

## **Freedom of Expression in Canada: Offensive Speech and the Limits of Tolerance**

Dan Shapiro, Research Associate

Sheldon Chumir Foundation for Ethics in Leadership

Presented at the *Tolerance/Intolerance, Difference/Indifference* Conference

Kwantlen Polytechnic University, Surrey BC, March 28, 2009

What does it mean for speech to be “offensive?”<sup>1</sup> Speakers (and writers) can give offense in a number of different ways, and offensive speech has several modes of expression. Similarly, hearers (or readers) can take offense for many reasons and can respond in various ways; however, I shall suggest that there is a common logic to taking offense and that this logic is evident in several recent human rights cases in Canada. A natural response to speech which the hearer (or reader) perceives as offensive is to seek to curtail it. This is also known as the desire to “shoot the messenger.” Thus examination of “offensive speech” is inevitably bound up with questions of freedom of expression and censorship.

This paper offers a taxonomy of offensive speech and argues that, while we might be offended by many kinds of intolerant or discriminatory expression, human rights commissions are not the appropriate arena to deal with such forms of intolerance.<sup>2</sup> We should take seriously the ways in which marginalized groups may be demonized in public discourse; but, in terms of human rights statutes, we should repeal legal restrictions on expression in favour of public education, rebuttal, protest, and other forms of moral suasion.

In several recent high-profile cases, complainants have used Canadian federal and provincial human rights statutes to challenge expression they deemed offensive and

---

<sup>1</sup> I use “speech” in the wider sense here of “expression,” as in “freedom of expression,” to include not just spoken or written words, but pictures, cartoons, and other representations.

<sup>2</sup> I do not address the hate speech provisions of the *Criminal Code*, nor the most extreme forms of hate speech, including the promotion of violence and genocide which the criminal law is designed to prevent.

intolerant. These cases set off a firestorm on opinion pages, talk radio and the blogosphere about freedom of expression and the appropriate role and function of human rights commissions, particularly with regard to provisions aimed at restricting speech that is “likely to expose a person or class of persons to hatred or contempt” on the basis of a protected ground, such as race, gender or colour.<sup>3</sup>

The ensuing debate exposed deep tensions between freedom of expression and equality rights—construed as the right to be free from discrimination—in a liberal, democratic society. At what point does my freedom to say what I think about controversial subjects (e.g., religious fundamentalism or gay marriage) impinge upon your right to be free from discrimination? On the one hand, some free speech advocates maintain that they have the right to be maximally offensive<sup>4</sup> even to the point of expressing discriminatory attitudes that vilify identifiable minorities. On the other, human rights and anti-discrimination advocates claim that people’s dignity, self-respect and standing in the community can be deeply harmed by some forms of offensive or intolerant speech such that they have a right to state protection from that kind of speech.

This tension between free speech and anti-discrimination measures raises important questions about tolerance and intolerance. Should human rights legislation aimed at promoting tolerance and combating discrimination be used to restrict speech

---

<sup>3</sup> Five jurisdictions in Canada have such provisions in their human rights legislation: Federally under section 13 of *Canadian Human Rights Act*, R.S., 1985, c.H-6. Saskatchewan under section 14 of the *Saskatchewan Human Rights Code*, R.S.S., 1979, c. S-24.1; Alberta under section 3 of the *Human Rights, Citizenship and Multiculturalism Act*, R.S.A., 2000, c. H-14; British Columbia under section 7 of the *Human Rights Code*, R.S.B.C., 1996, c. 210; Northwest Territories under section 13 of the *Consolidation of Human Rights Act*, R.S.N.W.T., 2002, c. 18.

<sup>4</sup> For example, in his interview with the Alberta Human Rights and Citizenship Commission concerning his publication of the Danish Cartoons of Prophet Mohammed, Ezra Levant says that he reserves the right to publish what he chooses for “the most offensive reasons you can imagine,” see: “How Does the Commission Make Decisions?”, <http://www.youtube.com/watch?v=tqD-KYRopA0&feature=channel>.

which expresses intolerance or discriminatory attitudes? In a liberal democracy, to what extent should we be tolerant of speech which marginalizes, or even vilifies, an identifiable group of people whom we wish to protect with anti-discrimination measures? How tolerant should we be of speech which expresses intolerance? Three recent human rights cases in Alberta and British Columbia offer a useful entry point into these debates.

### **Offensive Speech: Three Human Rights Cases in Canada**

The most infamous case concerns whether Mark Steyn's 2006 Maclean's article, "The Future Belongs to Islam,"<sup>5</sup> was "likely to expose" Muslims to "hatred and contempt" and thus violated British Columbia's *Human Rights Code*.<sup>6</sup> Consider the following:

On the Continent and elsewhere in the West, native populations are aging and fading and being supplanted remorselessly by a young Muslim demographic. Time for the obligatory "of courses": of course, not all Muslims are terrorists -- though enough are hot for jihad to provide an impressive support network of mosques from Vienna to Stockholm to Toronto to Seattle. Of course, not all Muslims support terrorists -- though enough of them share their basic objectives (the wish to live under Islamic law in Europe and North America) to function wittingly or otherwise as the "good cop" end of an Islamic good cop/bad cop routine. But, at the very minimum, this fast-moving demographic transformation provides a huge comfort zone for the jihad to move around in. And in a more profound way it rationalizes what would otherwise be the nuttiness of the terrorists' demands.... When a European jihadist blows something up, that's not in defiance of democratic reality but merely a portent of democratic reality to come. He's jumping the gun, but in every respect things are moving his way.

---

<sup>5</sup> An excerpt from his book *America Alone: The End of the World as We Know It*, Washington, D.C.: Regnery Publishing, 2006.

<sup>6</sup> Human rights complaints were also made to the Canadian Human Rights Commission and the Ontario Human Rights Commission, but were dismissed without adjudication on their merits in both jurisdictions. (See, "Rights Commission Dismisses Complaint Against Maclean's," *Vancouver Province*, June 29, 2008). Ontario does not have a section in its human rights legislation dealing with publications "likely to expose to hatred or contempt." The case went forward in British Columbia where complainants have "direct access" to the British Columbia Human Rights Tribunal, as long as the complaint is timely and falls under the jurisdiction of the Tribunal. British Columbia abolished its Human Rights Commission in 2003 in favour of the "direct access" model (See *Elmasry and Habib v. Roger's Publishing and MacQueen*, para. 8 and Pearl Eliadis, "The Controversy Entrepreneurs," in *Maisonneuve*, November 24, 2008.).

Two paragraphs earlier Steyn remarks, “on the Continent the successor population is already in place and the only question is how bloody the transfer of real estate will be.”<sup>7</sup> The implication that many Muslims are violent and unwilling to live peacefully in the secular, democratic states of the West comes across clearly in these and other passages in the article.

No doubt, the overall thrust of Steyn’s argument, as well as his sarcastic, even mocking tone, is offensive and hurtful to many Muslims (and Westerners too, who are his main target of derision for their cultural relativism, low birth rates, and unwillingness to defend Western society). The British Columbia Human Rights Tribunal Panel acknowledged that Steyn’s article was deeply offensive to some Muslims and also accepted that “the Article contains numerous factual, historical, and religious inaccuracies about Islam and Muslims.”<sup>8</sup> However, the Panel ultimately dismissed the complaints because the article did not rise “to the level of detestation, calumny and vilification necessary to breach s. 7(1)(b) of the *Code*.”<sup>9</sup> Moreover, they found that the article was an expression of political opinion in the context of ongoing debates about “recent historical events involving extremist Muslims and the problems facing the vast majority of the Muslim community that does not support extremism.”<sup>10</sup>

Portrayals of the threat of violence from extremist Muslims featured prominently in two human rights complaints filed in Alberta against Ezra Levant and his *Western Standard* magazine for publication of the infamous Danish cartoons. Most of the cartoons depict the Prophet Mohammed, sometimes in an unflattering way that links

---

<sup>7</sup> Mark Steyn, “The Future Belongs to Islam,” in *Maclean’s*. October 30, 2006.

<sup>8</sup> *Elmasry and Habib v. Roger’s Publishing and MacQueen* (No. 4), 2008 BCHRT 378. para.108 & 129.

<sup>9</sup> *Ibid.*, para. 156

<sup>10</sup> *Ibid.*, para. 150.

Islam with violence and terrorism. The accompanying article questioned why hardly any Western media outlets were willing to publish the cartoons for fear of offending Muslim sensibilities.<sup>11</sup> As Levant says, “How can you cover the biggest news story of the year [the riots in the Middle East and elsewhere in response to the cartoons] without showing what started it?”<sup>12</sup>

One of the complaints was dropped and the other was ultimately dismissed, but not before Levant filmed his interview with an Alberta Human Rights Commission investigator and posted it on YouTube as part of his all-out attack on the speech provisions of Canadian human rights commissions and indeed their very mandate and function.<sup>13</sup> The difference, however, between the Steyn and Levant cases is that while the former was primarily about Steyn’s stereotypical depictions of Muslims, the latter case concerned not just stereotyping, but also offense to many Muslims’ religious sensibilities, given the Islamic prohibition on depicting the Prophet Mohammed.

The third high-profile case which illustrates the desire to silence offensive speech in the name of protecting a vulnerable minority concerns the publication of a letter entitled “Homosexual Agenda Wicked” by Christian youth pastor Stephen Boissoin in an Alberta newspaper, the *Red Deer Advocate*. Darren Lund, a local teacher at the time and now a University of Calgary professor specializing in anti-discrimination education, filed a human rights complaint against Boissoin for exposing gays to “hatred and contempt”

---

<sup>11</sup> Kevin Steel, “Drawing the Line,” in *Western Standard*, February 27, 2006, 15-16. For a spirited defense of the right to offend by publishing the Danish cartoons, see Ayaan Hirsi Ali, “The Right to Offend” in *NRC Handelsblad*, February 10, 2006.

<sup>12</sup> Ezra Levant, Panel discussion at “The Media’s Right to Offend: Exploring Legal and Ethical Limits on Free Speech,” University of King’s College, Halifax, NS, November 1, 2008.

<sup>13</sup> Levant’s recent book, *Shakedown: How Our Government is Undermining Democracy in the Name of Human Rights*, describes his human rights case and continues his efforts to “denormalize” the human rights commissions in Canada.

under section 3(1)(b) of Alberta's *Human Rights, Multiculturalism and Citizenship Act* (HRCMA). Boissoin's letter was clearly discriminatory, and even hateful:

My banner has now been raised and war has been declared so as to defend the precious sanctity of our innocent children and youth, that you so eagerly toil, day and night, to consume.... [C]hildren ... are being subjected to psychologically and physiologically damaging pro-homosexual literature and guidance in the public school system; all under the fraudulent guise of equal rights. Your children are being warped into believing that same-sex families are acceptable; that men kissing men is appropriate.

And he continues:

Homosexual rights activists and those that defend them, are just as immoral as the pedophiles, drug dealers and pimps that plague our communities. The homosexual agenda ... is gaining ground simply because you, Mr. and Mrs. Heterosexual, do nothing to stop it. It is only a matter of time before some of these same morally bankrupt individuals ... will achieve their goal to have sexual relations with children and to claim that it is a matter of free choice and claim that we are intolerant bigots not to accept it.<sup>14</sup>

Lund's complaint was successful. However, it is under appeal.<sup>15</sup> Amongst the remedies ordered by the Panel, Mr. Boissoin must "cease publishing in newspapers, by email, on the radio, in public speeches, or on the internet, in future, disparaging remarks about gays and homosexuals."<sup>16</sup> This is an extraordinary remedy given the vagueness of the phrase "disparaging remarks" and that the ruling prohibits Mr. Boissoin from communicating his religious and political convictions about homosexuality, even in emails, *for the rest of his life*.

Of the three cases outlined, in only one (Boissoin) was a complaint successful under a "likely to expose to hatred or contempt" clause of a human rights act. But it is fair to say that in each case the opinions expressed caused offense. All three cases

---

<sup>14</sup> Stephen Boissoin, "Homosexual Agenda Wicked," in Red Deer Advocate, June 17, 2002, A4.

<sup>15</sup> Sarah McGinnis, "Former Pastor Appeals Human Rights Ruling," *Calgary Herald*, July 1, 2008.

<sup>16</sup> Darren Lund v. Stephen Boissoin and The Concerned Christian Coalition Inc. – Decision on Remedy. May 30, 2008 AHRCC S2002/08/0137, para. 14a.

involved the stereotyping of a group; Boissain's included what could be considered the implicit threat of violence ("war has been declared"),<sup>17</sup> and the cartoon case involved the violation of religious sensibility. These cases raise questions about the ways in which speakers (writers) can cause offense and the ways in which hearers (readers) can take offense. Let us now try to get to grips with "offensive speech" by considering (1) its various forms and (2) its modes of expression.

### **Giving Offense**

Legal philosopher Joel Feinberg notes that in its "general" sense "offense" includes "any or all of a miscellany of disliked mental states (disgust, shame, hurt, anxiety, etc)." In its "normative" sense, which he argues can justify legal prohibitions to prevent serious offense, the disliked mental state is the product of the "wrongful (right-violating) conduct of others."<sup>18</sup> Taken in its general—and subjective—sense, offense can be the product of a vast array of expressions and is not always a probable effect of a given expression. In other words, people can take offense at all kinds of speech. Nonetheless, here is a (not exhaustive) list of some of the most basic types of offensive speech:

- Speech that expresses a stereotype or differentiates on the basis of some identifiable characteristic, but does not call for any action on that basis
  - Racist, sexist, homophobic, etc.
  - E.g., "Chinese people are bad drivers."

---

<sup>17</sup> We cannot necessarily equate the use of the language of coercion or violence, such as "war," with an implicit threat of violence. Consider the "wars" declared on junk food or obesity, or the like, where there is no such implicit threat of violence.

<sup>18</sup> His discussion of how "offense to others" fits into a theory of criminal law is beyond the scope of this paper. However, his "offense principle" is worth noting: "It is always a good reason in support of a proposed criminal prohibition that it would probably be an effective way of preventing serious offense (as opposed to injury or harm) to persons other than the actor, and that it is probably a necessary means to that end," Joel Feinberg, *Offense to Others: The Moral Limits of the Criminal Law*, Oxford: Oxford university Press, 1985, 1-2.

- E.g., “Homosexual relationships are unnatural because they cannot produce children.”
- Speech that expresses a stereotype or differentiates on the basis of some identifiable characteristic *and* calls for some discriminatory treatment, behaviour or policy on that basis
  - Racist, sexist, homophobic, etc
  - E.g., “Chinese people shouldn’t be granted licenses because they are bad drivers.”
  - E.g., “Gays shouldn’t be allowed to marry because their relationships are unnatural and cannot produce children.”
- Hate Speech
  - Promotion of hatred and/or genocide & incitement to violence
  - Obvious examples abound from the holocaust, Rwandan genocide, etc.
- Obscenity
  - Pornography
  - Profanity
- Blasphemy
  - Profaning the sacred, “speaking evil of sacred matters”<sup>19</sup>
  - E.g., taking the Lord’s name in vain; according to some religions, depictions of God (ultra-Orthodox Jews) or Prophet Mohammed (Muslims)
- Satire, Mockery, Ridicule, Jokes, etc
  - Can involve any or all of the above types of offensive speech
  - One of the more interesting types of offensive speech since it includes the intent to offend, but often for perfectly legitimate purposes in political, religious, social and other debates which we should have no interest in stifling in a democratic society.

The most extreme of these types of offensive speech is hate speech, which is why it is prohibited by the *Criminal Code*.<sup>20</sup> However, all of the above types of offensive speech could result in a human rights complaint for being “likely to expose a person or a class of persons to hatred or contempt” on the basis of a protected ground.<sup>21</sup>

---

<sup>19</sup> Leonard W. Levy points out that blasphemers through history were mostly not “irreverent scoffers” but devout believers at odds with the majority they lived amongst. Leonard W. Levy, *Blasphemy: Verbal Offense Against the Sacred, From Moses to Salman Rushdie*. New York: Alfred A. Knopf, 1993, iv, 3.

<sup>20</sup> The Canadian *Criminal Code* prohibits wilful promotion of genocide (Section 318), public incitement of hatred [Section 319(1)] and the wilful promotion of hatred [Section 319(2)].

<sup>21</sup> For example, the protected grounds in the Alberta HRCMA are: race, religious beliefs, colour, gender, physical disability, mental disability, age, ancestry, place of origin, marital status, source of income, family status, and sexual orientation.

The types of offensive speech are varied; so too are its modes of expression, but we can identify at least 4 broad categories:

- (1) Intentionally offensive speech which aims solely or primarily to offend
- (2) Unintentionally offensive speech where the speaker does not know that the speech will offend
- (3) Unintentionally offensive speech where the speaker does know that the speech will offend, but thinks that 'X' needs to be said
- (4) Intentionally offensive speech which aims to do more than merely offend (e.g., inform, call to action, etc.)

The most obvious distinction concerns intentions: some speech is intended to offend, while some speech causes offense unintentionally. An example of the former is obscenity that aims to violate others' sense of shame or modesty for its own purposes,<sup>22</sup> such as the writings of the Marquis de Sade. The latter mode of expression of offense runs the gamut from offhand comments about a person's culture or religion to serious political debates about, for example, whether there is an internal connection between Islam and terrorism. In terms of unintentional offense a speaker may be clueless about the ways in which their speech may cause offense; for example, many people use expressions such as being "gypped" or "Jewed down" on a price without any thought to the history of the stereotypes embedded in these expressions. It is fair to say, however, that these expressions could offend persons of Roma or Jewish ancestry.

Thus, there is a knowledge component which further complicates the intentional/unintentional distinction concerning offensive speech. We might wish to say that the person who uses the phrase "gypped" to connote being "ripped off" in a trade or sale does not *know* what the phrase means and so does not intend to cause offense. We might further wish to say that they *ought* to know what the phrase means, or, that if they

---

<sup>22</sup> J.M. Coetzee, "Taking Offense," in *Giving Offense: Essays on Censorship*, Chicago: University of Chicago Press, 1996, 20.

come to know what it means, they should cease to use the phrase out of a desire not to cause unnecessary offense (ethically speaking, not legally).

However you treat the knowledge component of offensive speech, you still don't get the result that a speaker should refrain from causing offense when they think that something needs to be said or that a controversial issue needs to be discussed even if it may cause offense to others. An example of expression that the author likely knew would cause offense, but where that was not her intention comes from Margaret Somerville's discussion of gay marriage in *The Ethical Imagination*. She argues against gay marriage on the grounds that homosexual relationships are not "inherently procreative" and that we should form public policy on the basis of a "presumption in favour of the natural."<sup>23</sup> This is no doubt offensive to many gays and lesbians who not only see their relationships as perfectly natural, but also believe in their right to marry their same-sex partners. However, the "offensive" nature of Somerville's remarks does not make her view any less relevant to debates about gay marriage. Her view may be wrong, but not because of its offensiveness; even if it were right, it would be no less offensive to some people.

There are some topics that need to be addressed in an open society even if they are likely to cause offense. Stephen Ward, a professor of journalism ethics and former news reporter, notes that when he reported on the sexual abuse at Mount Cashel Orphanage in the 1980s, "coverage of the offensive details of the abuse prompted people to address a dark problem in Newfoundland society." This he calls "offensive journalism

---

<sup>23</sup> Margaret Somerville, *The Ethical Imagination*, Toronto: House of Anansi Press, 2006, 95-116.

in the public interest,”<sup>24</sup> and it is a prime example of a mode of expression where the speaker or writer knows that his expression will cause offense, but public interest considerations trump any hesitation about doing so. The obvious point is that controversial topics such as Islamist terrorism, gay marriage and sexual abuse are legitimate subjects of public discussion where the possibility of causing offense is not and should not be a legitimate criterion for stifling debate.

The more controversial mode of offensive speech is the fourth, which combines the intent to cause offense with some other aim such as to inform, express a political opinion, or make a call to action. I think that Mark Steyn’s *Macleans*’ piece falls into this category: demographics, immigration, multiculturalism, Islamic fundamentalism and its impact on Western societies are all legitimate topics of debate. Steyn’s piece was polemical and he may even have intended to cause offense in order to draw more attention to his political opinions, but this doesn’t limit the “public interest” value of his expression—including the counter-arguments and rebuttals it provoked.

Consider the following passage:

Pick a Muslim country, any Muslim country, and the most brutal humiliations will grab you by the vitals. In Pakistan, an average of two women every day die from “honor killings,” often with Allah’s name on the lips of the murderers. In Malaysia, a Muslim woman can’t travel without the consent of a man. In Mali and Mauritania, little boys are seduced into slavery by Muslim hustlers. In Sudan, slavery happens at the hands of Islamic militias. In Yemen and Jordan, Christian humanitarian workers have been shot point-blank. In Bangladesh, artists who advocate for the rights of religious minorities have been locked up or driven out of the country altogether. It’s all documented.<sup>25</sup>

---

<sup>24</sup> Stephen Ward, “Free Speech Won! Now What About Ethics?” on *J-Source.ca*, October 20, 2008. Note that Ward’s reporting on Mount Cashel could have founded a complaint under s. 3 of the Alberta Act on the basis of exposing Catholics to “hatred and contempt” on the basis of their religious beliefs.

<sup>25</sup> Irshad Manji, *The Trouble With Islam: A Wake-Up Call for Honesty and Change*, Toronto: Random House Canada, 2003, 31.

This passage may be offensive to many Muslims, and may even be intentionally offensive. We may ask, “How can Mark Steyn write so stereotypically about Muslims?” Well, he didn’t—at least not this passage. It was written by Irshad Manji, a Canadian Muslim who calls for reform from within her faith group, particularly concerning the rights of women and children. And throughout her book, *The Trouble With Islam: A Wake-Up Call for Honesty and Change*, she often uses sarcasm and a mocking tone to criticize the beliefs and practices of some of her co-religionists.<sup>26</sup> As with all freedom of expression issues, there is a line-drawing problem here. Compare Manji’s passage to the excerpts from Steyn’s article: how are we to separate the “good” political, reforming speech from the “bad” offensive speech? This points to a fundamental problem with the “likely to expose to hatred or contempt” clauses: they are far too broad and vague because they could catch even a dissident’s call for reform of her own faith in the censorship net. Both passages may offend Muslims, and both may even intend to do so to make some further political point, but it is hard to see why a human rights complaint was pressed against Steyn and not against Manji for expression “likely to expose” Muslims to “hatred or contempt.” And the answer cannot be that Manji is Muslim and Steyn is not, can it? Consideration of the logic of taking offense may help to shed some light on this inconsistency.

---

<sup>26</sup> For example, discussing Mohamed Atta’s suicide note, Manji says: “Atta and the boys expected unfettered access to dozens of virgins in heaven. They’re not the only ones. A month before September 11, a recruiter for the Palestinian resistance-turned-terror outfit Hamas told CBS television that he dangles the vision of seventy virgins in front of candidates. It’s like a perpetual license to ejaculate in exchange for a willingness to detonate, and it’s long been claimed that the Koran promises this reward to Muslim martyrs” (50-51). Similarly, Ayaan Hirsi Ali argues that it is time for reformers of Islam to use satire and art: “Creative people with a dissident message need to get beyond the mental block that prevents them from treating religion like any other subject—and from treating Islam like any other religion. They need to get their own message across with pictures, not just with words, to people who don’t, literally or metaphorically, speak their language.” Ayaan Hirsi Ali, *Infidel*, New York: Free Press, 2007, 307.

## Taking Offense

Speech can cause deep offense and even real harm. Contrary to some of the critics of human rights commissions who discount the moral importance of being-offended,<sup>27</sup> “mere offense” should be taken seriously for ethical reasons, but not as the basis for a human rights complaint. Amongst other negative consequences, offensive speech can cause: hurt feelings; loss of dignity, respect and self-respect; marginalization; scapegoating; damage to reputation; in extreme cases, offensive speech can involve bullying to the point of self-harm (for example, by calling a vulnerable teen by a racial or homophobic slur), or can lead to violence against the targeted group or retaliation against the speaker. Offensive speech can also cause deep resentment and a desire to silence the offending speech by “shooting the messenger.” As J.M Coetzee notes, “Because the offended typically feels resentment against the offender, we infer that an intentionality is perceived behind the obscene act.”<sup>28</sup> Here he is writing specifically about obscenity, but the point can be generalized to other forms of offensive speech.

When people take offense at stereotypical or discriminatory speech, including satire, mockery and ridicule, they often experience the offending speech as an attack on some aspect of their identity or deepest self. Moreover, as Coetzee notes, the impotence that people feel at “being-named” by the “offending” speaker results from the power of naming to draw people (affectionately) nearer or push them away on the basis of that naming. Thus, words like “nigger” maintain and even “build up power to offend and

---

<sup>27</sup> Micheal Vonn of the British Columbia Civil Liberties Association argues that many critics of human rights commissions are disdainful of the ways in which offensive speech does real harm to marginalized groups, see: “Why the Freedom of Speech Side is Losing the Debate,” [http://www.chumirethicsfoundation.ca/main/page.php?page\\_id=140](http://www.chumirethicsfoundation.ca/main/page.php?page_id=140).

<sup>28</sup> Coetzee, 20.

anger” because they are gestures of “distance-marking.”<sup>29</sup> Indeed, one response to this has been for marginalized groups to try to reclaim offensive words such as “nigger” so as to take control over their collective identity and overcome the impotence of being-named.<sup>30</sup>

Coetzee’s key insight into the logic of taking offense is that “the experience or premonition of being robbed of power” is “intrinsic to all instances of taking offense.” The experience of being defined by the speaker’s expression makes the targeted person feel unable to define himself and thus unable to have control over a fundamental aspect of his self-identity. Interestingly, Coetzee argues that this is true not just for marginalized people, but even for the powerful, such as states which employ censorship to maintain their power. “Powerlessness is ... not necessarily objective powerlessness: the fears of the powerful dare not speak their name precisely because, as fears of the powerful, they must seem groundless.”<sup>31</sup> Censorship allows individuals and states to control how they are named and to prevent critical or offensive characterizations from impinging upon their projects of self-definition. And here is the crux of the issue: Coetzee’s logic of offense plays out in the three human rights cases discussed above, albeit in different ways.

In both the Steyn and Levant cases, members of a vulnerable group (Muslims) who feel regularly stereotyped in popular media and fear discrimination on the basis of those stereotypes responded to being-offended and defined by seeking to silence the

---

<sup>29</sup> Coetzee, 2.

<sup>30</sup> Anthony Appiah, *The Ethics of Identity*, Princeton: Princeton University Press, 2005, 108-10. See also the news story, “Banning the N-Word,” CBC, March 7, 2008, [http://www.cbc.ca/national/blog/video/immigrationdiversity/banning\\_the\\_nword.html](http://www.cbc.ca/national/blog/video/immigrationdiversity/banning_the_nword.html).

<sup>31</sup> Coetzee, 6.

offending expression.<sup>32</sup> The seeming rightness of this course of action is underscored by the perception that a vulnerable group (Muslims) is holding the powerful to account (“the media”). In the Levant case, the issue was probably complicated by the fact that the offending speech was perceived as not just stereotypical and discriminatory, but also blasphemous.

The Boissoin case was slightly different in that the complainant was not himself a member of the targeted group; however, as a teacher working with high school students to combat discrimination, Lund felt compelled to try to silence the offending words of the pastor who was in a position to pass on his offensive and discriminatory views to youths in the community. In all three human rights cases, the complainants were concerned about the ways in which the offensive speech of someone in a perceived position of power (media or clergy)<sup>33</sup> was used to reinforce stereotypes about members of a minority identifiable on the basis of a protected ground of discrimination in human rights legislation. Thus, resistance to what Coetzee calls “being-named” was evident in all

---

<sup>32</sup> I should add that in the jurisdictions that have speech provisions in their human rights codes, complainants are legally entitled to do so. However, The Sheldon Chumir Foundation for Ethics in Leadership is opposed to such provisions and has called for amendment of section 3(1)(b) of Alberta’s HRCMA. See, *Toward Equal Opportunity for all Albertans: Recommendations for Improvement of the Alberta Human Rights Commission*, 37, 43-44. [http://www.chumirethicsfoundation.ca/files/pdf/Toward-Equal-Opportunity\\_SCF.pdf](http://www.chumirethicsfoundation.ca/files/pdf/Toward-Equal-Opportunity_SCF.pdf)

<sup>33</sup> It is instructive to consider why Irshad Manji’s or Ayaan Hirsi Ali’s books have not been subject to human rights complaints given the sometimes offensive things they write which could be “likely to expose” Muslims “to hatred or contempt.” (Consider Hirsi Ali’s remarks on the differences between some Muslim countries and the West: “The kind of thinking I saw in Saudi Arabia, and among the Muslim Brotherhood in Kenya and Somalia, is incompatible with human rights and liberal values. It preserves a feudal mind-set based on tribal concepts of honor and shame. It rests on self-deception, hypocrisy, and double standards. It relies on the technological advances of the West while pretending to ignore their origin in Western thinking. This mind-set makes the transition to modernity very painful for all who practice Islam.... I know that one of those worlds is simply better than the other. Not because of its flashy gadgets, but fundamentally because of its values,” *Infidel*, 347-48.) I think that there is an identity and a power component here. Manji and Hirsi Ali are given greater latitude to be critical and even mocking of Muslims given their own religious and cultural backgrounds. Also, perhaps, they are not perceived as wielding the same kind of power and ability to influence opinion as, e.g., Steyn and *Maclean’s*.

three cases, and complainants tried to take the struggle over representation of a group identifiable on the basis of a protected ground in human rights legislation from the arena of public discourse to the quasi-judicial forum of a human rights tribunal. If Coetzee is right that “the experience or premonition of being robbed of power” is “intrinsic to all instances of taking offense,” then it makes sense that those who feel themselves singled out by offensive speech might try to right the balance of power by making use of the protection of anti-discrimination legislation to combat the offending speech. As Stanley Fish writes, “it makes perfect sense to desire the silencing of beliefs inimical to yours, because if you did not so desire, it would be an indication that you did not believe in your beliefs.”<sup>34</sup> Where the speech concerns not just your beliefs, but a deep aspect of your identity such as your religion or sexuality, the desire to silence speech which is inimical to *who you are* is likely even stronger. I am suggesting that it was this logic that played itself out in the human rights cases discussed above. The desire to “shoot the messenger” is a regular feature of human psychology. But the ethical point is that it is wrong to follow that desire either in individual action or in adoption of law and policy.

This logic of offense illustrates a deep tension between the general mandate of human rights commissions to prevent discrimination and the aim of the “likely to expose” provisions to silence speech that is at odds with the anti-discrimination mandate. In his report to the Canadian Human Rights Commission dealing with section 13 of the *Canadian Human Rights Act* (CHRA), Richard Moon notes that the federal “likely to expose to hatred or contempt” provision has been interpreted narrowly to deal with the risk of violence generated by hateful speech. However, such a narrowly drawn ban “does

---

<sup>34</sup> Stanley Fish, “There’s No Such Thing as Free Speech, and it’s a Good Thing, Too,” in *There’s No Such Thing as Free Speech, and it’s a Good Thing, Too*. Oxford: Oxford University Press, 1994, 118.

not fit easily or simply into a human rights law that takes an expansive view of discrimination, emphasizes the effect of the action on the victim rather than the intention or misconduct of the actor and employs a process that is designed to engage the parties and facilitate a non-adjudicative resolution of the ‘dispute’ between them.”<sup>35</sup> Moreover, a human rights provision aimed at preventing prejudice and fostering tolerance and equality might need to “ban any expression that encourages a negative view of the group or undermines its position in society” yet such a ban “would involve a significant intervention into the conduct of public discourse and would severely compromise freedom of expression.”<sup>36</sup> This point was evident in my earlier discussion of Manji’s call for reform of the Muslim faith. As noted, the “likely to expose to hatred or contempt” clauses of human rights codes are too broad and vague because they could catch expression such as Manji’s in the censorship net and because of their chilling effect on public discourse. There is not sufficient space here to pursue these arguments. Suffice to say, that for similar reasons, Moon recommends repeal of section 13 of the *CHRA*.

Ronald Dworkin makes a similar point to Moon’s about the tension between anti-discrimination measures and the state censorship of offensive speech:

[I]n a democracy no one, however powerful or impotent, can have a right not to be insulted or offended. That principle is of particular importance in a nation that strives for racial or ethnic fairness. If weak or unpopular minorities wish to be protected from economic and legal discrimination by law—if they wish laws enacted that prohibit discrimination against them in employment, for instance—then they must be willing to tolerate whatever insults or ridicule people who oppose such legislation wish to offer to their fellow voters, because only a community that permits such insult as part of public debate may legitimately adopt such laws. If we expect bigots to accept the verdict of the majority once the majority has spoken, then we must permit them to express their bigotry in the process whose verdict we ask them to

---

<sup>35</sup> Richard Moon, *Report to the Canadian Human Rights Commission Concerning Section 13 of the Canadian Human Rights Act and the Regulation of Hate Speech on the Internet*. Ottawa: Canadian Human Rights Commission, 2008, 2.

<sup>36</sup> *Ibid.*, 25.

accept. Whatever multiculturalism means—whatever it means to call for increased "respect" for all citizens and groups—these virtues would be self-defeating if they were thought to justify official censorship.<sup>37</sup>

In a similar vein, in Moon's argument for repeal of section 13, the censorship provision of the *CHRA*, he stresses the importance of finding other ways to combat stereotypes and intolerance.<sup>38</sup>

Expression that stereotypes or defames the members of an identifiable group is offensive, insulting and harmful to the group's members. Nevertheless, censorship of this expression is not a viable option. Because discriminatory views or assumptions are so widely held and circulate generally in society, they cannot be eradicated through censorship. Any attempt to exclude all racial or other prejudice from public discourse would require extraordinary intervention by the state. Because discriminatory speech is so commonplace, it is impossible to establish clear and effective rules for its identification and exclusion. Because discriminatory attitudes and assumptions are so pervasive, it is vital that they be confronted rather than censored. They are often spread or reinforced without a clear intent by the speaker or conscious acceptance by the audience. The only effective response, then, is to expose the prejudiced character of commonplace assumptions and bring it to clearer, and hopefully more critical, consciousness. We must develop ways other than censorship to respond to expression that stereotypes and defames the members of an identifiable group and to hold institutions, such as the media, accountable when they advance such views.<sup>39</sup>

Human rights legislation aimed at promoting tolerance and combating discrimination should not be used to restrict speech which expresses intolerance or discriminatory attitudes. Nonetheless, given the combination of speech provisions in the human rights legislation in several Canadian jurisdictions with Coetzee's analysis of the logic of taking offense, we should not be surprised that such provisions have given rise to some controversial human rights cases concerning offensive speech.

---

<sup>37</sup> Ronald Dworkin, "The Right to Ridicule," in *The New York Review of Books*, Vol. 53, No. 5, March 23, 2006.

<sup>38</sup> The Sheldon Chumir Foundation made a similar recommendation in our report on reform of Alberta's human rights legislation. See, *Toward Equal Opportunity for all Albertans: Recommendations for Improvement of the Alberta Human Rights Commission*, 37.

[http://www.chumirethicsfoundation.ca/files/pdf/Toward-Equal-Opportunity\\_SCF.pdf](http://www.chumirethicsfoundation.ca/files/pdf/Toward-Equal-Opportunity_SCF.pdf)

<sup>39</sup> Moon, 27.

Ethically we ought to try to avoid causing unnecessary offense to others. However, it is not always inappropriate to cause offense, and indeed it may even be required when controversial subjects need to be discussed in a democracy. Thus, while we should be concerned about offensive speech and its divisive capacity, human rights commissions are not the appropriate venues to deal with such speech because of their potential chilling effect on the discussion of controversial subjects that may cause offense.

## Bibliography

- Appiah, Anthony. *The Ethics of Identity*. Princeton: Princeton University Press, 2005.
- Boissoin, Stephen. "Homosexual Agenda Wicked," in *Red Deer Advocate*. June 17, 2002, A4.
- Buruma, Ian. *Murder in Amsterdam: The Death of Theo van Gogh and the Limits of Tolerance*. London: Atlantic Books, 2007.
- Buruma, Ian. "Totally Tolerant, Up to a Point," in *The New York Times*. January 30, 2009. <http://www.nytimes.com/2009/01/30/opinion/30buruma.html>
- Canwest News Service. "Rights Commission Dismisses Complaint Against Maclean's," *Vancouver Province*, June 29, 2008.  
<http://www2.canada.com/theprovince/news/story.html?id=2902761d-2ced-4785-90f6-059bc2f199f3>
- CBC Television, "Banning the N-Word," March 7, 2008.  
[http://www.cbc.ca/national/blog/video/immigrationdiversity/banning\\_the\\_nword.html](http://www.cbc.ca/national/blog/video/immigrationdiversity/banning_the_nword.html)
- Coetzee, J.M. "Taking Offense," in *Giving Offense: Essays on Censorship*. Chicago: University of Chicago Press, 1996.
- Criminal Code*, R.S. 1985, c. C-46.
- Darren Lund v. Stephen Boissoin and The Concerned Christian Coalition Inc. – Decision*, November 30, 2007 AHRCC S2002/08/0137.  
<http://www.albertahumanrights.ab.ca/LundDarren113007Pa.pdf>
- Darren Lund v. Stephen Boissoin and The Concerned Christian Coalition Inc. – Decision on Remedy*. May 30, 2008 AHRCC S2002/08/0137.  
[http://www.albertahumanrights.ab.ca/Lund\\_Darren\\_Remedey053008.pdf](http://www.albertahumanrights.ab.ca/Lund_Darren_Remedey053008.pdf)
- Dworkin, Ronald. "The Right to Ridicule," in *The New York Review of Books*. Vol. 53, No. 5, March 23, 2006, <http://nybooks.com/articles/18811>
- Eliadis, Pearl. "The Controversy Entrepreneurs," in *Maisonneuve*. November 24, 2008.

- [http://www.maisonneuve.org/index.php?&page\\_id=12&article\\_id=3198](http://www.maisonneuve.org/index.php?&page_id=12&article_id=3198)
- Elmasry and Habib v. Roger's Publishing and MacQueen* (No. 4), 2008 BCHRT 378.  
[http://www.bchrt.bc.ca/decisions/2008/pdf/oct/378\\_Elmasry\\_and\\_Habib\\_v\\_Rogers\\_Publishing\\_and\\_MacQueen\\_\(No\\_4\)\\_2008\\_BCHRT\\_378.pdf](http://www.bchrt.bc.ca/decisions/2008/pdf/oct/378_Elmasry_and_Habib_v_Rogers_Publishing_and_MacQueen_(No_4)_2008_BCHRT_378.pdf)
- Feinberg, Joel. *Offense to Others: The Moral Limits of the Criminal Law*. Oxford: Oxford University Press, 1985.
- Fish, Stanley. "There's No Such Thing as Free Speech, and it's a Good Thing, Too," in *There's No Such Thing as Free Speech, and it's a Good Thing, Too*. Oxford: Oxford University Press, 1994, 102-119.
- Hirsi Ali, Ayaan. *Infidel*. New York: Free Press, 2007.
- Hirsi Ali, Ayaan. "The Right to Offend," in *NRC Handelsblad*. February 10, 2006.  
[http://www.nrc.nl/opinie/article1654061.ece/The\\_Right\\_to\\_Offend](http://www.nrc.nl/opinie/article1654061.ece/The_Right_to_Offend)
- Human Rights, Citizenship and Multiculturalism Act*, R.S.A. 2000, c.H-14.
- Levant, Ezra. "How Does the Commission Make Decisions?" Interview with Alberta Human Rights and Citizenship Commission. Posted, January 14, 2008.  
<http://www.youtube.com/watch?v=tqD-KYRopA0&feature=channel>
- Levy, Leonard W. *Blasphemy: Verbal Offense Against the Sacred, From Moses to Salman Rushdie*. New York: Alfred A. Knopf, 1993.
- Manji, Irshad. *The Trouble With Islam: A Wake-Up Call for Honesty and Change*. Toronto: Random House Canada, 2003.
- McGinnis, Sarah. "Former Pastor Appeals Human Rights Ruling," *Calgary Herald*, July 1, 2008.  
<http://www2.canada.com/calgaryherald/news/city/story.html?id=85c5adb1-b056-4095-b51e-4853f9c9ecb4>
- McKay-Panos, Linda. *Hate Speech and Canadian Law*. January 2008.  
[http://www.chumirethicsfoundation.ca/files/pdf/Hate\\_Speech\\_and\\_Canadian\\_Law\\_Jan2008.pdf](http://www.chumirethicsfoundation.ca/files/pdf/Hate_Speech_and_Canadian_Law_Jan2008.pdf)
- Moon, Richard. *Report to the Canadian Human Rights Commission Concerning Section*

*13 of the Canadian Human Rights Act and the Regulation of Hate Speech on the Internet*, Ottawa: Canadian Human Rights Commission, 2008.

Sheldon Chumir Foundation for Ethics in Leadership. *Toward Equal Opportunity for all Albertans: Recommendations for Improvement of the Alberta Human Rights Commission*, September 2008.

[http://www.chumirethicsfoundation.ca/files/pdf/Toward-Equal-Opportunity\\_SCF.pdf](http://www.chumirethicsfoundation.ca/files/pdf/Toward-Equal-Opportunity_SCF.pdf)

Somerville, Margaret. *The Ethical Imagination*, Toronto: House of Anansi Press, 2006.

Steel, Kevin. "Drawing the Line," in *Western Standard*. February 27, 2006.

<http://www.westernstandard.ca/website/article.php?id=1473>

Steyn, Mark. "The Future Belongs to Islam," in *Maclean's*. October 30, 2006.

[http://www.macleans.ca/article.jsp?content=20061023\\_134898\\_134898&source>](http://www.macleans.ca/article.jsp?content=20061023_134898_134898&source>)

van Mill, David, "Freedom of Speech", *The Stanford Encyclopedia of Philosophy* (Winter 2008 Edition), Edward N. Zalta (ed.),

<http://plato.stanford.edu/archives/win2008/entries/freedom-speech/>

Vonn, Micheal. "Why the Freedom of Speech Side is Losing the Debate," presented at *Offensive Speech: What's Legal? What's Ethical*. January 24, 2008, Calgary, AB. [http://www.chumirethicsfoundation.ca/main/page.php?page\\_id=140](http://www.chumirethicsfoundation.ca/main/page.php?page_id=140)

Ward, Stephen. "Free Speech Wins! What About Ethics?" on *J-Source.ca*. October 20, 2008. [http://www.j-source.ca/english\\_new/detail.php?id=2912](http://www.j-source.ca/english_new/detail.php?id=2912)