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Hate Speech and the Rights Cultures of Canada and the United States

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In recent years the traditional characterization of Canada following the social and political lead of the United States, catching up to trends and developments whose cutting edge is south of the border, appears to have been turned on its head. On a number of issue fronts including gay marriage, the decriminalisation of marijuana, sexual assault law, and hate crime, judicial rulings and legislative developments in Canada are often pointed to by American admirers as signposts along a road their own society should be taking. "Cool Canada"[1] was how the lead editorial in characterized what it saw as the emergence of the "hip," socially progressive and multiculturally tolerant society on America's doorstep.

This interpretation of Canada as having caught up to and surpassed the United States as a society respectful of rights and, moreover, as having been fundamentally transformed by the Charter revolution is, I believe, seriously misleading in two respects. First, the more statist and elitist qualities of Canadian political life compared to the United States remain largely undiminished, although better concealed than in the past by the prominence of rights talk and the much greater involvement and influence in the Charter era of so-called equality seeking groups. This argument has been made by many and will not be revisited here.[2] Second, what most commentators conclude to be a fairly dramatic shift in Canadians core values is, I would argue, firmly anchored in Canada's pre-Charter political culture. Moreover, interpretations of Canadian value change in the Charter era usually and mistakenly conclude that the Charter has in some ways Americanised Canadian political culture. Beyond the obvious fact of an elevated awareness of rights and their embededness in the constitution, this claim is seriously misleading. *Instead, I would argue that Canadians, and even more so their opinion-leaders and policy-makers, have tended to adapt rights talk and Charter values to ways of thinking about citizen-state relations and personal freedom versus social order that existed before the Charter's adoption*.

In order to demonstrate the plausibility of this argument I will examine the case of hate speech in Canada and the United States. In particular, I will show that in Canada the interpretation of what constitutes hate speech that falls outside the protection of the Charter stresses the *type of risk*, not the probability that actual harm may be incurred by the target(s) of the message. Courts in the United States have long made the probable harm to the targets of hate speech, or the likelihood that speech will incite violence, their litmus test in determining whether hateful speech is protected under the First Amendment. This difference between judicial interpretation in the two countries reflects an underlying and longstanding difference in how personal freedom is conceptualised in the two countries.

Hate Speech Laws

Hate speech, as distinct from other older forms of inflammatory and damaging expression such as slander, libel and group defamation, is a relatively recent concept. Inspired by article 20(2) of the United Nations International Covenant on Civil and Political Rights and article 4 of the Convention on Elimination of All Forms of Racial Discrimination, both passed in 1966, virtually all western democracies have incorporated various hate speech/propaganda provisions into their criminal codes. While the precise formulation of what constitutes hate speech varies significantly across institutional speech codes, human rights acts, and criminal codes, the fundamental idea is that "speech"—and this could include the written word, still images, video, music lyrics, etc.—that incites or advocates hatred, hostility, discrimination, or violence against the members of a group identifiable by its colour, race, ethnicity, religion or some other minority trait (in recent years sexual preference has been added to hate speech and hate crime laws in some jurisdictions) is prohibited. In the case of some institutional speech codes, such as those at many universities, and the provisions of non-criminal laws that prohibit and punish hate speech, such as those found in human rights codes, expression that is determined to be offensive, insulting or hurtful may also be banned and violations punishable. We are concerned here, however, with the criminalisation of speech.

The scope of hate law is, of course, broader than provisions relating to speech. Criminal acts that are deemed to be prompted or aggravated by hatred toward the group of which the victim is a representative constitute another important category of hate crime. Laws that punish on the basis of motivation raise chiefly equality rights and social tolerance issues rather than free speech ones.

Virtually all state legislatures have passed hate crime laws of one sort or another, the most common sort being that which imposes additional punishment for hate-motivated criminal acts. Under Title 28, Section 994 of the United States Criminal Code, hate crime is defined as "crime that is motivated by the actual or perceived race, colour, religion, national origin, ethnicity, gender, disability, or sexual orientation of any person." In addition, under the Hate Crimes Statistics Act of 1990, the federal government maintains a database of crimes that conform to the above definition.

Neither Congress nor the states have enacted hate speech/propaganda laws that specifically target speech. State laws cover actual intimidation, harassment, assault, and breach of the peace where hatred toward the members of a group is shown to have been a contributing factor. California's hate law, section 422.6 of the state penal code, specifically declares that, "no person shall be convicted of [a hate crime] based upon speech alone, except upon a showing that the speech itself threatened violence against a specific person or group of persons and that the defendant had the apparent ability to carry out the threat." There are obvious echoes of both the *fighting words* and *imminent danger* tests in this provision of California law.

The situation in Canada is quite different. It is no exaggeration to say that the public expression of group-targeted hatred, independent of whatever consequences might or might not flow from such expression, is considered a crime. Canada's criminal code distinguishes between three punishable forms of hate speech:

- *Advocating genocide* (s.318[1]). Every one who advocates or promotes genocide is guilty of an indictable offence and liable to imprisonment for a term not exceeding five years.

- *Public incitement of hatred* (s. 319[1]). Every one who, by communicating statements in a public place, incites hatred against any identifiable group where such incitement is likely to lead to a breach of the peace is guilty of [a crime].

- *Wilful promotion of hatred* (s. 319[2]). Every one who, by communicating statements, other than in private conversation, wilfully promotes hatred against any identifiable group is guilty of [a crime].

The first and third focus of what Canada's criminal code designates as hate speech, advocating genocide and the wilful promotion of hatred, are of particular interest. The second one, public incitement of hatred, involves speech that would be considered fighting words, placing the targets of such speech in imminent danger of harm, and so would not be protected by the First Amendment in the United States any more than it would under s.2 of Canada's Charter of Rights and Freedoms.

Advocating genocide, the first form of hate speech identified in Canada's criminal code, is considered to be a crime whether or not such advocacy is likely to influence the thinking or behaviour of those who are exposed to such messages. This point needs to be emphasized: *the content of the message is the crime*. No mitigating defence is specified in Canada's law and violation of this prohibition is in no way made contingent on the state's capacity to demonstrate malicious intent or probable consequences for the members of a specific group. It is, instead, assumed that the sheer fact of advocating genocide inflicts harm on a pluralistic society that values the tolerance of diversity.

Content is also the crime in the case of the criminal code's prohibition against the wilful promotion of hatred. Canadian law specifies a handful of defences that may extend constitutional protection to such speech. These include the truth of the statements (the onus is placed on the accused to establish their truth); that the accused acted in good faith in expressing a view on a religious subject; that the accused had reasonable grounds for believing the statements and they were relevant to a subject of public interest, the discussion of which was for the public benefit; or if the statements were made for the purpose of pointing out and abolishing hateful sentiments toward an identifiable group in Canada. The state is not required to demonstrate that the members of any group are placed in imminent danger by the speech in question or that the speech has any social consequences whatsoever beyond the public expression of hateful views that may be based on falsehoods and ill will. Again, it is content rather than consequences that is the basis for denying such speech constitutional protection.

In 2002 the Canadian parliament passed the Immigration and Refugee Protection Act. Section 34 of this law enables the federal government to deport persons on the grounds that they represent "a danger to the security of Canada." As in the case of s.319 of the Criminal Code, it appears that the content of the accused speech and/or associations with others, regardless of consequences, is deemed sufficient basis for punishment. Indeed, the recent deportation proceeding launched under s.33 of the Immigration and Refugee Act, targeted at neo-Nazi publicist Ernst Zundel, shows that content is precisely the test envisaged under this law.

Judicial Interpretation of Hate Speech

The difference between the Canadian and American approaches to hate speech become starkly evident when one turns to judicial interpretation of how far and in what circumstances the constitutional guarantee of free speech in each country extends to speech that expresses a hateful

message. The key ruling in Canada is the Supreme Court's 1990 decision in R. v. Keegstra. In the United States the decisions in Brandenburg v. Ohio (1969), R.A.V. v. St. Paul (1992), and Wisconsin v. Mitchell (1993) together provide a picture of the Supreme Court's position on hate speech and its relationship to the first amendment. All of these rulings have been examined in great detail by others, so I will limit myself to brief summaries of the judicial interpretation of hate speech in Canada and the United States.

1. Canada

James Keegstra was an Alberta high school teacher who taught his students that the Holocaust was a hoax and that an international Jewish conspiracy pulled much of the world's political, economic and cultural strings. He was charged under s. 319(2) of the Criminal Code. His original conviction by a trial court was overturned by the Alberta Court of Appeal on the grounds that s.319(2) violated the Charter's guarantee of freedom of expression and that this infringement could not be justified under s.1, the reasonable limits clause of the Charter. The Supreme Court of Canada disagreed and, on appeal, upheld Keegstra's original conviction and the constitutionality of s 319(2) of the Criminal Code.

In a 4 to 3 ruling, the majority on Canada's highest court held that the content of speech, in and of itself, could be considered so offensive as to place it outside the protection of s.2 of the Charter. They reasoned that the "pain suffered by target group members," Canada's "international commitments to eradicate hate propaganda," "Canada's commitment to the values of equality and multiculturalism in ss.15 and 27 of the Charter," and "our historical knowledge of the potentially catastrophic effects of the promotion of hatred" combined to make s. 319(2) of the Criminal Code a reasonable limit on freedom of expression.

The majority's ruling in Keegstra paid virtually no attention to the question of whether the messages communicated by the accused placed anyone or any group of persons in imminent peril. Such a test was considered to be wholly unnecessary. Instead, the majority accepted the argument that some speech is quite simply inconsistent with the sort of society that Canada is or ought to be and therefore should not be tolerated by law and protected by the constitution. Here is what the court said:

There is obviously a rational connection between the prohibition of hate propaganda and the objective of protecting target group members and of fostering harmonious social relations in a community dedicated to equality and multiculturalism. Section 319(2) serves to illustrate to the public the severe reprobation with which society holds messages of hate directed towards racial and religious groups. It makes that kind of expression less attractive and hence decreases acceptance of its content. Section 319(20) is also a measure by which the values beneficial to a free and democratic society in particular, the value of equality and the worth and dignity of each human person can be publicized…

Hate propaganda contributes little to the aspirations of Canadians or Canada in either the quest for truth, the promotion of individual self-development of the protection and fostering of a vibrant democracy where the participation of all individuals is accepted and encouraged… Consequently, the suppression of hate propaganda represents impairment of the individual's freedom of expression which is not of a most serious nature…

Indeed, one may quite plausibly contend that it is through rejecting hate propaganda that the state can best encourage the protection of values central to freedom of expression, while simultaneously demonstrating dislike for the vision forwarded by hate-mongers. In this regard,

the reaction to various types of expression by a democratic government may be perceived as meaningful expression on behalf of the vast majority of citizens.[3]

Writing on behalf of the majority, Justice Dickson stated that *"The main argument of those who would strike down s. 319(2) is that it creates a real possibility of punishing expression that is not hate propaganda,"*[4] and thus the prohibition is overbroad. This claim is not exactly true. Canadian civil libertarians like Edward Greenspan object to Canada's hate speech law on the grounds that the content of speech should never be the test of whether it deserves constitutional protection. Offensive, insulting and hurtful speech, including speech whose content can be demonstrated to be false, is not, these critics say, less deserving of constitutional protection. *"But the prevailing view today,"* Greenspan observes, *"is that people who hold wrong and hurtful opinions should be punished for the good of society."* Canada's hate speech law creates, he argues, *"a social right not to be offended. Words that wound, or 'assaultive speech' are now the subject of a social imperative in Canada and a crime"*[5]

The dissenting opinion in Keegstra argued that s. 319(2) of the Criminal Code should be considered unconstitutional on several grounds. *"[S]tatements promoting hatred are not akin to threats or violence"*[6] said Justice McLaughlin, thereby indicating that some standard of imminent danger or plausible peril experienced by the targets of the statements should be used in determining whether they fall into the category of constitutionally protected speech. The dissenting opinion also rejected the view that, at least in the case of hate speech, freedom of expression is legitimately restricted in order to protect and promote the Charter values of equality and multiculturalism. Third, McLaughlin and her colleagues maintained *"that [freedom of expression] does not protect only justified or meritorious expression…If a guarantee of free expression is to be meaningful, it must protect expression which challenges even the very basic conceptions about our society."*[7] Finally, and related to the previous point, the dissenting opinion argued that Canada's hate law amounted to a form of censorship. Although the Criminal Code's prohibition against hate speech excludes "private conversations"—when does a private communication become a public one?—McLaughlin argued that the vagueness of the ban on hate speech *"may have a chilling effect on legitimate activities important to our society by subjecting innocent persons to constraints born out of a fear of the criminal process."*[8]

This dissent sounds, in fact, very much like the objections that the United States Supreme Court has raised to laws that attempt to limit speech based on content. Let us now turn to the American jurisprudence on this question.

2. United States

The case of Brandenburg v. Ohio (1969), which established the imminent danger test, is still the cornerstone decision for an understanding of when hate speech loses the protection of the First Amendment. Clarence Brandenburg, a Ku Klux Klan leader, made what some considered to be incendiary statements at a Klan rally. He was charged under an Ohio state statute, but his conviction was overturned on appeal to the Supreme Court. The court ruled that only speech that poses an imminent danger of unlawful action, where the speaker has the intention to incite such action and there is the likelihood that this will be the consequence of his or her speech, may be restricted and punished by law. The content of the speech, even when that content involves the advocacy of the use of force or violating the law, is not a permissible basis for denying First Amendment protection to speech.

The issue of content-based restrictions arose again in the case of R.A.V. v. St. Paul (1992). A group of teenagers had erected a cross in the yard of a black family, setting it aflame in a gesture evocative of the racist intimidation practiced by the KKK over its history. The accused was

charged under the St. Paul's Bias-Motivated Crime Ordinance, which banned the display on public and private property of a symbol "which one knows or has reasonable grounds to know arouses anger, alarm or resentment in others on the basis of race, colour, creed, religion or gender." A burning cross was specifically mentioned in the ordinance as a prohibited symbol.

In its ruling the court acknowledge that a few categories of speech, including obscenity, defamation, and fighting words, could be denied First Amendment protection based on their content. But even in these instances, said the court, *"government may not regulate them based on hostility, or favouritism, towards a non-proscribable message they contain."***[9]** Hate speech, whether motivated by racism or some other prejudice, sentiment or ideology, does not involve a proscribable message unless and until it shades into the category of fighting words or is intended and is likely to have as its consequence unlawful action. The court's reasoning was as follows:

The reason why fighting words are categorically excluded from the protection of the First Amendment is not that their content communicates any particular idea, but that their content embodies a particularly intolerable (and socially unnecessary) mode of expressing whatever idea the speaker wishes to convey. St. Paul has not singled out an especially offensive mode of expression – it has not, for example, selected for prohibition only those fighting words that communicate ideas in a threatening (as opposed to a merely obnoxious) manner. Rather, it has proscribed fighting [505 U.S. 377, 394] words of whatever manner that communicate messages of racial, gender, or religious intolerance. Selectivity of this sort creates the possibility that the city is seeking to handicap the expression of particular ideas.[10]

The spirit of the ordinance that was ruled unconstitutional in R.A.V. v. St. Paul is, of course, virtually identical to that which is embodied in s. 319(2) of Canada's Criminal Code. But unlike Canada's highest court, the United States Supreme Court has taken the position that free speech is so central to the constitution and American democracy that its exercise cannot be denied to those who say nasty, offensive, hateful things unless it appears likely that their speech will lead to unlawful action. "Let there be no mistake about our belief that burning a cross in someone's front yard is reprehensible," said the court, *"But [government] has sufficient means at its disposal to prevent such behaviour without adding the First Amendment to the fire."***[11]**

In Wisconsin v. Mitchell (1993) the Supreme Court reiterated the line of reasoning found in the R.A.V. v. St. Paul ruling, in a case involving a state law that provided for additional punishment for crimes where bias appeared to be a motivating factor. Mitchell instigated an attack by a group of young black males on a young white male after having seen a movie in which white males attack a praying black male because of his race. Mitchell's lawyer argued that the penalty-enhancement provision of Wisconsin's criminal law involved a violation of free speech and could have a "chilling effect" on freedom of expression. The United States Supreme Court rejected these arguments on the grounds that *"physical assault is not, by any stretch of the imagination, expressive conduct protected by the First Amendment."***[12]** This fact made the singling out of bias- and hate-based motivation in the Mitchell case different from the law in question in the case of R.A.V. v. St. Paul, where that law was aimed at content, not action, expression, not assault. The ruling in Wisconsin v. Mitchell is worth noting here because it makes clear that hateful and biased motivation can be punished in the United States, but the *mere* expression of hatred and bias may not.

Two Rights Cultures

As the preceding cases show, judges in Canada and the United States have taken significantly different approaches toward hate speech and its relationship to the guarantee of freedom of

expression found in the Charter and the First Amendment, respectively. That difference boils down to this: content-based restrictions on free speech are not, on that basis alone, constitutional in the United States, but some content-based restrictions are constitutional in Canada. The doctrine of preferred position clearly is reflected in American courts' willingness to extend First Amendment protection to undeniably hateful messages that, in Canada, would be considered criminal violations of s. 319 of the Criminal Code. Canadian courts have never taken the position that freedom of expression should be elevated over other democratic rights and freedoms, whether these are explicitly set down in the Charter or are part of what the Supreme Court has called Canada's normative "constitutional architecture."

It is clear, therefore, that entrenching the guarantee of freedom of expression in the Charter has not resulted in an Americanisation of Canadian rights jurisprudence and rights culture, at least where hate speech is concerned. The rulings of the Supreme Court and lesser Canadian courts on cases brought under the hate speech provisions of the criminal code reflect what some have called Canadians' more positive conception of freedom, whereby freedom is thought of as a social product that may require state action. This has often been contrasted by thinkers like the Canadian philosopher Charles Taylor to the more American notion of freedom as the absence of constraint, a negative conception of freedom that does not require state regulation and which, necessarily, would be interfered with by state action.[13]

When it comes to so-called hate speech and the toleration of what most would consider to be offensive and socially unacceptable views, it is clear that Canada remains, as Seymour Martin Lipset has long argued[14], a society less solicitous toward individual freedom and more oriented toward the protection and promotion of group rights and identities, and social order. (Some will, of course, object to this characterization, pointing to the restrictions on individual rights and freedoms that the United States Patriot Act imposes in the name of national security considerations. I would respond that national security and terrorism concerns of the sort that have emerged since September 11, 2001, tilt the freedom/social stability balance in a way that does not fairly reflect the importance attached to the core beliefs and values that appear to be diminished in the face of such challenges.)

The recent cases of David Ahenakew, a Saskatchewan Native leader charged under s. 319(b) of the Criminal Code for public utterance of anti-Semitic remarks, and Ernst Zundel, a white supremacist who in May 2003 became the subject of a deportation process launched under Canada's Immigration and Refugee Protection Act, illustrate this difference. Ahenakew's expressed sympathy for Hitler and the extermination of millions of European Jews and his public statements professing his belief that a Jewish conspiracy controls the world's banks and media, could in no way be reasonably construed as having potential consequences beyond their affront to mainstream Canadian values and the more personal offence experienced by Jews who read or hear such statements. The decision to prosecute Ahenakew under s. 319(b) of the criminal code sends a very visible message that the expression of certain hateful views will not be tolerated in Canada. The 2002 conviction of Matthew Charles Duncan, a New Brunswick man who set a cross on fire on the lawn of a black family, and the conviction of Mark Harding, a preacher who in 1997 claimed that Muslims were "raging wolves" whose goal was to devour Toronto's inhabitants, are also instances where the content of the speech, rather than any serious fear of actual consequences flowing from these two instances of hate speech, was punished.

In the case of the Zundel deportation proceeding, the public summaries submitted by the Solicitor-General and the Canadian Security Intelligence Service to the Federal Court of Canada in May 2003 sought to justify Zundel's deportation as a risk to national security. This claim relied on arguments that his activities represented attempts to *"destroy the multicultural fabric and underpinnings of Canadian society"* and that Zundel has, over the years, maintained contact with notorious white supremacists whose ideas are thought to have inspired Timothy McVeigh,

the Oklahoma City bomber. *"To comprehend the threat Zundel represents to the security of Canada,"* says the CSIS submission to the court, *"his activities must be assessed in the context of the hostile white supremacist environments in which he predominates."*[15] But in neither the CSIS or the Solicitor-General's submission is any evidence presented, nor is it claimed, that Zundel has engaged in acts of violence, directly encouraged such acts, or engaged in criminal behaviour beyond violations of the spirit and letter of s. 319(b) of the Criminal Code, which bans certain types of offensive and offensive speech. (It is possible, however, that evidence relating to Zundel's actions as distinct from his ideas was presented during the closed-door hearings by the court. This is unlikely given that the Federal government's public summary of the case against him conceded that Zundel "has virtually no history of direct personal engagement in acts of serious violence," but that "His *status* [my emphasis] is such that adherents are inspired to actuate his ideology."[16]

Conclusion

I began this paper by arguing that the Charter and its interpretation by Canadian courts has not produced an appreciable Americanisation of Canada's rights culture. That it has provided the basis for much more rights talk than existed previously is undeniable. That the Charter has significantly changed the venues and strategies that groups rely on in struggling to get their preferences embodied in policy is apparent to all. And that the role of the courts in the political process has been elevated and judges have assumed a much more activist role in relation to policy are obvious. But all of this amounts to Americanisation of the form and process of politics. This is not unimportant, but it should not be confused with or mistaken for a convergence in the political values and beliefs of Canadians and Americans.

When it comes to the interpretation of the values embodied in the Charter and the rights talk that takes place before Canadian courts concerning these values, there is much less evidence that Canadian politics has become Americanised during the Charter ear. This, at least, is the conclusion that must be reached based on Canadian courts' treatment of Canada's hate speech law. A broader comparison of Canadian and American judicial interpretation of rights and freedoms would almost certainly show that the case of hate speech is not isolated and anomalous, but instead is part of a broader pattern of difference in the rights cultures of the two countries. Christopher Manfredi's book, *Judicial Power and the Charter*,[17] represents a good beginning in the direction of just such a comparison.

In arriving at my conclusion I am mindful of a rather sound methodological maxim: "narrow comparison brings out dissimilarities, and broad comparison brings out similarities."[18] The preceding analysis has involved a narrow comparison and thus the differences that I attribute to the Canadian and American rights cultures may well be magnified here beyond their true dimensions. But even if these differences have been overstated, the fact that embedding constitutional protection for free speech in Canada's constitution has not led to convergence between the Canadian and American approaches to hate speech should give pause to those who talk loosely about the Americanisation of Canada's political culture.

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[1] *The Economist*, "Cool Canada," 27 September 2003, 13

[2] F. L. Morton and Rainer Knopff, *The Charter Revolution and the Court Party* (Peterborough, Ontario: Broadview Press, 2000)

[3] *R. v Keegstra*, 3 SCR 697 (1990)

[4] *R. v. Keegstra*, 3 SCR 697 (1990)

[5] Edward Greenspan, "Don't criminalize words that wound," *National Post*, 13 June 2003, A14

[6] *R. v. Keegstra*, 3 SCR 697 (1990).

[7] *R. v. Keegstra*, 3 SCR 697 (1990).

[8] *R. v. Keegstra*, 3 SCR 697 (1990).

[9] *R.A.V. v. St. Paul*, 505 U.S. 377 (1992)

[10] *R.A.V. v. St. Paul*, 505 U.S. 377 (1992)

[11] *R.A.V. v. St. Paul*, 505 U.S. 377 (1992)

[12] *Wisconsin v. Mitchell*, 508 U.S. 476 (1993)

[13] Charles Taylor, *Philosophy and the Human Sciences* (New York: Cambridge University Press, 1985), particularly the chapters entitled "Atomism", 187-210 and "What's wrong with negative liberty?" 211-229

[14] Seymour Martin Lipset, *Continental Divide: The Values and Institutions of the United States and Canada* (New York: Routledge, 1990)

[15] Quoted in "Zundel a treat to Canada's multiculturalism, CSIS argues," *National Post*, 8 May 2003, A4

[16] Quoted in "Zundel a treat to Canada's multiculturalism, CSIS argues," *National Post*, 8 May 2003, A4

[17] Christopher Manfredi, *Judicial Power and the Charter: Canada and the Paradox of Liberal Constitutionalism*, 2nd ed. (Toronto: Oxford University Press, 2001).

[18] Marcus Cunliffe, "New World, Old World: The Historical Antithesis," in Richard Rose, ed., *Lessons from America* (London: Macmillan, 1974), 45