

HATE SPEECH REGULATION IN CANADA

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I. TWO KINDS OF HARM

While it may not be quite right to say that there are two kinds of hate speech, there are perhaps two general kinds of harm caused by hate speech. The first kind of harm is that suffered by the members of a racial, or other, target group (the group that is both the subject and audience of the hate speech). This form of harm includes fear, intimidation, insult, and emotional trauma. The second kind of harm is the spread of hateful views in the community or, in less general terms, the instilling of hateful attitudes about the members of a minority racial group in the minds of members of the general community. The type of harm caused by a particular instance of hate speech will depend significantly on the audience to which the speech is directed. The same speech act, of course, may contribute to both kinds of harm.

While the leading hate speech cases in the United States involve laws that respond to the first kind of harm, threats and insults, the Canadian cases generally involve the second kind of harm, the spread of hateful views in the community. The challenge to freedom of expression is different depending on the type of harm the law seeks to prevent. Laws that address the first harm are in principle reconcilable with a commitment to freedom of expression. However, the hate speech laws in the Canadian cases, addressing the second kind of harm, represent a more significant challenge to freedom of expression.

II. THE U.S. CASES—THREATS AND INSULTS

In the United States, the leading hate speech cases involve racist threats and insults against racial/ethnic groups.¹ The restriction of this speech may involve some difficult line-drawing but is in princi-

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1. See, e.g., *R.A.V. v. City of St. Paul*, 505 U.S. 377, 379 (1992) (involving a cross-burning on the front yard of a black family who lived across the street from the petitioner).

ple compatible with a commitment to freedom of expression.² In *Collin v. Smith*,³ a municipality sought to prevent a neo-Nazi march in a predominantly Jewish neighborhood, which included a large number of Holocaust survivors.⁴ The Federal Court of Appeals held that the march was protected speech under the First Amendment.⁵

In *R.A.V. v. City of St. Paul*,⁶ two young men, who planted a burning cross on the front lawn of a black family that had moved into a previously all-white neighborhood, were charged under an ordinance that prohibited the placing on public property of racist symbols, such as swastikas and burning crosses.⁷ The U.S. Supreme Court held that the municipal law, although directed at “fighting words,” breached the First Amendment because it was not content neutral.⁸ The law prohibited racist symbols but not the speech of antiracists, and Justice Scalia said, “St. Paul has no such authority to license one side of a debate to fight freestyle, while requiring the other to follow Marquis of Queensberry rules.”⁹

In the more recent case of *Virginia v. Black*,¹⁰ the U.S. Supreme Court suggested that a state could prohibit cross-burning when it was intended to intimidate.¹¹ The Court observed that cross-burnings had been used by the Ku Klux Klan to threaten and intimidate and had often been a prelude to violent action.¹² The Court, however, struck down the Virginia cross-burning law.¹³ While the law formally prohibited the burning of a cross with the intent of intimidating any person or group, it included a provision that “[a]ny such burning . . . shall be prima facie evidence of an intent to intimidate.”¹⁴ The Court was concerned that this presumption might result in conviction even

2. *Brandenburg v. Ohio* remains the leading U.S. case dealing with general incitement. 395 U.S. 444 (1969). In *Brandenburg*, the Court held that the state could prohibit advocacy only if it “is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.” *Id.* at 447.

3. 578 F.2d 1197 (7th Cir. 1978).

4. *Id.* at 1199.

5. *Id.* at 1201.

6. 505 U.S. 377 (1992).

7. *Id.* at 380. The ordinance stated that

[w]hoever places on public . . . property a symbol, object, appellation, characterization or graffiti, including, but not limited to, a burning cross or Nazi swastika, which one knows or has reasonable grounds to know arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender commits disorderly conduct and shall be guilty of a misdemeanor.

Id.

8. *Id.* at 391.

9. *Id.* at 392.

10. 538 U.S. 343 (2003).

11. *Id.* at 363.

12. *Id.* at 354.

13. *Id.* at 367.

14. *Id.* at 348.

when the purpose behind the cross-burning was not to intimidate others, but was instead to affirm “a statement of ideology” or “group solidarity.”¹⁵

Under established accounts of freedom of expression, racist threats may have some value inasmuch as they express personal feelings or convey some kind of crude political viewpoint. However, the limited value of these acts must be weighed against the intended and significant injury to others. The meaning and force of a racist threat depends significantly on the larger background of racist expression and action. A burning cross, planted in front of the home of the first black family to move into a previously all-white neighborhood, is experienced as threatening because it evokes the history of Klan violence against blacks. Similarly, a march with swastikas and SS uniforms in a Jewish neighborhood is experienced as threatening because it evokes the history of Nazi persecution of Jews. Even if these threats do not seem realistic or immediate to an outside observer, they must be viewed from the perspective of a target group member who experiences them as part of a continuing practice of violence against his or her group. The history and context of violence gives rise to genuine and understandable fear and insecurity. Even if the members of the target group know that the threat cannot be carried out (although it is not clear why they would feel confident about this), it is so closely linked to a larger practice of violent oppression that it is bound to cause significant anxiety and upset. The broader context of racist violence provides a basis for distinguishing unacceptable threats from “the rough and tumble of public debate,”¹⁶ which is sometimes unpleasant and impolite. Even if we accept that the neo-Nazi march manifests some kind of political solidarity among its participants or amounts to a political statement to other members of the community who witness it or hear about it, the march is, in the first instance, a threat against the Jewish residents of the neighborhood. Any political meaning or significance the march may have stems from its threatening character.¹⁷

15. *Id.* at 365-66.

16. *R. v. Keegstra*, [1990] 3 S.C.R. 697, 779 (Can.).

17. In *R.A.V.*, Justice Scalia wondered, “What makes the anger, fear, sense of dishonor, etc., produced by violation of this ordinance distinct from the anger, fear, sense of dishonor, etc., produced by other fighting words is nothing other than the fact that it is caused by a distinctive idea, conveyed by a distinctive message.” *R.A.V. v. City of St. Paul*, 505 U.S. 377, 392-93 (1992). He observed that under the ordinance “[o]ne could hold up a sign saying, for example, that all ‘anti-Catholic bigots’ are misbegotten; but not that all ‘papists’ are, for that would insult and provoke violence ‘on the basis of religion.’” *Id.* at 391-92. However, the history and context of violent racist action provides the basis for distinguishing racist symbols, such as a burning cross, from the angry speech of antiracist activists.

The context of racist violence and discrimination may also provide a basis for treating racist insults differently from other insults. Racist insults are different not only because they are often a prelude to violent behavior, but also because the context of violence, discrimination, and oppression adds significantly to their emotional impact. As well, a racist insult is not an isolated occurrence. The frequent expression of racial insults (coming from different sources) means that they cannot easily be avoided by individual target group members. Each insult is experienced as part of a practice of harassment that gives rise to a general injury of emotional upset, humiliation, and fear. It is now widely accepted, at least in Canada, that racist insults should be restricted in the workplace¹⁸ and in the schools.¹⁹ In the workplace or school, insults are difficult to avoid. The environment is both closed and hierarchical, and so a higher standard of civility may reasonably be expected. However, any ban (and certainly a general ban) on racist insults raises a variety of line-drawing issues such as the distinction between a racist insult and a claim or argument about race or the distinction between a derogatory term used against a particular group and the same term used by members of that group to describe themselves.²⁰

III. THE CANADIAN CASES—HARMFUL PERSUASION

The leading hate speech cases in Canada, *R. v. Keegstra*²¹ and *Canada (Human Rights Commission) v. Taylor*,²² involve the regulation of racist claims that are meant to persuade members of the general community about the dangerous or undesirable character of particular minority groups. The concern in these cases is that those who hear racist opinions may come to view the target group differently and act towards its members in a discriminatory or violent way.²³ Hate speech, in this form, damages the group's position in the community because it changes or reinforces the way that members of the dominant group think about the target group and its members.

Yet freedom of expression is said to be valuable because the free exchange of information and ideas is necessary to the formation of public opinion and to the realization/creation of individual and group identity. The thoughts, feelings, and more generally the identity take

18. See, e.g., *Hinds v. Can. (Employment & Immigration Comm'n.)*, [1988] 24 C.C.E.L. 65 (Canadian Human Rights Trib.).

19. See, e.g., *Ross v. N.B. Sch. Dist. No. 15*, [1996] 1 S.C.R. 825, 886 (Can.).

20. An example of the latter is the self-identification as "queer" by many gays and lesbians in an attempt to neutralize or transform the term's derogatory connotation. The law, of course, does not always deal well with this sort of context-based distinction.

21. [1990] 3 S.C.R. 697 (Can.).

22. [1990] 3 S.C.R. 892 (Can.).

23. *Id.* at 918-19.

shape in public discourse. Critical views cannot be restricted simply because they affect how an individual is regarded by others in the community and how that individual sees himself or herself. The standard freedom of expression position is that ideas cannot be censored simply because we fear that members of the community may find them persuasive or that an individual's self-understanding or self-esteem may be negatively affected. We should respond to racist claims not with censorship, but by offering competing views that make the case for equal respect or by creating more avenues for marginalized groups to express themselves.

The Canadian cases involve a fundamental challenge to conventional freedom of expression theory and doctrine. The courts in Canada have sought to reconcile the regulation of hate speech with the constitutional commitment to freedom of expression, first by requiring that the restricted speech be shown to cause harm—to generate hatred in the community—and second by limiting the scope of the restriction to a narrow category of extreme or hateful speech. The problem with the courts' approach, though, is that it is difficult to see how a particular instance of racist speech, however extreme, causes or leads others to hate. The spread or reinforcement of hatred in the community is a systemic problem. No particular instance of expression causes hatred, but a wide range of racist statements (some extreme and some more temperate and even commonplace) may contribute to racist or hateful attitudes in the community. The causation requirement seems to lead to the conclusion that either no hate speech is caught by the ban (since no statement alone causes hatred) or that all racist or bigoted expression is caught (as part of the system of racist speech that supports the spread of racism).

Before examining the leading Canadian case, I should say a little bit about the Canadian courts' general approach to freedom of expression under the *Canadian Charter of Rights and Freedoms*.

IV. THE TEST FOR A BREACH OF 2(B)

According to the Supreme Court of Canada, section 2(b) protects any activity that “conveys or attempts to convey a meaning.”²⁴ An act of expression is distinguished from other voluntary human acts by the intention with which it is performed. If the act is intended by the actor to convey a message to someone, then it is an act of expression

24. *Taylor*, 3 S.C.R. at 913-14. Section 2 of the *Canadian Charter of Rights and Freedoms* provides that “[e]veryone has the following fundamental freedoms: . . . (b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication” *Id.* at 907. The basic test for determining whether section 2(b) has been breached was set out in *Irwin Toy Ltd. v. Quebec*, [1989] 1 S.C.R. 927 (Can.). For a more general examination of the court's approach to freedom of expression, see R. MOON, *THE CONSTITUTIONAL PROTECTION OF FREEDOM OF EXPRESSION* (2000).

and prima facie protected under section 2(b).²⁵ Protection is given “irrespective of the particular meaning or message sought to be conveyed.”²⁶ This is because “in a free, pluralistic and democratic society we prize a diversity of ideas and opinions for their inherent value both to the community and to the individual.”²⁷ In a variety of decisions, the court has held that the category of human acts intended to carry a message, and so protected under section 2(b), includes advertising,²⁸ picketing,²⁹ defamation,³⁰ hate promotion,³¹ soliciting for the purposes of prostitution,³² and pornography.³³

There are two exceptions to the court’s broad definition of the scope of freedom of expression under section 2(b). First, the court has said that a violent act, even if intended to carry a message, does not fall within the scope of section 2(b).³⁴ The court has also narrowed the scope of section 2(b) by drawing a distinction between two different kinds of state restriction on expressive activity: (1) state acts that have as their purpose the restriction of expression; and (2) state acts that do not have this purpose but nevertheless have this effect.³⁵ The significance of the purpose/effect distinction, which roughly parallels the distinction in American jurisprudence between content restrictions and time, place, and manner restrictions, is that a law that is intended to limit expression, and in particular the expression of certain messages, will be found to violate section 2(b) automatically, while a law that simply has the effect of limiting expression will be found to violate section 2(b) only if the person attacking the law can show that the restricted expression advances the values that underlie freedom of expression.³⁶

Once the court has determined that the state has restricted expression protected by section 2(b), it then considers whether the restriction is justified under section 1 of the Charter. Section 1 provides that the rights in the Charter may be “subject only to such reasonable limits prescribed by law as can be demonstrably justified in a

25. *Irwin Toy Ltd.*, 1 S.C.R. at 969.

26. *R. v. Keegstra*, [1990] 3 S.C.R. 697, 729 (Can.).

27. *Irwin Toy Ltd.*, 1 S.C.R. at 968.

28. *See Rocket v. Royal Coll. of Dental Surgeons of Ont.*, [1990] 2 S.C.R. 232, 244 (Can.).

29. *See RWDSU v. Dolphin Delivery Ltd.*, [1986] 2 S.C.R. 573, 588 (Can.).

30. *See Hill v. Church of Scientology*, [1995] 2 S.C.R. 1130, 1188 (Can.).

31. *See Keegstra*, 3 S.C.R. at 733.

32. *See Reference re ss. 193 and 195.1(1)(c) of the Criminal Code (Man.)*, [1990] 1 S.C.R. 1123, 1134 (Can.).

33. *See R. v. Butler*, [1992] 1 S.C.R. 452, 488 (Can.).

34. In *Montréal v. 2952-1366 Québec Inc.*, the Supreme Court of Canada enlarged this exception. [2005] 3 S.C.R. 141 (Can.). According to the court, “[w]hile all expressive content is worthy of protection . . . , the method or location of the expression may not be.” *Id.* at 167.

35. *Irwin Toy, Ltd. v. Quebec*, [1989] 1 S.C.R. 927, 978 (Can.).

36. *Id.* at 976.

free and democratic society.”³⁷ The court asks whether the restricting law has a substantial purpose, advances the law’s purpose rationally, impairs the freedom no more than is necessary, and is proportionate to the impairment of the freedom.³⁸

V. APPLICATION OF THE TEST IN *R. v. KEEGSTRA*

In Canada, a variety of laws prohibit hateful statements. The expression of racist views is restricted by the Canadian Criminal Code and by federal and provincial human rights codes.³⁹ Both forms of regulation have been challenged in the courts and upheld as justified limits on freedom of expression.⁴⁰ In *Keegstra*, the Supreme Court of Canada upheld the Criminal Code ban on the wilful promotion of hatred under section 319(2).⁴¹ This section of the Code provides that “[e]very one who, by communicating statements, other than in private conversation, wilfully promotes hatred against any identifiable group” commits an offense, punishable for a term of up to two years.⁴²

37. Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982, ch. 11 (U.K.).

38. The basic test for determining whether a limitation is justified under section 1 was set out in *R. v. Oakes*, [1986] 1 S.C.R. 103 (Can.). For a discussion of limits on expression, see Richard Moon, *Justified Limits on Free Expression: The Collapse of the General Approach to Limits on Charter Rights*, 40 OSGOODE HALL L.J. 337 (2002).

39. Section 319 of the Criminal Code of Canada bans the incitement of hatred and the wilful promotion of hatred. The section provides as follows:

(1) Every one who, by communicating statements in any public place, incites hatred against any identifiable group where such incitement is likely to lead to a breach of the peace is guilty of (a) an indictable offence and is liable to imprisonment for a term not exceeding two years; or (b) an offence punishable on summary conviction.

(2) Every one who, by communicating statements, other than in private conversation, wilfully promotes hatred against any identifiable group is guilty of (a) an indictable offence and is liable to imprisonment for a term not exceeding two years; or (b) an offence punishable on summary conviction.

Criminal Code, R.S.C., ch. C-46, § 319(1)-(2) (1985) (Can.); see also Human Rights, Citizenship and Multiculturalism Act, R.S.A. 2000, c. H-14, § 3(1) (1996) (Can.) (province of Alberta); Human Rights Code, R.S.B.C., 210, § 7 (1996) (Can.) (province of British Columbia); Saskatchewan Human Rights Code, R.S.S. 1979, c. S-24.1, § 13 (1989) (Can.) (province of Saskatchewan).

40. See, e.g., *R. v. Keegstra*, [1990] 3 S.C.R. 697, 795 (Can.) (upholding restriction of racist views under the Canadian Criminal Code).

41. *Id.* at 795.

42. Criminal Code, R.S.C., ch. C-46, § 319(2) (1985) (Can.). Section 319(3) of the Criminal Code provides a number of defenses:

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 an argument an opinion on a religious subject or an opinion based on a belief in a religious text;
 (c) if the statements were relevant to any subject of public interest, the discussion of which was for the public benefit, and if on reasonable grounds he believed them to be true; or

James Keegstra was a teacher in the high school in the small town of Eckville, Alberta.⁴³ For almost ten years, he taught his students about an all-encompassing conspiracy on the part of Jews to undermine Christianity and control the world.⁴⁴ He taught his students that “the banking system, the media, Hollywood, the universities, most publishers, most of the churches and almost all political leaders were agents of this conspiracy.”⁴⁵ He told his students that Jews were “‘treacherous,’ ‘subversive,’ ‘sadistic,’ ‘money-loving,’ ‘power hungry,’ and ‘child killers.’”⁴⁶ He used the teachers’ punishment and reward powers to ensure that his students parroted his theories and ideas.⁴⁷ Students who did not adopt or acquiesce in his views did poorly in his class.⁴⁸ When Keegstra’s teaching finally became a public issue, he was dismissed from his position.⁴⁹ A year later, he was charged under section 319(2) of the Criminal Code with wilfully promoting hatred.⁵⁰

Keegstra challenged the constitutionality of section 319(2), arguing that it violated his freedom of expression under the Charter of Rights and Freedoms.⁵¹ Chief Justice Dickson, writing for the majority of the Supreme Court of Canada, accepted that section 319(2) of the Criminal Code restricted “expression” so that the provision violated freedom of expression under section 2(b) of the Charter.⁵² However, he found that the restriction was justified under section 1, the Charter’s limitation provision, because it limited “a special category of expression which strays some distance from the spirit of s. 2(b),” advanced the important goal of preventing the spread of racist ideas, and advanced this goal rationally and with minimal impairment to

(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.

Id. § 319(3).

Subsection (7) provides definitions and clarifications of some of the important terms used in the section. In particular, “‘communicating’” is said to include “communicating by telephone, broadcasting or other audible or visible means”; “‘identifiable group’ means any section of the public identified by colour, race, religion, ethnic origin or sexual orientation”; “‘public place’ includes any place to which the public have access as of right or by invitation, express or implied”; and finally, the term “‘statements’” is broadly defined to include “words spoken or written or recorded electronically or electro-magnetically or otherwise,” as well as “gestures, signs or other visible representations.” *Id.* §§ 318 (4), 319(7).

43. *Keegstra*, 3 S.C.R. at 713.

44. *Id.* at 713-14.

45. DAVID BERCUSON & DOUGLAS WERTHEIMER, A TRUST BETRAYED: THE KEEGSTRA AFFAIR 63 (1985) (examining the background of the *Keegstra* case).

46. *Keegstra*, 3 S.C.R. at 714.

47. *Id.*

48. *Id.*

49. *Id.*

50. *Id.* at 713.

51. *Id.* at 714.

52. *Id.* at 730.

the freedom.⁵³ Madame Justice McLachlin, in her dissenting judgment, agreed that preventing the spread of hateful ideas was an important end but doubted that a criminal prohibition would advance this end effectively and at minimal cost to freedom of expression.⁵⁴

At the outset of his section 1 analysis, Chief Justice Dickson described the harms caused by “hate propaganda.”⁵⁵ He referred first to the emotional or psychological injury experienced by the target group.⁵⁶ “It is indisputable,” he said, “that the emotional damage caused by words may be of grave psychological and social consequence.”⁵⁷ The “derision, hostility and abuse encouraged by hate propaganda . . . [has] a severely negative impact on” an individual target group member because her “sense of human dignity and belonging to the community at large is closely linked to the concern and respect accorded the groups to which she belongs.”⁵⁸ Because the identity of an individual is partly constituted by his association and interaction with others, he experiences attacks on the groups to which he belongs personally and sometimes very deeply.⁵⁹ Because an individual’s sense of self is shaped in important ways by the views and actions of others, attacks on her most important associations will cause injury to her self-worth or dignity.⁶⁰

The second injury or harm identified by Chief Justice Dickson is the harm that hate speech has upon “society at large.”⁶¹ If members of the larger community are persuaded by the message of hate speech, they may engage in acts of violence and discrimination, causing “serious discord” in the community.⁶²

The majority judgment, upholding the hate promotion provision of the Criminal Code, rested on two important determinations. First, the majority accepted that there is a causal link between the expression of racist views and the spread of hatred in the community.⁶³ Second, the majority considered that the restriction is narrow in its scope and catches “only the most intentionally extreme forms of expression.”⁶⁴ In the majority’s view, the state is justified in restricting the expression of the extreme racist views of hatemongers such as Keegstra because such views may lead (cause) others to hate the

53. *Id.* at 766.

54. *Id.* at 852-53 (McLachlin, J., dissenting).

55. *Id.* at 744-45 (majority opinion).

56. *Id.* at 746.

57. *Id.*

58. *Id.*

59. *Id.* at 746-47.

60. *Id.*

61. *Id.* at 747.

62. *Id.* at 747-48.

63. *Id.* at 746-47.

64. *Id.* at 783.

members of the targeted group and to act towards them in a violent or discriminatory way or because these views may be internalized by group members, damaging their self-esteem.⁶⁵ The majority accepted that there is a causal link between expression and the spread of hate because it was skeptical about the role of rational agency in the communicative process, at least in certain circumstances.⁶⁶ According to the majority, drawing on the report of the Cohen Commission, “individuals can be persuaded to believe ‘almost anything’ . . . if information or ideas are communicated using the right technique and in the proper circumstances,”⁶⁷ and so it is important not to “overplay the view that rationality will overcome all falsehoods in the unregulated marketplace of ideas.”⁶⁸

The majority accepted that the hate promotion provision restricts only a narrow category of expression.⁶⁹ Merely unpopular or unconventional communications are not caught by the ban.⁷⁰ Hatred is an emotion that is “intense and extreme” in character: “To promote hatred is to instil detestation, enmity, ill-will and malevolence in another.”⁷¹ The majority judgment assumed that only extreme statements would cause these extreme feelings.⁷²

The majority also noted that the restriction applies only when an individual *wilfully* promotes hatred.⁷³ The speaker must intend to promote hatred or must recognize that the promotion of hatred is the likely consequence of his expression.⁷⁴ This mental element, said the majority, ensures that only the most extreme statements will be caught by the Code provision.⁷⁵ The section will be breached “only where an accused subjectively desires the promotion of hatred or foresees such a consequence as certain or substantially certain to re-

65. *Id.* at 746-48.

66. *Id.* at 747-48.

67. *Id.* at 747.

68. *Id.* at 763. Chief Justice Dickson thought that the restriction of hate promotion rests on the fallibility of human reason in exceptional circumstances:

The successes of modern advertising, the triumphs of impudent propaganda such as Hitler's, have qualified sharply our belief in the rationality of man. We know that under strain and pressure in times of irritation and frustration, the individual is swayed and even swept away by hysterical, emotional appeals. We act irresponsibly if we ignore the way in which emotion can drive reason from the field.

Id. at 747 (quoting the REPORT OF THE SPECIAL COMM. ON HATE PROPAGANDA IN CANADA 8 (Queen's Printer, Ottawa 1966) [Cohen Commission]).

69. *Id.* at 783.

70. *Id.* at 771-73.

71. *Id.* at 777 (quoting *R. v. Andrews*, [1988] 65 O.R. (2d) 161, 179 (Can.)).

72. *Id.* at 777-78.

73. *Id.* at 773.

74. *Id.* at 774-75.

75. *Id.* at 775.

sult from [the communication].”⁷⁶ The majority acknowledged that the causal link between a particular act of expression and the spread of hatred in the community is difficult to establish.⁷⁷ According to the majority, it is enough that the speaker knows or is aware that her expression creates a substantial risk that hatred will be spread or that acts of violence will increase⁷⁸—“the hate-monger must intend or foresee as substantially certain a direct and active stimulation of hatred against an identifiable group.”⁷⁹

The majority’s emphasis on risk rather than cause and the stimulation or circulation of hateful feelings rather than the creation of hatred suggests some recognition that expression does not cause harm in a simple and predictable way. The impact of expression is unpredictable and creates only a risk of harm because it depends on the reaction of audience members who bring a wide range of attitudes and assumptions to their assessment of the claims made.

VI. THE CHALLENGE TO FREEDOM OF EXPRESSION

The court’s causal or behavioral approach seems incompatible with a commitment to freedom of expression—with the right of the individual to express and hear different views. If some individuals are persuaded of certain views, which they then act on, we might say that the expression has caused the action. However, under most accounts of freedom of expression, the state is not justified in restricting expression simply because it causes harm in this way, by persuading its audience. The listener, and not the speaker, is responsible for the judgments he makes and the actions he takes.

In *Keegstra*, the majority of the Supreme Court of Canada was prepared to treat hate speech as responsible for the spread of hatred and for increases in racist violence because they were skeptical that the audience would (always) exercise rational judgment when it considered racist claims—or because they were unwilling to take the risk that odious views might gain broader acceptance in the community.⁸⁰ Yet faith in human reason underlies most accounts of freedom of expression and cannot simply be cut out and discarded from the analysis. The implications of downplaying this faith in reason are enormous. Upon what is our commitment to freedom of expression based, if not on a belief in human reason and its power to recognize truth? What restrictions on expression are not acceptable once we have lost faith in human reason? If we are unwilling to trust, or give

76. *Id.* at 774.

77. *Id.* at 775-76.

78. *Id.* at 775-77.

79. *Id.* at 777.

80. *Id.* at 747-48.

space to, individual judgment and public reason, then the question of censorship will turn simply on whether the particular expression conveys a good or bad message or whether we think that public acceptance of the message will have good or bad consequences. But this amounts to a rejection of freedom of expression as a political/constitutional principle. A commitment to freedom of expression means protecting expression for reasons more basic than our agreement with its message, for reasons independent of its content.

If the courts are to address the harm of hate promotion without undermining the constitutional commitment to freedom of expression, they must isolate a category of hateful or extreme expression from ordinary public discourse, because of its irrational appeal or because it occurs in circumstances where rational agency is less likely to prevail. If a particular instance or form of expression (in a particular context) does not engage the audience or contribute to public reflection and judgment, but instead incites or manipulates its audience, then it may not deserve constitutional protection. Perhaps then, it is not a coincidence that two of the leading hate speech cases in Canada involve teachers.⁸¹ Keegstra, for example, used his authority as a teacher to limit the opportunity of his students to critically evaluate his views.⁸²

When the majority judgment in *Keegstra* sought to isolate the category of racist expression caught by the Criminal Code, it focused on the nature or content of the speech and not on the character of the relationship between the speaker and his or her audience.⁸³ Chief Justice Dickson assumed that extreme statements (statements that are hateful in content and tone) cause hateful views. He assumed that extreme racist views are manipulative or misleading. Yet he did not explain what makes them so or how they could be distinguished from ordinary nonmanipulative expression.

The majority's focus on extreme statements makes sense only if we believe that individual acts of expression create hatred in the community in a discrete and measurable way. Yet it cannot be the case that any particular hateful statement silences the members of a target group (damages their self-esteem so that they withdraw from public discourse) or leads to their unequal treatment (convinces others that they are undeserving of equal respect). It is difficult to imagine that the bizarre views of Keegstra would be taken seriously by

81. *Ross v. NB School District No. 15* is the other noteworthy case involving a teacher. [1996] 1 S.C.R. 825 (Can.). In *Ross*, the court noted that "[y]oung children are especially vulnerable to the messages conveyed by their teachers . . . [since] they are unlikely to distinguish between falsehoods and truth and more likely to accept derogatory views espoused by a teacher." *Id.* at 873-74.

82. *Keegstra*, 3 S.C.R. at 714.

83. *Id.* at 729.

anyone who was not already deeply mired in irrational hatred or who was not limited in his or her capacity for reasoned thought or who was not in a subordinate or vulnerable position in relation to the speaker. If silencing or inequality occurs, it must be the consequence of a system of racist expression and action and not of a narrow category of extreme statements. If the problem is systemic, how are we to identify a narrow category of expression that causes harm and should be restricted?

VII. THE LINE-DRAWING PROBLEM

The problem of line-drawing plays a key role in the argument against the restriction of hate promotion. Indeed, the line-drawing argument often seems to substitute for a more direct claim that the freedom should protect the expression of all viewpoints, no matter how wrong or offensive. Madame Justice McLachlin, in her dissenting judgment in *Keegstra*, argued against the criminal restriction of hate promotion, not by focusing on the value of this expression, but rather by pointing out how difficult it is to draw a line separating hate promotion from other forms of expression.⁸⁴ She was concerned that the line may be drawn in the wrong place so that valuable expression is restricted.⁸⁵ As well, she was concerned about the “chilling effect” of any line that may be drawn.⁸⁶ An individual may be reluctant to publish material, even valuable material, that should not, and probably would not, be restricted because she is unwilling to take the risk that it might fall within a criminal prohibition that does not have a clear and uncontested scope.⁸⁷ An individual who is critical of the members of a particular group or who engages in research concerning the different characteristics of racial/ethnic groups will “think twice” about what he says and may even decide to remain silent because he fears that his expression might fall within this vague prohibition.⁸⁸

In support of this concern, Madame Justice McLachlin referred to the “track record” of section 319(2).⁸⁹ She noted that, in the past, the section “has provoked many questionable actions on the part of the authorities.”⁹⁰ For example, the novels *The Haj* by Leon Uris⁹¹ and *The Satanic Verses* by Salman Rushdie⁹² were investigated and/or

84. *Id.* at 856-58 (McLachlin, J., dissenting).

85. *Id.* at 858-59.

86. *Id.* at 859-60.

87. *Id.*

88. *Id.* at 860.

89. *Id.* at 859.

90. *Id.*

91. LEON URIS, *THE HAJ* (1984).

92. SALMAN RUSHDIE, *THE SATANIC VERSES* (1988).

temporarily interfered with under customs restrictions.⁹³ Following investigation, the authorities concluded that neither of these books fell within the scope of the restriction.⁹⁴ However, for Madame Justice McLachlin, the temporary interference with these books by customs officials illustrated the uncertain application of the restriction and helped to create a climate in which writers have genuine concerns that their work may result in criminal punishment.⁹⁵

The way the line-drawing argument is stated, it sounds as if expression that has little or no value must be protected to ensure that valuable expression is also protected. Keegstra's Holocaust denial and Jewish conspiracy expression must be protected if we are to ensure that Uris is not prevented or discouraged from writing *The Haj*. But if Keegstra's expression is of little or no value and Uris's expression is clearly valuable, then why is it so difficult to draw a line between them?

The protection of hate speech must rest on more than its strategic significance. Protection must be based on a belief that hate speech is itself valuable, that it advances freedom of expression values, even though its message is wrong and offensive. (Indeed, if hate speech is itself without value, then it would be both possible and important to draw a line separating it from valuable forms of expression). The argument must be that racist speech should be protected because it expresses the thoughts and feelings of the speaker and provides information and ideas to an audience, who may decide either to accept or reject what they hear. The familiar freedom of expression argument is that these claims, absurd and offensive as they may be, should be responded to and not simply censored out of public discourse.

I suspect that the line-drawing problem is not, as Madame Justice McLachlin suggested, that the line between legitimate and illegitimate expression may be drawn in the wrong place by the legislature or the courts, or that even if the line is drawn in the right place, it may have a chilling effect on legitimate expression.⁹⁶ The problem is, rather, that the distinction between what in her example is assumed to be legitimate expression and what is assumed to be illegitimate expression is not all that clear. What Keegstra says is, in many ways, similar to what Uris writes. This is why it is difficult to draw a line between them. This is why the censorship of Keegstra's speech puts the writing of Uris at risk.

93. *Keegstra*, 3 S.C.R. at 859.

94. *See id.*

95. *Id.* at 859-60.

96. *Id.*

There are differences between what Keegstra says and what Uris writes. Keegstra, in contrast to Uris, makes specific racist claims that are extreme and bizarre. But Uris's writing is most certainly not free of the taint of prejudice. Indeed, the writing of Uris represents a powerful vehicle for the transmission and reinforcement of bigoted attitudes. In *The Haj*, Uris builds ethnic/racial stereotypes into the characters and events of a fast paced narrative.⁹⁷ The Jewish characters in his book are heroic and honorable, while the Arab characters are cowardly and dishonest.⁹⁸ Yet because these are just the attributes of the particular characters in a work of historical fiction, they are not explicit claims about Jews and Arabs that are open to consideration and debate by the readers. The writing of Uris supports and revitalizes ethnic/racial stereotypes not by argument, but simply by weaving them into a "realistic" narrative that is read by a large audience.

Is the answer simply to exclude both Uris and Keegstra from freedom of expression's protection? Keegstra makes racist claims that play on the fears and prejudices of some members of the community. Uris's narrative builds on ethnic and religious stereotypes, which may be assimilated by the reader without conscious, or at least careful, consideration. The line-drawing problem, however, is not resolved by redrawing the line in another place. The problem is much deeper than the unclear distinction between what Keegstra says and what Uris writes. Madame Justice McLachlin has not simply chosen a bad example with *The Haj*. Racial and other stereotypes are so deeply entrenched in our culture, our language, and our thinking that it is impossible to isolate clearly the offensive claims of Keegstra and the offensive stereotyping of Uris from ordinary public discourse. A wide range of expression, both extreme and ordinary, conveys racist attitudes and contributes to the spread or reinforcement of racist opinion in the community. This is the real line-drawing problem. It is much deeper than Madame Justice McLachlin supposes.

Yet, at the same time, recognition that line-drawing is a problem because racial and other stereotypes are pervasive may provide some support for the restriction of (extreme) racist expression. The line-

97. See URIS, *supra* note 91. In *The Haj*, a variety of objectionable statements are made about the Arab personality: "The short fuse that every Arab carries in his guts had been ignited with consummate ease. Enraged mobs poured into the streets . . ." *Id.* at 89. "The Bedouin was thief, assassin and raider and hard labour was immoral." *Id.* at 29. "So before I was nine I had learned the basic canon of Arab life. It was me against my brother; me and my brother against our father; my family against my cousins and the clan; the clan against the tribe; and the tribe against the world." *Id.* at 25.

More significant than these descriptions of the Arab personality are the actions of the different characters in the story. In contrast to the Jewish characters, Arab characters lie, cheat, rape, and attack for little or no reason.

98. See *id.*

drawing argument can be turned on its head once we understand why line-drawing is so difficult. Keegstra's hateful expression is difficult to isolate from ordinary public discourse because racist expression and thinking are pervasive. His expression may also be more dangerous because of this pervasiveness.

Keegstra's audience understands and evaluates his claims against this larger background of racist assumptions. Racist claims often play to fears and frustrations (of moral decay or unemployment) in a context where the space for critical reflection is reduced. These claims draw on the social background of bigotry and racial stereotyping, of which Uris's novel *The Haj* is only a very small part. Against this background, a racist claim may (to some at least) seem an ordinary part of discourse. Indeed, to some members of the community, even the absurd claims of Keegstra may seem reasonable or plausible. A general audience may be less critical of racist claims, which provide a channel for fear and resentment and which resonate with widely shared assumptions. Racist claims may resist critical evaluation because they give shape to popular but inchoate assumptions and attitudes. Similarly, the dominance of racist imagery and messages means that the members of target groups have little space to negotiate their identity, their place in the world.

Less extreme racist claims only seem "ordinary" because they reflect, or resonate with, common opinion. All racist expression, the extreme and the commonplace, takes place in a larger culture of racist attitudes and assumptions and contributes to the reproduction of this larger culture. It is arguable that common forms of racist expression are more harmful because their exposure is greater and their racist message is less obvious. Yet, any attempt to exclude all racist or bigoted expression from public discourse would require extraordinary intervention by the state. Moreover, public discussion of racial issues is vital precisely because these attitudes and assumptions are so pervasive. However, even if we accept that ordinary or commonplace racist claims and attitudes should be discussed and addressed and not simply censored out of public discourse, a sensitivity to the limits of reason, to the subtle or implicit form racist claims often take, and to the significant harm they cause should lead us to pay more attention to inequalities in communicative power or opportunity.

There may, however, be stronger reasons to restrict more extreme racist claims that either explicitly or implicitly advocate violence against the members of a minority group. While most members of the community will dismiss the extreme claims of hatemongers like Keegstra as bizarre and irrational, some individuals, already weighed down by prejudice or susceptible to manipulation or already part of an extremist subculture, will see in these claims a plausible account of their social and economic difficulties and a justification for

radical action. Hate speech offers a focus for their feelings of resentment and frustration. It builds on existing racist attitudes and so leads to more extreme opinions and actions, particularly in times of great insecurity. Its extreme character calls for action against members of the hated group. Any individual who accepts the views presented by Keegstra and other hatemongers would also have to conclude that radical action was called for.

Nevertheless, restricting hate promotion, whether narrowly or broadly defined, is very different from prohibiting the false yell of "fire" in a crowded theatre, the classic American example of an exception to freedom of expression protection.⁹⁹ The yell of fire in a crowded theatre occurs as an identifiable and discrete deviation from the conditions of ordinary public discourse. The theatre audience does not have the time or space to stop and think carefully before acting on the communicated message. The panic that will follow the yell of fire in these circumstances is likely to result in injury. The court in *Keegstra*, however, based its decision not on any exceptional and temporary circumstances that might distort or limit the audience's ability to rationally assess the message conveyed to them, but rather on a general skepticism about the exercise of human reason in a racist culture.¹⁰⁰ The concern is that certain ways of thinking about race are so deeply embedded in our culture, in its linguistic forms and popular concepts, that racist claims often go unexamined and are difficult to challenge. This skepticism, though, raises questions about the protection of any (negative) claim about race and not just the extreme claims of people like Keegstra. In the end, though, the censorship of extreme expression may rest simply on our unwillingness as a community to take the risk that the advocacy of racial violence will fall on deaf ears.

VIII. A GENERAL CONCLUSION

In the United States, debate about the appropriate limits on speech revolves around the question of whether or not the speech goes too far and disrupts the security or stability of the community by inciting members of the public to harmful action or deceiving them on an important public matter. The paradigmatic speaker in American free speech jurisprudence is the lone dissident who confronts or challenges state power or dominant ideologies. He or she should be free to speak and to challenge convention, unless his or her words go too far and provoke violence or threaten community security or stability.

99. *Schenck v. United States*, 249 U.S. 47, 52 (1919).

100. *See Keegstra*, 3 S.C.R. at 746-48.

In Canada, the freedom of expression debate is often framed in similar terms. Yet it may be that an entirely different sort of concern underlies the freedom of expression decisions of the Canadian courts. While the courts describe certain instances of racist, pornographic, or commercial expression as going too far and as appropriately subject to restriction, these forms of expression can only be understood as harmful if we see them as part of a systemic practice. The courts support the restriction of extreme expression or expression that goes too far (ads for dangerous products, violent sexual images, or extreme racist statements). However, the justification for restriction of these extreme statements depends not simply on their form, but also on the domination of public discourse by a narrow range of voices and views—the overwhelming presence in our public discourse (the mass marketing) of degrading sexual imagery or racist stereotypes or lifestyle product associations.

The extreme racist remarks of someone like Keegstra may affect the thinking and behavior of some members of the public only because racist expression (albeit less extreme) permeates public discourse. As well, ads for harmful products such as cigarettes are effective not simply because of their lifestyle form but also because commercial advertising so completely dominates public discourse. At one level, the issue in these cases is whether a particular instance of expression goes too far and causes harm to important human interests; at a deeper level, the issue is whether certain forms of expression, or certain messages or perspectives, so completely dominate public discourse that the space for critical judgment by the individual is compressed. In such a context, the concern is that (extremist) speech no longer appeals or contributes to independent reflection and judgment.

More speech is not always an answer when communicative resources are controlled by a small number of corporations and public discourse operates on marketing principles. Unable or unwilling to respond directly to the larger problem of the imbalance of communicative power and the rise of advertising as the paradigm of public communication, legislatures and courts address the worst and most obvious excesses of public discourse by supporting content restrictions on extreme expression. This response leaves the larger problems with public discourse substantially untouched. At the same time, however, because the line between extreme and ordinary is unclear—a matter of degree—the courts' approach puts the protection of all expression on unstable ground. The challenge for the courts is to maintain a clear and protected space for freedom of expression in a world where reason is imperfect and often not the object of expression, where individuals sometimes seem pushed and pulled by com-

municative forces, and where fundamental imbalances in communicative power seem either natural or unchallengeable.

