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Religion and Hate Speech

INTRODUCTION

Many recent hate speech cases in Canada and elsewhere involve religion either as the source of views that are alleged to be hateful or as the target of such views. The question this book will consider is what difference religion makes in the application of hate speech law, when it is either the source or target of speech that is alleged to be hateful.

“Religious” hate speech cases are difficult or contentious for the same reason that all hate speech cases are difficult. There is significant disagreement in the community about whether or to what extent the restriction of hate speech can be reconciled with the public commitment to freedom of expression. There is, however, another reason that hate speech cases involving religion are so difficult, which has to do with our complex conception of religious adherence or membership. Religion is viewed by the courts and other public institutions as a personal commitment to a set of claims about truth and right, but also as a cultural identity involving a shared and rooted commitment to a set of beliefs and practices.

If religious adherence is viewed as a personal commitment to a set of truth claims, then the individual’s religious beliefs and practices must be open to criticism, including criticism that is harsh in tone. This seems even more obvious when we recognize that religious beliefs often have public implications – that they often say something about how we should act towards others and about the kind of community we should work to create. But if religious membership is instead viewed as a cultural identity, then it can be argued that attacks on religious belief should sometimes be restricted, because they undermine the religious group’s standing in the community or strike at the individual member’s sense of self. As well, if religious membership is viewed as a cultural identity, then censorship of religiously based speech (that is alleged to be hateful) may be experienced by the speaker as a repudiation of her defining values and beliefs, as a denial of her equal worth, and as the marginalization of her community.

Most countries have laws restricting speech that expresses or encourages hatred against the members of religious and other groups, although these laws take very different forms.¹ Anti-hate or anti-vilification laws prohibit speech that seeks to intimidate the members of a religious or other identifiable group or to stir up hatred against the group's members. The Dutch penal code, for example, prohibits the incitement of hatred, discrimination, or violence against community members because of their race, their religion, or their life philosophy, among other grounds.² Other jurisdictions have enacted hate speech prohibitions that are concerned specifically with the protection of religious individuals or groups. In the United Kingdom, s. 29B of the *Racial and Religious Hatred Act, 2006* provides that "A person who uses threatening words or behaviour, or displays any written material which is threatening, is guilty of an offence if he intended thereby to stir up religious hatred."³ Some jurisdictions also ban more specific forms of racial or religious hatred such as Holocaust denial. Article 130 of the amended Criminal Code of Germany provides that an individual who publicly denies, diminishes, or approves an act committed under the regime of National Socialism in a way likely to disturb the peace shall be punished.⁴ In a number of European jurisdictions there are laws that restrict the ridicule or disparagement of religious beliefs, symbols, or practices. The Austrian Penal Code makes it an offence to disparage religious doctrines and the Swiss Penal Code includes the offence of maliciously offending or ridiculing the religious convictions of others or to disparage a person's convictions, objects of veneration, places of worship, or religious articles.⁵

¹ The European Commission for Democracy through Law (the "Venice Commission"), which is the Council of Europe's advisory body on constitutional matters, in a 2008 report, distinguished three types of regulation of anti-religious speech: (1) the restriction of blasphemy, (2) the restriction of religious insults, and (3) the restriction of religious hate speech. The first and second types – restrictions on blasphemy and religious insult – may now be indistinguishable, or nearly so, in practice. For a discussion of the report see I. Leigh, "Damned if they do, damned if they don't: The European Court of Human Rights and the protection of religion from attack", 17 *Res Publica* 55 (2011) at 57.

² Art. 137d *Wetboek van Strafrecht* (Sr.) (Dutch Penal Code). In Germany, *Volksverhetzung* (incitement of popular hatred) is prohibited under s. 130 of the Criminal Code (*Strafgesetzbuch*, StGB).

³ The *Racial and Religious Hatred Act, 2006* (UK) s. 29B c. 1, amending *The Public Order Act 1986* (UK) c. 64. See also the State of Victoria (Australia) *Racial and Religious Tolerance Act 2001*, which makes religious vilification unlawful. Section 8(1) of the Act provides, "A person must not, on the ground of the religious belief or activity of another person or class of persons, engage in conduct that incites hatred against, serious contempt for, or revulsion or severe ridicule of, that other person or class of persons."

⁴ German Criminal Code (*Strafgesetzbuch*, StGB). In Austria, Art. 3h of the *Prohibition Act* prohibits persons from "publicly denying the National Socialist genocide, or other National Socialist crimes." Art. 3h, *Verbotsgesetz* (*VerbotsG*) (Prohibition Act, 1947).

⁵ The Austrian Penal Code, Art. 188, *Strafgesetzbuch* (StGB). The Swiss Penal Code, Art. 261, *Strafgesetzbuch* (StGB). The Dutch Penal Code also prohibits insulting a group because of their religion or their life philosophy, as well as on other grounds (Art. 137c). The German Criminal Code, Art. 166 (n. 2), makes it an offence to insult a religious worldview (*Weltanschauung*) publicly. In this regard, it is also worth noting that the UN Human Rights Council in 2007 adopted a non-binding resolution condemning the "defamation of religion", although in a 2011 resolution the Council modified

Hate speech in Canada is currently restricted by both federal and provincial laws. The *Criminal Code* of Canada prohibits the advocacy or promotion of genocide, the incitement of hatred against an identifiable group “where such incitement is likely to lead to a breach of the peace”, and the “wilful promotion of hatred” against such a group.⁶ Under the *Criminal Code* an “identifiable group” “means any section of the public identified by colour, race, religion, ethnic origin, age, sex, sexual orientation, gender identity or expression, or mental or physical disability.”⁷ Anyone who is found by a court to have wilfully promoted hatred may be imprisoned for up to two years. However, relatively few prosecutions have been brought under this provision.⁸

Hate speech is also restricted by human rights laws. Until its repeal in 2014, Section 13 of the *Canada Human Rights Act* [CHRA] prohibited Internet communication that is “likely to expose the members of an identifiable group to hatred or contempt”.⁹ The human rights codes of British Columbia, Alberta, Saskatchewan, and the Northwest Territories continue to include a provision similar to Section 13 of the CHRA that prohibits hate speech on signs or in publications.¹⁰ In contrast to the criminal ban on hate speech, individuals may be found to have breached the human rights code ban even though they did not *intend* to expose others to hatred or realize that their communication might have this effect. The ban focuses on the effect of words and not the intention behind them. The ordinary remedy against an individual who is found to have breached the ban is an order that he or she cease his or her discriminatory practice. Once again there have been very few cases in which a tribunal or court has found a breach of these code provisions.¹¹

its position, removing any reference to religious defamation and focusing instead on religious hatred. Human Rights Council, *General Comment* 34, July 2011: “Prohibitions of displays of lack of respect for a religion or other belief system, including blasphemy laws, are incompatible with the Covenant, except in the specific circumstances envisaged in article 20, paragraph 2, of the Covenant.”

⁶ *Criminal Code*, R.S. 1985, c. C-46, s. 318–319.

⁷ *Criminal Code* (n. 6), s. 318(4). An individual will not be found to have promoted hatred “if, in good faith, he expressed or attempted to establish by argument an opinion on a religious subject” (s. 319(3)(b)).

⁸ Between 1994 and 2004, there were 93 prosecutions under s. 319. Thirty-two convictions were entered, and of these, 27 resulted in prison sentences and 5 in conditional sentences (CERD, Consideration of Reports, Comments and Information Submitted by State Parties under Article 9 of the Convention, Seventeenth and Eighteenth Periodic Reports of Canada, 2008). Prosecution under the provision cannot be initiated without the consent of the provincial Attorney-General.

⁹ *Canadian Human Rights Act*, R.S., 1985, c. H-6. 3. (1) The prohibited grounds of discrimination include race, national or ethnic origin, colour, religion, age, sex, sexual orientation, gender identity or expression, marital status, and family status.

¹⁰ *Saskatchewan Human Rights Code*, R.S.S., 1979, c. S-24.1, s. 14; *Human Rights, Citizenship and Multiculturalism Act*, R.S.A., 2000, c. H-14, s. 2 (Alberta); *Human Rights Code*, R.S.B.C., 1996, c. 210, s. 7 (British Columbia); *Consolidation of Human Rights Act*, R.S.N.W.T., 2002, c. 18, s. 13 (Northwest Territories).

¹¹ Richard Moon, *Report to the CHRC Concerning Section 13 of the CHRA and the Regulation of Hate Speech on the Internet*, October 2008 at 12: Between January 2001 and September 2008, the CHRC received seventy-three s. 13 complaints (about 2% of the total number of complaints received by the

The *Criminal Code* of Canada also includes a prohibition on the publication of “blasphemous libel”, although the prohibition does not extend to expression of “an opinion on a religious subject” that is made “in good faith and in decent language”.¹² There have been no prosecutions under this provision for almost seventy years and most commentators assume that the ban would not survive a constitutional challenge.

I RELIGION AS THE TARGET OF HATE SPEECH

A Anti-Semitic Speech

The leading Canadian hate speech cases involve anti-Semitic speech. *R. v. Keegstra* involved a high school teacher in the small town of Eckville, Alberta, who for more than a decade told his classes about an all-encompassing conspiracy by Jews to undermine Christianity and control the world.¹³ The teacher, James Keegstra, taught his students that Jews were “treacherous”, “subversive”, “sadistic”, “power-hungry”, and “child killers”. He was charged, and ultimately convicted, under s. 319(2) of the *Criminal Code* with “wilfully promoting hatred” against the members of an identifiable group. As part of his defence Keegstra challenged the constitutionality of the *Criminal Code* ban on hate speech. The Supreme Court of Canada held that section 319(2) breached the freedom of expression right (s. 2(b)) under the *Canadian Charter of Rights and Freedoms* (the *Charter*), but that the restriction was justified under section 1, the *Charter*’s limitation provision.¹⁴

The issue in *Canada v. Taylor* was whether a telephone hate line operated by the Western Guard Party, and its leader, John Ross Taylor, breached the human rights code ban on hate speech.¹⁵ Members of the public who dialled a telephone number that had been publicized by Taylor and his party would hear a short pre-recorded

CHRC). Of these, thirty-two were closed or dismissed by the CHRC and thirty-four were sent to the CHRT for adjudication. (When these numbers were compiled in September 2008, two of the seventy-three complaints were under investigation by the CHRC and five were awaiting decision by the CHRC.) Of the thirty-four complaints that were sent to the CHRT, ten were resolved prior to adjudication. In September 2008, eight of the complaints forwarded to the CHRT were awaiting conciliation/adjudication. In the remaining sixteen cases, the CHRT found that s. 13 had been breached and imposed a cease and desist order.

¹² *Criminal Code* (n. 6), s. 296. ¹³ *R. v. Keegstra* [1990] 3 SCR 697.

¹⁴ In the Court’s view, the restriction was justified because its purpose – to prevent the spread of hatred in the community – was “substantial and compelling” and because it limited only a narrow category of extreme speech that “strays some distance from the spirit of section 2(b)” (*Keegstra* (n. 13), paras. 85, 99).

¹⁵ *Canada v. Taylor* [1990] 3 SCR 892. The UN Human Rights Committee dismissed a complaint brought by Taylor under the *International Covenant on Civil and Political Rights* [ICCPR] (adopted 16 December 1966, entered into force March 23, 1976) 999 UNTS 1717: *Taylor v. Canada* (1983) Communication No. 104/1981: Canada (6 April 1983) CCPR/C/18/D/104/1981 (UN Human Rights Committee).

message that made a variety of false claims about Jews. Taylor and the Western Guard were found by the Canadian Human Rights Tribunal to have engaged in telephonic communication “that is likely to expose a person or persons to hatred or contempt” because of his or her membership in an identifiable group, contrary to s. 13 of the *Canadian Human Rights Act*. As part of his defence, Mr. Taylor argued that the human rights code ban on hate speech was unconstitutional. The Supreme Court of Canada, drawing on its decision in *Keegstra*, held that the ban did not breach the *Charter of Rights*.¹⁶

In *R. v. Zundel*, the author and publisher of numerous Holocaust denial tracts was charged under s. 181 of the *Criminal Code* with publishing news that he knew was false and was likely to cause injury or mischief to the public interest.¹⁷ Zundel was convicted at trial of spreading “false news”. However, the Supreme Court of Canada, on appeal, held that s. 181 was too vague to be considered a reasonable limit on freedom of expression (s.2(b) of the *Charter*), and set aside Zundel’s conviction. Zundel was later found to have breached s. 13 of the *CHRC*. The Human Rights Tribunal determined that a Holocaust denial website, which was operated under Zundel’s direction, was likely to expose Jews to hatred and contempt.¹⁸ The Tribunal found that in challenging “[v]irtually every aspect of the holocaust”, Zundel “branded [Jews] as liars, swindlers, racketeers and extortionists . . . criminals and parasites” “who wield[ed] extraordinary power and control.”¹⁹

In *Ross v. New Brunswick School District No. 15* (1996), the Supreme Court of Canada held that a public school teacher who expressed racist and anti-Semitic views in public settings away from the school was properly dismissed from his teaching position.²⁰ The Court upheld the decision of an adjudicator, appointed under the *New Brunswick Human Rights Code*, that ordered the school board to remove Mr. Ross from the classroom. The Court found that Mr. Ross’s expression of anti-Semitic views at public meetings and in the local media had “poisoned” the learning environment in the school.

Anti-Semitism has played a similarly central role in European hate speech jurisprudence. In *X v. Germany*, for example, the European Court of Human Rights (ECtHR) held that a ban on the display of Holocaust denial material was a justified restriction of freedom of expression under the *European Convention on Human Rights* (ECHR).²¹ Similarly, in *Garaudy v. France*, the ECtHR upheld a restriction

¹⁶ In the more recent decision of *Whatcott v. Saskatchewan Human Rights Commission* [2013] 1 SCR 467, the Supreme Court similarly found that the hate speech ban in the *Saskatchewan Human Rights Code* was compatible with the *Charter*.

¹⁷ *R. v. Zundel* [1992] 2 S.C.R. 731. The case was commenced as a private prosecution under s. 181 after the Attorney-General of Ontario refused to consent to prosecution under s. 319(2).

¹⁸ *Citron v. Zundel*, TD 1/02 (2002). ¹⁹ *Citron* (n. 18) at paras. 137–39.

²⁰ *Ross v. New Brunswick School District No. 15* [1996] 1 SCR 285. In *Ross v. Canada*, the UN Human Rights Committee dismissed the complaint brought by Ross under the Optional Protocol, ICCPR.

²¹ *European Convention on Human Rights* (Nov 4, 1950). *X v. Germany* (1982) Appl. no. 9235/81, Decision of 16 July 1982. See also *Kühnen v. Federal Republic of Germany*, Appl. no. 12194/86, Decision of

on speech denying the Holocaust.²² The ECtHR also sustained a hate speech conviction in *The Jewish Community of Oslo v. Norway*.²³ In that case a public speech that honoured Nazi Rudolph Hess and asserted that Jews continued to plunder and degrade the country was found to breach the Norwegian penal code. The UN Human Rights Committee in *Faurisson v. France* found that the conviction of an individual under French law for publishing a book denying the Holocaust did not breach the *International Covenant on Civil and Political Rights* (ICCPR).²⁴

B Anti-Christian Speech

In countries in which Christians are an ethnic minority, anti-Christian speech may sometimes include claims about the rooted characteristics of group members. However, in Canada and other countries in which Christianity is the dominant faith, anti-Christian speech seldom involves claims about the inferior or dangerous character of Christians – the ordinary form of hate speech. Instead, anti-Christian speech most often involves criticism or ridicule of the beliefs of Christians. The harm that may stem from this speech is not the marginalization of the group or the risk of violent action against its members, but instead the hurt or humiliation experienced by the group's members when what they regard as sacred is denigrated.

While Christians in Canada have sometimes been subjected to harsh criticism, there are no significant modern cases in Canada dealing with attacks on Christians or Christianity. In the late nineteenth and early twentieth centuries, there was a series of blasphemy prosecutions in Canada against individuals who criticized the doctrine and clergy of the Protestant and Roman Catholic churches; however, there have been no reported blasphemy cases in Canada since the early 1900s.²⁵

There are, however, a number of decisions in Europe and elsewhere, under blasphemy or religious insult laws, that deal with anti-Christian expression, and more particularly expression that denigrates the sacred symbols of the Christian faith.

In *Whitehouse v. Lemon*, a gay publication in England was found to have breached the now-repealed English blasphemy law when it published a poem

12 May 1988; *W.P. and Others v. Poland*, Appl. no. 42264/98, Decision of 2 September 2004; *Hosnik v. Austria*, Appl. no. 25062/94; *Marais v. France*, Appl. no. 31159/96; *M'Bala M'Bala v. France*, Appl. no. 25239/13 (Oct 20, 2015).

²² *Garaudy v. France*, Appl. No 65831/01 (24 June 2003).

²³ *The Jewish Community of Oslo v. Norway*, Comm No. 30/2003 (15 Aug. 2005).

²⁴ *Faurisson v. France*, Communication No. 550/1993.

²⁵ In the middle of the last century, Christian sects such as the Jehovah's Witnesses experienced persecution by both state and private actors – most notably in Quebec during the 1950s. In response to what many in the predominantly Roman Catholic province of Quebec regarded as blasphemy or insult against the Catholic Church, the provincial government enacted a variety of measures designed to suppress the proselytizing activities of the Jehovah's Witness community. In *Saumur v. City of Quebec* [1953] 2 S.C.R. 299, the Supreme Court of Canada struck down a by-law that forbade the distribution of literature in the streets of Quebec City without the prior consent of the Chief of Police – a by-law that was understood by all as directed at the Jehovah's Witness community.

depicting a same-sex encounter involving Jesus, as well as sexual acts performed on his crucified body.²⁶ A jury decided that the poem would “shock and outrage the feelings of ordinary Christians”.²⁷ The publisher argued before the European Commission on Human Rights that its conviction under UK law breached Article 10 (1) (freedom of expression) of the *ECHR*. The application was dismissed by the Commission, which held that the offence of blasphemy could be viewed as “necessary” in a “democratic society”: “If it is accepted that the religious feelings of the citizen may deserve protection against indecent attacks on the matters held sacred by him, then it can also be considered as necessary in a democratic society to stipulate that such attacks, if they attain a certain level of severity, shall constitute a criminal offence”.²⁸

In the *Otto-Preminger-Institute* case, a film society in Austria announced that it would be showing as part of its season a film entitled *Das Liebeskonzil* [Council of Heaven].²⁹ The film depicted Mary, the mother of Jesus, as a “loose woman”, God as “senile”, and Jesus as “cretinous”. The Austrian authorities seized the film prior to its screening and commenced an action against the institute under a provision of the penal code that prohibited the disparagement of religious doctrine. Even though the action was dropped, the government refused to return the film. After exhausting all domestic remedies, the institute claimed before the ECtHR that the seizure of the film breached the freedom of expression provision of the *ECHR*. The ECtHR, however, dismissed the claim, maintaining that the state had a legitimate role in protecting religious believers from insult to their religious feelings. In the Court’s view, even though offensive speech fell within the scope of freedom of expression under the *ECHR*, speech that was “gratuitously” insulting could legitimately be restricted by the state.

In subsequent cases, the ECtHR has been more willing to overturn convictions for blasphemy or religious insult. In *Giniewski v. France*, a French journalist who

²⁶ *Whitehouse v. Gay News Ltd* [1979] AC 617 (HL).

²⁷ *Whitehouse* (n. 26) at 657. Lord Russell of Killowen in the House of Lords decision indicated that “as an ordinary Christian” he found the publication “quite appallingly shocking and outrageous”.

²⁸ *Gay News Ltd. and Lemon v. U.K.*, Application No. 8710/79 (7 May 1982), para. 12. In another English case, the British Board of Film Classification (and the Video Appeals Committee) refused to issue a classification certificate for a video that it judged to be blasphemous: *Wingrove v. The United Kingdom* (19/1995/525/611) 25 November 1996; *Wingrove v. UK* (application no. 17419/90), Nov 25, 1996 at para. 57. The video, entitled *Visions of Ecstasy*, depicted St Teresa of Avila experiencing sexual raptures, stimulated by an image of the crucified Christ. The object of the film, according to its makers, was to “explore the relationship between mysticism and repressed sexuality” (Leonard W. Levy, *Blasphemy*, University of North Carolina Press, 1955, at 567). The film board, though, could see “no attempt to explore the meaning of the imagery beyond engaging the viewer in an erotic experience” (Levy at 567). The decision of the British board was upheld by the ECtHR, which accepted that the “refusal to grant ‘Visions of Ecstasy’ a distribution certificate was intended to protect ‘the rights of others’, and more specifically to provide protection against seriously offensive attacks on matters regarded as sacred by Christians” and so did not breach the *ECHR*.

²⁹ *Otto-Preminger-Institut v. Austria*, No. 13470/87, [1994] ECHR 26.

argued that the Roman Catholic Church (and a particular papal encyclical) had promoted a doctrine that contributed to anti-Semitism and the Holocaust was convicted in the French courts of defaming Christian belief.³⁰ The ECtHR, however, held that the conviction breached freedom of expression under the Convention, noting that the journalist's argument could be viewed as addressing an issue of public concern, and so was not "gratuitously offensive".³¹

C Anti-Muslim/Islam Speech

In the last several years, there have been a number of high-profile cases in Canada involving anti-Muslim speech or speech that attacks or ridicules Islam. The best known of these cases is the human rights code complaint against *Maclean's* magazine and columnist Mark Steyn. *Maclean's* published an excerpt from Steyn's book, *America Alone*, in which he argues that Muslims will soon become the majority community in many European countries (through higher birth rates and immigration), that their goal is to impose Sharia law on these countries, and that many Muslims are prepared to use violence to achieve this goal.³² As noted below, a similar view has been advanced in one form or another by a number of European authors, raising alarm about what is sometimes referred to as the "Muslim Tide" or the rise of "Eurabia".

Complaints about Steyn's piece in *Maclean's* were made under the *Canada Human Rights Act* and the *British Columbia Human Rights Code*.³³ The complaint against *Maclean's* was dismissed by the Canadian Human Rights Commission and did not go to the Canadian Human Rights Tribunal for adjudication. In British

³⁰ *Giniewski v. France*, App. No. 64016/00 (Eur. Ct. H.R. Jan. 31, 2006).

³¹ See also *Klein v. Slovakia*, Application no. 72208/01 (31 Oct 2006), and *Aydin Tatlav v. Turkey*, App. No. 50692/99 (2 May 2006) (ECtHR). In the Australian case of *Pell v. NSW Gallery*, an Anglican bishop brought a private prosecution under the blasphemy prohibition in the New South Wales criminal code against a public art gallery that displayed the "Piss Christ" – a photograph by the artist Serrano of a plastic crucifix immersed in a jar of his own urine. The Court held that the offence had not been established, since there was no evidence that the publication was intended to outrage the feelings of Christian believers or was likely to lead to a breach of the peace (*Pell v. Council of Trustees of the National Art Gallery of Victoria* (Unreported), Supreme Court of Victoria, Harper J., Oct 9, 1997). In many parts of the world blasphemy laws are still vigorously applied. For a survey see Paul Marshall and Nina Shea, *Silenced: How Apostasy and Blasphemy Codes Are Choking Freedom Worldwide* (Oxford University Press, 2011).

³² Mark Steyn, "The future belongs to Islam", *Maclean's Magazine*, Oct 23, 2006; Mark Steyn, *America Alone: The End of the World as We Know It* (Regnery Publishing, 2006).

³³ A complaint was also made under the *Ontario Human Rights Code*, R.S.O. 1990, C. H. 19 (OHRC), but the Commission found that it did not have jurisdiction to hear the complaint, because unlike the Canada and BC Codes, the Ontario Code does not include a ban on hate speech. The Commission, however, did issue a statement expressing concern that Steyn's article contributed to Islamophobia and was inconsistent with the spirit of the OHRC. See Ontario Human Rights Commission, Press Release, "Commission statement concerning issues raised by complaints against *Maclean's Magazine*" (Apr 9, 2008), www.ohrc.on.ca/en/news_centre/commission-statement-concerning-issues-raised-complaints-against-macleans-magazine.

Columbia, there is no commission that receives and filters complaints and so all complaints go directly to a tribunal for adjudication. The tribunal, in this case, dismissed the complaint following a hearing.³⁴ In the tribunal's view Steyn's claims were not sufficiently extreme or intemperate to count as hate speech and were offered as a contribution to an ongoing public discussion about immigration and terrorism.

Another well-publicized Canadian case was the complaint made to the Alberta Human Rights Commission against a right-wing publication, the *Western Standard*, following its publication of the "Danish Cartoons" depicting the Prophet Mohammad. This complaint was also dismissed prior to adjudication. The Commission investigated the complaint, as required by the human rights code, but decided that even though the cartoons were "stereotypical, negative, and offensive" they were relevant to "timely news" and "not simply gratuitous[]".³⁵

While neither of these complaints succeeded, in *R. v. Harding* a more vitriolic attack on Muslims resulted in conviction under the *Criminal Code* hate speech provision.³⁶ Mr. Harding, a Christian pastor, published and distributed several pamphlets in which he asserted that Muslims are violent and hateful towards Christians, Jews, and other "non-believers", are conspiring to take over Canada, and are "wolves in sheep's clothing" who will use violence to achieve their goals.³⁷ Muslims, he wrote, "are full of hate, violence and murder" and are incapable of living peacefully among non-Muslims.³⁸ The court saw the pamphlets as an invitation to readers "to take defensive action against the threat of violence posed by Muslims as a group" leading to "the inevitable conclusion . . . that Muslims are deserving of ill-treatment".³⁹ The court concluded that the claims made by Mr. Harding amounted to the wilful promotion of hatred, contrary to s. 319(2) of the *Criminal Code*.

In the last decade, European Muslims have increasingly become the focus of speech that is, or is alleged to be, hateful. In most cases, the focus of attack is directly on Muslims – on those who identify with the Islamic tradition. The speech attributes to the members of the group certain undesirable traits or entrenched beliefs and practices, and so is similar in character to anti-Semitic speech. While the followers of Islam may come from a variety of ethnic/cultural backgrounds, they are presented in this speech as culturally homogeneous. A number of books and blogs assert that Muslims will soon form a majority in Europe, as a consequence of continuing immigration from Muslim-majority countries and high birth rates among those who have settled in Europe, and that they are willing to employ a variety of means, including violence, to impose the Islamic faith on "native" Europeans. It is claimed that Muslim "culture" includes a variety of barbaric practices that are incompatible with

³⁴ *Elmasry and Habib v. Rogers' Publishing and MacQueen* (No. 4), 2008 BCHRT 378.

³⁵ Joseph Brean, "Magazine publisher Levant wins Danish cartoon dispute", *National Post*, Aug 8, 2008.

³⁶ *R. v. Harding* (1998), O.J. No. 2603, affirmed in Ontario Court of Appeal, 160 CCC (3d) 225; 48 C.R. (5th) 1.

³⁷ *Harding* (n. 36), para. 5. ³⁸ *Harding* (n. 36), para. 5. ³⁹ *Harding* (n. 36), para. 10.

the (Christian-inspired) liberal democratic culture of Europe, and that Muslims are so steeped in their religious culture that they simply cannot be assimilated into Western society.⁴⁰

One of the more prominent European hate speech cases involved the anti-Islam film *Fitna*, produced by the Dutch MP Geert Wilders, and released via the Internet in 2008. The short film portrayed Islam as a violent religion that requires its followers to impose its beliefs and practices on non-believers. *Fitna* is described by Caspar Melville as “not so much a film as a cut-and-paste web montage” that “intercuts verses from the *Quran* calling for violence against non-believers with images culled from news footage of terrorist attacks”.⁴¹ The film then invokes the past struggles and victories in Europe against Nazism and Communism and declares that Islamization must be stopped. The film ends abruptly with the explosion of a bomb – represented as Mohammad’s turban – an image that is “superimposed on a *Quran*”.⁴² Wilders was acquitted of the charge of hate speech in 2011, because, in the court’s judgment, the film’s attacks were directed at Islamic belief and not at Muslim believers, and because it contributed to an ongoing public debate.⁴³ However, in December 2016, Wilders was found guilty by a court in the Netherlands of inciting discrimination against Dutch Moroccans.⁴⁴ Wilders had made derogatory remarks about Moroccans to a public gathering and said that if elected he would ensure their exclusion from the Netherlands.⁴⁵

In *Norwood v. DPP*, the English courts held that Mr. Norwood breached s. 5 of the *Public Order Act, 1986*, which prohibits the display of a sign or other writing that “is threatening, abusive or insulting within hearing or sight of a person likely to be caused harassment, alarm or distress thereby”.⁴⁶ Mr. Norwood had displayed in the window of his home a poster with an image of the twin towers in flames, accompanied by the words “Islam out of Britain – Protect the British People” and the crescent and star symbol marked as prohibited (within a circle with a diagonal line through it). A judge of the Queen’s Bench upheld Mr. Norwood’s conviction in the lower court, noting that “The poster was a public expression of attack on all Muslims in this country, urging all who might read it that followers of the Islamic religion here should be removed . . . and warning that their presence here was a threat or a danger to the British people”.⁴⁷ Following his conviction in the British courts, Norwood

⁴⁰ Some notable examples include Christopher Caldwell, *Reflections on the Revolution in Europe* (Anchor Books, 2010); Bruce Bawer, *While Europe Slept: How Radical Islam Is Destroying the West from Within* (Anchor Books, 2007); Bat Ye’or, *Eurabia: The Euro-Arab Axis* (Farleigh Dickinson University Press, 2005).

⁴¹ Caspar Melville, *Taking Offence* (Seagull Books, 2009) at 4.

⁴² Melville (n. 41) at 6. ⁴³ www.bbc.co.uk/news/world-europe-13883331.

⁴⁴ Wilders, though, was acquitted of inciting hatred against this group.

⁴⁵ www.theguardian.com/world/2016/dec/09/geert-wilders-found-guilty-in-hate-speech-trial-but-no-sentence-imposed.

⁴⁶ *Norwood v. DPP* [2003] EWHC 1564 (Admin).

⁴⁷ *Norwood* (n. 46) at para. 13. In the judge’s view, the poster could not reasonably “be dismissed as merely an intemperate criticism or protest against the tenets of the Muslim religion, as distinct from an unpleasant and insulting attack on its followers generally” (para. 33).