

IS THERE A GAP IN CANADA’S HATE CRIME LAWS? THE IDENTIFICATION OF SOFT VIOLENCE AS A TOOL FOR CURRENT RIGHT-WING EXTREMIST SOCIAL MOVEMENTS

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Introduction

Since the beginning of Donald Trump’s campaign for the United States’ presidency, the international community has arguably seen a significant uptick in hate-motivated right-wing extremist (RWE) violence. While this is not the first time that sentiments such as racism, anti-Semitism, and misogyny have gained widespread popularity, it could be argued that the means through which these ideas are being communicated and the ways in which they are being expressed have transformed. One aspect that has not changed is the presence of hate crime in the locations where RWE actors or sentiments are prevalent. These hate crimes can cause fear in the communities that are being targeted by RWE messengers, thereby disrupting community harmony and public safety as a whole.

As RWE has evolved, it stands to reason that the types of hate crimes being committed have also changed. In Canada, where multiculturalism and tolerance are often touted as the country’s ideals, there have been numerous recent incidents of RWE kinetic and soft violence: “actions that stop short of criminally identified violence...and highlight superiority of one group over another without kinetic impact” (Kelshall & Meyers, 2019, p. 40). Soft violence seeks to create fear and can therefore be utilized by RWE actors to intimidate those they seek to marginalize, while simultaneously energizing their supporters (Kelshall & Meyers, 2019). Unfortunately, examples of soft violence – such as the use of culturally specific symbols and language – are not recognized by law enforcement or legislative officials to be hateful, and therefore have not been codified into Canada’s hate crime laws (Kelshall & Meyers, 2019). This is an important distinction to make when looking at the effect that soft violence has on the wider community, namely RWE message normalization, and how this may be contributing to the current political polarization and the increase in echo chambers found in the Canadian context (Kelshall & Meyers, 2019).

The increase in RWE kinetic and soft violence in Canada over the last few years begs the question: is there a gap in Canada’s hate crime laws? This paper argues that the legal use of soft violence by RWE actors provides reasonable grounds to question the sufficiency of Canadian hate crime laws. In order to properly distinguish any potential gaps in the law, this paper first provides a short history of hate crime law, followed by its strengths and weaknesses in the Canadian context. Next, there is an introduction to the notion of violent transnational social movements and the role they may play in increasing the widespread frequency of hate crime. After that, this paper discusses the current trends of hate crime and RWE kinetic and soft violence in Canada. Finally, there is an examination of potential areas of improvement for Canada’s hate crime law.

What is Hate Crime?

Hate crime can broadly be defined as any conduct that complies with the given state's definition of criminal conduct and is motivated by the perpetrator's prejudice against a group that is legally identified by the state (Naidoo, 2016, p. 54). Depending on the state and which groups they recognize as needing state protection, their hate crime laws may be relatively comprehensive. For example, in Canada, the *Criminal Code* (CCC) recognizes identifiable groups based on the following: "colour, race, religion, national or ethnic origin, age, sex, sexual orientation, gender identity or expression, or mental or physical disability" (Criminal Code of Canada [CCC], 1985, s. 318(4)). *The Canadian Charter of Rights and Freedoms* (CCRF) s. 15 recognizes a similar list when discussing the right to equality under the law and protection of the law without discrimination (1982). The harms of hate crime are often invisible and can affect more than just the victim of a specific criminal act, which is why a group – *The Hate Crimes Community Working Group* – was established with the help of the Ontario Attorney General (Perry, 2010, p. 125). The following four observations on the effects of hate crime were reported:

1. Hate crimes and incidents create high levels of fear, mistrust, isolation, and exclusion in targeted communities;
2. Hate crimes and incidents pit targeted communities against each other;
3. Hate crimes and incidents generate a lack of a sense of safety;
4. Hate crimes and hate incidents disrupt victims' education and create high levels of stress in families, lead to family breakdowns and health problems (as cited in Perry, 2010, p. 126).

These observations provide a clearer understanding of the public safety and security threat that hate crimes pose. Therefore, making sure that Canadian law is equipped to recognize and prosecute all forms of hate crime is of the utmost importance.

A number of scholars argue that the birth place of hate crime legislation was the United States, either during the reconstruction period following the American Civil War in the 19th century or as a result of the Second World War (WWII) in the 20th century (Naidoo, 2016). The laws which followed the civil war laid the foundation for American civil rights, ratifying Constitutional amendments that abolished slavery, granted citizenship for a wider group, and provided voting rights to those who were previously identified as slaves (Naidoo, 2016, p. 55). Due to the arguably entrenched racism in American civil society during this time, further legislation was required to enforce these rights at the state levels, resulting in the Civil Rights Act of 1866 and the Enforcement Act of 1870 (Naidoo, 2016, p. 55). These laws show aspects of 21st century hate crime legislation, most notably the identification of specific groups that require state protection.

The laws which followed WWII show an increased acknowledgement of the devastating effects of violence based on prejudice. Unlike during the American Civil War, the post-WWII legislations were enacted at both the state and federal levels, supporting the argument that the American public were significantly more united in their rejection of hate-based violence (Naidoo, 2016). There are

a number of examples of this rejection, including the overturning of the “separate but equal” doctrine in the US Supreme Court case of *Brown v Board of Education of Topeka* (1954), which enabled the racial integration of public schools (as cited in Naidoo, 2016, p. 59). Another example can be derived from the American Civil Rights Movement in the 1960s, when the *Civil Rights Act* was enacted with provisions that prohibited conduct motivated by prejudice – in regard to race, colour, religion or nationality – that interfered with a person’s federally protected rights (Naidoo, 2016, p. 60). While laws following WWII, such as the ones noted previously, provided stronger legal consequences for hate crime, these laws were not unique to America. It is arguable that the decades following WWII can be defined as the era of international acceptance and agreement on the prohibition of hate-motivated violence and propaganda. The international community reacted to the horrors of this war by signing the Universal Declaration of Human Rights, the Convention on the Prevention and Punishment of the Crime of Genocide, the International Convention on the Elimination of All Forms of Racial Discrimination, and many others. Therefore, attributing the hate crime legislations to post-WWII America is too narrow a scope.

While America’s Civil War arguably spurred the legal precedence for the acknowledgement of crime motivated by prejudice, the question remains of how hate crime was introduced into Canadian law. It is important to note that while the key racial tension that spurred change in US law was between White and African Americans in the context of slavery, the primary racial tension that first required addressing in Canada was between Indigenous Peoples and White Settlers in the context of trade (Perry, 2010). Racially-motivated laws and violence against Indigenous peoples and other people of colour – notably Chinese and Japanese Canadians – arguably continued relatively unchallenged in Canada until the mid 20th century. In fact, following the First World War (WWI), the Canadian government amended the *Immigration Act* of 1896 to include a prohibited group of people who hailed from ‘undesirable’ countries, thereby enforcing an ethnocentric immigration policy (Wong & Guo, 2018, p. 1).

The changes in the Canadian conversation around identifiable groups evolved significantly with the addition of the subject of multiculturalism to public discourse (Perry, 2010, p. 123). This occurred in part as a result of changes in Canada’s immigration policies that previously discouraged legal immigration from non-European, non-White countries (Perry, 2010, p. 123). These changes were primarily made as a result of international pressure to alter previously racist or ethnocentric government policies (Wong & Guo, 2018, p. 2). The subject of multiculturalism was also spurred by an economic boom in central Canada that required a work force that could only be accumulated through immigration (Wong & Guo, 2018, p. 2). Canada soon became known as a multi-ethnic society, where different identity groups were – and continue to be – capable of great acceptance and tolerance of one another, as well as strong group hatred (LaSelva, 2015, p. 713). This dynamic has made it even more crucial for Canada to have strong hate crime laws.

Another avenue of Canadian law that introduced the foundation for hate crime was the adoption of the CCRF (1982), specifically s. 15 that codifies “equality before and under law and equal protection and benefit of law.” Within s. 15(1) there is a specific focus on eliminating

discrimination based on factors including race, religion, and ethnic origin (Canadian Charter of Rights and Freedoms [CCRF], 1982). This explicit determination of equality under the law arguably enables the Canadian Criminal Justice System (CJS) to accurately assess the biased motivations of some criminal conduct. The CCRF works to identify hate-motivated conduct in conjunction with the CCC. There are a number of provisions within the CCC that enable harsher sentencing when bias has been determined as a key motivation for the criminal conduct, including the following: s. 430(4.1) which discusses criminal mischief, s. 318(2) which discusses the promotion of genocide, s. 319(1) and (2) which identify hate speech, and s. 718.2(a)(i) which determines biased motivation to be an aggravating factor with regard to sentencing (CCC, 1985).

Unfortunately, while the CCRF and the CCC provide the means to identify and prosecute hate crime, they also provide strong defences for the same crimes. For example, one of the strongest defences against hate speech as it is set out in s. 319(1) and (2) can be found in the CCRF s. 2, which describes the following fundamental freedoms: (a) freedom of conscience and religion; (b) freedom of thought, belief, opinion and expression; (c) freedom of peaceful assembly; and (d) freedom of association (1982). These freedoms can cover a myriad of potentially hateful practices, such as participating in holocaust revisionism, pro-life protests outside of medical clinics, and obtaining membership in a nationalist group. While it is of the utmost import to protect individual freedoms, it is easy to understand how these practices can promote fear in marginalized individuals and their communities. One can also find multiple defences for hate speech within the CCC s. 319(3), including (a) establishing the truth of the statement, (b) making an argument based on religious text or belief, or (c) providing proof that the statements were of public interest and reasonably believed in their truth (1985). It is arguable that with the addition of these defences, Canadian hate crime laws are weakened.

There is one important tool that can be utilized to reasonably limit someone's individual freedom for the purpose of achieving justice in a democratic society: s. 1 of the CCRF (1982). This limit is commonly argued during the prosecution of hate crimes, as the defence often relies on the accused's fundamental freedoms in order to achieve a verdict of not guilty. One important piece of Canadian case law, *R v Keegstra*, provides a great example of the utility of CCRF s. 1. In this case, a high school teacher (Keegstra) was charged under CCC s. 319(2) for promoting hatred in his classroom by spreading his own anti-Semitic views (Grossell, 2014). His defence argued that s. 319(2) infringed on Keegstra's freedom of expression as outlined in s. 2(b) of the CCRF (Grossell, 2014). The Supreme Court of Canada (SCC) decided that while s. 319(2) did infringe on Keegstra's s. 2(b) right, this infringement is considered justified under s. 1 of the CCRF (Grossell, 2014). This decision by the SCC has played a significant role in community protection against hate propaganda that seeks to destroy the delicate balance needed to support a multicultural society such as Canada (LaSelva, 2015, p. 714).

What is a VTSM?

An important part of understanding hate crime is knowing who the perpetrators of it are. In the current political and social climate in Canada, arguably the greatest perpetrators of hate crime are those individuals who participate in violent transnational social movements (VTSMs). This notion is described by Kelshall (2018) as transcending state boundaries in order to unite individuals with shared ideologies, perspectives or grievances, arguably facilitated primarily by the advent of the internet (p. 27). VTSMs are often created as a result of the perception that a certain aspect of life that has “social or cultural importance is under an existential threat,” and therefore requires a collaborative effort to restore it (Kelshall, 2018, p. 27).

VTSMs can be broadly identified by the following three key characteristics that were first conceptualized by Gerlach (1971) and later adapted by Kelshall (2018): polycentric, reticulate, and segmentary (as cited in Kelshall & Meyers, 2019, p. 20). First, VTSMs are polycentric due to their non-hierarchical nature, led by numerous messengers that focus on different aspects of their doctrine which unites the movement (Kelshall & Meyers, 2019, p. 20). Second, VTSMs are reticulate through their operational use of net centrality, which allows for self-actualization into the movement instead of compliance through hierarchical orders (Kelshall & Meyers, 2019, p. 21). Third, VTSMs are segmentary as they allow for membership to identify with aspects of the movement without requiring acceptance of the whole doctrine (Kelshall & Meyers, 2019, p. 21). This means that there can appear to be multiple groups advocating for different issues, while they are actually united under one movement. This particular characteristic allows VTSM members to jump from segment to segment with relative ease, averting the possibility of destroying the overall movement (Kelshall & Meyers, 2019, p. 21).

The creation of VTSMs have resulted in a new generation of warfare: Fifth Generation Warfare (5G warfare) (Kelshall, 2018, p. 27). Unlike previous generations of warfare that have involved conflict with the state, 5G warfare is a post-state conflict that arises between groups both within the state and transnationally (Kelshall, 2018, p. 27). This conflict is motivated by the need to “achieve recognition and [aid in the] survival of a socially and culturally defined way of life” (Kelshall, 2018, p. 27). 5G warfare is underpinned by a binary approach to conflict that effectively conveys the need for one VTSM to assert its superiority over another in order to dominate rather than be dominated (Kelshall, 2018, p. 28). This sense of inclusion in the superior group becomes an attraction for those who are disenfranchised within society as it can strengthen two key concepts that increase the effectiveness of a VTSM: identity affirmation, which is the strengthening of identity through things or actions that cause positive or strong feelings; and tribal bonds, which are narratives that unify a group through its shared culture (Kelshall, 2018, p. 34).

When discussing warfare, kinetic violence is generally considered to be the main facilitator, however 5G warfare does not have to be kinetic. Instead, soft violence is often used by VTSMs as an alternative way to assert superiority and cause widespread fear while stopping short of kinetic violence (Kelshall, 2018). This tactic is most prominently enabled by social media and the use of internet forums to spread misinformation and symbolic messages to other communities in order to cause insecurity while affirming members’ own identities and tribal bonds (Kelshall, 2018). The

utilization of soft violence in 5G warfare can also be seen in cyber-attacks, such as doxing, which effectively exposes a target to potential ridicule, job loss, or widespread community condemnation. An interesting phenomenon that can often appear as a result of VTSM conflict is the creation of culturally-specific language. This language, unique to a particular VTSM, is employed for the purpose of committing hate speech undetected. For example, Incels – an online movement that promotes the subjugation of women – have developed their own dictionary of hateful words to describe women and ethnic minority men that law enforcement and criminal law would not be able to identify as such. These words have the effect of causing fear and insecurity in the communities they target without the legal consequences that traditional hate speech would receive. This case illustrates the toxicity of the hate within these movements, as well as the danger of soft violence continuing to go undetected.

Hate Crime and RWE in Canada Today

In Canada, RWE has not generally received much attention, as any illicit activity is often overshadowed by more frequent and violent activity south of the border. That being said, in more recent years there appears to be a surge in the popularity of RWE activities and messaging. While it would be inaccurate to suggest that the rise in hate crime is caused by the rise of RWE in Canada, it is arguable that the sentiments often espoused by RWE actors are also commonly the underpinnings of hate speech and violence. For example, between 2014 and 2015, reported hate crimes against Muslims rose 61% in Canada (Godley, 2018, p. 113). What is more worrisome about this statistic, and crime statistics more generally, is that they are not representative of the dark figure of crime; the true frequency of a crime not necessarily reported by the victim. This is often due to issues such as only reporting the most severe crime, feeling ashamed or too vulnerable to report, and not having access or being discouraged against reporting. Godley (2018) found that this is a particular issue when discussing instances of discrimination, where many victims may not have knowledge that they have been discriminated against, may feel shame in admitting to it, or may be left out of the data altogether as the offence against them is not valued as severe enough (p. 114).

Understanding that the data may not be completely representative, Statistics Canada has released police-reported hate crime data for 2015, 2016, and 2017 that is helpful in grasping the current climate of hate in Canada. In 2015, there were 1,362 hate-motivated criminal incidents reported, a five percent increase from the previous year and primarily targeted at victims of a different religion, race or ethnicity (Leber, 2017, p. 3). The majority of these incidents, 62%, were non-violent crimes, with the most common being criminal mischief (Leber, 2017, p. 3). In 2016, there were 1,409 hate-motivated criminal incidents reported, a three percent increase from 2015, and primarily targeted at victims with a different sexual orientation, race or ethnicity (Gaudet, 2018, p. 3). The areas in Canada with the largest increase in reported hate crimes were Vancouver, Québec and Montréal (Gaudet, 2018, p. 3). As in 2015, non-violent reported hate crime in 2016 made up the majority of incidents, 57%, with criminal mischief being the main cause (Gaudet, 2018, p. 3). In 2017 – the most recent report available – there were 2,073 hate-motivated criminal

incidents reported, a 47% increase from 2016 (Armstrong, 2019, p. 3). This large increase can be primarily attributed to targets of religious, race or ethnicity-based hate crimes (Armstrong, 2019, p. 3). Non-violent hate crime in 2017 made up 62% of all reported hate crimes (Armstrong, 2019, p. 3). The areas that saw the greatest increase in hate crimes were Toronto and Montréal, where those most likely to be victims were of Muslim, Black, Jewish, Arab and West Asian descent (Armstrong, 2019, p. 3). These figures provide some clarity regarding the increased frequency of hate crime in Canada and those who are most often targeted.

The growth of RWE in Canada is of interest when discussing the recent increases of hate crime. There are some scholars who believe that RWE is no match for Canada's multicultural ideals. Specifically, Ambrose and Mudde (2015) argue that the far-right movement in Canada has failed to make any gains as a result of multicultural policy initiatives (p. 214). Granted, this report is from 2015, before the effects of Trump's presidency had made themselves known, and therefore the scholars may not hold the same beliefs today. However, they do suggest that Canada's history of tolerance and multiculturalism has protected it from a far-right party gaining any significant ground (Ambrose & Mude, 2015, p. 221). This assessment flies in the face of Perry and Scrivens (2018) description of Canada's history that pinpoints three key structural patterns which enable RWE groups to grow: "historical normativity of racism, political climates of intolerance, and weak law enforcement frameworks" (p. 173). In Canada, groups such as the Ku Klux Klan and the Aryan Guard have well known histories of finding success in different Canadian communities due to an underlying normalization of hate stemming as far back as colonialism (Perry & Scrivens, 2018, p. 173). Interestingly, while Ambrose and Mudde (2015) quote a *Maclean's* article from 2011 that reports that Canada has the highest percentage of tolerance of minorities, Perry and Scrivens (2018) also quote a *Maclean's* article from 2009 that reports that Canadians actually hold a majority unfavourable view of religious minorities, particularly Muslims and Sikhs (p. 221; p. 174). These discrepancies between scholars provide an important perspective for how Canada conceptualizes RWE and hate crime.

RWE actors in Canada have been busy within this past year. First, a three-part series of articles by the *Toronto Star* is published detailing the following significant strides that RWE has taken in Canada: a 20-25% increase in active RWE groups between 2015-2018, collaborations between groups on activities such as protests, increase in incidents of Canadian Armed Forces (CAF) members found to be affiliated with RWE groups, and greater online presence where their ability to spread hate has increased substantially (Boutilier, 2018a; Boutilier, 2018b; Boutilier 2018c). Particularly alarming was the research of hate-term searches online in Canada by Moonshot CVE (2018) over a two-week period (as cited in Boutilier, 2018c). The research found that Ontario had the highest searches of hate terms (eighteen searches per 100.000 people), with the Northwest territories, British Columbia, and Alberta with the next highest hate-term searches relative to their respective populations (as cited in Boutilier, 2018c).

One particularly contentious matter regarding the RWE group Blood and Honour (B&H) and its military branch Combat 18 (C18) that occurred in June 2019 was the designation by Public Safety

Minister Ralph Goodale of these two groups as terrorist organizations (Harris, 2019). This action was reportedly taken as an effort by the Canadian government to combat online hate (Harris, 2019). The consequences that come with this designation include the potential for criminal sanctions, ability for the government to freeze their assets, and the opportunity to charge those who support or perpetrate crimes on behalf of these groups with terrorism-related offences (Harris, 2019). There is some contention with regard to the efficacy of this designation, as Kelshall – president of the Canadian Association for Security and Intelligence Studies (CASIS) Vancouver – notes that “you can brand their group as a terrorist organization... [CASIS Vancouver researchers] have seen evidence that it will morph and be rebranded into something else” (as cited in Vescera, 2019). This is due to the transnational and decentralized nature of RWE movements (Vescera, 2019). Kelshall provides the recent example of the RWE group Soldiers of Odin rebranding themselves as the Canadian Infidels, proving that jumping from segment to segment of the RWE movement is not a difficult task (as cited in Vescera, 2019). Therefore, while the decision to designate B&H and C18 as terrorist organizations was a bold move, it arguably only serves a symbolic purpose (Vescera, 2019).

Concluding Thoughts

When dissecting the current landscape of RWE in Canada, certain commonalities begin to appear between the extremist groups and the qualities of VTSMs – polycentric, reticulate, and segmentary – which can arguably lead to the conclusion that RWE is a VTSM. There are two main reasons to make this connection. First, the hate crime data from Statistics Canada showed a trend towards non-violent hate crime against minority groups. This could suggest that the perpetrators of these crimes are committing soft violence against groups they perceive as challenging their culture or identity. This would be in line with the actions of a VTSM, given the overarching need to establish superiority over all other groups (Kelshall, 2018). Of interest to this argument would be the racial, ethnic, religious background, as well as the gender identification, and sexual orientation of the perpetrators of hate crime in Canada. This information would provide a clearer picture of potential active VTSMs. Of note in the data provided was the tendency towards non-violent rather than violent crime. This could suggest a shift towards soft violence tactics of fear and intimidation, as well as RWE message normalization. This change could also be enabled by the increased reliance on social media to spread messages of hate online.

Second, the RWE groups active in Canada that were discussed clearly showed markers of being polycentric, reticulate, and segmentary. It is arguable that simply identifying multiple groups with overlapping doctrinal messages, such as the neo-Nazi group B&H and white supremacist group Soldiers of Odin, provides a reasonable example of multiple messengers within a polycentric social movement. The use of the internet for participating in RWE online forums suggests that these groups also fit the reticulate nature of VTSMs by promoting the process of self-actualization rather than the centralized command structure of other extremist organizations. A clear example of the segmentary nature of RWE in Canada was provided by Kelshall in Vescera (2019), as she discussed the smooth transition for the members of Soldiers of Odin rebranding to the Canadian

Infidels. It is likely that many more examples of the polycentric, reticulate, and segmentary nature of RWE in Canada could be identified through a more thorough discussion on the characteristics of the active groups.

It would follow that if RWE is considered a VTSM in Canada, then the use of soft violence on the Canadian population is most certainly present. Therefore, it is imperative that legislators of Canadian criminal law amend the CCC to identify and criminalize acts of soft violence in order to decrease the frequency of unidentified hate crime. This would require a deeper understanding of what should be considered soft violence and how freedom of expression, along with the other rights codified in the CCRF, would be affected. The balance between individual rights and the protection of public safety has always been, and will continue to be a constant figurative tug-of-rope. This struggle will only increase with the addition of soft violence as a recognized crime, however the importance of diminishing hate in Canada is arguably of consequence.

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