

14. *Ibid.*, 256.

15. *Ibid.*

16. J. S. Mill, "The Subjection of Women," in *Essays on Equality, Law, and Education*, 261. For a very full account of what this "perfect equality" entailed for Mill, see Maria H. Morales, *Perfect Equality: John Stuart Mill on Well-Constituted Communities* (Lanham: Rowman and Littlefield, 1996).

17. See J. S. Mill, "De Tocqueville on Democracy in America" and "State of Society in America," in *Essays on Politics and Society*, 55n, 95; "The Contest in America" and "The Negro Question," in *Essays on Equality, Law, and Education*.

18. Cf. Mill, "Utilitarianism," 258: "All persons are deemed to have a right to equality of treatment, except when some recognized social expediency requires the reverse" (emphasis in original).

19. J. S. Mill, "Autobiography," in John M. Robson and J. Stillingier, eds., *Autobiography and Other Essays*, vol. 1 of *The Collected Works of John Stuart Mill* (Toronto: University of Toronto Press, 1981), 45.

20. *Ibid.*, 47.

21. For a profile of such groups in Canada see Warren Kinsella, *Web of Hate: Inside Canada's Far Right Network* (Toronto: HarperCollins, 1994).

22. The Simon Wiesenthal Center estimates that there are now more than 600 racist sites on the Web. The U.S. Anti-Defamation League puts the number of white-supremacy sites alone at 250.

23. He was convicted of the curious crime of "spreading false news" (about the Holocaust), but this conviction was overturned in 1992 when the Canadian Supreme Court found that the statute in question infringed the right to freedom of expression guaranteed in the Charter of Rights and Freedoms. Ironically, in an early essay Mill himself was willing to countenance restrictions on statements of fact that he rejected for the expression of opinions: "It must be admitted that the case of facts, and that of opinions, are not precisely similar. False opinions must be tolerated for the sake of the true: since it is impossible to draw any line by which true and false opinions can be separated from one another. There is no corresponding reason for permitting the publication of false statements of fact. The truth or falsehood of an alleged fact is matter, not of opinion, but of evidence; and may be safely left to be decided by those, on whom the business of deciding upon evidence in other cases devolves" ("Law of Libel," 14). At this stage of his thinking, therefore, Mill might have distinguished between Zundel's false antisemitic opinions and his false statements of fact about the Holocaust, holding him legally accountable for the latter but not the former. Needless to say, there is no trace of this distinction in *On Liberty*.

24. The availability of Zundel's antisemitic propaganda on the Internet raises special problems because of the access it affords to children. Mill is, of course, willing to accept forms of paternalistic protection of children that he would reject for adults. However, agreeing on the legitimacy of this kind of restriction on Internet access is one thing; figuring out how to operationalize it without infringing on the rights of adults is quite another.

25. I have argued this point at greater length in "Hate Propaganda."

## Holocaust Denial, Equality, and Harm: Boundaries of Liberty and Tolerance in a Liberal Democracy

Irwin Cotler

### I. Introduction

May I preface my remarks with a personal statement, or perhaps I should say that my essay should be understood against the backdrop of my own *sensibility* on the issue—but which sensibility is not unrelated to the juridical subject matter of the essay. In a word, speaking on a Holocaust-related topic is something I do sparingly, and with difficulty. For the subject matter evokes for me a sense of awe and reverence—indeed, humility—and I address it with a certain degree of hesitation, and not without a certain measure of pain. For I am reminded of what my parents taught me while I was still a young boy—a *formation* that informs my scholarship and advocacy to this day: that there are things in Jewish history that are too terrible to be *believed*, but not too terrible to have *happened*; that Oswiencim, Midanik, Dachau . . . these are beyond vocabulary. For the Holocaust, as Professor Yehuda Bauer stated, is "uniquely unique"—a war against the Jews in which, as Elie Wiesel put it, "not all victims were Jews, but all Jews were victims."

But if the Holocaust is uniquely unique—if it is beyond vocabulary—it is, arguably (and here sensibility merges with substance), beyond law; but if it is beyond the law, it may also escape the law, so that the very profundity of the horror—be it the Holocaust or its denial—becomes the basis for its immunity from law. Conversely, if law is to address it, it must somehow normalize the evil; yet the very "normalization"—while legally exigent—is somehow existentially unreal. And so the paradox: the very enormity—indeed, transcendental character—of the evil may defy legal remedy, while the very use of legal remedy—the "banalization" of evil—is the banality also of the law. An evil, then, that is "uniquely unique" requires the imaginative use of law and legal remedy that is unique, if not uniquely unique.

This invites yet another paradox or dilemma: how is one to be imaginative in speaking of freedom of speech—or freedom of speech in relation to hate propaganda, the hate propaganda of the Holocaust denier—when one is reminded of the words of John Stuart Mill, who in an apology at the beginning of his famous essay titled *On Liberty* said: “Those to whom nothing which I am about to say will be new, may therefore, I hope, excuse me, if on a subject which for now three centuries has been so often discussed, I venture on one discussion more.”<sup>1</sup>

Speaking 140 years after John Stuart Mill uttered his apology, I too must beg your indulgence for beginning still another discussion on the issue of freedom of speech. As I stated above, the very subject matter of this essay—Holocaust denial hate propaganda—appears as much to defy comprehension as freedom of expression itself is burdened with the banality of hundreds of years of discussion.

Yet there are some compelling considerations today that invite “one discussion more”—and distinguish the discussion from that of John Stuart Mill—as Professor Wayne Sumner’s essay in this book illustrates. First, there is the very existential character of the discussion. In other words, we are not simply discussing the abstractions of freedom of speech, or speech *in abstracto*, or freedom of expression as a matter of legal or political theory alone; rather, we are discussing the balancing—or even the confrontation—of two core values: (1) the principle of freedom of speech on the one hand, and (2) the right of minorities to protection against group-vilifying speech on the other. The philosophic and normative inquiry here, I submit, while owing much to Mill, emerges as more profound—and more compelling—than that addressed by Mill.

Second, there are important legal—indeed constitutional—considerations that did not even arise for Mill, or that arose in the framework of political theory, but that today have not only a national but international juridical resonance and are anchored in the dynamics of constitutional theory. More particularly, is antihate legislation—the panoply of civil and criminal remedies developed to combat hate propaganda—constitutional? How does one address, let alone determine, its constitutionality? Is such antihate legislation—necessarily overbroad and all-encompassing, given the enormity but ephemeral character of the evil it seeks to combat—to be rendered void because of this very overbreadth or vagueness? Or, conversely, if it is narrowly tailored so as to meet a constitutional challenge, can it be effective in combating the evil? Can constitutional theory and practice coexist? Is there a dissonance between validity and efficiency?

Third, there are important sociological considerations that Mill did not face or could not even imagine. In a word, there is a veritable explo-

sion today of racist hate speech—a global web of hate—not only of a kind and character that Mill could not envisage, but conveyed by a technology of cyberhate that even postmodernists did not foresee.

Fourth, there is a particular sociolegal dynamic that did not, and again could not, obtain in Mill’s time, or any time until the recent past. I am referring to the explosion of Holocaust denial—perhaps the most obscene form of hate propaganda—and the little-known but not insignificant fact that Canada has emerged as one of the world centers for hate propaganda litigation in general, and Holocaust denial litigation in particular. This is not, one must hastily add, because Canada is an international center for Holocaust deniers, or a center for the international dissemination of hate propaganda; rather, it is because Canada—while certainly not without its hate propagandists—has developed one of the most comprehensive legal regimes to combat hate propaganda of any jurisprudence anywhere.

Indeed, it is the dialectical—or what I would call dynamic—encounter in Canada between the rise in hate speech on the one hand and the existence of a comprehensive legal scheme to combat it on the other that has produced this Holocaust denial hate propaganda litigation. It is an encounter and litigation that would have been alien to Mill; but it is an encounter and experience—culturally and legally—that has international significance and that makes the Canadian experience a constitutional model for the validity and efficacy of legal remedy—for trying to determine the boundaries of liberty and tolerance.

There is a fifth consideration—a psychological one—that underpinned Mill’s analysis from the perspective of political theory but again was unknown to Mill and is only now becoming known to us. I am referring to the serious individual and societal harm resulting from this scurrilous speech, harm that is only now being appreciated as a veritable “assault” on our psyches with “catastrophic” effects for our polity—and harm that, if it had been known to Mill, would make the hate speech issue, even for this classical liberal theorist, a hard case.

Sixth, there are considerations of an international juridical character that were neither existing nor even foreseeable in Mill’s time. In a word, there exists an international legal regime, anchored in international treaty law, that not only prohibits racist hate speech—and excludes it from the ambit of protected speech—but obliges State Parties to these treaties, like Canada, to enact measures to combat such scurrilous speech. If countries like Canada had not enacted such measures, they would now be obliged to do so; having enacted them, they cannot lightly set them aside.

Seventh, there is a jurisprudential movement beyond the liberal legal theory and prejudice of free speech as reflected in Mill and Rawls that

finds expression in critical race theory, feminist legal theory, and international legal theory.

One can see, therefore, that there are a variety of considerations of an existential, philosophical, legal, sociological, psychological, and international character that simply were not part of Mill's analysis some 140 years ago; indeed, these considerations warrant "one discussion more" and must necessarily be factored into any discussion of free speech and hate propaganda today.

Moreover, this "one discussion more" may also be said to be warranted by its taking place today against the backdrop of the most celebrated hate speech litigation in the history of Canadian jurisprudence—and one that embraces all the above considerations. It includes, most notably,

1. the historic trilogy of the *Keegstra*,<sup>2</sup> *Andrews*,<sup>3</sup> and *Taylor*<sup>4</sup> cases, decided together by the Supreme Court of Canada in 1990, and for which *Keegstra* has become both metaphor and message, and including the ultimate disposition of the *Keegstra* case (*Keegstra*, No. 2) in 1996;
2. the *Zundel* cause célèbre,<sup>5</sup> involving one of the world's foremost Holocaust deniers;
3. still another cause célèbre, involving a complaint lodged under the Province of New Brunswick's *Human Rights Act* against the New Brunswick schoolteacher and hate propagandist Malcolm Ross, constituting the most recent "hate speech" judgment by the Supreme Court in 1996<sup>6</sup> and organized around the principle of Holocaust denial hate propaganda as assaultive of equality, if not of the underlying liberal rationale for free speech itself;
4. numerous lower court decisions under the federal and provincial human rights codes involving hate propaganda, notably the *Heritage Front* case in Ontario,<sup>7</sup> the *Harcus* case in Manitoba,<sup>8</sup> the *Bell* case in Saskatchewan,<sup>9</sup> the *Aryan Nations* case in Alberta,<sup>10</sup> and the *Liberty Net* cases in British Columbia,<sup>11</sup> which again are organized around the notion of hate propaganda as a discriminatory practice.

In each of the major hate speech cases decided under the *Canadian Charter of Rights and Freedoms* and human rights legislation thus far, there have been two central issues before the courts, issues that are likely to be the central concerns of any court in a democratic society called upon to decide a racial incitement case. The first issue is whether incitement to racial and religious hatred is prima facie "protected speech" under the

*Charter's* section 2(b) guarantee of freedom of expression. The second issue, even assuming that racial incitement is prima facie protected speech, is whether, and indeed not just whether but how and to what extent, hate propaganda can nonetheless be subject, in the words of the balancing principle stated in section 1 of the *Charter*, to "such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."<sup>12</sup>

But what makes this Canadian jurisprudential experience particularly significant for us—and for those seeking to construct a comprehensive legal theory for democracies generally—is that it has generated one of the more instructive and compelling sets of legal precedents and principles respecting this genre of hate speech litigation and the principle of freedom of expression in the world today.

First, the Canadian multicultural mosaic has been experiencing a dramatic increase in both hate speech and hate crimes targeting vulnerable minorities, mirroring thereby what has become a general, and not just Canadian, phenomenon.

Second, the existence in Canada of a comprehensive legal regime to combat racist hate speech not only mirrors this phenomenon elsewhere but emerges as a compelling case study of both the efficacy and validity of legal remedy.

Third, the encounter, as demonstrated by Canadian jurisprudence, is not only a legal one but a philosophic one; for what is at issue is not only the efficacy or validity of legal remedy, but the balancing under the *Charter* of two fundamental normative principles: on the one hand, freedom of expression as the lifeblood of democracy and of the autonomy of the individual; and, on the other hand, the right of vulnerable minorities to protection against discriminatory expression and its related humiliation, degradation, and injury. In effect, what is at stake in the invocation of these core principles at the most profound, and painful, level is the litigation of the values of a nation—the competing visions of what constitutes, or is creative of, a free and democratic society.

Fourth, the *Charter* emerges in these cases as a double-edged constitutional sword—invoked by both the purveyors and the targets of hate propaganda alike. The "hatemongers" shield themselves behind the freedom of expression principle. The victims shield themselves behind the right to protection against group-vilifying speech.

Finally, the Supreme Court of Canada, in its hate propaganda decisions, has articulated a series of principles and perspectives that have placed Canada in the forefront internationally in developing a distinguishable "hate speech" jurisprudence for a free and democratic society. The Canadian Supreme Court has done so by pouring content into the *Char-*

ter's dual guarantee of freedom of expression and nondiscrimination and using international human rights law as an interpretive source.

Accordingly, this "one discussion more" respecting freedom of expression and hate speech will be organized around five principal topics:

1. a snapshot of the nature and extent of the present hate movement and of hate propaganda in Canada;
2. a review of the Canadian legal regime of hate propaganda regulation, including an identification of the typology of legal remedies to combat hate speech and including in particular a summary of the hate speech provisions in the *Criminal Code*;
3. a discussion of the major principles and perspectives articulated by the Supreme Court of Canada in seeking to "balance" competing rights—the freedom to express hate and the right to protection against group-vilifying speech; the whole with a view to developing a comprehensive constitutional theory that will assist us in "drawing the line"—in delineating and defining boundaries of liberty and equality, of freedom and tolerance, in a liberal democracy.
4. freedom of expression, hate speech, and the American First Amendment doctrine;
5. the problems of prosecuting hate speech: constitutional validity, practical efficacy, and the dialectics of inversion; and here I will draw on my own experience in hate speech litigation.

The analysis will then conclude with a summary of the basic indices for developing a "hate speech" jurisprudence under the *Charter*, or the basic indices underlying a jurisprudence of free speech, nondiscrimination, and respect for human dignity in a free and democratic society.

## II. The Canadian Legal Regime of Hate Propaganda Regulation: A Typology of Remedies and the Criminalization of Hate Speech

Canada has one of the most comprehensive legal regimes in the world—including a spectrum of remedies—to combat hate propaganda. Both the federal and provincial governments have enacted laws that seek either to punish individual purveyors of hate or to remedy the discrimination perpetrated through hate propaganda, often by limiting or forbidding its expression by a particular individual or group. The legislation is of several different types. At the federal level, Parliament has criminalized three distinct forms of hate propaganda—advocacy of genocide, public incitement

of hatred, and willful promotion of hatred—and has otherwise restricted the ability of citizens to promote hatred, through various provisions in the *Criminal Code*, the *Canadian Human Rights Act*, the *Canada Post Corporation Act*, and the *Customs Tariff Act*. The provinces, although excluded by Parliament's jurisdiction over criminal law from actually punishing as such those who promote hatred against identifiable groups, have also attempted to remedy some of the harms effected by hatemongers, through various types of human rights legislation. In the private law area, while Canadian courts appear to have foreclosed a common law remedy of discrimination, Quebec civil law appears to offer a delictual remedy. And international human rights law has emerged in the post-*Charter* universe as a relevant and persuasive source in the invocation and application of legal remedy.

The enactment, in particular, of section 319(2) of the *Criminal Code*—and the advent of the *Charter*—have marked a watershed in "hate speech" jurisprudence. Indeed, section 319(2) of the *Criminal Code* is the only hate propaganda offense that has so far been challenged as violating the *Charter's* section 2(b) guarantee of freedom of expression. The section reads as follows:

**319. (2)** Every one who, by communicating statements, other than in private conversation, willfully 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.

It should be noted that section 319(6) states that no proceeding for the offense of willfully promoting hatred may be instituted without the consent of the provincial Attorney-General; also, section 319(3) establishes four distinct defenses unique to the crime of willfully promoting hatred:

- 319. (3)** No person shall be convicted of an offence under subsection (2)
- (a) if he establishes that the statements communicated were true;
  - (b) if, in good faith, he expressed or attempted to establish by argument an opinion upon a religious subject;
  - (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.

The leading cases challenging this section are *R. v. Keegstra* and *R. v. Andrews and Smith*, decided concurrently by the Supreme Court in 1990, at which time the Court upheld by a narrow 4–3 margin the constitutional validity of the crime of willfully promoting hatred; as well, it upheld the antihate provisions of the *Canadian Human Rights Act* in the *Taylor* case, which had been joined with *Keegstra* and *Andrews* for hearing. What follows is a “snapshot” of the hate propaganda in the historic *Keegstra* case—whose majority judgment alone runs over 100 pages and which transformed the free speech/hate propaganda jurisprudence in Canada, while seeking to draw the boundaries of freedom and tolerance in a free and democratic society.

James Keegstra was a high school teacher in the small town of Eckville, Alberta, from the early 1970s until his dismissal in 1982. For the better part of a decade, he imposed virulently antisemitic views upon his students in the classroom. The character of Keegstra’s hate propaganda was succinctly summarized in the majority judgment of Chief Justice Brian Dickson in the Supreme Court:

Mr. Keegstra’s teachings attributed various evil qualities to Jews. He thus described Jews to his pupils as ‘treacherous,’ ‘subversive,’ ‘sadistic,’ ‘money-loving,’ ‘power hungry’ and ‘child killers.’ He taught his classes that Jewish people seek to destroy Christianity and are responsible for depressions, anarchy, chaos, wars and revolution. According to Mr. Keegstra, Jews ‘created the Holocaust to gain sympathy’ and, in contrast to the open and honest Christians, were said to be deceptive, secretive, and inherently evil. Mr. Keegstra expected his students to reproduce his teachings in class and on exams. If they failed to do so, their marks suffered.<sup>13</sup>

Indeed, the *Keegstra* and *Zundel* cases are both dramatic case studies of Holocaust denial hate propaganda and Holocaust denial litigation. As the case law in Canada, France, and Germany illustrate, if racist hate propaganda is one of the more insidious manifestations of racism, then Holocaust denial has emerged as among the most insidious forms of racist hate propaganda. The cases also demonstrate that Holocaust deniers are not a bunch of social misfits, but part of an increasingly sophisticated and interconnected international movement whose “assault on truth and mem-

ory”<sup>14</sup> is the “cutting edge” of antisemitism old and new—with all the attendant harm and injury that such racist incitement connotes.

For the danger of this international hate movement does not lie only in its assaultive speech denying the Holocaust, however harmful or injurious such hate propaganda may be. Rather, it resides first in the imputation of this “hoax” to the Jews, in the scurrilous libel that the Jews “fabricated” this “hoax” so that they could illegally extort reparations from Germany—a teaching of contempt and incitement to violence against the “evil Jew thief”; and second, it resides in its whitewashing of the worst crimes and criminals in history. In effect, the Holocaust denial movement can be seen as an international criminal conspiracy to cover up the crime of genocide against the Jewish people, exonerating the crimes of the Jews as it rehabilitates the crimes of the Nazis.

Accordingly, it is not surprising that Austria, France, Germany, Israel, and Switzerland have adopted laws to combat this insidious form of hate propaganda; that the United Kingdom is considering such legislation; and that the European Parliament itself has called for legislation to prohibit Holocaust denial. For Canada, which has become a world center of Holocaust denial litigation—and an important supply source for the international movement worldwide—the situation might well warrant the consideration of the adoption of a *lex specialis* to prohibit this egregious form of racist propaganda.

### III. Hate Speech Jurisprudence: Principles and Perspectives

As set forth above, the “hate speech” jurisprudence of the Supreme Court of Canada—particularly as represented in the historic trilogy of *Keegstra*, *Andrews and Smith*, and *Taylor*—has articulated a series of principles and perspectives that may help to pour content into what American First Amendment scholar Fred Schauer has called the “multiple tests, rules, and principles” reflecting “the [extraordinary] diversity of communication experiences,”<sup>15</sup> a matter of particular importance as the rise in racist hate propaganda is now an international and not just domestic phenomenon.

What follows is a distillation from the case law of some of these interpretive principles and perspectives. It offers a looking glass into the considerations that ought to be factored into any analysis of hate speech, equality, and harm and seeks to strike a balance between competing normative principles in an attempt to define and delineate “boundaries”—and to address the “line-drawing” problem referred to in Professor Richard Moon’s essay in this book.

PRINCIPLE 1: "Chartering" Rights: The Constitutionalization of Freedom of Expression—the "Lifeblood of Democracy"

From the perspective of constitutional theory—or that of the First Amendment doctrine—the notion that Canadian constitutional theory and doctrine dilute and diminish freedom of expression as the "lifeblood of democracy" is misinformed and misleading. For the notion of freedom of expression as a "fundamental" right not only underpins the free speech jurisprudence under the *Charter of Rights*, but it pervaded the free speech jurisprudence even in the pre-*Charter* era.

Indeed, in the most recent free speech case decided by the Supreme Court of Canada in 1996<sup>16</sup>—and involving Holocaust denier Malcolm Ross—the Court reaffirmed, as it had in the *Keegstra* case, that "it is difficult to imagine a guaranteed right more important to a democratic society than freedom of expression; as such it should only be restricted in the clearest of circumstances." Indeed, the Court invoked the classic dictum of Justice Holmes in the *Schwimmer*<sup>17</sup> case as follows:

As Holmes J. stated over sixty years ago, the fact that the particular content of a person's speech might 'excite popular prejudice' is no reason to deny it protection for 'if there is any principle of the Constitution that more imperatively calls for attachment than any other it is the principle of free thought—not free thought for those who agree with us but freedom for the thought that we hate.'

What distinguishes the Canadian from the American approach—and locates it closer to the European and international perspective—is the constitutionalization of a configurative "balancing" principle of rights and limits in section 1 of the *Charter*, which, as we have seen, 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. One of the rights and freedoms so constitutionalized is freedom of expression in section 2(b), which guarantees "everyone . . . freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication."

Moreover, as the Supreme Court put it, the rights and freedoms guaranteed by the *Charter*, such as freedom of expression, are to be given "a generous and liberal interpretation," as befits constitutionally entrenched rights. The Constitution, said the Court in its paraphrase of Paul Freund, "should not be read like a last will and testament, lest it become one."<sup>18</sup>

This by no means suggests that the Canadian experience is irrelevant

to societies that do not have an entrenched charter of rights. As stated by the Supreme Court, "[The notion] that freedom to express oneself openly and fully is of crucial importance in a free and democratic society was recognized by Canadian Courts prior to the enactment of the *Charter* . . . freedom of expression was seen as an essential value of Canadian Parliamentary democracy."<sup>19</sup> In a word, freedom of expression was regarded as a "core" right even before the advent of the *Charter*, a perspective that ought to be instructive for societies without a constitutionally entrenched bill of rights.

What the Canadian experience demonstrates is that a constitutionally entrenched charter of rights invites "a more careful and generous study of the values informing the freedom"<sup>20</sup> and therefore commends itself to those concerned with a more enhanced promotion and protection of human rights generally. But while it regards freedom of expression as "the lifeblood of democracy," it acknowledges that it may be subject to reasonable and demonstrably justified limits; and, as will be seen below, this balancing act involves existential as well as legal questions—rights in collision as well as rights in the balance. On the one hand, there is the "fundamental" right of free speech, a core principle; on the other hand, there is the right to protection against group-vilifying speech—also a core principle. What is at stake, as we have seen, is the litigation of the values of a nation.

Accordingly, one cannot say that those who challenge antihate legislation are the only civil libertarians, or the only ones promotive of free speech; or that those who support antihate legislation are not really civil libertarians, or are against free speech; rather, there are good civil libertarians and good free speech people on both sides of the issue. In a word, one can adhere to the notion of free speech as the lifeblood of democracy and still support antihate legislation.

PRINCIPLE 2: Freedom of Expression: Fundamental—but Not an Absolute Right

Freedom of expression, then, as Professor Abraham Goldstein has put it, "is not absolute, however much so many persist in talking as if it is."<sup>21</sup> Indeed, in every free and democratic society certain forms and categories of expression are clearly regarded as being outside the ambit of protected speech. Even in the United States, certain categories of speech—obscenity, personal libel, and "fighting words"—are not protected by the First Amendment; such utterances, said the United States Supreme Court in *Chaplinsky*, "are no essential part of any exposition of ideas, and are of such slight social value as a step to the truth that any benefit . . . is clearly

outweighed by the social interest in order and morality,"<sup>22</sup> while some American scholars argue that *Beauharnais v. Illinois*,<sup>23</sup> which upheld the constitutionality of a group libel ordinance, is still good law.

In summary, all free and democratic societies have recognized certain limitations on freedom of expression in the interest of national security, such as prohibitions against treasonable speech; or limitations in the interest of public order and good morals, such as prohibitions against obscenity, pornography, or disturbing the public peace; or limitations in the interest of privacy and reputation, such as prohibitions respecting libel and defamation; or limitations in the interest of consumer protection, such as prohibitions respecting misleading advertising; and the like.

PRINCIPLE 3: The Scope of Freedom of Expression and the "Purposive" Theory of Interpretation

In the view of the Canadian Supreme Court, the proper approach to determining the ambit or scope of freedom of expression and the "pressing and substantial concerns" that may authorize its limitation is a *purposive* one. This principle of interpretation was set forth by Chief Justice Dickson (as he then was) in the *Big M. Drug Mart Ltd.* case as follows: "The meaning of a right or a freedom guaranteed by the *Charter* was to be ascertained by an analysis of the purpose of such a guarantee; it was to be understood, in other words, in the light of the interests it was meant to protect."<sup>24</sup>

In the *Keegstra* case, the Court reiterated the three-pronged purposive rationale for freedom of expression that it had earlier articulated in the *Irwin Toy* case as follows:

1. seeking and attaining truth is an inherently good activity;
2. participation in social and political decision making is to be fostered and encouraged; and
3. diversity in forms of individual self-fulfillment and human flourishing ought to be cultivated in a tolerant and welcoming environment for the sake of both those who convey a meaning and those to whom a meaning is conveyed.<sup>25</sup>

Hate mongering, however, according to the Court, constitutes an assault on these very values and interests sought to be protected by freedom of expression as follows: first, hate mongering—and particularly Holocaust denial hate propaganda—is not only incompatible with a "competitive marketplace of ideas which will enhance the search for truth," but it represents the very *antithesis* of the search for truth in a marketplace of ideas.<sup>26</sup> Second, it is antithetical to participation in democratic

self-government and constitutes a "destructive assault" on that very government.<sup>27</sup> Third, it is utterly incompatible with a claim to "personal growth and self realization"; rather, it is analogous to the claim that one is "fulfilled" by expressing oneself "violently."<sup>28</sup> Citing studies showing that victims of group vilification may suffer loss of self-esteem and experience self-abasement,<sup>29</sup> the Court found that incitement to racial hatred constitutes an assault on the potential for "self realization" of the target group and its members. It is not surprising, then, that the Court anchored its reasons for judgment in the "catastrophic effects of racism."<sup>30</sup>

Accordingly, the tenuous relationship of hate speech to the values underlying free speech—indeed, the assault by Holocaust denier hate speech on the purposive rationale of free speech—was clearly outweighed by the purposive rationale underlying the limitation.

PRINCIPLE 4: Freedom of Expression and the "Contextual" Principle

A fourth principle of interpretation—or "building block,"<sup>31</sup> as Madame Justice Bertha Wilson characterized it—is the "contextual" principle. Again, the contextual principle, as with the purposive principle, is relevant in the interpretation of the ambit of a right, and the assessment of the validity of legislation to limit it reminds us of the constraints of transcendental appellation.

As the Supreme Court put it in *Keegstra*, "it is important not to lose sight of factual circumstances in undertaking an analysis of freedom of expression and hate propaganda for these shape a court's view of both the right or freedom at stake and the limit proposed by the state; neither can be surveyed in the abstract."<sup>32</sup> As Justice Wilson (as she then was) said in *Edmonton Journal*, referring to what she termed the "contextual approach" to *Charter* interpretation: "a particular right or freedom may have a different value depending on the context. It may be, for example, that freedom of expression has greater value in a political context than it does in the context of disclosure of the details of a matrimonial dispute."<sup>33</sup>

One might equally argue—as will be seen through the prism of the principles below—that it makes all the difference in the world if the freedom of expression principle at issue comes before the court in the context of political speech, or in the context of hate speech aimed at historically disadvantaged minorities and against the backdrop of "the chilling facts of history." In the matter of hate mongering, then, whether the principle of interpretation adopted is the purposive or the contextual one, both interpretations converge in favor of the right of disadvantaged minorities to be protected against group vilification, while maintaining an "expansive" and "liberal" view of freedom of expression itself as a core right.

**PRINCIPLE 5: Freedom of Expression in a Free and Democratic Society**

According to Supreme Court doctrine, the interpretation of freedom of expression must involve not only recourse to the purposive character of freedom of expression (section 2[b]), but “to the values and principles of a free and democratic society.” This phrase, as the Court put it, “requires more than an incantation . . . [but] requires some definition . . . an elucidation as to the values and principles that [the phrase] invokes.”<sup>34</sup>

Moreover, such principles, said the Court, not only are the genesis of rights and freedoms under the *Charter* generally—or in democratic societies—but also underlie freedom of expression (section 2b) in particular. These values and principles include “respect for the inherent dignity of the human person . . . [and] respect for cultural and group identity”;<sup>35</sup> accordingly, antihate legislation should be seen not as infringing upon free speech but as promoting and protecting the values and principles of a free and democratic society.

**PRINCIPLE 6: Freedom of Expression in Comparative Perspective**

In determining whether incitement to racial hatred is a protected form of expression, the Supreme Court reasoned that resort may be had not only to the values and principles of a free and democratic society such as Canada, but to the legislative experience of other free and democratic societies; and it concluded that an examination of the legislative experience of other free and democratic societies clearly and consistently supports the position that such racist hate speech is not entitled to constitutional protection.<sup>36</sup>

Indeed, by 1966, the Special Committee on Hate Propaganda (hereinafter the Cohen Committee) had already recorded the existence of legislation in a number of countries that sought to proscribe incitement to group hatred. The countries concerned were demonstrably “free and democratic.”

An analysis of the legislative experience of other free and democratic societies supports the view, as the Court put it, that not only is such legislation representative of free and democratic societies, but its very purpose is to ensure that such societies remain free and democratic. Indeed, free and democratic societies in every region of the world have now enacted similar legislation, including countries in Asia, the Middle East, and Latin America, as well as the countries of Scandinavia and Western and Eastern Europe. Such legislation can also be found in the countries of the former Soviet Union.

Moreover, the particularly assaultive character of Holocaust denial has resulted not only in the application of a panoply of legal remedies to combat it, but in the enactment of specific legislation against Holocaust denial in Germany, France, Austria, and Switzerland.

**PRINCIPLE 7: The Holistic—or Interactionist—Principle of Rights: Freedom of Expression in the Light of “Other Rights and Freedoms”**

The Supreme Court has also determined that the principle of freedom of expression must be interpreted in the light of other rights and freedoms sought to be protected by a democracy like Canada. In the words of the Court: “The purpose of the right or freedom in question [freedom of expression] is to be sought by reference to . . . the meaning and purpose of the other specific rights and freedoms with which it is associated.”<sup>37</sup>

It should be noted that the purpose, if not also the effect, of hate speech is to diminish, if not deny, other rights and freedoms, or the rights and freedoms of others; indeed, such hatemongering is the very antithesis of the values and principles underlying these rights and freedoms. Accordingly, any reading of freedoms of expression in the light of other rights and freedoms admits of no other interpretation than that such hate speech is outside the ambit of protected expression.

**PRINCIPLE 8: Freedom of Expression and the Principle of Equality: Hate Propaganda as a Discriminatory Practice**

If freedom of expression is to be interpreted in the light of other rights and freedoms, a core—and underlying—associated right is that of equality. The denial of other rights and freedoms—or the rights and freedoms of “the other”—makes freedom of expression, or group defamation, not just a speech issue, but an equality issue. In the words of Professor Kathleen Mahoney:

In this trilogy of cases, the majority of the Supreme Court of Canada articulated perspectives on freedom of expression that are more inclusive than exclusive, more communitarian than individualistic, and more aware of the actual impacts of speech on the disadvantaged members of society than has ever before been articulated in a freedom of expression case. The Court advanced an equality approach using a harm-based rationale to support the regulation of hate propaganda as a principle of inequality.<sup>38</sup>



PRINCIPLE 9: Freedom of Expression, Group Libel, and the “Harm-Based” Rationale

According to the Supreme Court in *Keegstra*, the concern resulting from racist hate mongering is not “simply the product of its offensiveness, but stems from the very real harm which it causes.”<sup>39</sup> This judicial finding of the “very real harm” from hate mongering is not only one of the most recent findings on record by a high court, but may be considered a relevant and persuasive authority for other democratic societies. The following excerpt from the *Keegstra* case, anchored in the analysis and findings of the Cohen Committee, is particularly instructive in this regard: “Essentially, there are two sorts of injury caused by hate propaganda. First, there is harm done to members of the target group. It is indisputable that the emotional damage caused by words may be of grave psychological and social consequence.”<sup>40</sup>

In the words of the Cohen Committee:

... we are less confident in the 20th century that the critical faculties of individuals will be brought to bear on the speech and writing which is directed at them. In the 18th and 19th centuries, there was a widespread belief that man was a rational creature, and that if his mind was trained and liberated from superstition by education, he would always distinguish truth from falsehood, good from evil. So Milton, who said ‘let truth and falsehood grapple: who ever knew truth put it the worse in a free and open encounter.’

We cannot share this faith today in such a simple form. While holding that over the long run, the human mind is repelled by blatant falsehood and seeks the good, it is too often true, in the short run, that emotion displaces reason and individuals perversely reject the demonstrations of truth put before them and forsake the good they know. The successes of modern advertising, the triumphs of impudent propaganda such as Hitler’s, have qualified sharply our belief in the rationality of man. We know that under the strain and pressure in times of irritation and frustration, the individual is swayed and even swept away by hysterical, emotional appeals. We act irresponsibly if we ignore the way in which emotion can drive reason from the field.<sup>41</sup>

The Supreme Court’s conclusion on this point—relying as it does on the conclusions of the Cohen Committee itself—is particularly relevant today. In the words of the Court:

The threat to self-dignity of target group members is thus matched by the possibility that prejudiced messages will gain some credence, with the attendant result of discrimination, and even violence, against minority groups in Canadian society. With these dangers in mind, the Cohen Committee made clear in its conclusions that the presence of hate propaganda existed as a baleful and pernicious element, and hence a serious problem, in Canada (p. 59).<sup>42</sup>

Again, in the words of the Cohen Committee as quoted by the Supreme Court of Canada:

The amount of hate propaganda presently being disseminated [is] probably not sufficient to justify a description of the problem as one of crisis or near crisis proportion. Nevertheless the problem is a serious one. We believe that, given a certain set of socio-economic circumstances, such as a deepening of the emotional tensions or the setting in of a severe business recession, public susceptibility might well increase significantly. . . . As Mr. Justice Jackson of the United States Supreme Court wrote in *Beauharnais v. Illinois*, such ‘sinister abuses of our freedom of expression . . . can tear apart a society, brutalize its dominant elements, and persecute even to extermination, its minorities.’<sup>43</sup>

PRINCIPLE 10: Freedom of Expression, Hate Propaganda, and International Law

In the words of the Supreme Court, international law may be regarded as “a relevant and persuasive source”<sup>44</sup> for the interpretation of rights and freedoms under the *Charter*. Moreover, as Chief Justice Dickson (as he then was) wrote in *Keegstra*, “no aspect of international human rights has been given attention greater than that focused upon discrimination . . . this high concern regarding discrimination has led to the presence in two international human rights documents of articles forbidding the dissemination of hate propaganda.”<sup>45</sup>

Accordingly, reading the freedom of expression principle in light of international human rights law generally, and under these two international human rights treaties in particular,<sup>46</sup> requires that such racial incitement be excluded from the protective ambit of freedom of expression. Any legislative remedy prohibiting the promotion of hatred or contempt against identifiable groups on grounds of their race, religion, color, or ethnic origin would be in compliance with Canada’s international obligations

and indeed have the effect of implementing these international obligations.

Accordingly, reasoned the Supreme Court in *Keegstra*, after a review of international human rights law and jurisprudence, “it appears that the protection provided freedom of expression by CERD [*International Convention on the Elimination of All Forms of Racial Discrimination*] and ICCPR [*International Covenant on Civil and Political Rights*] does not extend to cover communications advocating racial or religious hatred.”<sup>47</sup> Of crucial importance was the conclusion of the Court that, in assessing the interpretive importance of international human rights law, the “CERD and ICCPR demonstrate that prohibition of hate-promoting expression is considered to be not only compatible with a signatory nation’s guarantee of human rights, but is as well an obligatory aspect of this guarantee.”<sup>48</sup>

#### PRINCIPLE 11: Freedom of Expression and the Multicultural Principle

The increasing multicultural features of the liberal democracies—or multicultural democracies like Canada—invite consideration or interpretation of hate speech in light of the multicultural principle. Indeed, section 27 of the *Charter* mandates that the rights guaranteed therein, including freedom of expression, be interpreted “in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians.”

This interpretive principle admits of no other reading than that such hate mongering is not only an assault on the members of the target group singled out on grounds of their identifiable race or religion, but it is destructive of a multicultural society as a whole; as such, it falls outside the protection of freedom of speech. Conversely, and again to paraphrase Mr. Justice Cory in *Andrews and Smith*, antihate legislation is designed not only “to protect identifiable groups in a multicultural society from publicly made statements which wilfully promote hatred against them,” but is designed to “prevent the destruction of our multicultural society.”<sup>49</sup>

#### PRINCIPLE 12: Freedom of Expression and the Principle of “Abhorrent Speech”

It is important that one distinguish between political speech—where the government, its institutions, and public officials are the target of offensive speech—and abhorrent, racist speech, intended to promote hatred and contempt of vulnerable and targeted minorities. The hate mongering at issue in *Keegstra*—and in analogous cases—is not the libel of public officials as in the *Sullivan* case,<sup>50</sup> or directed against “the world at large” as

in the *Cohen* case,<sup>51</sup> but it is hate mongering wilfully promoted against disadvantaged minorities with intent to degrade, diminish, vilify. In a word, this is not a case of a government legislating in its own self-interest regarding its political agenda, but an affirmative responsibility of governments to protect the inherent human dignity—and equal standing—of all its citizens.

#### PRINCIPLE 13: Freedom of Expression and the “Slippery Slope”

Those who reject antihate legislation on the grounds that such group libel legislation leads us inevitably down the “slippery slope” to censorship ignore a different “slippery slope”—“a swift slide into a marketplace of ideas in which bad ideas flourish and good ones die.”<sup>52</sup> It is submitted that the more that hateful speech is tolerated, the more likely it is to occur. As Karl Popper put it, the “paradox of tolerance” is that it breeds more intolerance—so that the tolerance of hateful speech results in more, not less, hate speech, in more, not less, harm, and in more, not fewer, hateful actions.<sup>53</sup> For tolerance of hate speech risks legitimizing such speech on the grounds that “it can’t be all bad if it is not being prohibited.” The “slippery slope” is there, but it may lead not in the direction of more censorship—which the Canadian experience does not demonstrate—but in the direction of more hate—which it does.

#### IV. Freedom of Expression, Hate Speech, and the American First Amendment Doctrine

An inquiry into the Canadian “hate speech” jurisprudence—and the challenges to the constitutionality of Canadian antihate legislation—would demonstrate the extent to which these challenges are inspired by, and anchored in, the American First Amendment doctrine. As Madam Justice McLachlin described it, “The relevance of aspects of the American experience to this case is underlined by the factums and submissions, which borrowed heavily from ideas which may be traced to the United States.”<sup>54</sup> And she added, “The *Charter* follows the American approach in method, affirming freedom of expression as a broadly defined and fundamental right, and contemplating balancing the values protected by and inherent in freedom of expression against the benefit conferred by the legislation limiting that freedom under section 1 of the *Charter*.”<sup>55</sup>

Indeed, in the *Taylor* case, decided the same day as *Keegstra*, Madam Justice McLachlin in her dissent was even more explicit about the relevance and authority of the American First Amendment doctrine:

In the United States, where freedom of expression is viewed as perhaps the most fundamental liberty, the validity of legislation restricting the promotion of hate and discrimination is seen as conflicting with free expression, and to survive must meet onerous tests, such as the connection between the legislation and a clear and present danger to society. . . . The Canadian *Charter* suggests an analysis closer to the American model than to the international, in so far as it confers a broad and virtually unlimited right, which, in cases of conflict, must be weighed against countervailing values under section 1.<sup>56</sup>

Madam Justice McLachlin is certainly correct in her characterization and comprehensive review of the American First Amendment doctrine, as American constitutional jurisprudence has generally considered such anti-hate legislation as a violation of the American Bill of Rights;<sup>57</sup> and as Chief Justice Dickson stated in the *Keegstra* case, "the [American] practical and theoretical experience is immense and should not be overlooked by Canadian courts,"<sup>58</sup> or indeed by courts in any democratic society.

"On the other hand," Dickson also noted, "we must examine American constitutional law with a critical eye, and in this respect Justice LaForest has noted in *R. v. Rahey*":

While it is natural and even desirable for Canadian courts to refer to American constitutional jurisprudence in seeking to elucidate the meaning of *Charter* guarantees that have counterparts in the United States Constitution, they should be wary of drawing too ready a parallel between constitutions born to different countries in different ages and in very different circumstances.<sup>59</sup>

In fact, the American constitutional jurisprudence may well be less relevant and persuasive for Canada than comparable experience in other free and democratic societies, for the following twelve reasons.

1. In the first major case to consider the constitutionality of group libel legislation, a closely divided United States Supreme Court in *Beauharnais v. Illinois*<sup>60</sup> upheld the constitutionality of a statute not unlike section 319(2) of the *Criminal Code*. Mr. Justice Frankfurter, writing for the majority, held that there is a certain class or genre of speech—such as group libel—"which by their very utterance inflict injury or tend to incite to an immediate breach of the peace."<sup>61</sup>

Forty years later, however, after reviewing a series of cases that have given *Beauharnais* "very limited reading,"<sup>62</sup> Madam Justice McLachlin concluded that "the effect of these cases has been to undermine the authority of *Beauharnais*"<sup>63</sup> and cited Professor Laurence Tribe to the effect that

"the continuing validity of the *Beauharnais* holding is very much an open question."<sup>64</sup>

This does not mean that the post-*Beauharnais* development of the First Amendment doctrine must necessarily be regarded as having overtaken—let alone overruled—the *Beauharnais* case,<sup>65</sup> or, even if that were the case, that this development must therefore now be authoritative and controlling for Canada. For one thing, it is not clear that *Beauharnais* is no longer good authority, or that it has expressly been overruled. Indeed, as Chief Justice Dickson put it, "credible arguments have been made that post-*Beauharnais* United States Supreme Court cases have not undermined its legitimacy."<sup>66</sup> And if indeed *Beauharnais* is no longer authoritative, then, as Professor Lorraine Weinrib has put it:

The idea that the *Charter* emulates the American model runs counter to the evidence that the international instruments, with their limitation clauses, were considered an improvement upon the American formulation of rights protection, and were later further refined in the general limitation clause in section 1 of the *Charter*.<sup>67</sup>

2. As the Supreme Court further noted in *Keegstra*,<sup>68</sup> there is a growing body of academic writing in the United States that focuses "upon the way in which hate propaganda can undermine the very values which free speech is said to protect. This body of writing is receptive to the idea that, were the issue addressed from this new perspective, First Amendment doctrine might be able to accommodate statutes prohibiting hate propaganda."<sup>69</sup>

3. That feature of the First Amendment doctrine that is seemingly most incompatible with antihate legislation is the doctrine's seeming antipathy to content-based regulation of expression. Yet skeptics may argue that this view of free speech in the United States is not entirely accurate. As Chief Justice Dickson pointed out, in rejecting the extreme position that would provide an absolute guarantee of free speech in the Bill of Rights, the Supreme Court of the United States has developed a number of tests and theories by which protected speech can be identified and the legitimacy of government regulation assessed; and what is often required, even with the First Amendment doctrine, is a content-based categorization of the expression under examination.<sup>70</sup>

In short, as the Supreme Court observed in *Keegstra*, "a decision to place expressive activity in a category which either merits reduced protection or falls entirely outside the First Amendment's ambit at least impliedly involves assessing the content of the activity in light of free speech values."<sup>71</sup>

4. The legislatures and courts of the United States are not bound by international treaties to prohibit hate-mongering; in particular, the United States, unlike Canada or other Commonwealth countries and the European States, has *not* ratified the major human rights treaties, including the *International Convention on the Elimination of All Forms of Racial Discrimination*, while its belated (1992) ratification of the *International Covenant on Civil and Political Rights* was replete with reservations respecting Articles 19 and 20 of that treaty. Accordingly, the United States, unlike Canada and the community of free and democratic societies, is not bound to enact legislative measures to implement the antihate provisions of those treaties, or to interpret the First Amendment in the light of international human rights law, or to abide by decisions of judicial and quasi-judicial international tribunals.

5. The *textual* reference to speech in the United States Constitution differs from that of section 2(b) of the Canadian *Charter*, as do the *travaux préparatoires* bearing on the respective provisions. As Chief Justice Dickson put it, "Canada and the U.S. are not alike in every way, nor have the documents entrenching human rights in the two countries arisen in the same context."<sup>72</sup>

6. The United States Constitution does not contain a limitations clause as do the Canadian *Charter* and the international human rights treaties. In a word, the two-stage analytical construct of Canadian *Charter* jurisprudence has no United States parallel.

7. The United States Constitution contains no section 27 provision directing American courts to interpret the First Amendment in a manner consistent with the preservation and enhancement of the multicultural heritage of the United States.

8. The historical development and doctrinal underpinning of the First Amendment doctrine—including the "political speech" metaphor and the Meikeljohn influence—are less relevant to a Canadian multicultural society whose enduring *ius gentium*, reflected in the *Cohen Committee Report*, has been the rights of vulnerable identifiable groups to protection against deliberate and incipiently malevolent incitement to racial hatred.

9. The United States Constitution, unlike its Canadian counterpart, has not developed interpretive principles whereby the First Amendment doctrine will be read in the light of the other rights and freedoms in the United States Constitution, as section 2(b) is read in the light of other *Charter* rights, for example, equality; on the contrary, the First Amendment doctrine has always enjoyed a "preferred" status in the hierarchy of rights and freedoms, whereas in Canada, section 2(b) cannot be insulated from the other associated rights and freedoms.

10. The American Constitution, unlike its Canadian counterpart, has

no theory of protection of group rights, and no corresponding ethos of group libel legislation.

11. The American First Amendment doctrine eschews comparative inquiry. There is very little reference to the legislative and jurisprudential experience of other free and democratic societies. This is not surprising in a society where, as Charles Fried put it, "in freedom of expression we lead the world";<sup>73</sup> but such a doctrine—or demeanor—is less relevant for a *Charter* that mandates the factoring in of a comparative perspective in the "balancing" under section 1.

12. The marketplace metaphor of the American First Amendment doctrine is anchored in the freedom of expression of the speaker, not the freedom from expression of the listener or target. In the American configuration, liberty is valued above all other values or is the only value, and freedom of speech is tantamount to liberty. In the Canadian configuration, liberty is an important value but not the only one, nor is it read apart from other values; and it is the liberty not only of the purveyor of hate speech, but of its targets as well.<sup>74</sup>

#### V. Prosecuting Hate Speech: Constitutional Validity, Practical Efficacy, and the Dialectics of Inversion

While the constitutionality of antihate legislation was upheld in *Keegstra* and *Andrews*, the very features of section 319(2) of the *Criminal Code* that Chief Justice Dickson characterized as essential to its constitutionality—as the foundation of the minimum impairment principle—may make the legislation ineffective, if not unworkable. In a word, contrary to the concern of some civil libertarians, including Madam Justice McLachlin, dissenting in *Keegstra*, that the hate propaganda provisions of the *Criminal Code* would have a "chilling effect" on free speech, the combined effect of subsections 319(2) and (3) of the *Code* may in fact make it very difficult, if not impossible, to convict, for the following reasons.

First, the term *hatred* must be defined contextually and purposively rather than abstractly and vaguely. In the words of Chief Justice Dickson, "the term 'hatred' connotes a notion of intense and extreme nature that is clearly associated with vilification and detestation."<sup>75</sup> As Cory J.A. stated in *R. v. Andrews*: "Hatred is not a word of causal connotation. To promote hatred is to instill detestation, enmity, ill will and malevolence in another. Clearly an expression must go a long way before it qualifies within the definition in section 319(2)."<sup>76</sup>

While this definition is clear, the Court proposes, in order to avoid situations where the trier of fact adopts his or her own interpretation, that the judge direct the jury regarding the nature of the term, such direction to

include an express warning not to find that the accused intended to promote hatred merely because the expression is distasteful.<sup>77</sup>

Second, it is not enough under section 319(2) to show that the accused is a hate propagandist or is engaged in the dissemination of hate propaganda as defined in section 319(2) of the *Criminal Code*. Rather, the accused must be shown to have engaged in the *promotion* as distinct from simply the dissemination of hatred.

Third, “promotion” is only the *actus reus* of the offense. The Crown must also prove that the accused *willfully* promoted hatred—that his or her specific and conscious purpose was the promotion of hatred. It is not enough to show that the accused accidentally, negligently, recklessly, or even knowingly promoted hatred. The very high *mens rea* threshold that Chief Justice Dickson relied upon to support both the “rational connection” and “minimum impairment” prongs of the proportionality test under section 1 may make prosecutions more problematic and ineffective.

Fourth, the accused’s willful promotion of hatred must be shown to have been directed not against just anyone but against an *identifiable group*, namely, one that is distinguishable by color, race, religion, or ethnic origin (section 318[4]). Interestingly enough, this qualification, which narrows the scope of the offense and thereby further supports the “proportionality” test, may yet make the legislation constitutionally vulnerable on other grounds. For it is now impossible to prosecute anyone under section 319(2), or indeed under any of the hate propaganda offenses, for the promotion of hatred or genocide against groups defined by sex, sexual orientation, mental or physical disability, and other unlisted grounds.<sup>78</sup>

Fifth, the statements that promote hatred must be shown by the Crown to have been made *other than in private conversation*.

Sixth, the Crown must *disprove any defenses* raised by the accused, beyond a reasonable doubt. In particular, the Crown must prove beyond a reasonable doubt that the accused was not making a good faith argument on a religious subject; disprove, also beyond a reasonable doubt, any reasonable mistaken belief defense; and prove beyond a reasonable doubt that the accused was not, in good faith, attempting to point out, for the purpose of removal, matters tending to produce feelings of hatred.

Seventh, even assuming that the Crown overcomes each of these defenses available to the accused, the accused may still escape conviction if he or she proves that the statements made were true. And finally, no prosecution may be initiated without the *consent* of the Attorney General.

It is not surprising, then, that the representatives of groups, “identifiable” and otherwise, have regarded the hate propaganda provisions of the *Criminal Code* as unworkable, while the Attorneys General of

the provinces, whose responsibility it is to prosecute under the provisions, have for the most part agreed with them.<sup>79</sup>

Moreover, not only may the requisites of constitutionality undermine the efficacy of prosecution, but the dialectics of prosecution may result in moral and legal inversions. In other words, as the *Zundel* case has shown, the prosecution of Holocaust deniers, in particular, may well end up putting the Holocaust itself, rather than the Holocaust denier, on trial, and this for a number of reasons.

First, the trial may become an occasion, as both the *Keegstra* and *Zundel* trials did, for an international gathering of the Holocaust denial movement, with all the attendant media “hoopla” and publicity. Indeed, Holocaust denial litigation is a natural magnet for “man bites dog” journalism, and the first *Zundel* trial, in particular, fell victim to this adage. For the prosecution under section 181 for disseminating “false news” (i.e., Holocaust denial) effectively invited the defense that the “news” was indeed true—that is, that the Holocaust is a “hoax”—thereby putting the Holocaust on trial. Similarly, a trial under section 319(2) invites a defense of “truth” under the statutory defenses to the charge. Admittedly, the antihate legislation is not as vulnerable to this strategy as was the “false news” prosecution; and a motion by the Crown at the outset of the trial for the court to take judicial notice of the existence of the Holocaust as a historical fact is likely to succeed. But the potential for inversion is still there. The irony is that, in a jury trial, taking judicial notice of the existence of the Holocaust as a historical fact may predispose the jury to acquit the accused, for they need not fear that an acquittal will be inferred to be an acquiescence in the denial of the Holocaust.

Second, there tends to be an asymmetry in the approaches taken by the Crown and the accused in Holocaust denial hate propaganda litigation, to the benefit of the accused. More particularly, as occurred in the first *Zundel* trial, the Crown may approach the proceedings as another “breaking and entering” case and may well assign as Crown Prosecutor someone whose experience lies primarily in this type of prosecution. Conversely, the Holocaust deniers may well be defended by someone (like Doug Christie—counsel for Ernst Zundel, James Keegstra, John Taylor, and Malcolm Ross) who has developed an expertise in this genre of litigation, to the disadvantage of the Crown.

Third, and as a corollary to the second point, inexperience may result in the Crown making a number of tactical and strategic mistakes that undercut the efficacy of the prosecution. For example, in the first *Zundel* trial, the Crown failed to ask the judge to take judicial notice of the existence of the Holocaust at the outset of the trial and did so only after the

Crown had led with its evidence. The result was a denial of the Crown's motion, leading to "Holocaust denial litigation" that put the Holocaust itself on trial. Moreover, as some of the witnesses for the prosecution themselves averred, the Crown did not prepare them for the brutal cross-examination of their testimony respecting the Holocaust, again being inexperienced in this genre of litigation. The Crown also did not object sufficiently to the admissibility of convicted Holocaust deniers as expert witnesses, or sufficiently impugn their testimony, or object effectively to the pleading and tactics of defense counsel. Finally, there was insufficient appreciation of the relevance of international law, or the authority of comparative law, or the use of empirical data to demonstrate harm.

## VI. Conclusion

The willful promotion of hatred may be said to be composed of a number of characteristics whose collection is itself representative, if not determinative, of a genre of expression that is beyond the ambit of protected speech. These characteristics, taken together, provide a set of indices warranting the exclusion from the ambit of protected speech of such a genre of expression; or if such expression is to be considered *prima facie* protected speech, then such antihate legislation as is designed to combat it should be regarded as a reasonable limit prescribed by the law as can be demonstrably justified in a free and democratic society. These indices are:

- (a) Where the genre of expression involves not only the communication of hatred—"one of the most extreme emotions known to humankind"<sup>80</sup>—but the willful promotion of such hatred against an identifiable group, an incipiently malevolent and violent act constituting an assault on the inherent dignity of the human person.
- (b) Where it involves not only an assault on the inherent dignity and worth of the human person, but on the equal worth of all human beings in society. For the systematic, public promotion of hatred against an identifiable group has the effect of reducing the standing and respect of that group and its members in society as a whole, while resulting in the self-abasement of each.
- (c) Where such hatemongering not only does not preserve, let alone enhance, a multicultural society such as Canada, but is destructive of it. In the words of Justice Cory (as he then was), "what a strange and perverse contradiction it would be if the *Charter* of Rights was to be used and interpreted so as to strike down a law aimed at preserving our multicultural heritage."<sup>81</sup>

- (d) Where the constitutionalization of the willful promotion of hatred would not only constitute a standing breach of Canada's international obligations under treaties to which it is a party, but a standing breach of its obligation to implement domestic legislation to prohibit such expression. To paraphrase Justice Cory, what a strange and perverse contradiction it would be if freedom of expression was to be used and interpreted so as to undermine Canada's conformity with international human rights law.
- (e) Where such hatemongering is not only destructive of the values and principles of a free and democratic society—and opposite to the legislative experience of other free and democratic societies—but constitutes a standing assault on the values and interests—and the purposive rationale—underlying protected speech.
- (f) Where the hatemongering not only constitutes an assault on the very values and interests underlying freedom of expression, but is destructive of the entitlement of the *target* group to protection from group defamation.
- (g) Where the hatemongering not only lays the basis for discrimination against, and debasement of, members of the target group, but engenders, if not encourages, racial and religious discord, while causing injury to the community as a whole.
- (h) Where such hatemongering not only does not partake in the conveyance of ideas or meaning of any kind, but is utterly without any redeeming value whatever.

The willful promotion of hatred is not only assaultive of a free and democratic society, but is assaultive of its core principle—free speech. To allow racist hate speech to be protected speech under the *Charter* is to give democracy a bad name.

## NOTES

Professor Cotler acted as Counsel before the Canadian Supreme Court in the major "hate speech" cases, including the *Keegstra*, *Andrews and Smith*, *Taylor*, and *Ross* cases.

1. John Stuart Mill, *On Liberty*, *Representative Government: The Subjection of Women* (London: Oxford University Press, 1969), 21.
2. *R. v. Keegstra*, [1990] 3 S.C.R. 697.
3. *R. v. Andrews and Smith*, [1990] 3 S.C.R. 870.
4. *Canada (Human Rights Commission) v. Taylor*, [1990] 3 S.C.R. 892.
5. *Zundel v. R.*, [1992] 2 S.C.R. 731.
6. *Ross v. New Brunswick School District #15*, [1996] 1 S.C.R. 825.

7. *Canada (Human Rights Commission) v. Heritage Front*, [1994] 1 F.C. 203 (T.D.); *Canada (Human Rights Commission) v. Heritage Front* (1994), 78 F.T.R. 241 (Fed. T.D.).
8. *League for Human Rights B'nai B'rith Can. (Midwest Region) v. Man. Knights of the Ku Klux Klan* (1993), 18 C.H.R.R. D/406 (Can. Human Rights Trib.).
9. *Saskatchewan (Human Rights Commission) v. Bell* (1994), 114 D.L.R. (4th) 370 (Sask. C.A.).
10. *Kane v. Church of Jesus Christ Christian—Aryan Nations (No. 3)* (1992), 18 C.H.R.R. D/268 (Alta. Bd. of Inq.).
11. *Khaki v. Canadian Liberty Net* (1993), 22 C.H.R.R. D/347 (Can. Human Rights Trib.); *Canada (Human Rights Commission) v. Canadian Liberty Net*, [1992] 3 F.C. 155 (T.D.); *Canada (Human Rights Commission) v. Canadian Liberty Net*, [1992] 3 F.C. 504.
12. Section 1 of the *Charter* states: "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."
13. *Keegstra*, *supra* note 2, p. 714.
14. D. Lipstadt, *Denying the Holocaust: The Growing Assault on Truth and Memory* (New York: Free Press, 1993).
15. F. Schauer, book review, 56 *Univ. Chicago L. Rev.* (1989), 397, 410.
16. *Ross v. New Brunswick School District #15*, [1996] 1 S.C.R. 825.
17. *United States v. Schwimmer* (1929), 279 U.S. 644, at 654–55.
18. Cited in *Hunter v. Southam*, [1984] 2 S.C.R. 145, 155.
19. *Keegstra*, p. 726.
20. *Ibid.*
21. Abraham Goldstein, "Group Libel and Criminal Law: Walking on the Slippery Slope," paper presented at the International Legal Colloquium on Racial and Religious Hatred and Group Libel (Tel Aviv University, 1991), 3.
22. *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571–72 (1942).
23. *Beauharnais v. Illinois* 343 U.S. 250 (1952).
24. *R. v. Big M. Drug Mart Ltd.*, [1985] 1 S.C.R. 295.
25. *Keegstra*, p. 728.
26. *R. v. Zundel* (1987), 580 R. (2d) 129 at 155–56, and quoted with approval on this point in *R. v. Andrews and Smith* (1988), 28 O.A.C. 161, to the effect that "the willful promotion of hatred is *entirely antithetical* to our very system of freedom" (emphasis added).
27. *R. v. Andrews and Smith*, *ibid.*, per Grange J.A., pp. 181–84.
28. See *Irwin Toy Ltd. v. A.-G. of Quebec*, [1989] 1 S.C.R. 927, p. 970.
29. See empirical data respecting the harm to target groups as summarized in *Report of Special Committee on Hate Propaganda in Canada* (otherwise known as the Cohen Committee) (Ottawa: Queen's Printer, 1965), 211–15; findings of the Ontario Court of Appeal in *R. v. Andrews and Smith*, *supra* note 3, per Cory, J., p. 171; and empirical data cited in M. Matsuda, "Public Response to Racist Speech: Considering the Victim's Story," 87 *Michigan Law Review* (1989), 2320.

30. *Keegstra*, p. 725.
31. See Justice B. Wilson, "Building the Charter Edifice: The First Ten Years," conference paper, Tenth Anniversary of the Charter (Ottawa, April 1992), 6.
32. *Keegstra*, p. 737.
33. *Edmonton Journal v. Alta. (AG)*, [1989] 2 S.C.R. 1326, pp. 1355–56.
34. *Keegstra*, p. 736.
35. *R. v. Oakes* (1986), 24 C.C.C. (3d) 321 (S.C.C.) 346.
36. See, for example, the *Study on the Implementation of Article 4 of the International Convention on the Elimination of All Forms of Racial Discrimination* (a report on the United Nations Committee on the Elimination of Racial Discrimination, submitted in May 1983)/A/CONF. 119/10 (18 May 1983).
37. *R. W. D. S. U. v. Dolphin Delivery Ltd.*, [1986] 2 S.C.R. 573, per McIntyre, J., p. 583.
38. K. Mahoney, "R. v. Keegstra: A Rationale for Regulating Pornography?" 37 *McGill Law Journal*, (1992), 242.
39. *Keegstra*, p. 746.
40. *Ibid.* A second harmful effect of hate propaganda that is of pressing and substantial concern is its influence upon society at large. The Cohen Committee noted that individuals can be persuaded to believe "almost anything" (30) if information or ideas are communicated using the right technique and in the proper circumstances (8).
41. *Keegstra*, p. 747.
42. *Ibid.*, p. 748.
43. *Ibid.*
44. *Reference re Public Service Employees Act (Alta)* (Dickson CJC dissenting, but not on this point) (1987) 1 S.C.R. 313 per Dickson CJ, p. 349. See also *R. v. Videoflicks* (1984), 14 D.L.R. (4th) 10 (Ont. C.A.), pp. 35–36.
45. *Keegstra*, p. 750.
46. *International Convention on the Elimination of All Forms of Racial Discrimination*. See especially Article 4 (a) of the convention (CERD); and *International Covenant on Civil and Political Rights*. See especially Article 20(2) of the covenant.
47. *Keegstra*, p. 752.
48. *Ibid.*, p. 753.
49. *R. v. Andrews and Smith* (1988), 43 C.C.C. (3d) 193 (Ont. C.A.O. 211).
50. *New York Times v. Sullivan*, 376 U.S. 254 (1964).
51. *Cohen v. California*, 403 U.S. 15 (1971).
52. This principle and perspective find expression in Goldstein, "Group Libel and Criminal Law."
53. Cf. Karl R. Popper, *The Open Society and Its Enemies* (London: Routledge and Kegan Paul, 1962), vols. 1, 2.
54. *Keegstra*, p. 812.
55. *Ibid.*, p. 822.
56. *Canada (Human Rights Commission) v. Taylor*, [1990] 3 S.C.R. 892.
57. *Collin v. Smith*, 578 F. 2d 1197 (7th Cir. 1978); *American Booksellers Ass'n Inc. v. Hudnut*, 771 F. 2d 323 (7th Cir. 1985); *R. A. V. v. St. Paul*, 120 L.Ed. 2d 305 at 326 (1992).

58. *Keegstra*, p. 740.
59. [1987] 1 S.C.R. 588, p. 639.
60. *Beauharnais v. Illinois*, 343 U.S. 250 (1952).
61. *Ibid.*, pp. 255–57.
62. L. Tribe, *American Constitutional Law*, 2d ed. (Mineola, NY: Foundation Press, 1988), 861 n. 2, cited by Madam Justice McLachlin in *Keegstra*, p. 816.
63. Madam Justice McLachlin, in *Keegstra*, p. 816.
64. *Ibid.*
65. This is clearly the tenor of reasoning of Dickson, C.J., in *Keegstra*.
66. See, for example, K. Lasson, "Racial Defamation as Free Speech: Abusing the First Amendment," 17 *Columbia Human Rights Law Review* (1985), 11.
67. L. Weinrib, "Hate Promotion in a Free and Democratic Society," 36 *McGill Law Journal* (1991), 1438.
68. *Keegstra*, p. 741.
69. See, for example, as cited by Dickson C.J. in *Keegstra*, Richard Delgado, "Words That Wound: A Tort Action for Racial Insults, Epithets, and Name-Calling," 17 *Harv. C.R.-C.L. Law Rev.* (1982), 133; Irving Horowitz, "Skokie, the ACLU, and the Endurance of Democratic Theory," 43 *Law & Contemp. Prob.* (1979), 328; Lasson, "Racial Defamation as Free Speech," 2030; Matsuda, "Public Response to Racist Speech," 2348; "*Doe v. University of Michigan*: First Amendment—Racist and Sexist Expression on Campus—Court Strikes Down University Limits on Hate Speech," 103 *Harv. L. Rev.* (1990), 1397.
70. As the Supreme Court of Canada points out by way of example, obscenity is not protected because of its content (see, for example, *Roth v. U.S.*, 354 U.S. 476, 1 L. Ed. 2d 1498, 77 S. Ct. 1304 [1957]), and laws proscribing child pornography have been scrutinized under a less than strict First Amendment standard even where they extend to expression beyond the realm of the obscene (see *New York v. Ferber*, 458 U.S. 747, 73 L. Ed. 2d 1113, 102 S. Ct. 3348 [1982]). Similarly, the vigorous protection of free speech relaxes significantly when commercial expression is scrutinized. See, for example, *Posadas de Puerto Rico Assoc. v. Tourism Co. of Puerto Rico*, 478 U.S. 328, 92 L. Ed. 2d 266, 106 S. Ct. 2968 (1968), and it is permissible to restrict government employees in their exercise of the right to engage in political activity: *Cornelius v. N.A.A.C.P. Legal Defense & Educ. Fund Inc.*, 473 U.S. 788, 87 L. Ed. 2d 567, 105 S. Ct. 3439 (1985).
71. *Keegstra*, p. 742.
72. *Ibid.*, p. 740.
73. C. Fried, "The New First Amendment Jurisprudence: A Threat to Liberty," in G. Stone et al., ed., *Bill of Rights in the Modern State* (Chicago: University of Chicago Press, 1992), 225, 229.
74. See, for example, Cory and Iacobucci J. J. dissenting (but not on this principle) in *Zundel v. R.*, [1992] 2 S.C.R. 731, p. 487.
75. *Keegstra*, p. 777.
76. *R. v. Andrews and Smith* (1988), 43 C.C.C. (3d) 193 (Ont. C.A.), p. 211.
77. *Keegstra*, p. 778.

78. Query: Is there a possibility of a challenge for "underinclusiveness" of identifiable groups under section 15 of the *Charter*?
79. T. Cohen, *Race Relations and the Law* (Toronto: Canadian Jewish Congress, 1988), 109.
80. *R. v. Andrews and Smith* (1988), 20 O.A.C. 161 (Ont. C.A.), per Cory, J. (as he then was), p. 178.
81. *Ibid.*, p. 176.