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Regulation of Hate Speech

Michel Rosenfeld

In a well-functioning democracy, the vindication of free speech rights depends primarily on the effective protection of unpopular and even offensive views. Indeed, widely shared views or even those held by a bare majority are unlikely to be suppressed, and even if they were occasionally trampled upon, it stands to reason that majoritarian politics would eventually inevitably come to their rescue. For example, in a democracy in which a majority strongly embraces a particular religious ideology, it would be unwise for those in power to seek to suppress expressions of that ideology as that would anger the political majority and prompt them to use their democratic rights to vote out those currently in power in favor of others, who would act more sympathetically to the ideology in question. On the other hand, it is easy to imagine how a political majority may be mobilized to legislate against views it deems repugnant or threatening to its established way of life. The minority religion that promotes a belief system and morality that the majority deems repugnant; the political dissidents who launch a radical attack (by means that most feel amount to mere propaganda) against the prevailing institutional order; and, the proponents of alternative lifestyles that are perceived as profoundly threatening to the traditions and way of life of the vast majority of citizens all loom as prime candidates for becoming the targets of majority-backed laws aimed at curtailing or suppressing their respectively held views. Accordingly, to the extent that these unpopular minority views are nonetheless constitutionally protected, it seems more likely that they will be consistently shielded by unelected judges than by those accountable to electoral majorities.

There is a serious and difficult question concerning whether limits on the protection of minority held views deemed repugnant or pernicious are appropriate, and if appropriate, what those limits ought to be. Can those views be as repugnant or disruptive to the polity as constructed and conceived by the overwhelming majority of its members as to warrant exclusion from free speech protection? Should the line be drawn at speech that poses a "clear and present" danger of violence or injury (e.g., falsely shouting "fire!" in a crowded theater)? Or should protection also be withheld from speech that profoundly upsets, disrupts, or disgusts an overwhelming majority of citizens?

The case of "hate speech"—that is, speech designed to convey or promote hatred on the basis of race, religion, or ethnic origin—is particularly vexing in this context as often a minority group historically subject to much vilification and discrimination becomes the target of vicious group slander that mirrors or reinforces deeply seated prejudices. Significantly, there are widely divergent jurisprudences on the protection of hate speech under constitutional free speech rights. The United States stands apart from most other Western democracies in affording protection to hate speech so long as it does not constitute an incitement to violence. These other democracies do not extend protection to hate speech that incites to racial, religious, or ethnic-based hatred. What accounts for this difference? Is the U.S. approach better or worse? Is the difference explained by ideological, historical, political, or constitutional divergences?

A comparative approach to adjudication of hate speech cases promises to afford crucial insights into these issues, and to allow for a better understanding and assessment of the American approach to the subject. The Canadian Supreme Court decision excerpted below is particularly instructive in this respect for a number of reasons. Chief among these are that Canada like the United States is a North-American common law jurisdiction with a written constitution containing a comparable free speech provision; that the Canadian Court was familiar with the free speech jurisprudence of the United States and that it discussed it extensively in its opinion; and, that the Canadian Court rejected the American approach after a thorough evaluation of its strengths and weaknesses.

Regina v. Keegstra

Supreme Court of Canada
[1990] 3 S.C.R. 697 (Can.)

Dickson, C.J.C. (Wilson, L' Heureux-Dubé, and Gonthier, JJ. concurring)

2. …Keegstra was a high school teacher…from the early 1970s until his dismissal in 1982. In 1984, Mr. Keegstra was charged under s. 319(2) (then 281.2[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.

3. …He taught his classes that…Jews [were] "treacherous," "subversive," "sadistic," "money-loving," "power hungry" and "child killers"… [and that Jews] "created the Holocaust to gain sympathy"…and expected his students to reproduce his teachings in class and on exams. If they failed to do so, their marks suffered.

[After conviction, Keegstra appealed, claiming that s. 319(2) of the Criminal Code unjustifiably infringed his freedom of expression as guaranteed by s. 2(b) of the Charter.[1]]

Criminal Code:

8. 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.

(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.…

318(4)…"identifiable group" means any section of the public distinguished by colour, race, religion or ethnic origin.

…

V. The History of Hate Propaganda Crimes in Canada…

23. …Following the Second World War and revelation of the Holocaust, in Canada and throughout the world a desire grew to protect human rights,

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[1] [Editor's Note] The Canadian Charter of Rights and Freedoms, 1982 provides as follows:

Section 1 [Limitation of Rights]

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.

Section 2 [Freedom of Religion, Speech, Association]

Everyone has the following fundamental freedoms:

(a) freedom of conscience and religion;

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

(c) freedom of peaceful assembly; and

(d) freedom of association.

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.…

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

35. …Communications which wilfully promote hatred against an identifiable group without doubt convey a meaning, and are intended to do so by those who make them. [Hate speech is expression protected under 2(b). It is not a form of violence.]

VII. Section I Analysis of s. 319(2)

A. General Approach to Section I…

49. Obviously, a practical application of s. 1 requires more than an incantation of the words "free and democratic society." These words require some definition, an elucidation as to the values that they invoke. To a large extent, a free and democratic society embraces the very values and principles which Canadians have sought to protect and further by entrenching 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.…

C. Objective of s. 319(2)…

(i) Harm caused by expression promoting the hatred of identifiable groups

63. 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.

64. …[T]he presence of hate propaganda in Canada is sufficiently substantial to warrant concern. Disquiet caused by the existence of such material is not simply the product of its offensiveness, however, but stems from the very real harm which it causes. Essentially, there are two sorts of injury caused by hate propaganda. First, there is harm done to members of the target group. It is indisputable that the emotional damage caused by words may be of grave psychological and social consequence.…

65. 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 to 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....

66. A second harmful effect of hate propaganda which is of pressing and substantial concern is its influence upon society at large....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....

(ii) International human rights instruments

69. ...I would also refer to international human rights principles...for guidance with respect to assessing the legislative objective.

70. 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.... Moreover, international human rights law and Canada's commitments in that area are of particular significance in assessing the importance of Parliament's objective under s. 1....

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

72. In 1966, the United Nations adopted the *International Convention on the Elimination of All Forms of Racial Discrimination,* Can. TS 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 doctrines 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 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, or acts of, 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 5 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....

73. Further, the *International Covenant on Civil and Political Rights*, 999 UNTS 171 (1966) (hereinafter ICCPR), adopted by the United Nations in 1966 and in force in Canada since 1976 . . . guarantees the freedom of expression [in Art. 19] while simultaneously prohibiting the advocacy of hatred: . . . Article 20 [states]: "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." . . .

(iii) Other provisions of the Charter

78. Significant indicia of the strength of the objective behind s. 319(2) are gleaned not only from the international arena, but are also expressly evident in various provisions of the Charter itself . . . 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 underline the great importance of Parliament's objective in prohibiting hate propaganda. . . .

(iv) Conclusion respecting objective of s. 319(2)

85. In my opinion, it would be impossible to deny that Parliament's objective in enacting s. 319(2) is of the utmost importance. Parliament has recognized the substantial harm that can flow from hate propaganda, and in trying to prevent the pain suffered by target group members and to reduce racial, ethnic and religious tension in Canada has decided to suppress the wilful promotion of hatred against identifiable groups.

D. Proportionality . . .

87. . . . [T]he interpretation of s. 2(b) under *Irwin Toy* gives protection to a very wide range of expression. Content is irrelevant to this interpretation, the result of a high value being placed upon freedom of expression in the abstract. This approach to s. 2(b) often operates to leave unexamined the extent to which the expression at stake in a particular case promotes freedom of expression principles. In my opinion, however, the s. 1 analysis of a limit upon s. 2(b) cannot ignore the nature of the expressive activity which the state seeks to restrict. While we must guard carefully against judging expression according to its popularity, it is equally destructive of free expression values, as well as the other values which underlie a free and democratic society, to treat all expression as equally crucial to those principles at the core of s. 2(b). . . .

91. 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). . . .

92. 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.... 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 obtain 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 overplay 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....

[Chief Justice Dickson recognizes that self-fulfillment is also an important free speech objective. However, this self-fulfillment is realized in a community and it must "therefore be tempered insofar as it advocates with inordinate vitriol an intolerance and prejudice which views as execrable the process of individual self-development and human flourishing among all members of society."]

94. Moving on to a third strain 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....

95. ...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 putatively 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....

96. 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....

(ii) Rational connection

102. …[I]t would be difficult to deny that the suppression of hate propaganda reduces the harm such expression does to individuals who belong to identifiable groups and to relations between various cultural and religious groups in Canadian society.

103. 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 earning them extensive media attention. In this vein, it is also suggested that persons accused of intentionally promoting hatred often see themselves as martyrs, and may actually generate sympathy from the community in the role of underdogs engaged in battle against the immense powers of the state. 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…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.

104. …I recognize that the effect of s. 319(2) is impossible to define with exact precision—the same can be said for many laws, criminal or otherwise. In my view, however, the position that there is no strong and evident connection between the criminalization of hate propaganda and its suppression is unconvincing.…

105. It is undeniable that media attention has been extensive on those occasions when s. 319(2) has been used. Yet from my perspective, s. 319(2) serves to illustrate 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.…

106. 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.…

108. [I] therefore conclude that the first branch of the proportionality test has been met…

(iii) Minimal impairment of the s. 2(b) freedom…

110. The main argument of those who would strike down s. 319(2) is that it creates a real possibility of punishing expression that is not hate

propaganda. It is thus submitted that the legislation is overbroad, its terms so wide as to include expression which does not relate to Parliament's objective, and also unduly vague, in that a lack of clarity and precision in its words prevents individuals from discerning its meaning with any accuracy. In either instance, it is said that the effect of s. 319(2) is to limit the expression of merely unpopular or unconventional communications. Such communications may present no risk of causing the harm which Parliament seeks to prevent, and will perhaps be closely associated with the core values of s. 2(b). This overbreadth and vagueness could consequently allow the state to employ s. 319(2) to infringe excessively the freedom of expression or, what is more likely, could have a chilling effect whereby persons potentially within s. 319(2) would exercise self-censorship. Accordingly, those attacking the validity of s. 319(2) contend that vigorous debate on important political and social issues, so highly valued in a society that prizes a diversity of ideas, is unacceptably suppressed by the provision.…

111. …In order to…determine whether s. 319(2) minimally impairs the freedom of expression, the nature and impact of specific features of the provision must be examined in some detail.…

118. …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 only such proof can demonstrate a harm serious enough to justify limiting the freedom of expression under s. 1. It was largely because of this lack of need for proof of actual hatred that KERANS J.A. in the Court of Appeal held s. 319(2) to violate the Charter.

119. …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 debilitate the effectiveness of s. 319(2) in achieving Parliament's aim.…

124. The factors mentioned above suggest that s. 319(2) does not unduly restrict the s. 2(b) guarantee.…

131. …I should comment on a final argument marshalled in support of striking down s. 319(2) because of overbreadth or vagueness. It is said that the presence of the legislation has led authorities to interfere with a diverse range of political, educational and artistic expression, demonstrating only too well the way in which overbreadth and vagueness can result in undue intrusion and the threat of persecution. In this regard, a number of incidents are cited where authorities appear to have been overzealous in their interpretation of the law, including the arrest of individuals distributing pamphlets admonishing Americans to leave the country and the temporary holdup at the border of a film entitled *Nelson Mandela* and Salman Rushdie's novel *Satanic Verses* (1988).

132. That s. 319(2) may in the past have led authorities to restrict expression offering valuable contributions to the arts, education or politics in Canada is surely worrying. I hope, however, that my comments as to the scope of the provision make it obvious that only the most intentionally extreme forms of expression will find a place within s. 319(2). In this light, one can safely say that the incidents mentioned above illustrate not overexpansive breadth and vagueness in the law, but rather actions by the state which cannot be lawfully taken pursuant to s. 319(2). The possibility of illegal police harassment clearly has minimal bearing on the proportionality of hate propaganda legislation to legitimate Parliamentary objectives, and hence the argument based on such harassment can be rejected.

c. Alternative modes of furthering Parliament's objective

133. …[I]t is said that non-criminal responses can more effectively combat the harm caused by hate propaganda….

134. 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. With respect to the efficacy of criminal legislation in advancing the goals of equality and multicultural tolerance in Canada, I agree that the role of s. 319(2) will be limited….

135. 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….

138. I thus conclude that s. 319(2) of the *Criminal Code* does not unduly impair the freedom of expression….

[With respect to the third branch of the proportionality test, Chief Justice Dickson emphasizes the enormous importance of the objective of s. 319(2): "Few concerns can be as central to the concept of a free and democratic society as the dissipation of racism, and the especially strong value which Canadian society attaches to this goal must never be forgotten in assessing the effects of an impugned legislative measure." He then concludes that in light of that objective, the effects of s. 319(2), "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. 2(b)." The infringement of freedom of expression is therefore upheld as a reasonable limit under s. 1.]

[Justice McLachlin (Justice Sopinka concurring), dissenting, finds lack of rational connection and refers to the chilling effects of the criminal provision.]

[Appeal allowed.]

Notes and Questions

1. *Hate speech in context and American exceptionalism.* "Hate speech"—defined as speech designed to promote hatred on the basis of race, religion, ethnicity, or national origin—has been subject to regulation since the end of the Second World War. Prompted by the obvious links between racist propaganda and the Holocaust and animated by the aim of rejecting the Nazi experience and of preventing its resurgence, the trend toward excluding hate speech from constitutionally protected expression spread worldwide. This trend was reflected in international covenants as well as in the constitutional jurisprudence of numerous individual countries, such as Germany, *see* Freidrich Kübler, *How Much Freedom for Racist Speech? Transnational Aspects of a Conflict of Human Rights*, 27 Hofstra L. Rev. 335, 340–47 (1998), and in the decade immediately following the war even the United States, *see Beauharnais v. Illinois*, 343 U.S. 250 (1952) (5–4 decision upholding the constitutionality of a statute criminalizing group defamation based on race or religion). Although never repudiated by the U.S. Supreme Court, *Beauharnais* is fundamentally inconsistent with later decisions on the subject, which frame the confines of American exceptionalism regarding the constitutional status of hate speech.

   A large number of international covenants call for, or condone, the criminalization of hate speech. The 1966 *U.N. Covenant on Civil and Political Rights* provides in article 20(2) that "[a]ny advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law" (999 U.N.T.S. 171, entered into force 1976). The European Convention on Human Rights and Fundamental Freedoms (ECHR) (1950) has also been interpreted as authorizing criminalization of hate speech. *See*, *e.g.*, *Jersild v. Denmark*, 19 Eur. Ct. H.R. Rep. 1 (1995) (Danish courts' conviction of racist youths for calling immigrants "niggers" and "animals" upheld as consistent with ECHR Art. 10(2)). A particularly strong stand against hate speech, which includes a command to states to criminalize it, is promoted by the 1965 International Convention on the Elimination All Forms of Racial Discrimination (CERD). Its Article 4 cited by the Court in *Keegstra* requires that states criminalize incitements to racial hatred and that they prohibit organizations that promote and incite racial discrimination. The United States attached a reservation to its ratification of CERD on the grounds that compliance with article 4 would contravene current American free speech jurisprudence. *See* Kübler, *supra*, at 357.

   Most Western constitutional democracies follow Canada in refusing constitutional protection to hate speech. Germany has enacted both civil and criminal laws against hate speech, and has for understandable reasons focused particularly on restricting or punishing anti-Semitic expression. Under current German law, criminal liability can be imposed for incitement to hatred, or for attacks on human dignity against individuals or groups determined by nationality, race, religion, or ethnic origin. *See* Kübler, *supra*, at 344. In addition, in the most notorious and controversial offshoot of its attempt to combat hate speech, Germany has prohibited denying the Holocaust or, to use a literal translation of the German expression, to

engage in the "Auschwitz lie". *See Holocaust Denial Case* (German Constitutional Court) 90 BVerfGE 241 (1994) (upholding constitutionality of criminalization of Holocaust denial). Furthermore, other Western European democracies, such as the United Kingdom, Germany, and France, also have extensive regulations including criminal laws, against hate speech. *See* Michel Rosenfeld, *Hate Speech in Constitutional Jurisprudence: A Comparative Analysis*, 24 Cardozo L. Rev. 1523, 1544–47, 1555–56 (2003). (The United Kingdom does not have a written constitution but adheres to broad, firmly entrenched constitutional norms and affords freedom of expression statutory protection. *See* The Human Rights Act 1998.)

In contrast, contemporary American free speech jurisprudence protects hate speech so long as the speech does not *incite violence*. *See Brandenburg v. Ohio*, 395 U.S. 444 (1969). The *Brandenburg* standard was applied subsequently to extend constitutional protection to a Neo-Nazi march in full SS uniform with swastikas in a Chicago suburb where many Holocaust survivors resided, *see Smith v. Collin*, 436 U.S. 953 (1978) and to a cross-burning inside the fenced yard of an African American family by young white supremacists, *see R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992).

Is it preferable to have a single standard for all speech? Or are multiple standards better attuned to discourage, and convey official state reprobation against pernicious racist invective or oppressive verbal assault singling out targeted victims on the basis of their religious affiliation?

Does not the concerted incitement to racial hatred, as was seen in Nazi Germany prior to Second World War, often lead to race-based violence? *See* Franklin S. Haiman, Speech and Law in a Free Society 87 (1981) (arguing that Nazi extermination of Jews might not have been possible in the absence of massive anti-Semitic propaganda designed to desensitize the German people). And, even if intense and concentrated racial or religious hatred does not eventually lead to violence, it is not likely to become so demeaning, humiliating, and oppressive as to cause victim groups profound social and psychological injuries that are comparable in severity with some of the consequences of physical violence? *See* Mari J. Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 Mich. L. Rev. 2320 (1989) (stressing that vicious hate propaganda causes physiological symptoms and emotional distress in victims).

2. *The constitutional treatment of hate speech: Text vs. context.* Is the contrast between *Keegstra* and U.S. cases such as *Collin* and *R.A.V.* explainable in textual terms given differences between the two countries' constitutions? Article 1 of the Canadian Constitution cited in *Keegstra* makes explicit provision for limitation of constitutional rights, including free speech rights. There is nothing comparable in the U.S. Constitution. The First Amendment provides for protection of speech in categorical terms, stating, in relevant part, that "Congress shall make no law . . . abridging the freedom of speech . . .". Compare article 5(2) of the German Basic Law (as the German Constitution is referred to) which limits freedom of expression "for the protection of youth and . . . the right to inviolability of personal honor." Similarly, article 10 of the European Convention of Human Rights protects the right to freedom of expression but specifies, inter alia, in 10(2) that such a right is "subject to restrictions . . . necessary in a democratic society . . . for the protection of health and morals, for the protection of the reputation or rights of others . . .".

In addition to these textual differences, there are stark contextual ones between the United States and other countries due to history, culture, and ideology. Perhaps

the sharpest contrast is that between how Nazi propaganda is constitutionally protected in the United States, *see Smith v. Collin*, *supra* and consistently subject to criminal punishment in Germany. Besides the historical fact that Germany spread Nazism and that the United States went to war against it, the fear of a recurrence and the constant need for explicit repudiation is paramount in Germany. *See* the *Lüth* case (German Constitutional Court) 7BverFGE 198 (1958) and the *Holocaust Denial* case, *supra*. In the United States, on the other hand, as evinced by the events and ultimate resolution of the controversy over the Neo-Nazi march litigated in *Collin*, the Neo-Nazis were completely isolated and marginalized and the larger public overwhelmingly unsympathetic to their cause. *See* Michel Rosenfeld, *Hate Speech in Constitutional Jurisprudence*, *supra*, at 1536–40. More specifically, both in terms of the targeted victims of the hate speech involving Jews in the United States versus Jews in Germany (*Cf.* the *Holocaust Denial Case* where the German Constitutional Court asserted that the Nazi "Nuremberg Laws" paving the way to the extermination of the Jews "puts Jews in the Federal Republic in a special, personal relationship vis à vis their fellow citizens; what happened then is also present in this relationship today") and in terms of possibly swaying the nonvictim targeted audience (American versus German non-Jews), Nazism looms as a rather minor preoccupation in the United States and clearly as a major one in Germany.

Do the textual differences mentioned above ultimately matter that much? Consider that although the First Amendment is expressed in categorical terms, the U.S. Supreme Court has interpreted it as allowing the imposition of some limitations on speech. Is not the American jurisprudence just like its Canadian counterpart, ultimately dependent on balancing or proportionality analysis? Does the difference boil down to the United States granting greater weight to speech—including hate speech—than Canada? Or, is it rather that the United States grants less weight to the pain and humiliation of the targeted victims of hate speech? *Cf.* Matsuda, *supra*. Or both?

The contextual differences between anti-Semitism in Germany and the United States are obviously vast. Arguably, the more relevant comparison should be between American racism and German anti-Semitism. The burning of a cross on the lawn of an African American family, as in *R.A.V.*, often done to discourage middle-class African Americans from moving into white neighborhoods, *see* Rosenfeld, *supra*, at 1540, may well amount to expression that seems as threatening to present-day African Americans as Holocaust denial seems to contemporary German Jews. *Cf. Virginia v. Black*, 538 U.S. 343 (2003) (because cross-burnings were frequently followed by beatings, lynchings, shootings, or killings of African Americans, they may in some cases constitute "incitements to violence"). Does U.S. constitutional jurisprudence fail to properly account for the contextual parallels noted above? Or is the difference between the German treatment of anti-Semitic expression and the American treatment of race-based hate speech better understood in terms of different conceptions of free speech?

3. *The dichotomy between fact and opinion, fighting words and the distinction between hate speech in form and in substance.* One of the most important line-drawing problems regarding hate speech involves sorting out crude, purely insulting race or religion based invective from views that may be abhorrent or despicable but that nonetheless should not be barred from the marketplace of ideas. Mere racist name calling may not be worth protecting, *cf. Chaplinsky v. New Hampshire*,

315 U.S. 568 (1942) (insults amounting to "fighting words" not constitutionally protected), but what about sincerely held ideological political or religious views? Should not the views of those who view a particular religion as amounting to Paganism or Satanism be fully protected? Or those of advocates of racial segregation as the means to a better society (even if only to be more vigorously and more thoroughly discredited)?

One possible way to draw the line in question is by relying on the distinction between fact and opinion. This is the approach taken in Germany. Thus, the German Constitutional Court justified its decision in the *Holocaust Denial Case* by stressing that spreading proven factual falsehoods to fuel racial or religious hatred makes no genuine contribution to discovery of the truth and has no legitimate role in opinion formation. Can the fact/opinion distinction used by the German Court serve to draw a workable line? Does Holocaust denial present a unique and completely exceptional set of circumstances? *See* the German Court's decision in the *Historical Fabrication Case*, 90 BVerfGE 1 (1994), where a book claiming that Germany was not responsible for the outbreak of the Second World War as that war was thrust upon it by its enemies was held to involve "opinion" and to be therefore within the realm of protected speech. Is the distinction tenable? What about the claim that the Holocaust did take place coupled with the assertion that the Jews brought it on themselves. Is that an "opinion" or a patently false "fact"? *See also* the *Tucholsky I Case*, 21EUGRZ (1994), where a lower German court held a bumper sticker stating "soldiers are murderers" at the time of the 1991 Gulf War to involve a statement of fact amounting to unprotected group defamation. The Constitutional Court, however, interpreted the slogan as expressing an opinion to the extent that when placed in context its message may well have been: "Don't send young Germans to war and force them to become killers."

In *Chaplinsky,* the U.S. Supreme Court held that "fighting words" addressed at individuals are not protected as they are more likely to provoke a violent reaction by the addressee than to lead to further discussion. More generally, the judicial limitations on free speech imposed in the United States, be they based on the "fighting words" rationale, the "clear and present danger" standard, or the "incitement to violence" one, seem justifiable under the same broad principle. If speech is most likely to be followed by violence or high risk of physical injury virtually barring the chance of further discussion, then such speech is not constitutionally protected. Underlying this principle is the belief, based on the views of the nineteenth century English philosopher John Stuart Mill, *see* his *On Liberty* (1859), that the best way to counter false statements of fact or pernicious opinions is through further speech. Mill was optimistic that truth would ultimately best false ideas. That view was challenged by the Canadian Supreme Court in *Keegstra*, *supra*, at 3 S.C.R. at 797: "The success of modern advertising, the triumph of impudent propaganda such as Hitler's have qualified sharply our belief in the rationality of man…We act irresponsibly if we ignore the way in which emotion can drive reason from the field." Are the Millian assumptions behind American free speech jurisprudence therefore no longer justified? In the case of "fighting words" or of crude racist or anti-Semitic slogans it may be clear that emotion drives away reason. But what about in other cases? Who should decide? Could any cogent lines be drawn? Is it always undesirable to rely on emotion, even if it risks overriding reason? For example, what about an advertisement relying on images of a dying medically uninsured child cancer victim

to counter the reasoned arguments of fiscal conservatives against adoption of universal health insurance?

Assuming that fighting words can be reasonably well distinguished from other kinds of utterances, it may seem desirable to rely on the distinction between hate speech in form and hate speech in substance, and to deny protection to the former while affording it to the latter. Thus, a statement that all members of a particular minority are "vermin," "thieves," "rapists," and so on would not be protected, *see Beauharnais*, *supra*. But the statement that "based on employment statistics, members of a particular minority group are clearly less capable and less enterprising than the rest of society as they have a much greater unemployment rate," would be protected. This would be the case even if that statement were uttered by an invidious hater of the group, and even if because of massive discrimination in employment and massive denial of educational opportunities to members of that group, any reasonable person would conclude that the employment rate discrepancy is above all the result of discrimination, and that the reasons advanced in the above statement are purely speculative and very likely contrary to fact.

Is the distinction between hate speech in form and in substance, even if sufficiently clear for line-drawing purposes, ultimately desirable? Are not pseudo-scientific factually couched demeaning assertions more harmful in the long run than crude insults? Are not both the members of the vilified minority and the rest of society more likely to be influenced by what appears to be factual scientifically grounded assertions than by sweeping insults?

Beauharnais, *Keegstra*, and cases in Germany and many other countries treat group defamation similarly to individual defamation. Being falsely accused of being a thief in one's individual capacity or because of one's membership in a reviled and discriminated against group seems equally injurious to one's honor, dignity, well-being, and ability to engage in the pursuit of happiness under the same conditions as fellow citizens not within one's group. Yet, *Beauharnais* has not been followed in the United States, and the defamation standard has given way to the incitement to violence standard, *see Collin*, *R.A.V.*, *supra*. Is that justified? Defamation, even involving public figures, is not protected in the United States when directed against individuals, *see New York Times Co. v. Sullivan*, 376 U.S. 254 (1964) (in case of a public figure, defamatory statement must not only be false but uttered with knowledge of its falsity or in reckless disregard of the truth). What may justify not extending this rule to groups? Is it that group defamation is never *completely* false as, for example, every group of a certain size is bound to include some thieves? Or is it that it is not likely to be taken literally? Indeed, if an individual is defamed as being a thief, his or her personal reputation is likely to suffer as a result. Most people, however, do not really believe that every single member of a group defamed as being made up of thieves is in fact a thief. Is that ultimately relevant? Is it not an equal or even greater affront to dignity to be systematically suspected of being dishonest because of one's group affiliation? May be the best justification for treating group defamation differently than individual defamation is based on the argument that group defamation is better handled through the political process and public debate than through adjudication. Should a country with a large majority that is highly prejudiced against a small minority have a different hate speech standard than a multiracial, multiethnic, multicultural country with no clear or dominant majority?

3. *Slippery slopes, pragmatism, equality, and individual regarding versus group-regarding concerns.* One argument prevalent in the United Stated against regulation of hate speech except when it incites to violence is that such regulation inevitably leads to a "slippery slope" bound to result in unwarranted suppression of legitimate speech. Foreign regulation under an incitement to hatred standard does lend some support to this argument. For example, in *Regina v. Malik* [1968] 1 All E.R. 582 (C.A. 1967) (United Kingdom), a black defendant was convicted under the British Race Relations Act of 1965 and sentenced to a year in prison for asserting, inter alia, that whites are "vicious and nasty people" and that "white savages" beat "black women." The court was unswayed by the defendant's assertion that his speech was in response to the evils that whites had perpetuated against blacks. Should there have been an exception for victims of racism who use hate speech to get back at their victimizers? Or does this British case lend support to leaving it to the marketplace of ideas to deal with hate speech that falls short of incitement to violence? Are judicial decisions based on whether the target group of hate speech is a dominant or subordinate one particularly dangerous or inappropriate?

   On the other hand, the British experience also lends some support to the proposition that criminalizing hate propaganda can be both salutary and effective. Indeed, pursuant to legislation adopted in 1936, Public Order Act, 1936, 1 GEO. 6, C.6 § 5, the United Kingdom waged a successful campaign against the spread of British Fascism prior to, and during, the Second World War. *See* Nathan Courtney, *British and U.S. Hate Speech Legislation: A Comparison*, 19 BROOK. J. INT'L. L. 727, 731 (1993). Moreover, even if it had not been that successful, does not outlawing hateful Fascist propaganda and prosecuting it play an important moral role in furtherance of human dignity for all within the polity? Is not official intolerance of Fascist propaganda supported by large majorities among the citizenry likely to boost the morale of the intended victims of that propaganda? Is it not also likely to have a positive effect on those who do not share the Fascist ideology, but might otherwise eventually become influenced by it? Or, on the contrary, notwithstanding the British experience with Fascist propaganda, would banning such hate speech be more likely than not to gain many more new adherents to the Fascist cause?

   Even if the slippery slope danger is substantial, is it really that much different in the area of hate speech than in other areas where limitations on free speech seem more readily accepted? Are there countervailing dangers that ought to outweigh slippery slope concerns in the area of hate speech? Arguably, the United States best avoids the slippery slope problem by drawing sharp lines, such as those set by the incitement to violence standard, and by strong adhesion to the principle of viewpoint neutrality. In contrast, Germany relies on distinctions that are more difficult to handle, such as the fact/opinion one, and does embrace some patent viewpoint biases, such as its particularly strong intolerance regarding anti-Semitic expression. *See* Friedrich Kübler, *How much Freedom for Racist Speech? supra*, at 344. For all its profound commitment to viewpoint neutrality, however, the U.S. jurisprudence has not been able to avoid excluding speech based on the particular viewpoint expressed. *See*, *e.g.*, *Dennis v. United States*, 341 U.S. 494, 544–45 (1951) (Frankfurter, J., concurring) (characterizing clearly political speech of members of the U.S. Communist Party advocating—but not inciting to violence or creating any imminent danger of—the violent overthrow of the government as speech that ranks "low" "on any scale of values which we

have hitherto recognized"). This confuses the *category* of speech involved, namely political speech, which has traditionally been ranked as the highest, and the *content* of the speech, which the vast majority of Americans strongly repudiate. Does this mean that biases inevitably creep into any free speech jurisprudence regardless of how or where the relevant lines are drawn? Consider in this respect that, over the years, American jurisprudence has been much more prone to exclude from protection extremist speech coming from the left whereas Western European jurisprudence has been much less tolerant of extremist speech coming from the right. *See* Norman Dorsen et al., Comparative Constitutionalism: Cases and Materials 920 (2003).

The American approach to hate speech has been defended on pragmatic grounds. From a Millian standpoint, the greater the freedom of speech the more likely it becomes that the truth will ultimately prevail. So long as speech is not immediately likely to be followed by violence, further speech will edge us closer to the truth. In the case of hate speech, this presumably means that countering and condemning the hate message will ultimately lead the overwhelming majority of those exposed to the hate message to firmly repudiate it. Justice Holmes adopted a position similar to that of Mill, but for very different reasons. *See* Rosenfeld, *supra*, at 1534. Holmes was highly skeptical and pessimistic, believing establishment of the truth to be highly unlikely. Accordingly, he believed on pragmatic grounds that greater freedom of speech would less likely result in the entrenchment of falsehoods and would prompt people to adopt a healthy measure of self-doubt rather than stubbornly holding on to worthless or harmful ideas. *See Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting). In other words, Mills believed that pragmatically greater freedom of speech maximized benefits whereas Holmes was of the view that it minimized harm.

Is the Canadian approach embraced in *Keegstra* ultimately as pragmatic as its U.S. counterpart if one factors in the contrast between U.S. individualism and Canada's more group-oriented constitutional culture? As Will Kymlicka has argued, although both the United States and Canada are multiethnic and multicultural polities, the United States has embraced an individualist assimilationist ideal symbolized by the metaphor of the "melting pot" whereas Canada has placed greater value on group identity, cultural diversity, and has promoted the ideal of an "ethnic mosaic." Will Kymlicka, Multicultural Citizenship: A Liberal Theory of Minority Rights 14 (1995). Consistent with Kymlicka's views, could not the U.S. and Canadian approaches be equally pragmatic, with the U.S. approach affording the best practical means to advance an individualistic culture and its Canadian counterpart the best practical means to promote coexistence and mutual respect among groups? Can individual-regarding and group-regarding concerns be cogently kept apart in the context of hate speech? Or are they in the last analysis inextricably bound together? And if that is so, does not greater emphasis on one or the other become solely dependent on cultural or ideological predispositions?