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## ***R. v. Keegstra*: A Rationale for Regulating Pornography?**

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### **Introduction**

The case of *R. v. Keegstra*<sup>1</sup> was heard in conjunction with two other similar appeals. One was *R. v. Andrews and Smith*,<sup>2</sup> and the other, *Human Rights Commission (Canada) v. Taylor*.<sup>3</sup>

In this trilogy of cases, the majority of the Supreme Court of Canada articulated perspectives on freedom of expression that are more inclusive than exclusive, more communitarian than individualistic, and more aware of the actual impacts of speech on the disadvantaged members of society than has ever before been articulated in a freedom of expression case. The Court advanced an equality approach using a harm-based rationale to support the regulation of hate propaganda as a practice of inequality. The competing constitutional values as weighed and evaluated point the way to a more inclusive, democratic and egalitarian view of speech regulation than past decisions which emphasized the autonomy of individuals, weighed their competing claims as though they were equal, and ignored the social realities in which they operated. In this comment, the *Keegstra* decision is analyzed in terms of its applicability to pornography laws which are currently being constitutionally evaluated by the Supreme Court in the case of *R. v. Butler*.<sup>4</sup> It is argued that while the equality harms-based approach to hate propaganda adopted in *Keegstra* was correct, pornography presents a much stronger case for regulation.

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<sup>1</sup>[1990] 3 S.C.R. 697, [1991] 2 W.W.R. 1, 1 C.R. (4th) 129, 61 C.C.C. (3d) 1 [hereinafter *Keegstra* cited to S.C.R.].

<sup>2</sup>[1990] 3 S.C.R. 870, 1 C.R. (4th) 266, 61 C.C.C. (3d) 490 [hereinafter *Andrews and Smith* cited to S.C.R.].

<sup>3</sup>[1990] 3 S.C.R. 892, 75 D.L.R. (4th) 577 [hereinafter *Taylor* cited to S.C.R.].

<sup>4</sup>(1990), [1991] 1 W.W.R. 97, 60 C.C.C. (3d) 219, 1 C.R. (4th) 309 (Man. C.A.), rev'g [1989] 6 W.W.R. 35 (Man. Q.B.) [hereinafter *Butler*].

## I. The Canadian Constitutional Approach

The argument that hate propaganda and pornography may be constitutionally regulated on an equality theory engages ss 1, 2(b), 15, 27 and 28 of the *Canadian Charter of Rights and Freedoms*,<sup>5</sup> which are set out below.

Section 1 of the *Charter* is its central, pre-eminent provision. It states:

1. *The Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstratively justified in a free and democratic society.

The freedom of expression guarantee is found in s. 2(b) of the *Charter*. It reads:

2. Everyone has the following fundamental freedoms:

...

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

The most important substantive provision relevant to an equality approach to freedom of expression is s. 15, the equality section. 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. The section reads:

15.(1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national 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, the multicultural section, and s. 28, the gender equality section, are provisions meant to assist in the interpretation of the *Charter*. They emphasize that multiculturalism and gender equality are important Canadian goals. They read:

27. This *Charter* shall be interpreted in a manner consistent with the preservation and enhancement of the multi-cultural heritage of Canadians.

28. Notwithstanding anything in this *Charter*, the rights and freedoms referred to in it are guaranteed equally to male and female persons.

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<sup>5</sup>*Canadian Charter of Rights and Freedoms*, Part 1 of the *Constitution Act, 1982*, being Schedule B of the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter *Charter*].

## II. Hate Propaganda and Freedom of Expression: The *Keegstra* Trilogy

The *Keegstra* and *Andrews and Smith* cases raised the same issue of the constitutional validity of s. 319(2) of the *Criminal Code*,<sup>6</sup> a provision which 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.<sup>7</sup> The *Taylor* case raised the issue of the constitutional validity of s. 13(1) of the *Canadian Human Rights Act*,<sup>8</sup> a legislative provision which prohib-

<sup>6</sup>R.S.C. 1985, c. C-46.

<sup>7</sup>Section 319 reads, in part, as follows:

- (2) Every one who, by communicating statements, other than in private conversation, wilfully promotes hatred against any identifiable group is guilty of
- (a) an indictable offence and is liable to imprisonment for a term not exceeding two years; or
  - (b) an offence punishable on summary conviction.
- (3) No person shall be convicted of an offence under subsection (2)
- (a) if he establishes that the statements communicated were true;
  - (b) if, in good faith, he expressed or attempted to establish by argument an opinion on a religious subject;
  - (c) if the statements were relevant to any subject of public interest, the discussion of which was for the public benefit, and if on reasonable grounds he believed them to be true; or
  - (d) if, in good faith, he intended to point out, for the purpose of removal, matters producing or tending to produce feelings of hatred toward 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,

"communication" includes communicating by telephone, broadcasting or other audible or visible means;

"identifiable group" has the same meaning as in section 318;

"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.

The meaning of "identifiable group" in s. 318 referred to in s. 319(7) is as follows:

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

<sup>8</sup>R.S.C. 1985, C. H-6. Section 13.(1) reads:

13.(1) It is a discriminatory practice for a person or group of persons acting in concert to communicate telephonically or to cause to be so communicated, repeatedly, in whole or in part by means of the facilities of a telecommunication undertaking within the legislative authority of Parliament, any matter that is likely to expose a person or persons to hatred or contempt by reason of the fact that person or those persons are identifiable on the basis of a prohibited ground of discrimination.

(2) Subsection (1) does not apply in respect of any matter that is communicated in whole or in part by means of the facilities of a broadcasting undertaking.

(3) For the purposes of this section, no owner or operator of a telecommunication undertaking communicates or causes to be communicated any matter described in subsection (1) by reason only that the facilities of a telecommunication undertaking owned

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

There was an additional issue in *Keegstra* as to whether the presumption of innocence protected in s. 11(d) of the *Charter* was breached by s. 319(3)(a) which provides a defence of "truth," but only where the accused proves the truth. This issue is beyond the scope of this comment, and is not dealt with.

The facts of the *Keegstra* case were that the accused, James Keegstra, a high school teacher, used his classroom time to communicate anti-semitic teachings to his students. He was convicted at trial of the offence of public, wilful promotion of group hatred.<sup>9</sup> The conviction was appealed to the Alberta Court of Appeal where it was unanimously overturned, the Court finding that s. 319(2) of the *Criminal Code* unjustifiably infringed Keegstra's freedom of expression as guaranteed by s. 2(b) of the *Charter*.<sup>10</sup> Speaking for the Court, Kerans J. found that although deliberate lies are not protected by s. 2(b), innocently or negligently made hate speech was protected. He said, moving to the s. 1 analysis, that the Alberta Court, while accepting that s. 319(2) had the valid legislative objective of preventing harm to the reputation and psychological well-

or operated by that person are used by other person for the transmission of that matter.

The purpose of the Act and grounds of discrimination are set out in s. 2 as follows:

2. The purpose of this Act is to extend the laws in Canada to give effect, within the purview of matters coming within the legislative authority of Parliament, to the principle that every individual should have an equal opportunity with other individuals to make for himself or herself the life he or she is able and wishes to have, consistent with his or her duties and obligations as a member of society, without being hindered in or prevented from doing so by discriminatory practices based on race, national or ethnic origin, colour, religion, age, sex, marital status, family status, disability or conviction for an offence for which a pardon has been granted.

<sup>9</sup>*R. v. Keegstra* (1984), 19 C.C.C. (3d) 254 (Alta Q.B.).

The accused taught social studies courses to grade 9 and grade 12 students 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 anti-semitic 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 only taught his personal biased views and told the students they should accept his biased view as truth unless they could contradict it (Statement of Facts, Factum of the Appellant, Her Majesty the Queen filed in the Supreme Court of Canada).

<sup>10</sup>*R. v. Keegstra* (1988), 87 A.R. 177, [1988] 5 W.W.R. 211, 43 C.C.C. (3d) 150, 65 C.R. (3d) 289, 60 Alta. L.R. (2d) 1 (C.A.) [hereinafter cited to C.C.C.].

being of target group members, nevertheless found the section unconstitutional because the injury was not serious enough to require the sanction of criminal law. The Court stated that 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, the equality and multicultural sections, were not viewed as working to justify the hate propaganda laws under s. 1. This decision was appealed to the Supreme Court of Canada.

### A. *The Section 2(b) Analysis*

In order to determine whether the hate propaganda prohibition violated the *Charter*, Dickson C.J., 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. He said those values are seeking and attaining the truth; encouraging and fostering participation in social and political decision-making; and cultivating diversity in forms of individual self-fulfilment and human flourishing.<sup>11</sup>

After finding the scope of s. 2(b) to be very large and liberal, the Court adopted a strict categorical test requiring content-based restrictions to fall outside s. 2(b) protection only when speech is communicated in a physically violent form. This was a departure from *RWDSU v. Dolphin Delivery Ltd*<sup>12</sup> where the Supreme Court ruled that the freedom of expression guarantee does not extend to threats of violence. The minority opinion in *Keegstra*, authored by McLachlin J., maintained that threats fall outside s. 2(b) protection.<sup>13</sup> The Court did not delineate precisely “when and on what basis a form of expression chosen to convey meaning falls outside the sphere of the guarantee,” but made it clear that a murderer or rapist could not invoke freedom of expression in justification of the form of expression chosen.<sup>14</sup> The Court said governments may only restrict expressive activity when its 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, s. 2(b) can still be brought into play to constitutionally protect the expressive activity 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.<sup>15</sup>

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<sup>11</sup>Relying on *Irwin Toy Ltd v. Quebec*, [1989] 1 S.C.R. 927 at 976, 58 D.L.R. (4th) 577 [hereinafter *Irwin Toy* cited to S.C.R.], aff'g *Ford v. A.-G. Quebec*, [1988] 2 S.C.R. 712 at 765-67, 54 D.L.R. (4th) 577 [hereinafter *Ford* cited to S.C.R.].

<sup>12</sup>[1986] 2 S.C.R. 573 at 588, 33 D.L.R. (4th) 174 [hereinafter *Dolphin Delivery* cited to S.C.R.].

<sup>13</sup>*Supra*, note 1 at 830-31.

<sup>14</sup>*Ibid.* at 732, citing *Irwin Toy*, *supra*, note 11 at 970.

<sup>15</sup>*Supra*, note 1 at 831.

Applying this categorical test to the hate propaganda provision, Dickson C.J. found that the legislation prohibiting the public, wilful promotion of group hatred did indeed infringe s. 2(b) of the *Charter*. He said the hate propaganda provision was an attempt by Parliament to prohibit communication conveying meaning. The Court rejected the argument that hate propaganda is a form of violence in and of itself.<sup>16</sup> The Chief Justice made the point that competing values contained in other *Charter* provisions such as equality and 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. He stated that s. 1 is the preferable place to balance because it permits a contextual analysis that fully weighs the harm hate speech inflicts on minorities.

The Court's adoption of a strict categorical approach is unconvincing and puzzling in light of the purposive approach to rights developed prior to *Irwin Toy* which said the judiciary determines the content of the right from the nature of the interests the *Charter* is meant to protect.<sup>17</sup> The Court says violence is not protected under s. 2(b) but it does not tell us why. Surely the reason is that such expression does not recognize or respect human dignity and autonomy. Even though the conduct may express profound meaning, its harm to other rights presumably outweighs its expressive value. While the Court acknowledged that some wordless human activity can have meaning and must be protected under s. 2(b), it does not seem to recognize that activity that takes the form of expression can nonetheless be devoid of meaning in the constitutional sense.<sup>18</sup> From a purposive perspective, the denial of equality rights through the discriminatory practice of promoting hatred arguably deserves the same constitutional consideration under s. 2(b) as does violence or threats of violence. Because the text of the *Charter* focuses on expression as the medium that manifests the individuality and common humanity of rights holders, the wilful promotion of hatred to the recipients of expression arguably should have no constitutional significance.

Section 15 of the *Charter* contains the competing rights. It guarantees racial, religious and ethnic minorities equal access to equality rights. In *Andrews*

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<sup>16</sup>For a contrary view, see M. Matsuda, "Public Response to Racist Speech: Considering the Victim's Story" (1989) 87 Mich. L. Rev. 2320; R. Delgado, "Words That Wound: A Tort Action for Racial Insults, Epithets and Name-Calling" (1982) 17 Harv. C.R.-C.L. L.Rev. 133.

<sup>17</sup>See, in particular, *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145, 55 N.R. 241, 11 D.L.R. (4th) 641, 33 Alta. L.R. (2d) 193, 14 C.C.C. (3d) 97, 6 W.W.R. 577.

<sup>18</sup>L. Weinrib makes a similar argument in a different context in "Does Money Talk? Commercial Expression in the Canadian Constitutional Context" in D. Schneiderman, ed., *Freedom of Expression and the Charter* (Toronto: Carswell, 1991) 336 at 348. See also, L. Weinrib, "Hate Promotion in a Free and Democratic Society: *R. v. Keegstra*" (1991) 36 McGill L.J. 1416.

v. *Law Society of British Columbia*,<sup>19</sup> the Supreme Court held that s. 15 is the broadest of all guarantees, applying to and supporting all other rights guaranteed by the *Charter*. In *R. v. Big M Drug Mart Ltd.*,<sup>20</sup> equality was linked with the concept of a free society. Particularly in light of Dickson C.J.'s comment that "[a] free society is one which aims at equality with respect to the enjoyment of fundamental freedoms and I say this without any reliance upon s. 15 of the *Charter*,"<sup>21</sup> one would think that equality rights are embedded within s. 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.<sup>22</sup>

In *R. v. Andrews and Smith*<sup>23</sup> at the Ontario Court of Appeal, Cory J.A. (as he then was) identified the connection between hate propaganda and discrimination. He stated: "[w]hen an expression does instil detestation it ... lays the foundations for the mistreatment of members of the victimized group."<sup>24</sup> 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, at a minimum, to act to further the social definition of the group as inferior, unequal and rightly disadvantaged. In other words, to promote group hatred is to practice discrimination. Discrimination after all, is an act that contradicts some of the core values underlying freedom of expression, namely, individual self-fulfilment and human flourishing — the very values we are told which define the environment in which all the goals of freedom of expression should be pursued.<sup>25</sup> Viewed this way, the 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.<sup>26</sup> Enforcement of inequality results in injury just as violence does. Its vio-

<sup>19</sup>[1989] 1 S.C.R. 143 at 185 56 D.L.R. (4th) 1 [hereinafter *Andrews* cited to S.C.R.].

<sup>20</sup>[1985] 1 S.C.R. 295, 18 D.L.R. (4th) 321.

<sup>21</sup>*Ibid.* at 336.

<sup>22</sup>*Brown v. Board of Education*, 347 U.S. 483 (1954), treated segregation as a form of racial discrimination.

<sup>23</sup>(1988), 65 O.R. (2d) 161 (C.A.).

<sup>24</sup>*Ibid.* at 179.

<sup>25</sup>The principles and values underlying the protection of freedom of expression were discussed in *Ford*, *supra*, note 11 at 765-67.

<sup>26</sup>K. Lahey makes the argument that pornography should be similarly viewed. As an act of discrimination which perpetuates or promotes women's subordinate status, it should be regulated as a form of discriminatory activity. See "The Canadian Charter of Rights and Pornography: Toward a Theory of Actual Gender Equality" (1984-85) 20 *New England L. Rev.* 649. In *American Booksellers Association v. Hudnut*, 598 F. Supp. 1316 (S.D. Ind. 1984), the Court found that pornography is a practice of discrimination but nevertheless held it was protected speech. See text accompanying note 67.

lent nature ranges from immediate psychic wounding and attack to well documented consequent physical aggression.<sup>27</sup>

At the very least, hate propaganda should be seen 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 though the action takes the form of words. When legislatures regulate harassment, they do not regulate the content of expression, although the expression has content. The Court treats it as a practice of inequality.<sup>28</sup> Hate propaganda, which is a particularly virulent form of harassment, should be treated similarly.

Had the Court viewed content and form as points on a continuum rather than as discernibly distinct categories, a more nuanced, sensitive and practical approach could be taken to forms of expression which 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 into this category. Social-psychologist Gordon Allport's analysis of the harms of prejudice supports a continuum approach rather than the categorical approach and appeals to common sense and historical experience. Allport says there are five stages of racial prejudice: expression of prejudicial attitudes, avoidance, discrimination, physical attack and extermination.<sup>29</sup> He says that each stage depends on and is connected to the preceding one. He refers to the history of the Third Reich to make this point:

It was Hitler's antilocution that led Germans to avoid their Jewish neighbours and erstwhile friends. This preparation made it easier to enact the Nuremberg laws of discrimination which, in turn, made the subsequent turning of synagogues and street attacks upon Jews seem natural. The final step in the macabre progression was the ovens at Auschwitz.<sup>30</sup>

It is this progressive, interdependent connection of hate propaganda with violence which cannot be contemplated within the "violent form" limitation on content regulation as articulated in *Irwin Toy*.

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<sup>27</sup>Center for Democratic Renewal, *They Don't Wear Sheets: A Chronology of Racist and Far Right Violence, 1980-1986* (Atlanta: Division of Church and Society of the National Council of the Churches of Christ in the U.S.A., 1987). This report documents violent racist incidents over several years in 48 states.

<sup>28</sup>*Janzen v. Platy Enterprises Ltd*, [1989] 1 S.C.R. 1252, 59 D.L.R. (4th) 352 [hereinafter *Janzen* cited to S.C.R.]; *Robichaud v. Treasury Board (Canada)*, [1987] 2 S.C.R. 84, 40 D.L.R. (4th) 577; see C. MacKinnon, *Sexual Harassment in the Workplace: A Case of Sex Discrimination* (New Haven: Yale U. Press, 1979) for the seminal work on this topic.

<sup>29</sup>G.W. Allport, *The Nature of Prejudice* (Cambridge, MA: Addison-Wesley, 1954), cited in D. Bottos, "Keegstra and Andrews: A Commentary on Hate Propaganda and the Freedom of Expression" (1989) 27 Alta. L.R. 461 at 471.

<sup>30</sup>*Ibid.*

In the final analysis, the category of “violent form” is unhelpful and even misleading. Without more convincing reasons, the deviation from the purposive approach makes both *Keegstra* and *Irwin Toy* inconsistent with the earlier decisions of the Supreme Court and introduces unnecessary rigidity into s. 2(b) interpretation. The effect of the narrow exclusion not only dignifies vicious, harmful speech activity, it progressively erodes expression rights in favour of policy-oriented decisions performed under s. 1. Ultimately, using s. 1 in this way may soften the stringency of its requirements, deny meaningful content to s. 2(b) and trivialize the *Charter* guarantee of freedom of expression.<sup>31</sup>

### B. The Section 1 Analysis

Having determined that the public, wilful promotion of group hatred falls within the protective ambit of s. 2(b) and that the *Criminal Code* prohibition of it infringed James Keegstra’s freedom of expression, the Court turned to consider whether under s. 1, the infringement was a reasonable limit demonstrably justifiable in a free and democratic society. The Court split 4 to 3 in finding that the burden of s. 1 was satisfied and that the legislation could be upheld. The analysis followed the format set out in *R. v. Oakes*.<sup>32</sup> It first looked at the pressing and substantial concerns test, articulating three reasons why the test was met. The first reason focused on the harm caused by hate propaganda. The Chief Justice stressed that extremist hate speech causes “real” and “grave” harm to both its target groups and society at large. It is not merely offensive. He said that 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, they are encouraged to withdraw from the community and deny their own personal identity. The societal harm was described as the serious discord caused by hate propaganda between cultural groups, which in turn creates an atmosphere conducive to discrimination and violence.<sup>33</sup>

It is worthy of note that the majority rejected the American “clear and present danger” test of harm, saying it and other categorizations and rules generated by American law may be inappropriate to Canadian constitutional theory.<sup>34</sup> This is a welcome clarification in the law. It not only clears up the confusion caused by differing opinions in the lower courts,<sup>35</sup> it recognizes that very serious harms

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<sup>31</sup>See *R. v. Committee For the Commonwealth of Canada*, [1991] 1 S.C.R. 139 at 232-33, 77 D.L.R. (4th) 385, McLachlin J.

<sup>32</sup>*R. v. Oakes*, [1986] 1 S.C.R. 103 at 136, 26 D.L.R. (4th) 200 [hereinafter *Oakes* cited to S.C.R.].

<sup>33</sup>*Supra*, note 1 at 744-49.

<sup>34</sup>*Ibid.*

<sup>35</sup>For example, Kerans J., speaking for the majority of the Court of Appeal of Alberta in the *Keegstra* case, *supra*, note 10 at 175-76, said that in order for the hate propaganda provisions to

addressed by the hate propaganda 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 majority of the Court appeared to recognize the harms caused by hate propaganda are often difficult to detect either immediately, or ever. Hate propaganda is known to have much more 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 would effectively ignore the realities of the crime, and ensure that very few, if any convictions would ever be obtained. By rejecting the "clear and present danger" test, Dickson C.J. made it quite clear that dry and sterile analytic techniques<sup>36</sup> which effectively predetermine the issue will not be imported into Canada.<sup>37</sup>

A second 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 ss 15 and 27 of the *Charter*. The majority situated s. 27 in an equality context, saying that attacks on groups need to be prevented because group discrimination can adversely affect its individual members.<sup>38</sup> The Court stated that by creating hate propaganda laws, Parliament seeks "to bolster the notion of mutual respect necessary in a nation which venerates the equality of all persons."<sup>39</sup> This reasoning is not dissimilar to that of the United States Supreme Court in *Beauharnais v. Illinois*,<sup>40</sup> to which the Chief Justice referred,<sup>41</sup> suggesting that the *Beauharnais* decision is closer to the Canadian approach to freedom of expression than the line of cases which subsequently undermined it.<sup>42</sup> He 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.

In this writer's view, the Court was entirely correct on this point. It brought a welcome and needed clarification between American free speech doctrine and Canadian constitutional values. The *Charter* is not constrained by the textual or

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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. While not conceding the point that hate propaganda causes real harm, Cory J. (as he then was) of the Ontario Court of Appeal, in *R. v. Andrews* (1988), 65 O.R. (2d) 161 at 186-87, on the other hand, cited numerous examples of laws which prohibit activities which carry a risk of harm (*i.e.*, impaired driving, attempted murder, conspiracy) but where harm need not occur.

<sup>36</sup>H.F. Stone, "The Common Law in the United States" (1936) 50 Harv. L. Rev. 4 at 10.

<sup>37</sup>*Supra*, note 1 at 740-44.

<sup>38</sup>*Ibid.* at 757.

<sup>39</sup>*Ibid.* at 756.

<sup>40</sup>343 U.S. 250 at 263 (1951).

<sup>41</sup>*Supra*, note 1 at 739.

<sup>42</sup>*Anti-Defamation League of B'nai B'rith v. Federal Communications Commission*, 403 F.2d 169 at 174 (D.C. Cir. 1968); *Collin v. Smith*, 578 F.2d 1197 at 1204-05 (7th Cir. 1978).

political constitutional imperatives of the American *First Amendment*,<sup>43</sup> but more importantly, the fundamental structure, historical and circumstantial differences between the two Constitutions require a distinctively Canadian approach.<sup>44</sup> 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.<sup>45</sup> 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 American melting pot approach to cultural diversity, 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.<sup>46</sup>

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. It states that the *Charter* shall be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians.<sup>47</sup> 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. Section 15(1) demonstrates Canada's very strong commitment to equality. It not only guarantees equal protection of the law, like the American Constitution, but it also guarantees equality before and under the law and equal benefit of the law without discrimination based on race, national or ethnic origin, colour, religion, sex, age, or mental or physical disability. It is thus much broader in scope than the *Fourteenth Amendment*,<sup>48</sup> having wider substantive protections as well as more prohibited grounds

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<sup>43</sup>The *First Amendment* reads as follows:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or of abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

<sup>44</sup>Dickson, C.J. discusses the similarities and differences in American and Canadian approaches to freedom of expression, *supra*, note 1 at 738-44.

<sup>45</sup>For a further discussion of this and other factors, see A.F. Westin, "The United States Bill of Rights and the Canadian Charter: A Socio-Political Analysis" in W. McKercher, ed., *The U.S. Bill of Rights and the Canadian Charter of Rights and Freedoms* (Toronto: The Economic Council, 1983).

<sup>46</sup>Special Joint Committee of the Senate and House of Commons on the Constitution of Canada, *Final Report* (Ottawa: 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."

<sup>47</sup>*Charter*, s. 27.

<sup>48</sup>The *Fourteenth Amendment*, s. 1, reads as follows:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State

of discrimination. Section 15(2) of the *Charter* expressly adds a clause which legitimizes affirmative action in the constitutional definition of equality rights. When s. 15 is read with the multiculturalism section, it creates a formidable obstacle against 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 denominational separate dissentient schools<sup>49</sup> — underline the strong commitment to collective rights in the *Charter* which 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 a matter of pressing and substantial concern sufficient to meet s. 1 requirements.

To further emphasize the pressing and substantial concerns, the Court took note of international human rights obligations which require Canada to suppress hate propaganda by way of the criminal law in order to protect identifiable and vulnerable groups.<sup>50</sup> 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 s. 1.<sup>51</sup> The United States has not ratified this or similar conventions.

In applying the second portion of the *Oakes* test, that of proportionality, the majority again referred to harm. The Court made the point that hate propaganda is only tenuously connected to the values underlying s. 2(b) because the harm of hate speech is significant and the truth value marginal.<sup>52</sup> 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 which loses its democratic aspirations to the free expression guarantee because the ideas it propagates are anathema to democratic values. Moreover, it 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. It 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.<sup>53</sup>

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shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

<sup>49</sup>*Charter*, ss 21, 25, 29, 35.

<sup>50</sup>See art. 4 of the *International Convention on the Elimination of All Forms of Racial Discrimination*, 24 August 1966, Can. T.S. 1970 No. 28 (entered into force for Canada, 4 January 1969).

<sup>51</sup>*Supra*, note 1 at 736, citing *Slight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038 at 1056, 59 D.L.R. (4th) 416.

<sup>52</sup>*Supra*, note 1 at 761.

<sup>53</sup>*Ibid.* at 763-65.

The minority, on the other hand, said some hate speech could be important.<sup>54</sup> 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. But 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. Perhaps a stronger argument is that the contextualized approach is a sufficient safeguard to isolate extremist hate speech from legitimate political speech closer to the core of s. 2(b). Constitutional equality as interpreted by the Court in *Andrews*,<sup>55</sup> is essentially designed to protect those groups who suffer social, political and legal disadvantage. If hate propaganda was directed against historically dominant group members by subordinated group members, a contextual approach would constitutionally protect it, even in the s. 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. Dickson C.J. cautioned against assigning categories of scrutiny to expressive activity, however, saying this would result in a loss of the sensitive examination of free speech principles the contextual approach allows.

Finally, the Court examined the relationship between the equality rights in the *Charter* and the freedom of expression guarantee. While acknowledging that s. 15 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. Its statement that “[t]he principles underlying s. 15 of the *Charter* are ... integral to the s. 1 analysis,”<sup>56</sup> gives s. 15 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 s. 15 values. In the words of the Chief Justice, “[i]n so far as it indicates our society’s dedication to promoting equality, s. 15 is also relevant in assessing the aims of s. 319(2) of the *Criminal Code* under s. 1.”<sup>57</sup> Similarly, the Court took account of s. 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 pro-

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<sup>54</sup>*Ibid.* at 859, McLachlin J.

<sup>55</sup>*Supra*, note 19 at 154, Wilson J., Dickson C.J., L’Heureux-Dubé J. concurring.

<sup>56</sup>*Supra*, note 1 at 756.

<sup>57</sup>*Ibid.* at 755. The Court cited, with approval, the written submissions of the intervenor, Women’s Legal Education and Action Fund (L.E.A.F.) 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 hatred, because it promotes social equality as guaranteed by the *Charter*, deserves special constitutional consideration under section 15 (*ibid.* at 756).

tected and enhanced. The equality section and the multicultural section read with the hate propaganda provisions within s. 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.<sup>58</sup>

In conclusion, the approach established by the *Keegstra* decision in the s. 1 balancing stage legitimated group rights to the extent that they outweighed the competing individual right of freedom of expression.<sup>59</sup> The recognition that the harm of discrimination can outweigh the free speech interest marks a major new development in freedom of expression jurisprudence.<sup>60</sup>

The connections the Court made between institutional arrangements, collective and individual harms, human relations and equality amount to a fundamental departure from the American approach. It recognized that boundaries between individual and collective rights must be confronted and that the *Charter* is capable of proposing new relationships.

By considering group rights in relation to free speech, the Court moved the analysis outside the limited liberal spectrum<sup>61</sup> of individual liberty, political freedom, the public/private distinction, and theoretical definitions.<sup>62</sup> The liberal perception of individuals in complete abstraction and isolation from each other and social circumstances was rejected by the majority in favour of the view that essential human characteristics, needs, interests, capacities and desires are both created and altered by context.<sup>63</sup>

It is at this fundamental level the American free speech doctrine differs from the Canadian approach. Under the *First Amendment*, social reality is not considered when legislation regulating extremist speech is challenged.<sup>64</sup> This is

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<sup>58</sup>*Ibid.* at 757-58.

<sup>59</sup>In the words of Wilson J. in *R. v. Turpin*, [1989] 1 S.C.R. 1296 at 1333, 96 N.R. 115, 69 C.R. (3d) 97, 48 C.C.C. (3d) 8 [hereinafter *Turpin* cited to S.C.R.], s. 15 is designed to protect those "groups suffering social, political and legal disadvantage in our society."

<sup>60</sup>The minimal impairment analysis is not discussed here as it specifically deals with the precise wording of the section and the defences available to an accused and this is not directly relevant to the equality approach.

<sup>61</sup>This has often been called "outsider jurisprudence." See Matsuda, *supra*, note 16 at 2323-26.

<sup>62</sup>For a discussion of the appropriateness and adequacy of liberal presuppositions, see K.E. Mahoney, "The Limits of Liberalism," in R. Devlin, ed., *Canadian Perspectives on Legal Theory* (Toronto: Emond Montgomery, 1991) 57 at 60-68.

<sup>63</sup>C.C. Gould discusses how the liberal theory and values separate human beings from their social context and how this leads to the development of definitions and principles that ignore other fundamental values. See "Private Rights and Public Virtues: Women, the Family and Democracy," in C.C. Gould, ed., *Beyond Domination [:] New Perspectives on Women and Philosophy* (Totowa, N.J.: Rowman and Allanheld, 1983) 3.

<sup>64</sup>See *Doe v. University of Michigan*, 721 F. Supp. 852 (E.D. Mich. 1989); P. Seator, "Judicial Indifference to Pornography's Harm: *American Booksellers v. Hudnut*" (1987) 17 *Golden Gate U. L. Rev.* 297.

a critical difference because taking a contextual approach can result in a right or freedom having a different value. In *Keegstra*, the Court looked at freedom of expression in the reality of the situation at hand when assessing its value, 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.<sup>65</sup> Most importantly, the *Keegstra* decision identifies a transformative potential in the Charter, a potential to achieve social change towards the creation of a society based on an ethic that responds to needs, honours difference and rejects abstractions.<sup>66</sup>

The next section of this paper deals with the case of *R. v. Butler* in relation to the *Keegstra* decision. The *Butler* case is presently before the Supreme Court of Canada on the constitutional challenge that obscenity laws violate the freedom of expression guarantee.

### III. *R. v. Butler*: The Constitutional Analysis of Obscenity Laws in Relation to the *Keegstra* Case

In *Butler*,<sup>67</sup> the entire inventory of a pornography store in Winnipeg was seized and the owner was prosecuted. The vast majority of the material seized was visual, in which women were presented as used, hurt or abused for sex for men. In the subject materials, women were presented as raped, sometimes acting as if they were enjoying it, sometimes screaming, resisting and trying to run away. Sex acts were presented as being performed on subordinates by superiors or caretakers, including employer or employee, priest or penitent, doctor or nurse, nurse or patient. Adult women were presented as children and some participants appeared to be children. Women were penetrated with objects, bound with rings through their nipples and hung handcuffed and nude from the ceiling. Men ejaculated on women's faces and into their mouths. A small amount of the subject material presented sexual aggression against men including bondage, penetration with objects, rape and beatings.<sup>68</sup>

The accused was charged with numerous counts pursuant to s. 159 of the *Criminal Code* (now s. 163), including possession of obscene material for the purposes of distribution, sale, and selling and exposing obscene materials to

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<sup>65</sup>*Andrews, supra*, note 19 at 185.

<sup>66</sup>S. Razack suggests this is a feminist ideal in *Canadian Feminism and the Law* (Toronto: Second Story Press, 1991) at 21.

<sup>67</sup>*Supra*, note 4.

<sup>68</sup>Exhibits 2, 3, 4, 5, 6, 9, 14, 20, 29, 33, 46, 50, 55, 56, 60, 62, 64, 66, 70, 71, 78, 79, 80, 85, 86, 87, 162, 168, 169, 171, 173, 174, 175, 176, 186, 189, 190, 11, 22, 4, 7/23, 12, 15, 17, 30, 34, 42, 44, 59 and 76.

public view. At trial, a conviction was entered on a small number of the charges. An acquittal was granted on most of the impugned material on the grounds that they were protected by s. 2(b) of the *Charter*. The Crown appealed the acquittals and the accused cross-appealed the convictions to the Manitoba Court of Appeal where the Crown's appeal was upheld and the accused's was dismissed. It was from the decision of the Manitoba Court of Appeal that the accused Butler appealed to the Supreme Court of Canada on the constitutional grounds that s. 163 of the *Criminal Code* violates s. 2(b) of the *Charter*.

In what follows, the same method of analysis that was used in the *Keegstra* case will be applied in order 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 s. 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 constitutionally regulate pornography under ss 2(b), 15, 28 and 1 of the *Charter*. The contextualized approach to equality adopted by the Supreme Court in *Andrews*<sup>69</sup> and followed in *Keegstra* will establish that the sex equality interest in pornography's regulation arises out of the harms it causes.

On the issue of the scope of s. 2(b), two arguments will be made: 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 s. 2(b) protection; and secondly, some pornography is not protected under s. 2(b) by virtue of s. 28. In the alternative, to the extent that s. 163 is interpreted to promote sex equality, any restraints it imposes 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*

When considering the scope of freedom of expression guarantee in *Keegstra*, the Supreme Court concluded two things: that the purpose of the hate propaganda law is to restrict content of expression, and that hate speech does not amount to a violent form of expression. The Court said 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*<sup>70</sup> and *Irwin Toy*.<sup>71</sup> As a result, the analysis of the legitimacy of hate laws took place within s. 1.

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<sup>69</sup>*Supra*, note 19.

<sup>70</sup>*Supra*, note 12.

<sup>71</sup>*Supra*, note 11.

The Court should not come to the same conclusion when evaluating pornography within s. 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, to make them such objects of ridicule and humiliation that acts of aggression against them are viewed less seriously.<sup>72</sup> The major difference between them is the method used to achieve the desired effects. In some pornography, the 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 pornography can be made of them.<sup>73</sup> 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.<sup>74</sup> 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 which 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 involved.<sup>75</sup>

The United States Supreme Court has dealt with child pornography in this way. In *New York v. Ferber*,<sup>76</sup> the Court upheld a statute criminalizing the distribution of child pornography. It looked at the process by which child pornography is made, concluding that it inflicts psychological and physical harm on children and is a form of child abuse.<sup>77</sup> Moreover, the Court found the harm to the child is exacerbated by circulation of pictures of the abuse. As a result, the sex pictures were also regarded as child abuse. Through *Ferber*, the Supreme

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<sup>72</sup>S. 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 "Against our Will: Men, Woman and Rape" in L. Lederer, ed., *Take Back the Night: Women on Pornography* (New York: Morrow, 1980) at 30-35.

<sup>73</sup>United States, *Final Report of the Attorney General's Commission on Pornography* (1986) at 747-56, 767-1035. This report is commonly known as the Meese Commission.

<sup>74</sup>See Matsuda, *supra*, note 16; A. Dworkin, "Against the Male Flood: Censorship, Pornography and Equality" (1985) 8 Harv. Women's L.J. 1, where the author discusses the pornographic portrayal of women being killed and mutilated and the direct connection between pornography and violence.

<sup>75</sup>Lahey, *supra*, note 26, describes how in *American Booksellers v. Hudnut* extensive evidence of harm to women participating in the production of pornography was adduced. See also the public hearings regarding an ordinance to add pornography as discrimination against women, held by the Government Operations Committee of the Minneapolis City Council (12-13 December 1983). The testimony before the hearings also included social science evidence of pornography's harm.

<sup>76</sup>458 U.S. 747 (1982) [hereinafter *Ferber*].

<sup>77</sup>*Ibid.* at 758.

Court of the United States criminalized the entire chain of sale, distribution and possession of child pornography as a means of eliminating its harms. The Court has also recognized that harm can extend to third parties.<sup>78</sup>

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

It will be very difficult for pornographers to argue that pornography produced through the use of violence, force or coercion meets any of the values underlying the freedom of expression guarantee. In her dissent in *Keegstra*, McLachlin J. explained the rationale for excluding not only violence from s. 2(b) protection, but also threats of violence:

The justification for excluding violence as a protected form of expression is not just that violence is harmful to the victim, it is rather that violence is inimical to the rule of law on which all rights and freedoms depend. Threats of violence are similarly inimical. They are coercive, taking away choice and undermining freedom of action. Most fundamentally, they undercut one of the essential justifications of free expression — the role of free expression in enhancing the freedom to choose between ideas (the argument based in truth) or between courses of conduct (the argument based on democracy). Being antithetical to the values underlying the guarantee of free expression, it is logical and appropriate that violence and threats of violence be excluded from its scope.<sup>79</sup>

In some pornography, there is an inherent threat of violence which takes away women's choices and undermines their freedom of action. For example, positive outcome rape scenarios which 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 which 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.<sup>80</sup> Materials which create such effects constitute

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<sup>78</sup>*Osborne v. Ohio*, 110 S. Ct. 1691 at 1697 (1990). For example, pedophiles may use pornography to abuse other children.

<sup>79</sup>*Supra*, note 1 at 830-31. See also *Dolphin Delivery*, *supra*, note 12 at 578; *Irwin Toy*, *supra*, note 11 at 970; *Rocket v. Royal College of Dental Surgeons*, [1990] 2 S.C.R. 232 at 245, 71 D.L.R. (4th) 68, 47 C.R.R. 193 [hereinafter *Royal College* cited to S.C.R.].

<sup>80</sup>E. Donnerstein, "Pornography: Its Effect on Violence Against Women" in N. Malamuth & E. Donnerstein, eds, *Pornography and Sexual Aggression* (Orlando, Fla: Academic Press, 1984) 53; E. Donnerstein & L. Berkovitz, "Victim Reaction in Aggressive Erotic Films as a Factor in Violence Against Women" (1981) 41 J. of Personality and Soc. Psych. 710; N. Malamuth, "Factors Associated with Rape as Predictors of Laboratory Aggression Against Women" (1983) 45 J. of Personality and Soc. Psych. 432; N. Malamuth, "Predictions of Naturalistic Sexual Aggression" (1986) 50 J. of Personality and Soc. Psych. 953; N. Malamuth & J.V.P. Check, "The Effects of Aggressive Pornography and Beliefs in Rape Myths: Individual Differences" (1985) 19 J. of

direct threats of violence against women, and for the reasons cited by McLachlin J., 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 s. 2(b). Hopefully, 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.

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

On its face, it is clear that s. 28 overrides every other provision in the *Charter*. It is unconditional. The words, "notwithstanding anything in this *Charter*, the rights and freedoms referred to in it are guaranteed equally to male and female persons," mandate 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 s. 28 engages s. 2(b) prior to any recourse to s. 1 and requires a balancing of speech and sex equality interests. This means that s. 28 should be able to constrain the operation of s. 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 s. 2(b) to protect it if the effect will be to promote or perpetuate the subordinate status of women.

Moreover, s. 15 read with s. 28 guarantees women equal access to equality rights. Constitutional equality is concerned with eliminating the disadvantage of historically subordinated groups.<sup>81</sup> This means that the *Charter* is not neutral on practices which promote inequality, but rather has a commitment to ending them. At the very least, before the protection of s. 2(b) can be claimed, s. 28 should require the pornographer asserting speech rights to demonstrate that the subject materials do not limit women's equality rights.

In *Keegstra*, s. 28 was not a factor, nor were coercion and violence present in the materials considered. But in considering s. 27, the multiculturalism section of the *Charter*, the Chief Justice quoted Cory J.A. in *Andrews* where he wrote that "multiculturalism cannot be preserved let alone enhanced if free rein is given to the promotion of hatred against identifiable cultural groups."<sup>82</sup> The

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Research in Personality 299; J.V.P. Check & T.H. Guloien, "Reported Proclivity for Coercive Sex Following Repeated Exposure to Sexually Violent Pornography, Nonviolent Dehumanizing Pornography, and Erotica" in D. Zillman & J. Bryant, eds, *Pornography: Research Advances and Policy Considerations* (Hillsdale, N.J.: Erlbaum, 1989) 159; M. McManus, "Introduction" to *Final Report of the Attorney General's Commission on Pornography*, *supra*, note 73 at xviii (consensus of all researchers as released by Surgeon General Koop).

<sup>81</sup>See *Andrews*, *supra*, note 19.

<sup>82</sup>*Supra*, note 1 at 758, citing *Andrews*, *supra*, note 35 at 181.

argument is stronger in relation to s. 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 which does not exhibit explicit or implicit violence in its production will be considered under s. 1. The function of s. 1 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 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 which enhance the participation of individuals and groups in society.<sup>83</sup>

The analysis in s. 1 requires the Court to go through 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 which limit the *Charter* right or freedom and the legislative objective.<sup>84</sup>

1. The Legislative Objective — Is It a Pressing and Substantial Concern?

The obscenity provisions seek to prohibit the portrayal, depiction or description of matters, the dominant characteristic of which is the undue exploi-

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<sup>83</sup>*Oakes, supra*, note 32, Dickson C.J.

<sup>84</sup>*Supra*, note 1 at 735-38, Dickson C.J. In his discussion of the role of s. 1, the Chief Justice also stressed that it is misleading to conceive of s. 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. He said there must be an awareness of the synergistic relationship between the values underlying the *Charter* and the circumstances of the particular case. In the pornography context, the interests of women would therefore have to be sensitively weighed against any value pornography has in the context of a free and democratic society.

tation of sex, or of sex and one or more of the following subjects, namely, crime, horror, cruelty and violence.<sup>85</sup> The *Wagner* line of cases<sup>86</sup> held that Parliament's objective is to protect women from the harms resulting from violent or dehumanizing and degrading depictions. This notion is implicit in *Towne Cinema Theatres Ltd v. R.*<sup>87</sup> where the Supreme Court stated that the definition of "undue" must encompass publications harmful to members of society. The Court held:

[e]ven if certain sex-related materials were found to be within the standard of tolerance of the community, it would still be necessary to ensure that they were not "undue" in some other sense, for example in that sense that they portray persons in a degrading manner as objects of violence, cruelty or other forms of dehumanizing treatment.<sup>88</sup>

Whether the legislation will meet the pressing and substantial concern test will depend upon how seriously the Court views the harms which are actualized by the promotion of women's inequality through pornography and the context in which pornography is assessed.

Here, as in the s. 2(b) analysis, pornography makes a stronger case for regulation than hate propaganda does. This is because pornography is much more commonplace, socially accepted and widely distributed across class, race, and geographical boundaries than hate propaganda, and it exists in a societal context of 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. Thus when pornography is prohibited, equality is promoted.

The finding in *Keegstra*<sup>89</sup> that serious and real harms are caused by discriminatory expression 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 it cannot be scientifically proven that pornography causes direct harm, it reinforces sexual attitudes and behaviour antithetical to equality rights and contributes to violent and dangerous behaviour.<sup>90</sup>

<sup>85</sup>*Criminal Code*, s. 163(8).

<sup>86</sup>*R. v. Doug Rankine Co.* (1983), 36 C.R. (3d) 154, 9 C.C.C. (3d) 53 (Ont. Co. Ct.); *R. v. Nicols* (1984), 43 C.R. (3d) 54, 17 C.C.C. (3d) 555 (Ont. Co. Ct.); *R. v. Ramsingh* (1984), 14 C.C.C. (3d) 230, 29 Man. R. (2d) 110 (Q.B.); *R. v. Wagner* (1985), 43 C.R. (3d) 318 (Alta. Q.B.), aff'd (1986), 50 C.R. (3d) 175 (C.A.), leave denied 50 C.R. (3d) 175 (S.C.C.); *R. v. Red Hot Video Ltd.* (1985), 45 C.R. (3d) 36, 18 C.C.C. (3d) 1 (B.C.C.A.), leave denied 46 C.R. (3d) xxv (S.C.C.); *R. v. Fringe Product Inc.* (1990), 53 C.C.C. (3d) 422 (Ont. Dist. Ct.) [hereinafter *Fringe Product*].

<sup>87</sup>[1985] 1 S.C.R. 494, [1985] 4 W.W.R. 1, 18 D.L.R. (4th) 1 [hereinafter *Towne Cinema* cited to S.C.R.].

<sup>88</sup>*Ibid.* at 505.

<sup>89</sup>See discussion *supra*, notes 32-36 and accompanying text.

<sup>90</sup>See Metro Toronto, *Final Report on Public Violence Against Women and Children* (1984) at 74 [hereinafter *Public Violence*]; D.E.H. Russell, "Pornography and Rape: A Causal Model"

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.<sup>91</sup>

A similar, but stronger view of the harm of pornography was expressed by Easterbrook J. in *American Booksellers Association v. Hudnut*,<sup>92</sup> where he stated:

[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.*

Depictions of subordination tend 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.<sup>93</sup>

Easterbrook J. specifically made the point that pornography is more than representational material depicting the subordination of women. He recognized that pornography actually subordinates women.<sup>94</sup>

(1988) 9 Political Psychology 41; D.E.H. Russell, "Pornography and Violence: What Does the New Research Say?" in L. Lederer, ed., *supra*, note 71 at 218; Malamuth & Donnerstein, *supra*, note 80; McManus, *Final Report of the Attorney General's Commission on Pornography*, *supra*, note 73; Commonwealth of Australia, *Report of the Joint Select Committee on Video Material* (Canberra: Australian Government Publishing Service, 1988).

<sup>91</sup>Standing Committee on Justice and Legal Affairs, *Report on Pornography* (Ottawa: Minister of Supply and Services, 1978) at 18:4. Similar findings were made in *Pornography and Prostitution in Canada: Report of the Special Committee on Pornography and Prostitution* (Ottawa: Minister of Supply and Services, 1985) at 95-103 [hereinafter *Fraser Report*]; and in the *Final Report of the Attorney General's Commission on Pornography*, *supra*, note 73 at 747-56, 767-1035.

<sup>92</sup>771 F.2d 323 (7th Cir. 1985), *aff'd* 475 U.S. 1001 (1986).

<sup>93</sup>*Ibid.* at 328-29 (emphasis added).

<sup>94</sup>This view has been put forward by leading feminist theorists such as C. MacKinnon in many of her excellent publications including *Towards a Feminist Theory of the State* (Cambridge: Harvard U. Press, 1989) c. 11; see also S. Brownmiller, *Against Our Will: Men, Women and Rape* (New York: Simon and Shuster, 1975) at 441-45; A. Dworkin, in numerous articles and books including "Against the Male Flood: Censorship, Pornography and Equality," *supra*, note 74.

In spite of this strong conclusion about the injurious nature of pornography, Easterbrook J. and the rest of the Court of Appeal for the Seventh Circuit proceeded to deny that any governmental effort to censor pornography on the grounds of harm to women as a class could possibly withstand a constitutional challenge. For a comprehensive critique of the judgment, see Seator, *supra*, note 64.

When the Supreme Court inquires into the larger social, political, and legal context of women's experience, as it must do in the *Butler* case,<sup>95</sup> the broad discriminatory effects of pornography should be obvious.<sup>96</sup>

In the larger context, women's experience includes rape, battery, prostitution, incest and sexual harassment as part of daily life. Compared to men, it is common knowledge that women are unequal socially, politically and individually. The encouragement and promotion of subordination in pornography, particularly the depictions of violence and exploitation of women at the hands of men, reinforces the systemic violence and 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 that of hate propaganda, makes the harm to women's credibility, safety and opportunities much more serious and generalized.<sup>97</sup>

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,<sup>98</sup> should ensure that the pressing and substantial requirement of the *Oakes* test will be met.

## 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 whether the way in which the limitation is imposed is justifiable.

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<sup>95</sup>This requirement was set out in *Turpin*, *supra*, note 59 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" (*ibid.* at 1333).

<sup>96</sup>In *Keegstra*, *supra*, note 1 at 745-49, Dickson C.J. found that hate propaganda produced real harms of a discriminatory nature without relying on authoritative studies or evidence. Extensive evidence of the harms of pornography were put before the Court in *Butler* so it will be surprising if the Court does not conclude, in a stronger way, that pornography discriminates against women.

<sup>97</sup>T. McCormick, *Making Sense of Research on Pornography*, a report for the subcommittee of the Metropolitan Toronto Task Force on Violence Against Women, relied on in *Public Violence*, *supra*, note 90 at 37.

<sup>98</sup>See text accompanying notes 72-75.

In a society where gender inequality and sexual violence exist as entrenched and widespread social problems,<sup>99</sup> criminal legislation prohibiting material which 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, by fostering non-violent, non-aggressive, positive gender relations in a community dedicated to sex equality 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."<sup>100</sup> If they are interpreted to include mere sexual explicitness according to a morality standard,<sup>101</sup> it will be difficult to find either a rational connection between the legislative objective and the means chosen to attain it or 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, resulting in more predictable application of the law.

In this part of the s. 1 assessment, the Court will also examine whether other less intrusive means are available to Parliament to meet its objective. The means, even if rationally connected to the objective, should impair "as little as possible" the right or freedom in question.<sup>102</sup> In *Irwin Toy*, 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.<sup>103</sup>

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<sup>99</sup>*Fringe Product*, *supra*, note 86 at 444.

<sup>100</sup>The definition of obscenity in s. 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.

<sup>101</sup>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* (1988), 26 B.C.L.R. (2d) 273, 64 C.R. (3d) 253 at 269, (B.C.C.A.); *R. v. Video World Ltd.* (1985), 22 C.C.C. (3d) 331 at 342-43, [1986] 1 W.W.R. 413, 36 Man. R. (2d) 68 (C.A.), leave denied, [1987] 1 S.C.R. 1255.

<sup>102</sup>*Oakes*, *supra*, note 32 at 139.

<sup>103</sup>*Supra*, note 11 at 994.

The Court also distinguished between situations where the government mediates between different groups with competing interests and those situations where government is the singular antagonist of the individual whose right has been infringed.<sup>104</sup> Where the latter is true, the Court will take a stricter approach to the "least drastic means test." Even though pornographers cast themselves as individual victims of government oppression, arguably they are aggressors in a social conflict between women and men who oppress them. It could be said that obscenity laws advance 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 balance which courts should not second guess. It follows that the relative burdens of the parties under s. 1 should be assessed in a mediation context. Pornographers should have to justify limiting the equality rights of women, just as the Crown should have to justify any limit on freedom of expression 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*,<sup>105</sup> and *Edmonton Journal*<sup>106</sup> 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 decision-making; and individual self-fulfilment and human flourishing.

Like hate propaganda, the *Butler* Court should find that 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 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 rep-

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<sup>104</sup>*Ibid.*

<sup>105</sup>*Supra*, note 79.

<sup>106</sup>*Edmonton Journal v. Alberta (A.G.)*, [1989] 2 S.C.R. 1326 at 1355-56, 64 D.L.R. (4th) 577, Wilson J.

resents an increase of at least fourteen times the growth of the Canadian population during the same period.<sup>107</sup> 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 which are also increasing at a very rapid rate. Widespread sexual assault, wife battery, sexual harassment and sexual abuse of children<sup>108</sup> 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. The "value" of 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 doesn't 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.<sup>109</sup>

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 it 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 which harms others.

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 group.

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<sup>107</sup>Committee on Sexual Offences Against Children and Youths, *Sexual Offences Against Children* (Chairman: Robin F. Badgley) (Ottawa: Minister of Supply and Services, 1984) at 180-83 [hereinafter *Badgley Report*].

<sup>108</sup>See the *Fraser Report*, *supra*, note 91; L. Clark & D. Lewis, *Rape: The Price of Coercive Sexuality* (Toronto: Women's Press, 1977) at 61, state that incidents of rape increased by 174% between 1961 and 1971 in Canada. In the period 1969-1973, it increased 76%. S. Armstrong, in "Wife Beating: Let's Stop it Now" *Canadian Living* (July 1985) 89, states that one woman in ten is beaten by her husband or common law spouse; and the *Badgley Report*, *ibid.*, states that 50% of women and 30% of men are victims of unwanted sexual acts or incidents occurring before adulthood.

<sup>109</sup>See L. Bollinger, *The Tolerant Society: Freedom of Speech and Extremist Speech in America* (New York: O.U.P., 1986) at 87-93.

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 victim's control. In *Keegstra*, the harms caused by hate propaganda were analogized to the harms of sexual harassment, an individualized harm which also promotes group disadvantage.<sup>110</sup> It would follow that 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.

In summary, 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 which the obscenity laws place on expression minimally impair the freedom because pornography is contrary to the principles and values which 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.

## 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 issue is framed and which legal principle is binding, are changing. Obscenity laws like hate propaganda laws should be reframed in equality terms and defended as such in constitutional litigation. The question of harm should be addressed in a way that recognizes the experience of inequality and subordination.

Equality is an emerging right. Establishing it requires reciprocity of respect and parity of regard for physical dignity and personal integrity. Legal interpre-

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<sup>110</sup>In *Janzen*, *supra*, note 28, Dickson C.J. drew a clear connection between sexual harassment and sex inequality generally.

tation must be guided by these values and goals and must not further entrench social realities to the contrary if the constitutional mandate of equality is to be met. Hopefully, the Supreme Court will continue in the direction mapped by the *Keegstra* decision in deciding what is and is not constitutionally protected speech in *Butler*. If they do, equality will be enhanced, rather than inequality entrenched.

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