3. The history of the Nazis' rise to power in Weimar Germany played a role in both the majority and dissent in Kegstraße. It has played a powerful role in the design and interpretation of the German Basic Law as well. See Questions and Comments following Wünsiedel (discussing "militant democracy" in Germany). Germany has been designed to be particularly restrictive of anti-Semitic speech, such as Holocaust denial. See generally Eric Stein, History Against Free Speech: The New German Law Against the "Auschwitz"—and other— "Wars of Free Communication" 26 Rev. 277 (1986). The "Auschwitz Lie" case, 90 BVerfGE 241 (1994), in which the Court upheld an injunction against a demonstration designed to publicize the view that the Holocaust never occurred, demonstrates a continuing divide between European and U.S. approaches. See Edward J. Eberle, Public Discourse in Contemporary Germany, 47 Case W. Res. L. Rev. 797 (1997) (concluding that in the United States the permissible scope of discourse while in Germany the permissible scope is human dignity); Donald P. Kommers, The Constitutional Jurisprudence of the Federal Republic of Germany 832–87 (2d ed. 1997).


5. Considering, on the one hand, that Article 6 of the Declaration of Man and the Citizen of 1789 provides: "Law is the expression of the general will..."; that according to this Article and to all other provisions of the constitution standing relating to the subject matter of the law that, without prejudice to the special provisions provided for under the Constitution, the Law has the vocation of laying down rules and must accordingly have a normative scope;  

6. Considering, on the other hand, that Article 11 of the Declaration of Man and the Citizen of 1789 provides: "The free communication of ideas and opinions is one of the most precious of the rights of man, every citizen may, accordingly, speak, write, and print with freedom, but shall be responsible for such abuses of this freedom as shall be defined by law"; that Article 34 of the Constitution provides: "Statutes shall determine the rules concerning... civic rights and the fundamental guarantees granted to citizens for the exercise of their civil liberties"; that on this basis, Parliament is at liberty to enact rules regulating the exercise of the right of free communication, freedom of speech (including the written word) and freedom of the press; that it is also at liberty on this basis to establish criminal offenses punishing the abuse of the exercise of the freedom of expression and communication which cause disruption to public order and the rights of third parties; that nonetheless, freedom of expression and communication is all the more precious since its exercise is a precondition for democracy and one of the guarantees of respect for other rights and freedoms; that the restrictions imposed on the exercise of this freedom must be necessary, appropriate and proportional having regard to the objective pursued;  

6. Considering that a legislative provision having the objective of "recognizing" a crime of genocide would not itself have the normative scope which is characteristic of the law; that nonetheless, Article 1 of the law referred punishes the denial or minimization of the existence of one or more crimes of genocide "recognized as such under French law"; that in thereby punishing the denial of the existence and the legal classification of crimes which Parliament itself has recognized and classified as such, Parliament has imposed an unconstitutional limitation on the exercise of freedom of expression and communication; that accordingly, Article 1 of the law referred must be ruled unconstitutional...  

What is the role of the "vocation" of "the Law" in the Council's analysis? The role of proportionality review? Under its analysis, can speech ever be prohibited if the subject matter of the speech is not subject to legal sanction?  


[In reading this article about the regulation of hate speech and pornography, note how a Canadian scholar characterizes Canadian and U.S. free speech cases. In particular, note Mahoney's critique of Kegstraße as, in some respects, too generous in its definition and protection of speech as compared with equality rights. Note, as well, Mahoney's agreement with Justice Dickson on the distinctiveness of Canadian and U.S. free speech law in discussing Kegstraße.]

INTRODUCTION

Constitutional law can be many things, but most of all it can be an agent of change. Ultimately, it determines the way we organize our lives, socially and politically. It provides us with insights to help us understand and define our society and where it is heading. It is intimately concerned with giving meaning to ourselves and our relations with others.  

Recently, a series of decisions by the Supreme Court of Canada has articulated some alternative 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 have ever before been articulated in a freedom of expression case. It is an approach that redistributes speech rights between unequal groups. I am calling this series of decisions an equality approach to freedom of expression. The approach is particularly evident in a recent trilogy of cases dealing with hate propaganda; it is also evident in a strong line of cases dealing with
the definition of obscenity. This article discusses the Supreme Court's treatment of extremist speech in light of the freedom of expression guaranteed by the 1982 Charter of Rights and Freedoms, and laws prohibiting the public, wilful promotion of hatred and obscenity... [and] argue[s] that the equality, harm-based rationale developed by the Court for the regulation of hate propaganda even more strongly supports the regulation of pornography as a practice of inequality. I will further argue that the competing constitutional values as weighed and evaluated by the Supreme Court point the way to a more inclusive, democratic, and egalitarian society, avoiding the more limited view of freedoms that in past decisions have emphasized the autonomy of individuals, weighed their competing claims as though they were equal, and ignored the social realities in which they operated...

II
HATE PROPAGANDA AND FREEDOM OF EXPRESSION: THE KEEGSTRA CASE...

A. Keegstra's Section 2(b) Analysis

...[The Court rejected the argument that hate propaganda is a form of violence in and of itself, and, as an integral link in systemic discrimination, should be excluded from section 2(b) protection. It is unfortunate that the Court significantly deviated from the purposive approach to adopt a rigid form/content distinction in its interpretation of section 2(b).] While it is true that hate propaganda combines content and form (colour, race, religion, or national origin are the content), when it takes the form of wilful, public promotion of group hatred on the enumerated grounds, it should be seen as a practice of inequality similar to racial segregation.

In Regina v. Andrews & Smith [85 O.R. (2d) 101 (Ont. CA 1989)], Justice Cory (in a then and now) identified the connection between hate propaganda and discrimination: "When expression does fulfill detestation it... lays the foundation for the mistreatment of members of the victimized group." Viewed this way, it can be said that the wilful, public promotion of group hatred is an act, an injury, and a consequence itself. It is not a mere intention to act in the future. To promote group hatred is to practice discrimination, and discrimination is an act that contradicts one of the core values underlying freedom of expression, individual self-fulfilment and human flourishing— the very value we are told defines the environment in which all the goals of freedom of expression should be pursued. Under this view, regulation of hate propaganda should not be invalidated by the doctrine of free speech any more than legal regulation of racial segregation is invalidated by the same doctrine. Except under this view, regulation of hate propaganda should be upheld. Under this view, the use of hate propaganda should not be punished only by the very speech it promotes. Its violent nature ranges from immediate psychic wounding and attack to well-documented consequent physical aggression.

At the very least, the Court should have viewed hate propaganda as harassment on the basis of group membership. The courts in both Canada and the United States have accepted that harassment is a practice of inequality resulting in legally recognized harm and loss, even when it consists solely of words. It is a form of discrimination, even if the action is words. When legislatures regulate harassment,
main constitutional consideration surrounding extremist speech is the harm it causes to equality interests. The Court is clear that if we are to live in a society without discrimination, the harm of hate speech must be redressed.

The minority, on the other hand, believed some hate speech could be important. It feared that regulations on hate propaganda could start a "slippery slope" of encroachment on valuable political speech or could catch angry speech by members of disadvantaged minority groups against dominant majorities. The Chief Justice was of the view that the mens rea requirement would restrict the reach of the provision to only those cases meant to be caught by it. Perhaps a stronger argument is that the contextualized approach serves as a sufficient safeguard to isolate extremist hate speech from legitimate political speech. Constitutional equality as interpreted by the Court in Andreou v. The Law Society of British Columbia [(1989) 1 S.C.R. 145], is essentially designed to protect the groups that suffer social, political, and legal disadvantage. If hate propaganda were directed against historically dominant group members, a contextual approach would constitutionally protect it even in the section 1 balance. This is appropriate because the attack would not be linked to the perpetuation of disadvantage. It would be tied to the structural domination of the group attacked. If the groups were equal, presumably any special protection would be removed.

The approach established by the Kegstroh decision in the section 1 balancing stage legitimated group rights to the extent that they outweighed the competing individual right of freedom of expression. This was due to the influence of section 15. The recognition that the harm of discrimination can outweigh the free speech interest marks a major new development in freedom of expression jurisprudence. The connections the Court made between institutional arrangements, collective and individual harms, human relations, and equality are unique. The Court's recognition that boundaries between individual and collective rights must be confronted demonstrates the Charter's potential to propose new relationships.

Canada's departure from American free speech doctrine is clear. Under the first amendment, social reality is not considered when legislation regulating extremist speech is challenged. This is a critical difference from the Canadian practice because, depending on the facts of the case, a contextual analysis can result in a right or freedom having a different value. In Kegstroh, when assessing the value of challenged expression, the Court looked at the reality of the situation at hand, including the nature of the interests at stake. The centrality of equality to the enjoyment of individual as well as group rights in the decision demonstrates a firm acceptance of the view that equality is a positive right, that the Charter's equality provision has a large remedial component, and that legislatures should take positive measures to improve the status of disadvantaged groups. Most importantly, Kegstroh identifies a transformation potential in the Charter, a potential to achieve social change toward the creation of a society based on an ethic that responds to needs, honours difference, and rejects abstractions.
CONCLUSION

Canadian judges are in the process of challenging existing thought about the constitutional protection of freedom of expression. The assumption that human behaviour can be generalized into natural universal laws is being challenged by the analytical approach which favours context rather than detached objectivity. It rebels against linearity and inevitability. It does not accept that certain truths exist and that it is futile to try and change them. By expanding the perimeters of the discussion, previously hidden underlying facts and issues are being exposed. As a result, decisions as to which facts are relevant, how the issues are framed, and which legal principles are binding are changing. Obscenity and hate propaganda laws are being reframed in equality terms and defended as such in constitutional litigation. The question of harm is starting to be addressed in a way that recognizes the experience of inequality and subordination.

In the United States, on the other hand, the contextual approach has not been incorporated into first amendment doctrine as it applies to extremist speech to the extent that it has in Canada. Furthermore, equality, particularly sex equality, does not appear to carry the same constitutional weight.

But the commitment to civil liberties, while a good start, is only the beginning. Human rights start where civil liberties end. Human rights go beyond the relationship of the individual to the state and emphasize the relationship of individuals to one another. They involve the state’s intervention and assistance because individuals in their capacity as members of groups are disadvantaged for arbitrary reasons. Human rights principles allow for different treatment because not all individuals have suffered history, generic exclusion because of their group membership. Where barriers impede fairness for some individuals they should be removed, even if this means treating some people differently. Intellectual pluralism does not and cannot mean that racism or sexism will be given the same deference as tolerance.

Where we can make common cause with civil liberties, we should. But when the debate involves the clash of interests presented by hate propaganda and pornography, nineteenth- and twentieth-century theories that served a need that modern democracies have outgrown do not seem to be the best way to solve the problem. No democracy should be embarrassed or uncomfortable prioritizing the needs of the impervious, disempowered, and disadvantaged over those who are more privileged.

Equality is an emerging right. Establishing it requires reciprocity of respect and parity of regard for physical dignity and personal integrity. Legal interpretation must be guided by these values and goals if the constitutional mandate of equality is to be met. Problems of the future cannot always be solved using the intellectual frameworks of the past. The goal of a more humane and egalitarian society requires new ways of talking about the problems of free expression; otherwise we will find the progressive tools of an earlier era turned against progress. I hope that sometime Canadian and American judges will continue along the path that mediates and promotes promotion of group hatred based on a context-driven, harm-based equality analysis. If they do, rights and duties will be allocated equitably, not simply on the basis of abstract, doctrinally stagnant grand principles of formal equality that thwart rather than achieve substantive liberty and substantive equality.

QUESTIONS AND COMMENTS

1. Durability of Canada’s Proportionality Doctrine: Note the continued agreement of members of the Court on a broad definition of what constitutes free expression protected by Section 2, and on the Oakes proportionality test as the proper measure of the Section 1 question. Does Canada’s commitment to this kind of flexible balancing test have implications for other constitutional systems’ treatment of free speech questions? See Chapter VII for discussion of proportionality doctrine.

2. Balancing Tests in the United States? Consider use of such a test in the United States. Although Professor Greenawalt accurately describes contemporary U.S. free speech law as more categorical than current Canadian law, balancing approaches to free speech issues have been attractive to U.S. justices in the past, and to some today. As noted earlier, Dennis v. United States, 341 U.S. 494 (1951), upheld convictions of the major leaders of the U.S. Communist Party for conspiracy to advocate the overthrow of the government by force or violence. The Court’s plurality opinion endorsed the lower court’s interpretation of the “clear and present danger” test, which was this: “In each case [court] must ask whether the gravity of the evil, discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger.” In NAACP v. Alabama, 357 U.S. 449 (1958), invalidating the state’s demand for membership lists from the NAACP, the Court asked whether the state had “demonstrated an interest in obtaining the disclosures it seeks ... which is sufficient to justify the deterrent effect ... these disclosures may well have on the free exercise by [the NAACP’s] members of their constitutionally protected right of free association.” How different are these approaches from the Canadian Supreme Court’s?

Balancing approaches to free speech issues were later advocated by Justice Lewis F. Powell, Jr. in e.g., Healy v. James, 408 U.S. 169 (1972). For a review of balancing approaches, see T. Alexander Aleinikoff, Constitutional Law in the Age of Balancing, 96 Yale L. J. 843 (1987). Critics of balancing approaches argue that they leave too much discretion in judges’ hands, allowing them to uphold repressive legislation where they think it a “good idea” and to invalidate laws with which they disagree on policy grounds. Proponents of balancing argue that such tests promote sound judicial decisionmaking and can constrain adjudication if appropriate deference is accorded decisions by politically accountable bodies in striking the balance. See the arguments noted in Kathleen M. Sullivan, Foreword: The Justice of Rules and Standards, 106 Harv. L. Rev. 22 (1992). Do the materials about Canada that you have read help you assess the defense and critiques of balancing approaches?

Recall Professor Tribe’s argument, in Chapter I, against compromise solutions that mix competing principles and in favor of clear rights-based decisions in a rights-oriented legal culture. Are balancing approaches in tension with the “rights” culture Professor Tribe notes in
ways that would too greatly undermine judicial legitimacy if used in the United States? If so, what accounts for the sometime use of balancing approaches by the Supreme Court and by individual judges?

Do the comparative materials you have studied help you assess the following argument: The contrast between balancing approaches and categorical rule approaches is overdrawn. The real issue is the extent to which judges defer to judgments made by other institutions. A judge suspicious of those institutions can employ a balancing approach, overturning their decisions by placing greater weight on certain considerations than the other institutions had. A judge who thought deference appropriate could use a categorical approach with categorical exceptions to a particular categorical rule, or could define the rule's scope so that it did not cover the problem at hand. A weaker version of this argument is that the stance of deference taken by the courts to decisions of other institutions is at least as important as whether a balancing or categorical test is employed.

3. Note the role of the Charter's commitments to equality and multiculturalism in the opinions in <i>Keegstra</i>. Is there a difference between relying on those commitments to uphold, rather than to invalidate, legislation?

2. THE UNITED STATES

R.A.V. v. City of St. Paul

Two years after Canada's <i>Keegstra</i> decision, the U.S. Supreme Court held that a prohibition of displays of a burning cross or Nazi swastika or other symbols likely to "arouse anger in others" based on their race, color, creed, religion or gender, was an impermissible "content" and "viewpoint-discrimination" prohibited by the First Amendment. Four of the justices did not join in this conclusion, but found that the particular statute was invalid because it was overbroad and regulated some speech that the First Amendment protected.

The Court held that the defendant, who with his friends had burned a cross inside the fenced yard of a black family that lived across the street, could not constitutionally be prosecuted under the local "Bias-Motivated Crime Ordinance," which provided:

Whoever places on public or private property a symbol, object, appellation, characterization or graffiti, including, but not limited to, a burning cross or Nazi swastika, which one knows or has reasonable grounds to know arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender commits disorderly conduct and shall be guilty of a misdemeanor.

The Supreme Court, in an opinion by Justice Scalia, began by noting that the defendant had been charged under this bias ordinance although "the conduct might have violated other Minnesota statutes carrying significant penalties," citing statutes prohibiting terrorist threats (up to five year penalty), arson (up to five years) and criminal damage to property (up to one year), and that the petitioner had also been indicted for violating a statute prohibiting racially motivated assaults, which was not challenged. Accepting the state court's interpretation of the statute as relating only "fighting words," the majority concluded that while the state could prohibit all "fighting words," it could not single out speech designed to arouse anger in others on the basis of the categories of the enumerated categories.

... Scalia, J., delivered the opinion of the Court. ...

... Assuming, arguendo, that all of the expression reached by the ordinance is permissible under the "fighting words" doctrine, we nonetheless conclude that the ordinance is facially unconstitutional in that it prohibits otherwise permitted speech solely on the basis of the subjects the speech addresses.

The First Amendment generally prevents government from proscribing speech, or even expressive conduct, see, e.g., <i>Texas v. Johnson</i>, 491 U.S. 397, 406 (1989), because of disapproval of the ideas expressed. Content-based regulations are presumptively invalid. <i>Simon & Schuster, Inc. v. Members of N. Y. State Crime Victims Bd.</i>, 502 U.S. 105, 115 (1991); <i>Consolidated Edison Co. of N. Y. v. Public Serv Comm'n of N. Y.</i> 447 U.S. 530, 536 (1980); <i>Polyester S. Inc. v. Mosley</i>, 406 U.S. 92, 95 (1972). From 1791 to the present, however, our society, like other free but civilized societies, has permitted restrictions upon the content of speech in a few limited areas, which are "of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality." <i>Chaplinsky</i>, 315 U.S. at 572. We have recognized that "the freedom of speech" referred to by the First Amendment does not include a freedom to disregard these traditional limitations. See, e.g., <i>Roth v. United States</i>, 304 U.S. 476 (1957) (obscenity); <i>Banham</i>, 443 U.S. 550 (1952) (defamation); <i>Chaplinsky</i> v. New Hampshire ("fighting words"). ... Our decisions since the 1960's have narrowed the scope of the traditional categorical exceptions for defamation, see <i>New York Times Co. v. Sullivan</i>, 376 U.S. 254 (1964); <i>Gertz v. Robert Welch, Inc.</i>, 418 U.S. 323 (1974), and for obscenity, see <i>Miller v. California</i>, 413 U.S. 15 (1973), but a limited categorical approach has remained an important part of our First Amendment jurisprudence.

We have sometimes said that these categories of expression are "not within the area of constitutionally protected speech," <i>Roth</i>, 352 U.S. at 453; <i>Banham</i>, 443 U.S. 550; <i>Chaplinsky</i>, 315 U.S. 572, or that the "protection of the First Amendment does not extend" to them, <i>Bose Corp. v. Consumers Union of United States, Inc.</i>, 466 U.S. 485, 504 (1984); <i>Sable Communications of Ca., Inc. v. FCC</i>, 492 U.S. 115, 124 (1989). Such statements must be taken in context, however, and are no more literally true than is the occasionally repeated shorthand characterizing obscenity as "not being speech at all." ... What they mean is that these areas of speech can, consistently with the First Amendment, be regulated because of their constitutionally proscribable content (obscenity, defamation, etc.)—not that they are categories of speech entirely invisible to the Constitution, so that they may be made