

# Debating Hate Crime

Language, Legislatures, and the Law in Canada

ALLYSON M. LUNNY



UBC Press · Vancouver · Toronto

Sample Material © UBC Press 2017



## **Law and Society Series**

W. Wesley Pue, General Editor

The Law and Society Series explores law as a socially embedded phenomenon. It is premised on the understanding that the conventional division of law from society creates false dichotomies in thinking, scholarship, educational practice, and social life. Books in the series treat law and society as mutually constitutive and highlight scholarship emerging from interdisciplinary engagement of law with fields such as politics, social theory, history, political economy, and gender studies.

*A list of recent titles in the series appears at the end of the book. For a complete list, see the UBC Press website, [www.ubcpres.ca/books/series\\_law.html](http://www.ubcpres.ca/books/series_law.html).*

© UBC Press 2017

All rights reserved. No part of this publication may be reproduced, stored in a retrieval system, or transmitted, in any form or by any means, without prior written permission of the publisher, or, in Canada, in the case of photocopying or other reprographic copying, a licence from Access Copyright, [www.accesscopyright.ca](http://www.accesscopyright.ca).

---

Library and Archives Canada Cataloguing in Publication

Lunny, Allyson M., author

Debating hate crime : language, legislatures, and the law in Canada/Allyson M. Lunny.

(Law and society series)

Includes bibliographical references and index.

Issued in print and electronic formats.

ISBN 978-0-7748-2959-5 (hardcover). – ISBN 978-0-7748-2961-8 (PDF)

– ISBN 978-0-7748-2962-5 (EPUB). – ISBN 978-0-7748-2975-5 (MOBI)

I. Hate crimes – Law and legislation – Canada. I. Title.

II. Series: Law and society series (Vancouver, B.C.)

KE8905 L85 2017

345.71'025

C2016-907196-0

KF9304 L85

C2016-907197-9

---

**Canada**

UBC Press gratefully acknowledges the financial support for our publishing program of the Government of Canada (through the Canada Book Fund), the Canada Council for the Arts, and the British Columbia Arts Council.

This book has been published with the help of a grant from the Canadian Federation for the Humanities and Social Sciences, through the Awards to Scholarly Publications Program, using funds provided by the Social Sciences and Humanities Research Council of Canada.

Set in Stone by Marquis Interscript

Copy editor: Stacy Belden

Indexer: Heather Ebbs

Cover designer: Gabi Proctor

UBC Press

The University of British Columbia

2029 West Mall

Vancouver, BC V6T 1Z2

[www.ubcpres.ca](http://www.ubcpres.ca)

Sample Material © UBC Press 2017

# Contents

Acknowledgments / vii

Introduction: The Political and Affective Language of Hate / 3

- 1 Hate Propaganda and the Spectre of the Holocaust / 30
  - 2 Legislating Victims of Hate / 56
  - 3 Bill C-250: A Censoring of Religious Freedom or a Protection Against Hate? / 80
  - 4 The Trans “Bathroom Bill” / 104
  - 5 The Baby and the Bathwater: The Repeal of Section 13 of the *Canadian Human Rights Act* / 126
- Conclusion / 162
- Notes / 169
- References / 208
- Index / 220

# Introduction

## The Political and Affective Language of Hate

It [psychoanalysis] is therefore a “hermeneutic” form of enquiry that explores how meanings are constructed and come to wield power within the psyche. For that reason it, too, lends itself to a rhetorical approach to politics.

– JAMES MARTIN, *Politics and Rhetoric: A Critical Introduction*

The language of debate in Parliament is a curious thing. It is literally a sign of the times, indexing and standing in for not only contemporaneous political currents and sensibilities but also larger and more abstract notions like the limits of national identity and the affective undercurrents of political economies. *Debating Hate Crime: Language, Legislatures, and the Law in Canada* explores, through critical discursive analysis, the federal legislative debates and parliamentary committee hearings regarding Canada’s “hate crime” laws, those laws being hate propaganda and its significant amendments, the repealed section 13 of the *Canadian Human Rights Act (CHRA)* that prohibited the telephonic communication of hate messages,<sup>1</sup> and the enhanced sentencing provision of the *Criminal Code*.<sup>2</sup> To date, the language and argumentation of debate regarding Canada’s “hate crime” laws have received scant attention, if any at all.

Responding to this lacuna and to the vivid tropes and scenarios articulated by the opponents and proponents of these laws, *Debating Hate Crime* reveals and interrogates the meaning and social signification of the endorsement of, and resistance to, hate law. In its identification and analysis

of major and often recurrent concerns and anxieties articulated by federal legislators and committee witnesses about hate and the legislative response to it, the book offers a historical and analytical account of some of Canada's most passionate public debates on victimization, rightful citizenship, social threat, and moral erosion. In a sense, these parliamentary debates and committee hearings are a rhetorical microcosm of an affective economy of hate that exposes larger political tensions, ambitions, trepidations, and fantasies of the national and legal subject. *Debating Hate Crime* attends to the denaturalizing of these arguments, locating them within power relations and exposing their affective materials.

*Debating Hate Crime* diverges significantly from other hate crime scholarship in that its preoccupation is with language and the signification of political speech and not with hate crime *per se*. Having stated that my interest lies in the analysis of debate and political excess, this is not to say that the topic of hate is insignificant or coincidental. Hate, and its legal manifestations as hate crime and hate propaganda, are the signifiers around which these debates and witness testimonies were generated and structured. In so far as hate is itself an index of affect and visceral emotion, it is no surprise that its invocation, as in the call for hate's censorship, further inspires affective responses, namely patriotism, liberal inquietude, moral outrage, and social anxiety. In this context, hate crime and hate speech are the topics around which political parliamentary passions swirl, sticking to some bodies and objects, as Sara Ahmed would say, and slipping away from others.<sup>3</sup>

It is these passions that, revealed by heated speech, raucous engagement, and radically divergent opinion, have piqued my curiosity and engagement. To cite Kendall Thomas's analysis of the figural and metaphorical language of the Supreme Court of the United States, rhetorical instances of dissonance, defensive posturing, and linguistic excess signify beyond the literal.<sup>4</sup> Such rhetorical excesses, if read closely through the lens of a critical interpretative methodology like psychoanalysis, affect theory and post-structural semiotics and betray and reveal unconscious elements and irrational desires, not only at the level of the subject but also at the level of discourse. My inquiry is informed by, and relies upon, the methods of interpretation inherent in post-structural semiotics, critical Freudian psychoanalysis, and queer and affect theories. This inquiry examines both the literal and the figurative. It is rooted in historical context and is textually

evidentiary while, at the same time, being open to displacement, disorientation, and slippage. It attempts to make meaning, to make sense, while simultaneously resisting “closed” meaning, metaphysical “truth,” and unified, coherent subjects. *Debating Hate Crime* is an engagement with, and an inquiry into, the ways in which legislative debates have represented and reproduced hate within the affective undercurrents of Canadian political identity.

### **Reading “Hate”**

Semiotics can be defined as the study of signification or the study of the meaning of sign systems. It cannot be “separated from the human subject who uses it and is defined by means of it, or from the cultural system which generates it.”<sup>5</sup> Adhering to the most basic Saussurian and Peircian tenets of semiotics, signs are arbitrary and derive meaning relationally and by way of difference. That is, a sign is meaningful only in that it is positioned against something else, drawing meaning from its arrangement to other signs and to what it is not. These arrangements organize by way of similarity – that is, paradigmatically and by way of contiguity and syntagmatically or by way of sequence. Semiotic interpretation analyzes the choice and arrangement of signs, and, importantly, the present absence of those signs not chosen, and makes meaning from such structures. Post-structural semiotics continues the work and interpretation of linguistic sign systems but breaks with a tradition that is purely linguistic.

In this tradition, we have Emile Benveniste’s<sup>6</sup> shift away from structuralism’s object – language – to that of discourse and Roland Barthes’s recognition of a second-order semiological system, one that shifts signification of the sign laterally from language to “myth.”<sup>7</sup> Reverberant of both Freudian unconscious materials and neo-Gramscian theories of hegemony respectively, Barthes remarks that “the myth hides nothing: its function is to distort, not to make disappear” and that the very principle of myth is to “transform history into nature.”<sup>8</sup> Norman Fairclough, a seminal figure within critical discourse analysis, notes that the critical work of discourse analysis is to “denaturalize” such naturalized “myths” or ideologies.<sup>9</sup> Thus, the interpretative work of post-structural semiotics as a discursive methodology is not restricted to reading linguistic codes and structures but, rather, is compelled to engage beyond the linguistic sign and to account

for the demands of history and its ideological forces. It recognizes that discourse is generated by competing networks of historically located social agents in an unstable field of power relations and that discourse is constitutive, reproducing both subjects and knowledge, and thus power relations, through language and other semiotic systems of representation.

To the degree that post-structural semiotics is a study of sign systems, with an adherence to reading signs relationally, it is also a method of interpretation that recognizes that, as Jacques Derrida noted, “meaning is never anything but a slippage or displacement from one term to another,” an escape from authoritative or transcendental meaning, an endless play and abeyance of signification.<sup>10</sup> Insofar as this is a problematic for interpretation, which others like Umberto Eco<sup>11</sup> have struggled with, I am aroused and vexed by such a possibility but, nevertheless, seek to make some meaning of these affective debates about hate and its socio-legal propositions.

Another interpretative strategy that I procure is that of critical Freudian psychoanalysis. I use the adjective “critical” to signify that psychoanalysis is used neither as a science nor as a cure. I use it as a tool of interpretation. My engagement with psychoanalysis as a critical tool rejects the notion that psychoanalysis provides a truth about the subject; rather, it suggests a “reading” of a subject – one among many. This engagement with psychoanalysis is also “critical” in that it is highly cognizant and rejecting of the misogynistic and heterosexualizing imperative of Freud’s Oedipal logic. Critical of these failings of Freudian psychoanalysis, I nevertheless marvel at Freud’s theory of the unconscious, which would include, in part, his claim that all psychic activity is an impulse to avoid unpleasure (psychic excitation often in the form of tension, anxiety, and so forth).

According to Freud, the unconscious works to control or diminish tension by way of a number of psychical operations including that of defence. Unconscious materials, including instinctual and forbidden desires, find disguised expression consciously when the repression of those materials fail. Freud notes several ways these materials express themselves – through dreams, parapraxes (slips of the tongue or pen), jokes, and neuroses (obsession, hysteria, and paranoia). Thus, the manifest sign secretes unconscious materials, which are primarily forbidden or unbearable desires. The disguise of the unconscious signifier works by way of displacement



and condensation, seeking expression through other signifiers bound to it by way of relationality and signification. The work of analysis, then, is to read the manifest signifiers by unmasking their cathexis (psychic attachment) to unbearable materials. Although the unconscious can never be truly “known,” psychoanalysis is a method of interpreting disguised and resistant signs of the unconscious.

Commonalities between psychoanalysis and semiotics are numerous. Both are theoretical methods of the interpretation of signs. Both view the signifier (the manifest symptom in psychoanalysis) as the first term of the system of signification and the signified (the latent meaning) as the second term of signification. Barthes writes of these shared commonalities, noting that Freudian theory and analysis, like semiotics, postulates a relation between two terms and that each is “no longer concerned with facts except inasmuch as they are endowed with significance.”<sup>12</sup> Both methods of interpretation theorize that, although meaning is structured upon relationality, there is not a one-to-one relationship in signification. Rather, meaning may be disguised, displaced, deferred, negated, and denied. Noting the debt of semiotics to psychoanalysis, Kaja Silverman remarks that semiotics “achieved maturity only when it was consolidated with psychoanalysis.”<sup>13</sup> In so far as my engagement with semiotics is post-structural, it also impacts the engagement with critical psychoanalysis by highlighting the displacement and slippage in my analytic observations. Thus, my psychoanalytic observations are not end products of a scientific truth or a meta-physical transcendental signified (“truth”) but, rather, signs of possibility and speculation.

One distinction that I draw between post-structural semiotics and Freudian psychoanalysis is the place of ideology. Clearly, Freud positions psychoanalysis and the constitution of the subject within the social and the symbolic, as evidenced by his Oedipal theory and his work on civilization and taboo. However, from my reading of Freud, the normative and hegemonic aspects of the constitutive power and demands of the social and the symbolic on the subject are not openly challenged or critiqued by him. For my purposes here, a useful aspect of post-structural semiotics, particularly one that was influenced by Barthes, is the political critique of ideology in the constitution of the subject and the cultural systems to which it is subject and in which it is embedded.

### ***The Affective Economy of Hate***

As defined by the *Oxford English Dictionary*, the noun “hate” is “an emotion of extreme dislike or aversion; detestation, abhorrence, hatred.” The transitive verb “to hate” means “to hold in very strong dislike; to detest; to bear malice to.” It is understood to be the opposite of love. Struggling with the subjective nature of hate and noting its wide range of diverse emotions, the Supreme Court of Canada legally defined it in *R. v Keegstra*, noting that, with respect to hate propaganda, hatred was “restricted to the most severe and deeply felt opprobrium.”<sup>14</sup> Different schools of thought have attempted to theorize hate. Classic Freudian psychoanalytic theory, Fanonian phenomenology and affect studies commonly find hate an engaging and dynamic psychic and emotional affective state. Classic Freudian psychoanalytic theory names hate as an extreme reaction of repudiation by the ego-instincts to a perceived threat.<sup>15</sup> The object of hate is seen as an intrinsic threat to the self that must be destroyed in some sense, psychically as in the repudiation of the hated object and physically as in the destruction or annihilation of that threat.

In *Black Skin White Masks*, Frantz Fanon appeals to psychoanalytic theory and Hegelian phenomenology as a means to comprehend the dynamics and power of racialized hate. This affective field takes form through the white racist’s declaration “Look, a Negro!”<sup>16</sup> In the Hegelian dialectic, the utterance both produces and destroys, protects and repudiates. “My body,” Fanon writes, “suddenly abraded into nonbeing.”<sup>17</sup> Here the utterance, as a marking of radical ontological difference, is uncannily similar to the cry of Joseph Conrad’s colonial agent Kurtz who exclaims, “The horror! The horror!”<sup>18</sup> This utterance by a white colonial subject is the exemplar from which Fanon illustrates the “anomalies of affect that are responsible for the structure of the [racist] complex.”<sup>19</sup> To the white racist, the black (male) body is a “hated” object, “a stimulus to anxiety.”<sup>20</sup> The utterance at once hails Fanon, marking him as “Negro,” and sticks to his black body, identifying him within a historico-racial schema as a “corporeal malediction.”<sup>21</sup> The result – that is, one possible result – is a kind of annihilation of another’s subjecthood, a radical reduction to otherness. Another product of this racist utterance, following Fanon’s engagement with the Hegelian dialectic, is the shoring up of whiteness, of marking it distinct and safe from blackness – an irrational impulse satisfied; a fragile ego protected.

Insofar as psychoanalytic theory posits hate as a fundamental defence against injury, its dynamic manifests ambivalently as both a turning against and a turning towards. In Sara Ahmed's discussion of hate and the politics of racial hatred, she notes that racist discourse is often both a story of hate and a story of love, a repudiation of the hated and an affirmation of the self. Examining the ways in which the role of hate "shapes bodies and worlds," Ahmed notes that hate works in both fantastic and material ways.<sup>22</sup> Through the rhetorical work of justification, persuasion, and reversal, white supremacist diatribes reproduce the "white citizen" as the one who is hated and who is threatened and victimized by the law and the polity. By constituting the racist's other as being dangerous, hateful, and threatening, emotions of rage, retaliation, repulsion, anger, fear, and loathing appear justified and are a measured response to a fantastic and immeasurable threat. In this particular narrative, the white supremacists' call to arms is a response of defence and protection of an imagined communal self. "Whiteness" itself, as an imagined identity, is under attack. "The emotion of hate works to animate the ordinary subject, to bring that fantasy to life," remarks Ahmed, "precisely by constituting the ordinary as in crisis, and the ordinary person as the real victim."<sup>23</sup>

However, hate is not the only emotion circulating in this affective discourse; love too circulates. Love of "whiteness," of the "white race," is produced alongside hatred for the "threatening" other. The work done by the racist discourse simultaneously produces a "shared 'communal' visceral response of hate."<sup>24</sup> Ahmed's recognition of multiple subjects and communal affective responses in the circulation of emotion between signs and objects shifts her understanding of affect to something more than merely psychic and as something more than a circuit between the subject and his object. "Where my approach involves a departure from psychoanalysis," she writes, "is in my refusal to identify this economy [of emotion] as a psychic one (although neither is it *not* a psychic one)."<sup>25</sup> In a move that dislocates the singular subject as the origin and destination of this affective economy in the circulation of hate, Ahmed argues that emotions do not positively inhabit anybody or anything but, rather, circulate among objects and social subjects, sticking to some things and subjects and slipping away from others. For her, affective economies, like that of hate, are "social and material, as well as psychic."<sup>26</sup>

Notable hate crime scholars, Barbara Perry, Mari Matsuda, and Gail Mason, have also respectively engaged in the theorization of hate and its affective field. One of Perry's major contributions has been her analysis of the psycho-social dynamics of a hate crime – that is, the constitutive effects on identity – something she has coined “doing difference.”<sup>27</sup> Her conception of doing difference aligns quite closely with both Ahmed's and Fanon's engagement with hate's affective field and its psychic/social constitution of identity. For Perry, the perpetrator of the hate crime feels that, as a hegemonic subject, his or her material or symbolic interests are being violated or challenged by a non-hegemonic subject in such a way that presents as threatening. For the xenophobic hate crime perpetrator, this may take form as losing out on a job competition to a new immigrant; for the homophobic hate crime perpetrator, this may be an encounter with someone who transgresses sexual and/or gender norms.

Like Donald Black's theory of self-help, the act of violence is the perpetrator's extra-legal attempt to rectify violation, threat, and social disorder.<sup>28</sup> “Hate crime provides a context in which the perpetrator can reassert his/her hegemonic identity and, at the same time, punish the victim(s) for their individual or collective performance of identity,” Perry writes, “in other words, hate-motivated violence is used to sustain the privilege of the dominant group, and to police the boundaries between groups by reminding the Other of his/her ‘place.’”<sup>29</sup> Notice that Perry's conception of hate crime's dynamic is both at the level of the interpersonal and at the level of political and social community. It is an observation that is well grounded in hate crime studies.

Early hate crime studies have noted the powerful effects of hate-motivated violence, not only on the victim of violence but also on the larger social community. For example, James Garafolo and Susan Martin, commenting on the disproportional harm of hate-motivated violence, argue that hate crimes attack the very identity (or perceived identity) of the victim.<sup>30</sup> In so far as hate crime targets identity – or, to be more accurate, perceived identity – the profound impact of such an assault disrupts the very ontological security of the victim. Moreover, they remark that this kind of violation is not only profoundly damaging to the self, but it also has a secondary effect of victimization, a kind of magnified or “ripple effect”

that impacts the victim's (perceived) community, potentially even impacting the nation itself.

Both Mason and Matsuda respectively engage these ideas regarding hate's constitutive effects on identity by looking specifically at the language used during the commission of a hate crime. In *The Spectacle of Violence*, Mason explores the symbolic function of anti-lesbian violence and epithets through what she names "interpretive repertoires."<sup>31</sup> That is to say, Mason analyzes the "linguistic and contextual patterns" found in the incidents of violence described to her by a number of lesbians whom she interviewed.<sup>32</sup> By examining the kind of language perpetrators regularly use and the types of violence in which they engage, she remarks that this has allowed her to "highlight the kinds of sexual and gendered assumptions that transform the words and actions of violence into a statement about lesbian sexuality."<sup>33</sup>

Her analysis of the epithet of "dirty lesbian" is particularly insightful to the symbolic quality and affective constitutive power of hate crime. Drawing on a wealth of critical theory that theorizes corporeality, including Julia Kristeva's theory of abjection and Elizabeth Grosz's analysis of the conception of female bodies as leaking, boundary disrupting, and disordering, Mason argues that the expression "dirty lesbian" has the effect of producing lesbians as the abject and a dangerous contagion to proper social order.<sup>34</sup> Accordingly, in order to maintain security, this particular body and identity is to be reviled and "excluded from legitimate social and political spheres."<sup>35</sup> Insofar as this may be the intent of the perpetrator and an effect of debasement, Mason remarks that violence operates through language performing, not only oppressively but also productively.

Drawing on the Foucauldian notion that power is generative, the violence of homophobic language has the potential to reconstitute its victim into an agent of resistance and self-worth. Here again, Ahmed's affective economy of hate re-emerges in this theorization of hate. For Ahmed, the affective circulation of hate sticks to some bodies and slips away from others – it may have unintended effects and produce unexpected responses and identities. For example, what if in Fanon's example, the racialized subject fails to recognize himself in the hail of "Look, a Negro!"? What if he rejects the hail or reformulates it as empowering? Mason offers these

possibilities and demonstrates that the affective economic circulation of hate is simultaneously analyzable and predictable while, at the same time, completely unforeseen and unpredictable. It is a claim that follows closely the ideas of Judith Butler in her essay “Critically Queer,” which ask: “How is it that those who are abjected come to make their claim through and against the discourses that have sought their repudiation?”<sup>36</sup>

For Matsuda, there is no such redeeming potentiality to racist speech. Nevertheless, her argument about the affective value of hate speech bears noting. Critical race scholars have long argued that hate speech – not only hate-motivated assault – produces material and concrete harm at the level of identity. Identifying these harms as a kind of “spirit murder,” Matsuda has pointedly named the profundity of this ontological trauma.<sup>37</sup> Through her study of First Amendment protections, she argues that racist speech and hate propaganda are oppressively performative. In an argument that hints at the ideas of Fanon and the phenomenological power of the racist utterance, Matsuda argues that uncensored hate speech has the power to reduce the minority citizen to the very ontological status of the assaultive racist invective. It is an attack upon identity; it is a blow to the self.

The effects of hate speech are over-determined psychologically and are symbolically crippling. “As much as one may try to resist a piece of hate propaganda,” she writes, “the effect on one’s self-esteem and sense of personal security is devastating ... the victim becomes a stateless person.”<sup>38</sup> In so far as identity is attacked and laid waste, Matsuda suggests that political-legal identity – that is, citizenship – is also ripped from the subject. Being a “stateless person” connotes a radical ontological displacement at the level of the political-legal. An advocate of hate crime laws, Matsuda argues that state intervention with respect to hate crime and hate propaganda laws has the potential to reinscribe the victim within the state.

Leslie Moran’s work on the emotional investments inherent in the political calls for enhanced penalty and his work with Beverley Skeggs, Paul Tyler, and Karen Corteen on the politics of violence and safety re-imagine the study of affective emotional response in this area of hate crime studies.<sup>39</sup> Drawing from the work of Wendy Brown on the dangers intrinsic to an emancipatory politics infected with reactionary and conservative political agendas, such as enhanced penalty, Moran prudently questions the desire for the violence of law: “The demand for the violence of the law

[is] informed by the very emotions [hatred, anger, retribution] that it seeks to condemn.”<sup>40</sup> Seeking debate and reflection on the emotive appeal to law articulated and demanded by gay men and lesbians in response to hate crime, Moran and his colleagues seek to alert their readers to the perils of pursuing an emancipatory politics – a politics seeking freedom from both legal regulation and violence – by way of vengeance and retribution. Emotional and affective resonance is found, they note, in the demands for new law and enhanced penalty.

Careful not to condemn gay and lesbian demands for state violence in the punishment of hate crimes as a simple alignment with a conservative law and order agenda, they warn that such emotions, nevertheless, are a “disavowed” presence in the violence of institutional punishment in which “punishment as law-bound practice is celebrated as impersonal, tempered, calibrated, measured, and reasonable.”<sup>41</sup> He cautions that this normative characterization of law’s violence as a kind of redemptive violence, measured and restorative – a sign of social (re)order, not disorder – necessarily negates the unruly, irrational and emotive aspects of criminal law. As they note, these may include fear, anger, hate, vengeance, terror, and pleasure. The desire to be heard, to be inscribed as a citizen within the state, and to demand a legal response to targeted violence produces multiple emotive and affective responses. Moran and his colleagues’ work on hate crime, law, and emotion shift the discussion of affect from the dynamic between perpetrator and victim to the dynamic between victim as rights bearer and the state. This consideration, measured with Ahmed’s injunctive that we should be “listening to the affective life of injustice, rather than establishing the truth of law,” offers thoughtful guidance and awareness to my project of analysis.<sup>42</sup>

Indebted to these engagements with hate and its affective economy, my analysis of legislative debates about hate are affectively rich for hermeneutic mining precisely because they are about hate, hate crime, and hate propaganda. These parliamentary debates and committee hearings are, in a sense, a rhetorical microcosm of an affective economy of hate that exposes larger political tensions, ambitions, trepidations, and fantasies of the national and legal subject. Literally, of course, these governmental forums are not the scene of hate crimes, but they are the scene of passionate exchanges, heated engagements, and often bizarre fantasies

of the citizen subject that revolve around the signifier “hate” guised in a civilized form of democratic debate. *Debating Hate Crime* explores the ways in which political and legislative arguments about citizenship, nationhood, and otherness are framed through emotional orientations and economies of affect.

My departure delves not into the language of hateful speech or the affective states of social movement politics but, rather, into the affective language of parliamentary debate and committee witness testimony about hate. The tropes, metaphors, and other unique linguistic signifiers used in these debates expose particular concerns, trepidations, and anxieties of Canadian lawmakers and those expert witnesses called before their committees. These concerns range from the consistent and dominant concern of the protection of free speech and democratic liberty to the vilification of racial and other minority groups, as well as elaborate and twisted arguments regarding equality, religious rights, and the protection of traditional marriage and women’s sexual security.

The generic convention of the parliamentary debate as an adversarial and hotly political forum also holds a significant place in my analysis of these arguments for and against hate speech and hate-motivated laws. Notably, the confluence and abuttedness of such diverse opinions index a point of entry into these debates that shift their analysis from one of strict legal interpretation and literal meaning to one of affective analysis. To use one of Ahmed’s phrases, the “emotionality of texts” enhances the national and social narratives by reflecting and revealing affective states as well as the unconscious elements of the body politic.<sup>43</sup>

Often much greater than the liberal concerns over freedom of speech and expression, these parliamentary debates articulate and imagine risk and threat beyond libertarian concerns. The rise of anti-Semitic pamphleting in the 1960s, for example, motivated the Canadian Jewish Congress to urge government to create specific laws criminalizing hate propaganda. At the heart of the debates on free speech that followed was an ever-present spectre of a post-Holocaust, modern technological world in which the power of rationality over the persuasive power of mass media was questioned. Nearly forty-five years later, parliamentary debates on a proposed amendment to add “gender identity and gender expression” jointly to these laws and to the *CHRA*, in an effort to offer protection for transgendered and



transsexual citizens against hate speech and hate-motivated offences, raised bizarre scenarios of rape in public washrooms by men disguised in women's clothing and the need for government to refuse the amendment in order to protect women's sexual security.

### ***The Call for Law***

Hate crime scholarship – from victim survey studies to provocative tomes questioning the place of identity politics in the creation of legal reform – recognizes that hate crime is fundamentally structured on identity. We see “identity” in hate crime's symbolic dimensions, such as the perpetrator's epithetical nomination of his hated object: “faggot!” “Identity” also appears as the lynchpin of the social and political mobilization of hate crime. The seminal work of Valerie Jenness and Kendal Broad as well as of Jenness and Ryken Grattet on the organizational politics of hate crimes stresses the importance of the construction of the “legitimate” hate crime victim to the institutionalization of hate crime as a socio-legal category.<sup>44</sup> The hate crime movement in the United States, for example, mobilized to frame victimization of the last twenty-five years as a social condition deserving of social empathy and institutional and legislative response.

Using a social constructionist model, these scholars argue that legitimate victimization is a status conferred onto injured parties, denoting a transformation from a merely harmed status to a status connoting innocence and harmed by forces beyond the individual's control, a status worthy of social concern and deserving of political and legal assistance and redress. With respect to the detailed ways in which the identity of the “hate crime victim” has been framed, mobilized, and institutionalized, the work of Jenness, Broad, and Grattet offer a comprehensive sociological analysis of the political processes that enabled it to become a meaningful category of condition and identity.

Other notable hate crime scholars, namely James Jacobs, Kimberly Potter, and Jessica Henry, have also stressed the importance of identity in the politicization of hate-motivated crime.<sup>45</sup> Taking a markedly different point of view from Jenness, Broad, and Grattet, they too claim that hate crimes are a socially and politically constructed phenomenon driven by the interests and social mobilization of particular identity groups. However, for Jacobs, Potter, and Henry, hate crime is a social construct, fabricated

from self-serving identity politics, media hyperbole, and dubious statistics. “Before the mid-1980s, the term ‘hate crime’ did not exist,” they remark, “‘hate crime’ as a term and as a legal category of crime is a product of increased race, gender, and sexual orientation consciousness in contemporary American society.”<sup>46</sup> Claiming that there is nothing new or special about violence directed at minorities, they retort that there should not be a socio-legal response to it beyond what there has traditionally been.

According to Jacobs and Potter, the creation of hate crime laws is a response to the organized pressures of identity groups who see an epidemic of violence and national crisis where there is none. The politicization of hate crime, they argue, is an effect of catering to alarmist special interests and ultimately results in the creation of societal divisions where there were none: “This pessimistic and alarmist portrayal of a fractured warring community is likely to exacerbate societal divisions and contribute to a self-fulfilling prophesy. It distorts the discourse about crime in America, turning a social problem that used to unite Americans into one that divides us.”<sup>47</sup> Theirs is a powerful statement distorted by an ideological notion of a homogeneous and mythic “America,” one that does not bear the scrutiny of history or political analysis. Responding to this criticism of hate crime’s status as a socially constructed phenomenon as fictive, artificial, and driven by political divisive interests, Jenness and Grattet note the following: “Recognizing that policy domains are rooted in social constructions does not, however, mean that the social conditions they address are not real or, by extension, that the social facts and attendant suffering underlying the problem are only illusory.”<sup>48</sup>

In response to the scholarship and the social mobilization of the “good” victim as the “legitimate” victim comes an important critique coming from queer studies. Addressing the homophobic construction of “dangerous gayness” that is well positioned within classic victimological discourse and the constitution of gay men who engage in public sex as a “self at risk,” Elizabeth Stanko and Paul Curry warn of the effects of self-regulation of victimization as a “strategy of governance.”<sup>49</sup> Wary of criminological knowledge produced by victimization surveys that both document and constitute the queer subject as being “at risk at all times,” they note that this condition category of ontological insecurity, to cite Anthony Giddens,<sup>50</sup> locates homophobic violence within a responsabilization paradigm.<sup>51</sup> As

such, they remark that such knowledges contribute to the generation of “the expectation that ‘good citizens avoid crime.’”<sup>52</sup>

As theorized by David Garland, responsabilization is “a new mode of governing crime” whereby the neo-liberal state “alone is not, and cannot effectively be, responsible for preventing and controlling crime.”<sup>53</sup> The work, and responsibility, of citizens (and of citizenship) is that of partnerships, networks, and joint initiatives with public, private, and quasi-private agencies and organizations for the effective management of safety and security. Accordingly, “the morally responsible individual or self is a key provider of safety and security in this new order of crime control.”<sup>54</sup> Speaking to this neo-liberal configuration of citizenship and security, Nikolas Rose writes that “as far as individuals are concerned, one sees a revitalization of the demand that each person should be obliged to be prudent, responsible for their own destinies, actively calculating about their futures and providing for their own security and that of their families.”<sup>55</sup> As partners in prudence, individuals are “also to secure themselves against crime risks and to take care not to make themselves victims of crime.”<sup>56</sup>

Failure to satisfy this requirement of private and individual responsibility for safety and security, warn Moran and his colleagues, “may impact on a person’s status as a good [read ‘responsibly prudent’] victim and citizen.”<sup>57</sup> Their wary prognostication, interestingly, situates gay and lesbian prudence uneasily within the responsabilization of safety and security, whereby citizenship may come at the cost of policing and managing dissident sexuality. Crime prevention and the self-disciplinary techniques that it proffers “foist ... the problem of crime onto the shoulders of would-be victims.”<sup>58</sup> For queers, this kind of management of risk through self-disciplinary techniques often involves a policing of the “queer” self, or what Gail Mason calls “body-mapping,” “a cartographic matrix of practices for surveying, screening and supervising the times, places and ways in which one is manifest as homosexual.”<sup>59</sup>

For Stanko and Curry, the self-policing and surveillance of sexual identity and unconventional gender expression is a strategy of governance that has “neatly and efficiently transform[ed] coercive control into self-control” – the queer who is always at risk of victimization must always be on guard for the homophobe, policing and regulating his or her identity and desire at all times in order to fulfil the obligation of private

prudentialism.<sup>60</sup> Problematically, “the wider political regulation of self-identities [that is a condition of responsabilized citizenship],” they note, “acts to resist the positive work of queer activism against violence.”<sup>61</sup>

A number of scholars have noted that the American hate crime movement is an odd conflation of seemingly antithetical social movements. Tracing how the hate crime movement is a product of “strange bedfellows,” Jenness, Broad, and Grattet claim that the civil rights movement, the contemporary women’s movement, the gay and lesbian movement, and the crime victims’ movement have converged, in part, producing the hate crimes movement in the United States and abroad.<sup>62</sup> According to Jenness and Broad, “the discursive themes emanating from the ‘rights’ movements of the 1960s and 1970s formed the sociopolitical terrain that inspired and continues to fuel the contemporary movement to recognize, respond to, and criminalize violence motivated by bigotry in the United States.”<sup>63</sup> The product of this ideological and political mobilization “overlap” converged around the issue of rights and harm.<sup>64</sup> They note that groups on the left and the right of the American ideological spectrum surprisingly united around the issue of violence as a criminal issue that terrorizes communities – for the hate crime movement, these communities are minority groups – and that such violence was in need of a socio-legal response.

Interestingly, this merging of strange bedfellows with respect to competing identity claims and politicized rights is not correspondent of the Canadian example in which alliances have been made across rights-seeking groups and not explicitly with victim rights groups. As illustrated by an examination of expert committee witnesses who appeared before the various government houses with respect to the advocacy of hate crime laws, major stakeholders have predominantly been the Jewish community, as represented by B’nai Brith’s League of Human Rights, and the lesbian, gay, bisexual, and transgender (LGBT) community, as represented by Equality for Gays and Lesbians Everywhere (EGALE). The oddity of conglomeration, in fact, seems to be where the resistance gathers, with extreme conservative political and religious groups advocating resistance alongside respected free speech advocates and scholars.

Canadian legal scholar, Kent Roach, offers a uniquely Canadian examination of hate crime identity politics north of the US border. Examining the Canadian phenomenon of victims’ rights and due process, he notes

that all victims' rights advocates do not march under the same banner. Instead, those on the right traditionally side with state and police interests, and those on the left seek equality for disadvantaged and marginalized groups.<sup>65</sup> Positioning gays and lesbians on the side of equality-seeking politicization, a claim backed up by other political scientists and socio-legal scholars like Miriam Smith, he writes that the demands for equal protection under criminal law produced a number of troubling outcomes.<sup>66</sup> One result was the "pit[ting] of the accused's due-process claims against the equality claims of disadvantaged groups."<sup>67</sup> In this contest of claims, the criminalized, who are most often marginalized, and the marginalized, who are disproportionality criminalized, compete against each other for protections and recognition under the law. Moreover, like many who debate the remedial effects of criminalization and enhanced punishment, he challenges the notion that the use of the criminal law actually remedies, deters, or controls crime.<sup>68</sup>

Another vexing concern is the use of criminal sanction in the name of minority rights. Other Canadian legal notables, specifically Walter Tarnopolsky and Richard Moon, have also questioned the use of criminal law as an advancement of legal equality and equal protection to groups historically ignored or targeted by law. Internationally, of course, this issue is equally pressing. Trans legal scholar and prison abolitionist, Dean Spade, is troubled by the politicization of hate crime and the desire of marginalized subjects to align with state interests: "By desiring recognition within this system's terms, we are enticed to fight for criminalizing legislation that in no way will reduce our experiences of marginalization and violence."<sup>69</sup> He warns of aligning queer and trans politics with "corporate-sponsored white gay and lesbian rights organizations" and calls for the rethinking of the use of criminal law as an advancement of legal equality and equal protection for marginalized communities.<sup>70</sup>

In "Wounded Attachments," Wendy Brown questions the potentiality of an emancipatory project located in identity-based claims, whereby the conditions of identity production is subject to a late modern liberal, capitalist, and disciplinary bureaucratic social order. She asks: "What are the particular constituents ... of identity's desire for recognition that seem as often to breed a politics of recrimination and rancor, of culturally dispersed paralysis and suffering, a tendency to reproach power rather than to aspire

to it, to disdain freedom rather than practice it?”<sup>71</sup> Warning of the affective attachments to political and social exclusion, pain, and suffering, her observation is pointed with respect to the call for punishment by rights-seeking groups.

With respect to the Canadian criminalization of hate crime politics, Roach notes the government responded to the mobilizing efforts of interest groups like B'nai Brith and EGALE by codifying a sentencing doctrine already in Canadian case law. The enhanced sentencing provision, he remarks, was largely a symbolic gesture lacking in any substantive movement towards equality. *Debating Hate Crime* regards this observation and offers a close reading of the objections to the creation of the enhanced sentencing provision and the particular resistance to the inclusion of sexual orientation to the bill. Although it may not have had any substantive effect upon equality, as Roach suggests, the resistance to it, and especially to the inclusion of sexual orientation to the list of protected categories, deserves a thorough analysis. Furthering his critique of the legal provision, Roach queries its very efficacy. Insofar as the enhanced sentencing provision was a punitive response that required enhanced punishment for bias motivation in criminal offences, he notes that “the fact that Parliament did not create a separate offence” potentially frustrated the prosecution of hate crimes.<sup>72</sup>

Lastly, his critique questions the creation of this legal provision within the larger sentencing restructuring that Canada underwent in the mid-1990s. To the degree that hate bias was now seen under Bill C-41 as an aggravating factor at sentencing, he argues that the codification of Canadian sentencing principles – such as proportionality – under the same bill “may dilute the symbolic and educational value” of the enhanced sentencing provision.<sup>73</sup> Mark Carter, challenging the value of the enhanced sentencing provision as an “anti-discrimination” strategy, warns that such principles may have detrimental and unforeseen effects on other non-retributive sentencing principles under Canadian criminal law.<sup>74</sup> Insofar as *Debating Hate Crime* does not look at legal judgments or judicial discourse, these observations merit investigation and would stand as an interesting future project.

Popularly coined in the media and in governmental debates as “Canada’s hate crime law,” the *Criminal Code*’s enhanced sentencing provision has refocused the issue of hate, criminality, and punishment by recommending

that judges account for hate motivation in their sentencing calculus as an aggravating factor. As these debates have revealed, parliamentary opinion for the necessity of this provision reflects broad and disparate perspectives. Insofar as advocates have cited the need for such a provision as a deterrent response to a growing threat of violence and intolerance towards minority citizens, particularly gay men and lesbians, opponents have characterized it not only as an unnecessary measure but also as an index of political pandering to minority group interests and a “homosexualist” subversive agenda that seeks to undermine Canada’s very moral fabric. From statements such as these, it is eerily apparent that within Canada’s political constitution of the hate crime victim deemed worthy of state recourse and protection, the opposing models of social construction held by Jenness and Jacobs and their various colleagues are firmly rooted in the affective undercurrents of the political constituency of the Canadian hate crime victim.

### ***A Canadian Context of Hate***

Insofar as hate propaganda has had a criminal presence under Canadian law since 1970, hate itself has regrettably had a ubiquitous presence throughout Canadian history. At an institutional level, a racist ideology of white supremacy and Anglo-Saxon superiority has manifested at various historical points as national projects of indigenous colonization and forced assimilation, slavery, restricted immigration, head taxing, and wartime internment. Individual and group acts of hate, including that of organized hate groups, have included bombings of synagogues, racist assaults, cross-burnings, neo-fascist rallies, anti-Semitic propaganda, white supremacist campus recruitment, “nipper tipping,” the desecration of Sikh temples and Muslim mosques, queer bashings, and racist, anti-Semitic, and homophobic murders.<sup>75</sup> Although hate as a legal concern is a relatively new phenomenon under Canadian law, falling within anti-discrimination and criminal law, the presence of hate itself has had a long and ignoble history.

A number of factors have resulted in the issue of hate being addressed by federal law. Two distinct, but related, clusters of social phenomena mark the constitution of hate crime law in Canada. Occurring in the 1960s and then in the late 1970s, the first cluster of social phenomena was comprised of a marked rise in extreme right-wing activity, a growing national consciousness around issues of discrimination and human rights, an organized