

**Legal Responses to Antisemitism: Legal Discourse and Anti-Jewish Hate in  
Contemporary Canada**

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*This thesis is dedicated to the memory and legacy of Anne Frank. Her courage, wisdom, and insight in the face of antisemitism and genocide has continuously inspired me to combat anti-Jewish hate.*

*I also write this in memory of my late grandparents, Patrick and Gloria Kavanagh, Dr. Harvey and Lois Hollinger. May their memories be a blessing.*

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## **Abstract**

Antisemitism is a pervasive social issue in Canada. A common response is to invoke the law. Law is expected to bring justice to perpetrators and solace to impacted individuals and communities. This thesis examines legal responses to antisemitic hate crimes over the last 12 years (the cases span the years 2008-2017). More specifically, it performs a discourse analysis on four provincial hate crime cases, all pertaining to antisemitic crimes. It addresses the following question: how does law frame and characterize Jewish identity and antisemitism and how do these conceptualizations affect its ability to deter and combat anti-Jewish hate in contemporary Canada? This thesis argues that through its procedural and methodological limitations, law is not efficient enough to be a main deterrent and combatant for antisemitism in contemporary Canada. In other words, how law frames and delimits particular phenomena and issues affect its ability to combat antisemitism. This thesis reveals that courts have tended to construct both Jewish identity and antisemitism in limited ways, portraying Jews as solely religious or racial and excluding important instances of new antisemitism from their decisions. Both Jewish identity and antisemitism are fluid, expressed and experienced in a variety of religious and nonreligious ways. Courts frequently overlooked the nuances that make both unique, instead constructing antisemitic crimes in particular ways that decontextualized its responses. In addition, my thesis reveals how courts further decontextualized their decisions through reducing their focus on the broader social harm and impact of hate and antisemitism.

Keywords: Antisemitism, anti-Jewish hate, new antisemitism, law, hate crime, Jewish, Judaism, Israel, Zionism, religion and law, courts, police.

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## Chapter 1: Introduction

In October 2018, a Montreal man named Robert Gosselin was arrested and charged with inciting hatred for posting comments on social media in which he threatened to kill Jewish schoolgirls. Originally released on bail, Gosselin was eventually found to be mentally unfit, which meant he was held not criminally responsible for his actions.<sup>1</sup> In January 2020, Shane Morrow went to visit his 65-year-old uncle at a residence in Toronto. His uncle suffers from Alzheimer's, Parkinson's disease, and diabetes. Morrow was shocked to find a swastika drawn in black marker on his uncle's scalp. A staff at the residence informed Morrow that there was a swastika drawn on his uncle's body as well, which was supposedly removed before Morrow arrived. While Morrow was assured that an arrest had been made, no police report had been filed for that address.<sup>2</sup>

More than 13,243 antisemitic incidents have been reported across Canada since 2012. These are just two of them.<sup>3</sup> Annual reports from Statistics Canada on police-reported hate crimes have consistently, for over a decade, named anti-Jewish hate as the largest type of religiously motivated prejudice in Canada.<sup>4</sup> This is a persistent, dangerous, and frightening trend.<sup>5</sup> B'nai Brith Canada, a Jewish advocacy and non-profit group annually produces the country's only audit of antisemitic incidents. They track each year's number of incidents, type,

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<sup>1</sup> Please see CTV Montreal (<https://montreal.ctvnews.ca/judge-places-stricter-conditions-on-montreal-man-accused-of-threats-against-jewish-community-1.4243674>) and the Canadian Jewish News (<https://www.cjnews.com/news/canada/man-who-threatened-to-kill-jews-deemed-mentally-unfit>).

<sup>2</sup> Please see The Times of Israel (<https://www.timesofisrael.com/swastika-reportedly-drawn-on-head-of-toronto-man-with-alzheimers/>).

<sup>3</sup> Please see B'nai Brith Canada's "Annual Audit of Antisemitic Incidents" reports from 2008-2019.

<sup>4</sup> In this thesis, I classify antisemitism as a "religiously motivated" form of hate because this is how Statistics Canada classifies it. As we will see throughout my thesis, antisemitism can be religious or nonreligious in motivation and manifestation. It targets Jews both as a religious group and as a racial or ethnic group. It can also be motivated by political and national motivations, for example anti-Israel sentiments.

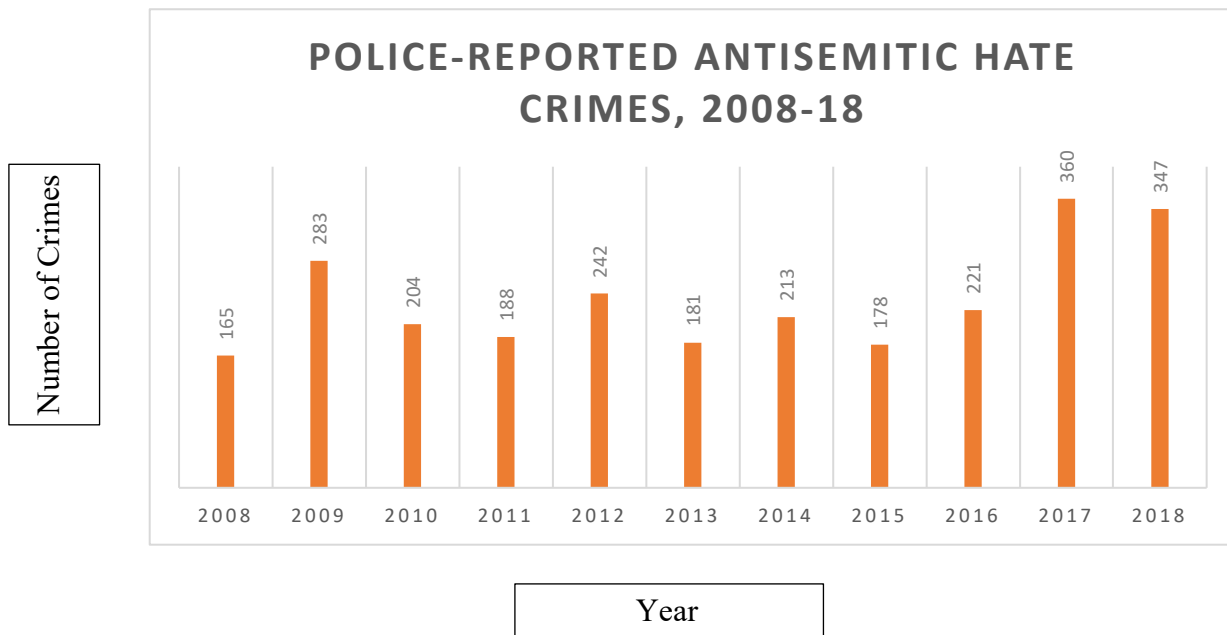
<sup>5</sup> Please see Table 1 below.



and frequency. The audit is the only comprehensive source of information about the nature of contemporary antisemitism in Canada. Unfortunately, this form of prejudice is severely understudied in Canada, with much of the academic literature focusing on historical analyses and providing descriptions of its general characteristics and implications.

Statistics Canada also provides comprehensive data about hate crimes annually. To clarify, B'nai Brith's audit focuses solely on antisemitism and incidents in general; these are not necessarily prosecuted as hate crimes. Statistics Canada provides data on all types of hate crimes, categorized as such by police. Evidently, only a fraction of all incidents are charged as hate crimes. This explains why Statistics Canada's numbers are much lower than those of B'nai Brith. Both inform my discussion about antisemitism in contemporary Canada.

Table 1: Antisemitic Hate Crimes, 2008-18<sup>6</sup>



This thesis will focus on antisemitism over the past 12 years (2008-2020). As the data shows, antisemitism is growing and remains a serious problem in Canada. My hope is that this

<sup>6</sup> According to Statistics Canada's annual reports on police-reported hate crime (reports from 2008-10, 2012-13, 2015-18).

thesis will contribute to a better understanding of contemporary anti-Jewish hate because it is an issue which requires urgent attention and action. This thesis focuses on legal responses to antisemitic hate crimes, drawing on discourse analysis of four provincial cases.<sup>7</sup> Why examine legal responses? Many socio-legal scholars argue that law casts a shadow over the social. Law is an important social institution to which people often turn for remedying social issues. It can have a significant influence on how these are resolved. If antisemitism is rising and law is a response people tend to rely upon, immediate inquiry is needed into law's ability to be an effective tool for deterring and combating anti-Jewish hate.

### **1.1. Historical Overview of Antisemitism in Canada**

Jews have been in Canada since about the 1730s. Some early Jewish settlers arrived in Canada from England and were occasionally involved in the business and finance industries (Joseph 1893, 117–20). The Montreal and Quebec Jewish communities date back to the second half of the 18<sup>th</sup> century. In these new communities across Canada, Jews established religious institutions and built religious infrastructure, securing their lasting place in Canada's social landscape (Joseph 1893, 117–20).

In the 19<sup>th</sup> century, a large number of Jews fled Russia in order to escape recurrent pogroms and persecution. John A. Macdonald took in some of these refugees, but not necessarily out of pure goodwill. He believed they could be helpful for populating the western part of the country. He attracted Jewish settlers by promising them farmland. Macdonald also thought those who were wealthy or had expertise in business could be of benefit to the Canadian economy (Kelley and Trebilcock 2010, 75). Once these Jewish immigrants arrived in Canada, they found themselves without the abundant farmland promised to them. Despite the false

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<sup>7</sup> For further information, please see "Chapter 2: Methodology and Method."

promises of a better life free of discrimination in Canada, the Jewish population continued to grow, numbering approximately 17,000 at the turn of the century. The Canadian Jewish population was about 10 times larger at this point than it was twenty years earlier in the 1880s (Kelley and Trebilcock 2010, 76).

Life for Jews in Canada did not get any easier in the first few decades of the 20<sup>th</sup> century. They became victims of persistent discrimination, especially with regards to employment. This was particularly strong in Winnipeg. During the Depression era, the creation and spread of fascist movements throughout Canada followed the spread of fascism and Nazism in Europe. These movements were racist, with a particular focus on anti-Jewish hatred (Kelley and Trebilcock 2010, 222–24). Immigration towards the end of the Depression and the beginning of World War II was restricted in Canada in response to the ensuing conflict overseas. This greatly affected Jewish refugees escaping persecution and antisemitism in Germany.

Canada, along with other countries, was faced with the dilemma of admitting these refugees. In 1938 at the Évian Conference, held in Évian, France, Canada along with other countries discussed what to do to resolve this issue. Canada did not adopt a very supportive stance, instead expressing hesitancy to admit refugees. They were not willing to lessen immigration restrictions, with the exception of admitting refugees to fulfill the needs of labour and business organizations (Kelley and Trebilcock 2010, 256–57).

Antisemitism in Quebec was particularly strong. Many Quebec citizens were strongly anti-immigrant, and so the refugee crisis was a contested issue. At this time, approximately one third of Canada's Jewish community lived in Quebec, mainly in Montreal (Kelley and Trebilcock 2010, 262–63). In Quebec before WWII, Jews were not trusted. Along with a general distrust of Jews, some people in Quebec blamed the Great Depression on Jewish people.

Many also assumed that Jews wanted to “dismantle” the leadership of the Catholic Church (Celemencki 2015, 13).

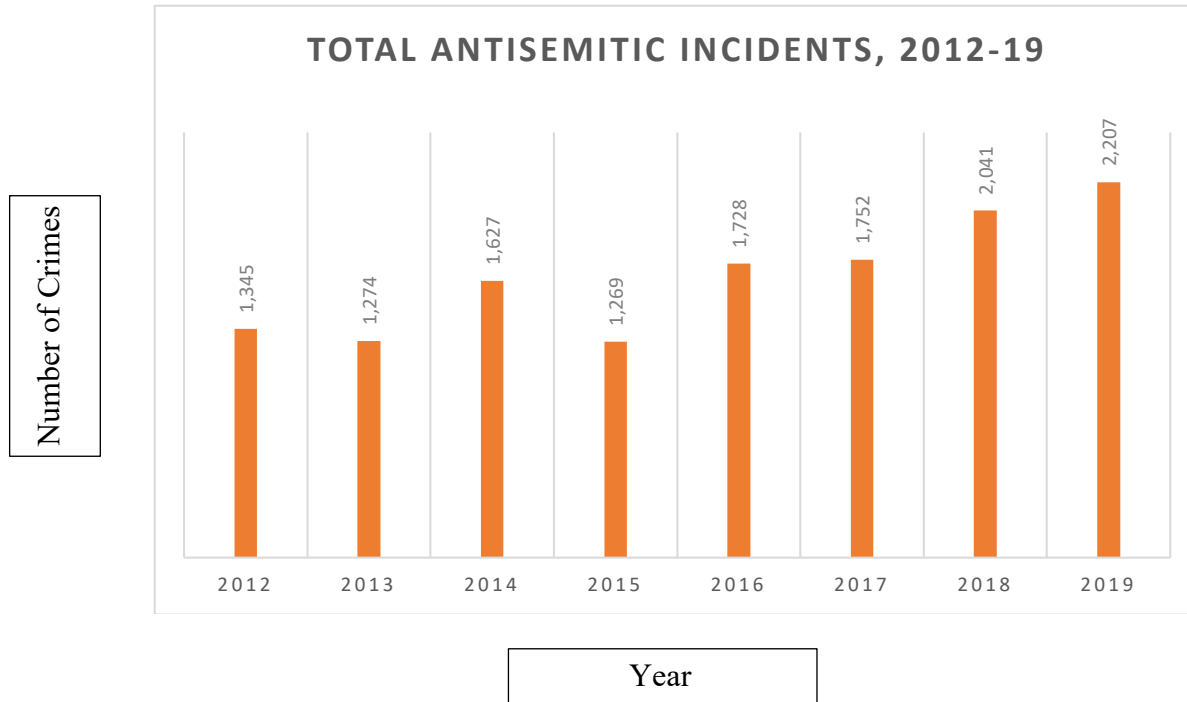
As the refugee crisis continued, then Prime Minister William Lyon Mackenzie King remained ambiguous as to why he was unwilling to admit refugees. By the end of the war, he permitted the entry of just 5,000 Jews. Canada’s record for admitting Jewish refugees was one of the worst of any democratic country at the time (Celemencki 2015, 13). Recounting one particularly painful story, a ship called the *SS St. Louis* left Germany carrying 937 passengers. The vast majority of these passengers were Jewish refugees attempting to flee the persecution in Germany. The ship left Hamburg for Havana, Cuba on May 13, 1939. Once it reached Cuba, the refugees were turned away. It then headed to the United States, where it was also immediately turned away. With limited options, the ship turned around to return to Europe. On the way, it stopped on Canadian shores only to be turned away again. The ship was forced to return its almost 1,000 passengers to Europe, where the refugees fell under Nazi rule and persecution once again, many perishing in the Holocaust (Long Mullins 2013, 393–94).

Antisemitism persisted in Canada after WWII. Anti-Jewish discrimination was very common, especially in the job market. For example, Jews were often discriminated against in the service industry. Distrust towards Jews continued as well, which manifested largely as a fear of Jews (many of them Holocaust survivors) coming to Canada after the war. In fact, a public opinion poll from October 1946 revealed that Canadians were generally not supportive of Jewish people coming to Canada (Kelley and Trebilcock 2010, 345).

## 1.2. Antisemitism in Contemporary Canada

B'nai Brith reported that 2019 broke records yet again for antisemitic incidents, with 2,207 total, up from 2,041 in 2018 (B'nai Brith Canada 2020, 12).<sup>8</sup> Antisemitism continues to be a growing problem in Canada. Discourses on Canadian identity include words such as inclusive, accepting, and welcoming. Despite the circulation of ideas about what defines Canadians, the rise of antisemitism over the last several years reveals a different and concerning reality. Further critical inquiry into antisemitism is necessary.

Table 2: Total Antisemitic Incidents, 2012-19<sup>9</sup>



According to the 2011 National Household Survey, Jewish people comprise around 1% of Canada's population.<sup>10</sup> Despite the fact that Jews comprise a very small portion of the

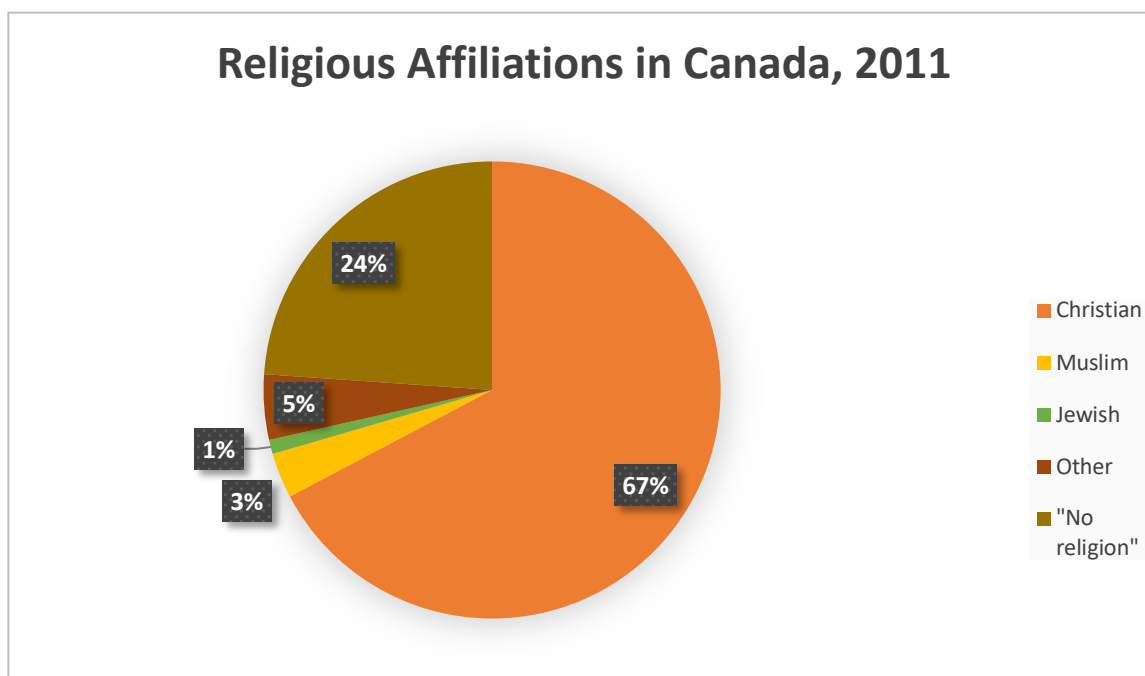
<sup>8</sup> Please see Table 2 below.

<sup>9</sup> According to B'nai Brith's annual audits for antisemitism in Canada (reports from 2015-19).

<sup>10</sup> Please see Image 1 below.

population, they face the highest rate of hate-motivated crimes and incidents.<sup>11</sup> Considering the size of the Canadian Jewish community, this statistic is peculiar. This statistic, along with the fact that law is often given authority as a deterrent and combatant to antisemitism, begs the question of whether current legal responses can accomplish these things.

Image 1: Religious Populations in Canada<sup>12</sup>



B'nai Brith states that the number of people prosecuted for enacting antisemitic hate is very low. This is something they refer to as the “culture of impunity” (B'nai Brith Canada 2018, 17–22). Unfortunately, there is no available data for the amount of hate crimes that are prosecuted. This information is difficult to acquire for various reasons. Although Statistics Canada measures hate crimes, there is no information available about how many antisemitic crimes are taken to court and how many do or do not make it to trial.<sup>13</sup> It is also difficult to track

<sup>11</sup> Please see Statistics Canada’s annual reports on police-reported hate crime (reports from 2008-10, 2012-13, 2015-18).

<sup>12</sup> According to Statistics Canada, National Household Survey 2011.

<sup>13</sup> Some annual reports mention the amount of hate crimes prosecuted in a given period, but there is no breakdown about which types were taken to court and how many.

cases in which antisemitism was involved, but hate charges were not the most serious ones laid by police. Current data sets are vague and do not reveal much about antisemitism, crime, and law. This highlights how law enforcement may not be fully equipped to respond to antisemitism and how current methods to track it are insufficient. It also highlights the inconsistency of legal responses to anti-Jewish hate. The lack of prosecutions and poor data management allow antisemitic hate to continue unchecked.

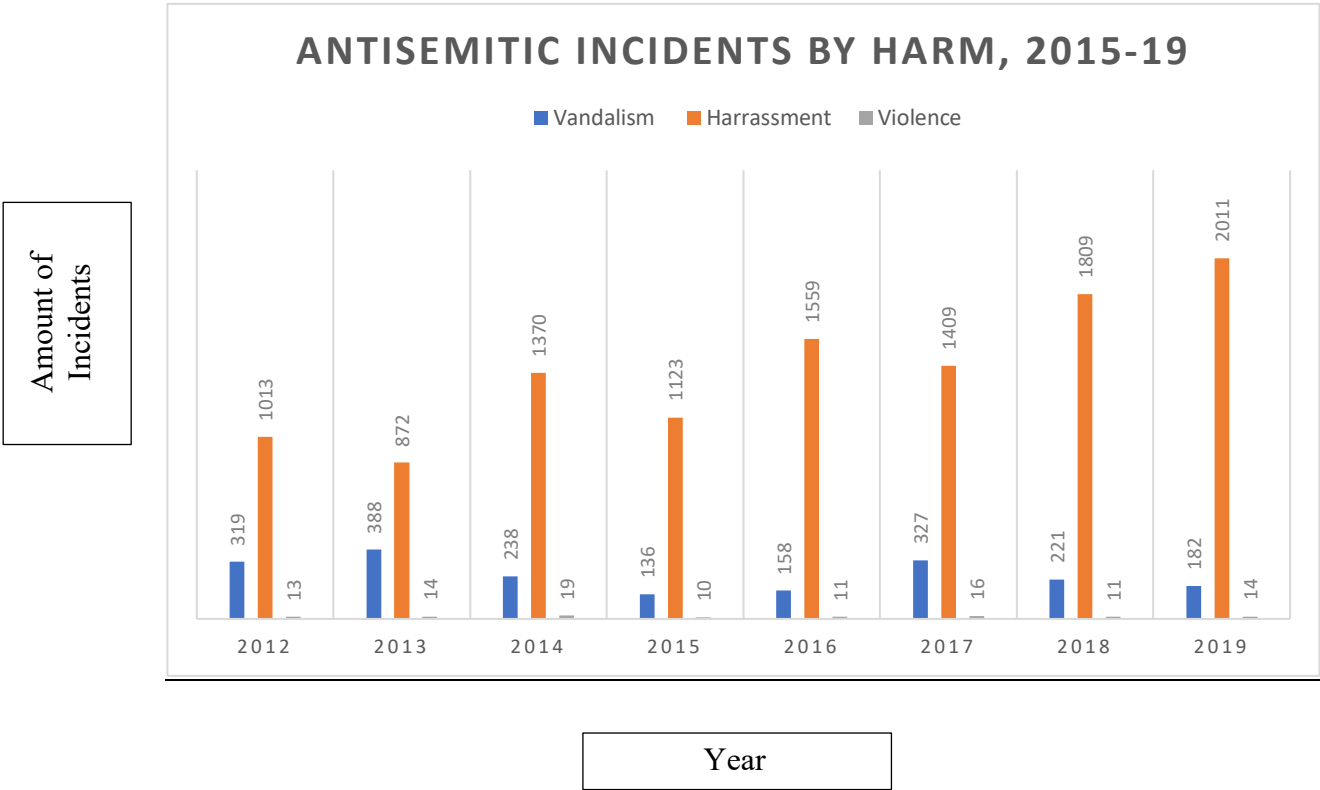
What exactly constitutes this form of hate? According to Deborah E. Lipstadt, antisemitism cannot be easily or universally defined because it is a nuanced and fluid phenomenon, despite it having common and identifiable features (Lipstadt 2019, 12–13). It is what Lipstadt refers to as an “elastic” or “heterogeneous” phenomenon. The various motivations and manifestations of antisemitism change throughout time, making it identifiable but unique to overall context (Lipstadt 2019, 14–21). Antisemitism’s dynamic nature will be further explored in the literature review.

B’nai Brith also describes three main forms of enacted antisemitism: vandalism, harassment, and violence. These classifications are created based on the types of incidents reported to the organization. It describes vandalism as destruction of Jewish property. This includes but is not limited to places of worship, community centres, and cemeteries. Harassment includes communicating hateful speech and promoting stereotypes and tropes. Harassment towards Jews can be found both online and offline, with online hate increasing. Holocaust denial and distortion are also examples of this form. Lastly, B’nai Brith describes violence as including both physical attacks towards Jewish people as well as uttering threats with intent to cause physical harm. Use of weapons or intent to use weapons in an attack are also considered acts of

violence. Violent antisemitism is the least common form but also the most prosecuted by law (B'nai Brith Canada 2019, 10–13).

Rates of all three types are outlined in the tables below. Data is only available on this from 2012 onwards. It is important to note that B’nai Brith only collects data on reported incidents. Rates of all three forms could therefore be higher. Accurate statistics are difficult to acquire because of under-reporting. Rates of online antisemitism are also difficult to measure and prosecute. Again, current efforts and tools are not geared for maintaining up-to-date data on the various platforms for anti-Jewish hate.

Table 3: Rates of Antisemitic Incidents by Harm, 2012-19<sup>14</sup>



<sup>14</sup> According to B’nai Brith’s annual audits for antisemitism in Canada (reports from 2015-19).



Based on the incidents reported, B'nai Brith identifies three main bases for antisemitism in Canada: 1) Islamist extremists, 2) Arab nationalists, and 3) White supremacists. These are general categories, and there are sub-groups and ideologies within these groups from which antisemitism arises. All manifestations of antisemitism can arise from each of these bases. A form of antisemitism that emanates from all bases is new antisemitism, motivated by anti-Israel and anti-Zionist sentiments. It is not always clear when anti-Israel criticism can be considered antisemitic or not (B'nai Brith Canada 2018, 17–21).

### **1.3. Important Definitions**

As we know, antisemitism is a difficult term to define. Established in 1998, the International Holocaust Remembrance Alliance (IHRA) was founded to promote Holocaust education and research so that the memory and lessons of this horrific chapter in history would not be forgotten. It includes 32 member states, including Canada (Centre for Israel and Jewish Affairs 2018). The IHRA also formulated an internationally recognized working definition of antisemitism. For the purposes of this thesis, I adopt the IHRA's "Working Definition of Antisemitism," which is as follows:

Antisemitism is a certain perception of Jews, which may be expressed as hatred toward Jews. Rhetorical and physical manifestations of antisemitism are directed toward Jewish or non-Jewish individuals and/or their property, toward Jewish community institutions and religious facilities.<sup>15</sup>

The IHRA also sets out criteria for determining when anti-Israel criticism and rhetoric should be considered antisemitic.<sup>16</sup> Major Jewish organizations in Canada, such as B'nai Brith, have also adopted this working definition.

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<sup>15</sup> Please see the International Holocaust Remembrance Alliance (<https://www.holocaustremembrance.com/working-definition-antisemitism>).

<sup>16</sup> For the full list of examples and criteria, please see Appendix A.

In June 2019, the Government of Canada officially adopted it as part of their “Anti-Racism Strategy” (Centre for Israel and Jewish Affairs 2018). The standards set out by the IHRA’s definition (including criteria for anti-Israel criticism) were not included in any official Canadian policy or law until very recently. Therefore, in my chosen cases, the courts did not consider the IHRA criteria because Canada had not yet adopted the definition.

It is also important to define “Zionism.” Zionism is a complex phenomenon in part because there are a number of Jewish motivations for rebuilding a home in Israel. Precursors to it have developed over the course of Jewish history (Hertzberg 1976, 15-16). The term is derived from the word “Zion,” which both describes this concept and serves as another name for Jerusalem.<sup>17</sup> The founding of the modern movement is usually attributed to Theodor Herzl who, in the 19<sup>th</sup> century, organized a movement to advocate for the Jewish desire to rebuild a home in Israel, the ancestral homeland of the Jewish people. It was a response to the frequent and severe antisemitic prejudice Jews had been experiencing in Europe.<sup>18</sup> Put simply, anti-Zionism is being against the idea that Jews should have a home in Israel.<sup>19</sup>

#### **1.4. The *Charter of Rights and Freedoms* and the *Criminal Code***

Section 2 of the *Charter of Rights and Freedoms* (the *Charter*), entitled “Fundamental Freedoms” guarantees various rights to Canadians. More specifically, Section 2(b) states the following: “Everyone has the following fundamental freedoms: (b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication.”<sup>20</sup>

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<sup>17</sup> Please see the World Zionist Organization (“Zionism Explained,” <https://www.wzo.org.il/index.php?dir=site&page=articles&op=item&cs=3450&langpage=eng&language=eng>).

<sup>18</sup> Please see the World Zionist Organization (“Zionism-Implementing Zionist Education by Herzl’s Vision,” <https://www.wzo.org.il/index.php?dir=site&page=content&cs=3058&langpage=eng>).

<sup>19</sup> For examples of how anti-Zionism appears in real life, please refer to those in Appendix A.

<sup>20</sup> For all sections mentioned, please refer to the *Canadian Charter of Rights and Freedoms* (<https://laws-lois.justice.gc.ca/eng/const/page-15.html>).

This section can be analyzed in hate crime cases because freedom of expression can be limited by the courts if certain expressions are found to be harmful.

Section 1 of the *Charter* balances rights with other societal interests. It states the following: “The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.” This section can be used to limit s. 2(b) rights in exceptional circumstances (Greene 2014, 270). An example could be when certain forms of expression can cause harm to others, such as public calls for genocide against a particular group.

What is meant by reasonable limits, however, is the subject of debate and depends on various factors. The criteria for determining this are set out in the Oakes test, founded by former Chief Justice of the Supreme Court of Canada, Brian Dickson (Greene 2014, 395). He based these criteria on the *Oakes* decision (Greene 2014, 225).<sup>21</sup> The debate about when to limit a *Charter* right is complicated and will be discussed in more detail in the literature review. The structure of the test is as follows: 1) It must be proven that limiting a *Charter* right is the appropriate action to be taken. 2) The right should only be limited to a level necessary to achieve the government’s objective. 3) The means used to limit the right should make sense for the objective sought. 4) The benefits of limiting the right should outweigh the harms in a free and democratic society (Greene 2014, 395-96).<sup>22</sup>

Although the *Charter* is occasionally used when prosecuting hate, the main legislative document for hate cases is the *Criminal Code of Canada* (the *Code*). Criminal law in Canada is vast and complex, and legislation, such as the *Code*, renders certain behaviours illegal. The enforcement and implementation of law is a multi-step and multi-party process. Some of the

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<sup>21</sup> Please see *R. v. Oakes*, [1986] 1 S.C.R. 103.

<sup>22</sup> I have simplified the language of the Oakes test for clarity.

parties involved in the enforcement and application of the law include law enforcement, the courts, and federal and provincial correctional departments (Roach 2015, 3). Most crimes in Canada are not reported to police and go unaccounted for. Most crimes do not result in charges that are reported, and of those that do get reported and charged, most lead to a verdict of guilt without a trial. There are also a large number of crimes that are not prosecuted as hate related offences. This means that there are many anti-Jewish hate crimes that are not prosecuted and those that are may not be given trials (Roach 2015, 1-2).

The *Criminal Code* (the *Code*) is divided into several sections. It contains provisions for responding to many criminal offences, including those motivated by hate. The term “hate crime” is never actually mentioned in the *Code*. Most of the sections dealing with hate are under the section entitled “Hate Propaganda,” outlined in Sections 318-320.1(1)-(9). Provisions also relevant to my analysis are Sections 430(4.1) – 430(4.101) and Section 718.2(a)(i).<sup>23</sup> A summary of these sections are detailed below.

Laws pertaining to hate and bias-motivated crimes in Canada were added to the *Criminal Code* in 1970 in response to an increase of racist activity, especially antisemitic incidents, perpetrated by white supremacists and far-right supporters during the 1960s (Lunny 2017, 21–22). In 1965, Guy Favreau, the former Minister of Justice, responded by creating the Special Committee on Hate Propaganda. He appointed Maxwell Cohen, former Dean of the McGill University Law School to head the committee, which came to be known as the Cohen Committee. Cohen suggested that three amendments should be added to the *Criminal Code* to legally address “group defamation” (Lunny 2017, 30–31). The first: “advocating or promoting genocide against an identifiable group.” The second: “public incitement of hatred against an

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<sup>23</sup> For the full text of these sections, please see Appendix B.

identifiable group that would likely lead to a breach in the peace.” The third: “wilful promotion of hatred against an identifiable group” (Lunny 2017, 30–31).

Since then, the *Criminal Code* provisions for hate offences have evolved. Today, the main sections in the *Code* pertaining to hate offences are as follows. Section 318 is entitled “Advocating Genocide.” It outlines how to identify genocide and the promotion of it, and how to sentence offenders accordingly. In addition to how to respond to this crime, s. 318 provides the government’s definitions of both “genocide” and “identifiable group.” The *Criminal Code* considers genocide to be “any of the following acts committed with the intent to destroy in whole or in part any identifiable group, namely, (a) killing members of the group; or (b) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction.” The *Code* defines “identifiable group” as, “any section of the public distinguished by colour, race, religion, national or ethnic origin, age, sex, sexual orientation, gender identity or expression, or mental or physical disability.”

Section 319(1) of the *Criminal Code* is entitled “Public Incitement of Hatred.” This refers to uttering hateful words against an identifiable group to the public. It also involves encouraging people to enact hate towards an identifiable group (Walker 2010, 2). Section 319(2) is entitled “Wilful Promotion of Hatred.” It refers to people who intentionally and publicly promote hatred. Section 319(3) lists four “defences” that can be used to prevent people in certain circumstances from being convicted of a s. 319 offence.<sup>24</sup> Lastly, Section 320.1 outlines the procedures for issuing warrants and seizing materials believed to be hate propaganda.

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<sup>24</sup> The four defences listed in s. 319(3) are as follows (the exact words are in Appendix B): 1) If it can be demonstrated that there was truth to the statements made, 2) That the opinion or words expressed were genuinely from a religious view or “subject” or “based on a belief in a religious text,” 3) The statements made were demonstrated to be in the public’s interest or for the public’s benefit, and 4) If in good intentions the perpetrator intended to bring to light, “for the purpose of removal” things that have the tendency to promote hate in Canada towards an identifiable group (*Criminal Code*).

Other relevant sections for responding to hate include s. 430(4.1) – (4.101), which fall under the section entitled “Mischief.” It was added after the 9/11 terrorist attacks. The purpose of this section is to outline how the law should respond to offences on religious places of worship motivated by hate and bias (Lunny 2017, 23). More specifically, Subsection 430(4.101) outlines provisions for offences against other types of religious institutions and properties used by identifiable groups.

Lastly, Section 718.2(a)(i) allows for sentencing to be intensified when a crime has been proven to be motivated by bias or hate. If the offence was committed with a bias-motivation towards an identifiable group, then this motivation becomes an “aggravating or mitigating circumstance.” As a result, the sentence intensifies and increases.

A major complication with hate legislation is that each province’s Attorney General must give consent for the provisions in the “Hate Propaganda” section to be applied to a crime (Moon 2018, 25). Richard Moon explains that Attorney Generals are often hesitant to consent to the use of hate legislation because hate crimes are harder to obtain a conviction for than non-bias crimes (Moon 2018, 25). Another complication is the risk of infringing people’s rights as per s. 2(b) of the *Charter*. This debate is elaborated on in the literature review. Nonetheless, it is important to mention because the *Charter* guarantees the creation of a space in which hateful attitudes and words can exist and potentially not be considered criminal. This can in turn normalize what can be considered hateful.<sup>25</sup> Proving intent or wilfulness to commit bias or hate crimes is also a requirement for convicting someone of a hate offence (Walker 2010, 7).

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<sup>25</sup> For more about normalization, please refer to “Chapter 3: Literature Review,” “Law as Social Change” section.

## 1.5. Research Questions, Hypothesis, and Thesis Statement

My research is guided by six questions: 1. Is law a reliable tool for deterring and combating antisemitism? 2. Should law be the main means by which we deter and combat antisemitism or is it merely a tool? 3. Does constructing various phenomena within a legal context affect law's responses to things such as antisemitism? 4. How does law frame and understand Jewish identity and antisemitism? 5. Are there gaps in law's understanding of both that affect its ability to effectively fight antisemitism? 6. Are there other inconsistencies in the legal method that affect this? My hypothesis was as follows: law is an important tool for combating antisemitism, but it is not an effective deterrent and combatant against anti-Jewish hate in contemporary Canada.

In performing my discourse analysis, I paid particular attention to the ways that courts framed Jewish identity and antisemitism. I analyzed four hate crime cases within the context of the *Criminal Code* provisions I outlined above. I wondered whether law is adequately equipped to respond to contemporary antisemitism and how its framing of both Jewish identity and anti-Jewish hate might relate to its effectiveness in combatting all manifestations of this type of prejudice. Law also framed the broader social impact of hate and antisemitism in particular ways, which will be discussed in chapters 4 and 5. The aforementioned issues affect law's ability to effectively deter and combat antisemitism in contemporary Canada. They highlight where and how legal responses can be strengthened as well as how alternate solutions to combating antisemitism that may be helpful in the fight against it.

## 1.6. Outline of Chapters

Chapter 2 presents my methodological framework and research method. I performed a Foucauldian discourse analysis, modelled after Jean Carabine's suggested method. The chapter

begins by discussing how both Carabine and Michel Foucault conceptualize “discourse.”

Following this is a discussion of my conceptual framework, drawing from the works and ideas of various scholars, including Mary Jane Mossman, Mariana Valverde, and Carol Smart. The next section discusses how I conducted my research. It outlines how I performed my Foucauldian discourse analysis and arrived at my conclusions. Throughout, this chapter describes how my framework and method helped guide my research and interpret my findings.

Chapter 3 is the literature review. It consists of three main sections: “Contemporary Antisemitism,” “Legislating Hate,” and “Law as Social Change.” Each section outlines the main trends found throughout the corresponding literature. The first section discusses what constitutes anti-Jewish hate in the contemporary world. The second highlights the main lines of thought regarding the use of hate legislation to combat prejudice. The third section discusses literature pertaining to whether law can be an effective tool for social change, drawing from various socio-legal scholars. Lastly, the chapter concludes with a brief discussion and conclusion which includes a summary of the literature.

Chapter 4 is the presentation of my research findings from four provincial court decisions. All pertain to hate crimes that were motivated either completely or in large part by antisemitism. The dates of the decisions range from 2008-2017. I examined these four decisions for two reasons. The first was because they were some of the only cases pertaining to antisemitic crimes violating the “Hate Propaganda” section of the *Criminal Code* from this time period. The second reason was because I wanted to understand how courts have been responding to antisemitic hate crimes. Through discourse analysis, this chapter explores various shortcomings in legal responses to antisemitic hate. Some of these include the repeated construction of both Jewish identity and antisemitism, reinforcing identifiable social difference, and largely excluding



the social impact of hate from the decisions. Legal method reinforces and normalizes these responses.<sup>26</sup>

Lastly, Chapter 5 is the discussion and conclusion, which summarizes the main findings from my analysis. This chapter takes the main points from Chapter 4 and connects them back to my thesis statement. It also offers some suggestions going forward with combating antisemitism, including how legal responses can be improved. One suggestion is to create more educational programs for law enforcement and legal officials about the nature of antisemitism and how to identify it. It also suggests various scholarly methods law enforcement and courts can adopt in their work to better understand the dynamic natures of Jewish identity and the hate that targets Jewish people. Further inquiry is needed, however, into alternate responses for combating antisemitism on a wider social scale and I plan to perform this research during my PhD.

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<sup>26</sup> Please see *R. v. Keegstra*, [1990] 3 S.C.R. 697.

## Chapter 2: Methodology and Method

The fact that antisemitism is difficult to define and is a complex phenomenon makes it uniquely challenging to study. Legal responses are important to consider because law is often relied upon to combat prejudice. Methodologically, it is important to consider how law frames the issues it responds to, which highlights where it may be lacking in its responses. I therefore decided I would examine a small selection of cases that dealt with the *Criminal Code* provisions for hate propaganda, outlined in Sections 318-319. Those decisions, I hoped, would provide me with the material I needed to think about how law responds to antisemitism. There are admittedly other ways to study legal responses antisemitism, including analysis of legislation and policy. Examining legal narratives about antisemitism, however, allowed me to uncover patterns in the cases and highlight shortcomings in law's responses that affect its ability to effectively deter and combat antisemitism on a wider social scale.

### **2.1. Methodology**

To frame my methodology, I considered a number of socio-legal perspectives on law's method, including how law characterizes and constructs issues and phenomena in particular ways. These perspectives provided me necessary background knowledge about law's place in society and how legal method shapes and characterizes social issues. I also considered various ideas about discourse analysis, especially those of Jean Carabine and Michel Foucault. It was with these ideas that I constructed my own methodological framework for my discourse analysis of four provincial hate crime cases. By using this framework, I was able to identify various issues and inconsistencies with law's responses to antisemitism.

Discourse analysis is a well-established and credible methodology for performing social scientific research. There are many different definitions of "discourse" and many ways to

perform analysis of it. Some analyses are focused on language and the construction of sentences. Others focus on identifying ideas and conversations more broadly. Norman Fairclough's well-known version analyzes how language relates to the various elements of social life (Fairclough 2003, 2). Sociological discourse analysis (SDA) is another common method of discourse analysis, often preferred when analyzing legal discourse. SDA understands discourses to be comprised of linguistic patterns that carry "social significance." It combines the analytical methods of linguistics with the empiricism of social scientific research (Pichlak 2014, 61-66).

Similarly, Margaret Wetherell understands language to be an important element in the shaping and perpetuation of social discourses. How ideas and perceptions are understood and framed in different contexts by different people contributes to broader understandings. Language and competing conversations contribute to how these ideas and perceptions are framed (Wetherell 2001, 16). Wetherell's methodology differs from more concrete forms of discourse analysis in her argument that discourses are created in context and produce meanings; they are not just comprised of statements and words. Rather, these statements and words both represent and perpetuate broader social meanings (Wetherell 2001, 16-18).

There are various forms of discourse analysis and conceptualizations of discourse. How one understands discourse affects how they analyze it. In my research, I perform a Foucauldian discourse analysis (FDA) based on Jean Carabine's model. Carabine states that there is no one way to perform FDA. She explains, "... I should make it clear that there are no 'hard and fast' rules which set out, step by step, what a genealogical analysis is. What Foucault's genealogy offers us is a lens through which to undertake discourse analysis and with which we can read discourses" (Carabine 2001, 268).

Although I will touch on the concept of genealogical analysis later on in this section, it is important, as mentioned above, that even an established methodology does not necessarily require a strict method. In other words, within the established types of discourse analysis, such as FDA, there are many different ways to perform the analysis. My analysis involves mapping the constructions of broader themes and then connecting these conceptualizations to broader social questions and issues, such as how law responds to antisemitism. How I did this will be the focus of the next section. This section will begin by discussing how Carabine and Foucault conceptualize discourse.

Like Foucault, Carabine argues that discourses are more than just a collection of words. Rather, discourses are groups of meaning-making statements that impact the social world and are continuously reconstituted to produce new meanings about phenomena and concepts (Carabine 2001, 268-79). They develop from the interaction of various conversations, ideas, and attitudes. These conversations and ideas work together to construct new meanings about things, such as what constitutes antisemitism (Carabine 2001, 270-72). Discourses also have effects on various people and institutions. They shape people's opinions, knowledge, and actions and they can even affect things such as policies and legislation (Carabine 2001, 272-73). Legal discourse shapes the ways antisemitism and Jewish identity are constructed both within and outside of the legal context. This is what I examine through my analysis of case law.

Carabine says that for Foucault, discourses determine what something is and what it is not. In other words, discourses establish what is considered to be truth or fact at any given time. It is an effect of power that certain discursive constructions of knowledge are given authority and influence at any given moment. As a note, power in the Foucauldian sense can be understood as a mobile aspect of society, permeating all parts of it. When something becomes established as a

truth, it becomes a location in which power is “activated.” Power, which operates between and within all elements of society is relational. Where it is activated at any given time is therefore in relation to other factors (Winter 1996, 832-35). Normalization is one process by which something becomes the norm and through which power is activated (Carabine 2001, 278). I will discuss normalization further in the literature review. Carabine explains that discourses are therefore productive. This means they are actively producing knowledge about objects, subjects, ideas, and phenomena (Carabine 2001, 268-69).

Lori G. Beaman adds that discourses are comprised of symbols, systems of thought, texts, and bodies of knowledge. They are also comprised of what is not explicitly stated and in part develop from resistant ideas and challenging notions. Discourses can influence how people respond to various phenomena, such as antisemitism (Beaman 2008, 2-38). This supports Carabine’s explanation of the Foucauldian conceptualization of discourse. It is through constant discursive interactions and movement that discourses construct meanings of various phenomena and ideas.

Foucault also argues that facts and knowledge are constructed from various normative discourses in different social, historical, and cultural contexts (Carabine 2001, 275). In addition, knowledge is perpetuated through the constant interaction of certain discourses with other related, and often more prominent discourses. Carabine explains that these discursive interactions continuously create new meanings about issues and phenomena (Carabine 2001, 269). Discourses are also shaped by the people circulating them and at the same time shape people’s responses to various experiences (Beaman 2008, 7).

I have drawn on various scholars’ articulations of discourse to situate my own. I understand discourse to be more than just a series of statements. A discourse involves competing

conversations that include not only statements, but ideas, definitions, emotions, and perceptions about various phenomena, such as antisemitism. Analyzing the decisions with this information in mind helped me understand how law shaped Jewish identity and antisemitism. Law produces a particular truth about what constitutes both. I explore this through discourse analysis and by doing so expose gaps in law's conceptualizations of Jewish identity and antisemitism that have an impact on its efficacy to respond to this type of hate.

Guiding my discourse analysis were conceptual frameworks by socio-legal scholars about legal method and how it constructs and frames particular ideas and definitions. Here I present those relating to law's characterization and construction of different facts and bodies of knowledge. The power of law to Effie Fokas can be described by a concept called the "shadow of the court" (or law), which is the idea that law has an impact over the social realm, and through its authority legitimizes concepts and ideas more broadly. She argues that law's influence is strong and casts a shadow over how phenomena are classified and defined beyond its realm (Fokas 2015, 64-69).

Complementing Fokas are the insights of Mary Jane Mossman. While Fokas argues that law's conceptualizations can change over time, Mossman argues that legal method is static. In other words, law's conceptualizations change but its method for reaching those conclusions does not (Mossman 1987, 149). A major component of legal method is the use of precedent from past decisions. Law creates its interpretative and analytical framework for particular cases based on frameworks from influential past decisions. Law also relies on evidence and conclusions based on both substantial evidence and reliable analytical frameworks. Mossman states that while not all courts rely strictly on this three-pronged approach, they interpret cases in different ways based on this framework (Mossman 1987, 153). Leaving room for interpretation, courts choose

to include information that they consider relevant to that particular case. Mossman therefore challenges law's objectivity. When certain pieces of information are given relevance and others are excluded and discredited, courts create narrow conceptualizations of the issues to which they are responding. They then respond in limited and routinized ways (Mossman 1987, 154-59).

In the decisions I analyzed, Jewish identity and antisemitism were legally constructed in particular ways. As we shall see, those constructions were related. As I will argue, relational constructions of various phenomena affect law's ability to effectively respond to them. Mossman argues that courts characterize issues and concepts in ways that support what they are trying to do. In other words, they frame things in particular ways that allow them to fulfill a specific purpose and "do law" (Mossman 1987, 157).

Along with Mossman, Mariana Valverde discusses how law constructs its definitions from other preconceived ideas and notions. If courts only understand ideas and concepts in specific ways, they will only understand other elements of the trials in corresponding ways (Valverde 1996, 209). This explains why in most of my chosen cases, the courts' perceptions of antisemitism were often limited based on how they defined Jewish identity. Their perceptions guided their responses.

In her classic work on legal discourse, Carol Smart not only argues what Mossman and Valverde argue, but goes even further to argue that law is conceptually close-minded. By this, Smart is saying that law intentionally understands phenomena and concepts in limited ways and that it will not take into consideration alternate accounts and assumptions (Smart 1989, 26). She illustrates this with the example of rape trials. Smart argues that courts only convict rapists as guilty and punish their crimes if the accounts of the rapes presented at the trials fit the courts'

limited definition of rape. It is legal method, Smart argues, that contributes to its ability to define and respond to phenomena in limited ways (Smart 1989, 26).

While Smart understands law and its method in a specific way, her argument that law conceptualizes things in limited ways was helpful for my research. Not only was it helpful in that it allowed me to understand how the courts framed and understood concepts and phenomena, but it allowed me to become aware of the ways in which law contributes to knowledge creation. In developing this awareness, I became more observant of patterns in the courts' classifications of various themes.

In the decisions I analyze, the courts were responding to perpetrators of hate. Taken together, the *Criminal Code*, the *Charter*, and legal method construct antisemitism in particular ways. Legal method privileges some formulations over others and these shape law's responses to perpetrators of hate. In the analysis chapter of this thesis, I will discuss in more detail the ways in which law and courts characterized and responded to these issues. My chosen framework also allowed me to map patterns of normalization in the courts' responses to anti-Jewish hate and reflect upon how they affected law's ability to be an effective response to antisemitism.

Regardless, whether law is accomplishing what it needs to in order to effectively deter and combat antisemitism, it nonetheless shapes how institutions and people perceive this form of hate. Its tendency to construct things such as Jewish identity and anti-Jewish hate affect how these can be understood more broadly. Likewise, how the public understands antisemitism and hateful expression influences how law determines which forms of anti-Jewish hate it will identify and prosecute. As my analysis will show, law selectively shapes the phenomena it responds to and this affects how effectively it responds to hate and antisemitism.



## 2.2. Method

Drawing on the scholars mentioned above, I conducted a discourse analysis on four provincial court cases. I chose this form of analysis because I wanted identify patterns and themes in legal responses to antisemitism in order to uncover any issues with these responses. Analyzing court decisions provided me with concrete examples of legal responses to antisemitic hate. Data on law's responses to anti-Jewish hate are minimal and therefore difficult to find. These decisions acted as records of how law has conceptualized and understood antisemitism in recent years. They provided me with insight into some of law's responses during this time.

In order to choose my cases, I searched legal databases for those that pertained to anti-Jewish hate crimes in the contemporary time period, which I define as the last 12 years or between now and just over a decade ago. My chosen cases span the years 2008-2017. Antisemitism has evidently been a social issue in Canada for as long as Jewish people have been settled here. It clearly remains a pervasive problem today and needs urgent critical inquiry. This is precisely why I chose the contemporary time period.

After deciding to focus on law and court decisions, I decided to select cases that dealt with antisemitic hate crimes as per Sections 318-319 of the *Criminal Code*. These are the main hate provisions in the *Code* and therefore helped me determine which cases responded to crimes in which the hate motivation was the most serious charge. To narrow my search and find the appropriate cases, I entered several related key words into legal databases. Some of these terms included "Jews," "Jewish," and "antisemitism." There were very few results that satisfied my criteria. The lack of hate crime cases in general is confirmed by B'nai Brith and Statistics Canada, with both referencing the lack of prosecution towards hate in recent years.

I considered six cases relevant for analysis. In order to select the cases I analyzed, I annotated them for basic information. For example, I looked at what the charges were in each because I wanted to examine the relation between the hate legislation in the *Code* and antisemitic crimes. Another criterion was whether or not there were substantial amounts of antisemitism in the evidence. This was important because analyzing the cases within the context of this thesis would have been difficult if the crimes being tried were not strongly motivated by antisemitism. In addition to substantial evidence of antisemitism in the crimes, I looked at the courts' discussions of the crimes. If themes such as Jewish identity and antisemitism were not discussed in detail, I chose not to use the case. Lastly, I wanted to ensure that the cases were tried during the time period I set for the research. In the end, four out of the six cases met my criteria.

My goal with FDA was to map various themes (also referred to as "objects of discourse") and related assumptions in the cases. Themes, as Carabine explains, are topics, ideas, or concepts around which discourses circulate (Carabine 2001, 268). Legal discourses include law's understandings and conceptualizations of the various themes within the decisions. As we have seen, law perpetuates assumptions and constructs definitional profiles about themes based on its preconceived notions and the information it has at its disposal. The resulting definitions include details about what constitutes each theme and what does not as well as various attitudes and ideas surrounding those themes. These legal discourses create and perpetuate knowledge and meanings about phenomena such as Jewish identity and antisemitism. How law understands these does not necessarily reflect their true and complete natures, but rather constructed images of them.

The themes I analyzed in the cases were Jewish identity, antisemitism, and hate. I approached the cases from a religious studies perspective, meaning I looked for themes that

related to identity, belonging, and group formation within a religious context. I approached my research from this perspective for several reasons. One reason is that Statistics Canada classifies Jews as a religious group in their annual police-reported hate crime reports. Although Jewish identity can be comprised of more than just religion, understanding it from this perspective provided a starting point for collecting data.

Another reason is that regardless of how Jews have identified as such throughout history and in different social and cultural contexts, the religious components of Jewish identity have consistently defined the Jewish people to some degree. Many people therefore understand Jews as religious, and so again this provided me a starting point from which to enter into analyzing the more nuanced forms of anti-Jewish hate and Jewish identity.

Next, I situated my themes in the broader social and cultural context of hate and in the context of law in contemporary Canada. As I coded the cases and conducted my analysis, I realized how important the courts' conceptualizations of Jewish identity and antisemitism were to their overall responses and to law's fight against antisemitism more broadly. Understanding the interactions and effects of these discourses also highlighted how law's method contributed to legal knowledge about responding to anti-Jewish hate and how it reinforced social difference and divisions.

FDA allowed me to map these conceptualizations and understand how knowledge is normalized through law. This is the genealogical approach to Foucauldian discourse analysis. Carabine explains: "Rather, genealogy is concerned with describing the procedures, practices, apparatuses and institutions involved in the productions of discourses and knowledges, and their power effects" (Carabine 2001, 276). This approach highlights how and why knowledge and truths are shaped and become normal. In other words, this approach highlights how themes and

ideas are normalized in certain contexts (Carabine 2001, 275-77). My research was structured around the circulation of thematic discourses in the context of law in contemporary Canada. Carabine's method guided me through mapping themes and conceptualizations and in understanding how various discursive elements contributed to legal knowledge about Jewish identity and anti-Jewish hate within this context.

Carabine argues that FDA involves looking for the following elements: a topic, questions, a summary, impressions, limitations of knowledge, themes (also referred to as categories or objects of discourse), background context, absences and silences, resistances and counter-discourses, effects, inter-relationships between discourses, discursive strategies and techniques, and analysis of these discourses within networks of power and knowledge (Carabine 2001, 281). These are important to identify because they help the researcher uncover the various assumptions and conversations that exist around certain themes in any given context. Discourses can be understood in relation to each other, highlighting how ideas and practices are normalized in law.

To help guide my analysis and identify which themes were important, I used my research questions.<sup>27</sup> Once I identified my questions and some of the themes, I coded the decisions by recording the paragraph numbers or page numbers where each theme was mentioned and discussed. I also made note of and coded the themes that became apparent throughout my analysis, such as identifiable social difference. Following this, I wrote a summary of how they were discussed and perceived by the courts in each particular decision. My analysis centred around these discussions and how they contributed to creating legal conceptualizations and responses to antisemitism. These discussions included what was mentioned and not mentioned by the courts about each theme, as well as their attitudes and perceptions.

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<sup>27</sup> Please see "Chapter 1: Introduction."

Following my coding process, I looked for counter-discourses and resistances (statements which challenge normative discussions and assumptions). These highlighted how legal discourses, such as those about Jewish identity, contributed to knowledge about anti-Jewish hate and how to respond to it. I also examined the interactions of legal discourses surrounding my chosen themes to better understand how law's perceptions and assumptions shaped knowledge about these themes. After identifying the legal discourses about my chosen themes and how they interacted, I noted the effects they have on law's ability to be an effective tool for combating antisemitism.

Although I analyzed many discursive elements, one question remained: how do discourses produce meaning and enter into wider circulation both within and outside of law? Carabine explains that this happens through the use of discursive strategies and techniques. These refer to the various methods used in a given context to perpetuate the knowledge and assumptions created through various thematic discussions (Carabine 2001, 288). In my analysis, I looked for techniques that were based on how certain themes were presented and talked about by the courts, including the courts' attitudes and presentations of the issues to which they were responding. Lastly, I connected these various discursive elements and mapped patterns of normalization more broadly. These patterns revealed the main issues with law's responses to antisemitism and how these responses impact the fight against it.

Contextualizing my findings in networks of knowledge and power provides insight into how effective current legal efforts are at combating antisemitism. FDA helped me understand the relationship between court responses to anti-Jewish hate and the fight against this form of prejudice. While court responses did not reveal anything significant at first glance, a more careful analysis revealed that the ways in which law conceptualizes Jewish identity and

antisemitism impact the efficacy of legal responses to anti-Jewish hate. FDA and my conceptual socio-legal framework guided my understanding of how normative responses to anti-Jewish hate are created and perpetuated within the context of Canadian law and society more broadly.

These findings will be presented in Chapter 4. Before I present them, I will discuss the scholarly literature related to my research.

## Chapter 3: Literature Review

This chapter presents an overview of the scholarly literature on three topics, including contemporary antisemitism, legislating hate, and law's ability to effect social change. Section 3.1. discusses the nature of contemporary antisemitism, including its various motivations and manifestations. It also discusses an important component of contemporary antisemitism: online hate. Section 3.2. considers the use of legislation as a means to combat hate. There are several key debates here, including the debate about limiting hate speech, the implications of using hate legislation, and the importance of considering other means to combat prejudice. Section 3.3. considers the debate about whether law has authority and influence over social life, relations, and interactions. It also describes some of the factors that affect law's ability to influence the social sphere. This chapter ends with a summary of the literature and discusses these ideas in light of using law as a main source to combat antisemitism.

### **3.1. Contemporary Antisemitism**

Contemporary antisemitism is a fluid phenomenon. It manifests in various ways and is motivated by different factors. Again, it can take the forms of harassment, vandalism, and violence (Weinfeld 2005, 37–38). Antisemitism is a global form of hate, one which manifests according to context and with the help of various modern technologies such as the internet and social media (Ye'or 2016, 35). Many scholars noted this dynamic nature of antisemitism as one of its defining traits. This is partly what makes it so difficult to combat.

Morton Weinfeld says that antisemitism in the West can be categorized into four types. The first type is religious antisemitism. The second is racist antisemitism. The third type is right-wing antisemitism. Lastly, there is left-wing antisemitism (Weinfeld 2018, 317–19). Most other scholars recognize these four types but tend to categorize them more broadly. For

example, traditional antisemitism includes as sub-types religious and racial anti-Jewish hate. Left-wing antisemitism has its own unique features but at times still appropriates the characteristics of traditional antisemitism. This section examines all of these types more broadly, with the two main categories being traditional and new antisemitism.

Traditional antisemitism is identified by its promotion of traditional tropes, stereotypes, and assumptions about Jews.<sup>28</sup> This type is seen largely on the political far-right but can also be invoked in some of the rhetoric on the left (Norwood 2016, 129). According to hate crime expert Barbara Perry, traditional antisemitism usually stems from white supremacist groups who are well-known for their racist and antisemitic ideologies. Christian-based antisemitism, although an old form of traditional anti-Jewish hate, is also seen largely on the far-right (Perry 2003, 301). Perry stresses throughout a number of her works that reinforcing difference, or “othering” minorities is something that maintains the cycle of hate against them. Combating a type of hate such as antisemitism can therefore be difficult because it stems from the depths of people’s emotions and minds, which are not easily changed (Perry 2002, 34–35). This is especially true because tropes and stereotypes about the Jews have persisted for a long time.

Another form of traditional antisemitism that a number of scholars discuss is Holocaust denial. Deborah E. Lipstadt explains that Holocaust denial is something that is typically seen on the far-right but can also be seen on the far-left and in Islamic antisemitism as well. This is a tricky form of antisemitism because denying the reality of the Holocaust is not always explicit. Holocaust denial can appear as explicit denial of the events and historical circumstances of the

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<sup>28</sup> According to Manuel Prutschi, one of the most well-known tropes or stereotypical portrayals about Jewish people is that they are conspiring as a group to dominate the world and want to run not only the political and social spheres, but the global economy as well. Prutschi, along with a number of other scholars, mentions this trope in particular as being one that is appropriated and expressed in various ways by antisemites from all ideological bases and motivations in order to further their agendas against the Jewish people, Israelis, and Zionists (Prutschi 2004, 108).



Holocaust, or more like a distortion of historical truths (Lipstadt 2019, 144–47). The former is what Lipstadt refers to as “hard-core denial” and the latter is what she terms “soft-core denial” (Lipstadt 2019, 144–45).<sup>29</sup>

Many scholars argue that traditional antisemitism remains a major problem for Jewish people. This is because ideologies and assumptions that exist with this type of antisemitism persist, meaning they are a threat to contemporary Jews. Because traditional tropes are being appropriated in new ways for different ideological purposes, traditional antisemitism is proving itself to be mobile and shapeshifting. Targeting something that is mobile and frequently changes appearance is extremely difficult.

In addition to traditional antisemitism, every single source mentions a form of antisemitism called “new antisemitism.” Morton Weinfeld describes this type as that which is motivated and characterized by anti-Israel and anti-Zionist rhetoric and sentiments (Weinfeld 2018, 307). He also describes it as a form of attitudinal hate, meaning that attitudes and opinions can be a source for prejudice against the Jewish people (Weinfeld 2018, 312). Although new antisemitism can manifest from all ideological platforms, all scholars describe it as characteristic of left-wing antisemitism. This can be attributed to the strong social justice attitude of many on that side of the spectrum. The left side of the spectrum often acts as an ideological meeting point for many social causes. New antisemites often combine their fights for different causes and their grievances with Israel into one big fight against the country and often towards the Jewish people (Marcus 2015, 34–35).

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<sup>29</sup> Both can be used amongst those who are anti-Israel and anti-Zionist. For example, hard-core deniers may accuse Jews of inventing the Holocaust as a part of a conspiracy to further their agenda for the State of Israel, while soft-core deniers might instead say that Jews are repeating the atrocities of the Holocaust in Israel today towards the Palestinians (Lipstadt 2019, 147).

One major problem that a number of scholars mention with regards to new antisemites is that they often perceive Israel to be one “collective Jew.” Many new antisemites uncritically intertwine the Jewish people with all aspects of the State of Israel, including its political actions and decisions. According to Kenneth L. Marcus, even though Israel is a Jewish nation-state, new antisemites do not separate Jews worldwide from those within Israel nor do they separate Jewish civilians from Israeli politicians. New antisemites therefore take their grievances against Israel and project them onto the entire Jewish people. In doing this, they often appropriate the tropes and stereotypes of traditional antisemites and apply them to Israel as a collective Jew (Marcus 2015, 21–23).

It is important to note that scholars made sure to mention that not all criticism of Israel is antisemitic. For example, Derek Penslar notes that context is very important for determining when criticism becomes antisemitic (Penslar 2005, 108). Criteria can also include comparing Israeli policy to Nazi policy or using imagery of the Holocaust to describe Israeli treatment of Palestinians. Other examples include blaming all of the Jewish people for the actions of the Israeli government or delegitimizing Jewish self-determination (Penslar 2005, 46).

Ira Robinson describes why new antisemitism and anti-Israel and anti-Zionist sentiments are so dangerous. White supremacists and far-right supporters, Robinson says, sometimes join left-wing critics of Israel and Zionism. This type of criticism is dangerous because Jews can be included in it, meaning it can become a platform for antisemitism to flourish. Anti-Israel and anti-Zionist sentiments not only provide a platform for antisemitism to develop, but can also act as covers for already existing anti-Jewish hate (Robinson 2015, 153–163).

New antisemites sometimes appropriate traditional antisemitic motivations into their Israel and Zionist-based motivations. Unlike traditional anti-Jewish hate, new antisemitism is

tricky to identify because of the blurred line as to what can be considered legitimate criticism of Israel and what is antisemitic. New antisemitism is therefore a phenomenon which can easily be disguised (Nirenstein 2016, 44). This is a cause for concern because if this type of hate is more discreet and socially acceptable, it can spread more easily. As Richard Moon argues, less extreme forms of hate speech can be more dangerous because people are more easily persuaded to believe something that is not obviously absurd (Moon 2018, 54).

Another base from which we see antisemitism is radical Islam. This is not the only base from which Islamic antisemitism comes from. Some mainstream Muslim groups which lean left politically and ideologically (but not all) hold antisemitic views based on anti-Israel and anti-Zionist sentiments (Lange et al. 2018, 7–19). Antisemitism from this base is harder to track and combat because of its discretion. This is because new antisemitism is not always obvious because it is often cloaked by anti-Israel and anti-Zionist discourses.

Another form of anti-Jewish hate is referred to as “Jewish self-hate.” Self-hating Jews are described as such because they are Jewish people whose rhetoric appears to be antisemitic. While it is difficult to accuse a Jewish person of being against themselves, and perhaps they are not inherently antisemitic, their attitudes about topics such as Israel create spaces in which they begin to speak like those around them who are (Lipstadt 2019, 183). In fact, Lipstadt explains that Jewish self-haters believe they are actually enacting Jewish values, such as social justice through promoting their rhetoric and calling out what they perceive to be injustices. It is by supporting the attitudes of new antisemites that they enable antisemitism to continue (Lipstadt 2019, 183). Again, criticism against Israel is not necessarily antisemitic. Jews have a variety of different views related to Israel. It is the rhetoric of new antisemites that makes Israel criticism

anti-Jewish. Jewish self-hate is therefore a phenomenon that highlights some of the complexities of antisemitism.

Just as there are diverse forms of antisemitism, so too are there different ways to be Jewish. According to Lynn Davidman, Jewish identity is incredibly diverse. It can be expressed in many ways. Jewish people can identify as religious, nonreligious, and anything in between. They can also call themselves cultural Jews. Cultural Jews (unless they also identify as religious) may not identify with theological and religious beliefs nor perform religious practices and observances. Jews also consider themselves an ethnic group and an historic nation. There is no universal identity for all people who identify as “Jewish” (Davidman 2007, 55–56).

There are also social, political, linguistic, historical, and ethnic identifiers for being Jewish. The Diaspora, Holocaust, and State of Israel have also affected Jewish identity and how they situate themselves in relations to the broader social sphere (Wettstein 2002, 2-14). Jewish identity is constructed uniquely in each individual from a variety of different characteristics. This helps explain how Jews have been understood and responded to in different social contexts throughout history. It also helps explain why there are many forms of hatred towards the Jews and how these persist in different ways through various means.

In today’s world, there is also concern about the increase of online hate. The internet is a very attractive tool on which hate groups form and hateful ideologies spread. According to Barbara Perry and Patrik Olsson, the internet is a social space in which people can assume different identities and bond with people who share similar identities and interests (Perry and Olsson 2009, 186). One complicating factor for combating cyberhate is anonymity. The internet provides a platform for people to hide their identities. The ability to disguise oneself makes it incredibly difficult for authorities to track down perpetrators of hate. This also makes it easier

for people to mobilize around certain ideologies, including those against Jews (Perry and Olsson 2009, 186). Another interesting point Perry and Olsson raise is that social groups can shut down websites and move them to new addresses and rename them. This online flexibility makes tracking down the sites on which people spread hate very difficult (Perry and Olsson 2009, 188).

John Bargh and Katelyn McKenna argue that the internet is changing how we communicate in social settings and is reducing the need to develop and recognize non-verbal social cues. They also argue that the internet fosters individualism and self-fulfillment through the enabling of egotistical identity construction and social acceptance from different online communities (Bargh and McKenna 2004, 579). These communities also alter how we understand safe and healthy interactions with others. Encountering and interacting with strangers is much easier to do online than offline. This anonymity is not the only thing that attracts perpetrators of hate to the internet. The ability to spread information (especially misinformation), lack of online and legal regulation, and symbolic uses of the web all attract deviant groups to it (Pyrooz, Decker, and Moule 2015, 472–74).

Identifying with other like-minded individuals becomes easier and more acceptable online (Bargh and McKenna 2004, 580–81). Bargh and McKenna raise two points about the internet and prejudice. On the one hand, because the internet allows for anonymity, vulnerable and minority groups can more easily hide their identities, meaning they may not be targeted as easily. On the other, online anonymity allows for the growth of racism and prejudice because perpetrators of hate can easily hide their identities too (Bargh and McKenna 2004, 584).

Andre Oboler shares Bargh and McKenna's concerns, adding that white supremacist and far-right groups can easily find a space on the internet in which their assumptions about and accusations against Jewish people find a wide audience and are validated. New antisemites find

a home on the internet too (Oboler 2016, 28–31). The internet is also dangerous because it not only allows for slander, but for actual calls to violence against groups like the Jews. There are calls all over the online world for people to commit violence against not only Jews but Israelis and Zionists as well (Oboler 2016, 12).

Chara Bakalis describes complications with prosecuting online hate. She says that hate legislation can be interpreted differently in different countries. Hate that is spread online between states and can be responded to differently depending on the laws of the country prosecuting it (Bakalis 2017, 96). Bakalis explains that depending on the provisions used to prosecute perpetrators, and depending on the specific criminal act, the law can be interpreted and applied in different ways. This means that not only are perpetrators punished inconsistently, but victims of hate receive protection in varying amounts as well (Bakalis 2017, 98).

She also argues that hate legislation is insufficient for prosecuting online hate because intent is harder to prove. Deciding whether certain forms of speech and expression are criminal also depends on how they can be understood in light of existing legislation. Bakalis illustrates this nicely with an example. If someone posts antisemitic material on a forum meant for similarly minded people, whether that person can be prosecuted or not depends on what the legislation says and how it is interpreted. It also depends on whether there was an intent to harm if the post was not made to the general public (Bakalis 2017, 99).

The internet is also an enabler of globalization. Globalization refers to the increasing interconnectedness of the world, which is happening faster than ever before thanks in large part to modern technologies and modes of transportation (Beyer 1994, 1-2). Peter Beyer explains that one issue arising from increasing globalization is that people are more exposed to others from around the world. This can cause an increase in prejudice and misunderstandings about others.

He also argues that in an increasingly globalized world, solutions to social ills should be more global in outlook and scope (Beyer 1994, 1-2). Perhaps antisemitism should be understood not only in terms of the Canadian context, but in the broader global context in order to understand how different people and trends interact to contribute to this growing problem.

Although antisemitism has made its way into various forms of media other than the internet, and even though many scholars have done extensive work on multimedia communication, their main concern with regards to anti-Jewish hate was the internet. Despite this, there was some mention of antisemitism in alternative platforms of communication. Barry Shaw, for example, highlights the political platforms for antisemitism and how these platforms can grow from media representation. Shaw also describes how antisemitism can grow when some politicians spread anti-Israel and anti-Zionist views to the wider public (Shaw 2015, 280).

Joseph Spoerl highlights another example of where the media spreads anti-Jewish hatred. He says that the media is a major tool used to spread antisemitic ideas and information from the bases of Arab and Islamic antisemitism (Spoerl 2012, 604–5). Online and offline hate are major threats to not only Jewish safety, but to the safety of other vulnerable groups and communities around the globe as well. The challenges associated with keeping track of and monitoring the various platforms on which hate can be spread makes controlling and legislating it all the more complicated. The implications of legislating hate will be explored in the next section.

### **3.2. Legislating Hate**

Hate legislation in Canada has existed for several decades. How effective is this legislation in not only responding to hate but in deterring it? Is hate legislation problematic or an intelligent and effective solution to combating hate? In general, the literature portrayed hate

crime legislation as an important component for combating hate. Most scholars also portray hate legislation as incomplete and inconsistent in not only application but purpose.

The first trend in the literature is about the conflict between limiting hate speech and guaranteeing the *Charter* right to freedom of expression. Steven Tomlins points out the main concern scholars have, which is that legislating hate speech can infringe upon people's right to freedom of expression (Tomlins 2015, 46). Richard Moon argues that what constitutes hateful speech is open to interpretation. This means that not all forms of offensive speech are classified as hateful (Moon 2018, 26). Moon argues that context and the type of harm the speech promotes are important to consider when a decision is made whether to limit someone's right to freedom of expression (Moon 2018, 35–36). Unfortunately, some expressions of speech that may pose a significant threat to a particular community can be overlooked by law (Schutten and Haigh 2015, 20).

In general, scholars diverge on their opinions about using hate legislation to combat hate speech. According to Section 1 of the *Charter*, certain forms of expression can be restricted by allowing for "reasonable limits" to be placed on one's rights if laws may have been broken (Greene 2014, 270). André Schutten and Richard Haigh point out that hateful speech and opinions are different from hateful actions and crime. This means that limiting speech too frequently can be socially and politically dangerous. Especially important in democracies, free political speech and expression allow for the exchange of ideas and information. This is why frequently limiting freedom of expression can do more harm than good (Schutten and Haigh 2015, 8-19).

Moon adds that the *Criminal Code* affects when this right can be limited. An example of this would be if someone incites hateful action through their speech. Determining whether



something is incitement and not just opinion is open to interpretation. This means there are and have been inconsistencies in how hate speech has been perceived and prosecuted (Moon 2018, 26–35). Moon argues that speech that promotes hate or poses an actual risk to public order and safety should be prosecuted as hateful (Moon 2018, 50). Jeffrey Ross also argues that it is not hate or opinion that is illegal *per se*, but acting on it that is (Ross 1994, 151). Ross' explanation, however, is problematic. Projecting hate in written or verbal form may still be illegal if it incites action to harm a specific group. His argument also does not take into account inciting hatred through online platforms.

Unlike Schutten, Haigh, and Ross, Roger Shiner argues that determining what is considered hateful should be based on the level of harm threatened in the expression, not necessarily the motivations behind it. This would mean that certain forms and instances of expression could be deemed hateful on a case by case basis, allowing for more specified prosecutions of hate speech. This would allow for laws to be applied with more discretion. With this approach, however, law risks over or under-classifying certain things as hateful (Shiner 2005, 659).

Shiner also argues that using a “costs-benefits” approach to determine whether certain expressions are hateful is not helpful. A costs-benefits approach examines whether the benefits of limiting the expression outweigh the costs. Although this seems to be law's main method for prosecuting hate speech, Shiner says that this approach causes courts to miss important nuances and sensitive details in each case. He also argues it does not allow for exhaustive language to be used that could create more specific outcomes in such cases, meaning the same language is used repeatedly by the courts (Shiner 2005, 657).

This issue is contentious amongst scholars. On the one hand, there is the argument that expression is an incredibly important right because it allows for people to live a life of freedom, truth, and fairness (Greene 2014, 391). Some scholars, such as Moon, Schutten, Haigh, and Ross argue that the potential for actual harm should be taken into account when courts have to decide whether to limit a person's right to freedom of expression. This, however, is challenged by Shiner, who does not agree that the costs-benefits approach is sufficient enough for limiting hate speech because not every case is the same. This means more dynamism should be encouraged in the courts. Within this debate there are nuances, making it even more complicated. While not all scholars agree, they all support the use of s. 1 of the *Charter* in certain circumstances.

The literature also emphasized that hate legislation has a number of limitations and complexities, which makes it inadequate for fulfilling the purpose of deterring and combating hate. While some scholars discuss the positive aspects of legislating hate, most focus on its limitations. One issue that scholars consistently mention is the idea that difference and identity categories are reinforced through legislation such as, for example, the language in the *Criminal Code*. As Allyson Lunny explains, existing laws reinforce social distinctions and classifications as opposed to promoting cooperation and compassion for all in society (Lunny 2017, 62). They do this by promoting the use of identity labels to categorize groups of people, which in turn reinforces the idea that the existence of these classifications is necessary. Hate legislation can also reinforce vulnerable groups' self-perceptions of being perpetual victims (Lunny 2017, 62). All of this maintains that which underpins the ideas and beliefs of hate crime perpetrators.

Some scholars, such as Gail Mason and Barbara Perry argue that hate legislation creates the impression that only certain identity-based groups are protected by the law, while others whose identity categories are not mentioned in the legislation are not. Mason explains that by

using identity categories, the law simultaneously protects people while creating animosity amongst groups who experience hate but do not fit into one of the protected categories (Mason 2015, 63). Perry adds that the exclusionary nature of hate legislation can give perpetrators the impression that perhaps it is permissible to harm some groups over others (Perry 2002, 198–211).

The application of hate legislation can also be inconsistent. There are two main reasons for this. First, hate laws are open to interpretation based on who is prosecuting the crime(s) on trial. Donald Green, Laurence McFalls, and Jennifer Smith explain that hate crimes are usually context specific, making it hard for courts to apply set provisions to nuanced cases. Defining hate and subsequently prosecuting it are subjective and open to bias. They also point out that there are people who believe that the broadness of hate crime legislation is actually helpful in that it allows for flexibility and an ability to prosecute various sorts of misconduct as hateful. The problem is that this leads to hate crime laws being prosecuted inconsistently, with a risk of either over-prosecuting or under-prosecuting certain crimes as hateful or not (Green, McFalls, and Smith 2001, 480–81).

Secondly, some crimes are not always prosecuted as hate crimes. Jeffrey Ross explains that prosecuting a crime as hateful creates more complications for the courts and makes it harder for convicting a person because of the added requirements to prove the crime was motivated by hate. The added complication of ensuring *Charter* rights are not infringed when classifying speech as hateful creates constitutional issues that also make hate crimes difficult to prosecute (Ross 1994, 162). All of this makes classifying crimes as hate-motivated unattractive to the courts.

Despite these concerns, some scholars offer some words of support for hate legislation. Nathan Hall, for example, mentions how hate legislation is part of the government's efforts to combat this type of harm. He also states that they set standards and expectations for social behaviour. The hope is that by implying something has consequences, it can be deterred (Hall 2017, 150). Kim McGuire and Michael Salter add that hate legislation reinforces social values and helps promote positive multiculturalism. In other words, hate laws can be seen as normalizing positive values in society more broadly (McGuire and Salter 2014, 164–70).

Lastly, there were suggestions about using means other than legislation to deter and combat hate. In some of the literature, policing is brought up as an important measure to combat hate. For instance, Nathan Hall explains that police are the ones who charge incidents as hate crimes. They are there to catch the perpetrators and gather the needed evidence to prosecute crimes as hateful. Police are also the ones enforcing the laws in place to keep people living in positive order. Sometimes, often due to lack of training and resources, police cannot and do not charge certain crimes as hateful. This can lead to inconsistencies in how the law is applied on the ground and whether hate crimes are brought to justice for what they are. This can affect how serious people are about these laws (Hall 2017, 154–161).

Derek McGhee, on the other hand, argues that although policing is important, it has its complications. Supporting what Hall says, McGhee adds that police sometimes use the limited resources they have to give priority to protecting certain groups over others. This can create problems for combating hate in general (McGhee 2017, 176). Just like legislation, policing is incredibly important for combating hate but can still potentially be ineffective. The efficacy of policing is contingent on the quality of services and resources available.

How much of an impact can law have for changing people's beliefs and attitudes?

Roscoe Pound argues that law cannot change beliefs and attitudes. Law can only punish some of the resulting actions (Hall 2017, 152). If hate is often motivated by embedded beliefs, then how can law prevent what causes those crimes? If people still commit hate crimes regardless of the laws in place, then perhaps some of these scholars are correct in saying that other measures are needed in order to target what causes the hate before it is enacted. This could be true for antisemitism because it is complex. It changes forms and is often based on ideas that are so old and engrained into not only the minds of individuals, but the mind of society. How can general and vague hate legislation combat a phenomenon as flexible and established as antisemitism?

### **3.3. Law as Social Change**

Scholars are somewhat divided on how much social influence law has and whether it can be an effective source for social change. They tend to give some credibility to the statement that law can be a catalyst for it, but that law alone cannot fully change the behaviours and attitudes of people in a society. Some, such as Martha Minow, Mariana Valverde, and Carol Smart argue that law is not as influential as it seems and actually has negative effects on society. Others, such as Benjamin Berger, Mary Jane Mossman, and Winnifred Fallers Sullivan argue that law has more social influence than we realize. Some, such as Effie Fokas, fall somewhere in between these two camps.

A number of socio-legal and legal scholars argue that law is an important and necessary tool for affecting people's behaviour, but that it is incomplete and insufficient if used by itself. As John Sutton explains, the law cannot consistently be applied to everyone and everyone's context is different. This means that not everyone will understand nor follow the law in the same way (Sutton 2001, 3-8). This creates problems for law to be a source of mass social change

because if the law will not be understood or followed in the same ways for everyone, then it cannot be expected to affect everyone's moral conscience and decisions in the same ways.

Roscoe Pound raises the point that law is inanimate. In other words, it does nothing without human input and implementation because it is comprised of abstracts of human moral conscience (Sutton 2001, 11).

Law is not, however, the only social institution that can effect change. There are limitations on law's social effects. Martha Minow, for example, explains that there are other institutions that can help those who are legally or socially deviant with problems for which law is not tailored. This is because the problems that cause some people to break the law cannot be remedied by it (Minow 1993, 175). She argues that the social realm is what affects people on a daily basis and should be a major base from which social attitudes are changed (Minow 1993, 178). It is important to mention that law can be seen as that which shapes our moral outlooks and is shaped by our moral outlooks. In other words, the evolving nature of law reflects what society in general considers "normative." Law in turn has the ability to reshape these normative perceptions (Sutton 2001, 4). Law and society are therefore interdependent.

Like Minow, Mariana Valverde argues that law is shaped by culture and that culture is engrained into people's minds, giving it authority and validation. She argues that people tend to assign law's authority and prominence to its regal and ceremonial traditions, which resembles its historic connection to the sovereign (Valverde 1996, 201–13). In addition, Valverde says that law's authority and people's loyalty to it also originate from the mundane and almost unconscious extras found in the courtrooms. Some of these extras include language, discourse, and even personal dress (Valverde 1996, 201–14).

Law, according to Valverde, is not self-reinforcing but self-regulating. In other words, it relies on expert testimonies from various social scientific disciplines in order to make decisions about social and criminal issues. In that sense, law is not its own expert, but rather it chooses which ideas it takes influence from, making it self-regulating (Valverde 1996, 201-8). She also argues that law is authoritative, but not without help from different disciplines. Despite law's authority coming from other sources, Valverde seems to argue that law has the potential to bring about social change (Valverde 1996, 202).

Carol Smart also takes a similar view of law's potential to affect social change. In contrast to other scholars, however, Smart argues that law has too much assigned power over social relations. What she means by this is that law gives the impression that it has significant authority because it has its own method and therefore appears to be authoritative. Because we as a society assign an authoritative appearance to law and subsequently defer to it, law comes to have significant influence over us (Smart 1989, 9–25). In other words, law's authority depends on how often people defer to it, meaning the social sphere influences the legal sphere. Law is also seen as a “regulator of discipline” because it is often relied upon for resolving social problems and issues.

Smart also argues that judges often give little attention to the nuances of each case. Judges may routinely interpret the laws without giving much thought to other perspectives and information that may help them make better judgements. In this way, law is disconnected from the social (Smart 1989, 13–17). This is in contrast to what other scholars have said, which is that the application of law is in fact too subjective. She suggests that law could be more effective in bringing about social change if it is reformed by considering the discourses of the groups it is designed to protect. This is not something easily done in a society in which law is already

influential (Smart 1989, 5-21). Even though her ideas differ somewhat from other scholars in this camp, her view of law as a source of social change is also largely negative.

The scholars above argue that law's influence is not necessarily inherent, and that the social may have more influence on law than we realize. In contrast to the views above, some scholars argue that law has a sufficient amount of influence over social life and interactions. Benjamin Berger argues that law does affect the social in these ways. He offers an example of how law's influence can be negative and actually reinforce suffering in society (Berger 2008, 117). Berger says that the legal system is meant to set the standards for acceptable social behaviour, maintain order and safety, punish perpetrators, and bring solace to victims. The problem Berger has is that law is precarious and inconsistencies in its application can reinforce the suffering of victims.

He also argues that law can worsen the destructive social ills it is meant to solve (Berger 2008, 99). Courts cannot fill all of the holes uncovered in every case. Rather, law's attempts to rationalize suffering can produce more negative interpretations and misinterpretations of cases, causing more suffering for victims. In other words, Berger argues that law can have an impact on social change, but this impact can be negative rather than positive (Berger 2008, 116-17).

Mary Jane Mossman also supports the argument that law can legitimize concepts and ideas. She says that courts have their own methods, incorporating self-serving perspectives and ideas into their decisions (Mossman 1987, 154). Mossman adds that law influences society more broadly by normalizing and solidifying the legitimacy of certain concepts through the use of precedent. Using precedent reinforces certain concepts in law and contributes to broader discourses about these normative ideas. Law also influences how we respond to various social issues and why we respond in those ways (Mossman 1987, 157-161).



Winnifred Fallers Sullivan agrees that law shapes and constructs concepts and influences how other courts understand and use them. Sullivan argues that law is often perceived to be autonomous and separate from all else. The shadow of the law hangs over the social and contributes to its ability to influence the social more broadly (Fallers Sullivan 2009, 1181-97).

Falling between these two camps, Effie Fokas argues that law is shaped by discourses and social trends external to itself and in turn reshapes them. In other words, law both influences the social and is influenced by the social. She also argues that courts can influence policy decisions and can lend legitimacy to ideas and things conceptualized within its realm. The law and the social interact to perpetuate new knowledge about various things (Fokas 2015, 64-69).

Fokas, inspired by the work of Marc Galanter, states that law can be influential beyond itself for three reasons. The first is that courts perpetuate certain norms and these norms in turn affect legal negotiations and resolutions. The second reason is that courts can influence the behaviour of the parties involved in the various court proceedings. These are the court's "special effects." "General effects," Fokas explains, are those that courts have on communication with the public and for affecting various social issues. Third, courts can mobilize and demobilize groups (Fokas 2015, 70-71). Fokas terms this influence "the shadow of the court," which can also be referred to as the "shadow of the law."

Michel Foucault offers a useful framework for understanding how things, including law, become influential. This concept, referred to as "normativity," is important for understanding how law conceptualizes certain themes and ideas in particular ways, and how it transforms those conceptualizations into legal truths. The norm refers to routinized and socially accepted ways in which people act, speak, and think. The norm is the accepted social standard for behaviour. It becomes so engrained into the social psyche that people do not realize they are behaving in

accordance with it. The norm is that which is by nature automatic and unconscious (Taylor 2009, 47). Normalization is the process by which something becomes “normalized” or “normal” (Foucault 1995, 184). This concept reinforces what some of the aforementioned scholars argue about how law causes particular ideas to become accepted truths, even if these truths are not completely representative of social realities.

The literature also mentioned the law’s public appearance and reputation to be important for its ability to effect change. This is not referring to aesthetic appearance necessarily, but to the portrayal of the laws and how they are used. It also refers to how the courts function and perform their duties. One issue relating to all of this is trust. The legislature needs to be trustworthy in order for people to give credibility to the laws they create. The courts need to be trusted in order for people to give credibility to the decisions they make. Nathan Hall explains that an aura of trust is incredibly important for the legal system to maintain because as a societal institution, distrust of and hostility towards it can erode its efficacy. If law appears to be institutionalized and less applicable and concrete, people’s trust in it will be diminished and they will be less likely to be influenced by it (Hall 2017, 152).

Derek McGhee reiterates these ideas and adds the point that fostering inter-group relations is also important for creating more social harmony in different communities. He also says that the under-protection of certain vulnerable groups by police is a contributing factor to the growth of hate crime victimization. This would mean that ensuring police units are trusted and equipped to deal with hate could enhance the enforcement of and compliance with the law (McGhee 2017, 172–188).

Another factor which affects whether law has influence over the social is language. This does not refer to the languages spoken in courts. As a note, language barriers could in fact play a

role in inhibiting the law from making a more positive difference in multicultural and multilingual societies. Instead, this refers to the discourses of the courts and the legislation (Minow 1993, 173). How the courts implement the law and how they speak about the issues and cases they are dealing with affect how people will respond to the law. How the laws are written can be a factor too (Sutton 2001, 9). In other words, if people are to be changed by the law, how the courts interpret and apply the legislation affect how people perceive it and respond to it.

### **3.4. Discussion and Conclusion**

Steven Beller explains how antisemitism has been shaped over time by different social, historical, and political contexts. He describes its persistence in the “post-Holocaust” world and how it continues to adapt to new contexts (Beller 2015, 1-127). As we have seen, antisemitism is pervasive, malleable, and persistent, which makes it all the more troublesome. It is difficult to combat because of its nuances. It is deeply engrained mentally and emotionally and those who challenge it face one of the most embedded, tricky, and stubborn forms of prejudice. The fact that antisemitism is rising in Canada is not surprising given both its adaptability to current ethno-political and geo-political conflicts and the pervasiveness of the largely unregulated internet.

Hate legislation is tricky and does not necessarily create the positive results it intends to. Hate laws should not be used alone to combat hate. Other institutions, services, and programs should be employed because hate legislation is limited in its abilities. It is therefore limited in ability and scope. Although many scholars argue that law itself is limited and thus cannot effectively and consistently create positive social change, others argue that law casts a shadow over the social. Disagreement amongst scholars about law’s efficacy for deterring hate also reflects whether law can consistently and effectively combat antisemitism.

Charging and prosecuting certain incidents as hate crimes is incredibly complicated. There is no unanimous opinion about whether law can influence social change and how it can accomplish this. Furthermore, some identity groups are not protected by the existing legislation. It is therefore debatable whether everyone can equally receive protection under the law. Other factors, such as appearance and trust, affect whether law can impactfully reach into the social sphere.

For combating antisemitism specifically, I offer the following reflection. Perhaps how the courts use hate legislation and how often they prosecute hate crimes affect how seriously people interact with law. It is difficult to measure how many people hold hateful ideologies in their hearts because not everyone enacts their hate nor are all instances of enacted hate charged and prosecuted. Antisemitism is complex, but so is law. As I will show in my analysis, law and antisemitism interact in particular ways at the court level.

## Chapter 4: Law's Conceptualizations of Jewish Identity and Antisemitism

In a 2002 interview with a reporter from a well-known Indigenous news source, David Ahenakew made several statements about Jewish people including the following (“Q” represents the journalist’s questions and “A” represents Ahenakew’s responses):

Q. You agree with them?

A. The Jews damn near owned all of Germany. Prior to the war. That, that's how Hitler came in, that he was gonna make damn sure that the Jews didn't take over Germany or Europe. That's why he fried six million of them you know.

Q. Okay. D'you think that it was a good thing that he, that he killed six million Jews? Isn't that a horrible thing?

A. Well, Jews, Jews owned the goddamn world and look at what they're doing. They're killing people in the Arab countries. I was there, I was there.

Q. I know, but how can you justify the holocaust? Six million?

A. You know, how, how do you get rid of a, a, a, you know, a disease like that that's gonna take over, that's gonna dominate, that's gonna everything...<sup>30</sup>

Unfortunately, Ahenakew’s attitudes are not unique. This quote provides an example of how anti-Jewish hate can be expressed. Very few of these incidents are prosecuted by law. When they are, how does law respond? Recalling Carol Smart and Mary Jane Mossman, both argue that through legal method and discourse, particular truths are created. People often turn to law when faced with discrimination and prejudice. Law does not target anti-Jewish hate and antisemitism. Rather, it targets the enacted forms of them. Taken together, Smart and Mossman provide insight into how legal responses to enacted antisemitism have been shaped in contemporary times, which provides insight into law’s ability to be an effective deterrent and combatant to antisemitism in contemporary Canada.

To help answer the question of how law responds to antisemitism, I analyze how legal discourse shapes themes related to my research, such as Jewish identity and antisemitism, in four

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<sup>30</sup> *R. v. Ahenakew*, 2009 SKPC 10 at para 11 [*Ahenakew*].

provincial cases.<sup>31</sup> Proceeding in chronological order, I begin with *R. v. Noble* (hereafter *Noble*), a 2008 case from the Supreme Court of British Columbia in which the court prosecuted a white supremacist and neo-Nazi for promoting antisemitic, racist, and homophobic rhetoric. Second is *R. v. Ahenakew* (hereafter *Ahenakew*), a high profile 2009 case from the Provincial Court of Saskatchewan. To clarify, David Ahenakew was originally tried and convicted in 2002 before appealing to the Court of Queen’s Bench, after which a new trial was ordered.<sup>32</sup> The decision from the second trial is the focus of analysis in this thesis. Third, *R. v. Mahr* (hereafter *Mahr*), is a 2010 case from the Ontario Court of Justice involving an 83-year-old Nazi. Last is a 2017 case involving a minor suffering from mental illness, *R. v. M.G.* (hereafter *M.G.*), also from the Ontario Court of Justice. While records of legal responses to antisemitic incidents are few in number, the following analysis reflects upon the stories of these four.

#### **4.1. *R. v. Noble***

“A man the Canadian Jewish Congress came to know as ‘Exterminance’ on the Internet has been given a hefty sentence after being convicted of willful promotion of hatred against identifiable groups, a CJC spokesman said yesterday.”<sup>33</sup> This was the beginning of a 2008 Globe and Mail article about a man who called himself “Exterminance.” Exterminance, like many perpetrators of online hate, lived in secret. Hailing from Fort St. John, British Columbia, he was a neo-Nazi and white supremacist.

Between January 2003 and October 2005, Exterminance participated on a number of online chatrooms and forums, under a false identity of the same name. On these sites and

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<sup>31</sup> For a description of my research process, please see my section on methodology in the “Chapter 2: Methodology and Method.”

<sup>32</sup> Please see the Globe and Mail (<https://www.theglobeandmail.com/news/national/david-ahenakew-dies-at-76/article4309886/>).

<sup>33</sup> Please see The Globe and Mail (<https://www.theglobeandmail.com/news/national/bc-man-sentenced-for-hate-messages-on-internet/article957863/>).

forums, he conversed with other like-minded individuals about topics such as the Holocaust and Adolf Hitler. His hate was directed towards Jews, Blacks, other non-white minorities, and “‘gay persons’.”<sup>34</sup> Exterminance also maintained his own website on which he frequently posted large amounts of antisemitic, racist, and homophobic material.<sup>35</sup>

In March 2004, Noble posted the following on Yoderanium Productions forums:

The trouble is the inherent nature of the Jew: it is irredeemably a parasite. Hitler would have had Germany for Germans and Israel for Jews. The Jews knew they could not sustain an independent, autonomous Jewish state: they needed slaves to survive. So they stabbed Germany in the back, crushed it utterly, and with it crushed as much as they could any hope for a self-governed White state.<sup>36</sup>

In May 2004, he also posted the following on the same forum:

A rhyming dream. I woke up laughing just the other day. . . The dream only lasted a few seconds from start to finish. I saw this guy with a great big lazy grin go swaggering onto a stage, looking like he was getting ready to sing or dance or something. He was wearing a top hat. Then he started talking in a sing-song sort of voice. “*Hat*”, he reached up and took hold of the brim of his hat, “why am I wearing a *hat*?” He tossed the hat over his shoulder, then pointed at a rope noose hanging from the ceiling. “There oughta be a *nigger* up there hanging on that! I promptly woke up laughing my ass off. It didn't make tonnes of sense, but that's how a lot of dreams go, I guess.”<sup>37</sup>

The RCMP received complaints about the content of Exterminance’s posts and issued a search warrant. They traced his posts back to a computer in a Fort St. John apartment. In the apartment, the RCMP found several things. Amongst the evidence was a resumé for a man named Bill Noble and a Telus phone bill for a man of the same name. They also found a copyright registration form for a work entitled, “Exterminance.” Lastly, they found Exterminance himself. With the help of the building’s landlord and the evidence, the RCMP confirmed his identity: Keith Francis William Noble. Noble was arrested and charged with a s. 319(2) violation of the *Criminal Code* for wilfully promoting hatred towards an identifiable

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<sup>34</sup> *R. v. Noble*, 2008 BCSC 215 at para 14 [*Noble*].

<sup>35</sup> Noble’s website was called [www.exterminance.org](http://www.exterminance.org).

<sup>36</sup> *Noble*, *supra* note 34, at para 39(b).

<sup>37</sup> *Ibid* at para 39(c).

group. Several attempts were made to have Noble partake in his trial, which he repeatedly refused, stating: “‘I am not participating in this proceeding’.”<sup>38</sup> In the end, the court found Noble guilty and sentenced him to six months imprisonment (minus two for time already served) followed by a three year probationary period. In its reasons for sentencing, the court also factored into Noble’s sentence the aggravating circumstances for hate-motivated crimes found in s. 718.2 of the *Criminal Code*.<sup>39</sup>

Noble’s sentencing was positive, and the court clearly understood him to have harmed the communities he targeted as evidenced by his conviction. There are some aspects of the court’s analysis, however, that warrant further examination. The first is that the court constructed and delimited Jewish identity as being only religious in nature. In the evidence analyzed by the court, we only see one allusion to Jews and religion: “... and Israel, the kingpin of the world, with 80% of its Orthodox Jews on welfare (something to do with religious laws against menial jobs, perhaps?)...”<sup>40</sup> The following quotation contains the court’s only reference to Jewish identity, which was in reference to the 2006 *Ahenakew* case: “In *R. v. Ahenakew*, 2006 SKQB 272, Chief Justice Laing had before him an appeal of a conviction under s. 319(2) for wilfully promoting hatred against people of the Jewish faith.”<sup>41</sup> Although using this categorization in conjunction with a legal reference, the court in *Noble* did not appear to question their categorization nor did it use any alternate descriptors for defining Jewish identity.

By only portraying the Jews as a faith group, the court uncritically constructed a view of Jewish identity without taking into account the nuances and variances of it. As we have seen, Jewish identity can be comprised of numerous factors, depending on the individual and how they

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<sup>38</sup> *Ibid* at para 2.

<sup>39</sup> *R. v. Noble*, 2008 BCSC 216 at paras 4-8.

<sup>40</sup> *Noble*, *supra* note 34, at para 39(b).

<sup>41</sup> *Ibid* at para 18.



personally identify as Jewish. Here we see what Mary Jane Mossman describes in her argument that law characterizes phenomena and issues in specific ways. By delimiting Jewish identity, law risks creating truths about not only who Jews are, but what may count as antisemitism towards them. By not considering the diversity of Jewish identity, the court was not able to identify the other types of antisemitic hate seen in the evidence.

Recalling the various types of antisemitism described in Chapter 3, Noble's hate falls primarily under the category of traditional antisemitism. This category, according to Stephen Norwood, is characterized by the promotion of tropes and stereotypes about the Jewish people. Barbara Perry reminds us that this type is most frequently promoted by white supremacists, neo-Nazis, and far-right supporters but can also be seen in Christian-based antisemitism.

Noble also promoted another form of traditional antisemitism worth noting here: Holocaust denial and distortion (recalling Deborah E. Lipstadt), which can be seen in the following quote:

Jewish dead = as many as 500,000, due to typhoid fever, and starvation (Germans themselves were subsisting on as little as one slice of bread today, sometimes; how much worse off one could expect prisoners to be!). Official historical version: 6,000,000 dead, deliberately murdered. (if that figure were true, then Jews were having seventy-five babies an hour, twenty-four hours a day, three-hundred-sixty-five days a year, nonstop for nine years, in a population that would have dipped to well below ten million. That's the only way their population could have 'recovered' so dramatically after a loss of six million.)<sup>42</sup>

Noble's strong focus and preoccupation with the Holocaust and Nazi treatment of Jews was a unique feature of this case.<sup>43</sup> He both denied and distorted certain facts about the genocide.

Once again, by finding Noble guilty, the court clearly thought Noble's rhetoric was dangerous

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<sup>42</sup> *Ibid* at para 39(a).

<sup>43</sup> Although the Holocaust was mentioned by David Ahenakew (which we will see in the next section), Noble's antisemitism was resembled the white-supremacist, far-right, neo-Nazi hate that characterizes traditional antisemitism.

and in violation of the *Criminal Code*, which was positive for the court. Despite this, the court did not mention anything about the Holocaust in its analysis.

In their 2019 audit, B'nai Brith Canada expressed concern that if Holocaust education is lacking around the country, rhetoric such as Noble's may become socially acceptable if people do not know any better (B'nai Brith Canada 2020, 29). Although there are no laws against Holocaust denial in Canada, and by not acknowledging this aspect of Noble's hate, the court risked creating the impression that spreading misinformation about the Holocaust is not a serious component of antisemitism.<sup>44</sup> Recalling Effie Fokas, law's potential shadow over the social means this lack of acknowledgement may be of concern more broadly.

In addition to the obvious elements of traditional antisemitism in Noble's rhetoric, there were also elements of new antisemitism which the court overlooked. For example:

Instead of Hitler's Germany for Germans and Israel for Jews, we have a myriad of Jew-occupied White nations (JOGS – Jew Occupied Governments), such as America, Canada, Britain, Australia - and Israel, the kingpin of the world, with 80% of its Orthodox Jews on welfare (something to do with religious laws against menial jobs, perhaps?), receiving billions of dollars from America annually, plus whatever benefits it can reap from its manipulation of the other White-populated, Jew-operated nations.<sup>45</sup>

It is clear in the above quote that Noble mixed traditional Jewish tropes with the State of Israel in order to perpetuate negative assumptions about the Jewish people which, Morton Weinfeld and Kenneth L. Marcus remind us, are characteristic of new antisemitism. Although the court identified most of the types of traditional antisemitism Noble engaged in, which is important, it was less aware of the new antisemitic elements. Once again, the shadow of the law is of concern. If law has the ability to shape social perceptions and ideas, it may affect how antisemitism is understood more broadly. It is therefore important to ensure courts are mindful

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<sup>44</sup> Please refer to Bernie Farber's talk entitled, "Building Fences of Protection Against Hate," (for the Association for Canadian Jewish Studies).

<sup>45</sup> *Noble, supra* note 34, at para 39(b).

of the diverse motivations and manifestations of antisemitism. Hopefully, increased understanding and awareness can help law respond to anti-Jewish hate in ways that better represent its dynamic nature.

Another concern is about the court's repeated use of the term "identifiable group." As we know, the term "identifiable group" is not a product of the court but is mentioned in the *Criminal Code*. While the court in *Noble* was following standard legal method by analyzing the evidence in light of the *Criminal Code*, this sort of language has implications that again may reach beyond the court. The following example references the court's use of the term: "These are but examples of the communications placed publicly by the accused on the Internet, which I find wilfully promote hatred against identifiable groups, namely, in the case of these three examples, Jews and Blacks."<sup>46</sup> This next quote also shows how the term was used by the court: "Secondly, an 'identifiable group' is defined in s. 318(4) as 'any section of the public distinguished by colour, race, religion, ethnic origin or sexual orientation'."<sup>47</sup>

An unintended consequence of repeatedly using the term "identifiable group" is that it reinforces the idea that social divisions are necessary.<sup>48</sup> Groups can and do identify themselves by some recognizable feature(s). This is how the legislation protects groups and individuals targeted on the basis of identifiable difference. In this way, this language has both a positive purpose and intention. With regards to hate and antisemitism, the concern is that if white supremacists thrive on a fear of difference and the "other," recalling Barbara Perry, and law uses the term "identifiable group" to protect certain communities from hate, law simultaneously protects these groups while reinforcing the discourse that white supremacists rely upon to

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<sup>46</sup> *Ibid* at para 40.

<sup>47</sup> *Ibid* at para 12.

<sup>48</sup> See Lori G. Beaman's book entitled, *Deep Equality in an Era of Religious Diversity*.

persecute them. Noble was clearly a perpetrator who relied on the idea of racial hierarchy and difference to fuel his rhetoric and gain an audience. Perhaps the goal is not to eliminate the term from law altogether, but to acknowledge difference insofar as it leads to hate without reinforcing the idea that social divisions exist by necessity.

How does law construct particular definitions and interpretations? One way law does this is by using precedent from past decisions to guide its conceptual definitions and interpretations in newer cases. This is a hallmark feature of legal method. By drawing from precedent, law can become frozen in both time (by citing old definitions and decisions) and conceptualization. Mary Jane Mossman, in discussing how the courts have historically used precedent to exclude women from entering the legal profession, mentions “the choice of legal precedent to decide the validity of women’s claims...” (Mossman 1987, 158). Mossman is referring to how courts choose the cases they use for precedent, meaning they shape definitions in purposeful ways (Mossman 1987, 157).

In this case, the court used precedent to define what constitutes wilfully promoted hate. More specifically, the court repeatedly cited *R. v. Keegstra*, a landmark Supreme Court of Canada decision (1990) about prosecuting hate propaganda, to define “wilfully” promoted hatred for Noble’s crime:

In *Keegstra*, the Supreme Court of Canada agreed with the interpretation of *wilfully* from *R. v. Buzzanga and Durocher* (1979), 1979 CanLII 1927 (ON CA), 101 D.L.R. (3d) 488. The word *wilfully* sets a high burden on the Crown, necessitating either an intent to promote hatred or knowledge of the substantial certainty of such. The present case is wholly unlike that in *Ahenakew*, where the court found that the circumstances suggesting that the accused spoke the words in anger must be considered. Here, the evidence, in my view, unequivocally establishes that the accused over a considerable period of time pursued a course of action calculated to express and advance the theories and ideas he believes.<sup>49</sup>

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<sup>49</sup> *Noble*, *supra* note 34, at para 39.

Courts must determine whether an expression or act is harmful and worthy of limitation as per s. 1 of the *Charter of Rights and Freedoms* to ensure that people's rights are not being infringed upon unnecessarily. Mossman's work again provides us with some insight. Although she discusses the use of precedent in a different socio-historical context, the same idea can apply for hate in contemporary times. Mossman reminds us that it is not the use of precedent that is problematic, but rather the fact that law can choose which cases it uses for precedent. In this way, law frames concepts and definitions in particular ways.<sup>50</sup> In this decision, the concern lay in the fact that precedent was used to construct and promote particular definitions of both hate and Jewish identity, without considering all of the nuances that made them unique in the context of Noble's case.<sup>51</sup>

What was also missing in this decision was any explicit mention of victim impact or the harm of promoting hatred and antisemitism. Courts are mandated to consider all victim impact statements in their sentencing (Smith 2011, 348). Hannah Arendt argues that courts often focus their attention solely on the perpetrator and do not consider the impact of the crimes on the victims, leaving certain facets of the crimes unexplored (Arendt 2006, 9). In *Noble*, the court could have examined in more detail how Noble's hate and antisemitism impacted the communities he targeted.

For example, the court analyzed the crimes in light of the *Criminal Code*:

Copies of the avatar along with a variety of other material were located on the hard drive of the computer found and seized during the search of the accused's apartment in Fort St. John. This accumulation of evidence, taken together with the whole of the Crown's evidence, leaves no reasonable doubt that the accused created and maintained the Extermination website and did so from the computer in his apartment in Fort St. John. There is also no reasonable doubt, in my view, that the accused is the person identified as Extermination who participated in the various

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<sup>50</sup> Please see Mary Jane Mossman's article, "Feminism and the Legal Method: The Difference it Makes," pages 158-61.

<sup>51</sup> Please recall the from earlier that the court framed Jewish identity by using a reference to the 2006 *Ahenakew* case.

discussions and forums described in the evidence and in many of the exhibits entered at this trial.<sup>52</sup>

It also, however, glossed over an important definition related to Noble's crimes:

“In my respectful view, these submissions ignore the reality of his material and his actions. *Hatred* is a term which has a broader meaning than simply violence. In my view, despite the difficult burden upon the Crown, the Crown has proven each and every element of the offence charged.”<sup>53</sup>

While the court did acknowledge that hate is not simple, it did not elaborate on what it meant by the term “hatred” in this statement. I draw on Benjamin Berger's point that law, through its method and analytical tendencies, sometimes rationalizes suffering. If law rationalizes the harm caused by antisemitism, then there is a risk that society may as well. All of this resembles the debate in Chapter 3 about the role that harm should play in legal decisions about hate speech.<sup>54</sup> By largely excluding the harm piece from its analysis, the court gave the impression that hate is something that can be responded to without love and heart for those it affects.<sup>55</sup> A more contextualized and detailed examination of the impact of Noble's statements could have positioned the court vis-à-vis the Canadian Jewish community, allowing for a more engaged and thorough analysis of the harm caused to victims.

Recalling Roger Shiner, the harm of the rhetoric should be considered when prosecuting hate speech. Although it is debated amongst experts about how to prosecute hate, courts can better situate their decisions within the specific contexts of the cases to which they respond by considering the broader impact of hate.<sup>56</sup> As Berger explained, courts should not only punish perpetrators but help bring closure and solace to victims.

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<sup>52</sup> *Noble, supra* note 34, at paras 29-30.

<sup>53</sup> *Ibid* at para 48.

<sup>54</sup> Please see “Chapter 3: Literature Review,” the “Legislating Hate” section.

<sup>55</sup> For more about love, compassion, and law, please see John Borrows' *Law's Indigenous Ethics*. Please also refer to the conclusion of this thesis.

<sup>56</sup> Please see this debate in “Chapter 3: Literature Review,” “Legislating Hate” section.

Although this analysis of the *Noble* case highlights some limitations of the legal approach to hate and antisemitism, it was nonetheless a victory for the Jewish, Black, and homosexual communities. *Noble* is one of only a few cases in recent years pertaining to antisemitic crimes, but it is rich in information about legal responses to antisemitism. Through its method, law shaped Jewish identity to be only religious in nature and excluded the many other elements by which Jews identify as Jewish. It also shaped antisemitic hate in light of its delimitation of Jewish identity, missing the instances of Holocaust denial and distortion and new antisemitism in the evidence. By constructing both Jewish identity and antisemitism, law risks limiting not only who can be considered “Jewish” in a legal context, but which forms of hate towards them can be prosecuted as criminal or deemed unacceptable.

Also, by failing to mention the victim impact and broader social harm of Noble’s crime, law also risked shaping hate into something that can be responded to without consideration of its unique nature and destructive characteristics. This was also reinforced by the repeated use of the term “identifiable group,” both by the court and within the legislation. Although intended to protect vulnerable groups, essentialized social difference can unintentionally be reinforced through the use of this sort of language and can inadvertently maintain the harm against vulnerable groups. The aforementioned issues will resurface in the next case, *R. v. Ahenakew* (2009) and will pose further challenges for law’s ability to respond to antisemitism.

#### **4.2. *R. v. Ahenakew***

David Ahenakew was a well-known First Nations politician, at one time elected chief of the Assembly of First Nations in Central Saskatchewan. He was also a strong advocate for Indigenous rights and education (Filice 2016). Ahenakew was also the youngest chief of the Federation of Saskatchewan Indian Nations (FSIN). In addition to his active participation and

leadership in Indigenous organizations, he was a veteran, having served 16 years as a soldier and peacekeeper in the Canadian military. His work for human rights earned him an honorary LL.D. Degree in 1972 from the University of Saskatchewan. Ahenakew was a recipient of various prestigious medals, including a Queen Elizabeth II Jubilee Medal and the 125<sup>th</sup> Anniversary of Confederation Medal.<sup>57</sup> He was also a recipient of the Order of Canada.<sup>58</sup> Ahenakew was well-known, highly respected, and accomplished.

Ahenakew's prestige was tarnished, however, in 2002 when he was invited to speak at a conference for the FSIN. The FSIN was meeting to discuss a government proposal to require every Indigenous person in need of medical treatment to sign a consent form. In response, the FSIN organized a conference, arguing this new requirement violated people's privacy and hindered their ability to access medical care. During Ahenakew's speech, he strayed off-topic and began spewing racist and antisemitic rhetoric. What began as slander against immigrants, white people (resentment probably based on white-Indigenous relations and history), and other minorities turned into a rant about the Jews and Israel:

My God, we're having a lot of problems aren't we? You know, the racial problems, you know, there's all kinds of bigots and so forth that are, that are wrong. You know, my great grandson goes to school in immersion, goes to school here in Saskatoon and these goddamn immigrants, you know, East Indians, Pakistanis, Afghanistan, and whites and so forth, (inaudible)... dirty little Indian, and he's the cleanest of the whole goddamn works there. You know. That's what I'm saying, it's starting right there, six years old, you know. So what do we do? We look after our people first, first and foremost.

But ah, the Germans used to tell me, and I got to know them well because I played soccer against them and with them and so forth. But they used to tell me that you guys are blessed. What we know about the Indians in Canada. They are blessed. But that blessing is being destroyed by the, by your immigrants that are going over there. Especially the Jews, they say, you know. The Second World War was created by the Jews, they say, you know. The Second World War was created by the Jews and the Third World War, whatever it is, right now the war that war ... that wages on Israel, in the Arab countries, I was there too. But there's gonna be a war because the

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<sup>57</sup> Please see Canadian Military Engineers obituary for David Ahenakew (<https://cmea-agmc.ca/sgt-david-ahenakew-lld-hon-cd-retd>).

<sup>58</sup> Please see the CBC (<https://www.cbc.ca/news/canada/saskatchewan/judge-finds-ahenakew-not-guilty-in-2nd-hate-trial-1.802574>).



Israelis and the "Bushies", you know, the bully, the bully, the ah, the bigot and so forth in the United States that tells you that if you're not with me, you're against me.<sup>59</sup>

Following the speech, Ahenakew gave an interview with Mr. Parker, a reporter for the Saskatoon Star Phoenix newspaper. During the interview, Mr. Parker asked several questions, to which Ahenakew responded with more antisemitic rhetoric (the interview was recorded). The following is a sample of the conversation (“Q” is Mr. Parker and “A” is Ahenakew):

Q. Okay. D'you think that it was a good thing that he, that he killed six million Jews? Isn't that a horrible thing?

A. Well, Jews, Jews owned the goddamn world and look at what they're doing. They're killing people in the Arab countries. I was there, I was there.

Q. I know, but how can you justify the holocaust? Six million?

A. You know, how, how do you get rid of a, a, a, you know, a disease like that that's gonna take over, that's gonna dominate, that's gonna everything, and the poor people, they ...<sup>60</sup>

Once the speech and interview were brought to the public's attention, Ahenakew was charged with a s. 319(2) violation in the *Criminal Code* for wilfully promoting hatred towards an identifiable group. The Crown first tried him in 2002, after which he was convicted and fined \$1,000. Ahenakew then appealed the decision to the Court of Queen's Bench and the conviction was overturned. In 2006, the court ordered a new trial. At the end of his second trial in 2009 at the Provincial Court of Saskatchewan, Ahenakew was acquitted.<sup>61</sup> I analyze the 2009 decision.

Just as in *Noble*, the court in *Ahenakew* constructed Jewish identity to be something limited by religious qualifiers. The court also repeatedly referred to the Jewish people as a religion and faith group. In its discussion about whether the Jews could be classified as an identifiable group, the court referenced several religious elements and words related to Judaism, such as the Old Testament, places of worship, and rituals:

The Jewish faith is one of the major religions of the world. It has its own unique beliefs, rituals, and places of worship. One of its primary religious compendiums has become the Old Testament,

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<sup>59</sup> *Ahenakew*, *supra* note 30, at para 10.

<sup>60</sup> *Ibid* at para 11.

<sup>61</sup> Please see the Globe and Mail (<https://www.theglobeandmail.com/news/national/david-ahenakew-dies-at-76/article4309886/>).

a part of the Christian Bible. The Christian religions, while originating in Judaism, are separate and distinct in their beliefs. The Jewish people have endured discrimination, hardship, and death from others because of their distinct, unique identity.<sup>62</sup>

Ahenakew never mentioned the Jewish religion in his speeches. His motivations for what he said were not religious in nature either, as evidenced by court records. Instead, he spoke of Jews as a racial group or nation. More specifically, Ahenakew described Jews as a people, not singled out as religious, who want to control the media, economy, and world:

Q. But wasn't Canadian army, ah, over in Europe to, to liberate the Jews, in a sense?

A. No, no, no, to liberate the world, not the Jews.

Q. To liberate the world (inaudible)

A. We didn't give a damn about the Jews.

Q. But to liberate the world from a dictatorship that was killing people, killing Jews, killing gypsies, killing homosexuals, killing all sorts of people.

A. Exactly. Wanna clean up the world. I, I don't support Hitler but I ....

Q. That's what it sounds like.

A. Well, you know, he cleaned up a hell of a lot of things, didn't he? You'd be, you'd be dominated by, you'd be owned by the Jews right now the world over. Look at a small little country like that and everybody supports them, the States, who in the hell owns many of the banks in the States, many of the corporations, many, well, look it here in Canada, ASPER.<sup>63</sup>

The court constructed its definition of being Jewish and interpreted Ahenakew's rhetoric in light of those assumptions. I draw on Mariana Valverde's argument that law builds its knowledge from predetermined legal conceptualizations. The court did not use precedent to construct their definition of Jewish identity, but nonetheless carried through in its analysis a similar characterization as we saw in *Noble*.<sup>64</sup> Unlike in *Noble*, Ahenakew never alluded to religion in any of his statements. By portraying Jews in a limited way, the court missed some of the other, very harmful aspects of Ahenakew's statements. To draw on Mary Jane Mossman, the court's characterization of Jewish identity in a monolithic way misrepresents the diverse nature of Jewish identity and the various manifestations of anti-Jewish hate.

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<sup>62</sup> *Ahenakew*, *supra* note 30, at para 24.

<sup>63</sup> *Ibid* at para 11.

<sup>64</sup> While the court did not use precedent, Jews were defined as a faith group in the 2006 Ahenakew decision, as we saw in the previous section on the *Noble* case.

One last point of concern with how the court constructed Jewish identity in the *Ahenakew* case was its classification of Jews as distinct and perpetual victims. In its analysis of s. 319(2), the court stated the following: “The Jewish people have endured discrimination, hardship, and death from others because of their distinct, unique identity.”<sup>65</sup> It is positive that the court acknowledged that Jewish people have been targeted in the past based on identifiable characteristics. It is also positive that the court considered past antisemitism in their discussion of whether Jews can be considered an identifiable group. By emphasizing the fact that Jews have a distinct and unique identity which has led to Jewish victimization in the past, however, the court risked portraying Jews as perpetual targets and essentially different from the rest of society.

As mentioned in the literature review, Allyson Lunney argues that hate legislation can sometimes reinforce vulnerable groups’ self-perceptions of being perpetual victims. In *Ahenakew*, the court, albeit unintentionally, risked creating the impression that Jews are easy targets. If law extends its influence into the social sphere, this impression risks inadvertently maintaining the cycle of hate against Jewish people. As an alternative, courts may consider contextualizing antisemitic hate crimes within the confines of the case or in relation to specific historic episodes of hate, rather than defining Jews as historically perpetual victims.

In addition to its construction of Jewish identity, the court also delimited antisemitism. What differentiated the *Ahenakew* case from the others was that Ahenakew was not motivated by white supremacy or neo-Nazism. He was a minority who had experienced prejudice himself. Rather, his hate seemed to stem from resentment towards other groups he deemed more privileged than his own:

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<sup>65</sup> *Ahenakew*, *supra* note 30, at para 24.

This person called a white person will never stand, stand up for you, for anything. When he first got here, he started to break our people. He started to take everything, he would grab it from us, and then he started to lie and steal from us. That's why I call them liars and thieves. That's what we have as neighbours in this country. (Translation from Cree). You know, I'm very dead serious when I say it's all right for the non-Indian people, all the immigrants that we have in this country to beat up on ya, to breach and break up your treaty rights, break up your families. You know, and even destroy your kids. It's all right to do that in this country. And they say, you know, the best country in the world. Bullshit. Maybe for them, yeah, the immigrants for sure. But, but not for us. My God, we're having a lot of problems aren't we? You know, the racial problems, you know, there's all kinds of bigots and so forth that are, that are wrong.<sup>66</sup>

As we also saw in earlier pieces of evidence, Ahenakew made several mentions of the conflicts in the Middle East and blamed the Jews and Israel for all of the instability there. Recall the following example:

The Second World War was created by the Jews and the Third World War, whatever it is, right now the war that war ... that wages on Israel, in the Arab countries, I was there too. But there's gonna be a war because the Israelis and the "Bushies", you know, the bully, the bully, the ah, the bigot and so forth in the United States that tells you that if you're not with me, you're against me.<sup>67</sup>

We also saw this in the following quote:

- Q. Okay. D'you think that it was a good thing that he, that he killed six million Jews? Isn't that a horrible thing?
- A. Well, Jews, Jews owned the goddamn world and look at what they're doing. They're killing people in the Arab countries. I was there, I was there.<sup>68</sup>

Ahenakew blamed the Jews for killing the Arabs and stated that Jews will start or have started World War III (after he blamed them for World War II). Based on the IHRA definition and criteria discussed in the introductory chapter, Ahenakew's statements could have been an example of new antisemitism because he conflated Israel and its geo-political conflicts with Jews in order to promote negative assumptions about both.<sup>69</sup>

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<sup>66</sup> *Ibid* at para 10.

<sup>67</sup> *Ibid* at para 10.

<sup>68</sup> *Ibid* at para 11.

<sup>69</sup> It is important to note that at this time, the Government of Canada had not yet adopted the IHRA definition. Courts may have been unaware of new antisemitism and how to identify it. I mention the definition to contextualize my interpretation of Ahenakew's rhetoric.

Perhaps the hate legislation in Sections 318-319 do not allow for the prosecution of hate towards states. As we saw in the literature review, the rights guaranteed in s. 2(b) of the *Charter* also complicate convicting particular statements as hateful. Regardless of whether the legislation allows for new antisemitic statements to be convicted as hate propaganda, acknowledging these and denouncing them may help law give the impression that antisemitism is dynamic and all forms of it are unacceptable.

This type of antisemitism went undetected by the court. As Mossman argues, law often misrepresents various issues by selecting particular features to characterize them. By excluding a discussion about what differentiates fair political criticism of Israel from new antisemitism, and by presenting anti-Jewish hate as void of its important political and national components, law contributes to a discourse about what constitutes it.

Antisemitism is also representative of deeper social divisions and issues. Law faces the challenge of responding to an incredibly nuanced and dynamic form of prejudice. By excluding important elements of anti-Jewish hate, however, law cannot respond in contextually specific ways that target the various manifestations of this form of prejudice. As we have also seen, narrow conceptualizations of antisemitism can affect broader social understandings. In other words, if law has the ability to influence social attitudes and norms, people may understand new antisemitism to be legally permissible and therefore socially acceptable if it is not identified and denounced as harmful to Jews.

As mentioned earlier, legal method involves the use of precedent. The court cited a few decisions in its analysis, namely the *Keegstra* decision: “Before considering the actual events in detail, it is essential to set out the law that governs this section of the Criminal Code, and guides

my considerations. The leading case is *Keegstra*, supra.”<sup>70</sup> Like in *Noble*, the court used precedent from a past decision to define public and wilful hate in the context of Ahenakew’s case. To reiterate Mossman’s point from my analysis of the *Noble* case: it is not the use of precedent in law that is problematic but rather that precedent is used to reinforce particular definitions and legal discourses. As Jean Carabine argues, reinforcing a discourse produces meaning. When law creates gaps in its understandings of hate and antisemitism, it makes decisions based on select facts that are sometimes outside of the context of the case.

Although the court framed major elements of this case in particular ways, it did use some sympathetic language to describe Ahenakew’s hate. This is another way in which the court’s approach in *Ahenakew* differed from that in *Noble*. The court used a number of strong adjectives to describe Ahenakew’s statements, which gave some indication that it was sympathetic to the Jews’ plight. In the following example, we can see that the court strongly condemned Ahenakew’s hate: “Mr. Ahenakew, the statements you made about Jewish people were revolting, disgusting, and untrue.”<sup>71</sup> The court in *Noble* excluded a more robust discussion of harm from its analysis. In contrast, the court in this case recognized the danger of Ahenakew’s statements. Like in the *Noble* case, the harm of Ahenakew’s statements was not discussed in more detail. The court’s acknowledgment of their destructive nature, however, was a positive step.

The court also appeared sympathetic to the social damage Ahenakew’s reputation had acquired as a result of his hate. The court discussed Ahenakew’s plight of being socially castigated as if he was harmed by the publicity of his own words: “The result of all of this had a disastrous effect on the accused, his reputation, his position with First Nations and society in

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<sup>70</sup> *Ahenakew*, supra note 30, at para 17.

<sup>71</sup> *Ibid* at para 43.

general, and resulted in an investigation, and the current charge.”<sup>72</sup> By using this sort of language to talk about Ahenakew, law risks suggesting that he too is a victim in this case. My concern is that if sympathetic language is used in relation to a perpetrator of hate, law risks not only minimizing the dangers of hate mongers, but the social damage of their rhetoric as well.

The 2009 *Ahenakew* case was both similar to and different from the *Noble* case. In the *Ahenakew* case, the court constructed both Jewish identity and antisemitism in limited ways. This prevented it from understanding Ahenakew’s crimes in a more robust way and within a context more representative of his antisemitism. This case serves as another example of how legal discourse constructs particular definitions and conceptualizations. Like in the *Noble* case, the court in this case defined Jews as only religious, which misrepresents the diverse nature of both Jewish identity and Ahenakew’s antisemitism. The court also portrayed Jews as perpetual victims who are essentially different from society. Portrayals such as the former risk shaping how anti-Jewish hate is understood, while those such as the latter risk maintaining antisemitism because Jews appear to be classified as easy targets.

Along with its delimitation of Jewish identity, the court missed the instances of new antisemitism in this case, just as the court did in the *Noble* case. My hope going forward is that by creating more inclusive definitions and making decisions based on a greater number of contextualizing details, law will be able to address issues such as antisemitism in more impactful and representative ways. This is something that will become clearer in the next case, *R. v. Mahr*.

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<sup>72</sup> *Ibid* at para 12.

### 4.3. *R. v. Mahr*

Max Mahr was an 83-year-old man living in Guelph, ON.<sup>73</sup> Not much is known about Mahr. He was born in Germany before World War II. He also fought for the German army during the war. According to a Guelph Mercury newspaper report about the trial, Mahr served in the German navy before being captured by the Russians and escaping only to be recaptured by the Americans. Mahr came to Canada in 1958 and married twice. After marrying his second wife, Mahr ceased identifying as a practicing Catholic and became a practicing Buddhist.<sup>74</sup>

Between January and September of 2009, Mahr went around Guelph graffitiing various public places with antisemitic slurs and rhetoric, including statements calling for the killing of the Jews. For example: “God Help Kill All Jews, Kill All Jews, God Help Exterminate Jews, God Help No Israel, Exterminate Israel, Exterminate All Evil Jews, Do Good Kill Jews, Kill Evil Jews.”<sup>75</sup> Mahr spread this hatred in a number of public places and businesses, including a Walmart, a mall, and in various parks:

By an agreed statement of fact, the accused on 19 separate occasions, from the time span alleged in the information, namely over an approximate eight to nine month period, attended at various places in the community of Guelph, public places; parks, many washrooms in the Stone Road Mall, Wal-Mart and different businesses, to write on the walls the messages that are contained in count one, obviously promoting genocide, urging other people to kill all members of the Jewish race.<sup>76</sup>

Mahr was charged with a s. 319(2) offence in the *Criminal Code* for wilfully promoting hatred towards an identifiable group, the Jewish people.<sup>77</sup> The court stated that Mahr’s mindset towards Jews came from his upbringing in prewar and WWII Germany. It understood Mahr’s

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<sup>73</sup> *R. v. Mahr*, 2010 ONCJ 216 at page 14 [*Mahr*].

<sup>74</sup> Please see the Guelph Mercury (<https://www.guelphmercury.com/news-story/2751305-83-year-old-pleads-guilty-to-hate-crime/>).

<sup>75</sup> *Mahr*, *supra* note 73, at page 3.

<sup>76</sup> *Ibid* at page 5.

<sup>77</sup> Justice Douglas was the only judge to mention obtaining his provincial Attorney General’s permission to prosecute this case according to s. 319 legislation.



crime as being motivated by “race, and national or ethnic origin...” and stated that the crime contained some of the aggravating circumstances from s. 718.2 of the *Code*.<sup>78</sup> As a result, the sentence was intensified. Mahr plead guilty to the charges and was sentenced to six months in jail followed by two years of probation:

Why do I believe the law requires me to sentence Mr. Mahr to real jail? I think I can sum it up in one word; denunciation. This may be the last opportunity a Canadian Court has to look into the eyes of a member of the German military during World War II and state clearly to him and to the public, what all Canadians think of these acts of the accused, which came from the same type of mind that led to the deaths of six million Jewish men, women and children. It would be a wrong message to grant Max Mahr a conditional sentence. It would be wrong morally and legally in my understanding of the law.<sup>79</sup>

In this decision, the court once again framed Jewish identity in a specific way. It referred to Jewish people as “the Jewish race” (please see the quote at the top of this page), and referred to Mahr’s crime as motivated by race, nationality, and ethnicity.<sup>80</sup> Mahr never mentioned anything related to the religious aspects of Jewish identity nor were his motivations necessarily religious in nature. Rather, Mahr portrayed Jews as a perpetually different community of people. In response, the court’s classification seemed to resemble Mahr’s portrayal of the Jews, which was positive.

The following is an example from Mahr’s (A) interview with the police officer, Constable King (Q):

Q. What are your thoughts on the war back then and how that worked out?

[Douglas J.] The accused says:

A. I believe Hitler was right at the time. I didn’t know any better. I was taught like that and now I know the difference.

[Douglas J.] Well if he knows the difference, then why does he go out and do the same things that Hitler did? At page 14 of the interview he says first of all that he believes Hitler was a Jew and he married a Jew. He calls her Eva Braum, but it was Eva Braun, B-R-A-U-N and not B-R-A-U-M. He doesn’t even have her name right, but he says:

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<sup>78</sup> *Mahr*, *supra* note 73, at pages 4-5.

<sup>79</sup> *Ibid* at page 17.

<sup>80</sup> *Ibid* at page 4.

A. Yeah and they had a big hide out in the Alps, where is it, in Innsbruck; they call the Eagles Nest and now they call it the Crow's Nest. I went there too, just to see. Eva Braum had a special room for her there.

[Douglas J.] So Constable King says:

Q. He's Jewish? His wife is Jewish?

[Douglas J.] Mahr says; Yeah and Constable King says:

Q. He did all these horrible things?

[Douglas J.] And Mahr says:

A. But you don't know if it's true. Maybe some of it is true. It was not Hitler alone. There was Hitler and there was all the others. Some of them were Jews too.

[Douglas J.] And says Heishman was a Jew. I think he probably means Eichmann.

Q. Who?

A. Heishman.

Q. Okay.

[Douglas J.] And Mahr says:

A. Typical Jew.

[Douglas J.] Think about that for a moment, typical Jew. Then he says:

[A] After the war - and Germany was no good anymore. Everything was just for Jews. No matter what the Jews did, they were always right, always were the Jews.<sup>81</sup>

I argue that it was positive that the court broke away from portraying Jews as only religious. Defining Jewish identity did not feature as prominently in this decision as it did in the previous two. By moving away from normative legal perceptions of Jewish identity, the court did two things. First, it better situated its decision in light of important contextual factors. In *Noble* and *Ahenakew*, the courts classified Jews as only a religious and faith group despite the fact that both Noble's and Ahenakew's statements were largely nonreligious in nature (with the

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<sup>81</sup> *Ibid* at pages 12-14.

exception of Noble's one mention of religion). Although it still imposed a definition, the court in *Mahr* seemed to consider the context of Mahr's hate and made its analysis in light of that, leading to what I argue to be a more robust and contextualized decision.

Second, by classifying this crime as being motivated by race, nationality, and ethnicity, the court expanded the legally constructed category of Jewish identity beyond the religious qualifier. Religion seems specific and delimited, while ethnicity, although a categorical label, seems to be more general. This type of categorization therefore allows for more flexibility with regards to who can be considered Jewish and who can receive the appropriate protection from anti-Jewish hate. It is important to note that the court was not limiting who it protects. By creating more general categories of belonging, however, law can understand and help victims in more nuanced and personalized ways. That being said, there are some concerns about labelling Jews as a "race."

Race has always been a contentious concept and discussing the full debate around its construction and conceptual existence is beyond the scope of this thesis. One concern is that by classifying Jews as a race, Jews will continue to be perceived as inherently different which, as we have seen, reinforces antisemitism. There is also the concern that the court reinforced the same perception and classification of Jews that the Nazis and Mahr used. Rather than helping, reinforcing this classification of Jewish people may impede law's ability and efforts to deter and combat hateful attitudes, ideologies, and actions.<sup>82</sup>

Despite the alternate framing of Jewish identity, the court once again constructed antisemitism in a particular way. As shown in the evidence, the hateful statements Mahr wrote around Guelph portrayed Jews mostly as a group separate from others and were inspired by his

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<sup>82</sup> For more information about the formulation of the concept of "race," its usage and evolution throughout time, and its use within the context of law, please see Martin Orkin and Alexa Alice Jouba's book entitled, *Race*.

upbringing in Nazi Germany. In that way his hate was motivated by traditional antisemitism. Perhaps the court identified these aspects of Mahr's hate because this type of antisemitism is more familiar and recognizable.

New antisemitism was also seen in the evidence, in which Mahr targeted Israel and Jews by calling for their destruction.<sup>83</sup> Recall from earlier in the chapter that new antisemitism is defined as conflating the Jews with Israel and spreading stereotypes (sometimes violent) about both. By calling for the killing of both the Jews and Israel, Mahr clearly moved outside of the realm of legitimate political criticism of Israel and into the realm of new antisemitism. The court, in response, excluded this piece from its analysis.<sup>84</sup> Perhaps the court did not understand that Jews could be targeted in this way and did not know how to identify this form of anti-Jewish hatred. The Canadian government had not yet adopted the IHRA definition and would not until 2019, which could have aided the court's understanding of the various manifestations of antisemitism.<sup>85</sup>

We know that antisemitism is shape-shifting and dynamic in both motivation and manifestation. In order to prosecute antisemitism in ways more representative of its diverse nature, courts must be made aware of its fluid nature. By shaping and defining things, law makes some things visible, while rendering others invisible. In this case, some aspects of Jewish identity and antisemitism were focused on by the court and others were excluded.<sup>86</sup> This is again

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<sup>83</sup> Please refer the quote referenced by note 75.

<sup>84</sup> The pattern of excluding new antisemitism from legal analysis is not unique to the Canadian context but has also been noted in the American context by Kenneth L. Marcus in his article, "Jurisprudence of the New Anti-Semitism."

<sup>85</sup> Discussed in Chapter 1, this working definition defines how to perceive and identify new antisemitism and provides examples to help determine when Israel criticism becomes antisemitic. Please see the Centre for Israel and Jewish Affairs (<https://cija.ca/policy-brief-ihra-defining-antisemitism/>).

<sup>86</sup> Although Canada guarantees freedom of expression, new antisemitism can be dangerous. The line, as we have seen, between legitimate criticism of Israel and hateful slander and defamation is blurred. This is why I argue that education about the many manifestations of antisemitism is so important for legal officials and law enforcement.

evident of what Mossman argues: that law chooses how it defines phenomena and ideas. We saw this in both the *Noble* and *Ahenakew* cases as well.

While identity and concept construction can be problematic in law, so can the issue of interpretation. There is a concern with regards to interpretation and law enforcement that is worth noting. There was no mention of s. 318(1) of the *Criminal Code*, the provision for advocating genocide against an identifiable group.<sup>87</sup> My role is not to decide if the charge was laid correctly. I do understand, however, that Mahr expressed a desire to kill Jews and that he graffitied that message in public places. This, along with the court's interpretation that Mahr did publicly and wilfully promote hate, could imply that Mahr was publicly trying to support and promote genocide. Instead, Mahr was charged with a s. 319(2) offence for wilfully promoting hatred.

Why was Mahr not charged with promoting genocide? Perhaps law enforcement did not fully understand hate legislation, or for some reason decided not to charge Mahr with a s. 318(1) offence. Maybe they did not charge him in this way because they did not believe he directly told people to kill Jews. Or perhaps Mahr's graffiti was interpreted to represent a desire for Jews to be killed. Regardless of the reasoning, the absence of this highlights some of the limitations of responding to antisemitism and hate not only at the court level, but also at the law enforcement level. It is not the purpose of this thesis to grasp how the legislation is understood, but it is important to highlight gaps in legal responses to antisemitic crimes in different sectors of the criminal justice system. Given the Mahr's Nazi motivations and the court's frequent references to the Holocaust, it is peculiar that the murderous nature of the Mahr's statements was not considered in more detail.

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<sup>87</sup>As seen in the quote referenced in footnote 76, the court did mention that Mahr seemed to be promoting genocide, but no discussion of this was carried through in its analysis.

One positive aspect in *Mahr* is that the court deviated from the norm in the previous cases by focusing heavily on the broader social impact of antisemitic hate. The court used emotionally charged and opinionated language throughout its analysis. For example:

...he breached the trust that Canadians gave him by welcoming him here, because it was that same heartless, merciless, cruel mindset of the Nazi Regime that he brings with him. And then by his actions, not just his thoughts, by his actions over a period of several months he sneaks around in a cowardly way and urges others to kill all Jews.<sup>88</sup>

Unlike the previous two cases, the focus of this case was not so much about legal analysis as it was on bringing justice to both Nazi ideology and hatred towards Jews. I argue this is positive because the court attempted to send a strong message to people about the harm of antisemitism. By considering the harm done to Mahr's victims, the court expressed to them that their concerns were not only heard but taken into consideration.

The court also stated that, "Every Jewish person alive today can be said to be a victim of his crime, clearly every Holocaust survivor."<sup>89</sup> This is the positive effect of focusing on the harm aspect of hate; doing so shifts law's focus from punishing a specific incident to punishing hate-motivated crimes as the uniquely destructive phenomena they are. Focusing on the victim impact therefore recontextualizes legal decisions.

In addition, the court stressed the role the law needs to play in order to bring justice to such harm. This was the first decision I analyzed in which a victim impact statement was quoted. The following was submitted by Len Rudner, of the former Canadian Jewish Congress (abridged):

Criminal actions such as the uttering of threats, harassment and assault have the effect of causing fear, anxiety and harm in the victim. While the content of many of these messages: God help kill all Jews; kill evil Jews; exterminate Israel; do good kill Jews; Jew means evil – is odious, why are such statements made in the public square (parks, malls, a Wal-Mart Store)? Words, for better or for worse, have the ability to transform people's minds. While the connection between evil words and evil deeds may not be identified with certainty, history is replete with examples of how

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<sup>88</sup> *Mahr*, *supra* note 73, at page 10.

<sup>89</sup> *Ibid* at page 9.

language can prepare the ground for the most tragic events [...]. For our community, the lessons of history are not easily forgotten. Indeed the memories of those brutal days are still alive in the minds of survivors, some of whom live within a few kilometres of the hateful acts of anti-Semitism engaged in by Mr. Mahr.<sup>90</sup>

The court also used graphic language, descriptions, and imagery to justify its verdict.

The following is an example: “The ugly messages that he wrote evoke those pictures that we have seen of Jewish children being led to the furnaces and the gas chambers. That is what those messages do. That is what they do to all Canadians.”<sup>91</sup> Using graphic and descriptive imagery was another way the court emphasized the seriousness of Mahr’s crimes.

At the end, Justice Douglas stated the following with reference to Mahr’s sentencing: “It would be a wrong message to grant Max Mahr a conditional sentence. It would be wrong morally and legally in my understanding of the law.”<sup>92</sup> On the one hand, this example highlights how the application of law is often subjective, recalling *Mossman*, and open to interpretation. On the other, the court acknowledged that law is not the only authority on every issue because it relies on subjective interpretation. The court had an awareness of its own subjectivity. As Benjamin Berger’s argues, law sometimes reinforces the suffering it seeks to remedy. By acknowledging its subjectivity and limitations, the court understood that its ability to remedy this kind of crime is limited. In this sense, the court did not trivialize its analysis of hate and reinforce the suffering caused by it. Instead, I argue, it gave the impression that hate moves beyond the realm of law and is a pervasive social ill.

Hopefully *Mahr* will become an example for how future courts can understand, acknowledge, and consider the social impact antisemitism has for Jews and society more broadly. As Douglas J. explained in the decision, hate threatens the values that many Canadians

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<sup>90</sup> *Ibid* at pages 10-12.

<sup>91</sup> *Ibid* at page 10.

<sup>92</sup> *Ibid* at page 17.

wish to uphold and share. While the court still constructed Jewish identity in a particular way, its construction was in light of Mahr's motivations. The court moved away from defining Jews as only religious and instead contextualized its perception of Jewish identity by giving consideration to the evidence and the specific details of the case. This was in contrast to how Jewish identity was defined by the courts in the *Noble* and *Ahenakew* cases.

The court also considered the traditional Nazi-motivated aspects of Mahr's antisemitism, perhaps because they are recognizable and historically rooted. This was also in line with Mahr's Nazi motivations. Despite this, the court still missed the instances of new antisemitism in Mahr's graffiti. New antisemitism has continuously fallen through the cracks and if law is to be an effective combatant, it needs further guidance on the responding to this form of antisemitism.

This decision stood out because of its highly graphic language and strong tone. The court expressed a self-awareness of its own limitations and contextualized its analysis with great consideration to the social impact of hate and ideologies such as Mahr's. I argue that the court responded to the case with respect and dignity for the victims and the harm caused by Mahr's actions. It deviated from the previous cases in these ways. In law, this deviation allows hate crimes to be understood as different, unique, and representative of larger social problems. Hopefully *Mahr* will have a positive influence on future legal responses to antisemitic hate crimes.

#### **4.4. *R. v. M.G.***

Not much was known about M.G. other than that at the time of his crimes, he was a teenager who had previously run into trouble with the law. Between November 12 and 19, 2016, M.G. went on a hate crime spree around Ottawa. His main targets were Jews, Muslims, and Black people. He vandalized religious and community properties with slanderous rhetoric. He



graffitied ““kill all kikes”” and ““White power 1488”” along with swastikas on the entrances of Kehillat Beth Israel Synagogue and the Torah Institute.<sup>93</sup> He also graffitied a swastika and the word ““kike”” on the front door of an Ottawa Rabbi’s private home, which had been used as a place of worship.<sup>94</sup>

M.G. also targeted Alta Vista synagogue Machzikei Hadas, painting several antisemitic slurs on the building, including phrases about killing Jews and saving the white race. Some of the messages he painted onto the synagogue included references to white supremacist and neo-Nazi symbolism and numerology.<sup>95</sup> M.G.’s crimes spree did not stop there. Towards the end, he made his way to the Parkdale United Church, led by a well-known African Canadian minister. On front of the church, M.G. painted ““1488 niggers”” before making his way to the Ottawa Muslim Association Mosque where on the front of the building he painted ““fuck Allah”” and ““go home 666’.”<sup>96</sup>

The Jewish, Muslim, and Black communities in Ottawa were shaken. Many people in Ottawa were shocked that someone could spray paint such horrible messages on places of worship and other buildings. The crimes caused a media uproar. Throughout the week, various news outlets across Ottawa and Canada reported on the crimes and their impacts on the targeted communities. There were many responses to the crimes. Amongst them were shows of unity, solidarity, and mutual support among the targeted communities and the general public. Machzikei Hadas held a solidarity event at their building during Shabbat, which was attended by various politicians, local figures, and prominent members of the targeted communities.<sup>97</sup> Over

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<sup>93</sup> *R. v. M.G.*, 2017 ONCJ 565 at para 3 [*M.G.*].

<sup>94</sup> *Ibid* at para 4.

<sup>95</sup> *Ibid* at para 4.

<sup>96</sup> *Ibid* at para 5.

<sup>97</sup> Please see the Ottawa Citizen (<https://ottawacitizen.com/news/local-news/new-racist-graffiti-attacks-target-ottawa-church-and-mosque/>).

600 people attended the event, including the then Premier of Ontario Kathleen Wynne and the then Ontario Attorney General, Yasir Naqvi.<sup>98</sup> In addition to the event, several Ottawa city councillors organized a public solidarity walk to express and promote social unity.<sup>99</sup>

M.G.'s hate spree ended shortly after at the Ottawa Jewish Community Campus, where he was painting antisemitic slurs onto one of the buildings before being caught and arrested by police.<sup>100</sup> It was found that M.G. had been active on various white supremacist and neo-Nazi social media forums (including a YouTube channel he owned). A search of his cell phone revealed that he had carefully researched his targets. His searches included the following:

“Jewish synagogue”  
 “Ottawa Jewish school”  
 “offensive things to Jews”  
 “Holocaust”  
 “waffen totenkopf”  
 “what Nazi unit did holocaust”  
 Ottawa anti-Semitic hate crime”  
 Photograph of the Rabbi’s home  
 Map to the Ottawa Muslim Association  
 Map to Parkdale United Church  
 Map to the Jewish Synagogues in Ottawa  
 Map and directions to the Star of David Hebrew School.<sup>101</sup>

M.G. was charged with a s. 319(1) offence in the *Criminal Code* for publicly inciting hatred. He was also charged with a s. 430(4.1) offence for damaging religious properties. Along with several other charges, M.G. was charged with a violation contrary to s. 264.1(2) of the *Code* for threatening the safety of various members of the Ottawa community.<sup>102</sup>

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<sup>98</sup> Please see the Canadian Jewish News (<https://www.cjnews.com/news/canada/teen-arrested-connection-ottawa-vandalism>).

<sup>99</sup> Please see the Ottawa Citizen (<https://ottawacitizen.com/news/local-news/new-racist-graffiti-attacks-target-ottawa-church-and-mosque/>).

<sup>100</sup> *M.G.*, *supra* note 93, at para 6.

<sup>101</sup> *Ibid* at para 7.

<sup>102</sup> Section 264(1) and (2) of the *Criminal Code*: (1) No person shall, without lawful authority and knowing that another person is harassed or recklessly as to whether the other person is harassed, engage in conduct referred to in subsection (2) that causes that other person reasonably, in all the circumstances, to fear for their safety or the safety of anyone known to them (*Criminal Code*).

What made this case stand out from the previous three was the focus on mental health. M.G. was described as having mental health issues. He had been assessed by a doctor for a prior conviction and met with a different doctor numerous times for this trial. The second doctor, Dr. Federoff, suspected that M.G. was in the early stages of developing schizophrenia. Dr. Federoff argued that it was too soon, however, to make a confident diagnosis. It was stated by the court that in the year before his crimes, M.G. began exhibiting antisocial behaviour and developed an interest in white supremacist ideology.

In law, if a person is found to have mental health issues, they can be found criminally not responsible for what they are accused of because it is thought that their judgement was impaired by these issues. Courts face a challenge with this defence because they have to balance treating those with mental illness fairly (and make sure the appropriate treatment is administered) with ensuring public safety (Roach 2015, 285–322).

Another factor that was unique about this case was that M.G. was a youth offender. How he was sentenced and how the court interacted with him and his crimes was largely influenced by the provisions for youth justice and sentencing, found in the *Youth Criminal Justice Act* (YCJA). Those under 18 years of age are usually tried in provincial youth courts, and typically sentenced less severely due to the fact that they are considered less “blameworthy” because they are seen as more vulnerable than adults, and as having a “reduced capacity for moral judgment” (Roach 2015, 26–29). In the end, the court came to the conclusion that sentencing M.G. as an adult would jeopardize the programs already in place for him at the youth correctional facility at which he was being held. The court believed that the three years M.G. was sentenced to (partly in the correctional facility, partly under community supervision), was in accordance with the YCJA and sufficient for the crimes committed.

Unlike in the previous cases, the court imposed no definitions onto what constitutes Jewish identity. Instead, even though it referred to religious institutions being targeted, the court focused on the evidence before it. With regards to the Jewish community, however, M.G. mostly targeted Jewish places of worship. Even though the Jewish Community Campus contains various buildings that are often used for nonreligious purposes, they can be and are used for religious purposes as well. The court's interpretation of the crimes and hate were in line with the context of the case and as a result, there were no alternate and unrepresentative constructions imposed upon Jewish identity, which I argue was positive.

In terms of antisemitism, there was a description of M.G.'s rhetoric and views in the presentation of the evidence, which was discussed earlier. Despite this, there was no in-depth discussion of what constitutes antisemitism beyond the mention of the evidence and some of the victim impact statements referenced. I argue that although there was a lack of analysis and focus on the hate and antisemitism, by not imposing definitional limits on the various forms of prejudice, the court allowed these to speak for themselves. The court responded to the crimes without placing unrepresentative impositions on what constitutes antisemitism. Perhaps the court did not think it was important to decide how Jews identify as such, but rather that they were identified by M.G. and unjustly targeted.

The court considered the impact of the M.G.'s actions on individuals and the community in one paragraph, shown below:

The impact of M.G.'s actions that week in November was profound. I received victim impact material from the leadership and members of each of the congregations. The victim impact statement of Reverend Anthony Bailey from Parkdale United Church included comments from many of his parishioners. They reported feeling vulnerable and protective of their church and their minister who was personally targeted with a hateful racial epithet. Reverend Bailey spoke of the traumatizing nature of the epithet used that brought to mind an earlier racial attack against himself and his brother. It caused him some emotional and psychological distress. A Holocaust survivor wrote that "the graffiti brings back all the horror and trauma I lived through". A young Jewish man wrote "Ottawa, which has been my home for over sixteen years, always offered a

sense of safety and security relative to some of the other major cities in Canada. This safety and security has how been put in jeopardy as a result of hateful acts of intolerance and bigotry.” A member of the Ottawa Muslim Association Mosque wrote about first seeing the hate message on the door of the Mosque, “I felt anger, discomfort and a momentary loss of belonging to my own home. I was thinking how this message was damaging to the community sense of belonging and insulting to my religion.” This is but a representative sampling of the many people who wrote or testified about the powerful emotional impact of the hateful words and symbols.<sup>103</sup>

It is positive that the court understood M.G.’s crimes to be destructive to various individuals.

The court did not, however, contextualize these statements further with a more in-depth discussion of the harm of antisemitism and hate more broadly. The victim impact was discussed once, and the rest of the case was devoted largely to M.G.’s mental health and status as a youth offender.

The court placed what I argue to be a disproportionately large emphasis on the perpetrator and very little on the victims and the hate aspect of the case:<sup>104</sup>

While at William E. Hay Centre M.G. has developed a number of important supportive relationships. He has met regularly for Case Management Planning meetings that cover subjects such as his strengths, identified needs, educational programming, and goals. Since December he has met weekly with a Youth and Family counsellor, who is a psychotherapist. He reports that those meetings are going very well. M.G. has demonstrated a very strong work ethic and has been an enthusiastic participant in in the sports and recreation programs at the facility. The strength of this relationship is such that M.G. has indicated that he would like to continue the counselling sessions upon his release and the counsellor has agreed to do this. The Trades Centre Coordinator describes M.G. as keen on learning and participating in all aspects of the program. It is noted that he “has proven himself to be a hard worker while participating in paid work and is eager to assist staff.” He is now in contact with a Community Support Team at youturn where a counsellor has been assigned to him. They are now in the assessment stage to determine the precise nature of counselling and support that M.G. will require when he is reintegrated into the community.<sup>105</sup>

The court added:

His youth probation officer testified again on the last day of evidence to provide the updates I have noted above. She reported that M.G. has started investigating how to cover up his racist tattoos. M.G. has also now agreed to meet with mental health professionals – a marked departure from his attitude following his arrest and during his meetings with Dr. Federoff. While in custody and continuing after his release M.G. has agreed to meet on a regular basis – as often as weekly – with his psychotherapist counsellor, his youth probation officer, the focussed

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<sup>103</sup> *M.G.*, *supra* note 93, at para 9.

<sup>104</sup> Please see debate in Chapter 3, “3.2. Legislating Hate” section.

<sup>105</sup> *M.G.*, *supra* note 93, at para 26.

counselling of his youturn counsellor, mental health professionals, and his transition counsellor. Plans are in place that he agrees with to provide him with the supports he needs to make positive changes in his life.<sup>106</sup>

On the one hand, the court's mention of victim impact is positive because it discussed the harm experienced by victims. On the other, by glossing over M.G.'s motivations and impact in one paragraph, the court risked creating the idea that harm is worth summarization rather than careful attention, focus, and discussion. Benjamin Berger reminded us in Chapter 3 that although the focus of a criminal trial is usually to deal with the accused and their crimes, it should also have a healing impact or bring closure for the victims. I argue M.G.'s progress is contextually important to consider in a legal decision. The concern is that devoting more space to the perpetrator than the harm of his actions gives the impression that the hate element of his crimes was not as high a priority for the court as it was. By more strongly focusing on the latter, the court could have better situated its decision in relation to the social harm of M.G.'s actions.

There were some other gaps in the court's analysis. For example, there was a lack of in-depth discussion about what constitutes publicly incited hate, which was peculiar considering this was a hate case. It was also unusual because in the previous decisions, all of the courts attempted to interpret the hate provisions in the *Criminal Code* in light of the cases. M.G. was accused of violating various sections in the *Code*, including sections 319(1) and 430(4.1). As a result of this absence, the court's decision seemed decontextualized. An analysis of the relevant *Criminal Code* provisions would have provided more nuance and contextual consideration to the unique elements of hate that characterized the case.

As in *Mahr*, M.G. also promoted the killing of Jews. It is curious as to why s. 318(1) (the provision for promoting genocide), was never mentioned in the case. If M.G. was found guilty

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<sup>106</sup> *Ibid* at para 28.

for violating s. 319(1) of the *Criminal Code*, then there was an implication that he was publicly inciting hatred, possibly even the killing of an “identifiable group.” Could that not be considered the promotion of genocide? Was this an oversight? Concerns and questions such as the aforementioned highlight the issue of interpretation in law, which may influence how hate and antisemitic crimes are responded to in the future. It also highlights how law enforcement officers may have limited access to knowledge and resources about certain topics, such as antisemitism. It is important to be more vigilant about such statements considering, as Steven Beller reminds us, the historical persistence of antisemitism and the memory of the Holocaust.

*M.G.* differed from the previous three cases in that no definitions were imposed onto Jewish identity and antisemitism, and no assumptions were perpetuated outside of the context of *M.G.*’s crimes. Similar to *Noble*, however, was how the court did not situate its response in relation to the broader impacts of hate and antisemitism. This seemed odd considering *M.G.* violated several hate provisions in the *Criminal Code*. Although the accused was found guilty, there was only one paragraph devoted to victim impact; the court never again discussed the harm this hate had on the Ottawa community. This means the decision may not have been as contextually nuanced as it could have been.

Instead, the court’s focus was largely centred around *M.G.*’s mental health and status as a youth offender. Considering the social response from the Jewish, Muslim, and Black communities along with others from across Ottawa and Ontario, the lack of focus on hate and antisemitism seemed strange. This case was larger and more socially impactful than the court would have us believe. Hopefully, going forward, courts will devote more attention to the contextual features that make hate crimes unique. Hopefully nuances such as calls for killing Jews will be considered by law enforcement and courts in the future. *M.G.* is another example

from which we can learn about the limitations of law with regards to combating antisemitism and hate.



## Chapter 5: Current Approaches and Future Directions

Throughout this thesis, I discussed combating antisemitism in a legal context. I performed a Foucauldian discourse analysis on four provincial court cases, all pertaining to predominately antisemitic hate crimes. My analysis confirmed, in the context of my research, what a number of socio-legal scholars argue about law: law's ability to effect positive social change for Jews in Canada is limited. That being said, law can have a positive impact for the safety and well-being of victims. With regards to antisemitism, however, my research revealed a number of concerns and limitations with legal discourse and method that prevent law from being a sufficient and adequate main response to this form of hate.

I also demonstrated that legal responses to antisemitism over the last 12 years have been minimal. Due to the lack of prosecutions and inconsistencies in the application of hate legislation, it is difficult to measure the exact number of court cases for antisemitic crimes in which hate charges are the most serious. Statistics Canada has recorded increasing amounts of antisemitic hate crimes over the last several years. As we saw in the introduction, B'nai Brith Canada has recorded over 13,000 antisemitic since 2012. Cases in which hate provisions from the *Criminal Code* were the most serious charges were very few in number, especially for antisemitic crimes. For this time period, I found less than 10 court cases pertaining to antisemitic hate crimes.

Perhaps the existence of legislation deters some people from enacting their hate. When it is enacted, however, responding through law is complicated and hate legislation is not consistently invoked. Only certain incidents of hate are considered criminal and if the rate of antisemitic incidents is rising, law is not deterring and combating antisemitism as effectively or

efficiently as needed. It is for this reason I argue that although an important tool, law should not be the main means upon which we rely to deter and combat anti-Jewish hate in the long-term.

In *Noble*, *Ahenakew*, and *Mahr*, the courts constructed Jewish identity in unitary ways. In this way, legal discourse perpetuated ideas about what it means to be Jewish. As a result, knowledge about what can be considered legitimate antisemitism was created. Relevant here is Carol Smart's argument that law excludes alternate ideas and viewpoints in order to construct specific versions of facts. In both *Noble* and *Ahenakew*, the courts' perceptions of Jewish identity were limited to religious qualifiers, which although not untrue, are not fully representative of the variety of ways Jews can identify as Jewish. Also, in *Noble*, the court based its understanding of Jewish identity on the selective use of precedent. The concern is that legal discourse and method will normalize, recalling Michel Foucault, how courts come to understand and perceive Jewish identity and as a result, antisemitism.

In *Mahr*, the court characterized Jewish identity in a different way. It categorized Jews as a "race" and not a religious group. It is important to note that unlike in the previous two cases, the court in *Mahr* classified Jewish identity in a way that was more in line with Mahr's motivations and antisemitism. By breaking away from classifying Jews as only religious, the court broadened the definition of who can be Jewish. This is a positive implication of this particular classification of Jewish people. The concern, however, is that by using the category of "race" to classify Jewish people, law will reinforce that Jews are separate and essentially different from the rest of society. Recalling Barbara Perry, reinforcing difference can maintain the cycle of hate against vulnerable groups. This can also unintentionally reinforce the idea that social divisions are necessary and negative.

If Jewish identity is defined in limited ways, then perhaps only Jews who fit that definitional mould can be considered victims of antisemitism and protected by law. If law does in fact have a shadow over the social sphere, recalling Effie Fokas, the concern is that who is considered Jewish and what counts as hate towards them will affect how society understands these issues. This may also negatively impact the treatment of Jews by various non-Jewish people.

My analysis also showed that the courts missed the instances of new antisemitism in the cases. In most of the cases, with the exception of *M.G.*, all of the perpetrators conflated the Jews with Israel and promoted negative and even violent rhetoric about both. At no point did any of these courts identify and consider the instances of new antisemitism in their analyses or decisions. By excluding the elements of new antisemitism, the courts contributed to a normative view of anti-Jewish hate through how they framed and shaped it. This was also seen in the *Noble* case when the court did not acknowledge the very prominent examples of Holocaust denial and distortion as characteristic of antisemitism.

New antisemitism is different from traditional forms of anti-Jewish hatred because, as we know, it either provides a platform to be antisemitic or disguises people's existing antisemitic prejudices as criticism of Israel and Zionism. Along with Smart, Mary Jane Mossman and Mariana Valverde argue that law characterizes issues in specific ways based on select facts. In most of the decisions I analyzed (with the exception of the *M.G.* case), the courts seemed to understand antisemitism in light of how they characterized Jewish people. In some of the decisions, Jews were only classified as a religious group with the nonreligious aspects of the crimes being overlooked by the courts.

If this type of antisemitism was not identified, then law risks creating the impression that new antisemitism is not an issue or as important as other types of antisemitism. Law also risks creating the impression that if new antisemitism cannot or will not be prosecuted, it is legally permissible and therefore socially acceptable. Michel Foucault argues that what is considered deviant is in relation to what is considered normal at any given time. Law determines what can be considered non-criminal based on what it considers criminal (Foucault 1995, 184). In other words, law may actually have a reverse effect and enable certain forms of antisemitism to continue by deeming only some as worthy of prosecution.

Perhaps the lack of acknowledgement of new antisemitism was a result of limited knowledge and awareness about it and how to identify it. If new antisemitism is often disguised as political criticism, courts may not prosecute it because the *Charter of Rights and Freedoms* allows for freedom of opinion and expression, including those of a political nature. Another reason for which law may have challenges with prosecuting new antisemitism is because this form of hate is not always explicitly directed at people, but towards the State of Israel. The “Hate Propaganda” section of the *Criminal Code* only calls for prosecution of attacks towards groups and individuals, not political states. The issue is that Jews and Israel are often targeted together, creating a complex web of hate that courts have not acknowledged because they may not be able to do so in a legal context. Going forward, it is important that courts understand and recognize antisemitism’s dynamic nature and prosecute the crimes before them in light of all contextual factors.

How the courts framed social difference and identity in relation to hate and antisemitism was another factor in the courts’ responses. The language in the *Criminal Code* references difference (i.e. “identifiable group”), and was cited explicitly in three of the four decisions:

*Noble, Ahenakew, and Mahr*. In *M.G.*, this sort of language was used very minimally, even insignificantly. With regards to legislation, I recall Allyson Lunney's argument that its reinforcement of social difference poses a problem for responding to hate through law. It is important for courts to analyze the evidence in light of the legislation, and this is what they did in *Noble, Ahenakew, and Mahr*. When used only in that context, however, it is this sort of language that conveys that Jews are essentially different.

Labeling reinforces the idea that separate groups must exist because they are named, identified, and defined by a particular characteristic (i.e. race, religion, sexuality, etc.). Recalling Barbara Perry and Patrik Olsson, perpetrators of white supremacy and hate are using new technologies to spread their prejudice towards Jews and other groups around the world. They rely on the idea of racial purity, superiority, and difference to exist and grow. In this way, legal discourse may be (albeit unintentionally) enabling antisemitism and hate to continue. All of the aforementioned consequences may reach beyond law into the social sphere, highlighting the implications of law's shadow in the fight against antisemitism in Canada.

Lastly, while there was some discussion in the cases of the social impact of antisemitism, this was often overlooked. The court in *Noble* largely excluded this from its decisions. In *M.G.*, for example, the court glossed over victim impact in one paragraph and never mentioned it again in its decision. By excluding these details and discussions (or minimizing them) from their analyses, however, the courts decontextualized their decisions and minimized the impression that hate crimes are not as unique or as socially impactful they are.

In contrast to these two cases, the court in the *Mahr* case centred much of its analysis around the broader harm caused by Mahr's antisemitism to not only Jews, but Canadians as well. By devoting more space to these matters, the court situated its decision within the specific

context of the case. When prosecuting hate, courts should consider all of the nuances that make hate crimes unique. If law is to be an effective deterrent and combatant to antisemitism, it should consider and acknowledge the broader social impacts and harm of it in order to convey to a wider social audience the seriousness of it.

Law has limitations and courts can only discuss certain things in particular ways. When law leaves very little to no room to discuss the broader social impacts of hate and antisemitism, however, it fails to address their nuances. While it is difficult to measure the actual social impact of hate, legal discourse and method can nonetheless perpetuate various attitudes and assumptions about Jews, hate, and antisemitism. They create knowledge and truths about how to respond to anti-Jewish hate, and risk normalizing these views both within the legal sphere and, through law's shadow, outside of it.

In two of the decisions, *Mahr* and *M.G.*, s. 318(1) of the *Criminal Code* (the provision for advocating genocide against an identifiable group) was not mentioned. In both these cases, the courts acknowledged that Max Mahr and M.G. wilfully and publicly promoted hatred. Some of this rhetoric included calls to kill Jews. The non-invocation of s. 318(1) could be problematic, considering the various historical episodes, such as the Holocaust, during which Jews were killed for simply being Jewish.

This is more of an issue for law enforcement, who, as Nathan Hall reminds us, lay the charges onto those they arrest. Again, it is not my goal to judge whether these charges were correct, but rather to highlight gaps in law's framing of antisemitic crimes. If law enforcement is not equipped with adequate knowledge and resources to respond efficiently and effectively to antisemitism in all its forms, including new antisemitism, then legal responses cannot be consistently relied upon to combat it for long-lasting change.

Ultimately, based on my discourse analysis, law has a limited ability to effectively combat antisemitism. Currently, however, responses to antisemitism at the law enforcement level are limited in ability and scope. I am not arguing for an end to prosecution of antisemitism and hate crimes, rather I argue that legal responses can be strengthened so that law can become a more effective tool for combating antisemitism. Based on my findings there are several steps that can be taken to improve law's response. I outline these in the following paragraphs.

One suggestion could be to implement more educational and training workshops for police units, law enforcement agencies, and court officials to educate them on the complexities, nuances, and features that characterizes antisemitism's motivations and manifestations. Mariana Valverde argues that in order for courts to make more representative and considerate decisions, they need to be trained on the issues to which they respond (Valverde 1996, 205). Educational programs can be broadened to include information about other forms of hate as well.

In addition to teaching about the dynamic and nuanced nature of antisemitism, I recommend that these educational programs should encourage the use of two scholarly methods. The first is the lived religion approach. Meredith McGuire describes this as a research method that allows for religious groups to be observed and studied as they are in everyday life, without researchers imposing their preconceived notions onto these communities. This approach highlights the lived and nuanced realities of various communities and individuals and helps researchers avoid constructing facts about them (McGuire 2008, 1-15).

The lived religion approach could be adapted to study different lived experiences and realities, both religious and nonreligious. Perhaps in the context of anti-Jewish hate, the lived religion approach should be referred to as the lived antisemitism approach. If law enforcement and legal professionals are to better and more accurately understand anti-Jewish hate, they need

to adopt an approach that will allow them to understand how antisemitism is experienced in everyday life. They will also be able to better understand how Jews live and express their identities every day. As a result, hate towards Jewish people may also be better understood both within and outside of law.

The second method that could be encouraged in these programs is the intersectional approach. Intersectionality describes the many different elements that comprise people's individual identities and how they interact. Prejudice can therefore affect people in different ways simultaneously (Bakht 2009, 137). As we know, antisemitism has many motivations and targets the different aspects of Jewish identity, both religious and nonreligious. Educational programs should encourage courts to adopt an intersectional approach for analyzing nuanced antisemitic crimes. In order to more effectively prosecute antisemitism, law must consider the various dimensions of it that intersect to create complex and dynamic experiences of hate for Jews across Canada.

I argue that antisemitism should always be combated with humanistic intentions and efforts. Antisemitic crimes consist of actions and words that can be considered criminal. They are also characterized by one thing that differentiates them from other crimes: their victims are targeted simply for being Jewish. I draw from the work of John Borrows, who although writes in the context of Indigenous legal issues and reconciliation, offers a helpful insight into approaching sensitive issues through law. He argues for the incorporation of Indigenous legal approaches into Canada's traditional legal method in order to better understand and represent the concerns and needs of various Indigenous communities. Borrows suggests that qualities such as love, respect, and honesty should be incorporated into legal method as a starting point for responding to Indigenous issues more effectively (Borrows 2019, 8-18).



I also argue that these qualities should be incorporated into law's approach to antisemitism and hate in general. Law must show compassion for the delicate and sensitive nature of hate, while ensuring appropriate justice is brought to perpetrators and established for victims. We must remember that on the receiving ends of an antisemitic attacks are people. By adopting a humanistic approach, all sectors of law, from policing to the courts, will be better equipped to understand how antisemitism and hate impact not only individuals but communities and society more broadly. By shifting its perspective, law may be able to offer more nuanced and considerate responses to anti-Jewish hate as well as other forms of hate.

Law acts as a safeguard. It is expected to set standards for appropriate social behaviour but is evidently not accomplishing this as effectively as it could. I also argue that law does not interact with the majority of enacted hate. Instead, law exists as a response to only certain forms of it, determined by the particular parameters it sets. This begs the following question: how are hate and antisemitism being deterred in the first place? As we know, law is not a deterrent that necessarily affects everyday emotions and attitudes. We need to consider what we understand about antisemitism, its motivations, and manifestations in order to target it. We cannot always wait until it becomes criminal and under law's power for response.

Deborah E. Lipstadt argues that solutions for combating antisemitism must be strategic and context-specific, especially with regards to the muddled nature of new antisemitism (Lipstadt 2019, 191-206). Antisemitism needs to be deterred through means that are preventative and purposeful and reach into the social sphere, from which this form of prejudice grows. In order to do so effectively, we must be continuously flexible in our approaches. We need to move beyond targeting only certain enacted forms of antisemitism and find solutions that

promote cooperation between Jews and non-Jews for the long-term. While these solutions are not clear yet, I intend to undertake this research in my PhD.

If law engages with only a small amount of antisemitic incidents, then why should we assign such authority to it in this fight? Antisemitism is a broader social problem, manifesting in ways which are often not prosecuted as criminal. As my thesis confirmed, when antisemitic hate crimes are brought before the courts, law is limited in its approach and method to effectively combat the dynamic and fluid nature of antisemitism. Antisemitism, as we have seen, is persistent and dependent upon time and context. We know that it has been taken to such extremes as the Holocaust and is destructive in all forms. I argue, therefore, that law and legislation should be tools in a larger kit for deterring and combating antisemitism; they should not be the main solutions upon which we rely. It is important to remedy a problem at its root, not just on the surface. It is also important to remember the extremes to which this form of prejudice have been pushed before. Going forward, this is what we must consider when combating antisemitism.

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## Appendix A

### IHRA Full Definition and Criteria for Israel Criticism and Antisemitism

“Antisemitism is a certain perception of Jews, which may be expressed as hatred toward Jews. Rhetorical and physical manifestations of antisemitism are directed toward Jewish or non-Jewish individuals and/or their property, toward Jewish community institutions and religious facilities.”

To guide IHRA in its work, the following examples may serve as illustrations:

Manifestations might include the targeting of the state of Israel, conceived as a Jewish collectivity. However, criticism of Israel similar to that leveled against any other country cannot be regarded as antisemitic. Antisemitism frequently charges Jews with conspiring to harm humanity, and it is often used to blame Jews for “why things go wrong.” It is expressed in speech, writing, visual forms and action, and employs sinister stereotypes and negative character traits.

Contemporary examples of antisemitism in public life, the media, schools, the workplace, and in the religious sphere could, taking into account the overall context, include, but are not limited to:

- Calling for, aiding, or justifying the killing or harming of Jews in the name of a radical ideology or an extremist view of religion.
- Making mendacious, dehumanizing, demonizing, or stereotypical allegations about Jews as such or the power of Jews as collective — such as, especially but not exclusively, the myth about a world Jewish conspiracy or of Jews controlling the media, economy, government or other societal institutions.
- Accusing Jews as a people of being responsible for real or imagined wrongdoing committed by a single Jewish person or group, or even for acts committed by non-Jews.
- Denying the fact, scope, mechanisms (e.g. gas chambers) or intentionality of the genocide of the Jewish people at the hands of National Socialist Germany and its supporters and accomplices during World War II (the Holocaust).
- Accusing the Jews as a people, or Israel as a state, of inventing or exaggerating the Holocaust.
- Accusing Jewish citizens of being more loyal to Israel, or to the alleged priorities of Jews worldwide, than to the interests of their own nations.

- Denying the Jewish people their right to self-determination, e.g., by claiming that the existence of a State of Israel is a racist endeavor.
- Applying double standards by requiring of it a behavior not expected or demanded of any other democratic nation.
- Using the symbols and images associated with classic antisemitism (e.g., claims of Jews killing Jesus or blood libel) to characterize Israel or Israelis.
- Drawing comparisons of contemporary Israeli policy to that of the Nazis.
- Holding Jews collectively responsible for actions of the state of Israel.

Antisemitic acts are criminal when they are so defined by law (for example, denial of the Holocaust or distribution of antisemitic materials in some countries).

Criminal acts are antisemitic when the targets of attacks, whether they are people or property – such as buildings, schools, places of worship and cemeteries – are selected because they are, or are perceived to be, Jewish or linked to Jews.

Antisemitic discrimination is the denial to Jews of opportunities or services available to others and is illegal in many countries.

## Appendix B

### *Criminal Code*

#### Sections 318-320: “Hate Propaganda”:

##### **Advocating genocide**

**318 (1)** Every person who advocates or promotes genocide is guilty of an indictable offence and liable to imprisonment for a term of not more than five years.

##### **Definition of *genocide***

**(2)** In this section, *genocide* means any of the following acts committed with intent to destroy in whole or in part any identifiable group, namely,

- (a)** killing members of the group; or
- (b)** deliberately inflicting on the group conditions of

life calculated to bring about its physical destruction.

##### **Consent**

**(3)** No proceeding for an offence under this section shall be instituted without the consent of the Attorney General.

##### **Definition of *identifiable group***

**(4)** In this section, *identifiable group* means any section of the public distinguished by colour, race, religion, national or ethnic origin, age, sex, sexual orientation, gender identity or expression, or mental or physical disability.

R.S., 1985, c. C-46, s. 318; 2004, c. 14, s. 1; 2014, c. 31, s. 12; 2017, c. 13, s. 3; 2019, c. 25, s. 120.

##### **Public incitement of hatred**

**319 (1)** Every one who, by communicating statements in any public place, incites hatred against any identifiable group where such incitement is likely to lead to a breach of the peace is guilty of

- (a)** an indictable offence and is liable to imprisonment for a term not exceeding two years; or
- (b)** an offence punishable on summary conviction. **Wilful promotion of hatred**



(2) Every one who, by communicating statements, other than in private conversation, wilfully promotes hatred against any identifiable group is guilty of

- (a) an indictable offence and is liable to imprisonment for a term not exceeding two years; or
- (b) an offence punishable on summary conviction.

### **Defences**

(3) No person shall be convicted of an offence under sub- section (2)

- (a) if he establishes that the statements communicated were true;
- (b) if, in good faith, the person expressed or attempt- ed to establish by an argument an opinion on a religious subject or an opinion based on a belief in a religious text;
- (c) if the statements were relevant to any subject of public interest, the discussion of which was for the public benefit, and if on reasonable grounds he believed them to be true; or
- (d) if, in good faith, he intended to point out, for the purpose of removal, matters producing or tending to produce feelings of hatred toward an identifiable group in Canada.

### **Forfeiture**

(4) Where a person is convicted of an offence under section 318 or subsection (1) or (2) of this section, anything by means of or in relation to which the offence was com- mitted, on such conviction, may, in addition to any other punishment imposed, be ordered by the presiding provincial court judge or judge to be forfeited to Her Majesty in right of the province in which that person is convicted, for disposal as the Attorney General may di- rect.

### **Exemption from seizure of communication facilities**

(5) Subsections 199(6) and (7) apply with such modifications as the circumstances require to section 318 or sub- section (1) or (2) of this section.

### **Consent**

(6) No proceeding for an offence under subsection (2) shall be instituted without the consent of the Attorney General.

### **Definitions**

(7) In this section,

*communicating* includes communicating by telephone, broadcasting or other audible or visible means; (*communiquer*)

*identifiable group* has the same meaning as in section 318; (*groupe identifiable*)

*public place* includes any place to which the public have access as of right or by invitation, express or implied; (*endroit public*)

*statements* include words spoken or written or recorded electronically or electro-magnetically or otherwise, and gestures, signs or other visible representations. (*déclarations*)

R.S., 1985, c. C-46, s. 319; R.S., 1985, c. 27 (1st Supp.), s. 203; 2004, c. 14, s. 2.

### **Warrant of seizure**

**320 (1)** A judge who is satisfied by information on oath that there are reasonable grounds for believing that any publication, copies of which are kept for sale or distribution in premises within the jurisdiction of the court, is hate propaganda shall issue a warrant under his hand authorizing seizure of the copies.

### **Summons to occupier**

**(2)** Within seven days of the issue of a warrant under subsection (1), the judge shall issue a summons to the occupier of the premises requiring him to appear before the court and show cause why the matter seized should not be forfeited to Her Majesty.

### **Owner and author may appear**

**(3)** The owner and the author of the matter seized under subsection (1) and alleged to be hate propaganda may appear and be represented in the proceedings in order to oppose the making of an order for the forfeiture of the matter.

### **Order of forfeiture**

**(4)** If the court is satisfied that the publication referred to in subsection (1) is hate propaganda, it shall make an order declaring the matter forfeited to Her Majesty in right of the province in which the proceedings take place, for disposal as the Attorney General may direct.

### **Disposal of matter**

**(5)** If the court is not satisfied that the publication referred to in subsection (1) is hate propaganda, it shall order that the matter be restored to the person from whom it was seized forthwith after the time for final appeal has expired.

### **Appeal**

**(6)** An appeal lies from an order made under subsection (4) or (5) by any person who appeared in the proceedings

- (a) on any ground of appeal that involves a question of law alone,
- (b) on any ground of appeal that involves a question of fact alone, or
- (c) on any ground of appeal that involves a question of mixed law and fact,

as if it were an appeal against conviction or against a judgment or verdict of acquittal, as the case may be, on a question of law alone under Part XXI, and sections 673 to 696 apply with such modifications as the circumstances require.

### **Consent**

(7) No proceeding under this section shall be instituted without the consent of the Attorney General.

### **Definitions**

(8) In this section, *court* means

(a) in the Province of Quebec, the Court of Quebec, (a.1) in the Province of Ontario, the Superior Court of

Justice,

(b) in the Provinces of New Brunswick, Manitoba, Saskatchewan and Alberta, the Court of Queen's Bench,

(c) in the Province of Newfoundland and Labrador, the Supreme Court, Trial Division,

(c.1) [Repealed, 1992, c. 51, s. 36]

(d) in the Provinces of Nova Scotia, British Columbia and Prince Edward Island, in Yukon and in the North-west Territories, the Supreme Court, and

(e) in Nunavut, the Nunavut Court of Justice; (*tribunal*)

*genocide* has the same meaning as in section 318; (*génocide*)

*hate propaganda* means any writing, sign or visible representation that advocates or promotes genocide or the communication of which by any person would constitute an offence under section 319; (*propagande haineuse*)

*judge* means a judge of a court. (*juge*)

### **Warrant of seizure**

**320.1 (1)** If a judge is satisfied by information on oath that there are reasonable grounds to believe that there is material that is hate propaganda within the meaning of

subsection 320(8) or computer data within the meaning of subsection 342.1(2) that makes hate propaganda available, that is stored on and made available to the public through a computer system within the meaning of subsection 342.1(2) that is within the jurisdiction of the court, the judge may order the custodian of the computer system to

(a) give an electronic copy of the material to the court; (b) ensure that the material is no longer stored on and

made available through the computer system; and

(c) provide the information necessary to identify and locate the person who posted the material.

#### **Notice to person who posted the material**

(2) Within a reasonable time after receiving the information referred to in paragraph (1)(c), the judge shall cause notice to be given to the person who posted the material, giving that person the opportunity to appear and be represented before the court and show cause why the material should not be deleted. If the person cannot be identified or located or does not reside in Canada, the judge may order the custodian of the computer system to post the text of the notice at the location where the material was previously stored and made available, until the time set for the appearance.

#### **Person who posted the material may appear**

(3) The person who posted the material may appear and be represented in the proceedings in order to oppose the making of an order under subsection (5).

#### **Non-appearance**

(4) If the person who posted the material does not appear for the proceedings, the court may proceed *ex parte* to hear and determine the proceedings in the absence of the person as fully and effectually as if the person had appeared.

#### **Order**

(5) If the court is satisfied, on a balance of probabilities, that the material is available to the public and is hate propaganda within the meaning of subsection 320(8) or computer data within the meaning of subsection 342.1(2) that makes hate propaganda available, it may order the custodian of the computer system to delete the material.

#### **Destruction of copy**

(6) When the court makes the order for the deletion of the material, it may order the destruction of the electronic copy in the court's possession.

### **Return of material**

(7) If the court is not satisfied that the material is available to the public and is hate propaganda within the meaning of subsection 320(8) or computer data within the meaning of subsection 342.1(2) that makes hate propaganda available, the court shall order that the electronic copy be returned to the custodian and terminate the order under paragraph (1)(b).

### **Other provisions to apply**

(8) Subsections 320(6) to (8) apply, with any modifications that the circumstances require, to this section.

### **When order takes effect**

(9) No order made under subsections (5) to (7) takes effect until the time for final appeal has expired.

2001, c. 41, s. 10; 2014, c. 31, s. 13.

Section 430 (4.1) - (4.101): "Mischief: Mischief relating to religious property, educational institutions, etc."

### **Mischief relating to religious property, educational institutions, etc.**

(4.1) Everyone who commits mischief in relation to property described in any of paragraphs (4.101)(a) to (d), if the commission of the mischief is motivated by bias, prejudice or hate based on colour, race, religion, national or ethnic origin, age, sex, sexual orientation, gender identity or expression or mental or physical disability,

(a) is guilty of an indictable offence and liable to imprisonment for a term not exceeding ten years; or

(b) is guilty of an offence punishable on summary conviction.

### **Definition of *property***

(4.101) For the purposes of subsection (4.1), *property*

means

(a) a building or structure, or part of a building or structure, that is primarily used for religious worship — including a church, mosque, synagogue or temple —, an object associated with religious worship located in or on the grounds of such a building or structure, or a cemetery;

(b) a building or structure, or part of a building or structure, that is primarily used by an *identifiable group* as defined in subsection 318(4) as an educational institution — including a school, daycare centre, college or university —, or an object associated with that institution located in or on the grounds of such a building or structure;

(c) a building or structure, or part of a building or structure, that is primarily used by an *identifiable group* as defined in subsection 318(4) for administrative, social, cultural or sports activities or events — including a town hall, community centre, playground or arena —, or an object associated with such an activity

or event located in or on the grounds of such a building or structure; or

(d) a building or structure, or part of a building or structure, that is primarily used by an *identifiable group* as defined in subsection 318(4) as a residence for seniors or an object associated with that residence located in or on the grounds of such a building or structure.

Sections 718.2 (a)(i): “Purpose and Principles of Sentencing: Other Sentencing Principals”:

### **Other sentencing principles**

**718.2** A court that imposes a sentence shall also take in- to consideration the following principles:

(a) a sentence should be increased or reduced to account for any relevant aggravating or mitigating circumstances relating to the offence or the offender, and, without limiting the generality of the foregoing,

(i) evidence that the offence was motivated by bias, prejudice or hate based on race, national or ethnic origin, language, colour, religion, sex, age, mental or physical disability, sexual orientation, or gender identity or expression, or on any other similar fac- tor,