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similar statutory provisions.¹⁵⁸ Criminal appeals to the Judicial Committee were, however, brought to an end with the passage of the Parliament of Canada's *Criminal Code Amendment Act, 1933*.¹⁵⁹ The validity of this Canadian legislation was upheld by the Judicial Committee in *British Coal Corporation et al. v. The King*¹⁶⁰ in part because of the changes to the Canadian constitution brought about by the passage of the *Statute of Westminster*.¹⁶¹

ETHICAL CONSIDERATIONS IN MEDIA COVERAGE OF HATE SPEECH IN CANADA¹

Raphael Cohen-Almagor*

In many democracies, freedom of expression and freedom of the media are guaranteed by the same constitutional provision. The author addresses the issue of media coverage of hate speech in Canada, one of the world's major exporters of hate literature. It is argued that the media should not cooperate with hate-mongers by providing them an uncontrolled platform for disseminating their ideas. This is not to say that the media should fail to report about the conduct of hate-mongers. Instead, it is argued that media coverage of hate speech should be cautious, sensitive to the interests of the group under attack and responsible. The free media should assist the democracy that enables their functioning in fighting the enemies of democracy.

Dans bon nombre de démocraties, la liberté d'expression et de la presse sont assurées par les mêmes dispositions constitutionnelles. L'auteur aborde la question de la couverture par la presse de la propagande haineuse au Canada, qui est l'un des plus gros exportateurs de littérature raciste du monde. L'auteur insiste sur le fait que la presse ne devrait pas collaborer avec des semeurs de haine en leur fournissant une tribune non contrôlée pour la propagation de leurs idées. Cela ne veut pas dire que la presse ne devrait pas signaler la conduite de semeurs de haine. Au contraire, on insiste sur le fait que la presse devrait faire preuve de prudence, de sensibilité à l'égard des intérêts du groupe remis en question et de la responsabilité dans sa couverture. Les médias libres devraient aider la démocratie qui assure leur fonctionnement en luttant contre les éléments de la démocratie.

¹ The author is most grateful to Wayne Sumner, Roderick A. Macdonald, Eugene Volokh, Conrad Winn, Joe Magnet and the Review's referees for their enlightening comments, and to Darren Jacob for her research assistance. I also express gratitude to The Honourable Justice Peter de C. Cory, The Honourable Justice Herbert Marx, Michel Roy, Einn Raudsepp, Martin Freeman, Dick Moon, Mark J. Freeman, Eric Barendt, Mayo Moran, Rick Abel and Jim Weinstein for providing me with pertinent material.

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¹⁵⁸ For an analysis of the Judicial Committee's actions in the *Nadan* decision, see J.D. Krikorian, "British Imperial Politics and Judicial Independence" (2000) 33 Can. J. Pol. Sc. 291.

¹⁵⁹ *Criminal Code Amendment Act, 1933* (Canada), 23 & 24 George V, c. 53, s. 17.

¹⁶⁰ *British Coal Corporation et al. v. The King*, [1935] A.C. 500.

¹⁶¹ *Statute of Westminster, 1931* (U.K.), 22 & 23 George V, c. 4.

1. INTRODUCTION

In many democracies, freedom of expression and freedom of the media are guaranteed by the same constitutional provision. Section 2(b) of the *Canadian Charter of Rights and Freedoms*² holds that everyone has the following fundamental freedoms: "freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication." The First Amendment to the American Constitution prohibits the abridgement of "the freedom of speech, or of the press." The British courts tend to treat freedom of speech and freedom of the press as interchangeable terms.³ In turn, article 5 of the German *Grundgesetz*⁴ covers press and broadcasting freedom, as well as the right enjoyed by everyone to disseminate opinions freely.⁵

Having said that, in the context of racist hate speech many democracies, as well as important international conventions, prohibit the dissemination of ideas hostile to racial groups. For instance, article 266(b) of the Danish *Penal Code* outlaws statements "threatening, insulting or degrading a group of persons on account of their race, colour, national or ethnic origin or belief."⁶ In the Netherlands, article 137 of the *Criminal Code*⁷ dictates that it is a criminal offence to "deliberately give public expression to views insulting to a group of persons on account of their race, religion or conviction or sexual preference." In Sweden, the *Freedom of the Press Act*⁸ prohibits the expression of contempt for a population group "with allusion to its race, skin colour, national or ethnic origin, or religious faith." In Australia, section 3 of *Racial Hatred Act*,⁹ prohibits

² Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

³ See e.g. *A.G. v. Guardian Newspapers* (no. 2), [1990] A.C. 109. See also E. Barendt, "Press and Broadcasting Freedom: Does Anyone Have Any Rights to Free Speech?" (1991) 44 *Curr. Leg. Prob.* 63 at 64–65.

⁴ *Basic Law for the Federal Republic of Germany* (Bonn: Press and Information Office of the Federal Government, 1994). See also G.H. Fox & G. Nole, "Intolerant Democracies" (1995) 36 *Harv. Intnl. L. J.* 1 at 32–34; D.P. Kommers, *The Constitutional Jurisprudence of the Federal Republic of Germany* (Durham: Duke University Press, 1989).

⁵ In Israel no specific law guarantees freedom of speech or of the press.

⁶ In J. Weinstein, "Hate Speech, Viewpoint Neutrality, and the American Concept of Democracy" (working draft) at 27.

⁷ *Criminal Code* (*Wetboek van Strafrecht*) (Netherlands).

⁸ *Freedom of the Press Act* (Sweden), c. 7, art. 4, online: The Swedish Parliament Homepage <www.riksdagen.se/english/society/fundamental/press/index.htm> (accessed on: 28 September 2001).

⁹ *Racial Hatred Act 1995* (Aust.), s. 3.

public behaviour that is likely "to offend, insult, humiliate or intimidate another person or group of people" if the act is done because of the race, colour or national or ethnic origin of the other person or a group.¹⁰ In Germany, article 130 of the *Penal Code* prohibits the production, storage or use of documents inciting hatred against part of the population or against groups determined by nationality, race, religion, or ethnic origin.¹¹ In Israel, Amendment No. 20 (1986) to the *Penal Code*¹² makes "incitement to racism" a criminal offence. Anyone who publishes anything with the purpose of inciting racism is liable to five years imprisonment (144B), and anyone who has racist publications in his or her possession for distribution is liable to imprisonment for one year (144D). The term "racism" is defined as "persecution, humiliation, degradation, manifestation of enmity, hostility or violence, or causing strife toward a group of people or segments of the population — because of colour or affiliation with a race or a national-ethnic origin" (144A). And the *Race Relations Act 1976*¹³ made "incitement to racial hatred" an offence in the United Kingdom in circumstances where the accused intended to incite racial hatred against any section of the public distinguished by colour, race, nationality or ethnic or national origins and the language used was threatening, abusive or insulting and was likely to stir up racial hatred.¹⁴

In turn, the following international conventions expressly prohibit hate speech. Article 4 of the *International Convention on the Elimination of All Forms of Racial Discrimination*¹⁵ requires state parties to declare as criminal offences "all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination" and participation in organizations which promote and incite racial discrimination. Article 20 of the *International*

¹⁰ W. Sadurski, *Freedom of Speech and Its Limits* (Dordrecht: Kluwer, 1999) at 179.

¹¹ *Penal Code*, StGB art. 130 (Federal Republic of Germany). Translation by F. Kübler in "How Much Freedom for Racist Speech? Transnational Aspects of a Conflict of Human Rights" (1998) 27 *Hofstra L. Rev.* 335 at 345. For further discussion on hate speech regulation in Germany, and also France, see J.-Q. Whitman, "Enforcing Civility and Respect: Three Societies" (2000) 109 *Yale L.J.* 1279.

¹² *Laws of the State of Israel*, 1191 (13 August 1986) at 219–20. See also A. Rubinstein, *The Constitutional Law of the State of Israel* (Jerusalem: Schocken, 1980) (Hebrew).

¹³ *Race Relations Act 1976* (U.K.), 1976, c. 48.

¹⁴ *Ibid.*, s. 6. See also R. Cohen-Almagor, *The Boundaries of Liberty and Tolerance* (Gainesville, FL: The University Press of Florida, 1994) at 270, n. 25, 281, n. 26 [hereinafter *Boundaries*].

¹⁵ *International Convention on the Elimination of All Forms of Racial Discrimination*, 660 U.N.T.S. 195 (adopted 21 December 1965) [hereinafter CERD].

*Covenant on Civil and Political Rights*¹⁶ declares that "[a]ny advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law."

The premise of this essay is that free expression is a fundamental right and value in democracies. It is the freedom of the individual to realize herself, to form a worldview and an opinion by giving flight to her spirit. It is the freedom of the individual and the community to bring truth to light through a struggle between truth and falsehood. The underlying assumption is that truth will prevail in a free and open encounter with falsehood. Furthermore, freedom of expression is necessary for maintaining the vitality of beliefs. It is the freedom to exchange opinions and views in a spirit of tolerance, with respect for the autonomy of every individual, and to persuade one another to strengthen, secure and develop the democratic system. Freedom of expression is crucial in indicating causes of discontent, the presence of cleavages and possible future conflicts.¹⁷

The second premise holds that there is a need to strike a balance between the right to freedom of expression and the harms that might result from a certain speech. It is argued that the right to exercise free expression does not include the right to do unjustifiable harm to others.¹⁸ Indeed, one of the four key principles of the Society of Professional Journalists' Code of Ethics is the minimization of harm: "ethical journalists treat sources, subjects and colleagues as human beings deserving of respect." The Code further instructs journalists to show compassion for those who may be affected adversely by news coverage and to avoid pandering to lurid curiosity, maintaining that the "pursuit of the news is not a license for arrogance."¹⁹

The third premise relates specifically to the harms of hate speech and the price society is required to pay when it tolerates such speech. Hate speech causes

¹⁶ *International Covenant on Civil and Political Rights*, 999 U.N.T.S. 171 (adopted 16 December 1966) [hereinafter CCPR].

¹⁷ A. Barak, "Freedom of Expression and Its Limitations" in R. Cohen-Almagor, ed., *Challenges to Democracy: Essays In Honour and Memory of Professor Sir Isaiah Berlin* (London: Ashgate, 2000) at 168 [hereinafter *Challenges*]; Cohen-Almagor, *supra* note 14 at 89-93; T.I. Emerson, *Toward a General Theory of the First Amendment* (New York: Random House, 1966) at 5-15.

¹⁸ *Canadian Charter of Rights and Freedoms*, *supra* note 2, s. 1; R. v. *Keegstra*, [1990] 3 S.C.R. 697 [hereinafter *Keegstra*]; *Canadian Human Rights Commission et al. v. Taylor et al.* (1990), 75 D.L.R. (4th) 577 (S.C.C.); R. v. *Butler*, [1992] 1 S.C.R. 452.

¹⁹ See Ontario Press Council, *24th Annual Report* (Toronto, Ontario, 1996) at 79.

immediate mental and emotional distress in its targets. It might also inflict psychological harm. The Canadian Supreme Court acknowledged this by using a harm-based rationale to justify criminalizing hate speech in *Keegstra*.²⁰ I will elaborate on this decision later. In France, a national report recognized that, in addition to psychological and moral harm, hate speech damages the individual and collective reputations of its victims.²¹ Germans view a racial or ethnic attack as an affront to a person's core identity. The concept of an attack on human dignity presupposes an attack on the core area of the victim's personality, a denial of the victim's right to life as an equal in the community or treating a person as an inferior, which has the effect of excluding him or her from the protection of the constitution.²² South Africa holds that a racial insult "harms souls."²³ In the United Kingdom, racial vilification is a form of defamation.²⁴ Furthermore, Canadian, French, German and British statutory documents affirm a corollary proposition about the effect of hateful speech on the community at large. The *Keegstra* ruling notes that hate propaganda can harm society as a whole. In France, the preamble to a statute on group libel declares that such "aggression is directed against the whole body politic and its social and moral fabric."²⁵ Article 131 of the German *Criminal Code* seeks to protect the "social harmony" endangered by incitement to racial hatred. It penalizes the dissemination, display and production of depictions of violence against people in a cruel or otherwise inhuman manner with the intent to glorify or seek to minimize the cruelty or to incite to racial hatred.²⁶ Common law in the United Kingdom restricts such speech in part to avoid harm to the public order.²⁷

Therefore, the fourth premise is that, with due appreciation for our innate liberal inclination to provide wide latitude to freedom of expression, we must also acknowledge the need for the setting of limits. The media should develop sensitive and responsible mechanisms in their coverage of hate speech. By

²⁰ See *Keegstra*, *supra* note 18.

²¹ R. Delgado & J. Stefancic, *Must We Defend Nazis?* (New York: New York University Press, 1997) at 127-28.

²² R. Hofmann, "Incitement to National and Racial Hatred: The Legal Situation in Germany" in S. Coliver, ed., *Striking a Balance* (London and Essex: Article 19, 1992) 163. For further discussion, see E. Stein, "History against Free Speech: The New German Law against the 'Auschwitz' - and Other - 'Lies'" (1986) 85 Mich. L. Rev. 277.

²³ In Delgado & Stefancic, *supra* note 21 at 128.

²⁴ *Ibid.*

²⁵ *Ibid.*

²⁶ Stein, *supra* note 22 at 281-86.

²⁷ In Delgado & Stefancic, *supra* note 21 at 128.

providing unfettered loudspeakers to hate-mongers, the media play into their hands and help spread their hatred and harmful messages. By 1965, the Special Committee on Hate Propaganda noted its worry that Canada "has become a major source of supply of hate propaganda that finds its way to Europe and specifically to West Germany."²⁸ Canada remains a major exporter of hate literature, and it is of interest to examine to what extent the media cooperate with hate-mongers by providing them a platform for disseminating their ideas.²⁹

Let me substantiate this premise with the following example, taken from Israeli politics. In October 1995, during a large demonstration by the Israeli political right protesting against the Oslo Accords and the Rabin government, photomontages of Prime Minister Yitzhak Rabin dressed in a black S.S. uniform were waved. A photograph of the Prime Minister's face was placed over an image of the body of the notorious Nazi leader Heinrich Himmler. When a political leader is portrayed as a Nazi it constitutes a call for murder, a hateful incitement to eliminate the most fervent enemy of the Jewish people.³⁰ In another article I argued that this speech should be excluded from the protection of the Free Speech Principle, and that the authorities were mistaken in not immediately prosecuting those who waved the photomontage.³¹ They were prosecuted only after Rabin's assassination.³² This hateful expression was instrumental in generating an atmosphere of hatred and incitement that was conducive to the assassination of Prime Minister Rabin on 4 November 1995.

As for the role of the media in covering such episodes, Attorney General Michael Ben-Yair's distinction between direct and indirect coverage is

²⁸ M. Cohen, *Report to the Minister of Justice of the Special Committee on Hate Propaganda* (Ottawa: Queen's Printer, 1966) at 69.

²⁹ For further deliberation, see W. Kinsella, "Challenges to Canadian Liberal Democracy" in *Challenges*, supra note 17, 119.

³⁰ It is not suggested that every incitement is a form of hate speech, or that every hate speech necessarily constitutes incitement. It is possible to incite, for instance, a strike, and there are many forms of hate speech that do not necessarily lead to a violent action. In incitement there is assumed to be a direct correlation between the speech and the violent action. The example here, however, is an example of hateful incitement.

³¹ R. Cohen-Almagor, "Boundaries of Freedom of Expression Before and After Prime Minister Rabin's Assassination" in R. Cohen-Almagor, ed., *Liberal Democracy and the Limits of Tolerance: Essays in Honor and Memory of Yitzhak Rabin* (Ann Arbor: University of Michigan Press, 2000) 79 [hereinafter *Liberal Democracy*].

³² Criminal file 673/95 of 17 March 1996, judgment delivered by Judge Uri Ben-Dor, Magistrate's Court, Jerusalem.

pertinent.³³ There is a difference between holding live interviews with inciters and printing instigating photos, and covering protests and demonstrations against the government. It is one thing to report about leaders of hate groups and/or instigators, and another to provide them with microphones. In Israeli culture and social context, printing photos showing the Prime Minister in a Nazi uniform is unethical. It is one thing to report that during a demonstration pictures of Rabin dressed in a Nazi uniform were waved and quite another to actually print the pictures in the newspapers, thereby serving the interests of the inciters. The media should not serve as a platform for spreading hatred and violence. Indeed, Moshe Vardi, editor of the major Israeli newspaper, *Yedioth Ahronoth*, applied self-censorship and refrained from printing these pictures. He did not wish to serve the interests of inciters. This is an example of applying ethical self-restraint. Another newspaper, *Ma'ariv*, did not adhere to this ethical standard.³⁴

To reiterate, it is *not* argued that the media should not cover incidents of racist manifestations and hate propaganda. The public should be made aware of these phenomena, know about the individuals and groups who preach hate, their motivations and methods. At the same time, it is possible to report about political extremists, their intentions and deeds, in the name of the public's right to know, without playing into the hands of inciters and serving as their loudspeaker. Responsible media are moral media. The setting of limits on the public's right to know should be left in the hands of journalists, but it is important to stress that explicitly inflammatory messages should not be protected

³³ See a letter by Attorney Amir Zolty, Senior Assistant to the Attorney General, to newspaper editors concerning nonpublication of praise for the murder of the Prime Minister and Defence Minister (8 November 1995); D. Meiri & T. Zimki, "There Exists a Danger of Another Political Murder" *Yedioth Ahronoth* (12 November 1995) 7; Uzi Fogelman, "An announcement from the plaintiff" H.C. 7094/95, *The National Union of Journalists v. Attorney General Ben-Yair* (14 December 1995); private discussions with Attorney General Ben-Yair.

³⁴ One referee noted that likening a Canadian political leader to a Nazi would not direct adherents to assassinate the intended target, nor would it usually justify a prosecution for the promotion of hatred. At most, it would lead to a suit for defamation, as happened recently in Québec. The referee therefore wondered: do different political contexts give rise to differing media responsibility? The answer is "no." This article relates to liberal democracies that accept the two basic values: respect for others and abstention from harming others. Examples may differ from one political culture to another but the rationale remains the same. In the Canadian context, if a rally were to be held preaching hatred against Aboriginal First Nations, portraying them as greedy, lazy, drunk and criminal, the media should not air such a portrayal. Instead, they should indirectly report about the hateful message that categorically and collectively denounces a group of people.

under the Free Speech Principle. Furthermore, it is possible to report demonstrations and protests without printing hateful messages (like photos of Israeli leaders dressed in the black Nazi uniform). Media editors and reporters, acting as responsible citizens in a democracy, should report such occurrences along with an unequivocal and clear condemnation. I shall reiterate this point later on.

Democracy and free media live and act under certain basic tenets of liberty and tolerance, from which they draw their strength and vitality and preserve their independence. Two of the most fundamental values underpinning every democracy are respect for others and abstention from harming others.³⁵ They should not be secondary to considerations of profit or of the personal prestige of journalists and newspapers. Journalists should see people as ends and not as means — a Kantian deontological approach.³⁶ This view implies the ability to control the media — even when acting in the name of the public's right to know — whenever publication might cause otherwise unjustifiable harm to others. These instances should be distinguished from incidents when the harm is justified.³⁷ This is what is meant when the media are called "the watchdog[s] of democracy."

The role of the media isn't only to report what "is there" and to "further truth." Along with the power the media possess comes responsibilities to their audience, their profession and to the democracy that enables their functioning.³⁸ The establishment of powerful press empires in Canada feeds the debate on social responsibility. The debate on ethical boundaries in media coverage is recent — the product of the last two decades or so — and nowadays is very

³⁵ R. Dworkin, "Liberalism" in *A Matter of Principle* (Oxford: Clarendon Press, 1985) 181;

R. Dworkin, *Taking Rights Seriously* (London: Duckworth, 1976); *Boundaries, supra* note 14. For further reading and analysis, see R.L. Abel, *Speaking Respect, Respecting Speech* (Chicago and London: The University of Chicago Press, 1998).

³⁶ See I. Kant, *Foundations of the Metaphysics of Morals* (Indianapolis, Ind.: Bobbs-Merrill Educational Publishers, 1969).

³⁷ For instance, when a person acts corruptly and there is evidence to prove it, the media are allowed, and even obliged, to look into the issue and bring it to public scrutiny.

³⁸ I have developed this argument in R. Cohen-Almagor, *Speech, Media and Ethics: The Limits of Free Expression* (Houndmills and New York: Palgrave, 2001) [hereinafter *Speech, Media and Ethics*]. For discussion on the basis of free expression theory and its limits, see K. Greenawalt, *Speech, Crime and the Uses of Language* (New York: Oxford University Press, 1989); Home Office, *Report of the Committee on Privacy and Related Matters* (June 1990), Cm 1102; Sir D. Calcutt, *Review of Press Self-Regulation* (London: Her Majesty's Stationary Office, January 1993) Cm 2135.

lively. It revolves around the questions *what* to report, in what priority and in accordance to what standards, as well as *how* to report.³⁹ It is possible to report about hate-mongers without directly reporting their malicious diatribes.

The further contention of this essay is that the media are not under an obligation to remain impartial or neutral with regard to all concepts: some concepts may coexist with the principles of democracy while others contradict them completely. It is for the media to take a firm stance to defend democracy whenever it is threatened.⁴⁰ On this issue my view differs significantly from the views of some commentators and media codes of conduct which speak of "neutral reporting."⁴¹ It is one thing to ask the media to be neutral in their coverage of news. But there is no obligation on the part of the media to adhere to neutrality in editorials and opinion columns. Indeed, columnists often advance partial views, strongly criticize decision-makers and offer remedies and alternative policies. Professional and ethical reporting means, in a nutshell, caring for the consequences of reporting. Where hate speech and Holocaust

³⁹ H. Holmes & D. Taras, eds., *Media, Power and Policy in Canada* (Toronto: Harcourt Brace Jovanovich, 1992); N. Russell, *Morals and the Media: Ethics in Canadian Journalism* (Vancouver: University of British Columbia Press, 1994); V. Alia, B. Brennan & B. Hoffmaster, eds., *Deadlines and Diversity: Journalism Ethics in a Changing World* (Halifax, Nova Scotia: Fernwood, 1996); A. Siegel, *Politics and the Media in Canada* (Toronto: McGraw-Hill Ryerson, 1996); R. Lorimer & J. McNulty, *Mass Communication in Canada* (Ontario: Oxford University Press, 1996); J. Winter, *Democracy's Oxygen: How Corporations Control the News* (Montreal: Black Rose Books, 1997); R.A. Hackett & Y. Zhao, *Sustaining Democracy? Journalism and the Politics of Objectivity* (Toronto: Garamond Press, 1998); D. Taras, *Power and Betrayal in the Canadian Media* (New York: Broadview Press, 1999).

⁴⁰ See the struggle of the *Times-Picayune* in New Orleans against a bigot named David Duke who wished to become the governor of the state of Louisiana (20 October–17 November 1991 issues). See D.E. Boeyink, "Reporting of Political Extremists in the United States: The Unabomber, the Ku Klux Klan, and the Militias" in *Liberal Democracy, supra* note 31, 215. For discussion on the concept of neutrality, see R. Cohen-Almagor, "Between Neutrality and Perfectionism" (1994) 7 Can. J. L. & Jur. 217.

⁴¹ For instance, the Radio/Television News Directors Association code begins by saying: "The responsibility of radio and television journalists is to gather and report information of importance and interest to the public accurately, honestly, and impartially." For further discussion, see G. Gauthier, "In a Defence of a Supposedly Outdated Notion: The Range of Application of Journalistic Objectivity" (1993) 18 Can. J. Comm. 497; R.A. Hackett, "An Exaggerated Death: Prefatory Comments on 'Objectivity' in Journalism" in Alia, Brennan & Hoffmaster, eds., *supra* note 39 at 40; J. McMannus, "Who's Responsible for Journalism?" (1997) 12 J. M. M. E. 5.

dential are concerned, such caring prescribes partiality rather than neutrality.⁴² Otherwise, impartial reporting might confer legitimacy on racist diatribe and blatant lies.

To substantiate these claims, in the next section I review the issue of hate speech in Canada and how the issue has been addressed by the media and by the courts.

II. HATE SPEECH IN CANADA

During the late 1930s a good deal of hate material was distributed across Canada. Most of the propaganda was anti-Semitic in nature, stressing such themes as "Communism is Jewish." Much of the activity centred around two people, Adrien Arcand and John Ross Taylor. Arcand was the founder of the National Unity Party in Québec, while Taylor was active in Toronto. Both were interned during World War II. Both resumed their hate operations after the war.⁴³

In its conclusions, the Special Committee on Hate Propaganda in Canada (the Cohen Committee) said that although the hate situation in Canada was not alarming, clearly it was serious enough to require action: "The Canadian community has a duty, not merely the right, to protect itself from the corrosive effects of propaganda that tends to undermine the confidence that various groups in a multicultural society must have in each other." The committee therefore recommended that the government take action in fighting against hate propaganda.⁴⁴

The emergence of Ernst Zundel in the 1980s evoked a lot of attention in political, legal and media circles. The media covered Zundel's trial for

⁴² It is suggested that Holocaust denial is a form of hate speech for what is the essence of such denial? The claim that is often made is that Jews invented this fascinating story to blackmail nations, to exploit others for their own purposes. The Holocaust is the product of partisan Jewish interests, serving Jewish greed and hunger for power. The Holocaust invention serves the Jewish conspirators ("elders of Zion") who wish to control and manipulate the world. These contentions are not innocent. Instead, these are contentions of hate. They are designed to evoke resentment against the Jewish people, and to trigger hate against Jews wherever they are.

⁴³ Reprinted from the Cohen Report in M. Cohen, "Hate Propaganda in Canada" in B. D. Singer, ed., *Communications in Canadian Society* (Toronto: Copp Clark, 1975) 342 at 343.

⁴⁴ *Ibid.* at 361.

distributing hate literature,⁴⁵ making the trial a media event.⁴⁶ The main personality, the defendant, did what he could to capture media attention. His hard hat, his short controversial quotes and his staged appearances were a recipe for camera exposure. He persuaded himself and many others that he was a master manipulator of the media. *Media Tactics I* and *Media Tactics II* were the titles of instructional audio tapes produced by the defendant and available for purchase during the course of the proceedings. Commentators and experts discussed at length how the media coverage would affect the Canadian public's beliefs about Nazism, the Holocaust, the justice system and Jews. The trial received an exceptional amount of media attention.⁴⁷

To understand the train of thought of many of the columnists, let me quote from the writings of Barbara Amiel Black, a well-known political columnist for *Maclean's* magazine.⁴⁸

It is a popular assumption that the prosecution of Zundel and the upcoming prosecution of Alberta teacher James Keegstra on similar charges are necessary in order to prevent the development of a climate that could lead to a new Third Reich. ... Hitler was right, alas. You either have free speech for everyone or you do not have free speech. You cannot have a little free speech or free speech 'except for'.

Black maintained: "What all the people who support the prosecutions of the Zundels and Keegstras don't understand is that limiting free speech creates the conditions for the rise of Hitler or his equivalent. The problem with freedom is that it is indivisible."⁴⁹

This liberal point of view is extremely sweeping and, at the same time, naive and false. As was said at the outset, freedom of speech and, indeed, any freedom, is not indivisible. Freedom of speech can inflict a lot of harm. It is not an absolute value that should be protected no matter what. Black's reasoning put a lot of emphasis on the positive consequences of fighting speech with more speech, and very little — if any — attention is given to the harmful consequences of such speech. Hate speech calls for the discrimination of certain

⁴⁵ See E. Kallen & L. Lam, "Target for Hate: The Impact of the Zundel and Keegstra Trials on a Jewish-Canadian Audience" (1993) 25 *Can. Ethnic Stud.* 9.

⁴⁶ On the concept of media events, see D. Dayan & E. Katz, *Media Events* (Cambridge, MA: Harvard University Press, 1992).

⁴⁷ G. Weimann & C. Winn, *Hate on Trial* (Oakville, Ont.: Mosaic Press, 1986) at 83.

⁴⁸ B. A. Black, quoted in M. Barlow & J. Winter, *The Big Black Book* (Toronto: Stoddart, 1997) at 110.

⁴⁹ *Ibid.*

people, denying their right to equal protection and treatment as citizens in a democracy. As premised earlier, it inflicts on its target emotional and psychological suffering, humiliation and distress; sometimes it also evokes intimidation and fear.⁵⁰ Hate speech might also instigate violence against the target group. Furthermore, hate speech may generate a certain discriminatory atmosphere against the target group. It might silence a minority and exclude its members individually and as a group from communicative interaction and from integration into society.⁵¹ When we are faced with questionable speech and ask ourselves whether there is reason to stop it, we need to examine four criteria: the content of the speech, its manner, the intention of the speaker and the circumstances. As I showed elsewhere,⁵² when the content and manner of the speech are significantly harmful, the intent to inflict suffering on a designated target group, and the circumstances such that they make the speech's harm inescapable, then there are grounds to restrict free speech.

Obviously, Black does not share this view. She does not think that we need to review anything but simply grant unqualified protection to freedom of speech. By pursuing this reasoning, she and like-minded journalists gave publicity and even credence to the views of Holocaust deniers and hate-mongers. A York University historian, Ramsay Cook, was quoted as saying: "Those people who denied the Holocaust were given the same objective treatment as the others so it sometimes appeared in the newspapers that this was really a matter that was open to question."⁵³ The media should, of course, cover the trial and the phenomenon but, at the same time, they should also condemn the man and his

⁵⁰ Further harms include feelings of isolation and self-hatred. See R. Delgado, "Words that Wound: A Tort Action for Racial Insults, Epithets, and Name-Calling" (1982) 17 Harv. C.R.-C.L. L. Rev. 133 at 137. See also K. Greenawald, *Fighting Words: Individuals, Communities, and Liberties of Speech* (Princeton, N.J.: Princeton University Press, 1995) at 47-70.

⁵¹ Kübler, *supra* note 11 at 367; J. Weinstein, *Hate Speech, Pornography, and the Radical Attack on Free Speech Doctrine* (Boulder: Westview, 1999) at 127-35. For further discussion, see M. Matsuda, "Public Response to Racist Speech: Considering the Victim's Story" (1989) 87 Mich. L. Rev. 2320.

⁵² For elaborate reasoning, see R. Cohen-Almagor, "Harm Principle, Offence Principle, and the Skokie Affair" in S.J. Heyman, ed., *Controversies in Constitutional Law: Hate Speech and the Constitution*, vol. 2 (New York & London: Garland Publishing, 1996) 277, reprinted from (1993) 41 Pol. Stud. 453.

⁵³ Professor Cook was quoted by M. Polanyi, "Holocaust Fact, Historians State" *Globe and Mail* (30 May 1985) A11. Also in N. Russell, *supra* note 39 at 26. Interview with R. Cook, General Editor, *Dictionary of Canadian Biography*, University of Toronto (1 October 1998).

views in editorials and opinion columns, trying to analyze the framework within which Zundel operates, and pursue the question as to whether the liberty to hate is a liberty that should be safeguarded under the Free Speech Principle. At any rate, denying the Holocaust is not simply offering "another truth" in the free marketplace of ideas,⁵⁴ it is a method of provoking hatred against Jews. Hate-mongers should be looked at as the enemies of democracy and not as people who offer a credible interpretation of history. After all, not all people are "reasonable people." Not all people accept the Holocaust as an indisputable historical fact. Zundel directed his hate speech especially towards young, impressionable minds. He urged them not to accept commonly accepted views without question, appealing to their rebellious nature. When the media cover Zundel's views without qualification, presenting him as a legitimate thinker who is offering his truth in the free market of ideas, the media provide him with a convenient platform from which to mislead people and to rewrite history, and confer onto his views undeserved legitimacy.

In his study of how the Canadian media cover hate propaganda, Warren Kinsella argues that in the *Keegstra* case (discussed below) the Albertan and national news media generally provided good coverage of the issues and personalities involved in the prosecution of the former high school teacher. In the Zundel trials, a less satisfactory approach was taken, with the media providing the pro-Nazi with what he called "one million dollars' worth" of free publicity.⁵⁵ Kinsella contends that in their coverage of the first Zundel trial, the willingness of Canadian reporters and editors to provide an uncritical platform for a parade of Holocaust-denying witnesses was shameful. In the process, the Canadian media gave a far wider circulation to the Holocaust-denying propaganda than Zundel had been able to achieve on his own. After a period of self-analysis and debate, the news media in Canada employed a different approach for Zundel's second trial, with some of them electing to give it very little, if any, prominence.⁵⁶

Having said that, Weimann and Winn argue that the first Zundel trial gave the general public a greater awareness of and sensitivity to Holocaust denial. They

⁵⁴ For a critique of the "free marketplace of ideas" concept, see J. Pole, "Freedom of Speech: From Privilege to Right" in *Challenges*, *supra* note 17, 11.

⁵⁵ W. Kinsella, *Web of Hate: Inside Canada's Far Right Network* (Toronto: Harper Collins, 1995) at 422. Interview with W. Kinsella (2 October 1998).

⁵⁶ Kinsella, *supra* note 29. For further discussion on the Zundel trials, see L. Douglas, "The Memory of Judgment: The Law, the Holocaust, and Denial" (1996) 7 *History and Memory* 100.

maintain that the media balanced their apparently neutral reporting of Holocaust denial with significant exposure for Holocaust survivors testifying at the trial and with extensive reporting on the Holocaust outside the context of the trial. Media users had opportunities to learn the facts of the Holocaust outside the context of the trial itself. Viewers of television and readers of the press could decide for themselves if the Holocaust had ever taken place.⁵⁷

It is reiterated that the media should not treat hate-mongers in a neutral fashion. In support, I recall some statements made by another professional agent of democracy, the courts, in dealing with hate speech. There are significant similarities between the courts and the media. Both are oriented to public questions. Both are expected to safeguard democracy and have a sense of social responsibility.⁵⁸ Both are professions in which a central activity is writing. Writing judgments and writing pieces for the media are rather specific. They are different from scientific professions, where the central activity is to arrive at "lawful" generalizations.⁵⁹ Both the media and the courts can drastically affect people's lives. Of course, there are also major differences that distinguish the courts from the media: (1) while the courts' role is to mete out justice, the role of the media is to inform and report; (2) the neutrality of judges is institutionally protected by their removal from the political and economic arenas, whereas media organizations operate within the market, are profit oriented, and some of them take an active part in politics. Even the publicly funded or regulated radio and TV channels are not free from the need to monitor audience ratings; (3) reporters need not have any formal qualifications to work in the media, whereas judges are required to study, pass exams and excel in law before being appointed to the bench; (4) in most cases, judges have relatively long periods of time to ponder before rendering their judgments, whereas news is a perishable commodity and must be hastily assembled;⁶⁰ (5) while the courts are

⁵⁷ Weimann & Winn, *supra* note 47 at 105.

⁵⁸ The 1947 Report of the Commission on Freedom of the Press, headed by Robert M. Hutchins and entitled "A Free and Responsible Press," is the chief source of the idea that has dominated discussion of journalism ethics for more than fifty years — the concept of the social responsibility of the press. For further discussion, see E.B. Lambeth, *Committed Journalism* (Bloomington, Ind.: Indiana University Press, 1992); C.G. Christians, J.P. Ferré & P.M. Fackler, *Good News* (New York: Oxford University Press, 1993); *Speech, Media and Ethics*, *supra* note 38 at 69–104.

⁵⁹ M. Schudson, *Origins of the Ideal of Objectivity in the Professions* (New York and London: Garland Publishing, 1990) at 28, 231–95.

⁶⁰ For further discussion, see K. Newton, "Neutrality and the Media" in R.E. Goodin & A. Reeve, eds., *Liberal Neutrality* (London & New York: Routledge, 1989) 131.

governmental agents, the media in democracies generally are not. Nevertheless, it is emphasized yet again that both should be committed not to the partisan interests of this or that government but to the inherent values of democracy.

Having acknowledged these major differences, my claim remains that the media, like the courts, have an important role to play in safeguarding democracy. The media need not remain neutral when values and institutions of democracy are threatened and attacked. Journalists are also citizens. Theodore Glasser⁶¹ notes that one of the unfortunate consequences of the view of objective reporting is that it denies journalists their citizenship: as disinterested observers, as impartial reporters, journalists are expected to be morally disengaged and politically inactive.⁶² This consequence is, indeed, unfortunate. Ethical journalism, in the sense of caring for individuals as human beings, caring for democracy and showing responsibility with regard to what one writes, is more important than the notion of moral neutrality that is embedded in the technique of objective reporting.

However, two criticisms could be made against this line of reasoning. First, as Eugene Volokh claims in his remarks on a draft of this essay, some members of the public will begin to sympathize with hate groups because they'll stop trusting the media's criticisms. Second, some reporters believe that all they need to do is to report the story and let the public, who are able to differentiate between right and wrong, use their judgment. What is required from them is to report the facts in a so-called "objective" manner. Let me say something about these criticisms.⁶³ Hate speech is not like any other matter that should be covered in an objective tone. It is not like any other piece of news: road accidents, the death of the Princess of Wales, the flooding of the rice fields or raising taxes. All humane people conceive of hatred of other groups — whether these are religious, cultural, national or racial minorities — as immoral, wrong, wicked and odious. People who care about the underlying values of democracy, respecting others and not harming others, may feel that the media's condemnation of hate speech is redundant, expressing the obvious, but they will not grow sympathetic to hate-mongers only because the media condemned hatred. Nor do I think that these citizens will mistrust the media on the sole ground that the media see it as their

⁶¹ T.L. Glasser, "Objectivity Precludes Responsibility" [1984] *The Quill* 15.

⁶² Glasser cites Walter Cronkite, who said: "I don't think it is any of our business what the moral, political, social, or economic effect of our reporting is. I say let's go with the job of reporting — and let the chips fall where they may." *Ibid.* at 16.

⁶³ I am paraphrasing statements made in another essay, "Objective Reporting in the Media: Phantom Rather than Panacea" in *Speech, Media and Ethics*, *supra* note 38, 69.

obligation to fight hatred against people. People on the whole would accept the media's expressed and explained rationale about why they are duty bound to denounce hate speech.

Furthermore, people who believe in democracy's underlying values also think that the media's view of hate speech is correct; in this case, for example, people might be sufficiently confident to say that they know that the media's views are true and, further, that those who disagree are terribly mistaken. Moreover, people think that their opinions are not just subjective reactions to the ideas of disrespect, discrimination and hate against others, but reflections of their own moral character. Following Dworkin, I would say that people think that it is an objective matter — a matter of how things really are — that hate speech is wrong and wicked. The claim that hate speech is objectively wrong is equivalent to the claim that hate speech would still be wrong even if no one thought it was. That is another way of emphasizing that hate speech is plainly wicked, not wicked only because people think it is.⁶⁴

In this respect, the media might learn from the courts when dealing with hate speech. James Keegstra, a high school teacher, was convicted for describing Jews in his classes as "treacherous," "money-loving child-killers" and "sadistic."⁶⁵ He was convicted under section 319(2) of the Canadian *Criminal Code*, which outlaws public communications that wilfully promote hatred against any identifiable group. Chief Justice Dickson, who delivered the opinion of the Court, said that hate propaganda seriously threatened both the enthusiasm with which the value of equality is accepted and acted upon by society and the connection of target group members to their community. The Court depicted Keegstra as inflicting injury on his target group, the Jews, and as striving to undermine worthy communal aspirations. The language used by the Court to describe Keegstra was far from neutral or objective. Chief Justice Dickson explicitly stated that there could be no real disagreement about the subject matter of the messages and teachings communicated by the respondent, Mr. Keegstra: it was deeply offensive, hurtful and damaging to target group members, misleading to his listeners and antithetical to the furtherance of tolerance and understanding in society. Those who promoted hate speech were described as "hate mongers" who advocated their views with "inordinate vitriol." Their aim was to "subvert" and "reputate" and "undermine" democracy, which they did with "unparalleled vigour." Since their ideas were "anathemic" and "inimical"

to democracy, the Court viewed them with "severe reprobation." Chief Justice Dickson asserted that expressions can work to undermine Canadians' commitment to democracy when employed to propagate ideas anathemic to democratic values. Hate propaganda worked in such a way, arguing as it did for a society in which the democratic process was subverted and individuals were denied respect and dignity simply because of racial or religious characteristics. This brand of expressive activity was thus wholly inimical to the democratic aspirations of the free-expression guarantee. In this manner, the Court characterized Keegstra as an enemy of democracy who did not deserve the right to free speech to undermine fundamental rights of others.⁶⁶ The media should treat racists in a similar fashion.

Finally, let me make the following observations. First, it is interesting to note that the big hate trials in Canada were covered unevenly in the different provinces. Keegstra and Zundel were big stories in Ontario and Alberta, but attracted far less interest in the other provinces. Marcel Pepin, ombudsman of Radio Canada, says that nobody knows Zundel in Québec.⁶⁷ This view coincides with Weimann and Winn's study, which found differences in the coverage of the trial by the English and French media. They argued that the differences in the coverage paralleled the differences in the attitudes of English and French Canadians towards Jews. The English press and television provided much more coverage of the trial and much more coverage of the Holocaust outside the context of the trial. The English media (except for Newfoundland) provided extensive coverage of nonviolent Jewish events while the French media provided essentially no such coverage. Jews in French news were portrayed almost exclusively in the context of victimization.⁶⁸

Second, as Warren Kinsella observed, the attitude of the media toward hate speech during the 1990s has changed. Conrad Winn argues that the 1980s were the heyday of media coverage of hate speech. He maintains that the media were neutral in their coverage and that Zundel made people become anti-German

⁶⁴ *Ibid.* at 763–69. See also M. Moran, "Talking about Hate Speech: A Rhetorical Analysis of American and Canadian Approaches to the Regulation of Hate Speech" (1994) 6 *Wisc. L. Rev.* 1425; R. Moon, "The Regulation of Racist Expression" in *Liberal Democracy*, *supra* note 31, 182. See also E. Kallen & L. Lam, "Target for Hate: The Impact of the Zundel and Keegstra Trials on a Jewish-Canadian Audience" (1993) 25 *Can. Ethnic Stud.* 9.

⁶⁵ Interview with M. Pepin (22 September 1998). On anti-Semitism in Quebec, see M. Shain, *Antisemitism* (London: Bowerdean, 1998) at 60–83; M. Richler, *Oh Canada! Oh Quebec! Requiem for a Divided Nation* (New York: Knopf, 1992).

⁶⁸ *Supra* note 47 at 164. See also *ibid.* at 105.

⁶⁴ R. Dworkin, "Objectivity and Truth: You'd Better Believe It" (1996) 25 *Phil. & Pub. Aff.*

87 at 92–98.

⁶⁵ Keegstra, *supra* note 18.

because he claimed to be speaking in the name of the German civilization.⁶⁹ Similarly, David Lepofsky, of the Ministry of the Attorney General in Ontario, argues that there was less coverage of hate speech trials and literature during the 1990s than during the 1980s because of the outcry and criticism regarding the extensive coverage during the 1980s. In the 1990s, the media refrained from quoting Zundel's expert witnesses who said that there was no Holocaust. They covered those statements during the 1980s.⁷⁰ And Mel Sufin, executive secretary of the Ontario Press Council, says that the major Toronto-based newspaper, the *Toronto Star*, was tired of covering the "ridiculous stories of Zundel" in the second case of 1992.⁷¹

Third, the Canadian Broadcasting Corporation (CBC) is now far more hesitant to cover Zundel. David Bazay, ombudsman of the CBC, contends that Zundel is not news anymore. He maintains that the CBC broadcast Zundel enough, paying far too much attention to someone who did not deserve it. Bazay states: "We provided him with too much publicity and at some point we said enough is enough. The issue was exhausted."⁷²

James Littleton, a producer at the CBC, supports these contentions. He says that, in principle, Zundel is not welcome on CBC programs. Littleton states that Zundel was invited once and "it was a mistake." The incident involved the president of Holocaust Survivors, who was invited to speak. Zundel called and asked to be interviewed for the sake of balance. Littleton reiterates that this mistake was never repeated.⁷³ He acknowledges that the invitation to "counter-balance" a Holocaust survivor conferred Zundel unjustified legitimacy and portrayed him as one whose "truth" should be heard, placing him on an equal footing with someone who described what happened to him in Europe during the Nazi period.

This mistake is a real concern. Today, when one searches the Internet using the term "holocaust," one receives information on the Holocaust and also on Holocaust denial. Young people might be confused between the two "truths"

⁶⁹ Interview with Professor Conrad Wynn, Chairman, "Compas," and Department of Political Science, Carleton University (28 September 1998).

⁷⁰ Interview with M. David Lepofsky, Ontario (3 October 1998).

⁷¹ Interview with Mel Sufin, Toronto (6 October 1998).

⁷² Interview with David Bazay, Ombudsman, Canadian Broadcasting Corporation, Toronto (6 October 1998).

⁷³ Interview with James Littleton, Canadian Broadcasting Corporation, Toronto (4 October 1998).

offered to them, not knowing which "truth" they should believe. As skeptical thinkers, they might come to think that *the* "truth" lies somewhere between the two proposed "truths," that there is some "truth" in the one view and some "truth" in the other. This trend is especially worrisome in light of the following considerations: within a few years there will not be any Holocaust survivors among us; the sites launched by hate-mongers are graphically compelling; and the media's inclination to balance between views. This unqualified inclination in the name of objective reporting might lead to future such mistakes, balancing between a historian who probes the horrors of the Nazi racist constitution and the subsequent mass murders, and a revisionist historian who refutes that any of the harsh consequences of racial hatred actually took place. If such a mistake could have been made by the CBC before the end of the twentieth century, when Holocaust survivors are required to hear that they are imagining and lying in order to exploit Germany and other countries, what will happen in another fifty years when the horrors of World War II become yet another historical phenomenon, remote from living generations?

Fourth, some people think that hate speech cases show how healthy the debate about freedom of speech in Canada is.⁷⁴ The debate focuses public attention on the rationale for free speech and on its limits. Canada did not become either a more racist society or a less tolerant society because of the hate speech cases. It would be hard to prove, for example, that the degree of racism in a society correlates to the degree of control of free speech. Contrasting the character and extent of racism in the United States and Canada and correlating this with each country's quite different views of limitations on hate speech would suggest that the absolute legal protection of free speech does not provide the salvation usually thought to result. This is the opinion of Professor Roderick A. Macdonald, president of the Law Commission of Canada. In his view, the vast majority of law professors in the United States have a rather absolutist view of freedom of expression. Their view is the result and reflection of the dominant First Amendment tradition.⁷⁵ Black law professors and female law professors

⁷⁴ Lee Bollinger has argued that the debate over hate speech has a positive contribution to the shaping of more tolerant society. See L. Bollinger, *The Tolerant Society* (Oxford: Clarendon Press, 1986), especially at 197-200.

⁷⁵ Upon ratification of the CERD and CCPR mentioned in *supra* notes 15, 16 and accompanying text, the United States attached reservations to both of them, saying that neither article 4 of CERD nor article 20 of CCPR could "authorize or require legislation... by the United States that would restrict the right of free speech... protected by the Constitution and the laws of the United States." See also Kübler, *supra* note 11 at 357. On the making of the American tradition, see S. Walker, *Hate Speech* (Lincoln: University of

would, however, be proportionally over-represented among those professors who favour limitations on freedom of expression.⁷⁶ In Canada, a majority of law professors would uphold limitations on hate speech. Macdonald believes that this willingness to limit hate speech does not correlate with individual socio-cultural traits. For example, as many non-Jewish law professors as Jewish law professors would take an anti-absolutist position. There is a shared belief that one should be on guard against those who seek to polarize public opinion on racial grounds.⁷⁷

Indeed, Canadian criminal law is far more extensive on prevention of hate speech than is American criminal law. In both cultures diversity is believed to be a good thing. In both cultures minorities are encouraged to speak and express opinions. But in Canada it is recognized that hate speech builds on differences and targets minorities for hatred. Hate speech destroys the mosaic that is so important for Canadian identity.⁷⁸

⁷⁶ Nebraska Press, 1994) at 9-16. The American free speech tradition is illustrated in J.B. Jacobs & K. Potter, *Hate Crimes* (New York: Oxford University Press, 1998), especially at 145-53. For lessons to be distilled from examination of free speech law in the United States and Canada, see Greenawalt, *supra* note 50 at 150-54.

⁷⁷ This is because many feminists perceive pornography as a form of hate speech. They argue that pornography falls outside the protection of the First Amendment because it is not merely an idea but rather a practice of subordination, the essence of sexist social order, its quintessential social act. See C. Mackinnon, *Feminism Unmodified* (Cambridge, MA: Harvard University Press, 1987) at 148-54. See also C. Mackinnon, *Only Words* (Cambridge, MA: Harvard University Press, 1993); A. Dworkin, *Pornography: Men Possessing Women* (New York: Perigee, 1981).

⁷⁸ Interview with Professor Roderick A. Macdonald, Ottawa (25 September 1998). For further deliberation on the Canadian viewpoint, see R. Moon, "Drawing Lines in a Culture of Prejudice: *R. v. Keegstra* and the Restriction of Hate Propaganda" (1992) 26 U.B.C.L. Rev. 99; R. Moon, "The Supreme Court of Canada on the Structure of Freedom of Expression Adjudication" (1995) 45 U.T.L.J. 419; J. Magnet, "Hate Propaganda in Canada" in W.J. Waluchow, ed., *Free Expression* (Oxford: Clarendon Press, 1994) 223 [hereinafter *Free Expression*]; W. Sumner, "Hate Propaganda and Charter Rights" in *Free Expression*, 153; A. Fish, "Hate Promotion and Freedom of Expression: Truth and Consequences" (1989) 2 Can. J.L. & Juris. 111; I. Cotler, "Holocaust Denial, Equality and Harm: Boundaries of Liberty and Tolerance in a Liberal Democracy" in *Liberal Democracy*, *supra* note 31, 151. For further discussion of the social and legal aspects of hate propaganda, see F.M. Lawrence, *Punishing Hate* (Cambridge, MA: Harvard University Press, 1999); J. Weinstein, "An American's View of the Canadian Hate Speech Decisions" in *Free Expression*, *supra* note 77, 175; Abel, *supra* note 35 at 14.

The most recent Zundel controversy concerns the hateful websites he operates in California. Section 13(1) of the Canadian Human Rights Act holds:⁷⁹

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

Consequently, Zundel was unable to continue disseminating his hateful propaganda via the Internet and was forced to move his site to the United States. Civil proceedings were opened before the Canadian Human Rights Tribunal alleging violation of section 13(1) of the *Canadian Human Rights Act*. One of the attorneys involved in the legal proceedings against Zundel, Mark Freiman, explained that the prosecution had expert evidence to show that Zundel was using telephone lines to operate the Californian site. This is, of course, a very contentious issue. Zundel contests the view that he is operating the site from Toronto. Freiman, however, thinks it can be proven that Zundel is the one who is communicating; that he is communicating "telephonically"; that he is using Canadian telecommunications facilities in whole or in part; and that his communications are likely to expose an individual or a group to hatred or contempt based on their membership in an ethnic group. If the Tribunal accepts the evidence that was presented and does not dismiss the complaint on procedural grounds, there will be a basis for finding that Zundel has committed a violation of section 13(1) of the *Canadian Human Rights Act*. What Zundel says is likely to expose Jews to contempt.⁸⁰ The desired remedy is to make an order against Zundel to discontinue operating the site.⁸¹

⁷⁹ *Canadian Human Rights Act*, R.S.C. 1985, c. H-6; The Act supplements the hate provisions of the *Criminal Code*, R.S.C. 1985, c. C-46.

⁸⁰ Interview with M.J. Freiman, McCarthy Tétrault, involved in some hate speech cases, Toronto (6 October 1998); telephone conversation with Freiman (13 March 2000). I also benefited from conversations with Richard G. Dearden, expert on media law, Gowing, Strathy & Henderson, Ottawa (29 September 1998), and Martin Freiman, Director and General Counsel, Department of Justice, Constitutional and Administrative Law Section (14 March 2000).

⁸¹ For further deliberation on the calculus of harm when the risk increases as a result of the sheer number of people exposed to harmful messages, see C.R. Sunstein, *One Case at a Time* (Cambridge, MA: Harvard University Press, 1999) at 191-97.

III. CONCLUSION

The freedoms that the media enjoy in covering events are respected as long as they do not oppose the basic values that underlie the society in which they operate: not harming others and respecting others. This issue becomes especially complicated when the media cover hate speech that, by definition, espouses the opposite principles — harming others and disrespecting others. It is not suggested that the media should ban hate speech. Whatever the reader might think about legal restrictions on bigoted speech, we should all agree that the media have a social responsibility far beyond the legal one to cover hate speech in a responsible and ethical manner. If the public believes that the government may not stop people from spreading hateful messages and propaganda, it becomes *even more* important for the public to urge powerful private institutions to adopt some ethical principles in their reporting of this troublesome phenomenon. The media should be called upon to condemn hate speech when they report it, rather than cling to neutral reporting. Freedom of speech is a fundamental right, an important anchor of democracy, but it should not be used in an uncontrolled manner. Unlimited liberty and unqualified tolerance might deteriorate into anarchy and lawlessness. In such an atmosphere, democracy would find it quite difficult to function and the media would be one of the first institutions to be undermined.

In their coverage of Holocaust denial, the Canadian media wrongly assumed that their viewers and readers were autonomous, rational adult beings who were capable of independently making up their own minds. They wrongly strove towards moral neutrality by providing equal footing to Holocaust survivors and Holocaust deniers. The assumption was wrong, not only because not all people are rational beings, but also because the media's audience includes children. Social responsibility requires the media to bear in mind that a substantial percentage of their consumers are youths, whose intellects are at a formative stage. The drive towards neutrality was wrong because it lacked sensitivity to Holocaust survivors and provided credence and legitimacy to a brute lie, the aim of which was, and still is, to provoke hostility towards Jews by claiming that they are blackmailing the world by spreading distorted stories about events that never happened.

Culture, Nonsense and Rights: Contemplating the *Human Rights Act RIGHTS AND DEMOCRACY: ESSAYS IN U.K. — CANADIAN CONSTITUTIONALISM* by G. Anderson, ed., (London: Blackstone Press, 1999) pp. 276

Reviewed by Ian Ward

"Nonsense on stilts." Jeremy Bentham famously observed on hearing Sir William Blackstone expound his theory of natural rights in a London lecture hall. Commenting on England in the late 1760s, Blackstone concluded that "[e]verything is now as it should be." No, it was not, Bentham rejoined. Everything was a shambles, the law a chaotic mess, the subjects of His Majesty rioting in England and rebelling in America. What England needed, as a matter of urgency, was constitutional reform.¹ In 1997, the U.K. elected a new Labour government with precisely this mandate, to reform the constitution. As part of this package, it has enacted a *Human Rights Act*, which from October 2000 has incorporated much of the European Convention on Human Rights into domestic law.²

Bentham would have been horrified. Rights-talk, he averred, leads to endless, debilitating metaphysical "gossip," the articulation of "superstitious fancy" and the advocacy of rival "splenetic deities." Advocates of fundamental rights, men such as Tom Paine or William Godwin, dealt "in sounds instead of sense, in caprice instead of reason, in darkness instead of light." Their

intellectual supplicants, those who engineered revolutions in America or France, advanced the cause of "anarchy" rather than democracy, of "license" rather than "liberty."³ What England did not need is more rights, more nonsense. What it needed was genuine legal and political reform. He would undoubtedly have said the same today.

It seems the culture, which was cast by the likes of Bentham and Edmund Burke, and later by Bagehot and Dicey, has been overcome. "Something is happening," according to Helena Kennedy, "a different *Zeitgeist*, a shift in the legal tectonic."⁴ Translating the central concept, Francesca Klug refers to a "new spirit of the age."⁵ The British, it appears, distrust rights no longer. Indeed, they cannot get enough of them: a new *Human Rights Act* in October 2000, a new European Union *Charter of Fundamental Rights* just two months later. Suddenly, the U.K. is awash with rights. Though not, perhaps, with rights-talk. For no one, it seems, has seen fit to let the British people know of this jurisprudential and cultural sea-change.

But why has the U.K. allowed itself to be so readily seduced, after centuries of resisting the wiles of right? What has happened? What does the future hold? Is it an affair that is destined to end in tears?

¹ *Supra* note 1 at 11-14. Bentham expressly addressed the political implications of rights-talk in his condemnatory commentary on the French Revolutionary Declaration, *Anarchical Fallacies*. For a discussion of the context of Bentham's critique, see I. Ward, *A State of Mind: The English Constitution and the Popular Imagination* (Stroud: Sutton, 2000) at 128-53.

² H. Kenard, "Introduction" in F. Klug, *Values for a Godless Age: The Story of the United Kingdom's New Bill of Rights* (London: Penguin, 2000) xi.

³ F. Klug, *Values for a Godless Age: The Story of the United Kingdom's New Bill of Rights* (London: Penguin, 2000) at 6-7.

¹ I. Bentham, *An Introduction to the Principles of Morals and Legislation* (London: Methuen, 1982) at xxxviii, 4, 11-14, 17-20, 26, 31.

² The Convention was already in large part incorporated into Scots law; see *Scotland Act 1998*, 1998, c. 46, s. 29.