

FREEDOM OF EXPRESSION OR FREEDOM FROM HATE: A CANADIAN PERSPECTIVE

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Bauer Lecture
October 19, 2017

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David Rudenstine, who came up with the topic of “Freedom of Expression or Freedom from Hate,” gave me a wonderful area to research and think about for the Bauer Lecture, especially in today’s environment.¹ It provided me with a chance to explore comparative law, history, legal and political theory, and my own assumptions. And all this in the shadow of my increasing anxiety. Why anxiety? Because I worry about social fragmentation. Relatedly, I worry about how speech seems to have become America’s new religion. Anything goes. Combine this rhetorical anarchy with everyone’s constitutionally protected right to have a gun and we begin to see what, for me, are the contours of a crisis.

The lecture is in five parts: (1) characterizing rights; (2) the current social context; (3) a detour into press freedom because it is much on my mind these days; (4) a backgrounder on Canada’s constitutional interpretation of rights in general and freedom of expression in particular; and finally, (5) hate speech through Canadian and, comparatively, American eyes.

I want to start our conversation by suggesting that even though the word “rights” is usually thought of as an organic whole, I see it as binary. To me, there are two kinds of rights: human rights and civil liberties. Unless we understand the difference between them we cannot really understand why Canada’s approach is different from America’s,

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¹ I am grateful to my law clerks, Samuel Greene and Mark Strychar-Bodnar, for their research assistance.

why there is so much confusion about freedom of expression, or why there is so much tension between those who claim a right to express themselves any way they want and those who claim a right to be free from the slings and arrows of outrageous denigration. The extremes on one side seek unrestricted rhetorical flights; those on the other extreme seek restriction on rhetorical slights.

As a Canadian, I find somewhat problematic the view that unrestricted speech should be protected in the name of everyone's right to speak, regardless of content, on the theory that the answer to bad speech is good speech, and that the exchange of ideas, good with bad, is at the core of democratic discourse.

To me, this completely ignores the fact that not all speech is equal. Sometimes vitriolic speech *silences* those it targets, especially if they are vulnerable, with the result that far from promoting healthy democratic conversations, it results in promoting toxic monologues.

On the other hand, I accept that some comments can be offensive without attracting a legal duty to refrain.

This brings us to the heart of the issue: where and when do you draw the lines? That depends.

Let me illustrate with a metaphor whose meaning I can paraphrase as follows: "I may not know what good speech is, but I know it when I see it." The play *Art*, by Yasmina Reza, is about three close male friends and what happens to their relationship when one of them, Serge, spends \$200,000 on a painting.² The painting is white, with fine diagonal lines. Serge's oldest friend, Marc, is astonished by the purchase. He sees nothing of merit in it, and is offended by Serge's devotion to what seems to him to be a ridiculous purchase. The third friend, Yvan, does not understand the painting, but does not mind it either, thereby annoying Marc. The relationship between the three men unravels over the meaning and worth of the painting, and each of them stakes their pride on their point of view. They are simply unable to persuade each other of the value of their respective opinions.

On the tensest evening in the course of this dispute, Yvan's solipsistic hysteria over his pending wedding distracts Serge and Marc from their animosity towards each other and unites them in laughter at Yvan's hyperbolic behavior. The tension is broken when Serge suddenly throws Marc a blue felt pen and invites him to draw on the painting.

² YASMINA REZA, *ART* (C. Hampton trans., Faber, Straus and Giroux ed. 1996).

Marc cautiously approaches the painting, and slowly draws a little skier with a woolly hat along one of the diagonal white lines. Yvan is stunned.

Serge's act in permitting Marc to deface the painting proved to Marc that Serge considered their friendship to be more important than the painting, and the two friends recommitted themselves to rebuilding their relationship. Together, they survey the painting calmly, wash the skier off the painting, and then decide to go for dinner. As the play ends, Marc stands in front of the picture willing to see it differently now. Here are his closing words as he stares at the white canvas:

Under the white clouds, the snow is falling.

You can't see the white clouds, or the snow.

Or the cold, or the white glow of the earth.

A solitary man glides downhill on his skis.

The snow is falling.

It falls until the man disappears back into the landscape.

My friend Serge, who's one of my oldest friends, has bought a painting.

It's a canvas about five foot by four.

It represents a man who moves across a space and disappears.³

That white canvas is "speech." Different people see different things in it and approach the canvas in different ways: some see the lines clearly, some see only a big white canvas with no lines at all. That's what makes this topic so fascinating. And it is also what makes it so urgent. Unless we figure out what we want to be able to say *to*, and to hear *from*, one another, we will keep spinning farther and farther apart. And that, to me, is the irony—unless we have some lines or limits, we give our seal of approval to deeper polarization.

Let us go back to what I suggest is the first framework for understanding freedom of expression and why I think it needs some limits to preserve its legal integrity: the difference between civil liberties and human rights.

"Civil liberties" is about treating everyone the same; "human rights" is about acknowledging people's differences so that they can be

³ *Id.* at 63.

treated as equals. Civil liberties is only about the individual; human rights is about how individuals are treated because they are part of a group. Civil liberties is a concept of rights that requires the state *not* to interfere with our liberties; human rights, on the other hand, cannot be realized *without* the state's intervention.

But we have to start at the beginning of the story. The rights story in North America, like many of our legal stories, started in England. The rampant, religious, feudal, and monarchical repression in seventeenth century England inspired new political philosophies like those of Hobbes, Locke, and eventually John Stuart Mill, philosophies protecting individuals from having their freedoms interfered with by governments.⁴ These were the theories of civil liberties which came to dominate the "rights" discussion for the last 300 years. They were also the theories which journeyed across the Atlantic Ocean and found themselves firmly planted in American soil, receiving confirmation in the Declaration of Independence, guaranteeing that every "man" enjoyed the right to life, liberty, and the pursuit of happiness, and that the government existed only to bring about the best conditions for the preservation of those rights. Thus was born the essence of social justice for *Americans*—the belief that every American had the same right as every other American to be free from government intervention. To be equal was to have this same right. No differences.

Unlike the United States, we in Canada were never concerned only with the rights of individuals. Our historical roots involved as well constitutional appreciation that the two cultural groups at the constitutional bargaining table, the French and the English, could remain distinct and unassimilated, and yet theoretically of equal worth and entitlement. That is, unlike in the United States, whose individualism promoted assimilation, we in Canada have always conceded that the right to integrate, based on differences, has as much legal and political integrity as the right to assimilate. This, I think, is the key to understanding Canada's approach to hate speech.

Where for others pluralism and diversity are fragmenting magnets, for Canadians they are unifying. Where for others assimilation is the

⁴ THOMAS HOBBS, *LEVIATHAN: OR THE MATTER, FORME & POWER OF A COMMON-WEALTH ECCLESIASTICALL AND CIVIL* (Ian Shapiro ed., Yale University Press 2010) (1651); JOHN LOCKE, *TWO TREATISES OF GOVERNMENT* (New York: Legal Classics Library 1994) (1690); JOHN STUART MILL, *ON LIBERTY* (Elizabeth Rapaport ed., Hackett Publishing Co. 1978) (1859).

social goal, for us it represents the inequitable obliteration of the identities that define us. Where for others treating everyone the same is the dominant governing principle, for us it takes its place alongside the principle that treating everyone the same can result in ignoring the differences that need to be respected if we are to be a truly inclusive society.

Integration based on differences, equality based on inclusion despite difference, and compassion based on respect and fairness. These are the principles that to me form the moral core of Canada's national values, and the values that make us the most successful practitioner of multiculturalism in the world.

In any event, the individualism at the core of the civil libertarian political philosophy of rights articulated in the American constitution, became America's most significant international export and the exclusive rights barometer for countries in the western world.

Until 1945. That was when we came to the realization that, having chained ourselves to the pedestal of the individual, we had been ignoring rights abuses of a fundamentally different kind; namely, the rights of individuals in different groups to retain their different identities . . . without fear of the loss of life, liberty, or the pursuit of happiness.

It was the horrifying spectacle of *group* destruction in the Second World War which jolted us, a spectacle so far removed from what we thought were the limits of rights violations in civilized societies, that we found our entire vocabulary and remedial arsenal inadequate. We were left with no moral alternative but to acknowledge that individuals could be denied rights not *in spite of* but *because of* their differences, and started to formulate ways to protect the rights of the group in addition to those of the individual.

We had, in short, come to see the brutal role of discrimination, a word we had never and could never use in a concept like civil rights, that permitted no different treatment—because everyone was supposed to be treated the same—and invented the term “human rights” to confront it. We clothed governments with the authority to devise remedies to prevent arbitrary harm based on race, or religion, or gender, or ethnicity, and we respected government's new right to treat us differently to redress the abuses our differences attracted. So we blasted away at the conceptual wall that had kept us from understanding the inhibiting role group differences played and extended the prospect of full socio-economic participation to women, non-whites, indigenous

peoples, persons with disabilities, and those with different sexual identities. And, most significantly, we offered this full participation and accommodation *based on* and notwithstanding group differences.

We came to understand that not all rights are created equal. Some are more equal than others. Yelling “fire” in a crowded theatre⁵ is fundamentally different from yelling “theatre” in a crowded fire station; teaching Holocaust denial is different from teaching about the Holocaust; and promoting racist, sexist, or homophobic ideas is different from promoting diversity.

Civil liberties had given us the universal right to be equally free from an intrusive state, regardless of group identity; human rights had given us the universal right to be equally free from discrimination *based on* group identity. We need both.

How do they intersect in freedom of expression? The intersection occurs when freedom of expression, a core civil liberties right, crosses paths with discrimination, the core of human rights. It is the conceptual battle of the constitutional titans.

This brings me to the social context for any discussion on freedom of expression, a context in which I see a retreat from our human rights victories in too many parts of the world.

What we appeared to do, having watched the dazzling success of so many individuals in so many of the groups we had previously excluded, is conclude that the battle with discrimination had been won and that we could, as victors, remove our human rights from the social battlefield. Having seen women elected, appointed, promoted, and educated in droves; having seen the winds of progress blow away segregation and apartheid; having permitted parades to demonstrate gay and lesbian pride; having constructed hundreds of ramps for persons with disabilities, many were no longer persuaded that the diversity theory of rights was any longer relevant, and sought to return to the simpler rights theory in which everyone was treated the same. So we started to dismissively call a differences-based approach political correctness, or an insult to the goodwill of the majority and to the talents of minorities, or a violation of the merit principle.

Somehow, we let those who had enough, say “enough is enough,” allowing them to set the agenda while they accused everyone else of having an “agenda,” and leaving millions wondering where the human

⁵ See *Schenck v. United States*, 249 U.S. 47, 52 (1919) (“The most stringent protection of free speech would not protect a man in falsely shouting fire in a theater . . .”).

rights they were promised are, and why so many who already had them thought the rest of the country did not need them.

The essence of their message was that there was an anti-democratic, socially hazardous turbulence in the air, most notably during media and judicial flights. So here we now are, trapped in a frenetically fluid, intellectually sclerotic, rhetorically tempestuous, ideologically polarized, and economically narcissistic discourse that I see outside my country's borders. The discourse includes, notably, an intense verbal whirlpool about judges, the press, democracy, and rights, a conversation in which loaded phrases are perpetually spun and important concepts are conveniently disregarded. The most basic of the central concepts we need back in the conversation is that democracy is not—and never will be—just about the wishes of the majority. What pumps oxygen no less forcefully through vibrant democratic veins is the protection of rights, through courts, *notwithstanding* the wishes of the majority.

The critics made their arguments against the media and courts skillfully. They called the good news of an independent judiciary the bad news of judicial autocracy. They called minorities seeking the right to be free from discrimination special interest groups seeking to jump the queue. They called efforts to reverse discrimination “reverse discrimination.” They trumpeted the rights of the majority and ignored the fact that minorities are people who want rights too. They said courts should only interpret, not make law, thereby ignoring the entire history of common law. They called advocates for equality and human rights “biased,” and defenders of the status quo “impartial.” They claimed a monopoly on truth, frequently used invectives to assert it, then accused their detractors of personalizing the debate, thereby proving, to paraphrase Martin Luther King, that the arc of the moral universe may be long, but it decidedly and increasingly does not always bend towards justice.

That is why I think we have to think hard, not only about people's rights in general, but about how we approach freedom of expression.

But before I get into Canada's approach to the constitutional interpretation of freedom of expression and, in particular, hate speech, I want to put in a plug for remembering how important it is to protect the expressive rights of the press, and why, although Canada restricts some expression in the name of freedom from expression, as you will hear later in this lecture, it gives an independent and diverse press, who are protected under our constitutional freedom of expression guarantee, a

wide berth. In our view, unless the press is protected in being able to do its job properly, the values underlying free speech are at risk.

This past March, the U.N. Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression issued a declaration expressing concern about “the dissemination of knowingly or recklessly false statements by official or State actors.”⁶ Are we really there again? I’m old enough to remember when Ron Ziegler, the Nixon press secretary who once referred to the Watergate break-in as a “third rate burglary,”⁷ launched specific, targeted attacks from the briefing room against the journalists writing about Watergate. He criticized the Washington Post and its reporters by name, accusing them of “shabby journalism” and “a blatant effort at character assassination.”⁸ Ziegler attacked the Post so aggressively that when the full scope of the Watergate story came out he felt compelled to make a public apology.⁹ But before the story broke wide open, Bob Woodward and Carl Bernstein wrote in *All The President’s Men* that they were far from sure that the war between the Post and the White House was one they would win.¹⁰ And this despite the fact that the Supreme Court had just vindicated—robustly—the press’ First Amendment right to publish the Pentagon Papers, a story we know well from David Rudenstine’s brilliant book, *The Day the Presses Stopped*.¹¹

The Nixon administration had obtained injunctions on national security grounds against, among others, the New York Times.¹² The

⁶ Joint Declaration from David Kaye the United Nations Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression, (Mar. 3, 2017), <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=21287&LangID=E> [<https://perma.cc/HH4D-EGHV>].

⁷ Stephanie Mansfield, *Ron Ziegler: The Loyalists and the Lobbyist*, WASH. POST (Feb. 17, 1981), https://www.washingtonpost.com/archive/lifestyle/1981/02/17/ron-ziegler-the-loyalists-and-the-lobbyist/a326891d-5672-4d3f-8215-8939e6bf8b67/?utm_term=.2a7bead3359a [<https://perma.cc/8ZSB-MH38>].

⁸ Robert B. Semplir Jr., *The 1972 Campaign*, N.Y. TIMES (Oct. 26, 1972), <https://www.nytimes.com/1972/10/26/archives/ziegler-denies-an-article-linking-haldeman-to-fund-angrily-rebukes.html> [<https://perma.cc/K83C-HHXT>].

⁹ *Ziegler Apologizes to Washington Post on Watergate*, N.Y. TIMES (May 2, 1973), <http://www.nytimes.com/1973/05/02/archives/ziegler-apologizes-to-washington-post-on-watergate.html?mcubz=3> [<https://perma.cc/9GNX-TEJ9>].

¹⁰ BOB WOODWARD & CARL BERNSTEIN, *ALL THE PRESIDENT’S MEN* (1974).

¹¹ DAVID RUDENSTINE, *THE DAY THE PRESSES STOPPED: A HISTORY OF THE PENTAGON PAPERS CASE* (1996).

¹² *United States v. New York Times Co.*, 444 F.2d 544 (2d Cir. 1971) (en banc), *rev’d*, 403 U.S. 713 (1971).

press appealed. The Supreme Court held that the government failed to meet its “heavy burden” to displace the presumption that prior restraints on expression are constitutionally invalid.¹³ There were multiple concurrences, but I found Justice Black’s words particularly memorable:

In the First Amendment the Founding Fathers gave the free press the protection it must have to fulfill its essential role in our democracy. The press was to serve the governed, not the governors. The Government’s power to censor the press was abolished so that the press would remain forever free to censure the Government. The press was protected so that it could bare the secrets of government and inform the people. Only a free and unrestrained press can effectively expose deception in government.¹⁴

As were Brennan’s in *New York Times v. Sullivan*, when he said that the Constitution must provide “breathing space” for media criticism of public officials because “debate on public issues should be uninhibited, robust, and wide-open.”¹⁵

And that is exactly the approach Canada applies, namely, that any coherent, principled approach to freedom of expression must accord a wide and robust sphere of protection for the freedom and independence of the press because the press has a foundational and profound role in shaping how we see the world.

And that, in turn, is why we need, and need to insist on, a responsible, ethical, and independent press, as Lynne Olson and Stanley Cloud in their wonderful book, *The Murrow Boys*, wrote in describing the journalists hired by Edward R. Murrow for CBS during World War II:

¹³ *New York Times Co. v. United States*, 403 U.S. 713, 714 (1971).

¹⁴ *Id.* at 717 (Black, J., concurring).

¹⁵ *New York Times Co. v. Sullivan*, 376 U.S. 254, 270–72 (1964).

They didn't want to sell any ideology or a partisan view or persuade people how to think or vote. They wanted to draw conclusions about the stories they covered and present those conclusions to their listeners. They wanted to be more than conveyors of facts; they wanted to interpret the facts, place them in context, analyze them. They did not believe that all facts, or all ideas or actions, were equal, and in their reports they did not want to pretend they were. Murrow and the Boys weren't stenographers; they were journalists. They wanted, within reason, to make moral, ethical and historical judgments, based on their knowledge and experience, and to share those judgments with the public.¹⁶

As George Gershwin asked, "Who could ask for anything more?"

But Cardozo Law School *has* asked me for more, and what they have asked for is how Canada looks at hate speech.

Canada constitutionalized the protection of rights in 1982 with the *Charter of Rights and Freedoms*.¹⁷ We have civil liberties, like the freedoms of religion, association, and expression;¹⁸ the right to counsel;¹⁹ and the right to security of the person.²⁰ And we have human rights, like equality,²¹ linguistic rights,²² indigenous rights,²³ and multiculturalism.²⁴

¹⁶ STANLEY CLOUD & LYNNE OLSON, *THE MURROW BOYS: PIONEERS ON THE FRONT LINES OF BROADCAST JOURNALISM* 174 (1996).

¹⁷ Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982 *being* Schedule B to the Canada Act, 1982, c.11 (U.K.).

¹⁸ 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.

Id. § 2.

¹⁹ Everyone has the right on arrest or detention

- (a) to be informed promptly of the reasons therefor;
- (b) to retain and instruct counsel without delay and to be informed of that right; and
- (c) to have the validity of the detention determined by way of *habeas corpus* and to be released if the detention is not lawful.

Id. § 10.

²⁰ "Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice." *Id.* § 7.

²¹ Section 15 provides:

We also have section 1, which states that “*The Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such a reasonable limits prescribed by law as can be demonstrably justified in a free democratic society.”²⁵ We call this our proportionality provision, which requires us not only to balance the benefit of the limitation against its harm to the right in question, but it is an exhortation to look at other “free and democratic” societies to see how they protect and limit rights.²⁶ And that direction, by the way, helps explain why Canadian courts embrace comparative and international law without the slightest hesitation.²⁷

So what Canada got with the *Charter* was a dramatic package of guaranteed rights, subject only to those reasonable limits that were demonstrably justified in a free and democratic society.

The foundational cases interpreting the *Charter* adopted a “generous” interpretation of the rights it established so that it could be a robust remedial instrument and a steady guarantor of rights protection, an interpretation that was “capable of growth and development over time to meet new social, political and historical realities often unimagined by its framers.”²⁸

(1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

(2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

Id. § 15.

²² “English and French are the official languages of Canada and have equality of status and equal rights and privileges as to their use in all institutions of the Parliament and government of Canada.” *Id.* §16.

²³ “The guarantee in this Charter of certain rights and freedoms shall not be construed so as to abrogate or derogate from any aboriginal, treaty or other rights or freedoms that pertain to the aboriginal people of Canada . . .” *Id.* § 25.

²⁴ “This Charter shall be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians.” *Id.* § 27.

²⁵ *Id.* § 1.

²⁶ *Id.*

²⁷ See, e.g., *Saskatchewan Federation of Labour v. Saskatchewan*, [2015] 1 S.C.R. 245, ¶ 71; *R. v. Hape*, [2007] 2 S.C.R. 292, ¶ 55; *Slaight Commc’ns Inc. v. Davidson*, [1989] 1 S.C.R. 1038, 1056–57.

²⁸ *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145, 155.

All of this flowed from Lord Sankey's admonition to the Canadian Supreme Court in 1929 that the word "persons" in the Constitution included women: "The *British North American Act* planted in Canada a living tree capable of growth and expansion Their Lordships do not conceive it to be the duty of this Board—it is certainly not their desire—to cut down the provisions of the Act by a narrow and technical construction, but rather to give it a large and liberal interpretation."²⁹ And the "living tree" has been our guiding constitutional interpretive approach ever since.

Freedom of expression, the right we are exploring in this lecture, is found in section 2(b). It says that everyone has the right to freedom of thought, belief, opinion and expression, including freedom of the press and media. When you combine this right with section 1, it means that, in Canada, a limitation on freedom of expression will only pass constitutional scrutiny if it is a "reasonable limit[]" that can be "demonstrably justified in a free and democratic society."³⁰ What does that mean?

In its first proportionality case, the Supreme Court of Canada said the purpose of proportionality was to protect Canada's democratic values, which it identified as:

[R]espect for the inherent dignity of the human person, commitment to social justice and equality, accommodation of a wide variety of beliefs, respect for cultural and group identity, and faith in social and political institutions which enhance the participation of individuals and groups in society.³¹

So, unlike the First Amendment's facially absolutist text, which stipulates that "Congress shall make no law . . . abridging the freedom of speech, or of the press,"³² Canada, like most modern constitutions, has a clause permitting reasonable limitations on the right if those limits are justified and proportional.

The possibility of justifying limitations under a proportionality analysis has had particular impact on the Canadian approach to freedom of expression in a number of important ways. Because finding a breach does not end the analysis, Canadian courts have been willing to

²⁹ *Edwards v. Attorney-Gen. for Can.*, [1930] AC 124, 136 (U.K. PC).

³⁰ Canadian Charter of Rights and Freedoms, *supra* note 17, at § 1.

³¹ *R. v. Oakes*, [1986] 1 S.C.R. 103, 136.

³² Compare U.S. CONST. amend. I, with Canadian Charter of Rights and Freedoms, *supra* note 17, at § 1.

take a very broad view of what types of expression qualify for protection under the *Charter*.³³

Justifying limits on expression under section 1 has also encouraged courts to directly consider the *value* of different forms of expression. While many forms of expression fall within the ambit of section 2(b), the Supreme Court of Canada has affirmed that “not all expression is equally worthy of protection,” “[n]or are all infringements of free expression equally serious.”³⁴ Instead, courts look to how closely the restricted expression relates to the core values underlying freedom of expression—the purposes animating the right—when conducting a proportionality analysis under section 1. The more closely aligned the expression is with those values, the more onerous the state’s burden of justification is.

In its first freedom of expression case, *Irwin Toy Ltd. v. Quebec*, the Supreme Court of Canada outlined three values underlying the freedom of expression guarantee: (1) seeking and attaining the truth; (2) participation in social and political decision-making; and (3) individual self-fulfillment and human flourishing.³⁵ That is the “Why.” Let us now turn to “How” and discuss hate speech.

Canada’s most recent hate speech case is *Saskatchewan (Human Rights Commission) v. Whatcott*.³⁶ William Whatcott, a social conservative activist in Saskatchewan, distributed four different kinds of flyers condemning “homosexuality” in strong language. One attacked same-sex sexual education in schools, alleging that gay and lesbian teachers would share “filth and propaganda” and teach “sodomy” to their students.³⁷ Another suggested that the Bible clearly defines homosexuality as “abomination,” and that Sodom and Gomorrah was “destroyed by God’s wrath” as a result of homosexual “perversion.”³⁸ Two others alleged that “Saskatchewan’s largest gay magazine allows ads for men seeking boys!” and, quoting the Bible, suggested that “if you cause one of these little ones to stumble it would be better that millstone

³³ See, e.g., *Rocket v Royal College of Dental Surgeons*, [1990] 2 S.C.R. 232, 244; *R. v Keegstra*, [1990] 3 S.C.R. 697, 729, 826.

³⁴ *Rocket*, [1990] 2 S.C.R. at 246–257 (citing *Edmonton Journal v. Alberta (Attorney General)*, [1989] 2 S.C.R. 1326, 1351 (Wilson, J., concurring)).

³⁵ *Irwin Toy Ltd. v. Quebec*, [1989] 1 S.C.R. 927, 973–977.

³⁶ *Saskatchewan (Human Rights Commission) v. Whatcott*, [2013] 1 S.C.R. 467.

³⁷ *Whatcott*, 1 S.C.R. at 545.

³⁸ *Id.* at 546.

was tied around your neck and you were cast into the sea.”³⁹

A provincial human rights tribunal ordered Mr. Whatcott to stop distributing the flyers and to pay compensation to those who had filed complaints under section 14 of Saskatchewan Human Rights Code.⁴⁰ Section 14 prohibits publication or display of material “that exposes or tends to expose to hatred, ridicules, belittles or otherwise affronts the dignity of any person or class of persons” on the basis of specified prohibited grounds (including sexual orientation).⁴¹ Mr. Whatcott challenged the constitutionality of that legislation on various grounds, including that it unjustifiably violated freedom of speech.

The Supreme Court of Canada upheld the legislation’s constitutionality. Although the section did breach the freedom of expression guarantee, it did so in a reasonable, justified, and proportionate manner. The objective of preventing the harm to minorities caused by hate speech was sufficiently important to justify limiting freedom of speech, particularly expression of slight social value. On the other hand, that part of the section that prohibited speech that “ridicules, belittles or otherwise affronts the dignity” of a person went too far in curtailing expression.

The Supreme Court of Canada emphasized the importance of Canada’s international commitments to combating racial hatred and discrimination in finding that hate speech laws represented a reasonable limit on freedom of expression.

It is interesting to compare this to the United States Supreme

³⁹ *Id.*

⁴⁰ Saskatchewan Human Rights Code, R.S.S. 1979, c. S-24.1, § 14.

⁴¹ The full text of section 14 states:

(1) No person shall publish or display, or cause or permit to be published or displayed, on any lands or premises or in a newspaper, through a television or radio broadcasting station or any other broadcasting device, or in any printed matter or publication or by means of any other medium that the person owns, controls, distributes or sells, any representation, including any notice, sign, symbol, emblem, article, statement 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 law; or

(b) that exposes or tends to expose to hatred, ridicules, belittles or otherwise affronts the dignity of 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 upon any subject.

Id.

Court's decision in *Snyder v. Phelps*, involving the Westboro Baptist Church.⁴² Fred Phelps, the church's founder, along with several parishioners, picketed the funeral of Matthew Snyder, a marine killed in the line of duty in the Iraq War. Staying off the property of the Catholic church at which the funeral took place, the picketers displayed signs expressing messages like: "God Hates the USA/Thank God for 09/11," "Thank God for Dead Soldiers," and "God Hates Fags."⁴³

While the messages fell "short of refined social and political commentary," the issues they highlighted—the "political and moral conduct of the United States and its citizens"—were, in the Court's view, matters of public importance.⁴⁴ Despite the "incalculable grief" Westboro caused the Snyder family, liability for infliction of emotional distress could not be imposed in this case because it aimed at the content of speech on a public matter, rather than being a content-neutral restriction on the "time, place, or manner" of the speech.⁴⁵ It did not matter that Westboro's activities were "certainly hurtful and its contribution to public discourse may be negligible."⁴⁶

This conception of harm was applied in other U.S. hate speech cases such as *R.A.V. v. City of St. Paul*, where the Court struck down a municipal ordinance banning display of symbols like "a burning cross or Nazi swastika," likely to arouse "anger, alarm or resentment in others on the basis of race, color, creed, religion or gender,"⁴⁷ and *Virginia v. Black*, where the Court held that a ban on cross burning with direct intent to intimidate was constitutional, but struck down a statutory provision establishing that simple proof of burning a cross created a rebuttable presumption of intention to intimidate.⁴⁸ In these and other cases, the Court considered the harm in hate speech to be too remote to justify regulation.

In *Whatcott*, on the other hand, the Supreme Court of Canada rejected the suggestion that hate speech laws should require proof of a close causal connection between speech and harm, concluding:

Such an approach . . . ignores the particularly insidious nature of hate

⁴² 562 U.S. 443 (2011).

⁴³ *Id.* at 448.

⁴⁴ *Id.* at 454.

⁴⁵ *Id.* at 456–57.

⁴⁶ *Id.* at 460.

⁴⁷ *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992).

⁴⁸ *Virginia v. Black*, 538 U.S. 343 (2003).

speech. The end goal of hate speech is to shift the environment from one where harm against vulnerable groups is not tolerated to one where hate speech has created a place where this is either accepted or a blind eye is turned.⁴⁹

Mr. Whatcott had argued that his expression related to moral and political matters and, thus, attracted a high degree of protection under the *Charter*. The Supreme Court of Canada agreed that some of Mr. Whatcott's comments focused on public, political, and moral matters but, unlike the majority in *Phelps*, the analysis did not stop there. Mr. Whatcott was entitled to express his disapproval of homosexual conduct and to advocate for exclusion of such matters from public school curricula. But "words matter," and the law can rightly prohibit his use of "hate-inspiring representations" in the course of expressing those views.⁵⁰

Accepting that hate speech can "marginalize [a] group by affecting its social status and acceptance in the eyes of the majority,"⁵¹ the Court concluded that "[h]ate speech lays the groundwork for later, broad attacks on vulnerable groups. . . . [ranging] from discrimination, to ostracism, segregation, deportation, violence, and, in the most extreme cases, to genocide."⁵²

In *R. v. Keegstra*, an earlier hate speech case about an anti-semitic teacher convicted under a *Criminal Code* provision prohibiting the willful promotion of hatred against an identifiable group, the Canadian Supreme Court, in upholding the constitutionality of the law— notwithstanding Mr. Keegstra's argument that it violated his freedom of expression right—identified two broad categories of harm.⁵³ The first was harm done to members of the targeted group. Hate speech can humiliate and degrade members of minority groups, undermining their "human dignity," "sense of self-worth," and "belonging to the community at large."⁵⁴ The second was the impact of hate speech on society as a whole. Active dissemination of hateful speech "can attract individuals to its cause, and in the process create serious discord

⁴⁹ Saskatchewan (Human Rights Commission) v. Whatcott, [2013] 1 S.C.R. 467, ¶ 131.

⁵⁰ *Id.* ¶ 119.

⁵¹ *Id.* ¶ 80.

⁵² *Id.* ¶ 74.

⁵³ *R. v. Keegstra*, [1990] 3 S.C.R. 697.

⁵⁴ *Id.* at 746.

between various cultural groups.”⁵⁵ Importantly, the alteration of society’s views of minorities “may occur subtly,” and not always consciously.⁵⁶ In the end, those changed views may result in “discrimination, and perhaps even violence, against minority groups.”⁵⁷

Neither of these two categories of harm is recognized under the dominant American approach; both, in fact, would, I think, be considered too remote to justify a restriction on speech.

In *Whatcott* and *Keegstra*, the Canadian Supreme Court also addressed the *value* of the particular speech. In *Keegstra*, the Court said that hate propaganda contributed little to Canadians’ aspirations in the quest for truth, promotion of individual self-development, or in the fostering of a vibrant democracy. Such speech, while protected by section 2(b) of the Charter, strayed a considerable distance from the spirit underlying that guarantee. Consequently, when balancing the state’s objective of preventing harm, against the impact on the Charter-protected interests of the speaker, hate propaganda weighs less heavily. Instead of promoting the search for truth, hate propaganda can, in fact, distort it by intimidating minorities and discouraging them from joining the discussion.

So in the Canadian approach, the key is the *nature* of the speech and its relationship to the values underlying freedom of expression.

In *Phelps*, on the other hand, the majority in the U.S. Supreme Court focused on the need to ensure “that we do not stifle public debate.”⁵⁸ The same theme animated the majority opinions in *R.A.V.* and *Virginia v. Black*. Though not addressing the issue directly, these opinions, it seems to me, rest on the assumption that false or injurious speech will be responded to and overtaken in the “marketplace of ideas.”

By contrast, in *Keegstra* and *Whatcott*, our Court expressed skepticism that publicity and the “marketplace of ideas,” left entirely unregulated, would properly address the challenges posed by hate speech. In *Keegstra*, the Canadian Supreme Court held that “the state should not be the sole arbiter of truth, but neither should we overplay the view that rationality will overcome all falsehoods in the unregulated marketplace of ideas.”⁵⁹ In fact, unbridled hate speech might undermine

⁵⁵ *Id.* at 747.

⁵⁶ *Id.*

⁵⁷ *Id.* at 748.

⁵⁸ *Snyder v. Phelps*, 562 U.S. 443, 461 (2011).

⁵⁹ *Keegstra*, 2 S.C.R. at 762–66.

truly free and open debate. As the Court observed in *Whatcott*, “a common effect of hate speech is to discourage the contribution of the minority” in public discussion.⁶⁰

The Canadian approach has not been to disavow the “marketplace of ideas”—it forms an important part of Canada’s foundational jurisprudence on free expression. But Canada’s approach leaves room for addressing what might be referred to as market failures. The Canadian Supreme Court has left itself open to concluding that the very harms hate speech regulations are aimed at redressing—the shutting down of debate, the marginalization of minorities, the ever-present specter of discrimination, and violence—make the “free market” solution counterproductive. As the Canadian Broadcast Standards Council, a broadcast regulatory body, once said in a decision: “In Canada, we respect freedom of speech, but we do not worship it.”⁶¹

Canada’s pluralist conception of constitutional adjudication can and does accommodate the most robust protections—such as in those defending a free and independent press—while at the same time leaving space for reasonable limits, such as those protecting society from hate.

That, at least, is Canada’s view and, by sheer and happy coincidence, it is also mine.

A concluding story about competing truths. It is taken from a book called *Fragments* written several years ago by a Swiss man then in his mid-fifties.⁶² The book is hopelessly mired in controversy over its authenticity but, even as fiction, it is a powerful lesson about empathy and how we have to see the world as it really is, not how we imagine it to be.

The title of the book comes from the fragments of memories the author recovered with the help of a therapist in recent years. The memories relate to the years he spent, from the ages of four to five, in Polish concentration camps. After the war, when the young boy was ten or eleven years old, he was placed in a foster home in Switzerland. The horror and brutality of the only life he had really known left him totally unprepared for the civility of his new surroundings. School, in

⁶⁰ Saskatchewan (Human Rights Commission) v. *Whatcott*, [2013] 1 S.C.R. 467, ¶ 104.

⁶¹ “CFYI-AM re the *Dr. Laura Schlessinger Show*”, Canadian Broadcast Standards Council, Ontario Regional Council (Decision 99/00-0005, Feb. 9, 2000) and “CJCH-AM re the *Dr. Laura Schlessinger Show*”, Atlantic Regional Council (Decisions 98/99-0808, 1003 and 1137, Feb. 15, 2000), at pp. 2, 6 (per Ron Cohen, Chair), https://www.cbcs.ca/decisionsarchive/19-9900/19-9900-0005&9899-0808+_PD_E.pdf [<https://perma.cc/5DVH-MD63>].

⁶² BENJAMIN WILKOMIRSKI, *FRAGMENTS: MEMORIES OF A WARTIME CHILDHOOD* (1996).

particular, was utterly bewildering. And hence this story about the day he was totally humiliated by his teacher in front of a giggling classroom when he was asked to identify a colored poster of the Swiss hero, William Tell, of whom, of course, he had never heard:

“What do you see here?” [the teacher] asks again.

“Tell! William Tell! The arrow!” they’re calling from all the benches.

“So—what do you see? Describe the picture,” says the teacher, who’s still turned toward me.

I stare in horror at the picture, at this man called Tell . . . and he’s holding a strange weapon and he’s aiming it at a child, and the child’s just standing there, not knowing what’s coming.

I turn away. . . . Why is she showing me this terrible picture? Here in this country, where everyone keeps saying I’m to forget, and that it never happened, I only dreamed it. But they know all about it!

“You’re supposed to be looking at the picture—what do you see?” she asks impatiently, and I make myself look at the picture again.

“I see—I see an SS man,” I say hesitantly, “and he’s shooting at children,” I add quickly.

A gale of laughter in the classroom.

“Quiet,” barks the teacher, then turns back to me,

“I’m sorry—what did you say?” and I can see that she’s getting angry. . . .

“The hero’s shooting the children, but . . .”

“But what?” the teacher says fiercely. “What do you mean?” Her face is turning red.

“. . . But . . . but it’s not normal,” I say, trying not to cry.

“Who or what isn’t normal here?” Now she’s beside herself, and shouting. I force down the lump in my throat and try to concentrate. But I can’t interpret what’s going on. What’s this about? . . .

“It’s not normal, bec—because . . .” I’m stuttering again.

“Because why?” she says loudly.

“Because our block warden said, ‘Bullets are too good for children,’ and bec—bec—because only grown-ups get shot . . . or they go into the

gas. The children get thrown into the fire, or killed by hand—mostly that is.”

... She screeches, losing her composure. ...

“Sit down and stop taking drivel.” ...

I look over at the warden-teacher, standing there shaking with anger, standing there in front of the big blackboard, her hands still on her hips. My eyes begin to smart, and the big blackboard turns watery, gets bigger and bigger until it surrounds the whole classroom and turns into a black sky ...⁶³

This is a story about a child who interprets the world based on what he knows, and a teacher who judges his answers based on what she does *not* know.

We are each limited by what we *do not* know; we are each limited by what *others* do not know. With knowledge comes understanding, with understanding comes courage, and with courage comes justice. And without justice, there is no democracy. For democracy to work, we must never forget how the world looks to those who are vulnerable.

⁶³ *Id.* at 128–30.