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The Harm of Hate Speech: Are Media Responses Knee Jerk, Impulsive and Thoughtless?

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Saskatchewan Human Rights Commission v Whatcott, 2013 SCC 11 (CanLii)

It is difficult to find balanced or thoughtful responses from the media on the subject of hate speech harms or hate speech laws. Oxford Professor Jeremy Waldron, in his book, *The Harm in Hate Speech* writes, "The philosophical arguments about hate speech are knee-jerk, impulsive and thoughtless." This article argues that media responses to hate speech are likewise.

The myriad of furious articles written by editorial writers and journalists after the recent Supreme Court of Canada decision in *Saskatchewan Human Rights Commission v Whatcott* (*Whatcott*), illustrate this. Without a doubt one of the most important decisions to come out of the court in many years, the media failed to see the significance of it beyond their own self-interest in absolute freedom of speech.

The importance of the *Whatcott* decision to the battle against hate groups, terrorist networks, the radicalization of children and youth, and use of the Internet for bullying, cannot be understated. The decision upheld the hate speech provisions of the *Saskatchewan Human Rights Code* on a constitutional challenge as well as finding liability in respect of some anti-homosexual pamphlets. The core legislation was found to be constitutional even though it limited speech rights, and two of the four pamphlets were held to have violated the hate speech prohibitions. The Court affirmed that the prohibition of hate speech is constitutional because of the core Canadian value of equality. It told us that equality is not optional in a free and democratic society.

The media's response, however, from the Globe and Mail and the Toronto Star to the National Post and the Calgary Herald was silent on the harms of hate speech. Instead, the predictable, overheated rhetoric was all about freedom of speech and how it must never be limited by any law, heaven forbid a human rights law. The media's knee-jerk response was to condemn the decision, suggesting the unanimous Court must have lost its collective mind. (For e.g. Andrew Coyne's headline, *Top Court's Ruling in Whatcott case Beyond Belief*, National Post, February 28; Karen Selick's article, *Unworthy of Canada's Highest Court* describing the Court's "absurd thesis" National Post, February 28, 2013; or Robert Teskey in Erosion *of Free Speech*, Ottawa Citizen, March 1, 2013, describing the Court as "sinking to the level of maligned Human Rights Tribunals, while the Calgary Sun's Alan Shanoff asks "Why does the court fear the truth?" Calgary Sun March 10, 2013.)

The problem with the media is that it tends to only look at expressive rights from the very narrow perspective of the speaker or the writer. This is evident in their arguments that proof that people actually hate homosexuals as a result of reading the pamphlets should be required before hate speech can be limited; the marketplace of ideas can take care of hate speech by providing space for competing ideas; that gay rights should not trump the rights of religious Christians to promote a Biblical view of homosexuality; there should be a legal distinction between hating the act of homosexuality and hating homosexuals as people; and the truth and honestly held beliefs should be a complete defense to hate speech.

These arguments allow them to deliberately misunderstand, or at least ignore the competing rights of victims that protect them as they go about their daily lives. It also hobbles their thinking beyond the case itself. One would think that a responsible media, even though they perceive their ox being gored by any limits on speech, would, at the very least, explain to the public what the competing arguments are and their current significance, especially in the light of hate crimes causing harms such as the Boston Marathon bombing, home grown terrorism in Canada, on-line bullying, and the murders or beatings of homosexuals, all engendered and contributed to by hate speech campaigns. In their 2011 hate crime overview, the FBI makes the link when it states, "Why? Not only because hate crime has a devastating impact on families and communities, but also because groups that preach hatred and intolerance plant the seeds of terrorism here in our country" (See here).

"A cross burning is not just an arson"

"A cross burning is not just an arson" are words taken from an article on police bias, (Susan Martin, *Criminology*, Vol 33 Issue 3 pp 303-326.) that underscores the importance of coming to grips with the context of hate speech to know what is really at stake in the hate speech/equality rights debate. If context is ignored, the real problem disappears. This is what happened in this case. The lack of context is palpable in the media's free speech rhetoric condemning the Supreme Court's reasoning. The majority of commentators refuse to acknowledge the systematic theoretical framework and careful calculus developed and successfully applied by the Supreme Court over the past 20 years since the decision in the leading Alberta case of Canada *(Human Rights Commission) v John Ross Taylor and the Western Guard Party*, [1990] 3 SCR 892. This framework is now successfully applied in most free and democratic jurisdictions around the world except in the USA, which is fast becoming a haven for hate speech dissemination because of the lack of laws to regulate it. (See Breckheimer, A Haven for Hate: the Foreign and Domestic Implications of Protecting Internet Hate Speech Under the First Amendment, 75 S Cal L Rev, 1493). By using a deeper and more contextual analysis, the Canadian Supreme Court recognizes that where the speech of one person threatens the rights or safety of another, the rights have to be reconciled.

The starting point for discussion of a fair understanding of the *Whatcott* decision must be the legal context within which the hate speech laws exist, the context of hate speech and the context of discrimination against homosexuals in Canada.

The legal context

As a whole, human rights legislation protects vulnerable groups from the harms of discriminatory or unequal treatment. They primarily apply to employment, accommodation and provision of services. Over the past several decades strides have been made towards equality in reproductive freedoms, sex equality, race equality, pay equity, employment, housing,

immigration, family law, sexual violence, sexual orientation and disability accommodation for women and marginalized groups that would not have occurred except for the protections provided by human rights legislation and the litigation which ensured the protections were honored. Good examples of this in Alberta would be the *Vriend* case, [1998] 1 SCR 493, which required the Alberta government to include homosexuals in its human rights legislation; and employment cases that defined "employment" broadly to protect independent contractors, subcontractors, taxi drivers, army cadets and volunteers from discrimination. Hate speech laws protect vulnerable citizens from other types of discriminatory harm that can range from bullying to terrorism and genocide.

The provincial human rights laws in Canada exist in a much broader framework of national, international and regional human rights treaties under which Canada and all other western democracies, with the exception of the United States, have instituted regulations restricting hate speech. The *Canadian Charter of Rights and Freedoms* as well as all of the conventions, which address the right to freedom of speech, give equal weight to the right of equality. In addition to the jurisprudence of the Canadian Supreme Court and other equivalent Courts around the world, the jurisprudence of the European Court of Human Rights and the UN Committee on the Racial Discrimination Convention support hate speech laws and have not found them to violate free speech rights. The media ignores this context in its predictions that Canada is on the "road to ruin" as a free and democratic nation because of our hate speech laws. This is misleading and demonstrably false.

The context of hate speech

Traditionally, hate groups recruited members and spread extremist messages by word of mouth, or through the distribution of flyers and pamphlets, much like Mr. Whatcott's anti-gay hate campaign in Saskatchewan. The medium of choice of most hate groups today, however, is the Internet. Because of its reach, the Internet allows members of hate groups from all over the world to engage in real-time conversations with each other, encouraging intolerance, violence discrimination and suppression against groups they despise. The Internet has been a windfall for the spread of their messages and their recruitment of new members. Today, according to the FBI, CSIS and other law enforcement agencies and human rights groups, some of the most active hate groups are those targeting younger audiences who in turn, form their own hate groups through social media (see here). See also, Schafer & Navarro, *The seven-stage hate model: The psychopathology of hate groups*. FBI Law Enforcement Bulletin, March 2003) Using Facebook for example, hate page/group creators choose their target, set up a site, and then recruit members. Anyone can create a Facebook group and invite followers to post comments, add pictures and participate in discussion boards that can amount to a form of on-line hate speech. A Facebook page is similar, except one must 'like' the page to become a member. This is exactly the reality teenagers Rehtaeh Parsons and Amanda Todd faced, culminating in their suicides from cyber bullying (see here).

The Simon Wiesenthal Center in its 2009 *iReport*, identified more than 10,000 problematic hate and terrorist websites and other Internet postings that participate in on-line bullying, recruitment and radicalization of youth into hate and terrorist organizations. The report includes hate websites, social networks, blogs, newsgroups, YouTube and other video sites.

A 2011 FBI Law Enforcement bulletin says a hate group, if unimpeded; will in time, commit violent hate crimes. Hate groups initially vocalize their beliefs and later, some inevitably act on them. The report points to a transition period that exists between verbal violence and acting that

violence out, separating hardcore haters from rhetorical haters. Hate speech is thus, a prerequisite of hate crimes and a policy issue of public safety as well as equality. (See Hunter and Heinke, *Perspective Radicalization of Islamist Terrorists in the Western World*, here).

In Canada, a 2011 Senate Report on *Security, Freedom and the Complex Terrorist Threat* (here) found that young people are finding radicalizing material too easily online, including video and audio recordings that could generate emotional urges to react violently to perceived injustices. They recommended the government seek new ways of limiting access to radicalizing material on the Internet and work with committee leaders to respond to messages that glorify violence. The human rights laws respecting hate speech now validated by the *Whatcott* decision could be part of the solution to these serious problems our country is facing. When the media ignores such important findings of the very groups that are tasked with the responsibility of dealing with the consequences of hate speech and instead, characterizes its harms as minimal or non-existent, I would say that Prof. Waldron's accusations of thoughtless, knee-jerk and impulsive responses to hate speech are more than aptly made out.

The context of discrimination

When the Court looked at the constitutional and liability issues in *Whatcott,* they considered the perspective of the victims and the audience, not just the speaker. This balanced approach had them consider that historically, discrimination against homosexuals in Canada has been systemic and prevalent. They have been treated as mentally ill and subjected to conversion therapies, including electroshock treatment; they have been targeted by discriminatory laws, including criminal prohibition of same-sex practices; until recently they have not been permitted to participate openly in the Armed Forces; they have faced discrimination in employment and housing; and been the frequent victims of hate-motivated crimes, anti-gay and anti-lesbian violence, and verbal harassment. It is against this backdrop that the question of harm was evaluated as well as the right of freedom of speech.

The damage the Court looked for in *Whatcott*, was damage to both our democratic imperative of equal citizenship and damage to the complainants. In determining whether the expression was hate speech, they asked whether a reasonable person, aware of the context and circumstances, would view the expression as exposing the protected group to hatred by others. "Hatred" or "hatred and contempt" is restricted to manifestations of the emotion described by the words "detestation" and "vilification." This filters out expression, which does not incite the level of abhorrence that would cause discrimination or other harmful effects.

The Court indeed found that Whatcott's pamphlets were hate speech. They contained a permanent denunciation of the equality rights of homosexual citizens in terms that a reasonable person would say provoked hatred towards them. The Court was clear in saying mere hurt feelings of individual victims are not sufficient to justify limits on speech. They looked beyond the individuals targeted, to their membership in the larger, traditionally vulnerable minority and assessed the harm done to the whole group. The Court described Whatcott's hate speech as causing damage to the dignity of all homosexual citizens, meaning the social standing and respect that entitles gay citizens to the right to be treated equally as they go about their daily lives without facing violence, hostility, hatred, and discrimination by others.

In examining the harm to the expressive rights of Mr. Whatcott, on the other hand, there was little value found in his hate speech in terms of truth seeking, encouraging participation in political decision-making and cultivating self fulfillment and human flourishing. As such, his expressive rights were not violated to the extent that they would outweigh the equality rights at stake. The media unlike the Supreme Court, avoided consideration of this analysis, merely making the decontextualized argument that speech is always a good thing, and that the harm was only about "hurt feelings." This is in direct contradiction to the express findings of the Court and is seriously misleading to their readers.

The emphasis the contextual analysis places on the victims explains why the motives of the speaker are irrelevant as are defenses of truth or honest belief. It is the *effects* of the speech that are examined in the balancing act the Court must perform. What the people who are spreading hate messages believe, religious or secular, may explain their behavior, but it is not the issue when it comes to assessing the harms that human rights legislation was designed to address. There is nothing in the *Whatcott* decision that says religious Christians cannot denounce homosexuality, but they must do it in a manner that does not generate hatred against homosexuals. One could be forgiven for thinking that this should not be such a difficult standard for religious leaders to meet.

In summary, as a result of the *Whatcott* decision, on one level, homosexual Canadians can now take comfort in the fact that the legal system is able to protect them when they are attacked. This is how equality rights are supposed to work. In the area of hate speech, everybody knows the libertarian notion of free expression comes into tension with the aspiration of equal dignity. The limits on both must be resolved within the framework of democracy and equal citizenship as they were in this case. On another level, the Court has cleared the air and silenced doubters by bringing the case law up-to-date in affirming that civil laws against hate speech are constitutionally supportable. In doing so, they have provided a very important tool with which law enforcement agencies, human rights commissions, targeted groups and individuals can combat the debilitating, dangerous and harmful effects of hate speech we are witnessing with alarming regularity. The media could immeasurably enrich the conversation by accurately reporting and commenting on the *Whatcott* decision; the rights engaged by hate speech on both sides of the debate, and the importance of reconciling those rights in a manner, which maximizes freedoms for all.