CENSORSHIP AS FREE SPEECH! FREE EXPRESSION VALUES AND THE LOGIC OF SILENCING IN *R.* V. *KEEGSTRA*

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In this article, the author criticizes the Supreme Court of Canada's view in Keegstra *that free expression values — and by extension free expression itself — are furthered rather than hindered by the suppression of free speech. The author examines in detail, first, the majority's reasoning in its consideration of the relation of hate speech to the "truth," "self-fulfillment," and "political process" rationales, and second, the thesis underpinning the contention that tolerating hate speech will effectively "silence" the expression of target group members. In fact, a significant portion of the critical space of the article is devoted to an examination of the merits of this controversial "silencing" argument. The author contends that this second argument poses the relevant problem, not as a conflict between free expression and other* Charter values (such as equality or multiculturalism), but as one occurring entirely within the free expression guarantee itself. In this aspect of its reasoning, the author views Keegstra *as pioneering an argument that would suppress free expression in its very name.*

L'auteur critique le point de vue de la Cour suprême dans l'arrêt Keegstra *voulant que les valeurs de la libre expression, et de ce fait la libre expression même, soient promues plutôt que limitées par la suppression de la liberté de parole. L'auteur examine d'abord en détail les arguments de la majorité sur les rapports entre la propagande haineuse et la vérité, l'épanouissement personnel et le processus politique; puis, la thèse selon laquelle la tolérance des propos haineux « étoufferait » effectivement l'expression des membres des groupes cibles. La majeure partie de l'article est consacrée à l'examen des mérites de l'argument controversé relatif à l'imposition du silence. Pour l'auteur, ce second argument établit la pertinence du problème, non pas dans le conflit entre la liberté d'expression et d'autres valeurs de la* Charte *(telles que l'égalité ou le multiculturalisme), mais au coeur même de la garantie de la liberté d'expression — l'auteur voyant dans* Keegstra *le recours à un argument trouvant dans la liberté d'expression le caractère justifiable de sa restriction.*

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> [I]t is through rejecting hate propaganda that the state can best encourage the protection of values central to free expression. (Dickson C.J.)[1]

> A hate promoter need only plant doubts about the character or intentions of some identifiable group to impair its freedom of expression. Put differently, hate promotion need only convince people that an identifiable group is different from the majority of people in order to impair the maligned group's freedom of expression. A member of a maligned group, speaking to an audience which doubts his character and intentions, will have a hard time generating the trust which is a prerequisite to persuasion. Hate promotion threatens the ability to persuade without which freedom of expression is worthless. (Arthur Fish)[2]

> Debasing speech discredits targets ... reducing their ability to have their speech taken seriously. (Mari Matsuda)[3]

> [R]acism excludes minorities from participating in the contemplation of public issues because their concerns are discounted by the majority and because they have been demoralized by repeated victimization. (Richard Delgado)[4]

> Freedom of expression guarantees the right to loose one's ideas on the world; it does not guarantee the right to be listened to or believed. (McLachlin J.)[5]

I. INTRODUCTION

On 13 December 1990, just as some of the most repressive socialist states on record were being dismantled in Eastern Europe and the former Soviet Union, just as the racially repressive regime of South Africa was collapsing, and just as the newly

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1 *R.* v. *Keegstra*, [1990] 3 S.C.R. 697 at 764 [hereinafter *Keegstra*].

2 "Hate Promotion and Freedom of Expression: Truth and Consequences" (1989) 2 Can. J. Law & Jur. 111 at 131.

3 "Public Response to Racist Speech: Considering the Victim's Story" (1989) 87 Mich. L. Rev. 2320 at 2376.

4 "Words that Wound: A Tort Action for Racial Insults, Epithets, and Name-calling" (1982) 17 Harv. C.R.-C.L. L. Rev. 133 at 179.

5 *Keegstra*, *supra* note 1 at 831-32.

"liberated" of all those countries were loudly proclaiming the human importance of a regime in which one is free to speak one's mind openly without fear of punishment, the forces of repression achieved what appeared to be a landmark constitutional victory on the very continent that was traditionally thought to be home to the free expression guarantee. In *R.* v. *Keegstra*[6] by a narrow vote of four to three the Canadian Supreme Court upheld the constitutionality of s. 319(2) of the *Criminal Code* of Canada which makes it an offense punishable by up to two years in prison for anyone to wilfully promote hatred[7] against an identifiable group.[8]

The Court held[9] that while s. 319(2) abridged the right of free expression as guaranteed by s. 2(b) of the *Charter*, it nevertheless was justifiable under s. 1 as one of those "reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."[10] In short, the Court decided that while s. 319(2) violated the free expression right, it did so constitutionally.

Keegstra has an interesting, if complex, history. James Keegstra, a social studies teacher and Mayor of Eckville, Alberta, was fired in December of 1982 from his fourteen-year position at the local high school. Officially, he was fired for failing to follow the education department's social studies curriculum. His main deviation was that he taught the curriculum of the Institute for Historical Review,[11] specifically holocaust revisionism, and that he made many statements denigrating Jews, calling them "gutter rats" and "money thugs" and claiming that they were responsible, *inter*

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6 *Ibid.*

7 *Criminal Code*, R.S.C. 1985, c. C-46:
319(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.
319(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 electro-magnetically or otherwise, and gestures, signs or other visible representations.

8 *Criminal Code*, R.S.C. 1985, c. C-46:
318(4) In this section, "identifiable group" means any section of the public distinguished by colour, race, religion, or ethnic origin.

9 *Supra* note 1 at 795.

10 *Canadian Charter of Rights and Freedoms*, Part 1 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.
1. The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only 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.

11 An academic sounding outfit located in Torrance, California that seems to have as its sole mandate the "review" of only one historical truth.

alia, for the assassination of Abraham Lincoln, the French and Russian revolutions, the two world wars, the welfare state, and, of course, communism and high interest rates.[12] In January 1984 charges were brought against him under s. 281(2) (now s. 319(2)) of the *Criminal Code* (the anti-hate speech provision), and he has been involved in litigation on this issue until this past year.[13]

Despite its complicated history, *Keegstra* instances most of the arguments currently favoured by speech suppressionists. In keeping with the movement away from purely moralistic rejections of hate speech (such as those based purely on its "offensiveness") it focuses on the harms such speech allegedly causes.[14] As well, it tackles head on the relation between freedom of expression and other constitutional values such as equality and multiculturalism, and concludes that the free expression rights of hate speakers may in certain cases rightfully be limited by both.[15] Still further, it argues that the anti-hate speech legislation before it is not only consistent with Canada's international obligations as a signatory to various international instruments[16] but that these also strongly buttress the case for such legislation.[17]

But perhaps the most novel, most interesting, most unique, and most precedent-setting argument the Court advances is not about the harms allegedly caused by hate

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12 In the Court's own words: "Mr. Keegstra's teachings attributed various evil qualities to Jews. He thus described Jews to his pupils as 'treacherous,' 'subversive,' 'sadistic,' 'money-loving,' 'power hungry' and 'child killers.' He taught his classes that Jewish people seek to destroy Christianity and are responsible for depressions, anarchy, chaos, wars and revolution. According to Mr. Keegstra, Jews 'created the Holocaust to gain sympathy' and, in contrast to the open and honest Christians, were said to be deceptive, secretive and inherently evil." *Supra* note 1 at 714.

13 In November 1984 he launched an unsuccessful pre-trial application before the Alberta Court of Queen's Bench to stay proceedings on the ground that s. 281(2) infringed the right of free expression guaranteed by s. 2(b) of the *Charter* (*R.* v. *Keegstra* (1984), 19 C.C.C. (3d) 254 (Alta. Q.B.) [hereinafter *Keegstra*, Alta. Q.B.]). Then, in July 1985 after a 4 month trial Keegstra was convicted and fined $5,000, however, on appeal s. 281(2) was declared unconstitutional, his conviction was set aside, and charges against him were dropped. (*R.* v. *Keestra* (1988), 43 C.C.C. (3d) 150 (Alta. C.A.)). On appeal once again in 1990 the Canadian Supreme Court upheld the constitutionality of s. 319(2) but returned the case to the Alberta Court of Appeal to resolve issues the latter left unexamined. (*Supra* note 1 at 796). In March, 1991 the Alberta Court of Appeal quashed Keegstra's conviction and ordered a new trial on the grounds that given excessive pre-trial publicity, he should have been permitted to challenge the impartiality of jurors at his original trial. (*R.* v. *Keegstra* (No. 2) (1991), 63 C.C.C. (3d) 110 (Alta. C.A.)). On re-trial in July, 1992, he was again convicted, this time given a $3,000 fine. On appeal for the third time, the Alberta Court of Appeals vacated the conviction altogether holding that the trial judge erred in not properly responding to requests by the deliberating jury for a transcript of the evidence of one of the Crown's witnesses and to hear or see again the particulars of the relevant *Criminal Code* provision. (*R.* v. *Keegstra* (1994), 92 C.C.C. (3d) 505 (Alta. Q.B.)). Then, in 1996 the Supreme Court upheld an appeal but not a cross-appeal, thereby restoring the conviction and remitting the case back to the Alberta Court of Appeal for a ruling on an appeal of the sentence. (*R.* v. *Keegstra* (1996), 105 C.C.C. (3d) 19). Finally, in September 1996 the Court of Appeal quashed the $3,000 fine in favour of a one year suspended sentence and 200 hours of community service.

14 *Supra* note 1 at 745-49.

15 *Ibid.* at 755-58.

16 *E.g.*, the *International Convention on the Elimination of All Forms of Racial Discrimination* and the *International Covenant on Civil and Political Rights*. *Ibid.* at 749-55.

17 *Ibid.* at 758.

speech, nor about the degree to which anti-hate speech legislation supports other constitutional values, nor even about the supposed consistency of such legislation with Canada's alleged international obligations; it is what it says about the relationship of hate speech to the ends, values, or purposes underlying the free expression guarantee and to the free expression rights of others. What is most profound about *Keegstra* is what it says about free expression itself. And what it says is nothing short of astonishing.

Simply put, the Court argues that even though the sole purpose of anti-hate speech legislation appears unambiguously to prohibit and thus suppress expression, it is actually its ally. Such legislation, as the Court sees it, furthers rather than stifles the free expression of opinion.[18] In support of this thesis the Court advances three main arguments. Its first is that measured against the ends, values, or purposes of the free expression guarantee, hate speech has little or no value. From this argument, it leaps to the conclusion that "it is through rejecting hate propaganda that the state can best encourage the protection of values central to free expression...." [19]

Secondly, the suppression of hate speech promotes free expression by freeing the expression of those who would otherwise be "silenced" by such speech, namely, its targets. In this part of its argument, the Court addresses in all but name the increasingly popular complaint[20] that the exercise of the free expression right by hate speakers "silences" the speech of others, rendering it less likely that the targets of hate speech will exercise to the full their own *Charter*-conferred rights. I say "in all but name" because the Court nowhere in *Keegstra* actually uses the term "silencing." Indeed, it was not until 1996 in *Ross*[21] that the Court finally named what it had been arguing all along.

Following from both arguments, the Court advances, thirdly, the novel claim that anti-hate speech laws and trials are actually forms of "expression" in their own right in that they give aid and comfort to members of identifiable groups and remind

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18 In the Alberta Court of Queen's Bench six years earlier Quigley J. expressed the same view: in his opinion, s. 281.2(2) — now s. 319(2) — "cannot rationally be considered to be an infringement which limits 'freedom of expression,' but on the contrary it is a safeguard which promotes it" (*Keegstra*, Alta. Q.B., *supra* note 13 at 268).

19 *Supra* note 1 at 764. According to the Court "hate propaganda" denotes "expression intended or likely to create or circulate extreme feelings of opprobrium and enmity against a racial or religious group" (*ibid.* at 722). A word about terminology: throughout this article I use the term "hate speech" or "hateful expression(s)" to denote what the Court terms "hate propaganda." I do so to avoid prejudicing the case at the outset by loading the definition with the many negative connotations carried today by the term "propaganda" — the harmful effects of which are nowhere more evident than in the Court's consideration of the "truth" rationale for free expression. See the discussion accompanying *infra* notes 55 and 56.

20 See *infra* note 106.

21 *Ross* v. *New Brunswick School District No. 15*, [1996] 1 S.C.R. 825 [hereinafter *Ross*]. (*Ross* let stand a New Brunswick Human Rights Commission Board of Inquiry order that a high school teacher who publicly made racist and discriminatory statements against Jews in his off-duty time should be removed from teaching duties and appointed to a non-teaching position if one is available).

community members of the values for which the community stands. In this article I examine each part of this three-stage argument.

Part II argues that the Court plays fast and loose with free expression values. In each instance its examination of the ends of free expression culminates in an argument for the suppression of expression. To reach this conclusion, however, the Court has to provide strained, distorted, and, at times, even contradictory understandings of these values. In the first place, it converts the "truth" rationale — ostensibly an argument from uncertainty or fallibility — into an argument from their opposites. Second, where it is not purely speculative, its discussion of the "self-fulfillment" rationale is grounded in little more than contentious sociological postulates. In this context, its contention that identifiable group membership is critical to the development of self-autonomy threatens to undercut the individualistic basis of the rationale altogether. Finally, the Court's treatment of the "political process" (or "democratic") rationale completely ignores the centrally important idea that free expression is essential to ensuring a wide variety of policy options, and its contention that the muzzling of a few individual's participation rights is not "substantial," not only subjects the rights of Canadians to unacceptable utilitarian trade-offs but also stands the very free expression guarantee on its head. Part III looks for the basis of the Court's arguments and concludes that it is found in the claim that the exercise of free expression rights by hate speakers "silences" the exercise of the free expression rights of their targets. This explains why the Court asks us to accept certain utilitarian trade-offs it presents in its treatment of the "self-fulfillment" and "political process" rationales. Its focus is not on the speaker or his audience — as is generally the case in most such discussions — but on the targets of hate speech. However, once it adopted this "victim's perspective,"[22] as its normative framework, it was practically inevitable that it would conclude that s. 319(2) is not only not antithetical to a system of free expression but actually in furtherance of it. Thus, having fixed its focus on those targeted by hateful expression, the Court's main interest

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[22] So named by Matsuda, *supra* note 3 at 2356. Commentators on Canadian jurisprudence sometimes refer to this same perspective as embodying an "anti-disadvantage principle": R. Colker, "Contextuality, Section 1, and The Anti-Disadvantage Principle" (1992) 42 U.T.L.J. 77 — or a "purposive approach" which they associate with the writings of Madam Justice Bertha Wilson. See, *e.g.*, K.E. Mahoney, "Recognizing the Constitutional Significance of Harmful Speech: The Canadian View of Pornography and Hate Propaganda" in L. Lederer & R. Delgado, eds., *The Price We Pay: The Case Against Racist Speech, Hate Propaganda, and Pornography* (New York: Hill & Wang, 1995) 277 at 280: "Justice Wilson describes this approach as based on the premise that the *Charter*'s purpose is to protect from an overbearing collectivity those typically shut out of the political process — the poor, the oppressed, the powerless, and racial minorities. In other words, it is anti-majoritarian."

Whatever the validity of the overall premise, the last clause in this statement is more than a little astonishing. For if Justice Wilson actually believed that *this* list of the excluded did *not* compose a majority of people in *any* society, Canadian or otherwise, then she would have a quarrel with virtually every political analyst who ever wrote on the subject from Aristotle to Marx. Aristotle noted that "the wealthy are generally few and the poor are generally numerous" (*Politics*, trans. E. Barker (London: Oxford University Press, 1958) at paras. 1279b6, 1317b2): Marx, of course, throughout his work argued both that the proletariat in a capitalist society was the most numerous class, and that it was "oppressed" and relatively "powerless." The only category mentioned by Mahoney that has even the taint of legitimate minority status is that of "racial minorities," and this, of course, is true simply by definition.

naturally falls on the putative effects of such expression on *their* truth claims, self-autonomy prospects, and political participation rates.

To assess the validity of the majority's argument in this regard, Part III explores essentially three types of silencing argument: 1) those that focus on the alleged destruction of credibility in the targets caused by hateful expression; 2) those that focus on the fear or intimidation brought about by public or private coercive acts or by illegal acts such as threats or acts of violence; and 3) those that focus narrowly on physically coercive acts alone. The Court — implicitly in *Keegstra* but explicitly in *Ross*[23] — adopts the first of these arguments. The bulk of this Part is devoted to analyzing the various silencing arguments. I conclude that the weakest of all is the one the Court highlights — *viz.* the "credibility" argument — and that the only speech protective position to take on the silencing claim is to restrict any such argument to the third of the above possibilities. Concluding this Part, I suggest four reasons why faulty silencing arguments might be advanced and note the danger to a strong free expression commitment they present.

Part IV concludes that the proper forerunner of the Court's claim that speech suppression leads to speech protection is the argument of O'Brien in *1984*. The analogy is justified, I argue, not only because of the one-hundred-and-eighty degree turns required by the logic of the Court's "silencing" argument — which "reads up" the power of hate speakers to the level of that of state officials — but also because of the part that the Court believes may rightfully be played by state laws and institutions in a regime of free expression — which, on the other hand, "reads down" the power and authority possessed by these same officials. According to the majority, laws and trials are a "form of expression" by which state officials are able to send messages to the public at large. By saying this the majority not only reveals the exclusiveness of its own conception of the Canadian community, it also places state officials on the same power plane as that occupied by ordinary citizens. The end result of this argument transforms state officials into private individuals, for they too are simply exercising the free expression right. Such reasoning, I argue, effectively obliterates the distinction between private and public exercises of power and loses sight of both the uniqueness and the finality of state forms of coercion. Furthermore, the claim that its exercise of its "expression" right is but "meaningful expression on the behalf of the vast majority of citizens" shows that the majority's very conception of a right is defective. Since this claim stands the very concept of a right on its head, I conclude that *Keegstra* aligns itself more with the O'Briens of Oceania than with the principles of a free and democratic society.

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[23] *Supra* note 21.

II. FREE EXPRESSION VALUES: ROOM FOR DISCRETION

First systematically codified by Thomas Emerson in 1963, the list of free expression values[24] has since been expanded by other legal scholars and adopted to one degree or another by courts in many different jurisdictions. The Canadian Supreme Court first formulated its particular version of free expression values in *Ford*[25] and *Irwin Toy*.[26] *Keegstra* simply reproduces them.

Apart from — or, perhaps, because of — the lack of any firm constitutional basis for doing so, the focus on free expression values introduces a large element of judicial discretion into the decisional mix.[27]

In the first place, in measuring the worth of any particular form of expression against the values supposedly served by the free expression guarantee, the Court has to determine which of the many rationales that have been offered are applicable. Secondly, having selected the appropriate rationales, it must interpret them, that is, it must decide what they mean as well as how they should be applied in any given context. The Court's argument in *Keegstra* brings both these issues to the fore. Indeed, as we shall see, while its choice of the values furthered by the free expression guarantee departs only minimally from the list of values commonly associated with the guarantee, the same is not true about the way it interprets them. Both the content given them by the Court and the manner of their application suggest that its interpretive latitude is quite wide. As we shall also see, despite the majority's own reading of the result of its efforts

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24 "Towards a General Theory of the First Amendment" (1963) 72 Yale L.J. 877 at 878: "The values sought by society in protecting the right to freedom of expression may be grouped into four broad categories. Maintenance of a system of free expression is necessary (1) as assuring individual self-fulfillment, (2) as a means of attaining the truth, (3) as a method of securing participation by the members of society in social, including political, decision-making, and (4) as maintaining the balance between stability and change in the society."

25 *Ford* v. *Quebec (A.G.)*, [1988] 2 S.C.R. 712 at 764-66.

26 *Irwin Toy Ltd.* v. *Quebec (A.G.)*, [1989] 1 S.C.R. 927 at 976-77.

27 In this context, L.E. Weinrib in "Hate Promotion in a Free and Democratic Society" (1991) 36 McGill L.J. 1416 at 1448, has this to say about Dickson C.J.'s overall argument in *Keegstra*:

> Dickson C.J.'s sympathy lies with those who are or might be the targets of hate propaganda. He is apprehensive that wilful public hatemongering ... poisons the atmosphere of public life, so that members of target groups will be reluctant or unable to emerge from negative parochial identification into the larger social and political arena. He requires neither empirical proof of this effect, nor statistical evidence of its likelihood. He is not daunted by the possibility that this criminal offence might stifle heated public debate. He is secure in this approach because his conception of free and democratic society, as an aspiration to a public world of equality and individual dignity, builds upon the knowledge that human beings are not invariably rational and that, even if they were, rationality takes time.

A more candid account of the practice of judicial discretion "run wild" is hard to imagine — unless it be the following which is also intended to describe the jurisprudence of Dickson C.J.: "[t]he Chief Justice's compassion for those without economic resources, and thus without political power, is so strong that he has extended the reach of section 1 justification to avoid results that he finds repugnant": L.E. Weinrib, "The Supreme Court of Canada and Section One of the *Charter*" (1988) 10 Supreme Court L. Rev. 469 at 510.

in this regard, free expression values will have been used to serve ends clearly hostile to the guarantee itself.[28]

Why do we have the guarantee? The Court tells us the reasons are threefold: (1) because of "the need to assure that truth and the common good are attained, whether in scientific or artistic endeavors or in the process of determining the best course to take in our political affairs";[29] (2) because it is a means of "ensuring individuals the ability to gain self-fulfillment by developing and articulating thoughts and ideas as they see fit";[30] and (3) because politically, "it permits the best policies to be chosen from among a wide variety of proffered options," and because it "helps to ensure that participation in the political process is open to all persons."[31] In shorthand, these are commonly called the "truth," "self-fulfillment," and "political process" or "democratic" rationales. Following the lead of Robert J. Sharpe,[32] the Court in *Ford* collapsed the third and fourth rationales proferred by Emerson[33] into one, thus yielding only three.[34]

A. HATE SPEECH AND THE PROBLEM OF TRUTH

1. THE SEARCH FOR TRUTH

"Truth" is a core value of freedom of expression. "Nevertheless," Dickson C.J. argues, "the argument from truth does not provide convincing support for the protection of hate propaganda" because "[t]aken to its extreme, this argument would require us to permit the communication of all expression, it being impossible to know with *absolute*

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28 In part, this is a consequence of the very attempt to measure expression against ends external to free expression and supposedly furthered by the free expression right. For if speech is valuable *only* to the extent it serves other ends and not valued for its own sake, then it is valueless to the extent it fails to serve them. In this event, the ends or purposes of expression *inevitably* function to limit as well as guarantee expression. Being that for the sake of which the free speech right exists, these ends or purposes logically take precedence over that which exists only because of and to further them. Thus, unless free expression is thought of as an end in itself, the entire project of measuring expression against the ends supposedly furthered by it is necessarily an end-governed operation, and the friend of a strong free speech principle can only hope that those doing the reading of the ends are more than less catholic and plural about their final causes.
Unfortunately, as Ronald Dworkin has pointed out, such consequentialist justifications for the free expression guarantee have recently become a haven for arguments such as the *Keegstra* court's that would suppress rather than protect expression. Dworkin himself contends that apart from instrumentalist justifications, one must also consider free expression as "an essential and 'constitutive' feature of a just political society": "The Coming Battles Over Free Speech" *The New York Review of Books* (11 June 1992) 55 at 56. While I agree with Dworkin that a full defence of the guarantee requires both constitutive and instrumentalist justifications, I confine my argument in this article to an examination of the instrumentalist position the Court enunciates and conclude that even to arrive at *its* particular suppressionist position, the Court has had to render excessively parochial, distorted, and singular readings of the causes.

29 *Supra* note 1 at 762.

30 *Ibid.* at 763.

31 *Ibid.* at 764.

32 "Commercial Expression and the *Charter*" (1987) 37 U.T.L.J. 229.

33 *Supra* note 24.

34 *Supra* note 25 at 765.

certainty which factual statements are true, or which ideas obtain the greatest good."[35] Some have concluded from a position of skepticism in favour of a strong free speech principle,[36] but Dickson C.J. seems not even to be aware that such an argument exists. Instead, he advances an argument from certainty that comes dangerously close to being an argument from intolerance.

What is wrong with the "extreme" position, he says, "is that the greater the degree of certainty that a statement is erroneous or mendacious, the less its value in the quest for truth."[37] But this approach is the exact reverse of any proper strategy for ascertaining truth. It is even more troubling when the truth at stake is political in form. For as Karl Popper has argued with respect to scientific theories, the proper truth-seeking approach is not to seek to confirm or verify, but rather to falsify. In fact, on his argument, the scientist is distinguishable from the ideologist precisely over this point. The latter looks not for evidence that will falsify or refute his favourite theory but only for evidence that will confirm it, and as Popper argued, "[i]t is easy to obtain confirmations ... if we look for confirmations."[38] But if we look to falsify our own beliefs, then we surely cannot hold them up as the test of the admissibility or inadmissibility of opposed viewpoints, for then we would be assuming that they are already "confirmed" as truth. If we honestly seek truth, then, on this reading, the best method to find it would be to look for error.[39] Antony Flew has captured this logic perfectly:

> *Honest inquirers* ... though they will naturally want their own theories and their own hypotheses to turn out to have been correct, must *to the extent that they are indeed sincere truth-seekers* necessarily labour to show that all theories and hypotheses proposed — most especially their own — are after all false. Suppose that one nevertheless survives the most rigorous and comprehensive criticism. Then,

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35 *Supra* note 1 at 762 [emphasis in original].

36 *E.g.*, Steven G. Gey, "The Apologetics of Suppression: The Regulation of Pornography as Act and Idea" (1988) 86 Mich. L. Rev. 1564 at 1623 ("The theory of skepticism asserts that all statements of truth are hypothetical and transitory. That is not to say that one can never find reasons for adopting one theory and rejecting another, but rather that all theories are susceptible to constant modification and periodic rejection."); see also D.F. McGowan & R.K. Tangri, "A Libertarian Critique of University Restrictions of Offensive Speech" (1991) 79 Cal. L. Rev. 825 at 873-74: "Where the idea the speaker expounds is the source of the offense, the skepticism of marketplace theory teaches that we may not regulate the speech to protect listeners, no matter how severe the offense they suffer. To hold otherwise would allow the government to define as true an idea to which at least persons prosecuted under a given regulation likely do not subscribe (or to define as false ideas to which they do subscribe)."

37 *Supra* note 1 at 762-63. Martin Redish has observed the danger to free expression to which the argument from truth is sometimes subject: "any theory positing that the value of free speech is the search for truth creates a great danger that someone will decide that he has finally attained knowledge of the truth. At that point, the individual (or society) may feel fully justified, as a matter of both morality and logic, in shutting off expression of any views that are contrary to this 'truth.'" Noting that the theory's primary proponent, J.S. Mill "would not have accepted such reasoning," we are nonetheless forced to add that the *Keegstra* majority did: "The Value of Free Speech" (1982) 130 U. Penn. L. Rev. 591 at 617.

38 *Conjectures and Refutations: The growth of scientific Knowledge* (New York: Basic Books, 1965) at 36.

39 Hence, a maxim: "if you seek truth, search for error!"

> however temporarily, the hopes of its sponsors are fulfilled. On the other hand, when a promising theory or hypothesis is falsified its sponsors can console themselves with the thought that the strenuous testing culminating in this conclusion must surely have advanced research. So the successor theory or hypothesis should be, if not the final truth, at least significantly nearer to it.[40]

On this view, there is never any good reason to "block the way of inquiry,"[41] which is precisely what laws like s. 319(2) and arguments like those of the Dickson C.J. in fact do. By first establishing a protected orthodoxy, and then closing the door on challenges to it, the Court proceeds anti-scientifically. In so doing, it not only ignores the possibility that its protected truth might be false, but it sets itself up as truth's effective arbiter.

The problem is exacerbated, moreover, to the extent that we realize that what is at stake in the Court's actions is not scientific but *political* truth. For here the natural human tendency to "confirm" what "we" already "know," and "falsify" that which "we" are certain is "erroneous or mendacious" is especially tempting — doubly so if we have the power of the state to enforce our judgments.[42]

Taken to its extreme, the argument that the greater the certainty that a statement is false, "the less its value in the quest for truth" would be enough to supply every self-certain authoritarian in human history good Court approved reasons to silence those

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40 A.G.N. Flew, *Thinking About Social Thinking: Escaping Deception, Resisting Self-Deception* (London: Fontana Press, 1991) at 14-15 [emphasis added].

41 C.S. Pierce, "The Scientific Attitude and Fallibilism" in J. Buchler, ed., *Philosophical Writings of Pierce* (New York: Dover, 1955) 42 at 54:

> Upon this first, and in one sense this sole, rule of reason, that in order to learn you must desire to learn, and in so desiring not to be satisfied with what you already incline to think, there follows one corrolary which itself deserves to be inscribed upon every wall of the city of philosophy:
>
> Do not block the way of inquiry.

In his gloss on this passage, T.L. Thorson notes "The principle of fallibilism does not say that we can never know the truth, but rather that we are never justified in behaving as if we knew it. That is to say, we are never justified in refusing to consider the possibility that we might be wrong": *The Logic of Democracy* (New York: Holt, Rinehart and Winston, 1962) at 122.

42 See, for example, the argument from "governmental incompetence" advanced by F. Schauer, *Free Speech: A Philosophical Enquiry* (Cambridge: Cambridge University Press, 1982) at 86: "Freedom of speech is based in large part on a distrust of the ability of government to make the necessary distinctions, a distrust of governmental determinations of truth and falsity, an appreciation of the fallibility of political leaders, and a somewhat deeper distrust of governmental power in a more general sense." But even absent any judgments about the corrupting influence of power, simple human fallibility is enough to lead us to be skeptical about any claim, governmental or otherwise, to censorial omnicompetence. As argued in J. Feinberg, "Limits to the Free Expression of Opinion," in Feinberg & Gross eds., *Philosophy of Law*, 2d ed., (Encino, Cal.: Dickenson, 1980) at 192:

> there are serious risks involved in granting any mere man or group of men the power to draw the line between those opinions that are known infallibly to be true and those not so known, in order to ban expression of the former. Surely if there is one thing that is *not* infallibly known, it is how to draw *that* line.

who disagreed with him.[43] Indeed, it is likely that Keegstra himself would pass this test with flying colours, for he is alleged more than once to have stated positions with the infallible aura of the permanently convinced.[44] For that matter, it would be difficult to find a bigot anytime or anywhere who both believes that he is tolerant and has failed this particular test. And while he is certainly no bigot, without even the slightest hint that he is aware of it, Dickson C.J.'s contention here is almost the mirror image of the conclusion reached by J.S. Mill in *On Liberty,* namely, that the degree of the need for the guarantee of freedom of expression is almost perfectly proportional to the degree of certainty we feel about any given issue.[45] On the Court's logic the more *I* am certain that a view is false, the clearer it is that *you* should not hear it. But if so, then not only is it advancing an argument from intolerance, it is advancing an argument from infallibility as well. For as Mill wrote, "it is not the feeling sure of a doctrine (be it what it may) which I call an assumption of infallibility. It is the undertaking to decide that question *for others*, without allowing them to hear what can be said on the contrary side."[46]

Finally, after stating that "the state should not be the sole arbiter of truth" — who, other than "perfectionists" such as Plato,[47] "conventionalists" like Hobbes,[48] or "totalitarians" like Hitler or Stalin, ever said it should have *any* part at all to play in arbitrating truth? — Dickson C.J. warns us that we should not "overplay the view that rationality will overcome all falsehoods in the unregulated marketplace of ideas."[49] However, with the exception of John Milton,[50] few, if any, commentators have been so foolish as to argue that truth will necessarily win any confrontation with falsity, at least in the short run. As both Mill and Holmes[51] (the two major theoretical sources for the "marketplace rationale") well knew, history is replete with instances where it

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43 As Oliver Wendell Holmes put it in *Abrams* v. *U.S.*, 40 S.Ct. 17 at 22 (1919):
> Persecution for the expression of opinions seems to me perfectly logical. If you have no doubt of your premises or your power and want a certain result with all your heart you naturally express your wishes in law and sweep away all opposition. To allow opposition by speech seems to indicate that you think the speech impotent, as when a man says that he has squared the circle, or that you do not care wholeheartedly for the result, or that you doubt either your power or your premises.

44 For examples, see D. Bercuson & D. Wertheimer, *A Trust Betrayed: The Keegstra Affair* (Toronto: Doubleday, 1985); S. Mertl & J. Ward, *Keegstra: The Trial, The Issues, The Consequences* (Saskatoon: Western Producer Prairie Books, 1985).

45 *On Liberty* (Indianapolis: Hackett, 1978) at 20-22.

46 *Ibid.* at 22 [emphasis in original].

47 *Republic*, 2d ed., trans. A. Bloom (New York: Basic Books, 1991) paras. 375a, 412b.

48 "But men's reasonings are sometimes right, sometimes wrong; and consequently, that which is concluded and held for a truth, is sometimes truth, sometimes error. Now errors, even about these philosophical points, do sometimes public hurt, and give occasions of great seditions and injuries. It is needful therefore, as oft as any controversy ariseth in these matters contrary to public good and common peace, that there be somebody to judge of the reasoning, that is to say, whether that which is inferred, be rightly inferred or not; that so the controversy may be ended.... It remains therefore that the judges of such controversies, be ... those who in each city are constituted by the sovereign": *English Works* (London: C. Richards, 1841) 268-69.

49 *Supra* note 1 at 763.

50 "[W]ho ever knew Truth put to the worse, in a free and open encounter?" *Areopagitica* (London: University Tutorial Press, 1968) at 126.

51 *Supra* note 43 at 22.

has not; where eyes have been put out, bodies turned on the rack and burned at the stake, for expressing opinions that others were absolutely *certain* were false. What those who reason from the "marketplace of ideas" rationale believe is that the free play of ideas is the *best method* for ascertaining truth,[52] that it is the method most consonant with democratic presuppositions, and that it is the only rational way to be certain that our political and social scripts have not been pre-edited and pre-determined for us. The majority, of course, attacks the marketplace model because it fears that people left to their own devices might not conclude "correctly."[53] And because they might not, it believes that state authorities have an important part to play making sure they do.[54]

In the last analysis, and *contrary to virtually every argument contained in the "truth" rationale*, we are left with the bland but authoritative assurance that "[t]here is very little chance that statements intended to promote hatred against an identifiable group are true, or that their vision of society will lead to a better world."[55] It would certainly be helpful to know exactly why the Chief Justice thinks "there is very little chance" either that such statements are true or that the appropriate "vision" will "lead to a better world," just as it would be helpful to know exactly how much of a "chance" there actually must be in order for statements to pass freely beyond the prison walls of s. 319(2). Alas, no such information is provided, just as no information is provided on exactly how much of a role the state should play in its capacity of "arbiter" of truth.

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52 See, *e.g.*, McGowan and Tangri, *supra* note 36 at 836:

> as Justice Holmes' *Abrams* dissent implicitly recognized, the marketplace theory is, at bottom, a process-driven theory. It is an experiment in ascertaining truth and achieving the good society. As a process, however, it offers no view on the ultimate question of what constitutes objective truth other than to say that such truth, whatever it is, is more likely to emerge from this process than from any other.

But *cf.* A. Meiklejohn, *Political Freedom: The Constitutional Powers of the People* (New York: Harper and Brothers, 1960) at 73: "[the] test of truth is not merely the 'best' test. There is no other."

53 In so thinking, the majority's animus is misplaced. As McGowan and Tangri argue, *supra* note 36 at 878: "A market does not fail because people decline to adhere to a given set of ideas that the market makes available. A market does fail when it is prevented from making available certain ideas to which people might wish to adhere. The function of a market is to provide choices, not compel them."

54 In taking this position, however, the majority seems unable to understand that its irrationality argument can cut two ways. As McLachlin J. said in dissent:

> The argument that criminal prosecutions for this kind of expression will reduce racism and foster multiculturalism depends on the assumption that some listeners are gullible enough to believe the expression if exposed to it. But if this assumption is valid, these listeners might be just as likely to believe that there must be some truth in the racist expression because the government is trying to suppress it.

(*Supra* note 1 at 853).

55 *Ibid.* at 763. This statement goes a fair way toward revealing exactly how the Court interprets the "truth" rationale. On its reading, the argument from truth holds that once we are sure we have the truth, there is no need to tolerate opinions contrary to it. No *proponent* of the doctrine known to this author has ever suggested such a reading.

We are simply told that to consider hate speech "as crucial to truth and the betterment of the political and social milieu is ... misguided."[56]

2. THE TRUTH VALUE OF HATE SPEECH

However, even assuming with Dickson C.J. that hate speech is of no value in the search for truth, it does not follow that hate speech is of no value at all in relation to truth. For one thing, as J.S. Mill pointed out long ago, even if we are convinced that we have the truth, it is good to have an adversary in the field to prevent us from falling into "the deep slumber of decided opinion."[57] For another, even if we are convinced of the general falsity of the beliefs at issue, it is still more useful to have them circulating in the light of day than festering underground. Even if we think them patently false, they still speak a "truth" concerning "who believes what about whom" in society that is certainly important and useful to know — particularly in a democracy.[58]

3. STATE OFFICIALS AS ARBITERS

The Court's entire discussion of the truth rationale rests on the general premise that there is less to fear from granting governments the power to separate the true from the false than from leaving this determination to private individuals. But surely, even granting that individuals are often mistaken in their sortings, why should governments

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56 *Ibid.* How it is possible to determine the truth value of hate speech without considering the truth value of even one representative instance must remain mysterious. Certainly nothing about the Court's own definition of the genre — loaded as it is — permits the possibility (*supra* note 19). For an argument that it is not possible, see *infra* notes 136-146 and accompanying text.

57 "Both teachers and learners go to sleep at their post as soon as there is no enemy in the field." *Supra* note 45 at 41; The point is nowhere better illustrated than in an exchange that occured during the first trial of Ernst Zundel in 1984-85 under s. 177 (now s. 181) of the *Canadian Criminal Code* which made it an offense wilfully to publish a "statement, tale or news that [one] knows is false and that causes or is likely to cause injury or mischief to a public interest." One of the statements Zundel, a holocaust denier, made was that Jews were not gassed at Dachau. And in the context of arguing that it was a mistake to try Zundel, G. Caplan responded to Zundel's claim by stating that Dachau was "a slaughtering centre where tens of thousands were gassed in showers and then cremated in vast ovens": "Terrible Blunder Made in Zundel Affair," *Toronto Star* (3 March 1985) F3. As it turns out Zundel was closer to the truth (in this particular matter anyway) than Caplan. Zundel was right to note that Dachau was not a killing centre in which Jews were gassed. Instead, it was a "slave-labor camp and a prison for political detainees" in which Jews, among others, were killed — though not by gassing, and not in the numbers that they were at killing-centers such as Treblinka or Auschwitz-Birkenau: P. Adams, "A Death Camp 40 Years Later: Dachau Casts a Long Shadow" *The Globe and Mail* (29 April 1985) 7. But while Zundel was right about Dachau, he was wrong and, arguably, duplicitous about the holocaust as a whole.

58 For an argument "that even patently false statements communicate particular truths," see S.D. Smith, "Skepticism, Tolerance, and Truth in the Theory of Free Expression" (1987) 60 So. Cal. L. Rev. 649 at 712. For the claim that offensive speech also serves this purpose, see D.A. Farber, "Civilizing Public Discourse: An Essay on Professor Bickel, Justice Harlan, and the Enduring Significance of *Cohen* v. *California*" (1980) Duke L.J. 283 at 303: "the most highly offensive forms of expression communicate an important truth about the offensiveness of the speaker's message. They have a place in the marketplace of ideas because they help the marketplace reject false, ugly ideas by revealing them for what they are."

be thought any more capable? Indeed, given the history of governmental efforts in this regard, they should be considered much less capable. As Professor Schauer has argued:

> [T]he focus on the possibility and history of error makes us properly wary of entrusting to any governmental body the authority to decide what is true and what is false, what is right and what is wrong, or what is sound and what is foolish. As individuals are fallible, so too are governments fallible and prone to error. Just as we are properly skeptical of our own power always to distinguish truth from falsity, so should we be even more skeptical of the power of any governmental authority to do it for us.[59]

And as earlier noted,[60] not only is the argument from truth based on an inherent skepticism about human judgment, it is also based "on a more profound skepticism about the motives and abilities of those to whom we grant political power."[61] Nothing we know about state officials *per se* — certainly nothing the Court submits — suggests that their intelligence is any greater, their motives any less cynical, their characters any less corruptible, their love of command any less firmly established, their inclinations towards zealotry any less pronounced, their penchants for quick and easy solutions to complex problems any less likely, and their beliefs that they possess truth any less unshakeable than those of private individuals. But if they are not better situated with respect to these qualities, why on earth should we grant state officials *any* part at all to play as "arbiters of truth?"

In conclusion, the majority in *Keegstra* asks state officials to play the role of "arbiter of truth" for the entire nation, but while it arms them with the power to do so, nothing in its argument suggests these officials possess either the knowledge or the competence necessary to carry out the task. Given that they do not, it seems much wiser policy to leave to each individual the task of sorting out the true from the false, the right from the wrong, and the good from the bad or evil. For while doing so provides no guarantee that individuals will choose wisely, neither does the provision of a "truth arbiter." At the same time, leaving such decisions to each individual to determine is both less dangerous to society as a whole and decidedly more in keeping with the premises of a free and democratic society.

B. HATE SPEECH AND INDIVIDUAL SELF-FULFILLMENT

1. SELF-AUTONOMY AND GROUP MEMBERSHIP

The second free expression value against which the Court measures hate speech is individual "self-fulfillment." Free expression furthers self-fulfillment by permitting individuals to develop and articulate "thoughts and ideas as they see fit."[62] The Court

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59 F. Schauer, *supra* note 42 at 34. Given the speech protective implications of Schauer's argument from "governmental incompetence," it is clear that the Court could have reached its conclusion that the truth rationale furnishes no support for an assault on the constitutionality of s. 319(2) only by entirely ignoring it.

60 *Ibid.*

61 *Ibid.*

62 *Supra* note 1 at 763.

concedes that s. 319(2) is antithetical to this free speech value among those whose expression falls afoul of it, but it seems to believe that there is a larger gain to be had in overall social self-fulfillment if such expression is suppressed rather than allowed.[63]

The reasoning in support of this proposition, however, is flawed in important respects. In the first place, its argument rests on little more than questionable conceptual postulates and unsupported empirical claims. Having conceded that because it prohibits expression, s. 319(2) inhibits the fulfillment of "those individuals whose expression it limits, and hence arguably works against freedom of expression values," the Court abruptly shifts its focus from speaker to target, and says without further argument that "such self-autonomy stems in large part from one's ability to articulate and nurture an identity derived from membership in a cultural or religious group." And it adds that "[t]he message put forth by individuals who fall within the ambit of s. 319(2) represents a most extreme opposition to the idea that members of identifiable groups should enjoy this aspect of the s. 2(b) benefit."[64] Earlier, in its argument that s. 27 of the *Charter* (the multicultural provision) supports the constitutionality of s. 319(2), the Court had also maintained that individual identity derived from group membership, but, just as here, it offered no evidence to support the claim.[65] Nevertheless, without offering any evidence whatever, the Court authoritatively assures us that the self-fulfillment of the targets of hateful expression is threatened by the presence of hate speech in society.

But why should the "self-autonomy" of the targets of hate speech be threatened by the "unhindered promotion" of the message of hate speakers? Are we seriously to believe that the "self-fulfillment" of members of identifiable groups is threatened in any important way by the marginal mutterings of outsiders like Keegstra? If so, we would surely be attributing to these members rather weak, fragile, and easily shaken concepts of self and identity. To be sure, a member of a target group in a regime which authorized attacks against one's person on the basis of ascriptive qualities like race or ethnicity would have serious cause for concern, but the same is not true of societies like Canada or the United States which both officially subscribe to doctrines of equality and actively prosecute illegal hateful deeds. The mere fact, moreover, that a society which punishes racist deeds permits individuals to speak their minds freely carries no implication whatever that it either accepts the message proffered by hate speakers or condones any particular course of action they recommend.[66] If anything, the fact that it punishes racist deeds would suggest that acting on such views is *not* governmentally sanctioned.

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63 The logical structure of this argument alone would seem to call into question at least the second element contained in Lorraine Weinrib's contention that "[t]he majority judgment manifests no trace of the deferential, utilitarian and empirically suspect arguments, championed by Justice La Forest and referred to with favour by the Chief Justice at the beginning of his judgment." ("Hate Promotion in a Free and Democratic Society," *supra* note 27 at 1427). Whatever credence we might want to give to the first and third of these, the claim that the above argument is not "utilitarian" is simply false.

64 *Supra* note 1 at 763.

65 *Ibid.* at 757-58.

66 *Infra* notes 166-173 and accompanying text.

Second, what is the evidence for the proposition that anyone's self-autonomy "stems in large part from one's ability to articulate and nurture an identity derived from membership in a cultural or religious group"? For starters, what do we mean by the concept "self-autonomy"? On some readings, the very concept of "autonomy" is of dubious value because it seems to wall off individuals from the outside world.[67] On others, the outside world naturally intrudes but not without bringing important questions along with it. For example, how much determination from within is required to make a person autonomous? And over what issues? Every issue? Some? If so, which? And what is the principle of selection? All of these questions are relevant to determining the utility of the concept of autonomy, yet none of them are addressed by the Court.

Third, what is the evidence that *individual* "autonomy" is derived from group membership in the first place? Isn't one's autonomy sometimes gained in opposition to one's group memberships? [68] Indeed, how can an individual be said to take his identity "in large part" from *any* group membership without at the same time also be said to be threatening his *individual* "autonomy"?

Still further, what is the exact relationship between an individual and his group memberships? Are not individuals often members of many groups, not all of which are "cultural or religious"? If so, how can we be so sure that our identities are derived only from our cultural and religious group memberships, as the Court would have it, and not from others? Is it not sometimes the case that our various group memberships pull us in contrary directions?[69] If so, and if they do, how can anyone predict, as the Court certainly attempts, which particular groups we *will* identify with without at the same time running the risk of telling us which groups we *should* identify with?[70]

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67 See, for examples, M. Sandel, *Liberalism and the Limits of Justice* (London: Cambridge, 1982); A. MacIntyre, *After Virtue: A Study in Moral Theory* (Notre Dame: University of Notre Dame Press, 1981); C. Taylor, "Atomism" in A. Kontos, ed., *Powers, Possessions and Freedom* (Toronto: University of Toronto Press, 1979).

68 R. Fulford has suggested intermarriage as one possible way of asserting individual autonomy ("Do Canadians want ethnic heritage freeze-dried?" *Globe and Mail* (19 February 1997) C1: "those born to a certain culture may find its expressions — from food to marriage customs, from music to political allegiances — oppressive, boring, or irrelevant. The proof lies in the growing number of marriages between members of different groups. Ethnic organizations vigorously oppose intermarriage, but can't stop it. Often, intermarriage can be best understood as a conscious or unconscious break for freedom").

69 In the context of asking whether students need to "see themselves" in the curriculum in order to learn, N. Glazer in *We Are All Multiculturalists Now* (Cambridge: Harvard University Press, 1997) at 49 asks:

> What do we mean by the "self"? The assumption of the multicultural enthusiasts is that the self refers to the racial and ethnic self. But of course we are all made up of many selves. There is the self that prefers tennis to baseball, the self that prefers rock to classical music, the self that prefers science to social studies, that is poor rather than well-to-do, suburban rather than inner city, Southern rather than Northern, Lutheran rather than Baptist, and so on and so on. There are multiple selves....

70 Fulford, *supra* note 68: "In the natural course of things some citizens will choose to identify themselves with their historic culture and others will choose to move outside it. Government policy should never for a moment even hint that one choice is more desirable than the other." But see W. Kymlicka, *Multicultural Citizenship: A Liberal Theory of Minority Rights* (Oxford: Clarendon, 1995) for a contrary view.

Finally, and derived from all the above, does not this part of the Court's argument ultimately question the very possibility of individuality? More precisely, when it speaks about identity, it is not clear whether it is speaking about the identity of "individuals" or about the identity of "group members." If the latter, then should not we be speaking less of "individual" autonomy when we speak of fulfillment than of "member of group" autonomy? But if we are speaking only about individuals insofar as they are members of groups, then is not the very possibility of individuality conceived within this conceptual framework called into question? For surely an individual is more than simply a member of a group. On the other hand, if we are in fact speaking about individuals rather than members of groups, should not we be open to the possibility — nay, perhaps certainty — that individual autonomy or fulfillment can be obtained — indeed, often is obtained — outside of, and in opposition to, any *particular* group membership?[71]

Furthermore, even if we accept the Court's facile sociology and the normative implications contained therein, why does it follow that a hate speaker can only *threaten* my Court-preferred identifiable group identity? Why can it not be said with equal — or even more — legitimacy that the "unhindered promotion" of a hateful message would foster a closer identification with the preferred group? At stake here, after all, are not deeds but words.[72] Indeed, is not the Court's contention that group identity is threatened by the message of hate speech wonderfully refuted by the hideous spectacle of the Johnson administration's futile attempt to bomb the North Vietnamese people into dissociation from their "group"? But if *bombs* from the most powerful nation on earth were not sufficient to disengage "disadvantaged" individuals in a relatively poor and powerless nation from their "group memberships," why, again, should we expect that in the metropole the *words* of non-authoritative and relatively powerless individuals like James Keegstra can?

2. INDIVIDUALS OR GROUP MEMBERS?

The Court's entire approach to the free expression value of self-fulfillment raises the question whether its focus is on the individual *per se*, or on the individual only insofar as he is a member of a preferred identifiable group. As noted earlier, those theorists who have argued the case for free expression from the vantage point of the value of self-fulfillment all have focused on the individual *simpliciter*. In so doing, these theorists certainly did not mean to deny that group memberships can be an important part of any individual's identity, or that they play an important role in the dynamics of self-fulfillment. For if they did, they would court the rather obvious objection that even hate speakers have group memberships, some of them sometimes of a very strong

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[71] For an analysis of some of the problems faced by minorities who are themselves members of minority groupings, but who are also subject to arguably illiberal treatment by their larger minority groups, see L. Green, "Internal Minorities and Their Rights" in J. Baker, ed., *Group Rights* (Toronto: University of Toronto Press, 1994) 101.

[72] Of course, for some believers in the magical and bone-crushing power of words — *e.g.*, C.A. MacKinnon, *Only Words* (Cambridge: Harvard, 1993) — such talk is likely both implausible and hurtful.

nature.[73] But while none of these theorists would deny the important part played by group memberships in identity-formation or individual fulfillment, none of them would allow that the individual is fulfilled *only* as a member of a group, and, indeed, given the shift in the Court's focus, only as a member of an *identifiable* group. But the Court does.[74]

The claim that individuals are fulfilled only as members of groups — no matter the variety — is entirely antithetical to the *self*-fulfillment rationale which, faithfully adhered to, pertains only to individuals as such. Moreover, the idea that members of identifiable groups are fulfilled only to the extent that they identify with their identifiable group is not only spurious sociology, it is also deeply insulting to those the Court would include within the identifiable group category; for it assumes that they, unlike those of us ostensibly from non-identifiable groups, are inevitably and inexorably prisoners of their identifiable group identities.[75] Even more than this, however, it places the Court right in the center of identifiable group "identity" politicking. For surely the Court cannot be unaware of the likelihood that there will be more than one "preferred" conception of any such group's "proper" identity, and, therefore, generally more than one competitor within any particular group vying for the right to determine this identity both authoritatively and permanently. However, by focusing on the identities of group members rather than of individuals *per se*, the Court's argument naively supports whatever power-outcome currently obtains among identifiable group identity-determining competitors.[76] Adding insult to injury, its authoritative pronunciation inevitably *enforces* this outcome as well. The prospect of such an eventuality can only depress those who believe that freedom of expression is essential to *individual* self-fulfillment.

3. A CONFLICT OF FULFILLMENTS

Lastly, there is the Court's focus on the message of hate speech. The Court produces no evidence at all to suggest that those advancing the self-fulfillment rationale even contemplated the possibility that it could be used to proscribe expression on the basis

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[73] Imagine, for example, the strength of the group ties that are required to bind Klan families together in the context of a society that generally regards them as social pariahs.

[74] The Court speaks of "an identity derived from membership in a cultural or religious group" rather than from membership in an "identifiable group" — which is the term s. 319(2) uses and what s. 318(4) describes as a group "distinguished by colour, race, religion, or ethnic origin." Though it nowhere says, I assume that the term "cultural" here is to be taken to include the first, second, and fourth of these — in other words, as a catch-all to distinguish them from religious groupings.

[75] The Court treats the category "identifiable group" as if it applied only to specific groupings, but this is in clear violation of the plain language of s. 318(4) which is universal in its coverage. *Supra* note 8 and *infra* notes 237-240 and accompanying text.

[76] For an account of the difficulties such "support" can create for dissident members of identifiable groups, see G. Lowery, *One By One From The Inside Out: Essays and Reviews on Race and Responsibility in America* (New York: Free Press, 1995). See also S.L. Carter, *Reflections of an Affirmative Action Baby* (New York: Basic Books, 1991) and S. Steele, *The Content of Our Character: A New Vision of Race in America* (New York: St. Martins, 1990).

of viewpoint.[77] To be sure, some commentators otherwise apparently sensitive to free speech arguments[78] have argued that hateful expression might be proscribed under certain circumstances consistent with a "fighting words" rationale,[79] but none of these believes with the Court that this rationale provides a blank cheque with which to proscribe expression *solely* because of the general message it presents,[80] and none of these, furthermore, looks to the self-fulfillment thesis for support.[81] The Court is virtually unique in this respect. Is it right?

Is the Court correct in thinking that the self-fulfillment thesis *requires* the suppression of expression which opposes the idea that members of identifiable groups should themselves be free to gain self-fulfillment "by developing and articulating thoughts and ideas as they see fit"? Implicit in the very question is the assumption that what is at stake here is not so much a conflict between the speaker's right to gain self-fulfillment from promoting hatred against members of identifiable groups versus these members rights to be protected against, say, the violence thought to result therefrom, as much as it is between a conflict of expressive "fulfillments." In other words, the conflict the Court espies is not between the self-fulfillment right of speakers and some non-self-fulfillment and, therefore, non-free expression right of target group members, but between the free speech self-fulfillment rights of speakers and the free speech self-fulfillment rights of their targets. The conflict is, thus, one that occurs entirely *within* the free expression right. This is the true novelty of the Court's position.[82] However, since the Court advances a similar argument in the context of its

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77 C.E. Baker, *Human Liberty and Freedom of Speech* (New York: Oxford University Press, 1989) probably comes closest to the mark in that he argues that commercial speech can legitimately be given less protection than other forms of speech. But even here, it is an entire class of expression that is singled out not a particular viewpoint.

78 K. Greenawalt, "Insults and Epithets: Are They Protected Speech?" (1990) 42 Rutgers L. Rev. 287; T.C. Grey, "Discriminatory Harassment and Free Speech" (1991) 14 Harv. J. of Law and Pub. Pol. 157; R. Smolla, "Rethinking First amendment Assumptions About Racist and Sexist Speech" (1990) 47 Wash. and Lee L. Rev. 171.

79 *Chaplinsky* v. *New Hampshire*, 62 S.Ct. 766 at 769 (1942): "those which by their very utterance inflict injury or tend to incite an immediate breach of the peace."

80 Greenawalt, *supra* note 78 at 306 is representative: "If racial and ethnic epithets and slurs are to be made illegal by separate legal standards, the focus should be on face-to-face encounters, targeted villification aimed at members of the audience"; see also, Grey, *supra* note 78 at 160-61; Smolla, *supra* note 78 at 210-11.

81 D. Kretzmer, "Freedom of Speech and Racism" (1987) 8 Cardozo L. Rev. 445 at 483 argues — wrongly, I believe — that the self-fulfillment thesis does not "necessarily lead us to the conclusion that content-related limits on speech must be absolutely prohibited," but even he does not contend, as the Court does, that such limits are *required* by the thesis.

82 Novelty only at the level of Supreme Court opinions, however, not at the level of argument *per se*. A few years after *Keegstra*, F.I. Michelman, "Civil Liberties, Silencing and Subordination" in L. Lederer & R. Delgado, eds., *supra* note 22, 272 at 273 advanced a strikingly similar argument:

> being able to speak one's mind to others is crucial to autonomy. From this it would follow that for a person to be stopped by another's actions from speaking his or her mind to others is the infliction of a loss of autonomy. That loss is not erased, it is not shrunk, just because the actions that inflict it are an exercise of someone else's autonomy. This is an absolutely crucial point. It means that we have autonomy values on both sides, a truth that ought to make conscientious civil libertarians squirm.

consideration of the "democratic political process" rationale, I shall postpone further discussion of it until after I examine that argument.

4. CONCLUSION

In conclusion, we certainly could grant that if they had their way, hate speakers likely would deny to their targets the individual self-fulfillment they would retain for themselves. However, absent any corresponding attempt to, say, forcibly prevent target group members from doing so, what, again, is at issue is nothing more than the odiousness of the message itself. Moreover, with all due respect to the Court, the fact remains that we have no more *hard* evidence of the exact relationship between hate speech and target group attitudes or behavior than we have of the relationship between pornography and the behaviour of its supposed "targets" — women and children.[83] Absent any hard evidence demonstrating a causal connection between hate speech and anti-social conduct, we are forced to conclude that *it is the message alone* that offends the Court's sensibilities.[84]

In the argument developed below (*infra* notes 103ff and accompanying text) I contend that in a regime that tolerates hate speech, target-group members, no less than hate speakers, *are* "able" to speak their minds to others, are not necessarily "stopped by another's actions" from doing so, and therefore, suffer no necessary loss of autonomy because of such tolerance. For a list of other works addressing the "silencing" theme, see the works cited in *infra* note 106.

83 Despite its conclusion that hate speech "causes" real and important harm to target group members, the Court majority's own analysis of the issue, where it does not simply assert its conclusions, is peppered throughout with uncertainty and equivocation. It claims, for example — and with no apparent sense of irony! — that "[i]t is indisputable that the emotional damage caused by words *may be* of grave psychological and social consequence." As well, it says that "words and writings that wilfully promote hatred *can constitute* a serious attack on persons..."; that the impact of hate propaganda on "the individual's sense of self-worth and acceptance ... *may cause* target group members to take drastic measures in reaction, *perhaps avoiding* activities..."; and that "[i]t is *not inconceivable* that ... hate propaganda *can attract* individuals to its cause...." Continuing in the same vein, the Court says that "the alteration of views held by the recipients of hate propaganda *may occur* subtlely" [sic]; and, of hate propaganda itself, that "*there is evidence that* its premise of racial or religious inferiority *may persist* in a recipient's mind as an idea that holds some truth, an incipient effect *not to be entirely discounted*...[!]" And finally, connecting its argument about harms to target- group members with its argument about harms to society, it says that "[t]he threat to the self-dignity of target group members is thus matched by *the possibility that* prejudiced messages will gain some credence, with the attendant result of discrimination, and *perhaps even* violence, against minority groups in Canadian society": *supra* note 1 at 745- 48 [emphasis added]. No doubt many things are possible when some individuals speak hatefully to others. No doubt, as well, many ugly things might be said, and many feelings might be hurt. But it is a giant step taken with no "Captain May I?" clearance to conclude from these mere *possibilities* that we can be *certain* about the reaction of any given individual or target group. Given all its equivocations, the Court, in spite of its obvious predilections for causal terminology, would appear to agree.
On pornography, see, for example, F.M. Christensen, *Pornography: The Other Side* (New York: Praeger, 1990) at 41: "the presumptuous claim that women in general feel degraded by pornography is just not true."

84 To be sure, the Court refers to the "inordinate vitriol" characteristic of hate speech (*supra* note 1 at 763), but it is clear from the context of the claim that the vitriol at issue derives solely from its message of "intolerance and prejudice."

C. HATE SPEECH AND THE DEMOCRATIC POLITICAL PROCESS

The third free expression value has to do with the part played by free expression in the political process. Dickson C.J. calls the connection between these the "linchpin of the s. 2(b) guarantee" and says that "the nature of this connection is largely derived from the Canadian commitment to democracy."[85] This part of his analysis accepts that the free expression of ideas is central to the operation of a democratic society, and so in measuring the value of hate speech, he is measuring it in terms of its supposed contribution to the workings of a democracy. As we shall see, however, the general argument he presents in this context is not that different from the arguments he presents in his consideration of the other values supposedly underpinning the free expression guarantee. Here as elsewhere it is the message of the expression that convicts hate speech, despite the fact that the political character of such expression seems to be both explicitly recognized and explicitly valued.[86]

Dickson C.J. says that freedom of expression is important in a democratic society for two reasons: first, because "it permits the best policies to be chosen from among a wide variety of proferred options," and second, "because it helps to ensure that participation in the political process is open to all persons."[87] However, while his argument pays lip service to the first of these considerations, his concern is almost entirely with the second. And, as is the case with his treatment of the other values central to a free and democratic society, his overarching concern about political "participation" is with its egalitarian message: "open participation must involve to a substantial degree the notion that all persons are equally deserving of respect and dignity." Should the state "condemn a political view," it could not do so without "to some extent harming the openness of Canadian democracy and its associated tenet of equality for all."[88]

1. FREE EXPRESSION AND PARTICIPATION OPEN TO ALL

The first argument the Court advances to support its contention that s. 319(2) is not inimical to inclusive political participation in a free and democratic society is that even though "[t]he suppression of hate propaganda undeniably muzzles the participation of a few individuals in the democratic process, and hence detracts somewhat from free expression values ... the degree of this limitation is not substantial."[89] Again, just as it did in its consideration of the self-fulfillment rationale, the Court concedes that the democratic political process value is violated by s. 319(2), but its utilitarian argument trades the participation prospects of "a few" for those of the many. However, given the supposed egalitarian leanings of the Court majority, the most obvious reply to its claim that the limitation is not substantial would seem to be "to whom?" One gets the

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85 *Ibid.* at 764. Compare A. Meiklejohn (*supra* note 52 at 27): "The principle of the freedom of speech springs from the necessities of the program of self-government."

86 Which is more than a little surprising since he apparently also believes that political expression is "at the very heart of the principle extolling freedom of expression as vital to the democratic process": *supra* note 1 at 764.

87 *Ibid.*

88 *Ibid.*

89 *Ibid.*

disturbing feeling, though, that such a question is not, in the Court's considered judgment, germane. For despite its supposed commitment to egalitarian principles, it apparently does not consider the views of "a few individuals" to count for much in the overall scheme of things.[90]

But this argument turns democratic — not to mention free speech — theory on its head. For one thing, it makes the exercise of the right of free expression conditional on the number of people advocating a particular point of view. However, since one of the central features of the free expression guarantee in a democracy is to permit individuals regardless of numbers to have their say, the argument is profoundly anti-democratic.

Moreover, surely one of the central functions of free expression in a democracy lies in its potential ability to turn today's minority, no matter how small in number, into tomorrow's majority.[91] However odious the opinions of a minority might appear to the majority of people in our society, they need protection from legislative majorities precisely because they are those of a relatively "few individuals." To say, therefore, that majorities should be free to suppress the speech and, therefore, the participation of minorities, because they are but "a few individuals" runs entirely counter to both democratic and free expression logic. Again, just as it did in its consideration of the truth and self-fulfillment values, the court here is playing fast and loose with the intellectual content of the democratic political process rationale.

Once more, the reason for this anti-egalitarian and anti-democratic argument would appear to be the anti-egalitarian and anti-democratic concern that the hateful and despised ideas of a minority might eventually spread to a majority. Yet, surely, this is a risk that a "free and democratic society" is required to run, if it is to remain both free and democratic. Dickson C.J. seems, in part, to agree, since he says that he is "aware that the use of strong language in political and social debate — indeed, perhaps even language intended to promote hatred[92] — is an unavoidable part of the democratic process." He also says that he recognizes "that hate propaganda is expression of a type which would generally be categorized as 'political,' thus putatively placing it at the very heart of the principle extolling freedom of expression as vital to the democratic process." Nevertheless, he claims, "expression can work to undermine our commitment to democracy where employed to propagate ideas anathemic to democratic values." How does it do so? By "arguing as it does for a society in which the democratic process is subverted and individuals are denied respect and dignity simply because of racial or religious characteristics."[93]

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90 While many of us are uneasy with the fact that we are part of a political society that includes people who utter hateful messages, it is not clear that all of us would accept the utilitarian premises on which this claim is based. Again, *cf.* Weinrib, *supra* note 27.

91 Or to protect members of today's majority should they be so unfortunate as to find themselves in tomorrow's minority — a position that those who would ban hate speech often seem not to countenance.

92 Without evincing any hint that he might conceivably be contradicting the sum and substance of his overall argument, Dickson C.J.'s admission here is quite remarkable. Given the admission, what convicts one hate promoter but not another is simply the target group selected!

93 *Supra* note 1 at 764.

What is wrong with hate speech in the context of the democratic political process rationale is exactly what was wrong with it in the "truth" and "self-fulfillment" contexts; first, that its message contradicts some of the most basic ideals that the majority of people in our society hold dear, and second, that if permitted to circulate, these ideas might eventually gain majoritarian acceptance. Thus considered, the Court's real worry seems to be as much — if not more — with free expression and the "free and democratic society" as it is with hate propaganda. For surely one of the virtues of free expression in a free and democratic society is that it makes possible the expression of even the most outrageous ideas and leaves it to the people to weed out the good from the bad — even evil — among them. However, in the Court's opinion, the democracy will remain neither free nor democratic if it allows the free circulation hateful opinions. Thus, given what appears to be both a strong aversion to risk and a low opinion of human reason, the Court would short-circuit the communicative process for us by using censorship to bring about what it (falsely) believes to be a democratic end — the guarantee of a proper outcome.[94]

2. FREE EXPRESSION AND CONSTRICTED POLICY OPTIONS

The Court says that free expression is important to a democratic society in the second place because "it permits the best policies to be chosen from among a wide variety of proffered options," but it advances no argument whatsoever in support of this claim and, more important, no argument in support of its claim that s. 319(2) is consistent with this aspect of the democratic rationale for free expression. This is surely surprising since it seems obvious that a law punishing the expression of certain opinions contracts rather than expands policy options. Indeed, one would think the majority would have to agree since it also believes that one of the primary "values or principles" undergirding a free and democratic society is that such a society is characterized by an "accomodation of a wide variety of beliefs."[95]

Though it nowhere argues the point, it seems reasonable to speculate that the Court believes that a regime of freedom of expression which permitted such an "accomodation" would expand both the number and variety of policy options and, therefore, would maximize, even if it does not guarantee, the probability of choosing the best policy in any given instance. The assumption behind such reasoning is that when people are free to say what they think, it is plausible to expect a greater number and variety of opinions to circulate than when they are not. Of course, by itself a regime of freedom of expression is no *guarantee* of a wider variety of policy options, since for any number of possible reasons individuals might all end up proferring similar opinions. However, if a regime of free expression is no guarantee of a wide range of

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[94] Of course, as earlier noted (*supra* notes 59-61 and accompanying text), permitting state officials to determine what we may see, hear, or read is no guarantee of political truth either.

[95] *Supra* note 1 at 736, quoting Dickson C.J. in *R.* v. *Oakes* [1986] 1 S.C.R. 103 at 136:

> The Court must be guided by the values and principles essential to a free and democratic society which I believe embody, to name but a few, respect for the inherent dignity of the human person, commitment to social justice and equality, accomodation of a wide variety of beliefs, respect for cultural and group identity, and faith in social and political institutions which enhance the participation of individuals and groups in society.

options, even less so surely is a regime of suppression. Moreover, a regime which refrains from suppressing disfavoured options is the one indispensible condition favourable to the growth of of both number and variety of opinions as well as for thinking that policy debates have not been distorted and manipulated, and policy choices have not been pre-determined by the intrusion of state authorities.

On the other hand, laws such as s. 319(2) constrict the bounds of legitimate political discourse, making it less likely that those individuals and political groupings on the margins will feel free to say what they think. To the extent they do, such laws not only deprive us of the knowledge of what some of our fellow citizens are thinking but might be too reticent to express, but also lead us to assume that what they are thinking is not politically truthful.

One might, of course, object (as the Court surely would) that laws like s. 319(2) are directed only at the most outrageous and despicable political viewpoints and, therefore, ought rationally not affect "legitimate" political debate. But this objection misses the real danger of such laws. For even if these laws target only the most extreme forms of hateful exression, they inevitably catch in their proscriptive nets many less virulent forms of political discourse. Their greatest danger in this regard is not so much that they penalize people for the mere expression of opinion — which they surely do — but that intelligent and sensible people holding potentially unorthodox opinions on politically sensitive topics will reasonably choose not to express them rather than risk the chance of both expensive litigation and a possible prison sentence. Inevitably, then, such laws do not restrict the political participation of only "a few."

Indeed, virulency itself is a most fluid term. To some people — the Court majority for example — the targets of hate speech laws are very narrowly construed. For others the law's net captures a much wider variety of potential offenders. Indeed it is not unreasonable to say that laws such as s. 319(2) contribute importantly to the chilled political climate attending discussion of matters of race, sex, and ethnicity that pervades North American society today. For given both their existence and their Court approved constitutionality, such laws make it prudent for anyone holding "incorrect" views on such matters to forego the opportunity to press their opinions and arguments. Being on the margins of political debate rather than at its center, and being a private citizen rather than a state official, one can never be sure when one's opinions will be perceived by the relevant authorities to have crossed the lines of acceptability and legality. According to the dissent, these twin problems of chill and self-censorship stem from the vagueness and overbreadth that necessarily attends s. 319(2).[96]

3. CONCLUSION: THE "DEMOCRATIC VALUES" LIMITATION

Dickson C.J. concludes his discussion of the relationship of hate speech to free expression values by noting that while he is "very reluctant to attach anything but the highest importance to expression relevant to political matters,"

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[96] *Supra* note 1 at 854-65.

> given the unparalleled vigor with which hate propaganda repudiates and undermines *democratic values*, and in particular its condemnation of the view that all citizens need be treated with equal respect and dignity so as to make participation in the political process meaningful, I am unable to see the protection of such expression as integral to the democratic ideal so central to the s. 2(b) rationale.[97]

Here he explicitly grants that hate speech is political expression, but he thinks that its particular political message is so contrary to democratic values that it cannot be said to be "integral to the democratic ideal." However, even granting the "unparalleled vigor" with which such expression "repudiates and undermines democratic values," this argument, just as those he offered on the values of truth and self-fulfillment, stands the democratic rationale on its head. For, surely, one of most important principles attached to this rationale is that those opposed to democracy and democratic values should be free to argue "vigorously" against them. But, strictly construed, Dickson C.J.'s argument, here, forecloses this possibility. Adding insult to injury, it does so in the very name of democracy. Nor is this the only instance in the opinion where the argument for democracy — as well as the argument for free expression — is turned against itself.

At several points in his opinion, Dickson C.J. argues as if he sees nothing odd about empowering a legislative majority in a putatively democratic society to criminalize ideas or opinions held by a minority of citizens to the extent that these ideas or opinions repudiate or condemn "democratic values." In his discussion of the relation of hate speech to the value of equality, he says:

> The message of the expressive activity covered by s. 319(2) is that members of identifiable groups are not to be given equal standing in society, and are not human beings equally deserving of concern, respect and consideration. The harms caused by this message run directly counter to the values central to a free and democratic society, and in restricting the promotion of hatred Parliament is therefore seeking to bolster the notion of mutual respect necessary in a nation which venerates the equality of all persons.[98]

And in his discussion of the relationship between hate speech and the value of multiculturalism, he says the former can be proscribed because it "seriously threatens 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."[99] In fact, much of what he says throughout his opinion suggests that he believes there is no

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97 *Ibid.* at 765 [emphasis added]. Thus, hate propaganda is low value political expression because it "repudiates and undermines democratic values." This suggests that "high value" political expression is that which celebrates and solidifies these values. But compare Meiklejohn (*supra* note 52 at 26-27) on expression which is "integral to the democratic ideal":

> the vital point ... is that no suggestion of policy shall be denied a hearing because it is on one side of the issue rather than another. And this means that though citizens may, on other grounds, be barred from speaking, they may not be barred because their views are thought to be false or dangerous.... When men govern themselves, it is they — and no one else — who must pass judgment upon unwisdom and unfairness and danger. And that means that unwise ideas must have a hearing as well as wise ones, unfair as well as fair, dangerous as well as safe; un-American as well as American.

98 *Supra* note 1 at 756.

99 *Ibid.* at 758.

contradiction whatever in arguing that a democratic majority should be free to legislate a "democratic" orthodoxy and imprison those who publicly reject it.

III. THE FREE EXPRESSION BASIS OF HATE SPEECH LAWS: THE "SILENCING" ARGUMENT

Why, it is worth asking at this point, does Dickson C.J. advance so confidentally such contentious, tendentious, and even, at times, contradictory, arguments in his discussion of the relationship of hate speech to free expression values? Having said, for example that political expression is the form of expression closest to the core of s. 2(b), he also says both that hate propaganda is "expression of a type which would generally be categorized as 'political,'" *and* that it "strays some distance from the spirit of s. 2(b)."[100] And why does he play so casually with the rationales themselves? His treatment of the argument from truth converts it into an argument from infalliblity and self-certainty. Where the argument from truth says tolerate expression because we either do not, or cannot, know for certain whether we have it, or because even if we think we do, we ought not block the road to further inquiry, Dickson C.J. assumes we already possess the relevant truths and concludes that there is, therefore, no need to leave the road free of the relevant encumbrances.

In his treatment of the argument from self-fulfillment, he admits that s. 319(2) "inhibits this process among those individuals whose expression it limits," but then without offering any reasons for so doing, abruptly shifts the focus of the discussion from speakers to targets and, in the process, advances claims about the fulfillment possibilities of identifiable group members that are grounded in nothing more substantial than conceptual abstractions and unsupported sociological postulates.[101] Most important, his operative assumption that individuals are fulfilled only as members of identifiable groups is entirely contrary to the rationale itself.[102]

Finally, his consideration of the democratic political process rationale altogether ignores the argument that free expression is essential to ensuring a wider variety of policy options.[103] And while he, again, admits that s. 319(2) "muzzles the participation of a few individuals in the democratic process, and hence detracts somewhat from free expression values," he does not believe "the degree of this limitation is ... substantial." Instead, standing both democratic and free speech rationales on their heads, he, once again, shifts the focus of his concern from speakers (and even audiences) to the targets themselves and concludes in the name of democracy that people should *not* be left free to argue in favour of certain anti-democratic values.[104]

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100 *Ibid.* at 764-66; *supra* note 97 and accompanying text.

101 *Cf.* Weinrib, *supra* note 27.

102 *Supra* note 1 at 763; *supra* notes 73-76 and accompanying text.

103 Which, again, is especially puzzling since one of the ideals that he says "inform[s] our understanding of a free and democratic society" is an "accomodation of a wide variety of beliefs": *supra* note 1 at 736.

104 *Ibid.* at 764.

Why not? Because "all citizens need be treated with equal respect and dignity so as to make participation in the political process meaningful."[105]

At last we have reached the core of the Court's argument. What was at issue throughout its treatment of hate speech in relation to the ends or purposes of free expression was the free expression guarantee itself — not for those whose utterances brought them into contact with s. 319(2), nor for those of their audiences who might legitimately claim that the information they need to carry out their duties as citizens of a democracy is unjustly kept from them by such laws. What was at issue all along was *the free expression rights of target group members.* Once the Court determined that hate speech was not expression close to the core to the s. 2(b) guarantee, it shifted the focus of its free expression attention and concern from the speakers to the targets of hate speech. Having done that, a clash of free expression rights was practically inevitable.

In this part I address what has come to be called the phenomenon of "silencing." On the most general level, silencing arguments hold that the exercise of the free speech rights of some restrict or "silence" the speech of others.[106] The first two sections of

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[105] *Ibid.* at 765.

[106] There has been in recent years something of an industry in "silencing" arguments. The following is but a selection of some of the more prominent among them: Fish, *supra* note 2; C. Sunstein, "Pornography and the First Amendment" (1986) Duke L.J. 589; *Democracy and the Problem of Free Speech* (New York, Free Press, 1993); "Words, Conduct, Caste" in L. Lederer & R. Delgado, eds., *supra* note 22 at 266; "Free Speech Now" in G.R. Stone *et al.*, eds., *The Bill of Rights in the Modern State* (Chicago: University of Chicago Press, 1992) at 225; C. Fried, "The New First Amendment Jurisprudence: A Threat to Liberty" in G.R. Stone *et al.*, eds., *ibid.* 225; F.I. Michelman, "Civil Liberties, Silencing, and Subordination" in L. Lederer & R. Delgado, eds., *supra* note 22 at 272; "Conceptions of Democracy in American Constitutional Argument: The Case of Pornography Regulation," (1989) 56 Tenn. L. Rev. 291; Delgado, *supra* note 4; "Note: The Power of Words: The Power of Advocacy Challenging the Power of Hate Speech" (1991) 52 U. Pitt. L. Rev. 955 at 970; A. Dworkin, "Against the Male Flood: Censorship, Pornography, and Equality" (1985) 8 Harv. Women's L.J. 1; O. Fiss, "Freedom and Feminism" (1992) 80 Georgetown L.J. 2041; *The Irony of Free Speech* (Cambridge: Harvard, 1996); J. Butler, *Excitable Speech: A Politics of the Performative* (New York: Routledge, 1997); C.A. MacKinnon, "Not a Moral Issue" (1984) 2 Yale L. & Pol. Rev. 321; "Pornography, Civil Rights, and Speech" (1985) 20 Harvard C.R.-C.L. L. Rev. 1; *Feminism Unmodified: Discourses on Life and Law* (Harvard: Harvard University Press, 1987); *Only Words*, *supra* note 72. There has been considerable debate generated by MacKinnon's particular version of the "silencing" argument. See, *e.g.*, R. Dworkin, "Liberty and Pornography" *The New York Review of Books* (15 August 1991) 12; "Women and Pornography" *The New York Review of Books* (21 October 1993) 36; J. Hornsby, "Speech Acts and Pornography" in S. Dwyer, ed., *The Problem of Pornography* (Belmont, Ca: Wadsworth, 1995) at 224. See as well the exchange between R. Dworkin and MacKinnon in *The New York Review of Books* (3 March 1994) 47. For a sympathetic attempt to produce a more coherent version of MacKinnon's argument, see R. Langton, "Speech Acts and Unspeakable Acts" (1993) 22 Phil. & Publ. Affairs 293. For criticism, see D. Jacobson, "Freedom of Speech Acts? A Reply to Langton" (1995) 24 Phil. & Publ. Affairs 64; and L. Green, "Pornographizing, Subordinating, and Silencing" in R. Post, ed., *Censorship and Silencing: Practices of Cultural Regulation* (L.A.: Getty Research Institute, 1998) at 285-311. For a useful attempt to "delegitimize," "invalidate," or "disable" the entire speech act construct — at least insofar as it is used as a tool to limit expression, see F.S. Haiman, *Speech Acts and the First Amendment* (Carbondale: Southern Illinois University Press, 1993); *Speech and Law in a Free Society* (Chicago: University of Chicago Press,

this part explore the question what is supposedly being silenced: — the right to speak or the exercise of this right? Following the terminology set out in the work of J.L. Austin,[107] the next two sections address two different species of "silencing" arguments — the "perlocutionary" and the "illocutionary."[108] The perlocutionary argument, claims that hate speech silences by destroying the "credibility" of identifiable group members, and clearly has its roots in the reasoning of *Keegstra* and *Ross*. On the other hand, while not evident in the reasoning of either case, the illocutionary argument, which maintains that the expression of some silences the expression of others by rendering it incomprehensible, has made its appearance mainly in the context of some anti-pornography debates and is worth considering for what it might be thought to say in the hate speech context. I contend that both arguments are flawed, though for different reasons. Next I examine three separate versions of the argument that people can be silenced by expression that renders them fearful or apprehensive — *viz.*, that *public* sanctions by their absence as well as their presence have a silencing effect; that *private* sanctions such as boycotts or picketing do the same; and that people are silenced by *illegal acts or threats of violence* performed or uttered against them. I maintain that none of these arguments are necessarily valid and conclude that the silencing argument should be reserved only for physically coercive disruptions of the communicative process. The remaining sections of this part consider some reasons why these flawed silencing arguments might have been advanced, and the dangers to a system of free expression posed by the expansive conception of silencing that the Court itself accepts and advances.

A. A CLASH OF S. 2(B) RIGHTS? OR A CLASH OF THEIR EXERCISE?

But how might it be said that my exercise of my free expression right can restrict or impede your free expression right? In a regime devoted to the evenhanded protection of everyone's right to express opinions, it would seem obvious that no one's right to speak their mind would be lessened, and it seems absurd to suggest that the simple exercise of the free expression rights of some necessarily restricts or impedes the right of others to use theirs? Nevertheless, the Court seems to be arguing that the free expression rights of some *can* somehow impede the free expression rights of others, and it is this contention that appears to furnish its argument for restriction with a constitutional basis. For if you can show that your free expression rights are impeded by something I have said, then since your right is protected by s. 2(b), there is a *prima facie* reason for the law to step in to protect your right to speak. Section 319(2), then, might be justified on the basis that it protects the free speech rights of identifiable group members. On this argument, s. 319(2) is not speech-suppressive it is speech-protective, and the Court in upholding its constitutionality is acting entirely consistent with the values underlying s. 2(b). Is the argument correct? If it is, it certainly needs a lot of fancy free expression footwork to make it even remotely plausible.

1981).

107 *How to Do Things with Words* (New York: Oxford, 1965).

108 *Ibid.* at 108.

In the first place, free expression arguments customarily have been launched from one of three perspectives: from the perspective of the speaker, his audience, or both. The Court's argument here, however, is primarily from neither. It speaks from the standpoint of the targets of a speaker's remarks and concerns itself almost exclusively with the effects of these remarks on *their* free expression rights. But what is it about the free expression rights of target group members that the majority believes is infringed by hate speech? Does such expression, in its judgment, trench upon these rights themselves? Or only upon their exercise? Since it says so little about the entire matter, it is difficult to tell exactly what it thinks, but the distinction at stake here is nonetheless critical to determining the coherence, let alone correctness, of its overall argument. Consider the following.

To say that my exercise of my free expression right infringes your *right* to free expression is to say either that you no longer have the right or that you have it but in some restricted form. But to say that you have it in some restricted form is really to say one of two things: either that you have a watered down version of the right, such that though you possess it, state officials are not generally obliged to respect it; or that while state officials are obliged to respect it, it operates only within a limited range. However, watered down rights are no rights at all. For rights are both like and unlike pregnancy: they are like pregnancy in that you either have them or you don't, and they are unlike pregnancy in that if you have them, you must carry them to term. Thus there can be no aborted rights — at least in a moral sense. To have a moral right is to be free to say or do something even in the face of a law which prohibits it. Hence, there are no half-way moral rights against the state — "you may say this but we have a right to punish you if you do" — for if you are at liberty to say something — anything — then the state has no right to prevent you from saying it.[109] So the argument that my exercise of my free speech right infringes your free speech right must be taken to mean either that it somehow abolishes or abrogates it — *i.e.*, that you no longer have it — or that it confines it to some limited range.

But how could my exercise of my free expression right either abrogate altogether or restrict your *right* to exercise yours? Clearly, it could affect your moral right to speak not at all, for a moral right is something you possess whether or not anyone or anything respects it. On the other hand, if you were in some legally subordinate relationship to me, such that you were obliged to take my word for law, and if I stipulated that you had no right to say anything at all without my authorization, then at least to the extent of your obligation, my exercise of my free expression right (my "stipulations") might be said to abrogate your *legal* right to free expression.[110] Most commonly, laws or orders given the backing of courts are thought to fall into the category of "expressions" that might be said to eliminate free expression rights in this sense, and, thus, "silence" potential speakers.[111] For example, a legal prohibition on signs on beaches that says

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109 R. Dworkin, *Taking Rights Seriously* (Cambridge: Harvard, 1977) at 184-205.

110 Notice, however, if this restriction affects not at all your *moral* right to speak, it also has no necessary effect on your *physical* ability to speak. See the discussion at *infra* notes 200-208 and accompanying text.

111 For criticism of this view, see *infra* notes 174-185 and accompanying text.

"No dogs or Jews" is a restriction of the free speech right to that extent. What makes some restrictions legally rightful and others not is simply the authoritative element in the former. Thus for me to say that hate speech is unprotected expression is not the same as it would be for the Court to say it. What I lack, and what the Court possesses, is the authority and the legitimacy necessary to effectuate a binding judgment.[112] So it is with the Keegstras of this world. Since they are not blessed with the authoritative mantle of state power, their expressions of disdain for minorities have no effect on the latter's *rights* of free expression? If, therefore, the Court is contending that the exercise of free speech rights by hate speakers can restrict either moral or legal free speech rights of minorities, it is simply wrong. To be sure, if it means that the exercise of these rights over time might conceivably convince enough people that the free expression rights of members of identifiable groups should be withdrawn, then its argument, though possibly incorrect, is at least coherent.

B. MY EXERCISE OF MY FREE EXPRESSION RIGHT VS. YOUR EXERCISE OF YOURS

But if it is not coherent to think that the exercise of the free expression rights by private individuals can restrict the *free expression rights* of minorities,[113] perhaps it may be said that the exercise of these rights restricts the *exercise* of the latter's rights.[114] In fact, if it is unclear whether the Court believes the former, it clearly believes something like the latter. It worries, as we have seen, that the "unhindered promotion" of hateful messages might threaten the connection between identifiable group members and their groups, and that it would deny them the right to enjoy the self-fulfillment that comes from the exercise of the free expression right. It also argues that the promotion of hatred propagates messages anathematic to "democratic values" and denies the thesis that the democratic process is open to the participation of everyone. And though the Court nowhere explicitly says that the mere promotion of hatred automatically has these effects, the claim that it does is implicit in much of what it says.[115]

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112 See, *e.g.*, Leslie Green, *supra* note 106.

113 Cass Sunstein disagrees. He claims that both hate speech and pornography share the "unusual characteristic of denying victimized groups the *right* to participate in the community as free and equal persons": "Preferences and Politics" (1991) 20 Phil. & Publ. Affairs 3 at 31-32 [emphasis added].

114 Some commentators confuse the two claims. Objecting to the portrayal of gays and lesbians in the mainstream media, Brenda Cossman and Bruce Ryder write: "We need to move beyond the narrow concept of limitless free speech for an unaccountable few, to examine who is speaking, and *how the exercise* of speech by some more powerful members of society undermines an equal *exercise* by others. The portrayal of gays and lesbians in major Hollywood films contributes to homophobia and to the marginalization of gays and lesbians in society, so that their *right to equal free speech* is denied" ("Why are Hollywood's heroes never gay?" *Globe and Mail* (3 April 1992) A19 [emphasis added]).

115 For example, its s. 27 argument contends that "Multiculturalism cannot be preserved let alone enhanced if free rein is given to the promotion of hatred against identifiable cultural groups": *supra* note 1 at 758, quoting Cory J.A. in *R.* v. *Andrews* (1988), 65 O.R. (2d) 161 at 181 (C.A.).

But what the Court leaves implicit in *Keegstra* it makes explicit in *Ross*.[116] There, arguing on the basis of assumptions identical to those set out in *Keegstra*, the Court said that expression whose "primary purpose" is "'to attack the truthfulness, integrity, dignity and motives of Jewish persons' ... *silences* the views of those in the target group," "hinders the ability of Jewish people to develop a sense of self-identity and belonging," and "impedes meaningful participation in social and political decision-making by Jews."[117] Here the Court both clearly and unambiguously announces that the exercise of the free expression rights of hate speakers restricts the exercise of the free expression rights of their targets. No evidence is presented to support these assertions which, apparently, are to be taken simply as axiomatic. But, one might reasonably ask,[118] while any given hate speaker certainly might wish that his expressions could have the result of silencing his targets, why, as the court appears to do, attribute to him the authority or power necessary to do so? He plainly has neither. But if he has neither, why should identifiable group members remain silent because of what a James Keegstra or a Malcom Ross might say about their particular group? Indeed, if anything, they should be thought less likely to be silenced and more likely to be vocal.[119] Of course, neither the *Keegstra* nor *Ross* majorities tell us exactly what they mean by being "silenced" other than that a regime which permits a Ross or Keegstra to speak will effectively silence their putative targets.

Nor is it clear why, on the *Keegstra* and *Ross* rationales, expression contemptuous of Jews should hinder any Jewish person's ability to develop "a sense of self-identity and belonging." That Ross (or any other anti-Semite) is free to express open contempt for Jews says nothing at all that need carry any particular weight with any Jewish person. Again, Jews are free to accept or reject his remarks, and if the latter, to speak out strongly against them. Since they are more than free to do so,[120] they can hardly be said to be "silenced" — at least in any generally accepted sense of the term. Moreover, as earlier noted,[121] if anything, we should expect contemptuous remarks to elicit a greater sense of ethnic identity and belonging rather than less.

Finally, and for all the same reasons, why should expression which is intended to "undermine democratic values" impede "meaningful participation in social and political

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116 *Supra* note 21 at 877-78.

117 In its *Keegstra* factum, LEAF said:

> The wilful public promotion of group hatred inhibits truth-seeking, because it intimidates disadvantaged groups from asserting the truth. Rather than encouraging community participation, group defamation restricts the participation of disadvantaged groups by undermining respect for them and spreading fear. If the individuals who engage in hatemongering are thereby fulfilled, it is at the expense of others.

(*Factum of the Women's Legal Education and Action Fund*, File Nos. 21118 and 21034 at 9). Given the argument of *Ross*, it appears that by 1996 the Court had bought into just about all of LEAF's arguments in its *Keegstra* factum.

118 As we have at *supra* note 66 and accompanying text.

119 As, indeed, they were in both cases.

120 "More than free to do so" because the entire constitutional, legal, political, economic, social and moral edifice of liberalism supports their unqualified right to do so — which certainly cannot be said of anti-Semitism.

121 *Supra* notes 70-83 and accompanying text.

decision-making by Jews." As a matter of life and logic the claim seems absurd. The argument is that because Ross (or those who share his views) are free to speak, his (or their) targets are less free to participate meaningfully in the political process. As an empirical matter, this claim is almost certainly false. For despite the fact that Ross and other anti-Semites are formally free to speak, the participation rates of Jews in Canadian social, political, economic, and cultural life are as high or higher than any other ethnic group in the society. Again, the Court notwithstanding, why shouldn't they be?[122]

C. PERLOCUTIONARY "SILENCING": THE CREDIBILITY ARGUMENT

Neither majority in *Keegstra* nor *Ross* offer even a hint of an answer to the question why expressions of private individuals like James Keegstra or Malcom Ross should have the effect of "silencing" the views of target-group members,[123] but one reason has been suggested by Arthur Fish in an article the *Keegstra* majority cites but on which it does not comment:

> A hate promoter need only plant doubts about the character or intentions of some identifiable group to impair its freedom of expression. Put differently, hate promotion need only convince people that an identifiable group is different from the majority of people in order to impair the maligned group's freeom of expression. A member of a maligned group, speaking to an audience which doubts his character and intentions, will have a hard time generating the trust which is a prerequisite to persuasion. Hate promotion threatens the ability to persuade without which freedom of expression is worthless.[124]

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122 In an American context, D.F. McGowan & R.K. Tangri have asked "whether formal equality is so insufficiently protective of the sensibilities of social minority groups that members of such groups cannot use meaningfully the protections of the first amendment." They answer:

> Speech that is offensive to members of social minorities might well cause them to feel alienated from society, but it does not follow that they will stop participating in the process of self-governance. We find it difficult to believe, for example, that members of social minorities who otherwise would do so will decline to vote because of the absence of racist speech regulations, or even because they were the subject of epithets. We find it equally unlikely that offensive speech will stop parades, speeches, petitions, letter-writing campaigns, or any of hundreds of other ways in which social minorities attempt to bring political majorities around to their point of view.... If anything, one might expect the use of invective to stir social minority groups to demand redress from political leaders. There is simply no reason to believe that absolute (or even substantial) freedom from emotional distress is a precondition of a democratic society.

See *supra* note 36 at 882.

123 However, Quigley J.A. of the Alberta Court of Queen's Bench did. He suggested that "[t]he protection afforded by [proscribing hate speech] tends to banish the apprehension which might otherwise inhibit certain segments of our society from freely expressing themselves upon the whole spectrum of topics, whether social, economic, scientific, political, religious, or spiritual in nature": *Keegstra*, Alta. Q.B., *supra* note 13 at 268. I address this particular argument at *infra* notes 164-73 and accompanying text.

124 "Hate Promotion and Freedom of Expression: Truth and Consequences" (1989) 2 Can. J. Law & Jur. 111 at 131. Others have made similar claims. Michelman, ("Civil Liberties, Silencing and Subordination") *supra* note 106 at 275 characterizes silencing speech similar to Fish as "speech that evidently both exploits and inflames existing cultures of caste and subordination so as to induce prejudgment; speech by which some speakers degrade the speech of others by summoning

So the argument is that hate propaganda silences the expression of identifiable group members by undermining the credibility they need to persuade and convince others. In so doing, it undermines not their rights of free expression, but, perhaps even more important, the *worth* or *value* of these rights.[125] Hence, although they may be formally free to speak, identifiable group members are effectively "silenced" because no one will be convinced by what they say. Their speech is, thus, valueless, in that it has no *effect*.[126]

1. OPEN POLITICAL DEBATE VS. THE "RIGHT TO BE BELIEVED"

There are three important objections that might be advanced against the thesis that identifiable group members are silenced by the exercise of the free expression rights of hate speakers. In the first place, the claim that identifiable group members (A) are silenced because hate speakers (B) convince third parties (C) that they are not "credible" is essentially an objection against the existence of an open political debate. For what is the purpose of political debate in a democracy if not to convince third parties that one's political opponents — whomever they may be — lack credibility and, thus, ought not be believed. True, one might be bothered by the assumption that that what B convinces C about A is ugly, unfair, wrong, and even dangerous, but that is surely different from saying A is "silenced" by that fact. For while A might have a difficult time persuading C of his credibility on any issue, as long as he is free to press his case, it seems wrong to say he is silenced.

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castelike perceptions of the others as unworthy to be heard; and speech that by such off-the-merits means discredits in advance whatever those others say and in the process reinforces caste." Matsuda, *supra* note 3 at 2376; Delgado, *supra* note 106 at 179.

And detailing the logic of silencing advanced in some anti-pornography arguments, Sunstein, "Pornography and the First Amendment," *supra* note 106 at 618-19 says:

> the pornography industry is so well-financed, and has such power to condition men and women, that it has the effect of silencing the anti-pornography cause in particular and women in general. The silencing involved is not the kind of silencing associated with totalitarian regimes. Instead, women who would engage in 'more speech' to counter pornography are denied credibility, trust, and the opportunity to be heard — the predicates of free expression.

Further in this same vein, in the context of arguing that the traditional "more speech" remedy for speech we dislike cannot, without "civil equality," remedy the harms of pornography, C.A. MacKinnon claims in "Pornography, Civil Rights, and Speech," *supra* note 106 at 63, that "so long as the pornography exists in the way it does there *will not be more speech by women*. Pornography strips and devastates women of credibility, from our accounts of sexual assault to our everyday reality of sexual subordination. We are deauthorized and reduced and devalidated and silenced." Finally, according to O. Fiss, *supra* note 106 at 16: when the "victims" of hate speech "speak, their words lack authority; it is as though they said nothing." At the same time, "pornography reduces women to sexual objects, subordinating and silencing them. It impairs their credibility and makes them feel as if they have nothing to contribute to public discussion."

125 "It is worth little to talk when no one is listening": Fish, *supra* note 2 at 130.

126 That is to say, no "perlocutionary" effect — *i.e.*, they speak but no one accepts what they say as true. See Austin, *supra* note 107 at 108: perlocutionary acts are "what we bring about or achieve *by* saying something, such as convincing, persuading, deterring, and even, say, surprising or misleading"; J.R. Searle, *Speech Acts: An Essay in the Philosophy of Language* (London: Cambridge University Press, 1969) at 25.

In dissent, McLachlin J. addressed this particular objection directly. "Freedom of expression," she said, "guarantees the right to loose one's ideas on the world; it does not guarantee the right to be listened to or believed." At the same time, she said the objection ignores an essential element of public debate:

> It is impossible to imagine a vigorous political debate on a contentious issue in which the speakers did not seek to undermine the credibility of the ideas, conclusions and judgment of their opponents.... Furthermore, it should be permissible in vigorous debate to go beyond rational arguments on the merits and attack the credibility of one's opponent. Lack of credibility in the proponent of an idea is an important and justifiable reason for rejecting a position.[127]

Both points are valid. Much of the "silencing" argument, as we shall see, seems little more than a complaint that the putatively silenced group is neither heard nor believed. And, however unfortunate it might be, much clearly acceptable political debate is intended to be credibility-destroying.[128]

Moreover, the argument that A is silenced because B convinces C that A is not credible is flawed in at least two other important respects. In the first place, it is based on an unrealistic model of the communications and learning processes. To give it plausibility, the argument requires an all-persuasive hate speaker, a relatively unpersuasive target group, and an highly suggestible and manipulable audience. In the second place, its across-the-board claims about credibility direct our focus to the person rather than to what is said. As a result, the argument ends up assuming what it should be proving — *viz.*, that incredibility is due to *who* one is rather than to *what* one says.

2. THE LANDSCAPING ARGUMENT

On a general level, the argument that A is silenced because B "planted" doubts about A's credibility in C's mind seems to adhere to a slightly modified, though garden variety, version of what I have elsewhere called the "AIDS theory of ideas."[129] According to the the most extreme version of this theory, mere aural or visual exposure to the virus of hate propaganda is fatal. Once you have been exposed to its message you will forever be infected with it, can never recover from it, and will go to your death as one of its proponents. According to Fish's agricultural version of the theory, once doubts about the "character or intentions" of an identifiable group have been "planted" in the soil of one's mind, it is very easy to bring them to fruition and very difficult, if not impossible, to weed them out.[130] The social result of such cultivation is an intellectual landscape overtaken by the poisonous weeds of hatred, in which any

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127 *Supra* note 1 at 831-32.

128 For verification of this claim one need but examine any recent North American electoral campaign.

129 "Free Speech and the Zundel Trial" 95 *Queen's Quarterly* 837 at 847-48.

130 "Distrust of identifiable groups is easy to generate and difficult to overcome." Fish, *supra* note 2 at 111.

contrary shoot of trust and understanding will quickly die for lack of fertile soil in which to grow and develop.[131]

This argument assumes the best about the speaker and the worst about his targets and his audience. In the first place, it attributes an almost Herculean amount of persuasive skill to the hate speaker and — since in the nature of things no names can be forthcoming — to *just any hate speaker*. But surely, not just any speaker has the requisite ability to convince an audience that any particular group lacks character or credibility. If persuasion were as easy as the argument assumes, then there would have been over the centuries no need for the *ars rhetorica*, no need to study and develop the finely honed persuasive talents of a Pericles, a Demosthenes, a Cicero, an Anthony or even a Lincoln or a Trudeau; for these would quickly and democratically present themselves to anyone when needed. But as we well know, rhetoric is an art and like all arts it does not distribute its secrets equally.

Moreover, even within the class of all potential orators, why presume, as the argument does, that hate speakers have any greater persuasive powers than the much more powerful members of the community with which they are allegedly in competition? In fact, since general intelligence, educational attainment, verbal facility, not to mention social connections, media access, and majoritarian status tend to correlate well with persuasiveness, it seems more likely that the hate speaker rather than the messenger of tolerance would be at a competitive disadvantage. I am not saying that these qualities guarantee the repudiation of messages of hate, only that they are competitively advantageous.

In the second place, if the argument assumes the best about the talents of any given hate speaker, it completely ignores questions about the intelligence, moral character, education, upbringing, and intellectual acumen of his audience. And so while it assumes that the former will be able to persuade his audience to accept whatever message he wishes to send, it also assumes that the latter will have little or no resistance to the message sent and will be unable to see the lack of moral character, socially destructive agenda, and intolerant motives of the speaker for what they are. As with most versions of the AIDS theory of ideas, Fish's assumes audience members have little or no resistance to the hateful messages to which they are exposed, and that is why he advocates a strategy of censorship.[132] Since mere exposure is near fatal, avoiding

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131 M. Matsuda also draws on gardening imagery to make a similar point of which the *Keegstra* majority takes official note. She says: "at some level, no matter how much both victims and dominant-group members may resist it, racial inferiority is planted in our minds as an idea that may hold some truth. The idea is improbable and abhorrent, but it is there before us, because it is presented repeatedly." *Supra* note 3 at 2339 *cf. supra* note 1 at 747-48; see also, K. Greenawalt, *Speech, Crime, and the Uses of Language* (New York: Oxford, 1989) at 51.

132 Though Fish's might not, some silencing arguments assume an audience already prejudiced against identifiable groups and, therefore, set to react negatively to anything they might say and positively to anything that might be said against them. C.R. Lawrence III, for example, has argued that resistance to racist messages is low — at least in the "American marketplace of ideas" — because it "was founded with the idea of the racial inferiority of non-whites as one of its chief commodities, and ever since the market opened, racism has remained its most active item in trade.... Racism is ubiquitous. We are all racists": "If He Hollers Let Him Go: Regulating Racist

contact with the impugned material seems a rational strategy for healthy living. In so thinking, proponents of such arguments forget that even assuming the malleability of audiences, such a strategy simply postpones any confrontation with the problem, it does nothing to cure it. Cure is only possible by exposure to the despised material, and by practice[133] at coming to terms with it. As Mill put it:

> He who knows only his own side of the case, knows little of that. His reasons may be good, and no one may have been able to refute them. But if he is equally unable to refute the reasons on the opposite side; if he does not so much as know what they are, he has no ground for preferring either opinion. The rational position for him would be suspension of judgment, and unless he contents himself with that, he is either led by authority, or adopts, like the generality of the world, the side to which he feels most inclination. Nor is it enough that he should hear the arguments of adversaries from his own teachers.... He must be able to hear them from persons who actually believe them; who defend them in earnest, and do their very utmost for them.[134]

Third, the argument ignores altogether the tolerant climate of opinion in a free and democratic society a hate speaker would necessarily be forced to ply his persuasive trade, as well as the fact that a regime of free expression would be likely to furnish multiple opportunities for those opposed to the message of a hate speaker to have their say. Given these facts, why it should be assumed that hate speakers would automatically be persuasive is quite puzzling. The entire argument here simply assumes that the speech of the targets of hate speakers as well as that of their supporters will necessarily be unpersuasive. Why? Apparently because hate speaker B has already convinced audience C that target A is not to be believed. But, again, this assumes that

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Speech on Campus" (1990) Duke L.J. 431 at 468. MacKinnon, ("Not a Moral Issue") *supra* note 106 at 337, would extend the analysis to include pornography as well as racist speech: "pornography (like the racism, in which I include anti-Semitism, of the Nazis and the Klan) is not at all divergent or unorthodox. It is the ruling ideology."

Neither argument, it should be noted, objects in principle to censorship. For according to both, audiences come to hold the views that they do only because they have been conditioned by racist or pornographic speech to hold them. Thus, for both Lawrence and MacKinnon, "silencing the silencers" through censorship can be expected to cure the problem. It is simply a question of whose speech will be controlling — *i.e.*, who will do the conditioning.

133 Do you promote, enhance, or protect the activity of singing by banning the bad singer from singing and suppressing the bad song that results? Don't you need bad singers and bad songs precisely to produce good singers and good songs? Doesn't one learn from bad singing what good singing is? From one's own bad singing? And from other's? And doesn't one become a good singer in large part by coming to terms with one's own bad singing, *i.e.*, by practice? Why are ideas and thinkers any different from songs and singers?

134 *Supra* note 45 at 36. F.S. Haiman asks

> how people develop the capacity to discriminate and make better choices in their tastes, attitudes, and values. Are they suddenly and magically endowed with that ability at the age of ten, or twelve, or sixteen, or when they pass the STEP examination for high school freshmen? Does insulating them from debasing stimuli during their "tender" years help to achieve it? Or should they, on the contrary, be exposed to whatever they may encounter in the real world and given the guidance that will aid them in learning how to respond wisely and healthfully?

He answers that the full development of faculties of discrimination "does not grow in a vacuum, but only out of the rich soil of the widest possible range of human experience": *Speech and Law in a Free Society* (Chicago: University of Chicago Press, 1981) at 179.

the entire game is over even before A is able to speak. It assumes that A's speech is necessarily less effective than B's, either because C is currently (and perhaps permanently) prejudiced against A because of B's speech and is, therefore, set to reject A's and accept B's speech no matter what, or because C is simply too irrational, too unintelligent, or just too plain stupid to see through B's ploys and embrace A's solid arguments.

Rejecting the all-pervasive racism thesis,[135] we are left with the last possibility. However, this option surely denigrates the rational capacities of both C and A: C because he is not really the rational moral agent democratic theory suggests he should be, and A because he is nothing more than a helpless, hopeless, and hapless victim of an all-persuasive and all-powerful B.

Fourth, in keeping with the denigration, and in contradistinction to all that we know about the techniques of successful agriculture, the argument assumes that once a doubt has been "planted" in someone's mind, enough work has already been done to guarantee that it will be accorded a positive reception. No metaphorical soil preparation, fertilizing, watering, weeding, and the like appear to be necessary. On this argument, simply "planting" the seed of doubt will be enough to bring to fruition a convinced and convincing audience. However, "planting doubts" is tantamount to "convincing people," once again, only on the assumption that audiences have no minds of their own, or that if they have, that these are like virgin soil upon which one may grow whatever noxious weeds one wishes.

But even if no more cultivation were necessary than is granted, the argument assumes, finally and implausibly, that if, at any given time, an audience-member were to be convinced by the message of a hate-speaker he would remain convinced, even over long periods of time, and in spite of contradictory experience and strong arguments to the contrary. This particular assumption renders changes of mind, indeed, learning itself, at best improbable, and flatly contradicts something any middle-aged person knows all-too-well: what we believed when we were young is not necessarily what we believe to be true today. More plausible assumptions suggest that hate speakers are less — not more — capable than their targets of "planting doubts" about the credibilty of their opponents that will come to fruition because they are less likely to be knowledgeable in the arts of persuasion, and their audiences are neither as racist nor as irrational as the theory would have them to be.[136]

3. DOESN'T IT MATTER WHAT IS SAID?

In the second place, even if we grant, as we must, that the exercise of the free speech right by hate speakers *can* destroy the credibility of targets, we still have no compelling reason to conclude that in any given instance the reason for the resulting unpersuasiveness is the incredibility allegedly "implanted" by hate speakers. Silencing

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135 *Supra* note 132.

136 But even if they were, whether censorship would be an intelligent response is another matter altogether.

arguments that focus on the destruction of credibility often say little more than that target group members are not considered "credible" or "believable" and, because of this, that their speech is unpersuasive to third parties.[137] But, surely, it must be asked, of *what* are they supposedly unpersuasive? Fiss[138] does not say, but perhaps, with Michelman,[139] he means that "such off-the-merits" speech "discredits in advance *whatever those others say*." On this reading, by destroying the credibility of target group members, hate speakers are doing so across-the-board. No matter what they may say, they will not be believed. But this argument is surely unpersuasive. If a target group member tells an audience that "two plus two is four," are we to take it that he will not be believed? Or if he says that "the sun is shining" to an audience that can clearly see that it is, are we to believe that his statement will not be taken as true? On the other hand, suppose a target group member informs us that "the moon is made of barbequed ribs" or that "the earth is flat" or that "six and four are one," are we to assume that any credibility problem that might result is because of "silencing" caused by hate speakers? According to those arguments that focus only on the credibility or lack thereof of target group members and ignore altogether the substance of what they might be saying, we should assume that it is. But clearly, if it is not plausible to claim across-the-board incredibility, neither is it plausible to claim across-the-board credibility.[140] And the reason both are implausible is because the problem of credibility is always at least in part statement specific.

But if credibility or incredibility are necessarily statement specific, then, assuming, *arguendo*, that the silencing argument is even remotely plausible, we need to know exactly what is being said in any given expressive instance before we can conclude that silencing has occurred. Lacking this information, we have no way of knowing for certain whether the alleged silencing is due to *who* one is rather than because of *what* one says.

Nor will it do, as so often is done, to collapse the two and simply *assume* that whatever is said on the side of target group members is always true and therefore believable, while whatever is said by the other side is always false and incredible. Yet these are assumptions such across the board silencing arguments are forced to make because they focus not on *what* is said but on *who* is saying it, and because they accord *carte blanche* credibility or incredibility on the same basis. Proponents of silencing

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137 *Supra* note 124.

138 *Supra* note 106.

139 "Civil Liberties, Silencing, and Subordination," *supra* note 106 at 275 [emphasis added].

140 Surely those who advance such silencing arguments should be relieved to know that target group members who might believe that the earth is flat or that the moon is made of barbequed ribs are corrected in their errors? For aren't target group members who are corrected when they are wrong better off for being so? Or is correcting the mistakes of target group members necessarily tantamount to "silencing" them? After all, their claims are not being "validated," their words are being denied "authority," and their arguments are being said to lack "credibility"? Alternatively, might not "silencing" simply be but another word for the first stage of the learning experience itself — *viz.*, contradiction? If it is — and isn't it a primary supposition of dialectic from Socrates to Hegel that it is? — is silencing necessarily a bad thing? Moreover, is "invalidation" necessarily silencing? Why can't it be "empowering"? Why can't it be an enabling step along the path to "find one's real tongue?"

arguments no less than those they criticize end up legislating the truth and falsity of specific statements purely on the basis of authorship. In so doing, the truth or falsity of such statements is effectively placed beyond the reach of investigation — hardly a result anyone committed to truth as a rationale for free expression should applaud.

For example, those advancing silencing arguments in the context of pornography sometimes say that "because women who would engage in 'more speech' to counter pornography are denied credibility, trust, and the opportunity to be heard..., [t]he notion that 'when she says no, she means yes' — a common theme in pornography — thus affects the social reception of the feminist attack on pornography."[141] But unless one already *knows* that "no" *always* "means no," how can one be certain in any particular context that "no" in fact means "no" and not possibly "perhaps" or even "yes"; or that any auditor hearing "no" has no good reason to take the proffered "no" for a "perhaps" or a "yes"? In a similar vein, feminists often castigate men for believing "the myth that women want to be raped."[142] But again, unless one has previously concluded across the board that women *never* want to be raped, how on earth can anyone conclude that any particular woman in any particular case does not?[143]

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141 Sunstein, ("Poronograpy and the First Amendment") *supra* note 106 at 619.

142 C. Jacobs, "Patterns of Violence: A Feminist Perspective on the Regulation of Pornography" (1984) 7 Harv. Women's L.J. 5 at 15.

143 For surely even though many of our laws and social conventions nowadays tend to assume the contrary — namely, that erotic relations between and among the sexes can and should be governed by clearly defined rules, roles, and regulations — sex between two people drawn lustfully, romantically, perhaps even "irresistibly" to one another is no less driven by familiar yet mysterious undeniable forces, no less complicated by conflicting social, cultural, and psychological conventions and expectations, and no less imbued with moral complexity — indeed, even moral ambiguity — today than in the past. To deny this in favour of a bureaucratic set of assumptions of what "proper" sexual relations "should be like" is to miss altogether the tragic, the pathetic, and even the comic dimensions of human sexuality. In this light, P. Kael had the following to say about the attempted "rape" scene in the film *Hud*:

> I suppose we're all supposed to react on cue to movie rape (or as is usually the case, attempted rape): rape, like a cattle massacre, is a box-office value. No doubt in *Hud* we're really supposed to believe that Alma [Patricia Neal] is, as Stanley Kauffmann says, "driven off by [Hud's] vicious physical assault." But in terms of the modernity of the settings and the characters, as well as of the age of the protagonists (they're at least in their middle thirties), it was more probable that Alma left the ranch because a frustrated rape is just too sordid and embarassing for all concerned — for the drunken Hud [Paul Newman] who forced himself upon her, for her defending herself so titanically, for young Lon the innocent [Brandon deWilde] who "saved" her. Alma obviously wants to go to bed with Hud, but she has been rejecting his propositions because she doesn't want to be just another casual dame to him; she wants to be treated differently from the others. If Lon hadn't rushed to protect his idealized view of her, chances are that the next morning Hud would have felt guilty and repentant, and Alma would have been grateful to him for having used the violence necessary to break down her resistance, thus proving that she *was* different. They might have been celebrating ritual rapes annually on their anniversaries.
>
> Rape is a strong word when a man knows that a woman wants him but won't accept him unless he commits himself emotionally. Alma's mixture of provocative camaraderie plus reservations invites "rape" (As quoted in R. Blount Jr., "Lustily Vigilant" (December 1994) Atlan. 131 at 142). For C. Paglia as well, "no" does not always really mean "no": "'No' has always been, and always will be, part of the dangerous, alluring courtship ritual of sex and seduction, observable even in the animal kingdom": "Madonna I: Anomility and Artifice" *New York Times* (14 December 1990),

I am not saying either that when women say "no" they generally do not mean "no" or that it is generally true that women want to be raped. I do not believe either statement is true. My point is simply that when we are speaking about specific instances, we never have any good reason to rule such claims altogether out of court, and that because of their preference for across the board statements, silencing arguments do precisely that: they presuppose the very truths they should be arguing.

I conclude then, that a hate speaker needs to do more than simply "plant doubts about the character or intentions of some identifiable group to impair its freedom of expression." The landscaping theory overestimates the persuasive abilities of hate speakers, underestimates those of target group members, and denigrates altogether the critical faculties of publics in free and democratic societies. At the same time, because the argument focuses on the merits of the person rather than on the merits of what is said, it simply assumes that any problems of credibility stem "from the speaker's group membership and not from what she is saying."[144] To rephrase Michelman:[145] such "off-the-merits" argument credits in advance whatever target group members say and discredits in advance whatever their opponents say; as a result, apart from reinforcing caste by associating truth claims with ethnicity, *etc.*, we are left entirely uncertain whether any given statement is rejected "on" or "off" its merits. In the end, while we can agree with Fish that "[i]t is worth little to talk when no one is listening," we are not forced to conclude that the free expression right is abridged whenever no one listens to us. As McLachlin J. put it, while s. 2(b) gives us a right to speak, "it does not guarantee the right to be listened to or believed."[146]

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as quoted in C. Hoff Sommers, *Who Stole Feminism* (New York: Simon & Schuster, 1994) at 218. Nor does "no" necessarily mean "no" to J. Butler: for "[t]he disjunctive relation between affirmation and negation discounts the erotic logic of ambivalence in which the "yes" can accompany the "no" without exactly negating it. The domain of the phantasmic is precisely suspended action, neither fully affirmed nor fully denied, and most often structured in some form of ambivalent pleasure ("yes" and "no" at once)" (*supra* note 106 at 94-95). Finally, in the context of a discussion about miscommunication between males and females during sexual encounters, K.R. Browne, "An Evolutionary Perspective on Sexual Harassment: Seeking Roots in Biology Rather than Ideology" (1997) 8 J. Contemp. Legal Issues 5 at 25-26 notes that one study "found that 37.2% of college women responded positively to the question whether they had ever been in the following situation":

> You were with a guy you'd *never* had sexual intercourse with before. He wanted to engage in sexual intercourse and you wanted to also, but for some reason you indicated that you didn't want to, although you had every intention to and were willing to engage in sexual intercourse. In other words, you indicated "no" and you meant "yes."

(Quoting C.L. Muehlenhard & M.L. McCoy, "Double Standard/Double Bind: The Sexual Double Standard and Women's Communication About Sex" (1991) 15 Psychol. Women Q. 447 at 451-53). See also, S. Schulhofer, "Unwanted Sex" *Atlantic Monthly* (October 1998) 55 at 58-60.

144 McGowan & Tangri, *supra* note 36 at 883.

145 "Civil Liberties, Silencing and Subordination," *supra* note 106 at 275.

146 *Supra* note 1 at 832. Additionally, the idea that anyone at all has the right to have his speech "validated" — isn't this something that is done by right only to parking tickets? — or that even though someone is not an authority he has the right to have his speech considered "authoritative," is simply bizarre.

D. ILLOCUTIONARY SILENCING: THE RIGHT TO "SECURE UPTAKE"

Still, even if the above arguments in opposition to the credibility-destroying version of the silencing argument are deemed to be correct, they might still be held to reach only the "perlocutionary" aspects of the problem. But there is an "illocutionary" argument to be made as well. On this view, the silencing accomplished by undermining the credibility of identifiable group members is not so much that they will speak and not be "listened to or believed," but that they will speak and not even be *understood.* [147] In terms of the vocabulary of speech-act theory, it is not that their expressions do not produce "perlocutionary effects" — "I speak, you understand my intention, you act consistent or inconsistent with it" — but that their utterances do not secure "illocutionary uptake" — that is, they do not bring about an understanding of the very "meaning and ... force of the illocution."[148] Most of those who have drawn on the concept of unsecured illocutionary uptake to illuminate the phenomenon of silenced expressions have focused on pornography rather than hate speech.[149] In an interesting twist of an example we considered earlier,[150] Rae Langton, for example, asks us to consider the hypothetical case of a woman who says "no" to the sexual advances of a man who is apparently so convinced of the veracity of the "pornographic message" (that "no means yes"), that he actually *hears* her "no" as a "yes."[151] In the event, the woman does not secure "uptake"; her negative on his sexual advances is "drowned out" by the "flood" of contrary "messages" freely circulating in society and effectively "constructing" both our images of women and their social reality. He hears "yes" when she says "no," because of the overwhelming presence and persuasive power of the pornographic message. [152]

According to Langton,[153] the failure to secure uptake is a form of linguistic "disablement": "although the appropriate words can be uttered, those utterances fail to count as the actions they were intended to be.... The hearer fails to recognize the utterance as a refusal: uptake is not secured. In saying 'no' she may well intend to refuse ... but she is far from doing as she intends."

In her discussion of the failure of Anita Hill's speech to secure uptake during the Senate confirmation hearings on Clarence Thomas's nomination to the American

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147 See, *e.g.*, MacKinnon, ("Not a Moral Issue") *supra* note 106 at 335-40; Langton, *supra* note 106.

148 Austin, *supra* note 107 at 115-16; P.F. Strawson, "Intention and Convention in Speech Acts," in J.R. Searle, ed., *The Philosophy of Language* (Oxford: Oxford University Press, 1971) 24.

149 Butler, *supra* note 106 is an important exception. See also A. Altman, "Liberalism and Campus Hate Speech: A Philosophical Examination" (January 1993) Ethics 302.

150 *Supra* notes 141-144 and accompanying text.

151 *Supra* note 106 at 320-21.

152 Perhaps but perhaps not. As earlier argued, perhaps rather than the pornographic message, it is his previous experience with women, this one included, that leads him to assume that "no" does not necessarily mean "no." If so, then he could be said to understand her meaning well enough; he simply does not believe that her words reveal her real wishes. Granted the possibility, her problem would seem to be perlocutionary rather than illocutionary. In any event, without some understanding of the particular facts involved, it seems simply wilful to rule such a possibility completely out of court.

153 *Supra* note 106 at 299, 321.

Supreme Court, Catherine Mackinnon[154] makes a similar point, saying that Hill's speech recounting her alleged harassment by Judge Thomas was taken as "sex" by her male auditors. Commenting on MacKinnon's contention here, Judith Butler argues that it "presupposes that one ought to be in a position to utter words in such a way that the meaning of those words coincides with the intention with which they are uttered, and that the performative dimension of that uttering works to support and further that intended meaning."[155] However, in this context, to work "to support and further that intended meaning" seems to imply that one has a *right to be heard as intended* or, in other words, a "right to "secure uptake," a close cousin of the "right to be believed." Such a reading cashes out clearly in Butler's comments on Langton's claims about "disablement": "This power to exercise speech such that the performance and the reception are governed and reconciled by a single and controlling intention is conceived by Langton as essential to the operation and agency of a rights-bearing person, one who is socially capable of exercising fundamental rights and liberties such as those guaranteed under the Equal Protection Clause of the Fourteenth Amendment."[156] If Butler is right, and I think she is, the arguments of both MacKinnon and Langton actually contend that women have a *prima facie* moral right to be heard as they intend, to have their speech received as they wish, or in speech-act terminology, to be "performatively successful."[157]

Now whatever one might think of the cogency of this argument as it applies to examples drawn from the world of sexual conventions,[158] it has no cogency at all when applied to the context of hate speakers and their audiences. For one thing, the argument relies for its credibility on the empirical claim that there is a veritable "flood" of hate speech in circulation in Canadian society. This contention, however, is almost certainly false. Indeed, some of the best evidence to the contrary is furnished by studies that the *Keegstra* Court itself acknowledges.[159] As well, the argument from

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154 *Supra* note 72 at 64-68.

155 *Supra* note 106 at 84.

156 *Ibid.* at 85.

157 Whether on this argument men would be accorded the same presumptive status seems doubtful.

158 For arguments (besides Butler's) that claim it has little or no cogency, see D. Jacobson, *supra* note 106; and L. Green, *supra* note 106. Two further lines of criticism might briefly be suggested here. The first is that the claim that women have a right to "secure uptake" falls into the same trap the credibility argument does — *viz.*, it assumes that one can speak meaningfully about speaking and understanding simply by knowing who the players are — that is, who is saying what to whom — and without inquiring into the truth or falsity of what is being said. (*Supra* notes 137-146 and accompanying text). Secondly, the claim that anyone might have a right to be understood as intended — especially in a sexual context — seems excessively simple-minded. To be received exactly as one intends requires, *inter alia*, 1) that the speaker knows exactly what he or she intends to say; 2) communicates it with perfect transparency to the auditor; 3) who in turn must hear and understand it exactly as it was sent. In this process there can be *no* misunderstandings — no bad intentions, no mixed motives, no misleading body language, no misplaced words, no improper inflections, and no tinny ears whatsoever — just perfect orators and perfect auditors communicating transparently and unrealistically in the "ideal speech situation." Machiavelli would be horrified.

159 See, *e.g.*, the *Report of the Special Committee on Hate Propaganda in Canada* (Ottawa: Queen's Printer, 1966) at 24 (Chairman: Maxwell Cohen): "there exists in Canada a small number of persons and a somewhat larger number of organizations, extremist in outlook and dedicated to the

illocutionary linguistic disablement requires for its elemental coherency that the unflattering images of identifiable group members advanced by hate speakers are accepted as *authoritative* — *i.e.*, as officially Canadian in some important way. But this requirement is not met either. In the most basic sense, to be authoritative, the constitutional or legal structure of society would have to give both expression and force to the images of minorities promoted by hate speakers. Evidence for such authoritativeness, however, is singularly lacking. Official recognition given identifiable group members is not that they are to be treated with contempt, disrespect, or unconcern, but that, as full members of society, they are entitled to the same "concern respect and consideration"[160] that is accorded all other individuals. Nor, apart from this recognition, is there persuasive evidence that attitudes of contempt or disdain for identifiable group members are considered authoritative in any other way by any important segment of Canadian society.[161]

In any event, even were they considered more widespread than I allow, such attitudes are, surely, not so authoritative that when a spokesman for the Canadian Jewish Congress "protests" the broadcasting of an unflattering stereotype of Jewish mothers on the airwaves,[162] his attempt to protest is not *understood* as a protest.[163] But if

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preaching and spreading of hatred and contempt against certain identifiable minority groups in Canada"; see also the Canada, House of Commons, *Report of Special Committee on Visible Minorities in Canadian Society: Equality Now!* (Ottawa: Supply and Services, 1984) at 9: "The groups that create and distribute hate literature are often small in membership but compensate for this by the violence of the caricatures and ideas they promote." A more recent study undertaken by B'nai Brith into "right wing extremism in Canada" concluded that while there are "pockets of radicalism in every region" of Canada, "the numbers here are very small," and there is "no evidence of a national network of hate": "Extremists Pose Threat in Canada MPs Told" *Toronto Star* (27 April 1995) A3. The 1984 and 1995 findings echo in essentials those of the Cohen Committee in 1966.

160 *Andrews* v. *Law Society of British Columbia*, [1989] 1 S.C.R. 143 at 171.

161 And we have M. Matsuda's word, *supra* note 3 at 2359, that the same holds true for the rest of the world:

> We know, from our collective historical knowledge, that slavery was wrong. We know the unspeakable horror of the holocaust was wrong. We know white minority rule in South Africa is wrong. This knowledge is reflected in the universal acceptance of the wrongness of the doctrine of racial supremacy. There is no nation left on this planet that submits as its national self-expression the view that Hitler was right.... At the universities, at the centers of knowledge of the international community, the doctrines of racial supremacy and racial hatred are again uniformly rejected.

162 R. Fulford, "Broadcaster's remarks ring some ugly bells" *Globe and Mail* (27 September 1995) C1: commenting on statements made by a CHUM radio journalist that the financial crisis affecting legal aid was caused by "Jewish mothers," who are "infamous for advising their offspring to become doctors or dentists or lawyers.... The result is we have too many of all three in this province, especially lawyers." See also: E. Renzetti, "B'nai Brith, CJC differ on CHUM" *Globe and Mail* (28 September 1995) C1: commenting on complaint by CJC that CHUM's attempts to "mend fences" after the on-air broadcast were "insufficient."

163 Langton, *supra* note 106 at 321-22 notes that when Linda Marchiano (pka Linda Lovelace) attempted in *Ordeal* to "protest" her "forced participation" in pornographic films, her protest itself was classified as "adult reading" and, therefore, as "pornography" by a mail-order house in a catalogue of reading material sent, apparently unsolicitated, to Langton in the mail. Langton treats the incident as an example of the failure of Marchiano's protest to secure "illocutionary uptake," and, therefore, as a case study in "illocutionary disablement." But surely there are other, certainly

"illocutionary uptake" *can* be secured, then the unflattering stereotype cannot be said to be sufficiently "authoritative" to satisfy the requirements of this version of the silencing argument.

E. SILENCING FROM FEAR AND INTIMIDATION

In both versions of the silencing argument thus far considered identifiable group members are said to be silenced even if the following conditions obtain: those "silenced" are legally at liberty to speak, are not otherwise prevented from speaking, actually do speak, and suffer no non-speech penalties for doing so.[164] Nevertheless, the argument maintains, identifiable group members are silenced because hate speech destroys their "credibility" to third parties who, *inter alia*, do not "listen to," "believe," or "validate" what they say, find their words lacking in "authority" and "credibility," and, therefore, find their arguments "unpersuasive," "unconvincing," perhaps, even "incomprehensible." Thus, the silencing that results stems strictly from the *reception* their speech is allegedly accorded not from any other postulated contextual characteristic.

There is, however, another type of silencing argument that can also trace part of its lineage to *Keegstra*[165] and *Ross*. This argument would change at least some of the postulated characteristics. Whereas the above arguments assume that those silenced actually speak but fail to convince others or even gain "uptake," this argument postulates that identifiable group members are deprived of the very opportunity to convince others because they are so fearful and apprehensive about penalties perceived to be attached to speaking that they refrain from speaking altogether. As we shall see, depending on the source and nature of the penalties apprehended, there are at least three possible versions of the argument; and while each version is certainly more consistent with common sense understandings of what it means to be silenced than those we have thus far considered,[166] none of them are valid.

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much simpler, and more plausible, explanations for Marchiano's difficulties — not the least important of which is the existence of federal statutes and various court decisions that make it reasonable for any would-be mail-order dealer — Langton included were she to become one — to protect himself — or herself — from today's Anthony Comstocks. In other words, far from being the act of a person moved by the pornographic message, it might well be the very regime of censorship that MacKinnon and company advocate that rendered Marchiano's alleged protest mute. If so, then the appropriate remedy would seem to be the elimination rather than the solidification of obscenity or anti-pornography legislation.

164 No one prosecutes, fines, or imprisons them; no one boycotts either them or their businesses; no one threatens them with violence, *etc.*

165 See the statement by Quigley J. at *supra* note 18.

166 Surely, it strains credibility to be told that someone is "silenced" simply because he is not believed or not understood. For if to be disbelieved or misunderstood is to be silenced, then we are all silenced whenever we are not believed or not understood. But if we are, then the so-called phenomenon of silencing is as trivial — and often as justifiable — as it is commonplace.

1. LEGAL SANCTIONS AND SILENCING

One version of the argument that people are silenced when they do not speak due to fear, apprehension, or intimidation looks to the law (or some other class of authoritative expression) as the source of the fear, apprehension, or intimidation allegedly silencing them. This version, in turn, contains two possibilities: the first holds that not passing a law outlawing hate speech intimidates identifiable group members into silence; the second takes the opposite tack and holds that passing such a law intimidates potential speakers into silence for fear of the penalties attached to speaking. Both arguments fail but for different reasons.

a. The "Toleration is Promotion" Argument

Perhaps one reason why the *Keegstra* Court believes that the unhindered promotion of hateful messages will have baleful effects on the exercise of the free expression rights of members of identifiable groups is that in its s. 15 argument, it bought into L.E.A.F.'s contention that Parliament promotes equality by suppressing hate speech.[167] But by doing so, it also came very close to buying into the companion proposition that Parliament promotes inequality by *tolerating* hate speech. And in its s. 27 argument, it reached an even more direct conclusion, saying: "[m]ulticulturalism cannot be preserved let alone enhanced if free rein is given to the promotion of hatred against identifiable groups."[168] Moreover, if in *Keegstra* there was any doubt that the mere *toleration* of hate speech was thought to silence the expression of identifiable group members, the Court explicitly connected the two in *Ross*: "*to give protection* to views that attack and condemn the views, beliefs and practices of others is to *undermine* the principle that all views deserve equal protection and *muzzles* [silences] the voice of truth."[169]

If, as the Court says, the promotion of hatred against identifiable groups undermines equality, destroys multiculturalism, and "muzzles the voice of truth," then tolerating the promotion of hatred when it could proscribe the activity might be said to make the government complicitous in bringing about these very disbenefits. To tolerate the promotion of hatred would then appear to be tantamount to promoting it oneself. If it were, then on the basis of LEAF's argument which the majority said it accepts,[170]

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167 "Government sponsored hatred on group grounds would violate section 15 of the *Charter*. Parliament promotes equality and moves against inequality when it prohibits the wilful public promotion of group hatred on these grounds. It follows that government action against group hate, because it promotes social equality as guaranteed by the *Charter*, deserves special consideration under section 15." *Supra* note 1 at 756; *Factum*, *supra* note 117 at 3. See also C.A. MacKinnon, "Pornography as Defamation and Discrimination" (1991) 71 B.U.L. Rev. 793 at 810.

168 *Supra* note 1 at 758, Dickson C.J. quoting Cory J. in *R.* v. *Andrews* (1988), 43 C.C.C. (3d) 193 at 213 (Ont. C.A.).

169 *Supra* note 21 at 878, my emphasis But aren't "views" which "attack and condemn the views" of others still "views"? If so, and if all views "deserve equal protection," don't these also?

170 [1990] 3 S.C.R 697 at 756. According to LEAF, *supra* note 117 at 3:

> Government sponsored hatred on group grounds would violate section 15 of the *Charter*. Parliament promotes equality and moves against inequality when it prohibits the wilful public promotion of group hatred on these grounds. It follows that government action against

Parliament would be sponsoring group hatred and, thus in violation of s. 15. But if this is the Court's reasoning, then it would also appear to be recognizing an affirmative constitutional duty to proscribe hate speech. For if the values attacked by the promotion of hatred are mandated by the *Charter* as the Court believes they are, and if giving "free rein to the promotion of hatred" has the effects the Court believes it has, then there is *ex hypothesi* a positive obligation on the part of Parliament to proscribe it.[171] While in *Keegstra* the Court never explicitly recognizes such a duty and limits its holding simply to sanctioning the constitutionality of s. 319(2), its reasoning implicitly does.

But is the mere toleration of hate speech in effect, even if not in intention, tantamount to the promotion of hatred? Why, in a regime which protects everyone's right to speak, should it be assumed that the mere act of toleration promotes any particular view? Perhaps because the Court bought into Mari Matsuda's contention that,

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group hate, because it promotes social equality as guaranteed by the *Charter*, deserves special consideration under section 15.

171 As a corollary, aggrieved citizens should also be able to seek to force Parliament to do so through the courts, as they have attempted to do in other contexts. For example, a group called the "Alliance for Employment Equity" has gone to court to attempt to force the Ontario government to bring back the "employment equity" legislation it abolished in 1995. According to the group, repealing the law was an act of discrimination against "women, disabled people, and visible minorities" and, therefore, a violation of the *Charter*'s equality guarantee. According to one spokesperson, abolishing the law "is as if the government gave people permission to discriminate": K. Toughill, "Tories violating rights, group says" *Toronto Star*, (26 November 1996) A8. In rejecting the group's challenge, Mr. Justice Paul Dilks of the Ontario Court's General Division also rejected the idea that there was a "constitutional duty" on the part of the legislature "to enact laws in a certain area," saying that "The application of the *Charter* must be confined to government action as opposed to inaction": T. Claridge, "Tories can scrap equity program" *Globe and Mail* (10 July 1997) A3.

However, if I read matters correctly, the Canadian Supreme Court's recent decision in *R.* v. *Vriend*, [1998] 1 S.C.R. 493 suggests that Mr. Justice Dilks is right for the wrong reasons. For whereas Dilks J. clearly believes that no governmental act occurs where the government has not explicitly decided to act, the Court in *Vriend* argued that an "act" of legislation can occur even in the face of a deliberate decision on the part of a government *not* to act. Thus, in *Vriend* the Court expanded the definitional boundaries of an "action" to include a "legislative omission," or what on Mr. Justice Dilks reading would be a "non-act." The result is to leave entirely open the question whether the Alliance's challenge will succeed.

Apart from the specifics of the Alliance's case, the implications of the Court's conflation of action and inaction in *Vriend* are potentially far- reaching. *Vriend* involved a Human Rights *statute* that the Court rejected as "underinclusive" because it omitted sexual orientation as a protected category. Left open, however, was the question "whether a government could properly be subjected to a challenge under s. 15 of the *Charter* for failing to act at all" — *i.e.*, when *no law whatever* is at stake and when the Court believes the unacted upon matter is "within the authority of Parliament" or "the legislature of each Province." (s. 32 (1) (a,b)).

Thus, if at this writing it is not clear that the Court would reject the Alliance's challenge, neither is it clear how it would decide a case in which *Parliament* "fails to act" to prohibit *expression* that the Court believes is both unconstitutionally discriminatory *and* a "matter within the authority of Parliament." But if it is too early to speculate with much confidence on this issue, it is certainly true that the free expression implications of *Vriend* are not at all heartening.

> To be hated, despised, and alone is the ultimate fear of all human beings. However irrational racist speech may be, it hits right at the emotional place where we feel the most pain. The aloneness comes not only from the hate message itself, but also from *the government response of tolerance*. When hundreds of police officers are called out to protect racist marchers, when the courts refuse redress for racial insult, and when racist attacks are officially dismissed as pranks, the victim becomes a stateless person. Target-group members can either identify with a community that *promotes racist speech*, or they can admit that the community does not include them.[172]

However, besides implying that tolerant governments are hate promoters, the contention that target-group members are forced either to "identify with a community that promotes racist speech," or to "admit that the community does not include them," powerfully insults the intelligence of target-group members. For if mere tolerance of hate speech were enough to make them believe that the community is racist, then they would also have to believe that because the government tolerates the marches of Trotskyists, the government is Trotskyist; because it protects the persons of "lesbigays," it is lesbian, gay and bisexual all rolled into one; because it refrains from jailing Nazis, it is fascist; or, for that matter, because it tolerates the existence of evil, that it is evil! Suffice it to say that any such argument misses the rather obvious third option — namely, that mere toleration of expression in a regime dedicated to the free expression of opinion *carries no necessary implications whatever* of support for any particular group or cause tolerated.[173]

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172 *Supra* note 3 at 2338 [emphasis added]. Indeed the *Keegstra* majority cites Matsuda favourably at *supra* note 1 at 747-48. See also, Delgado, *supra* note 3 at 141 "The failure of the legal system to redress the harms of ... racial insults, conveys to all the lesson that egalitarianism is not a fundamental principle; the law through inaction, implicitly teaches that respect for individuals is of little importance"; "Note: The Power of Words...," *supra* note 106 at 970: "judicial decisions that do not recognize the seriousness of hate speech tolerate (and implicitly authorize) the hate inflicted on its victims". *Cf.* McGowan & Tangri, *supra* note 36 at 904 (terming Matsuda's contention that tolerating racist speech is taking sides through inaction "a paradigm example of the fallacy of the false opposite": "If we are to regulate speech because a prospective audience may interpret it through a logical fallacy, there will be little speech left at all"). See also, R.C. Post, "Racist Speech, Democracy, and the First Amendment" (1991) 32 William and Mary L. Rev. 267 at 292: "Just as a library could not function if it were understood as endorsing the views of the authors whose books it collects and displays, so also in a democracy the government could not serve the value of autonomy if it were understood as endorsing the ideas expressed by private persons in public discourse."

173 For criticism of Matsuda's argument here and elsewhere, see T. Heinrichs, "The Civil Libertarian as censor: 'Public Response' Reconsidered" (1992) 56 Alta. L. Rev. 337 at 365-69. See also, H.L. Gates Jr., "War of Words: Critical Race Theory and the First Amendment" in Ira Glasser, ed., *Speaking of Race, Speaking of Sex: Hate Speech, Civil Rights, and Civil Liberties* (New York: New York University Press, 1994) 17 at 39-40.

The promotion of hatred by means of mere toleration might also be thought to result from a different form of putatively *implicit* state authorization. Proponents of such an argument might instance the case of some police forces in the southern United States in the 1960s which stood by and did nothing while civil rights workers attempting to register blacks to vote were threatened and beaten by private individuals; this, despite the fact that the police officers were constitutionally sworn to protect *all* citizens without regard to race or colour. In this case, it is certainly true that "doing nothing" is a form of "doing something." However, the "something" being done is nothing more than the dereliction of official duty, which duty, in our example, requires not that police condone the violence, but that they protect against it. In such a case to "tolerate," as Matsuda

b. The Criminalization as Silencing Argument

If legal sanctions are considered silencing by their absence, they also might be considered silencing by their presence.[174] On this argument, a law such as s. 319(2) which carries a possible two year prison term for violating it can be said to "silence" those who would utter the proscribed messages in that they choose not to speak for fear of the penalties attached. But is this claim correct?

Do laws such as s. 319(2) — or any other public sanctions[175] — "silence" potential speakers? They certainly make it more likely that people who hold the proscribed views will be less likely to speak out in ways they prefer than they otherwise would, and they certainly also carry the strong likelihood that public discussion of issues connected with the proscribed views will undergo a chilling effect. But can we equate the self-censorship attending the one, and the chilling effect attending the other with the "silencing" of expression? I think not.[176]

In the first place, while anti-hate speech laws certainly *attempt* to silence hate speakers — indeed, this is their very point! — as a matter of empirical fact, there is good reason to think not only that they do not accomplish their intended ends, but that they might well function unintentionally to aid the various causes of hate speakers rather than to retard them.[177]

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might say, *is* to "promote," but the toleration and promotion at issue are both outside the scope of, and contrary to, the affirmative duty on the part of the police officers to uphold and enforce the law. In this context, the very act of toleration is illegal, and so it cannot properly be construed as state action. No state authorization, implicit or otherwise, can therefore be implied.

174 Though here by quite different people for almost opposite reasons.

175 I include here civil sanctions as well since they carry penalties that are sometimes every bit — or more — onerous than criminal sanctions.

176 It is probably worth stressing here that nothing in my argument is intended to suggest that because anti-hate speech laws do not "silence" those who fear them, there is nothing wrong with such laws. My belief is that such laws are a political and social disaster because of the chilling effect they have on public discourse, and they are a moral disaster because their mere existence is an insult to citizens of a "free and democratic society" who, as such, ought to be free to decide for themselves without state interference who and what they will listen to and what they will say.

177 For example, by getting them to clean up their language, thereby rendering their speech more mainstream, more palatable, and, therefore, more acceptable to buyers in the marketplace of ideas. Commenting on the effect of the passage of the 1965 *British Race Relations Act* which prohibited expression "likely to stir up hatred ... on grounds of colour, race, or ethnic or national origins," one observer had this to say:

> Regularly published papers, journals and magazines of racialist organisations immediately became more moderate in the presentation of their views as soon as the 1965 Act came into force. At least one leader of a racialist organization has admitted that this has been to the advantage of his movement, for whereas the former virulently racialist language of his magazines had often alientated people who might otherwise have subscribed to his views on racial matters, more moderate language had increased the circulation of his publications.

See A. Dickey, "English Law and Race Defamation" (1968) 14 N.Y.L. Forum 16 as quoted in Haiman, *supra* note 134 at 98; Samuel Walker, *Hate Speech: The History of an American Controversy* (Lincoln: University of Nebraska, 1994) at 103. Moreover, to the extent that anti-hate speech laws have the unintended effect of facilitating rather than hindering the messages of hate speakers, then on the very argument advanced by LEAF and accepted by the Court that

In the second place, while it is regretable that laws like s. 319(2) render it *less likely* that public debate on public issues will be "uninhibited, robust, and wide-open,"[178] it is not plausible to think that anyone in particular is necessarily silenced by that fact.[179] The idea that it is plausible is based on the assumption that because one faces the possibility of a lengthy jail term for speaking out, one really has no choice but to remain silent. But this is to equate the fact that speaking out carries penalties one would rather not undergo with the idea that one has no choice at all whether to undergo them, which is simply not true. As Thomas Hobbes long ago pointed out:

> Feare, and Liberty are consistent; as when a man throweth his goods into the Sea for *feare* the ship should sink, he doth it neverthelesse very willingly, and may refuse to doe it if he will: It is therefore the action, of one that was *free*: so a man sometimes pays his debt, only for *feare* of Imprisonment, which because no body hindred him from detaining, was the action of a man at *liberty*. And generally all actions which men doe in Common-wealths, for *feare* of the law, are actions, which the doers had *liberty* to omit [*sic*].[180]

Simply because one of our proposed courses of action has consequences we think unpalatable does not mean we have no choice at all whether to undertake it. In the case at hand, we can speak and risk the penalties, or we can remain silent and avoid them altogether. What we choose to do when faced with such a choice will depend, *inter alia*, on the depth of our feelings about the issues involved, on our estimations of the importance of speaking out on them and on the probable effectivenesss of our doing so, on our readings of the severity of the penalties attached to so doing, on the particular persons we are, on the particular persons we think we are (or would like to be) as well as on the images of ourselves we would like to project to others.

Those who, to protest segregated facilities, violated trespassing ordinances, municipal permit requirements, disorderly conduct statutes, or police orders to disperse in the Southern and Northern United States in the 1960s;[181] or who burned draft cards,[182] wore armbands,[183] attached peace symbols to the flag,[184] *etc.* to protest the war in Vietnam in the 60s and 70s; or who burned the American flag in the 1980s to protest U.S. policies generally;[185] no less than those today who chain themselves to trees to

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"[g]overnment sponsored hatred on group grounds would violate section 15 of the *Charter*," such laws should be repealed.

178 *N.Y. Times* v. *Sullivan*, 84 S.Ct. 710 at 721 (1964).

179 Though Cass Sunstein would seem to disagree. He believes that if "we allocated the right to speak to those people whose speech other people are willing to pay to hear," then "[t]his system *would prevent people from speaking* if other people were not willing to pay enough for them to do so." "Free Speech Now," *supra* note 106 at 280 [emphasis added].

180 T. Hobbes, *Leviathan* (Oxford Ed., 1909) at 162.

181 *Garner* v. *Louisiana* 358 U.S. 157 (1961); *Edwards* v. *South Carolina*, 372 U.S. 229 (1963); *Cox* v. *Louisiana*, 379 U.S. 559 (1965); *Brown* v. *Louisiana*, 383 U.S. 131 (1966); *Adderley* v. *Florida*, 385 U. S. 39 (1966); *Shuttlesworth* v. *Alabama*, 394 U.S. 147 (1969); *Gregory* v. *City of Chicago*, 394 U.S. 111 (1969).

182 *U.S.* v. *O'Brien*, 391 U.S. 367 (1968).

183 *Tinker* v. *Des Moines Independent School District*, 393 U.S. 503 (1969).

184 *Spence* v. *Washington*, 94 S.Ct. 2727 (1974).

185 *Texas* v. *Johnson*, 491 U.S. 397 (1989); *U.S.* v. *Eichman*, 110 S.Ct. 2404 (1990).

protest logging practices, or to each other to protest the legalization of abortion, made, and continue to make, decisions to express their views and not remain silent despite the presence of legal sanctions for so doing. For all those who undertook (and undertake) a commitment to express what they wish in the context of such sanctions, the question is simply one of value. The existence of sanctions surely makes the decision to speak more difficult for most people to make, but it ultimately reduces to whether or not any given individual believes the speech is worth the risks. In any event, it simply cannot be said that the existence of legal sanctions, without more, forces anyone into silence. Imagine, for example, where civil rights in North America would be today if Martin Luther King (or even Malcom X) would have remained silent for "*feare* of the law."

2. PRIVATE SANCTIONS LEGALLY UNDERTAKEN

The second version of the silencing argument from fear, apprehension, or intimidation looks not to public but to private sanctions. For private sanctions can carry penalties for expression that in some cases might be every bit or more as unpleasant as public sanctions like imprisonment.[186] Frank Michelman has called our attention, for example, to the speech suppressive power of private actions such as the boycotts urged in chapter eight of the *Final Report* of the 1986 U.S. Attorney General's Commission on Pornography (the "Meese Commission"). According to Michelman:

> with a bit of prompting you may easily remember or imagine how overbearing a boycott can be: how, for example, you might stand to lose any or all of your job, your customers and your business, your friends, your sleep, and your status as a socially respectable person should you so much as continue to shop for your daily bread and milk in a neighborhood variety store that keeps on its sales rack a certain magazine, if that magazine has been branded as pornographic — no matter how falsely, ignorantly, and outrageously, in your opinion — by self-appointed but socially effective boycott organizers who are also keeping a watchful eye on your weaker-willed and fearful employer, customers, and friends.[187]

Losing one's job, customers, business, friends, sleep, and socially respectable status simply because one shops at a store that sells legal, but allegedly pornographic, materials certainly might be considered by some people to be a punishment worse than imprisonment.[188] And if legal sanctions on expression are regarded as "silencing"

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186 In fact, the only point at which the second version differs from the first is over the nature and source of the respective sanctions. Thus, if we grant that public sanctions on expression *because they are sanctions* silence expression, then there seems no clear reason why we should not also grant that *private* sanctions do the same.

187 "Conceptions of Democracy in American Constitutional Argument: The Case of Pornography Regulation," *supra* note 106 at 311.

188 But certainly not by all. Nothing in my argument here should be understood as endorsing Michelman's larger claim that we have less to fear from public sanctions on expression than from private sanctions. As McGowan and Tangri, *supra* note 36 at 840, have argued: "The government is the only entity that can legally arrest you and throw you in jail for your speech." In the same vein, K. Sullivan points out that "[i]f Simon and Schuster rejects you, you can go to Random House. If the government bans your novel, you may have to move to France": "Free Speech Wars" (1994) 48 S.M.U.L. Rev. 203 at 207.

devices, then it seems every bit as reasonable to believe that private sanctions fall into the same category.

The fact is, however, that for the same reasons that legal sanctions as such cannot legitimately be thought to silence expression, neither can private sanctions such as boycotts.[189] For those faced with the prospect of a boycott, no less than those faced with the prospect of a prison term, are still free to speak or not to speak as they may ultimately choose. To hold that they are not is to make a necessity out of either simple prudence, insufficient commitment, or, perhaps, even rank cowardice. But as the examples of dissidents the world over surely attest, moral progress is never the result of believing one is "silenced" and acting so as to confirm the belief.[190] Again, simply because our choices are not as favourable to us as we would like does not mean we have no choices at all. I conclude, then, that neither public nor private sanctions in and of themselves are sufficient to silence expression, whereas, as I shall later argue, certain physical restrictions necessarily and always do.

3. SILENCING BY ILLEGAL ACTS OF INTIMIDATION OR TERROR

But if it is not legitimate to claim that laws like s. 319(2) or private sanctions like boycotts or picket lines silence expression because the decision whether to abide them remains with the potential speaker, isn't it also true that certain attempts to silence speakers can be *so horrendous* as to render the focus on choice altogether hollow? For if you remain silent either because you or your loved ones have been tortured or you fear that if you speak you or they will be killed or tortured, isn't it both empty and wilful as well as gratuitous and counterintuitive to say that you have not been silenced simply because you are "free to choose" your fate?[191]

It is, of course, true that some people may be terrorized or intimidated into silence by acts or threats of violence, but it is not true that everyone will. As Franklyn S.

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189 McGowan and Tangri, *ibid.* at 840, are undoubtedly correct when they note that "[t]he case reporters are filled with cases in which individuals endured social condemnation, ridicule, and obloquy without being silenced." However, they go way too far when they say "[a]s an historical matter, speakers have withstood such assaults from private parties and continued advocating their views; the same cannot be said of the effects of imprisonment." Apart from the examples previously adduced (*supra* notes 181-185 and accompanying text), the unhappy case of Adolph Hitler is surely sufficient to reject this claim.

190 Even the death sentence pronounced by the fanatic Khomeini, the carrying out of which Iran has determined to be the duty of all good Moslems, has not been enough to silence the man who today certainly stands as the very embodiment of the free expression ethos.

191 "For an audience to choose death or bodily harm instead of compliance, as it is theoretically 'free' to do in the face of such 'persuasion' is not genuinely much of an option": Haiman, *supra* note 134 at 229-30. See also I. Berlin, *Four Essays on Liberty* (Oxford: Oxford University Press, 1969) at 130:

> not all choices are equally free, or free at all. If in a totalitarian state I betray my friend under threat of torture, perhaps even if I act for fear of losing my job, I can reasonably say that I did not act freely. Nevertheless, I did, of course, make a choice, and could, at any rate in theory, have chosen to be killed or tortured or imprisoned. The mere existence of alternatives is not, therefore, enough to make my action free (although it may be voluntary) in the normal sense of the word.

Haiman reminds us, "the instances are many in human history where men and women have chosen death over surrender."[192] The question whether people will be silenced by acts or threats of violence is an empirical one, and, again, to that question our answer must be unequivocally equivocal. Not everyone has been or will be intimidated into silence. Whether any particular person will, again, will depend on many variables, ranging from the nature of the act or threat in question to the types of personalities involved and the context within which the act or threat is delivered.

But even if we accept that not all individuals will be silenced by acts or threats of violence, isn't the fact that some — perhaps even most — people likely will be silenced sufficient reason to criminalize all such expressions? Again, I think not. One reason why is that criminalizing expression because it intimidates some people into silence poses a serious threat to the very foundations of our system of free expression. Another is that the fact that acts or threats of violence might intimidate some speakers into silence is not in the first instance why we criminalize them. Still another, for those who worry lest absent the silencing argument we have no valid reason to punish such acts or threats, is that we certainly do.

Let me take the last point first. Acts or threats of violence are sometimes both intended to convey meaning and received as such. To the extent they do, such acts or threats might arguably be said to be covered by the free expression principle. On the other hand, to the extent they are, some might worry that without the silencing argument we would lack any valid free expression reason to limit them?

It is, of course, true that few commentators have argued that acts such as torture or murder should be protected simply because they are accompanied by expression ("in the name of the people, I turn this rack"), or because even if mute they convey some discernible political message (the blowing up of a federal building to protest government policy), or that *bona fide* threats of violence are immune from prosecution simply because they are verbally delivered — that is, because they are speech and not actions ("I just *said* I'd kill you when I held that gun to your head, I didn't *do* it"). But the mere fact that few people have advanced such arguments is not necessarily a reason for their invalidity.[193]

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[192] *Supra* note 106 at 16. In this vein, Robert Cover relates the Yom Kippur story of Rabbi Akiba who chose to continue teaching in spite of the decree [of the Romans forbidding it].

> When they led him to the executioner, it was time for reciting the Sh'ma. With iron combs they scraped his away his skin as he recited *Sh'ma Yisrael*, freely accepting the yoke of God's Kingship. "Even now?" his disciples asked. He replied: "All my life I have been troubled by a verse:'Love the Lord your God with all your heart and with all your soul,' which means even if he take your life. I often wondered if I would ever fulfill that obligation. And now I can.

He left the world while uttering, "The Lord is One": R.M. Cover, "Violence and the Word" (1986) 95 Yale L.J. 1601 at 1605, quoting the translation used in J. Harlow, ed., *Mahzor for Rosh Hashanah and Yom Kippur, A Prayer Book for the Days of Awe* (1972) at 555-57.

[193] As a matter of fact, at least as far as threats of violence are concerned, a notable exception to the rule would seem to be the Supreme Court of Canada which held in *Keegstra*, *supra* note 1 at 729, 733 that because s. 2(b) "embraces all content of expression irrespective of the particular meaning or message sought to be conveyed," and because "threats of violence can only be classified by

Do we have reasons independent of their alleged silencing effects sufficient to conclude that the mere fact that acts or threats of violence may be said to convey meaning is not enough to protect them? Of course. Generally speaking, we criminalize *bona fide* acts or threats of violence such as murder or torture not primarily because of the silencing effects these are thought rightly or wrongly to have on expression, but because of the physical pain or destruction they cause to those beaten, tortured, or murdered, or the fear, intimidation, and terror they tend to cause among those threatened. On this view, any silencing involved is but a side effect of the pain, destruction, fear, intimidation, or terror directly effectuated by such acts and threats.[194] Silencing, then, is at best a secondary effect of acts or threats of violence which are punishable in the first instance because we do not believe people should be murdered, tortured, or beaten or forced to live their lives under conditions of fear, intimidation, or terror. Thus, acts or threats of violence can rightfully be punished whether or not they carry any silencing side effects.

So we need not have recourse to the silencing argument to criminalize acts or threats of violence. However, the problem for any regime committed both to the values of free expression and physical and psychological security is to balance these claims in such a way that neither is denied. But what should a regime so committed do about acts or threats of violence, and how does legislation such as s. 319(2) along with the Court's opinions in *Keegstra* and *Ross* stand in this regard? To answer these questions I shall focus the discussion only on threats of violence because even though, contrary to the argument of the *Keegstra* majority, acts of violence do raise free expression issues, such questions are raised more usefully for our purposes by threats of violence. Granted, then, that threats of violence do, indirectly anyway, silence some individuals — but not all — what should the good regime about them?

Our first problem is to establish some rule to determine when threats are *bona fide*. For while we surely know that people can ignore or downplay threats that are real, we also know that they can perceive threats where there are none. Unfortunately, however, the line demarcating real from imaginary threats is often not clear. For if we know that people can perceive threats where there are none, we also know that one person might

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reference to the content of their meaning," they are protected by s. 2(b), "and their suppression must be justified under s. 1."

However, contrary to the argument of the Court, it seems clear that acts of violence such as blowing up a building can also be said in certain circumstances to "convey meaning" — as, for example, did the bombing of the federal building in Oklahoma City on April 19, 1995, the second anniversary of the destruction of the Branch Davidian compound in Waco, Texas by federal Bureau of Alcohol, Tobacco, and Firearms and FBI agents. An act of this sort might convey many different meanings. Among other things, it might be intended as revenge for a perceived "atrocity" or as a statement of what is likely to come unless government policy changes in the appropriate ways. Alternatively, it might be intended simply to show how deep feelings run on certain issues, or that unlike some groups on the right that prefer "talk" to "action," this particular faction is prepared to "act." Given that *acts* of violence can convey meaning, the Court's judgment that such acts are outside the scope of s. 2(b) while *threats* are within the provision seems arbitrary.

194 The order of the relevant effects is perhaps best captured in the claim that someone has been "struck dumb by fear."

feel terrorized or intimidated by a specific act or pattern of action but not another.[195] Because different individuals have different threat, terror, or intimidation thresholds, and because even the same individual might at one time experience as threatening what at another time with more knowledge or with a change in psychological make-up he considers harmless, the attempt to protect against threats of violence raises serious free expression problems. For surely, while we do not want to force individuals to live lives of fear and intimidation, we also do not want our rights of free expression to be subject to the lowest common denominator of fear or intimidation, for that would be not only to subject what you or I may say to the tolerance threshold of the most incurable paranoiac, it would also be to jeopardize our entire system of free expression.

What we need is a rule governing expression that is both broad enough to get at real, as opposed to groundless, threats and yet narrow enough not to call for criminal penalties every time someone hears something critical either of him or of a group with which he might identify. This, of course, is no easy task. Nevertheless, to protect free expression interests, I would suggest that at least two background conditions need to be satisfied before any threat of violence should be considered *bona fide*. First, it seems reasonable to require that the threat be clear and not vague or uncertain, that it target specific individuals or groups not some vague entity such as the entire society, and that it poses a very serious danger to the physical security, health, or property of those targeted. Unambiguous threats of murder, torture, beatings, bombings, or kidnappings addressed to specific individuals or small groups fall easily into this category. Unspecified, vague, and relatively trivial threats uttered to large and amorphous groups or to no one in particular — for example, to trample certain of society's flowers — do not.

Second, it must be clear that the persons threatening the violence both intend to carry it out and are in a position actually to do so.[196] "Kill the umpire!" screamed out by baseball fans upset at a particular call is not a real threat because no one really believes that those uttering the threat actually intend to carry it out. Similarly, a three-year old who says to his mother "if you don't let me watch 'Mr. Rogers,' I'll kill you" not only does not likely intend to kill his mother but is almost certainly unable to do so even were the intent there.

Given these conditions, we might arrive at the following rule for determining whether any given threat is *bona fide*: if the violence threatened is clear, targeted, and serious, and if the persons uttering the threat both intend to carry it out and are actually in a position to do so, then, and only then, is it plausible to say that threats of violence

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195 "Some people feel intimidated by a nasty look or mildly critical comments; others would not budge if a bulldozer were about to plow into them." Haiman, *supra* note 106 at 17.

196 This last proviso is very important. According to Haiman: "[w]here there is no possibility of a communicator being capable of carrying out a threat, verbal or nonverbal, and where that fact is evident to the person or persons being addressed, the expression should not be defined as coercive" and, thus, ought to go unpunished. *Supra* note 134 at 230-32. I would add after "is evident," the phrase "or should be evident" to Haiman's formulation in order to capture the element of reasonableness that is necessary to avoid inevitable problems of subjectivity.

per se may be punished. If so, how well does the expression punished by s. 319(2) fit the rule?

In the first place, given that the provision is intended to punish any and all non-private expression that "wilfully promotes hatred against an identifiable group," it is clear that threats of violence are covered to the extent they constitute "public" and "wilfull promotions" within the scope of the act. But it is also clear that the act targets for punishment much more expression than could reasonably be included under the rubric of violent threats. Indeed, from some of the examples the Court lists,[197] even reasoned arguments that oppose the values of equality, multiculturalism, and equal participation conceivably qualify as "silencing" expression in spite of the fact that such arguments threaten, intend, and accomplish nothing at all even remotely violent. And so from a perspective that would limit prosecution strictly to acts or threats of violence, both the law and the Court's interpretation of it are surely overbroad.

In the second place, if the law is not limited to acts or threats of violence, neither does it require, insofar as it might be thought to apply to such threats, that those uttering them be in a position to carry them out. Indeed, as we have seen throughout this article, in interpreting the law the Court entirely ignores the status of the party uttering the speech impugned by the law.[198] This fact, as we have also had occasion to see at many places, lends a degree of unreality to the silencing argument that is truly astonishing. For while we surely might have cause to worry for the physical safety of minorities if neo nazi groups like Aryan Nations managed to obtain something approaching majoritarian status, there is absolutely no doubt that at present they do not possess this status and have no serious prospect of achieving it in any foreseeable future.[199] Thus, even if taken — wrongly I believe — to be threats of violence against Jews, the idea that the anti-Semitic expressions of altogether marginal individuals like a Keegstra or a Ross actually "muzzles the voice of truth" is absurd. In fact, such expressions should be expected to bring about — as they actually have brought about — a torrent of public criticism.

To conclude: because S. 319(2) punishes an entire *category of expression* (hate speech) rather than simply specific acts or threats of violence, because the expression it punishes targets large and inchoate *groups* of people rather than specific individuals, and because it entirely ignores the question of the ability of the party uttering any threat to make good on it, even this most plausible version of the silencing argument from fear fails: for given that it is being applied in *Keegstra* and *Ross* to hateful messages

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197 *Supra* note 1 at 756, 758, 764.

198 Which surely is odd since it concerns itself throughout with the party allegedly impugned by the *speech*!

199 This does not, of course, mean we have no cause at all for worry, or that certain individuals among them are not capable of carrying out specific violent actions against minority group members. The murders of Denver talk show host Alan Berg in 1984 and of Ethiopian student Mulugeta Seraw in Portland, Oregon in 1988, along with the violence perpetrated against columnist Keith Rutherford in Alberta in 1990 are ample testimony to the danger posed by some individuals within these groups. See, *e.g.*, W. Kinsella, *Web of Hate: Inside Canada's Far Right Network* (Toronto: Harper, 1994).

about large groups of people, delivered to the public at large, it speaks too broadly and too abstractly to make even minimally coherent "silencing" sense.

4. IS THERE A SILENCING CONTINUUM?

By saying that none of the various silencing arguments examined are valid, I do not wish to be construed as saying that there is no such thing as silencing, for there certainly is. If I kill you, I've arguably silenced you.[200] If I torture you and leave you in some catatonic state, I have done the same. Indeed, acts of physical violence such as these raise silencing questions at their clearest and most basic level. However, even apart from acts of violence which render one *permanently* unable to communicate, the moment we are forcibly prevented by some physical act from saying what we wish to those whom we wish we are clearly being silenced. If I or my henchmen, for example, grab you, tie you up, tape your mouth, and place you in some or other form of solitary confinement, it is hardly controversial to say — assuming you have things which you wish to say to specified others — that you have been silenced.[201] But why are you silenced in this case but not in the others? Because in the others, no matter how unpalatable personally your options may have seemed, you still had the *choice* not only to speak but also to put yourself into a position to be heard, whilst here, even though you may choose to speak, and may even silently mouth the appropriate syllables, your speech is completely inaudible. No one can *hear* what you are saying, much less put themselves in a position either to "understand" or to "validate" it. Utter whatever words you may, you are effectively silenced not because no one believes you or does not understand what you believe you are saying but because no one can hear — or, in my example, even see[202] — you.

In my judgment, this is precisely where we should leave the silencing argument. We should restrict it only to those cases — hopefully relatively rare — where speakers are forcibly prevented from communicating to their intended audiences — where "forcibly prevented" is read narrowly to refer only to physically coercive acts carried out within a specific communicative context. So restricting the argument, of course, rules out altogether the possibility that mere *expression of opinion* can silence expression,[203] that my exercise of my free expression right can "silence" your exercise of your free expression right. In terms of the particular arguments we have been tracking, it rules out the possibility that anyone is necessarily silenced because of illegal acts or threats of violence,[204] or public or private sanctions attendant upon expression,[205] or

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200 Though the act might resonate over time and space to my ultimate disbenefit, in which case, while I have certainly silenced you personally, I may not have silenced your cause. As examples, Socrates and Jesus Christ most notably come to mind.

201 At least for the term of your confinement. Similar instances that come to mind — jamming broadcasts, confiscating newspapers, tearing down posters, shouting down opponents — also entail direct physical interventions and hold only for the time-frame of the specific act in question.

202 I add this proviso to meet any possible lip-reading objection.

203 In both cases just as "speech" is more than the sound created by the tongue striking the palate so the "expression" at stake must be understood to convey meaning not simply physical sounds or noise.

204 *Supra* notes 191-99 and accompanying text.

because someone else has convinced a third party that their speech should not be taken seriously,[206] or simply because they have been misunderstood.[207]

Apart from the arguments presented earlier, I think there is one very important reason to restrict the silencing argument in the way just suggested. The closer we stay to the physical act of preventing someone from speaking, the closer we adhere to conceptions of human agency normally thought to be consistent with free expression theory and the free and democratic society. Both assume that speakers and auditors alike are agents with minds of their own who alone are responsible for the statements, choices, and judgments they make. However, the more we move away from the strictly physicalist account I suggest, the more such speakers and auditors are denied that very agency and the individual responsibility that goes along with it. In this sense, there is a kind of "slippery slope" down which we are in danger of sliding that begins with "threats," extends through "unpalatable choices," and culminates in the highly dubious, indeed absurd, "credibility" argument. For surely, as I have noted throughout, it is at best silly to say that someone is "silenced" who is legally free to speak, is not forcibly prevented from speaking, actually does speak, and is both heard and understood — yet this is precisely what the "credibility" version of the silencing argument which the *Keegstra* majority advances would have us believe. In contrast, by assuming that silencing occurs only to the extent that the communications process is disrupted by the physically coercive act of another, we retain the assumption of agency in speaker and audience, and we put the responsibility for silencing precisely where it should be put — *viz.*, on those who are forcibly preventing the communicative act.[208] As an added bonus, we will actually be calling things by their proper names and not find ourselves in the patently ludicrous position of claiming that someone who is both free to speak, write, and publish volumes and actually does so is in fact "silenced."

F. THE UTILITY OF SILENCING ARGUMENTS: AN *ARGUMENTUM AD HOMINEM*

1. SPEECH SUPPRESSION MASQUERADING AS FREE EXPRESSION

Given their rather obvious flaws, it is hard to believe that silencing arguments of the sort we have been tracking are really intended to be speech protective at all. In fact some of these arguments are so speech suppressive that they seem the progeny less of

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205 *Supra* notes 174-90 and accompanying text.

206 *Supra* notes 123-46 and accompanying text.

207 *Supra* notes 147-63 and accompanying text.

208 In what is surely both a model of fanatical consistency as well as a ghastly indication of the moral and legal consequences attendant upon some of the more extreme forms of the silencing argument, C. MacKinnon has argued that the courts that first convicted and then upheld the death penalty conviction of brutal rapist and murderer, Thomas Schiro, actually fingered the wrong man. According to MacKinnon, the real culprit in the case was less Schiro who "repeatedly raped and tortured his victim," who "beat her on the head with a vodka bottle until the bottle broke, beat her with an iron, and when she resisted, finally strangled her to death," and then, adding grisliness to sadism, "sexually assaulted and bit into his victim's corpse" than the pornography which destroyed his ability to appreciate "the wrongfulness of his actions" and made him "unaware" that his victim was "not consenting." See N. Strossen, *Defending Pornography: Free Speech, Sex, and the Fight for Women's Rights* (New York: Scribner, 1995) at 270-72; Mackinnon, *supra* note 72 at 95-97.

those concerned to advance the cause of free expression than to retard it. If they are, one could hardly imagine a better strategy for so doing than to enlist the very cause of free expression in support. As we have seen throughout this article, one of the main pillars of support the Court erected for s. 319(2) in its battle with s. 2(b) has been the s. 2(b) guarantee itself. What better speech suppressive strategy than one that turns the free expression argument inside out and, at the same time, uses it against those who traditionally have been thought to be the ones protected by it? Frank Michelman, who himself, as we saw, advances a perlocutionary version of the silencing argument, seems to have captured the logic perfectly:

> What are we to make of the idea of the silencing of some people by the speech of others? Once we let ourselves entertain it seriously, that idea has a uniquely disquieting force for the friends of expressive freedom. The point of raising the issue of silencing is to justify restrictions on freedom of expression in the name of the one value that we cannot conceivably rank below freedom of expression, namely, freedom of expression.[209]

If my exercise of my free expression right "silences" your exercise of your's, then how can any ostensible "friend" of free expression not be concerned about such "silencings"? For if you advertise yourself as a friend of free expression, and you are not concerned about such violations, then you stand revealed as unprincipled — favouring free expression claims when they are pressed by your favoured groups, and opposing them when advanced by those whose causes you dislike. In this sense, the silencing argument has the look, however falsely, of evenhandedness.

But it has another, even more important, attraction for those advancing the cause of speech suppression: it can be used to support the case for censorship *without even appearing to do so*. Few in Canada or the United States these days wish to be associated with the cause of censorship; this for the simple reason that the past exploits of those who have paraded under its banner have given it a pretty bad name. But presto! With the silencing argument what is at stake is not censorship, but "free speech!" Never mind that the argument requires that the expressions of some be *legally* suppressed so that "the voices of others" can be heard.[210] Never mind that it is precisely this particular form of suppression ("silencing") that we have traditionally called "censorship."[211] Never mind that, as we have seen throughout this work, the argument stands the free expression guarantee on its head — protecting the speech of a majority at the expense of a minority. For by appending arguments for censorship to the cause of free speech, the silencing argument cleverly, if perhaps just a bit disingenuously, is able to triumph through the back door. It would eliminate expression it abhores all the while upholding the right of "free speech" that it allegedly champions.

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209 "Civil Liberties, Silencing and Subordination," *supra* note 106 at 273.

210 Fiss, *The Irony of Free Speech*, *supra* note 106 at 4.

211 Andrea Dworkin to the contrary, the day is certainly long past when the term applied only to prior restraints: "In legal terms censorship has always meant prior restraint: you pass a law that stops something from being made or done." See A. Dworkin, "Where Do We Stand on Pornography?" (1994) 4 Ms. 32 at 37, as noted in Strossen, *supra* note 208 at 64-65.

As an added benefit, it would divide the supposedly indivisible free speech guarantee against itself. Even more useful, it would do so in its very own name!

But, one might ask, why assume the argument from silencing is not to be taken at face value? Why assume that its stated concern for free expression is not genuine? It is not genuine, I would argue, for the simple reason that though it advertises itself as such the argument is *not* evenhanded; it favours or rejects free expression claims strictly according to the viewpoints expressed and the groups allegedly being served or harmed by the statements.[212] Some commentators are very open about their preferences. For example, Owen Fiss says: "[s]tate regulation of the type we are considering might promote, under the best of assumptions, the speech rights of women, minorities, and the poor, but it necessarily diminishes the speech rights of racists, pornographers, and the rich."[213] Others, on the other hand, are less open about their preferences. And this particular list certainly includes the *Keegstra* majority.

As we have seen, s. 318(4) of the Canadian criminal code defines an identifiable group for s. 319(2) as "any section of the public distinguished by colour, race, religion, or ethnic origin." As stated, the provision is entirely content neutral. It does not distinguish among the various groups that conceivably might be included within the categories listed, protecting some but not others; instead, the provision applies evenhandedly across-the- board to *all* groups "distinguished by colour, race, religion, or ethnic origin." Hence, the category "colour" includes whites as well as blacks, browns, reds, or yellows, and the category "race" includes Caucasians just as Negroids or Mongoloids. All religions and all ethnic groups are likewise put on an even footing. Thus, given the content neutrality of s. 318(4), it is not a little surprising to find the majority reading the provision as if it were content specific — that is, as if it pertained only to *certain* sections of the public. For even though the court nowhere argues the case for selectivity — *indeed, it never even acknowledges that it is being selective*! — few, if any, of its arguments apply to groups that it does not consider "disadvantaged."[214] Virtually every argument the majority makes concerning the harms allegedly caused by hate speech — either to its targets, to society as a whole, to the values of equality, multiculturalism, democracy or, as we have seen, to the values of free expression itself — make coherent rhetorical sense only if the groups targeted are racial or ethnic minorities. Indeed, so ingrained is the assumption of selectivity, that

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212 For a criticism of this "selective" approach, see T. Heinrichs, "Who Exactly is Hurt by 'Hurtful Speech' or Whatever Happened to Sticks & Stones ... ?" (1995) 4 Inroads 175.

213 *Supra* note 106 at 17. Similarly, M. Matsuda, *supra* note 22 at 2356, would grant a "victim's privilege" to groups she believes have been victimized by racist speech but would withhold it from "historically dominant" groups. And commenting on Stanford University's campus speech code which he helped author, T.C. Grey, *supra* note 78 at 162, says: "the Stanford regulation would prevent me from firing my most powerful verbal assault weapons across racial, sexual, or sexual preference lines. By contrast, people of color, women, and gays and lesbians can use all the words they have at their disposal against me."

214 Kent Greenawalt makes a similar observation about the *Keegstra* majority's selectivity: "[m]uch of what the Court says about the pressing concern to suppress hate speech does not apply to "hate speech" of minorities against socially dominant groups. Presumably, whether such speech can constitutionally be punished remains open": *Fighting Words: Individuals, Communities, and Liberties of Speech* (Princeton: Princeton University Press, 1995) at 69.

at one point the majority even distinguishes between "[t]he many, many Canadians who belong to identifiable groups" and "the community as a whole" — despite the fact that the plain language of s. 318(4) requires that *every member of the Canadian community is necessarily and unavoidably a member of some identifiable group*! And, of course, as we have also had many occasions to see, its entire argument for regulating hate speech is predicated on the anti-egalitarian, anti-multicultural, and anti-democratic content of the message it sends. Evenhandedness, therefore, does not appear to be one of the majority's strongest suits. Nor is it a feature of any of the other silencing arguments which focus on the alleged destruction of credibility.

2. BAD SHORTCUT FOR HARD WORK

Silencing arguments also would seem to have a certain appeal for those who, for one reason or another, do not want to expend the effort necessary to convince a broader segment of the public that what they (as opposed to what those they would silence) have to say is the truth. For some, censorship is but a shortcut to a more receptive audience. On their logic, it is much easier to get one's views accepted by others if there are few or no competitors in the field. However, it is not by any means clear that censorship will yield the desired results. Moreover, even if it is effective in shutting down the opposition, it is not clear that the intended beneficiaries of censorship will in fact benefit by it. For there are good reasons to think that in a regime of censorship, one's audience might not be convinced by "official" — *i.e.*, uncontested, messages at all.[215] But if censorship is unlikely to succeed, why advocate it?

Contrast the censorial strategy behind the silencing argument with that engaged in by proponents of civil rights in the southern United states in the 1950s and 1960s. Segregation of the races, and the inferiority of blacks were ideas firmly "planted" in the minds of southern whites during the 1940s and 50s, but while there certainly remain isolated pockets of racism, the same is not generally true today.[216] And why isn't it? Because, in large part, blacks and whites together used their constitutional rights of free expression in the 50s and 60s to convince both southernors and northernors of the utter immorality of these ideas and practices. Given the truly heroic efforts undertaken by civil rights workers who risked and experienced intimidation, terror, beatings, and even murder, for a cause they thought was right, the strategy of censorship proposed by proponents of the silencing argument reeks of both laziness and intellectual cowardice.[217]

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[215] The experiences of those who lived "double Lives" in the states of the former Soviet bloc should their orthodoxies went with them. See, for example, T. Garton Ash, "Eastern Europe: The Year of Truth" *The New York Review of Books* (15 February 1990) 17.

[216] See, for example, S Thernstrom & A. Thernstrom, *America in Black and White: One Nation Indivisible* (New York: Simon & Schuster, 1997).

[217] For an account of the importance of freedom of expression in the context of civil rights politics, see H. Kalven Jr., *The Negro and the First Amendment* (Columbus: Ohio University Press, 1965). See also, K. Karst, "Boundaries and Reasons: Freedom of Expression and the Subordination of Groups" (1990) U. Ill. L. Rev. 95; and D.E. Lively, "Racial Myopia in the Age of Digital Compression" in Gates, *et. al.*, *supra* note 173, 63: "The racist speech control agenda is formulated largely from tenured faculty positions in academic communities where intellectual output may be

Nor is it without its own costs. On one level, by attacking the indivisibility of the free expression guarantee, the strategy of censorship renders its proponents vulnerable when their pet causes come under attack.[218] On another level, such strategies evince a faith in the like-mindedness of governmental officials that is naive almost to the point of incredibility. Those who argue for the suppression of hate speech often simply assume that the state officials called on to enforce such measures will share the same ideological biases as they. More often than not, however, these same proponents will also argue that these selfsame officials *do not* share their biases — that, in fact, state power has historically been arrayed against the very causes they wish to promote. Recent adventures in censorship policies tend to confirm the latter rather than the former possibility. More often by far than not, state power has been used against, not in favour of, the causes current proponents of censorship have promoted.

As well, strategies of censorship deflect valuable energies away from activities and measures that might actually have useful effects on real and important problems. As Donald E. Lively has argued:

> The immediate benefits of racist speech regulation are negligible in a society that remains functionally segregated. Moreover, it is a strategy unreferenced to a future, likely to condition racial progress upon lowered social barriers, enhanced multicultural experience, and a broader aquisition and sharing of knowhow. A danger of expressive management, unmitigated by any limited short-term gain, is that it provides no basis for and actually may deter cross-cultural engagement that is a necessary prelude for real progress.[219]

Though Lively is speaking in an American context, much of what he says has relevance for Canada. For in Canada just as in the United states, "[o]ne of racism's most perverse legacies is the inducement of anxiety and reticence when the subject of race arises or a cross-racial encounter materializes."[220] In this context, censorial strategies "heighten

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more the grist for publishing mills than an engaged concern with real-world disadvantage." For a spirited defence of one such "racist speech control agenda," see R. Delgado & D. Yun, "The Neoconservative Case Against Hate-Speech Regulation — Lively, D'Souza, Gates, Carter, and the Toughlove Crowd" (1994) 47 Vanderbilt L. Rev. 1807.

218 For an imaginative construction of the bind such strategies create for their proponents, see Anthony P. Griffin, "The First Amendment and the Art of Storytelling" in Gates, *et al.*, *supra* note 173, 257. See also, J. Butler, *supra* note 106: "Strategies devised on the part of progressive legal and social movements ... run the risk of being turned against those very movements by virtue of extending state power, specifically legal power, over the issues in question."

219 "Racial Myopia in the Age of Digital Compression" in Gates et. al., *supra* note 217 at 62.

220 According to G. Mallet: "[i]ncreasingly Canadians are hyphenating themselves and putting up walls around their separate cultures, communicating in the euphemisms of political correctness, and insisting on asserting group rights over individual rights.... In public, euphemisms and code words have taken over real language": "Multiculturalism: Has diversity gone too far?" *Globe and Mail* (15 March 1997) D1-2. For a defence of attempts to create a "chilly" expressive climate around "issues like rape, abortion, homosexuality, or affirmative action," and an apparent lack of *any* longing for that time when people "did not have to watch their words, when they could engage in the pursuit of knowledge and truth uncensored by 'political correctness,'" see C.R. Lawrence & M. Matsuda, *We Won't Go Back: Making the Case for Affirmative Action* (Boston: Houghton Mifflin, 1997) at 219. How anyone would feel free in such a climate to utter any controversial opinion on any of the "protected" issues is hard to discern. Controversial issues would be, at least

a sense of jeopardy, enhance an already strong tendency to avoid judgment or embarrassment and fortify the resolve to avoid dialogue where it is most needed."[221]

3. A WAY TO RAISE CONSCIOUSNESS: IS IT REALLY "WHEEL OF FORTUNE'S" FAULT?

The silencing argument, thirdly, bespeaks a certain resentment over the fact that relatively few persons seem to have bought into the ideological positions advanced by its particular proponents, and an arrogance of attitude to match perhaps fueled by this fact. "What we believe is true," so the reasoning seems to go, "therefore *something* must be wrong. Either the game was rigged against us from the start so that our messages never got through to those who needed to hear them (or got through but only in a distorted version), or if these messages did get through clearly and unambiguously, something about the auditors themselves must have rendered them incapable of seeing such obvious truths. Perhaps they have been brainwashed by the 'flood' of pornography, hate speech, *etc.*, in circulation. But whatever the cause, it is clear that their consciousnesses are false and need raising.[222] By 'sending messages' about what one can and cannot say, laws like s. 319(2) do just that." While such reasoning is certainly common coin for many of those who argue the silencing case,[223] it is the arrogance of such thinking that led McLachlin J. to say that freedom of expression does not include "the right to be believed,"[224] and it was this selfsame arrogance that J.S. Mill termed an "assumption of infallibility."[225] Whatever the label, the one possibility the thesis cannot countenance is the one possibility that makes the most sense: namely, that in relevant part anyway, their arguments have been both heard and understood — *and rejected.* And though I find it very hard to believe that a speech suppressive strategy is strictly and necessarily a left-wing phenomenon, Charles Fried put the point well when he asked "what in the world are these people talking about?"

> They cannot literally mean that their messages are drowned out in the sense that those who wish to hear them cannot. It is not as if the networks or The Wall Street Journal were actually jamming the

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publicly, avoided, conventions embraced rather than flouted. Rather than seeking truth, people would try to avoid giving the offence that truth (or their conceptions of it) might bring; rather than speaking their minds, they would disguise their meaning through carefully coded vocabularies. We would imperceptibly begin to live "what almost everyone in East Germany and Czechoslovakia was living — a double life: systematically saying one thing in public and another in private": T. Garton Ash, *supra* note 215.

221 Lively, *supra* note 217 at 95.

222 According to Post, *supra* note 172 at 308: "it is one thing to use the idea of false consciousness as a weapon *within* public discourse to convince others of the need to break with the prejudices of the past, and it is quite another to use the idea as a justification to limit public discourse itself. The first is a familiar rhetorical strategy. It is consistent with the processes of public discourse because its effectiveness ultimately depends on its persuasive power. The second, however, presupposes an intimacy with truth so vital as to foreclose opposing positions."

223 Surely still the master *oeuvre* in this nauseatingly presumptuous *genre* is Herbert Marcuse's "Repressive Tolerance" in R.P. Wolff, B. Moore, & H. Marcuse, eds., *A Critique of Pure Tolerance* (Boston: Beacon, 1965) at 831.

224 *Supra* note 1 at 831.

225 *Supra* note 45 at 24. Again, it was not just "the feeling sure of a doctrine" that Mill referred to by the "assumption," but "the undertaking to decide that question *for others*, without allowing them to hear what can be said on the contrary side."

broadcasting of anyone's views. What these people really mean is that not many people are interested; or are not interested for long; or, like myself, if interested are not at all persuaded. In this respect these critics are like annoying children who whine at their parents, "you're not listening to me," when what they mean is, "however much I go on, you don't think I'm right." This whining is dressed up in the self-serving jargon of false consciousness, domination, and cultural-hegemonism ... all of which is intended to show how the vulgarity of the competing media is at fault for causing people to ignore the left's more weighty message. What this comes to, of course, is that what some on the left have to say is so boring or so unconvincing that people would rather watch *Wheel of Fortune*. But is that really *Wheel of Fortune*'s fault?[226]

4. A WAY TO EVEN UP THE SIDES

Finally, and perhaps as a result of such presumptuousness, censorial strategies suggest that their proponents see nothing wrong with strategies of manipulation and distortion where lives *other than their own* are concerned.

On these arguments, since the game is rigged in one way or another, silencing the silencers simply evens things up a bit. Of course, even if "the game" were rigged, it would also be true that more "rigging" would not be adding less but more distortion to the debate, and thus, not less, but more manipulation to its outcome. The end result would be to add more opacity and less transparency to the communicative process. On the very theories proposed by proponents of silencing arguments, audience-control is brought about in large part by distorting the communication process.[227] That proponents of such arguments end up doing exactly what they accuse their opposition of doing is, therefore, not in the end surprising. Nor, given their attitude towards the "existing private preferences" of the very "citizens" for whom they would speak,[228] is it surprising to find that proponents of such arguments generally treat the lives and goals of others as if these were simply extensions of their own. For if one is convinced that one is on the side of the truth, that this truth is individually "self-fulfilling," and that being on side and in possession of it makes one "special" and unique, then why not override the "false," non-self- fulfilling, destructive preferences and conceptions of others. Not to do so would seem to create doubt about your premises if not your power.[229] Besides, you will be doing these others a favour!

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226 *Supra* note 106 at 252.

227 An odd outcome, surely, for those "civic republicans" who speak fondly of "dialogue," "deliberation," "consensus," and "jurisgenerative politics." See, *e.g.*, F. Michelman, "Law's Republic" (1988) 97 Yale L.J. 1493; Sunstein, *supra* note 113. M.H. Redish & G. Lippman, "Freedom of Expression and the Civic Republican Revival in Constitutional Theory: The Ominous Implications" (1991) 79 Cal. L. Rev. 267; S.G. Gey, "The Unfortunate Revival of Civic Republicanism" 141 U. Penn. L. Rev. 801.

228 Sunstein, *supra* note 113 at 10-11: "Respect for preferences that have resulted from unjust background conditions and that will lead to human deprivation and misery hardly appears the proper course for a liberal democracy."

229 "Persecution for the expression of opinions seems to me perfectly logical. If you have no doubt of your premises or your power and want a certain result with all your heart you naturally express your wishes in law and sweep away all opposition." *Abrams* v. *U.S.*, 40 S.Ct. 17 at 22 (1919); Fried, *supra* note 106 at 246: "The ban is an exercise of power. It shows who is boss. Thus the holders of noxious ideas are suppressed and the rest of the community is impressed and

G. PRE-EMPTIVE SILENCING: THE THREAT TO FREE EXPRESSION

Given the evidence the Court presents, we are forced to conclude that the free expression guarantee does not and cannot furnish either the moral or constitutional grounds necessary to imprison people whose messages express contempt for identifiable groups. It is simply absurd to think that expressions of disdain by private individuals necessarily carry authoritative weight in the society at large. No identifiable group member can reasonably claim either that his free expression right, or his freedom to exercise this right, is at all necessarily threatened by the exercise of the rights of free expression on the part of hate speakers. Because he cannot, the conflict of rights the Court believes to exist within the free expression guarantee is, thus, non-existent. And because it is, the argument that the suppression of hate speech will further both the values underlying free expression and the free expression of opinion itself is fallacious. The suppression of hate speech is not necessary to free the speech of target-group members, it is already perfectly free.

There is one other important reason why those friendly to the cause of free expression should be wary of expansive silencing arguments. It is, however, also a good reason why those who would advance such arguments should think twice before so doing. If "silencing" arguments are thought to furnish good free expression reasons why identifiable group members might invoke state censorial power to silence the Keegstras of this world, they also furnish equivalent free expression reasons for attempts on the part of the Keegstras of the world to silence those who would silence them. In fact, one such attempt has already been made in the United States, and the incident should serve as a bone-chilling reminder of the inherent foolishness of most such arguments. Deborah Lipstadt reports that holocaust deniers have had recourse to a "disturbing reversal of the free speech argument" to silence their opponents. According to Lipstadt:

> In 1984 David McCalden, the former director of the IHR [Institute for Historical Review], contracted to rent exhibit space at the California Library association's annual conference. The subject of his exhibit was the Holocaust "hoax." The Simon Wiesenthal Center and the American Jewish Committee (AJC) protested to both city and association officials. The Wiesenthal Center rented a room near McCalden's exhibit space to set up its own exhibit, and the AJC threatened to conduct demonstrations outside the hotel in which the meeting was to be held. When the association cancelled McCalden's contract he sued the Wiesenthal Center and the AJC, arguing that they had conspired to deprive him of his constitutional rights to free speech. Though the court dismissed his complaint, the U.S. Circuit Court of Appeals reversed that decision in 1992.

Lipstadt notes that "[t]he case constitutes the first time that the First Amendment has been used to attempt to still the voices of those who oppose Nazi bigotry."[230] But

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intimidated by this display of political might."

230 D.E. Lipstadt, *Denying the Holocaust: The Growing Assault on Truth and Memory* (New York: The Free Press, 1993) at 220. See also *McCalden* v. *California Library Association*, 955 F.2d 1214 (9th Cir. 1990). M.J. Matsuda, *Where is Your Body? And Other Essays on Race, Gender and the Law* (Boston: Beacon, 1996) at 92.

surely if "silencing" arguments become fashionable, we should expect their deployment by anyone capable of making a minimally plausible case. And on the basis of the ridiculously loose requirements for being "silenced" advanced by the proponents of some of these arguments, it should be apparent that almost anyone could. We should expect, then, that not only holocaust deniers, but any putatively aggrieved group might plausibly claim that the exercise of the free speech rights of their opponents has had the effect of silencing them. We should look, then, for anti-abortion as well as pro-abortion crusaders, tobacco lobbyists as well as anti-smoking zealots, masculinists just as feminists, pornographers just as "MacDworkinites,"[231] heterophobes as well as homophobes — all to join the silencing parade. And if the argument should work for one, what recognizable judicial principle would rule it out for another? But if it works for all, the classically courageous and tolerance affirming[232] "more speech" remedy for the expression "we hate"[233] will effectively have given way to a new fear-ridden, fainthearted, intolerant strategy of "more litigation." A strategy *less* suited to the task of conflict-resolution in an ethnically and socially diverse society would be hard to imagine.

IV. EPILOGUE: FURTHERING FREE EXPRESSION ENDS — JUST A TOUCH OF ORWELL

Part of the Court's rationale for s. 319(2) is the flawed argument we have been tracking — *viz.*, that "it is through rejecting hate propaganda that the state can best encourage the protection of values central to freedom of expression." In other words, by censoring expression we are actually furthering free expression ends. Another part of its rationale, however, is that in so doing, it is also "simultaneously demonstrating dislike for the vision forwarded by hate mongers."[234] On this latter argument, a speech-suppressive law such as s. 319(2) "serves to illustrate to the public the severe reprobation with which society holds messages of hate directed towards racial and religious groups." However well-intentioned it might be, the Court's reasoning in support of this claim is as bizarre as it is frightening. It says: "The existence of a particular criminal law, and the process of holding a trial when that law is used, *is thus itself a form of expression*, and the message sent out is that hate propaganda is harmful to target group members and threatening to a harmonious society."[235] By so saying, the Court seems to be claiming that *criminal laws* like s. 319(2) which prohibit expression, and *criminal trials* like Keegstra's which punish expression *are themselves expressive* in that they communicate specific messages to the public at large. But what

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231 The term is N. Strossen's (*supra* note 208).

232 V. Blasi, "The First Amendment and the Ideal of Civic Courage: The Brandeis Opinion in *Whitney* v. *California*" (1988) 29 William and Mary L. Rev. 653; L.C. Bollinger, *The Tolerant Society: Freedom of Speech and Extremist Speech in America* (Oxford: Clarendon, 1986).

233 *U.S.* v. *Schwimmer*, 279 U.S. 644 at 654 (1929), Holmes J. dissenting: "[I]f there is any principle of the Constitution that more imperatively calls for attachment than any other it is the principle of free thought — not free thought for those who agree with us but freedom for the thought that we hate."

234 *Supra* note 1 at 764.

235 *Ibid.* at 769 [emphasis added].

is the message they communicate? By whom is it communicated? And to whom is the communication addressed?

> The many, many Canadians who belong to identifiable groups surely gain a great deal of comfort from the knowledge that the hate-monger is criminally prosecuted and his or her ideas rejected. Equally, the community as a whole is reminded of the importance of diversity and multiculturalism in Canada, the value of equality and the worth and dignity of each human person being particularly emphasized.[236]

These claims can make coherent sense only on the assumptions that certain sections of the public are *not* members of identifiable groups and certain individuals are *not* members of "the community as a whole." For as earlier noted,[237] because an identifiable group is defined by s. 318(4) as "any section of the public distinguished by colour, race, religion, or ethnic origin," all Canadians by definition must belong to one or another "identifiable group" — even the "hate-monger." And while the Court's reference to "[T]he many, many Canadians who belong to identifiable groups" necessarily excludes certain "sections of the public," such a reading is without either statutory or constitutional basis. *All Canadians* are distinguishable by "colour, race, religion, or ethnic origin" not just "minorities" or whomever else the Court has in mind. And though it should go without saying, not just members of majoritarian groupings are capable of hateful utterances. Hate-mongers can be found among all colours, races, religions, or ethnic groups, and their hateful utterances can be directed against majority as well as minority group members.

That the Court's reading of those qualifying for identifiable group membership is selectively underinclusive is evident from other claims made in the passage as well. For it is only on the assumption that someone is not a member of an identifiable group and, thus, not to be included among the Court's list of possible addressees, that it could say what it says in the first sentence. For while members of identifiable groups might be said to dervive "a great deal of comfort" from the fact that a hate monger is being "criminally prosecuted" and his "ideas rejected" how could a "hate-monger" both be a member of an identifiable group and be said to do so?

Finally, if the Court reads identifiable group membership too narrowly, it also would seem to possess a less than inclusive conception of "the community as a whole." For surely it could not have been thinking of the hate-monger as a member of the community and still say what it says in the last sentence above. For given that its values of equality, diversity, and multiculturalism are by definition anathema to the hate monger, it is not clear how his prosecution could be thought to emphasize *to him*, the "worth and dignity of each human being." Surely, as far as he would be concerned, state officials could not be thinking of him either as a member of the "community" or

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236 *Ibid.* D. Kretzmer also speaks of "the symbolic importance of restrictions on racist speech": "a society committed to ideals of social and political equality cannot remain passive: it must issue unequivocal expressions of solidarity with vulnerable minority groups and make positive statements affirming its committment to those ideals. Laws prohibiting racist speech must be regarded as important components of such expression and statements" (*supra* note 81 at 456).

237 *Supra* note 75 and accompanying text.

as a dignified and worthwhile human being and at the same time prosecute him for holding and uttering values anathematic to those of the communal majority. In fact, by prosecuting him for what he says, the state is both excluding him from community membership and treating him as an "outlaw" who, publicly assaulting community values, might legitimately be subject to incarceration.[238]

Clearly, at this point we are on some or other level of "double-speak." The language of the statute is universalistic ("any section of the public..."); its authoritative judicial interpretation, however, is particularistic ("The many, many Canadians..."). The "community as a whole" supposedly includes every Canadian but apparently doesn't include the hate-monger. The person who rejects the values the majority of Canadians accept and is prosecuted for publicly rejecting them is supposedly "reminded" by his prosecution of the importance of "diversity," "equality," and "multiculturalism" in Canadian society and of the "worth and dignity" of each "human being." Such reasoning would have made O'Brien proud.[239]

However, even granting that speech-suppressive trials might be considered to be forms of "expression" in that they convey some particular message, we might still want to ask whether they are expressive in the exact same sense as the unpopular expression of a marginal speaker? Can we take seriously the claim that state expression backed up as it is by the force of state power is equivalent to the expression of marginalized speakers? For is not the matter significantly altered by the fact that while a Keegstra or a Ross can legitimately express their views only in speech, the state, on the Court's view, "expresses" itself by means of laws, arrests, trials, convictions, and prisons — coercive mechanisms which exist to punish those who express views allegedly undermining "community values"? Are we seriously to believe, as the Court's argument would suggest, that the authoritative expressions of a society's legislators, police, judges, and prison wardens are equivalent to the unempowered mutterings of marginal individuals like a Keegstra or a Ross? Are we to believe, in short, that the authoritative coercive power which attends the expression of state officials but which does not attend that of private individuals is altogether *irrelevant* to questions concerning the free expression of ideas? If so, we might well ask what universe of discourse the Court majority believes it inhabits.

The Court's argument here equalizes the power relationship between state officials and marginalized private individuals. In the process it makes two important mistakes.

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238 On the Court's view, the arrest, prosecution, trial, and incarceration of the hate-monger constitute a kind of public ritual which at one and the same time functions to "remind" the "community as a whole" who is and is not part of it, what values it stands for, and how far one may go in challenging those values and still remain a member in good standing.

239 If the retort to this argument is that the Court is not including the hate-monger in its definition of the "community" and so none of what I am saying reaches the issue it is considering, then it ought not use the universalistic language that it does ("the community as a whole"), it ought to explicitly and honestly state that it is choosing sides in a community-wide debate, it should justify the constitutional and, in this case, statutory basis for its choice and explain to the public exactly how the universalistic language of both the *Charter* and the law in question requires the departure from universalism.

In the first place, by reading down the power of state expression to render it no more authoritative or more powerful than that of private individuals, the Court not only obliterates the line between the public and the private but renders plausible the assumption that the expression of state officials is essentially no different from that of private individuals, and, thus, no less worrisome either. And in the second place, by reading up the power of private individuals to the level of that wielded by state authorities, the Court not only once again obliterates the distinction between private and public power, it also attributes to the expressions of private individuals an authority and power these cannot in the nature of things possess. This last, of course, is exactly what, as we have seen throughout this article, the Court's "silencing" argument amounts to — *viz.*, that the expressions of marginalized individuals like Keegstra or Ross by their very utterance have the authority and the power necessary to invalidate and silence the speech of their targets.

What is wrong with this "reading up" and "reading down" is that we are in danger of being deluded from two directions. In the first place, reading down the power of state "expression" threatens to read out of it altogether its necessarily coercive dimension at the very moment that appeals by proponents of anti-hate speech measures are made to legislators, police, judges, juries, and prison officials to take the very coercive action against hate speakers that their "silencing" arguments ostensibly suggest should be unnecessary. In short, we are in danger of losing sight of the coerciveness of state power at the very time we are calling for its application. In the second place, reading up the power of the expressions of private individuals to the level of that of state officials both attributes to these a power they do not in the nature of things possess and confers upon them a mantle of authority and legitimacy that private individuals as such cannot have. We have, thus, reached a universe in which every individual is a state official, and every state official is a private individual. In the rush to embrace the power of the state as our friend, we are in danger not only of losing any sight of it as our enemy but any sight of it at all.

Speaking about the argumentative shift away from a focus on the state as the agency of censorship to a focus on the "censorship" produced by the speech of the "citizen-subject" Judith Butler puts the point well:

> In this shift, it is not simply that citizens are said to act like states, but the power of the state is refigured as a power wielded by a citizen subject. By "suspending" the state action doctrine, proponents of hate speech prosecution may also suspend a critical understanding of state power, relocating that power as the agency and effect of the citizen-subject. Indeed, if hate speech prosecution will be adjudicated by the state, in the form of the judiciary, the state is tacitly figured as a neutral instrument of legal enforcement. Hence, the "suspension" of the state action doctrine may involve both a suspension of critical insight into state power and state violence..., but also a displacement of that power onto the citizen and the citizenry, figured as sovereigns whose speech now carries a power that operates like state power to deprive other "sovereigns" of fundamental rights and liberties.[240]

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[240] *Supra* note 106 at 48. ("It is the subject who now is said to wield such power, and not the state or some other centralized institution.... Indeed, the subject is described on the model of state power....": *supra* note 106 at 137).

Still further, what, if anything, distinguishes the Court's logic here from that of the Vishinsky's, *etc.*, who presented to the world the infamous spectacle of the Moscow Trials? There, as here, courts were "sending messages"? When we are told with no "tongue in cheek" that laws and trials are "forms of expression," we have a right to wonder whether the expressive rights of unpopular defendants are not in fact taking a back seat to the desire on the part of state officials to send politically correct "messages" to majoritarian constituents. For when a criminal trial becomes "a form of expression," the expression at issue can only be majoritarian. The Court itself recognizes this when it says "In this regard, the reaction to various types of expression by a democratic government may be perceived as meaningful expression on the behalf of the vast majority of citizens."[241] But, once again, this contention stands the free expression guarantee on its head. The guarantee exists, of course, not to protect the majority from the minority — for it needs no such protection — but only to protect the minority from the ravages of the majority. But since, in the case at bar, Parliament and the Court (and, thus, the societal majority) are all "sending the message" that those who disagree with the substance of the majority's views will either have to be silent or face a prison term, the direction of the guarantee is reversed. In the event, the "guarantee" is no longer necessary.

If as we have seen, the values the Court wishes to protect are the ones the Court itself advances — truth, self-fulfillment, and democracy — then its argument that hate speech laws like s. 319(2) protect rather than offend free speech values is seriously flawed. The additional claim that they are the "best" means to protect these seems flatly perverse. It is akin to saying that the "best" means to free a prisoner is to keep him incarcerated. The argument ignores the obvious fact that the government has many resources at its disposal to register its rejection of such expression short of using the criminal law as social and political educator.[242]

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241 *Supra* note 1 at 764-65.

242 Some of the non-criminalizing possibilities were pressed in briefs by intervenors in the case, but the Court rejected the non-criminalization option outright saying: "No one is contending that hate propaganda laws can in themselves prevent the tragedy of a Holocaust ... hate propaganda laws are one part of a free and democratic society's bid to prevent the spread of racism, and their rational connection to this objective must be seen in such a context" (*ibid.* at 770).