THE CANADIAN CONSTITUTIONAL APPROACH TO FREEDOM OF EXPRESSION IN HATE PROPAGANDA AND PORNOGRAPHY

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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.[1] But on their own, constitutional guarantees are abstract concepts. They require judges, through their interpretations, to breathe life into them. The act of giving meaning to a constitutional guarantee, such as freedom of expression, requires an examination of its context, purposes, history, precedent, and the intent of the framers.[2] But guarantees are always open to competing interpretations because usually the sources themselves require interpretation. A reliance on one interpretation involves the suppression of another. It is at this juncture where we find either explicit or implicit reliance on the ways in which the interpreter imagines social and political life. This becomes

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As Counsel for the Women's Legal Education and Action Fund ("LEAF") in its interventions at the Supreme Court of Canada in both the hate propaganda and pornography cases discussed in this article, namely *Regina v. Keegstra* and *Regina v. Butler*, I had many discussions with members of the National Legal Committee and the case subcommittees. Many of the ideas in this article came from those discussions and from the written facta filed. I am particularly indebted to Professor Catharine MacKinnon and my co-counsel, Linda Taylor.

1. Patrick Macklem, *Constitutional Ideologies*, 20 Ottawa L Rev 117, 119 (1988).

2. In *R. v Big M Drug Mart*, [1985] 1 SCR 295, 344, the Supreme Court described the purposive approach:

> the purpose of the right or freedom in question is to be sought by reference to the character and the larger objects of the Charter itself, to the language chosen to articulate the specific right or freedom, to the historical origins of the concepts enshrined, and where applicable, to the meaning and purpose of the other specific rights and freedoms with which it is associated within the text of the Charter. The interpretation should be . . . a generous rather than a legalistic one, aimed at fulfilling the purpose of the guarantee and securing for individuals the full benefit of the Charter's protection.

See also *Law Society of Upper Canada v Skapinker*, [1984] 1 SCR 357; *Hunter v Southam Inc.*, [1984] 2 SCR 145.

especially apparent when laws exist in areas where there is considerable conflict between competing values. Pornography and hate propaganda are two such areas.

Recently, a series of decisions by the Supreme Court of Canada has articulated some alternative perspectives on freedom of expression that are more inclusive than exclusive, more communitarian than individualistic, and more aware of the actual impacts of speech on the disadvantaged members of society than have ever before been articulated in a freedom of expression case. It is an approach that redistributes speech rights between unequal groups. I am calling this series of decisions an equality approach to freedom of expression. The approach is particularly evident in a recent trilogy of cases dealing with hate propaganda; it is also evident in a strong line of cases dealing with the definition of obscenity. This article discusses the Supreme Court's treatment of extremist speech in light of the freedom of expression guaranteed by the 1982 Charter of Rights and Freedoms, and laws prohibiting the public, wilful promotion of hatred and obscenity. As the constitutionality of obscenity laws has yet to be determined by the Supreme Court,[3] I use the recent pronouncements in the hate propaganda cases to argue that the equality, harm-based rationale developed by the Court for the regulation of hate propaganda even more strongly supports the regulation of pornography as a practice of inequality. I will further argue that the competing constitutional values as weighed and evaluated by the Supreme Court point the way to a more inclusive, democratic, and egalitarian society, avoiding the more limited view of freedoms that in past decisions have emphasized the autonomy of individuals, weighed their competing claims as though they were equal, and ignored the social realities in which they operated.

The argument that hate propaganda and pornography may be constitutionally regulated on an equality theory engages sections 1, 2(b), 15, 27, and 28 of the Charter.[4]

Section 1 of the Charter is the central, preeminent provision. It states that the Charter "guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstratively justified in a free and democratic society." This is an unusual section if one compares it with other national or international rights-protecting instruments. The American Bill of Rights, for example, has no similar section. At first glance, section 1 may appear to be inconsistent or contradictory. On the one hand, it guarantees rights, yet, on the other, it authorizes limits on those rights in certain circumstances. The presence of section 1 in the Charter requires the analysis to be split into two distinct stages. The first stage requires a court to determine the scope and content of the right and decide whether the right has been breached. In the second stage, the court determines whether any limitation on the right can be justified in the context of the free and

3. See *R. v Butler*, [1990] 1 WWR 97 (Man CA), rev'g [1989] 6 WWR 35 (Man QB).

4. Can Const (Constitution Act, 1982) pt I (Canadian Charter of Rights and Freedoms).

democratic society of Canada. This double function embodies the idea that constitutional rights in the Charter are not absolute.

The freedom of expression guarantee is found in section 2(b) of the Charter, which provides that "[e]veryone has the following fundamental freedoms: . . . freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication." The most important substantive provision relevant to the egalitarian approach to freedom of expression is section 15, the equality section. It, like section 1, is distinctive compared to other national and international instruments that exist to prohibit discrimination. It actually contains four equality guarantees, an open-ended list of prohibited grounds, and an affirmative action provision to allow for beneficial programs for disadvantaged groups or individuals. It reads:

> (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 or ethnic origin, colour, religion, sex, age or physical or mental disability.
> (2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

Section 27, a multicultural section, and section 28, a gender equality section, are meant to assist in the interpretation of the Charter. They emphasize that multiculturalism and gender equality are important Canadian goals. Section 27 provides that the Charter "shall be interpreted in a manner consistent with the preservation and enhancement of the multi-cultural heritage of Canadians." Section 28 further states that, "[n]otwithstanding anything in this Charter, the rights and freedoms referred to in it are guaranteed equally to male and female persons."

II

HATE PROPAGANDA AND FREEDOM OF EXPRESSION: THE *KEEGSTRA* CASE

Regina v. Keegstra[5] was heard in conjunction with two similar appeals, *Regina v. Andrews and Smith*[6] and *Canada (Human Rights Commission) v. Taylor*.[7] *Keegstra* and *Andrews* raised the same issue: the constitutional validity of section 319(2) of the Criminal Code,[8] a provision that prohibits the wilful promotion of hatred, other than in private conversation, towards any section of the public distinguished by colour, race, religion, or ethnic origin.[9] *Taylor* raised the issue of the constitutional validity of section 13(1) of the Canadian

5. [1990] 3 SCR 697.
6. [1990] 3 SCR 870.
7. [1990] 3 SCR 892.
8. Criminal Code RSC, ch C-46, § 319(2) (1985).
9. Id. The relevant provisions of section 319 read as follows:

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

Human Rights Act, a legislative provision that prohibits the communication of hate messages over the telephone.[10]

In all three cases, the Court was asked to decide whether the legislation infringed the guarantee of freedom of expression found in section 2(b) of the Charter, and, if so, whether it could be justified under section 1 of the Charter. Of the three, *Keegstra* was the leading decision in that it set out the approach adopted by the majority in the other two cases. I therefore will confine my remarks to the reasoning of the Court in that decision.

In *Keegstra*, the accused, James Keegstra, a high school teacher, used his classroom time to communicate anti-semitic teachings to his students.[11] He was convicted at trial of the offence of the public, wilful promotion of group hatred.[12] The conviction was appealed to the Alberta Court of Appeal, where it was unanimously overturned, the court finding that section 319(2) of the Criminal Code unjustifiably infringed Keegstra's freedom of expression as guaranteed by section 2(b) of the Charter.[13] Speaking for the court, Judge Kearns found that, although deliberate lies are not protected by section 2(b),

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(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 upon a religious subject;
(c) if the statements were relevant to any subject of public interest, the discussion of which was for the public benefit, and if on reasonable grounds he believed them to be true; or
(d) if, in good faith, he intended to point out, for the purpose of removal, matters producing or tending to produce feelings of hatred towards an identifiable group in Canada.

. . .

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

(7) In this section,
"communicating" includes communicating by telephone, broadcasting or other audible or visible means;
"identifiable group" has the same meaning as in section 318 [("any section of the public distinguished by colour, race, religion or ethnic origin," id § 318(4))];
"public place" includes any place to which the public have access as of right or by invitation, express or implied;
"statements" includes words spoken or written or recorded electronically or electromagnetically or otherwise, and gestures, signs or other visible representations.

10. Canadian Human Rights Act, RSC, ch H-6, § 13(1) as amended (1985).

11. The accused taught social studies courses to students in grades nine and 12 at Eckville High School from the early 1970s until 1982. Through evidence given by former students, as well as students' notebooks and essays written during courses, it was determined that the accused taught antisemitic theories. Students were expected to take down what was said by the accused in class or written by him on the blackboard, and they were expected to learn and reflect this information in the form of essays and on exams. If their essays and exams contained the theories taught by him in class, they received excellent marks. If, however, they used sources from outside his classroom such as encyclopedias, dictionaries, and history books, they received poor grades. The accused taught only his personal biased views and told the students they should accept his biased views as truth unless they could contradict them. Statement of Facts, Appellant's Brief, Her Majesty the Queen at 2, *Keegstra*, [1990] 3 SCR 697.

12. *R. v Keegstra*, 19 CCC (3d) 254 (Alta QB 1984).

13. *R. v Keegstra*, 87 AR 177 (CA 1988).

innocently or negligently made hate speech is. Moving to the section 1 analysis, he said that, while he accepted that section 319(2) had the valid legislative objective of preventing harm to the reputation and psychological well-being of target group members, he nevertheless found the section unconstitutional because the injury was not serious enough to require the sanction of criminal law. In order to be constitutional, more than reputational harm was required. Greater harm, such as proof of actual hatred being caused as a result of the impugned expression, was necessary. Sections 15 and 27 of the Charter, the equality and multicultural sections, were not viewed as justifying the hate propaganda laws under section 1. This decision was appealed to the Supreme Court of Canada.

A. *Keegstra*'s Section 2(b) Analysis

To determine whether or not the hate propaganda prohibition violated the Charter, Chief Justice Dickson, writing for the majority, first examined the scope of the freedom of expression section. He did so by looking at the underlying values supporting the freedom of expression guarantee. Those values, he said, are seeking and attaining the truth, encouraging and fostering participation in social and political decisionmaking, and cultivating diversity in forms of individual self-fulfilment and human flourishing.[14]

After finding the scope of section 2(b) to be both large and liberal, the Court adopted a strict categorical test,[15] permitting content-based restrictions only if the speech is communicated in a physically violent form.[16] Otherwise, as long as an expressive activity conveys a meaning, it is protected by section 2(b), regardless of the meaning or message conveyed. The Court held that even threats of violence are within the scope of the section's protection.[17] Governments may restrict expressive activity only when their purpose is other than to restrict the content of the activity. Even if the purpose is directed solely at the effect rather than the content of the expression, section 2(b) can still be brought into play if the affected party can demonstrate that the activity in question supports rather than undermines the principles and values upon which freedom of expression is based.[18]

Applying this categorical test to the hate propaganda provision, Chief Justice Dickson found that the legislation prohibiting the public, wilful

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14. *R. v Keegstra*, [1990] 3 SCR at 727 (relying on *Irwin Toy Ltd v Quebec (Attorney General)*, [1989] 1 SCR 927, 976, aff'g *Ford v Quebec (Attorney General)*, [1988] 2 SCR 712, 765-67).

15. Id at 728-29.

16. In *RWDSU v Dolphin Delivery Ltd.*, [1986] 2 SCR 573, 588, the Supreme Court ruled that the freedom of expression guarantee does not extend to acts of violence and threats of violence. In *Keegstra*, the Chief Justice, writing for the majority, clarified this exception, ruling that only meanings communicated through the medium of violence will be excluded from § 2(b) protection. *R. v Keegstra*, [1990] 3 SCR at 731. The minority opinion, authored by Justice McLachlin, maintained that threats of violence fall outside § 2(b) protection. Id at 826-27.

17. *Reference re §§ 193 and 1985.1(1)(c) of the Criminal Code of Canada (Man)* [1990] 15 CR 1123, 1181; *Keegstra*, [1990] 3 SCR at 732. Justice McLachlin, joined by Justices LaForest and Sopinka in dissent, however, held that threats of violence do not attract § 2(b) protection. Id at 830-31.

18. *Keegstra*, [1990] 3 SCR at 762.

promotion of group hatred did indeed infringe section 2(b) of the Charter. He said the hate propaganda provision was an attempt by Parliament to prohibit communication conveying meaning. The Chief Justice made the point that competing values contained in other Charter provisions, such as equality, multiculturalism, and Canada's international obligations to prohibit hate propaganda, should not be balanced within the freedom of expression guarantee at the first stage of analysis because the Court would not have the benefit of making a contextual assessment and the analysis would be dangerously and overly abstract.[19] He said section 1 is the preferable place to balance because it permits a contextual analysis that fully weighs the harm hate speech inflicts on minorities.

At this point, the Court rejected the argument that hate propaganda is a form of violence in and of itself,[20] and, as an integral link in systemic discrimination,[21] should be excluded from section 2(b) protection. It is unfortunate that the Court significantly deviated from the purposive approach to adopt a rigid form/content distinction in its interpretation of section 2(b). While it is true that hate propaganda combines content and form (colour, race, religion, or national origin are the content), when it takes the form of wilful, public promotion of group hatred on the enumerated grounds, it should be seen as a practice of inequality similar to racial segregation.[22]

In *Regina v. Andrews & Smith*,[23] Justice Cory (as he then was) identified the connection between hate propaganda and discrimination: "When expression does instill detestation it . . . lays the foundation for the mistreatment of members of the victimized group."[24] Viewed this way, it can be said that the wilful, public promotion of group hatred is an act, an injury, and a consequence itself. It is not a mere intention to act in the future. To promote group hatred is to practice discrimination, and discrimination is an act that contradicts one of the core values underlying freedom of expression, individual self-fulfilment and human flourishing—the very value we are told defines the environment in which all the goals of freedom of expression should be pursued.[25] Under this view, regulation of hate propaganda should not be invalidated by the doctrine of free speech any more than legal regulation of racial segregation is invalidated by the same doctrine.[26] Enforcement of inequality results in injury just as violence does. Its violent

19. Id at 764-70.

20. Id at 770.

21. For a contrary view, see Mari Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 Mich L Rev 2320 (1989); Richard Delgado, *Words That Wound: A Tort Action for Racial Insults, Epithets and Name-Calling*, 17 Harv CR-CL L Rev 133 (1982).

22. *Brown v Board of Education*, 347 US 483 (1954), treated segregation as a form of racial discrimination.

23. 65 OR (2d) 161 (Ont CA 1988).

24. Id at 179.

25. *Irwin Toy*, [1989] 1 SCR at 967.

26. Kathleen A. Lahey, *The Canadian Charter of Rights and Pornography: Toward a Theory of Actual Gender Equality*, 20 New Eng L Rev 649, 675 (1984-85), citing Catharine MacKinnon's Brief as Amicus Curiae for Linda Marchiano 19-30, *American Booksellers Assn v Hudnut*, 598 F Supp 1316 (SD Ind 1984).

nature ranges from immediate psychic wounding and attack to well-documented consequent physical aggression.[27]

At the very least, the Court should have viewed hate propaganda as harassment on the basis of group membership. The courts in both Canada and the United States have accepted that harassment is a practice of inequality resulting in legally recognized harm and loss, even when it consists solely of words. It is a form of discrimination, even if the action is words. When legislatures regulate harassment, they do not regulate the content of expression, although the expression has content. The Court treats harassment as a practice of inequality.[28] Hate propaganda, which is a particularly virulent form of harassment, should be treated similarly.

A purposive approach, if applied as it was in earlier Supreme Court decisions, would lead to the conclusion that hate propaganda is an abuse of freedom of expression beyond the contemplation of the Charter.[29] At this stage of the analysis, the Supreme Court incorporated a strict categorical approach for the Canadian constitutional context without providing convincing reasons for doing so. The purposive approach to rights protection under the Charter developed prior to *Irwin Toy*, which said the judiciary evolves the content of the right from the nature of the interests it is meant to protect, would seem to require more.[30] For example, the majority of the Court says violence in the form of murder or rape would not be protected under section 2(b), but it fails to tell us why.[31] Surely the reason is that such expression does not recognize or respect human dignity and autonomy and is inimical to the rule of law. While the Court acknowledges that some wordless human activity can have meaning and must be protected under section 2(b), it does not seem to recognize that the corollary is also true. That is, activity that takes the form of expression can also be devoid of meaning in the constitutional sense.[32] The denial of equality rights through the discriminatory practice of promoting hatred arguably deserves the same constitutional consideration under section 2(b) as does violence. Because the text of the Charter focuses on expression as the medium of thought that manifests the individuality and common humanity of right holders, the wilful promotion of hatred should have no constitutional significance.

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27. Center for Democratic Renewal, *They Don't All Wear Sheets: A Chronology of Racist and Far Right Violence, 1980-1986* (Div Church & Society, Natl Council of the Churches of Christ in the USA, 1987) (documenting violent racist incidents over several years in 48 states) (compiled by Chris Lutz).

28. *Janzen and Govereau v Platy Enterprises Ltd. et al*, [1989] 1 SCR 1252; *Robichaud v Canada*, [1987] 2 SCR 84. See Catharine MacKinnon, *Sexual Harassment in the Workplace of Working Women* (Yale U Press, 1979), for the seminal work on this topic.

29. *Big M Drug Mart*, [1985] 1 SCR at 344.

30. See in particular *Hunter v Southam Inc*, [1984] 2 SCR 145.

31. *Keegstra*, [1990] 3 SCR at 763.

32. Lorraine Weinrib makes a similar argument in a different context in *Does Money Talk? Commercial Expression in the Canadian Constitutional Context*, in David Schneiderman, ed, *Freedom of Expression and the Charter* 336, 348 (Carswell, 1991); Lorraine E. Weinrib, *Hate Promotion in a Free and Democratic Society*, 36 McGill L J 1416, 1419 (1991).

Had the Court viewed the content/form distinction as points on a continuum rather than as discernibly distinct categories, it could have taken a more nuanced, sensitive, and practical approach to forms of speech that should not be dignified or legitimized by Charter protection. Speech activity such as pornography, racist signs, sexual and racial harassment, as well as hate propaganda fall on this continuum.

Social-psychologist Gordon Allport's analysis of the harms of prejudice is convincing. His analysis supports a continuum approach rather than the categorical approach and appeals to common sense and historical experience. According to Allport, there are five stages of racial prejudice: expression of prejudicial attitudes, avoidance, discrimination, physical attack, and extermination.[33] Each stage depends on and is connected to the preceding one. Allport uses as an example the history of the Third Reich:

> It was Hitler's antilocution that led Germans to avoid their Jewish neighbours and erstwhile friends. This preparation made it easier to enact the Nuremburg laws of discrimination which, in turn, made the subsequent burning of synagogues and street attacks upon Jews seem natural. The final step in the macabre progression was the ovens at Auschwitz.[34]

It is this progressive, interdependent connection of hate propaganda and violence that cannot be contemplated within the "violent form" limitation on content regulation as articulated in *Irwin Toy*. The category of "violent form" is thus unhelpful and even misleading. Without more convincing reasons, the deviation from the purposive approach introduces unnecessary rigidity into section 2(b) interpretation. The effect of the narrow exclusion not only dignifies vicious, harmful speech activity, it progressively erodes expression rights by increasing the frequency of policy-oriented decisions performed in section 1. Ultimately, using section 1 in this way may soften the stringency of its requirements, deny meaningful content to section 2(b), and trivialize the Charter guarantee of freedom of expression.[35]

B. *Keegstra*'s Section 1 Analysis

Having determined that the public, wilful promotion of group hatred as a category falls within the protection of section 2(b) and that the criminal prohibition infringed James Keegstra's freedom of expression, the Court turned to consider whether under section 1 the infringement was a reasonable limit demonstrably justifiable in a free and democratic society. The Court split four to three in finding that the burden of section 1 was satisfied and that the legislation could be upheld.

The analysis followed in the format set out by *Regina v. Oakes*.[36] In determining that the impugned law relates to pressing and substantial

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33. Gordon W. Allport, *The Nature of Prejudice* 14-15 (Addison-Wesley, 1954), cited in Dino Bottos, Keegstra *and* Andrews: *A Commentary on Hate Propaganda and the Freedom of Expression*, 27 Alberta L Rev 461, 471 (1989).

34. Allport, *The Nature of Prejudice* at 14 (cited in note 33).

35. See *The Queen v Committee for the Commonwealth of Canada*, [1991] 1 SCR 139 (McLachlin).

36. [1986] 1 SCR 103, 136.

concerns, three reasons were articulated. The first focused on the harm caused by hate propaganda. Chief Justice Dickson stressed that extremist hate speech is not merely offensive; it causes "real" and "grave" harm to both its target groups and society at large. Like sexual harassment, hate propaganda constitutes a serious attack on psychological and emotional health. Members of the target groups are humiliated and degraded, their self worth is undermined, and they are encouraged to withdraw from the community and deny their own personal identity. The majority described hate propaganda's societal harm as causing serious discord between cultural groups and creating an atmosphere conducive to discrimination and violence.[37]

It is worth noting that the majority rejected the American "clear and present danger" test of harm, saying it and other categorizations generated by American law may be inappropriate to Canadian constitutional theory.[38] This is a welcome clarification in the law. It not only clears up the confusion caused by differing opinions in the lower courts,[39] it recognizes that serious harms that need to be addressed by the criminal law do not in general entail such an identifiable danger point or necessarily lend themselves to a "clear and present danger" type of classification. The harms caused by hate propaganda are often difficult to detect, either immediately or ever. Hate propaganda has subtle effects. It relies on fear and ignorance to engender indoctrination over time. It works by socializing, by establishing the expected and the permissible. Any requirement to prove "clear and present danger" or scientifically verifiable harm not only ignores the realities of the crime, it ensures that very few, if any, convictions will ever be obtained. By rejecting the "clear and present danger" test, the Court made it quite clear that dry and sterile analytic techniques[40] that effectively predetermine the issue will not be imported into Canada.[41]

A second, related reason the provisions were found by the majority to be of pressing and substantial concern was the importance of the Canadian commitment to equality and multiculturalism reflected in sections 15 and 27 of the Charter. The majority situated section 27 in an equality context, saying that attacks on groups need to be prevented because group discrimination can adversely affect its individual members.[42] According to the Court, in restricting hate propaganda, Parliament seeks "to bolster the notion of

37. *Keegstra*, [1990] 3 SCR at 744-49.
38. Id at 743.
39. For example, Justice Kearns, speaking for the majority of the Court of Appeal of Alberta in *Keegstra* said that in order for the hate propaganda provisions to meet the proportionality test, the law would have to require the *successful* promotion of hate; otherwise, the harm would not be serious enough to justify infringements on the freedom of expression guarantee. *R. v Keegstra*, [1988] 87 AR 177, 181. On the other hand, while not conceding the point that hate propaganda causes real harm, Justice Cory (as he then was) of the Ontario Court of Appeal, in the *Andrews* case, cited numerous examples of laws that prohibit activities that carry a risk of harm (that is, impaired driving, attempted murder, conspiracy) but where harm need not occur. *R. v Andrews*, [1988] 65 OR2d 161, 187.
40. Harlan F. Stone, *The Common Law in the United States*, 50 Harv L Rev 4, 10 (1936).
41. *Keegstra*, 3 SCR at 740-44.
42. Id at 746.

mutual respect necessary in a nation which venerates the equality of all persons."[43] This reasoning is not dissimilar to that of the United States Supreme Court in *Beauharnais v. Illinois*,[44] to which the Chief Justice referred in *Keegstra*,[45] suggesting that the *Beauharnais* decision is closer to the Canadian approach to freedom of expression than the line of cases that subsequently undermined it.[46] The Chief Justice cautioned that even though current American free speech doctrine may be helpful in many respects, it is of dubious applicability in the context of a challenge to hate propaganda legislation.

The Chief Justice is entirely correct on this point. The Charter is not constrained by the textual or political constitutional imperatives of the American first amendment, but more importantly the fundamental structure, historical, and circumstantial differences between the two constitutions require a distinctively Canadian approach.[47] Although both countries share a democratic ideal, they do not share the same view of social and political life. In sociological terms, Canada and the United States experience some of the same realities of heterogeneity of population, of language differences, and of original native population.[48] In this dimension, definition and reconciliation of minority rights have been central to civil liberties politics in both countries. But a major ideological difference is Canada's rejection of the melting pot approach to cultural diversity adopted in the United States in favour of a mosaic approach. One of the objectives of the drafters of the Charter was to develop a bilingual, multicultural country and a pluralistic mosaic.[49]

As a result, Charter commitments are different in many respects from the commitments of the American Bill of Rights. The multicultural section is a case in point. Section 27 states that the Charter shall be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians.[50] This provision is particularly important when courts are required to balance the freedom of expression of hate propagandists against the multiculturalism ideal and the powerful equality provision. It is thus much broader in scope than the fourteenth amendment, containing wider substantive protections as well as more

43. Id at 756.

44. 343 US 250 (1952).

45. [1990] 3 SCR at 739.

46. *Anti-defamation League of B'nai B'rith v FCC*, 403 F2d 169, 174 (DC Cir 1968); *Collin v Smith*, 587 F2d 1197, 1204-05 (7th Cir 1978).

47. *Re BC Motor Vehicle Act*, [1985] 2 SCR 486, 498; compare to *Collin v Smith*, 587 F2d 1197 (7th Cir 1978).

48. For a further discussion, see Alan F. Westin, *The United States Bill of Rights and the Canadian Charter: A Socio-Political Analysis*, in William McKeacher, ed, *The U.S. Bill of Rights and the Canadian Charter of Rights* 27 (Economic Council, 1983).

49. Special Joint Committee of the Senate and House of Commons on the Constitution of Canada: Final Report (Queen's Printer, 1972). The minutes state that the purpose of a multicultural provision would be "[t]o develop Canada as a bilingual and multicultural country in which all its citizens, male and female, young and old, native peoples and Métis, and all groups from ethnic origins feel equally at home."

50. Charter § 27.

prohibited grounds of discrimination.[51] Section 15(2) of the Charter expressly adds a clause that legitimizes affirmative action in the constitutional definition of equality rights.[52] Reading section 15 together with the multiculturalism section creates a formidable obstacle for those who would use the freedom of expression guarantee to promote hatred against identifiable groups.

The other minority interests protected in the Charter—including language and education rights, aboriginal rights, and rights for denominationally separate dissentient schools[53]—underline the strong commitment to collective rights in the Charter that is not evident in the American Constitution. Against this background, it is not surprising the Court found the prohibition of the public, wilful promotion of group hatred is a matter of pressing and substantial concern sufficient to meet the section 1 requirements.

To further emphasize the point that hate propaganda laws relate to pressing and substantial concerns, the Court took note of international human rights obligations that require Canada to suppress hate propaganda criminally to protect identifiable and vulnerable groups.[54] The Court said that when values such as equality and freedom from racism enjoy status as international human rights, they are generally ascribed a high degree of importance under section 1.[55] The United States has not ratified this or similar conventions.

The connections the Canadian Supreme Court makes between institutional arrangements, collective and individual harms, human relations, and equality are very important elements in its equality approach to freedom of expression. The centrality of equality to the enjoyment of individual as well as group rights emphasizes that the main constitutional consideration surrounding extremist speech is the harm it causes to equality interests. The Court is clear that if we are to live in a society without discrimination, the harm of hate speech must be redressed.

The majority again referred to harm in applying proportionality, the second portion of the *Oakes* test. The Court made the point that hate propaganda is only tenuously connected to the values underlying section 2(b), because the harm of hate speech is significant and the truth value marginal.[56]

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51. Section 15(1) states: "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 or ethnic origin, colour, religion, sex, age or mental or physical disability."

52. Section 15(2) states that § 15(1) does not preclude laws designed to ameliorate conditions of disadvantaged groups and individuals.

53. Charter §§ 21, 25, 35, 29.

54. See article 4 of the International Convention on the Elimination of All Forms of Racial Discrimination (New York, Aug 24, 1966), entered into force for Canada, Jan 4, 1969, Canada Treaty Series 1970 No 28.

55. *Keegstra*, [1990] 3 SCR at 750, citing *Slaight Communications Inc. v Davidson*, [1989] 1 SCR 1038, 1056.

56. *Keegstra*, [1990] 3 SCR at 761.

In assessing hate propaganda against the fundamental values underlying the freedom of expression guarantee, the Court found it to be an illegitimate form of political speech that loses its democratic aspirations to the free expression guarantee because the ideas it propagates are anathema to democratic values. Moreover, the Court found that hate speech undermines the value of protecting and fostering a vibrant democracy because it denies citizens equality and meaningful participation in the political process and its contribution to self-fulfilment and human flourishing is negligible. Hate speech not only chills or denies freedom of expression to those it targets, it undercuts the self-development and human flourishing among all members of society by engendering intolerance and prejudice.[57]

The minority, on the other hand, believed some hate speech could be important.[58] It feared that regulations on hate propaganda could start a "slippery slope" of encroachment on valuable political speech or could catch angry speech by members of disadvantaged minority groups against dominant majorities. The Chief Justice was of the view that the *mens rea* requirement would restrict the reach of the provision to only those groups meant to be caught by it.[59] Perhaps a stronger argument is that the contextualized approach serves as a sufficient safeguard to isolate extremist hate speech from legitimate political speech. Constitutional equality as interpreted by the Court in *Andrews v. The Law Society of British Columbia*[60] is essentially designed to protect the groups that suffer social, political, and legal disadvantage. If hate propaganda were directed against historically dominant group members, a contextual approach would constitutionally protect it even in the section 1 balance. This is appropriate because the attack would not be linked to the perpetuation of disadvantage. It would be tied to the structural domination of the group attacked. If the groups were equal, presumably any special protection would be removed.

Finally, the Court examined the relationship between the equality rights in the Charter and the freedom of expression guarantee. While acknowledging that section 15 of the Charter does not itself guarantee social equality, the Court nevertheless made it clear that equal law is seen as a means to an equal society, as well as an end in itself. The Court's statement that "the principles underlying section 15 of the Charter are . . . integral to the section 1 analysis"[61] requires section 15 to have a broader constitutional function than protecting individuals from state-imposed discrimination. The *Keegstra* Court clearly established that just as Charter rights can be used to challenge legislation, they can be used to uphold existing legislation that furthers section 15 values. In the words of Chief Justice Dickson, "[i]nsofar as it indicates our society's dedication to promoting equality, section 15 is also

57. Id at 763-65.
58. Id at 859 (McLachlin dissenting).
59. Id at 774-76.
60. [1989] 1 SCR 143, 154 (Wilson, Dickson, and L'Heureux-Dubé concurring).
61. *Keegstra*, [1990] 3 SCR at 756.

relevant in assessing the aims of section 319(2) of the Criminal Code under section 1."[62] The Court cited with approval the written submissions of the intervenor, Women's Legal Education and Action Fund (LEAF), which stated:

> Government sponsored hatred on group grounds would violate section 15 of the Charter. Parliament promotes equality and moves against inequality when it prohibits the wilful public promotion of group hatred on these grounds. It follows that government action against group hate, because it promotes social equality as guaranteed by the Charter, deserves special constitutional consideration under section 15.[63]

Similarly, the Court took account of section 27 and its recognition that Canada possesses a multicultural society in which the diversity and richness of various cultural groups is a value to be protected and enhanced. The equality section and the multicultural section read with the hate propaganda provisions within section 1 were sufficient to outweigh the freedom of expression interest in the propagation of hatred and establish equality as a pre-eminent value in Canadian society.

The approach established by the *Keegstra* decision in the section 1 balancing stage legitimated group rights to the extent that they outweighed the competing individual right of freedom of expression. This was due to the influence of section 15.[64] The recognition that the harm of discrimination can outweigh the free speech interest marks a major new development in freedom of expression jurisprudence. The connections the Court made between institutional arrangements, collective and individual harms, human relations, and equality are unique. The Court's recognition that boundaries between individual and collective rights must be confronted demonstrates the Charter's potential to propose new relationships.

Canada's departure from American free speech doctrine is clear. Under the first amendment, social reality is not considered when legislation regulating extremist speech is challenged.[65] This is a critical difference from the Canadian practice because, depending on the facts of the case, a contextual analysis can result in a right or freedom having a different value. In *Keegstra*, when assessing the value of challenged expression, the Court looked at the reality of the situation at hand, including the nature of the interests at stake. The centrality of equality to the enjoyment of individual as well as group rights in the decision demonstrates a firm acceptance of the view that equality is a positive right, that the Charter's equality provision has a large remedial component, and that legislatures should take positive measures to improve the status of disadvantaged groups. Most importantly, *Keegstra* identifies a transformation potential in the Charter, a potential to

62. Id at 755.

63. Id.

64. Justice Wilson in *R. v. Turpin*, [1989] 1 SCR 1296, 1333, said that § 15 is designed to protect those groups that suffer social, political, and legal disadvantage in our society.

65. See *Doe v University of Michigan*, 721 F Supp 852 (ED Mich 1989); Penelope Seator, *Judicial Indifference to Pornography's Harm:* American Booksellers v. Hudnut, 17 Golden Gate U L Rev 297 (1987).

Canada on the constitutional ground that section 163 of the Criminal Code violates section 2(b) of the Charter.

The same method of analysis as that used in *Keegstra* will apply to determine the constitutionality of obscenity laws. First, the scope of freedom of expression will be examined to see if the legislation violates the expression guarantee. If it does, it will be tested against the section 1 standard to see whether it constitutes a reasonable limit prescribed by law (as can be demonstrably justified in a free and democratic society). On the basis of *Keegstra*, an equality, harms-based theory should be able to regulate pornography constitutionally under sections 1, 2(b), 15, and 28 of the Charter.

The contextualized approach to equality adopted by the Supreme Court in *Andrews* will establish that the sex equality interest in pornography's regulation arises out of the harms it causes. There are at least three arguments to make: First, some pornography is made through the use of force, violence, or coercion. As such, it is a "violent form" of expression and is excluded from the scope of section 2(b) protection. Second, some pornography is not protected under section 2(b) by virtue of section 28. Third, and in the alternative, to the extent the obscenity laws are interpreted to promote sex equality, any restraints they impose on expression are demonstrably justifiable in a free and democratic society. Each of the arguments is dealt with in turn.

A. Pornography as a Violent Form of Expression

In considering the scope of the freedom of expression guarantee in *Keegstra*, the Supreme Court concluded two things: the purpose of the hate propaganda laws is to restrict content of expression, and hate speech does not amount to a violent form of expression. The Court found that, while Mr. Keegstra's ideas were unsettling and demeaning in the extreme, they did not amount to a violent form of expression because they did not urge actual or threatened physical interference in the same sense that violence was characterized in *Dolphin Delivery*[69] and *Irwin Toy*.[70] As a result, the analysis of the legitimacy of hate propaganda laws took place within section 1.

The Court should come to a different conclusion when evaluating pornography within section 2(b). While hate propaganda and pornography are similar in some respects, they have qualitative differences. They are similar in their express or implied intent, which is to distort the image of a group or class of people, to deny their humanity, and to make them such objects of ridicule and humiliation that acts of aggression against them are viewed less seriously.[71] The major difference between them is the method

69. [1986] 2 SCR 573.
70. [1989] 1 SCR 927.
71. Susan Brownmiller compares pornography to hate propaganda against Jews and blacks, finding strong similarities in content, yet differences in society's reaction to them. Whereas racist hate propaganda is disparaged, pornography is ideologically encouraged. See Susan Brownmiller,

used to achieve the desired results. In some pornography, sexual use and abuse of women are direct, visual portrayals. Unlike most hate propaganda, pornography often involves real violence where women are coerced and sexually assaulted so that they become the subjects of pornography.[72] When overt infliction of pain, overt use of force, or the threat of either of them is used in the production of pornography, its purely violent nature should bring it within the "violent form" category.[73] Furthermore, mass marketing of sexual assault as a form of "entertainment" provides a profit motive for physically harming people. Clearly this is a more serious, immediate harm than the harms identified by the majority in *Keegstra*. Pornography that is made from assaults should be no more worthy of protection as expression than the assaults themselves. Obscenity laws, properly interpreted, criminalize this type of pornography not because of any meaning it may have, but because of the direct harm it causes to the participants.[74]

Where the government's aim is not to limit freedom of expression but to accomplish another goal, then the person complaining about the infringement must show that its effect was to infringe his or her constitutional freedom.[75] It will be very difficult for pornographers to make an argument that pornography produced through the use of violence, force, or coercion meets any of the values underlying the freedom of expression guarantee. Justice McLachlin's dissent in *Keegstra* explained that violence or threats of violence must be excluded from Charter protection because they are inimical to the rule of law upon which all rights and freedoms depend.[76] This approach is consistent with the way the U.S. Supreme Court deals with child pornography. In *New York v. Ferber*,[77] the Court upheld a statute that criminalizes the distribution of child pornography. It looked at the process by which child pornography is made and concluded that it inflicts psychological and physical harm on children and is a form of child abuse.[78] Moreover, the Court found that the harm to children is exacerbated by circulation of pictures of the abuse. As a result, the sex pictures also are regarded as child abuse. Through *Ferber*, the U.S. Supreme Court upheld criminal convictions for the

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Against Our Will: Men, Women and Rape, in Laura Lederer, ed, *Take Back the Night: Women on Pornography* 30-35 (Morrow, 1980).

72. Final Report of the Attorney General's Commission on Pornography 747-56, 767-1035 (U.S. Govt Printing Office, 1986) ("Final Report").

73. Matsuda, 87 Mich L Rev 2320 (cited in note 21); Andrea Dworkin, *Against the Male Flood: Censorship, Pornography and Equality*, 8 Harv Women's L J 1, 5 (1985) (discussing the pornographic portrayal of women being killed and mutilated, and the direct connection between pornography and violence).

74. Lahey describes how extensive evidence of harm to women participating in the production of pornography was adduced in *American Booksellers v. Hudnut*. Lahey, 20 New Eng L Rev 649 (cited in note 26). See also Public Hearings regarding an Ordinance to add pornography as discrimination against women, the Government Operations Committee of the Minneapolis City Council (Dec 12-13, 1983). The testimony before the hearings also included social science evidence of pornography's harm.

75. *Keegstra*, [1990] 3 SCR 697.

76. Id at 830-31 (McLachlin dissenting).

77. 458 US 747 (1982).

78. Id at 758.

entire chain of sale, distribution, and possession of child pornography as a means of eliminating its harms. The Court also recognized that harm can extend to third parties when child abusers use the pornography to abuse other children.[79] The Court reasoned that the obscenity test enunciated in *Miller*[80] was irrelevant to the issue of whether a child is physically or psychologically harmed in the production of pornography.

Women forced into the production of pornography or assaulted in it should receive the same protection. In the context of historic disadvantage on the basis of sex and age, both women and children are vulnerable, and both experience the same kind of harm to produce the same kind of expression, for the same purposes.

In some pornography, there is an inherent threat of violence that takes away women's choices and undermines their freedom of action. For example, positive outcome rape scenarios that portray rape as pleasurable for the victim are known to increase the risk of violence against women. In laboratory settings, social scientists have found that exposure to such scenarios increases aggression against women, increases attitudes that are related to violence against women in the real world, and increases self-reported likelihood to rape. A significant percentage of men exposed to such materials come to believe that violence against women is acceptable.[81] Materials that create such effects constitute direct threats of violence against women and, for the reasons cited by Justice McLachlin, should be excluded from constitutional protection. The majority decision in *Keegstra*, however, would preclude such a finding, as threats were found to fall within the protective ambit of section 2(b). One hopes the Court will reconsider this decision in *Butler*. The ramifications of protecting threats of violence as constitutional speech make the underlying free speech rationale of democracy and truth meaningless.

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79. *Osborne v Ohio*, 495 US 103, 110 (1990).

80. *Miller v California*, 413 US 15, 34 (1974). The Court in *Miller* said the test for determining whether something is legally obscene is that which

> the average person applying contemporary community standards "would find that . . ., taken as a whole, appeals to the prurient interest . . . [that] depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and [that], taken as a whole, lacks serious literary, artistic, political, or scientific value."

Id at 34.

81. Edward Donnerstein, *Pornography: Its Effect on Violence Against Women*, in Neil Malamuth & Edward Donnerstein, eds, *Pornography and Sexual Aggression* 53 (Academic Press, 1984); Edward Donnerstein & Leon Berkovitz, *Victim Reaction in Aggressive Erotic Films as a Factor in Violence Against Women*, 41 J Personality & Social Psych 710 (1981); Neil Malamuth, *Factors Associated with Rape as Predators of Laboratory Aggression Against Women*, 45 J Personality & Social Psych 432 (1983); Neil Malamuth, *Predictions of Naturalistic Sexual Aggression*, 50 J Personality & Social Psych 953 (1986); Neil Malamuth & James V. P. Check, *Aggressive-Pornography and Beliefs in Rape Myths: Individual Differences*, 19 J Research in Personality 299 (1985); James V. P. Check & Ted H. Guloien, *Reported Proclivity for Coercive Sex Following Repeated Exposure to Sexually Violent Pornography, Nonviolent Dehumanizing Pornography, and Erotica*, in Dolf Zillmann & Jennings Bryant, eds, *Pornography: Research Advances and Policy Considerations* 159 (Erlbaum, 1989); Michael McManus, *Introduction*, in Final Report at xviii (cited in note 72) (consensus of all researchers as released by Surgeon General Koop).

B. Pornography Is Not Protected Expression by Virtue of Section 28

On its face, it is clear that section 28 overrides every other provision in the Charter. It is unconditional: "Notwithstanding anything in this Charter, the rights and freedoms referred to in it are guaranteed equally to male and female persons." Clearly this language mandates that all rights and freedoms, including freedom of expression and equality rights, are guaranteed equally to women and men. From its wording, it is difficult to come to any other conclusion than that section 28 engages section 2(b) prior to any recourse to section 1 and requires a balancing of speech and sex equality interests. Thus section 28 should be able to constrain the operation of section 2(b) to the extent that freedom of expression cannot be expanded when it would have the effect of increasing sex inequality. In other words, if pornography is recognized as a practice of sex discrimination, it follows that freedom of expression cannot be expanded within section 2(b) to protect it if the effect will be to promote or perpetuate the subordinate status of women.

Moreover, section 15 read with section 28 guarantees women equal access to equality rights. Constitutional equality is concerned with eliminating the disadvantage of historically subordinated groups.[82] This means that the Charter is not neutral on practices that promote inequality, but rather has a commitment to ending them. At the very least, before the protection of section 2(b) can be claimed, section 28 should require the pornographer asserting speech rights to demonstrate that the subject materials do not limit women's equality rights.

In *Keegstra*, section 28 was not a factor, nor were coercion and violence present in the materials considered. In considering section 27, the multicultural section of the Charter, Chief Justice Dickson states, however, that "multiculturalism cannot be preserved let alone enhanced if free rein is given to the promotion of hatred against identifiable cultural groups."[83] The argument is stronger in relation to section 28: equality cannot be guaranteed equally to male and female persons if free rein is given to pornography.

C. The Analysis under Section 1: Pornography Is Protected Expression but Justifiably Regulated by Obscenity Laws

Pornography that does not exhibit explicit or implicit violence in its production but which is covered under the obscenity provision will fall to be considered within section 1.

Section 1's function is to balance tensions between harms. When obscenity laws collide with the freedom of expression guarantee, the state must prove that the rights or interests protected by the law outweigh the expression right infringed. The equality approach adopted in *Keegstra* will require a balancing of the harms that flow from regulating expression by obscenity laws against harms actualized through the promotion of women's

82. See *Andrews*, [1989] 1 SCR 143.
83. *Keegstra*, [1990] 3 SCR at 758.

inequality in pornography. In deciding on the proper balance, courts must be guided by the values and principles essential to a free and democratic society, which include 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 that enhance the participation of individuals and groups in society.[84]

The section 1 analysis requires several steps. First, the objectives of the obscenity provisions must be of sufficient importance to warrant overriding the constitutionally protected right of freedom of expression in pornography. Second, if such an objective is established, the state must show that the means chosen to attain the objective are reasonably and demonstrably justified in a free and democratic society. To conclude that the means chosen are reasonable and demonstrably justified, the Court must be satisfied of three things: The measures designed to meet the legislative objective must be rationally connected to the objective; the means used should impair as little as possible the right and freedom in question; and there must be proportionality between the effect of the measures that limit the Charter right or freedom and the legislative objective.[85]

1. *The Legislative Objective—Is It a Pressing and Substantial Concern?* The obscenity provisions of the Criminal Code seek to prohibit the portrayal, depiction, or description of matters, of which the dominant characteristic is the undue exploitation of sex, or of sex and one or more of several subjects, namely, crime, horror, cruelty, and violence.[86] The *Wagner* line of cases[87] held that Parliament's objective is to protect women from the harms resulting from violent, dehumanizing, or degrading depictions. This notion is implicit in *Towne Cinema Theatres Ltd. v. Regina*,[88] in which the Supreme Court stated that the definition of "undue" must encompass publications that portray persons in a degrading manner.[89] Whether the legislation will meet the pressing and substantial concern test will depend upon how seriously the Court views the harms that are actualized through the promotion of women's

84. *Oakes*, [1986] 1 SCR 103.

85. *Keegstra*, 3 SCR at 735-38 (Chief Justice Dickson). In his discussion of the role of § 1, the Chief Justice also stressed that it is misleading to conceive of § 1 as a rigid and technical provision. He said it plays an immeasurably richer role embracing not only Charter values, but all values associated with a free and democratic society. There must be an awareness of the synergistic relationship between the values underlying the Charter and the circumstances of the particular case.

86. Criminal Code § 163(8).

87. *R. v Doug Rankine Co*, 36 CR (3d) 154 (1983), 9 CCC (3d) 53 (Ont Co Ct); *R. v Nicols*, 43 CR (3d) 54 (1984), 17 CCC (3d) 555 (Ont Co Ct); *R. v Ramsingh*, 14 CCC (3d) 230 (1984), 29 Man R (2d) 110 (Man Q B); *R. v Wagner*, 43 CR (3d) 318 (Alta Q B, 1985), aff'd, 50 CR (3d) 175 (Alta CA, 1986), leave denied, 50 CR (3d) 175 (SCC); *R. v Red Hot Video Ltd.*, 45 CR (3d) 36 (1985), 18 CCC (3d) 1 (BCCA), leave denied, 46 CR (3d) xxv (SCC); *R. v Fringe Product Inc.*, 53 CCC (3d) 422 (Ont Dist Ct, 1990).

88. [1985] 1 SCR 494.

89. Id at 505.

inequality through pornography and the context in which pornography is assessed.

Here, as in the section 2(b) analysis, pornography makes a stronger case for regulation than hate propaganda does. Pornography is much more commonplace, socially accepted, and widely distributed across class, race, and geographical boundaries than hate propaganda is, and it exists in a societal context of pervasive sex inequality. It follows that the harm of pornography must be deeper, wider, and more damaging to social life than the harm of hate propaganda. When pornography is prohibited, equality is promoted.

The finding in *Keegstra* that serious and real harms are caused by discriminatory expression[90] is consistent with the findings of numerous social science studies and commissions that have reported on the specific harms of pornography. They all acknowledge that while a causal link between pornography and direct harm cannot be scientifically proven, the proof is clear that pornography reinforces sexual attitudes and behaviour antithetical to equality rights and contributes to violent and dangerous behaviour.[91]

One of the many statements describing the discriminatory effects of pornography is found in the Report on Pornography by the Standing Committee on Justice and Legal Affairs ("MacGuigan Report"):

> The effect of this type of material is to reinforce male-female stereotypes to the detriment of both sexes. It attempts to make degradation, humiliation, victimization, and violence in human relationships appear normal and acceptable. A society which holds that egalitarianism, non-violence, consensualism, and mutuality are basic to any human interaction, whether sexual or other, is clearly justified in controlling and prohibiting any medium of depiction, description or advocacy which violates these principles.[92]

A similar but stronger view of the harm of pornography was expressed by Judge Frank Easterbrook in *American Booksellers Association v. Hudnut*:

> [P]ornography affects thoughts. Men who see women depicted as subordinate are more likely to treat them so. Pornography is an aspect of dominance. It does not persuade people so much as change them. It works by socializing, by establishing the expected and the permissible. *In this view, pornography is not an idea; pornography is the injury.*

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90. See discussion at notes 67-69 and accompanying text; see also notes 33-38 and accompanying text.

91. See Metropolitan Toronto Task Force on Public Violence against Women and Children, Final Report 74 (1984) ("Metro Final Report"); Diane E. H. Russell, *Pornography and Rape: A Causal Model*, 9 Political Psych 41 (1988); *Pornography and Violence: What Does the New Research Say?*, in Lederer, ed, *Take Back the Night* at 218 (cited in note 71); Malamuth & Donnerstein, eds, *Pornography and Sexual Aggression* (cited in note 81); Donald L. Mosher & Harvey Katz, *Pornographic Films, Male Verbal Aggression Against Women, and Guilt*, in 8 Technical Report of the Commission on Obscenity and Pornography (US Govt Printing Office, 1971); McManus, *Introduction* (cited in note 81). Report of the Joint Select Committee on Video Material, Commonwealth of Australia (Aust Govt Publishing Service, 1988).

92. Standing Committee on Justice and Legal Affairs, Report on Pornography 18:4 (Minister of Supply and Services, 1978). Similar findings were made in Pornography and Prostitution in Canada: Report of the Special Committee on Pornography and Prostitution 95-103 (Minister of Supply and Services, 1985) ("Fraser Report"), and in Final Report at 747-56, 767-1035 (cited in note 72).

> Depiction of subordination tends to perpetuate subordination. The subordinate status of women in turn leads to affront and lower pay at work, insult and injury at home, battery and rape on the streets.[93]

Judge Easterbrook was very clear in his finding that pornography is more than expression or representational material depicting the subordination of women. His words indicate that pornography does not just subordinate women representationally, it does so actually.[94]

When the Court inquires into the larger social, political, and legal context of women's experience, as it must do in *Butler*,[95] the broader discriminatory effects will be obvious.[96] Women's experience in the larger context includes rape, battery, prostitution, incest, and sexual harassment as part of daily life. Compared to men, women are profoundly unequal socially, politically, and individually. The encouragement and promotion of subordination in pornography in this broader context, particularly the depictions of violence and exploitation of women at the hands of men, reinforces the systemic violence and the social harm.

Stereotyping and stigmatization of historically disadvantaged groups were recognized as harms deserving of sanction in *Keegstra* because the Court found that they shape the social image and reputation of group members, often controlling their opportunities more powerfully than individual abilities do. The vast proliferation and sheer volume of pornography compared to hate propaganda makes the harm to women's credibility, safety, and opportunities much more serious and generalized.[97]

The pronouncements of the Supreme Court about the importance of equality in a free and democratic society and the need to protect vulnerable groups from real harm caused by expression[98] should ensure that the pressing and substantial requirement of the *Oakes* test[99] will be met.

The pressing and substantial concern requirement will be further bolstered by section 28, which creates an overriding exception to section 2(b). As noted above, section 28 states that, "notwithstanding anything in the

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93. 771 F2d 323, 328-29 (7th Cir 1985) (emphasis added), aff'd, 475 US 1001 (1986).

94. This view has been put forward by leading feminist theorists, such as Catharine MacKinnon in many of her excellent publications including *Towards a Feminist Theory of the State* (Harvard U Press, 1989); Susan Brownmiller, *Against our Will: Men, Women and Rape* 441-45 (Simon and Shuster, 1975); Andrea Dworkin, in numerous articles and books, including 8 Harv Women's L J at 1 (cited in note 73). In spite of this strong conclusion about the injurious nature of pornography, Judge Easterbrook and the rest of the Seventh Circuit denied that any governmental effort to censor pornography on the ground of harm to women as a class asserted in the case could possibly withstand a constitutional challenge. *Hudnut*, 771 F2d at 329. For a comprehensive critique of the judgment, see Seator, 17 Golden Gate U L Rev 297 (cited in note 65).

95. This requirement was set out in *Turpin*, [1989] 1 SCR at 1331. The Supreme Court of Canada said that in assessing whether a group is discriminated against, inquiry must be directed into "the larger social, political and legal context," and enumerated "indicia of discrimination such as stereotyping, historical disadvantage or vulnerability to political and social prejudice." Id at 1333.

96. *Keegstra*, [1990] 3 SCR 645-49.

97. Thelma McCormick, *Making Sense of Research on Pornography*, in Metro Final Report at 37 (cited in note 91).

98. See text accompanying notes 68-71.

99. *Oakes*, [1986] 1 SCR at 139.

Charter, the rights and freedoms referred to in it are guaranteed equally to male and female persons." If pornography cannot be excluded from section 2(b) protection because it conveys meaning, then the guarantee of sex equality within section 28 must be contemplated within section 1. According to section 28, sex equality is unconditional. As such, it cannot be tempered by any other provisions in the Charter. What this means is that section 28 must weigh in the balance of section 1 to the extent that no freedom or right should override legislation when it would have the effect of increasing sex inequality. Once the discriminatory effects of pornography are understood, it follows that freedom of expression cannot be expanded within section 1 where the effect will be to perpetuate or promote women's subordinate status.[100] Furthermore, treating the state goal of eliminating sex discrimination as forming a reasonable justification for limiting free speech[101] should allow a cutting back of fundamental freedoms in section 1 in order to reinforce equality or combat sex inequality.

Just as Chief Justice Dickson commented in *Keegstra* that "multiculturalism cannot be preserved let alone enhanced if free rein is given to the promotion of hatred against identifiable cultural groups,"[102] it could similarly be said that equality cannot be guaranteed equally to male and female persons if free rein is given to pornography.

2. *Are the Means Chosen to Attain the Objective Reasonably and Demonstrably Justified in a Free and Democratic Society?* Once the pressing and substantial objective of the legislation is identified, the second branch of the *Oakes* test, proportionality, must be examined. The Court determines whether the means—the criminal prohibition of obscenity—is proportional and appropriate to the ends of suppressing pornography in order to maintain individual dignity and women's equality. The Court must consider not only the importance of the right in question and the significance of its limitation, but also whether the way in which the limitation is imposed is justifiable.[103]

In a society where gender inequality and sexual violence exist as entrenched and widespread social problems,[104] criminal legislation prohibiting material that attempts to make degradation, humiliation, victimization, and violence against women appear normal and acceptable would be more in line with principles of a free and democratic society than otherwise. The criminal prohibition should meet the requirement of rational connection to the legislative objective by fostering non-violent, non-aggressive, positive gender relations in a community dedicated to sex

100. Lahey, 20 New Eng L Rev at 683 (cited in note 26).
101. Id.
102. *Keegstra*, [1990] 3 SCR at 758, citing *Andrews and Smith*, [1990] 3 SCR at 880 (Cory).
103. The definition of obscenity in § 163(8) of the Criminal Code reads as follows:

> For the purposes of this Act, any publication a dominant characteristic of which is the undue exploitation of sex, or of sex and any one or more of the following subjects, namely, crime, horror, cruelty and violence, shall be deemed to be obscene.

104. *Fringe Product*, 53 CCC at 444.

equality; it obviously bears a rational connection to the protection of those targeted by pornography.

Whether the means used impair freedom of expression as little as possible will depend on how the Court interprets the key words of the obscenity definition, "undue exploitation of sex."[105] If they are interpreted to include mere sexual explicitness according to the morality standard,[106] or it will be difficult to find a rational connection between the legislative objective and the means chosen to attain it, minimal impairment. Arguably, the net is cast too wide if mere explicitness amounts to "undue exploitation of sex." The inherent vagueness in the assessment would probably fail to meet the requirements of intelligible standards. On the other hand, if the harm-based equality interpretation is adopted, the rational connection is there. The impairment to expression is minimized because the harm is more explicit and the application of the law more predictable.

In this part of the section 1 assessment, the Court will also examine whether other less intrusive means are available to Parliament to meet their objective. "The means, even if rationally connected to the objective . . . should impair 'as little as possible' the right or freedom in question."[107] In *Irwin Toy*, however, the Court softened this requirement, emphasizing the importance of protecting vulnerable groups where evidence indicates the ban is reasonable: "This Court will not in the name of minimal impairment, take a restrictive approach to social science evidence and require legislatures to choose the least ambitious means to protect vulnerable groups."[108]

The Court also distinguished between situations where the government mediates conflicts involving different groups with competing interests and those situations where government is the singular antagonist of the individual whose right has been infringed.[109] Where the latter is true, the Court will take a stricter approach to the "least drastic means test." Even though pornographers cast themselves as victims of government oppression, the products they produce, distribute, and sell arguably show them to be aggressors in a social conflict between women and men. Obscenity laws could be seen as advancing the interests of women, while pornographers advance the interests of the dominant male group by subordinating women. If that is the case, obscenity laws should be viewed as Parliament's reasonable assessment as to where a line should be drawn between competing interests. By prohibiting the undue exploitation of sex interpreted as violent, degrading, and dehumanizing depictions, Parliament strikes a reasonable

105. Criminal Code § 163(8).

106. Historically, obscenity law was justified on the basis of morality, a rationale which has been the subject of much criticism and obscures pornography's discriminatory effects on women. Some courts rely on the morality standard, justifying regulation on the "dirt for dirt's sake" rationale. See, for example, *R. v Pereira-Vasquez*, 26 BCLR (2d) 273 (1988), 64 CR (3d) 253, 269 (BCCA); *R. v Video World Ltd.*, [1986] 22 CCC (3d) 331, 342-43; [1986] 1 WWR 413, 36 Man R (2d) 68 (Man CA), leave denied, [1987] 1 SCR 1255.

107. *Oakes*, [1986] 1 SCR at 139.

108. *Irwin Toy*, [1989] 1 SCR at 994.

109. Id at 995.

balance that courts should not second guess. It follows that the relative burdens of the parties under section 1 should be assessed by requiring pornographers to justify limiting the equality rights of women, just as the Crown should have to justify any limit on freedom of expression that obscenity laws create.

The final portion of the *Oakes* test requires the Court to examine the proportionality between the effect of the obscenity laws on freedom of expression and the legislative objective. If the contextual approach of *Keegstra*, *Royal College*,[110] and *Edmonton Journal*[111] are followed, the Court will examine the relationship of pornography to the free expression values of seeking and attaining the truth, participation in social and political decisionmaking, and individual self-fulfilment and human flourishing.

The *Butler* Court should find that, like hate propaganda, pornography is low-value speech. It is hardly persuasive to argue that opinions advocating the sexual torture or degradation of women in pornography will lead to a better world or can contribute to truth-seeking. Rather than a vehicle for seeking and attaining the truth, pornography more obviously inhibits truth-seeking because it intimidates and silences women, preventing them from asserting the truth. While it could be said that pornography may be of some value through educating the population about misogyny, it is far from clear that an open confrontation with pornography in the marketplace of ideas leads to a richer belief in the truth; it is more likely that the opposite result occurs. Debasement of women in pornographic magazines, books, movies, films, or on television, on street corner news-stands, on covers of record albums, and in shop windows is an ever-increasing phenomenon. Three surveys indicate that sales of pornographic magazines in Canada increased by 326.7 percent between 1965 and 1980. This represents an increase of at least fourteen times the growth of the Canadian population during the same period.[112] The messages in pornography that women and children are sex objects available to be violated, coerced, and subordinated at the will of men is replicated in real life statistics that are also increasing at a rapid rate. Widespread sexual assault, wife battery, sexual harassment, and sexual abuse of children indicate that the competing idea that women as human beings are equal to men and that children must be treated with dignity and respect is not emerging from the marketplace in any significant way.[113] The "value" of

110. *Rocket v Royal College of Dental Surgeons*, [1990] 2 SCR 232.

111. *Edmonton Journal v Alberta (Attorney General)*, [1989] 2 SCR 1326, 1355-56.

112. Report of the Committee on Sexual Offences Against Children and Youths, Sexual Offences Against Children 180-83 (Minister of Supply and Serv, 1984) (Chair: Robin F. Badgley) ("Badgley Report").

113. See Lorenne Clark & Debra Lewis, *Rape: The Price of Coercive Sexuality* 61 (Women's Press, 1977) (stating that incidents of rape increased by 174% between 1961 and 1971 in Canada). In the period 1969-1973, it increased 76%. Susan Armstrong, in *Wife Beating: Let's Stop it Now*, Canadian Living 89 (July 1985) (stating that one women in ten is beaten by her husband or common law spouse); Badgley Report at 180-83 (cited in note 112) (stating that 50% of women and 30% of men are victims of unwanted sexual acts or incidents occurring before adulthood). See generally Fraser Report (cited in note 92).

pornography as a truth-seeking device in these terms would seem to range from remote to none. In light of the serious facts detailing widespread abuse, it does not make sense to suggest that the uninhibited activity of pornographers is important to maintaining a belief that what they have to say is wrong. If pornography is seen to subvert the truth-seeking process itself, the interests of seeking truth work against rather than in favour of it.[114]

The harms of pornography render it antithetical to the other values and purposes underlying the freedom of expression guarantee as well. For example, it is difficult to imagine that pornography encourages community participation. The more likely scenario is that social and political participation of women is constrained by pornography because it undermines respect for them. In terms of the value of self-fulfilment, if individuals who traffic in and consume pornography are fulfilled, it is at the expense of the rights of women. Human flourishing of men cannot be said to be encouraged by material that harms women.

Pornographers and civil libertarians often argue that the harm of pornography is "in the eye of the beholder" and any offensiveness caused is easily diminished or eradicated by averting the eyes or not listening. The problem with this argument is that the categorization of "offensiveness" wrongly places the harm within the victim's control. It suggests that if the victim is harmed it is her own fault because she should or could have avoided it. This form of victim-blaming ignores the true essence of discrimination, which is not how members of disadvantaged groups feel about themselves, but rather how they are viewed by members of the dominant majority.

To the extent that the majority in *Keegstra* made a clear finding that degradation and humiliation fall into the category of serious harms rather than mere offensiveness, it will be difficult for pornographers to argue that pornography's harms are trivial or within the victims' control. In *Keegstra*, the harms caused by hate propaganda were analogized to the harms of sexual harassment, an individualized harm that also promotes group disadvantage.[115] Pornography's harms, which affect women as a class as well as individual women, should at the very least be equivalent to the harms caused by hate propaganda.

When an equality analysis is used to determine what is a reasonable limit prescribed by law in the context of a free and democratic society, courts allow the government to alleviate the harmful effects of discrimination. From an equality perspective, the means chosen by Parliament to alleviate discrimination through obscenity laws are rationally connected to the objectives of protecting society and individuals from dehumanization and degradation. The limitations that the obscenity laws place on expression minimally impair the freedom because pornography is contrary to the

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114. See Lee Bollinger, *The Tolerant Society: Freedom of Speech and Extremist Speech in America* 87-93 (Oxford U Press, 1986).

115. In *Janzen*, [1989] 1 SCR 1252, Justice Dickson drew a clear connection between sexual harassment and sex inequality generally.

principles and values that underlie its protection. Any limit on freedom of expression is slight when compared with the deleterious effect pornography has on women and on society as a whole. An equality analysis further recognizes that the legislative action to deter degradation and dehumanization of women goes some way to redress the imbalance of power between the sexes.

IV

CONCLUSION

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

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

Earlier in the article, I discussed the different civil liberties politics in Canada and the United States.[116] Both countries' traditions for civil liberties grow from the thoughts of Locke, Hobbes, Rousseau, and Mill. The tradition has centered on individualism and the individual's relationship to the state. The state was to interfere only when one individual violated the rights of another. The law, as neutral arbiter, was to apply rules equally.

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

116. See text accompanying notes 45-52.

cannot mean that racism or sexism will be given the same deference as tolerance.[117]

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

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

AUTHOR'S POSTSCRIPT

On February 27, 1992, the Supreme Court of Canada unanimously upheld the obscenity law in Canada using a harms-based equality analysis. It held that the law infringed freedom of expression as protected by section 2(b) of the Charter, but it nevertheless passed the section 1 reasonable limit test. Although the Court declined to accept the argument that some forms of pornography fall outside the Charter's ambit because they constitute violent forms of expression, the Court focussed on the harm of violence, degradation, and dehumanization in pornography as the basis for its decision.

The Court limited its deliberations to an examination of the definition of obscenity in section 163, which states that obscenity is "the undue exploitation of sex or of sex and one or more of the following subjects, namely, crime, horror, cruelty and violence."[118] The Court said that the meaning of "undue" must be determined by a "community standard of tolerance." This determination must be made on the basis of the degree of harm that may flow from such exposure, harm of the type which predisposes persons to act in an anti-social manner. In explicitly finding pornography to be harmful, the Court said it harms women's rights to be equal, their sense of self-worth, and their physical safety. The harm is exacerbated, the Court said, by the

117. Rosalie Abella, Keynote Address, National Symposium on Women, Law, and the Administration of Justice (June 10, 1991) (paper available from the Department of Justice, Canada).
118. See note 86.

burgeoning pornography industry, making the objective of Parliament more pressing and substantial now than when section 163 was first enacted.

The type of sexual material at which the statute aims, the Court said, is the portrayal of sex coupled with violence or explicit sex which is degrading or dehumanizing and which creates a substantial risk of harm. Explicit sex which is neither violent, degrading, nor dehumanizing will not be considered obscene unless it involves the use of children in its production. The Court recognizes an exception to the law where the obscene depiction is necessary for artistic purposes or for the serious treatment of a theme.

In the section 1 analysis, the Court clarified the purpose of the obscenity provisions. It said that Parliament's objective is not moral disapprobation but rather, avoidance of harm of the type that potentially victimizes women. This classification in the law is historic. For the first time, the Supreme Court of Canada has linked the obscene with that which subordinates or degrades women rather than that which offends some notion of sexual morality.

Once the Court found that the purpose of the legislation was the avoidance of harm, it had little difficulty in upholding the law on the basis of the *Oakes*[119] criteria. For example, Justice Sopinka, writing for the Court, said that the harms analysis makes it untenable to argue that time, place, and manner restrictions are a better form of regulation than prohibition. This reasoning is correct because imposing heavy taxes on pornography, or requiring special licenses for its distribution sends the message that harms to women will be tolerated as long as the user pays. Government would be complicit in the pornography trade and even become a participant in it if it collected taxes or issued licenses. Justice Sopinka pointed out how inconsistent and hypocritical it is to argue time, place, and manner restrictions once the state has reasonably concluded that certain acts are harmful to certain groups in society. To permit such acts as long as conditions are more restrictive is wrong because the harm sought to be avoided remains the same in either case.[120] This approach is encouraging because it means that the Charter is not neutral on practices that promote inequality. Rather, it is a constitutional commitment to ending them.

The suggestion that reactive solutions such as the provision of counselling for rape victims are more proportional to the objective than prohibition also lose their force once harms are recognized. As alternatives to prohibition, they imply that women must absorb the harm caused by the very behaviour encouraged by pornography. It is hard to believe that such a requirement could have any credibility in any society that is free and democratic and has equality as an entrenched guarantee. Certainly these and other strategies should be offered to protect women from violent men, but to argue, as the civil liberties intervenors in the *Butler* case did, that they are preferable to controlling the dissemination of the very images that contribute to such behaviours diminishes the harm and consequently diminishes women and children as full citizens. As the Court stressed, serious social problems such as violence against women and children requires a multi-faceted approach.[121]

In examining the freedom of expression values of pursuit and attainment of the truth, participation in the political process, and individual self-fulfillment, the Court

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119. See text accompanying note 36.
120. *R. v Butler*, [1992] SCC at 62 (Feb 27, 1992) (unreported).
121. Id at 61.

found, as it did in *Keegstra*, that speech which harms people is low-value speech. The Court said the kind of expression represented by pornography does not stand on equal footing with other kinds of expression values.[122] The Court buttressed this view by taking judicial notice of the fact that pornography is motivated, in the overwhelming majority of cases, by economic profit. In summary, the Court's recognition that the sexual exploitation of women and children can lead to "abject and servile victimization" as well as other types of harm goes some way toward redistributing speech rights between men and women. The Court's contextually sensitive method of defining pornography is responsive to progress in the knowledge and understanding of pornography and its harms. The *Butler* decision is a welcome development in the law that other countries and the international human rights community should contemplate if they are genuinely serious about women's human rights, violence against women, and women's equality.

122. Id at 51.