
Hate Promotion in a Free and Democratic Society:

R. v. Keegstra

Lorraine Eisenstat Weinrib*

Where s. 1 operates to accentuate a uniquely Canadian vision of a free and democratic society...we must not hesitate to depart from the path taken in the United States.¹

[T]he provisions of the *Charter*, though drawing on a political and social philosophy shared with other democratic societies, are uniquely Canadian.²

Introduction

*R. v. Keegstra*³ deals with an issue fundamental to a free and democratic society: is hate propaganda constitutionally protected?

Mr. Keegstra was a secondary school teacher who used his classroom to inculcate anti-semitism. He taught that Jews were personally odious (“sadistic,” “manipulative,” “deceptive,” “money-loving,” “child killers,” “inherently evil”)⁴ and politically dangerous (“treacherous,” “subversive,” “power hungry,” “revolutionists,” “communists”).⁵ He faulted them for attempting to destroy Christianity through a variety of world calamities, including “depressions, anarchy, chaos, wars and revolution.”⁶ Students could obtain good marks by regurgitating this mesh of anti-semitic myth and diatribe, poor marks for doing otherwise.⁷

Mr. Keegstra was prosecuted for promoting hatred contrary to s. 319(2) of the *Criminal Code*.⁸ As is evident from the debate which preceded its adop-

* Of the Faculty of Law, University of Toronto.

© McGill Law Journal 1991

Revue de droit de McGill

¹*R. v. Keegstra*, [1990] 3 S.C.R. 697, [1991] 2 W.W.R. 1 at 40 (S.C.C.), Dickson C.J. [hereinafter *Keegstra* cited to W.W.R.].

²*Ibid.* at 112, McLachlin J. (dissenting).

³*Ibid.*

⁴*Ibid.* at 17, Dickson C.J., and at 81, McLachlin J.

⁵*Ibid.*

⁶*Ibid.* at 17.

⁷*Ibid.* at 81. The factum submitted to the Supreme Court on his behalf gives a chilling sense of Mr. Keegstra's Christian crusade against “evil.”

⁸S. 319 of the *Criminal Code*, R.S.C. 1985, c. C-46 [hereinafter s. 319], provides as follows:

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

tion and the numerous studies that have deliberated upon its retention, this section is complex and controversial. Its many twists and turns reflect the tension between Canada's national commitment to freedom of expression and our awareness of the corrosive effects of racial, religious and ethnic hatred.

In a 4-3 decision, the Supreme Court of Canada upheld the constitutionality of s. 319(2). The majority and the dissent agreed that the section infringed s. 2(b) of the *Charter*,⁹ but disagreed as to whether the provision could be saved by s. 1. The two judgments canvass many issues of both substance and method. What kinds of expression should be protected by the *Charter*? On what basis can the state abridge expression? How should a court of law determine the scope of a constitutionally protected right? And behind these specific questions lies a puzzle about the place of the *Charter* in the corpus of rights-protecting documents. Is the *Charter* modelled on the text and jurisprudence of the American *Bill of Rights*,¹⁰ or on the international commitment to human rights that arose in response to the experience of the Second World War?

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

(b) an offence punishable on summary conviction.

(3) No person shall be convicted of an offence under subsection (2)

(a) if he establishes that the statements communicated were true;

(b) if, in good faith, he expressed or attempted to establish by argument an opinion upon a religious subject;

(c) if the statements were relevant to a subject of public interest, the discussion of which was for the public benefit, and if on reasonable grounds he believed them to be true; or

(d) if, in good faith, he intended to point out, for the purpose of removal, matters producing or tending to produce feelings of hatred towards an identifiable group in Canada.

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

(7) In this section,

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

"identifiable group" [incorporated from s. 318] means any section of the public distinguished by colour, race, religion or ethnic origin ...

"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 electro-magnetically or otherwise, and gestures, signs or other visible representations.

⁹*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*].

¹⁰U.S. Const., amend I.

While both the majority and the dissent in *Keegstra* find the guarantee of freedom of expression in s. 2(b)¹¹ of the *Charter* to be infringed by s. 319(2), the mode of analysis in the two opinions differs dramatically. Resting its discussion on doctrinal precedent, the majority comes to the conclusion that s. 2(b) brooks no content-based restrictions; the dissent reads the right to freedom of expression as a prerequisite to an open, democratic and progressive polity. The respective s. 1 analyses reflect even more profound disagreement. The majority understands s. 1 analysis as normative, forwarding the *Charter's* promise of a free and democratic society imbued with the public values of equal respect for all individuals. The dissent, in contrast, takes an empirical approach, insisting upon proof of the effectiveness of s. 319(2) to eradicate the evil it was enacted to address without chilling expressive activity beyond its actual reach.

I. The Majority Judgment

The majority judgment, written by Chief Justice Dickson (Wilson, L'Heureux-Dubé and Gonthier JJ. concurring), follows the two-stage analysis now standard to *Charter* cases. The first stage focuses on the scope of the right and the fact of its infringement; the second seeks to ascertain whether the infringement constitutes a justified limitation under s. 1. The two stages of the majority opinion in *Keegstra* differ remarkably in tone and technique. The first part of Dickson C.J.C.'s reasons for judgment relies mechanically and superficially on recent precedent. Only the second part exhibits the now familiar and welcome characteristics of the Chief Justice's other leading *Charter* judgments: detailed, well-researched and sensitive presentations of the history and policy underlying both the *Charter* and the impugned legal rules; a deep concern for those whose lives are marked by disadvantage or discrimination; and an awareness that the *Charter* is a testament to Canada's commitment to the values underlying the family of post-war rights-protecting instruments.

A. *The Scope of Freedom of Expression*

The first issue addressed by the Chief Justice is whether the public, wilful promotion of hatred, proscribed by s. 319(2) of the *Criminal Code*, is expression protected under the guarantee set out in s. 2(b) of the *Charter*. The majority answers this question in the affirmative, relying on the Court's determination in a previous case that the guarantee of freedom of expression in the *Charter* embraces "all content ... irrespective of the particular meaning or message

¹¹S. 2(b) of the *Charter*:

Everyone has the following fundamental freedoms:

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

sought to be conveyed.”¹² The only relevant exception to the otherwise comprehensive constitutional protection of communicated meaning is for expression communicated directly through physical harm.¹³ Hate promotion does not fall under this exception. It is criminalized for the repugnancy of its *meaning*, not because any direct physical harm is consequent on its utterance. With meaning, therefore, comes constitutional protection.

The Chief Justice’s view that the guarantee of freedom of expression protects all communicated meaning that lacks violent form is a function of his comprehensive approach to the rationales for the protection of freedom of expression. Citing previous case law,¹⁴ Dickson C.J. sets out these values as: (1) the protection of the “inherently good activity” of “seeking and attaining truth”; (2) the fostering and encouragement of “participation in social and political decision-making;” and (3) the cultivation of “diversity in forms of individual self-fulfilment and human flourishing” in a society that is “tolerant and welcoming,” so as to benefit speaker and listener alike.¹⁵

Despite the broad range of the values he advances as underlying the guarantee of freedom of expression, Dickson C.J.’s conception of the right is surprisingly desiccated. These stated values play only a perfunctory role in his elucidation of that right in the general sense, and no role in the specific context of the wilful promotion of hatred. In his discussion of the scope of the guarantee, the Chief Justice considers neither the plausibility of the three rationales he has enumerated, nor their inter-relationship, nor the degree to which the propagation of hatred instantiates them, nor the extent to which the specific text of s. 319(2) and (3) conforms to them. Only when he reaches the second stage of *Charter* analysis, and comes to consider the justification for the impugned provision, does he acknowledge that the three rationales are in tension with one another, that their formulation derives from a jurisprudence that is marginal to our own,¹⁶

¹²*Supra*, note 1 at 29, referring to *Reference re ss 193 and 195.1(1)(c) of the Criminal Code of Canada (Man.)*, [1990] 1 S.C.R. 1123 at 1181, 4 W.W.R. 481.

¹³*Irwin Toy v. A.G. Quebec*, [1989] 1 S.C.R. 927, 58 D.L.R. (4th) 577 at 607 & 614 [hereinafter *Irwin Toy* cited to D.L.R.] formulated this exception. In *Keegstra*, *ibid.* at 31-32, Dickson C.J. differentiates the idea of physical harm from mere threats, which are content specific and thus protected by s. 2(b): “threats of violence can only be ... classified by reference to the content of their meaning. As such, they do not fall within the exception ...” The violent form exception would exclude, *e.g.*, acts of murder or rape that carry a communicative message. See, *infra*, note 89, for McLachlin J.’s view that threats are not protected expression.

¹⁴*Irwin Toy*, *ibid.* at 612.

¹⁵*Supra*, note 1 at 28.

¹⁶The majority, in its s. 1 discussion, takes the view that the *Charter* is sufficiently different from the American mode of rights protection to warrant different results in similar cases. See *Reference re S. 94(2) of the Motor Vehicle Act*, [1985] 1 W.W.R. 481, 24 D.L.R. (4th) 536 [hereinafter *B.C. Motor Vehicle*], where Lamer J. (as he then was) stated:

We would, in my view, do our own Constitution a disservice to simply allow the American debate to define the issue for us, all the while ignoring the truly fundamental structural differences between the two constitutions.

that the argument based on democratic process cuts both ways,¹⁷ and that the truth-seeking rationale is no longer credible.¹⁸ Only then, also, does he demonstrate how the careful drafting of s. 319(2) and (3) of the *Criminal Code* respects the values for which freedom of expression is protected. Like Penelope forestalling her suitors, the Chief Justice weaves and then unravels before our eyes the right to propagate hatred.

Dickson C.J.'s broad-brush approach to the delineation of the right to freedom of expression precludes careful examination of the relationship between s. 2(b) and other *Charter* provisions. Thus, although the Chief Justice concludes that the guarantee in s. 2(b) protects the wilful promotion of hatred against identifiable groups "distinguished by colour, race, religion or ethnic origin" (s. 319(2)), he does not relate that designation of identifiable groups to the *Charter* proscription against state discrimination in s. 15, on grounds that include colour, race, religion and ethnic origin.¹⁹ Moreover, he denies s. 27 of the *Charter* any role in delineating the scope of s. 2(b), even though this section mandates an interpretation of *Charter* rights that is favourable to our multicultural heritage — and hence the colour, race, religion and ethnic origin — of Canadians.²⁰

Similarly, the Chief Justice refuses to consider in the first stage of his analysis the international agreements on rights-protection to which Canada is a

¹⁷Democracy can be used to support an argument both for and against regulation of expression. Some would argue that democracy can flourish only if expression is unchecked. Others would argue that democracy can function properly only when the state regulates to eliminate excesses and manipulation. See O.M. Fiss, "Free Speech and Social Structure" (1986) 71 Iowa L. Rev. 1405 and "Why the State?" (1986) 100 Harvard L. Rev. 781.

¹⁸The Chief Justice does note in *Keegstra*, *supra*, note 1 at 28, perhaps critically, that *Irwin Toy*, "perhaps goes further towards stressing as primary the 'democratic commitment'". He appears to prefer the formulation that s. 2(b) protects more than political expression in service of democracy, because "it serves individual and societal values in a free and democratic society." For a discussion of the conceptual difficulties posed by these rationales for protecting expression, see L.E. Weinrib, "Does Money Talk? Commercial Expression in the Canadian Constitutional Context" in D. Schneiderman, ed., *Freedom of Expression and the Charter* (Toronto: Carswell, 1991) [hereinafter "Does Money Talk?"].

¹⁹S. 15 of the *Charter* provides:

(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 mental or physical disability.

(2) Subsection (1) does not preclude any law, program or activity that has as its objective 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.

²⁰S. 27 of the *Charter* provides:

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

signatory. To do so in the course of articulating the *Charter* right, he contends, would diminish the large and liberal interpretation made possible by s. 1 balancing. He therefore relegates consideration of these instruments to the second stage of his analysis, that of “weighing of contextual values”²¹ to set limits on protected rights.

According to the majority judgment, then, the first stage of *Charter* adjudication excludes textual, contextual and comparative analysis. The Court is to read the values underlying the right or freedom as expansively as possible, leaving aside any consideration of the currency or mutual consistency of these values, the broader significance of the *Charter* text and its interpretive provisions, as well as the interpretive resources provided by similar systems of rights protection elsewhere in the world. This, says the Chief Justice, is the “large and liberal interpretation”²² of *Charter* rights.

While this approach may be “large and liberal,” it is certainly not the “purposive” approach as originally articulated in *R. v. Big M Drug Mart*.²³ Far from directing the Court to raise values at the initial stage of *Charter* analysis that turn out to be irrelevant at the justification stage, or to ignore the rest of the *Charter* text or other rights-protecting documents simply because s. 1 offers the Court a second bite, the purposive approach allowed for reference to:

the character and the larger objects of the *Charter* itself, to the language chosen to articulate the specific right or freedom, to the historical origins of the concepts enshrined, and where applicable, to the meaning and purpose of the other specific rights and freedoms, with which it is associated within the text of the *Charter*. The interpretation should be ... a generous rather than a legalistic one, aimed at fulfilling the purpose of the guarantee and securing for individuals the full benefit of the *Charter*'s protection. [In order not to overshoot the purpose of the right or freedom, the *Charter* must] be placed in its proper linguistic, philosophic and historical contexts.²⁴

Compared to the formulation in *Big M*, the Chief Justice in *Keegstra* takes an extremely narrow view of the values that are relevant to the characterization of the scope of freedom of expression.

On the basis of the purposive approach dictated in *Big M*, a court might still have reached the Chief Justice's conclusion that wilful promotion of hatred is protected by s. 2(b) of the *Charter*, but in so doing, it would have taken into

²¹*Supra*, note 1 at 32.

²²*Ibid.*

²³[1985] 1 S.C.R. 295, 18 D.L.R. (4th) 321 [hereinafter *Big M* or *Big M Drug Mart* cited to S.C.R.]. P.W. Hogg, “Interpreting the Charter of Rights: Generosity and Justification” (1990) 28 *Osgoode Hall L.J.* 817 also makes the distinction between a broad or generous approach to interpreting the scope of a right and an approach tied to its underlying purposes. D. Beatty, “A Conservative Court: The Politicization of Law” (1991) 41 *U.T.L.J.* 147 traces the development of the case law on rights and limits.

²⁴*Big M*, *ibid.* at 344.

account the following factors. First, the *Big M* formulation encourages consideration of the language chosen to articulate the s. 2(b) guarantee. The *Charter*, like the international instruments, employs the word "expression," rather than the word "speech," which appears in the First Amendment to the United States' *Bill of Rights*. The *Charter's* departure from the American terminology, twinned with the provision in s. 1 of an express limitation clause under which the state bears the burden of persuasion, gives s. 2(b) a particular significance. "Expression" connotes emotive behaviour rather than rational discourse. It focuses on the interests of the speaker, leaving the interests of the audience or of other affected parties to be considered under the expressly provided limitation clause, which directs justification to the demands of a free and democratic society.

Second, *Big M* directs the Court to examine critically the historical origins of the concepts enshrined in the *Charter*. Historically, politically and socially, international rights-protecting documents are more relevant to the Canadian experience than is the American one. Much of the American commitment to unrestrained freedom of speech was developed in the course of and in the *ex post* legitimation of a revolution, which had been fomented by public speeches, letter writing and pamphleteering. This background explains the republican ideal of a sovereign, homogeneous people creating and sustaining self-government, which continues to inform speech rights in the United States.²⁵ Moreover, the precise ideas underlying the rationales for freedom of expression, as developed in this century, remain matters of contention. For example, does the free trade in ideas stand for a truth-seeking enterprise, libertarian ideals, autonomy, self-fulfilment or individual dignity?²⁶

The American background should not provide an unexamined paradigm for the development of freedom of expression in Canadian constitutional law. On the contrary, it should highlight the contrast with Canadian loyalty to the Crown and faith in the state as promoter of the conditions of collective life in a system of parliamentary democracy. Instead of accepting the American approach to free speech, Canadian courts should have recourse to the ideas that underlie freedom of expression in a more relevant context. The international

²⁵See, e.g., L.H. Cohen, "Creating a Usable Future: The Revolutionary Historians" in J.P. Greene, ed., *The American Revolution: Its Character and Limits* (New York: New York University Press, 1987); B. Bailyn, *The Ideological Limits of the American Revolution* (Cambridge: Harvard University Press, 1967); G.S. Wood, *The Creation of the American Republic* (New York: Norton, 1969); and D.A. Richards, *Foundations of American Constitutionalism* (New York: Oxford University Press, 1989) at 172-201.

²⁶See M.H. Redich & G. Lippman, "Freedom of Expression and the Civic Republican Revival in Constitutional Theory: The Ominous Implications" (1991) 79 Calif. L. Rev. 267, D. Cole, "Agon at Agora: Creative Misreadings of the First Amendment Tradition" (1986) 95 Yale L.J. 857, and P. Lahav, "Holmes and Brandeis: Libertarian and Republican Justifications for Free Speech" (1988) 4 J. of L. & Politics 451.

instruments, the other available paradigm, reflect a more current and more relevant agenda with respect to expression rights. In particular, the international model is more relevant to Canada than the American one because it is contextualized in the post-war project of maintaining democratic stability in nation states with mixed racial, religious and ethnic populations.

Third, the *Big M* methodology renders relevant other provisions of the *Charter* text.²⁷ In particular, the values embodied in s. 15 (the equality section) and s. 27 (the multiculturalism section) bear on the constitutional status of the wilful promotion of hatred. S. 15 proscribes state discrimination, with a proviso for affirmative action programmes, directed at (or affecting) individuals with characteristics similar to those listed in s. 319(2). Accordingly, one might argue, a speaker must be given wide latitude with respect to public comment on the activities, claims and interests of persons identified by those constitutionally significant characteristics, because the *Charter* considers these characteristics to be of great public importance. Furthermore, the possible application of the directive in s. 27 to ss 1, 2(b) & 15 gives additional weight to the recognition of a prima facie right to expression which touches on these categories of persons.

The majority in *Keegstra* invokes precedent to relegate these considerations to the second stage of their analysis. The choice of precedent, however, reflects interpretive preference. The majority relies heavily on *Irwin Toy* for the rule that all expression attracts protection regardless of content, based upon its uncritical adoption of the three rationales noted earlier.²⁸ An alternative was available, however. Dickson C.J. might have emulated the reasoning in the *Ford* case,²⁹ where the Court had focussed in the first stage of *Charter* analysis not on expression in the general sense, but instead upon the particular claim asserted. With this focus, the Court in *Ford* considered whether s. 2(b) protected the right to speak in the language of one's choice in the context of a modern democracy grappling with the problem of the varied linguistic usages of its inhabitants. In *Ford*, unlike *Keegstra*, the Court analyzed other sections of the *Charter*, as well as international human rights jurisprudence, to reach its conclusion that choice of language found protection under s. 2(b) because of the unde-

²⁷See *Dubois v. R.*, [1985] 2 S.C.R. 350 at 365, [1986] 1 W.W.R. 193, Lamer J. (as he then was), for the view that the *Charter* must be construed so that each component gives meaning to the whole and vice versa: "[t]he courts must interpret each section of the *Charter* in relation to the others."

²⁸For comment on *Irwin Toy* and its progeny, e.g., *Royal College of Dental Surgeons v. Rocket*, [1990] 2 S.C.R. 232, 71 D.L.R. (4th) 68 [hereinafter *Rocket* cited to S.C.R.], see "Does Money Talk?," *supra*, note 18 and R. Moon, "Lifestyle Advertising and Classical Freedom of Expression Doctrine" (1991) 36 McGill L.J. 76.

²⁹*Ford v. A.G. Quebec*, [1988] 2 S.C.R. 712, 54 D.L.R. (4th) 577 [hereinafter *Ford* cited to D.L.R.].

niable links between individual identity, group affiliation and the expressive content of language.³⁰

The majority in *Keegstra* abandoned the methodology of *Big M* without explanatory comment. Instead of elucidating broadly those factors relevant to discerning the purpose of a right in the context of the *Charter* text, its history and value structure, the Court adopted an expansive analysis of the particular right, isolated from the rest of the *Charter* text.

The Court's "large and liberal" approach bears certain methodological costs. First, it sets s. 2(b) off from the other rights already elaborated by the Court using the purposive approach. The Court has interpreted most other sections of the *Charter*, not by parading unexamined values, as did the majority in *Keegstra*, but by discerning the values for the sake of which we set the right above the political fray.³¹ By exempting s. 2(b) from this methodology, the majority in *Keegstra* suggests that freedom of expression has higher standing than other *Charter* rights. This may in turn suggest that the main goal of the *Charter* is to support the democratic political function, rather than to affirm individual human flourishing in a free and democratic society.³² While orienting the *Charter* agenda towards the political process may appear to be rights-forwarding, it may in reality be a post-*Charter* expression of anti-entrenchment

³⁰*Ibid.* at 604-09, where the Court quotes from *Reference re Language Rights under Manitoba Act, 1870*, [1985] 1 S.C.R. 721, 19 D.L.R. (4th) 1 at 19, for reference to the same values of individual dignity and equality that Dickson C.J. later invokes in his s. 1 analysis in *Keegstra*:

The importance of language rights is grounded in the essential role that language plays in human existence, development and dignity. It is through language that we are able to form concepts; to structure and order the world around us. Language bridges the gap between isolation and community, allowing humans to delineate the rights and duties they hold in respect of one another, and thus to live in society.

The reasons for judgment in *Ford* refer to other sections of the Canadian *Charter*, to the preamble of the *Quebec Charter of the French Language*, R.S.Q. 1977, c. C-11, ss 1 & 58, and to the views of the European Commission of Human Rights and the European Court of Human Rights. While the conclusion in *Ford* was that choice of language is protected because of its inextricable relationship with content and meaning, the benchmark values in the case were individual dignity and equality.

³¹See, e.g.: for s. 2(a), *Big M Drug Mart*; for s. 7, *B.C. Motor Vehicle* and *R. v. Morgentaler*, [1988] 1 S.C.R. 30, 44 D.L.R. (4th) 385 [hereinafter *Morgentaler* cited to D.L.R.]; for the legal rights, *R. v. Strachan*, [1988] 2 S.C.R. 980, 25 D.L.R. (4th) 567, *R. v. Vaillancourt*, [1987] 2 S.C.R. 636, 47 D.L.R. (4th) 399, and *R. v. Oakes*, [1986] 1 S.C.R. 103, 26 D.L.R. (4th) 200 [hereinafter *Oakes* cited to S.C.R.]; and for s. 15, *Andrews v. Law Society of B.C.*, [1989] 1 S.C.R. 143, 56 D.L.R. (4th) 1. P.W. Hogg, *supra*, note 23, suggests that the Court's more recent abandonment of the purposive approach will be reversed. *Keegstra* and *McKinney v. Univ. of Guelph*, [1990] 3 S.C.R. 229, 76 D.L.R. (4th) 545 [hereinafter *McKinney* cited to D.L.R.], to the extent that they demonstrate the future direction of the Court, reconstituted after a number of retirements, suggest otherwise.

³²For the view that the *Charter* protects democratic values, see P. Monahan, *Politics and the Constitution* (Toronto: Carswell, 1987), who follows the line of thinking developed in the American context by J.H. Ely, *Democracy and Distrust* (Cambridge: Harvard University Press, 1980).

sentiment, because it introduces into *Charter* adjudication a methodology that favours claims to expression, particularly in the political arena, and little else.

Second, the approach of the majority in *Keegstra* undermines the normativity of *Charter* rights. When the reasons for protecting rights are not fully articulated or critically examined by the Court, the currency of rights-protection is debased. What is essential in the first stage of *Charter* argument is that the Court explain why certain activities, here speech acts, are *prima facie* beyond the range of our representative and politically accountable institutions. The purposive approach of *Big M* should focus our attention on Mr. Keegstra's right to spew racist venom without being hindered by the state, not on the claims of his listeners (to listen) and his targets (to stop him). It should make us realize, whatever our views about s. 319(2) of the *Criminal Code*, the sense in which Mr. Keegstra's interests are *our* interests. This, the real reason for content-neutral protection of expression under s. 2(b), is the message that the Chief Justice's "large and liberal" approach fails to deliver.³³

Finally, when the right is not brought home to us by the Court as a right that we must each hold in order to enjoy and maintain a free and democratic society, then s. 1 justification in the second stage of *Charter* analysis becomes blurred.³⁴ Unless the holder of the right comes into clear focus in the first stage, the broader and more varied viewpoints appropriate to the second stage do not come alive. How can we tell what might justify limiting the right if we lack a well-considered appreciation of its grounds? The Chief Justice's approach in *Keegstra* in effect reduces the difference between the two stages to a shift in onus, from the rights-claimant to the proponent of the impugned legislation. The change in the burden of persuasion is without significance, however, if the same arguments arise at both stages and cancel each other out.

B. Limitation under Section 1

When the Chief Justice turns from articulating the scope of s. 2(b) to s. 1 justification, he revisits the themes of truth-seeking, democratic process and human fulfilment, which he earlier found to underlie the guarantee of freedom of expression. Now, he regards these values with a critical eye. In a startling retreat from the jurisprudence that constrained his s.2(b) analysis, and in stark contrast to the s. 1 analysis offered by the dissent, the Chief Justice uses the second stage of *Charter* adjudication to forge a new resolution of the tension

³³D.A.J. Richards, *Tolerance and the Constitution* (New York: Oxford University Press, 1989) at 192 presents a ringing affirmation of the missing appeal: "the state's restriction of ... speech by group libel laws is inconsistent with the place respect for conscience holds in our constitutional traditions"; "communicative integrity, grounded in the fuller expression of its background right of critical conscience, is not one that can be abridged on grounds of offence, which would sanitize authentic exercises of the moral powers of free people" (at 195).

³⁴See T. Macklem, "Putting Heart into Expression" (1991) 1 M.C.L.R. 341 at 347ff.

between vibrant, even heated, public debate, and restrictions on freedom of expression.

1. Methodology

The Chief Justice introduces the second part of his judgment with a methodological preface. He warns at the outset that it would be “dangerously misleading to conceive of s. 1 as rigid and technical,” “rigid or formalistic,” or “mechanical.”³⁵ While the target of these dreaded adjectives is not fully explicit, he seems to be criticizing the view that the justificatory undertaking in s. 1 pertains solely to the values “expressly set out in the *Charter*.”³⁶ Dickson C.J. prefers a “flexible,” “contextual,” “sensitive” approach,³⁷ summarized in the following quotation from an earlier judgment of Justice La Forest in *U.S.A. v. Cotroni*:

While the rights guaranteed by the *Charter* must be given priority in the equation, the underlying values must be sensitively weighed in a particular context against other values of a free and democratic society sought to be promoted by the legislature.³⁸

Although the metaphors are mixed, if not garbled, the message here is clear: *Charter* values are not the exclusive pre-occupation of s. 1 analysis. Under the case law embodied in and evolved from this quotation, s. 1 justification is free-form balancing — a decidedly subjective exercise, serviced by a superficial utilitarian cost-benefit analysis, informed by a less-than-rigorous attitude to facts and data, and deferential in the extreme to majoritarian policy formation.³⁹ A free and democratic society, for Justice La Forest, is defined in the mind of the legislature.⁴⁰

One can contrast the La Forest quote with the Court’s approach in *Oakes*.⁴¹ The *Oakes* test focused s. 1 justification on *Charter* values, so that a free and

³⁵*Supra*, note 1 at 33.

³⁶*Ibid.* at 33-35. See, *ibid.* at 58 for attribution of these negative characteristics to American analysis based on levels of scrutiny.

³⁷*Ibid.* at 35.

³⁸[1989] 1 S.C.R. 1469 at 1489-90, 48 C.C.C. (3d) 193 [hereinafter *Cotroni* cited to S.C.R.], quoted by Dickson C.J. in *Keegstra*, *ibid.* at 35. In the *Keegstra* case itself, La Forest J. concurs with the dissenting reasons of McLachlin J. This quote from *Cotroni* is adopted by La Forest J. in his majority judgment in *McKinney*, *supra*, note 31 at 647-48, as epitomizing the balancing function under s. 1.

³⁹For an application of this methodology, see *McKinney*. Judgment was rendered in that case on December 6, 1990, one week before *Keegstra*.

⁴⁰*McKinney*, *ibid.* at 676. This approach to s. 1 would have accorded well with versions of its text that pre-dated its final draft, e.g., “reasonable limits as are generally accepted in a free and democratic society” or “reasonable limits as are generally acceptable in a free society living under a parliamentary democracy.” See A.F. Bayefsky, *Canada’s Constitution Act, 1982 and Amendments: A Documentary History* (Toronto: McGraw-Hill Ryerson, 1989) at 669 & 678.

⁴¹*Supra*, note 31. The first section of the *Charter* states:

The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set

democratic society is one which honours the values that underlie *Charter* rights and freedoms, in both stages of *Charter* adjudication. Despite his invocation of the La Forest quotation, the Chief Justice in fact follows the *Oakes* approach. He rehearses the most significant interpretive component of the *Oakes* case, namely, the dual function of s. 1 as the source of both the guarantee and its limitation. In *Oakes*, Dickson C.J. had inferred from this dual function that the concept of a "free and democratic society" was both the "genesis of the rights and freedoms guaranteed by the *Charter*,"⁴² and "the ultimate standard against which a limit on a right or freedom must be shown, despite its effect, to be reasonable and demonstrably justified."⁴³ On this reading the values underlying *Charter* rights are decisive in justifying their limitation.

The use of the *Oakes* test, in turn, allows the majority in *Keegstra* to rely heavily on international human rights instruments. Both the *Charter* and these international instruments build upon the idea that rights protection and limitation are joined in the common venture of affirming individual dignity and equality.⁴⁴ So understood, the relationship between the *Charter* and the international instruments means that one need not go beyond the *Charter*'s own values in *Keegstra*. And Dickson C.J. does not.

The majority judgment manifests no trace of the deferential, utilitarian and empirically suspect arguments, championed by Justice La Forest and referred to with favour by the Chief Justice at the beginning of his judgment. Indeed, Dickson C.J. applies the method he just decried as "mechanistic," "formalistic" and "technical." In so doing, he demonstrates it to be as "sensitive," "contextual"

out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

⁴²*Oakes, ibid.* at 136. See L.E. Weinrib, "The Supreme Court of Canada and Section One of the Charter" (1988) 10 Sup. Ct. L. Rev. 469 for an elaboration of this view of s. 1.

⁴³*Oakes, ibid.* at 136, quoted in *Keegstra, supra*, note 1 at 34. Accordingly, each and every strand of the *Oakes* test was tied to the values of a free and democratic society. See "The Supreme Court of Canada and Section One of the Charter," *ibid.* for the full development of this approach to the *Charter* as a matter of theory as well as doctrinal development. In that article, I attribute this approach to Wilson J., and argue that she has been its most consistent adherent.

⁴⁴Particularly helpful sources on this point are: J. M. Ross, "Limitations on Human Rights in International Law: Their Relevance to the Canadian Charter of Rights and Freedoms" (1986) 6 Human Rights Q. 180; A.C. Kiss, "Permissible Limitations on Rights" in L. Henkin, ed., *The International Bill of Rights: The Covenant on Civil and Political Rights* (New York: Columbia University Press, 1981) 290; and the Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights, E/CN.4/1985/4 Annex (reprinted in (1985) 7 Human Rts Q.). This embrace of international rights-protection as the model for justification of limitation upon freedom of expression marks a rejection of the American jurisprudence on free speech. To soften the sharp departure from previous Supreme Court decisions, which imported without criticism the American rationales for freedom of speech, the focus is narrowed. Dickson C.J. indicates that he doubts the unmitigated commitment to content neutrality in that body of law, and therefore does not read that jurisprudence as inexorably mandating the invalidation of hate promotion laws: *Keegstra, ibid.* at 38-39.

and “flexible” an analytic approach as one might desire. Justice La Forest’s preferred methodology is to be found in the dissent.

2. The *Oakes* test applied

a. *Pressing and substantial objective*

The first part of the *Oakes* test requires that the objective of the impugned legislation be pressing and substantial. In a detailed and sensitive discussion, Dickson C.J. finds adequate foundation for the enactment of s. 319(2) in a series of parliamentary reports, dating from the 1965 *Report of the Special Committee on Hate Propaganda in Canada*,⁴⁵ to the Working Paper entitled *Hate Propaganda*, issued by the Law Reform Commission of Canada in 1986.⁴⁶

The Chief Justice begins his survey of the literature by observing that racial tension, even at low levels, constitutes a breeding ground for sentiments inimical to civilized society. Originally evidenced in anti-semitic and anti-black prejudice, hatred of individuals identified by particular characteristics has expanded with the diversification of Canada’s population. The harm inflicted by the preaching of racial and religious contempt begins with an affront to the target individuals’ “sense of human dignity and belonging to the community at large.”⁴⁷ An individual’s feeling of acceptance into Canadian society correlates with that society’s concern for the group with which the individual identifies.⁴⁸ The majority judgment underscores the pivotal role of “connection” and “belonging.” Dickson C.J. takes the concern encompassed in the “chilling effect” doctrine, favoured by the dissent, for speakers who may be silenced beyond the actual application of a restrictive law, and re-directs it to the targets of wilfully promoted hatred, whose entry into the larger community may be thwarted.

⁴⁵*Report to the Minister of Justice of the Special Committee on Hate Propaganda in Canada* (Chair: M. Cohen) (Ottawa: Queen’s Printer, 1966) [hereinafter *Cohen Report*].

⁴⁶Law Reform Commission of Canada, *Hate Propaganda* (Working Paper No. 50) (Ottawa: The Commission, 1986) at 36, quoted in *Keegstra*, *supra*, note 1 at 41-44. The work of these expert bodies provides the Chief Justice with the basis for his skepticism, in this part of his analysis, of the “marketplace of ideas” and the democratic function rationales for freedom of expression, which he relied upon in the earlier part of his opinion.

⁴⁷*Keegstra*, *ibid.* at 42.

⁴⁸*Ibid.*, at 42-43 and also at 35 & 55. At 42, Dickson C.J. refers to I. Berlin, “Two Concepts of Liberty” in *Four Essays on Liberty* (London: Oxford University Press, 1969) 118 at 155, and at 51 he cites J. Magnet “Multiculturalism and Collective Rights: Approaches to Section 27” in G.-A. Beaudoin & E. Ratushny, eds, *The Canadian Charter of Rights and Freedoms* (Toronto: Carswell, 1989) 739, as well as Cory J.A.’s judgment, in the Ontario Court of Appeal, in *R. v. Andrews* (1988), 43 C.C.C. (3d) 193 at 213, 28 O.A.C. 161. For a Rawlsian elaboration of the issues, see the *Factum* filed by the Intervenor, Interamicus in *Keegstra*.

Dickson C.J. is keenly aware that the community at large, and thus majoritarian politics, can fall prey to the poison of hatred because human beings are not solely or simply rational, truth-seeking creatures. He candidly notes that emotion can displace reason, at least in the short run and particularly at the non-conscious level. He makes reference to two examples: modern advertising and Hitler's propaganda machine.⁴⁹ He therefore questions the reliability of both the democratic process and the marketplace of ideas to protect society from the harm inflicted by the wilful promotion of hatred — although he had earlier accepted these as rationales for the constitutional protection of expression.

Such rejection also informs international rights protecting instruments adopted after the Second World War. For this reason, these documents offer a model. One is reminded of the Chief Justice's earlier pronouncement on the relevance of international conventions:

Since the close of the Second World War, the protection of the fundamental rights and freedoms of groups and individuals has become a matter of international concern. A body of treaties (or conventions) and customary norms now constitutes an international law of human rights under which the nations of the world have undertaken to adhere to the standards and principles necessary for ensuring freedom, dignity and social justice for their citizens. The *Charter* conforms to the spirit of this contemporary international human rights movement, and it incorporates many of the policies and prescriptions of the various international documents pertaining to human rights. The various sources of international human rights law ... must, in my opinion be relevant and persuasive sources for interpretation of the *Charter's* provisions.⁵⁰

The international approach is to protect freedom of expression, while also committing signatory states, including Canada, to legislate against hate propaganda. This approach does not manifest a lesser allegiance to democracy. Rather, it rests upon the understanding that a nation must have healthy public relationships between the individual, the identified group, and the community at large,

⁴⁹*Keegstra, ibid.* at 43. This reference to advertising stands in stark contrast to the Supreme Court's consideration of advertising in the context of *Charter* cases. See "Does Money Talk," *supra*, note 18; Moon, *supra*, note 28; *Irwin Toy*; and *Rocket*. In addition, Dickson C.J. does not comment on the degree to which mass media and advertising concerns now shape politics.

⁵⁰*Re Public Service Employee Relations Act (Alta.)*, [1987] 1 S.C.R. 313, 38 D.L.R. (4th) 161 at 184, Dickson C.J., dissenting. I am indebted to Mordechai Wasserman for bringing this quote to my attention, and for general discussions on the line of argument developed in this paper. In *Slaight Communications v. Davidson*, [1989] 1 S.C.R. 1038 at 1056-57, 93 N.R. 183, Chief Justice Dickson stated:

Given the dual function of s. 1 identified in *Oakes*, Canada's international human rights obligations should inform not only the interpretation of the content of the rights guaranteed by the *Charter* but also the interpretation of what can constitute pressing and substantial s. 1 objectives which may justify restrictions upon those rights.

For a detailed account of the reliance in *Charter* cases upon the international law of rights and limitations, see W.A. Schabas, *International Human Rights Law and the Canadian Charter: A Manual for the Practitioner* (Toronto: Carswell, 1991) at 65-126.

to ensure that all members of society may take part in the democratic process. The commitment is to the dignity and equality of individuals, regardless of group identification, through the eradication of hate propaganda, so that all are members of a free and democratic society.⁵¹

The Chief Justice understands the *Charter* to reflect this commitment to inherent dignity and equality in a democratic society. Accordingly, he treats the values of equality and multiculturalism promoted in ss 15 and 27 as informing the justification exercise under s. 1.⁵² He also adduces other sections of the *Charter*, to highlight the connection of the individual to cultural groups by providing, for example, language and denominational education rights, aboriginal rights, and guarantees of gender equality.⁵³ These sections, of course, do not apply independently to the issue at hand. Rather, they provide a value structure for the judicial evaluation of arguments proffered to justify limits on *Charter* rights and freedoms. Their role follows from the understanding that the sole justificatory criterion of limitation is the idea of a free and democratic society, which is itself the genesis of the rights.⁵⁴

b. Proportionality

Having recognized the objective of s. 319(2) as “of the utmost impor-

⁵¹*Keegstra, supra*, note 1 at 45ff, referring to the *International Convention on the Elimination of All Forms of Racial Discrimination* (“CERD”), Can T.S. 1970, No. 28, Art. 4 and the *International Covenant on Civil and Political Rights*, 999 U.N.T.S. 171 (1966), arts. 19 & 20. In addition, the Chief Justice refers to *Taylor and Western Guard Party v. Canada*, Communication No. R. 24-104, Report of the Human Rights Committee, 38 U.N. GAOR, Supp. No. 40 (A/38/40) 231 (1983), para. 8(b). The latter decision of the United Nations Human Rights Committee rejects the argument that s. 13(1) of the *Canadian Human Rights Act*, S.C. 1976-66, c. 33 — prohibiting the communication of hate messages by telephone — violates art. 20. To mark the general approach of international human rights documents, the Chief Justice also refers to the *European Convention for the Protection of Human Rights and Fundamental Freedoms*, 213 U.N.T.S. 221 (1950), art. 10 and its interpretation. The argument with respect to CERD, to the extent that it is an argument about Canada’s international legal obligations, is diminished by the fact, unmentioned in the judgment by either the Chief Justice or McLachlin J., that Canada has not acted on para. (b) of art. 4 of the CERD, even though it made no reservation or interpretive declaration at the time of ratification: see *Hate Propaganda, supra*, note 44 at 18-19, nn 65-67. This paragraph requires adhering states to declare illegal organizations and organized activities, including membership therein, that promote and incite racial discrimination. The Chief Justice refers to this study in *Keegstra, supra*, at 44.

⁵²*Keegstra, ibid.* at 49-51. Reference is made to *Singh v. Minister of Employment and Immigration*, [1985] 1 S.C.R. 177 at 218, 17 D.L.R. (4th) 422, Wilson J., where she states: “it is important to remember that the courts are conducting this inquiry [under s. 1] in light of a commitment to uphold the rights and freedoms set out in other sections of the *Charter*.” This idea, picked up in *Oakes* is part of the orientation of s. 1 towards exclusively right-based values, discussed *supra*, note 23 and accompanying text.

⁵³*Keegstra, ibid.* at 50. The *Charter* sections referred to are ss 16-23, 25, 28 & 29.

⁵⁴See, *supra*, notes 40-43 and accompanying text.

tance,”⁵⁵ the first part of s. 1 justification is satisfied and the Chief Justice turns to consider the provision’s proportionality to its objective.

First, he finds a rational connection between the stated objective of s. 319(2) and its terms. He rejects the contention that criminal prosecution undermines the stated objective by providing the hate-monger a free public forum and lending legitimacy to the message. He also rejects the proffered historical example of Weimar Germany, which prosecuted hate-mongers and nevertheless descended into totalitarianism and genocide based on the type of category found in s. 319(2) as identifying groups.⁵⁶ The Chief Justice adopts a normative stance, in contrast to the dissent’s more empirical approach. The criminal law, he stresses, embodies society’s highest form of disapprobation, and when it condemns expression that undercuts diversity and multiculturalism, it sheds no glimmer of respectability or veracity. Furthermore, the historical example of Weimar Germany does not attest to the futility of such laws, but to the multi-faceted nature of the factors that work for and against societal tolerance. More instructive on this point is the fact that post-war Germany, as well as a number of other countries, maintain comparable laws today.⁵⁷

The Chief Justice turns next to the contention that s. 319(2) is vague and overbroad, and exceeds the minimal impairment test laid down in *Oakes*. After detailed review of the impugned provision, Dickson C.J. rejects these arguments. In particular, he notes the following constricting features in the section: the offence does not attach to statements made “in private conversation”; prosecution is made more difficult by the Crown’s need to prove subjective *mens rea*; the accused must either “subjectively desire” to promote hatred or “foresee such a consequence as certain or substantially certain to follow” from his actions; there must be active support or instigation of hatred, rather than mere encouragement or advancement; the need for an “identifiable group” precludes prosecution for fostering hatred against individuals; and “hatred” denotes only a most extreme emotion that ousts reason, rather than a wide range of diverse emotions.⁵⁸

The defences afforded under s. 319(3) further narrow the range of activity proscribed.⁵⁹ Specifically, an accused may avoid conviction by establishing that the statements were true, or good faith opinions on a religious subject, or commentary on a subject of public interest reasonably believed to be true, or good

⁵⁵*Supra*, note 1 at 51.

⁵⁶*Ibid.* at 60.

⁵⁷*Ibid.* at 60-61. While comparison to legislative arrangements in other free and democratic societies is not cogent as legal argument, such references should at least alert the reader to the fact that the American aversion to content-based regulation of hate speech is not standard in Western democracies, and has not been adopted in a number of countries that have post-war constitutions.

⁵⁸*Ibid.* at 62ff.

⁵⁹*Ibid.* at 67ff. For the text of s. 319(3), see *supra*, note 8.

faith comments for the purpose of countering hatred towards identifiable groups.⁶⁰ The Chief Justice takes the view that the defence afforded for true statements is not mandated by the *Charter*, but is to be understood as a Parliamentary concession to truthful freedom of expression even though it may have harmful results. This conclusion meshes well with Dickson C.J.'s skepticism as to the rationality of human behaviour, but appears to call into question the legitimacy of the truth-seeking rationale said to underlie s. 2(b). The first and second stages of the argument lack integration with respect to this important consideration.

Once again, empirical considerations bow to *Charter* values in Dickson C.J.'s analysis. The fact that the state has unsuccessfully tried to use s. 319(2) in unwarranted circumstances is illustrative of unlawful action, not of legislative meaning for the purposes of *Charter* analysis. Moreover, the availability of non-criminal measures, even if more effective, does not undermine the use of the criminal sanction. The minimal impairment test under s. 1 does not require the state to choose one of a number of alternatives where multiple approaches are indicated, as long as the more restrictive measure is not redundant.⁶¹

The Chief Justice concludes his analysis under s. 1 by finding that the limitation upon s. 2(b) freedoms effected by s. 319(2) does not outweigh its legislative objective. This conclusion follows from the finding that the expressive activity proscribed is remote from the values that underlie the guarantee in s. 2(b), while the objective of the proscription reflects these values. The limitation, in other words, is more faithful to *Charter* values than is the crystallized right expressed in the document itself.

The majority's s. 1 analysis as a whole is lucid, cogent and principled. It belies the apprehension initially expressed by the Chief Justice that, were *Charter* values alone to drive s. 1 analysis, the exercise would become "mechanical" or "formalistic." These opprobrious adjectives are out of place. The *Charter* shares the values of other post-war rights-protecting instruments, which promote stable democratic political functioning by rejecting the excesses that can deprive certain members of the community of their self-dignity and the will to take part in public life. The Court's s. 1 analysis is of high calibre. It would have been a worthy counterpart for a purposive interpretation of s. 2(b), which was inexplicably lacking in the earlier part of the majority judgment.

⁶⁰Space precludes discussion of the consideration of s. 11(d) of the *Charter*, the presumption of innocence.

⁶¹*Supra*, note 1 at 70-72. Also, the division of powers under ss 91 & 92 of the *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3 would limit Parliament's power to legislate to areas within its jurisdiction. Reliance on the possibility of provincial schemes would be an unrealistic, as well as novel, approach under the "minimal impairment" test.

II. The Dissent

The dissent reaches the same conclusion as the majority in the first stage of the analysis, finding that s. 319(2) infringes s. 2(b), but holds that this infringement is not justified under s. 1. The reasons for judgment of McLachlin J. (La Forest and Sopinka JJ. concurring) are less well documented, less focused and less cogent than those of Chief Justice Dickson. The most striking contrast between the two lies in the underlying commitments evident in the respective reasons for judgment. While the majority reads the objective of the *Charter* project as the protection of the rights and freedoms of individuals in a free and democratic society, the dissent finds the unfettered and often heated democratic marketplace to be the *Charter's* highest aspiration. Accordingly, the dissenters align the *Charter* with the American conception of unfettered speech rights as indispensable to the democratic political process.

A. *The Scope of Freedom of Expression*

Like Chief Justice Dickson, McLachlin J. easily finds the s. 2(b) guarantee to be infringed by s. 319(2). Her understanding of expression as a constitutional value is developed in an extensive philosophical, historical and comparative discussion. What emerges from this discussion is *Charter* interpretation that lacks focus on the individual, and instead gives pride of place to democratic ordering and social progress. Curiously absent here, in light of McLachlin J.'s ultimate finding that s. 1 remains unsatisfied, is any sense of the legitimacy of Mr. Keegstra's claims and interests.

The three rationales for protecting freedom of expression, set out earlier by the Chief Justice, here acquire a distinctively instrumental cast.⁶² Freedom of expression is protected not to serve the individual but to serve the state. This characteristic of the dissenting judgment, although at first glance an effort at purposive analysis in the *Big M* tradition, re-orientes the first stage of *Charter* interpretation to utilitarian considerations. Under the first rationale considered by McLachlin J., the *Charter* protects expression to safeguard the institution of political democracy and to create the bulwark of open debate against state subversion of other rights and freedoms.⁶³ She reads the political process rationale narrowly, so that it offers protection only to political expression, although she recognizes that the broad language of both s. 2(b) of the *Charter* and the Amer-

⁶²For the three rationales, see *supra*, text accompanying note 15. *Keegstra, ibid.* at 85ff.

⁶³*Ibid.* at 85-86. See also, *Palko v. Connecticut*, 302 U.S. 319 (1937) at 327, Cardozo J.: "[freedom of speech is] ... the matrix, the indispensable condition of nearly every other form of freedom." But consider the following: "The effort to identify the 'indispensable conditions of an open society' thus proves inseparable from the much larger enterprise of identifying the elements of being human — and deciding which of those elements are left entirely to politics to protect, and which are entrusted to protection by judicial decree" (L. Tribe, *American Constitutional Law*, 2d ed. (Mineola, New York: Foundation Press, 1988) at 778-79).

ican First Amendment suggests otherwise. She cites A. Meikeljohn's *Free Speech and its Relation to Self-Government*⁶⁴ as the *locus classicus* of the political process rationale, even though that work more generously embraces artistic expression as forwarding the development of the full-rounded citizen necessary for successful self-government.⁶⁵

McLachlin J. regards freedom of expression, understood in light of the political process rationale, as the "pivotal" *Charter* right. Her view is at odds with the text of s. 2 and the First Amendment, both of which give precedence to the protection of religion or individual conscience. Indeed, in *Big M Drug Mart*, Dickson J., as he then was, referred to freedom of religion as the "prototypical" and "paradigmatic" example of a belief and manifestation.⁶⁶ To read expression as the primary freedom is to see democratic political functioning as the end of constitutionalism, rather than to understand the shifting sands of democratic politics as the most favourable environment or means for the flourishing of the individual in society at large.⁶⁷

McLachlin J.'s consideration of the second rationale for protecting freedom of expression, the maintenance of a marketplace of ideas that will come to value truth over non-truth, continues the instrumentalist analysis. She concedes that truth remains an elusive concept. She also concedes that the failure of this marketplace, or its slowness to discern truth, has generated high social costs historically, for example in the Second World War experience. Yet she determines that the restriction of freedom of expression produces societies that are not "relevant, vibrant and progressive" in terms of "industry, economic development and scientific and artistic creativity."⁶⁸ Section 2(b) helps to avoid the stagnation

⁶⁴1st ed. (New York: Harper, 1948), cited in *Keegstra, ibid.* at 51.

⁶⁵*Keegstra, ibid.* at 85. For the view that Meikeljohn's concern was direct democracy, not truth, see "Does Money Talk?," *supra*, note 18.

⁶⁶*Big M, supra*, note 23 at 347 and L.E. Weinrib, "The Religion Clauses: Reading the Lesson" (1986) 8 Sup. Ct. L. Rev. 507. For the connection between freedom of speech and conscience, see Richards, *supra*, note 33.

⁶⁷For an attempt — ultimately unconvincing in my view given the text, history and jurisprudence — to read American constitutionalism as rooted in individual dignity, see W. R. Murphy, "An Ordering of Constitutional Values" (1980) 53 S. Calif. L. Rev. 703. McLachlin J.'s view of s. 2(b) as the bulwark against the erosion of other rights and freedoms is more correctly positioned in the American than the Canadian context. The *Charter* expressly provides for judicial review of infringements of all guaranteed rights and freedoms, a feature absent from the text of the American *Bill of Rights*, and controversial to this day given the separation of powers doctrine espoused by the U.S. *Constitution* generally. It is accordingly unhelpful to understand s. 2(b) as the bulwark against the infringement of those rights and freedoms.

⁶⁸*Supra*, note 1 at 85-86. This approach is formulated, not as a variation of the marketplace of ideas, but as a fourth rationale, by a leading American academic on the subject, whose thinking McLachlin J. relies upon quite extensively, but not for this point. See T.I. Emerson, *The System of Freedom of Expression* (New York: Random House, 1970):

freedom of expression is a method of achieving a more adaptable and hence a more stable community ... This follows because suppression of discussion makes a rational

caused by government errors in regulating the marketplace of ideas, *e.g.*, by promoting orthodoxy in religion, science and art.⁶⁹ For Justice McLachlin, therefore, the evil to be avoided by protecting freedom of expression is the divine right of kings, or perhaps its modern counterpart — the Cold War.⁷⁰

Even when McLachlin J. turns to the third rationale, the idea that freedom of expression promotes the self-fulfilment of the individual in society, she does not sustain a non-instrumental viewpoint.⁷¹ She questions whether a commitment to the self-realization of speaker and listener is sufficiently focused to ground constitutional principle, and wonders why the *Charter* should so privilege expression without favouring other self-fulfilling activities as well, which she does not enumerate. She concludes that non-instrumental considerations provide “a useful supplement to the more utilitarian rationales,”⁷² *e.g.*, by affording protection to artistic expression.⁷³

McLachlin J.’s treatment of the three rationales for s. 2(b) demonstrates that she is much more comfortable in the utilitarian universe. She subordinates the “inherent dignity of the individual”⁷⁴ to the maintenance of the democratic

judgment impossible, substituting force for reason; because suppression promotes inflexibility and stultification, preventing society from adjusting to changing circumstances or developing new ideas; and because suppression conceals the real problems confronting a society diverting public attention from the critical issues.

⁶⁹The examples cited are the suppression of Galileo’s determination that the earth was round or the use of obscenity laws against great works of art. See *Keegstra, ibid.* at 87 for the reference to F. Schauer, *Free Speech: A Philosophical Enquiry* (Cambridge: Cambridge University Press, 1982).

⁷⁰McLachlin J.’s emphasis on progress, particularly with reference to industrial and economic undertakings, appears to reflect concern for the contemporary problems of the former Iron Curtain countries. These countries, freed from totalitarian control, are now testing the extent to which the shift to market economies must be tied to democratic process, including freedom of expression. The older idea of freedom of speech as a departure from the divine right of kings is echoed in the *Cohen Report, supra*, note 45 at 60, which puts it this way:

Our Anglo-Canadian political and legal tradition reflects generally the long struggle to free society from the absolutism of sovereign [sic] or the oligarchy of the privileged. Free expression became the most conspicuous index of the movement from government by the few to self-government by the many ...

While McLachlin J. sees this tradition as a pointer to American-style “absolute” protection for expression, the Report goes on to note that in Canada the idea of free expression has always been circumscribed by law.

⁷¹*Supra*, note 1 at 86-87. It is unclear what McLachlin J. understands to be non-instrumental. She begins her discussion with the statement that the desideratum is “the sort of society we wish to preserve.” She then includes three quotes from T.I. Emerson, “Toward a General Theory of the First Amendment” (1963) 72 *Yale L.J.* 877, which stress as the end the individual’s self-realization, not the attainment of a particular sort of society.

⁷²*Ibid.* at 87.

⁷³See *supra*, notes 64 & 67 and accompanying text.

⁷⁴*Supra*, note 1 at 88.

process and the pursuit of "truth and creativity in science, art, industry and other endeavours."⁷⁵

Justice McLachlin underscores her view that the highest aspiration of the *Charter* is to promote democracy by referring to Canadian constitutionalism generally. In a short historical analysis of freedom of expression in Canada before the entrenchment of the *Charter* in 1982, she endorses the view that freedom of speech and the press enjoyed "quasi-constitutional status"⁷⁶ in this period, citing the familiar case law invoking the division of powers and the implied bill of rights.⁷⁷ The nature of this status is obscure, however, since she concedes that before the *Charter*, freedom of speech was "ultimately recognized as subservient to legislative limits."⁷⁸ Indeed, the pre-*Charter* legislative context included the offence challenged by Mr. Keegstra in this case, as well as an array of other legislative instruments regulating expression.⁷⁹

Having concluded that the *Charter's* primary commitment to the democratic process reflects the larger context of Canadian constitutionalism, McLachlin J. turns to consider whether the American or the international regimes for the protection of freedom of expression provide a model for *Charter* interpretation. Her assessment is that while both systems honour freedom of expression less than absolutely, the *Charter* follows the American rather than the international model.

Her preference for the American model follows from the understanding that the First Amendment affirms freedom of expression broadly; it may not be infringed unless the test of "clear and present danger" is satisfied.⁸⁰ The international instruments, in contrast, expressly read down the freedom to accommodate the prohibition of the promotion of racial hatred.⁸¹ In McLachlin J.'s view, the U.S. approach provides a closer analogy to the *Charter's* combination of a

⁷⁵*Ibid.* at 87-89.

⁷⁶*Ibid.* at 89ff.

⁷⁷*Ibid.* at 89-91. For a description of this material see P.W. Hogg, *Constitutional Law of Canada*, 2d ed. (Toronto: Carswell, 1985) at 706ff.

⁷⁸*Ibid.* at 53, citing *Dupond v. Montreal (City)*, [1978] 2 S.C.R. 770, 19 N.R. 478. On those occasions when provincial laws were invalidated, the reason was not the inviolate nature of expression but exclusive, albeit unexercised, federal jurisdiction.

⁷⁹McLachlin J. gives a detailed outline of the various legislative measures adopted to combat racist acts and expression, *ibid.* at 101-03.

⁸⁰*Ibid.* at 94.

⁸¹*Ibid.* at 99-100. The same conclusion is set out at 88-89, invoking the quasi-constitutional pre-*Charter* status as well as the text of the *Charter* as further reasons for the view that the s. 2(b) right is *prima facie* all inclusive, leaving all infringements to be justified under s. 1. McLachlin J. provides the following formulation of the "clear and present danger" test. Advocacy of the use of force or violation of the law cannot be proscribed "except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action," (*ibid.* at 88-89, citing *Brandenburg v. Ohio*, 395 U.S. 444 (1969) at 447).

broad guarantee under s. 2(b) with justification of limitation under s. 1 than the international instruments.⁸²

This search for a model for *Charter* interpretation is more conclusory than analytic. Particularly noteworthy is McLachlin J.'s failure to counter the contrary observations of the Chief Justice. First, Dickson C.J. had noted that some commentators read the American case law as permitting the legislative prohibition of hate promotion. Second, her attribution of content-neutrality to American law overlooks its exclusion of various sorts of speech from protection, e.g. defamation and obscenity. These two observations by the Chief Justice, supported by reference to case law and academic commentary, suggest that it is the language, not the application, of the First Amendment's negation of congressional power that is absolute.⁸³

Furthermore, the dissent's structural analogy of the *Charter* to the United States *Bill of Rights* is faulty. The *Charter's* provision of rights plus a general limitation clause is much closer to international models than it is to the American *Bill of Rights*. The international model of express limitation clauses tied to groups of rights was intentionally emulated in early drafts of the *Charter*, and later developed into the more general formulation of s. 1.⁸⁴ In contrast, the struc-

⁸²This conclusion is easier to reach when one disregards the text of s. 1, which is the basis for both the guarantee of the rights that are "set out" in other sections, including s. 2(b), and the limit. This reading of s. 1, in *Oakes, supra*, note 31 and accompanying text, was the basis for the Court's pronouncement that the values that undergird the rights and freedoms also undergird the justification of limits. Dickson C.J., in my view, maintains fidelity to that vision in his analysis here, although he departs from it in his description of his methodology.

⁸³See *supra*, note 27 and accompanying text. McLachlin J. cites Tribe, *supra*, note 63 in *Keegstra, supra*, note 1 at 95, while the Chief Justice cites a broader range of American academic writing: see *Keegstra, supra*, at 38ff. To the Chief Justice's list may be added the following references, which give an indication of the intensive debate now flourishing in the American academic literature on both the political desirability and the constitutional permissibility of regulating hate speech, especially on the university campus: P. Linzer, "White Liberal Looks at Racist Speech" (1991) 65 St. John's L. Rev. 187; M.E. Gale, "Reimagining the First Amendment: Racist Speech and Equal Liberty" (1991) St. John's L. Rev. 119; Note, "A Communitarian Defense of Group Libel Laws" (1988) 101 Harvard Law Rev. 682; R.C. Post, "Racist Speech, Democracy and the First Amendment" (1990) 32 Wm. & M. L. Rev. 267; D. Goldberger, "Sources of Judicial Reluctance to Use Psychic Harm as a Basis for Suppressing Racist, Sexist and Ethnically Offensive Speech" (1991) 56 Brooklyn L. Rev. 1165. The American Supreme Court will soon hear argument on a case involving issues of hate speech. See "Judges to Decide if Hate-Crime Law Curbs Free Speech" *New York Times* (11 June 1991) A1. The case is *R.A.V. v. St. Paul*, on appeal from a decision of the Supreme Court of Minnesota, 464 N.W. 2d 507 (Minn. 1991). The regulation challenged makes it an offense to place a burning cross, swastika or other symbol likely to arouse "anger, alarm, or resentment" on the basis of race, colour, creed, religion or gender on public or private property.

⁸⁴Bayefsky, *supra*, note 40 at 53, 60, 284, 500, 505, 506, 510, 511, 537, 659 & 747. See also, M.A. Hayward, "International Law and the Interpretation of the *Canadian Charter of Rights and Freedoms*: Uses and Justifications" (1985) 23 U.W.O. L. Rev. 9; J. Claydon, "International Human Rights Law and the Interpretation of the *Canadian Charter of Rights and Freedoms*" (1982) 4 Sup.

ture of the American *Bill of Rights* imposes a negative prohibition on Congress with no express limitation provision. The idea that the *Charter* emulates the American model runs counter to the evidence that the international instruments, with their specific limitation clauses, were considered an improvement upon the American formulation of rights protection, and were later further refined in the general limitation clause in s. 1 of the *Charter*.

Moreover, McLachlin J. too easily dismisses the arguments based on Canada's obligations under these international instruments. She quotes from several of these documents, including two to which Canada is a signatory.⁸⁵ Both of these mandate adhering states to prohibit by law the incitement of racial discrimination, hostility or violence. She rejects their relevance, however, on the grounds that international instruments offer only lukewarm protection of freedom of expression, and are generally deferential to the sovereignty of their national adherents.⁸⁶ She thus predetermines the issues she sets out to decide. Her rejection of the international instruments as models, which appears at first to rest on structural elements and political arrangements, flows instead from doctrine.

Specifically, McLachlin J. states that the Court need not follow international law in its interpretation of the *Charter*. She chooses not to do so in this case because the Court has made clear its view in previous cases that s. 2(b) establishes a content-neutral scope of protection.⁸⁷ In effect, she applies the Court's previous interpretation of s. 2(b), drawn from cases where arguments arising from international legal obligations were not apposite, to the *Keegstra* situation, the first situation where they are clearly relevant.

One might have thought that the particular issue at bar would have invited reconsideration of the appropriateness of content neutrality, particularly since Canada has acceded to international obligations to proscribe hate propaganda by law.⁸⁸ Instead of analysis focused on this new question, McLachlin J. states that

Ct. L. Rev. 287; M. Cohen & A.F. Bayefsky, "The *Canadian Charter of Rights and Freedoms* and Public International Law" (1983) 61 Can. Bar Rev. 265. See L.E. Weinrib, "Of Diligence and Dice ..." (1991) U.T.L.J. [forthcoming] for the development of the text of s. 1.

⁸⁵McLachlin J. cites, in *Keegstra*, *supra*, note 1 at 98-100: the

European Convention for the Protection of Human Rights and Fundamental Freedoms, *supra*, note 51; the *International Covenant on Civil and Political Rights*, *supra*, note 51; and the *International Convention on the Elimination of All Forms of Racial Discrimination*, *supra*, note 51. Canada is a signatory to the latter two of these.

⁸⁶*Keegstra*, *ibid.* at 112-13 & 100.

⁸⁷See *Ford*; *Rocket*; and *Irwin Toy*.

⁸⁸The *Cohen Report*, *supra*, note 45 at 56-57, which prepared the way for the enactment of s. 319, took the view that international obligations could set "a moral standard for the world," and that the then forthcoming convention against racial discrimination would be "legally binding on any state which ratifies it." The Law Reform Commission of Canada, writing after this convention was adopted and ratified by Canada, takes the view that it "imposes on the member states the obli-

these international obligations — despite their rather clear language — are “general in nature” and unconnected to the enactment of s. 319(2).⁸⁹

Despite its instrumentalism, the dissenting opinion does share a number of arguments with the majority. Like the Chief Justice, McLachlin J. rejects the claim that hate propaganda is akin to violence, action which may be expressive but is nevertheless excluded from the scope of protection, although she appears to read the exception somewhat differently than does the Chief Justice.⁹⁰

Similarly, McLachlin J. rejects the arguments based on sections 15 and 27 of the *Charter* text, although on more technical grounds than did the Chief Justice. She finds s. 15 to be irrelevant: there is no collision of rights between s. 2(b) and s. 15, since s. 15 acts as a bar to legal or state action.⁹¹ Moreover, she takes the view that this type of interpretation would be inconsistent with the Court’s rejection of any content-based evaluation under s. 2(b), and would raise the spectre of balancing rights in the abstract, rather than under s. 1, where the government bears the burden of persuasion.⁹²

McLachlin J. finds s. 27 to be an unhelpful gloss on s. 2(b) because multiculturalism is an unsettled concept. While some would contend that multicultural goals mandate the proscription of hate propaganda, others would consider the “expression of derogatory opinion about other groups ... a necessary correlative of a multicultural society,”⁹³ as various groups compete for scarce resources.⁹⁴ Tolerance of the promotion of hatred, not repression, may be considered the “essence of multiculturalism.”⁹⁵

Thus, while the dissent joins the majority in the conclusion that s. 2(b) is infringed, the analytic pathway of each judgment is markedly different. The Chief Justice goes through the motions in the first stage analysis and ultimately rests his conclusion on precedent. McLachlin J., in contrast, presents a critical

gation to introduce in their national legislation offences to deal with racial discrimination.” See *supra*, note 46 at 17-18.

⁸⁹*Supra*, note 1 at 113.

⁹⁰*Ibid.* at 103-08. Here, McLachlin J. expresses the view that threats are not protected expression, on the authority of *R.W.D.S.U. v. Dolphin Delivery Ltd.*, [1986] 2 S.C.R. 573 at 588, 33 D.L.R. (4th) 174. See, *supra*, note 13, for the Chief Justice’s view that threats cannot be excluded from the scope of s. 2(b) without relying on content based review.

⁹¹*Keegstra, ibid.* at 109. See *supra*, note 52 and accompanying text.

⁹²*Ibid.* at 106ff.

⁹³*Ibid.* at 110.

⁹⁴The reference to scarce resources is somewhat enigmatic. Is McLachlin J. saying that striving for scarce resources in the political marketplace necessitates debate having the characteristics of wilful hate promotion? Curiously, this consideration is not raised again where one would expect it, under s. 1.

⁹⁵*Supra*, note 1 at 111. It is regrettable that the idea of toleration was not better developed. It has potential as an aspiration of a democratic and diverse society, but in the context of the first stage of *Charter* adjudication it must be tied to an idea of the values underlying the right.

analysis of the rationales she posits as informing s. 2(b). Her discussion, however, transforms the *Charter* from an embodiment of individual rights to an invitation to instrumental analysis. Although her approach might validate many claims to expressive rights, particularly those that involve comment on public issues, it will not sustain strong rights-protection where the link to the democratic process and to progress is absent. In abandoning individual dignity as the benchmark of *Charter* values, the dissent adopts the value structure of those who opposed the entrenchment of rights in the *Charter* in the name of majoritarian politics and institutions.

B. *Limitation of Freedom of Expression under s.1*

1. Pressing and Substantial Objective

In the initial stage of her s. 1 analysis, McLachlin J. has no difficulty in finding the objective of s. 319(2) to be pressing and substantial. The precise characterization of that objective is somewhat unclear, however. It becomes even less clear as her discussion moves from the consideration of legislative objective to the testing of proportionality. This lack of clarity is a function of the instrumentalism that pervades the initial part of her judgment on the scope of freedom of expression. It is difficult to ground limitation on the principles inherent in a free and democratic society when the rationale for the right in issue is itself posited as progressive democratic society. Accordingly, the instrumental bent of the analysis leads to reliance upon weak and often speculative empirical grounds, as well as a range of seemingly inapposite examples. The dissent shifts grounds so easily, and departs so markedly from the established criteria of s. 1 analysis, as to undermine the persuasiveness of McLachlin J.'s reasoning.

McLachlin J.'s initial statement of the objective of s. 319(2) is a mere recapitulation of the terms of the provision itself. She states that the provision is designed "to prevent the promotion of hatred toward identifiable groups within our society."⁹⁶ McLachlin J. sets out a broader formulation of the objective as well, which refers to the societal rationales for the prohibition against the wilful promotion of hatred, including the prevention of the spread of hatred and the preservation of social harmony and multiculturalism.⁹⁷ She carries only the nar-

⁹⁶*Keegstra, ibid.* at 119.

⁹⁷The wider account of the section's objective, put forward by the Attorney General of Canada, appeared to find favour with McLachlin J.; quoted at *Keegstra, ibid.*:

among other things, to protect racial, religious and other groups from the wilful promotion of hatred against them, to prevent the spread of hatred and the breakdown of racial and social harmony [and] to prevent the destruction of our multicultural society.

In addition, she refers with approval to the idea, central to the Chief Justice's approach, that racial conflict renders members of minority groups "outsiders in their country," although she appears to

rower initial characterization forward into the proportionality argument, however. Its concrete, limited focus lends itself more easily to the instrumental, empirical and anecdotal arguments McLachlin J. applies.

Unfortunately, the reasoning is weak because there is little data available of the kind McLachlin J. would need to execute the type of analysis she favours. Over a twenty-year period, a number of government studies on the question of restricting hate promotion in a democratic society have set out the problem and the proposed solution. Early studies recommended the adoption of a provision like s. 319(2);⁹⁸ later studies advocated its retention.⁹⁹ McLachlin J. views this material as empirical proof of the sufficient importance of the objective of s. 319(2). Given her further findings, however, these reports apparently failed to provide adequate foundation for the proportionality analysis.

2. Proportionality

One might think that characterizing the objective of the impugned provision as preventing what the section itself criminalizes would render McLachlin J.'s s. 1 analysis circular and thus perfunctory. Since the objective of the provision is to eliminate the activity to be penalized, it would appear that the tests of rational connection, minimal impairment and comparative cost should be easily satisfied. This is not the case, however. McLachlin J.'s analysis takes the s. 1 inquiry beyond its application in previous cases to reach the opposite conclusion on each of the three facets of the proportionality inquiry.

McLachlin J.'s initial inquiry into the rational connection of the impugned provision to its pressing and substantial objective suffers because of a failure to focus on that objective. McLachlin J. states that s. 319(2) furthers Parliament's intention, in that prosecution:

for offensive material directed at a particular group may bolster its members' beliefs that they are valued and respected in their community, and that the views of a malicious few do not reflect those of the population as a whole.¹⁰⁰

In this passage, she dilutes her earlier characterization of the section's objective. The objective of preventing speakers from provoking their audience to hatred of identifiable groups has turned into an objective of mollifying members of those groups by general condemnation of messages that are offensive to them. In addition, she alters the thrust of s. 319(2), which proscribes the wilful promotion of hatred of identifiable groups, not the distribution of material which may be offensive to a particular group.

emphasize the social rather than individual costs. These broader concerns are abandoned as McLachlin J. builds her proportionality analysis upon the narrower formulation.

⁹⁸*Keegstra, ibid.* at 119-20.

⁹⁹*Ibid.*

¹⁰⁰*Ibid.* at 122.

McLachlin J. then attempts to apply the *Oakes* test to empirical grounds that play no part in the *Keegstra* case. She makes reference to *Morgentaler* for the proposition that the operative effect of legislation may undermine its objective,¹⁰¹ so that rational connection between objective and means is lacking. The parallel is misconceived, however, because the consideration of effect by Justice Beetz and Chief Justice Dickson in *Morgentaler* was based on empirical evidence regarding the experience of women and doctors under the regime of therapeutic hospital committees laid down by the *Criminal Code*.¹⁰² McLachlin J. cites no data, nor indeed could any be made available, for a similar evaluation of the effect of s. 319(2) on the activities of would-be hate promoters or target groups, because that section simply creates an offence with defences. Unlike the *Criminal Code* section at issue in *Morgentaler*, s. 319(2) did not set up a system dispensing exemptions from otherwise proscribed acts. The only empirical findings before the Court in *Keegstra* were those McLachlin J. referred to as satisfying the requirement of pressing and substantial objective. Why this material did not provide an adequate foundation in the social sciences for a finding of rational connection McLachlin J. does not make clear.

McLachlin J. states that the rational connection test requires some "likelihood" or "probability" that the objective of the impugned provision will be furthered. Yet she is satisfied with pure speculation as to whether state suppression and prosecution may defeat Parliament's intentions, and in fact promote rather than inhibit the cause of hate-mongers, by providing free publicity, public sympathy, the "joy of martyrdom,"¹⁰³ and even legitimacy to those promoting hatred.¹⁰⁴ Thus, McLachlin J. assumes here the power of the media to subvert

¹⁰¹*Supra*, note 31, in *Keegstra*, *ibid.* at 123ff.

¹⁰²McLachlin J.'s characterization of the objective of the 1969 amendment to the *Criminal Code* at issue in *Morgentaler*, *supra*, note 30 as preserving "women's life and health," is questionable. This interpretation was expressly rejected in *Morgentaler*. Beetz J. characterized the primary objective as the protection of the foetus. Dickson C.J. characterized the objective as balancing the priorities and aspirations of pregnant women against the state's interest in protecting the foetus. Wilson J. identified the primary purpose as protecting the foetus, and the ancillary objective as the protection of the life and health of pregnant women. *Morgentaler*, *supra*, note 30 at 453-54, 416 & 498. I have argued that the objective of the 1969 amendment, which added the therapeutic abortion exemption invalidated by the Supreme Court of Canada in *Morgentaler*, was not "designed to preserve women's life and health," but to protect doctors from criminal liability when they provided abortions for therapeutic reasons. See "The Morgentaler Judgment: A Study in Constitutional Rights, Legislative Intention and Institutional Design" (1992) 42 U.T.L.J. [forthcoming].

¹⁰³*Keegstra*, *supra*, note 1 at 123-25. In making these findings, McLachlin J. appears to give credence to an alleged hateronger undergoing prosecution who proved a master at attracting media attention by making provocative statements about the media coverage of his trial, who claimed to have derived a million dollars worth of publicity from his trial. She appeared to prefer his assertions to the deliberations on the question by numerous experts over a number of years in the material before the Court.

¹⁰⁴This line of argument raises the possibility that the validity of a *Criminal Code* provision might depend upon factors as contingent as the novelty of some feature of the prosecution, the

the will of Parliament in creating the offence, yet still clings to the metaphor of the marketplace of ideas. Furthermore, she moves without explanation from a test of "probability" that s. 319(2) will meet Parliament's objective, to what she terms "the point of view of actual effect."¹⁰⁵ For empirical grounds, she turns from Canada to pre-Second World War Germany. She finds the deterioration of the Weimar Republic into a racist totalitarian regime, despite its prosecution of hate mongers, to be evidence of the "tenuous"¹⁰⁶ nature of the connection between s. 319(2) and its goals. McLachlin J.'s conclusion appears to rest on this "actual effect" test, rather than the probability test. She states that the rational connection test is not satisfied, because the proponents of the impugned legislation have not established a "strong and evident connection between the criminalization of hate propaganda and its suppression."¹⁰⁷

Her analysis is flawed in a number of ways. The test used by the dissent is a moving target, shifting from social science expertise to empirical evidence, probable effectiveness, historical record, and actual effectiveness in rapid succession. The speculative quality of McLachlin's assertions stands up poorly against the findings of a number of expert bodies,¹⁰⁸ which have devoted decades of study to the issue of hate promotion, and of the prerequisites for a healthy social and political climate for all members of society.

Perhaps most importantly, McLachlin J.'s discussion denies the normative function of the criminal law, and ignores the care that went into the drafting of s. 319(2). The then Minister of Justice Mark MacGuigan¹⁰⁹ emphasized this normative function in the following commentary on the package of *Criminal Code* amendments in 1970, of which s. 319(2) was one:

It is the creation of a legal concept of group defamation ... In this law we have an appeal to the conscience of the Canadian people, an appeal to all of us to put our convictions in writing, in the *Criminal Code* of Canada, to make them part of the moral code of our society and to display them in a way which will be plain not only to ourselves but also to those of the minority group who may be attacked by less well informed and less well intentioned members of society.¹¹⁰

amount and type of media coverage, the public relations skills of the accused, and the newsworthiness of the accused's lawyer.

¹⁰⁵*Keegstra*, *supra*, note 1 at 125.

¹⁰⁶*Ibid.*

¹⁰⁷*Ibid.* There was an increase in "overt acts of racism and anti-Semitism" in Alberta in the aftermath of the Court of Appeal invalidation of s. 319(2) in *Keegstra*. See B.P. Elman, "A Review of the *Keegstra* case" (1991) 2 Const. Forum 86 at 88.

¹⁰⁸See *Keegstra*, *ibid.* at 41-44 for the studies referred to by Dickson C.J.

¹⁰⁹Professor MacGuigan was a member of the Cohen Committee which first recommended the adoption of the impugned provision, and is now a judge on the Federal Court of Canada.

¹¹⁰M.R. MacGuigan, quoted in R.E. Hage, "The Hate Propaganda Amendment to the Criminal Code" (1970) 28 U.T. Fac. L. Rev. 63 at 69, from House of Commons *Debates* 910 (17 November 1969). See also, *Morgentaler*, *supra*, note 31 at 412, Dickson C.J.: "The criminal law is a very special form of governmental regulation, for it seeks to express our society's collective disapprobation

McLachlin J. puts great stock in the way in which the criminal law shapes behaviour in other contexts: for example, she emphasizes the potential chilling effect of s. 319(2) on speech in general.¹¹¹ Nevertheless, she denies the effectiveness of the provision in regard to the very speech targeted by s. 319(2), and therefore sees insufficient rational connection between the objective of s. 319(2) and its terms.

McLachlin J. next turns to the second branch of the proportionality test, and finds that ss 319(2) & (3) impose more than the minimal impairment permitted under *Oakes*. Her conclusion is based on two grounds: first, the broad range of conduct caught by the prohibition and, second, the choice of criminalization as opposed to regulation.

For McLachlin J., none of the features of ss 319(2) & (3) manifest sufficient legislative restraint.¹¹² Consequently, in her view, at one extreme, the provision will catch unpopular expression even if it does not contain actual hatred, and at the other, it will deter people from participating in public debate even when there is no reasonable possibility of prosecution.

The actual track record of s. 319(2) appears to have no significance here. The fact that there have been no convictions under s. 319(2), aside from the case considered here, offers her no comfort. That a number of prosecutions have been called for and not instituted, or instituted unsuccessfully, demonstrates for her not the narrow compass of the offence, but that "initially quite a lot of speech is caught by s. 319(2)."¹¹³ In her discussion of rational connection, she provides no explanation for her dismissal of this relevant information, which constitutes the closest parallel available to the factual record of *Morgentaler*, or for her acceptance of the much more tenuous information about the workings of hate propaganda legislation in Weimar Germany.¹¹⁴

of certain acts and omissions," and *Thomson Newspapers v. Canada*, [1990] 1 S.C.R. 425, 67 D.L.R. (4th) 161 at 222, La Forest J.: "the typical concern of the criminal law system" is "conduct which is by its very nature morally or socially reprehensible," i.e., "acts violating common sense standards of humanity which we regard as meriting disapprobation and punishment," quoting from the Law Reform Commission of Canada, *Our Criminal Law* (Report No. 3) (Ottawa: Law Reform Commission of Canada, 1976) at 3, 5 & 7.

¹¹¹*Supra*, note 1 at 123.

¹¹²See Hage, *supra*, note 110 at 68 for an account of the narrowing of the Cohen Committee's recommendations into the terms of s. 319(2). *E.g.*, statements made "for the purpose of removal" and the exception for private conversation were added by the House of Commons Justice and Legal Affairs Committee.

The *Cohen Report*, *supra*, note 45 at 66, saw no danger to healthy democratic debate:

The two defences of unqualified truth, and reasonable belief in truth coupled with public benefit, provide considerable, and we believe adequate, latitude for legitimate public examination of all matters of concern to it from the rough and tumble of the political hustings to the riposte of more elegant forms of dialectical needling.

¹¹³*Supra*, note 1 at 128.

¹¹⁴McLachlin J. makes no mention of the other countries, including Germany, that have laws against hate propaganda.

McLachlin J.'s argument regarding the criminalization of hate promotion suffers from lack of consistency. In considering rational connection, McLachlin J. regarded criminalization as potentially advantageous to the hate propagandist, affording renown, credibility and sympathy.¹¹⁵ Here, in her discussion of minimal impairment, she invokes the more traditional viewpoint of the Court with respect to criminalization in *Charter* cases, namely, that the criminal process imposes stigma and great stress on the accused, and may lead to the curtailment of one of the most prized interests of all individuals, the liberty of the accused. McLachlin J.'s analysis militates against the necessity of criminalization and in favour of other legislative initiatives.¹¹⁶ In her view, human rights codes, for example, provide an opportunity to educate and reform the hate promoter, but stop short of imposing criminal punishment.¹¹⁷ The idea that the minimal impairment standard requires the state to prove the *necessity* — and not merely the minimal nature — of the intrusion of its impugned policy upon the guaranteed right is novel.¹¹⁸

McLachlin J. treats the system of human rights codes as less intrusive upon the s. 2(b) right than the criminal process and sanction, and accordingly as a demonstration that s. 319(2) does not constitute minimal impairment of freedom of expression. She makes no mention of the controversial nature of this conclusion, however. One might suggest, for example, that human rights codes fail to

¹¹⁵*Supra*, note 1 at 123-24.

¹¹⁶*Ibid.* at 130.

¹¹⁷McLachlin J. does not mention the possibility of civil actions for group defamation. See the *Civil Rights Protection Act*, S.B.C. 1981, c. 12, which prohibits conduct or communication which purposely promotes hatred, contempt or ideas of superiority of persons, on the basis of colour, race, religion, ethnic origin or place of origin. Relief includes damages, exemplary damages, and injunction. The *Act* also provides for provincial prosecution for breach of the *Act*, with penalties of a maximum fine of \$2,000 or six months imprisonment.

¹¹⁸In *Oakes*, *supra*, note 31 at 227, the minimal impairment test mandated that the means employed by a legislature to meet its pressing and substantial objective impair the right claimed "as little as possible." In *Irwin Toy*, *supra*, note 13 at 624-26, the minimal impairment test was relaxed for instances where the government was mediating between vying groups, reflecting LaForest J.'s concern that *Charter* rights not privilege the already privileged or interfere with the legislature's ability to give priority to urgent "concerns or constituencies." In such instances, the test was to consider whether the government had a reasonable basis to assume, on the evidence, that its legislation impaired the claimed right as little as possible. In other cases, where the government is not mediating competing group claims, but stands as the "singular antagonist" against the rights claimant, a "least drastic means" test is applicable: *ibid.* at 626. In *McKinney*, *supra*, note 30 at 652, the majority, per LaForest J. used the "reasonable basis test." The "necessity" test, therefore, is a surprising new addition to the shifting sands of the Court's approach to s. 1 of the *Charter*, reminiscent of the test articulated for the *Canadian Bill of Rights* R.S.C. 1985, Appendix III, in *MacKay v. R.*, [1980] 2 S.C.R. 370 at 407, 114 D.L.R. (3d) 393: "whether [the inequality] is a necessary departure from the general principle of universal application of the law for the attainment of some necessary and desirable social objective." The *Irwin Toy* distinction between "competing group" and "single antagonist" situations is an insecure foundation for such widely divergent tests as "reasonable basis" and "necessity."

protect the alleged wrongdoer as assiduously as would the criminal law. The criminal process requires a stricter standard of proof, regards only the prosecutor and the accused as parties, provides a trial conducted by an impartial judge, and affords defences and full appeal rights — surely all advantages to an accused when one is fearful of prosecution for unpopular speech.¹¹⁹ In addition, McLachlin J. makes no mention of the requirement in s. 319(6) that the Attorney General of the particular province consent prior to prosecution, a powerful protection against ill-considered reliance upon s. 319(2) by the police or would-be private prosecutors.¹²⁰

Turning to the final consideration under the s. 1 *Oakes* test, that of weighing the importance of the right against the benefit conferred by its limitation, McLachlin J. determines that the core values of freedom of expression are jeopardized by s. 319(2). On one side of the balance, she puts the three rationales for s. 2(b), set out at the beginning of her reasons for judgment.¹²¹ On the other, she finds only the “tenuous”¹²² gains afforded by s. 319(2), returning to the view that the impugned provision may “promote the cause of hate-mongering extremists,”¹²³ and hinder the possibility of voluntary reform available under human rights code regimes but not the criminal law. In this discussion, McLachlin J. once again dismisses the normative force of the criminal law, as well as the stigma and personal cost of criminal proceedings.¹²⁴

This mode of argument is not the now-familiar sequence of considerations in a s. 1 analysis. While precedent is decisive for McLachlin J. in her consideration of the scope of the right in the first part of her reasons for judgment, she creates her s. 1 reasoning from whole cloth. Where, one might ask, is the s. 1

¹¹⁹In a companion case to *Keegstra*, the Supreme Court upheld a provision of the *Canadian Human Rights Act*, S.C. 1976-77, c. 33 which named as a discriminatory practice the use of the telephone to communicate repeatedly any matter likely to expose persons to hatred or contempt with respect to their identification with prohibited grounds of discrimination. McLachlin J. dissented from that judgment on the basis, *inter alia*, that the impugned provision was too broad and vague, caught expression beyond what was necessary, lacked an intent requirement, and lacked a defence of truth. See *Taylor v. Canadian Human Rights Commission* (1990), 75 D.L.R. (4th) 577, 117 N.R. 191.

¹²⁰Ernst Zundel was prosecuted in Ontario under s. 181, the false news provision of the *Criminal Code*, rather than s. 319(2) because Attorney General Ian Scott refused to consent to a prosecution for inciting hatred. See *Hate Propaganda*, *supra*, note 46 at 38, referring to H.R.S. Ryan, “The Trial of Zundel, Freedom of Expression and the Criminal Law” (1985) 44 C.R. (3rd) 334. It is surprising that the Chief Justice made no mention of this requirement of consent either. The importance of this feature has come to light recently in the debate about recriminalization of abortion under the proposed Bill C-43. Had the federal government undertaken an amendment requiring Attorney General consent for prosecution, the Bill might well have passed the Senate and become law.

¹²¹*Supra*, note 1 at 84-85 and 121-22.

¹²²*Ibid.* at 132.

¹²³*Ibid.*

¹²⁴*Ibid.* at 131-33.

concern to ensure that the *Charter* is not used to invalidate legislation designed to ameliorate disadvantage?¹²⁵ Where is the reasonable legislature test for minimal impairment?¹²⁶ Where is the deference to representative institutions appropriate when *Charter* cases call on courts to reconcile “claims of competing individuals or groups,”¹²⁷ dealing on a step by step basis as urgency dictates?

McLachlin J.’s use of example is also deeply flawed. Her discussion of s. 319(2) is contextualized in hypothetical circumstances that would not in reality fall within the terms of the provision.¹²⁸

This treatment of s. 1 can be contrasted with the careful and well documented analysis offered by McLachlin J. in her judgment for the B.C. Court of Appeal in *Andrews v. Law Society of B.C.*¹²⁹ There she was assiduous in articulating the precise nature of the right, in order to afford the s. 1 argument focus and rigour. To give s. 15 normative content, she looked to all *Charter* rights and interpretive clauses, noting that “no one section should be regarded as paramount or as encompassing all of the other sections,”¹³⁰ distinguished the American equality jurisprudence and looked to international human rights law to find full meaning for the term “discrimination” in s. 15.¹³¹ In other words, in

¹²⁵*R. v. Edwards Books*, [1986] 2 S.C.R. 713 at 779, 55 C.R. (3d) 193.

¹²⁶*Ibid.* See also, *Irwin Toy and McKinney*.

¹²⁷*Irwin Toy*, *supra*, note 13 at 625-26.

¹²⁸*E.g.*, she refers to the American legislation under review in *Collin v. Smith*, 578 F.2d 1197 (7th Cir., 1978) as similar to s. 319(2), a comment that disregards the narrow delineation of the offence and the list of defences. She also suggests the possibility of prosecutions for dissemination of William Shakespeare’s *The Merchant of Venice*, or discussion of reverse racial discrimination: *Keegstra*, *supra*, note 1 at 98. It is unthinkable that either of these examples, as described, would attract prosecution in Canada under s. 319(2). Indeed, it is difficult to understand how a march of neo-Nazis in a suburb inhabited by Holocaust survivors could be said to involve the promotion of hatred. Who are the intended promotees? While one could certainly use Shakespeare’s *The Merchant of Venice* to promote hatred, the question is whether one has actually done so, not whether one has made the play available. Other examples are rooted in depictions of the heat of political debate, *e.g.*, vilifying opponents, even Cabinet ministers or members of a different political party, as “incompetent, corrupt or unintelligent – or worse” or attempting to “undermine the credibility of the ideas, conclusions and judgments” of one’s opponents who belong to particular groups: *Keegstra* at 106-07. The cut and thrust of debate appears to fall outside s. 319(2) by virtue of subs. (3)(c). Moreover, it is difficult to put such actions within the definition of “inciting hatred” against an “identifiable group”. Similarly, the bitter comments uttered by a native leader about whites would appear to fall outside the section because “whites” would not appear to be an “identifiable group.” *Ibid.* at 115. The examples of repression of literary subjects, scientific inquiry or political debate on questions of immigration, language policy or foreign ownership and trade are given in the context of discussion of the chilling effect of s. 319(2), and therefore are not proffered as situations that might attract prosecution. To the extent that it may be inferred that these examples might attract prosecution, again, subs. (3)(c) should provide a clear answer. *Ibid.* at 129.

¹²⁹[1986] 4 W.W.R. 242, 27 D.L.R. (4th) 600, aff’d [1989] 1 S.C.R. 143, 56 D.L.R. (4th) 1 [hereinafter *Andrews*, cited to W.W.R.].

¹³⁰*Ibid.* at 250.

¹³¹*Ibid.* at 251ff.

Andrews, McLachlin J. applied the purposive approach. In addition, her application of the *Oakes* case reflected the more stringent approach to its various tests, which in *Keegstra* were employed only by the majority.

III. The Significance of *Keegstra*

The *Keegstra* judgment lays bare the two very different value structures underpinning the right to freedom of expression in a free and democratic society.

The Chief Justice reads s. 2(b) as forwarding the *Charter's* general concern for individual dignity and equality. In his examination of the *Criminal Code* provision against hate propaganda, Dickson C.J.'s sympathy lies with those who are or might be the targets of hate propaganda. He is apprehensive that wilful, public hatemongering, in both the short and long term, poisons the atmosphere of public life, so that members of target groups will be reluctant or unable to emerge from negative parochial identification into the larger social and political arena. He requires neither empirical proof of this effect, nor statistical evidence of its likelihood. He is not daunted by the possibility that this criminal offence might stifle heated public debate. He is secure in this approach because his conception of free and democratic society, as an aspiration to a public world of equality and individual dignity, builds upon the knowledge that human beings are not invariably rational and that, even if they were, rationality takes time. It is therefore permissible for the state to attach its highest form of disapprobation to wilful promotion of hatred in the knowledge that there is ample national and international recognition that this kind of communicative activity is inimical to the stability in multicultural statehood of the post-war world.

McLachlin J.'s allegiance to the values underlying s. 2(b) may appear to lie with potential speakers, whose expression stands to be curtailed or chilled by provisions like s. 319(2). Yet she speaks very little about the rights of speakers, or even about the rights of Mr. Keegstra himself. Her primary concern is to preserve a social order that can absorb the fortuities of unregulated expression, for the benefit of the vitality and progress that such expression facilitates. State interference in expression is forbidden, unless one can establish that there is violence at hand, or an empirical link between the offensive communication and harm to members of the target group. Her metaphor is the marketplace of ideas, in which rational beings trade their wares and true value emerges. She ignores the fact that the trade in virulent anti-semitism and debased racism can precipitate market failure at exorbitant tangible and intangible cost.

The *Keegstra* decision is the swan song of Chief Justice Dickson, who wrote, and Justice Wilson, who concurred. It may mark the final invocation of an understanding of the common values forwarded in *Charter* rights guarantees and their limitation, the original vision of purposive rights and justified limita-

tion under the *Charter*.¹³² In that vision, the text of the *Charter* encapsulates the rights and freedoms that are intrinsic to liberal democracy, and permits the justification of limits that give priority to individual dignity and equality. The legacy of the *Keegstra* judgment is not that expression rights are feeble. On the contrary, restrictions on promoting hatred against identifiable groups both publicly and wilfully manifest a commitment to vibrant democracy in a diverse and far flung land.¹³³

¹³²This is likely given that the majority's generous overtures to La Forest and McLachlin JJ. were ineffective to secure a less sharply divided bench. See *supra*, note 1 at 35 & 53-54. Cory J., before his appointment to the Supreme Court, delivered a judgment much like the majority in *Keegstra*: see *supra*, note 47. Stevenson J. was a member of the Alberta Court of Appeal panel that invalidated s. 319(2).

¹³³For a similar approach in the American context, see H. Arkes, *The Philosopher in the City: The Moral Dimensions of Urban Life* (Princeton: Princeton University Press, 1981), c. 2 & 3.