

A CONSTITUTIONAL “RIGHT” TO DENY AND PROMOTE GENOCIDE? PREEMPTING THE USURPATION OF HUMAN RIGHTS DISCOURSE TOWARDS INCITEMENT FROM A CANADIAN PERSPECTIVE

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“To fit in with the change of events, words, too, had to change their usual meanings.”¹
-Thucydides

“Every exceptional circumstance gives rise to an awakening of rhetoric, if only because a circumstance acquires its exceptional dimension only if language declares it to be such.”²
- Jean Starobinski

I would like to thank the organizers of the conference, particularly Sheri Rosenberg, for their gracious invitation to speak to what is undoubtedly one of the most pressing themes commanding our attention – genocide and its denial. This is a time when historical truth struggles to endure in the face of insidious attacks at times couched in human rights rhetoric.

Thus, for instance, Iran’s president Mahmoud Ahmadinejad’s recurring and unequivocal assertions that Israel “should be wiped off the map,”³ his incitement of students to ultimately commit genocide, chanting “death to the Jews” at a government-sponsored conference called the “World without Zionism”⁴ (in violation of

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¹ THUCYDIDES, *THE PELOPONNESIAN WAR* III 209–210 (Rex Warner trans., Penguin Classics 1954).

² Jean Starobinski, *La chaire, la tribune, le barreau*, in *Les Lieux de Mémoire*, 2, LA NATION, Paris, 2:425–85 (Pierre Nora ed. 1986) (“dans les pays d’ancienne culture rhétorique, toute circonstance exceptionnelle suscite un réveil de la rhétorique, ne fut-ce que parce qu’une circonstance ne prend sa dimension exceptionnelle que si une parole la déclare telle”).

³ Ewen MacAskill & Chris McGreal, *Israel Should Be Wiped off Map, Says Iran’s President*, GUARDIAN, Oct. 27, 2005, available at <http://www.guardian.co.uk/iran/story/0,12858,1601413,00.html>.

⁴ Letter to President Bush Calling for Indictment by International Criminal Court of President Ahmadinejad for Incitement to Commit Genocide, Oct. 24, 2006, <http://www.genocidewatch.org/Ahmadinejadsignonletter.htm>.

international law),⁵ was – not coincidentally – preceded by denials of the Holocaust⁶ – an example of denial as a necessary prelude to incitement. These occurrences are by no means isolated. Instead, they echo similar calls for the Jewish state’s annihilation by clerics from London to Dubai,⁷ and those housed within the Hamas covenant, which – interestingly for our purposes – frames its demand for the “obliteration from existence”⁸ of the Jewish state as a religious right.⁹

Significantly, such genocidal affirmations are increasingly cast in human rights discourse as a religious right or a right of the op-

⁵ U.N. Charter art. 2, para. 4; Convention on the Prevention and Punishment of the Crime of Genocide, U.N. GAOR, 3d Sess., pt. 1, U.N. Doc. A/810 (1951); Rome Statute of the International Criminal Court, July 17, 1998, art. 6 and art. 25, ¶ 3(e), 2187 U.N.T.S. 3.

⁶ See *Holocaust Denial Sparks Outrage*, BBC NEWS, Dec. 14, 2005, available at http://news.bbc.co.uk/1/hi/world/middle_east/4529198.stm (“Mr. Ahmadinejad made the comments while speaking on live TV in the south-eastern city of Zahedan. ‘They have created a myth today that they call the massacre of Jews and they consider it a principle above God, religions and the prophets,’ he said.”).

⁷ See, e.g., *Rafsanjani Says Muslims Should Use Nuclear Weapon Against Israel*, IRAN PRESS SERVICE, Dec. 14, 2001, available at http://www.iran-press-service.com/articles_2001/dec_2001/rafsanjani_nuke_threats_141201.htm:

One of Iran’s most influential ruling cleric [sic] called Friday on the Muslim states to use nuclear weapon [sic] against Israel, assuring them that while such an attack would annihilate Israel, it would cost them “damages only.” “If a day comes when the world of Islam is duly equipped with the arms Israel has in possession, the strategy of colonialism would face a stalemate because application of an atomic bomb would not leave anything in Israel but the same thing would just produce damages in the Muslim world,” Ayatollah Ali Akbar Hashemi-Rafsanjani told the crowd at the traditional Friday prayers in Tehran.

Id. See, e.g., The Yale Initiative for the Study of Antisemitism, Newsletter, Volume 1, January 2007, available at http://www.yale.edu/yiissa/newsletter_v1_n6.htm (citing examples); see also Alessandra Stanley, *The Libeling of a People Surges With a Vengeance*, N.Y. TIMES, Jan. 8, 2007, at E5, available at <http://www.nytimes.com/2007/01/08/arts/television/08cent.html> (reviewing a PBS documentary chronicling modern anti-Semitism and incidents referred to above).

⁸ See Hamas Covenant 1988, <http://www.yale.edu/lawweb/avalon/mideast/hamas.htm> (“Israel will exist and will continue to exist until Islam will obliterate it”); see also Michael Herzog, *Can Hamas be Tamed?*, FOREIGN AFFAIRS, Mar./Apr. 2006 available at <http://www.foreignaffairs.org/20060301faessay85207/michael-herzog/can-hamas-be-tamed.html>.

⁹ Irwin Cotler, *Human Rights and the New Anti-Jewishness*, 38 JUSTICE 24 (2004), available at <http://www.intjewishlawyers.org/doccenter/frames.asp?id=9285>; see also Irwin Cotler, *Human Rights and the New Anti-Jewishness*, FrontPageMagazine.com, <http://www.frontpagemag.com/Articles/ReadArticle.asp?ID=12191> (referring to “genocidal or existential anti-Semitism”).

The covenants of terrorist organizations like Hamas which publicly call for, and incite to, the destruction of Israel and the killing of Jews anywhere; religious *fatwas* or execution writs issued by radical Islamic clerics, which not only call for the destruction of Israel and the killing of Jews, but proclaim it also as a religious obligation. Israel, then, has emerged as the Salmon Rushdie of the nations.

Id.

pressed to self-defense or self-determination,¹⁰ often preceded by the denial of previous atrocities perpetrated against the vilified group. Denial of victimization therefore stands as a prerequisite for re-victimization.¹¹ Denial is the *first* rather than final stage in the genocidal “process.”¹²

It appears that the re-conceptualization of democracy – from procedural to substantive – or what Lorraine Weinrib eloquently deems “a new constitutional paradigm,” in the aftermath of the Holocaust,¹³ is increasingly subject to a disturbing distortion.

The immediate purpose of constitutionally recognizing and enshrining rights such as dignity and equality at the domestic level is presumably to render any majoritarian decision unjustifiably violating these supreme values devoid of legal force.¹⁴ This post-war

¹⁰ See President Mahmoud Ahmadinejad, Address Before the 61st Session of the General Assembly of the United Nations, ¶ 8 (Sep. 19, 2006) (transcript available at www.un.org/webcast/ga/61/pdfs/iran-e.pdf); see also Gerald M. Steinberg & Sarah Mandel, *Watching the Watchers*, 43 JUSTICE 24, 26 (2006) (chronicling the inversion of human rights narratives by various “human rights” NGOs. “In Belgium, the local branch of Oxfam, which was headed for many years by a radical socialist named Pierre Galand, distributed an anti-Semitic poster in 2003 based on the theme of the blood libel, in promoting a campaign to boycott Israeli goods and Israelis themselves”).

¹¹ See Gregory H. Stanton, *The Eight Stages of Genocide*, Genocide Watch, <http://www.genocidewatch.org/aboutgenocide/8stagesofgenocide.html> [hereinafter Stanton]. “DENIAL is the eighth stage that always follows genocide. It is among the surest indicators of further genocidal massacres.” *Id.* Dehumanization is the third stage: “Dehumanization overcomes the normal human revulsion against murder.” *Id.*; see also Irwin Cotler, *The Human Rights Revolution and Counter-Revolution: A Dance of the Dialectic* 44 U.N.B. L.J. 357, 369 (1995)

[T]he Holocaust denial movement, the cutting edge of antisemitism old and new as Bernie Vigod would put it, is not just an assault on Jewish memory and human dignity in its accusation that the Holocaust is a hoax, but it is an international criminal conspiracy to cover up the worst crimes in history. Here is the most tragic, bitter and ironic historiography of the Holocaust, a historiography in its ultimate Orwellian inversion. For we move from the genocide of the Jewish people to a denial that the genocide ever took place; then, in a classic Orwellian cover-up of an international conspiracy, the Holocaust denial movement whitewashes the crimes of the Nazis, as it excoriates the crimes of the Jews. It not only holds that the Holocaust was a hoax, but maligns the Jews for fabricating the hoax.

Id.

¹² Stanton, *supra* note 11 (discussing the “process” of genocide).

¹³ Lorraine E. Weinrib, *The Postwar Paradigm and American Exceptionality*, in THE MIGRATION OF CONSTITUTIONAL IDEAS (Sujit Choudry ed., 2006); see also Lorraine Weinrib, *The Supreme Court of Canada in the Age of Rights: Constitutional Democracy, the Rule of Law and Fundamental Rights Under Canada’s Constitution*, 80 CAN. BAR REV. 699 (2001) [hereinafter Weinrib, *Supreme Court*]; *Canada’s Rights Revolution: From Politics to Law* 33 ISR. L. REV. 13 (1999).

¹⁴ See Aharon Barak, *A Judge on Judging: The Role of a Supreme Court in a Democracy*, 116 HARV. L. REV. 16, 149 (2002); R. DWORKIN, *PRENDRE LES DROITS AU SÉRIEUX* 199 (1995); Weinrib, *Supreme Court*, *supra* note 13; THE CANADIAN CHARTER OF RIGHTS AND FREEDOMS; REFLECTIONS ON THE CHARTER AFTER TWENTY YEARS (Beaudoin et al. eds., 2003).

“constitutionalization,” intended to protect the vulnerable from the procedural manipulation of democracy, risks being progressively inverted to justify the “freedom” to deny and promote genocide. Worse, such assertions can be inconspicuously buried in human rights rhetoric.¹⁵

Constitutionalism – the anticipated safeguard against the devastation of democracy from within – may itself, it seems, be co-opted for that very purpose.

Inversions of this nature — particularly the invocation of human rights rhetoric towards genocide denial and incitement, and its constitutional ramifications form the backdrop of my reflection on the Canadian example today.

Accordingly, my brief talk will proceed in two stages:

First, I will turn generally to the danger of co-opting human rights narratives towards genocide denial and subsequent incitement. In this vein, most informative are the lessons of the Vichy regime.¹⁶ For as demonstrated by Richard Weisberg, legal language associated with profound pre-existing social values can be appropriated in order to seamlessly subvert those very principles and lay the foundation for their destruction.¹⁷

That being the case, to what extent should calls to genocide and denials thereof be protected by constitutionally enshrined liberties such as freedoms of speech and religion? What is the relationship between freedom of expression, religion and hate propaganda?

These are clearly broad questions, which in light of time constraints can only be summarily touched on today. Given the magnitude of the task, I will proceed to limit my comments to a succinct overview of the Canadian approach to genocide denial and incitement, distinctively in light of the Canadian Charter of Rights and Freedoms.

More specifically, I would like to draw attention to the precautionary principle as a rationale for limiting certain forms of otherwise protected expression, namely hate speech. As noted, the

¹⁵ See *infra* at 470.

¹⁶ JEAN-PIERRE FAYE, *LANGAGES TOTALITAIRES* (Paris Hermann ed., 1972) (demonstrating how “seemingly innocuous rhetorical devices” served to lay the ground work for the “conceptual relegation of Jews to non-human status” during the Vichy period (quoting Vivian Grosswald Curran, *Fear of Formalism: Indications From The Fascist Period in France and Germany of Judicial Methodology’s Impact on Substantive Law*, 35 *CORNELL INT’L L.J.* 101, 121 (2002))).

¹⁷ RICHARD H. WEISBERG, *VICHY LAW AND THE HOLOCAUST IN FRANCE* (New York University Press 1996).

Canadian example is instructive here, for Canada has seen fit to criminalize and otherwise proscribe certain forms of hateful speech including genocide denial. Significantly, such restrictions have passed constitutional muster following principled balancing of constitutional rights by that country's Supreme Court.

SETTING THE STAGE: LAW, HISTORY AND THE PRECAUTIONARY PRINCIPLE

Legal historians observe that law provides society with a legitimizing myth; it represents the moral hegemony, thus assuming both a symbolic and instrumental social function.¹⁸ As Stephen Toope notes in a different context: “[n]orms feed back into processes of social interaction and influence identity.”¹⁹

Moreover, law and history are intertwined for law, not unlike history, recounts facts and injects them with new meaning. Both study facts and offer an assessment thereof with a certain degree of finality.²⁰ For our purposes, relating to the denial of genocide in particular, it is said that any legal decision – even symbolic – can play a powerful role in establishing the truth²¹ in the collective consciousness. In this manner, law joins the voices that build historical narrative. Cases are not just decisions; instead, they become part and parcel of the historical record.²² In the words of Asher Maoz: “[T]he judicial determination per se has far-reaching consequences because of the great public confidence in its validity and the public's identification of that determination with the ‘real’ truth.”²³

¹⁸ MISHPAT VE'HISTORIYA [LAW AND HISTORY] (Daniel Gutwein & Menachem Mautner eds., 1999). See also Haim H. Cohn, *Din emet le'amito* [*The True Justice*], in GEVUROTH LE' SHIMON AGRANAT [ESSAYS IN HONOR OF SHIMON AGRANAT] (Ruth Gavison & Mordechai Kremnitzer eds., 1986).

¹⁹ Stephen J. Toope, *Public Commitment to International Law: Canadian and British Media Perspectives on the Use of Force*, in BRITISH AND CANADIAN PERSPECTIVES ON INTERNATIONAL LAW 13-29 (Christopher Waters ed., 2006).

²⁰ See Gutwein & Mautner, *supra* note 18. See also Cohn, *supra* note 18, at 35, 57.

²¹ Asher Maoz, *Historical Adjudication: Courts of Law, Commissions of Inquiry, and “Historical Truth,”* 18 LAW & HIST. REV. 559, § 13 (2000), available at <http://www.history.cooperative.org/journals/lhr/18.3/maoz.html>; see also Aharon Barak, *Al Mishpat, Shiput ve'e'met* [*On Law, Adjudication, and Truth*], 27 MISHPATIM [L.R. OF THE HEBREW UNI.] 11 (1996) (Isr.).

²² See Gutwein & Mautner, *supra* note 18; see also Cohn, *supra* note 18, at 35 & 57; for an example the on “court rulings as history” generally, see Daphna Barak-Erez, *Collective Memory and Judicial Legitimacy: The Historical Narrative of the Israeli Supreme Court*, 16 CAN. J.L. & SOC. 93, 95 (2001), available at <http://www.tau.ac.il/law/barakerez/articals/canadian.pdf>.

²³ See Maoz, *supra* note 21, at 569.

Accordingly, courts' recognition of past genocides, their chronicling of the incitement leading thereto and sanctioning of their denial serve a particularly valuable purpose. As Shamsey cautions: "[G]iven the tendencies of legislatures . . . to succumb to pressure of realpolitik, it [is] crucial for the [the law/courts] . . . to do its part in ensuring that the instances of genocide and crimes against humanity in the 21st century are not white-washed or ignored."²⁴

What is more, history is an open intellectual process whereas law is constrained – operates in a given framework,²⁵ which can be ill-maneuvered. Indeed gains in the judicial arena arguably boast a measure of permanence and legitimacy that could not be otherwise achieved.²⁶

Thus, to quote Asher Maoz in a different context:

The historian [or politician] is likely to reach conclusions that his colleagues will dispute — something that is not true of a legal decision. The latter remains in effect until it is overturned in a manner provided for by law . . . the findings of a historian carry with them only the prestige, conscience, and skill of the person standing behind them. A judgment relies on the force of the law.²⁷

A fortiori, when the decision is made in the constitutional realm given its emblematic potency.²⁸ In this vein, the Canadian experience is not of negligible interest.²⁹ In Canada, it is said that the Charter of Rights and Freedoms, enacted as part and parcel of

²⁴ See John Shamsey, *Eighty Years Too Late: The International Criminal Court and the 20th Century's First Genocide*, 11 J. TRANSNAT'L. L. & POL'Y. 327, 376 (2002). While clearly exceeding the scope of this present endeavor, suffice it to note that in *R v. Finta*, [1994] 1 S.C.R. 701, (Finta was accused of being a key official in the rounding up and deportation of Jews in Szeged, Hungary to Auschwitz), the Supreme Court of Canada did not take judicial notice of the Holocaust. See David Matas, *The Case of Imre Finta*, 43 U.N.B. L.J. 281 (1994).

²⁵ See Gutwein & Mautner, *supra* note 18.

²⁶ In addition to defining the relationship between the citizen and the state, a Bill of Rights serves as an exposition of a given community's most cherished values. As the Constitution is said to be normatively superior to ordinary laws – which perish if irreconcilable – the values enshrined therein are reputed that country's secular religion – an “attempt at self-perpetuation” of sorts, binding future generations. CLAUDE KLEIN, *THÉORIE ET PRATIQUE DU POUVOIR CONSTITUANT* (Presses Universitaires de France 1996). See also CLAUDE KLEIN, *THE ETERNAL CONSTITUTION* (Diner *et al.* eds., 2000). See also CARL SCHMITT, *POLITICAL THEOLOGY: FOUR CHAPTERS ON THE CONCEPT OF SOVEREIGNTY* (1985).

²⁷ Maoz, *supra* note 21, at 68.

²⁸ MICHAEL MANDEL, *THE CHARTER OF RIGHTS AND THE LEGALIZATION OF POLITICS IN CANADA* (1992). See also R. KNOPFF & F.L. MORTON, *CHARTER POLITICS* (1992).

²⁹ This is true for both the courageous decision not to offer a Constitutional shield to genocide denial, see *R. v. Keegstra*, [1990] 3 S.C.R. 697, to recognize the role of words in ushering in

a worldwide constitutional revolution or shift from majoritarian to constitutional democracy,³⁰ served to mold and refashion Canadians' identity. *Charter* values are considered to filter through society."³¹

So called "Charter Canadians"³² now intimately identify with their bill of rights and correctly perceive themselves as rights-bearers.³³ What is more, the discourse used both within and without the courtroom has similarly evolved to reflect this shift, with invocation of human rights terminology becoming commonplace. As Schneiderman explains: "the *Charter* has insinuated itself into our consciousness. It has become a central component of the symbolic order."³⁴ In a word, it served to "re-orient the moral compass of the citizenry."³⁵

This in and of itself is a most positive and cherished development. The Charter's public and authoritative recognition of rights gave added legitimacy within the political arena for claims to fairer treatment of vulnerable minorities in all contexts.³⁶ The difficulty

violence, see Mugesera *infra*, note 57, and for the potential of abuse of the protected human rights, see Zundel *infra*, note 53 and Finta *supra* note 24.

³⁰ See Weinrib, *Supreme Court*, *supra* note 13.

³¹ Canada also has enacted The Canadian Human Rights Act which states the following as its purpose:

The purpose of this Act is to extend the laws in Canada to give effect, within the purview of matters coming within the legislative authority of Parliament, to the principle that all individuals should have an opportunity equal with other individuals to make for themselves the lives that they are able and wish to have and to have their needs accommodated, consistent with their duties and obligations as members of society, without being hindered in or prevented from doing so by discriminatory practices based on race, national or ethnic origin, colour, religion, age, sex, sexual orientation, marital status, family status, disability or conviction for an offence for which a pardon has been granted.

Canadian Human Rights Act, R.S.C., ch. H 6 (1985), available at <http://laws.justice.gc.ca/en/showdoc/cs/H-6//en?page=1>.

³² Term coined by eminent political scientist Alan Cairns.

³³ Charter Canadians have a "new awareness of rights and freedoms." Frank Iacobucci, *The Charter: Twenty Years Later*, 21 WINDSOR Y.B. ACCESS JUST. 3, 21 n.59 (2002) (quoting unpublished remarks given by Justice Bertha Wilson of the Supreme Court of Canada on her last day on the bench, December 6, 1990).

³⁴ CHARTING THE CONSEQUENCES: THE IMPACT OF CHARTER RIGHTS ON CANADIAN LAW AND POLITICS (David Schneidermann & Kate Sutherland eds., 1997).

³⁵ See *id.* "[T]he Charter has insinuated itself into our consciousness. It has become a central component of the symbolic order." *Id.* (emphasis added). Herman notes that *Charter* values "filter through society symbolically."; Alan C. Cairns, *Book Reviews "Charting the Consequences: The Impact of Charter Rights on Canadian Law and Politics,"* 36 ALBERTA L. REV. 1039, 1042 (1998) (emphasis added).

³⁶ See Weinrib, *Supreme Court*, *supra* note 13.

it is posited lies not with the advent of a rights culture but with the potential for its manipulation.

In addition to *changing the venue* in which difficult political choices are made, the ‘legalization’ phenomenon – brought on by, or resulting from, the Charter – also serves to obscure these issues’ political character by clothing them in legal jargon. Once issues are proffered “in terms of conflict of *right* as opposed to conflicts of *interest*”³⁷ the balance of power inevitably changes as he invoking ‘rights’ is presumed to be of higher moral caliber – a “Charter Warrior” fighting injustice even if it is a genocide denier.

Cognizant thereof, “instead of directly attacking democracy,” genocide deniers and proponents of violence against vulnerable peoples “opt for a more deceptive and cunning strategy of inner attrition.”³⁸

To quote Andreas Kalyvas, “[i]n a democratic age, where the idea of constitutionalism and rights enjoys a vast ideological hegemony, the effective challenge can only come from within.”³⁹ A classic example of the manipulation of Human Rights rhetoric in Canada is that of Ernst Zundel, one of the largest distributors of hate literature and Holocaust deniers in the world. In the multiple proceedings against him (which time does not permit to elaborate) Zundel posed as the noble champion for freedom of expression. As Mark Freiman eloquently recounts, Zundel and his attorney showed up in bullet-proof vests, to act as victims of what they characterized as the enemies of free speech and historical truth.⁴⁰

The use of rights narratives by holocaust deniers and rights language by inciters, while visibly only in its inception, begs our vigilance.⁴¹ It further underscores the need for a principled stance to constitutional interpretation. Such a principled stance was arguably taken by Canada’s Supreme Court in its handling of hate speech generally and the denial of genocide specifically.

³⁷ See MANDEL, *supra* note 28, at 125.

³⁸ Andreas Kalyvas, *Carl Schmitt and the Three Moments of Democracy*, 21 CARDOZO L. REV. 1525, 1528 (2000).

³⁹ *Id.* at 1528–29.

⁴⁰ Mark Freiman, *Litigating Hate on the Internet*, http://www.ccdp-chrc.ca/proactive_initiatives/hoi_hsi/page6-en.asp Apr. 14, 2008.

⁴¹ Vivian Grosswald Curran, *The Legalization of Racism in the Constitutional State: Democracy’s Suicide in Vichy France*, 50 HASTINGS L.J. 1, 2 (1998) (explaining “how a constitutional democracy can undermine itself from within, despite legal, constitutional and procedural safeguards designed to ensure self-perpetuation”).

THE CANADIAN EXPERIENCE: A BRIEF OVERVIEW⁴²

“Historians have recognized that genocide results from the conscious choices of elites and occurs when there is indifference of outsiders to early warning signs, particularly hate language that serves to catalyze genocidal actions.”⁴³ Importantly, so has the Supreme Court of Canada, which, unlike its American counterpart,⁴⁴ has elected to balance the value of free speech with the competing constitutional values of dignity,⁴⁵ equality⁴⁵ and multiculturalism.⁴⁶

⁴² See generally Kathleen Mahoney, *The Canadian Constitutional Approach to Freedom of Expression in Hate Propaganda and Pornography*, 55 L. & CONTEMP. PROBS. 77, 102–103, (1992); see also Jean-Francois Gaudreault-DesBiens, *From Sisyphus’s Dilemma to Sisyphus’s Duty? A Meditation on the Regulation of Hate Propaganda in Relation to Hate Crimes and Genocide*, 46 MCGILL L.J. 121, 121–139 (2000).

⁴³ See e.g. Genocide Watch, www.genocidewatch.org (last visited Jan. 2007); Hadassah-Hebrew University Program on Genocide Prevention, <http://www.spme.net/cgi-bin/articles.cgi?ID=359>.

As Eliahu Richter at all correctly observe, “Genocide is the foremost cause of preventable death and suffering in the last hundred years. Governmental incitement and use of hate language is a recognized predictor of genocide, and incitement to commit genocide is a crime in violation of the Genocide Convention. Indifference to incitement and inaction by the outside world are recognized predictors and risk factors for genocide. Denial of previous genocides is another risk factor contributing to future genocides.

Id.

⁴⁴ See Keegstra, *supra* note 30, at ¶ 60:

[A]pplying the *Charter* to the legislation challenged in this appeal reveals important differences between Canadian and American constitutional perspectives. I have already discussed in some detail the special role of s. 1 in determining the protective scope of *Charter* rights and freedoms. Section 1 has no equivalent in the United States, a fact previously alluded to by this Court in selectively utilizing American constitutional jurisprudence (see, e.g., *Re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486 (Can.), *per* Lamer J., at p. 498). Of course, American experience should never be rejected simply because the *Charter* contains a balancing provision, for it is well known that American courts have fashioned compromises between conflicting interests despite what appears to be the absolute guarantee of constitutional rights. Where s. 1 operates to accentuate a uniquely Canadian vision of a free and democratic society, however, we must not hesitate to depart from the path taken in the United States. Far from requiring a less solicitous protection of *Charter* rights and freedoms, such independence of vision protects these rights and freedoms in a different way. As will be seen below, in my view the international commitment to eradicate hate propaganda and, most importantly, the special role given equality and multiculturalism in the Canadian Constitution necessitate a departure from the view, reasonably prevalent in America at present, that the suppression of hate propaganda is incompatible with the guarantee of free expression.

Id. See also Jamie Cameron & Kathleen Mahoney, *Language as Violence v. Freedom of Expression: Canadian and American Perspectives on Group Defamation*, 37 BUFF. L. REV. 337, 344 & 353 (1988–89).

⁴⁵ Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11 article 15 (1) (“Every individual is equal before and

For that reason, only *unreasonable* infringements of Constitutional rights are deemed unconstitutional under the Canadian Charter of Rights and Freedoms.

Consequently, although hate speech is considered protected speech in Canada, anti-hate provisions, limiting hateful expression, both of criminal and administrative law ilk⁴⁷ have been upheld.

The leading case relevant to hate speech and genocide denial is the Supreme Court decision in *R v. Keegstra*.⁴⁸ The facts can be roughly summarized as follows: James Keegstra was a high school social studies teacher and mayor of Eckville Alberta who for years taught that Jews were “child killers” out to destroy Christianity and created the myth of Holocaust to gain sympathy. He further preached that the Holocaust never occurred. He was eventually charged with willfully promoting hatred under section 281(2) [now 319(2) of Canada’s Criminal Code] which proscribes the willful public communication of extreme hatred against an identifiable group.⁴⁹ Importantly, the communication is deemed “willfull,” ac-

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 and ethnic origin, colour, religion, sex, age or mental or physical disability.”).

⁴⁶ Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, Schedule B to the Canada Act 1982 (U.K.), c. 11 (“This Charter shall be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians.”).

⁴⁷ Communicating hate messages is prohibited by section 13 of the *Canadian Human Rights Act*, Canada Human Rights Law, R.S.C., Ch. H-6 (1985) which states,

As interpreted by the courts, messages are likely to expose persons to “hatred” when they portray a person or a group of persons as having no redeeming qualities and involve emotions and feelings of extreme ill will toward others. Such messages are likely to expose persons to “contempt” where they portray persons as being inferior. Noteworthy, s. 13 itself survived a constitutional challenge alleging that it was inconsistent with the freedom of speech guarantees in Canada.

Id. See also Human Rights Commission v. Taylor, [1990] 3 S.C.R. 892; Ross v. School District No. 15, [1996] 1 S.C.R. 825. A thorough discussion of the Ross Case is beyond the scope of this discussion. Suffice it to observe that Ross a teacher publicly made comments against Jews. A Jewish parent filed a complaint with the New Brunswick Human Rights Commission, alleging that the school board, which employed the teacher, violated section 5(1) of the Human Rights Code by discriminating against him and his children, on the basis of religion and ancestry, in the provision of accommodation, services or facilities. Ross was disciplined and subsequently challenged the decision’s constitutionality. Based on reasoning, not dissimilar to Keegstra (although in the administrative rather than criminal law realm), the Supreme Court of Canada upheld the Human Rights Act remedies against hate speech as a reasonable balance. *Id.*

⁴⁸ See Keegstra, *supra* note 30.

⁴⁹ Criminal Code, R.S.C., c. C-46, 319 (1985)

- (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.

ording a high standard of intention in terms of a criminal *mens rea* where one subjectively desires the promotion of hatred or foresees such a consequence as certain or substantially certain to result from their act.⁵⁰

The rationale being – to borrow the Supreme Court of Canada’s eloquent words – that the Holocaust did not begin in the gas chambers but with words.⁵¹ Keegstra of course proceeded to chal-

- (3) No person shall be convicted of an offence under subsection (2)
- (a) if he establishes that the statements communicated were true;
 - (b) if, in good faith, he expressed or attempted to establish by argument an opinion on a religious subject;
 - (c) if the statements were relevant to any subject of public interest, the discussion of which was for the public benefit, and if on reasonable grounds he believed them to be true; or
 - (d) if, in good faith, he intended to point out, for the purpose of removal, matters producing or tending to produce feelings of hatred towards an identifiable group in Canada.
- (6) No proceeding for an offence under subsection (2) shall be instituted without the consent of the Attorney General.
- (7) In this section, “communicating” includes communicating by telephone, broadcasting or other audible or visible means;
 “identifiable group” has the same meaning as in section 318;
 “public place” includes any place to which the public have access as of right or by invitation, express or implied;
 “statements” includes words spoken or written or recorded electronically or electromagnetically or otherwise, and gestures, signs or other visible representations.
 318. . . .
- (4) In this section, “identifiable group” means any section of the public distinguished by colour, race, religion, ethnic origin, or sexual orientation.

Id.

⁵⁰ See Myron Claridge, *The Criminal Code and Hate: A Criminal Law Approach to Combating Hate*, CANADA HUMAN RIGHTS COMMISSION, http://www.chrc-ccdp.ca/proactive_initiatives/hoi_hsi/page8-en.asp. The hate/bias crime provisions of the *Criminal Code* can be separated into two categories:

1. Hate propaganda offences where the offender advocates genocide or communicates hatred of any identifiable group Sections 318, 319, 320 and 320.1.
2. Any other offence motivated by bias, prejudice or hate where the sentencing judge must consider this as an aggravating factor section 718.2(a)(1). These provisions date from 1996 amendments to the *Criminal Code*. . .

Section 318, “Advocating Genocide” states that every one who advocates or promotes genocide is guilty of an indictable offence. Genocide is defined as acts committed with intent to destroy in whole or in part any identifiable group, namely, including killing members of the group or deliberately inflicting on the group conditions of life calculated to bring about its physical destruction.

Section 319(1), “Public Incitement of Hatred,” states that 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 an indictable offence or an offence punishable on summary conviction.

Id.

⁵¹ See Michel Troper, *La Loi Gayssot et la Constitution*, 54 ANNALES, HISTOIRE, SCIENCES SOCIALES 1239 (1999), extracts available at <http://www.phdn.org/negation/gayssot/troper.html> . (explaining that the speech right “must . . . give way to other no less precious rights. A liberty

lenge the provision's constitutionality, arguing that it offended the right to free expression, enshrined in section 2(b) of Canada's Charter of Rights and Freedoms⁵² – of superior normative character.

The Supreme Court of Canada held that although [now] subsection 319(2) of the Criminal Code⁵³ did in fact violate the Charter's freedom of expression guarantee (hate speech was a protected form of expression),⁵⁴ it could be saved as a reasonable limit under

[such as speech] quickly finds its limits, either in others' rights or in the necessities of public order").

⁵² Part I of the Constitution Act, 1982, Schedule B to the Canada Act 1982, ch. 11 (U.K.).

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

2. Everyone has the following fundamental freedoms. . . (b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;

Id.

⁵³ Briefly, four offences in the Canadian criminal code deal specifically with hate speech: (1) § 318 relates to the advocacy of genocide; (2) § 319(1) involves the public incitement of hatred; (3) § 319(2) willful promotion of hatred; and (4) § 181, the so called "spreading false news" provision was struck down as unconstitutional in *R. v. Zundel*, [1992] 2 S.C.R. 731, 95 D.L.R. (4th) (accepting the proposition that spreading false news could have value). *See also* Criminal Code, R.S.C., ch. C 46 (1985).

⁵⁴ *See* Keegstra, *supra* note 30 at 33. The first step in the *Irwin Toy* analysis involves asking whether the activity of the litigant who alleges an infringement of the freedom of expression falls within the protected § 2(b) sphere. In outlining a broad, inclusive approach to answering this question, the following was said:

"Expression" has both a content and a form, and the two can be inextricably connected. Activity is expressive if it attempts to convey meaning. That meaning is its content. Freedom of expression was entrenched in our Constitution and is guaranteed in the Quebec *Charter* so as to ensure that everyone can manifest their thoughts, opinions, beliefs, indeed all expressions of the heart and mind, however unpopular, distasteful or contrary to the mainstream. Such protection is, in the words of both the Canadian and Quebec Charters, "fundamental" 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.

Apart from rare cases where expression is communicated in a physically violent form, the Court thus viewed the fundamental nature of the freedom of expression as ensuring that "if the activity conveys or attempts to convey a meaning, it has expressive content and *prima facie* falls within the scope of the guarantee" (p. 969). In other words, the term "expression" as used in s. 2(b) of the *Charter* embraces all content of expression irrespective of the particular meaning or message sought to be conveyed (*Reference re ss. 193 and 195.1(1)(c) of the Criminal Code (Man.)*, *supra*, at p. 1181, *per* Lamer J.) . . . I thus conclude on the issue of s. 2(b) by finding that s. 319(2) of the *Criminal Code* constitutes an infringement of the *Charter* guarantee of freedom of expression, and turn to examine whether such an infringement is justifiable under s. 1 as a reasonable limit in a free and democratic society.

Id. at ¶ 44.

section 1 (the justification clause)⁵⁵ given the right of minorities to protection against group-vilifying speech *inter alia*.⁵⁶

⁵⁵ The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society. See also Keegstra, [1990] 3 S.C.R. 697, ¶ 46.

R. v. Oakes, [1986] 1 S.C.R. 103. This Court offered a course of analysis to be employed in determining whether a limit on a right or freedom can be demonstrably justified in a free and democratic society. Under the approach in *Oakes*, it must first be established that impugned state action has an objective of pressing and substantial concern in a free and democratic society. Only such an objective is of sufficient stature to warrant overriding a constitutionally protected right or freedom. The second feature of the *Oakes* test involves assessing the proportionality between the objective and the impugned measure.

⁵⁶ See Keegstra, [1990] 3 S.C.R. 697

In my opinion, a response of humiliation and degradation from an individual targeted by hate propaganda is to be expected. A person's sense of human dignity and belonging to the community at large is closely linked to the concern and respect accorded the groups to which he or she belongs (see I. Berlin, "Two Concepts of Liberty," in *Four Essays on Liberty* (1969), 118, at p. 155). The derision, hostility and abuse encouraged by hate propaganda therefore have a severely negative impact on the individual's sense of self-worth and acceptance. This impact may cause target group members to take drastic measures in reaction, perhaps avoiding activities which bring them into contact with non-group members or adopting attitudes and postures directed towards blending in with the majority. Such consequences bear heavily in a nation that prides itself on tolerance and the fostering of human dignity through, among other things, respect for the many racial, religious and cultural groups in our society.

A second harmful effect of hate propaganda which is of pressing and substantial concern is its influence upon society at large. The Cohen Committee noted that individuals can be persuaded to believe "almost anything" (p. 30) if information or ideas are communicated using the right technique and in the proper circumstances (at p. 8): . . . we are less confident in the 20th century that the critical faculties of individuals will be brought to bear on the speech and writing which is directed at them. In the 18th and 19th centuries, there was a widespread belief that man was a rational creature, and that if his mind was trained and liberated from superstition by education, he would always distinguish truth from falsehood, good from evil. So Milton, who said "let truth and falsehood grapple: who ever knew truth put to the worse in a free and open encounter."

We cannot share this faith today in such a simple form. While holding that over the long run, the human mind is repelled by blatant falsehood and seeks the good, it is too often true, in the short run, that emotion displaces reason and individuals perversely reject the demonstrations of truth put before them and forsake the good they know. 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.

It is thus not inconceivable that the active dissemination of hate propaganda can attract individuals to its cause, and in the process create serious discord between various cultural groups in society. Moreover, the alteration of views held by the recipients of hate propaganda may occur subtly, and is not always attendant upon conscious acceptance of the communicated ideas. Even if the message of hate propaganda is outwardly rejected, there is evidence that its premise of racial or religious

Most significantly for our purposes, the majority opined that hate speech can serve as a precursor to genocide and, through its ruling, advocated a precautionary approach to denial and incitement.

The peril of hate speech and perhaps more importantly – its direct role in causing genocide was again recognized by the Canadian Supreme Court in the case of *Mugesera*.⁵⁷ While the decision was handed down in the context of immigration – Mugesera was an incitor of the Rwandan genocide who sought refuge in Canada, the recognition that the danger of hate speech in the Court’s opinion “lies not only in the injury to the self-dignity of target group members but also in the credence that may be given to the speech, which may promote discrimination and even violence” is of the essence.

Finally, more recently and in the same vein, the Federal Court of Canada recognized that “[t]he damage caused by hate messages to the groups targeted is very often difficult to repair.”⁵⁸ If constitutionalism is to serve the purpose for which it was intended – namely – to safeguard substantive democracy – the principles of constitutional interpretation require a lucid evaluation.

This is in order to embrace a coherent judicial philosophy consciously aimed at preserving its moral basis. To this end, we must recognize that rights cannot simply be balanced in an ad-hoc fashion since, as David Cole cautions in a different context: The problem with an ad hoc approach is that it does away with the animating idea of the Constitution – namely that it represents a collective commitment to principles constitutional theory requires an effort, guided by text, precedent and history to identify the higher principles that guide us as a society.”⁵⁹

History teaches the importance of the precautionary principle as it relates to genocide denial. Canadian law, as shown, has embraced this view by upholding carefully drafted anti-hate provi-

inferiority may persist in a recipient’s mind as an idea that holds some truth, an incipient effect not to be entirely discounted (see Matsuda, op. cit., at pp. 2339-40). *Id.* at ¶ 65-66.

⁵⁷ *Mugesera v. Canada (Minister of Citizenship and Immigration)*, [2005] SCC 40 § 8, available at <http://www.SCC.lexum.umontreal.ca/en/2005scc40/2005scc40.html>. See also Joseph Rikhof, *Hate Speech and International Criminal Law*, 3 J. INT’L CRIM. JUST. 1121 (2005).

⁵⁸ *Canadian Human Rights Commission v. Winnicki* 2005 FC 149, ¶ 30, available at http://www.chrc-ccdp.ca/media_room/jurisprudence/page2-en.asp.

⁵⁹ David Cole, *How to Skip the Constitution*, N.Y. REV. BOOKS (Nov. 2006), available at <http://www.nybooks.com/articles/19595> (reviewing RICHARD POSNER, *NOT A SUICIDE PACT: THE CONSTITUTION IN A TIME OF NATIONAL EMERGENCY* (2006)).

sions. Extreme forms of expression such as the willful promotion of hatred are a justifiable and proportional limit on free expression in light of their deleterious effects upon the dignity and equality of the vulnerable and society as a whole. The challenge for both judges and civil society now is not to let constitutionalism be undermined by the very narrative it conceived.

