Yahool and Yahoo! France to restrain their allowing Nazi symbols on their websites and rejecting Yahoo!’s argument that the French court should not proceed because enforcement of a judgment against Yahoo in the United States would violate the (U.S.) First Amendment); Macron Douglas-Scott, The Helpfulness of Protective Speech: A Comparison of the American and European Approaches, 7 Wm. & Mary Bill of Rts. J. 305 (1999). Another is in defamation law, where questions of "libel tourism" have been raised in the United States and the United Kingdom. See, e.g., Ehrenfeld v. Rin Mahfouz, 518 F. 3d 102 (9th Cir. 2010) (describing efforts by an American scholar to quash a U.K. libel judgment against her that, she claimed, would violate the First Amendment if litigated or enforced in the United States); Trout Point Lodge Ltd. v. Handahoe, 729 F. 3d 481 (5th Cir. 2013) (construing federal "SPEECH Act," 28 U.S.C. § 4102, enacted in 2008, to exclude enforcement in Mississippi of a Canadian defamation-based default judgment because, inter alia, the Canadian doctrine did not provide as much protection as the U.S. First Amendment); Doug Banderman, Collecting a Libel Tourist's Defamation Judgment, 87 Wash. & Lee L. Rev. 467 (2011). See also Daniel C. Taylor, Libel Tourism: Protecting Authors and Preserving Censority, 80 Geo. L.J. 139 (2011) (discussing new state laws, including New York’s "Libel Terrorism Protection Act," designed to protect defamation defendants from the enforcement of judgments obtained in countries that do not have equivalent of U.S. First Amendment protections). For related discussion of other ways in which domestic and non-domestic law intersect, see Chapter II above, at 205–206.

2. In the years since Erznoznik’s paper was written, the possibility of conflicts between European level rights regimes and national laws has arguably increased, as the web of European level law has thickened. Although European countries are free to provide greater protection of free speech rights than that required by the European Convention on Human Rights, they may do so only if they do not violate other rights guaranteed by the Convention (such as rights to, for example "respect for privacy and family life"). Moreover, national laws prohibiting, or permitting, speech might be claimed to run afoul of the European Union’s rules on freedom of commercial intercourse. See, e.g., Case C-360/02, Omega Spielballen-und Automatenaufstellungs-GmbH v. Oberbürgermeister der Bundesstadt Bonn, 2004 F.C.R. 1-980 (rejecting a challenge to Germany’s law prohibiting the depiction of human figures in video gambling; Case C-112/00, Schmidberger v. Austria, 2003 F.C.R. 1-5869 (rejecting trucking companies’ challenge to Austria’s having given a permit for a demonstration across a major trucking route). In the United States, the First Amendment would be regarded as an obstacle to government regulation of videos depicting cruelty. See United States v. Stevens, 559 U.S. 460 (2010) (finding unconstitutionally overbroad a federal law prohibiting commercial depiction of animal cruelty); Brown v. Entertainment Merchants’ Ass’n, 131 S. Ct. 2729 (2011) (invalidating a state law restricting the sale or rental of violent video games to minors). What effects on the development of distinct domestic constitutional law might flow from the European regimes, including forms of supranational judicial review?

C. FREE SPEECH AND HATE SPEECH, WITH NOTES ON COMMERCIAL SPEECH AND CAMPAIGN SPEECH

A particularly difficult issue in the United States and in other liberal constitutional democracies is the degree to which society should, or is required to, allow (or even protect) speech that is inconsistent with liberal norms of equality and tolerance. Does a system of free expression have to tolerate hate speech? Does it have to prohibit hate speech? The following materials on the constitutionality of regulating hate speech in Canada and the United States provide different perspectives on these difficulties. A note on commercial speech is included as well, to permit further evaluation of Professor Greenawalt’s claims about the differences between the balancing called for by Canada’s Charter Section I and the more "categorical" approach he saw U.S. courts using.

1. CANADA

Professor Greenawalt focuses on textual and doctrinal differences between the U.S. and Canada in explaining differences in outcomes. He argues that the U.S. Constitution has tended to result in "categorical" forms of analysis, in which the critical distinction is in the classification of an act as "speech" or not, whereas the Canadian Charter permits a balancing approach in which acts can be more broadly recognized as speech and then regulated or not depending on the nature of the reason for regulation.

The Keegstra opinion, which both Greenawalt and Professor Kathleen Mahoney comment upon, is a leading Canadian decision analyzing criminal prohibitions of "hate speech" under the Charter. Later in this chapter, after reading R.A.V. v. City of St. Paul, 509 U.S. 377 (1993), reflect on the convergences and divergences in the approaches of both majority and dissent in these two cases.

Professor Mahoney places greater weight on differences in the overall purposes of the Canadian Charter that reflect cultural differences between Canada and the United States. She emphasizes Canada’s provisions on equality, as well as the constitutional status given to protection of multiculturalism, as a reflection of Canada’s emphasis on society as a "mosaic," as opposed to the U.S. view of society as a "melting pot." She argues that the Keegstra case can be understood as a reflection of a more positive approach to the assurance of multicultural equality in Canada. She condemns the reasoning in Keegstra, however, as unduly "categorical" in insisting on seeing hate speech as a form of speech rather than of violence.

\* Similar questions arise with respect to tolerance or prohibition of political parties committed to nondemocratic principals.

\* He notes, for example, that content neutrality and rules against prior restraints are less significant in Canada than in the United States, while the distinction in whether the context is civil or criminal may be of greater importance in Canada than in the United States.
approach, it is assumed that no constitutional issue is raised by a government practice that is not aimed at speech. An expansive approach to the scope of judicial review of allegedly impermissible infringement regards impairments of speech with skepticism and requires a heavy burden to justify them. A modest approach permits impairments under fairly relaxed standards of review.

Balancing approaches to decision openly weigh crucial factors: conceptual approaches employ categorical analysis. A rule that a practice is invalid unless sustained by a compelling interest relies on balancing. A rule that defamation of public officials is protected unless there is knowledge or reckless disregard of falsity is categorical.5 Of course, conceptual approaches typically reflect some underlying balance of rights and interests. In addition, many applicable standards employ a combination of conceptual and balancing approaches. For instance, if "content distinctions" can be upheld only upon an extremely strong showing of government need, then content distinction operates as an important category that triggers highly stringent balancing review.

Constitutional language and broader traditions concerning review of legislative and executive action will largely determine the approaches a country's judiciary takes. The language of the U.S. Constitution is rather unrevealing. The first amendment states "Congress shall make no law . . . abridging the freedom of speech, or of the press . . . ." The "the preceding "freedom of speech" might have been taken to mean whatever freedom of speech then existed at common law, but courts have declined this limiting perspective. Despite the specific language about "Congress," the clause as construed covers any abridgment of free speech by any officer of the federal government. The fourteenth amendment, with its requirements that states not deprive persons of due process of law or abridge the privileges or immunities of citizens, has been held to make the first amendment applicable to the states. Since the American Constitution does not provide for government justifications of violations of guaranteed individual rights, a court's formal determination that free speech has been abridged is necessarily a formal decision that the government action was impermissible.

The Canadian Charter of Rights and Freedoms is strikingly different in important respects. Section 2 provides that everyone has the fundamental freedoms of "thought, belief, opinion and expression, including freedom of newspapers and other media of communication." The Charter explicitly applies to the national and the provincial governments. Under section 1 of the Charter, fundamental freedoms are subject "to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society." A Canadian court may thus decide that an act limits freedom of expression under section 2 but is nonetheless effective because it satisfies the standard of section 1.

II CONSTITUTIONAL LANGUAGE AND GENERAL APPROACHES

One critical inquiry in free speech cases asks what falls within the definition of speech. Another critical inquiry asks what constitutes interference with speech. How stringently courts will review government actions that interfere with speech is also a central concern. In respect to each question, judicial approaches may be expansive or modest, and they may be balancing or conceptual.

An expansive approach understands speech broadly, to include virtually all written and oral communication, fine arts and music, demonstrations, and symbolic acts such as flag burning. An expansive approach treats indirect threats to speech as well as focused interference as raising constitutional questions. A modest approach defines the limits of constitutional speech more closely, perhaps not including private communications about private subjects, including private demonstrations, or physical acts such as flag burning. Under a modest approach, it is assumed that no constitutional issue is raised by a government practice that is not aimed at speech. An expansive approach to the scope of judicial review of allegedly impermissible infringement regards impairments of speech with skepticism and requires a heavy burden to justify them. A modest approach permits impairments under fairly relaxed standards of review.

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It is one of the virtues of the recent past that while neo-Marxists in Western democracies have challenged the liberal values of freedom of speech, citizens of countries with official Marxist ideologies have put their lives on the line to achieve some form of liberal free speech.

5 The Constitution does, however, allow suspension of the writ of habeas corpus "when in Cases of Rebellion or Invasion the public Safety may require it." U.S. Const. Art. I, § 9.

These differences in constitutional language might be expected to yield variances in judicial approach. The basic American constitutional standard of "abridging the freedom of speech" seems to call for conceptual categorization to play the central role in judicial decision, although courts may need some explicit balancing to avoid unacceptable results. In discerning the fundamental freedoms of section 2, Canadian courts might rely even more exclusively on conceptual approaches, because the explicit balancing standard of section 1 allows courts to balance when they believe they must.

Since section 1 permits government justification of action that infringes section 2 freedoms, Canadian courts can find a violation of section 2's freedoms more easily than an American court would find a violation of the first amendment. But one would expect the flexibility that section 1 introduces to lead Canadian courts to invalidate fewer laws and practices as finally unconstitutional than their American counterparts. This is partly because the section 1 justification for regulation appears to its terms to grant more latitude to the political branches of government than does the language of the first amendment. It is also because most balancing tests tend to induce deference to legislative or executive wisdom. A court that is "balancing" considerations that were before the legislature may be more hesitant to conclude that the legislature made a mistake than a court inquiring whether the legislature ran afoul of some conceptual barrier.

Another reason we might expect Canadian courts to be less activist than American courts is to do with constitutional language but with a long tradition of judicial legislative for judgments (at least ones that do not arguably violate principles governing division of powers) as finally authoritative. The Charter's novel principle of direct judicial invalidation based on individual rights can be expected to alter drastically and swiftly engrafted habits of deference to the political branches.

Both American and Canadian courts have accepted broad rationales for freedom of speech and an accompanying expansively of the speech that raises constitutional questions. In the United States, nonpolitical speech is protected as well as speech related to public affairs, while commercial communication for profit enjoys some lesser protection. Music and art count as speech. Forms of expression that indicate emotional intensity or capture attention are also protected even if less offensive words or methods could convey the same substance. The law of defamation is largely constitutionalized, and other private law doctrines imposing on expression receive constitutional scrutiny. Controversially, the U.S. Supreme Court continues to leave obscene expression unprotected.

In pre-Charter days, when freedom of speech was invoked mainly in connection with issues concerning the division of authority between the national and provincial governments, Canadian decisions suggested that only expression about political affairs was protected. But the advent of the Charter has led to coverage roughly similar to that of the American first amendment jurisprudence. One important exception concerns the common law of defamation and other common law bases of liability. According to present interpretation, common law rules enforcing private rights do not present Charter issues. An American's initial reaction is to wonder if all such judicial actions can continue to be beyond the scope of section 2. If a provincial court holds that an ordinary political communication would infringe the freedom of speech, would the Canadian Supreme Court conclude that no fundamental freedom had been violated?

In comprehending the present status of common law and Charter rights, one needs to recognize a crucial difference between common law in the United States and in Canada. In the United States, common law is generally state law; if common law doctrines do not infringe the federal Constitution or federal statutes, they are not a matter of federal concern and they are unreviewable by the Supreme Court. In Canada, Supreme Court powers are different. The Supreme Court is the court of last resort in a unitary system and may review common law decisions of any lower court. Whether in some theoretical sense parts of the common law might be viewed as "federal law" or "provincial law," the Supreme Court can overturn what it regards as a bad common law judgment. Thus, in the past, the Supreme Court has been able to develop the common law of defamation in light of Charter values. This structure reduces the practical significance of a role that common law doctrines never directly infringe Charter rights.

In the last two decades, a principle prohibiting "content regulation" has emerged as a central doctrine of first amendment. The fundamental idea is that some messages should not be favored over others. Certain differences in content are permissible bases of distinction; a message urging the commission of a crime may be treated differently from a message urging legal obedience. But, in general, differences in viewpoint are not a permissible basis for distinction. Differences among categories in speech, for example, political as opposed to sexual speech, are also treated with suspicion. When the government interferes with speech in a manner that would normally be impermissible, its action will be sustained only if it is necessary to serve a compelling need and is narrowly drawn to achieve that end. In free speech cases using the compelling interest test, judges rarely sustain what the government has done.

Within the boundaries of speech that enjoys some protection, certain limited categories of speech are considered to have lower value, most notably commercial advertising and sexually explicit speech that falls short of obscenity. Regulation of these types of speech is subject to less stringent standards of review.

Less stringent standards also apply to governmental regulation that serves a purpose independent of the communication's substance. Thus, the government may restrict the size of billboards or limit the volume of sound trucks without satisfying a stringent compelling interest test.

Canadian constitutional doctrine, up to the present, is less complicated than that of the United States. There is both an expansive approach to what counts as freedom of speech and a developed balancing test under section 1 of the Charter. I will describe these

* [Denies' Note: See the discussion of Canada's Dolphin Delivery case and the state action problem below in Chapter XIII]
* [Perry Education Act v. Perry Local Educational Ass'n, 400 U.S. 37 (1980).]
features more fully when I consider recent Canadian Supreme Court decisions. For most troublesome cases, the section I balancing test raises the critical inquiry. In time, Canadian courts may develop various subsidiary doctrines similar in character if not in substance to those of the United States; but the contextualized standard under section I will probably limit such doctrinal proliferation by making much of it unnecessary. The following treatment of specific substantive areas illustrates the general remarks I have made thus far.

IV

FIGHTING WORDS AND HATE SPEECH: RESPONSIVE VIOLENCE AND INDEPENDENT HARM

Among the most controversial modern questions about freedom of speech is the proper treatment of strong insults and "hate speech." Many strong insults use coarse language in a highly derogatory way ("You are a fucking bastard"), but others avoid any single shocking word. Many strong insults are cast in terms of race, religion, ethnic origin, gender, or sexual preference. Some language that is contemptuous or hateful toward members of such groups occurs in contexts other than individual insults.

The leading American case on direct insults remains Chaplin v. New Hampshire, to decide more than a half century ago. A Jehovah's Witness who had been warned about his proselytizing by a city marshal responded by calling the marshal "a God damned racketeer" and "a damned Fascist." The defendant was convicted under a law that prohibited calling someone an offensive or derisive name. The state supreme court held the statute to cover only words that "men of common intelligence would understand [to be] likely to cause an average addressee to fight." The Supreme Court, affirming the conviction, said:

There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or "fighting" words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace. Such utterances are not essential part of any expository ideas, and 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.

Two developments since Chaplin have substantially undercut its rationale and its permissive attitude toward punishment of fighting words. The opinion says "such utterances are no essential part of any expositions of ideas...." Fighting words cannot, unfortunately, be dismissed as lacking any expressive content. In meaning, they attribute negative characteristics to the object. Group epithets, such as "kike" or "wop" or "nigger," call to mind negative qualities that some people associate with a group, such as laziness, greed, dishonesty, stupidity, and vulgarity, and make a strongly negative evaluation of the group.


Section C

FREE SPEECH AND HATE SPEECH, WITH NOTES ON COMMERCIAL SPEECH AND CAMPAIGN SPEECH

Is the expressive value of such utterances negligible because the same ideas could be stated in less troubling language? In one of the first developments since Chaplin, the Court rejected this approach in a 1971 case. In Overton v. Cohen, the Court held that "Fucking the Draft," Justice Harlan's opinion for the Court in Cohen v. California indicated that people are free to choose the words that best reflect their feelings, and strong words may better convey to listeners the intensity of feeling than more conventional language.

The second important development since Chaplin has been the Court's invalidation of statutes directed at offensive language, on grounds of overbreadth and vagueness. Provisions have been found too vague to guide conduct and overbroad in reaching too much speech that is protected. Under Supreme Court doctrine, when a statute suffers the defect of substantial overbreadth, it improperly chills free speech, and it may not be used even against those whose own speech otherwise might properly be punished.

The basic idea that likely responsive violence can be the basis for punishing insulting words remains from Chaplin and lies close to the subject covered by the Brandenburg principle. It would be odd to say that public insults can be punished on a lower probability of violence than actual urgings of illegal violent acts. Under Brandenburg, imminent lawless action must be likely; something similar should be needed if fighting words are punished for their propensity to cause immediate violence. Chaplin's suggestion that an "average addressee" must be likely to fight, however, is inappropriate or misleading, and almost certainly reflects the implicit sense that actors are male. When one takes women, children, and old people of both sexes into account, it is doubtful whether any words are likely to cause the "average addressee" to fight. The focus on groups of addressers other than young males raises a more deeply troubling question as to whether likely violence in the particular instance should be the standard for punishment. In otherwise similar circumstances, a white male of twenty-five calls an Afro-American male of twenty-five a "nigger," and six white males of twenty-five call an Afro-American female of sixty a "nigger." Can it really be that the first male is constitutionally punishable and the other six males are not?

Abusive words can wound their targets deeply, offending them and a much broader audience as well. Perhaps they may have a negative effect on public communication by endangering the civility of discourse. Group epithets can reinforce feelings of prejudice, inferiority, and hostility among groups, thus contributing to social patterns of domination. Which, if any, of these bases underlie punishment of insulting words in the United States?

Perhaps the Supreme Court has not completely rejected the idea that offensive expression could underlie conviction, but in Cohen v. California and other cases striking down criminal provisions for overbreadth and vagueness, it has strongly suggested that in our society people must be wary enough to tolerate very strong expression if they do not avoid it. The Court has permitted a ban on some words on
daytime radio,^{6} regulation of the location of theaters specializing in adult movies,^{7} and discipline of a high school student who used "vulgar and offensive" language at a school assembly,^{8} but it has not sustained any absolute prohibition of forms of speech because they are thought to be offensive.

When focusing on long-term harms, one encounters problems that are among the most difficult for any democratic legal order. In the first instance, the relevant domain of utterances expands significantly. The harm from group epithets can occur not only when words are directed toward members of the group but also when members are not present. For example, men who use denigrating expressions about women in conversations with each other may impair gender equality just as much as men who address denigrating expressions toward women. Moreover, the harm can occur whether or not the speaker chooses particularly crude or offensive language. Even neutral-sounding scientific language can be deeply corrosive, as we see when people deny that many Jews were killed during World War II or claim that Afro-Americans possess less intelligence on the average than whites.

If the concern is with the long-term effect of language that denigrates members of groups, even polite language can cause much of the same harm. To admit that such language can be punished is to strike much more severely at traditional concepts of free speech, and certainly flies in the face of a principle of "no content regulation." Yet allowing such speech may perpetuate or cause unjust inequalities. For liberal democracies committed to equality and to liberty of speech, the dilemma is painful.

The leading U.S. Supreme Court case on the subject, [at the time of writing] nearly forty years old, vividly portrays the problem. An Illinois law forbade publications portraying "depravity, criminality, unchastity, or lack of virtue of a class of citizens, of any race, color, creed or religion [in a way that exposes those citizens] to contempt, derision, or obloquy or which is productive of breach of the peace or riots." Beaufournais had organized distribution of a leaflet asking city officials to resist the invasion of the Negro and warning that if "the need to prevent the white race from becoming mongrelized by the negro will not unite us, then the aggressions... rapes, robberies, knives, guns and marijuana of the negro, surely will." The Court upheld the conviction, emphasizing the publication to group libel, instances in which a small group is defamed in such a way that the damaging remark falls on all group members. The Court mentioned the danger of racial riots, which a legislature might reasonably think is increased by racist speech.

The leaflet's collection of claimed facts and opinions certainly did not contribute to a healthy racial climate. Yet, under ordinary free speech standards, the opinions, for example, about the undesirability of whites having children with blacks, would be protected. The asserted

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46 See Beaufournais v. Illinois, 343 U.S. 290 (1952). [Editor's Note: This article was written prior to R.A.V. v. St. Paul, 505 U.S. 877 (1992), discussed below in Section 5.]

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R. v. Keegstra

[1989] 3 S.C.R. 497 (Supreme Court of Canada)

Appeal from a judgement of the Alberta Court of Appeal, 43 C.C.C. 3d 150 (1988) allowing the accused's appeal from his conviction on a charge of wilfully promoting hatred contrary to s. 319(2) of the Criminal Code.

- Present. *DICKSON C.J.C., WILSON, LA FORST, L'HEUREUX-DUBÉ, SPOKINA, GONTHIER and MCLAHLIN JJ. [Chief Justice at the time of the hearing.]

- The judgment of DICKSON C.J.C., and WILSON, L'HEUREUX-DUBÉ and GONTHIER J.J. was delivered by DICKSON C.J.C.—This appeal ... raises a delicate and highly controversial issue as to the constitutional validity of s. 319(2) of the Criminal Code, R.S.C. 1985, c. C-46, a legislative provision which prohibits the willful promotion of hatred, other than in private conversation, towards any section of the public distinguished by colour, race, religion or ethnic origin. In particular, the Court must decide whether this section infringes the guarantee of freedom of expression found in s. 2(b) of the Canadian Charter of Rights and Freedoms in a manner that cannot be justified under s. 1 of the Charter....

1. Facts

Mr. James Keegstra was a high school teacher in Eckville, Alberta from the early 1970s until his dismissal in 1982. In 1984 Mr. Keegstra was charged under s. 319(2) of the Criminal Code with unlawfully promoting hatred against an identifiable group by communicating anti-Semitic statements to his students. He was convicted by a jury in a trial before McKenzie J. of the Alberta Court of Queen's Bench.

Mr. Keegstra's teachings attributed various evil qualities to Jews. He thus described Jews to his pupils as "treacherous", "subversive", "seditious", "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 expressed his students to reproduce his teachings in class and on exams.

If they failed to do so, their marks suffered....
The Attorneys General of Canada, Quebec, Ontario, Manitoba and New Brunswick, the Canadian Jewish Congress, Interantimac, the League for Human Rights of B'nai B'rith, Canada, and the Women's Legal Education and Action Fund (L.E.A.F.) have intervened in this appeal in support of the Crown. The Canadian Civil Liberties Association has intervened in support of striking down the impugned legislation.

III. Relevant Statutory and Constitutional Provisions

The relevant legislative and Charter provisions are set out below:

Criminal Code 319 . . .

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

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

(b) an offence punishable on summary conviction.

(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 on 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 towards an identifiable group in Canada.

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

(7) In this section . . . "identifiable group" [means any section of the public distinguished by colour, race, religion or ethnic origin.]

Canadian Charter of Rights and Freedoms

1. 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.

2. Everyone has the following fundamental freedoms:

(a) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;

(b) freedom of conscience and religion;

(c) freedom of and protection from unfounded search and seizure;

(d) the right to life, liberty and security of person including freedom from arbitrary detention and interference.

15. (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national and other ethnic origin, colour, religion, sex, age or mental or physical disability.

27. This Charter shall be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians . . .

V. The History of Hate Propaganda Crimes in Canada . . .

While the history of attempts to prosecute criminally the libel of groups is lengthy, the British Criminal Code provisions [did . . .] not focus specifically upon expression propagated with the intent of causing hatred against racial, ethnic or religious groups. Even before the Second World War, however, fears began to surface concerning the inadequacy of Canadian criminal law in this regard. In the 1930s, for example, Manitoba passed a statute combating a perceived rise in the dissemination of Nazi propaganda. Following the Second World War and revelation of the Holocaust, in Canada and throughout the world a desire grew to protect human rights, and especially to guard against discrimination. Internationally, this desire led to the landmark Universal Declaration of Human Rights in 1948, and, with reference to hate propaganda, was eventually manifested in two international human rights instruments. In Canada . . . most influential in changing the criminal law in order to prohibit hate propaganda was the appointment by Justice Minister Guy Favreau of a special committee to study problems associated with the spread of hate propaganda in Canada.

The Special Committee on Hate Propaganda in Canada, usually referred to as the Cohen Committee, was composed of the following members: Dean Maxwell Cohen, Q.C., Dean of the Faculty of Law, McGill University, chair; Dr. J.A. Curry, Principal, Queen's University; L'Abbé Gérard Dion, Faculty of Social Sciences, Laval University; Mr. Saul Hayes, Q.C., Executive Vice-President, Canadian Jewish Congress; Professor Mark B. MacGuigan, Associate Professor of Law, University of Toronto; Mr. Shane MacKay, Executive Editor, Winnipeg Free Press; and Professor Pierre-E. Trudeau, Associate Professor of Law, University of Montreal. This was a particularly strong Committee, and in 1966 it released the unanimous Report of the Special Committee on Hate Propaganda in Canada.

The tone of the Report is reflected in the opening paragraph of its Preface, which reads:

This Report is a study in the power of words to min . . . and what it is that a civilized society can do about it. Not every abuse of human communication can or should be controlled by law or custom. But every society from time to time draws lines at the point where the intolerable and the impermissible coincide. In a free society such as our own, where the privilege of speech can induce ideas that may change the very order itself, there is a bias weighed heavily in favour of the maximum of rhetoric whatever the cost and consequences. But that bias steps this side of injury to the community itself and to individual members or identifiable groups innocently caught in verbal cross-fire that goes beyond legitimate debate.

In keeping with these remarks, the recurrent theme running throughout the Report is the need to prevent the dissemination of hate propaganda without unduly infringing the freedom of expression, a
theme which led the Committee to recommend a number of amendments to the Criminal Code. These amendments were made, essentially along the lines suggested by the Committee, and covered the advocacy of genocide (s. 318), the public incitement of hatred likely to lead to a breach of peace (s. 319(1)) and the provision challenged in this appeal and presently found in s. 319(2) of the Code, namely, the wilful promotion of hatred.

VI. Section 2(b) of the Charter—Freedom of Expression

[After quoting Ford v. Quebec] ... [The reach of s. 2(b) is potentially very wide, expression being deserving of constitutional protection if "it serves individual and societal values in a free and democratic society" ...] [The Court has attempted to articulate more precisely some of the convictions fueling the freedom of expression, these being summarized in Irwin Toy [1989] 1 S.C.R. 927 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 meaning is conveyed.]

Although Ford commented upon the values generally seen to support the freedom of expression, the decision was also sensitive of the need to consider these values within the textual framework of the Charter. It is the presence of s. 1 which makes necessary this bifurcated approach to Canadian freedom of expression cases. Indeed, the application of this approach in Ford in part permitted the Court to give a large and liberal interpretation to s. 2(b), on the facts of the case leading to the inclusion of commercial expression within its ambit, and to state that the weighing of competing values would "in most instances" take place in s. 1. ...[from page 1550]

apt from rare cases where expression is communicated in a physically violent form, the Court has ... viewed the fundamental nature of the freedom of expression as ensuring that "if the activity conveys or attempts to convey a meaning, it has expressive content and prima facie falls within the scope of the guarantee". In other words, the term "expression" as used in s. 2(b) of the Charter embraces all content of expression irrespective of the particular meaning or message sought to be conveyed.

The second step in the analysis ... is to determine whether the purpose of the impugned government action is to restrict freedom of expression. The guarantee of freedom of expression will necessarily be infringed by government action having such a purpose. If, however, it is the effect of the action, rather than the purpose, that restrains an activity, s. 2(b) is not brought into play unless it can be demonstrated by the party alleging an infringement that the activity supports rather than undermines the principles and values upon which freedom of expression is based. ...[Editors' Note: Irwin Toy held that provincial legislation prohibiting television advertising directed at children under thirteen years of age infringed on the Charter's freedom of expression guarantee, but was justified under Charter Section One.]
freedom of expression decisions to support this belief. It is, in my opinion, inappropriate to attenuate the s. 2(b) freedom on the grounds that a particular context requires such; the large and liberal interpretation given the freedom of expression in Brown v. Board of Education indicates that the preferable course is to weigh the various contextual values and factors in s. 1.

I thus conclude on the issue of s. 2(b) by finding that s. 319(2) of the Criminal Code constitutes an infringement of the Charter guarantee of freedom of expression, and turn to examine whether such an infringement is justifiable under s. 1 as a reasonable limit in a free and democratic society.

VII. Section 1 Analysis of Section 319(2)

In the words of s. 1 are brought together the fundamental values and aspirations of Canadian society. As this Court has said before, the premier article of the Charter has a dual function, operating both to activate Charter rights and freedoms and to permit such reasonable limits as a free and democratic society may occasion to place upon them. What seems to me to be of significance in this dual function is the commonality that links the guarantee of rights and freedoms to their limitation. This commonality lies in the phrase “free and democratic society”… “The underlying values of a free and democratic society both guarantee the rights in the Charter and, in appropriate circumstances, justify limitations upon those rights.” (Sligh v. Communications Inc. v. Davidson, [1987] 1 S.C.R. 1038).

To a large extent, a free and democratic society embraces the very values and principles which Canadians have sought to protect and further by outranking specific rights and freedoms in the Constitution, although the balancing exercise in s. 1 is not restricted to values expressly set out in the Charter. With this guideline in mind, in Oakes ([1986] 1 S.C.R. 103) I commented upon some of the ideals that inform our understanding of a free and democratic society, saying:

The Court must be guided by the values and principles essential to a free and democratic society which I believe embody, to name but a few, respect for the inherent dignity of the human person, commitment to social justice and equality, accommodation of a wide variety of beliefs, respect for cultural and group identity, and faith in social and political institutions which enhance the participation of individuals and groups in society. The underlying values and principles of a free and democratic society are the genesis of the rights and freedoms guaranteed by the Charter and the ultimate standard against which a limit on a right or freedom must be shown, despite its effect, to be reasonable and demonstrably justified.

It is important not to lose sight of factual circumstances in undertaking a s. 1 analysis, 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. As Wilson J. said in Edmonton Journal v. Alberta (Attorney General), [1988] 2 S.C.R. 1330 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. The contextual approach attempts to bring into sharp relief the aspect of the right or freedom which is truly at stake in the case as well as the relevant aspects of any values in competition with it. It seems to be more sensitive to the reality of the dilemma posed by the particular facts and therefore more conducive to finding a fair and just compromise between the two competing values under s. 1. . . .

B. The Use of American Constitutional Jurisprudence

Having discussed the unique and unifying role of s. 1, I think it appropriate to address a tangential matter, yet one nonetheless crucial to the disposition of this appeal: the relationship between Canadian and American approaches to the constitutional protection of free expression, most notably in the realm of hate propaganda. Those who attack the constitutionality of s. 319(2) draw heavily on the tenor of First Amendment jurisprudence in weighing the competing freedoms and interests in this appeal, a reliance which is understandable given the prevalent opinion that the criminalization of hate propaganda violates the Bill of Rights. . . .

A myriad of sources—both judicial and academic—offer reviews of First Amendment jurisprudence as it pertains to hate propaganda. Central to most discussions is the 1952 case of Beauharnais v. Illinois, 343 U.S. 250, where the Supreme Court of the United States upheld as constitutional a criminal statute forbidding certain types of group defamation. Though never overruled, Beauharnais appears to have been weakened by later pronouncements of the Supreme Court (see, e.g., Garrison v. Louisiana, 379 U.S. 64 (1964); Ashton v. Kentucky, 384 U.S. 195 (1966); New York Times Co. v. Sullivan, 376 U.S. 254 (1964); Brandenburg v. Ohio, 395 U.S. 444 (1969); and Cohen v. California, 403 U.S. 15 (1971)). The trend reflected in many of these pronouncements is to protect offensive, public vitriolic as long as the speaker has not knowingly lied and there exists no clear and present danger of violence or incitement.

In the wake of subsequent developments in the Supreme Court, on several occasions Beauharnais has been distinguished and doubted by lower courts. Of the judgments expressing a shaken faith in Beauharnais, Collin v. Smith, 575 F.2d 1197 (7th Cir.1978), certiorari denied, 439 U.S. 916 (1978), is of greatest relevance to this appeal. In Collin, the Court of Appeal for the Seventh Circuit invalidated a municipal ordinance prohibiting public demonstrations inciting “violence, hatred, abuse or hostility toward a person or group of persons by reason of reference to religion, race, ethnic, national or regional affiliation”, and thereby allowed members of the American Nazi Party to march through Skokie, Illinois, home to a large number of Jewish Holocaust survivors.

The question that concerns us in this appeal is not, of course, what the law is or should be in the United States. But it is important to be explicit as to the reasons why or why not American experience may be useful in the s. 1 analysis of s. 319(2) of the Criminal Code. In the
a content-based categorization of the expression under examination. As an example, obscenity is not protected because of its content and laws prescribing child pornography have been scrutinized under a less than strict First Amendment standard even where they extend to expression beyond the realm of the obscenity (see New York v. Ferber, 458 U.S. 747 (1982)). Similarly, the vigorous protection of free speech relaxes significantly when commercial expression is scrutinized (see, e.g., Poussard v. Puerto Rico Associates v. Tourism Co. of Puerto Rico, 478 U.S. 328 (1986)), and it is permissible to restrict government employees in their exercise of the right to engage in political activity (Corridus v. NAACP Legal Defense and Educational Fund, Inc., 473 U.S. 788 (1985)).

In short, a decision to place expressive activity in a category which either merits reduced protection or falls entirely outside of the First Amendment's ambit at least implicitly involves assessing the content of the activity in light of free speech values. . . . [E]ven in the United States it is sometimes thought justifiable to restrict a particular message because of its meaning.

Third, applying the Charter to the legislation challenged in this appeal reveals important differences between Canadian and American constitutional perspectives. I have already discussed in some detail the special role of s. 1 in determining the protective scope of Charter rights and freedoms. Section 1 has no equivalent in the United States, a fact previously alluded to by this Court in selectively utilizing American constitutional jurisprudence. Of course, American experience should never be rejected simply because the Charter contains a balancing provision, for it is well known that American courts have fashioned compromises between conflicting interests despite what appears to be the absolute guarantee of constitutional rights. Where s. 1 operates to accommodate a uniquely Canadian vision of a free and democratic society, however, we must not hesitate to depart from the path taken in the United States. Far from requiring a less solicitous protection of Charter rights and freedoms, such independence of vision protects these rights and freedoms in a different way. As will be seen below, in my view the international commitment to eradicate hate propaganda and, most importantly, the special role given equality and multiculturism in the Canadian Constitution necessitate a departure from the view, reasonably prevalent in America at present, that the suppression of hate propaganda is incompatible with the guarantee of free expression . . .

Most importantly, the nature of the s. 1 test as applied in the context of a challenge to s. 319(2) may well demand a perspective particular to Canadian constitutional jurisprudence when weighing competing interests. If values fundamental to the Canadian conception of a free and democratic society suggest an approach that denies hate propaganda the highest degree of constitutional protection, it is this approach which must be employed.

C. Objective of Section 319(2)

I turn now to the specific requirements of the Oakes approach in deciding whether the infringement of s. 2(b) occasioned by s. 319(2) is justifiable in a free and democratic society. [The first aspect of the s. 1 analysis is to examine the objective of the impugned legislation. Only if
the objective relates to concerns which are pressing and substantial in a free and democratic society, can the legislative limit on a right or freedom hope to be permissible under the Charter . . .

(i) Harm Caused by Expression Promoting the Hatred of Identifiable Groups

Looking to the legislation challenged in this appeal, one must ask whether the amount of hate propaganda in Canada causes sufficient harm to justify legislative intervention of some type. The Cohen Committee, speaking in 1965, found that . . .

. . . there exists in Canada a small number of persons and a somewhat larger number of organizations, extremist in outlook and dedicated to the preaching and spreading of hatred and contempt against certain identifiable minority groups in Canada. It is easy to conclude that because the number of persons and organizations is not very large, they should not be taken too seriously. The Committee is of the opinion that this line of analysis is no longer tenable after what is known to have been the result of hate propaganda in other countries, particularly in the 1950's when such material and ideas played a significant role in the creation of a climate of malice, destructive to the central values of Judaic-Christian society, the values of our civilization. The Committee believes, therefore, that the actual and potential danger caused by present hate activities in Canada cannot be measured by statistics alone.

Even the statistics, however, are not unimpressive, because while activities have centered heavily in Ontario, they nevertheless have extended from Nova Scotia to British Columbia and minority groups in at least eight Provinces have been subjected to these vicious attacks.

In 1964, the House of Commons Special Committee on Participation of Visible Minorities in Canadian Society in its report, entitled Equality Now, observed that increased immigration and periods of economic difficulty "have produced an atmosphere that may be ripe for racially motivated incidents". With regard to the dissemination of hate propaganda, the Special Committee found that the prevalence and scope of such material had risen since the Cohen Committee made its report, if anything.

There has been a recent upsurge in hate propaganda. It has been found in virtually every part of Canada. Not only is it anti-Semitic and anti-black, as in the 1960s, but it is also now anti-Roman Catholic, anti-East Indian, anti-aboriginal people and anti-French. Some of this material is imported from the United States but much of it is produced in Canada. Most worrisome of all is that in recent years Canada has become a major source of supply of hate propaganda that finds its way to Europe, and especially to West Germany.

As the quotations above indicate, the presence of hate propaganda in Canada is sufficiently substantial to warrant concern . . . 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 great psychological and social consequence. In the context of sexual harassment, for example, this Court has found that words can in themselves constitute harassment. In a similar manner, words and writings that wilfully promote hatred can constitute a serious attack on persons belonging to a racial or religious group, and in this regard the Cohen Committee noted that these persons are humiliated and defiled.

In my opinion, a response of humiliation and degradation from an individual targeted by hate propaganda is to be expected. A person's sense of human dignity and belonging to the community at large is closely linked to the concern and respect accorded the groups to which he or she belongs. The derision, hostility and abuse encouraged by hate propaganda therefore have a severely negative impact on the individual's sense of self-worth and acceptance. This impact may cause target group members to make drastic measures in reaction, perhaps avoiding activities which bring them into contact with non-group members or adapting attitudes and postures directed towards blending in with the majority. Such consequences bear heavily in a nation that prides itself on tolerance and the fostering of human dignity through, among other things, respect for the many racial, religious and cultural groups in our society.

A second harmful effect of hate propaganda which 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" if information or ideas are communicated using the right technique and in the proper circumstances. . . . 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 "the truth is ever known, truth put to 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 pseudosciences like the Nazis, have qualified sharply our belief in the rationality of man. We know that under strain and pressure in times of irritation and frustration, the individual is awed 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.

It is thus not inconceivable that the active dissemination of hate propaganda can attract individuals to its cause, and in the process create serious discord between various cultural groups in society.
Moreover, the alteration of views held by the recipients of hate propaganda may occur subtly, and is not always attendant upon conscious acceptance of the communicated ideas. Even if the message of hate propaganda is outwardly rejected, there is evidence that its premise of racial or religious inferiority may persist in a recipient's mind as an idea that holds some truth, an insinuating effect not to be entirely discounted. 

The amount of hate propaganda presently being disseminated and its measurable effects probably are not sufficient to justify a description of the problem as one of crisis or near crisis proportions. Nevertheless the problem is a serious one. We believe that, given a certain set of socioeconomic circumstances, such as a deepening of the emotional tensions or the setting in of a severe business recession, public susceptibility might well increase significantly. Moreover, the potential psychological and social damage of hate propaganda, both to a desensitized majority and to sensitive minority target groups, is incalculable. As Mr. Justice Jackson of the United States Supreme Court wrote in Barenhains 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".

The close connection between the recommendations of the Cohen Committee and the hate propaganda amendments to the Criminal Code made in 1970 indicates that in enacting s. 519(2) Parliament's purpose was to prevent the harm identified by the Committee as being caused by hate-promoting expression. 

(iii) International Human Rights Instruments

Generally speaking, the international human rights obligations taken on by Canada reflect the values and principles of a free and democratic society, and thus those values and principles that underlie the Charter itself...

No aspect of international human rights has been given attention greater than that focused upon discrimination...

In 1966, the United Nations adopted the International Convention on the Elimination of All Forms of Racial Discrimination. Can. T.S. 1970 No. 28 (hereinafter "CERD"). The Convention, in force since 1969 and including Canada among its signatory members, contains a resolution that States Parties agree to:

- adopt all necessary measures for speedily eliminating racial discrimination in all its forms and manifestations, and to prevent and combat racist doctrine and practices in order to promote understanding between races and to build an international community free from all forms of racial segregation and racial discrimination.

Article 4 of the CERD is of special interest, providing that:... States Parties condemn all propaganda and all organizations which are based on ideas or theories of superiority of one race or group of persons of one colour or other ethnic origin, or which attempt to justify or promote racial hatred and discrimination in any form, and undertake to adopt immediate and positive measures designed to eradicate all incitement to such discrimination and, to this end, with due regard to the principles embodied in the Universal Declaration of Human Rights and the rights expressly set forth in article 1 of this Convention, inter alia:

(a) Shall declare an offence punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin, and also the provision of any assistance to racist activities, including the financing thereof;

Further, the International Covenant on Civil and Political Rights, 999 U.N.T.S. 171 (1966) (hereinafter "ICCPR"), adopted by the United Nations in 1966 and in force in Canada since 1976, in the following two articles guarantees the freedom of expression while simultaneously prohibiting the advocacy of hatred:

Article 19...

2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.

3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. They may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:

(a) For respect of the rights or reputations of others;

(b) For the protection of national security or of public order ("ordre public"), or of public health or morals.

Article 20. 1. Any propaganda for war shall be prohibited by law.

2. Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.

It appears that the protection provided freedom of expression by CERD and ICCPR does not extend to cover communications advocating racial or religious hatred. In discussing the stance taken toward hate propaganda in international law, it is also worth mentioning the European Convention for the Protection of Human Rights and Fundamental Freedoms, 213 U.N.T.S. 221 (1950), to which twenty-one states are parties. The Convention contains a qualified guarantee of free expression in Article 10...

Article 10(2), the language of which bears significant resemblance to that of s. 1 of the Charter, has been interpreted by the European Commission of Human Rights so as to permit the prohibition of racist...
communications as a valid derogation from the protection of free expression... 

CERD and ICCPR demonstrate that the prohibition of hate-promoting expression is considered to be not only compatible with a state's national guarantee of human rights, but is as well an obligatory aspect of this guarantee. Decisions under the European Convention for the Protection of Human Rights and Fundamental Freedoms are also of aid in illustrating the tenor of the international community's approach to hate propaganda and free expression... 

(iii) Other Provisions of the Charter... 

... Most importantly for the purposes of this appeal, ss. 15 and 27 represent a strong commitment to the values of equality and multiculturalism, and hence underlie the great importance of Parliament's objective in prohibiting hate propaganda... 

It is clear that the purpose of s. 15 is to ensure equality in the formulation and application of the law. The promotion of equality entails the promotion of a society in which all are secure in the knowledge that they are recognized at law as human beings equally deserving of concern, respect and consideration. It has a large remedial component... [Andrews v. Law Society, 1989] 1 S.C.R. 145]

The value expressed in s. 27 cannot be casually dismissed in assessing the validity of s. 319(2) under s. 1, and... s. 27 and the commitment to a multicultural vision of our nation bear notice in emphasizing the acute importance of the objective of eradicating hate propaganda from society... [The sense that an individual can be affected by treatment of a group to which he or she belongs is clearly evident in a number of other Charter provisions not yet mentioned, including ss. 16 to 23 (language rights), s. 25 (aboriginal rights), s. 28 (gender equality) and s. 29 (denominational schools).]

Hate propaganda seriously threatens both the enthusiasm with which the value of equality is accepted and acted upon by society and the connection of target group members to their community... When the prohibition of expressive activity that promotes hatred of groups identifiable on the basis of colour, race, religion, or ethnic origin is considered in light of s. 27, the legitimacy and substantial nature of the government objective is therefore considerably strengthened... 

D. Proportionality

The second branch of the Oakes test—proportionality—poses the most challenging questions with respect to the validity of s. 319(2) as a reasonable limit on freedom of expression in a free and democratic society... 

(i) Relation of the Expression at Stake to Free Expression Values... 

One must ask whether the expression prohibited by s. 319(2) is tenaciously connected to the values underlying s. 2(b) so as to make the restriction "easier to justify than other infringements..."... [There can be no real disagreement about the subject matter of the messages and teachings communicated by the respondent, Mr. Koolstra: it is deeply offensive, hurtful and damaging to target group members, misleading to his listeners, and antithetical to the furtherance of tolerance and understanding in society. Furthermore, as will be clear when I come to discuss in detail the interpretation of s. 319(2), there is no doubt that all expression fitting within the terms of the offence can be similarly described. To say merely that expression is offensive and disturbing, however, fails to address satisfactorily the question of whether, and to what extent, the expressive activity prohibited by s. 319(2) promotes the values underlying the freedom of expression. It is to this difficult and complex question that I now turn.

From the outset, I wish to make clear that in my opinion the expression prohibited by s. 319(2) is not closely linked to the rationale underlying s. 2(b)... [Expression intended to promote the hatred of identifiable groups is of limited importance when measured against free expression values [identified in Ford and Irwin Toy].

At the core of freedom of expression lies the need to ensure that truth and the common good are attained, whether in scientific and artistic endeavors or in the process of determining the best course to take in our political affairs. Since truth and the ideal form of political and social organization can rarely, if at all, be identified with absolute certainty, it is difficult to prohibit expression without impeding the free exchange of potentially valuable information. Nevertheless, the argument from truth does not provide convincing support for the protection of hate propaganda. Taken to its extreme, this argument would require us to permit the communication of all expression, it being impossible to know with absolute certainty which factual statements are true, or which ideas attain the greatest good. The problem with this extreme position, however, is that the greater the degree of certainty that a statement is erroneous or mendacious, the less its value in the quest for truth. Indeed, expression can be used to the detriment of our search for truth; the state should not be the sole arbiter of truth, but neither should we overlook the view that rationality will overcome all falsehoods in the unregulated marketplace of ideas. There is very little chance that statements intended to promote hatred against an identifiable group are true, or that their vision of society will lead to a better world. To portray such statements as crucial to truth and the betterment of the political and social milieu is therefore misguided.

Another component central to the rationale underlying s. 2(b) concerns the vital role of free expression as a means of ensuring individuals the ability to gain self-fulfillment by developing and articulating thoughts and ideas as they see fit. It is true that s. 319(2) inhibits this process among those individuals whose expression it limits, and hence arguably works against freedom of expression values. On the other hand, such self-autonomy stems in large part from one's ability to articulate and nurture an identity derived from membership in a cultural or religious group. The message put forth by individuals who fall within the ambit of s. 319(2) represents a most extreme opposition to the idea that members of identifiable groups should enjoy this respect of the s. 2(b) benefit. The extent to which the unhindered promotion of this message furthers free expression values must therefore be tempered insofar as it advocates with inordinate virility an intolerance and prejudice which view as execrable the process of individual self-development and human flourishing among all members of society.
Moving on to a third strand of thought said to justify the protection of free expression, one's attention is brought specifically to the political realm. The connection between freedom of expression and the political process is perhaps the linchpin of the s. 2(b) guarantee, and the nature of this connection is largely derived from the Canadian commitment to democracy. Freedom of expression is a crucial aspect of the democratic commitment, not merely because it permits the best policies to be chosen from among a wide array of proffered options, but additionally because it helps to ensure that participation in the political process is open to all persons. Such open participation must involve to a substantial degree the notion that all persons are equally deserving of respect and dignity. The state therefore cannot act to hinder or condemn a political view without some basis for harming the openness of Canadian democracy and its associated tenet of equality for all.

The suppression of hate propaganda undoubtedly muzzles the participation of a few individuals in the democratic process, and hence detracts somewhat from free expression values, but the degree of this limitation is not substantial. I am aware that the use of strong language in political and social debate—indeed, perhaps even language intended to promote hatred—is an unavoidable part of the democratic process. Moreover, I recognize that hate propaganda is expression of a type which would generally be categorized as "political," thus patently placing it at the very heart of the principle extolling freedom of expression as vital to the democratic process. Nonetheless, expression can work to undermine our commitment to democracy where employed to propagate ideas anathemic to democratic values. Hate propaganda works in just such a way, arguing as it does for a society in which the democratic process is subverted and individuals are denied respect and dignity simply because of the content. Similarly, it is very doubtful that the brand of expressive activity is thus wholly inimical to the democratic aspirations of the free expression guarantee.

Indeed, one may quite plausibly contend that it is through rejecting hate propaganda that the state can best encourage the protection of values central to freedom of expression, while simultaneously demonstrating dislike for the vision forwarded by hate-mongers. . .

[If] even the unparalleled vigour with which hate propaganda repudiates and undermines democratic values, and in particular its condemnation of the view that all citizens need be treated with equal respect and dignity so as to make participation in the political process meaningful, I am unable to see the protection of such expression as integral to the democratic ideal so central to the s. 2(b) rationale.

(ii) Rational Connection . . .

Doubts have been raised, however, as to whether the actual effect of s. 319(2) is to undermine any rational connection between it and Parliament's objective. As stated in the reasons of McLachlin J., there are three primary ways in which the effect of the impugned legislation might be seen as an irrational means of carrying out the Parliamentary purpose. First, it is argued that the provision may actually promote the cause of hate-mongers by enabling them extensive media attention. Second, the public may view the suppression of expression by the government with suspicion, making it possible that such expression—even if it be hate propaganda—is perceived as containing an element of truth. Finally, it is often noted, citing the writings of A. Noer, Defending My Enemy: American Nazis, the Skokie Case, and the Risks of Freedom (1979), that Germany of the 1920s and 1930s possessed and used hate propaganda laws similar to those existing in Canada, and yet these laws did nothing to stop the triumph of a racist philosophy under the Nazis.

If s. 319(2) can be said to have no impact in the quest to achieve Parliament's admirable objectives, or in fact works in opposition to these objectives, then I agree that the provision could be described as "arbitrary, unfair or based on irrational considerations."

. . . [From] my perspective, s. 319(2) serves to illustrative to the public the severe reprobation with which society holds messages of hate directed towards racial and religious groups. The existence of a particular criminal law, and the process of holding a trial when that law is used, is thus itself a form of expression, and the message sent out is that hate propaganda is harmful to target group members and threatening to a harmonious society. As I stated in my reasons in R. v. Morgentaler, "the criminal law is a very special form of governmental regulation, for it seeks to express our society's collective disapproval of certain acts and omissions." The many, many Canadians who belong to identifiable groups surely gain a great deal of comfort from the knowledge that the hate-monger is criminally prosecuted and has or her ideas rejected. Equally, the community as a whole is reminded of the importance of diversity and multiculturalism in Canada, the value of equality and the worth and dignity of each human person being particularly emphasized.

In this context, it can also be said that government suppression of hate propaganda will not make the expression attractive and hence increase acceptance of its content. Governmental disapproval of hate propaganda does not invariably result in dignifying the suppressed ideology. Pornography is not dignified by its suppression, nor are defamatory statements against individuals seen as meritorious because the common law lends its support to their prohibition. Again, I stress my belief that hate propaganda legislation and trials are a means by which the values beneficial to a free and democratic society can be publicized.

As for the use of hate propaganda laws in pre-WWII Nazi Germany, I am skeptical as to the relevance of the observation that legislation similar to s. 319(2) proved ineffective in curbing the racism of the Nazis. No one is contending that hate propaganda laws can in themselves prevent the tragedy of the Holocaust. Rather, hate propaganda laws are one part of a free and democratic society's bid to prevent the spread of racism, and their rational connection to this objective must be seen in such a context. Certainly West Germany has not reacted to the failure of pre-war laws by seeking their removal, a new set of criminal offences having been implemented as recently as 1985 (see E. Stein, "History Against Free Speech: The New German Law Against the Nazi Past" and others—"Ilie" (1987), 85 Mich. L. Rev. 277). Nor, as has been discussed, has the international community regarded the promulgation of laws suppressing hate propaganda as futile or counter-productive. Indeed, this Court's attention has been
The principle of restraint requires lawmakers to concern themselves not just with whom they want to catch, but also with whom they do not want to catch. For example, removing an intent or purpose requirement could well result in a proliferation of cases similar to Buzangano, (1979), 49 C.C.C. (2d) 369 (Ont. C.A.) where members of a minority group publish hate propaganda against their own group in order to create controversy or to agitate for reform. This crime should not be used to prosecute such individuals (quoting Law Reform Commission, Working Paper on Hate Propaganda).

I agree with the interpretation of "willfully" in Buzangano, and wholeheartedly endorse the view of the Law Reform Commission Working Paper that this stringent standard of mens rea is an invaluable means of limiting the incursion of s. 319(2) into the realm of acceptable (though perhaps offensive and controversial) expression. It is clear that the word "willfully" imports a difficult burden for the Crown to meet and, in so doing, serves to minimize the impairment of freedom of expression.

It has been argued, however, that even a demanding mens rea component fails to give s. 319(2) a constitutionally acceptable breadth. The problem is said to lie in the failure of the offence to require proof of actual hatred resulting from a communication, the assumption being that such proof can demonstrate a harm serious enough to justify limiting the freedom of expression under s. 1.

While mindful of the dangers ... I do not find them sufficiently grave to compel striking down s. 319(2). First, to predicate the limitation of free expression upon proof of actual hatred gives insufficient attention to the severe psychological trauma suffered by members of those identifiable groups targeted by hate propaganda. Second, it is clearly difficult to prove a causative link between a specific statement and hatred of an identifiable group. In fact, to require direct proof of hatred in listeners would severely dehelicize the effectiveness of s. 319(2) in achieving Parliament's aim. It is well accepted that Parliament can use the criminal law to prevent the risk of serious harms, a leading example being the drinking and driving provisions in the Criminal Code. The conclusions of the Cohen Committee and subsequent study groups show that the risk of hatred caused by hate propaganda is very real, and it in view of the grievous harm to be avoided in the context of this appeal, I conclude that proof of actual hatred is not required in order to justify a limit under s. 1.

c. Alternative Modes of Furthering Parliament's Objective

One of the strongest arguments supporting the contention that s. 319(2) unacceptably impairs the s. 2(b) guarantee posits that a criminal sanction is not necessary to meet Parliament's objective. ... Most generally, it is said that discriminatory ideas can best be met with information and education programmes extolling the merits of tolerance and cooperation between racial and religious groups. As for the prohibition of hate propaganda, human rights statutes are pointed to as being a less severe and more effective response than the criminal law. Such statutes not only subject the disseminator of hate propaganda to reduced stigma and punishment, but also take a less confrontational approach to the suppression of such expression. This conciliatory tack is
said to be preferable to penal sanction because an incentive is offered the disseminator to cooperate with human rights tribunals and thus to amend his or her conduct.

Given the stigma and punishment associated with a criminal conviction and the presence of other modes of government response in the fight against intolerance, it is proper to ask whether s. 319(2) can be said to impair minimally the freedom of expression...

In assessing the proportionality of a legislative enactment to a valid governmental objective, however, s. 1 should not operate in every instance so as to force the government to rely upon only the mode of intervention least intrusive of a Charter right or freedom. It may be that a number of courses of action are available in the furtherance of a pressing and substantial objective, each imposing a varying degree of restriction upon a right or freedom. In such circumstances, the government may legitimately employ a more restrictive measure, either alone or as part of a larger programme of action, if that measure is not redundant, furthering the objective in ways that alternative responses could not, and is in all other respects proportionate to a valid s. 1 aim.

Though the fostering of tolerant attitudes among Canadians will be best achieved through a combination of diverse measures, the harm done through hate propaganda may require that especially stringent responses be taken to suppress and prohibit a medium of expressive activity. At the moment, for example, the state has the option of responding to hate propaganda by acting under either the Criminal Code or human rights provisions. In my view, having both avenues of redress at the state's disposal is justified in a free and democratic society...

d. Conclusion as to Minimal Impairment

To summarize the above discussion, in light of the great importance of Parliament's objective and the discounted value of the expression at issue I find that the terms of s. 319(2) create a narrowly confined offence which suffers from neither overbreadth nor vagueness. This interpretation stems largely from my view that the provision possesses a stringent mens rea requirement, necessitating either an intent to promote hatred or knowledge of the substantial certainty of such, and is also strongly supported by the conclusion that the meaning of the word "hated" is restricted to the most severe and disfavored form of opprobrium. Additionally, however, the conclusion that s. 319(2) represents a minimal impairment of the freedom of expression gains credence through the exclusion of private conversation from its scope, the need for the promotion of hatred to focus upon an identifiable group and the presence of the s. 319(3) defences. As for the argument that other modes of combating hate propaganda eclipse the need for a criminal provision, it is eminently reasonable to utilize more than one type of legislative tool in working to prevent the spread of racist expression and its resultant harm. It will indeed be more difficult to justify a criminal statute under s. 1, but in my opinion the necessary justificatory arguments have been made out with respect to s. 319(2)...

### Free Speech and Hate Speech, with Notes on Commercial Speech and Campaign Speech

Section C

(vi) Effects of the Limitation

The third branch of the proportionality test entails a weighing of the importance of the state objective against the effect of limits imposed upon a Charter right or guarantee...

I have little trouble in finding that its effects, involving as they do the restriction of expression largely removed from the heart of free expression values, are not of such a deleterious nature as to outweigh any advantage gleaned from the limitation of s. 20(9)...

- McLachlin J. dissenting—

Introduction

The issue on this appeal is whether ss. 319(2) and 319(3) of the Criminal Code, R.S.C., 1985, c. C-46, creating the offence of unlawfully promoting hatred, should be struck down on the ground that they infringe the guarantees of free expression and the presumption of innocence embodied in the Canadian Charter of Rights and Freedoms.

Mr. Koegestra, a secondary school teacher in Eckville, a small town in Alberta, was convicted of unlawfully promoting hatred under s. 319(2). The evidence established that he had systematically denigrated Jews and Judaism in his classes... He maintained that anyone Jewish must be evil and that anyone evil must be Jewish. Not only did he maintain these things; he advised the students that they must accept his views as true unless they were able to contradict them. Moreover, he expected his students to repudiate these notions in essays and examinations. If they did so, they received good marks. If they did not, their marks were poor...

Salient among the justifications for free expression... is the postulate that the freedom is instrumental in promoting the free flow of ideas essential to political democracy and the functioning of democratic institutions. This is sometimes referred to as the political process rationale. The locus classicus of this rationale is A. Meiklejohn, Free Speech and Its Relation to Self-Government (1948).

A corollary of the view that expression must be free because of its role in the political process is that only expression relating to the political process is worthy of constitutional protection. However, within these limits protection for expression is said to be absolute. The political process rationale has played a significant role in the development of First Amendment doctrine in the United States, and various justices of the U.S. Supreme Court (though never a majority) have embraced the theory that protection of speech is absolute within these restricted bounds. Its importance has also been affirmed by Canadian courts, both before and since the advent of the Charter...

Another venerable rationale for freedom of expression (dating at least to Milton's Areopagitica in 1644) is that it is an essential precondition of the search for truth. Like the political process model, this model is instrumental in outlook. Freedom of expression is seen as a means of promoting a "marketplace of ideas", in which competing ideas vie for supremacy to the end of attaining the truth. The "marketplace of ideas" metaphor was coined by Justice Oliver Wendell Holmes, in his famous dissent in Abrams v. United States, 250 U.S. 616 (1919). This approach, however, has been criticized on the ground that
there is no guarantee that the free expression of ideas will in fact lead to the truth. Indeed, as history attests, it is quite possible that dangerous, destructive and inherently untrue ideas may prevail, at least in the short run.

Notwithstanding the cogency of this critique, it does not negate the essential validity of the notion of the value of the marketplace of ideas. While freedom of expression provides no guarantee that the truth will always prevail, it still can be argued that it assists in promoting the truth in ways which would be impossible without the freedom of expression.

But freedom of expression may be viewed as more than a means to other ends. Many assert that free expression is an end in itself, a value essential to the sort of society we wish to preserve. This view holds that freedom of expression "derives from the widely accepted premise of Western thought that the proper end of man is the realization of his character and potentialities as a human being." It follows from this premise that all persons have the right to form their own beliefs and opinions, and to express them. "For expression is an integral part of the development of ideas, of mental exploration and of the affirmation of self." T. H. Emerson, "Toward a General Theory of the First Amendment" (1963), 72 Yale L.J. 877, at p. 879.

Freedom of expression is seen as worth preserving for its own intrinsic value.

... [An emphasis on the intrinsic value of freedom of expression provides a useful supplement to the more utilitarian rationale, justifying, for example, forms of artistic expression which some might otherwise be tempted to exclude.]

Arguments based on intrinsic value and practical consequences are married in the thought of P. Schauer (Free Speech and Philosophical Enquiry (1983)). Rather than evaluating expression to see why it might be worthy of protection, Schauer evaluates the reasons why a government might attempt to limit expression. Schauer points out that throughout history, attempts to restrict expression have accounted for a disproportionate share of governmental blunders—from the condemnation of Galileo for suggesting the earth is round to the suppression as "obscene" of many great works of art. Professor Schauer explains this peculiar inability of censoring governments to avoid mistakes by the fact that, in limiting expression, governments often act as judge in their own cause. They have an interest in silencing criticism of themselves, or even in enhancing their own popularity by silencing unpopular expression. These motives may render them unable to carefully weigh the advantages and disadvantages of suppression in many instances. That is not to say that it is always illegitimate for governments to curtail expression, but government attempts to do so must prima facie be viewed with suspicion.

How do these diverse justifications of freedom of expression relate to s. 2(b) of the Charter? First, it may be noted that the broad wording of s. 2(b) of the Charter is arguably inconsistent with a justification based on a single facet of free expression. This suggests that there is no need to adopt any one definitive justification for freedom of expression. Different justifications for freedom of expression may assume varying degrees of importance in different fact situations.

The interpretation which has been placed on s. 2(b) of the Charter confers the relevance of both instrumental and intrinsic justifications for free expression. This Court has adopted a purposive approach in construing the rights and freedoms guaranteed by the Charter. When placed in the context of the judicial history of freedom of expression in Canada, it suggests that it is appropriate to consider the ends which freedom of speech may serve in determining its scope and the justifiability of infringements upon it. These ends include the maintenance of our democratic rights and the benefits to be gained from the pursuit of truth and creativity in science, art, industry and other endeavours. At the same time, the emphasis which this Court has placed upon the inherent dignity of the individual in interpreting Charter guarantees suggests that the rationale of self-actualization should also play an important part in decisions under s. 2(b) of the Charter.

B. The Historical Perspective

Freedom of speech and the press had acquired quasi-constitutional status well before the adoption of the Charter in 1882. In a series of cases dealing with legislation passed by repressive provincial regimes, the Supreme Court endorsed the proposition that the right to express political ideas could not be trammeled by the legislatures.

The focus of these decisions was the division of powers between the provinces and the federal government. The Alberta Press reference [Alberta Statutes, [1938] S.C.R. 100] provides a good example. At issue was a bill introduced by the Alberta Legislature to compel newspapers to disclose their sources of news and information and to prohibit government statements correcting previous articles. The bill was struck down on the basis that the province had no jurisdiction over the free working of the political institutions of the state. Political expression, vital to the country as a whole, could not be limited by provincial legislation.

These decisions confirmed the fundamental importance of freedom of speech and the press in Canada. The conception of freedom of speech embodied in these cases, however, was largely limited to the political process model.

Nevertheless, one thing has remained constant throughout all the decisions. That is the recognition that freedom of speech is a fundamental Canadian value.

The enactment of s. 2(b) of the Charter represented both the continuity of these traditions, and a new flourishing of the importance of freedom of expression in Canadian society.

C. Hate Propaganda and Freedom of Speech—An Overview

Hate literature presents a great challenge to our conceptions about the value of free expression. Its offensive content often constitutes a direct attack on many of the other principles which are cherished by our society. Tolerance, the dignity and equality of all individuals; these and other values are all adversely affected by the propagation of hateful sentiment. The problem is not peculiarly Canadian, it is universal. Wherever racially or culturally distinct groups of people live together, one finds people, usually a small minority of the population, who take it
upon themselves to denigrate members of a group other than their own. Canada is no stranger to this conduct. Our history is replete with examples of discriminatory communications. In their time, Canadians of Asian and East Indian descent, black, and native people have been the objects of communications tending to foster hate. In the case of anti-Semitism it is the Jewish people who have been singled out as objects of calumny.

The evil of hate propaganda is beyond doubt. It inflicts pain and indignity upon individuals who are members of the group in question. Insofar as it may persuade others to the same point of view, it may threaten social stability. And it is intrinsically offensive to people—the majority in most democratic countries—who believe in the equality of all people regardless of race or creed.

For these reasons, governments have legislated against the dissemination of propaganda directed against racial groups, and in some cases this legislation has been tested in the courts. Perhaps the experience most relevant to Canada is that of the United States, since its Constitution, like ours, places a high value on free expression, raising starkly the conflict between freedom of speech and the countervailing values of individual dignity and social harmony. Like s. 5(b), the First Amendment guarantee is conveyed in broad, unrestricted language, stating that “Congress shall make no law ... abridging the freedom of speech, or of the press.” The relevance of aspects of the American experience to this case is underlined by the facts and submissions, which borrowed heavily from ideas which may be traced to the United States.

The protections of the First Amendment to the U.S. Constitution, and in particular free speech, have always assumed a particular importance within the U.S. constitutional scheme, being regarded as the cornerstone of all other democratic freedoms. As expressed by Justice Black in West Virginia Board of Education v. Barnette, 319 U.S. 624 (1943), “If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.”

Nevertheless, tolerance for unpopular speech, especially speech which was perceived as a threat to vital security interests, was initially a hallmark of the U.S. Supreme Court. When the socialist labour leader Eugene Debs made a speech critical of United States involvement in the First World War, the court was content to uphold his conviction for “willfully caus[ing] or attempt[ing] to cause ... insubordination, disloyalty, mutiny, or refusal of duty, in the military or naval forces ... the recruiting or enlistment service”: Debs v. United States, 249 U.S. 211 (1919). A companion case set out the classic test for the justifiability of an abridgment of free speech:

The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evil that Congress has a right to prevent. (Schenck v. United States, 249 U.S. 47 (1919), at p. 52.)

The test was stiffened in the famous dissent of Holmes J. in Abrams v. United States, supra, at p. 628 ("present danger of immediate evil or an intent to bring it about") and Brandeis J. (Holmes J. concurring) in Whitney v. California, 274 U.S. 357 (1927):

... if there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence.

... moreover, even imminent danger cannot justify resort to prohibition of those functions essential to effective democracy, unless the evil apprehended is relatively serious.... There must be the probability of serious injury to the State.

This stricter formulation of the "clear and present danger" test came to be accepted as the standard for a justified infringement of the free speech guarantee, but it too was subject to varying interpretation. In the climate atmosphere of the cold war, the court upheld convictions of communists for conspiring to advocate the overthrow of the United States government in Dennis v. United States, 341 U.S. 494 (1951). Purporting to apply the above test, the court endorsed the following formulation: "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?" This is how matters stood when hate propaganda first came to the attention of the court.

[Justice McLaughlin's discussion of Beauharnais is omitted.]

But the full flowering of First Amendment doctrine came after the Beauharnais case. Later cases have weakened its authority to the extent that many regard it as overruled. ... The test that emerges from Brandenburg is much stricter than the earlier formulations—advocacy of the use of force or violation of the law cannot be prohibited "except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action."

... It is worth describing a few doctrines associated with free speech that form part of the reasoning in the U.S. cases, and which are cited in the facts. One is a hierarchy of possible abridgments on free speech. Legislation against the content of speech has traditionally been distinguished from legislation restricting speech in other ways, with the former attracting stricter judicial scrutiny. For example, while "time, place and manner" regulation of speech has traditionally been given some latitude, an ordinance preventing picketing other than labour picketing near schools has been struck down because the law drew a distinction based on content of the speech: Police Department of the City of Chicago v. Mooney, 408 U.S. 92 (1972). Viewpoint-based abridgments of speech, in which the Government selects between viewpoints, will be more likely to be justifiable. Section 219(b) of the Criminal Code is probably best described as content-based rather than viewpoint-based, because the Government itself does not choose between viewpoints directly. A statement declaring the superiority of a particular race is not preferred over a declaration suggesting the reverse hierarchy. Rather, all discussion of the superiority of a particular race over another is partially suspect. This content-based provision is similar in this regard to the statute forbidding demonstrations critical of foreign
The task which judges are required to perform under s. 1 is essentially one of balancing. On the one hand lies a violation or limitation of a fundamental right or freedom. On the other lies a conflicting objective which the state asserts is of greater importance.
The demons of racial and cultural prejudice have never been either officially or unofficially exercised from Canadian society. We may, on occasion, have been marginally more enlightened than our southern neighbours, but instances of racism and intolerance are deeply etched in the historical record and, for that matter, not hard to find in the daily newspapers.

Given the problem of racial and religious prejudice in this country, I am satisfied that the objective of the legislation is of sufficient gravity to be capable of justifying limitations on constitutionally protected rights and freedoms.

(2) Proportionality

(a) General Considerations

The real question in this case, as I see it, is whether the means—the criminal prohibition of willfully promoting hatred—are proportional and appropriate to the ends of suppressing hate propaganda in order to maintain social harmony and individual dignity. The objective of the legislation is one of great significance, such significance that it is capable of outweighing the fundamental values protected by the Charter. The ultimate question is whether this objective is of sufficient importance to justify the limitation on free expression effected by s. 319(2) of the Criminal Code.

... In approaching the difficult task of determining where the balance lies in the context of this case, it is important not to be diverted by the offensive content of much of the speech in question. As this Court has repeatedly stated, even the most reprehensible or disagreeable comments are prima facie entitled to the protection of s. 2(b). It is not the statements of Mr. Keegstra which are at issue in this case, but rather the constitutionality of s. 319(2) of the Criminal Code.

Another general consideration relevant to the balancing of values involved in the proportionality test in this case relates peculiarly to the nature of freedom of expression. Freedom of expression is unique among the rights and freedoms guaranteed by the Charter in two ways.

The first way in which freedom of expression may be unique... is that the right to fully and openly express one's views on social and political issues is fundamental to our democracy and hence to all the other rights and freedoms guaranteed by the Charter. Without free expression, the vigorous debate on policies and values that underlies participatory government is lacking. Without free expression, rights may be trammelled with no recourse in the court of public opinion...

A second characteristic peculiar to freedom of expression is that limitations on expression tend to have an effect on expression other than that which is their target. In the United States this is referred to as the chilling effect... This chilling effect must be taken into account in performing the balancing required by the analysis under s. 1. It mandates that in weighing the intrusiveness of a limitation on freedom of expression our consideration cannot be confined to those who may ultimately be convicted under the limit, but must extend to those who may be deterred from legitimate expression by uncertainty as to whether they might be convicted.

(b) Rational Connection

... It is clear that the legislation does, at least at one level, further Parliament's objectives. Prosecutions of individuals for offensive material directed at a particular group may bolster its members' beliefs that they are valued and respected in their community, and that the views of a malicious few do not reflect those of the population as a whole. Such a use of the criminal law may well advance certain values and priorities which are of a pressing and substantial nature.

It is necessary, however, to go further, and consider not only Parliament's intention, but whether, given the actual effect of the legislation, a rational connection exists between it and its objectives. Legislation designed to promote an objective may in fact impede that objective. In R. v. Morgentaler this Court considered the actual effect of abortion legislation designed to preserve women's life and health and found that it had the opposite effect of the legislative goals by imposing unreasonable procedural requirements and delays. This Court was particularly mindful of the effects that those requirements had in practice of substantially increasing the risks to the health of pregnant women, especially in certain locations. Dickson C.J. treated this in the context of rational connection, stating, "to the extent that s. 251(1) is designed to protect the life and health of women, the procedures it establishes may actually defeat that objective."

This approach recognizes that s. 1 of the Charter could easily become diluted if an intention on the part of government to act on behalf of a disadvantaged group suffered in all cases to establish the necessary rational connection between the legislation and its objective. In some cases the link between the intention of the legislators and the achievement of the goal may be self-evident. In others, there may be doubt about whether the legislation will in fact achieve its end; in resolving that doubt deference must be paid to the Parliament and the legislatures. But in cases such as Morgentaler, where it appears that the legislation not only may fail to achieve its goal but may have a contrary effect, the Court is justified in finding that the rational connection between the measure and the objective is absent. This is only a matter of common sense. How can a measure which takes away a measure of one's constitutional freedom be reasonably and demonstrably justified unless there is some likelihood that it will further the objective upon which its justification rests?...

In my view, s. 319(2) of the Criminal Code falls in this class of case. Section 319(2) may well have a chilling effect on defensible expression by law-abiding citizens. At the same time, it is far from clear that it provides an effective way of curbing hate-mongers. Indeed, many have suggested it may promote their cause. Prosecutions under the Criminal Code for racist expression have attracted extensive media coverage...
Chapter XII

There is an unmistakable hint of the joy of martyrdom in some of the literature for which Andrews, in the companion appeal, was prosecuted:

"The Holocaust Hoax has been so ingrained in the minds of the hatred 'goys' by now that in some countries ... challenging its validity can land you in jail." (R. v. Andrews (1988), 65 O.R. (2d) 161, at p. 165 (C.A.))

Not only does the criminal process confer on the accused publicity for his dubious causes — it may even bring him sympathy . . . .

The argument that criminal prosecutions for this kind of expression will reduce racism and foster multiculturalism depends on the assumption that some listeners are gullible enough to believe the expression if exposed to it. But if this assumption is invalid, these listeners might be just as likely to believe that there must be some truth in the racist expression because the government is trying to suppress it. Theories of a grand conspiracy between government and elements of society wrongly perceived as malevolent can become all too appealing if government dignifies them by completely suppressing their utterance. It is therefore not surprising that the criminalization of hate propaganda and prosecutions under such legislation have been subject to so much controversy in this country.

Historical evidence also gives reason to be suspicious of the claim that hate propaganda laws contribute to the cause of multiculturalism and equality.

Remarkably, pre-Hitler Germany had laws very much like the Canadian anti-hate law. Moreover, those laws were enforced with some vigour. During the fifteen years before Hitler came to power, there were more than two hundred prosecutions based on anti-Semitic speech. And, in the opinion of the leading Jewish organization of that era, no more than 10 per cent of the cases were mishandled by the authorities. As subsequent history so painfully testifies, this type of legislation proved ineffectual on the one occasion when there was a real argument for it. Indeed, there is some indication that the Nazis of pre-Hitler Germany shrewdly exploited their criminal trials in order to increase the size of their constituency. They used the trials as platforms to propagate their message (A.A. Borovoy, When Freedoms Collide (1988)).

Viewed from the point of view of actual effect, the rational connection between s. 319(2) and the goals it promotes may be argued to be tenuous. Certainly it cannot be said that there is a strong and evident connection between the criminalization of hate propaganda and its suppression.

(c) Minimum Impairment . . .

Despite the limitations found in s. 319(2), a strong case can be made that it is overbroad in that its definition of offending speech may catch many expressions which should be protected.

The first difficulty lies in the different interpretations which may be placed on the word "hate." . . .

"Hated" is proved by inference — the inference of the jury or the judge who sits as trier of fact — and inferences are more likely to be drawn when the speech is unpopular. The subjective and emotional nature of the concept of promoting hatred compounds the difficulty of ensuring that only cases meriting prosecution are pursued and that only those whose conduct is calculated to dissolve the social bonds of society are convicted.

But "hated" does not stand alone. To convict, it must have been "willfully promote[d]." Does this requirement sufficiently constrain the term to meet the claim that s. 319(2) is overbroad? . . .

The real answer to the debate about whether s. 319(2) is overbroad is provided by the section's track record. Although the section is of relatively recent origin, it has provoked many questionable actions on the part of the authorities. There have been no reported convictions, other than the instant appeals. But the record amply demonstrates that intercultural statements about identifiable groups, particularly if they represent an unpopular viewpoint, may attract state involvement or calls for police action. Novels such as Leon Uris' pro-Zionist novel, The Haj (1984), face calls for banning; Toronto Star, September 26, 1984, p. A7. Other works, such as Salman Rushdie's Satanic Verses (1988), are stopped at the border on the ground that they violate s. 319(2). Films may be temporarily kept out, as happened to a film entitled "Nelson Mandela," ordered as an educational film by Ryerson Polytechnical Institute in 1986; Globe and Mail, December 24, 1986, p. A14. Arrests are even made for distributing pamphlets containing the word "Yankee Go Home"; Globe and Mail, July 4, 1975, p. 1. Experience shows that many cases are winnowed out due to prosecutorial discretion and other factors. It shows equally, however, that initially quite a lot of speech is caught by s. 319(2).

Even when investigations are not initiated or prosecutions pursued, the vagueness and subjectivity inherent in s. 319(2) of the Criminal Code give ground for concern that the chilling effect of the law may be substantial . . .

This brings me to the second aspect of minimum impairment. The examples I have just given suggest that the very fact of criminalization itself may be argued to represent an excessive response to the problem of hate propaganda . . .

(6) Importance of the Right versus Benefit Conferrd

The third consideration in determining whether the infringement represented by the legislation is proportionate to the ends is the balance between the importance of the infringement of the right in question and the benefit conferred by the legislation. The analysis is essentially a cost-benefit analysis. On the one hand, how significant is the infringement of the fundamental right or freedom in question? . . .

A deal first with the significance of the infringement of the constitutionally guaranteed freedom at issue in this case. Viewed from the perspective of our society as a whole, the infringement of the guarantee of freedom of expression before this Court is a serious one. Section 319(2) of the Criminal Code does not merely regulate the form or tone of expression — it strikes directly at its content and at the viewpoints of individuals. It strikes, moreover, at viewpoints in widely diverse domains, whether artistic, social or political. It is capable of catching not only statements like those at issue in this case, but works
of art and the intemperate statement made in the heat of social controversy. While few may actually be prosecuted to conviction under s. 319(2), many fall within the shadow of its broad prohibition. Those dangers are exacerbated by the fact that s. 319(2) applies to all public expression. In short, the limitation on freedom of expression created by s. 319(2) of the Criminal Code invokes all of the values upon which s. 3(1)(a) of the Charter rests—the value of fostering a vital and creative society through the marketplace of ideas; the value of the vigorous and open debate essential to democratic government and preservation of our rights and freedoms; and the value of a society which fosters the self-actualization and freedom of its members....

I turn then to the other side of the scale and the benefit to be gained by maintenance of the limitation on freedom of expression effected by s. 319(2) of the Criminal Code. As indicated earlier, there is no question but that the objectives which underlie this legislation are of a most worthy nature. Unfortunately, the claims of gains to be achieved at the cost of the infringement of free speech represented by s. 319(2) are tenuous. It is far from clear that the legislation does not promote the cause of hate-mongering extremists and hinder the possibility of voluntary amendment of conduct more than it discourages the spread of hate propaganda. Accepting the importance to our society of the goals of social harmony and individual dignity, of multiculturalism and equality, it remains difficult to see how s. 319(2) fosters them.

In my opinion, the result is clear. Any questionable benefit of the legislation is outweighed by the significant infringement on the constitutional guarantee of free expression effected by § 319(2) of the Criminal Code....

QUESTIONS AND COMMENTS

1. Related Cases. In Attit v. Board of School Trustees, [1996] 1 S.C.R. 825 (Supreme Court of Canada), the Court applied the reasoning of Keegstra in a somewhat different setting. Parents of Jewish students at a public school in New Brunswick filed a complaint with the Human Rights Commission against the local school board for its failure to respond to a student teacher's public circulation of anti-Semitic statements during his off-duty hours. Given the publicity attending his statements, the parents claimed the teacher's conduct had an adverse effect on their children's comfort and security in school. The school teacher had made "racist and discriminatory statements" in published writings (including four books or pamphlets and three letters to local newspapers) as well as in public television appearances, arguing that "Christian civilization was being undermined and destroyed by an international Jewish conspiracy.

In response to the complaint the Commission found (and the courts agreed) that the school board, not affirmatively responding to and disciplining the teacher, had discriminated against its Jewish students in violation of the provincial Human Rights Law. The Commission ordered, inter alia, that the school board (1) transfer the teacher into a nonteaching, administrative position and (2) permanently prohibit him from circulating any such material as long as he was a school employee. The Supreme Court upheld the disciplinary order transferring the teacher into a nonteaching position. But, finding a violation of the teacher's Charter Section 2 rights of freedom of expression and religious belief, it concluded that the Charter Section 1 requirement of proportionality (particularly of minimal impairment) was violated by the order permanently barring the school teacher from communicating these ideas.

Attit is in some ways an extension of Keegstra, since it upholds adverse government action against a teacher for making anti-Semitic remarks on his off-duty time, whereas Keegstra involved criminal prosecution of a teacher for anti-Semitic comments made in class. But Attit also suggests that the Section 1 analysis of proportionality can be calibrated to achieve protection of the equality-related interests of others without prohibiting expressions of unpopular or prejudiced views, perhaps to a greater degree than the majority opinion in Keegstra suggested.

Zundel v. Regina, [1992] 2 S.C.R. 731 (Supreme Court of Canada), involved a prosecution for "spreading false news," the elements of which were that the accused published a false statement knowing that it was false, and that the statement caused or was likely to cause injury or mischief to a public interest. Zundel published a booklet, "Did Six Million Really Die?," purporting to provide evidence that the Holocaust was a "myth perpetrated by an international Jewish conspiracy to obtain reparations for Jews and support for Israel." By a vote of 4–3, the Supreme Court ordered that an acquittal be entered and the prosecution dismissed. Justice McLachlin wrote the majority opinion, finding first that the pamphlets were covered by § 2(b) and that the question of coverage should not take into account "the content of the communication." Even some deliberate lies could promote the values underlying that section: Exaggeration—even clear falsification—may arguably serve useful social purposes linked to the values underlying freedom of expression. A person fighting cruelty against animals may knowingly cite false statistics ... with the purpose of communicating a more fundamental message, e.g., cruelty to animals is increasing and must be stopped. A doctor, in order to persuade people to be inoculated against a burgeoning epidemic, may exaggerate the number or geographical location of persons potentially infected with the virus. An artist, for artistic purposes, may make a statement that a particular society considers both an assertion of fact and a manifestly deliberate lie; consider the case of Salman Rushdie's Satanic Verses, viewed by many Muslim societies as perpetrating deliberate lies against the Prophet.

Turning to the § 1 analysis, Justice McLachlin concluded that the legislation's objective was not "pressing and substantial." Examining the history of the offense, which dated to an English statute of 1775 (and which had been abolished in England in 1857), the majority found that the provision initially was aimed at preserving "political harmony in the state by preventing people from making false allegations against the monarch and others in power." That purpose no longer existed: Here, Parliament has identified no social problem, much less one of pressing concern. The courts could not adopt a "shifting purpose," attributing to the statute the goal of combating into propaganda or racism. "The fact that s. 181 has been so rarely used despite its long history supports the view that it is hardly essential to the maintenance of a free and democratic society. Moreover, it
is significant that the Crown could point to no other free and democratic country which finds it necessary to have a law such as s. 181 on its criminal books." In addition, Justice McLachlin concluded that the statute failed the proportionality test because it went "much further than necessary" to promote social harmony "by encompassing a vast territory carved out by its vague and broad wording.

Consider whether the requirement that the statement be made with knowledge of its falsity eliminates the vagueness problem. Justice McLachlin argued that it did not, at least in the context of a publication making "unreasonable" assertions about historical facts: "The logic is ineluctable: everyone knows this is false; therefore the defendant must have known it was false." Note that the majority's analysis does not in itself indicate that a statute directed specifically at publication of "Holocaust lie" materials would violate the Charter. According to Justice McLachlin, "different considerations might well apply" to "a much more finely tailored provision."

In Saskatchewan (Human Rights Commission) v. Whatcott, 2013 SOC 11, the Supreme Court unanimously applied Regehr to resolve a dispute before the Saskatchewan Human Rights Tribunal. (Chief Justice McLachlin joined the judgment; one justice did not participate.) The case involved four flyers Whatcott distributed that were characterized as "the mostgraphic statements that could be made." The flyers "expressed persons to hatred and ridicule" in violation of a provision in the provincial human rights code prohibiting "the publication or display of any representation that exposes or tends to expose to hatred, ridicule, belittling or otherwise affront the dignity of any person or class of persons on the basis of a prohibited ground," including sexual orientation. The Saskatchewan Human Rights Tribunal held that the flyers "exposed persons to hatred and ridicule" in violation of a provision in the provincial human rights code prohibiting "the publication or display of any representation that exposes or tends to expose to hatred, ridicule, belittling or otherwise affront the dignity of any person or class of persons on the basis of a prohibited ground," including sexual orientation. The Saskatchewan Court of Appeal set aside the Tribunal's determination; the Supreme Court reinstated it with respect to two of the four flyers Whatcott distributed. The Court held that the words "ridicule, belittling or otherwise affront the dignity" were unconstitutional because they were "not rationally connected to the legislative purpose of addressing systemic discrimination of protected groups." Justice Rothstein wrote for the Court, "Expression criticism or creating humour at the expense of others can be derogatory to the extent of being repugnant. Representations belittling a minority group or attacking its dignity through jokes, ridicule or insults may be hurtful and offensive. However, offensive ideas are not sufficient to ground a justification for infringing on freedom of expression. While such expression may inspire feelings of disdain or superiority, it does not expose the targeted group to hatred.

The Court confined the statute to prohibiting "hatred," explaining: "Representations that expose a target group to deprecation tend to inspire enmity and extreme ill-will against them, which goes beyond mere disdain or dislike. Representations vilifying a person or group will seek to obtain and communicate them, to render them abhorrent, dangerous, unworthy or unacceptable in the eyes of the audience. Expression exposing vulnerable groups to deprecation and vilification goes far beyond merely ridiculing, humiliating or offending the victims." While hate speech often uses the device of inflammatory falsehoods and misrepresentations to persuade and galvanize its audience, the use of such tools is not necessary to a finding that the expression exposes its targeted group to hatred. Nor would false misrepresentations, alone, be sufficient to constitute hate speech. "The term 'hatred' in the context of human rights legislation is a component of looking down on or denying the worth of another. The act of vilifying a person or group connotes accusing them of disgusting characteristics, inherent deficiencies or immoral propensities which are too vile in nature to be shared by the person who vilifies... Hate speech often vilifies the targeted group by blaming its members for the current problems in society, alleging that they are a 'powerful menace,' that they are carrying out secret conspiracies to gain global control, or plotting to destroy western civilization. Hate speech also further denigrates the targeted group by suggesting its members are illegal or unlawful, such as by labelling them liars, cheats, criminals and thieves; a 'parasitic race'; or 'pure evil.' Exposure to hatred can also result from expression that equates the targeted group with groups traditionally reviled in society, such as child abusers, pedophiles, or 'deviant criminals who prey on children.' One of the most extreme forms of vilification is to dehumanize a protected group by describing its members as animals or as sub-human. References to a group as 'horrible creatures that ought not be allowed to live'; 'incoherent primates,' 'genetically inferior' and 'lesser beings'; or 'sub-human filth' are examples of dehumanizing expression that calls into question whether group members qualify as human beings.

Consider the degree to which this limitation on the scope of the prohibition strikes the correct balance between promotion of nondiscrimination and dissemination of ideas. How predictably can courts and other officials be expected to apply the distinction between ridicule and belittlement, on the one hand, and hatred-provocation, on the other?

2. Compare the use of United States law in the opinions of Justices Dickson and McLachlin in Regehr. Do they both accurately describe U.S. law? Note in particular Justice Dickson's suggestion that U.S. law is not always categorical, and reconsider his discussion after you read the R.A.V. decision below.

The Court in Whatcott referred at two points to the U.S. Supreme Court decision, Snyder v. Phelps, 131 S.Ct. 1207 (2011), in which the U.S. Court held unconstitutional a lower court's tort judgment (imposing liability for intentional infliction of emotional distress) against participants in a protest near the site of a funeral for an American soldier killed in Iraq. The protesters carried signs expressing their view "that God hates and punishes the United States for its tolerance of homosexuality, particularly in America's military," Justice Alito dissented. One of the Whatcott Court's references was to Justice Alito's statement, "I fail to see why actionable speech should be immunized simply because it is interspersed with speech that is protected." The other was to support this assertion: "a dissertation on public policy issues will not necessarily cleanse passages within a publication that would otherwise constitute a hate speech prohibition. Are there references to U.S. case necessary? Helpfull?
3. The history of the Nazis’ rise to power in Weimar Germany played a role in both the majority and dissent in Kegstra. It has played a powerful role in the design and interpretation of the German Basic Law as well. See Questions and Comments following Wunsiedel (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—*Revisionist* 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 prominent value is individualistic freedom of discourse while in Germany the prominent value is human dignity); Donald P. Kommers, *The Constitutional Jurisprudence of the Federal Republic of Germany* 382–87 (2d ed. 1997).


4. 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 constitutional 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;

5. 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 . . . civil 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 freedom of speech (including the written word) and freedom of the press; that it is also at liberty on this basis to establish criminal offences punishing the abuse of the exercise of 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 *Kegstra* 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 *Kegstra*.]

I 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 communication 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