking Action to End Online Hate, Report of the Standing Committee on Justice and Human Rights*. Ottawa: 42nd Parliament, 1st Session.

Minister of Public Safety and Emergency Preparedness, issued a news release announcing their legislative plans to 'protect Canadians from hate speech and online harms.'[88]

> The bill aims to: amend the Canadian Human Rights Act to define a new discriminatory practice of communicating hate speech online, and to provide individuals with additional remedies to address hate speech; add a definition of 'hatred' to section 319 of the *Criminal Code* based on Supreme Court of Canada decisions; and create a new peace bond in the *Criminal Code* designed to prevent hate propaganda offences and hate crimes from being committed, and make related amendments to the Youth Criminal Justice Act. [89]

Adding a clear definition of 'hatred' to section 319 of the *Criminal Code* may reduce some ambiguities in the law. But far more clarity on the definition of hate speech and its core and related concepts, such as *harm* and *reasonable limits* to freedom of expression, is needed in order to make the law and its application consistent, just, and nearly effective. In Chapter 4, I will explore the challenges related to online hate speech, highlighting deficiencies in current laws and methods for monitoring and removing it.

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[88] Government of Canada (June 23, 2021), News Release. This plan was put in Bill C-36, which went through the first reading at the Second Session, Forty-third Parliament, 2020-2021. The bill did not proceed further because it was interrupted by an election. A copy of the bill can be found here: https://parl.ca/DocumentViewer/en/43-2/bill/C-36/first-reading

Note that bill went dormant when Parliament was dissolved on 15 August 2021.

[89] Ibid.

Another recent issue that relates to hate speech laws in Canada is the debate over the definition of antisemitism.[90] On 25 June 2019, the federal government adopted the International Holocaust Remembrance Alliance's working definition of antisemitism as part of 'Canada's Antiracism Strategy."[91] On 11 December 2019, two members of Ontario Legislative Assembly, Will Bouma and Robin Martin, tabled Bill 168 Combating Antisemitism Act, that has gone through its second reading.[92] As part of its adoption of this definition of antisemitism, the Bill mandates all universities and institutions across Ontario to adopt the definition of antisemitism as stated by the International Holocaust Remembrance Alliance (IHRA). The IHRA'a definition of antisemitism is as follows:

> A certain perception of Jews, which may be expressed as hatred toward Jews. Rhetorical and physical manifestations of antisemitism are directed toward Jewish or non-Jewish individuals and/or their property, toward Jewish community institutions and religious facilities.[93]

The proposed legislation was eventually abandoned. On October 26, 2020, the Lieutenant Governor of Ontario ordered the adoption of the IHRA's Working

[90] Government of Canada (2019–2022). Canadian Heritage. Building a Foundation for Change: Canada's Anti-Racism Strategy 2019–2022.

[91] NOIHRA. The IHRA Definition of Antisemitism & Canadian Universities and Colleges: What You Need to Know, *Academic Alliance Against Antisemitism, Racism, Colonialism & Censorship in Canada (ARC)*.

[92] Bouma (11 December 2019). Legislative Assembly of Ontario (2019). 1st Session, 42nd Legislature, Ontario 68 Elizabeth II, 2019. Bill 168 An Act to Combat Antisemitism.

[93] Rodriguez (2019), 22.

Definition of Antisemitism through Ontario's Order in Council 1450/2020, bypassing the need for a majority vote.[94]

Since the late 1970s, hundreds of hate speech cases were brought to courts and tribunals across Canada. A brief scanning of hate speech cases on different online repositories indicates that at issue were charges/complaints of antisemitism, Islamophobia, xenophobia, homophobia, offensive expressions based on religious beliefs, subversive artwork, defunding of groups accused of hate speech, employment dismissal of individuals accused of hate speech, and in general speech of sociopolitical, ideological, and cultural opinions. Key-terms search—i.e., 'hate speech,' 'hate propaganda,' 'Hate Propaganda Act,' 'section 13,' 'Islamophobia,' 'antisemitism,' 'anti-gay,' etc.—on online caselaw repositories returns different numbers of hate speech cases ranging from 500 to over 1500 cases.[95]

This brief overview of Canada's legislative treatment of freedom of expression demonstrates that as a liberal democracy, Canadian legal system has had to maneuver around the principle of free expression and its limits under classical liberalism. The expansion and contraction of the concept of harm can be observed in legislative changes throughout Canada's legal history. Whether the restriction on free expression stemmed from fear of alienated cultures of the First Nations, Jehovah's Witnesses, communism,

[94] Ontario Government (27 October 2020).

[95] As of 14 February 2023. Searching on combination of specific terms also returns different numbers and is not an accurate way to obtain the exact number of hate speech cases, in courts and tribunals.

sedition, or hate propaganda, relevant laws were consistently enacted based on broader interpretations of harm without accompanying evidence. Subsequently, when these laws were repealed, they were replaced with new laws grounded in different perceptions of harm. The latest set of hate speech laws, too, were put in place based on expanded notions of harm and *justifications* that were not evidence-based. In Section 1.3 I will provide a close look at what was presented to Parliament as *evidence*. But let us first look into the concept of harm and its relation to freedom expression.

1.2 Freedom of Expression and Expanded Notions of Harm

Canada is regarded as a liberal country where freedom of expression is protected by the Constitution through the *Charter of Rights and Freedoms* (the *Charter*). Section 2 of the *Charter* outlines the right to free expression among those rights that are guaranteed and protected,

> Everyone has the following fundamental freedoms:
>
> (a) freedom of conscience and religion;
>
> (b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;
>
> (c) freedom of peaceful assembly; and
>
> (d) freedom of association. [96]

[96] The *Charter*.

Section 1 of the *Charter*, however, subjects all of its guaranteed rights to *reasonable limits* prescribed by law.[97] The right to free expression is limited by hate speech laws, which prohibit speech that promotes or incites hatred against individuals or groups based on their race, ethnicity, religion, gender, sexual orientation, and disability.[98] Laws, however, are general in regulating people's conduct, and hate speech laws are no exception. In Canada, hate speech laws do not explicitly define *hate speech* or establish *reasonable limits* on freedom of expression. Instead, these specifics are left to the adjudicators of hate speech cases.

The rights and their limits set forth in the *Charter* are based on the liberal utilitarian framework of balancing competing values that are to be upheld in a free and democratic country such as Canada. The *Charter's* guaranteed right to free expression is a cherished democratic value that is not absolute since it competes with another democratic value of living in a society that is free of discrimination. To be sure, the *Charter's* utilitarian framework was largely inspired by the doctrine of classical liberalism, notably that of John Stuart Mill. In Mill's liberal doctrine, however, the liberty of thought and expression is a single feature that can safeguard a range of other liberal values,

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[97] Ibid.

[98] The term *identifiable group* was defined in the Report (1965) as any section of the public distinguished by religion, colour, race, language, or ethnic or national origin. Since the enactment of the Hate Propaganda Act in 1970, the laws have been amended to include more categories—i.e., gender and disability—to what constitutes the term identifiable group. Parliament expanded the definition of 'identifiable group' in the following bills: Bill C-250, An Act to amend the Criminal Code (hate propaganda), 3rd Session, 37th Parliament (S.C. 2004, c. 14).; Bill C-13, An Act to amend the Criminal Code, the Canada Evidence Act, the Competition Act and the Mutual Legal Assistance in Criminal Matters Act, 2nd Session, 41st Parliament (S.C. 2014, c. 31).; and Bill C-16, An Act to amend the Canadian Human Rights Act and the Criminal Code, 1st Session, 42nd Parliament (S.C. 2017, c. 13).

including the values of truth, individual development, wellbeing of the collective, and even the value of protecting minority groups from 'the tyranny of the majority.'[99] Because liberty of thought and expression forms the foundation of numerous other liberal values, Mill asserts that caution is necessary in safeguarding this fundamental liberty. He emphasizes that no society is immune and that even a democratic society can be plagued by the tyranny of prevailing opinions of the majority. The tendency of the state to manipulate individuals' thoughts and expressions, Mill warns, can follow by the tendency of society and culture to impose 'ideas and practices as rules of conduct on those who dissent from them.'[100] In his approach in safeguarding the freedom of thought and expression, Mill employed a strategy and demarcated the threshold for free expression in his harm principle that distinguishes dangerous speech from all other types of speech.[101] Mill elaborated on his strategy through his corn-dealer example.

> An opinion that corn-dealers are starvers of the poor, or that private property is robbery, ought to be unmolested when simply circulated through the press, but may justly incur punishment when delivered orally to an excited mob assembled before the house of a corn-dealer, or when handed about among the same mob in the form of a placard.[102]

[99] Ibid.

[100] Ibid.

[101] Mill (2003), 66.

[102] Ibid.

In his corn dealer example, Mill imagines a corn dealer hoarding and artificially inflating the price of corn during a famine, effectively causing suffering for those in need. Mill argues that people have the right to express themselves against the corn dealer's conduct, but only as long as such expression does not directly expose the corn dealer to a violent threat leading to physical injury or death to the corn dealer and his family. In Mill's corn dealer example, the speaker and his mob audience are situated in front of the corn dealer's house, and the passionate speech of the speaker can lead to a harmful outcome. The key distinction between the harm caused in this example and the perceived harm caused by hate speech lies in the directness and immediacy of the harm caused. Hate speech, while harmful, may not have an immediate and direct link to causing harm like the speech in Mill's corn dealer example. It is important to note, however, that even in cases where Mill draws the line, he does not suggest that the liberty of the speaker should be completely curtailed. For Mill, the speaker should still be free to express his views elsewhere and through other media, where his speech cannot pose a threat to others.

Admittedly, even Mill's notion of *harm* is not as clear-cut as we may wish it to be, particularly when this principle is viewed through his utilitarian framework, within which free speech becomes defendable only when its benefits and interests outweigh other liberal values. In more than two centuries since Mill, many theorists have further developed such frameworks across various subjects. Pertaining to the contemporary discourse on freedom of expression and its limit in Canada, W. L. Sumner's philosophical work is notable here. In his *The Hateful and the Obscene: Studies in the Limits of Free Expression*, Sumner engages

in extensive evaluation of the cost-benefit of the legislative limits on free expression in Canada through Mill's utilitarian framework, and enquires whether the restriction on some expressions would have better utility than their protection.[103] Sumner postulates that a utilitarian justification of legal restriction on free expression is heavily dependent 'on the facts of the matter,' both contextually and temporally. This means that 'what is best for a society at one time may not be best at another time,' and 'what is best for one society might not be best for another.'[104]

> Coercive interference with some particular form of expression (hate literature, pornography, or anything else) can be justified only if the expression in question causes harm to others and interference with such expression results in better balance of benefits over the costs than non-interference.[105]

For Sumner, since the only 'justification for restraints on' such expression 'is to reduce the risk of harm to members of vulnerable social groups, such as children, visible minorities, gays, and women,' we need to see whether such restraints protect them or carry more harms on the members of a given group. Sumner argues that such cost-benefit evaluation is a challenging task since it is compounded by the fact that 'appeals to utility are notoriously susceptible to interpretation and manipulation,' and therefore a 'shaky ground

[103] Sumner (2004), 21.

[104] Ibid, 22.

[105] Ibid, 33.

for the defense of a core political freedom.'[106] We can extend Sumner's argument through his examination of *R v. Butler*.[107]

In August of 1987, the Winnipeg police raided the Avenue Video Boutique in Manitoba and charged its owner, Donald Butler, with about 250 counts that ranged from possessing, distributing, and selling pornographic material to exposing the public to obscenity. Through a trial, appeal, and cross-appeal, the case traversed from Manitoba's lower court and Court of Appeal to the Supreme Court of Canada.

> At his trial in 1989 [Butler] was convicted on 8 counts, relating to eight of the seized videotapes, and acquitted on all of the remaining charges. The crown appealed the 242 acquittals to the Manitoba Court of Appeal, and Butler cross-appealed the 8 convictions. In 1990, by a 3-to-2 majority, the Court of Appeal entered convictions with respect to all 250 counts. Butler then appealed these convictions to the Supreme Court.[108]

The Supreme Court was faced with the challenge of establishing a link between the obscene material at issue and harm. In the absence of scientific evidence demonstrating a

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[106] Ibid, 28.

[107] *R. v. Butler*, 1992 CanLII 124 (SCC), [1992] 1 SCR 452. Although this case was not charged under the Hate Propaganda Act, it is still relevant to my discussion of harm and its relationship to the interpretation of reasonable limits of free expression set out in the *Charter*. The Supreme Court has typically developed the harm principle in cases that were not specifically related to hate speech. Nonetheless, courts and tribunals that deal with hate speech cases frequently reference and apply the Supreme Court's elaboration of harm in the *Butler* case. See, for instance, *R. v. Keegstra,* 1984 CanLII 1313 (AB KB); *Chilliwack Teachers' Association v. Neufeld*, 2021 BCHRT 6; *Canadian Jewish Congress v. North Shore News and Collins*, 1997 BCHRT 35.

[108] Sumner (2004), 99.

causal relationship between the material and harm, the Court considered the question of harm as per the community's standard and what it 'would *tolerate* others being exposed to on the basis of the degree of harm that may flow from such exposure.'[109]

> Harm in this context means that it predisposes persons to act in an anti-social manner as, for example, the physical or mental *mistreatment* of women by men, or, what is perhaps debatable, the reverse. Anti-social conduct for this purpose is conduct which society formally recognizes as incompatible with its proper functioning.[110]

Here, the concept of harm is ambiguous and broadened to include both the likelihood of mistreatment and anti-social conduct, as well as possible interpretations of harm by the community, which are mere speculation. The Court did not have empirical evidence at its disposal to show what society recognized as 'incompatible' with its norms or how a proper functioning of society would look like. Sumner reads the Supreme Court's vague statement to mean one of the following: (1) that we are to accept the community's intolerance of pornography as an indicator of its harmfulness; or (2) it is the independent evidence of the harmfulness of the material that set the community's tolerance. Whether the Supreme Court's statement is read to mean Sumner's former or latter reading, the requirements for a cost-benefit evaluation remain the same: (1) evidence of harm of pornographic material to the community's norms; (2) evidence that showed the

[109] *R. v. Butler*, 1992 CanLII 124 (SCC), [1992] 1 SCR 452, emphasis added.

[110] Ibid, emphasis added.

community was in fact intolerant toward pornographic material; or (3) evidence of harm to women who participated in the pornography material in question. Given the lack of evidence on any of these counts in *Butler*, Sumner argues that even if the Court was concerned about the mistreatment of porn performers and that such mistreatment is evidential, the harm is separated from the expression itself but relevant to the conditions in which the work is performed. Such harm, Sumner suggests, can be addressed and prevented through proper regulation of the porn industry, in the same way harm is prevented by law in other workplaces. When the type of expression is banned altogether, the industry goes underground and the probability of harm to women working in the industry increases.[111] In other words, legislative restriction on pornographic expressions deprives women working in the industry of legislative work protection since the industry remains underground without regulation. Furthermore, the Court's decision in this case indicates that neither the liberal value of living in a society free of discrimination nor the value of free expression should supersede the prevailing opinions of the majority. In this case, the expanded notion of harm as per the standards of the community was the basis of the Court's decision. In Mill's view this is the prevailing of the tyranny of the majority who imposes its own 'ideas and practices as rules of conduct on those who dissent from them.'[112]

[111] In Chapter 4, I will argue that the prohibition of hate speech does not effectively deter or eliminate such expressions. Instead, it often drives them underground, leading to their proliferation in obscure and encrypted online forums that largely operate beyond the reach of the law.

[112] Mill (2003), 66.

Moon, too, points to two problematic lines of reasoning by the Court in *Butler*. One, the Court's faith in legislative judgment indicates that if Parliament prohibited such material, it must have been based on evidence of harm caused by pornographic expression. Two, that the Court tried to fit a feminist understanding of the harm of pornography into its reasoning. In the first line of reasoning, Moon refers to the Court's consideration that 'Parliament was entitled to have a "reasoned apprehension of harm" resulting from the desensitization of individuals exposed to materials which depict violence, cruelty, and dehumanization in sexual relations.'[113] Moon argues that the Court's use of the legislative judgment was problematic because: (1) Parliament referred to 'sex combined with violence, cruelty and horror' and not 'specifically to degrading representations of women' in pornographic expression such as those in *Butler;* and (2) it is still unclear as to what sort of evidence Parliament based its judgment upon, given that we now know that empirical studies on the subject were non-existent in 1956, at the time when Parliament passed the law. Moon then contrasts the Court's deferring to legislative judgment with the *Charter's* protection of the right to freedom of expression.

> The Court's deferential approach seems inconsistent with the idea that a restriction on freedom of expression can be justified only if a clear and convincing case is made under section 1 (i.e., only if the restricted material clearly and directly causes harm to important individual or societal interests).[114]

[113] Moon (1993), 375–76.

[114] Ibid, 376.

Unfortunately, in most speech cases such evidence is either non-existent or inconclusive at best.

In the second line of reasoning, through a feminist lens assuming that individuals' thoughts are influenced by pornography, Moon argues that the Court's rationale did not sufficiently address how the material in question caused harm.[115] This is because the specific stream of feminist critique that the Court adopted was too abstract to serve any meaningful cause-and-effect argument.

> In the feminist critique, pornography causes harm not by persuading its audience to think or act in a particular way but rather by shaping non-cognitively the way the male audience views women. It does not 'cause' discrete acts of violence or discrimination against women; instead, it contributes to a social understanding of gender and sexuality that shapes individual thought and informs individual action.[116]

Indeed, this theoretical feminist view of pornography does not provide a causal relationship between pornography and a particular frame of thought or conduct that undermine the status of women. Furthermore, it is important to note that this is just one theory among many feminist perspectives on pornography and its impact on the status of women. Not to mention that misogyny, which is the oldest prejudice shaping attitudes

[115] Moon (2000), 106.

[116] Ibid.

towards women across all cultures, is hardly caused by pornographic expression—though human sexuality can be correlated with misogyny.

That a causal relationship between a single factor and outcome is highly implausible is a common understanding in social sciences. In social sciences, investigations of social phenomena always involve additional factors and variables that include but are not limited to cultural norms, identity, perception, the effects of power and status, history, and other social issues.[117] Studies also suggests that even when a single factor is isolated, it typically leads to different meanings for different individuals within a group.[118] As such, arguments that try to draw a direct cause and effect relation between expression and harm do not say much about the actual causes but only what is perceived to be a single contributing factor amongst many other. The fallacy of the single cause is indeed recognized across disciplines.

There are at least three conditions that must be satisfied for causality to be established. The first criterion is temporal precedence: the cause must take place before the effect. The second criterion is covariation: the cause was related to the effect. The third criterion is non-spuriousness or a lack of a plausible alternative explanation: that the covariation to other plausible causal factors has been ruled out—for instance, through statistical control or treatment randomization.[119] Meeting all three criteria together,

[117] See Franks (2014); McNaughton (2000); Fanselow & Poulos (2005); Davis (1992); Shields et. al. (2006); Hall (1997).

[118] See Brown (1990); Cook, et al. (2002); Brown (1990); Andersen (2013).

[119] See Cook, et al. (2002); Brown (1990); Andersen (2013).

however, is difficult in the context of social phenomena. This is because not only the relations in causal law are murky in such issues, but also the totality of events add more plausible factors that are as important but at times unmeasurable.[120] Even in experimental situations where a presumed cause can be manipulated for observation, the presence of various alternative explanations and their plausibility make it challenging to pinpoint a single definitive cause.[121] The question of causality has been an enduring one and preoccupied different schools of thought that do not even agree on premises.

> According to reductionism, causal laws are supervenient upon the total history of the world. According to realism, they are not. With respect to causal relations, the central issue is whether causal relations between events are reducible to other states of affairs, including the non-causal properties of, and relations between, events. The reductionist holds that they are; the realist that they are not.[122]

Disagreements and challenges in causal argument should not mean that hopes for possible causal explanation of an event should be abandoned. In the hope for getting closer to the causes of an event, the open-ended approach in scientific methodology has mostly shifted toward finding the *correlation* among different variables rather than *causation* among them. The maxim of *correlation does not prove causation* has gained currency in social sciences, but even this does 'little to rule out alternative explanations for a relationship

[120] Tooley (1990).

[121] Andersen (2013).

[122] Tooley (1990), 215.

between two variables.'[123] In correlating relationships, there ought to be a third variable—i.e., the confound variable—while no social science research limits itself or suffices to just three factors, namely the event, the assumed cause, the confound variable.

> Thus a central task in the study of experiments is identifying the different kinds of confounds that can operate in a particular research area and understanding the strengths and weaknesses associated with various ways of dealing with them. This is so because we may not know which variable came first nor whether alternative explanations for the presumed effect exist.[124]

Considering the principles that govern the cause-and-effect relationship, it is not a straightforward, one-on-one correlation to link alleged speech with broader concepts of harm, such as harm to the community's standards or the potential influence on others to adopt specific attitudes, perspectives, or behaviors. It may be theoretically or speculatively possible to say that in the presence of the right details, a particular expression may cause the kind of things it is claimed to cause. However, such a causal argument is merely a hypothetical point of view that assumes a highly improbable relationship contrary to sociological, scientific, and practical evidence-based arguments. In Section 2.1 of Chapter 2, I expand on this discussion from a conceptual perspective to show that speech—particularly that of ideological,

[123] Cook, et al. (2002), 7.

[124] Ibid.

sociopolitical, and cultural nature—is an exceptional social phenomenon that resists any conclusive causal argument.

In his analysis of case law related to freedom of expression, Moon has observed that the Supreme Court is willing to support restrictions on freedom of expression even when empirical evidence is lacking or inconclusive.[125] This occurs when the court believes that the exercise of the freedom results in harm to the interests of another, such as harm to reputation, business operations, or public order.

> In most of its freedom of expression cases the court has looked to social science evidence of the link between expression and harm. Yet such evidence is often inconclusive. In many of these cases the court has either fallen back on a 'common sense' recognition of the causal link between a particular form of expression and harmful consequences or deferred to the legislature's judgment that such a link exists, particularly when the restriction is meant to protect a vulnerable group in the community.[126]

While a common sense approach involves one's own subjective worldview or just a point of view, legislative judgment is not necessarily evidence based. In fact, the Hate Propaganda Act of 1970 was based on three non-evidential *justifications* that were outlined in the 1965 *Report to the Minister of Justice of the Special Committee on Hate Propaganda in Canada* (the Report), produced by the Special Committee on Hate

[125] Moon (2000), 6, 36, 39, 54, 70. Also see Moon (1993).

[126] Moon (2000), 36.

Propaganda (the Committee).[127] Hence, it is important to take a close look at those justifications, also because the Report has remained significant since its production five decades ago.

According to the CHRC, the Report 'laid the groundwork for the enactment of Canada's legal regime for dealing with the promotion of hatred,' and 'resulted in the 1970 amendments to the *Criminal Code*.'[128] The significance of the Report is not just in its role in the enactment of the first hate speech law in Canada, but also in the fact that it is still referenced in courts, tribunals, and documents pertaining to hate speech laws and the adjudication of hate speech cases.[129] The most recent case in which the Committee is referenced is *R v Patron* (2022), while the oldest case is *Canada (Human Rights Comm.) v. Taylor* (1979).[130] In most instances, references to the Report carry more weight than just being historical or incidental, as they often contain substantive assumptions. For instance, the Tribunal in the 2008 case of *Elmasry and Habib v. Roger's Publishing and*

[127] Report (1965).

[128] Canadian Human Rights Commission (2009), 12.

[129] As of April 12, 2023, a CanLII specific keyword search returns 29 cases in which the Committee is referenced by its full title. To conduct a specific key search of the term, I put the term in double quotation marks. While the Committee is referred to by various terms, such as 'the committee' or 'Cohen Committee,' which is named after the committee's chair, Michael Cohen, I did not search for variations of the term.

[130] Search links:
https://www.canlii.org/en/#search/type=decision&sort=decisionDateAsc&text=%22Special%20Committee%20on%20Hate%20Propaganda%22

The Special Committee on Hate Propaganda is also referred to by different terms such as 'the Cohen Committee,' 'the Committee.' I did not search variation of the term.

MacQueen[131] referenced the Supreme Court in *R. v. Keegstra*,[132] which referenced the Report to consider the speech in question as hate propaganda and to indicate its harm as per the Committee's perspectives of harm. Indeed, the Report remains significant, as it has had important implications for the law and the adjudication of hate speech cases. Moreover, deferring to legislative judgment pertaining to freedom of expression and prohibition of hate speech is, by extension, an indirect reference to the Committee's *justifications* for its recommendations. It is, therefore, important to have a close look at the evidence documented in the Report.

1.3 Unexamined Justifications and Legislative Judgment

The first aspect of the Report that should be deemed important has to do with the amount and type of data on which the Report pivoted. Though 'hate propaganda' was the very subject of the Report, the Committee found it challenging to define. Instead, by including samples of racist expressions, the Committee demonstrated what hate propaganda looked like.

> The term 'hate propaganda' is a very difficult one to define, but this Committee has tended to restrict its attention to the kind of materials discussed in this chapter ['Chapter II' of the Report]—significant samples of which are included here ['Chapter II' of the Report] and in greater detail in Appendix III [of the

[131] *Elmasry and Habib v. Roger's Publishing and MacQueen* (No. 4), 2008 BCHRT 378, 42.

[132] *R. v. Keegstra,* 1990 CanLII 24 (SCC), [1990] 3 SCR 697.

> Report]—and the main characteristics of which are a generally irrational and malicious abuse of certain identifiable minority groups in Canada.[133]

Chapter II of the Report, entitled 'Hate Propaganda in Canada,' lists several organizations that were involved in racist activities and dissemination of hate propaganda. The Committee, however, acknowledged that such organizations had small memberships and that the individuals of concern were 'relatively few in number.'[134] The Report includes 'a selective summary of some of the leading instances of hate propaganda disseminated in Canada' between 1963 and 1965.[135] The summary includes a chronological listing of racist pamphlets that were distributed and/or posted in public places in Ontario, Quebec, British Columbia, Alberta, Saskatchewan, Manitoba, New Brunswick, and Nova Scotia. These add up to three bulletins, of which only one has an issue number and date stamp, and 45 short descriptions of similar materials with no dates or issue numbers.[136]

> It is easy to conclude that because the number of persons and organizations is not very large, they should not be taken too seriously. […] In the Committee's view the 'hate' situation in Canada, although not alarming, clearly is serious enough to require action. It is far better for Canadians to come to grips with this problem now, before it attains unmanageable proportions, rather than to deal

[133] Report (1965), 10.

[134] Ibid, 14.

[135] Ibid, 18. Note that the Report does not provide references or citations for its summary of hate propaganda in Canada.

[136] Ibid, 14–24.

with it at some future date in an atmosphere of urgency, of fear and perhaps even of crisis.[137]

Appendix III of the Report also includes 40 hate propaganda pamphlets of which eight were made in Canada, 31 in the United States, and one in Germany.[138] The sample materials included in Appendix III of the Report seem to be selected pages of books and publication but lack information about their origins, publication date, circulation, or destination. Among them there are only four samples that come with such information.

- *The Thunderbolt*, Birmingham, Atlanta, Issue of February 1963, front and back pages;
- National White Americans, Issue of February 1964;
- Common Sense, New Jersey, U.S.A., Issue of 1 Oct 1963, front page;
- Der Sturmer, Nuremberg, Germany, Issue of May 1934 (in German language), front and back pages.[139]

Elsewhere in the Report, it is stated that the import and distribution of *The Thunderbolt* was already prohibited under two 'prohibitory orders issued by the Postmaster General of Canada.'[140] Furthermore, at the time of the Report in 1965, there were other laws and regulations in place that prohibited importation and mailing of material deemed immoral

[137] Ibid, 24, 25.

[138] Ibid, 11, 250, 256.

[139] Ibid, 253.

[140] Ibid, 13.

and indecent. For instance, the 1847 Custom Act and the provisions of the Customs Tariff, that were still in effect in 1965, prohibited the importation of 'Books and drawings of an immoral or indecent character,'[141] and authorized custom officials to confiscate all materials including books, drawings, photographs, and other print materials deemed as 'representations of immoral or indecent character.'[142] Section 7 of the Post Office Act, too, prohibited transmitting of forbidden materials via mails.[143] It was under these laws that the importation and distribution of *The Thunderbolt* was already banned and prevented by the Canada Custom and Post Office Acts. The data on which the Report based its arguments were not sufficiently large and/or relevant for a social science investigation into the effects of hate propaganda in Canadian society. It is important to also note that the size and relevance of data are both critical considerations in social science research that aim to study a social phenomenon and demonstrate its correlations to its hypothesized outcomes.

Some criticized the Report for its lack of evidence and the legislative moves that were based on the Report. They pointed to the insufficient amount of hate propaganda in Canada that did not justify the law, and/or argued that even if the amendment was considered a preventative measure for future crimes, 'people should not be persuaded to

[141] Province of Canada Statutes, 10 & 11 Vic., c.31 at p. 1427, which refers to a specific law enacted by the Province of Canada during the 10th and 11th year of the reign of Queen Victoria. Also see an Act Imposing Duties of Customs, S.C. 1867, 31 Vict., c.7, Schedule E, which refers to a specific act passed by the Parliament of Canada in 1867, shortly after the country's confederation. It pertains to the imposition of customs duties.

[142] *Luscher v. Dep. Minister, Revenue Canada*, 1985 CanLII 5600 (FCA), [1985] 1 FC 85.

[143] Report (1965), 3.

suffer an invasion of their freedom' in order to secure future generation against 'potential dangers which may never come to pass.'[144] In 1970, Robert Hage also argued that 'in urging the adoption of a new law the committee appears to have overlooked the consequences of making a particular act criminal.'[145]

> The *Criminal Code* should not be open to additions or deletions without more evidence than that provided in [the Report]. Not one member of the committee was a criminal lawyer; in fact, the committee called oral evidence from only one such person and based its findings on the harmful effects of hate propaganda on the study of only one psychologist. And yet, the Bill, which introduced this 'new law' into the *Criminal Code* was based wholly on the recommendations of this committee.[146]

With insufficient data, the Committee recommended a law to prohibit hate propaganda and based its recommendation on three justifications: (1) that hate propaganda should be prohibited since it leads to public disorder through violent reactions of the target group; (2) that hate propaganda should be prohibited since it causes psychological harms on its target; and (3) that hate propaganda should be prohibited since it harms the reputations of the target group.[147] Below, each of these justifications will be

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[144] A statement by Prof. Arthurs, the then Associate Dean of Law School at York University at the Proceedings of the Senate Committee (22 April 1969), quoted in Hage (1970), 72. Also see Mewett (1966).

[145] Hage (1970).

[146] Ibid, 66, 72.

[147] Report (1965), 27–30, 59, 63–66.

examined in their own subsection and in light of an understanding of the concept of *justification* that is inextricable from *evidence.*

1.3.1 The Public Disorder Justification

The first justification included in the Report for outlawing hate propaganda was that hate propaganda causes public disorder and disrupts the peace. The Committee explained it as follows:

> To our minds the social interest in public order is so great that no one who occasions a breach of the peace, whether or not he directly intended it, should escape criminal liability where the breach of the peace is reasonably foreseeable, i.e., likely; and we believe that this should be the law regardless of whether the incitement to hatred or contempt against an identifiable group is spoken, written, or communicated in any other way.[148]

The Report then offers the following qualifications if such speech is to be proscribed. The first qualification is if the speech takes place 'in a public place'; the second, if it is hateful and contemptuous against an identifiable group; and the third, if the speech is 'likely' to lead to a 'breach of the peace.'[149] The Report defines 'identifiable group' as 'limited to sections of the public distinguished by religion, colour, race, or ethnic or national origin,

[148] Ibid, 63.

[149] Report (1965).

so that sharp attacks on such other groups as political parties will clearly be outside the prohibitions of the legislations.'[150]

In 1965, while the Report was being prepared, sections 65 to 67 and section 296 of the *Criminal Code* already prohibited unlawful assembly, riot, and speech that offended religious beliefs and incited public unrest.[151] For instance section 296, also known as the blasphemy law, prohibited public expressions or gatherings that entailed anti-religious sentiments. From 1901 to 1936, under section 296, and just in the province of Quebec, four cases were charged with anti-Catholic expression.[152] These sections were challenged as 'archaic' and argued that 'if used, would, in all likelihood, be challenged under the *Charter*.'[153] In December 13, 2018, the blasphemous libel law was repealed with the passage of Bill C-51.[154]

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[150] Ibid.

[151] Sections 64-67 of the Criminal Code in 1965 and *Criminal Code*, RSC 2010, c C-34, s 296 (removed in 2017). *Criminal Code*, RSC 2010, c C-34, s 296 & *Criminal Code*, R.S.C., 1985, c. C-46. Also see Ross (2012). Also see Response to Petition No. 421-01047–House of Commons of Canada. https://www.ourcommons.ca/Content/ePetitions/Responses/421/e-382/421-01047_JUS_E.pdf. Also see https://laws-lois.justice.gc.ca/eng/acts/c-46/page-8.html#docCont

For example, sections 65 to 67 read:

> 65. A riot is an unlawful assembly that has begun to disturb the peace tumultuously·
>
> 66. Every one who takes part in a riot is guilty of an indictable offence and is liable to imprisonment for two years.
>
> 67. Every one who is a member of an unlawful assembly is guilty of an offence punishable on summary conviction.

[152] Patrick (2008).

[153] See Greenspan & Rosenberg (2008), 618. Also see Gold (2006), 445.

[154] Bill C-51: An Act to Amend the Criminal Code and the Department of Justice Act and to Make Consequential Amendments to Another Act (218), 42nd Parliament, 1st Session, 2018.

According to the legal philosopher Joel Feinberg, prohibition of hate speech based on the breach of the peace justification violates a principle of the rule of law that specifies that no one should be punished for the wrongdoing of another.[155] This line of reasoning posits that breach of the peace justification should be reserved for exceptional circumstances when national security is concerned. Otherwise, it violates the rule of law in two ways: it offloads civil liability and responsibility from individuals in an audience onto the speaker, and hence renders the speaker guilty based on the illegal conduct of the audience. Feinberg points out the individual civic responsibility principle that should not be discounted even in the most provocative situations.

> If [one] is followed, insulted, taunted, and challenged, he can get injunctive relief or bring charges against his tormentor for harassment; if there is no time for this and he is backed to the wall he may perhaps be justified in using 'reasonable force' in abatement of the nuisance; or if he is followed to his own home, he can use the police to remove the nuisance. But if he is not personally harassed in these ways, he can turn on his heels and leave the provocation behind, and this is what the law should require of him, if he can do it without loss or hardship.[156]

In other words, according to the rule of law, the audience who willingly attends a speech and has the option to avoid hearing it are responsible for their own conduct. Feinberg

[155] See Hobson (1996); Bingham (2010); Cotterrell (2004), 5: 'the Rule of Law is, in part, the doctrinal recognition of a need for equal treatment of equal cases before uniform, consistently applied law.'

[156] Feinberg (1974), 91.

asserts that holding the speaker responsible for the conduct of the audience, even when the likelihood of a 'violent response to an abusive epithet may be known in advance,' cannot be 'legally justified,' since the law takes the individual's autonomy and civil responsibility as foundational.[157]

Moon keeps an open mind about this justification and states that it may 'offer a more objective standard for the restriction of [hate] speech.'[158] He admits, however, that such justification is problematic because it might encourage the "'heckler's veto" (when the threat of violence by others is used by the state as a reason to shut down otherwise protected speech.'[159] Moon explains that the problem with this justification 'is that if speech can be restricted whenever violence occurs (or is threatened), there will be an incentive for opponents of the speech to respond violently.'[160] Moon suggests that prohibiting speech in exceptional circumstances with high potential of public unrest is justified in order to prevent violence and injury.[161]

> Yet, with that said, the risks of giving to the state the power to suppress speech in order to prevent a violent response may outweigh the risk to public order. The temptation of a government to prohibit provocative speech – and to use the risk

[157] Ibid, 91.

[158] Moon (2018), 105.

[159] Ibid, 113.

[160] Ibid, 105.

[161] Ibid, 114.

of public disorder as an excuse to do so – may be too great to permit such an exception to the general protection of expression.[162]

It is important to note here that the decisive event upon which the Committee based its public unrest justification was a planned riot that took place on May 30th of 1965. The riot took place in the Allan Gardens area—a small urban park at the corner of Carlton and Jarvis streets in downtown Toronto—and lasted about fifteen minutes. Known as the Allan Gardens riot, it sprang from an anti-Nazi demonstration that was organized to counter a talk by a neo-Nazi individual by the name of John Beattie. The anti-Nazi demonstration was organized by the Jewish community in Toronto that was home to many Holocaust survivors who were worried about and keenly sensitive to antisemitism in Canada. The community was also upset that the government officials took no action to stop the neo-Nazi event and the fact that the City had issued a permit for it.[163] Given that the memory of Holocaust was still fresh, the anti-Nazi demonstration carried anger and anxiety. The riot was planned by a number of small groups within the Jewish community.[164] According to a member of the CJC, Franklin Bialystok, the Allan Gardens riot was planned by four small but self-acclaimed groups as the 'vigilante squads,' that included groups such as 'JCRC [Joint Community Relations Committee of the Congress], N3 [Newton's third law, with the mandate of 'to each action there is an opposite and equal reaction.'], 'Englishman/Irv' [Mike Englishman, Member of the CJC

[162] Ibid.

[163] See Bialystok (2000) and (1997).

[164] Ball (3 Dec 2015); also see Bialystok (2000) and (1997).

Anti-Nazi Committee], and C.O.I.N. [the Canadian Organization for the Indictment of Nazism].'[165] Bialystok explains that the vigilante squads 'felt that only a strong, public display against the actions of the neo-Nazis would act as a deterrent' to antisemitism and as such planned to physically attack anyone who were suspected of being a neo-Nazi.[166] In their planning of the riot, the vigilante squads attended meetings organized by the CJC and presented their rioting plan. The majority in the Jewish community, however, strongly opposed the vigilante approach and 'unanimously voted' against the idea of rioting and violence.[167] Notwithstanding the opposition, the rioters went ahead with their plans, though the riot took no more than 'fifteen minutes.'[168] The Allan Gardens riot is the only riot included in the Report and theorized as a justification by the Committee. The Report did not mention another but more significant riot of similar context that took place more than two decades earlier and became known as the Christie Pits riot, perhaps because the context of the riot involved many more factors than hate propaganda.

The Christie Pits riot took place in August 1933 in the Christie Pits Park at the intersection of Bloor and Christie streets. The context out of which this riot broke had to do with not just one factor—i.e., hate propaganda—but multiple factors, such as the Great Depression, the rise of the Nazis in Germany, fear of war, and, of course, rising antisemitism throughout the West. This brings us to another important issue that the

[165] Bialystok (1997), 12, 14.

[166] Ibid, 12, 14.

[167] Bialystok (2000), 122.

[168] Ibid.

Committee overlooked, namely, multivariate factors that in combination may play a role in group conflict, riots, and violence. These aspects are of importance in any valid social science study on the conditions that lead to civil unrest and violence.

Sociological and violence studies show that not a single factor—e.g., hate propaganda—but rather multiple and combined correlating factors may lead to public unrest, group conflict, and violence. Such factors include but are not limited to group grievances, socioeconomic inequality, discrimination, exploitation, oppression, group competition for resources, greed, colonialism, etc.[169] This does not mean that hate propaganda cannot be dangerous and cannot fuel group conflict and violence. Studies on the link between hate propaganda and group violence show that while propaganda, as a single factor, cannot cause group conflict and violence,[170] at the time of ongoing conflict hate propaganda can be an effective tool in the hands of conflicting parties. In his study of the 1994 civil war in Rwanda, for instance, David Yanagizawa-Drott found that 'radio station broadcasting anti-Tutsi propaganda […] significantly increased participation in the violence against Tutsis.'[171] Yanagizawa-Drott states that 'mass media can affect conflict in general, and genocidal violence against an ethnic minorities in particular.'[172]

Despite the Committee's lack of social science evidence to support their public unrest justification, the lawmakers did not demand further studies and investigation. The

[169] See Collier & Hoeffler (2001); Fearon (2001); Kalyvas (1999).

[170] Ibid.

[171] Yanagizawa-Drott (2014).

[172] Ibid.

justification is also so weak that it has rendered the law unapplicable to all expressions that yield high probability of public unrest. For instance, expressions that target sacred values of devout Muslims are not prohibited in Canada. This means that the justification of public unrest that was based on just one event, was not broad enough to account for future social development of a multicultural society such as Canada, where various social groups could consider different types of expressions offensive and worthy of street demonstration and even violence. As such, this justification itself renders the law and its application inconsistent and creates a structural inequality in a society that prioritizes the emotional reaction of one social group, and not others.

1.3.2 The Psychological Stress Justification

The second justification for prohibition of hate propaganda outlined in the Report is that hate propaganda causes psychological harm to the individual or group it targets. The Committee backed this justification by the work of the social psychologist Harry Kaufmann, who contributed a chapter to the Report.[173] Kaufmann's chapter is entitled 'Social Psychological Analysis of Hate Propaganda—A Survey of the Literature,' in which he engages in a literature review of social science scholarship on related subjects.[174]

The most significant factor that disqualifies the Report is Kaufmann's chapter that surveys scholarship that focused not on Canadian society but on German, Austrian, and American societies between the 1920s and 1960s, primarily relating to American

[173] Report (1965), 171–251.

[174] Ibid.

society in the 1930s and 1940s. Throughout this period, mainstream stereotypes, segregation policies, and overt discrimination against minorities, especially the African-American population, were pervasive and officially supported in American society. When the Report was produced in 1965, Canadian society was markedly different from that of the United States during the time period referenced in the scholarship under Kaufmann's survey in the Report.

Equally important, Kaufmann's account of the scholarship omitted various aspects and selectively included only segments of the studies within his survey that aligned with his preconceived conclusions. Here is why. Firstly, Kaufmann does not mention that the studies within his survey did not focus on hate propaganda and its impact on members of minority groups. Secondly, many significant aspects of these studies were overlooked in Kaufmann's narrative. In what follows, I will explain some of the omissions pertaining to the qualitative and quantitative research of the sociologists George Simpson and John Yinger on the effects of prejudice and discrimination of minorities in the US*;* the socialization theory by George Herbert Mead; the contact theory by the psychologist Gordon Allport; the strain theory by the sociologist Robert Merton; and the experimental research by the social psychologists Kenneth and Mamie Phipps Clark on the effect of the segregation policy on African-American children.[175] Of these, let us look closely at two examples.

[175] Kaufmann surveyed a large body of scholarship in sociological and psychological studies. I only checked the validity of his references to the scholarship and theories that I have mentioned here.

In their *Racial and Cultural Minorities: An Analysis of Prejudice and Discrimination,* Simpson and Yinger's use of Merton's strain theory and Allport's contact theory in their studies is expansive. In this study, the authors focus on structural racism and discrimination in the US that deny minority groups the equal social status and systematically prevent them from achieving the so-called American Dreams.

> Most Chicanos, Blacks, Puerto Ricans, Native Americans, and other minorities, however, although fully in touch with the sights and sounds and promises of an affluent society, are denied full access to achievement in that society by discrimination and by their own responses. The result, inevitably, is a high level of disillusionment and frustration. Contemporary research on the effects of minority status on personality helps us to spell out some of the conditions under which various results occur.[176]

Simpson and Yinger's extensive discussions also account for a more thoroughgoing uncertainty than what is reflected in Kaufmann's reading and, by extension, in the Report which relies on his reading. Consider the following directly from Simpson and Yinger's study:

> Probably no two persons respond in exactly the same way to the problems they face as members of a minority group. It is possible, however, to classify the patterns of adjustment into broad types for purposes of analysis and to point out

[176] Simpson & Yinger (1958), 120.

> the kinds of persons and groups most likely to adopt each type as the primary mode of response to prejudice and discrimination.[177]

The 'broad types' discussed in Simpson and Yinger's study—and omitted in Kaufmann's reference to their work—were rather four expansive categories, devised by Allport, as *aggression*, *avoidance*, *acceptance*, and *reform*, and further expanded in Merton's typology of *conformity, innovation, ritualism, retreatism,* and *rebellion.* While Simpson and Yinger employed these theories, they also carefully qualified them in their own work.

> Several qualifications and clarifications are necessary in the use of such typologies: (1) as analytic types, they do not describe particular individuals, who usually express mixed responses; (2) few specific actions are purely of one type or another; (3) these modes of response are subject to change, often quite rapidly, as situations change; (4) they feed back into the system from which they come and thus are causes as well as effects; (5) they are in many ways similar to the modes of response in areas of human behavior other than those of minority-majority relation.[178]

Of these, Kaufmann includes only three categories—i.e., *aggression*, *avoidance*, *acceptance*—to draw a link between hate propaganda and aggression as the type of response by the target group. This is despite the fact that throughout their study, Simpson and Yinger considered a long list of factors—such as history, culture, family, gender,

[177] Ibid, 137–138.

[178] Ibid.

socioeconomic status, neighbourhood, education—that possibly influence minority groups that experience systematic violence, structural racism, and discrimination.[179] Simpson and Yinger also state that they paid close attention to 'the interactive and cumulative nature of the forces influencing intergroup relations.'[180] They claim that 'the interlocking of the many factors that affect majority-minority relations greatly' complicated their work.[181] All of these are ignored in Kaufmann's narration of the Simpson and Yinger's studies.

Another source based on which Kaufmann draws a link between hate propaganda and psychological harm is the works of George Herbert Mead and his socialization theory that signifies the importance of the *significant* and *generalized others* in one's life, from childhood onward. In his *Mind, Self, and Society*, Mead introduces the term 'generalized other' to expand upon his theory of socialization in relation to the development of the child's identity and throughout one's lifetime. He postulates the (re)formation and continuous changes of *the self* throughout long processes of socialization and social interactions in one's lifetime.[182] For Mead, the concept of *the self* should not be perceived as singular but rather as performative multi *selves* that are formed, performed, and re-formed contextually and continuously. More importantly, his 'generalized other' includes all those encountered by the individual throughout their life, including parents, teachers,

[179] Ibid, 137–138.

[180] Ibid, 434.

[181] Ibid.

[182] Mead (1962), xxiv, 238–241.

friends and peers, neighbours, fictional characters, officials, and/or even imaginary figures in one's mind. It is through these various encounters, Mead suggests, that the individual perceives their place in society and understands the expectations of their given society from them. But not all encounters carry the same significance. The generalized other gains importance to Mead when it is juxtaposed with the *significant others*—i.e., 'people in one's own interpersonal life with whom the most has been learned.'[183] Moreover, Mead emphasizes on the hierarchy of importance pertaining to the individual's socialization and social interactions.

The *significant others,* which is a critical aspect of Mead's socialization theory, is completely omitted in Kaufmann's narrative of this theory. Furthermore, while hate propaganda and its effect on formation of identity is not something that Mead took into consideration, his 'generalized other' became the hate speaker in Kaufmann's reference and conclusion. As such, Kaufmann claims that 'a large majority of individuals to whom hate communications are directed accept and nourish stereotypes' made by the 'generalized other' and the individual targeted by hate propaganda internalizes the negative perceptions of him/her held by the 'generalized other'.[184]

It is important to note that criticism of the cause-and-effect claims in the Report should not lead to the denial of a relationship between hate propaganda and harm. It is

[183] Ibid, xiii. Also see Sullivan (1953); Freud (1958); Kelly (1955); Bowlby (1969); Sullivan (1953). Also see Andersen and Baum (1981) where a metanalysis of the said literature can be found.

[184] Report (1965), 28, 211.

true that not everyone in the target group may be psychologically affected by hate propaganda, but that does not mean that all others are not affected by it. Indeed, someone may even suffer from possible consequences of a widespread prejudice and hate speech, even if they remain unaware of such harm. The point here, however, is the fact that the psychological harm justification offered by the Committee was based on a bias and partial narrative of the scholarship at hand, and that the studies used to draw conclusions were irrelevant to the question at hand.

1.3.3 Damage to Group Reputation

The damage to reputation justification was mostly based on the opinions of the members of the Committee. Unlike the other two justifications, the Committee did not reference any particular event or literature to back its arguments. The Committee argued that there was a need for legal measures against 'group defamation that would prohibit the making of oral or written statements or of any kind of representations which promote hatred or contempt against any identifiable group.'[185] The Committee claimed that this is needed because such regulation did not exist. At the time when the Committee was working on the Report, sections 166, 259 and 315 of the *Criminal Code* prohibited defamatory libel against individuals.[186] The Committee deemed section 259 to be 'insufficient protection'

[185] Ibid, 65. The Report defines identifiable groups as any section of the public distinguished by religion, colour, race, language, or ethnic or national origin. Note that at the time, 'identifiable group' did not include gender, sex, or disability. These group categories were added in 2017 onward.

[186] As quoted in the Report (1965) page 45: Section 166 of the *Criminal Code* (*Criminal Code*, S.C. 1953-54, c. 51, s. 166.): Every one who wilfully publishes a statement, tale or news that he

against group defamation and claimed that the definition of 'person' in the defamatory libel law was not broad enough to include an unincorporated social group. The Committee also considered sections 166 and 315 to 'have limited application to hate propaganda,' since both sections 'required the Crown to prove that the libeler knows that the matter is false,' and that 'both apparently apply only to straight matters of "fact" and would have no application to any matters of opinion.'[187] The Committee then concluded that there was no criminal law in Canada that adequately protected social groups from libel and that the defamation civil remedy that existed for protection against individual libel was not a solution against group defamation.[188] The Committee also acknowledged that group libel law may infringe upon free expression and public discussion, but stated

knows is false and that causes or is likely to cause mischief to a public interest is guilty of an indictable offence and is liable to imprisonment for two years.

Section 259 (the *Criminal Code*, 1955, c. 51, s. 259) reads: 'No person shall be deemed to publish a defamatory libel by reason only that he publishes defamatory matter that, on reasonable grounds, he believes is true, and that is relevant to any subject of public interest, the public discussion of which is for the public benefit.' This text, however, is Section 5(1) of the Canadian Libel and Slander Act. *Libel and Slander Act*, RSO 1990, c L.12, s 5(1). I couldn't find it under section 259.

The current version is section 298 (1) in the *Criminal Code—Criminal Code*, RSC 1985, c C-46, s 298(1)—that reads: 'A defamatory libel is matter published, without lawful justification or excuse, that is likely to injure the reputation of any person by exposing him to hatred, contempt or ridicule, or that is designed to insult the person of or concerning whom it is published. Marginal note: Mode of expression (2) A defamatory libel may be expressed directly or by insinuation or irony (a) in words legibly marked on any substance.; or (b) by any object signifying a defamatory libel otherwise than by words.'

As quoted in the Report (1965) page 45: 315(1) Every one who, with intent to injure or alarm any person sends or causes or procures to be sent by letter, telegram, telephone, cable, radio, or otherwise, information that he knows is false is guilty of an indictable offence and is liable to imprisonment for two years. Again this text can be found in section 372(1) of the *Criminal Code*: *Criminal Code*, RSC 1985, c C-46, s 372(1).

[187] Report (1965), 45.

[188] Ibid, 64.

that their suggested tests left 'sufficient latitude for the fullest legitimate public discussion however rough and tumble it may be.'[189]

The Committee recommended three tests to be performed by the court: (1) that the accused should be able to defend 'the unqualified truth'; (2) that the accused should be able to defend 'reasonable belief in the truth' of their statements; and (3) that their expression qualifies as 'public benefit,' or benefits the public.[190] To determine 'the unqualified truth' and the speaker's 'reasonable belief in the truth,' however, still requires fact checking. As the Committee itself acknowledged, group libel involves stereotyping and 'generalization about groups.'[191] Though fact checking of an alleged stereotyping speech may not be practical, it may turn out as true. This is because stereotyping is the exaggerated and generalization of certain group characteristics that are likely to exist and are, to an extent, applicable at least to some members the group in question. For instance, the statement 'Muslims are violent' is a stereotypical statement that generalizes the conduct of some Muslims. While the statement is a sweeping and derogatory generalization, from a purely logical perspective, the statement is not technically false and can be qualified as valid since it can mean at least one of the followings:

- Some Muslims are violent.
- More than one Muslim are violent.

[189] Ibid, 65.

[190] Ibid, 65–66.

[191] Ibid, 65.

- A majority of Muslims are violent.
- A minority of Muslims are violent.

Even if a handful of Muslims are violent, the statement 'Muslims are violent' is technically true because it is likely to satisfy the tests of deduction in logic, i.e., validity and soundness. In other words, the statement 'Muslims are violent' will be valid if it follows necessarily from its premises, e.g., 'A and B are Muslims' –> 'A and B are violent' –> thus, 'Muslims are violent'. The statement will also be *sound* if, in fact, A and B are actually Muslims and, in fact, they have undertaken acts that are recognized as constituting violence. But, of course, these logical tests are insufficient to conclude that all Muslims are violent. While the statement 'Muslims are violent' reflects a logical claim (which is true), it is also a social and political claim (which is false because it uses two data points about A and B to make a claim about a much larger group). What separates the logical claim from the sociopolitical one is the breadth of the test for soundness.

The two tests, suggested by the Committee, illustrate the challenge that group libel cases could pose a challenge in the adjudication of related cases, since the adjudicator would have to resort to their own discretion and interpretation of the speech at hand. In *Elmasry v. Roger's Publishing*, for instance, the BC Tribunal that adjudicated the case agreed that the speech in question attempted to 'rally public opinion by *exaggeration* and causing the reader to fear Muslims.'[192] This means that the Tribunal accepted that there

[192] *Elmasry and Habib v. Roger's Publishing and MacQueen* (No. 4), 2008 BCHRT 378 at 157, emphasis added. This case is the main subject of Chapter 3 and will be fully analyzed there.

were some truths in the speech in question, but the speaker *exaggerated* them. The Tribunal also deemed that, though exaggeration of such truth did not apply to all Muslims, they were still 'issues of importance' and as such the speech in question was of public interest and deserved the *Charter's* protection.[193]

While the Committee's suggestion of the first two tests—i.e., 'the unqualified truth' and 'reasonable belief in the truth'—can quickly become a matter of formality in group libel cases, the third test—i.e., whether the expression qualifies for 'public benefit'—is as challenging. For one thing, the concept of *the public* is not a simple term, while the term *benefit* may mean different things to different people. In determining *the public*, the libeller and those who are interested in hearing the given speech are all subset of *the public*. Furthermore, having the court to define *benefit* is as arbitrary as having it to decide who is entitled to such benefit. The Committee recognized that group libel cases could be misused by different groups but left the judgment to 'men of good will.'

> Where it is apparent to *men of good will* that the statements are an abuse of legitimate public discussion, we believe that Canadian courts will have little difficulty in so finding and dealing summarily with malicious or fraudulent or abusive documentation.[194]

The Committee was also cognisant about other shortcomings of the Report, including the small size of hate propaganda data in Canada, its own sweeping

[193] Ibid.

[194] Report (1965), 59, 66.

generalizations on different issues pertaining to the effects of hate propaganda, lack of evidence, etc. This is apparent in the Committee's statement where it tried to minimize the importance of evidence and scientific approach to the problem at hand. For instance, at some point the Committee quotes someone by the name of Karl Stern,[195] who suggested that 'one must always beware of "*l'optisme de la technique*," the naïve belief that everything can be done with the scientific knowledge which we now possess or that we can fix everything scientifically as if society were a piece of plumbing.'[196]

The Committee's recommendation to prohibit hate propaganda lacked sufficient evidence or scientific knowledge to support it. This should raise concerns about the adjudication of hate speech cases that are decided by deferring to legislative judgment without thoroughly evaluating whether the legislative move was based on evidence. It is worth noting that there has been a lack of thorough scholarly investigation into the characteristics, reasoning, and evidence in the Report, which served as the basis for Parliament's enactment of the Hate Propaganda Act in 1970 and subsequent additions to the federal and human rights acts.

[195] On page 28, the Report (1965) refers to Karl Stern as someone who gave a testimony to the House of Commons Standing Committee on External Affairs. But it does not specify the date, reason, or context in which Stern testified. I could not find much about Karl Stern of the Report. There was, however, a Karl Stern (April 8, 1906-November 11, 1975), who was a German-Canadian neurologist and psychiatrist in 1965 (see https://en.wikipedia.org/wiki/Karl_Stern). There is no source to be found as to where this Stern said the statement quoted in the Report.

[196] Report (1965), 28.

1.4 Extended Harms and the Slippery Slope

As perceptions of harm can be expansive, the unresolved query is whether non-evidentiary allegations of harm warrant the imposition of interpretive *reasonable limits* on the right to free expression. If that is so, some of the most enduring perceptions of harm that expand beyond the physical and bodily damage to that which is social, emotional, and psychological, can qualify more types of expressions for restriction. For instance, Fredrich Engels in his *Condition of the Working Class in England,* used the term 'social murder' to convey that the harm in the exploitation of the working class through 'social and political control.'[197] For Engels, exploitation of the working class led to early and unnatural death which he considered the ultimate harm that was 'quite as much a death by violence as that by the sword or bullet.'[198] The link between capitalism and harm, to which Engels referred, has manifested in devastating health conditions of the poor in Canada since the Europeans arrived.[199] Arguably, the poor ought to be considered as a social group and included in the law's recognition of an identified group—which is an arbitrary categorization to begin with. Despite this, the idea of prohibiting capitalism for the harms it inflicts on the poor would sound outrageous.

There are numerous examples of expressions that, under expanded notions of harm, can be considered harmful to various vulnerable social groups. For instance, a more

[197] Engels (1891, pdf copy), second paragraph under 'Results' section.

[198] Ibid.

[199] Literature on the state of poverty in Canada is extensive—see for examples, Raphael (2020); Gupta, et al. (2007); Palmater (2022).

relevant expanded perception of harm is explained in Pierre Bourdieu's theoretical and sociological work in *Language and Symbolic Violence.*[200] For Bourdieu, language and symbolic violence are perpetrated through cultural expressions and normative performances that are also exercised *by and upon* the social agent.[201] With a keen sociological imagination, Bourdieu connects everyday linguistic and cultural expressions to relations of power in which one side is advantaged and another is harmed.

> Linguistic exchange—a relation of communication between a sender and a receiver, based on enciphering and deciphering, and therefore on the implementation of a code or a generative competence—is also an economic exchange which is established within a particular symbolic relation of power between a producer […] and a consumer. In other words, utterances are not only […] signs to be understood and deciphered; they are also signs of wealth, intended to be evaluated and appreciated, and signs of authority, intended to be believed and obeyed.[202]

For Bourdieu, symbolic violence is perpetrated through the language and practices of norms before it is manifested in real violence that is part and parcel of class and gender inequality. Such violence, however, is not just limited to one realm but perpetrated in most of our social and domestic interactions. For instance, when in a marriage ceremony an expression such as 'I do' is uttered, Bourdieu argues, such expression is inextricable

[200] Bourdieu (1991).

[201] Ibid, 170.

[202] Ibid, 66.

from the marriage institution that defines the conditions of gender inequality and the exploitation of people that can fit into different social groups.[203] As such, our language and cultural expressions carry perpetration of symbolic violence determining inequality and exploitation of all sorts. By the same token, as absurd as it may sound, such expanded notions of violence can qualify most of our daily activities for legislative prohibition.

While it is crucial to acknowledge the broader impacts of harmful expressions in discussions on racism, gender inequality, and other societal issues, adopting overly expansive notions of harm for the purpose of prohibiting hate speech could set the legal system on a slippery slope. This may result in the legal system having to grapple with an increasing number of hate speech allegations, based on different notions of harm. But what exactly do we mean by *slippery slope* in the context of hate speech regulation? To answer this question, let's first examine the structure of a slippery slope and then explore how an expanded notion of harm could potentially qualify different types of speech for prohibition.

The slippery slope argument highlights situations in which (dis)allowing *Xa* would leave no logical explanation for (dis)allowing *X1*, *X2*, …, *Xn* where there is not much distance between of *Xi and Xi+1,* while they are not the same. In fact, the slippery slope argument posits that while there is very little distinguishable difference for rationally (dis)allowing X_1 and X_2, X_2 and X_3, and henceforth, reaching *Xn* which is at the bottom of the slope is only a matter of time and eventuality. Whereas there is a significant

[203] Bourdieu (1991).

difference between X_1 and Xn, the rationality that (dis)allows X_1 remains the same for disallowing Xn. The slippery slope argument is used in different contexts where legal arguments for (dis)allowing specific prohibition leads to eventual situation that violates other values and rights.[204] That is, once one type of expression is sanctioned by the law, then similar rationale can be used for sanctioning other types of expression. But why does expanded harms pertaining to speech lead us down a slippery slope? And why is expanded harm is the slippery slope type?

In a legal context, the slippery slope argument invokes the base question of whether all considerations of right and wrong should be subjected to legal restrictions, especially given the relationship between the law and morality.[205] For Mill, and many legal philosophers who have furthered Mill's ideas and his harm principle, morality should be limited in the law because such a limit on the law would distinguish a society managed through liberalism from societies that are ruled by totalitarianism or autocracy. The legal philosopher Richard A. Epstein argues that no liberal theory of freedom can survive without limits in the law. Such limits, Epstein argues, can only be based on a robust harm principle. This is not because different types of harm do not exist or should not be acknowledged, but because legislative receptivity toward various harms render the legal system vulnerable to pressures by political and interest groups that seek to influence public

[204] See for instance the slippery slope argument on Assisted Human Reproduction Act, SC 2004, c.2 that criminalizes any editing of human genes. In the case of gene editing, the Act drew a line and criminalized all types of gene editing, not because the prospect of producing babies that become resisting adults to certain kind of diseases was not appealing, but because such legal sanction entails a presumably dangerous slippery slope.

[205] See Epstein (1995).

policy and legislative decision-making, which surely undermine the value of equality and inclusivity.

The slippery slope argument also shows that going by extended notions of harm any expression may eventually qualify for legal restriction. As the legal scholar Frederick Schauer states, allowing 'one restriction on communication, a restriction not by itself troubling and perhaps even desirable, will increase the likelihood that other, increasingly invidious restrictions will follow.'[206] That is, our inclination to deny protection to appalling racist and prejudicial expressions is likely to start us down a slippery slope, where the same argument can be used against expressions that are not quite hate speech but can be interpreted as such or rationalized as harmful. But while on such slope, we are destined to eventually reach the bottom where even expressions that are merely offensive, radical, or subversive would lose protection too.[207] Consequences of not protecting the right to free speech under a robust and clear harm principle, such as that of Mill's, are grave, one being the precipice of change to a non-liberal system, even if such change is not apparent to the naked eye. Chapters 3 and 4 present detailed arguments on the consequences and ramifications of the current hate speech legal regime. However, the next chapter will focus on the uniqueness of speech as a social phenomenon, which poses various challenges to the law and its application.

[206] Schauer (1985), 361.

[207] Ibid, 363.

2

Conceptualizing *Speech* and *Hate*

According to the Oxford English Dictionary, 'hate speech' is 'a speech or address inciting hatred or intolerance, especially toward a particular social group on the basis of ethnicity, religious belief, sexuality, etc.'[208] The same source traces the first use of the term in a 1938 piece published by the *Syracuse (N.Y.) Herald* and another one published in 1981 by the *Los Angeles Times.*[209] In the Canadian legal context, one instance of the term appeared in 1990 in *Keegstra*, in which the Supreme Court made a reference to an article which had the term 'hate speech' in its title.[210] In recent decades, the term 'hate speech' has become a buzzword and is ubiquitously used in a variety of contexts—there is now even an emoji that accommodates the casual usage of the term.[211] Indeed, a Google search on the term 'hate speech' returns about 436,000,000 results worldwide and about 40,000,000 results in Canada.[212] Google Ngram in the time-period range of 1965–2019 shows that the use

[208] Oxford English Dictionary, 'hate speech.'

[209] OED: '1938 *Syracuse (N.Y.) Herald* 29 Sept. 21/8 Hitler's single hate speech did more to alienate the world from Germany than anything he has done.'; 1981 *Los Angeles Times* 14 May 6 Those of us who are seeking to limit hate speech are not dealing with 'false or doubtful evidence.'

[210] See *R. v. Keegstra,* 1990 CanLII 24 (SCC), [1990] 3 SCR 697 and its reference to 'First Amendment. Racist and Sexist Expression on Campus. Court Strikes down University Limits on Hate Speech. *Doe v. University of Michigan*, 721 F. Supp. 852 (E. D. Mich. 1989).' (1990), *Harvard Law Review*, 103(6), 1397–1402. The referenced article is published here: doi:10.2307/1341420

[211] A snapshot of the emoji is included in Appendix IX.

[212] As of 15 February 2023.

of the term started to gain currency in late 1990s and reached its highest peak in 2019.[213] While some of the results are scholarly works or legal documents on the subject, the vast majority are links to blogs, news articles, opinion pieces, entertainment transcripts, lyrics, and similar content in which 'hate speech' seems to mean different things to different users. Searching the term on CanLII, an online repository of legal cases in Canada, returns 2,429 instances in 1,660 cases, which suggests that the term *hate speech* is frequently used in courts and tribunals.[214] The widespread usage of the term in various contexts, however, does not imply a shared understanding of the compound term 'hate speech' or its individual components, namely 'hate' and 'speech.' Moreover, within the concept of the slippery slope, the legal interpretation of hate speech can become just as vague and subjective as its colloquial understanding.

Understanding the constitution of *hate speech* is particularly challenging given that it is used interchangeably with terms such as *hate propaganda, offensive speech*, *racist speech, insulting speech, assaultive speech, abusive speech, harmful speech, injurious speech, wounding speech, disparaging speech, extreme speech, punishing speech, offensive speech, subordinating speech, delegitimizing speech, denigrating speech, discriminatory publication, inflammatory speech, dangerous speech,* etc.—and, indeed, others.[215] Though these terms are often used casually and interchangeably, each can have different meanings in different contexts and

[213] Google search, as of 15 May 2020. See Appendix VIII for related Google Ngram.

[214] As of 15 February 2023.

[215] These terms are interchangeably used in the adjudication of hate speech cases in courts and tribunals, see for example, e.g., *R. v. Butler*, 1992 CanLII 124 (SCC), [1992] 1 SCR 452; *Saskatchewan (Human Rights Commission) v. Whatcott*, 2013 SCC 11, [2013] 1 SCR. See Matsuda & Lawrence III (1993), for even larger variations of the term used throughout their book.

may have different effects on different people, societies, and cultures. Nonetheless, speech branded with any of these terms can lead to significant consequences. To be sure, hate speech laws have encouraged the branding of unwelcome speech, leading to significant consequences for those who express their opinions freely on topics that have become increasingly controversial, or simply on topics that are off limit by the mainstream culture.[216]

Hate speech laws are centered on two concepts of *speech* and *hate*. While the law is general and broad in scope, the task of providing clarity on these concepts—in their single or compound forms—is left to the adjudicator. Despite this, after five decades of application of hate speech laws in courts and tribunals, there is still a gap in comprehension on the clear constitution of *hate speech*. Instead, adjudicators have offered their own understanding of the term. For instance, in *Warman v. Kouba*, the adjudicator identified several characteristics of hate speech as 'hallmarks of hate message.'[217] However, the tribunal also noted that this list is not comprehensive and that there may be additional characteristics that could be considered indicative of hate speech.[218] The eleven hallmarks of hate messages as per *Warman v. Kouba* are as follows, though not in the same order:

[216] In Chapter 4, section 4.2, we will delve into cases that exemplify this claim.

[217] *Warman v. Kouba*, 2006 CHRT 50.

[218] Ibid.

1. The targeted group is portrayed as a powerful menace that is taking control of the major institutions in society and depriving others of their livelihoods, safety, freedom of speech and general well-being;

2. The messages use 'true stories', news reports, pictures and references from purportedly reputable sources to make negative generalization about the targeted group;

3. The targeted group is portrayed as preying upon children, the aged, the vulnerable, etc.;

4. The targeted group is blamed for the current problems in society and the world;

5. The targeted group is portrayed as dangerous or violent by nature;

6. The messages convey the idea that members of the targeted group are devoid of any redeeming qualities and are innately evil;

7. The targeted group is de-humanized through comparisons to and associations with animals, vermin, excrement, and other noxious substances;

8. Highly inflammatory and derogatory language is used in the messages to create a tone of extreme hatred and contempt;

9. The messages trivialize or celebrate past persecution or tragedy involving members of the targeted group;

10. The messages communicate the idea that nothing but the banishment, segregation or eradication of this group of people will save others from the harm being done by this group;

11. Calls to take violent action against the targeted group.[219]

Except for the last two items, which refer to explicit calls for violence against the targeted group, the application of hallmarks 1–9 in hate speech cases is still subject to interpretation, as their specific application may not always be clear. That is, signification of any or all these hallmarks still depends on the manner in which an alleged hate speech is interpreted. This is while the language used in an alleged hate speech may conceal any or all these hallmarks. Hence, not even these hallmarks make the adjudication any more objective or any less interpretive.

Hate speech often contains sociopolitical, ideological, and cultural views, and is as complex as the aspects it conveys.[220] Furthermore, speech and language are highly versatile and allow people to convey a single meaning in an infinite number of ways, while also allowing for an infinite reception of meanings from a single expression. In other words, hate speech can still be expressed even in the presence of prohibitions against it but remain immune from the law because the language used can make it difficult to adjudicate it as such. Indeed, a determined hate monger can still find a way to express their hateful ideas regardless of such prohibitions. Speech and language are inextricably linked to human creativity, which does not lend itself to prohibition and adjudication—

[219] Ibid. The order of the items in this list is not the same as in the case transcript, as I meant to separate the two items on the direct call/message to violence from the rest.

In Chapters 3 and 4, we will examine several adjudicated hate speech cases and point out that the hallmarks 1-9 can be applied to any and all of them. However, while some of them were adjudicated as inciting hatred and contempt, yet some were not.

[220] This claim is exemplified in all hate speech cases that are included and analyzed in this dissertation.

not even under a dictatorship. A hate monger with language and communication skills can use elusive, manipulative, or artfully crafted expressions to convey a message that could carry any or all of the hallmarks of hate speech, and still stay immune from the law. Elusive prejudicial expressions are often too risky for legal action, especially in a country where the right to freedom of expression is valued and constitutionally protected. In fact, the hallmarks of hate speech mentioned above can be found plentifully in films, novels, op-eds, and other forms of expression that have vilified and alienated different vulnerable groups, and are still enjoying protection under the *Charter*, while subjecting their creators to legal action or adjudication would be unimaginable and troublesome for the legal system. Indeed, the core reason as to why the constitution of hate speech has remained vague and ambiguous is that speech as a complex social phenomenon—especially speech that is of a sociopolitical, ideological, and cultural nature—does not lend itself to a single definitive judgment—unless, of course, a common sense approach is the legal standard.

This chapter aims to examine the two core concepts of hate speech—i.e., hate and speech—and is organized in the following sections. Section 2.1 of this chapter focuses on some of the structural and sociolinguistic complexities of speech that make it a unique social phenomenon unlike any other human behaviours. *Hate,* too, is a complex concept that deserves some conceptual attention. Section 2.2 provides a theoretical analysis and argues that *hate*, at a group level, is a sociopolitical construct, hence a structural issue. In this light, *hate* expressed by an individual seems to be a symptom of long-standing divides, injustices, and inequalities enculturated and maintained systemically at the structural level. That is, hateful expression can *sometimes* be explained—though by no means

excused or in any sense justified—as a symptom of longstanding group competition leading to inequities experienced by groups situated in lower strata of power hierarchy. Whether systemic hatred has manifested in racial segregation, the residential school system, systemic colour-coding, employment inequity, income gap and poverty, police differential treatment, the court's racialization and high conviction of people of colour, or disproportionate incarceration of Black and Indigenous men, systemic hatred is largely perpetrated at the structural level. To be sure, hate speech is situated within the social structure that sustains group hierarchy, which contributes to tension and hatred amongst social groups. Section 2.2 will argue that hate speech laws, though seemingly as a deterring measure to protect minorities, have not resulted in less hate speech or group inequality since structural problems persist.

2.1 Performative Speech Act

Speech is a highly intricate and polysemous mode of communication that is intimately intertwined with human creativity, encompassing the transmission and interpretation of diverse meanings. Alleged hate speech carries complexities that extend to its historical, sociopolitical, ideological, and cultural aspects as well. As such, alleged hate speech is even more challenging to interpret, to the point where its interpretation may extend to the audience's views on those aspects of the speech in question and may result in different meanings than those intended by the speaker. Multiple factors contribute to the complexity of speech, preventing any definitive links between the *intended* meaning of a given speech and its *perceived* meaning by, or its effect on, the audience. Both sides of a

given speech, the speaker and the listener, are shaped by factors that are external to and go far beyond the speech itself. By the same token, the adjudicator of an alleged hate speech can only offer their own perceived meaning of the speech in question, while it is possible that they may conflate its meanings and/or potential impacts. An example of this would be when an adjudicator fails to recognize potential hateful meanings and intentions conveyed by an elusive speaker who uses clever language, prose, or artistic expressions to vilify a minority group, while the same or another adjudicator may mistakenly classify an unsophisticated speech as hate speech with very little or no power to affect anyone. Later in this section, I will say more about the importance of language and its usage pertaining to the adjudication of hate speech cases. For now, let us explore the intricacies of speech and their underlying origin.

Different dictionaries define the term *speech* as the communication or expression of thoughts in spoken words and other communicative modes through which thoughts and meanings can be conveyed.[221] Speech in US law is any communicative act and 'is generally protected under the First Amendment unless it falls within one of the narrow categories of unprotected speech.'[222] These definitions, however, do not do the term justice or reflect the fact that understanding speech as a social phenomenon is exceptionally challenging. Linguists, sociolinguists, and scholars from related fields have long had to confront the inherent complexities of speech and language, which are closely

[221]The Canadian Oxford Dictionary (2 ed.), Merriam-Webster.com, & Dictionary.com.

[222] See 'The First Amendment: Categories of Speech,' (U.S. Const. amend. I.) here: https://sgp.fas.org/crs/misc/IF11072.pdf

intertwined with various sociocultural aspects of our social existence. One of the pioneers of linguistics, Edward Sapir, for instance, noted that the questions of language and speech constitute 'the problem of thought, the nature of the historical process, race, culture, and art,'[223] pointing out that speech is inextricable from the past, its habitus, and human creativity. John Austin, another notable theorist on the subject, revealed overlapping layers in the structure of speech that make it a unique act unlike any other human conduct.[224] To Austin, unlike other acts, speaking or uttering words is not 'the sole thing necessary if the act is to be deemed to have been performed.'[225] For instance, the statement such as *colonize those people* does not necessarily make the colonization of such people a reality, since other circumstances are the necessary conditions for such utterances to have an effect or meaning. Even so, such a statement can imply advocacy for violence against a particular group of people.

According to Austin, speech comprises three structural acts: (1) the locutionary act, which involves simply saying something; (2) the illocutionary act, which relies on conventions and conditions that enable the speaker to perform another act while saying something; and (3) the perlocutionary act, which produces a result or effect through saying something. While these three layers of speech acts may be distinguishable at times, Austin argues, they often occur in an indistinct and inextricable manner, making the interpretation of a given speech act subjective and contingent upon other things. Austin's

[223] Sapir (2004), 9.

[224] Austin (1962).

[225] Ibid, 8.

technical and theoretical approach sheds lights on performative and interpretive aspects of speech that are inextricable from contextual and other factors. For instance, Austin explains that locutionary acts are the intended effects of what is said. These can include making requests, giving orders, making promises, apologizing, and so on. The success of an illocutionary act, however, depends not just on the speaker's intention but also external factors that include the listener's understanding of that intention. [226] Hence an illocutionary act is actionable only in the presence of other things.[227] Perlocutionary acts, on the other hand, refer to the possible effects of what is said on the listener. These effects can include changing the listener's beliefs, attitudes, or actions. The success of a perlocutionary act depends on the listener's response to the speaker's words, but the consequences of perlocutionary performances depend on broader contexts and factors that are outside the speech and sometimes outside of the context where speech takes place. For example, by uttering 'immigrants should be ousted' or 'Muslim countries should be colonized,' the speaker may be performing a figure of speech, signifying a cultural code, idiom, joke, or perhaps advising or ordering the actual ousting or colonizing acts. The effect of such speech, however, depends on endless factors that include the status of the speaker as well as that of the audience, or whether the audience can be sufficiently persuaded, whether the audience has the means, ability, or motivation to carry out such an act, whether the government in power has a plan to oust immigrants or is committed to bring more immigrants to the country, whether the state is inclined to peace or is run

[226] Ibid, 106.

[227] Ibid, 106.

by war mongers, and the force of the target that render such action possible or impossible. The effects of such speech acts can also be explicit or implicit depending on yet other unseen factors and/or unforeseeable circumstances that are distinct from the speech itself.[228] This means that the speech by itself cannot have an effect, unless other factors are present.

Austin further emphasizes that overlapping structural layers of speech act also obscure the (un)intended meanings of the same or different versions of a given speech, and render it difficult for judgment.[229] The linguist John Searle responds to Austin's claim by suggesting that when attempting to understand the meaning and intention of a speech act, one should focus primarily on the illocutionary aspect and take its intended meaning as it appears. Searle argues that when a statement is uttered, the utterance itself should be considered a manifestation of intention and, therefore, should be considered sufficient for the purpose of interpretation and judgement.[230] *Intentionality,* however, is another complex concept that is difficult to pinpoint.

In his *Language, Culture, and Mind,* the anthropologist Paul Kockelman defines intentionality as the subjectiveness, directedness, aboutness, or reference of mental states that 'have propositional contents, or satisfaction conditions more generally.'[231] Kockelman

[228] Ibid, 99.

[229] Ibid, 99.

[230] Searle (1989), 535–558.; Also see Searle (1999).

[231] Kockelman (2010), 4–5.

argues further that these are also contingent upon external factors that influence one's intention.

> [T]he representational nature of mental states means that they are caught up in both logical and causal processes. For example, perceptions are caused by states of affairs, and are used as reasons. Beliefs are in need of reasons, and are used as reasons. And intentions are in need of reasons, and are causal of states of affairs. Thus, just as a state of affairs may cause a perception, which may be used as a reason for a belief, a belief may be used as a reason for an intention, which may cause a state of affairs. In this way, mental states not only inferentially relate to each other (within the mind), they also indexically relate to states of affairs (out in the world).[232]

In light of Kockelman's view, the linguistic complexities of speech act are also rooted in the transactive conditions or interconnectedness of the mental states and states of affair or what is 'out in the world' that renders a speech continuous and situated in history. The continuity of speech, including the speaker's intentionality, extends to the audience as well. The audience's interpretation of the speech is also part of the continuity and intentionality embedded in the speech in question. The meaning and impact of a speech can vary depending on the context, the cultural background of the audience, their previous experiences, beliefs, and socialization. Therefore, consideration of the audience's

[232] Ibid, 4–5.

perspective adds to the challenges of judging the meanings, effects, and intention of a given speech.

Sociolinguistic studies provide insights into the diverse interactive conditions and factors that shape speech.[233] These factors include cultural, socioeconomic, and political contexts, among others. They exert influence on the internal mental states of both the speaker and the audience. Key aspects that encompass the speaker-audience relationship are linguistic and communication skills, cultural familiarity, individual and group social status, political context, religion, and more. Individually or in combination, these factors play a significant role in determining the meanings conveyed through speech. Of these factors and pertaining to our discussion on hate speech laws, let us explore the role of language competency and communication skills and how they may affect the adjudication of an alleged hate speech.

Language is the means, or the tool, used to utter speech. The use of language, however, requires learning and acquiring the relevant skills. Communication competency, on the other hand, is the 'knowledge of linguistic and related communicative conventions that speakers must have in order to create and sustain conversational cooperation.'[234] While linguistic skills and communication competency have social values and can determine our social status, they are decisive in how (un)intended meanings are communicated. Furthermore, though we may be born equipped with the basic functional

[233] For examples see Searle (1968) and (1989); Gumperz (1982); Austin (1962); Sharifian & Palmer (2007).

[234] Gumperz (1982), 209.

elements of language,[235] knowledge of the rules of a given language, including grammar, vocabulary, and other related technical aspects, as well as communication skills, is acquired through upbringing and schooling. In this light, our competency in language and communication depends, to a large extent, on where and when we were born, the type of family we are born into, schooling or education we receive, etc. Moreover, to a large extent, the education one receives determines and differentiate the 'pedagogy of the oppressed' from that of the elite—which can also determine how one is treated within the legal system.[236] According to a 2015 governmental statistical report, nearly '75% of offenders admitted to federal custody on their first sentence between April 1, 2008 and March 31, 2013, self-reported that they did not have a high school diploma or equivalent (i.e., had a need for education programming).'[237]

Education, language skills, and communication competency are particularly important when it comes to adjudicating of hate speech cases that are brought to courts and tribunals. Let us examine these factors in the adjudication of two cases pertaining to Islamophobia, namely *R. v. Harding* ('*Harding*') and *Elmasry v. Roger's Publishing*.[238]

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[235] Chomsky (1986). According Chomsky's *universal grammar* theory, 'development of language in the individual must involve three factors: genetic endowment, which sets limits on the attainable languages, thereby making language acquisition possible.; external data, converted to the experience that selects one or another language within a narrow range.; principles not specific to the Faculty of Language.' Also see Yang et al. (2017), who posit that 'language is fundamentally a biological system.'

[236] Freire (2013).

[237] Government of Canada (February 2015).

[238] *R. v. Harding*, 2001 CanLII 21272 (ON CA); *Elmasry and Habib v. Roger's Publishing and MacQueen* (No. 4), 2008 BCHRT 378. Detailed analyses of these two cases are included in Chapter 3.

Respectively, the speakers in the two cases were Mark Harding, who was a pastor with poor communication competency and language skills, and Mark Steyn, who is a highly educated elite and seasoned author. In both cases, the speakers are of the view that Muslims living in Western countries are a threat to the future of Western cultures, traditions, and democracy. Harding and Steyn both claim that because Islam is backward and a politically ambitious religion, and because Muslims are unwilling to integrate to Western cultures, they intend to take over these countries through their growing population, backward culture, and tendency to violence. Both speakers seem compelled to raise awareness against the assumed threats by Muslims. While Harding suggests that Muslims should be ousted from Canada, Steyn suggests that the West at large should do *something* against its Muslim population. Elsewhere, Steyn goes as far as suggesting that Muslim countries should be colonized by the West in order to correct deficiencies of Islamic cultures.[239] The two cases, however, received contrasting decisions. Harding was convicted while the claim involving Steyn was dismissed. In the case of *Harding*, the speech was deemed as hate speech and found to be in violation of the law. On the other hand, Steyn's speech was considered important to the public interest and was deemed deserving of protection under the *Charter*. Let us consider some excerpts from both cases.

For the most part, Harding's speech was not included in the court's transcript, perhaps because of its illegibility. Instead, the court summarized his speech.

[239] Steyn (October 9, 2001).

> (a) The prevailing theme is that Muslims as a group are dangerous people capable of acts of violent terrorism and great cruelty. (b) Muslims are intolerant of other faiths and pose a threat to such groups. In particular, they are rabidly anti-Semitic and anti-Christian. (c) Muslims have perpetrated horrific acts of violent terrorism throughout the world in the name of their religion. (d) Canadian Muslims are no different from their brethren in other countries, but they dishonestly masquerade as pacifists. They are 'like raging wolves in sheep's clothing, inside they are full of hate, violence, and murder.' (e) It is the objective of all Canadian Muslims to overtake this country. A 'holy war' is being waged. When Muslims succeed with this goal, they will brutalize those who do not accept their religion.[240]

In instances that Harding's statements are quoted verbatim in the court's transcript, they showcase his poor language skills even in the basic rules of spelling and grammar.

> Are all Muslims living in Canada Today Terrorsits [sic]. This is a Warning To All Canadians and Their Families.[241]

Elsewhere in the court's transcript Harding is quoted:

[240] *R. v. Harding*, 1998 CanLII 18857 (ON SC).

[241] Ibid.

> but nobody questions the Muslims in Toronto to find out is that that is happening good. These people do not obey our laws, so we must teach them to obey our laws.[242]

The incoherent and poorly communicated speech showcases Harding as an unsophisticated speaker. One could argue, in a pedantic manner, that the court's interpretation and paraphrasing of Harding's speech might have a more detrimental impact than the speech itself. Alternatively, it could be argued that Harding's incoherent statements were not worthy of serious consideration and deserved no more than a laugh.

The speech in *Elmasry,* on the hand, was written by a seasoned author who arranged his prejudicial ideas behind sophisticated prose and furbished them with statistical numbers to add validity to his claims.

> If you'd said that whether something does or does not cause offence to Muslims would be the early 21st century's principal political dynamic in Denmark, Sweden, the Netherlands, Belgium, France and the United Kingdom, most folks would have thought you were crazy. Yet on that Tuesday morning the top of the iceberg bobbed up and toppled the Twin Towers. This is about the seven-eighths below the surface - the larger forces at play in the developed world that

[242] Ibid.

> have left Europe too enfeebled to resist its remorseless transformation into Eurabia.[243]

Wherever a statement was too crude or troublesome, Steyn knew how to say it from someone else's mouth.[244] Arguably, his language and communication competency played a role in the manner the speech in question was interpreted by the adjudicators in *Elmasry*. In these examples, it is likely that the adjudicators classified the speech as hate speech or protected speech due to either a limited understanding of the complexities of speech and language or their own sociopolitical and ideological views, which influenced their interpretation. In some respects, Steyn's speech seemed more consequential than that of Harding's—given its manipulative aspect through artful prose, the author's status, or the prestige of the media outlet that published his article.

The intrinsic association of language and culture, too, is as important here and has been extensively examined in cultural anthropology, cultural linguistics, and cultural studies. Cultural linguistics, for instance, which is governed by the motto of 'the concurrence of language-as-culture and language-governed-by-culture,'[245] is focused on how language and culture necessitate one another. Paul Friedrich and Michael Agar even use the terms *linguaculture* and *languaculture*, respectively, to emphasize the inevitable

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[243] *Elmasry and Habib v. Roger's Publishing and MacQueen* (No. 4), 2008 BCHRT 378.

[244] Ibid, 46. See Steyn's article as an appendix in *Elmasry*, where he quotes the former Libyan President, Muammar Gadhafi.

[245] Sharifian & Palmer (2007), 1.

dependencies between the two phenomena.[246] Stuart Hall, too, emphasizes that the means by which cultural meanings are produced and conceptualized is language.

> [C]ulture is about 'shared meanings.' Now, language is the privileged medium in which we 'make sense' of things, in which meaning is produced and exchanged. Meanings can only be shared through our common access to language. So language is central to meaning and culture and has always been regarded as the key repository of cultural values and meanings.[247]

The importance of language, Hall asserts, is that it sustains 'the dialogue between participants' and also allows them to construct and share culture. The strength of language, he adds, is in its semiotic representational aspect that is the connecting current in what he calls a 'circuit of culture', in which meanings are conceptualized and instrumentalized. In such a circuit, strategic meanings and concepts are distributed through cultural, socioeconomic, and political systems. These are all inevitable aspects of an alleged hate speech that are too challenging to be considered in the adjudication of hate speech cases, whose focus is singular. Surely, Hall's 'circuit of culture' includes the entire context that should prompt us to look at instances of speech such as those in *Harding* and *Elmasry* differently.

In light of theoretical discussion provided in this section, alleged hate speech such as those in *Harding* and *Elmasry* can be viewed within the geopolitical and economic

[246] See Friedrich (1989); Agar (1994).

[247] Hall (1997), 13-74.

context pertaining to the West's relationship with Muslim countries. Undeniably, such relations have both influenced the manner in which Muslims are depicted in the mainstream media and are factors that encouraged Harding to make his views of Muslims public and have continuously provided conceptual material to Steyn's writing. In this context, it is important to remember the alliances formed by Western governments that participated in the war and contributed to the destruction of a Muslim country like Iraq, while the mainstream media concurrently depicted the victims of the war as barbaric and backward. From this perspective, Steyn's speech is as complex as its context and cannot be viewed in isolation or in what philosopher Judith Butler calls 'the scene of racism.'[248] This is because Steyn's speech is not only shaped by but is one component in the order of things.

In his *The Order of Things,* Foucault argues that the 'fundamental codes of a culture' govern its language in three domains. He describes the first domain as the everyday life, where cultural codes, values, and perceptions are formed and practiced in comfortable boundaries within which people, oblivious to the order and arrangement of things, ritually practice and conform to them. The second domain is the scientific and philosophical fields in which theories are produced, explaining why 'particular order has been established' and how they are arranged in the ways they are supposed to be arranged. To Foucault, it is in this domain that strategic knowledge is produced and justifications for legal or scientific control and ways of things are formulated. The third domain in

[248] Butler (1997), 79. More on this will be discussed in the next section.

Foucault's classification is the region where different individuals question the prescribed codes, regulations, and the prevailing order of things. This domain, which Foucault calls 'middle region,' is where 'a culture, imperceptibly deviating from the empirical orders prescribed for it by its primary codes, [… causing] them to lose their original transparency, relinquishes its immediate and invisible powers.'[249] As such, Foucault's notion of discourse replaces speech in order to illuminate on an existing and continuous struggle of 'all against all' in 'relations of power' and not relations of actual meanings, or relation of a speech and its perceived effect.[250] In discourse, references to historical context, the production of meaning, and the formation of knowledge are constantly changing.[251] From this perspective, meanings and knowledge are produced by the subject that wins the struggle, and not necessarily because such meanings make the most sense.[252] It is from this sociological perspective that the legal regime on hate speech should be assessed, with the aim of gaining a better understanding not only of the discursive struggle surrounding hate speech and the question of who should be allowed to speak but also of the authoritative power of the law that influences this struggle and shapes the content of the public sphere.

[249] Foucault (2005), xxii.

[250] Foucault (1980), 208.

[251] Ibid, 114.

[252] Ibid, 780.

2.2 Conceptualizing Hate

Concepts are complex because they have a history. Along with its psychological characteristics, *hate* also qualifies as a concept, particularly when it is examined as a sociopolitical instrument. With its potential intensity and hostility, and as representative of some other ideas, *hate* is manipulatable, extendable, and socially constructible. Time and again, for instance, *hate* has been instrumental to occupiers, colonizers, dictators, warmongers, and the like. The conceptualization of *hate*, therefore, can involve an examination of its nuances in relations of power and not merely as it is assigned to an expression. This section will first examine *hate* from a theoretical angle and then show how while group hatred is deeply embedded in social structures and institutions, it is also instrumentalized to maintain such structures. The objective here is to show that not only is the concept of hate excessively simplified in hate speech legal discourse, but also that such simplification that situates hate in hate speech deflects our attention from hatred as a structural problem. While it is true that hate can manifest as bigotry at the individual level, overly focusing on bigotry can obscure the ways in which hate is instrumentalized for political purposes. This can enable a politics of hate that seeks to silence subversive and unwelcomed voices.

Since the mid-twentieth century *hate* has become the subject of legal control in the majority of western countries. But while there is a substantial body of scholarship on hate speech and hate crime, *hate* as a concept has remained relatively understudied. As a concept, however, hate is traceable. Dale Jacquette traces hate in the works of

philosophers of antiquity, when it was not necessarily considered an emotion that ought to be avoided or controlled.[253] Aristotle, for instance, viewed hate as a necessary emotion against immorality. In *Rhetoric,* he argues that hate arises naturally against the consequences of the immoral conduct of 'bad men' and that 'we are bound to hate bad men excessively.'[254] Aristotle seems to postulate that hate arises when people experience injustices by particular classes of people, such as 'thieves' or 'informers' and that since the consequences of their actions are 'the greatest evils, injustice and folly,' hate is an inevitable emotion that allows people to combat immorality.[255] For Aristotle, hate is an instrument to champion justice and fend against the injustices that is perpetrated by immoral agents—e.g., thieves, informer, etc.—against 'the poor,' 'helpless persons,' and 'the innocents.'[256]

For Plato, on the other hand, *hate* or *misology* starts with an intolerance of argumentation and discourse. He is of the view that 'no greater evil one can suffer than to hate reasonable discourse,' because such hatred harms the hater himself by keeping him in ignorance. Plato's view on the hatred of discourse and, as he puts it, 'the end of wisdom,' is signified in the death of Socrates himself.[257] In *Phaedo,* Socrates argues that *hate/misology* grows into hatred of humankind, i.e., into *misanthropy,* but while the root

[253] See Jacquette (2014), 28, 1–17.

[254] Aristotle, *Rhetoric*, 63, 88–89. Also see Jacquette (2014).

[255] Ibid, 63.

[256] Ibid, 66.

[257] See Jacquette (2014), 6.

of such hatred is intolerance for free and open discussion, it deprives one from truth and knowledge.

> It would be pitiable, Phaedo, he said, when there is a true and reliable argument and one that can be understood, if a man who has dealt with such arguments as appear at one time true, at another time untrue, should not blame himself or his own lack of skill but, because of his distress, in the end gladly shift the blame away from himself to the arguments, and spend the rest of his life hating and reviling reasonable discussion and so be deprived of truth and knowledge of reality.[258]

Plato also suggests that *misology* prevents the dialectical aspects of discourse that requires tolerance toward unsound, objectionable, or offensive speech. For it is from these dialectical processes that wisdom emerges. While Plato seeks moral knowledge by encouraging dialogue, Socrates constantly pits his views and those of his interlocutors against one other. For Plato, *hate* seems to be that which prevents dialogue, discourse, and tolerance of other opinions. Jacquette's interpretation of Socrates' misology is 'a matter of pedagogical experience,' and the best way to prevent the spread of misology is to encourage education and 'the practice of dialectic.'[259]

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[258] See Cooper & Hutchinson (1997), *Phaedo* 90d. Also see Jacquette (2014), 7.

[259] Jacquette (2014), 11. Note that Plato's misology can also be discussed within a more recent phenomenon that has come be known as anti-intellectualism. Anti-intellectualism is a social phenomenon that is central to scientific scholarship, particularly in fields related to the environment and more recently, to Covid-19. Although the hatred of knowledge, science, and intellectuality is an important topic to be discussed, it is beyond the scope of our current discussion.

> We can adopt a specific program of discussion prepared to help them come to terms psychologically, cognitively and emotionally, with the seemingly endless clash of arguments in dialectical exchange, as nevertheless not only compatible with but essential in the search for truth.[260]

Given its potency, however, *hate* manifests not just in misology and as a result of the individual's limited experience, but rather in broader contexts where power is expressed through competing forces of interest groups, where the individual is situated. Indeed, *hate* is not just an emotion that starts or ends at the individual level. Whether *hate* is manifested in misology or in hate speech, it involves race, gender, ethnicity, religion, nationality, language, knowledge, and other group characteristics. It is, therefore, a social concept that plays a role within relations of power. At the social level, *hate* resembles Foucauldian characteristics of power. Though it is difficult to locate, its dynamic allows it to be a potent force at the sites of oppression, domination, and resistance. As such, a monolithic treatment of hate limited to *hate speech* would be limiting and distract from locating *hate* at its source.

Though *hate* is manifested in many ways—i.e., misogyny, misandry, misology, misanthropy, etc.—racial hatred can be a useful point of departure here. *Race*, however, is another concept that has been manipulated and exploited in different fields of knowledge. For instance, it was only in the 1970s that the world of science realized that

[260] Jacquette (2014), 11.

race is not a biological fact that can be used in the field of human biology.[261] Prior to this insight, however, bad science of people such as Francis Galton or Arthur de Gobineau contributed to the ideological perception of *race* and facilitated colonial objectives of the *superior race*. While Galton utilized Charles Darwin's theory of natural selection to categorize social groups and advocate for the legal elimination of the 'inferior race' through eugenics, Gobineau employed the notion of degeneracy to assert that certain groups of people lacked any 'intrinsic value.'[262] As such, the elite-centred conception of *race* situated the 'well-born' against 'the inferior race' that allowed for widespread eugenics movements in different sites of colonialism—e.g., Canada, United States, and Australia—where the legal field played its own part in minimizing and eradicating resistance by the colonized.[263]

Confronting racial relationships, however, had to include *hate* as one of its required components. While people like Galton endorsed racism under the guise of science, other governing practices further promoted racial divides and hatred. For instance, the first Canadian census, which took place in 1901, ensured racial division through its invention of colour-coding and the use of 'w,' 'r,' 'b,' and 'y' to designate the race of its population as 'white,' 'red,' 'black,' and 'yellow' respectively.[264] To surveyors,

[261] Kwabi-Addo (2017); Blakey (2001); Cooper (1986). Here 'science' refers to scientific findings in the field of biology that show no component in human blood that is specific to one's race. However, one's DNA might tell a whole different story about one's background and genealogy.

[262] Galton (1883), 200–201; Gobineau (1915), 25.

[263] See the Sterilization Act of Alberta (1928–1972).

[264] Backhouse (1999), 4.

race and skin colour were a matter of fact and were 'definitive, except when it became a question of 'purity' and 'degree'.'[265] In those cases and in the cases of the children of interracial parents, the surveyors mentally applied the 'one drop' rule and placed the children of interracial parents in non-white categories:

> Children who were of mixed Caucasian and other heritage (that is, red, black or yellow) were to be designated as members of the appropriate non-white race.[266]

This codification was not just a matter of formality but rather a part of governing strategy needed for the allocation of resources as well as legal control over the economic transactions among the population. In her renowned work, *Colour-coded: A Legal History of Racism in Canada, 1900-1950*, Constance Backhouse summarizes her findings about the motivations behind such codification:

> Racial classification functioned as the hand-servant for many disparate groups as they sought to explain why they were entitled to hold inequitable resources, status, and power over others. The adoption of the notion of 'race' in aid of the institution of Black slavery is well known. It is equally evident that 'racial' ideology was pressed into service as an excuse for seizure of First Nations lands. 'Race' was offered as a definitive explanation for the punitive treatment of Asian

[265] Ibid.

[266] Government of Canada: Census of Canada (1901).

> immigrants in the late nineteenth century. 'Racial' terminology was also used to rationalize exploitation between whites. [267]

The context in which inferiority of some social groups was established through a colour-code ranking system and laws that openly implied disgust toward *people of colour*, also legitimized display of hatred by the public. In Canada, negative sentiments towards Indigenous peoples were reflected in various statutes. For instance, the Indian Act (1876–present) empowered the state to seize Indigenous lands and resources, while the Residential School amendment (1884–1948) legally sanctioned the separation of Indigenous children from their parents with the aim of eradicating their cultural identity and assimilating them into the dominant culture. This racial hatred also manifested at the community level, where Indigenous people were the target of blatant hatred in the public.[268]

The racial ideology imposed and established at the state level through legal and administrative means was also balanced at the cultural level, where hate was expressed in what Homi Bhabha calls the 'prose of power' in cultural productions and semiotic representation of social groups. A semiotic investigation in the cultural domain locates *hate* in 'the sense of social order,' 'the hidden injuries of class,' 'the common sense of injustice,' and in 'the *langue* of the law.'[269] Indeed, *hate* stands out clearly in the symbolic representation of everyday life, where the *Other* symbolized as different in *race* becomes

[267] Backhouse (1999), 6.

[268] Bhabha (1990), 1–2.

[269] See Ibid.

different in nature—as degenerate, savages, dangerous, pathological, illegal, immoral, alien, etc. Situating the *Other* in the realm of immorality necessitates hatred of the *Other* and in the *Other*.[270] In such a context, *hate* was transitive and recycled in a subject-object relationship and through a sense of superiority and inferiority, rejection and submission, paranoia and fear, and loathing and idealization practiced by both sides. Consider the following.

In his documentary film, *Reel Injun,* the filmmaker Neil Diamond, himself a Cree-Canadian, re-narrates the western cinematic representation of the natives as bloodthirsty savages bent on scalping white settlers, and as obstacles to settlements or irresponsible drunkards. This led him to resent the natives on the screen and cheer for the cowboys in their cinematic massacre and genocide of the natives.[271] Diamond claims that most in his community did not notice that they were the ones perpetually depicted as evils nor did they see the irony of taking sides with the cowboys.[272] In the colonial context of North America, the resonance quality of *hate* affected both the settlers and the natives. *Hate* in such a context was operationalized in a way that both the natives and settlers internalized self-hatred and hatred of the other that was operationalized through governing practices of the state and in a make-believe popular representation of good and evil, of the good race and the bad race.

[270] Aristotle: 'we are bound to hate bad men excessively.' *Rhetoric* Book II - Chapter 21: 1395b.

[271] Diamond (2009).

[272] Ibid.

Structural *hate* has a debilitating effect on the working class of any social group. Studies show that *hate* that is instilled through artificial colour-coding, and exploitation of the *Other*, has created a sense of racial distinction that is also detrimental to the social mobility of the working class. Steve Martinot, who works on racism and the labour history of working-class white Americans, argues that racial hatred has been one of the most decisive barriers to unionism among poor white workers in the US.

> There are many instances where white workers have actually rejected unionism, typically in the South, because it implied shared membership with black workers. Even in the face of utmost hardship, white workers have traded away economic improvement and class strength for illusory cultural privileges of whiteness.[273]

Here, *hate* functions efficiently against union of those, whose rights are equally quashed but are too divided on racial line and blind on the causes of their shared suffering.[274]

So how does structural hate relate to our discussion on hate speech and its legal prohibition? For one thing, the discourse that locates hate in the individual expression can deflect the public attention from the more problematic structural issues that have persistently remained unresolved. As Butler states:

> When the scene of racism is reduced to a single speaker and his or her audience, the political problem is cast as the tracing of the harm as it travels from the

[273] Martinot (2000).

[274] Bourdieu (2004), 7– 8.

> speaker to the psychic/somatic constitution of the one who hears the term or to whom it is directed. The elaborate institutional structures of racism as well as sexism are suddenly reduced to the scene of utterance, and utterance, no longer the sedimentation of prior institution and use, is invested with the power to establish and maintain the subordination of the group addressed.[275]

One may suggest that it is possible to both punish discrete actions and racism at 'the scene of racism' and simultaneously address the structural problems that contribute to hate speech. Unfortunately, neither of these suggestions have materialized. That is, while structural inequality and discrimination still persist, hate speech laws have not meaningfully deterred prejudicial expressions, regardless of the objective behind such laws. In fact, as will be shown in Chapters 4 and 5, while the hate speech legal regime in Canada is a major contributor to structural inequality, hate crime is on the rise. Moreover, under the current legal regime, accusations of hate speech are rampant and regularly victimize and threaten people and their livelihood. Let us now consider some statistical numbers that can shed light on the rates of group inequality and hate crime in Canada.

The Hate Crime Unit of the Police Service publishes annual reports on reported hate crimes across Canada that inform the rate of criminal offences that are 'motivated by prejudices against the victim's race, national or ethnic origin, language, colour, religion, sex/gender, age, mental or physical disability, sexual orientation, or gender orientation or

[275] Butler (1997), 79.

expression, or on any other similar factor.'[276] The Police Service uses the working definition of hate propaganda as stated in sections 320(8) of the *Criminal Code* as 'any writing, sign or visible representation that advocates or promotes genocide or the communication of which by any person would constitute an offence under section 319.'[277]

The Service's 2020 report shows that while all other crimes decreased by 10% from 2019 to 2020, reported hate crimes that targeted members of minority groups 'distinguished by colour, race, religion, national or ethnic origin, age, sex, sexual orientation, gender identity or expression, or mental or physical disability,' substantially increased by 52%.[278] The same report states that in 2019, the number of hate crimes across Canada was 2,669, which marked 'the largest number of police-reported hate crimes since comparable data became available in 2009.'[279] When calculated based on race and ethnicity, however, the report shows 'police-reported hate crimes targeting race or ethnicity' increased by 80% 'compared with a year earlier.'[280]

> Canadians were the victims of over 223,000 criminal incidents that they perceived as being motivated by hate in the 12 months that preceded the survey

[276] Statistics Canada (17 March 2022), 4-38.

[277] Statistics Canada (17 March 2022), 4-38.; *Criminal Code*, R.S.C., 1985, c. C-46, s. 319 (Canada).

[278] Ibid.

[279] Ibid.

[280] Ibid.

> (3% of self-reported incidents). Approximately one in five (22%) of these incidents were reported to the police.[281]

Going by this self-reporting, there seems to be an increase in the rate of hate speech. If true, increase in hate crime mirrors an increase in the rate of group inequality at the structural level. For instance, a study entitled 'Exploring the Causes and Consequences of Regional Income Inequality in Canada' shows that the regional income gap has steadily increased from 1981 to 2011.

> Income inequality has increased considerably in Canada over the last thirty-five years. Looking at the Gini coefficient suggests that levels of inequality in the country are 15 percent higher today than in 1981, with much of this growth taking place from the early 1990s to the mid-2000s, driven by the rise in incomes at the top of the distribution.[282]

The study emphasizes that 'virtually all (75 percent) of the income gains in Canada over this period of time have gone to the top 10 percent of earners while by itself, the top 1 percent of earners have captured 37 percent of total income growth in Canada.'[283] Structural inequality based on race and ethnicity is not isolated to income gap but also overwhelming in justice system, enforcement institutions, prison system, etc. For instance, a 2011 quantitative study entitled 'The Usual Suspects: Police Stop and Search

[281] Ibid.

[282] Marchand, et al. (2020).

[283] Ibid.

Practices in Canada,' that includes 'a representative sample of black, Chinese and white adults (18 years of age or older) living in Metropolitan Toronto,' shows that majority of those stopped and searched by police were Black men.[284] When participants in the study were asked whether they consider racial profiling a problem in Canada, '6 out of 10 black respondents (57%) view racial profiling in Canada as a 'big problem', compared to only 21% of white and 14% of Chinese respondents.'[285] Conversely, when respondents were asked whether they consider it legitimate for 'the police to randomly stop and search' people belonging to the Black racial group, 'white (39%) and Chinese respondents (34%)' viewed police 'racial profiling tactics as a legitimate crime-fighting strategy than their black counterparts (23%).'[286] And when the respondents were asked how many times they were stopped and id-ed by the police while simply walking or standing in a public space, the result was as following:

> a third of the black respondents (34%) have been stopped by the police in the past two years, compared to 28% of whites and 22% of Chinese respondents. Blacks are especially likely to experience multiple police stops. Indeed, 14% of black respondents indicate that they have been stopped by the police on three or more occasions in the past two years, compared to only 5% of white and 3% of

[284] Wortley & Owusu-Bempah (2011).

[285] Ibid.

[286] Ibid.

> Chinese respondents. On average, blacks experienced 1.6 stops in the past two years, compared to 0.5 stops for whites and 0.3 stops for Chinese respondents.[287]

Another statistical study entitled 'Adult and Youth Correctional Statistics in Canada, 2018/2019' shows that in the said years, 'Indigenous adults accounted for 31% of admissions to provincial/territorial custody and 29% of admissions to federal custody, while representing approximately 4.5% of the Canadian adult population.' [288] Such disproportions of Indigenous representation among inmates have not changed from the previous years.[289]

Whether it is employment inequity, income gap and poverty, police differential treatment, high conviction rates by courts, and/or disproportionate incarceration, to a large extent, the patterns of systemic hatred that disadvantage some groups and maintain the status quo persist. Hate speech can be seen not only as a product of, but also as situated within, a particular sociopolitical structure that reinforces group hierarchies and contributes to intergroup tensions. Systemic hatred at the structural level and hate speech at the individual level are as much inexcusable as they are common. Contrary to common belief, however, hate speech laws are not protecting groups that are vulnerable to the structural hatred even if such laws are meant to protect such groups.

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[287] Ibid.

[288] Malakieh (2020).

[289] Ibid.

While hate speech laws have proved to be ineffective in deterring hate speech, they are also perpetuating structural inequality through excessively subjective adjudication and inconsistent judgments. As discussed in the first section of this chapter the polysemous and interpretive characteristics of speech, along with other sociopolitical, historical, ideological complexities, make speech as a unique social phenomenon that does not lend itself to a single definitive judgment. It is this uniqueness that has not allowed the legal system to define a clear constitution of hate speech or set a clear limit for the right to free expression. Adjudicators at various levels have had to adopt to a *common sense* approach in interpreting the law and its application to alleged hate speech at hand. At times, the same law and alleged hate speech have been interpreted differently by various adjudicators at different levels, ranging from tribunals to the Supreme Court. Though qualifications on such inconsistency are on the offer in the related literature, the fact remains: that the adjudication of hate speech cases is possible only through a *common sense* approach, which makes the adjudication excessively subjective and characteristically inconsistent. Canada's hate speech legal regime has also encouraged the proliferation of hate speech politics and the suppression of critical voices that oppose the interests of different stakeholders and interest groups. Under the current hate speech legal regime, minority groups at the bottom of the power hierarchy are disproportionately impacted. In the following two chapters, we will explore the negative impacts of Canada's hate speech legal regime in greater detail, analyzing the various implications that contribute to structural hatred.

3

Excessively Subjective and Inconsistent Adjudication

Section 319(1) of the Hate Propaganda Act in Canada's *Criminal Code* prohibits and punishes any public communication that incites hatred against any minority groups that are identified based on race, national or ethnic origin, colour, religion, age, sex, sexual orientation, or gender identity.

> Every one who, by communicating statements in any public place, incites hatred against any identifiable group where such incitement is likely to lead to a breach of the peace is guilty of an indictable offence and is liable to imprisonment for a term not exceeding two years; or an offence punishable on summary conviction.[290]

Section 319(2) states the following:

> Every one who, by communicating statements, other than in private conversation, wilfully promotes hatred against any identifiable group is guilty of an indictable offence and is liable to imprisonment for a term not exceeding two years; or an offence punishable on summary conviction.[291]

[290] Section 319(1) of the Hate Propaganda Act in Canada's Criminal Code. Full text is provided in Appendix II.

[291] Ibid.

Federal and provincial human rights codes, too, prohibit public communication that is discriminatory toward, or is 'likely to expose,' a person or class of persons to hatred or contempt. For instance, section 7(1) of the British Columbia Human Rights Act dictates:

> A person must not publish, issue or display, or cause to be published, issued or displayed, any statement, publication, notice, sign, symbol, emblem or other representation that (a) indicates discrimination or an intention to discriminate against a person or a group or class of persons, or (b) is likely to expose a person or a group or class of persons to hatred or contempt.[292]

Throughout this chapter, the term *hate speech* is used to refer to all forms of prohibited expression and communication under Canada's criminal and human rights codes. Likewise, the term *hate speech laws* will be used to refer to the criminal and human rights codes that prohibit *hate speech*.

This chapter engages in close reading of several cases that were litigated under section 319 of Canada's *Criminal Code* and/or section 7(1)(b) of the British Columbia Human Rights Act. There are, of course, important differences between criminal and human rights codes that will be accounted for as needed throughout the discussions in this chapter. The core argument here, however, is that in Canada, regardless of the code under which an alleged hate speech is litigated, its adjudication suffers from inconsistency and arbitrariness. I argue that such inconsistency is largely due to: (1) the lack of a clear constitution of hate speech and guideline on limits of the right to free speech; and (2) the

[292] Appendix IV provides full text of Section 7 of the British Columbia Human Rights Act.

adoption of a *common sense* approach in the adjudication.[293] Both of these, however, are inevitabilities imposed by the object at hand—i.e., speech—which is a unique social phenomenon unlike any other human conduct.

In this chapter, I intend to examine the excessively subjective and inconsistent characteristics of the adjudication of hate speech cases. Before we begin, however, it might be useful to clarify and say a few words about the term *excessive subjectivity,* which frequents this chapter. That all judgments, in the legal and other social realms, are subjective is not debated here. In fact, subjectivity is inherent in any judgment one makes about the world they inhabit, as it is in legal judgments. However, the term *excessive subjectivity* as used in the context of adjudicating hate speech cases refers the adjudicator's excessive engagement in interpreting the law, speech at hand, and the application of the law. This is because, in this context, objective, verifiable, measurable, or deductive means are largely unavailable to establish a solid understanding of the law or to demonstrate the evidential impact of the speech in question. As such, the adjudicator has to rely on a *common sense* approach, which is essentially the adjudicator's own worldview and assumptions. The term excessive subjectivity describes the act of interpretation that results in the conclusion or judgement that cannot be deduced inferentially. Excessive subjectivity here means the interpretation that allows for an (in)advertent predetermined judgment based on the adjudicator's own worldview. In other words, the adjudicator's

[293] The approach was suggested by the Supreme Court of Canada, which is referenced by courts and tribunals. See *R. v. Keegstra,* 1990 CanLII 24 (SCC), [1990] 3 SCR 697 [hereafter *Keegstra* (1990)]; *Saskatchewan (Human Rights Commission) v. Whatcott*, 2013 SCC 11, [2013] 1 SCR [hereafter *Whatcott* (2013)]; *Canadian Jewish Congress v. North Shore News and Collins*, 1997 BCHRT 35 [hereafter *CJC* (1997)].

judgment Y of fact X can be excessively subjective if Y does not necessarily follow from X. Excessive subjectivity in the interpretation of a given hate speech case and application of the law, I argue, is that which is contingent upon the particularities of the adjudicator rather than an objective and evidence-based adjudication. Excessive subjectivity is as inevitable because, as discussed in Chapter 2, speech is structurally complex, versatile, and polysemous. Hate speech is even more complex because it also carries sociolinguistic, political, historical, and ideological complexities that make any single definitive judgment impossible. The versatility and polysemy of speech have posed a fundamental challenge in the adjudication of hate speech cases, all aspects of which are often contingent upon the manner in which they are interpreted. In his theory of interpretation, the late legal philosopher Ronald Dworkin argued that interpretation is 'interpretive all the way down' and that its multiplicity is 'intractable, pervasive, and endless.'[294] For instance—and especially since hate speech is a sociopolitical, ideological, and cultural expression—the adjudicator's interpretation can be based on his/her own view about a Constitutional right, constitution of democracy, power and authority, principles of legitimacy, limits to privacy and individualism, rights hierarchy, or even about their own role and responsibility as the adjudicator. Even if the adjudicator is not consciously thinking about these issues, the nature of the case at hand invokes the act of interpretation that is 'all the way down,' especially since, in the lack of objective guidelines, the jurisprudence allows for a *common sense* approach.

[294] Dworkin (2010).

This chapter anchors its arguments in *Elmasry* held at the British Columbia Human Rights Tribunal ('the Tribunal') under section 7(1) of the British Columbia Human Rights Act.[295] *Elmasry* is an ideal case study for several reasons. First, the accused was a large media corporation and the case attracted significant media attention that possibly affected the Tribunal's decision. Second, central to *Elmasry* was an accusation of Islamophobia that, according to the complainants, exposed 'Muslims in British Columbia to hatred and contemp.'[296] Since Islamophobia is a prejudice based on religion and ethnicity, *Elmasry* will be read comparatively with a number of cases that were centered on accusation of a similar prejudice such as antisemitism. A comparative reading of *Elmasry* with those cases highlights the differing treatment of the two prejudices—i.e., Islamophobia and antisemitism—and evidence in courts and tribunals. The following will be read alongside *Elmasry*.

Harding was held at the Ontario Superior Court of Justice, where the accused was convicted for 'willfully promoting hatred against Muslims' under section 319(2) of the *Criminal Code*.[297]

Canada (Human Rights Comm.) v. Taylor (1979) ('*Taylor*') was held at the Canadian Human Rights Tribunal, where the accused were ordered to cease the said

[295] *Elmasry and Habib v. Roger's Publishing and MacQueen* (No. 4), 2008 BCHRT 378 [hereafter *Elmasry* (2008)].

[296] Ibid, 4.

[297] *R. v. Harding*, 2001 CanLII 21272 (ON CA) [hereafter *Harding* (2001)].

communication prohibited under the former section 13 of Canadian Human Rights Act. At issue in *Tyalor* were accusations of antisemitism.[298]

Canadian Jewish Congress v. North Shore News and Collins (1997) ('*CJC*') was adjudicated at the British Columbia Human Rights Tribunal under section 7(1) of the British Columbia Human Rights Act. At issue was an article written by Doug Collins and published in *North Shore News.* The defendants were accused of 'likely' exposing 'Jewish persons to hatred or contempt.'[299] The case was dismissed.

The speech in *Abrams v. North Shore News and Collins* (1999) ('*Abrams*') was adjudicated at the British Columbia Human Rights Tribunal, was the same article in *CIC*. In *Abrams*, there were two issues before the Tribunal: (1) 'what was the proper interpretation of s. 7(1)(b) of the Code' that, according to the complainant, was 'inappropriately read down' by the adjudicator in *CJC*; (2) whether the statements [by Doug Collins and published by *North Shore News*] 'likely' exposed 'Jewish persons to hatred or contempt,' and if they did, what was 'the appropriate remedy?' In *Abrams,* the accused were ordered to cease publishing the given statements and pay $2000 to the complainant 'for the injury' they caused to the complainant's 'dignity and self-respect.'[300]

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[298] *Canada (Human Rights Comm.) v. Taylor*, 1979 CanLII 3882 (CHRT) [hereafter *Taylor* (1979)].

[299] *CJC* (1997).

[300] *Abrams v. North Shore News and Collins,* 1999 BCHRT 7 [hereafter *Abrams* (1999)].

The central questions that inform the discussions and analyses of this chapter in support of the inconsistency argument are as follows:

- How were the terms 'hate' and 'contempt' defined in *Elmasry* and applied to the case?
- How was Islamophobia perceived and treated in *Elmasry* in comparison to the perception and treatment of antisemitism in *Taylor, CJC*, and *Abrams*?
- How were the evidence adduced by the witnesses treated in *Elmasy,* in comparison to the treatment of the same in *Taylor, CJC*, and *Abrams?*

To examine the above questions, two preliminary sections are required: (1) a detailed description of the case, *Elmasry*, which will be provided in section 3.1; and (2) a brief literature review on Islamophobia in the post 9/11 crisis leading to the time when *Elmasry* was adjudicated—this will be the task of section 3.2. Note that the objective for the literature review in section 3.2 is not to examine the nature, root causes, doctrines, sources, objectives, or consequences of Islamophobia, or to study Islamophobia as a social phenomenon. The aim here is, instead, to include social studies that show the role of the media in spreading Islamophobia and rendering it mainstream. This is important since *Elmasry* centered on an accusation of the type of Islamophobia in the media that the complaining party presumed to be prohibited under section 7(1)(b) of the British Columbia Human Rights Act. Section 3.3 provides a context in terms of the Tribunal's introductory statements, definition of the key terms, and relevant parts of the testimonies. Section 3.4 will then provide an analysis of the adjudication through its comparative reading with the cases mentioned above.

3.1 Understanding *Elmasry*

In October 2006, *Maclean's* magazine published a segment of Mark Steyn's book, *America Alone: The End of the World as We Know It.*[301] *Maclean's* article ('the Article'), entitled 'Why the Future Belongs to Islam,' argues that Muslims in Europe are a threat to the future of the continent, its traditional cultures, and progressive democracy.[302] Because Islam is a politically ambitious ideology, Steyn argues, the population growth, Muslims' propensity for violence, and the aging demographics of Europeans can bring an end to the cultures of European countries:

> The children and grandchildren of those fascists and republicans who waged a bitter civil war for the future of Spain now shrug when a bunch of foreigners blow up their capital. Too sedated even to sue for terms, they capitulate instantly. Over on the other side of the equation, the modern multicultural state is too watery a concept to bind huge numbers of immigrants to the land of their nominal citizenship. So they look elsewhere and find the jihad. The Western Muslim's pan-Islamic identity is merely the first great cause in a world where globalized pathologies are taking the place of old-school nationalism.[303]

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[301] Steyn (2008). Mark Steyn is a Canadian author, commentator, columnist. He has written a number of books including the New York Times bestsellers *America Alone: The End of the World as We Know it* and *After America: Get Ready for Armageddon*. As a commentator, Steyn frequents Fox News, TVO, CNN, and other mainstream commercial networks. His many columns are published by the *National Post*, *MacLean's*, *Globe & Mail*, *Huffington Post*, etc.

[302] The Article was included as an appendix in *Elmasry* (2008).

[303] *Maclean's* (October 2006). A snapshot of *Maclean's* cover and the link to the archived article is included in Appendix VII.

The Article engages in generalizing Muslims and attributing to them a willingness to resort to violence in order to achieve an end goal of dominating and controlling the West. Its tone conveys an imminent threat posed to Europe by its Muslim population:

> Can [Europeans] grow up before they grow old? If not, then they'll end their days in societies dominated by people with a very different world view […] The enemies we face in the future will look a lot like al-Qaeda: transnational, globalized, locally franchised, extensively outsourced—but tied together through a powerful identity that leaps frontiers and continents. They won't be nation-states and they'll have no interest in becoming nation-states, […]. The jihad may be the first, but other transnational deformities will embrace similar techniques.[304]

The Article led to public debate that included reaction from the Muslims community in Canada. The Article also prompted blogs and online forums, where some commentators called for extermination of Muslims in the West.

> [Comments] included calls to exterminate European Muslims with DDT because they were multiplying like mosquitoes (mosquitoes being a comparator used in the last paragraph of the Article), calls for an end to Muslim

[304] *Maclean's* (October 2006).

immigration, and calls for enough bullets or nuclear bombs to eliminate the Muslim "problem". [305]

Many Muslims in Canada took issue with the Article, while three law students at the time—Naseem Mithoowani, Khurum Awan, and Muneeza Sheikh—spearheaded formal complaints against the publisher. In June 2008, a formal complaint against the publisher of the Article was submitted to the Canadian Human Rights Commission (CHRC). The CHRC rejected the complaint, reasoning that 'the writing [of the Article] was polemical, colourful and emphatic, and was obviously calculated to excite discussion and even offend certain readers, Muslim and non-Muslim alike.'[306] Without a hearing, the CHRC decided that 'the views expressed in the Steyn article, when considered as a whole and in context, are not of an extreme nature, as defined by the Supreme Court.'[307] The complainants also submitted their case to the Ontario Human Rights Commission (OHRC), which also rejected it. In a statement, the OHRC explained its decision based on jurisdiction and that 'the *Ontario Human Rights Code* (the "Code") does not give the Commission the jurisdiction to deal with the content of magazine articles through the complaints process.' [308] In the same statement, the OHRC also acknowledged and expressed concern about racism and islamophobia in the media.

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[305] *Elmasry* (2008) at 94. Quote was included as appeared in the case.

[306] *CBC* (28 June 2008).

[307] Ibid.

[308] Ontario Human Rights Commission (09 April 2008), Press Release, 'Commission statement concerning issues raised by complaints against Maclean's Magazine.' Also see Brean (08 April 2008).

> [S]ince the September 2001 attacks, Islamophobic attitudes are becoming more prevalent in society and Muslims are increasingly the target of intolerance, including an unwillingness to consider accommodating some of their religious beliefs and practices.[309]

Finally, two complaints were submitted to the British Columbia Human Rights Tribunal ('the Tribunal') by two residents of British Columbia, Mohamed Elmasry and Naiyer Habib. The Tribunal was jurisdictionally required to hear the case.[310]

The complainants in *Elmasry* alleged that the Article exposed 'Muslims in British Columbia to hatred and contempt, on the basis of their religion, in breach of s. 7(1)(b) of the *Human Rights Code*.'[311] While the respondents had the option to request the dismissal of the case, it decided not to apply for an early dismissal and 'chose to defend against the complaints on the basis that the Article did not breach s. 7(1)(b) of the Code.'[312] The defendants' lawyers did not involve the publisher, editorial staff, or the author of the Article in the hearing and chose to call no evidence. [313]

The Tribunal explored the themes of the Article and issues raised by the complaints. It also engaged 'in balancing two important and potentially competing rights,'

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[309] Ontario Human Rights Commission (09 April 2008).

[310] The panel consisted of Heather M. MacNaughton, Chair of British Columbia Human Rights Tribunal, Tonie Beharrell and Kurt Neuenfeldt.

[311] *Elmasry* (2008) at 4

[312] Ibid at 11.

[313] Ibid at 11 and 12.

namely the constitutionally protected right to live in a society that is free from discrimination on the one hand, and the constitutionally protected right to freedom of expression on the other.[314] On this point, the Tribunal acknowledged that 'the difficulties' involved in striking such balance have rendered the approach 'controversial' and a subject of public debate[315] The Tribunal dismissed the case with the following reasons:

- 'expertise did not extend to linking the inaccuracies in the Article to the probability that it would expose Muslims in B.C. to the level of "unusually strong feelings and deeply felt emotions of detestation, calumny and vilification"'[316]

- 'we can give [the evidence by the third expert witness] little weight because much of the evidence she gave fell outside the scope of her expertise. At times, she slipped into giving her personal interpretation of, and reaction to, the Article as opposed to describing the impact on Muslims of the stereotypes in the Article.'[317]

- 'We were not provided with evidence from, for example, an expert qualified to identify a writer's use of words and their intended meaning or effect of the recipient of a communication.'[318]

[314] Ibid at 7. Section 2(b) of the *Charter* reads: 'Everyone has the following fundamental freedoms: … (b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication.'

[315] *Elmasry* (2008).

[316] Ibid at 140.

[317] Ibid at 141.

[318] Ibid at 143.

- 'Nor were we provided with expert evidence from a sociologist, who could explain the nature of Islamophobia and how the themes and stereotypes in the Article might increase its prevalence.'[319]

- *'Maclean's* [the accused] did not explicitly endorse the author's views.'[320]

The hearing of *Elmasry* took place between 2–6 June 2008.

Since the case centered on the complaint of Islamophobia, the next section provides a brief literature review on the subject. The Tribunal's own view of Islamophobia was that 'in general, [Islamophobia] is understood to refer to the targeting of Muslims and Islam, drawing on common stereotypes about their association with terrorism and violence, in order to generate fear.'[321]

3.2 Islamophobia: The Elephant in the Room

In 2018, a group of social scientists used 'computer-assisted methods of lexical sentiment analysis and collocation analysis' in order to assess a corpus of more than 800,000 articles between 1996 and 2016 in a range of British, American, Canadian, and Australian newspapers.[322] Though the main objective of the research was to investigate the religiosity and 'tone of devotion-related themes when linked to Islam and Muslims,' their qualitative

[319] Ibid at 143.

[320] Ibid at 149.

[321] *Oxford English Dictionary* defines Islamophobia as 'the fear of, hatred of, or prejudice against the religion of Islam or Muslims.'

[322] Bleich et al. (2018b), 1–20.

and quantitative findings on the portrayal of Muslims in the western media is equally important.[323]

> The Western media tend to portray Muslims in an overwhelmingly negative manner […] frequently associating Islam with terrorism, extremism, and a cultural otherness that conflicts with mainstream values […]. Given the influence of the media in shaping public perceptions, this negative representation of Islam likely plays a role in how Muslims are viewed and treated by the public […].[324]

The research includes findings that suggest that 'the media devote more coverage to negative stories [about Muslims] than to positive ones, and that its coverage of negative stories is more intense than its coverage of positive ones.'[325] The same study also cites the Pew Research Center's survey of 15 European countries in 2018 which concluded that Muslims are a highly stigmatized group in many Western societies. [326] A 2007 survey by Pew Research Center, too, provides similar findings.

> These differences are reflected as well in opinions about negative traits associated with Muslims. Roughly eight-in-ten Spanish (83%) and Germans (78%) say

[323] Ibid.

[324] Ibid.

[325] Ibid, 1–20.

[326] Ibid, 1–20.

> they associate Muslims with being fanatical. But that view is less prevalent in France (50%), Great Britain (48%) and the U.S. (43%).[327]

In another study that focused on the media treatment of Muslims in the US, the lexical-based coding was applied to 850,000 articles in 17 national and regional US newspapers over the 20-year period of 1996–2015.[328] This study was an attempt to investigate whether the tone of the articles was more negative towards Muslims than to Hindus, Jews, and Catholics.

> The average tone of articles about Muslims is considerably more negative than both this baseline and compared to articles about the other groups. The negative tone is most strongly associated with stories about extremism and events in foreign settings. However, even controlling for a wide range of factors does not eliminate the negativity in stories mentioning Muslims. We discuss the implications of these findings for media objectivity and for public attitudes and policy preferences with respect to Muslims and other social groups.[329]

The negative pattern of representation of Muslims is also prevalent in mainstream media in Canada. In a study entitled 'Framing Muslims in the "War on Terror": Representations of Ideological Violence by Muslim versus Non-Muslim Perpetrators in Canadian National News Media,' Azeeza Kanji compares representations of ideological

[327] PEW Report (22 June 2006).

[328] Bleich et al. (2018b).

[329] Ibid.

violence perpetrated by Muslims to those perpetrated by non-Muslims in Canadian national news media, *the Globe and Mail, National Post,* and *CBC*.[330] Kanji's quantitative and qualitative examination shows that

> [a]cts of Muslim violence received 1.5 times more coverage, on average, than non-Muslim ones, and thwarted Muslim plots received five times more coverage. Muslim incidents were more likely to be labelled 'terrorism' and linked to other episodes of violence, and Muslim perpetrators were more likely to be labelled by their religious and ethno-racial identities. These patterns in representation serve to stabilise the racial formations of the Canadian national security state in the 'war on terror.'[331]

Kanji also states that violence perpetrated by Muslims was '23 times more likely to be labelled terrorism than non-Muslim violence and plots,' and that media coverage of Muslim perpetrators 'was three times more likely' to be described through 'the perpetrator's religious, political, or ideological motive' and '8.5 times more likely' to be specified by the 'perpetrator's ethno-racial identity and/or immigration status.'[332] The same study also stated that the effects of the media representation of Muslim as perpetrators of violence has effectively signified that the war on terror is a war on Muslims.[333]

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[330] Kanji (2018).

[331] Ibid.

[332] Ibid, 4.

[333] Ibid, 11.

A Wilfrid Laurier University's fact sheet shows a 2007 Environics poll that indicate that 66% of Muslims surveyed in Canada were 'concerned' about discrimination while 30% indicated that they were 'very concerned.'[334] The report also reveals that '43% of Canadians had unfavourable views of Islam as compared to other faiths.'[335] These studies show that Islamophobia and anti-Muslim sentiments were widespread and exacerbated after the 9/11 crisis and the ensuing wars in Iraq and Afghanistan.[336] In another study entitled 'The US Media, Huntington and September 11,' the historian Ervand Abrahamian shows that right after the 9/11 crisis, op-ed pages, news coverage, and books adopted headlines such as 'A Nation Challenged,' 'Yes, this is about Islam,' 'This is a religious war,' 'Jihad 101,' 'The one true faith,' etc., depicting Muslims as violent and a threat to Western cultures.[337]

> The mainstream quality media in the USA—unlike that of Europe—framed September 11 within the context of Islam, culture, and civilisations. In other

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[334] Zine (nd).

[335] Ibid.

[336] See Huntington (1996); Talbott (2001); Steyn (2006) and (2008).

[337] See Abrahamian (2003).

Samuel Huntington's thesis, 'clash of civilizations,' was penned in 1996 in his book of the same name. Amid the 9/11 crisis, Huntington's thesis gained an exceptional currency. While many built their own similar views upon that of Huntington's, many also countered it. For instance, the scholar Amartya Sen addressed Huntington's thesis and argued that 'diversity is a feature of most cultures in the world. Western civilization is no exception. The practice of democracy that has won out in the modern West is largely a result of a consensus that has emerged since the Enlightenment and the Industrial Revolution, and particularly in the last century or so. To read in this a historical commitment of the West—over the millennia—to democracy, and then to contrast it with non-Western traditions (treating each as monolithic) would be a great mistake.' See Sen A (1999). Timothy Garton Ash referred to it as the 'extreme cultural determinism... crude to the point of parody,' (Ash, 2000), while Edward Said referred to it as 'The Clash of Ignorance' (Said, 2001).

> words, it explained the crisis by resorting to Samuel Huntington's 'Clash of civilizations.'[338]

Abrahamian clarifies his use of 'the mainstream quality media,' as newspapers and journals that are read 'by the American literati and intelligentsia,' also known as the 'attentive public.'[339] The mainstream media, according to Abrahamian, includes *the New York Times, Wall Street Journal and Washington Post, Time, Newsweek, Atlantic Monthly, New Republic, the Nation,* and *the New York Review of Books*. The author also invokes the Samuel Huntington's 1996 book, *The Clash of Civilization,* in which Huntington predicts future wars to be cultural wars, where western cultures would be confronted with those of non-western cultures. Abrahamian call Huntington's thesis 'the Huntington paradigm,' that has been adopted aggressively since 9/11 by the mainstream media and 'even more keenly embraced by the tabloid press, the television and radio networks.'[340] Abrahamian's cursory glance on the content produced by the mainstream media after 9/11 reveals the language used in the media's stereotyping of Muslims.

> [The media] ran reams of articles with such potent titles as 'Yes, this is about Islam', 'This is a religious war', 'Jihad 101', 'The one true faith', 'Dictates of faith', 'Defusing the holy bomb', 'Barbarians at the gates', 'The force of Islam', 'Divine inspiration', 'The core of Muslim rage', 'Dreams of holy war', 'Mosque and state', 'Word for word: Islam's argument', 'The deep intellectual roots of

[338] Abrahamian (2003).

[339] Ibid.

[340] Ibid.

> Islamic rage', 'The age of Muslim wars', 'A head-on collision of alien cultures', 'Feverish protests against the West', 'How Islam and politics mixed', 'Survey of the Islamic World', 'Faith and the secular state', 'A business plan for Islam Inc', 'Hair as a battlefield for the soul', 'How Islam won, and lost the lead in science', and 'Two views: can the Koran condone terror?'[341]

Similarly, Huntington's *clash of civilization* thesis was being regurgitated by commentators and pundits that frequented popular news channels and aired their ideologically and politically motivated views of Muslims, and painted them as 'worse than Nazis.'[342] Mark Steyn was one of those regular pundits who frequented both American and Canadian media. In his own words, he has referenced *Clash of Civilization* 'many times over the years, not least its passages on what Huntington called "Islam's bloody borders".'[343] In another article titled 'What the Afghans Need is Colonizing,' published by the *National Post* on 10 October 2001, Steyn wrote that 'insofar as the Middle East is the victim of anything other than its own failures, it is not Western imperialism but Western post-imperialism'[344] that failed to civilize the uncivilized.

> America has prided itself on being the first non-imperial superpower, but the viability of that strategy was demolished on September 11th. For its own security, it needs to do what it did to Japan and Germany after the war: civilize

[341] Ibid.

[342] *Washington Post* (2 December 2002).

[343] Steyn (29 August 2018).

[344] Steyn (9 October 2001).

> them. It needs to take up (in Kipling's words), 'the white man's burden,' a phrase that will have to be modified in the age of Colin Powell and Condi Rice but whose spirit is generous and admirable.[345]

In fact, most of Steyn's books and articles are about the barbarism of Islam, incivility of Muslims, and their hostile relationship with the West, which are the subjects of his popular book, *America Alone: The End of the World as We Know It.*[346] A review of Steyn's *America Alone* by Gerald Caplan was published in *The Globe and Mail*, entitled 'Demonizing Muslims: To What End?'[347] Caplan states that *America Alone* 'is quite possibly the most crass and vulgar book about the West's relationship with the Islamic world ever encountered.'[348] He adds that Steyn and other 'Muslim-haters' such as 'Ann Coulter and Geert Wilders' continuously lump all 'Muslims together as terrorists, by equating a violence-prone Muslim lunatic fringe with all Muslims.'[349] And 'by insulting the hundreds of millions of moderate Muslims everywhere,' they not only alienate Muslims but also 'create among non-Muslims an irrational fear of and hostility to all Muslims,' who 'live in every country on earth and are divided by sect, nationality, class, language, religious practice, ideology and race.'[350]

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[345] Ibid.

[346] Steyn (2008).

[347] Caplan (2011).

[348] Ibid.

[349] Ibid.

[350] Ibid.

Moon argues that Mark Steyn's Islamophobia is not aimed at the religion itself, its doctrines, or rituals. Rather, Steyn's criticism is directed at Muslims and 'what they say and do in the civic sphere.'[351] Moon notes that Steyn considers Islamic belief and Muslim culture to be inseparable because the belief system is deeply embedded in the life of a Muslim, and it forms a powerful identity that transcends borders and continents. However, Moon maintains that Steyn's depiction of Muslim culture, as stagnant and generic, qualifies it as racist speech, especially since culture 'can be reified and essentialized to the point where it becomes the functional equivalent of race.'[352] Despite Steyn's attempts to distinguish race from culture, Moon argues, his discourse is Islamophobic and racist against Muslims.[353]

As the literature on the topic shows, not only was Islamophobia widespread and intense at the time of *Elmasry,* but also Steyn's published expressions fit into and was part of the mainstream Islamophobia in the media. Shortly after *Elmasry, Maclean's* conducted and published a poll, which indicated that roughly 70 percent of people across Canada—including 80 percent of people in Quebec—had negative views towards Islam and

[351] Moon (2018), 74.

[352] Quoted in Moon (2018), 74: 'As George M. Frederickson observes, 'If we think of culture as historically constructed, fluid, variable in time and space, and adaptable to changing circumstances, it is a concept antithetical to that of race. But culture can be reified and essentialized to the point where it becomes the functional equivalent of race' – representing "unbridgeable and invidious differences" between groups.'

[353] Moon (2018), 73–78.

Muslims.[354] This reality, unknown or ignored by the Tribunal, informs our analyses of *Elmasry* in the remaining sections of this chapter.

3.3 Defining *Hate Speech*

A core task in the adjudication is to establish a set of working definitions of the terms, hate and contempt. Over the years, adjudicators have commonly referred to the dictionary and/or previous cases in order to authenticate their understanding of these terms. In *Elmasry,* the Tribunal accepted the definitions provided in *Nealy*[355] and *Taylor.*[356]

> To say that one hated another meant that one found no redeeming qualities in the latter. Contempt, on the other hand, suggested looking down upon, or treating as inferior, the object of one's feelings. The words did not mean the same thing because hatred, in some instances, may be the result of envy of superior qualities such as intelligence, wealth and power, which contempt, by definition, cannot.[357]

Adjudicators in *Taylor* relied on the Oxford English Dictionary, which defines hatred and contempt as 'active dislike, detestation, enmity, ill will, and malevolence' and 'the

[354] Geddes (28 April 2009).

[355] *Nealy et al. v. Johnston et al.* (unreported, July 25, 1989) cited in *Elmasry* (2008) at 66.

[356] *Canadian Human Rights Commission, et al. v. the Western Guard Party and John Ross Taylor*, unreported, July 20, 1979, cited in *Elmasry* (2008) at 64. Also see, *Elmasry* (2008) at 62, 64, 66, 69, 70–73, 75– 79, 84, 138, 157–158, & 160.

[357] *Elmasry* (2008) at 62, 64, 66, 69, 70–73, 75– 79, 84, 138, 157–158, & 160.

condition of being condemned or despised, dishonoured, or disgraced', respectively.[358] *Taylor* was also appealed to the Supreme Court of Canada, where Chief Justice Dickson found the definitions of the terms by the Tribunal 'not particularly expansive':

> The reference to 'hatred' […] speaks of 'extreme' ill-will and an emotion which allows for 'no redeeming qualities' in the person at whom it is directed. 'Contempt' appears to be viewed as similarly extreme, though is felt by the Tribunal to describe more appropriately circumstances where the object of one's feelings is looked down upon. According to the reading of the Tribunal, s. 13(1) thus refers to unusually strong and deep-felt emotions of detestation, calumny and vilification, and I do not find this interpretation to be particularly expansive.[359]

Justice Dickson then expanded on his own interpretation of section 13(1) of the Canadian Human Rights Act by saying that '[i]n sum, the language used in s. 13(1) of the Canadian Human Rights Act extends only to that expression giving rise to the evil sought to be eradicated.'[360] Notwithstanding Justice Dickson's elaboration, the Supreme Court also referred to two other cases—i.e., *Keegstra* and *Andrews*—and included an additional set of definitions from those cases.[361] These definitions culminated in two sets of working

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[358] *Canada (Human Rights Commission) v. Taylor*, 1990 CanLII 26 (SCC), [1990] 3 SCR 892 [hereafter *Taylor* (1990)].

[359] *Elmasry* (2008) at 69.

[360] Ibid at 69.

[361] *Keegstra* (1990); *R. v. Andrews*, 1990 CanLII 25 (SCC), [1990] 3 SCR 870.

definitions of hate and contempt, in *Elmasry,* which ranged from 'active dislike' to the 'envy of superior qualities such as intelligence, wealth and power.'

- **Hate:** 'disdain,' 'ill will,' 'no redeeming quality,' 'looking down upon,' 'denigrating,' 'intense ill,' 'malevolence,' 'active dislike,' 'detestation,' 'enmity,' 'unusually strong and deep-felt emotions of detestation,' 'afront to dignity,' 'vilification,' and 'an expression giving rise to the evil sought to be eradicated.' 'envy of superior qualities such as intelligence, wealth, and power.'[362]

- **Contempt:** 'active dislike,' 'treating as inferior,' 'looking down upon,' 'condemned,' 'despised,' 'dishonoured,' 'disgraced,' 'ardent and extreme nature,' 'belittlement,' 'ridicule,' 'detestation,' 'calumny,' 'vilification.'[363]

What is apparent here is that while these terms, concepts, and phrases differ in meaning, each term on its own carries a wide range of further meanings, emotions, and context requiring further reflection, interpretation, and contextualization. For instance, a distinction must be made between hate speech that: (a) conveys 'disdain' toward an individual or social group; (b) 'gives rise' to evil unleashed on to an individual or social group; or (c) carries 'envy of superior qualities such as intelligence, wealth, and power.' Of these definitions, the last one is particularly peculiar and problematic in more than

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To avoid a misrepresentation of Justice Dickson's statement, here is his complete statement: 'To the extent that the section may impose a slightly broader limit upon freedom of expression than does s. 319(2) of the Criminal Code, however, I am of the view that the conciliatory bent of a human rights statute renders such a limit more acceptable than would be the case with a criminal provision … In sum, the language employed in s. 13(1) of the Canadian Human Rights Act extends only to that expression giving rise to the evil sought to be eradicated and provides a standard of conduct sufficiently precise to prevent the unacceptable chilling of expressive activity.'

[362] *Elmasry* (2008).

[363] Ibid.

one aspect. Not just because it first attaches intelligence to wealth and power and then implies the combination as reflecting 'superior qualities,' but also because it criminalizes expressions with sentiment of envy toward a social group that, arguably, gains all these qualities by exploiting the poor.[364] It is also peculiar that the Tribunal includes this definition of hate, since stereotyping of Muslims as a group has never associated them with having 'superior qualities such as intelligence, wealth, and power,' but mostly as backward, inferior, and violent. The wide range of definitions of the core concepts in the law is indicative that not only the law has not provided enough clarity but also the fact that adjudicators can pick and choose whatever meaning they see fit in the case at hand.

From among these definitions of hatred and contempt, the Tribunal chose 'feelings of an ardent nature and unusually strong and deeply felt emotions of detestation, calumny and vilification' and perceived it to be the meaning of the terms in section 7(1)(b) of the *BC Human Rights Code* prohibits.[365] It is questionable, however, as to why this particular meaning was selected by the Tribunal and not, for instance, 'active dislike,' 'treating as inferior,' 'looking down upon,' 'belittlement,' 'ridicule,' or 'vilification,' which seem more fitting with the speech in question. In any case, it was the complaining party who was tasked to meet 'their burden of demonstrating, on a balance of probabilities,'

[364] Hatred toward wealthy and powerful is a sanctioned sentiment in societies across board and time. Aristotle, for instance, hated those in 'chrēmatistikos,' i.e., in the moneymaking business. Adam Smith in his *Theory of Moral Sentiments* despised the 'natural selfishness and rapacity' of the rich. Jesus remarked that 'it is easier for a camel to go through the eye of a needle than for a rich man to enter the kingdom of God.' Karl Marx's hatred for wealthy capitalists is likewise famous.

[365] *Elmasry* (2008) at 138.

that the Article exposed Muslims to hatred and contempt—i.e., as per the Tribunal 'feelings of an ardent nature and unusually strong and deeply felt emotions of detestation, calumny and vilification'.[366] While this task is arguably insurmountable in any objective manner, it could only be performed through interpretation of the Article at hand. By the same token, accepting the complaining party's interpretation of the Article is as much interpretive, if not more. That is, regardless of the complaining party's perception of the strength or weakness of their *evidence,* the decision lies in the adjudicator's own interpretive consideration of the said evidence. Let us now examine the evidence provided by the complaining party and the treatment it received by the Tribunal.

Naiyer Habib, one of the complainants, testified that the Article targeted Muslims through its 'repeated depiction of Muslim youth as threatening; the connection of all Muslims and Islam to terrorism; the demonization of the Islamic religion, the characterization of Muslims as being unable or unwilling to integrate into Western society.'[367] Khurrum Awan, too, testified about 'the degree to which the publication on its face' contained 'hateful words or' reinforced 'existing stereotypes.'[368] He testified that the Article 'deliberately cast suspicion on all Muslims by referring to the "Islamic religion," as opposed to a small group of extremists.'[369] This aspect of the Article, Awan

[366] Ibid at 138.

[367] Ibid at 23.

[368] Ibid at 97–107.

[369] Ibid at 26.

testified, represented Muslims living in the West as a collective terrorist threat to the West.[370]

> He [Awan] was concerned about what he viewed as the overall theme of the Article that the West should fear Muslims because of their numbers and their wish to impose on Western society oppressive Islamic laws through a bloody takeover. He was concerned that the Article deliberately cast suspicion on all Muslims by referring to the 'Islamic religion,' as opposed to a small group of extremists, as being at the heart of the terrorist threat.

Habib also adduced into evidence several Internet blogs and forums that referenced the Article and regurgitated its arguments, while some commentators called for extermination of European Muslims.[371]

Habib's and Awan's evidence focused on the content and tone of the Article. Both testified that the Article stereotyped and vilified Muslims as terrorists and rendered them vulnerable to hatred and contempt. The Tribunal heard Habib's and Awan's evidence and acknowledged that their 'reaction generally reflected that of many Muslims in British Columbia.'[372] Despite this, the Tribunal considered Habib's and Awan's *evidence* as their own subjective viewpoint.

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[370] Ibid at 196.

[371] Ibid at 94.

[372] Ibid at 108.

> It was clear from Dr. Habib's and Mr. Awan's evidence that, from their *subjective viewpoint* as Muslim Canadians, the Article's theme and content were very upsetting.[373]

The Tribunal, however, does not reason as to how else the Article should have been read/viewed if not *subjectively*.

The Tribunal then heard the evidence by expert witnesses Andrew Rippin, a scholar in History; Mahmoud Ayoub, a scholar in Islamic Studies; and Faiza Hirji, a scholar in Journalism and Communication. The three expert witnesses testified on the Article's content, the tone of its message, its inaccuracies, and the manner in which it stereotyped its target. Ayoub and Rippin testified about the historical and religious inaccuracies in the Article and characterized it as a conspiracy similar to the conspiracy theories and 'accusations [that] had historically been levelled at the Jewish community.'[374] Rippin testified that the Article's characterization of Muslims 'by barbarism, sexism and violence' singled out the group and created 'a sense of fear in non-Muslims'.[375] Ayoub, too, testified that the Article's 'depiction of Islam as an Arab religion' was inaccurate since 'Arabs constitute only about 25% of Muslims (Indonesia being the country with the largest Muslim population in the world).'[376] Ripping and Ayoub both testified that the Article's meaning was more of an 'Islamic conspiracy' that vilified Muslims with having

[373] Ibid at 108, emphasis added.

[374] Ibid at 114, 115, 117, 120.

[375] Ibid at 117.

[376] Ibid.

'serious global ambitions' to dominate the world by creating what the Article calls 'Eurabia.'[377] Ayoub also testified that the Article appropriated 'actions of a fringe group like al-Qaeda' to all Muslims and asserted violence 'as being the norm' among all Muslims.[378] The Tribunal summarized Ayoub's and Rippin's testimony as 'helpful' and accepted that the Article contained 'numerous factual, historical, and religious inaccuracies about Islam and Muslims.'[379]

The third expert witness was Faiza Hirji, a scholar in Communications and Journalism, who testified about the nature of Islamophobia and its prevalence in the mainstream media, including the Article. She testified that the threat of Islam taking over the world is repeated throughout the Article, while its specific use of the word 'Western Muslim's pan-Islamic identity' representing of the threat as not being distant, but 'inside' Western society and from 'the Muslim who is your friend or neighbour.'[380]

> Dr. Hirji specifically directed us to the Article's use of the phrase 'the top of the iceberg bobbed up and toppled the twin towers' as presenting Muslims as the principal threat to Western society. She indicated that, in her view, the description of Europe as being too enfeebled to resist a remorseless transformation into 'Eurabia,' represented a stereotypical view that Europe is under siege from foreigners, specifically Muslims, who are opposed to

[377] Ibid at 115.

[378] Ibid at 125.

[379] Ibid at 115.

[380] Ibid at 133–135.

> 'civilization' and 'modernity,' and will attack anything related to Western civilization. [381]

The Tribunal accepted Hirji's evidence that the Article 'used common Muslim stereotypes.'[382]

In sum, all witnesses collectively interpreted and viewed the Article as stereotyping and vilifying Muslims as a danger and threat to the West. The Tribunal, however, read the Article differently and did not give the testimonies enough weight to decide in their favour. The case was thereby dismissed.

3.4 Analysis

In 2019 and the aftermath of the terrorist attack against a Muslim family in London Ontario, Moon revisited the judgment in *Elmasry* and asked whether violence against Muslims including 'the shootings in mosques in Quebec City and Christchurch NZ,' should make us view the case differently.[383] Moon poses the question of whether we would be 'more willing to see Islamophobic speech as falling outside the scope of free speech protection.'[384] For Moon, Steyn's article amounts to Islamophobia.

[381] Ibid at 134. The quote is as appears in the case.

[382] Ibid at 141–142.

[383] Moon (2019).

[384] Ibid.

> Steyn seeks to avoid the charge of racism or hate speech by acknowledging that not all Muslims are committed to the use of violence. He offers what he calls 'the obligatory 'of courses,' seeming to acknowledge (with a nudge and a wink to those who know what is expected in our 'politically correct' society) the diversity of opinion within the religious community. Not all Muslims are inclined to violence, Steyn concedes; but then in baroque style he immediately inserts a counter-point—qualifying the caveat or generalizing again about Muslims and the place of violence in their culture.[385]

Moon also highlights Steyn's qualifying caveat that 'not all Muslims are inclined to violence,' which he describes as a comforting statement, like saying 'not every Jew is dishonest' or 'some gay men are not pedophiles.'[386] The expert witnesses in *Elmasry*, too, elaborated on the same nuances, but the Tribunal gave little or no weight to their testimonies.

One may argue that the lack of 'willingness to see Islamophobia' as hate speech is that Islamophobia has become a natural reaction to the fact that Islam is an oppressive religion; or that Islam is incompatible with human rights; or that Islamophobia is the result of radical Islamic terrorism. Such views, as rational or irrational, or reasonable or unreasonable, as they may be, and regardless of whether they can be said about other

[385] Ibid.

[386] Moon (2019). Also see Moon (2018), 73–79.

religions, ought to be irrelevant in the adjudication of hate speech cases.[387] A human rights tribunal's statutory duty is to apply the law and not impose its collective views about the root causes of a prejudice or hatred. Indeed, hate speech laws do not say anything about the causes of hatred and contempt, or about the relevance such questions have for the law. Accordingly, the adjudicator is obligated to evaluate the *evidence*—in *Elamsry* that which was provided by the complaining party—and decide whether the speech on trial targets the given group and expose them to hatred and contempt. Moon suggests that the objective of prohibiting hate speech cannot be eradication of bigotry and discrimination since some of these are too mainstream to be controlled. Instead, Moon argues, such a ban must be more narrowly defined, aiming to prevent the encouragement of 'isolated' acts of violence against members of a targeted group. Additionally, the ban may aim to prevent the extreme from becoming mainstream.[388]

Indeed, whether it is the Millian harm principle, the hallmarks of hate speech, or other legal or scholarly recommendations such as those of Moon, one thing that has acquired a wide consensus is that calls to take violent action against a target group or advocating for the eradication of such a group are the types of speech that warrants a ban. What about a speech that is not a direct call to violent action against the target group but has this sort of effects? Should such speech be banned too? In fact, one of the witnesses

[387] The question of trueness or falsehood of a given speech is central in hate speech laws that cover 'discriminatory libel' type of speech against an individual. Proving the trueness or falsehood of a statement in group libel cases, however, are challenging and problematic. This issue was discussed in length in Chapter 2, Section 2.3 of this dissertation.

[388] See Moon (2018).

in *Elmasry* presented evidence that showed some of Steyn's audience who had read the Article—presumably its online version—called for extermination of 'European Muslims with DDT' and called 'for an end to Muslim immigration, and calls for enough bullets or nuclear bombs to eliminate the Muslim "problem".'[389] This evidence, however, was not given weight because 'the Tribunal concluded that it did not have jurisdiction over the Internet version of the Article.'[390] The Tribunal's statement can mean: (1) merely an assumption: that it assumed that the commentator read the online version of the Article; and (2) an unacceptable confusion: that the Tribunal confused jurisdictional limitation over the speech in question with that of its effect. That is, not only there was no proof as to which version of the Article the commentator read, but also there is no jurisdictional limitation placed on the *effect* of an alleged hate speech.

Questions that remain are whether the Tribunal in *Elmasry* fulfilled its statutory obligation and provided demonstrably sound reasons for dismissing the case. Answers to these questions may emerge through the examination of three plausible scenarios:

- Islamophobic expression was not considered discriminatory and prohibited at the time of *Elmasry*; or the Article itself did not amount to Islamophobia; or Islamophobia as expressed in the Article did not constitute hate speech;
- the politics around the case influenced the Tribunal's decision; or
- the adjudicators' own cultural sensibilities led to their judgement.

[389] *Elmasry* (2008) at 94.

[390] Ibid at 45.

These plausible scenarios will be examined in conjunction with the Tribunal's reasons for dismissing the case:

- 'we can give [the evidence by the third expert witness] little weight because much of the evidence she gave fell outside the scope of her *expertise*. At times, she slipped into giving *her personal interpretation of, and reaction to, the Article* as opposed to describing the impact on Muslims of the stereotypes in the Article.' [391]

- 'We were not provided with evidence from, for example, an expert qualified to identify a writer's use of words and their intended meaning or effect of the recipient of a communication.' [392]

- 'Nor were we provided with expert evidence from a *sociologist*, who could explain the nature of Islamophobia and how the themes and stereotypes in the Article might increase its prevalence.' [393]

- 'Maclean's [the defendant] did not explicitly endorse the author's views.'[394]

3.4.1 Islamophobia and Hate Speech

The type of Islamophobic speech considered as hate speech can be found in *Harding*.[395] *Harding* was a criminal case, in which the accused, Mark Harding, 'was charged with

[391] Ibid at 141, emphases added.

[392] Ibid at 143.

[393] Ibid at 143, emphasis added.

[394] *Elmasry* (2008) at 49. Note that section 7 of *BC Human Rights Code* prohibits 'cause to be published' too. The section reads: 'A person must not publish, issue or display, or cause to be published, issued or displayed, any statement, publication, notice, sign, symbol, emblem or other representation.'

[395] *Harding* (2001) and *R. v. Harding*, 1998 CanLII 18857 (ON SC).

three counts of willfully promoting hatred against Muslims as an identifiable group and in violation of section 319(2) of Canada's *Criminal Code*.'[396] At issue were 'two pamphlets which he published and distributed' and 'recorded telephone messages,' in which Harding 'stated that Muslims as a group, including Canadian Muslims, are a dangerous people capable of acts of violent terrorism and great cruelty.'[397] As per *Harding*, the accused was 'cry[ing] out to Canadians to warn them about all Muslims,' by citing 'incidents of violent atrocities committed by "Muslim terrorists"' in other parts of the world, and then stating that 'we have the same Muslim believers living right here in Toronto.'[398] On 19 June 1998, Judge Linden of the Ontario Court (Provincial Division) in Toronto convicted Harding on all three charges. Harding then appealed to the Ontario Superior Court of Justice. On 31 January 2001, the Ontario Superior Court rejected the appeal and upheld the original decision.

At the outset of *Harding*, Judge Linden established Canadian Muslims as an identifiable group, based on their religion.[399] He then referenced the decision of the Supreme Court in *Keegstra*[400] to establish the issue of criminal intent by saying that 'it is reasonable to infer a subjective *mens rea* [guilty mind] requirement regarding the type of conversation covered by s. 319(2).'[401] Although Judge Linden acknowledged that

[396] Ibid.

[397] *Harding* (2001) at 1.

[398] Ibid at 15.

[399] Ibid at 5.

[400] *Keegstra* (1990).

[401] *Harding* (2001).

establishing willful intent is not an easy task, he interpreted the Harding's actions as his intention to promote hated and contempt against Muslim. One such action was that the accused took two specific articles in Toronto Star and Toronto Sun and produced his own two pamphlets, by replacing terms such as 'Taliban militia,' 'rebels,' 'militants,' 'insurgents'—used in the original articles by Toronto Star and Toronto Sun—with the term 'Muslims.'

> I am referring now to the Toronto Star article of April 25, 1997, where the omission of the words 'rebels', 'militants', 'insurgents' and substitution of the word 'believers'. […] The Toronto Star article of October 3, 1996, insertion of the word 'Muslim' in the term 'Taleban militia', and omission of the fact that the acts referred to were committed by 'Taleban guards', […] And the Toronto Sun article of May 5, 1997, omission of the word 'militant' in relation to the term 'Muslim group'.[402]

Judge Linden then summarizes the message in Harding's pamphlets and telephone messages as following:

> (a) The prevailing theme is that Muslims as a group are dangerous people capable of acts of violent terrorism and great cruelty. (b) Muslims are intolerant of other faiths and pose a threat to such groups. (c) Muslims have perpetrated horrific acts of violent terrorism throughout the world in the name of their religion. (d) Canadian Muslims are no different from their brethren in other

[402] Ibid.

countries, but they dishonestly masquerade as pacifists. (e) It is the objective of all Canadian Muslims to overtake this country.[403]

There is no mention of the term 'Islamophobia' in *Harding*, but the Court characterized Harding's speech as the type that 'engender fear of and hatred towards Muslims.'[404] The Court's characterization of the speech in *Harding* matches the definition of Islamophobia by the Oxford English Dictionary: 'Islamophobia is the fear of, hatred of, or prejudice against the religion of Islam or Muslims.'[405] According to Judge Linden's decision, Harding's speech was hate speech and prohibited. According to the definition of the term and that included in *Harding*, Harding's statements were Islamophobic to the extent that it 'engender[ed] fear of and hatred towards Muslims.'[406] Let us now examine whether Steyn's Article amounted to Islamophobia; or Islamophobia as expressed in the Article did not constitute hate speech.

In many ways, the theme in Harding's and Steyn's speech is one and the same, though the language and style in the two are different, as one was written in sophisticated prose by an established author and member of the elite (Mark Steyn), whereas the other was produced by a priest (Mark Harding), who, due to his poor language skills, created a collage of words from different newspapers to convey his message. The message in both speeches, however, is utterly similar, even the same. They both identify Muslims as a

[403] Ibid at 11.

[404] Ibid.

[405] *Oxford English Dictionary.*

[406] *Harding* (2001).

dangerous group by any means, both warn their audience of an imminent threat posed by the group, both alienate the group, and they both imply that something must be done to prevent such threat. While Steyn alarms his audience against the concept of Eurabia,[407] which suggests the possibility of Europe becoming predominantly Muslim, Harding warns about perceived ambitions of Canadian Muslims to transform Canada into a Muslim country.

> Are all Muslims living in Canada Today Terrorsits [sic], […] This is a Warning To All Canadians and Their Families. […] 'the objective of every Muslim living in this city' is to take over and make Canada into a Muslim country.[408]

Both Steyn and Harding refer to violence perpetrated by 'Muslim terrorists,' to imply that Muslims everywhere are a threat.

> We have the same Muslim believers living right here in Toronto [and …] although the Muslims in this city are outwardly peaceful, in truth they are like raging wolves in sheep's clothing, inside they are full of hate, violence and murder.[409]

Steyn puts it differently, but the message sounds the same:

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[407] *Elmasry* (2008).

[408] *Harding* (2001). Quote as appears in the transcript.

[409] *Harding* (2001).

> Of the ethnic Belgian population, some 17 per cent are under 18 years old. Of the country's Turkish and Moroccan population, 35 per cent are under 18 years old. The 'youths' get ever more numerous, the non-youths get older. To avoid the ruthless arithmetic posited by Benjamin Franklin, it is necessary for those 'youths' to feel more Belgian. Is that likely? Colonel Gadhafi doesn't think so.[410]

Steyn does not say where his knowledge of Gadhafi's thought come from but claim it was expressed by the late Libyan President, Muammar Abu Minyar al-Gaddafi, who according to Steyn, said the following:

> 'There are signs that Allah will grant Islam victory in Europe—without swords, without guns, without conquests. The fifty million Muslims of Europe will turn it into a Muslim continent within a few decades.'[411]

Having this quote say what Steyn himself meant to say, is a clever tactic of persuasion that Steyn employed to represent the growing Muslim population in the West as a threat. Steyn also uses statistical figures to quantify his argument.

> If your school has 200 guys and you're playing a school with 2,000 pupils, it doesn't mean your baseball team is definitely going to lose but it certainly gives the other fellows a big starting advantage. Likewise, if you want to launch a revolution, it's not very likely if you've only got seven revolutionaries. And they're

[410] *Elmasry* (2008) at Appendix.

[411] Ibid. The quotations in the blockquote are meant to indicate Steyn's quoting the passage—though he does not provide a citation.

> all over 80. But, if you've got two million and seven revolutionaries and they're all under 30 you're in business. For example, I wonder how many pontificators on the 'Middle East peace process' ever run this number: The median age in the Gaza Strip is 15.8 years.[412]

Going by Judge Linden's logic in establishing *intent,* Steyn's intention to single out and vilify Muslims as a group should be found in the use of numbers and prose that align Muslim youth in Gaza as a threat to the 'Middle East peace process,' and in Europe as Gadhafi's 'fifty million,' soldiers who are determined to turn Europe 'into a Muslim continent' and 'Eurobia.' To be sure, Steyn's intent to single out Muslims can be established since he did not mention the growing population of other ethnic Europeans, e.g., Europeans with Asian, Indian, Jewish, Latin, or Hindu backgrounds. He rather singles out one group against his presumably homogenous White Europeans.

For Hirji, too, Steyn's use of the iceberg metaphor uses a minority Muslim terrorist group as the tip of the iceberg to depict the rest as the iceberg itself that is hidden but dangerously emerging. Hirji also states that the Article's description of Europe as 'too enfeebled to resist a remorseless transformation into "Eurabia,"' engender fear of Muslims in Europe 'under siege' by a force that is anything but 'civilized' and 'modern.'[413]

The Tribunal was particularly unconvinced by Hirji's testimony and gave it 'little weight because much of the evidence she gave fell outside the scope of her *expertise.'* The

[412] Ibid, Appendix.

[413] Ibid at 134.

Tribunal, however, seemed to forget that earlier in the case, when *Maclean's* objected to Hirji's expertise, 'the panel determined that she had expertise that went beyond [its] own.'[414] As per Tribunal's acknowledgment about its own lacking in the subject area, questioning the expertise of a scholar in the field is in and of itself questionable. While the Tribunal did not offer a sound reason in questioning Hirji's expertise, it added that 'at times, she slipped into giving her personal interpretation of, and reaction to, the Article.'[415] But again, the Tribunal did not reason or offer an explanation on the difference between a *personal interpretation* and a *subjective reading* of an opinion piece—i.e., the Article—and concepts in fields such as communication and the media that were not hard science.

The Tribunal also included in its reasoning that it was not provided with 'evidence from, for example, an expert qualified to identify a writer's use of words and their intended meaning or effect of the recipient of a communication.'[416] As if, there was only one fixed meaning in the use of words, or as if one can, with certainty, prove the effect of such meaning on an audience. This is despite the fact that the Tribunal also gave little weight to documented Internet blogs and forums that, to some extent, evinced the effect of the Article on some of its recipients. The Tribunal also offered another reason for not giving enough weight to expert testimonies, for none of them were sociologists:

[414] Ibid at 113.

[415] Ibid at 141.

[416] Ibid at 143.

> Nor were we provided with expert evidence from a *sociologist*, who could explain the nature of Islamophobia and how the themes and stereotypes in the Article might increase its prevalence.[417]

The Tribunal's reasoning here cannot be more unsound, as a sociology degree has never been a requirement pertaining to the expert witness in the adjudication of hate speech cases, nor has it been a base upon which weight is given to such testimony.

None of the reasons offered by the Tribunal seem sound in its allowance of weight to the evidence adduced by the complaining party. It should, however, be apparent that the Article in *Elmasry* and the expression in *Harding* were both Islamophobic, and that both singled out Muslims, vilified the group as a threat, raised a sense of urgency and asked their respective audience to do something against the group. We also know that Harding's speech was categorized as hate speech. The question of whether the Islamophobia as expressed in the Article constitute hate speech remains open. Let us now examine the context within which *Elmasry* was adjudicated and whether the Tribunal's decision was likely influenced by it.

[417] Ibid, emphasis added.

3.4.2 Elmasry and *Politics*

On 10 October 2008, the same day that the Tribunal issued its decision, Andrew Coyne, a veteran Canadian journalist, published a paragraph-long statement on *Maclean's* website that read:

> More comment to follow once I've read the thing [the Tribunal's decision], but be clear on this: it is no victory to be told by a shadowy government agency that you will be permitted to publish. This ruling only preserves the tribunal from utterly discrediting itself, and as such keeps alive the possibility that some other complainant can drag *Maclean's* or any other media organization through yet another travesty half-a-continent away, at great expense of time and money. It also prevents *Maclean's* from appealing the tribunal's decision to an actual court, wherein it might have had the relevant section of the B.C. human rights laws thrown out on constitutional grounds. (Or does it? Can you appeal when you win?)[418]

This summarized the context in which the Tribunal found itself. In fact, in 2008, exaggerated media coverage of hate speech cases led to an already substantial reputational damage to the human rights institution in Canada that included accusations of 'abuses of

[418] Coyne (10 October 2008). Coyne also included a note at the end of his statement: 'The Tribunal does not appear to have put the decision up on its website as of 2:45 PM Eastern time. I'm assured it's coming soon.'

power,' 'lack of transparency and accountability,' and 'partiality."[419] According to Moon, who was asked by the CHRC to write a report about section 13 of the CHRA and regulation of online hate speech, CHRC was 'under significant scrutiny' because it took cases involving popular discourse, 'notably speech that links Muslims to violence and anti-gay speech,' and also because it accepted 'complaints against mainstream publications, including *Maclean's* magazine and smaller publications such as the Western Standard and Catholic Insight."[420] Of such cases that the CHRC undertook, *Lemire* gained significant media coverage, which further intensified the public scrutiny of CHRC and a legislative move toward repealing of the former section 13 of the Canadian Human Rights Act.[421] As in Coyne's statement, an unfavourable decision in *Elmasry* could have resulted in what *Maclean's* hoped for, namely a similar legislative move to repeal section 7 of the *BC Human Rights Code*.[422] Given this context, it can be argued that the Tribunal's decision to dismiss the case not only functioned as a damage control but also stopped *Maclean's* from pursuing the case further. In this light, the Tribunal's decision should say something about the fact that while the law itself is agnostic about who speaks hate, adjudicators of

[419] See Brean (22 March 2008); Gillis. (21 April 2008)*; CBC* (Sep 2009); McLean (2009); Krashinsky (2009).

[420] Moon (2010).

Warman v. Marc Lemire, 2009 CHRT 26 was one of many cases that were brought to the CHRC by a single person, Richard Warman, who was an employee of the CHRC between 2004 and 2006. I found sixteen cases on CanLII that were initiated by Richard Warman between 2003 and 2009.

[421] Detailed description of the repeal of the former section 13 of the Canadian Human Rights Act is included in the Introduction of this dissertation.

[422] Coyne (October 10, 2008). Also see footnote 419.

hate speech cases are not. The fact that, in *Elmasry,* the accused was Roger's Publishing Limited should not be taken lightly.

Roger's Publishing Limited is a media giant which owns more than seventy major publications in Canada and is one of the subsidiaries of Rogers Communication which in turn owns and controls most of Canada's mass media industry and technologies. As such and as far as *Elmasry* was of concern, *Maclean's* possessed the means of mass communication that included access to the public, the technologies, and the discursive capacity to popularize its narrative among the public and influence their opinions. It would not be too far-fetched to assume that a loss for *Maclean's* would be publicized as a loss for freedom of the press in Canada and in turn a blow to hate speech legal regime upon which Canada's Human Rights Commissions and its Tribunals reside.[423] At the end, *Maclean's* seemingly won the case*;* the Tribunal prevented the risk of repeal of section 7(1) of the *BC Human Rights Code;* and the complainants—and by extension Muslims in British Columbia—lost the case.

While the immediate context may have played a significant role in the dismissal of *Elmasry,* there are still other contextual considerations that should not be discounted. The next section will examine the importance of the adjudicator's sociocultural (in)sensitivity through a comparative reading of *Elmasry* and *Taylor*.

[423] Coyne (October 10, 2008).

3.4.3 'Culture in the Courtroom'[424]: Elmasry and *Taylor*

Though still an understudied subject, the concern over the dominant culture in the courtroom has produced important scholarship in recent years.[425] In her study entitled 'Cultural (in)sensitivity: The Dangers of a Simplistic Approach to Culture in the Courtroom,' the legal scholar Sonia Lawrence presents her observation of the court's treatment of defendants with ethnic backgrounds, in criminal cases across Ontario. Lawrence argues that the cultural views of judges and jurors play a significant role in the courtroom and the outcome. Given the cultural diversity in Toronto, she argues, defendants from subcultures—e.g., those with South Asian backgrounds—are likely to be racialized by judges and jurors based on stereotypical narratives of those cultures. She asserts that even if defendants are born or raised in Canada, they are often treated by the court as a cultural product of their ethnicity.

> When faced with cultural questions, the legal system often produces distorted and questionable versions of the content of non-mainstream cultures. At the same time, it paints an equally distorted, but often more flattering picture, of the mainstream. Alongside visions of 'Other' cultures, which are dominated by one particular emblematic practice, we find an inability to distinguish between cultures separated in time and space. […] the legal process operates to define

[424] Borrowed from Lawrence (2001).

[425] Good (2008); Lawrence (2001); Maeder & Yamamoto (2015); Neuliep & McCroskey (2005).

> and constrain any 'culture' that comes before it and to label members of that culture as deviant.[426]

Lawrence calls this 'a modern project of racialization,' but states that in modern courtrooms, racialization is no longer as vulgar and direct as it used to be but manifests in judges' 'sophisticated' attitudes that subtly attach 'the inferiority label' not directly to the racial affiliation of defendants but to their cultural origins.[427]

> What goes on in courtrooms can be seen as a modem project of racialization, namely a more 'sophisticated' version of the blunt attribution of inferior traits to non-Whites that thereby attaches the inferiority label not to the individuals but rather to their culture. In belittling the content of other cultures and depicting the members of these cultures as either ignorant victims or zealous followers of deviant norms, legal processes are assigning traits to people. Of course, these 'traits' are ostensibly based on cultural, rather than racial, affiliations.[428]

As per Lawrence's study, racialization of the accused belonging to a minority group is prevalent in Canadian courtrooms and in turn may affect the court's judgment. Literature on the role of culture in courts and tribunals pertaining to hate speech cases is still thin. One recent qualitative study by Bahdi Reem is notable here.

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[426] Lawrence (2001), 112–113.

[427] Ibid.

[428] Lawrence (2001).

In her 'Arabs, Muslims, Human Rights, Access to Justice and Institutional Trustworthiness: Insights from Thirteen Legal Narratives,' Bahdi examines 13 cases from four Canadian jurisdictions between 2002 and 2017.[429] Badhi's qualitative study examines the given groups' experiences with access to justice not in terms of barriers to procedural access but in the manner the complaining parties were treated and their claims delayed. She found that not only a 'majority of the 13 claimants spent between two and 15 years pursuing a human rights claim,' but also 'many found their experiences minimized or misunderstood by adjudicators.'[430]

> Analysis reveals that, with one exception, the claimants became embroiled in the legal system for several years notwithstanding the fact that they had legal representation. With two exceptions, both from Quebec, the claimants do not secure the remedies that they sought to achieve. Across jurisdictions, moreover, adjudicators tend to misunderstand or minimize the complainants' experiences. In the end, some of the complainants emerged from their legal encounters clearly traumatized.[431]

While racializing, minimizing, and/or misunderstanding can impede access to justice for a member of a minority group, culture and cultural (in)sensitivity can be even more significant in cases that are centered on expressions of sociopolitical and cultural

[429] Bahdi (2018).

[430] Ibid, 74.

[431] Ibid.

prejudices such as Islamophobia and antisemitism. Let us examine the cultural aspect of adjudication by reading *Elmasry* and Islamophobia along with *Taylor* and antisemitism.

In *Taylor,* the Canadian Human Rights Commission ordered John Ross Taylor and the Western Guard Party to cease 'their discriminatory practice of using the telephone to communicate repeatedly the subject matter.'[432] But since Taylor did not obey or cease the communication in question, the case was taken to the Federal Trial Division, which found Taylor and the group he led 'guilty of contempt of court for disobeying an order of the applicant, the Canadian Human Rights Commission.'[433] The Federal Trial Division then sentenced Taylor 'to imprisonment for a period of one year' and the Western Guard Party to 'a fine in the amount of $5,000.'[434] The sentence was conditional as long as the accused obeyed the order.[435] The case lasted several years—from 1979 to 1990—and traversed all the way up to the Supreme Court.

In 1979, *Taylor* was the first case that was adjudicated under the former section 13 of the Canadian Human Right Act and by the Canadian Human Rights Commission.[436] At issue was that Taylor and his Western Guard Party 'instituted a telephone message service in Toronto whereby any member of the public by dialing the relevant phone number could listen to a pre-recorded message of approximately one

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[432] *Taylor* (1979) at 60.

[433] *Canada (Human Rights Comm.) v. Taylor (No. 1),* 1980 CanLII 3955 (FC) at Summary.

[434] Ibid at 15–16.

[435] Ibid.

[436] *Taylor* (1979) at 1.

minute in length.'[437] Matters that Taylor raised in his recorded messages ranged from 'unemployment, inflation, immigration and profits to international capital,'[438] to his admiration of South African Apartheid and to accusing political public figures of Jewish background with corruption and greed.

> The white race is under attack. An international conspiracy of communist agents originally financed by the New York Jewish Banking House, Kuhn Loeb, that dominates the Federal Reserve Bank for half a century has mounted an all encompassing campaign against the white race. The prevalence of divorce, abortion, which is really legalized murder, smaller families, adoption of non-white children by whites, homosexuality, sterilization. [439]

In *Taylor,* the Tribunal was provided with one expert witness by the name of Rene-Jean Ravault, who was a PhD student in communication studies at the time. Ravault testified that although Taylor's messages were hard to follow, they had to be read within the context in order to establish their effects on its audience.[440] The context that Ravault had in mind included: (1) 'the personal characteristics of the person receiving the communication'; (2) 'the medium that is used to transmit the communication'; (3) 'credibility of the originator'; (4) 'the motivation of the originator'; and (5) 'the

[437] Ibid at 4.

[438] Ibid at 17.

[439] Ibid at 28.

[440] Ibid at 28.

exploitation of frustrating situations.'[441] The effects of the message pertaining the personal characteristics of the audience, according to Revault, had to do with whether the audience was 'frustrated by reason of unemployment' or 'suffered a financial reversal.' If so, Revault testified, they were 'more likely to be persuaded by propaganda and to become involved in some political action.'[442] Revault also testified that the medium of communication was as important in having a stronger impact on the audience, and that since Taylor's speech was 'spoken words over the telephone,' it had a stronger impact on his audience.[443] As for credibility and motivation, Revault testified that 'if the person making the communication relies upon strong authorities such as academics and politicians' or references religious leaders, or alike, their statements gain 'an air of credibility.'[444]

In *Elmasry,* three witnesses with expertise in communication and journalism, history, and religion testified that the Article in question exploited the economic crisis in Europe and used pseudo-science logic and numbers to transmit falsehood about Muslims and vilify them as a threat. They testified that the Article stereotyped Muslims as 'foreign, different and threatening' and an immediate threat to Western societies and cultures.[445] While the expert witness in *Taylor* relied on theory and speculation to characterize Taylor's audience, the witnesses in *Elmsary* presented Internet blog posts and online

[441] Ibid at 28.

[442] Ibid at 28.

[443] Ibid at 28.

[444] Ibid at 14.

[445] Ibid at 133.

forums on which a frustrated audience showcased the presumed effect of the Article by calling for the extermination of Muslims in Europe.[446] In *Elmasry,* expert witnesses testified the Article created 'an Islamic conspiracy' similar to that which 'had historically been levelled at the Jewish community.'[447] The advantage that the expert witnesses in *Elmasry* had over the witness in *Taylor* was that the Article was well written with clarity, whereas Taylor's statements were illegible.

The Tribunal in *Taylor* states that '[a]s we listen to and read the messages, we frankly admit that we find it difficult to follow the thread of thought in most of them.'[448] The Tribunal in *Taylor*, however, had no difficulty in recognizing the antisemitic message of the speech in question. In drawing a link between Taylor's speech and spread of antisemitism, the Tribunal proactively referenced the *Report by the Special Committee on Hate Propaganda* and its chapter on social psychology,[449] and established a link between Taylor's speech and his audience.

> Given the right technique and circumstances, human beings can be persuaded to believe almost anything. Some individuals, of course, are more susceptible than others. Persons of low self-esteem or with a feeling of social inadequacy are consistently more easily influenced than persons without these personality

[446] Ibid at 94.

[447] *Elmasry* (2008) at 114, 115, 117, 120.

[448] *Taylor* (1979) at 13.

[449] A thorough discussion on the Report (1965) and its chapter on social psychology are the subjects of discussion in Chapter 2 of this dissertation.

> attributes. Highly hostile individuals tend to be less susceptible than persons with little hostility, but on the other hand they also tend to hold generally negative opinions about others, particularly about minorities.[450]

The Tribunal in *Taylor* did not seem to need to be informed about the prevalence of antisemitism and already possessed a cultural sensibility to see the antisemitic tone and message in Taylor's speech. In contrast, the adjudicators in *Elmasry* seemed indifferent, or at best uninformed, about Islamophobia. The Tribunal itself admitted its limited understanding of Islamophobia and acknowledged that the expertise of the witnesses 'went beyond' its own.[451] The Tribunal's degree of understanding about Islamophobia did not disqualify it from adjudicating the case, but it became a disadvantage to *Elmasry* in comparison to the adjudicator's cultural sensibility about antisemitism in *Taylor*.

In his *Anti-Semitism and Islamophobia: Hatreds Old and New in Europe*, Matti Bunzl argues that, unlike antisemitism, Islamophobia is a 20th and 21st century phenomenon that is fueled by the ongoing geopolitics and mass migration of Muslims to the West. Bunzl states that, as far as mainstream cultures in the West are concerned, antisemitism has run its course so much that even political parties that are known for their staunch antisemitism in the past, have now shifted to be clamorously inclusive to European Jews, and advocate for the Jewish cause. On the other hand, Bunzl argues, new

[450] *Taylor* (1979) at 43.

[451] *Elmasry* (2008) at 113.

hatred has replaced the old one and is normalized in the mainstream so much that political parties openly adopt Islamophobic rhetoric as their populist political strategy.

> When the Freedom Party abandoned its traditional nationalism in the mid-1990s, it embraced a new exclusionary project. Instead of the ethnic community, however, it now cast itself as the protector of Europe. This shift put the spotlight on a novel set of Others. Jews had interfered with the purity of the nation-state; but from the vantage point of a supranational Europe, they were no longer outsiders. Rather, Europe was undermined by such groups as Africans and Asians, who quickly emerged as targets for surveillance and exclusion. Most importantly, however, it was Muslims who now appeared as a potential threat.[452]

Such shift to Islamophobia manifested in politics and culture seems to extend to courts and tribunals adjudicating cases with accusation of Islamophobia and antisemitism.

Cultural sensibility with respect to cases of antisemitism means that the adjudicator's contextual consideration extends beyond the case to establish a link between historical suffering of Jewish people and pervasiveness in stereotyping of the group. In *Taylor,* the Tribunal demonstrated acute awareness of the nature of antisemitism. In *Elmasry,* the Tribunal was passive about Islamophobia and much keener on the importance of the right to free expression, so much that it became blind to the errors in some of its own statements.

[452] Bunzl (2007).

> The Article, with all its inaccuracies and hyperbole, has resulted in political debate which, in our view, s. 7(1)(b) was never intended to suppress. In fact, as the evidence in this case amply demonstrates, the debate has not been suppressed and the concerns about the impact of hate speech silencing a minority have not been borne out.[453]

For one thing and as per the case, neither *Maclean's* nor the complaining party adduced evidence on the Article resulting 'in political debate.' That is, it is one thing for a speech resulting in a political debate and another for itself to fall under the prohibited category. Hate speech, whether ruled as such or not, has often resulted in the sort of political debate to which the Tribunal refers. Such expression has often ensued with expressive reactions of all sorts, media coverage, etc. These, however, are irrelevant to the adjudication which is to decide whether the alleged speech is hateful and/or contemptuous toward its target group.

The last sentence in the statement above, too, is problematic because it raises concerns that were even more irrelevant to the case at hand: 'the concerns about the impact of hate speech silencing a minority have not been borne out' of the Article.[454] This statement seems to suggest that: (1) the Article does constitute hate speech; (2) but since it did not *silence* its target group; (3) the case was dismissed. Again, not only the *silencing* effect of the Article was not a concern of the complaining party, but also this unsound

[453] *Elmasry* (2008), 159.

[454] Ibid, 159.

reasoning confuses the Tribunal's responsibility of adjudication—deciding whether the Article exposed its target to hatred and contempt—as per the legislative justification of the law. The role of the adjudicator is not to justify the law but to apply it by carefully evaluating the facts and evidence using sound reasoning. However, in *Elmasry*, the Tribunal made speculative and unsupported claims. For example, it remains unclear how the Tribunal measured whether the speech in question silenced all, some, or none in the Muslim community in British Columbia, apart from relying on excessively subjective approaches and mere speculations.

3.4.4 Common Sense Approach and *Inconsistency: Elmasry, CJC* and *Abram*

At issue in *Canadian Jewish Congress v. North Shore News and Collins* ('*CJC*') and *Abrams* was an article written by the columnist Doug Collins, entitled 'Hollywood propaganda,' published in *North Shore News,* a local newspaper in West Vancouver. In his article, Collins took issue with the film *Schindler's List* that was set during WWII and depicted the cruelties and injustices that European Jews suffered in the hands of the Nazi army.[455] Collins opens his argument with the following:

> I make that forecast without having seen it and without having any intention of doing so, since it must be the 555th movie or TV program on the 'holocaust.' Fifty years after the war one tires of hate literature in the form of films. B.C. schoolchildren are being trooped in to see this effort. In the name of piety, of

[455] *CJC* (1997) and *Abrams* (1999).

> course. But wasn't it Elie Wiesel, a major holocaust propagandist, who said the world should never stop hating the Germans? Such indoctrination goes on even though Germans born after 1925 or so are no more responsible for the Hitler period than are the Eskimos. Why we are [*sic*] getting such an overdose of a bad thing? One reason is that it is profitable in more ways than one. [456]

Collins continues:

> Billions of dollars are still being paid out in compensation to Israel and 'survivors,' of whom there seem to be an endless number—paid out by those same Germans who were not responsible for Hitler. [457]

He ends his article by asking a question and answering it himself.

> Am I suggesting that Hitler wasn't Hitler or that hundreds of thousands of Jews didn't die in the camps and elsewhere, as did many non-Jews? No. But propaganda is selective and Hollywood propaganda is the most selective of all. So I won't be watching the Academy Awards. Let me know if my little prediction is wrong.[458]

CJC and *Abrams* were adjudicated by different adjudicators at the BC Tribunal. The adjudicator in *CJC* dismissed the case in 1997 and the adjudicator in *Abrams* in 1999 ruled

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[456] *CJC* (1997), Appendix 1.5 and *Abrams* (1999), Appendix 1

[457] Ibid.

[458] Ibid.

the speech in question as discriminatory that 'likely [exposed] Jewish persons to hatred and contempt.'[459] In *Abrams,* the Tribunal ordered the accused to pay $2,000 to the complainant for the injury they caused to 'his dignity and self respect.'[460] It also ordered *North Shore News* to 'publish in one of its next three editions the Summary' that accompanied the Tribunal's decision.[461]

In *Abrams,* the complainant stated that the decision in *CJC* was the result of 'inappropriately read[ing] down' section 7 of the *BC Human Rights Code*. The Tribunal in *Abrams* reassured the complainant that in *CJC* the 'Tribunal Member Iyer did not utilize "reading down"' but rather focused on the constitutionality of the said section.[462] The focus of the adjudicator in *Abrams* was to address 'questions of statutory interpretation,'[463] and 'Ms. Iyer's [the adjudicator in *CJC*] interpretation of the meaning of the words 'likely to expose' to 'hatred or contempt.'[464] In essence, the adjudicator in *CJC* took advantage of the flexibility that the term 'likely' in section 7 of the *BC Human Rights Code* provides and decided that Collins' article did not incite hatred or contempt to the level that raised concern. In *Abrams,* however, the adjudicator thought otherwise, and read the article in a broader context that included the credibility of newspaper and

[459] Ibid.

[460] *Abrams* (1999) at 99.

[461] Ibid.

[462] Ibid.

[463] Ibid.

[464] Ibid at 15 and 20.

the effects of Collin's article on the Jewish community in which the newspaper was delivered.

> The publication of these messages in a community newspaper that is delivered to almost every home in the community is likely to increase the risk to Jewish people of being exposed to hatred or contempt because of their race, religion or ancestry. […] Further, publication of these ideas in a credible newspaper increases the likelihood that others will manifest hateful and contemptuous views in a more directly harmful manner. [465]

It should be noted here that as far as the credibility of the publisher is of concern, *North Shore News* is a small local newspaper in West Vancouver,[466] with a considerably smaller readership and status in comparison to *Maclean's,* which is a 'national news magazine with close to three million readers.'[467] Despite this, the Tribunal watered down the credibility question by saying that '*Maclean's* did not explicitly endorse the author's views.'[468] In doing so, however, the Tribunal overlooked part of section 7 of the *BC Human Rights Code* that prohibits facilitation of prohibited speech too.

[465] Ibid at 85.

[466] *North Shore News*, https://www.nsnews.com/about-us.

[467] *Elmasry* (2008), 149.

[468] Ibid.

> A person must not publish, issue or display, *or cause to be published*, issued or displayed, any statement, publication, notice, sign, symbol, emblem or other representation.'[469]

Even when the law provides clarity—in this case *cause to be published*—the adjudicator can discount it.

In an attempt to read the case *objectively*, the Tribunal in *CJC* referred to a case by the Supreme Court,[470] where the Court suggested that in cases where *scientific proof* cannot be provided, 'common-sense analysis' should 'be sufficient to satisfy the rational connection test.'[471] To be sure, *scientific proof,* pertaining to the likelihood of hatred and contempt and the impact of the speech at hand on its target group, is hard to come by. Regardless of whether the burden of proof is on the Crown—under section 319 of the *Criminal Code*—or on the complaining parties to show a balance of probabilities—under a human rights code—*evidence* adduced is always interpretive and not *scientific.* By the same token, adjudication based on interpretive evidence is as interpretive since the approach cannot be scientific but a *common sense.*

[469] See Appendix IV, emphasis added.

[470] *RJR-MacDonald Inc. v. Canada (Attorney General)* (1995), 64 (SCC). Though cases in which the Supreme Court developed the harm principle were not typically about hate speech, courts and tribunal in hate speech cases regularly refer and use the Supreme Court's justification on 'common sense' approach. See, for instance, *R. v. Keegstra*, 1984 CanLII 1313 (AB KB); *Chilliwack Teachers' Association v. Neufeld* (2021); *CJC* (1997).

[471] *CJC* (1997) at 164.

The *Canadian Oxford Dictionary* defines common sense as 'a generally held belief or opinion' that is 'a widely shared feeling or judgement.'[472] The meaning of common sense in Canadian legal system is not that far from that of the dictionary. For instance, in *Saskatchewan (Human Rights Commission) v. Whatcott*, the Supreme Court explains *common sense* as 'the everyday knowledge and experience of Canadians.'[473]

> While courts should not use common sense as a cover for unfounded or controversial assumptions, it may be appropriately employed in judicial reasoning where the possibility of harm is within the everyday knowledge and experience of Canadians, or where factual determination and value judgments overlap. Canadians presume that expressions which degrade individuals based on their gender, ethnicity, or other personal factors may lead to harm being visited upon them because this is within most people's everyday experience ... Common sense reflects common understandings.[474]

But who is to guarantee that adjudicators' *common sense* does not include prejudicial assumptions? If a prejudice is engrained in the fabric of society and certain prejudices are highly pervasive and mainstream, then they are internalized in the common sense among Canadians, including those serving as adjudicators. Depending on the era, the adjudicator's common sense may mean a decision based on his/her (in)sensitivity to, or against, a particular prejudice. Indeed, while a *common sense* develops over time and

[472] *The Canadian Oxford Dictionary (2 ed.)*.

[473] *Whatcott* (2013) at 133.

[474] Ibid.

through processes of socialization and enculturation, it does not mean that it is necessarily in the interest of all minority groups, or the right way to deliver justice. When, however, the common sense is an inevitable approach in the adjudication, it becomes the very tool that render the adjudication inconsistent and arbitrary.

The case analyses in this chapter illustrate the excessively subjective approach that is prevalent in the adjudication of hate speech cases. Excessive subjectivity, which allowed for the most irrational arguments and decisions in such cases, is indicative that the adjudication of hate speech cases is characteristically inconsistent and arbitrary. As discussed in the previous chapters, such subjectivity is rooted in challenges posed by speech which is a unique social phenomenon and does not allow for clarity in the law and objectivity in the adjudication. In general, speech is versatile, adaptable, polysemous, and highly interpretive both when it is uttered and when it is received. Hate speech, which is an expression of sociopolitical, ideological, and cultural nature, poses even greater challenges since in addition to its structural intricacies, there are social, political, historical, and cultural complexities that disallow for a single definitive judgement. The failure to recognize the uniqueness of speech and the limitations it imposes, has resulted in a legal system that can be more detrimental to marginalized minorities than hate speech itself. This legal system is also consequential to society at large. In the next chapter, we will examine the repercussions of this legal regime.

4

Speech Scare

As with all laws, hate speech laws are bound to have their own intended and unintended social impacts. The primary aim of the legal prohibition of hate speech in Canada is undoubtedly to safeguard minorities from the detrimental effects of hate speech. The existence of such an intention or objective, however, does not mean that the unintended outcomes of the law are not undermining its core objective.

This chapter will examine some of the outcomes of hate speech laws in Canada that harm both minority groups and foundations of Canada's democratic system. For clarity, I divide the outcomes in mind into two categories: *consequences* and *ramifications*. While consequences refer to those outcomes that stem from the law and judicial system themselves, ramifications are those that develop over time and through the interplay of multiple and complex legal, political, and cultural factors. These consequences and ramifications are discussed in three sections of this chapter. Section 4.1 examines two consequences of the law: (1) the chilling or deterring effect of the law not just on illegal speech but also on legal speech that is 'close to the line'; (2) inconsistency in the adjudication of hate speech cases that allows for further enforcement of structural inequality. Sections 4.2 and 4.3 then examine some of the ramifications of the current hate speech legal regime that have developed through the interplay of law and politics.

Section 4.2 shifts the attention to the intersection of Canada's hate speech legal regime and hate speech politics. It offers a new framework by introducing the term *speech scare,* which refers to a complex system of societal, political, and cultural pressures upon free expression by spreading fear of hate speech and of speaking freely on controversial topics. Some of the tactics used to spread fear within this framework include but are not limited to smear campaigns, false accusations of hate speech, and content production that heightens fear and anxiety about the threats of hate speech with the aim of influencing policy. This section relies on scholarship with case studies, reports, and events to provide examples.

In Section 4.3, we examine critical moments that present themselves in significant events and bolster speech scare and allow stakeholders and entities to push for more restriction on online communication. This section argues that despite the claims made in reports, surveys, and polls, there is still no reliable method to quantify the prevalence of online hate speech. This is due not only to the unclarity in the constitution of hate speech but to the overwhelming volume of online content, surpassing human capacity to effectively monitor, detect, and remove hate speech. The challenges are further compounded by the lack of sufficient monitoring tools and algorithms, which are essential for making such efforts meaningful. Section 4.3 also explores some potentially irreversible consequences of online speech suppression and the recent efforts to regulate online content. These effects can include, among other things, more invasive data harvesting by social media and tech companies, the removal of lawful content, infringements on the

right to free expression and privacy, the migration of online communication to encrypted cyber spaces, and an increase in hate speech within echo chambers of the dark web.

4.1 The Chilling Effect

The chilling effect is a metaphor that suggests a deterrence of communication as a result of an inhibiting legislation, possible lawsuit, legal costs, opportunity loss, and/or similar signaling factors. The metaphor was first used in 1952 at the US Supreme Court in the First Amendment case *Wieman*.[475] At issue in *Wieman* was anti-Communism legislation, enacted in 1950, that required all state officers and employees to take an oath, pledging loyalty to the US government, denying any involvement with a communist front and subversive conduct against the government. When some faculty and staff at Oklahoma Agricultural and Mechanical College refused to take the oath, a private citizen by the name of Paul W. Updegraff initiated a lawsuit demanding that the state cease paying salaries to those who refused to take the oath. The case traversed the state and federal courts until it reached the US Supreme Court, where the presiding judge Justice Frankfurter granted a judicial review of the case, stating that any

> unwarranted inhibition of the free spirit of teachers affects not only those who, like the appellants, are immediately before the Court. It has an unmistakable tendency to chill that free play of the spirit which all teachers ought especially to

[475] *Wieman v. Updegraff* (1952), 344 U.S. 183.

> cultivate and practice; it makes for caution and timidity in their associations by potential teachers.[476]

Justice Frankfurter's use of the term 'chill' became known as the chilling effect of the law on ***the legal right to free expression***. In the advocacy years leading to the 1970 enactment of the Hate Propaganda Act in Canada, opponents of the legislative prohibition of hate speech, too, used the term chilling effect to voice their concern about the law having a chilling effect on ***the legal right to free speech***.[477] Their arguments were aligned with that of Justice Frankfurter who expressed that criminal legislation to limit speech would have adverse effects on free speech. The first time that the term was used by a Canadian judge was in *Keegstra*,[478] in which the dissenting judge Justice McLachlin stated that

> the chilling effect of prohibitions on expression is at its most severe where they are effected by means of the criminal law. It is this branch of the law more than any other which the ordinary, law-abiding citizen seeks to avoid. The additional sanction of the criminal law may pose little deterrent to a convinced hate-monger who may welcome the publicity it brings; it may, however, deter the ordinary individual.[479]

References to the chilling effect, such as those made by Justice Frankfurter and Justice McLachlin, however, are not common in the adjudication of hate speech cases in

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[476] Ibid.

[477] See Mewett (1966); Hage (1970).

[478] *R. v. Keegstra,* 1990 CanLII 24 (SCC), [1990] 3 SCR 697 [hereafter *Keegstra* (1990)].

[479] Ibid.

Canada. That does not mean that the use of the metaphor is not frequent. In fact, the term 'chilling effect' has become popular, and is routinely referenced, in the adjudication of hate speech cases in courts and tribunals across Canada. A key word search for 'chilling effect' on Canadian Legal Information Institute (CanLII), a case law repository site, returns about 2,681 cases.[480] A closer look at these references, however, reveals that the metaphor is turned on its head and used to mean the deterring effect of the law on ***illegal speech***. That is, the metaphor is now used by some adjudicators to convey the deterring effect of the law on hate speech. The use of the metaphor, however, confuses, more than elicits, the type of speech that is considered illegal. Let us consider how the adjudicator in *CJC* interpreted section 7(1)(b) of the *BC Human Rights Code*.[481]

> It is more difficult to balance salutary and deleterious effects in respect of the second kind of expression that is suppressed by the measure. This is expression which would not contravene the provision, but which is not expressed because of the law's chilling effect. In balancing salutary and deleterious effects in this context, it is important to be clear about the nature of this expression. It is reasonable to assume that the expression that would be chilled by s. 7(1)(b) would be expression that is ***'close to the line'***? In other words, I believe I should

[480] https://www.canlii.org/en/#search/type=decision&text=%22chilling%20effect%22. As of 23 April 2022.

[481] *Canadian Jewish Congress v. North Shore News and Collins*, 1997 BCHRT 35 [hereafter *CJC* (1997)].

> assume that potential speakers have a reasonable understanding of the scope of s. 7(1)(b).[482]

In the statement above, while the question mark on 'close to the line?' may indicate the adjudicator's uncertainty, she elaborates on her assumption of three kinds of expressions that may be 'close to the line.' Such expressions, she states, include

> speech that is hateful or contemptuous but which is not likely to expose targets to further risk of hatred or contempt; speech which is not in itself hateful or contemptuous but which is likely to stimulate others to manifest hatred or contempt; and speech which is intended to be hateful or contemptuous but does not have the effects stipulated by s. 7(1)(b). The chilling effect of s. 7(1)(b) is to cast a shadow around the expression that actually does contravene the provision. Within this shaded region, some expression will be deterred. But the way in which the law deters such expression is noteworthy.[483]

The Tribunal, however, does not illustrate, with examples or otherwise, how an expression can be hateful or contemptuous yet would not incite hatred and contempt; or the kind of expression that is not in itself hateful or contemptuous but would incite hatred and contempt; or an expression that is intended to be hateful or contemptuous but would not incite hatred and contempt. In any case, the Tribunal's attempt to explain the chilling

[482] Ibid, emphasis added.

[483] Ibid.

effect of section 7(1)(b) confuses the matter further by pointing to the chilling effect of the law on one's thoughts as well:

> Given *the narrow scope* of the provision, its chilling effect on the speech it does not actually prohibit will not be so much to suppress certain messages entirely, but to require *authors of communications that might be close to the line think very carefully about how they say what they wish to say*. The existence of s. 7(1)(b) requires them to advert to *the likely* impact of the message on others.[484]

The terms such as 'the line' and 'the narrow scope' are apparently not clear to the Tribunal itself, particularly when it tries to balance the law's 'deleterious effect' against its 'salutary' ones:

> [s]ome expression that would not have been found to contravene the provision will be suppressed because of *the speaker's uncertainty about its impact*. On balance, even with respect to expression that is not objectively hateful or contemptuous and likely to expose persons or groups to further hatred or contempt on the listed grounds, but which is 'close'? to such expression, I find that the salutary effects outweigh the deleterious effect on freedom of expression.[485]

As such, the chilling effect metaphor that was initially used to explain a perilous effect of the law on ***the legal exercise of the right to free speech***, was invoked to suggest the

[484] Ibid, emphases added.

[485] Ibid, emphasis added.

deterring effect of the law can also be on ***speech that may be legal*** or ***may not contravene the law***. Here, the Tribunal also suggests that such evaluation is to take place in one's thought, and that the individual should *'think* very carefully about how they say what they wish to say.'[486] This coming from a legal authority should be considered an intended outcome of the law, albeit a negative consequence that manifests in self-censorship.

The Tribunal dismissed *CJC,* as it considered the speech on trial legal and constitutionally protected. The decision, however, was not the end of the matter. The case was resubmitted to the Tribunal for the second time by another complainant in *Abrams.*[487] The Tribunal in *Abrams* stated that in *CJC* the Tribunal Member focused on the constitutionality of section 7(1)(b), and that in *Abrams* the focus was to address 'questions of statutory interpretation,' which is the same as saying that he intended to see how the adjudicator in *CJC* interpreted the case and then offer its own 'proper' interpretation.[488] The adjudicator in *Abrams* tried to correct the interpretation of the law by the adjudicator in *CJC.* He stated that the confusion by adjudicator in *CJC* on the meaning of the law is caused by 'the meaning of the words "likely to expose … to hatred or contempt." There is dispute about whether this test is appropriate.'[489] This demonstrates that the law and its application to a given speech are both subject to the adjudicator's interpretation. Furthermore, the interpretive characteristic of the

[486] Ibid, emphasis added.

[487] *Abrams v. North Shore News and Collins,* 1999 BCHRT 7 [hereafter *Abrams* (1999)].

[488] Ibid.

[489] Ibid.

adjudication process also renders it characteristically inconsistent, and that such inconsistency is not an exception but the rule. Let us consider another case, which traversed the legal system from 2005 until 2013, from a provincial tribunal all the way to the Supreme Court of Canada.

At issue in *Wallace v. Whatcott* were four anti-homosexuality flyers that were published and distributed by William Whatcott in Saskatoon.[490] The first two flyers were entitled 'Keep Homosexuality out of Saskatoon's Public Schools!' and 'Sodomites in our Public Schools.' The other two flyers 'were identical to one another and were a reprint of a page of classified advertisements to which handwritten comments were added.'[491] The case was first brought to the Saskatchewan Human Rights Tribunal under section 14 of the *Saskatchewan Human Rights Code* that prohibits any speech that '*exposes or tends to expose* to hatred any person or class of persons on the basis of a prohibited ground.'[492] The Tribunal fined Whatcott, with $17,500 in compensation to be paid to the four complainants. While Whatcott refused to pay, he first took the case to the Court of Queen's Bench which upheld the Tribunal's decision, and then to the Court of Appeal, where Justice Hunter completely over-ruled the decisions by the Tribunal and the Court of Queen's Bench. Justice Hunter also stated the following.

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[490] *Wallace v. Whatcott*, 2005 CanLII 80912 (SK HRT).

[491] *Whatcott v. Saskatchewan (Human Rights Tribunal),* 2008 SKCA 95 [hereafter *Whatcott* (2008)].

[492] Ibid, emphasis added.

> Much speech which is self-evidently constitutionally protected involves some measure of ridicule, belittlement or an affront to dignity grounded in characteristics like race, religion and so forth. I have in mind, by way of general illustration, the editorial cartoon which satirizes people from a particular country, the magazine piece which criticizes the social policy agenda of a religious group and so forth. Freedom of speech in a healthy and robust democracy must make space for that kind of discourse and the code should not be read as being inconsistent with that imperative.[493]

Following the decision of Saskatchewan Court of Appeal, this time in 2013, the Saskatchewan Human Rights Commission took the case to the Supreme Court of Canada. The Tribunal asked the Court to first define the proper meaning of the law and the limits of free speech, and then give a final decision for *Whatcott*. The Court classified two of the flyers as protected expression and the other two as prohibited forms of expression. Hence, from the Tribunal's decision against all four flyers and the Court of Queen's Bench's decision in favor of the Tribunal's decision, to the Court of Appeal's total rejection of the Tribunal's and Court of Queen's Bench's decisions, and to a half-and-half ruling by the Supreme Court, *Whatcott* encountered various interpretations and judgments as it moved up to its final destination. The decision aside, in an attempt to clarify the law and its application, the Supreme Court engaged in a confusing analysis of a long list of hate speech cases and opinions of different judges. For instance, in explaining

[493] *Whatcott* (2008).

whether the benefits of section 14(1)(b) outweigh its deleterious effects, the Court explained:

> Section 14(1)(b) of the Code represents a choice by the legislature to discourage hate speech and its harmful effects on both the vulnerable group and on society as a whole, in a manner that is conciliatory and remedial. In cases such as the present, the process under the legislation can provide guidance to individuals like Mr. Whatcott, so that they can continue expressing their views in a way that avoids falling within *the narrow scope of expression captured by the statutory prohibition*.[494]

The Court, however, did not provide clarity on what it means by *narrowness* in scope and/or how it should be measured by adjudicators, ordinary people, or even *the reasonable person*.

The *reasonable person* is a central concept in legal discourse and refers to a hypothetical adjudicator who is prudent, sensible, and impartial, taking all relevant circumstances and context into account when making decisions. According to the Supreme Court of Canada, *the reasonable person* should be 'aware of the context and circumstances,' and able to recognize whether a given speech or 'the representation exposes or tends to expose any person or class of persons to detestation and vilification on

[494] *Saskatchewan (Human Rights Commission) v. Whatcott*, 2013 SCC 11, [2013] 1 SCR 467 [hereafter *Whatcott* (2013)] at 148, emphasis added.

the basis of a prohibited ground of discrimination.'[495] From this, we can assume that the adjudicator should aspire to be the *reasonable person*. The problem is, however, that the adjudicator's inspiration to be the *reasonable person* is suggestive and presumed, but not measurable. Here is why.

To be sure, not all adjudicators are sufficiently 'aware of the context and circumstances' around the case in question. This is where another category of persons comes to mind: the expert witness. In fact, the adjudicator who is not 'aware of the context and circumstances' relies on the expert witness testimony pertaining to meanings, contexts, circumstances, information, and knowledge around the case at hand. As such, the expert witness plays a critical role in the adjudication of hate speech cases and in helping the adjudicator to manifest the *reasonable person* in fulfilling his/her judicial responsibility. Notwithstanding, neither the expert witness nor *the reasonable person* can help with the dilemmas of the excessively subjective nature of hate speech adjudication and its characteristic inconsistency. Let us examine these by revisiting *Elmasry v. Roger's Publishing*.

In the adjudication of hate speech cases by human rights tribunals, the expert witness is partial as they are selectively invited to support the side that extends the invitation. In *Elmasry*, all expert witnesses invited by the complainants shared the same opinion as the complainants. They provided evidence regarding the Islamophobic nature of the Article and its vilification of Muslims. In *Elmasry*, the Tribunal was not sufficiently

[495] Ibid.

'aware of the context and circumstances,' and had to rely on the evidence by the expert witness to determine the reasonable perspective. The Tribunal, however, gave little or no weight to the evidence by the expert witnesses, even though it lacked expertise on the subject matter. This is because the manner of applying weight to the evidence of expert witnesses, too, is interpretive and excessively subjective. As such, the Tribunal came up with the most arbitrary rationale for giving the least weight to the evidence of the expert witnesses.

> We were not provided with evidence from, for example, an expert qualified to identify a writer's use of words and their intended meaning or effect of the recipient of a communication. Such an expert was of great assistance to the Canadian Human Rights Tribunal in *Citron v. Zundel*, cited above. Nor were we provided with expert evidence from a *sociologist*, who could explain the nature of Islamophobia and how the themes and stereotypes in the Article might increase its prevalence. [496]

As mentioned before, being a sociologist is not a required qualification for expert witnesses.

The non-evidential legislative judgment, excessively subjective adjudication, and inconsistent judgment have collectively formed the current hate speech legal regime that is imposed from above. This legal framework has been consequential not just by creating

[496] *Elmasry and Habib v. Roger's Publishing and MacQueen* (No. 4), 2008 BCHRT 378 [hereafter *Elmasry* (2008)] at 143, emphasis added.

structural problems that harm vulnerable minorities, but also by having sociopolitical impacts that may be irreversible. Some of these impacts will be discussed in the remaining pages of this dissertation.

4.2 Law and Politics

Law is not an independent force existing outside of society but is fundamentally ingrained within the fabric of social relations. While law is shaped by politics and shapes politics in return, hate speech laws cannot be viewed as neutral or objective rules that exist outside of political processes. Similarly, laws are created through political processes, but the way they are operationalized and utilized can also have a significant impact on political and social relations. Furthermore, considering that the law is a powerful tool for reinforcing the existing status quo and power hierarchy, it is not surprising that interest groups and organizations may use laws to influence decision-makers, shape the political landscape, and impact society at large. In the context of our discussion, therefore, it is important to examine sociologically the current hate speech legal regime and its relation to politics and society.

In its simplest form, the concept of *politics* refers to the competing activities of various stakeholders, parties, and individuals concerning a specific issue, with the goal of achieving or safeguarding their interests or gaining control over how that issue is managed socio-politically. Similarly, I use the term *hate speech politics* to refer to tactical activities of various entities, groups, and/or individuals who aim to control the content of the public sphere and influence policy through different means and tactics. A social phenomenon

that has arisen from the intense interplay between the legal regime on hate speech and politics is *speech scare*.

I use the term *speech scare* as a fresh framework for understanding the politics of fear pertaining to hate speech. Speech scare can be described as a complex system of societal, political, and cultural pressure imposed upon free expression through the spread of fear of hate speech itself and of speaking freely on controversial topics. Speech scare is multi directional. On the one hand, it spreads fear and anxiety over perceived threats of hate speech and creates a sense of urgency and a belief that urgent actions are necessary to address the perceived threats. At this level, speech scare often involves exaggeration of the prevalence and threats of hate speech through media coverage, content production, and public campaigns aimed at curbing public communication. These are often followed by more policies and mandates. Speech scare also spreads fear of speaking freely on an increasing number of controversialized issues. Of course, fear of repercussions is nothing new, since censorship imposed from above is an old phenomenon. What I have in mind for the term speech scare, however, is a phenomenon that has developed under a system that on the one hand, is inspired by liberal values of freedom of expression, inclusivity, and living in a society free of discrimination, and on the other, operationalizes a legal framework that undermines those principles. Under the current hate speech legal regime, speech scare operates subtly, not through coercive force, but smoothly, by the cooperation and complacency of social agents. While fear of repercussions and moral panic are not new phenomena, no term has yet encapsulated a regime that creates ambivalence and trepidation about public expression, and/or speaking out in contemporary Western

society, or what might happen when others speak. In short, speech scare is a systemic promotion of fear of hate speech and of speaking freely at a large scale, in which social entities (in)advertently participate. Discussions on these aspects of speech scare will continue in sections 4.2.1, 4.2.2, and 4.3. For now, let us have a brief qualitative look at the development of speech scare.

Speech scare can be traced back to the advocacy years of hate speech laws in the 1950s and 1960s in Canada and other Western countries, where the discourse in favour of the state's control of public speech consistently referenced past atrocities of Nazism and Fascism to raise consciousness about unrealistic threats of hate propaganda, linking it to Fascism and Nazim. The 1966 *Report of the Special Committee on Hate Propaganda* that convinced the Parliament to enact the 1970 Hate Propaganda Act—the first hate speech law in Canada—was mainly a referential work that linked hate speech in Canada to atrocious acts committed by Nazis and Fascists of the 1930s in Europe.

> The triumphs of Fascism in Italy, and National Socialism in Germany through audaciously false propaganda have shown us how fragile tolerant liberal societies can be in certain circumstances. They have also shown us the large element of irrationality in human nature which makes people vulnerable to propaganda in times of stress and strain.[497]

[497] Report (1965), 9.

Statements such as this, as well as operative words and concepts such as danger, threat, violence, atrocity, and alike alarming terms are frequently used in the Report.

Arguably, the Report's warning against the dangers of hate speech heightened the attention of lawmakers. In November 1969 at the 28th session of Parliament, the Minister of Justice John N. Turner, who moved Bill C-3 for its third reading to add the Hate Propaganda Act to the *Criminal Code*, read out the warning parts of the Report to the sitting MPs, especially the parts that emphasized Nazi atrocities during WWII. Even the Conservative MP Eldon M. Woolliams, who objected to the Bill, softened his position in agreement.

> I think we need to look at history in order to understand the background of this legislation. In our own generation, in our own lifetime, we have witnessed what is probably the most brutal, barbaric and inhuman treatment of a certain race, of people belonging to a certain religion, in the course of which they were virtually wiped out in several states in Europe.[498]

In the adjudication of hate speech cases, adjudicators in courts and tribunals also often use similar language and refer in their reasoning to the atrocities committed in Europe during the 1930s and 1940s to underscore the perceived dangers of hate speech.[499]

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[498] House of Commons Debates, 28th Parliament, (November 1969), 883.

[499] For examples see *Warman v. Tremaine*, 2007 CHRT 2; *Warman v. Marc Lemire*, 2009 CHRT 26; *Elmasry* (2008).

The speech scare gained momentum in the 1980s due to media coverage of prominent hate speech cases. The most notable cases, *Keegstra* and *Zundel,* belonged to two Holocaust deniers whose court trials were extensively covered by major media outlets in Canada.

> Media coverage of the original seven-week trial was so intense that it provoked fierce arguments—particularly among Jewish activists—about whose interests the reports served. Indeed, after an Ontario district court jury found him guilty, Zundel, 48, flashed a defiant victory sign and said that the media had given him the equivalent of millions of dollars' worth of free publicity.[500]

The focus of such media coverage was a message that conveyed that banning hate speech and prosecuting individuals such as Ernest Zundel and James Keegstra would prevent the emergence of a new Nazism. This assumption was popularized to the extent that people thought 'that the prosecution of Zundel and the upcoming prosecution of Alberta teacher James Keegstra on similar charges are necessary in order to prevent the development of a climate that could lead to a new Third Reich.'[501]

While the coverage of hate speech cases showcased the new law, the coverage was also framed with grotesque images of Nazi atrocities.[502] As such, offenders were brought into the spotlight and publicized,[503] while the media projected hate speech as a destructive

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[500] Aikenhead (29 Feb 1988).

[501] Cohen-Almagor (2005), 168.

[502] See, for example, The Fifth Estate (1993).

[503] See Cohen-Almagor (2005).

force in Canada and implied that if it were not stopped it would turn into the same problem as the Nazism of 1930s Europe. In other words, the media coverage of hate speech cases in the 1980s appealed to fear by first presenting a perception of a threat and then suggesting that hate speech laws and prosecution of hate speakers would be the solution to diminish it.[504] The scale of fear that was spread through the media coverage of hate speech cases was significant but incomparable to that which has developed since then, particularly since the development of social media and online mass communication.

The scale of mass communication in the 1980s was limited to radio, television, and print, incomparable with what was to come in the 1990s and onward into the contemporary era. In the present era, the creation and distribution of content are no longer monopolized by traditional media channels. The widespread availability of social media platforms has given millions of individuals the power to actively participate in online communication and create their own content. According to Statista, a leading provider of market and consumer data, the number of social media users worldwide was 3.6 billion in 2020, and it is projected to reach almost 4.41 billion by 2025.[505] This indicates the rapid growth and widespread usage of social media platforms around the world. Such a scale of communication has surely alarmed the state and governments, especially in the post 9/11 era. To find out how speech scare operates within online

[504] See Williams (2012).

[505] *Statista*.

communication and social media, we need to say a few words about how online communication is managed by the tech companies that own the platforms.

With access to almost half the world's population, competing social media corporations are keen to navigate and direct users' behaviour, particularly through user-generated content. Similar to traditional media, social media attracts a bigger audience when content is more entertaining, thrilling, contentious, and dynamic.[506] Existing studies on the manner in which social media upends speech scare is still thin, but there is a rich body of literature that elucidates on how moral panic is triggered on social media. For instance, in his article 'Social Media and Moral Panics,' James Walsh states that 'by inflating the visibility of inflammatory content, social media mobilize animosity towards common enemies and transform uneasy concern into full-blown panic.'[507] While incendiary communications are privileged in social media, Walsh argues, 'the frisson of disgust is too alluring as content unleashing fear and anger,' against a given target. The target, of course, varies but the strategy remains since it has empirically proved to be lucrative and effective. The efficacy of such a strategy lies in how emotions such as disgust, anger, fear, etc., are produced dynamically. While studies in psychology show that emotions are contagious, tech companies utilize such findings to advance their algorithms, which privilege contentious emotions and in turn influence 'interactions and escalating bitterness and antipathy within online environments.'[508] This means that by

[506] See Chen (2 June 2015); Rubin (2017). For data on panic production on social media during critical moments see Walsh (2020).

[507] Walsh (2020).

[508] Ibid.

design contentious online interactions, combined with speech scare, create a synergistic communication that not only increases inflammatory communication as well as risk awareness but also intensifies demands for more policies to regulate public communication. Section 4.3 of this chapter will provide a detailed discussion about the prevalence of speech scare pertaining to online communication and the challenges associated with its moderation.

4.2.1 Speech Scare and Hate Speech Accusations

Tactics aimed at instilling fear and discouraging individuals from freely expressing their opinions on contentious issues typically involve raising the costs of sharing critical viewpoints and participating publicly in related discourse. Such tactics often involve creating an atmosphere of fear, where individuals may feel intimidated or threatened if they speak out against prevailing opinions or beliefs. For example, some people may face social or professional repercussions if they express controversial views, such as losing their jobs or being ostracized, while others may face more severe consequences, such as legal prosecution. By raising the costs of expressing dissenting opinions, these tactics aim to create a chilling effect on free speech, making people more hesitant to speak out and participate in open discussions. These tactics are very effective in promoting self-censorship both off-line and online. Let us look at some cases that set an example for the public.

In her work entitled 'Disciplining Dissent: Multicultural Policy and the Silencing of Arab-Canadians,' Rafeef Ziadah argues that 'curtailing freedom of expression, partly

through funding cuts,' has become 'a key mechanism for disciplining dissent in racialized communities.' [509] Ziadah analyzes the silencing campaigns against a number of organizations that 'included a wave of funding cuts by both the Canadian International Development Agency (CIDA) and the Citizenship and Immigration Canada (CIC).'[510] The funding cuts targeted several Non-Governmental Organizations (NGOs) in Canada that included Kairos Canada, Alternatives, the Canadian Arab Federation (CAF), and Palestine House. Ziadah notes that these NGOs had previously denounced Israel's policies towards Palestinians, particularly the 2009 bombardment of Gaza. According to Ziadah, based on accusations of antisemitism, more than ten million in CIDA and CIC funding were cut from the said NGOs. CAF pressed for explanations behind the cuts and even took the matter to court. Subsequently, Jason Kenney, the then Minister of Citizenship, Immigration and Multiculturalism, issued a response that included the following:

> The objectionable nature of public statements in that they appear to reflect the CAF's evident support for terrorist organisations and positions on its part which are arguably anti-Semitic raises serious questions about the integrity of [the] organisation and has undermined the government's confidence in the CAF as an appropriate partner for the delivery of settlement services to newcomers.[511]

[509] Ziadah (2017).

[510] Ibid.

[511] Quoted in Ziadah (2017), 16. Also quoted in *Canadian Arab Federation v. Canada (Citizenship and Immigration),* 2013 FC 1283 at 2.

Ziadah states that Kenney's use of the terms 'they appear to reflect' and 'arguably anti-Semitic,' indicates that there was no evidentiary support of Kenney's accusations or even legal grounds for his decision to terminate funding for the said NGOs. Here, hate speech politics plays out through accusations and is followed by a strategic defunding that not only punished and debilitated the NGOs involved but sent a message to other organizations and individuals to stay away from such controversial topics. It is noteworthy to mention here that around the same time in 2015, the government had already stated 'its intention to use hate crime laws against Canadian advocacy groups that encourage boycotts of Israel.'[512] Ziadeh adds that in the 2015 election, Liberal Prime Minister, Justin Trudeau, expressed his opinion on Twitter that 'the BDS movement, like Israeli Apartheid Week' is hate speech and should not be allowed on Canadian campuses.[513]

The legal scholar Faisal Bhabha, too, argues that 'the fight against anti-Semitism has been increasingly instrumentalized […] to delegitimize the Palestinian cause and to silence defenders of Palestinian rights.'[514] Strategies in silencing such groups, Bhabha asserts, include 'persistent barriers to the free exercise of constitutionally protected activity' and 'ordinary acts, like buying a book, boarding an airplane, meeting an acquaintance for coffee, or attending religious services.'[515] Smear campaigns against a target and causing a loss of employment are particularly effective in silencing people. In

[512] Macdonald (11 May 2015).

[513] Ziadah (2017). Also see a snapshot of the tweet in Appendix X

[514] Bhabha, (2023).

[515] Ibid.

his chapter entitled 'Fighting Anti-Semitism by Fomenting Islamophobia: The Palestine Trope, A Case Study,' Bhabha also provides a case study of Ayman Elkasrawy, a PhD student and part-time teaching assistant in the engineering program of Toronto Metropolitan University (TMU).[516] In 2017, Elkasrawy was subjected to a smear campaign by right-wing media such as Rebel News and organizations such as B'nai Brith Canada, Never Again Canada, and the Jewish Defence League (JDL). Elkasrawy was specifically targeted for a talk he gave in Arabic at TMU, which was mistranslated as antisemitic and then disseminated through an extensive smear campaign against him.[517]

> Because the supplications were entirely in Arabic, the text needed translation to English, which Halevi [a well-known right-wing media figure and Rebel News blogger] undertook himself. He interpreted it to be advocating for 'killing Jews' and calling for the 'purification' of the Al-Aqsa mosque in Jerusalem 'from the filth of the Jews.'[518]

The accusations and campaign against Elkasrawy were followed by a letter to TMU by 'the CEO of B'nai Brith Canada, an aggressive pro-Israel advocacy group' who asked the president of TMU to dismiss Elkasrawy from the university.[519] TMU complied with the request and dismissed Elkasrawy without investigating the matter or verifying the

[516] Ibid.

[517] Ibid.

[518] Ibid.

[519] Ibid.

accusations made about the content of his talk.[520] Though Elkasrawy launched a formal complaint against TMU with the Ontario Human Rights Tribunal,[521] the damage was already done.

> Repairing the damage of a smear can be hopeless, especially where the smeared person is a member of a vulnerable minority group. Even where a retraction or correction is issued, the internet ensures it will never go away. Smearing, it turns out, is a highly effective way to discredit one's less powerful opponents.[522]

In Canada, there is no law that can fully protect people from smear campaigns and accusations of hate speech. The reasonable limits allowed by the *Charter* on its guaranteed right to free expression, are determined by the same legal regime that is too subjective and inconsistent, making it difficult to rely on as a means of protection.

Consequences of publicly sharing opinions on controversial issues are indeed too costly for individuals and organizations. Cases such as those mentioned in this section send a powerful signal to people with the message of *think very carefully about how you say what you wish to say*,[523] or *think very carefully* about whether saying it is worth the cost at all. Masha Gessen, a Russian-American journalist, describes fear and self-censorship as an internal conversation and states:

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[520] Ibid.

[521] *Elkasrawy v. Toronto Metropolitan University*, 2022 HRTO 1353.

[522] Ibid.

[523] Borrowed it from the adjudicator in *Canadian Jewish Congress v. North Shore News and Collins* (1997).

> This is how self-censorship works. One bargains with oneself. How much can I sacrifice before I lose respect for myself as a journalist? Can I respect myself if I don't give a story the play it deserves because I'm afraid? Can I respect myself if I kill a story because I'm afraid? Can I respect myself if I force the reader to look for the truth between the lines because I'm afraid?[524]

Whether it is the fear of an authoritarian state's iron fist or the potential consequences of publicly expressing opinions on controversial topics in a liberal state, self-censorship serves as a mechanism for self-preservation. It is a readily available option for individuals, especially when considering that the constitutional guarantee of the right to freedom of expression, which is intended to provide protection, is also subject to arbitrary and subjective interpretation. In this context, it is not hard to imagine that fear of consequences and self-censorship may be common, although they are very difficult to quantify since they happen internally.

4.2.2 Speech Scare and Policy Audience

Speech scare also has a policy audience, and in this respect, there are at least two significant sides that participate in it. The first comprises interest groups and entities that seek to impact policy through public campaigns and content production. These groups may include organizations, interest groups, advocacy groups, individual activists, political parties, media outlets or content producers on related issues. The second comprises policymakers who are responsive to the demands of the first group and see some benefits

[524] Gessen (2005).

in greater control over public communication. Policymakers can include elected officials, government agencies, or regulatory bodies that have the power to influence or regulate public communication. They are often responsive to the demands for greater regulation of public communication. The examples that follow illustrate how the dynamic between these groups plays out in practice and lead to increasing control over the public sphere and freedom of expression.

In October 2019, a talk by Meghan Murphy that was held at a Toronto Public Library (TPL) branch attracted a group of angry demonstrators against her presence and gathered the media's attention.[525] Murphy is a Canadian writer and journalist who identifies herself as a 'socialist feminist.'[526] As the founder of the online magazine 'Feminist Current,' Murphy's views on gender identity, sex work, and third-wave feminism have made her a controversial figure.[527] The media coverage of the event at the TPL publicized Murphy's views as 'dangerous' and 'fuelling hate.'[528] John Tory, the then Mayor of Toronto, stated that when it comes to public space the government has an obligation *to protect* the public. He expressed regret for allowing someone like Murphy to use the public space.[529] The CBC report stated that TPL 'reserved the right to cancel a booking likely to promote or would have the effect of promoting discrimination,

[525] *CBC News*. (October 30, 2019).

[526] See Murphy's website: https://www.feministcurrent.com/

[527] Ibid.

[528] *CBC News*. (October 30, 2019).

[529] Ibid.

contempt or hate on the basis of … gender identity.'[530] The report did not state how Murphy's talk incited or promoted hatred and contempt, but the City's top librarian stated that 'Murphy's rhetoric' did not 'reach that bar,' and that the demonstrators tried to shut down ideas.[531] Nonetheless the event and its coverage provided an opportunity for Councillor Kristyn Wong-Tam to introduce a new motion that ensured tighter booking rules of public property against people like Murphy.

> Tonight the @torontolibrary [*sic*] wrongly let a known transphobic speaker use public space to attack a Charter-protected group who are routinely and disproportionately targeted by hate & violence. My motion directs City Manager + Solicitor [*sic*] to review booking rules for all public spaces.[532]

It did not take long before Wong-Tam's promise materialized in motion 2019.MM11.14.[533] This policy grants public libraries the authority to restrict access for individuals/groups that are considered as 'contravening the City's Human Rights and Anti-Harassment/Discrimination Policy' and 'that permits are denied or revoked, where appropriate.'[534]

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[530] Ibid.

[531] Ibid.

[532] From Wong-Tam's Twitter page. Also see Johnson (30 Oct 2019), Council calls for review of Toronto facility permits in wake of controversial speech at library, *CTV News*.

[533] https://secure.toronto.ca/council/agenda-item.do?item=2019.MM11.14

[534] Ibid.

Speech scare and its tactic of content production manifest in plenty of polls, surveys, and reports that highlight the prevalence of online hate speech, its threats, as well as the need for legislative action for more control over online communication. For instance, a poll conducted by the website called Anti-Hate stated that 'Canadians of all stripes overwhelmingly support the federal government introducing measures to combat hateful and racist content and behavior online.'[535] It also states that while 'most Canadians have neither seen nor experienced hate or racism online, half (49%) believe it is a large problem, and only one-quarter (26%) believe it's not really a problem.'[536] Another survey conducted by Montreal Gazette entitled 'Most Canadians Have Seen Hate Speech on Social Media: Survey' states that in response to their survey, 'about 60 per cent of Quebecers' and 'the same on the national' level said that they 'had seen "hateful or racist speech on the internet" or "racist comments in social media".'[537] While such reports and surveys often contain statistical numbers accompanying their tone of urgency, they do not provide details about their research methods and perceptions of their participants or researchers regarding what constitutes hate speech. As such, they perceive hate speech to be universally understood by all, whereas the reality is far from that. Content production in speech scare also surges at critical moments.

Speech scare becomes particularly intense in critical moments that present themselves in significant events such as a terrorist attack, mob attack, mass shooting,

[535] Canadian Anti-Hate Network. (2020).

[536] Ibid.

[537] Montreal Gazette, (2019, March 21).

unrest, financial crisis, war, etc. Such moments not only bolster fear but also allow stakeholders and entities to push for their respective agendas and act on their interests in suppressing their critics. Critical moments can create a perfect storm, so to speak, from which the following pattern often emerges:

- demand for the state's interference to curb online hate speech;
- demands for new policies that allows control over online content;
- demands for more funding to groups to combat hate speech; and
- demand to hold tech companies responsible for online monitoring and surveillance.

What needs to be emphasized here is that critical moments are often utilized by all sorts of stakeholders, including but not limited to the state itself, as well as interest groups and commercial corporations. For instance, the Pittsburgh synagogue shooting in October 2018, was followed by the four demands addressed to the government. Following the event, in addition to the media coverage, numerous letters and statements were sent to the Canadian Parliament demanding control over online communication. Some of these statements came from organizations that are known for their support of alleged hate speech that was adjudicated in a court and/or tribunal.[538]

[538] See for instance Evangelical Fellowship of Canada. (2019, February 5). Calling Parliament to address online hate [Letter]. https://www.evangelicalfellowship.ca/Communications/Outgoing-letters/February-2019/Calling-Parliament-to-address-online-hate-Letter.

The report by the Standing Committee on Justice and Human Rights includes a long 'List of Witnesses' among which are individuals and organizations such as Mark Steyn (whose article was

In response to such demands, in March 2019, the government assigned the Standing Committee on Justice and Human Rights (SCJHR) to study and present a report and recommendations on how the government should tackle online hate speech. The SCJHR produced a report and presented it to the 42nd Parliament in June 2019.[539] The report states that the study was a response to the demands by different groups and organizations. The set of groups and organizations included the Evangelical Fellowship of Canada, which had a keen interest in new laws to curtail 'online hate speech.' The SCJHR's report does not provide a clear definition or specification of the term 'online hate speech,' but its overall message implies a link between 'online hate speech' and horrific events like the synagogue shooting. It is worth noting that the Evangelical Fellowship has a track record of publicly advocating for other forms of expression that are deemed as hate speech, such as anti-homosexuality, anti-abortion, anti-surrogacy, and anti-prostitution stances.[540] That is to say, stakeholders such as the Evangelical Fellowship of Canada may not be particularly interested in the principles that might lead someone to curtail hate speech due to the harm it can inflict on its targets, or the convictions that motivate someone to defend free speech because of its contribution to democratic values. Let us further examine the new report by the SCJHR.

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the subject of adjudication in *Elmasry* (2008)), and Anglican Church of Canada and Evangelical Fellowship of Canada that in *Whatcott* (2013), participated in support of free expression and in defense of William Whatcott anti-homosexuality speech.

[539] Canadian Parliament, House of Common (June 2019). *Taking Action to End Online Hate, Report of the Standing Committee on Justice and Human Rights*. Ottawa: 42nd Parliament, 1st Session.

[540] See footnote 539.

The report of the SCJHR was initiated in March 2019 and submitted to the 42nd Parliament also included the dissenting views of the Canadian Civil Liberties Association, whose position was that

> [a]ny attempts to regulate online hate will inevitably bump against freedom of expression, because contrary to what some say, the precise contours of hate speech are not easily discerned.[541]

Notwithstanding dissenting views, the committee forged ahead with following in mind:

> Recent events in Canada and abroad have shown that online hate can have serious consequences and often precedes acts of violence. It is imperative that all governments around the world effectively address both online and offline acts of hatred. Government responses must strike the right balance between protected rights and freedoms.[542]

This report, too, presents a misleading cause-and-effect argument by suggesting that 'online hate' is the factor contributing to extremist violence. Furthermore, the repeated use of alarming terminology such as 'atrocities,' 'violence,' 'extremism,' 'killers,' and 'security' throughout the SCJHR's report creates a sense of urgency for legislative action. The report then includes nine recommendations: (1) Funding for Training on Online Hate; (2) Sharing Best Practices; (3) Addressing the Gap in Data Collection; (4)

[541] See Canadian Parliament, House of Common (June 2019).

[542] Ibid.

Tracking Online Hate; (5) Preventing Online Hate; (6) Formulating a Definition of Hate; (7) Providing a Civil Remedy; (8) Establishing Requirements for Online Platforms and Internet Service Providers; and (9) Authentication.[543] The study concludes that 'we cannot afford to be complacent, given the link between online hate and real world violence.'

> Similarly, it was noted that '[t]he audacity and frequency with which people now spew hate online shows us that we are failing in how our system currently combats online hate.' Throughout the study, witnesses stressed that we must recognize the urgent need for governments, civil society, online platforms and Internet service providers to take the necessary measures to counter the incitement of hatred through online platforms.[544]

Some of the witnesses, on which the Standing Committee relied to conclude the above, were from the Anglican Church of Canada, Canadian Rabbinic Caucus, and Presbyterian Church in Canada, with religious ideologies on issues that also require secular input.[545] Similar to the Evangelical Fellowship of Canada, these religious organizations have a track record of advocating for free expression when it comes to speech that is anti-abortion, anti-prostitution, anti-gay-marriage, etc., but are pro hate speech laws when it comes to progressive voices against religious doctrine and institutions. Approximately forty organizations appeared before this committee and presented their 'evidence' of

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[543] Ibid.

[544] Ibid.

[545] See Canadian Parliament, House of Common (June 2019).

'online hate speech.' Among these groups were also Twitter Inc., Google Canada, and Facebook Inc., who were there to commit to establishing oversight boards to assist in moderating and governing hate speech on their platforms.

Aside from the Standing Committee's reliance on commercial, political, and religiously motivated institutions for whom the protection of minorities may not be a priority, its report has led to other initiatives and actions by different governmental branches. The Department of Canadian Heritage, for instance, has published a 'Technical paper' on its website that includes reasons to justify the enactment of online hate speech laws. The 'Technical paper' includes two Modules and many sections, in which matters related to online communication are proposed to involve agencies and companies such as Canadian Security Intelligence Service, Royal Canadian Mounted Police, and commercial corporations that provide online communication services and platforms. The paper suggests that the definition of hate speech in the new Act should be adopted from the existing laws.

> The concept of hate speech should be defined in the same way as it is defined under the amended Canadian Human Rights Act and hate speech should only be considered as harmful content for the purpose of the Act when communicated in a context in which it is likely to cause harms identified by the Supreme Court of Canada and in a manner identified by the Court in its hate speech jurisprudence.[546]

[546] See Government of Canada, *Technical Paper*.

Considering the lack of a clear definition of hate speech in the current hate speech legal regime, which has proven ineffective at deterring or preventing hate speech, it seems unlikely that legislative efforts to address online hate speech will be any more successful.

Although procedures to moderate private online platforms will be the result of direct consultation and oversight of the federal government in Canada, the formidable challenges inherent in this endeavor may significantly impede effective moderation, ranging from ineffectiveness to potential complications and problems. This is because the problems with the existing legal approach to hate speech—some of which we discussed in this dissertation—are also compounded by challenges posed by the characteristics of online communication, the sheer volume of online content, and a lack of appropriate monitoring tools. All of these render any claim that promises to curb online hate speech rather ambitious and at worse misleading. Let us take a closer look at some of these challenges.

4.3 Speech Sacre and Online Hate Speech

Based on statistical data, Facebook boasts more than 2.9 billion monthly active users, while Google handles over 2 trillion searches per year.[547] As of 2021, Google's index has

[547] Facebook: https://investor.fb.com/investor-news/press-release-details/2022/Facebook-Reports-Fourth-Quarter-and-Full-Year-2021-Results/default.aspx

Google: https://www.internetlivestats.com/google-search-statistics/;

expanded to include over 130 trillion web pages.[548] The following are also the daily activities of the five most popular social media platforms since 2021:

- Facebook Messenger and WhatsApp combine for over 100 billion messages sent per day[549]
- Instagram users upload over 100 million photos and videos daily. [550]
- Twitter users send over 500 million tweets per day.[551]
- YouTube users watch over 1 billion hours of video per day.[552]
- Google processes over 5.6 billion searches per day.[553]

This large volume of daily content production is also continuously modified and highly dynamic, as users are constantly adding, changing, and removing content at their discretion. The characteristics of online communication, too, are an important aspect that cannot be taken lightly. Online communication presents a complex challenge for detecting *hate speech* as the language used by social media users are varied and diverse. The language used on social media can be informal, grammatically incorrect, slangy, ladened with cultural codes, abbreviation, symbols, etc. Slang and cultural codes that are

[548] Google: https://www.internetlivestats.com/google-search-statistics/;

[549] Facebook Messenger and WhatsApp: https://about.fb.com/news/2021/01/whatsapp-now-delivers-100-billion-messages-every-day/

[550] Instagram: https://www.businessofapps.com/data/instagram-statistics/

[551] Twitter: https://www.businessofapps.com/data/twitter-statistics/

[552] YouTube: https://www.businessofapps.com/data/youtube-statistics/

[553] Google's index: https://www.google.com/search/howsearchworks/crawling-indexing/

frequently used are particularly challenging to decipher and decode, while the use of elusive and sophisticated language can also conceal hatred and make it even more challenging to identify hate speech.

Given the sheer volume of online content, the characteristics of online communication, the lack of a clear definition of hate speech, and private commercial entities in charge of controlling online communication, there are at least two aspects and set of problems that require our attention. The first is a large gap pertaining to our knowledge of online hate speech and the second pertains to barriers in controlling online communication. These two sets of challenges overlap, while both are compounded with challenges regarding structural and sociolinguistic complexities of speech itself that we discussed in earlier pages of this dissertation. Let us consider these set of issues in turn.

Our knowledge and understanding of online hate speech are still developing. Scholarship on the subject is large but suffers from the lack of reliable data and appropriate methods of processing such data. That is, not only do researchers lack access to appropriate data for the purpose of studying online hate speech, there is a lack of tools and algorithms that can process the data that is available to them. A systematic literature review conducted by Gaikwad et al. reviewed a total of 64 research papers on online extreme speech.[554] Out of these, 31 were obtained from sources such as SCOPUS,[555] Web

[554] Gaikwad, et al. (2021).

[555] SCOPUS is a bibliographic database of peer-reviewed literature and quality web sources with tools to track, analyze and visualize research. It is operated by the publishing company Elsevier and covers scientific, technical, medical and social sciences fields, including arts and humanities.

of Science, Association for Computing Machinery, and Institute of Electrical and Electronics Engineers, while the remaining 33 comprised thesis, technical, and analytical reports. According to Gaikwad et al., the data used in the studies in question is made available by social media companies for machine learning and testing purposes, rather than for studying online hate speech. They point to two main challenges faced in the studies in question:

- the datasets that were not meant for the given studies;
- lack of standardized scanning techniques, validation methods, and more user-friendly tools to detect online extreme speech.[556]

Gaikwad et al. show that most of the studies at hand utilized datasets that have been made publicly available by companies such as Twitter and web forums for the purpose of utilizing machine learning and testing purposes, but were not particularly useful for the given research.[557] Gaikwad et al. state that the publicly available datasets used in the studies at hand were not representative of broader online communications, while the tools used to scan such data were not the most useful tools. Gaikwad et al. state that machine learning-based classification techniques—such as SVM and deep learning—that were commonly used in the studies under their review, are unreliable because of a lack of standardization in the choice of classification techniques that could be used for accurate

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Scopus provides citation information, abstracts, and references to articles from academic journals, conference proceedings, and books.

[556] Gaikwad, et al. (2021).

[557] Ibid.

detection. According to Gaikwad et al., most studies under their review used standard machine learning evaluation metrics to validate their models.[558] Currently available machine learning algorithms and evaluation metrics, however, are inefficient, error-prone, and inaccurate. In other words, despite the availability of some tools and frameworks, the current understanding of multi-ideology hate content is still unreliable and inaccurate. Consequently, there is a lack of effective tools and algorithms to adequately identify and categorize the specific types of expression under examination. This brings us back to the challenges of structural and sociolinguistic complexities of speech that disallow a clear definition of hate speech—and for that matter, the production of algorithms—that can identify *hate speech* that is the type of speech as versatile, polysemous, and adoptable as human creativity. Challenges posed by online communication and monitoring/controlling online hate speech are far greater than challenges posed by a single hate speech case.

If we thought that adjudicators in courts and tribunals were already excessively subjective in interpreting and applying hate speech laws to a single case at hand, the problems with interpretation and application of those laws to online hate speech are manifold. Again, hate speech as a subset of speech is versatile, polysemous, interpretive, and too complex to lend itself to a single definitive judgment on its intended or received meaning. Such intricacies and complexities of speech are compounded in online communication, because of its compounded characteristics. Online communication

[558] Ibid.

particularly on social media is interactive, real-time, unorganized, multimodal, user-generated, viral, and fragmented. A single post can generate interactions by many who may express their views through symbols, images, videos, audio, coded text, etc. Social media users also communicate in colloquial language, using slang and cultural codes that are dynamic and diverse. Cultural codes are often in the form of emojis or icons that express emotions or reactions, while hashtags can be keywords or phrases that can signify not a single but a multitude of meanings. Use of acronyms and abbreviations also render online communication on social media challenging to decipher, while memes often convey satirical intent that can be interpreted in various ways. Understanding slang—which is common in online communication—too, is not straightforward. Challenges posed by these characteristics of online communication, which is representative of human creativity, are compounded by challenges posed by the sheer volume of online communication. That is, given the characteristics and volume of online communication, moderation of online hate speech is largely beyond human and even machine capacity.

In response to governments' anxious push for control over online content and legislative mandates for online content moderation, social media and tech companies have put in place a number of strategies that include:

- Artificial intelligent algorithms that are based on limited set of keywords, phrases, and patterns to monitor, detect, flag, and remove online hate speech.
- Large- and small-scale human moderators or bureaucrats who are trained to monitor, detect, flag, and remove online hate speech.

In addition to these strategies, while social platforms rely on their users to report online hate speech, they also rely on their users to adhere to their community standards.[559]

In the off-line world, given the generality of the law, it is the responsibility of the adjudicator to interpret the law and its application on a case-by-case basis. The same laws apply to online hate speech are still the same and as general. Pertaining to online hate speech, there is no judge or trained adjudicator to interpret the law and apply it on a case-by-case basis. Monitoring, adjudicating, and removing online hate speech is therefore entrusted to the employees or machines employed by social media companies. As such, we are faced with a new set of problems that include but are not limited to (1) political and ideological motivation of human moderators and/or those of the given company itself that may be intent to engineer the public sphere; and (2) faulty machine algorithms that detect legal expressions and miss illegal expression.

Daphne Keller, the Director of the Program on Platform Regulation at Stanford University's Cyber Policy Center, argues that legislation imposed on social media and tech companies to combat online hate speech lacks strict procedural safeguards.[560] She adds that imposing monitoring obligations on companies to actively police their platforms for complex categories of content, such as hate propaganda, has generally resulted in higher rates of lawful content being removed from platforms through their moderation

[559] The respective community standards and guidelines pages for Facebook and Twitter can be found here: https://transparency.fb.com/policies/community-standards/hate-speech/ and here: https://help.twitter.com/en/rules-and-policies/hateful-conduct-policy

[560] Keller (2018), 18-20.

processes.[561] This problem is further compounded by 'procedural-remedial' deficiencies, which encompass inadequate user notifications, insufficient mechanisms for appeals, and the lack of or inadequate remedies for content removals conducted in error.[562] The constitutional scholar Jack Balkin, too, states that platform actions of blocking and removing content typically occur without any legal determination of whether the speech is protected or not, without due process protections, and without a requirement to promptly address user objections.[563] This is in addition to the fact that removal of content by social media platforms can be motivated by political and ideological agendas of the platform itself or those in charge of moderating the content—there are many examples of arbitrary banning and blocking of people from the major social media such as Facebook, Twitter, etc.[564]

Most content moderation by social media platforms and other large tech companies is done by artificial intelligent algorithms, that are known to be error prone. In their quantitative studies, the authors of 'Automated Hate Speech Detection and the Problem of Offensive Language,' arrive at the conclusion that one of the main obstacles in automatically detecting hate speech on social media is distinguishing it from other types of offensive or abusive communication.[565] They state that lexical detection methods

[561] Ibid.

[562] Sander (2020), 962.

[563] Balkin (2018), 2041-2092.

[564] For examples, see *The New York Times* (August 19, 2019), *Al Jazeera* (May 17, 2021), and *The Guardian* (May 5, 2021) for instances related to the removal or blocking of subversive voices.

[565] Davidson et al. (2017).

often have low accuracy because they classify any message containing certain terms as hate speech. The authors argue that even when supervised learning is integrated with automated detection, differentiating between hate speech and other offensive language remains a struggle. To address this, the authors utilize a hate speech lexicon obtained through crowdsourcing to collect tweets containing hate speech keywords and divide these tweets into three categories: those containing hate speech, those with only offensive language, and those with neither. A multi-class classifier—i.e., machine learning algorithm that can classify data into three or more distinct categories or classes—was also trained to distinguish between these categories. The analysis of the results showed that racist and homophobic tweets are more likely to be classified as hate speech, while sexist tweets are generally classified as offensive. The authors also found that tweets that are prejudicial but contain not explicit hate keywords, go undetected.[566]

The accuracy of online hate speech detection by artificial intelligent is indeed challenged by the complexities of speech itself and the fact that languages used by social media users can be informal, grammatically incorrect, slangy, or elusive and too sophisticated for machine detection. Automated detection, therefore, is challenged by the limitations of keyword specifications, obfuscated words, obscured statements, and/or colloquial nature of social media communication. This is while online hate speech can

[566] Ibid.

take many different forms, including implicit or indirect expressions, sarcasm, or humor which makes it even more difficult to detect.[567]

The various difficulties and challenges of monitoring, detecting, and removing online hate speech should be evaluated before responding to speech scare that heightens a sense of urgency for legislative action and unrealistic demand for control over online content. Legislating requirements for online content moderation is problematic because it places private companies in a position of power over public communication. Online platforms, such as social media networks and discussion forums, are commercial private entities with the primary goal of generating profits for their owners or shareholders, who may also be profiting from lobbyist and other stakeholders. Demands such as that of the Standing Committee on Justice and Human Rights (SCJHR) and legislative mandate such as that by the 42nd Parliament in June 2019,[568] can effectively delegate controlling of public communication to private companies, allowing them to significantly alter the public sphere, which is one of the most important aspects of a democratic society. To be sure, any legislative mandate pertaining to online hate speech should undergo a cost-benefit evaluation and weigh whether such measures protect minorities or lead to a consequence of compromising fundamental rights by ceding control to social media and tech companies. In the latter case, the voices most at risk of being silenced are those belonging to minority groups with the least access to power.

[567] See Kovács, et al. (2021).

[568] House of Commons Debates, 43rd Parliament (June 2019).

Speech scare and discourse that have triggered more initiatives to curb online hate speech have provided tech companies with profitable opportunities. While these companies are aware of the challenges and impossibility of effective detection of online hate speech, their focus on profits has led them to participate in the rhetoric of speech scare. Meanwhile, smaller companies that are trying to enter this lucrative market advertise themselves as innovative with surveillance technologies that they claim can accurately detect and filter online hate speech. Consider the language used in the statement below by a small tech company in India that claims to be able to detect and filter 'toxic online content' with '95.6% accuracy.'

> Toxic online content has become a major issue in today's world due to an exponential increase in the use of internet by people of different cultures and educational background. […] Differentiating hate speech and offensive language is a key challenge in automatic detection of toxic text content. […] we [the tech group] propose an approach to automatically classify tweets on Twitter into three classes: hateful, offensive and clean. Using Twitter dataset, we perform experiments considering […] term frequency-inverse [and] multiple machine learning models. […] After tuning the model giving the best results, we achieve 95.6% accuracy upon evaluating it on test data. We also create a module which serves as an intermediate between user and Twitter.[569]

[569] Gaydhani (2018).

Commercial social media and tech companies, however, are not known for their protection of people and their rights.

Social media and tech companies are often referred to as 'data vultures,' which refers to their aggressive data collection and utilization of large amounts of their users' personal data for profit. These companies have been collecting users' personal information, including browsing history, search queries, location data, and private messages and emails, which are then utilized to target them with personalized ads, which is the main source of profit and revenue. In the past decade or so, aggressive gathering of users' personal data by these companies has led to a significant concern due to potential issues surrounding privacy, security, and consent. Such concerns have also led to increased regulation and the implementation of privacy laws. While these laws may not be exceptionally effective, they have had some influence on the data collection activities of these companies, particularly due to the potential for costly lawsuits against them.

However, the advent of speech scare in online hate speech discourse and governments' increasing urgency to control online hate speech have given tech companies a green light and a role in content moderation. This has eased privacy laws imposed on tech companies, enabling them to continue data collection more freely and with reduced concern about potential lawsuits. As far as social media and tech companies are concerned, the development of online hate speech discourse seems like a dream that came true. In 2010, Facebook's CEO, Mark Zuckerberg thought out loud by suggesting that people 'have really gotten comfortable not only sharing more information and different kinds, but more openly and with more people,' adding that privacy should no longer be

considered as a societal norm.[570] Meanwhile, the sincerity of his statement can be evaluated against the fact that he 'Spent more than $30 Million Buying 4 Neighboring Houses so He could have Privacy.'[571]

Speech scare and hate speech politics have had other impacts. Although participation in online communication on social media platforms remains high, studies also indicate an increased level of awareness of risks has motivated different people to avoid online communication. While individuals with informed perspectives may weigh the costs and benefits of sharing their opinions and choose to abstain from public participation due to the significant risks they may face, others may prefer online platforms that offer enhanced anonymity and secure communication. A recent article in *The Guardian* with the title 'Is it time to leave WhatsApp—and is Signal the answer?' is a sample but indicative of such a trend. The article is in response to WhatsApp's ever-changing privacy policy. WhatsApp is owned by Facebook, which is notorious for its data mining and sharing of users' data with different governmental and commercial entities.[572]

> Earlier this month, WhatsApp issued a new privacy policy along with an ultimatum: accept these new terms, or delete WhatsApp from your smartphone. But the new privacy policy wasn't particularly clear, and it was widely

[570] Johnson (January 10, 2010).

[571] Shontell (October 11, 2013).

[572] O'Flaherty (Jan 24, 2021).

> misinterpreted to mean WhatsApp would be sharing more sensitive personal data with its parent company Facebook. [573]

Alternatives to the major social media platforms and instant messaging apps are also growing. Telegram, for instance, has a reputation of providing protection and publicity by offering private messaging and large scope broadcasting. Telegram has a group capacity with a ceiling of up to 200,000 users and an embedded function that enables channels capable of hosting an unlimited number of subscribers. The app was founded in 2013 by Pavel Durov, a Russian entrepreneur, with the goal of ensuring private communications free from government control. This objective was particularly relevant to evade scrutiny from the Russian authorities, who pursued the founder on tax avoidance charges and accusations of providing a platform for terrorist groups such as ISIS.[574] The founder of Telegram and his team serve as prime examples of privacy advocates as they prioritize secure communication and have actively relocated to avoid what Durov refers to as 'undue influence.'[575] Despite the eventual departure of the Telegram creators from Russia, the app has maintained its popularity by offering users the security and broadcasting capabilities they desire. Just in 2022, the app attracted about 100 million new users.

> In recent years, downloads of mobile instant messaging Telegram have experienced an upward trend in all the examined regions of the world. In the second quarter of 2022, Telegram registered 44.5 million downloads in the Asia-

[573] Ibid.

[574] Rogers (2020).

[575] Ibid, 216.

> Pacific region, while Europe, the Middle East, and Africa registered over 33 million downloads in the examined period. In 2021, users have found in mobile apps like Telegram or Signal an alternative to market leader WhatsApp, after the controversial privacy policy updated the app required.[576]

Telegram is also notorious for providing platform to individuals and groups that are known as extremists. For instance, in 2019 Facebook and Instagram removed Milo Yiannopoulos, Alex Jones, Laura Loomer, and Paul Joseph Watson stating that they were involved in 'organized hate' and/or 'organized violence.'[577] This followed by Loomer announcing her Telegram channel, while Alex Jones directed users to his own websites.[578]

The growing trend of opting for alternative and/or underground platforms and websites, commonly known as the dark web, should be recognized as another ramification of speech scare and hate speech politics.[579] Although it may appear unlikely that the dark web could attain the same level of popularity as major social media platforms, it remains crucial to consider its significance, particularly in the realm of hate speech scholarship and discussions. This is particularly relevant as it represents a significant area of the Internet and communication platforms that are growing but remain out of reach for authorities and researchers too.

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[576] Ceci (Apr 17, 2023).

[577] Rogers (2020).

[578] Ibid.

[579] See Gehl (2016); Habibinia (2020); Kumar & Rosenbach (2019); Rainie (2017); Veliz (2019).

The dark web is the term used to refer to encrypted and protected networks of online communications that require gateways and configurations that allow access through authorized membership. In fact, what we have come to know as the dark web was the encrypted, anonymized, and secret network of communications that was first developed by the US Defense Department in the 1970s to shield secret information and communications of US spy operatives.[580] Since then, the crypto-network technology has been used by governmental secret services around the world—often to spy or undermine other governments—also by commercial and criminal entities as well as by the public.

The significance of the dark web in our discourse is that the traditional public sphere, where theoretical conflicts are resolved without violence, may be undergoing a transformation due to speech scare, hate speech politics, and hate speech legislation, and is gradually being eroded and displaced to the dark web.[581] The exact size of the dark web is unknown, but it is estimated to be much larger than the visible web that is accessible through search engines.[582] Studies indicate that the dark web is a diverse network of various websites, including marketplaces, forums, social networks, and dissident sites, rather than a homogenous entity.[583] Anonymity is a defining feature of the dark web, enabling both political activism and criminal activities such as fraud, drug trafficking, and

[580] Kumar & Rosenbach (2019), 3.

[581] Habermas (1991), 175–180. Here Habermas points to the 'disintegration of the public sphere' caused by the capitalist mass culture that emptied the public sphere from rational discourse and turned it into the sphere for a culture of mass consumption and leisure entertainment.

[582] Positive Technologies (2021).

[583] Abdellatif, et al. (2022).

child pornography. There is no governing body to oversee the dark web and activities are based on a given group's norms. Although law enforcement has been adamant in infiltrating the dark web, it remains out of reach of the authorities. The dynamic relationship between the dark web and the mainstream internet is continuously evolving, with content and users frequently moving between the two.[584]

According to research, an increasing number of individuals who wish to express their thoughts without revealing their identity are transitioning to encrypted online spaces and platforms within the dark web that offer anonymity.[585] A 2013 study observed that in just ten months, the number of accounts in the dark web 'grew from 3,000 to over 24,000, with over 170 groups, hundreds of blog posts, and tens of thousands of micro-blog posts.'[586] commercial corporations, etc.[587] Another study in 2017 echoes the increasing rate of expansion of websites where hostile and hate speech are only getting worse.[588] While many agree that the expansion of the dark web and bursts of hateful expressions on the Internet should be controlled and dismantled,[589] some argue that the dark web should be left alone or even protected, since it is the only place left that 'promotes free speech by protecting the identity of people who might otherwise face

[584] Ibid.

[585] Rainie, et al. (2017).

[586] Gehl (2016).

[587] See Gehl (2016); Habibinia (2020); Kumar & Rosenbach (2019); Rainie (2017); Veliz (2019).

[588] See Habibinia (2020).

[589] Habibinia (2020); Rigby (Fall 1995); Rainie et al. (2017); Veliz, (2019).

negative consequences for expressing their ideas.'[590] Notwithstanding these demands and arguments, the dark web can neither be controlled nor dismantled.

Complexities that keep the dark web out of the reach of governments relate to the fact that the dark web is also used by different governments, some of which are also rogue and out of reach. For one thing, the dark web functions similarly to organized crime with its own economy, but in parallel and close links to the legitimate economy. It is a complex crypto-network technology that was originally created in the 1960s and used by governmental secret services, presumably meant to promote democracy in rogue states, funding and arming freedom fighters, measures for national security, etc. While the dark web has grown even more complex and multipurpose since its origin, some aspects of it are still funded by different governments around the world. For instance, one of the major and well-known gateways to the dark web is the Tor (The Onion Router) network equipped with layers of encryption, allowing secure access, and ensuring anonymity in communications.[591] According to the Tor Project's financial statements, the Tor network receives annual funding from the US State Department and the US National Science Foundation.[592]

The dark web is also an extensive crypto-market economy, in which trading of everything generates billions of dollars on an annual basis. In fact, the large userbase of the dark web has motivated and attracted all types of investments—legal and illegal. The

[590] Ibid.

[591] Hern (Jul 29, 2014).

[592] Ibid.

most significant aspect of the dark web economy is that trading takes place in digital currency or bitcoin, which has cyclically increased its value, so much that bitcoin trading is now also indirectly linked to the stock market. A report by Statistica, a popular provider of market and consumer data, states that in April 2021, 'the Bitcoin market cap reached an all-time high and had grown by over 1,000 billion USD when compared to the summer months.'[593] It added that 'the market capitalization decline since that moment, reaching roughly 600 billion U.S. dollars in June 2021.'[594] This means that, while technically an impossibility, dismantling the dark web may mean destabilizing the market and global economy. Hence any collapse in bitcoin economy may also translate to collapse elsewhere. According to economists watching the bitcoin economy, the future is bright for investors of such, especially for poor countries and rogue regimes that look for alternative financial systems.[595] As such, any notion that online hate speech laws may clean the online world from hate speech is elusive.

Some argue that the dark web should be left alone because it provides people with the anonymity and space that they need to express themselves. This argument is more along the lines of the pressure cooker metaphor that suggests controlling people's expression creates pressure from within that can potentially be explosive and messy. Some also argue that leaving anonymous free speech in the dark web is good for society at large because it is the only place left for free debate. These perspectives are at best too

[593] Statistica.

[594] Ibid.

[595] *The Economist* (June 2021).

ambitious. To be sure, forums on the dark web are restricted to all but like-minded members. These forums function as echo chambers in which opinions gain a multiplier effect instead of being countered openly. That is, while free speech and anonymity on the dark web do not translate into constructive discourse on important issues, more hate speech and even dangerous speech may be circulated and recycled in such echo chambers. It is true that in the dark web, users can share their thoughts freely and anonymously, but it is not clear how this could benefit society at large.

5. Conclusion

This dissertation adopted a sociological approach to explore Canada's legislative prohibition and adjudication of hate speech. On the legislative side, it argued that the 1970 enactment of the first hate speech law in Canada, known as the Hate Propaganda Act, was based on unexamined justifications that failed to establish a causal link between hate speech and its perceived harms. As a result, Canada's hate speech laws were set on an uncertain and shaky foundation from the beginning. Furthermore, I argued that the vague understanding of hate speech as an offense was a consequence of the inherent challenges posed by speech itself. Speech, particularly of ideological, political, and cultural nature, is inherently as complex and versatile as human creativity, and open to multiple interpretations, resisting a singular definition, interpretation, and judgment. The complexities and characteristics of speech have indeed debilitated lawmakers and adjudicators in formulating a clear constitution of hate speech that could have helped stabilize the adjudication of hate speech cases.

On the adjudication side, it argued that due to the broadness of the law, the challenges posed by speech itself, and the lack of (social) scientific evidence regarding the alleged harms of hate speech, courts and tribunals have had to rely on a common sense approach and/or defer to legislative judgment, assuming that the lawmakers must have possessed compelling evidence of harm to justify the prohibition of hate speech. However, both approaches destined the adjudication of hate speech cases to be arbitrary, excessively interpretive, and characteristically inconsistent. This is because a common sense approach

involves the worldviews of the adjudicator, influenced by sociopolitical, ideological, and cultural aspects that are inherent to the law itself and the alleged hate speech at hand.

In such a context, the act of interpretation becomes 'interpretive all the way down,' as described by Dworkin, and can be 'intractable, pervasive, and endless.'[596] In other words, the adjudication of alleged hate speech becomes excessively subjective, as the interpretation by the adjudicator may involve their personal views on various issues. These issues may include the individual right to free expression and/or privacy, the constitution of Canadian democracy and liberal values, differing convictions about power and authority, freedom of the press, rights hierarchy, or other factors that contribute to the entirety of the speech under consideration. Furthermore, views and interpretations can vary among different adjudicators, resulting in a characteristic inconsistency in the adjudication process. These inevitabilities, which result in arbitrary and inconsistent judgments, also contribute to the structural inequality concerning who can exercise the right to freedom of speech and engage in public participation. It is important to note that structural inequality disproportionately affects minority groups situated at the bottom of the power hierarchy.

The loopholes within the current hate speech legal regime have allowed for the proliferation of hate speech politics, involving influential stakeholders and interest groups

[596] Dworkin (2010). It should be noted here that Dworkin's perspective on the act of interpretation is particularly useful in the context of hate speech adjudication, where the ambiguity of the law and the polysemous nature of alleged hate speech, encompassing sociopolitical, ideological, and cultural elements, are most relevant. This might not be the case in other legal contexts where reasonable disagreements could exist.

that possess the means to shape both the law and the content of the public sphere. This dissertation delved into the concept of speech scare, which encompasses the systematic spread of fear surrounding hate speech itself and the apprehension of freely expressing controversial opinions. The intricate relationship between law and politics has resulted in cascading ramifications that extend beyond the inconsistencies within the legal system and its chilling effect. These consequences include the transformation of the public sphere, its migration to encrypted cyber spaces and platforms that provide privacy and anonymity, an increase in online hate speech, aggressive data harvesting by commercial tech companies, and the erosion of the right to privacy.

In recent years, the pressure for moderation of online communication and the suppression of online hate speech has intensified, involving commercial entities. However, the aspiration to effectively eliminate online hate speech appears to be an ambitious and impractical goal, contrary to the prevailing reality. The reasons for this difficulty are manifold: (a) the sheer volume and vastness of online communication that surpass human and machine capacities for moderation; (b) the dynamic nature of online communication, characterized by colloquialism, slang, abbreviations, and cultural nuances; (c) the lack of a comprehensive, multi-ideological conceptualization of online hate speech; (d) flawed algorithms and inadequate tools for accurately detecting and moderating online hate speech; and (e) the involvement of profit-driven commercial tech companies that may succumb to pressure or prioritize the interests of wealthy entities and governments. It is important to note here that the implications and complexities surrounding the involvement and moderation of online content by tech companies

necessitate further in-depth and comprehensive research, as the findings presented here only scratch the surface.

Although the intention behind hate speech laws and the regulation of hate speech is to safeguard minority groups, the sociological perspective reveals the ineffectiveness and inherent problems associated with these legal efforts. This raises the important question: What is the best way forward? It is important to acknowledge that advocating for an absolute right to freedom of expression would be naive and even careless. It is evident that speech can be extreme and dangerous, particularly when it directly promotes violence and carries a risk of inciting the audience to act upon such advocacy.

Even figures like Mill, who were known for their near-absolutist stance on the right to free expression, recognized the need for limitations. Mill introduced his renowned harm principle, suggesting that the state has a responsibility to protect individuals from speech or actions that cause harm to others, without any valid reason or justification. He suggested that in certain significant cases, it is necessary for society to actively intervene to prevent such harmful actions.

> Acts of whatever kind, which, without justifiable cause, do harm to others, may be, and in the more important cases absolutely require to be, controlled by the unfavorable sentiments, and, when needful, by the active interference of

> mankind. The liberty of the individual must be thus far limited; he must not make himself a nuisance to other people.[597]

According to Mill, speech, for example, the corn-dealer example—mentioned in Chapter 1 of this dissertation[598]—that incites violence and presents an imminent danger of harm, should be subject to government restrictions. However, Mill emphasized that such restrictions should be narrow and targeted, avoiding unnecessary state interference with public expressions that do not present significant dangers.

Any attempt to reform and refine Canada's hate speech legal framework should consider two fundamental principles: (1) compromising the right to freedom of expression should be allowed only in extreme cases and situations; (2) the right to freedom of expression cannot be absolute since speech can escalate to a level that may result in serious harm to its target and society at large. The first principle encourages us to identify and define those extreme situations and cases. However, this cannot be a matter of opinion but necessitates impartial scientific findings and expertise in sociology, communication studies, violence studies, political science, and other relevant social sciences disciplines to collaborate with legal scholars and demonstrate the kind of communication and Canadian context that render speech extreme and dangerous.

One could argue that there may exist some types of speech that are less dangerous but still harmful, capable of negatively impacting members of identifiable groups. While

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[597] Mill (2003), 66.

[598] See Chapter 1, pages 49–50 of this dissertation.

proposing a solution for addressing such types of speech proves challenging and surpasses the present intellectual capacity of this author, it is still crucial to assess the costs and benefits associated with the current hate speech legal regime. We must question whether the consequences and ramifications of the current hate speech legal framework outweigh its advantages. From a sociological standpoint, the broader notions of harm contribute to a less objective adjudication of hate speech cases, resulting in increased inconsistency and instability within the law. To be sure, inconsistency and instability within the law perpetuate structural inequality that harms vulnerable social groups.

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Appendix I

Criminal Code: Section 98 (1919-36)[599]

(1) Any association, organization, society or corporation, whose professed purpose or one of whose purposes is to bring about any governmental, industrial, or economic change within Canada by use of force, violence, terrorism, or physical injury, or which teaches, advocates, advises or defends the use of force, violence, or physical injury, in order to accomplish such change, or for any other purpose, or which shall by any means prosecute or pursue such purpose or professed purpose, or shall so teach, advocate, advise or defend, shall be an unlawful association.

(2) Any property, real or personal, belonging or suspected to belong to an unlawful association, or held or suspected to be held by any person for or on behalf thereof may, without warrant, be seized or taken possession of by any person thereunto authorized by the Chief Commissioner of Dominion Police or by the Commissioner of the Royal Northwest Mounted Police, and may thereupon be forfeited to His Majesty.

(3) Any person who acts or professes to act as an officer or any such unlawful association, and who shall sell, speak, write or publish anything as the representative or professed representative of any such or wear, carry or cause to be displayed upon or about his person or elsewhere, any badge, insignia, emblem, banner, motto, pennant, card, button or other device whatsoever, indicating or intending to show or suggest that he is a member of or in anywise associated with any such unlawful association, or who shall contribute anything as dues or otherwise, to it or to anyone for it, or who shall solicit subscriptions or contributions for it, shall be guilty of an offence and liable to imprisonment for not more than twenty years.

(4) In an prosecution under this section, if it be proved that the person charged has

a. attended meetings of an unlawful association; or,

b. spoken publicly in advocacy of an unlawful association; or,

c. distributed literature of an unlawful association by circulation through the Post Office mails of Canada, or otherwise;

it shall be presumed, in the absence of evidence to the contrary, that he is a member of such unlawful association.

(5) Any owner, lessee, agent or superintendent of any building, room, premises or place, who knowingly permits therein any meeting of an unlawful association or any subsidiary association or branch or committee thereof, or any assemblage of persons who teach, advocate, advise or defend the use, without authority of the law, of force, violence or physical injury to person or property, or threats of such injury, shall be guilty of an offence under this section and shall be liable of a fine of not more than five thousand dollars or to imprisonment for not more than five years, or to both fine and imprisonment.

(6) If any judge of any superior or county court, police or stipendiary magistrate, or any justice of the peace, is satisfied by information on oath that there is reasonable ground for suspecting that

[599] As cited in Fidler & Hay (1984).

any contravention of this section has been or is about to be committed, he may issue a search warrant under his hand, authorizing any peace officer, police officer, or constable with such assistance as he may require, to enter at any time any premises or place mentioned in the warrant, and to search such premises or place, and every person found therein, and to seize and carry away any books, periodicals, pamphlets, pictures, papers, circulars, cards, letters, writings, prints, handbills, posters, publications or documents which are found on or in such premises or place, or in the possession of any person therein at the time of such search, and the same, when seized may be carried away and may be forfeited to His Majesty.

(7) Where, by this section, it is provided that any property may be forfeited to His Majesty, the forfeiture may be adjudged or declared by any judge of any superior or county court, or by an police or stipendiary magistrate, or by any justice of the peace, in a summary manner, and by the procedure provided by Part XV of this Act, in so far as applicable, or subject to such adaptations as may be necessary to meet the circumstances of the case.

(8) Any person who prints, publishes, edits, issues, circulates, sells, or offers for sale or for distribution any book, newspaper, periodical, pamphlet, picture, paper, circular, card, letter, writing, print, publication or document of any kind, in which is taught, advocated, advised or defended, or who shall in any manner teach, advocate, or advise or defend the use, without authority of law, of force, violence, terrorism or physical injury to person or property, or threats of such injury, as a means of accomplishing any governmental, industrial or economic change, or otherwise, shall be guilty of an offence and liable to imprisonment for not more than twenty years.

(9) Any person who circulates or attempts to circulate or distribute any book, newspaper, periodical, pamphlet, picture, paper, circular, card, letter, writing, print, publication or document of any kind as described in this section, shall be guilty of an offence and shall be liable to imprisonment for not more than twenty years.

(10) Any person who imports into Canada from any other country, or attempts to import by or through any means whatsoever, any book, newspaper, periodical, pamphlet, picture, paper, circular, card, letter, writing, print, publication or document of any kind as described in this section, shall be guilty of an offence and shall be liable to imprisonment for not more than twenty years.

(11) It shall be the duty of every person in the employment of His Majesty in respect of His Government of Canada, either in the Post Office Department, or in any other Department to seize and take possession, of any book, newspaper, periodical, pamphlet, picture, paper, circular, card, letter, writing, print, publication or document, as mentioned in the last preceding section, upon discovery of the same in the Post Office mails of Canada or in or upon any station, wharf, yard, car, truck, motor or other vehicle, steamboat or other vessel upon which the same may be found and when so seized and taken, without delay to transmit the same, together with the envelopes, coverings and wrappings attached thereto, to the Chief Commissioner of Dominion Police, or to the Commissioner of the Royal Northwest Mounted Police.

Appendix II

Criminal Code: Hate Propaganda Act

Public incitement of hatred

319.(1) Every one who, by communicating statements in any public place, incites hatred against any identifiable group where such incitement is likely to lead to a breach of the peace is guilty of an indictable offence and is liable to imprisonment for a term not exceeding two years; or an offence punishable on summary conviction.

Wilful promotion of hatred

(2) Every one who, by communicating statements, other than in private conversation, wilfully promotes hatred against any identifiable group is guilty of an indictable offence and is liable to imprisonment for a term not exceeding two years; or an offence punishable on summary conviction.

Defences

(3) No person shall be convicted of an offence under subsection (2) if he establishes that the statements communicated were true; if, in good faith, the person expressed or attempted to establish by an argument an opinion on a religious subject or an opinion based on a belief in a religious text; if the statements were relevant to any subject of public interest, the discussion of which was for the public benefit, and if on reasonable grounds he believed them to be true; or if, in good faith, he intended to point out, for the purpose of removal, matters producing or tending to produce feelings of hatred toward an identifiable group in Canada.

Forfeiture

(4) Where a person is convicted of an offence under section 318 or subsection (1) or (2) of this section, anything by means of or in relation to which the offence was committed, on such conviction, may, in addition to any other punishment imposed, be ordered by the presiding provincial court judge or judge to be forfeited to Her Majesty in right of the province in which that person is convicted, for disposal as the Attorney General may direct.

Exemption from seizure of communication facilities

(5) Subsections 199(6) and (7) apply with such modifications as the circumstances require to section 318 or subsection (1) or (2) of this section.

Consent

(6) No proceeding for an offence under subsection (2) shall be instituted without the consent of the Attorney General.

Definitions

(7) In this section, 'communicating' includes communicating by telephone, broadcasting or other audible or visible means; 'identifiable group' has the same meaning as in section 318; 'public place' includes any place to which the public have access as of right or by invitation, express or implied;

'statements' includes words spoken or written or recorded electronically or electro-magnetically or otherwise, and gestures, signs or other visible representations.

Warrant of seizure

320.(1) A judge who is satisfied by information on oath that there are reasonable grounds for believing that any publication, copies of which are kept for sale or distribution in premises within the jurisdiction of the court, is hate propaganda shall issue a warrant under his hand authorizing seizure of the copies.

Summons to occupier

(2) Within seven days of the issue of a warrant under subsection (1), the judge shall issue a summons to the occupier of the premises requiring him to appear before the court and show cause why the matter seized should not be forfeited to Her Majesty.

Owner and author may appear

(3) The owner and the author of the matter seized under subsection (1) and alleged to be hate propaganda may appear and be represented in the proceedings in order to oppose the making of an order for the forfeiture of the matter.

Order of forfeiture

(4) If the court is satisfied that the publication referred to in subsection (1) is hate propaganda, it shall make an order declaring the matter forfeited to Her Majesty in right of the province in which the proceedings take place, for disposal as the Attorney General may direct.

Disposal of matter

(5) If the court is not satisfied that the publication referred to in subsection (1) is hate propaganda, it shall order that the matter be restored to the person from whom it was seized forthwith after the time for final appeal has expired.

Appeal

(6) An appeal lies from an order made under subsection (4) or (5) by any person who appeared in the proceedings on any ground of appeal that involves a question of law alone,

on any ground of appeal that involves a question of fact alone, or on any ground of appeal that involves a question of mixed law and fact, as if it were an appeal against conviction or against a judgment or verdict of acquittal, as the case may be, on a question of law alone under Part XXI, and sections 673 to 696 apply with such modifications as the circumstances require.

Consent

(7) No proceeding under this section shall be instituted without the consent of the Attorney General.

Definitions

(8) In this section, 'court' 'court' means: in the Province of Quebec, the Court of Quebec, in the Province of Ontario, the Superior Court of Justice, in the Provinces of New Brunswick, Manitoba, Saskatchewan and Alberta, the Court of Queen's Bench, in the Provinces of Prince Edward Island and Newfoundland, the Supreme Court, Trial Division, in the Provinces of Nova Scotia and British Columbia, in Yukon and in the Northwest Territories, the Supreme Court, and in Nunavut, the Nunavut Court of Justice; 'genocide' has the same meaning as in section 318; 'hate propaganda' means any writing, sign or visible representation that advocates or promotes

genocide or the communication of which by any person would constitute an offence under section 319; 'judge' 'judge' means a judge of a court.

Source: https://laws-lois.justice.gc.ca/eng/acts/c-46/section-319.html

Appendix III

Former Section 13 of the Canadian Human Rights Act

Hate messages

13 (1) It is a discriminatory practice for a person or a group of persons acting in concert to communicate telephonically or to cause to be so communicated, repeatedly, in whole or in part by means of the facilities of a telecommunication undertaking within the legislative authority of Parliament, any matter that is likely to expose a person or persons to hatred or contempt by reason of the fact that that person or those persons are identifiable on the basis of a prohibited ground of discrimination.

Interpretation

(2) For greater certainty, subsection (1) applies in respect of a matter that is communicated by means of a computer or a group of interconnected or related computers, including the Internet, or any similar means of communication, but does not apply in respect of a matter that is communicated in whole or in part by means of the facilities of a broadcasting undertaking.

Interpretation

(3) For the purposes of this section, no owner or operator of a telecommunication undertaking communicates or causes to be communicated any matter described in subsection (1) by reason only that the facilities of a telecommunication undertaking owned or operated by that person are used by other persons for the transmission of that matter.

Source: https://laws-lois.justice.gc.ca/eng/acts/h-6/section-13-20021231.html

Appendix IV

Section 7 of the British Columbia Human Rights Act

7 (1) A person must not publish, issue or display, or cause to be published, issued or displayed, any statement, publication, notice, sign, symbol, emblem or other representation that

(a)indicates discrimination or an intention to discriminate against a person or a group or class of persons, or

(b)is likely to expose a person or a group or class of persons to hatred or contempt

because of the race, colour, ancestry, place of origin, religion, marital status, family status, physical or mental disability, sex, sexual orientation, gender identity or expression, or age of that person or that group or class of persons.

(2)Subsection (1) does not apply to a private communication, a communication intended to be private or a communication related to an activity otherwise permitted by this Code.

Source: https://www.bclaws.gov.bc.ca/civix/document/id/94consol18/94consol18/84022

Appendix V

Section 3 of the *Alberta Human Rights Code*

3(1) No person shall publish, issue or display or cause to be published, issued or displayed before the public any statement, publication, notice, sign, symbol, emblem or other representation that indicates discrimination or an intention to discriminate against a person or a class of persons, or is likely to expose a person or a class of persons to hatred or contempt because of the race, religious beliefs, colour, gender, physical disability, mental disability, age, ancestry, place of origin, marital status, source of income or family status of that person or class of persons.

(2) Nothing in this section shall be deemed to interfere with the free expression of opinion on any subject.

(3) Subsection (1) does not apply to

(a) the display of a notice, sign, symbol, emblem or other representation displayed to identify facilities customarily used by one gender,

(b) the display or publication by or on behalf of an organization that

(i) is composed exclusively or primarily of persons having the same political or religious beliefs, ancestry or place of origin, and

(ii) is not operated for private profit, of a statement, publication, notice, sign, symbol, emblem or other representation indicating a purpose or membership qualification of the organization, or

the display or publication of a form of application or an advertisement that may be used, circulated or published pursuant to section 8(2), if the statement, publication, notice, sign, symbol, emblem or other representation is not derogatory, offensive or otherwise improper.

Source: https://albertahumanrights.ab.ca/other/statements/what_to_know/Pages/section_3.aspx

Appendix VI

Section 14 of the *Saskatchewan Human Rights Code*

Discriminatory publications prohibited

14(1) No person shall publish or display, or cause or permit to be published or displayed, before the public any statement, publication, notice, sign, symbol, emblem or other representation:

(a) tending or likely to tend to deprive, abridge or otherwise restrict the enjoyment by any person or class of persons, on the basis of a prohibited ground, of any right to which that person or class of persons is entitled under the law; or

(b) that exposes or tends to expose to hatred any person or class of persons on the basis of a prohibited ground.

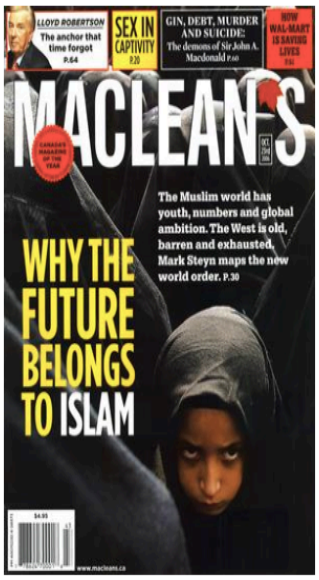
(2) Nothing in subsection (1) restricts the right to freedom of expression under the law on any subject.

Source: https://saskatchewanhumanrights.ca/wp-content/uploads/2020/03/Code2018.pdf

Appendix VII

Maclean's Cover

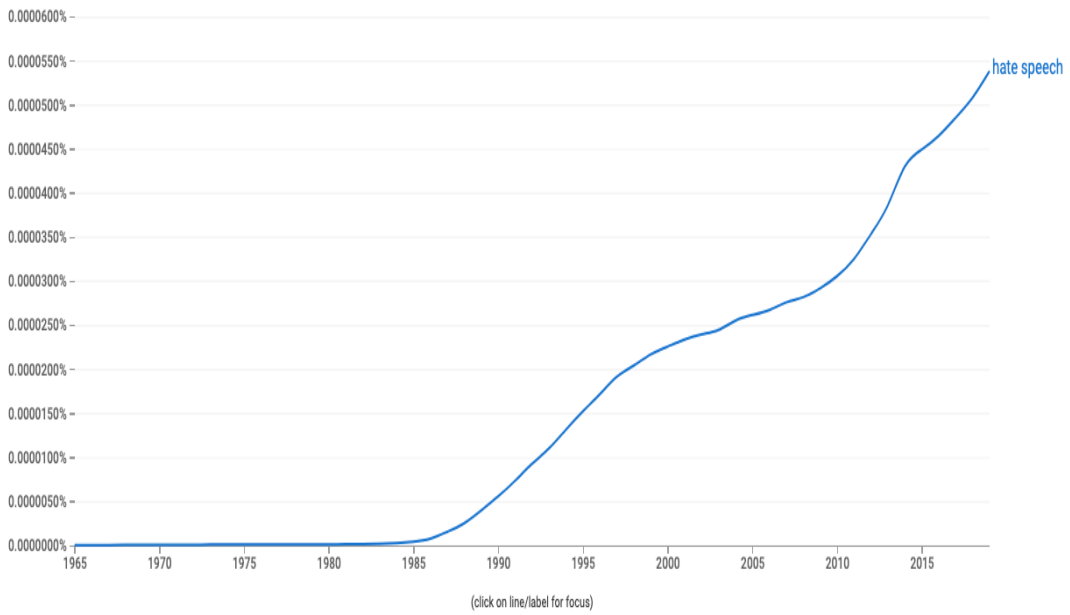
CLICK TO VIEW ARTICLE PAGES



VIEW FULL ISSUE

Appendix VIII

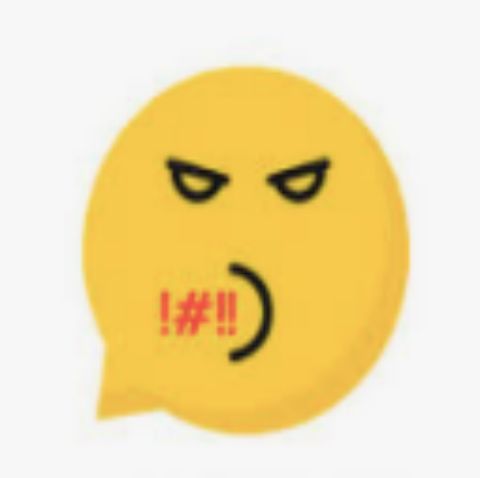
Google Books Ngram Viewer: 'hate speech'



Source: https://books.google.com/ngrams/graph?content=hate+speech&year_start=1965&year_end=2019&corpus=26&smoothing=5

Appendix IX

Hate Speech Emoji



Appendix X

Justin Trudeau ✓
@JustinTrudeau

The BDS movement, like Israeli Apartheid Week, has no place on Canadian campuses. As a @McGillU alum, I'm disappointed. #EnoughIsEnough

3:31 PM · Mar 13, 2015