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**DELIBERATIVE DEMOCRACY
EXPANDED:
BALANCING FREEDOM OF EXPRESSION AND
HATE PROPAGANDA WITHIN THE “I & WE”
PARADIGM**

by

BERNARD J. KING

A thesis submitted to the Faculty of Graduate Studies in partial fulfilment of the
requirements for the degree of

Master of Arts (Legal Studies)

Carleton University
Ottawa, Ontario
August 20th 2001

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**DELIBERATIVE DEMOCRACY EXPANDED:
BALANCING FREEDOM OF EXPRESSION AND HATE
PROPAGANDA WITH THE "I & WE" PARADIGM**

Submitted by

Bernard King, B. A. Hons.

**in partial fulfilment of the requirements for
the degree of Master of Arts**

Thesis Supervisor

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September 2001**

Abstract

Liberal and communitarian approaches to balancing freedom of expression in the context of hate propaganda have failed to adequately conceptualize the harms conveyed. The harm both to the groups targeted and to the democratic functioning of the larger society requires a systemic strategy for effective redress. With the goal of expanding deliberation amongst a diversity of rational interlocutors, I propose it is through an “I & We” paradigm shift that goes beyond the limitations of liberal and communitarian thought to develop a systemic strategy. “I & We” philosophy is premised on principles of non-discrimination and non-repression, in redressing and preventing the harm conveyed by hate expression, in all of its forms and functions. I argue that the principled methodological framework of “I & We” philosophy should inform and guide Canada’s socio-political and legal spheres in their approaches to balancing expressive rights and responsibilities with dignity, respect and inclusion of disadvantaged groups in society.

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Introduction

The ideal of freedom of expression/speech is a principle upon which every democratic society is founded and receives its legitimation and justification among its citizenry. Modern democratic societies are complex and highly nuanced structures and systems of institutional and citizen interaction. This complex interaction produces a plethora of competing interests, needs and desires that cannot all be realized. In this thesis I will consider the problem of hate propaganda and the fundamental tensions that its regulation (in the socio-political and legal spheres) poses for the very ideal of a democratic polity and the often competing wants and needs of its citizenry. In answering how hate propaganda may legitimately be regulated my aim is to develop both a theoretically principled and consistent rationale with an eye on practicality and flexibility.

Hate propaganda is antithetical to an open democratic society based on diverse citizen participation and the give and take of rational debate among citizens as members in the expressive community. Hateful conveyances that negate even the possibility of rational conversation attack the underlying credibility and legitimacy of democracy rendering it more akin to the Hobbesian “war of all against all . . . [where life is] . . . nasty, brutish and short.”¹ Historical justifications for expressive freedoms including, one's search for truth, self-fulfillment and democratic participation are rejected by hate conveyances that aim to silence and exclude its targeted audience from membership in the expressive community. The protection of these historical justifications and underlying rationales of an open and free democratic conversation requires that the hateful conveyances of a few must be

regulated to permit the respect and inclusion of those groups targeted.

Balancing the ideals of freedom of expression against the need to protect targeted groups presents a problem for a society founded upon democratic ideals. In developing a principled and consistent strategy of balance, the form and function of a particular hateful conveyance, as well as its medium of dissemination, must be adequately addressed. Current conceptual approaches including liberalism and communitarianism fail to address the complex and nuanced strategy needed to approach the balancing of expressive freedom in the context of hate propaganda and other "democratic ideals." A fundamental failing of both liberal and communitarian approaches in setting the democratic balance, is that each ideology tips the scale towards the extremes of its own theory. This is to say, the paramountcy of the individual in liberal prescriptions; conversely, the overriding supremacy of collective interests in communitarianism.

Proponents of each ideology present the other as a caricaturization of a principled approach, emphasizing the flaws and inadequacies of the other's approach, while highlighting one's own theories perceived strengths. Liberalism with its emphasis on individual rights and responsibility presumes that the expressive interests of the individual take paramountcy over any competing interests or concerns from any group in society. Taken to its extreme view, libertarian ideology argues that not even the concerns and interests of society as a whole may override the expressive rights and freedoms of the individual. An exception in the most circumscribed of cases exists where such hate expression will inflict actual violence or its likely occurrence upon identifiable individuals. Conversely, communitarians

seek to promote the interests and concerns of the group (or some dominant part within a group) as the ideal to be pursued in conceiving of the balance to be set regarding freedom of expression and hate propaganda. In doing so, however, communitarianism's overriding ideology of group supremacy subsumes the legitimate interests and differentiated perspectives of individuals.

Critical Race Theory (CRT) as an alternative framework conceiving freedom of expression in light of its impact on particular groups also fails to adequately address the shortcomings both within liberal and communitarian approaches. In an effort to redress the harm from hate propaganda inflicted upon disadvantaged groups, CRT is prone to censorial excess. CRT's tendency to repress legitimate, albeit highly controversial expression, in part, stems from its failure to offer a principled and practical methodological framework in approaching the tension.

Throughout this thesis I will be putting forward the rationales and principles underlying a paradigm shift from liberal, communitarian and CRT approaches to a new "I & We" paradigm. I argue the "I & We" approach overcomes the conceptual deficits and failures of competing conceptual frameworks to provide a consistent and principled methodology dealing with this tension. The features of the "I & We" paradigm allow it to address these issues, encompass theoretical and practical rationales, which enable a principled and consistent approach in balancing expressive interests and other "democratic ideals."

First, an "I & We" philosophy argues for a deliberative view of democracy over liberal aggregative models. An "I & We" deliberative democracy calls for the recognition of positive obligations on the government to redress both blatant and

systemic forms of hate propaganda. Second, underlying “I & We” philosophy is a conceptual distinction between expression that is illocutionary and/or perlocutionary in form and function. The form and function of a particular expressive conveyance will determine whether it is perlocutionary (capable of rational response) or illocutionary (negating rational response and conveying harm instantaneous with its expression). Inevitably there will be “hard-cases” where a particular expressive conveyance will possess attributes of both illocutionary and perlocutionary conveyances. An important theoretical and practical consequence of this expressive delineation is the requirement that groups targeted by perlocutionary hate conveyances be guaranteed a fair equality of opportunity for response in public fora.

Third, an “I & We” approach will recognize the foundational principles of non-discrimination and non-repression as part of the egalitarian framework for the functioning of public fora. “I & We” philosophy has substantive implications for modifying the *ad hoc* approach the Canadian judiciary takes in its conception of the values underlying freedom of expression and its analysis in justifying any reasonable regulation. I argue that the aim of the “I & We” paradigm is an expanded deliberation of ideas and public policy by a diversity of citizens who respect one another as rational interlocutors in the expressive community.

Thus, in this thesis I will consider freedom of expression and hate propaganda² through the lens of deliberative democracy. I will suggest that deliberative democratic theory infused with insights drawn from the “I & We” paradigm developed by authors like Amitai Etzioni provides a useful approach to the vexing problems that the conflict between adherence to freedom of expression and

the presence of hate speech and propaganda pose to liberal democracies, like Canada. In multicultural societies that are marked by inequality, the conveyance of hate propaganda causes systemic harm to identifiable groups that necessitates a systemic remedial and preventative approach. In moving towards “I & We” principles, I argue that Canada could facilitate an expanded deliberation among a diversity of rational interlocutors, while proactively redressing and preventing blatant and systemic causes of hate.

In the first chapter I develop some of the concepts that a deliberative democratic theory, informed by an “I & We” perspective, requires. In so doing, I argue that such an approach exceeds both liberal and communitarian paradigms while drawing from them in order to develop a new paradigm. This new “I & We” paradigm facilitates an egalitarian concept of “fair equality of deliberative opportunity” for citizens as rational interlocutors to participate in a deliberative democracy. I will emphasize the ideological and practical utility of the “I & We” approach in avoiding the counterproductive tendency of liberalism and communitarianism to conceive of rights and responsibilities of individuals and groups in zero-sum terms.

In chapter two I will elucidate the theoretical arguments for and practical implications of establishing deliberative “I & We” fora that are premised on procedural principles of non-discrimination and non-repression. In developing my view of “I & We” public fora, I will set out the critical distinction- theoretical and practical- in deciding when expression should *prima facie* be excluded (illocutionary expression) or potentially included in discussion and debate (perlocutionary

expression). As a part of this analysis, I will also examine the potential of “I & We” public fora to proactively redress and prevent the blatant and unique systemic forms of harm from hate conveyances, while facilitating tolerance and mutual respect among citizens. In doing so I will set out the theoretical and practical strategies of facilitating and guaranteeing (in form and function) such deliberative procedures and access for identifiable groups targeted by hate propaganda.

In chapter three I will examine the Canadian judiciary's approach in balancing hate propaganda and freedom of expression, providing insight into its capacity and capability in facilitating “I & We” philosophy, in the socio-political and legal spheres of society. I will analyze the judiciary's use of the *Canadian Charter of Rights and Freedoms* (*Charter*) as a constitutional tool in freedom of expression cases, and its potential employment to facilitate “I & We” philosophy. Concepts and principles fundamental to the “I & We” paradigm developed in the first two chapters will inform the critical analysis of the approach the Supreme Court and lower courts have taken in balancing freedom of expression and hate propaganda. I will endeavour to tie the socio-political, legal principles and concepts of “I & We” philosophy together to suggest the systemic approach, I argue, is necessary among the three branches of government and civil society to most effectively progress towards a more tolerant, diverse, and expanded deliberative democracy. I argue it is the “I & We” methodological framework that can infuse the Canadian judiciary's *ad hoc* approach with principle and consistency, while maintaining flexibility and discretion.

Chapter 1

The “I & We” Approach Within A Deliberative Democracy

We believe that the responsive community is the best form of human organization yet devised for respecting human dignity and safeguarding human decency and the way of life most open to needed self-revision through shared deliberation.³

In this first chapter, I will briefly analyze the counter-productive debate between liberalism and communitariansim, indicating that these ideologies, along with liberal democracy itself, are insufficient to the task of appropriately balancing the rights and responsibilities of individuals and groups in the context of freedom of expression. I seek to reveal the often-sterile opposition between liberalism and communitarianism in characterizing deliberative processes and procedures of public participation, for disadvantaged groups, in a democratic society. My analysis of liberalism and communitarianism will emphasize the shortcomings of these approaches in their respective conceptions of freedom of expression (in and outside of the context of hate propaganda), deliberation, reciprocal respect and individual autonomy of citizens.

I seek to go beyond the limitations of liberal and communitarian ideologies in proposing how public fora (in their procedural form and function) ought to set an "I & We" balance when considering freedom of expression claims in a deliberative democracy. I will suggest that a conception of democracy that draws on both liberalism and communitarianism, but which emphasizes a deliberative rather than an aggregative⁴ view of democracy, may be helpful. In particular, I will lay out the required concepts for developing and applying deliberative democracy through the lens of the "I & We" paradigm to freedom of expression and hate propaganda. I

argue that the “I & We” paradigm proactively facilitates an egalitarian conception of fair equality of deliberative opportunity, egalitarian interdependence, capabilities and resources that, in its public fora premised on principles of non-discrimination and non-repression, seeks to expand deliberation among a diversity of rational interlocutors.

Deliberative Democracy through the Lens of the “I & We” Paradigm

I attempt to sketch a middle ground theory- a proceduralist view supported by substantive principles of deliberative democracy. This is a proceduralist conception of deliberative democracy that, while drawing on liberal and communitarian ideas, reformulates the facile zero-sum game of rights and responsibilities to freedom of expression, and other substantive values of “fair equality of opportunity”, dignity and reciprocal respect into a more symbiotic and balanced relation. I argue that a public policy of freedom of expression and public deliberative fora based on the fundamentals of the “I & We”⁵ paradigm is more plausible and acceptable than those derived from liberal, libertarian and communitarian ideologies which assert the overwhelming primacy of liberty or equality. In highlighting this sentiment, Etzioni argues that

the preservation of individual liberty depends on the active maintenance of the institutions of civil society where citizens learn respect for others as well as self-respect, along with the appreciation of our own rights and the rights of others.⁶

I lay out some of the fundamental theoretical principles behind a new paradigm for considering the balancing of free expression rights and responsibilities

of individuals and groups in a deliberative democracy. I am indebted to Etzioni for setting out some of the basic tenets of an egalitarian and critical approach to freedom of expression. I seek to modify and expand upon Etzioni's communitarian arguments while drawing out some practical and plausible implications for an "I & We" deliberative democracy. This new approach equally considers the implications of taking individual and disadvantaged group interests into account in balancing freedom of expression and hate propaganda, with the underlying impetus of expanding participation, from a more diverse and inclusive deliberative citizenry.

The "I & We" paradigm may overcome the stark dichotomy of liberal and communitarian ideologies and the counterproductive tension of each side's facile, adversarial characterization of the other. The "I & We" paradigm may overcome this dichotomy by bringing the terms of rights and responsibilities of individuals and the groups they belong to into a new relationship: a paradigm shift. Thus, the "I & We" paradigm can plausibly be regarded, as in Thomas S. Kuhn's formulation, as a reconstruction of the field from liberal and communitarian fundamentals, a reconstruction that changes some of the field's most elementary theoretical generalizations as well as many of its core paradigm methods and applications.⁷

Since new paradigms are born from old ones, they ordinarily incorporate much of the vocabulary and apparatus, both conceptual and functional, that the traditional paradigm had previously employed.⁸ Within the new paradigm then, old terms, concepts, and experiments fall into new relationships one with the other. The

"I & We" paradigm is one such example of the birth of the new from the old. Entailed in the "I & We" paradigm is the idea that both individual and community have a basic moral standing; neither is secondary or derivative.

The "I & We" paradigm stresses the interlocking, mutually dependent relationship of individual liberty and rights and community concerns about equality and responsibility. "I" signifies the unique persons that individuals are by virtue of societal influences, but also free will and choice of the individual. Individuals are responsible for their choices even while recognizing that environmental circumstances (e.g. group membership and socio-political status and opportunities) may mitigate, reduce, or spread responsibility. Responsibility and obligation as the interdependent other side of the rights of individuals and groups is fundamental to the "I & We" paradigm. Indicative of this view Etzioni asserts "...responsibilities are anchored in community"⁹ and that it is in the context of community that deliberative opportunities are created for individual interlocutors.

Affirming this notion Bernard Williams maintains that "to hold a man responsible for his actions is presumably the central case for treating him as a moral agent."¹⁰ Similarly, the "I & We" paradigm maintains that if citizens are not treated as equally responsible there is not much left to their substantive equality as moral agents and rational interlocutors. Thus, allowing hateful expression without guaranteeing an effective response (assuming a rational response is possible) and refutation from representatives of the groups(s) targeted in public fora, would undermine individuals as responsible moral agents.

“We” signifies social, cultural, group and political resources that interact to help shape the individual and the life choices and opportunities available to him or her. These “resources” are the historical and institutional forces (e.g. the three branches of government-- executive, legislative and judicial-- the education system, religious and socio-political organizations etc.) that shape the community and in turn influence institutions.¹¹ These resources of interdependent rights and obligations of individuals and groups in an “I & We” deliberative democracy coincides with Jürgen Habermas's analysis of Republicanism.

Habermas's conception of Republicanism has strong communitarian sensitivities, where politics goes beyond a mediating function to communicative procedures that are constitutive of society as a whole and fosters notions of “solidarity”.¹² “I & We” philosophy supports Habermas's assertion that “...besides administrative power and individual personal interests, solidarity and the orientation to the common good appear as a third source of social integration.”¹³

Liberalism, Primacy of the Individual and the Libertarian Extreme

The classical liberal paradigm emphasizes the lone egoist competing in the market-place of goods and ideas, radically individualistic and calculating, succeeding by his own effort and merit.¹⁴ This individualistic (libertarian) view of liberalism evokes an extreme belief in an individual's free will and liberty that trumps all competing interests, rejecting any possibility of common goals, or concern for future generations. Classical individualistic liberal ideals assert the primacy of the autonomous individual asserting her individualistic rights and liberty. This

individualistic liberalism is closely aligned with the "rational economic man," entailing a largely solitary and rational being that competes in society for the maximization of merit and personal profit.

By construing politics almost exclusively in terms of reaction (responding only after a particular social, political or legal event or action has occurred), liberals limit it to resisting others, an anti-political act at best, or to acquiescing to them; politics understood as compliance, agreeing to, but not doing.¹⁵ Liberals and libertarians are sceptical and wary of state initiative for fear of potential despotism and social control. In relation to freedom of expression a liberal ideology (and libertarian to a more extreme degree) maintains that liberty, understood as entailing as little regulation as possible, is necessary to affirm the ideal of the open, free and competitive "market-place of ideas."

Nineteenth century classical liberal philosopher, John Stuart Mill, saw freedom of expression as a special case of "other regarding acts" that should enjoy almost complete immunity from the state's interference or control.¹⁶ Of significance to the tension between freedom of expression and potential restrictions from a liberal viewpoint is Mill's "Harm Principle."¹⁷ Mill's "Harm Principle" asserts "the only purpose for which power can be rightfully exercised over any member of a civilized community against his will is to prevent harm to others."¹⁸ Potential restriction of an individual's expressive rights from a liberal ideology may be justified, where explicit and identifiable harm to another individual or individuals will result. The extreme libertarian extension of Mill's "Harm Principle" holds that there is an individual right

to freedom of speech "...even though its existence may be inimical to the welfare and development of society."¹⁹

William Ryan argues that at the heart of liberal democracy is the equality idea of "fair play."²⁰ Liberalism's conception of "fair play" evokes the metaphor of the foot race whereby individuals starting at a formally equal position can compete to win the amenities of life.²¹ The impetus put forth by liberal ideology for participating in the "market-place of ideas" allows the unrestrained expression of competing individual wants and needs and the realization of the most rational and meritorious. Liberalism promotes the idea that, a formal procedural fairness (i.e. absence of restrictions on expression/speech) allowing individuals to express their interests and ideas, will result in the most rational and desirable needs and wants being realized.

For libertarians, such as Robert Nozick, social arrangements are essentially "a necessary burden" and "the good of community consists solely in the advantages individuals derive from cooperating in pursuit of their egoistic ends."²² For less extreme liberals, the community is more than a "necessary burden." For example, the liberalism of John Rawls contends that a "well ordered society" founded on principles of justice possesses "shared final ends and common activities valued for themselves."²³ Yet, in *A Theory of Justice*, Rawls founded a conception of justice on respect for the individual. Individual persons and their self-chosen ends are primary; the common good or general welfare subordinate:

each person possesses an inviolability founded on justice that even the welfare of society as a whole cannot override. For this reason justice denies that the loss of freedom for some is made right by a greater good shared by

others.²⁴

Rawls's philosophy emphasizes the primacy of the individual, and draws social attributes (i.e. mutual cooperation, following societal rules and laws etc.) mainly from the aggregation of individual's self-interested rational choices.

Liberals and libertarians alike continue to hold that individual liberty, protected by individual rights, takes priority over any and all common good, rather than treating individual and community [the group(s) one inhabits] as moral and political equals (as the "I & We" paradigm institutionalizes in its public fora). The liberalism of Rawls sees just institutions as "good in themselves" because they provide each individual's life with "a more ample and rich structure than it would otherwise [not] have."²⁵ That is, individuals may seek and indeed benefit from a just society, but it is they who change it, for their individual purposes. Community is thus still explicitly secondary, derivative and reflecting a rational choice of the Rawlsian representative rational agent- with whom all basic rights rest. The impetus for community and identification with it is thus based on individual self-interests and benefits.

Libertarianism and liberalism produce artificial and shallow selves without sufficient recognition of larger constitutive communal attachments. Liberalism does not give adequate recognition to the significant extent to which an individual's membership in various communities may operate to either expand or constrain the range of choices and options open to individuals. In the context of hate propaganda, liberalism (and certainly libertarianism) does not possess the necessary theoretical

tools to effectively respond, in a systemic manner that addresses the group or communal locus of harm and hurt that effects individual members of the targeted group(s).

A Critique of Communitarian Solidarity

Michael Walzer maintains that the central issue for political theory is not the constitution of the self, but the connection that constitutes selves; the pattern of social relations.²⁶ Walzer argues that insofar as liberalism tends toward instability and dissociation, it requires periodic communitarian correction.²⁷ Communitarianism provides a compelling critique of liberalism's and libertarianism's conception of the radical lone egoist operating purely as a self-interested individual in pursuit of private interests and desires. Communitarian philosophy highlights an individual's communal and interdependent ties to various groups that exist in society as the necessary locus where individuality and choice can emerge. Communitarianism can bring out the latent collective possibilities of liberalism and facilitate awareness for interests and concerns beyond the individual to encompass the group(s) one belongs to and civil society itself.

Communitarian philosopher Michael Sandel argues that Rawls's representative rational agent, "fails plausibly to account for certain indispensable aspects of our moral experience."²⁸ In its constitution and laws the just liberal democracy, according to Sandel, seeks to provide a framework within which citizens can pursue their own values and ends, consistent with liberty for others.²⁹ However, in Sandel's view, we are not, indeed, cannot be, entirely autonomous agents as so

much of liberalism supposes, "independent in the sense that our identity is never tied to our aims and attachments."³⁰

Etzioni similarly charges that the liberal concept of the individual remains atomistic at least in so far as liberals do not recognize community as a constitutive element of the self.³¹ Communitarians view persons as "implicated," as "embedded," or as "citizens" who share a set of moral values by virtue of their membership in a community.³² Communitarians argue that an individual cannot be defined without reference to the context of his or her communal membership(s), as it is the community one is socialized and educated in, that is the constituting force of individuality and choice. Sandel insists, "[If] we are partly defined by the communities we inhabit, and then we must also be implicated in the common purposes and ends characteristic of those communities."³³ Communitarian philosophy argues that autonomous selves do not exist in isolation, but are shaped by the values and culture of communities.

Communitarians are further troubled by what they see as a weak conception of community and the common good, or shared moral values in liberal conceptions of justice, like Rawls's. They point out that liberal positions hold that individual's ends are either competing or independent, "but not in any case complementary...[no] one takes account of the good of others."³⁴ Communitarian critics of liberalism argue that individual rights need to be balanced with their corresponding social responsibilities which are part of the nature of rights.

The critique of liberalism's one-sided emphasis on rights has been key to

defining communitarianism. Rights tend to be asserted without the corresponding sense of how they can be achieved, or who will accept the corresponding responsibilities and obligations. Absolutist (affirming an a-priori primacy of individual claims to free expression over all other claims) "rights-talk," according to many communitarians, corrupts our political discourse and is used to trump genuine conversation and influence of differentiated group concerns, public deliberation, and practical compromise.³⁵

Communitarians believe that unless we begin to redress the balance toward the pole of community, society will continue in its trend toward a normless and self-centered amalgamation of individuals. Communitarian thought holds that the nature of rights ought to be determined in light of their contribution to communal life. Free expression is valuable, then, because it concretely contributes to the abstract goods of community, family, social and religious life. It retreats from the view that free expression necessarily has an objective and predetermined meaning that is culturally neutral.³⁶ This enables expression to be analyzed in light of the cultural values of the community in which it arises and upon which it has an impact. Communitarian thought is able to conceptualize free speech in light of cultural history and allows expression to be evaluated in terms of the "culture of discrete communities."³⁷

Nancy L. Rosenblum, in a manner consistent with "I & We" philosophy, criticizes communitarians and liberals alike for not acknowledging the "messy reality of pluralism- of shifting involvements among diverse spheres."³⁸ Ignoring pluralism

(that individuals are shaped by numerous influences besides community) creates a weakness at the centre of communitarian thought in particular, since it promises to provide the strong dose of sociological realism that liberal theory, with its fondness for abstract and universal principles, allegedly lacks.

Communitarianism's absence of sociological realism (acknowledging the diverse cross-cutting spheres of belonging) is inseparable from the tendency to float above the messy reality of pluralism and to overlook its centrality to self-development.³⁹ When it comes to neglecting pluralism, communitarians and libertarians converge: libertarians by imagining an individualistic imperial self that is all there is and communitarians by imagining they can discover a unified political world within the firmly constituted self (that is the community).⁴⁰

Rosenblum asserts that the everyday experience of shifting involvements (e.g. membership in different groups and communities) in multiple life spheres that individuals inhabit acts in a sense as self-defence against being constrained and wholly defined in their identity and opportunities by any particular sphere.⁴¹ The cost, when shifting involvements is impossible, is familiar- total absorption in a single role that eclipses any individualist purpose. Overwhelmingly approving references to the importance of collective identity suggests that communitarians have chosen to ignore the fact that "belonging" is not always positive.

Moreover, the desire of members to remain entwined or escape (i.e. through assimilation or exclusion of group differentiation) depends in part on the group's particular political, social, legal, ethnic, religious and economic circumstances.⁴²

Walzer argues that the only community that most communitarians actually know is just this liberalism of unions (indefinite and shifting affiliations of self-interests among different individuals); always precarious and always at risk.⁴³ Moreover, communitarianism cannot triumph over this liberalism; it can only, sometimes, reinforce its internal associative capacities. Walzer maintains that communitarianism criticism is doomed- to at best- eternal recurrence because the capacity for disassociation is strongly internalized and highly valued in a liberal democracy.⁴⁴

When communal or collective identity is overly emphasized pressures to conform and support the beliefs and values of one's "community" can have a repressive and negative impact on the freedom of choice of individual members. Whether such communities are based on religious doctrine, ethnicity, nationality, race or class there is usually a notion of the "other" or outsider that can entail blatant or systemic discrimination and oppression of non-group members in extreme cases. One person's fond wish for community can lead to another's well-founded fear of repression.⁴⁵ Communitarian prescriptions, whether embeddedness in community (e.g. racial, ethnic, religious, national etc.) or penetration by community (internal pressures to conform to group norms and interests), are regressive, according to Rosenblum.

What is essential is not only recognizing the fact of social differentiation, but also making the experience of diversity and socio-political access and influence real by enabling people to enter and exit associations and spheres. This in turn, in the

course of “ordinary deliberation” (absent hate expression or public policy issues that directly and inordinately affect an identifiable, disadvantaged group) and political participation, requires open groups that are denied guaranteed populations. Substituting a plurality of diverse concrete relations and spheres of belonging in place of communitarian notions of fraternal “community” (that often amounts to an undifferentiated and discriminating bloc) where community is constitutive of the individual works against dichotomizing. Substitution of plurality illuminates the fruitlessness of having to choose between atomistic and holistic models for structuring possibilities for the self or society. Thus, the “I & We” paradigm attempts to facilitate deliberative spheres of attachment and membership (e.g. a sense of belonging as a rational interlocutor while maintaining one’s ethnic, national or religious group membership) that can help to foster a sense of belonging that defends, and facilitates one’s sense of self-worth.⁴⁶

Contrasting Liberal, Aggregative and Deliberative Conceptions of Democracy

The very essence of a liberal democracy is that there may be free and open debate between competing arguments and ideas, so that “the people” or their representatives may govern. Although subject to a multitude of theoretical interpretations and constructions, its foundational ideal of “rule by the people” has remained its legitimating locus, if not in practice, at least in theoretical façade. Moreover, who “the people” are that have social, political and legal access and influence directly relates to the institutional constructions of the dominant group(s).

Jack Knight and James Johnson argue that liberal democracy has traditionally been premised on a purely aggregative decision-making procedure.⁴⁷ The aggregative view holds that citizens vote by merely announcing their individualistic preferences, and the collective outcome is the sum of these preferences.⁴⁸ With deliberative democracy, this relationship is more complex to the extent that deliberation embodies reasoned argument and rational persuasion. A rational interlocutor is always open to the possibility of reassessing one's own position. Because of this possibility, one's subsequent position as an individual member of a deliberative assembly may not be the same as one's initial position.

The deliberative conception of democracy is organized around an ideal of socio-political justification and egalitarian conceptions of equality. Egalitarian conceptions of equality take a critical approach to power relations and recognize that a fair equality of opportunity is needed to "level the playing field." The exercise of collective political power is to proceed on the basis of free public reasoning among equals. A deliberative democracy institutionalizes this ideal in its public fora structured as responsive frameworks of socio-political, legal and institutional conditions that facilitate deliberation. The deliberative conception offers a more forceful rendering than the aggregative view of the fundamental democratic idea—the idea that citizens should actively participate in the deliberation and formulation of public policy that effects them.⁴⁹

The context of hate propaganda, however, raises some unique issues for deliberative democracy and the balance to be set between individual and

differentiated group liberties to free expression and their corresponding obligations that facilitate reciprocal respect, individual autonomy, and dignity. When hate propaganda is at issue in public fora, I argue that the form and function of such deliberative mediums must be structured to substantively guarantee the effective access and representation of disadvantaged groups targeted by hate- to publicly refute such claims.

By public fora I mean public mediums of discussion and deliberation of citizen's interests including representative institutions such as parliament, but also the numerous less formal socio-political and legal access points in civil society. Public fora in an "I & We" deliberative democracy must creatively adapt and tailor the form/structure of the particular public mediums affirming an "I & We" approach. This is essential to affirm the egalitarian principles underlying the participatory goals of "I & We" public fora: to expand the topics of deliberation while affirming the tolerance, dignity and mutual respect of a plurality of rational interlocutors.⁵⁰

Egalitarian Interdependence of Individual and Group Attachments

It is possible to theorize about abstract individuals apart from a community, yet, if individuals were actually without community they would have very few of the attributes commonly associated with the notion of an autonomous person.⁵¹ The consensus of sociological and psychological work supports the basic notion that isolation, whether the product of urbanization, mass society or other phenomena, erodes the mental stability necessary for individuals to form their own judgements, and resist undue external pressure and influence.⁵² Thus, individuals require a

concrete sense of community; without it they are diminished if not completely incapacitated. Affirming the autonomy and free will potential of rational interlocutors, Carol Gould views humans as having the capacity to create their own destinies through the choices they make asserting that "Their [human] nature is not fixed but self-transforming."⁵³

In the "I & We" paradigm this self-transforming capacity (along with group influences and opportunities) of citizens participating in a deliberative society is the locus of the formation and reformation of our moral and socio-political beliefs and judgements. In Gould's view this political formation of citizen's beliefs and judgements is "...a social reality constituted by intentional, and interacting human beings."⁵⁴ It is a rational reflection on the experiential or empirical knowledge, action and interaction- one, which the "I & We" paradigm affirms.

"I & We" philosophy recognizes that the context of moral and political practices is pluralist (identities marked by race, ethnicity, religion etc.), on any account of personal development, the self is formed from an array of relations in diverse spheres. It is the human capacity and ability (acknowledged by other interlocutors) for actively choosing that becomes concretely realized in the self-development of individuals and their society. The principle of democracy, for Gould, holds that every person who engages in a common activity with others has an equal right to participate in making decisions concerning such activity.⁵⁵

The "I & We" paradigm finds support in that taken alone, its constitutive elements- highly individualistic conceptions of liberalism and libertarianism or

communitarianism- leads to policy conclusions with which their own advocates are often uncomfortable.⁵⁶ The "I & We" paradigm shift also alters the constituent elements such that individual and group interests are to as great an extent as possible reconciled, facilitated in compromise, or at least both equally considered. Those who recognize only the primacy of community and equality, and consider individual rights and liberties either secondary or derivative or assert simply "there are no such rights"⁵⁷ undermine plurality, opening the door to intolerance and tyranny- totalitarian ideologies, absolutist theology and authoritarian political ideologies.

Given that individual and group perspectives differ in any one society or community, the rational public deliberation of alternative views and contesting ideas in a critical manner is necessary for democracy to be deliberative. Allowing for a diverse scope and matter of deliberation allows individuals and the community to determine which issues they shall reconcile, which they should reject and which shall remain contested (they will agree to disagree).

The "I & We" paradigm argues that one-sided emphasis on rights in individualistic conceptions of liberalism or libertarianism is related to its conception, in Sandel's words, of the individual as a "disembodied and unencumbered self," uprooted from cultural meanings, community attachments and the life stories that institute the full identities of real human beings. Asymmetrical confrontation of individual versus group interests (liberty versus equality) has operated within the liberal and libertarian ideologies, as well as communitarian views.

This destructive and often futile exercise has polarized debate and prevented compromise and balance in deciding where the deliberative balance is to be pursued, regarding the exercise and benefit of expressive liberties and equality. What is needed is a retooling of the pursuit of balance, one that would shift the balance, arguing that the “I” is constituted through the “We” in a dynamic relationship. The “I & We” paradigm accepts the modern condition that we are located within a web of pluralistic communities with crosscutting tugs and pulls and genuine value conflicts within them, and within selves. It also recognizes that the group(s) one belongs to helps shape the individual, proscribing to varying degrees the particular options and choices available.

Defining an Egalitarian Notion of Fair Equality of Opportunity

A society's understanding of equality (the dominant view) will significantly shape the structure and functioning of its institutions and general beliefs and value systems.⁵⁸ Particular notions of equality will have an influence on the scope and potential boundaries of freedom of expression. Its formulation will affect where the balance may be set regarding whether to permit particular forms and functions of expression, or to favour other “I & We” deliberative values (e.g. reciprocal respect of rational interlocutors, individual autonomy, non-discrimination and non-repression etc.). In asking “Equality in respect of what?”⁵⁹ J. Lucas seeks to infuse some practical utility in considering the implications of asserting a particular conception of equality in the matters it concerns. As Lucas asserts, discussions of equality are more fruitful if we translate them into discussions of relevance and irrelevance.

Lucas criticizes egalitarian conceptions of equal respect and opportunity (of critical importance to democratic deliberation) as being general to the point of not saying anything meaningful about relevant differences between individuals and the groups(s) to which they belong.⁶⁰ This inadequacy of egalitarian ideals, according to Lucas, prevents any practical mechanism for measuring opportunities among people. It is a plausible assertion Lucas makes when he states “Divorced from its proper context, equality of opportunity becomes increasingly vague.”⁶¹ However, egalitarian ideals rooted in practical notions of “fair equality of opportunity” and reciprocal respect of deliberators as rational interlocutors, in “I & We” fora, sufficiently ground the analysis to overcome the charges of self-defeating vagueness and irrelevance that Lucas poses.

In an “I & We” deliberative democracy, questions of relevance or irrelevance relate to justifications for setting the balance between the expressive rights and the responsibilities of individuals and groups. In setting an “I & We” deliberative balance factors to be considered in public fora include: the interests of individuals and groups seeking to express hate and the interests of individuals and groups asserting their rights and obligations relating to claims for reciprocal respect, non-discrimination, non-repression and individual autonomy.

Liberal democracies have traditionally affirmed the notion of “formal equality” asserting notions of “negative individual rights” (entailing freedom from state intervention and potential despotic regimes).⁶² What is needed, however, is recognition of the inequality of starting positions of different groups and the absence

of opportunity to have one's interests and perspectives heard and considered. The "I & We" paradigm proposes an egalitarian notion of equality in considering the interests of individuals within disadvantaged groups that facilitates what Rawls calls, a "fair equality of opportunity."⁶³ Rawls's view of fair equality of opportunity affirms the liberal idea that the formal basic conditions (e.g. minimal conditions including adequate shelter, clothing, food, basic public education and absence of blatant discriminatory barriers) enabling individuals to compete in the "market-place of ideas" for maximization of self-interested needs and wants is necessary to enable an equal "playing field".⁶⁴

Rawls recognizes the deficits of a merely liberal concept of formal equal opportunity by recognizing that, premising equal opportunity solely on formal conditions of equality, (i.e. treating all individuals and groups the same) often leads to the unfair result of inequality obscured behind formal justifications. Lesley Jacobs asserts that the formal liberal conception of equality of opportunity is frequently thought to be a weak sort of egalitarian principle of justice. One of the reasons for this is entailed in the notion that what it amounts to is merely the idea "everyone has the equal opportunity to be unequal."⁶⁵

The introduction of the "difference principle"⁶⁶ by Rawls is meant to offset the liberal deficiency of formal equality of opportunity by arguing for a substantive conception of equality. Rawls's "difference principle" states that socio-political and economic inequalities are acceptable only in so far as they benefit the least advantaged.⁶⁷ Similarly motivated and endowed individuals may differ in their

success under formal equality of opportunity because they come from different socio-economic, racial, ethnic or religious backgrounds. The principle of fair equality of opportunity was formulated by Rawls in response to this flaw in formal equality of opportunity. It maintains

those who are at the same level of talent and ability, and have the same willingness to use them, should have the same prospects of success regardless of their initial place in the social system, that is, irrespective of the income class into which they are born.⁶⁸

A conception of fair equality of opportunity takes into consideration the blatant and systemic discrimination and asymmetries of power and resources faced by individuals and identifiable groups historically and presently.

A fundamental principle of egalitarian equality within the “I & We” paradigm, then, entails a critical approach to equality and power relations employing Rawls’s fair equality of opportunity when developing and evaluating the form and function of democratic deliberative fora. “I & We” philosophy, in agreement with Rawls’s conception of substantive equality, proposes an egalitarian, not merely formal, conception of equality of opportunity. Fair equality of opportunity ought to form the foundation of a workable theory of “I & We” deliberative democracy. It necessitates a critical and proactive effort by government and the facilitators of the particular deliberative forum at issue, in redressing discrimination and repression to facilitate expanded participation from a diverse citizenry (e.g. disadvantaged groups).

Amy Gutmann supports the necessity of two fundamental principles that are constitutive of the substantive and inclusive principles underpinning the procedures that, I argue, should operate in a multicultural “I & We” deliberative democracy. For

a community to be truly responsive-not only to an elite group, a minority, or even the majority, but to all its members and all their basic human needs-it will have to develop socio-political and legal values which meet Gutmann's criteria: they must be non-discriminatory and non-repressive. These principles are foundational to the "I & We" procedures of public fora; justified in their practical utility as fair and equitable to all rational interlocutors.⁶⁹

Gutmann maintains that for a democratic society to reproduce itself (rather than some segment of it) consciously it must be both non-repressive and non-discriminatory in its public deliberative fora.⁷⁰ Gutmann's project is an important effort to develop a philosophy within the "I & We" approach that facilitates a "fair equality of opportunity" for social and political access and influence. Gutmann seeks to formulate a position recognizing both individual rights and a substantive good (defined in the process of active participation by each citizen adhering to deliberative democratic principles) in pursuit of a "society dedicated to both freedom and civic virtue."⁷¹ Institutionalization of these substantive principles is the best bulwark against the excesses of ethnic, national and religious bigotry and particularism that could well produce new forms of repression.

"I & We" public fora go beyond formal liberal procedures (e.g. merely redressing blatant barriers of discrimination and formal conditions of inequality) theoretically allowing for citizen participation to proactively facilitate the representation and input of citizens (especially from individuals and groups historically and presently disadvantaged and oppressed). Liberalism's conception

of formal equality of opportunity is inadequate in failing to recognize the systemic nature (and initial starting positions) of many of the obstacles faced by disadvantaged groups. According to Jacobs, fair equality of opportunity, on the other hand, is motivated by a concern that "similarly endowed and motivated individuals begin from roughly equal starting positions."⁷²

From the perspective of fair equality of opportunity the "market-place of ideas" approach to freedom of expression, which does not acknowledge differences in initial starting positions to freedom of expression, results in a disparate opportunity and lack of voice from disadvantaged groups. Conversely, the egalitarian concept of fair equality of opportunity, characterized as a substantive deliberative form of political equality and reciprocal respect (in contrast to formal equality), is grounded in the "I & We" notion of "equality as an ideal" in access and participating as a rational interlocutor.⁷³ Unlike the concept of formal equality, this ideal is one that aims to change the rules of distribution of societal power (benefits and burdens)⁷⁴ resulting in a substantive fair equality of deliberative access and opportunity.

The intent of the "I & We" approach in the context of hate propaganda is to have the possibility of effectively refuting, in a public forum, the hateful claims of the individual(s) or group(s) asserting them, thus providing the fair equality of opportunity for rational deliberation among a diverse citizenry. The form and function behind expression that contains a message of hate, may or may not be able to be effectively refuted. Chapter two will set out the critical distinction-

theoretical and practical- for deciding when expression is prima facie excluded (illocutionary) or potentially included in discussion and debate (perlocutionary).

A fair equality of opportunity for having a particular individual or group's ideas and arguments heard and considered in public fora (whether in the medium of the expresser or a new forum of debate) does not necessarily entail that these particular interests must be actually realized. What matters is that there is a real sense (felt by the participants and the group(s) to which they belong) that such perspectives and interests were able to be voiced and were considered- rather than an equality of outcome. In the context of hate propaganda it is particular targeted individuals and groups that are singled out and attacked on the basis of their ethnicity, race, religion, nationality etc. This presents unique challenges of systemic redress if "I & We" deliberative fora are to facilitate a fair equality of opportunity and expanded participation (effective representation from groups historically and presently disadvantaged) among a pluralistic citizenry.

Impetus for this pursuit is the recognition of the potential for distinctive perspectives and contributions of individuals from a plurality of groups in the socio-political and legal community. Expanding the diversity of participants and issues to be discussed will enhance the legitimacy and credibility of the procedures and processes of socio-political access. A wider diversity of citizens included in the societal debate will likely offer increased opportunities for critical challenge and reflection on ideas and arguments maintained by the majority or dominant culture possibly fostering innovative and more equitable approaches in public policy and

legislation. A greater potential for innovative and challenging ideas and arguments will be facilitated by a more inclusive public fora that considers the diversity of different socio-political positions and life experiences of individuals and groups who fall outside of dominant group membership or dominant modes of thought that affirm the status quo.

Individual Rights and Group Identity in the “I & We” Paradigm

It is a valid acknowledgment that the idea of a group of individuals having rights and responsibilities is ultimately dependent upon the claims and satisfaction of its individual members. Yet it is equally important to recognize that this is only possible in the context of the multiple and diverse groups to which an individual belongs and identifies with, and the particular resources, and opportunities possible in each. As well, the corresponding responsibilities are carried out by individuals and refer to obligations that individuals must assume. Yet, not all interests worthy of protection necessarily take this individualistic form. This is a problematic limitation of the libertarian/liberal paradigm where rights and responsibilities are regarded solely, or at least largely, in individualistic terms.⁷⁵

The communitarian paradigm, however, is also inadequate upon critical inspection. While a systemic remedy could certainly be put forward recognizing systemic harm to the group according to communitarian thought, the reasoning underlying it would be inadequate in not paying enough attention to the differential effects on individual dissenting members. A communitarian would presume that the benefit would be solely collective, in that even though its members would benefit

from the remedy, it would be in such a manner that their already existing communal identity, roles, opportunities and benefits would be strengthened and affirmed. Such a conception fails both to give sufficient force to individual freedom and to account for the multiplicity of group affiliations that intersect with people's lives.⁷⁶

"I & We" philosophy argues that from these failings it does not follow, however, that groups are fictitious, or have no significant relation to individual possibilities, opportunities for social and political access and influence. Hate propaganda will often have the intent and effect of oppressing individuals within a group perhaps to different degrees. Hate expression will also negatively affect the group's collective identity, status, respect, dignity and fair equality of opportunity of social and political access and influence. Racist expression or religious bigotry (as particular guises of hate propaganda that target group specific characteristics) are unacceptable because they lock in the oppression of already marginalized and disadvantaged groups and reinforce it. Racist expression⁷⁷ is particularly harmful because it is a mechanism of subordination, reinforcing and reproducing a historical, vertical relationship of exploitation, discrimination and exclusion.

The "I & We" paradigm agrees with Iris Marion Young that social affiliations do position individuals, but a person's identity is his or her own, formed in active relation to that socio-political positioning, among other things, rather than solely constituted by it.⁷⁸ Young also rejects the idea that structural (socio-political) positioning forms the specific identities of individuals. Young maintains that "who I am" is a product of my own particular history, and active engagement with the

multiple facts of social positioning that conditions my life.⁷⁹ While acknowledging that groups (i.e. racially, religiously, or ethnically based) are not homogeneous blocs- the “I & We” paradigm maintains that groups do have a collective identity (i.e. individuality is based on group affiliation). Moreover this collective or group identity affects and is effected by the larger society in facilitating or constraining social, political and legal status and deliberative opportunities for influence of individual members.

Capabilities, Resources and Fair Equality of Equal Opportunity in an “I & We” Deliberative Democracy

Citizens must be given sufficient respect and recognition as rational interlocutors so as to be able to have a fair equality of opportunity to influence decisions that effect them. Differences in opinion, tastes, preferences, moral and political beliefs are crucial to the constant struggle and evolution of a deliberative democracy. Differences that are antithetical to the deliberative ideal of an “I & We” democracy, however, are those differences which make for grossly disproportionate political advantages of access and influence, persistent political disadvantages or inability to respond to hate propaganda because of the form and function of its dissemination.

Below the threshold of what James Bohman calls “adequate public functioning”⁸⁰ it is less likely that citizens will be able to develop their public capacities. Adequate public functioning entails a capability for full and effective use of political access, opportunity, and liberties in deliberation, such as when citizens make their concerns known and initiate public debate about them.⁸¹ In a deliberative

democracy, adequate public functioning entails a fair equality of opportunity for citizen participation that recognizes the need for a proactive government initiative to redress and prevent blatant and systemic forms of hateful discrimination. In order for citizens to participate in rational deliberation in public fora, their underlying capacity for effective debate requires that the necessary socio-political and legal resources (e.g. organizational, informational and financial) be adequately facilitated and provided for by the state.

If deliberative politics is to remain democratic, it cannot simply favour those who are the most educated or most articulate, who have access to special information, who possess the greatest resources and privileged social and political positions by virtue of ethnicity, race, class, religion etc. The procedures and processes constituting public fora in an “I & We” deliberative democracy ought not invariably favour the ideas and arguments of advantaged individuals or groups. Bohman argues that the lack of such capacities for deliberative participation makes it less likely that the outcomes of deliberation are either just or legitimate.⁸²

Bohman’s notion of “political poverty”,⁸³ entailing the inability of groups of citizens to participate effectively in democratic politics, is taken to the extreme in the context of hate propaganda. Illocutionary hate expression (and perlocutionary hate invective absent “I & We” public fora) always enacts an extreme version of political poverty- the obverse of a deliberatively interpreted version of political equality. When groups that have faced historic and present discrimination are confronted by blatant and/or systemic hate propaganda, the consequences, among others, include

public exclusion or asymmetrical political inclusion (deemed acquiescence by virtue of apathy, silence and non-participation). Such groups often cannot avoid asymmetrical or false political inclusion either, since they are the legal, social and political addressees of the deliberative arguments (e.g. illocutionary or perlocutionary absent "I & We" fora) over which they have no real influence.

Exclusion and asymmetrical inclusion succeed by constantly shifting considerable political burdens onto the worst off (e.g. disadvantaged groups targeted by hate propaganda). Such individuals and groups often lack the resources, capabilities, and social and political recognition to mount an effective challenge to the conditions which govern non "I & We" politics. On the other hand, recognition and consideration of an individual's or group's perspective and interests by others shapes and influences the process of deliberation itself giving it credibility and legitimacy as a democratic medium of deliberation. In such an inclusive and egalitarian process of representation and debate, deliberators can at least recognize the fair equality of opportunity for their ideas and arguments as having had the opportunity to shape and influence the outcome in a way that makes it reasonable to endorse a decision taken.

Citizens cooperate in deliberation only if they confer upon each other the expectation that they can influence each other's deliberations as rational interlocutors. Without the reasonable expectation of possible success and fair equality of opportunity allowing for adequate voicing and consideration of their interests, the deliberative process would lack credibility as a medium for democratic

participation. Information and knowledge are precisely the sort of resources that can be shared, so long as all citizens have the capacity and capability to make use of them, in deliberating with others in public. Bohman affirms that it is the capability to make use of information and convert it into convincing public reasons and not merely to have it that determines deliberative success.⁸⁴

Persistent inequalities based on race, ethnicity or economic status are not merely the results of the initial unequal distribution of resources. In an “I & We” deliberative democracy citizens must always examine the reasons for success and failures in deliberation. Persistent failures of disadvantaged groups to have their perspectives and ideas represented and considered indicate the presence of “impoverished citizens”- citizens excluded from the expressive community as rational interlocutors.⁸⁵ The conveyance of hate propaganda compounds the disadvantaged group's socio-political “impoverishment” systemically alienating and negating their status as rational interlocutors in the speech/expressive community.

The “I & We” paradigm affirms Bohman's argument that expressive conveyances (when such conveyances employ a hateful message whether illocutionary or perlocutionary in form) are “beings” (not doings) which reduce the social agency of these groups in relation to the effectiveness of others in advancing their goals, as well as reduce such socio-political freedom that is realized, when one's reasons receive uptake from others.⁸⁶ A significant site of the production and re-production of asymmetrical power resources and deliberative opportunities are the socio-political and legal institutions of liberal democracy.

An important role of the ideal of egalitarian fair equality of opportunity and mutual respect in an “I & We” paradigm is to facilitate in constructing policies that ensure that pre-existing and socially constructed disadvantages do not enter into the deliberative process in a way that reproduces or contributes to political inequality. One of the main functions of public fora in an “I & We” deliberative democracy is to correct for shortfalls of social and political agency and public consideration in “normal” deliberation absent hate propaganda or issues that directly affect a particular disadvantaged group. The capability-based notion of fair equality of socio-political opportunity in deliberation permits a broadening of the scope of socio-political rights and liberties beyond procedural opportunity or access to aggregate resources.⁸⁷

Redistribution of political and financial resources through public funding (to facilitate a fair equality of opportunity) could encourage the formation and improvement of access in existing multiple public spheres of deliberation to redress hate expression.⁸⁸ “I & We” philosophy supports Bohman’s argument that deliberative theories need to develop an account not only of adequate public functioning, but also a minimum threshold of shared capability, the absence of which leaves one politically ineffective and hence “impoverished.”⁸⁹

Reciprocal Respect and Responsibility in Responsive “I & We” Fora

At the heart of the “I & We” paradigm is an understanding of social justice and the idea of reciprocity: each member of the community owes something to all the rest, and the community owes something to its members. Community

obligations include the duty to be responsive to all members and to facilitate the capacity and capability for effective participation in deliberation. Etzioni asserts that, "Justice requires responsible individuals in a responsive community."⁹⁰ He suggests that beyond self-support, individuals have a responsibility for the material and moral wealth of others.⁹¹ This does not require heroic self-sacrifice; rather, it means the constant self-awareness that no individual is "...an island unaffected by the fate of others."⁹²

Etzioni argues that, "cultivation of social responsibilities is the only way to ensure the societal conditions that rights require."⁹³ People are at one and the same time members of several communities such as those at work, home, neighbourhood, city, etc. They can and do use these multi-memberships (as well as the ability to choose one's work and residential communities) to protect themselves from excessive pressure by any one community. Etzioni maintains that "Its best to think about communities as nested [at least in many cases], each within a more encompassing one."⁹⁴

Respect in an "I & We" deliberative democracy entails that citizens view one another as rational interlocutors with at least the potential to persuade each other in public deliberation by the force of the better argument or idea. If one claims there is no responsibility to maintain and ensure the rights of others to do the same, or if one explicitly denies the same rights of another out of racism or bigotry, then one is demanding an untenable socio-political condition: that one is entitled to benefit from communal services or institutions but need not contribute to them.

Citizens each have a responsibility, insofar as they reasonably can, to redress and prevent blatant and systemic forms of discriminatory barriers to the realization of one another's rights. He argues that positing individual rights entails corresponding responsibilities to ensure respect and practicality for them.⁹⁵ Etzioni adds that, "...cultivation of social responsibilities is the only way to ensure the social conditions that rights require."⁹⁶ Without a language and practice of respect and social responsibilities, as Mary Anne Glendon observes, we are left with the "unexpressed premise that we roam at large in a land of strangers, where we presumptively have no obligations toward others except to avoid the active infliction of harm."⁹⁷

"I & We" proponents are neither mere majoritarians nor mere communitarians. Successful policies are accepted because they are recognized to be legitimate rather than imposed.⁹⁸ Etzioni argues that responsive deliberative fora cannot be created through fiat or coercion, but only through genuine public conviction.⁹⁹ An "I & We" deliberative democracy offers a procedural framework via public fora underpinned by the substantive principles of non-discrimination and non-repression for institutions that seek to expand deliberative participation from a diversity of rational interlocutors. The "I & We" procedural deliberative framework safeguards the liberty of individuals without alienating their differentiated group status, dignity and perspective from public space (deliberative "I & We" fora)- since their liberty and equality is constructed and facilitated in and with respect to that public space and their group membership(s).

The language of consent in liberal conceptions of democratic participation is “me” language: “I agree” or “I disagree.” The language of participation in an “I & We” deliberative democracy is “we” language (equally considering the rights and obligations of individuals and groups). “Can we?” or “Is this good for us?”¹⁰⁰ It is not the “we” language of communitarianism, however, where what defines “we” is exclusionary, often relating to a discriminating group’s ethnicity, race, religion or nationality.

Rather, the “I & We” paradigm places such communal attachments and identification of disadvantaged groups on an equal footing of consideration with individual interests and claims in deliberative fora. An acceptable “I & We” approach must be able to avoid radical individualism and forge robust notions of the common good and public welfare in facilitating access and deliberation for disadvantaged groups targeted by hate. It must do so without collapsing into the opposite error of subsuming the welfare of individuals and liberty entirely into the social good. The “I & We” commitment to respect for persons as individuals and as members of various groups constituting society demands that it meet the charges by critics- that communitarianism would require homogeneity and uncritical acceptance of a moral and political authoritarianism.

For the “I & We” paradigm, respect entails a reciprocal positive regard among people or groups as rational interlocutors, who advocate morally and politically reasonable, but perhaps opposing, positions in politics. Joshua Cohen argues that “...we have no theory of practical reason that would lead us to predict

convergence on comprehensive moralities.”¹⁰¹ An acceptable political and moral philosophy in a multicultural deliberative democracy is not a call for homogeneity or conformity or the repression of individuality and differentiation. It is, rather, an expression of a belief that genuine individuality is only possible within an “I & We” deliberative and more inclusively participatory and egalitarian community.

**Affirming an Expansive and Pluralistic Deliberative “I & We” Democracy:
Rejecting State Neutrality and State Perfectionism**

A fundamental aspect of deliberation is the imparting of information. Seyla Benhabib expresses this sentiment asserting that, “Deliberation is a procedure for being informed.”¹⁰² Imparting new information is important because no single individual or group can anticipate and foresee all the variety of perspectives through which matters of ethics and politics would be perceived by different individuals and groups (hence the necessity of deliberative justification of one’s ideas, arguments and interests). Moreover, no single individual can possess all the information and ideas deemed relevant to a certain decision affecting all.

Different groups and communities in society may offer unique and critical contributions, perhaps influenced by the particular status and life experiences of group members, to public deliberation and policy formation. A multicultural “I & We” deliberative democracy highlights the necessity of looking beyond the mere aggregation of individuals to consider the exercise of public reason from a diversity of differentiated perspectives and ideas from different groups and communities.

John Rawls restricts the exercise of public reason to deliberation about specific subject matter- issues involving “constitutional essentials” and questions of

basic justice.¹⁰³ In contrast, the deliberative model emphasizes the openness of the agenda and issues of public debate. Rawls's model of public reason proceeds from a restricted agenda of public debate and a restricted arena of public deliberation. Conversely, the aim of "I & We" deliberative fora proceeds from a proactive and expansive agenda seeking to expand the participation of a pluralistic citizenry and the potential issues of debate.

Bruce Ackerman's notion of liberalism similarly understands democracy as a way of talking about power, as a political culture of public dialogue based on certain kinds of "conversational constraints."¹⁰⁴ Ackerman's notion of conversational constraints indicates that when persons disagree about fundamental "truths" of moral or political arguments we, as deliberators, should shut down the dialogue. We should not search for any common values or reasoned compromises. Rather, Ackerman argues that we should say nothing at all about fundamental public disagreements and try to solve public problems by invoking premises that we do agree upon.

Benhabib accurately criticizes Ackerman's notion of conversational restraint maintaining that "it imposes arbitrary as opposed to reasonable and defensible limits on the content and scope of public dialogue."¹⁰⁵ "I & We" philosophy rejects Ackerman's notion of conversational restraint as a potentially repressive instrument to restrict or negate ideas and arguments that are critical and challenge the status quo of the dominant group(s). "I & We" philosophy avoids the arbitrary constriction of dialogue and expression that Rawls's and Ackerman's liberal positions adopt and

instead seeks to facilitate an expanded deliberation from a diversity of individuals and groups.

Expanding the effective opportunity for diverse and critical deliberation may enhance the potential of individuals and groups outside of the dominant culture to realize democratic power and partake in its liberties (i.e. consideration of the ideas and arguments of disadvantaged groups), while fulfilling their responsibilities as rational interlocutors. What must be acknowledged is the notion that public deliberation is not external to, but rather constitutive of, power relations. An “I & We” deliberative democracy thus must not restrict socio-political and legal debate and understanding, including consideration of controversial issues and ideas that inform citizen’s perspectives on public policy.

Such “I & We” procedures and principles of public deliberation must, in agreement with Benhabib’s argument, be flexible to the point that even how the rules of dialogue are set-up can be discussed and contested.¹⁰⁶ Yet, while challenging the rules and issues of deliberation the substantive “I & We” principles of non-discrimination and non-repression underpinning deliberative fora must remain intact as generalizable and foundational.¹⁰⁷ It is important to acknowledge that these substantive principles are not neutral among all conceptions of the good life. These principles, however, do not define the outcome of deliberation, rather, they are constitutive of the procedural framework of the deliberative process.

A distinctive feature of contemporary liberal theory is its emphasis on “neutrality”, the view that the state should not reward or penalize particular

conceptions of the good, but, rather, should provide a neutral framework within which different and potentially conflicting conceptions of the good can be pursued.¹⁰⁸ “The idea,” writes Will Kymlicka, “is that people are entitled to ‘neutral concern’ from the government—that is, equal concern regardless of the good (so long as it does not violate the rights of others), whether it is approved or disapproved of by the majority in society, or by state officials.”¹⁰⁹ In accordance with Kymlicka, “I & We” philosophy argues that, as a normative socio-political philosophy, liberalism has its own substantive assumptions and is not neutral about matters of justice.¹¹⁰

Communitarians object to the neutral state. Communitarianism argues, rather, that it should be abandoned for a politics of the “common good.”¹¹¹ Kymlicka rejects the uncritical endorsement (like that of many communitarians) of existing social group norms and practices as the sole basis for political deliberation about the good.¹¹² Communitarians wish to use the ends and practices of their cultural tradition as the basis for a politics of the common good, but they do not typically mention that these practices were historically defined by a small segment of the population.¹¹³ Nor do they discuss how that exclusionary history would affect the access and deliberative participation, of individuals and groups in public deliberation, about the value of different ways of life.¹¹⁴

The communitarian view of the common good is conceived as a substantive conception of the good life, which defines the community’s way of life. This common good, rather than adjusting itself to the pattern of people’s preferences, provides a

standard by which those preferences are evaluated. A communitarian state- in this conception- is a “perfectionist state” since it involves a public ranking of the value of different ways of life.¹¹⁵ Kymlicka asserts that communitarians rank them according to their conformity to existing practices. There would be a tendency for minorities to describe and debate conceptions of the good in the terms of dominant values, which would then reinforce the cultural conservatism and hegemony of the dominant group itself.¹¹⁶ “I & We” philosophy is in agreement with Kymlicka’s argument that,

state perfectionism would serve to distort the free evaluation of ways of life, to rigidify the dominant ways of life, whatever their intrinsic merits, and to unfairly exclude the values and aspirations of marginalized and disadvantaged groups within the community.¹¹⁷

Respect for the autonomy of members of a minority groups requires respect for their differentiated cultural structure and social position. Citizens must have the socio-political conditions necessary to argue critical and diverse views, about conceptions of the good life, and to acquire an ability to examine and deliberate those views persuasively. In accordance with Kymlicka, “I & We” philosophy argues that individual judgements require the sharing of experiences and the give and take of rational collective deliberations.¹¹⁸ Individual judgements become a matter of purely subjective and arbitrary whim if they are cut off from collective deliberations. In support of the necessity of socio-political interdependence among rational interlocutors to develop a sense of autonomy, Kymlicka cites W. Sullivan who argues that

this shared process is the civic life, and its root is involvement with other generations, other sorts of persons whose differences are significant because they contribute to the whole upon which our particular sense of self depends.¹¹⁹

Meaningful choices concerning our life projects requires pluralism, in the sense of a diversity of possible ways of life. A deliberative account of the principle of the common good begins by observing that citizens have good reason to reject "a system of public policy"¹²⁰ that fails to advance their (a particular disadvantaged group) interests at all. While this remains an open question, Kymlicka recognizes that we are not likely to get anywhere in answering it if we continue to see it as a debate between libertarian "atomism"¹²¹ and communitarianism's social thesis (the priority of community). Kymlicka's reconstructed liberalism affirms communitarian sensitivities of the substantive interdependence of individual and community that the "I & We" paradigm is supportive of.

At the heart of an "I & We" deliberative democratic theory is the structure of a flexible and responsive framework continually striving towards the ideal of "rule by the people" not just the dominant group(s). Frank I. Michelman expresses this sentiment holding that popular political self-government can be thought of as "the ongoing social project of authorship of a country's fundamental laws by the country's people- in some non-fictively attributable sense."¹²² It is the institutionalised "I & We" processes and procedures of public deliberation that provides legitimation and rationality in public debate and policy.

Conceptions of deliberative democracy within the "I & We" paradigm operate on the intuitive idea that public deliberation- the exchange of viewpoints,

perspectives and arguments- should improve the quality and legitimacy of the political decisions issuing from such deliberation. This conception of an expanded deliberative democracy goes beyond traditional notions of liberal democracy with its conception of formal equality of opportunity, negative rights, and aggregative democracy's orientation toward the grouping together of private interests.

It is a crucial acknowledgment of the legitimacy and justification of deliberative processes and procedures that even if one finds oneself holding a contrary or minority viewpoint that the underlying framework is nonetheless affirmed.¹²³ William Rehg expresses this important observation with respect to the affirmation of the underlying framework by asserting that

as a member of a minority I may continue to believe that the outcome is objectively incorrect according to some procedure independent standard. However, I still should view the outcome as legitimate and consider myself morally obliged to obey it, insofar as it has issued from a duly implemented, fair procedure of decision-making.¹²⁴

In this account the legitimacy of a particular outcome is effected through the impartiality (facilitated by egalitarian features) of the procedure. While real-world pursuit of the ideal of deliberation will very likely always fall short of full success (due to factors including: the motivational, access and discursive demands of deliberation, etc.) its justificatory and legitimating purpose of striving for relative "right" answers ought to be pursued.

Public political justification is irreducibly cooperative, so that what counts as justification for a polity's action as a polity, lies at a different level from what counts as justifications for a personal or group choice.¹²⁵ The process of public deliberation

can plausibly be thought of as our “best collective guess” about what is publicly justifiable at a given point in time and thus indirectly, a collective guess about what is most likely to be correct.¹²⁶ At the same time, the individual does not surrender his or her judgment about what is correct, but only about what is publicly justifiable. By requiring justification on terms acceptable to others, an “I & We” deliberative democracy provides for a form of political autonomy to individual members. All who are governed by collective public policy decisions, who are expected to govern their own conduct by those decisions, must find the basis of those decisions acceptable.

As Joshua Cohen argues, this is not because collective decisions crystallize a shared ethical outlook that informs all social life, nor because collective good takes precedence over all the liberties of members.¹²⁷ Rather, it is the requirement of providing acceptable reasons for the exercise of political power to those who are governed by it¹²⁸ - a requirement absent in traditional conceptions of aggregative democracy. A problem is “political” precisely because its solution must satisfy a multiplicity of interests. Affirming this idea, Rehg maintains “A problem is grasped as a political problem, only if one descends from the level of idealizations.”¹²⁹ Thus, because legitimacy does not presuppose absolute correctness or full consensus, but only agreement on reasonability, it gives those individuals or groups an alternative to, in Rehg's words, “...defiance or deference: they can disagree with outcomes without considering them illegitimate.”¹³⁰

It is important to acknowledge the reality that when hate propaganda occurs it is often directed at a particular and identifiable group rather than an isolated

individual. It is an individual's group or community identification, based on race, ethnicity, religion, nationality etc., that is targeted requiring a systemic response to publicly and effectively refutes such hate. Beyond the harm to the particular individuals targeted by hate, the "I & We" paradigm acknowledges there is a general systemic harm inflicted on all members of the target group. This group harm negatively affects the status, autonomy, and fair equality of opportunity of group members to access, participate, and have influence in public deliberation. It fosters discrimination, repression of critical and potential group differentiated perspectives and ideas and erodes democratic deliberation from the excluded group.

"I & We" philosophy facilitates a balanced approach in considering the rights and responsibilities of individuals and groups in public fora. In "I & We" public fora participants recognize the egalitarian equality and legitimacy of the procedures and processes, underpinned by the substantive principles of non-discrimination and non-repression. It is precisely in circumstances of persistent disagreement, or asymmetrical inclusion of disadvantaged groups that an "I & We" deliberative democracy and the egalitarian values of a substantive process of representation (guaranteed in the case of hate propaganda to effective representation and public response by the targeted group) and deliberative fora it embodies become so important.

Deliberative democracy viewed through the lens of "I & We" philosophy represents a paradigm shift from liberalism's aggregative view of rational interlocutors and communitarianism's communal centric and inward looking conception of rights and responsibilities of citizens. The "I & We" approach is

informed by an egalitarian conception of fair equality of opportunity that facilitates an expanded deliberation and realization of society's goods and benefits for its diverse citizenry.

"I & We" philosophy avoids the counterproductive caricaturization of liberal and communitarian approaches in analyzing individual and group deliberative and democratic rights and responsibilities--each ideal type defined by its adversary. Building on selective ideas from liberalism and communitarianism the "I & We" approach formulates its own lens through which to critically analyze the balancing of deliberative process in the Canadian state. "I & We" philosophy formulates new ways of conceiving the rights and responsibilities of individuals and groups (and principled justifications for them), when hate propaganda is at issue.

Endnotes

1. Thomas Hobbes. The Leviathan introduction edited by Edwin Curley, (Cambridge: Hackett Publishing Company, Inc., 1994), 76.

2. I define hate propaganda (in conformity with ss. 318 to 320 in Part VII of Canada's Criminal Code RSC 1985 c. C-46) as any expression short of physical action that conveys or attempts to convey messages, ideas, information, arguments etc. wholly or in part of a hateful nature that targets an identifiable and disadvantaged group. Such hateful expressive conveyances whether verbal, written, symbolic or some combination thereof can be intentional or unintentional, blatant or more subtle and systemic in its effects. While the form of hate propaganda may differ in the particular guise of its dissemination (e.g. racist expression, religious and ethnic bigotry, blatant or systemic discriminatory barriers etc.) its primary function and effect is always to exclude its targets from the expressive community, negate targeted group member's status and dignity as rational interlocutors. Hate propaganda functions to depolitize and deligitimize the claim's of its targets as contributing members of society that ought to have a fair equality of opportunity to participate in and benefit from public deliberation.

3. Amitai Etzioni. The Spirit of Community: The Re-invention of American Society, New York: Simon & Schuster, 1993, 265.

4. According to an aggregative conception, democracy institutionalizes a formal principle of equal opportunity in the "market-place of ideas" requiring equal consideration for the interests of citizens along with what Joshua Cohen describes as a "presumption of personal autonomy"—the understanding that adult members are the best judges and most vigilant defenders of their own interests. Joshua Cohen. "Procedure and Substance in a Deliberative Democracy," 95-119, in Democracy and Difference: Contesting the Boundaries of the Political, Seyla Benhabib editor, (Princeton, New Jersey: Princeton University Press, 1996), 98.

See also Jürgen Habermas. "Three Normative Models of Democracy," 21-30, in Democracy and Difference: Contesting the Boundaries of the Political, Seyla Benhabib editor, (Princeton, New Jersey: Princeton University Press, 1996), where he effectively distinguishes between aggregative (liberal) and deliberative (republican) views of democratic politics. Habermas argues that on the liberal view, democratic will-formation has the exclusive function of *legitimizing* the exercise of political power (Habermas, 1996: 28). Election results are the licence to assume governmental power, whereas the government must justify the use of power to the public. (*Ibid.*). On the republican view, Habermas argues that democratic will-formation has the significantly stronger function of *constituting* society as a political community and keeping the memory of this founding act alive with each election (*Ibid.*).

5. Amitai Etzioni. "Liberals and Communitarians," 127-151, in A Responsive Society: Collected Essays On Guiding Deliberative Social Change, San Francisco, California: Jossey-Bass Publishers, 1991, 137.

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6. (Etzioni, 1993: 253-254)
 7. (Etzioni, 1991: 140)
 8. (Kuhn, 1996: 149)
 9. (Etzioni, 1993: 267)
 10. Bernard Williams. "The Idea of Equality," in J. Feinberg, ed., Moral Concepts, (Oxford U.P., 1969), 131.
 11. (Etzioni, 1991: 138)
 12. Jürgen Habermas. "The Normative Models of Democracy," in Democracy & Difference: Contesting the Boundaries of the Political, 21-30, Seyla Benhabib ed., (New Jersey: Princeton University Press, 1996), 21.
 13. (Ibid.)
 14. Liberalism's conception of the lone egoist is taken to an extreme individualistic formulation in its libertarian ideal-type construct.
 15. Benjamin R. Barber. "Liberal Democracy and the Costs of Consent," 54-68, in Liberalism & the Moral Life, Nancy E. Rosenblum ed., Cambridge, Massachusetts: Harvard University Press, 1989, 60.
 16. John Stuart Mill. On Liberty, Elizabeth Rapaport editor, Indianapolis: Hackett Publishing Company, Inc., 1978, 9.
Mill did not deny that expression may cause harm to individuals either directly or indirectly by infringing their constitutional rights. In what he regarded as extreme circumstances, he explicitly admitted the importance of restricting expressive rights (Mill, 1978: 10-11)
 17. (Mill, 1978: 9)
 18. (Ibid.)
Mill maintains that whenever there is a definite damage or a definite risk of damage either to an individual or the public "...the case is taken out of the province of individual liberty and placed in that of morality or law" (Mill, 1978: 10).
 19. Eric Barendt, "Three Free Speech Theories," 8-22 in Freedom of Speech, London: Oxford University Press, 1985, 8.
 20. William Ryan. Equality, New York: Pantheon Books, 1991, 26. Such a formalistic notion of equality is completely blind to asymmetrical differences in initial starting position, resources and systemic barriers that tend to skew or negate opportunities for access and influence in socio-political deliberation.

21. (Ryan, 1991: 27) Ryan questions the legitimacy of merit asking, "why if everyone supposedly gets a fair start do those with black skin or female reproductive organs rarely arrive in the winners circle?" According to Ryan there is no reasonable, let alone scientific, way of demonstrating the most able, virtuous and intelligent members of society are in fact occupying the leading roles in it (1991: 27-28).

22. Michael J. Sandel. Liberalism and the Limits of Justice. 1982, 148.

23. John Rawls. A Theory of Justice. Cambridge, Mass.: Belknap Press of Harvard University Press, 1971, 525.

24. (Rawls, 1971: 3)

25. (Rawls, 1971: 528)

26. Michael Walzer. "The Communitarian Critique of Liberalism," 52-70 in New Communitarian Thinking: Persons, Virtues, Institutions, and Communities, Amitai Etzioni ed., Charlottesville, Virginia: University Press of Virginia, 1995, 69.

27. (Ibid.)

28. Michael J. Sandel. "The Procedural Republic And The Unencumbered Self" in Political Theory Vol.12 no.1, 1984, 179.

29. (Sandel, 1984: 82)

30. (Ibid.)

31. Amitai Etzioni. A Responsive Society: Collected Essays on Guiding Deliberative Social Change, San Francisco, California: Jossey-Bass Publishers, 1991, 131). For communitarians, the shared moral values or "virtues" and traditions of the community, rather than the rational choices of abstract individuals, are the bedrock of moral-philosophical discourse.

32. (Ibid.)

33. (Sandel, 1984: 6)

34. (Rawls, 1971: 521)

35. For example, a hate monger demanding an absolute right to espouse racist speech in public necessarily does not acknowledge the corresponding responsibility to allow for the possibility of rational or effective response and refutation. The racist's claim of an absolute right of freedom of expression is employed without a corresponding sense of responsibility for any potential negative harm to the group members targeted (indeed such an affect may be wilful). While the blatant racist has no interest in democratic deliberation the effect on target group members by more subtle and systemic racism, even if unintentional, may be even more harmful as it requires a more complex and

systemic strategy of redress.

36. Leon E. Trakman. "Transforming Free Speech: Rights And Responsibilities" in Ohio Law Journal, Vol. 56, 1995, from WestLaw OHLJ database, 14.

37. (Trakman, 1995: 15)

38. Nancy L. Rosenblum. "Pluralism and Self-Defence," 207-226, in Objectivity Relativism and Truth, Cambridge: Cambridge University Press, 1991, 208.

39. (Rosenblum, 1991: 220)

40. (Ibid.)

41. (Rosenblum, 1991: 223)

42. (Rosenblum, 1991: 215)

43. (Walzer, 1995: 70)

44. (Ibid.)

45. Examples of such extreme cases include white racist Klu Klux Klan (KKK) communities and other hate groups, exploitative religious cults and nationalistic communities that resort to ethnic cleansing and genocide. Often, however, a more subtle systemic oppression impedes the liberties of individuals or groups that do not belong to more powerful and privileged communities. A feeling of not belonging fosters a sense of alienation and apathy in such communities that can lead to social, political and legal impotence. "Canadians felt a strong sense of community when they put Japanese Canadians in concentration camps in the 1940's and Americans when they prosecuted suspected Communists in the 1950's", asserts professor Charles Shultz." Michael D'Antonio. "I or We?" in http://www.mojones/MOTHER_JONES/MJ94/dantonio.html Shultz adds that "These are examples of what can happen when people believe they are responding to a crisis that threatens the community" (Ibid.).

46. Bernard Williams in "The Idea of Equality," in Feinburg, ed., Moral Concepts, (Oxford U.P.), 1969, 133 gives support to this contention that in these various diverse spheres of interaction citizens are at least potentially conscious, to an intermediate degree, of their situation and what Williams calls their "titles" in society. That is citizens are capable of reflectively standing (in a manner similar to the Rawlsian original position, where an individual's choice of interests are influenced by the multiplicity of life situations they may find themselves in, but are unaware of beforehand) back from their roles and positions in which they are cast. This reflective consciousness may be enhanced or diminished by their social condition.

47. Jack Knight and James Johnson. "What Sort of Political Equality Does Democracy Require?", in Deliberative Democracy: Essays on Reason and Politics, Cambridge, Massachusetts: MIT Press, 1997, 301.

48. (Ibid.)

49. Thomas S. Kuhn in The Structure of Scientific Revolutions, 3rd edition, Chicago: The University of Chicago Press, 1996, 23 defines a paradigm as "an accepted model or pattern" that defines the "legitimate problems and methods of a research field for succeeding generations." He asserts that paradigms gain their status because they are more successful than their competitors "in solving a few problems that the group of practitioners has come to recognize as acute." (Ibid.)

50. By public fora, I include a wide range of existing and evolving political access points for citizens such as: provincial legislatures, the federal legislature, the judiciary, media discussions, opinion polls, referenda, academic debates in college and universities, town hall and community group meetings, cultural associations, public hearings, public and private interest groups, trade unions, non-governmental organizations, places of worship, public radio, television, movies, posters, public meetings, door-to-door canvassing, Internet discussion groups, Internet public web sites and postings, books, newspapers, magazines and any public fora where any such dissemination of opinion, ideas and argument may occur including for purposes of peaceful civil protest. Each medium has its own particular audience (albeit with varying degrees of cross-over) and method of penetration.

51. This is increasingly recognized by political and legal philosophers such as Will Kymlicka and Seyla Benhabib. A basic observation of sociology and psychology is that the individual and the community "make" one another, and that individuals are not able to function effectively without deep links to others, to community. House et al. in "Social Relationship and Health", Science, Vol. 241, No.44865, (July 29, 1988), 540-545 conclude that a lack of social relationships heightens a person's susceptibility to illness: "Prospective studies, which control for baseline health status, consistently show increased risk of death among persons with a low quantity, and sometimes low quality, of social relations" (1988, 540). The ability of social relations to moderate or is especially important (1988, 541). Bernard Berelson and Gary A. Steiner in Human Behaviour: An Inventory of Scientific Findings. Orlando, Fla.: Harcourt Brace Jovanovich, 1964 in their overview of more than 1000 social science studies remark: "total isolation is virtually always an intolerable situation for the human adult- even when physical needs are provided for" (1964, 252).

52. (Ibid.)

53. Carol Gould. Rethinking Democracy, (Cambridge: Cambridge University Press, 1988), 128.

54. (Gould, 1988: 128-129)

55. (Gould, 1988: 132)

56. (Etzioni, 1991: 140)

For example, extreme communitarian policies would likely lead to a collective totalitarian regime, where communal pressures blatantly and subtly enforced "group" norms, thereby

suppressing any form of individual interest and expression. In such a society a constant danger would exist where one individual or group of individuals would use the facade of community to exploit other members in furthering their own self-interests. Alternatively, an extreme libertarian society would likely result in a fractured and alienated aggregate of individuals acting in their own self-interests and reacting to the interests of others only in an *ad-hoc* manner. In this hyper-individualist "society" there would be a constant danger of the rise of often-violent totalitarian individuals able to accumulate a relative advantage in power resources over others.

57. Alasdair, MacIntyre C. After Virtue: A Study in Moral Theory, (Notre Dame, Indianapolis: University of Notre Dame Press, 1984), 69.

58. The "I & We" paradigm recognizes that asymmetrical power relations and the role of ideology among different individuals and groups have direct and indirect implications for the status, equality and opportunities for citizens. For example, persons who belong to a disadvantaged group may face blatant discrimination as well as systemic disadvantages in accessing and exploiting political, social and legal resources. Individuals affiliated or belonging to the "dominant group" (i.e. group(s) with relative economic, social, political and legal advantages) can more effectively access and exploit societal institutions and power structures especially as compared to historically disadvantaged groups. Ideological affinity between the "dominant group" and societal institutions and power structures (e.g. business community, legal system, education system, media etc.) buttress the hegemony of privileged individuals.

59. J. Lucas. Principles of Politics, Oxford U.P., 1966, 187.

60. (Lucas, 1966: 190)

61. (Lucas, 1996: 192)

62. Byron M. Sheldrick (Professor), Selected Lectures in Public Law II 3605.03B, 3rd Jan. '95 "Civil Liberties: An Introduction."

63. Lesley A. Jacobs, "Equal Opportunity and Gender Disadvantage," in The Canadian Journal Of Law And Jurisprudence, Vol. VII, No.1 (London, Ontario: University of Western Ontario, January 1994), 65.

64. (Ibid.)

65. (Jacobs, 1994: 63)

66. John Rawls. A Theory Of Justice, (Cambridge, Massachusetts: Belknap Press of Harvard University Press, 1971), 302.

For example, differences in income, wealth, and socio-political status among different professions and social groups can be defended as just only if they are produced by a system of incentives, market-forces, and capital accumulation whose productivity makes even unskilled labourers better off than they would be in a more equal system.

67. (*Ibid.*)

"I & We" philosophy agrees with the spirit of Rawls's "difference principle" in the context of guaranteeing a right of response of groups targeted by hate propaganda in public fora. While such a guarantee is unequal in a formal sense it is supportive of a substantive conception of fair equality of opportunity that improves the overall deliberative access and ability of targeted groups to participate in and benefit from democratic deliberation.

68. (Rawls, 1971: 73)

In A Theory of Justice Rawls emphasizes two principal ways to approximate fair equality of opportunity. First, it is important to avoid excessive concentrations of wealth. This lays the foundations for Rawls' advocacy of what he describes as a property-owning democracy (Rawls, 1971: 274). Second, an education system should be designed to minimize the effects of one's socio-economic class on an individual's ambitions and the development of his or her natural talents and abilities. As Rawls puts it, "Chances to acquire cultural knowledge and skills should not depend upon one's class position, and so the school system, whether public or private, should be designed to even out class barriers" (Rawls, 1971: 73). "I & We" philosophy extends Rawls's principled approach to approximate fair equality of opportunity to encompass systemic strategies of redress and prevention of discriminatory and bigoted racial, ethnic and religious barriers to deliberative access and participation by disadvantaged groups targeted by hate propaganda.

69. (Gutmann in Etzioni, 1993: 256)

For example, instead of claims based on individual or group desires in the context of deliberation of concerns effecting all citizens, citizens would draw on a general and common definition of justice (flexible enough to consider group differentiated concerns where necessary i.e. Where public policies directly concern and effect a disadvantaged group). Amy Gutmann argues that they must incorporate the full range of legitimate needs and values rather than focussing on any one category, be it individualism, autonomy, interpersonal caring, deliberation, or social justice (*Ibid.*).

70. Amy Gutmann. "The Virtues of Democratic Self-Restraint," 154-169, in New Communitarian Thinking: Persons, Virtues, Institutions, and Communities, Amitai Etzioni ed., Charlottesville, Virginia: University Press of Virginia, 1995, 161.

71. (Gutmann, 1995: 155)

72. (Jacobs, 1994: 65)

73. William B. Griffith. "Equality and Egalitarianism: Framing the Contemporary Debate." in The Canadian Journal Of Law And Jurisprudence, Vol.VII, No.1 (London, Ontario: University of Western Ontario, January 1994), 6.

74. Many social goals require partnership between public and private groups. Though government should not seek to replace local communities and groups, it may need to facilitate them in socio-political access and deliberation by strategies including, revenue sharing, technical, informational and organisational assistance. Etzioni asserts that there is a great need for study and experimentation with creative use of the structures of civil

society and public-private cooperation, especially in common interest areas including: health, education, and social services (Etzioni, 1993: 260).

75. Amy Bartholomew and Alan Hunt. "What's Wrong With Rights?" in 9 Law & Equality, 1990, 508. Bartholomew and Hunt offer support for the notion that a liberal conception of rights (albeit with communitarian sensitivities) affirmative of the "I & We" approach is possible maintaining that, "whilst rights discourses 'fit' most comfortably within an individualist frame of reference there is no theoretical or conceptual barrier to a viable discourse on group or collective rights."

76. (Young, 1997: 365-366)

77. By racist, and bigoted expression I include blatant as well as systemic and subtle forms of stereotyping, pseudo-scientific claims, prejudice, oppression and targeted harm because of an individual's particular group identification: race, ethnicity, nationality, religion etc. In ideal "I & We" public spheres "group" identities- racial, ethnic, religious, class, sex, etc. would merely serve in positive ways as differing contexts of experience, knowledge and perspective. These contexts would add, enrich and expand the issues of debate and ensure that the conditions enabling public deliberation affected a fair equal opportunity of capability to all individuals and groups upon the particular matter.

When relatively powerful individuals or groups use hate propaganda they evoke the group identity of the individual(s) they are seeking to exclude from public deliberation- dehumanise them sometimes merely for hate and harm- more often instrumentally. Hate propaganda attempts to take away control and positive use of one's group identity.

78. Iris Marion Young. "Deferring Group Representation," 349-377, in Nomos XXXIX Ethnicity and Group Rights, Ian Shapiro and Will Kymlicka eds., New York: New York University Press, 1997, 391.

79. (Young, 1997: 365-366)

80. James Bohman. "Deliberative Democracy and Effective Social Freedom: Capabilities, Resources and Opportunities", in Deliberative Democracy: Essays on Reason and Politics, 321-347, (Cambridge, Massachusetts: MIT Press 1997), 324.

81. (Bohman, 1997: 325)

82. (Ibid.)

83. (Bohman, 1997: 333)

84. (Bohman, 1997: 342)

85. (Ibid.)

86. (Bohman, 1997: 343)

87. (Bohman, 1997: 342)

88. Citing Cohen and Rogers (1993) Jack Knight and James Johnson propose state intervention to create financial incentives to establish secondary socio-political associations that foster deliberative democracy (Knight and Johnson, 1997: 307). Their goal is to encourage the development of various capacities related to deliberative participation and enhance equality of opportunity for socio-political influence. Perhaps proactive initiatives such as government and minority group cooperation in sharing informational and expert resources, technology, as well as financial resources could facilitate the fair equality of opportunity of access to and influence in deliberative fora.

89. (Bohman, 1997: 332)

90. (Etzioni, 1993: 263)

91. Seyla Benhabib offers support to the importance of recognizing the influence of the political and social context of the deliberations in a democratic society arguing that,

We never begin our deliberations...at a "moral ground zero!" Rather, in moral theory as in everyday morality, in political theory as in everyday political discourse- we are always situated within a horizon of presuppositions, assumptions and power relations, the totality of which can never become wholly transparent to us (Benhabib, 1989: 78-79).

92. Amitai Etzioni. "Old Chestnuts and New Spurs," 16-34, in New Communitarian Thinking: Persons, Virtues, Institutions, and Communities, Charlottesville, Virginia: University Press of Virginia, 1995, 20.

93. (Etzioni, 1995: 20)

Citizens may discharge their communal responsibilities by being involved in non-political activities, i.e. volunteer work. Just as an "I & We" deliberative polity is but one facet of interdependent social life, so public policy debate and voting are not the only ways to be responsible members of society. Indicative of this view Etzioni maintains that a good citizen is involved in a community of communities but not necessarily active in the polity (Etzioni, 1993: 261-262).

94. (Etzioni, 1995: 25)

95. (Etzioni, 1995: 20)

96. (Ibid.)

97. (Etzioni citing Mary Anne Glendon, 1995: 21-22)

98. (Etzioni, 1993: 255)

99. (Etzioni, 1993: 266)

100. Benjamin R Barber. "Liberal Democracy and the Costs of Consent," 54-68 in Liberalism & the Moral Life, Nancy E. Rosenblum editor, (Cambridge, Massachusetts:

Harvard University Press, 1989), 65.

101. (Cohen, 1996: 96)

Joshua Cohen's conception of deliberative democracy takes into account the intensity of particular beliefs individuals or groups hold. The "I & We" paradigm rejects the notion that merely because a particular group of individuals intensely holds a certain socio-political, moral, religious or ethical view, relative to other individuals or groups, that this powerful emotive criteria be preferentially considered in public deliberative fora. Cohen believes this view (assigning preferential weight based on emotive intensity) of deliberation is a virtue in that the relative stringency and weight of the demands imposed by a person's particular convictions must be given consideration in public deliberation.

This supposed virtue is however untenable in an "I & We" deliberative democracy that is premised on diverse and critical public deliberation of rational ideas and arguments rather than emotive intensity and fervour. Passionate and emotionally charged debate may add to the persuasiveness of an individual interlocutor's or group's argument(s). In and of itself, however, such emotion separated from the rational ideational impetus behind the particular claim(s)- should not be given consideration- let alone take preference over a more rational and critical deliberation.

102. Seyla Benhabib. "Toward a Deliberative Model of Democratic Legitimacy," 67-94, in Democracy and Difference: Contesting the Boundaries of the Political, Seyla Benhabib ed., Princeton, New Jersey: Princeton University Press, 1996, 71.

103. John Rawls. Political Liberalism, New York: Columbia University Press, 1993, 214.

104. (Benhabib, 1989: 148)

105. (Benhabib, 1989: 145)

106. (ibid.)

107. Benhabib argues that "while challenging the rules of dialogue we have to respect some rules to keep the conversation going" (Benhabib, 1989: 148).

108. Will Kymlicka. "Liberal Individualism And Liberal Neutrality," in Communitarianism & Individualism, eds. S. Avineri and S. De-Shalit. (Oxford University Press, 1992), 165

109. Will Kymlicka. Liberalism, Community, and Culture, (Oxford, England: Clarendon Press, 1991), 76.

110. (ibid.)

For Kymlicka neutrality requires a certain faith in the operation of non-state forums and processes for individual judgement and cultural development- and a distrust of the operation of state forums and processes for evaluating the good (Kymlicka, 1992: 177).

111. (Sandel, 1984: 205-206)

112. (Kymlicka, 1992: 177)

113. (Kymlicka, 1992: 182)

114. (Ibid.)

115. (Kymlicka, 1992: 178-179)

116. (Kymlicka, 1992: 180)

Political scientist, Susan Strange, in States and Markets, 2nd ed. London: Pinter Publishers, 1994 effectively indicates the power of those individuals or groups that maintain a hegemonic (superior) position over what is widely regarded as "the" truth. Strange states that "...knowledge is power and whoever is able to control or acquire and deny access of others (including democratic participation) to a kind of knowledge respected and sought by others...control its channels of access, will exercise a very special kind of structural power" (Strange, 30). This hegemonic structural power enables the hegemon "...to change the range of choices open to others, without apparently putting pressure directly on them to make one choice rather than another." (Strange, 31)

117. (Kymlicka, 1992: 179)

118. (Kymlicka, 1992: 173)

119. (Kymlicka, 1992: 173-174)

120. (Cohen, 1996: 105)

121. (Kymlicka, 1992: 171)

Kymlicka describes the "atomist" route as an ideology, which accepts "the utterly facile moral psychology of traditional empiricism, according to which an individual's capacity for meaningful choice is self-sufficient outside of society and culture" (Ibid.). The atomist approach denies that the value of autonomous choice depends on a viable and flourishing pluralistic culture.

122. Frank I. Michelman. "How Can the People Ever Make the Laws? (A Critique of Deliberative Democracy)," 311-330, in The Modern Schoolman, V.LXXIV, May 1997, 312.

123. Peter Swan in "Environmental Justice & Minority Ecological Rights: Do We Need Minority Rights?," 179-213, in Do We Need Minority Rights? J. Räikkä (ed.)

(Netherlands: Kluwer Law International, 1996), 203 argues that neutrality can also refer to "neutrality of justification" according to which the justification of norms that bind everyone does not rest on particular ethical values but rather on a procedure that is capable of providing "impartial" reasons. Swan argues that such reasons are based on a public exchange of arguments that are reciprocal and general in character (Ibid.).

"I & We" philosophy in agreement with Swan's conception of "neutrality of justification" does not require that we keep controversial matters off the political agenda (Swan, 1996: 204). Citing Rainer Forst in "How (Not) to Speak about Identity: The Concept of the Person in a Theory of Justice" (1992) 18 Philosophy and Social Criticism

293 at p. 301, Swan argues that the moral conception of the general justification of norms cannot be complete unless it is translated into a theory of political legitimacy or public justification. Within such a conception, the state acts not to promote a specific culture or way of life but rather in ways to promote rational deliberation about the social and moral conflicts that divide us without excluding any positions (Swan, 1996: 204). A principle of neutrality in agreement with "I & We" philosophy thus can operate in such a way as to provide the social and political conditions necessary for the disadvantaged and the vulnerable to have a voice in the decisions that affect their lives (ibid.).

124. William S. J. Rehg. "Legality And Deliberation In Epistemic Conceptions of Democracy: Between Habermas And Estlund," 355-374, in Objectivity, Relativism and Truth, VLXXIV No. 4, May 1997, 361-362.

125. (Rehg, 1997: 367)

126. (ibid.)

127. (Cohen, 1996: 102)

128. (ibid.)

129. (Rehg, 1997: 369)

130. (Rehg, 1997: 371)

Chapter 2

Balancing Hate Expression and Democratic Ideals in an “I & We” Deliberative Democracy

Public expression in an “I & We” deliberative democracy is not separable from the effects it may engender in its target audience and accordingly any potential restrictions are to be considered in view of consequences. In the context of public fora, there is no such thing as mere speech or the simple inconsequential expression of ideas or arguments. When a society (or some dominant individuals or groups within the state) allows or affirms particular expression it is deciding either consciously or unconsciously to permit certain affects and effects (e.g. harmful, helpful or benign) on its target audience. In doing so society either knowingly or inadvertently upholds the consequences of such expression as a value greater than the value of preventing them.

This chapter seeks to develop an analysis of the different expressive forms and functions of hate propaganda (illocutionary and perlocutionary) and its harmful effects on its targeted audience. I argue that the reflexive procedural structures and underlying substantive principles (i.e. non-discrimination and non-repression) of “I & We” public fora, employing the illocutionary/perlocutionary expression distinction, provide a plausible and balanced deliberative mechanism to determine the rights and responsibilities of claims to freedom of expression and protection against hate propaganda.

The approach that a democratic polity (e.g. its executive, legislatures, judiciary, education system etc.) takes in considering and deciding claims to freedom of expression, when hate propaganda is at issue, has critical implications for facilitating movement towards or away from “I & We” deliberative ideals. Absent

guaranteed and effective institutionalized representation of disadvantaged groups providing a fair equality of opportunity to publicly respond and refute perlocutionary hate expression, judicial discretion weighing the costs and benefits of allowing or temporarily censoring deliberation, until such procedural conditions exist, should be the normative, albeit contestable, option.

It is in the unique “I & We” deliberative sites where the contestation of perlocutionary hate expression may occur, that the procedural and substantive rationales contained in Jürgen Habermas's conception of Discourse Ethics (DE) significantly facilitates and fleshes out “I & We” principles and strategies of systemic redress. I argue that it is in public “I & We” deliberative contexts that a substantive affinity and approximation of DE and the “ideal speech situation” is most attainable. Fundamental to both “I & We” philosophy and DE is a faith in the power of communicative reason where rational interlocutors can deliberate. Habermas's DE, or ideal speech situation, and “I & We” philosophy elucidate an effective proceduralist conception of deliberative democracy that is theoretically and practically plausible for expanding democratic participation from a greater diversity of citizens.

A fundamental aim of “I & We” fora in redressing hate propaganda is the public refutation of hateful ideas and arguments, thus, bringing the former addressees/victims of hate into the speech/expressive community as rational interlocutors addressing their political poverty. In order to bring formerly

disadvantaged group members into the speech/expressive community, an equal consideration of their differentiated social, political and legal group rights, perspectives and responsibilities, apart from common societal interests and concerns, is essential if expansion of a fair equality of deliberative opportunity is to be striven for.

Consideration of a group's differentiated perspectives and interests, absent hate propaganda in "I & We" fora, also has significant implications in the context of public policy issues that directly or disproportionally affect its members. Peter Swan argues that socio-political decisions ought to be made in public communication by those most directly affected by their outcome.¹ An "I & We" approach affirms Swan's argument that all those directly affected by public policy initiatives should have a fair equality of deliberative opportunity for actively questioning and influencing decisions about projects that represent significant concerns and risks.²

In their form and function "I & We" fora are superior to liberal, libertarian and communitarian theories of democracy and their respective practical implications for redressing the harms to disadvantaged groups targeted by hate. Whereas the libertarian defines liberty as the absence of government restrictions on individual value choices, the "I & We" balanced approach defines it as responsible deliberative participation of rational interlocutors. The former endows the individual with rights that trump communal judgments, but the latter believes that "civic commitments and common action...furnish both content and guidance to the exercise of rights (and

responsibilities).”³

Since citizens live within the bounds and responsibilities of a community or communities, they do not have free rein to express themselves without regard to the potentially harmful consequences for other individuals and groups. In liberal theory it is the instrumental use of expression to achieve one’s own self-interests that give freedom of expression its strategic and manipulative values. To value a multicultural deliberative democracy only for the opportunities it provides individuals to pursue their own interests, unfettered by communal responsibilities and concerns, is to permit public space to be used unabashedly for private and self-interested ends.

The substantive principles of non-repression and non-discrimination underlying “I & We” deliberative fora reflect the egalitarian ideal that we ought to respect each other as rational beings whose viewpoint and perspective is worthy of equal consideration. We should treat each other as concrete human beings whose capacity to express differentiated viewpoints we should enhance by creating, whenever possible, socio-political and legal practices embodying the discursive ideal of an expanded deliberative democracy.

These principles of non-discrimination and non-repression will require public resources (the type and amount depending on the context and medium of expressive conveyance) from the government working with all of the facilitators (e.g. persons responsible for the particular technical medium of expression, media and analysts responsible for its public conveyance, debate and critique) of the particular

public fora and of course the group targeted. I seek to demonstrate the practical utility of “I & We” public fora and its conception of the ideal speech situation, in recognizing and addressing notions of individual harm and the additional harm that is uniquely experienced by members of targeted, disadvantaged “identifiable groups” such as those groups set out in section 318(4) of the *Canadian Criminal Code*, defined as “any section of the public distinguished by colour, race, religion or ethnic origin.”⁴

Where public expression of hate propaganda takes perlocutionary form the targeted individual(s) and group(s) must be guaranteed effective representation in the corresponding public fora and a right of response to debate and refute hateful expression, whether blatant or more subtle. Thus, where expression in a public setting takes on a hateful function (whether intentional or not) and its form is such that it can be effectively debated (it is perlocutionary) an “I & We” deliberative democracy institutionalizes the positive obligation on the state to provide the material resources, infrastructure, organizational and knowledge resources to guarantee effective representation and response from members of the group targeted.

The moral and socio-political value of expression in an “I & We” deliberative democracy is not determined in an a priori sense. There is no officially sanctioned “truth” or belief system, to the exclusion of alternatives or dissenting conceptions. Such predetermined conceptions of what is true or what is worth protecting are counter-intuitive and untenable in a pluralistic, deliberative democracy. A multiplicity

of potential reasonable truths appear in “I & We” fora because in weakening our confidence in homogeneous reason and intrinsic “truth” it exposes “the game of true and false” as an exercise in power, selectivity, entitlement and control.⁵ Fundamental to the effective operation of “I & We” public fora, in seeking to expand deliberation by a diversity of citizens, are the egalitarian ideals of mutual consideration, toleration and the ideal of reciprocal respect as fellow rational interlocutors.

In balancing freedom of expression and hate propaganda the standard individualistic liberal position is to ask: why couldn't freedom of expression be the greater value to which other democratic values (e.g. mutual consideration, respect and toleration etc...) must yield in the event of a clash? A plausible answer, supportive of the “I & We” paradigm, is given by Stanley Fish when he argues

freedom of expression would be the primary value only if it didn't matter what was said, didn't matter in the sense that no one gave a damn-but just liked to hear talk.⁶

In the “ordinary” contexts of every day life, however, expression is produced with the goal of trying to “move the world in one direction rather than another.”⁷ While the opportunity to express is necessarily fundamental it is the intent, purpose and effect on an individual or group exercising or refraining from exercising that opportunity (by virtue of choice or coercion) that has substantive meaning, value and purpose in an “I & We” deliberative democracy.

It is reasonable to postulate that eventually a principled point will come when society decides that some forms of expression do not further but endanger that deliberative purpose. Such a principled point where expression may endanger the

deliberative ideals of an “I & We” democracy is when that expression contains, relies on, or conveys hate propaganda. By hate propaganda I include forms of illocutionary (non rebuttable) and perlocutionary (rebuttable) expression. This is a crucial distinction in the effective operation of “I & We” deliberative fora which will be defined and analyzed in the following section. Such expressive hate can be conveyed through numerous means including: the promotion of prejudices, stereotypes, pseudo-science, bigotry, racism etc... whether it is written, spoken, or symbolic.⁸

By racist expression I include blatant as well as systemic and subtle forms of stereotyping, pseudo-scientific claims, prejudice, repression and targeted harm because of an individual's particular group identification: race, ethnicity and nationality. While racist expression is a form of hate propaganda its specificity in highlighting for attack a common characteristic of the group targeted differentiates both the form and function of its conveyance and the harms inflicted as compared to hate propaganda that is more generalized in its method of target and in its degree of harmful infliction. Racist expression calls upon a history of discrimination of the group targeted that interpolates its addressees into a status and position of inferiority, loss of dignity and exclusion. Harm experienced by group members is amplified in its current production and reproduction when racist expression is conveyed, because of the historical citation of hate propaganda that exacerbates contemporary discrimination.

Similarly, bigoted hate propaganda targeted at Orthodox Jews, because it is specifically targeted against an identifiable and historically disadvantaged religious

group, has analogous historical citations of discrimination and amplification of harms inflicted upon its target. On the other hand, hate propaganda that merely addresses itself to numerous groups or non-specific characteristics while harmful to its target does not necessarily call upon a history of discrimination, nor does it necessarily amplify harm conveyed by virtue of the historical citation of discrimination. For example, the ignorant hate conveyances of a bigot claiming that all immigrants are dirty, lazy, prone to criminality and put a drain on the welfare state inflicts harm on all immigrants in general, it does not, however, emphasize a particular characteristic or common group attribute of an identifiable group for specific infliction of harm.

Relevance of the Illocutionary & Perlocutionary Distinction for the Regulation of Hate Propaganda

Oppressive language may not be the same as the experience of physical violence, but it enacts its own kind of violence. J. Austin's distinction, as analyzed by Judith Butler, of illocutionary and perlocutionary expression is fundamental to the form and function of "I & We" public fora.⁹ Butler succinctly expresses Austin's illocutionary conception of expression and its automatic conveyance of harm asserting that when hate expression "captures" and "encapsulates" the events and lives it describes (e.g. it hatefully ridicules and caricatures its target), it acquires its own harmful and violent force.¹⁰ The assertion that illocutionary speech/expression not only communicates hate but itself constitutes an injurious act, presumes not only that language "acts" (in the sense of either effects simultaneous with the conveyance, illocutionary, or, expression that has the potential of realizing its

intended effects through further expressive conduct- perlocutionary), but that it acts upon its addressee in an injurious way.

Illocutionary expression has more than a temporal element- it also “hails” and interpolates the subject(s) of its address and is legitimately suppressible because it does not allow rational reaction and response. The intent is to automatically convey its message (and cause harm in the case of hate propaganda to the targeted individual or group) when it is being expressed whether by words (written or verbal), pictures, symbols, gestures and the like. Butler argues that in the context of historically disadvantaged and targeted groups hate propaganda works through the invocation of convention such as historically based popular stereo-types, prejudice, racism, and religious bigotry. Such hate expression circulates and though it requires the subject for its presentation, it neither begins nor ends with the subject who speaks or with the specific hateful name that is used or symbol displayed.¹¹ She conceptualises the “moment” (recalling and reproduction of discrimination built upon a long history of invective) in “ritual” as

a condensed historicity: it exceeds itself in past and future directions (meaning it recalls the past systemic and blatant history of hate, harm and oppression), an effect of prior and future invocations that constitute and escape the instance of utterance.¹²

This identifies the systemic and historical context of discrimination and its production and reproduction at each successive utterance of hate propaganda targeting identifiable and disadvantaged groups. Kathleen Mahoney asserts that the targets of hate expression are silenced as their credibility is eroded.¹³ The more they are silenced the more their inequality grows as they are excluded as rational

interlocutors able to participate and contribute their issues, ideas and arguments in a deliberative democracy. Charles R. Lawrence agrees that with illocutionary racist or bigoted expression the injury is instantaneous.¹⁴ There is neither an opportunity for intermediary reflection on the idea conveyed nor an opportunity for rational response. Lawrence asserts that assaultive illocutionary speech functions as a pre-emptive strike.

The argument that hate propaganda can take an illocutionary form is, that it produces the targeted individual or group in a systemic position of subordination. Mari J. Matsuda argues that hate speech is understood not only to act upon its listener, but also to contribute to the social constitution of the one addressed. Hence it becomes part of the process of social interpolation-it is partly constitutive of the self in an illocutionary sense.¹⁵

This idea approximates the view that when hate propaganda is targeted at historically disadvantaged and marginalized individuals and groups the subject is interpolated by an anterior voice¹⁶ (that is the targeted individual is in a sense temporally inserted into a historical position of discrimination that reproduces and amplifies current hate expression). Such targeted hate propaganda also includes an interior voice in particular group member's that harms his or her dignity in a moral and socio-political sense. The hateful utterance also enjoins the subject to reoccupy a subordinate socio-political position.

Such speech, argues Butler, reinvokes and reinscribes a structural relation of domination and constitutes a linguistic occasion for the reconstitution of that

structural domination.¹⁷ In this illocutionary form, speech does not merely reflect a relation of social domination, rather, speech enacts domination, becoming the expressive instrument through which that social structure is reinstated. If the account of the injury of hate expression forecloses the possibility of a critical response to that injury, the account confirms the totalizing effects of such an injury.¹⁸

For example, the use of particular illocutionary expressive symbols targeted at an identifiable group may elicit highly negative emotive feelings of past discrimination and repression that forecloses of the possibility of a rational response. There are certain symbols and regalia that in the context of history carry a clear message of racial supremacy, hatred, persecution and degradation of certain groups, for example, swastikas, Klu Klux Klan robes and burning crosses. Intrinsically, signs have no meaning in and of themselves, but they convey a powerful meaning and message to both the conveyer and audience based on recognizable and acknowledged social and political conventions. Here, society must look to the history of these signs to understand what they mean. If the historical association, known to both victim and perpetrator is racist, or religiously bigoted persecution then the sign like verbal or written illocutionary epithets ought to be restricted.

In such instances the reactions of the targeted oppressed identifiable groups however “true”, or potentially rationally persuasive, will not likely be listened to or accorded respect and therefore they are rendered incapable of any effective

response. The regulation of such illocutionary expression, like epithets, might be supported by an analogy to the obscene telephone call. Like an obscene telephone call, a racial epithet is not plausibly taken as part of rational socio-political or legal deliberation on racial issues and the harms that it produces go well beyond subjective offence to the targeted individual. Such a one-sided expressive “right” that instantaneously conveys and inflicts harm on the targeted group is antithetical to the autonomy and dignity of its members.

Attempts at redress will necessitate systemic solutions that aim to break the pattern of reinforcement of historical and present discrimination. Legal efforts to curb injurious speech/expression have tended to isolate the current “speaker” alone as the culpable agent. Butler maintains that the speaker assumes responsibility precisely through the citational character of the hateful conveyance (thus hate expression against identifiable groups draws upon/cites a history of blatant and systemic discrimination which supports and amplifies current hate invective).¹⁹ More effective redress of hate propaganda must employ strategies that target blatant forms of discrimination from individuals as well as systemic forms, where a finding of guilt of a particular individual or group is less important than identifying and remedying the structural causes and effects, of more subtle forms of discrimination.

Responsibility for the incitation of hate, in Butler’s view, is thus linked with speech as repetition. “I & We” philosophy affirms that a systemic remedy necessitates a temporal acknowledgement of the historical systemic oppression against disadvantaged groups. There is a temporal connection when modern hate

propaganda is inflicted against these groups when its message and harm is amplified by historical context in its reproduction. The individual or group who utters hate propaganda is responsible for the manner in which such speech is conveyed, for reinvigorating such speech, for re-establishing contexts of hate and injury which neither begins nor ends with the subject(s) who expresses, or with the specific hate employed, as there is an established history. It is also important, however, to hold the particular current conveyor of hate legally accountable as both a reproducer of hate as Butler identifies, but also as a unique originator in themselves, in the particular subjective hateful expression and medium of conveyance chosen.

Perlocutionary expression, on the other hand, is characterized as expressive acts that “merely” have the potential to set off certain effects and further actions that are not the same as the speech act itself.²⁰ Such perlocutionary speech acts produce certain effects as their consequence, by saying something; a certain effect may follow if not actively countered.²¹ Yet the saying and the consequences produced are temporally distinct, those consequences are not the same as the expressive conveyance of speech, but are what we may bring about or achieve by saying something. The message it conveys does not automatically cause harm to those it targets, but, rather, calls upon further action to accept, prove and propagate its claims by like-minded persons.²²

Butler holds that an “...injurious address may appear to fix or paralyze the one it hails, but it may also produce an unexpected and enabling response.”²³ She suggests that, if to be addressed as a rational interlocutor (no matter what the designation) is to be interpolated (or “hailed”), then the addresser runs the risk of

recognizing a subject in speech who can potentially use language/expression to counter the addresser. In this way the form and function of the expression can be debated and potentially refuted. This deliberative possibility to rationally refute the message of perlocutionary hate propaganda and prevent the infliction of harm does not exist in the case of illocutionary hate conveyances. Firstly, the hate conveyed when it is in an illocutionary form does not permit a rational response because its message itself is irrational and will not be swayed or redressed by reasoned debate. Secondly, because illocutionary hate expression conveys the harm to its target instantaneous with its expression there is no temporal opportunity to deconstruct the hate and prevent the harm which has already been inflicted.

For example, if a group of anti-Semites wants to run an ad in the student newspaper (the only one on the university campus) that claims the Holocaust was exaggerated and claimed to have information and evidence in support of their position, rather than refuse it out right, the student paper could accompany the ad with an editorial from a member of the targeted group explaining why it is offensive and its ideational content incorrect, misleading or manipulative and publish supporting articles, evidence and facts by respected historians and academics on the subject. The intended hateful expression is perlocutionary because it does contain ideational content that provides the possibility of rational response and potential rebuttal. The intended harm to target group members from such a perlocutionary publication is not instantaneous or inevitable if challenged and refuted in public fora premised on "I & We" principles.

In this way the publication of the ad could turn into a public educational event in redressing hate. The goal in this “I & We” forum would be to deconstruct the particular hate messages by constructing a rational and generalizable norm confirming the validity claims of the group targeted by hate. The publication is perlocutionary because it is communicated in a form where an effective response and debate of its ideational content is possible. Permitting such perlocutionary hate expression is affirmative of “I & We” goals of expanding deliberation of even highly controversial, unpopular and even hateful arguments and ideas.

If that same group of anti-Semites claimed the Holocaust did not occur (it is reasonable to assume with a malicious and hateful intent unless proven otherwise) and addressed their university campus audience with racist invective and epithets such expression cannot rationally be effectively responded to, debated and rebutted. Its form and content is not based on rational, or reasonable, arguments, evidentiary sources and theories that can be debated and rebutted. Rather, Holocaust denial regardless of whether it is accompanied by epithets and invective constitutes illocutionary hate propaganda based on intentional fabrications, maliciousness and cunning, irrational hatred and instantaneous harm to its target.

While a rebuttal of the ludicrous and irrationality behind Holocaust denial could be put forth and irrefutable evidence presented to publicly rebut such claims made, the harm to target group members would have already been conveyed with the utterance. Holocaust denial negatively affects the psyche and dignity of survivors of the historic atrocity, their families, as well as belittling the memory of its

victims. A sense of revictimization is inflicted on Jewish persons having to justify and legitimize their feelings and memories while disproving the irrational and insidious claims of Holocaust deniers.

Whether expression is perlocutionary or illocutionary or perhaps a mixture of the two cannot always be predetermined (except perhaps blatant forms of illocutionary hate invective) before examination of the intent and form of a particular conveyance of expression taking into account the context and the actors themselves. However, it does not invalidate the concept of the "I & We" balancing approach to note there will be difficulties in interpretation and adjudication.²⁴ Hateful conveyances that take a mixed or hybrid form of illocutionary and perlocutionary expression will require the discretion and thoughtful consideration of citizens including elected government officials, the judiciary and representatives of the targeted group as well as input from other concerned rational interlocutors in society.

Any differences in the type and degree of harm and political poverty experienced by the addressees of hate, whether illocutionary or perlocutionary in form, will depend on the particular socio-political, legal and economic factors of group members. Such factors effecting the degree, scope and type of harm experienced include the extent of its public dissemination, the particular epithets, invective or ideas and arguments conveyed, whether the targeted group has experienced historical systemic discrimination, the present socio-political, legal and economic status and resources of individual group members. Assessments of any

differential impact of hate conveyances on target group members whether perlocutionary, illocutionary, or some mixture of the two will have to consider the context of the particular instance and factors in its dissemination. While rational response is possible when perlocutionary hate expression is at issue, its harmful effects may be compounded if the particular arguments and ideas buttressing its message are left publicly unchallenged thereby negating any rational deliberative counterbalance.

In an "I & We" deliberative democracy it is rational interlocutors that should determine whether the potential and opportunity to publicly rebut and refute the ideas and arguments of such expression outweighs the harm to target group members and society as a whole. We can allocate examples in "I & We" public fora as they occur to one or the other category and accept that some are borderline or hard cases, without doubting that others deserve to be on one or the other side of the distinction. Holocaust denial dressed-up in the form of academic arguments and revisionist hypothesis is one such illocutionary expressive conveyance, where the instantaneous harm conveyed by its public utterance outweighs the benefits to be gained from potential public rebuttal of its absurd and incongruous position.

Beyond Critical Race Theory (the Minority Critique): Conceptions of Harm and Responsibility in the "I & We" Paradigm

Critical race theorists conceive of freedom of expression in light of its impact upon particular communities, (i.e. disadvantaged groups) providing insight into some of the harms conveyed by hate propaganda. According to this theory, racist and bigoted expression accentuates the disempowerment and alienation of those who

traditionally were denied access to power. It perpetuates that disempowerment by devising institutional and even state sanctioned barriers to exclude minorities from the mainstream.²⁵

The result is indignity and protracted social tension arising from words (or symbols) that "wound,"²⁶ that reduce minorities to "caricatures," or that depict them as "an untouchable caste...."²⁷ In the words of Mari Matsuda, those who proclaim the racial inferiority of members of racial minorities render the genus "at once alike and inferior."²⁸ Critical race theorists highlight and stress the harm and silencing effects of hate propaganda experienced by targeted group members. Citizens can neither have influence nor achieve their goals if they are unable to access and function adequately in the public arena.

An "I & We" deliberative democracy recognizes that systemic barriers and hate conveyances facilitate political poverty among target group members by negating conditions of mutual respect, fair equality of deliberative opportunity, adequate public functioning and membership in the speech/expression community of rational interlocutors. These are insights that come from deliberative theory that may contribute to an analysis of hate propaganda and potential remedial responses. An "I & We" deliberative democracy is clearer about political poverty and the challenges it foists upon disadvantaged groups in developing a systemic strategy and procedural medium where perlocutionary hate conveyances can be deconstructed and publicly refuted.

Critical race theorists successfully dispute the majoritarian interest (majority

rule via the libertarian “market-place of ideas”) in the right of free speech. From the perspective of an “I & We” deliberative democracy, critical race theorists fail, however, to distinguish between illocutionary and perlocutionary hate expression which permits censorial excess in its attempts at redress. Critical race theorists also fail to provide a procedural medium through which to possibly reconcile the opposed claims of the speaker (the conveyor of hate) to freedom of expression and the target (disadvantaged groups) to freedom from such expression. It is important to note that critical race theorists, such as Matsuda and Lawrence, are willing to censor a wide range of expression that would fall outside of illocutionary form. The illocutionary/perlocutionary distinction provides a more principled and consistent approach to balancing freedom of expression and hate propaganda in accordance with the “I & We” perspective that avoids the “slippery slope” of censorial excess.

Leon Trakman argues that an alternative to such censorial excess is to conceive of free speech in light of communal conceptions of liberty and responsibility, going beyond the Minority Critique.²⁹ The “I & We” paradigm affirms Trakman’s move beyond the Minority Critique and considers individual and communal conceptions equally in the context of hate propaganda. This arises when free expression is valued according to the communal and individual conditions that affect the parties to each speech relationship. The “I & We” approach, however, rejects communitarian views that promote a pervasive group identity and claim to rights that initiates a zero-sum and necessarily conflictual mentality to individual identity and rights claims.

Communal liberty within an “I & We” deliberative democracy is affirmed positively in promoting self and group empowerment. It is preserved negatively in redressing threats to liberty, such as threats to the liberty of disadvantaged minorities who are denigrated on account of race, religion, ethnicity etc. It is affirmed in its capacity to perpetuate relations of trust, solidarity and mutual respect among individuals from different communities. It is preserved negatively, in redressing the communal harm suffered by those members who were denied liberty historically and seek redress on account of the ongoing violation to that liberty.³⁰

Both the liberty to speak and the liberty from speech are attributes of communal liberty in both Trakman's view and the “I & We” paradigm.³¹ The liberty to speak consists of the communal means by which citizens may deliberate and convey their perspectives, opinions, thoughts and ideas to others as rational interlocutors in public fora. The liberty from speech encompasses the communal means by which that liberty to speech and expression may be constrained (either prohibited from entering into public fora or rebutted) in the interests of those who are subjugated and harmed by speech/expression.³² It is in the deliberative fora in an “I & We” deliberative democracy where the liberty to expression is weighed against the liberty from speech/expression and that the communal perimeters of liberty and equality are determined.

“I & We” philosophy argues that individuals and groups have expressive rights and responsibilities that are interdependent and constitutive of each other. In the context of hate propaganda this interdependence is focused and merged into an assault on all members of a disadvantaged group based on common attributes,

characteristics and affiliations whether chosen or immutable. The harms conveyed by perlocutionary hate propaganda inflicted against its target presents a deliberative opportunity for possible refutation unlike the instantaneous and rationally irrefutable harm conveyed by illocutionary hate propaganda.

Censoring perlocutionary hate expression when there is a guaranteed opportunity for public response by target group members would negatively effect the legitimacy of the underlying framework and procedures of a deliberative democracy. Firstly, a priori censorship of perlocutionary hate expression would deny the possibility of target group members participating in the democratic process and negate the potential for public refutation. Secondly, censorship would deny the targets of perlocutionary hate the chance to publicly redress some of the causes of their political poverty and affirm their dignity, respect and inclusion as rational interlocutors in the speech/expression community.

The goal of hate expression is often to assimilate and negate the numerous differences between individuals in a particular ethnic, racial, national or religious group by subsuming individual characteristics in a homogenizing hateful attack. Such hate propaganda targeted at the common shared characteristic(s) affects and effects the member's group identity, status and deliberative opportunities by delegitimizing and depolitisizing the moral, legal and socio-political membership of the individual and group as belonging and contributing to civil society. Focussing on the disproportionate and unique harm caused by hate propaganda and hate crimes (violent acts based on hate) inflicted on society P. Finn argues

the harm, which arises from bias [hate] crimes, is distinct because an entire disfavoured and discrete group of people is assaulted whenever an individual

is assaulted as a result of an immutable characteristic. Communal harmony within society in general is totally disrupted by a single act of arbitrary hatred because of the distrust and fear that is ignited.³³

Hate propaganda contributes to the political poverty of its addressees by affecting the status and dignity of individual members as participating rational interlocutors (to different degrees depending on the form of hate expression and individual subjective coping factors, resources and community support structures) and their individual socio-political and moral status, dignity, respect and opportunities to participate in a deliberation.

The seriousness of the harm from hate propaganda cannot be fully understood without taking the unique group factor into consideration. The harm lies in the atmosphere of fear and apprehension to which all hate propaganda and hate crimes contribute.³⁴ Research in the United States shows a clear association between the presence of hate motivation and the extent of harmful psychological affects inflicted due to hate propaganda and in its escalation to physical injuries inflicted in hate crimes.³⁵ Data from the Boston Police Department in 1993 shows that assaults motivated by hate resulted in greater physical injury than other forms of assault.³⁶ According to this same source, victims of hate propaganda and hate crimes experienced two to three times more negative psychological and behavioural problems than victims of violence not motivated by racial, religious or ethnic hatred.³⁷

Analyzing the statistics and crime reports of the harms from hate propaganda and hate crime directed at disadvantaged racial and religious groups P. Sanderson, argues

...a hate crime resembles no other crime. The effects of hate propaganda and hate crime (which can function separate, simultaneously or as an escalation from expression to violent crime)³⁸ reach beyond the effects of the immediate victim or institution and can damage and fragment communities.³⁹

It is reasonable to deduce that the harm from hate propaganda increases the level of fear and can only heighten tension between different racial, ethnic and religious groups. Because it is directed both at an identifiable, disadvantaged group and at individual group members, hate propaganda carries an element of harm that is not present in other kinds of expression. Hate propaganda has an effect upon the victim beyond those associated with non-hate biased expressive harassment.

Non-hate based harassment does not call upon a history of discrimination against its target, nor does it amplify and reproduce harms inflicted upon groups targeted because of the particular race, ethnicity, nationality or religion of group members. The harm conveyed by non-hate harassment is individualistic in that the form and degree of harm experienced by the victim depends upon the particular context (e.g. intensity of harassment, power asymmetries, individual coping factors and support resources of the victim, opportunity for redress etc.) of each expression.

The characteristics group members have in common (e.g. by virtue of race, ethnicity, or religion) that elicit the victimizations are often important elements in the victim's own unique sense of identity and status, thus presenting the hate expression with additional factors that can create feelings of anger, fear, isolation, exclusion and vulnerability.⁴⁰ This constitutes an additional and distinct element of harm, which accordingly should be publicly recognized by society including

legislatures, the education system, media, public fora, the judiciary and criminal justice system, in considering strategies of redress.

The existence of a criminal law prohibiting hate propaganda serves to denounce and condemn such discriminatory conduct, so that, while it may not dissuade those who are motivated by hatred of a person's race, colour, religion, ethnic origin, etc. from conveying a hateful message, it does serve to publicly reaffirm the fundamental values of human dignity and egalitarian equality that are particularly attacked by such expression. And, by such public affirmation, the hate propaganda sections in the Criminal Code (sections 318-319) serve to assure the public that such expressive conveyances are intolerable in a pluralistic and multicultural society. A shortcoming of these Criminal Code sections, however, is that they fail to recognize the illocutionary/perlocutionary distinction and the effect such an acknowledgement would have on legal and socio-political approaches to balancing freedom of expression and hate propaganda. Explicit recognition of the distinction within the Criminal Code would equip lawmakers, enforcers and adjudicators with an effective statutory tool to enable the criminal justice system to move towards the "I & We" approach.

The "I & We" paradigm maintains that interdependence is possible only when the dignity and mutual respect of the individual interlocutor encompasses the dignity and respect of the intended audience (and their right to rationally respond) as a condition of social and political deliberation itself. A.C. Cairns and C. Williams pragmatically support the importance of recognizing both rights and responsibilities fundamental to "I & We" philosophy maintaining that

a political order in which rights consciousness is highly developed is prone to instability unless counterbalanced by norms of duty, obligation and responsibility.⁴¹

Trakman also affirms this “I & We” conception with his notion of a “transformative” conception of free speech entailing that legal responsibilities inhere within the right to speak (and express) itself.⁴² These responsibilities are owed variously to the state (legislature, executive and judiciary), civil society (i.e. non-governmental organizations, public interest groups, religious organizations, trade unions etc...), discrete communities (identifiable groups) and each citizen as a rational interlocutor. Trakman's transformative conception of free speech is directly affirmed and expressed by the “I & We” paradigm and its facilitation of expansive public fora.

The conception of socio-political and legal relations affirmed by the “I & We” paradigm (e.g. public fora characterized by principles of non-discrimination and non-repression where rational interlocutors can debate public policy initiatives in a tolerant and mutually respectful manner) has the advantage of taking account of the specific relationships between the parties. For example, in addition to the form of expression, whether perlocutionary or illocutionary, the character of a speaker's responsibility for hate propaganda depends, in part, upon the nature of his or her intent, as well as the reasonable foresight of the likely effect of such speech and expression upon the intended audience.

When hate propaganda takes a systemic form the impetus for identification and redress in an “I & We” democracy is focussed on the systemic structural causes and discriminatory effects on disadvantaged groups rather than on individual

culpability. In cases of blatant hateful discrimination the underlying assumption is that the citizen's responsibility and degree of legal culpability hinges upon the extent to which one intends the exercise of his or her rights to have a destructive effect upon others, or acts in negligent and reckless disregard of that effect and the degree to which he or she could reasonably anticipate the ensuing harm. It follows that, the more deliberately or recklessly one uses hate propaganda to degrade others and the more readily he or she foresees ensuing harm, the greater will his or her responsibility (and culpability) be for that expression.

The "I & We" paradigm ensures that the rights and responsibilities of speaker and audience depend upon their relationship, viewed in the context of their social, political and legal environment. This egalitarian orientation has the advantage of allowing rights and responsibilities to be conceived in light of individual and interdependent relations. It grants a speaker the right to free speech so long as he or she assumes responsibility to exercise that right, in a manner that effectively facilitates a continuing rational deliberative dialogue. The "I & We" paradigm leads to a strategy of systemic remedies that affirm the right to expression precisely because it is the subject of responsibilities.

Libertarians might well accept that the targets of hate propaganda have a distinctly moral interest in not being subject to unmitigated degradation. Communitarian critics of the libertarian approach might concede that the diligent protection of free speech has communal value. It is the "I & We" paradigm, however, that is cognizant of the fact that freedom of expression is best protected

in light of the differentiated group identity, toleration, mutual respect and recognition of both speaker and listener. Speech/expression is most effectively protected when it is evaluated in light of the interdependent communal conditions under which it is exercised.

As Trakman pragmatically points out, to protect speech/expression is to acknowledge the interdependence that exists between the right to speak and the responsibility for it.⁴³ This recognition is necessary to preserve the dignity of the target of speech/expression. It is a central means towards communal discourse and the possibility of a sense of social and political solidarity within an "I & We" deliberative democracy. In ignoring this relationship between the right to speak/express and the responsibility for it a traditional doctrine of liberalism applied to free speech is counter-productive in promoting social justice and civic accountability of citizens as rational interlocutors.

James Bohman argues that, "without the reasonable expectation of success and adequate voicing of their concerns, citizens would not have the common knowledge that their decision making is public."⁴⁴ Political poverty reinforces these barriers by perpetuating a nexus between racial differentiation and racial discrimination. It forces disadvantaged minority group members either to submit to hatred or meet out hatred in reactive (and necessarily irrational) responses. Minorities who respond to racist taunts likely are accused of engaging in "reactive racism". Minorities who remain silent are deemed to submit to racism. "I & We" philosophy concurs with Bohman's argument that "persistently disadvantaged [and

politically impoverished] groups have no reason to recognize the legitimacy of the regime with which they disagree but cannot afford to ignore."⁴⁵

In insisting that protection of freedom of expression ought primarily to preserve the dignity of the speaker, traditional liberal/libertarian thought ignores or does not do enough to proactively redress the systemic harms to groups and individual identity and respect that hate propaganda inflicts upon its target. In subscribing to a market-place of hate propaganda, it threatens to undermine free expression in deliberative public fora. Recognition of the illocutionary/perlocutionary expression distinction, in conjunction with "I & We" fora guaranteeing an effective right of response from representatives of the group targeted by hate, would be a significant systemic strategy in redressing the political poverty of disadvantaged groups.

**The "Paradox of Public Discourse" and the Responsibility of "I & We"
Public Fora to Proactively Redress Hate Propaganda**

Robert C. Post represents a sophisticated conception of liberalism affirming the "market-place of ideas" approach as the best way to overcome the harms of hate propaganda. Post's analysis, however, is deficient in that it does not adequately address the unique forms of harm that hate propaganda inflicts on disadvantaged groups. His analysis is unable to deal with illocutionary forms of hate propaganda, as he does not recognize the instantaneous harm it produces, or the impossibility of rational response in deliberative fora. Furthermore, Post fails to consider the necessity of developing deliberative fora to combat the political poverty and perversions to the "market-place of ideas" that hate propaganda instigates and

exacerbates.

Post argues that tolerating “uncivil” speech “does not necessarily undermine the process of rational deliberation, so long as the extent of such speech is confined and does not infect the process as a whole.”⁴⁶ Critically, however, Post does not address exactly what constitutes “uncivil” speech- that is, if it includes intense expressive disagreement with one another’s arguments and ideas in public fora (perlocutionary expression) and also hateful expressive attacks and racial or religious epithets too (illocutionary expression). Nor does Post explicate the form and function of any mechanism or principled approach that might delineate what speech/expression will “infect” the deliberative process and accordingly be “confined” in some manner. “I & We” philosophy argues that tolerating uncivil and hateful illocutionary speech does infect the deliberative process as a whole compounding the political poverty and discrimination of groups targeted by hate expression.

Furthermore, Post offers no principled framework to effectively debate and respond to perlocutionary forms of hate propaganda. He fails to recognize the public responsibility and fundamental need, for institutionalized procedural mediums of rational deliberation. There is no mention of any deliberative fora where effective representation of the targeted group’s perspectives and interests may be equally considered (as the “I & We” paradigm provides). Ultimately, then, Post’s analysis merely recapitulates the liberal’s belief in the effectivity of the free “market-place of ideas”.

According to Post, for public discourse to enable self-government (what I take to entail autonomous yet interdependent and rational citizenship) hate propaganda must be repudiated on the merits rather than be silenced by force of law.⁴⁷ The “I & We” paradigm affirms Post’s assertion as long as it is perlocutionary expression capable of refutation through rational deliberation and effective expression in “I & We” fora. But, “I & We” philosophy goes further to attend to the conditions that are necessary for rebuttal as well.

Post wrongly maintains, however, that all communication that violates “civility rules” is treated by proponents of limits to hate propaganda as both irrational (incapable of debate) and coercive. Communication can be uncivil; highly emotive—yet still have a rational argument or idea at its core, albeit it is in error, or based on problematic or controversial evidence or theory. Conversely, illocutionary hate propaganda is always non-rational because conveyed in a form that purposively negates reasoned ideational contestation and debate among its targeted audience.

Post continues his argument holding that “if the state were to enforce civility rules [which is not what “I & We” theory proposes] it would in effect exclude from public discourse those whose speech advocated and exemplified unfamiliar and marginalized forms of life.”⁴⁸ Post further argues that “if the state were to suspend the enforcement of civility rules, it would endanger the possibility of rational deliberation by permitting the dissemination of abusive and coercive speech.”⁴⁹ For Post, while the principle of equality is formal, the conception of equality that is said to be attacked via hate propaganda is substantive. This tension between the

requirement that self-government respect all of its citizens “as free and equal persons” and the requirement that self-government proceed through the requirement of rational deliberation, creates what Post identifies as “the paradox of public discourse”.⁵⁰ Post asserts that the principle of equality embedded in the “paradox of public discourse” is formal; “its extension to all persons is the fundamental precondition of the possibility of self-government.”⁵¹

The “I & We” ideal of egalitarian equality violated by hate propaganda is a fundamentally formative factor contributing to the identity, status and dignity of each group member. Post, however, maintains that censorship of even illocutionary hate expression is inconsistent with the formal principle of equality which he maintains is central. This is so, he argues, because such censorship would exclude from the medium of public discourse those who disagree with a particular substantive norm of equality (that is, anti-racism). Moreover, Post asserts that such persons would be “cut off from participation in the processes of collective self-determination.”⁵²

Viewed through the lens of the “I & We” paradigm, the “paradox of public discourse” appears to be resolved. Contrary to Post’s argument that citizens are excluded in the paradox of public discourse, “I & We” philosophy asserts, rather, that it is certain forms of expression and not rational interlocutors that are censored. So, the effects are not nearly as drastic as he suggests they are. Moreover, because of the illocutionary/perlocutionary distinction, only some hate expression is censored. The liberal and communitarian sensitivity underpinning the “I & We” paradigm maintains an egalitarian balance in its deliberative fora and systemic

strategy of redressing the political poverty of disadvantaged groups. It is a balance between the deliberative values of maximizing public reason and diverse participation while simultaneously treating interlocutors as free and equal persons. Attention to resources and special representation of groups targeted by hate, in fact, enhances, rather than detracts from public discourse.

For deliberative theorists like Jürgen Habermas public reason and the deliberative sites of its contestation go beyond formal state institutions including: the “unofficial arenas of the political public sphere.”⁵³ “I & We” philosophy argues that the egalitarian principles of non-discrimination and non-repression must be supported and facilitated to buttress an expanded, diverse deliberation in a multiplicity of public fora. Public reason in an “I & We” society occurs in the numerous socio-political and legal access points of public deliberation including: citizens, public and private interest groups, non-governmental organizations, legislatures and adjudication by the judiciary that will draw the distinction between perlocutionary and illocutionary expression.

Post further asserts that as a practical matter the law can restrain only a small category of blatantly racist epithets. Although the form and function of such epithets are deeply offensive and lack any ideational content that allows for rational debate, he argues that they have relatively little to do with the more widespread phenomenon of silencing.⁵⁴ Post supports this view by arguing that because the logic of the argument from pre-emptive silencing does not impeach the necessity of preserving the free expression of ideas, public discourse could at most be

regulated in a largely symbolic manner so as to purge it of outrageous racist invective and names.⁵⁵

Post maintains that it seems highly implausible to claim that such symbolic regulation will eliminate the pre-emptive silencing that is said to justify restraints on public discourse.⁵⁶ I reject this assertion (which is not supported by further arguments or evidence by Post) as counterintuitive and contradictory to sociological and psychological studies that support the harmful silencing and exclusionary effects of hate propaganda on targeted groups. Moreover, the (illocutionary) epithets and name calling that Post identifies as blatantly racist and hence regulatable are only a small part (on a continuum) of illocutionary hate propaganda-one that also encompasses institutional/systemic, symbolic, written, verbal and emotive expression.

Public policy initiatives and practices employing racial profiling by police and immigration officials provide examples of illocutionary (although there may be perlocutionary arguments and ideas mixed in) thought and expression that automatically conveys harm to its addressees without the possibility for rational response and debate. Group profiling based on race, ethnicity, nationality and religion have been used by Citizenship and Immigration Canada to determine how prospective immigrants to be are treated, instead of making decisions on each person's individual case.⁵⁷

The 1994 Saskatchewan Court of Appeal case *Saskatchewan (Human Rights Commission) v. Bell* provides an example of the judiciary recognizing and

redressing the hate conveyed from symbolic illocutionary hate propaganda.⁵⁸ The appellant in *Bell* owned a retail store in which he displayed and offered for sale stickers depicting caricatures of persons of black, Oriental and East Indian origin with a “not allowed” symbol over each caricature.⁵⁹ The respondent Human Rights Commission of Saskatchewan successfully asked for a permanent injunction under the *Saskatchewan Human Rights Code*, S.S. 1979, c. S-24.1 to restrain the appellant from publishing and displaying such stickers as a violation of s. 14 of the Code.⁶⁰

The Court found that the stickers, by their use of strong images, rather than words, appeal to emotion as much as to reason and their purpose and effect is unmistakable: they expose or tend to expose those groups represented by the images to all things which constitute hatred.⁶¹ Sherstobitoff J. argues

they do this by showing the groups depicted to the viewer as being different from the other members of society in a malevolent way, attributing to them undesirable characteristics such as dangerousness, untrustworthiness, lack of cleanliness, lack of emotion, inferior intelligence, dishonesty and deceit.⁶²

And all of this is reinforced and driven home by the circle and slash superimposed over the image, the universal symbol for forbidden, not allowed or not wanted.⁶³ The effect of the stickers on any individual viewer must necessarily be in part subjective. But the Court argues that, “even if there are some viewers who would not see the stickers as actually exposing to hatred, they certainly tend to do so.”⁶⁴ They belittle in the sense that they make the groups depicted and their members appear inferior to other groups or other members in our society.⁶⁵ They ridicule in the sense that they make fun of them in a mocking, deriding and demeaning way.⁶⁶ “I & We”

philosophy supports the Court's conclusion that the stickers

affront the dignity of the groups and their members in the sense that they openly insult their inherent human worth and thus diminish, or deprive them of, the respect due them as equal members and rational interlocutors of our society.⁶⁷

In the case of perlocutionary hate expression Post gives no mention of the practical necessity for public deliberative fora to guarantee procedures that can plausibly counter and possibly refute the systemic group harms that will likely occur unless actively rebutted. I thus reject Post's assertion that because the logic of the argument from presumptive silencing does not impeach the necessity of preserving the free expression of ideas, public discourse could at most be regulated in a largely "symbolic manner" so as to purge it of outrageous racist epithets and names. Post concludes that it seems highly implausible to claim that such symbolic regulation will eliminate the presumptive silencing that is said to justify restraints on public discourse.⁶⁸ Illocutionary hate propaganda (and perlocutionary hate propaganda that goes uncontested), however, has a great deal to do with producing and reproducing the phenomenon of silencing and harm to targeted individuals and groups. Post offers no compelling evidence to support his claim of superficiality regarding effects of regulating such illocutionary hate expression.

People confronted by hate propaganda experience a form of "silencing" in the sense that they may be reluctant to speak and express themselves, that is, if such deliberative opportunity exists at all. The function of hate propaganda is to distort the message of a group or class of people, to deny their humanity and to make them objects of ridicule and humiliation such that acts of aggression against

them (e.g. hate crimes) are perceived less seriously (and there is a desensitization and a depoliticization of the claims and reactions of disadvantaged group members).⁶⁹ Hate mongers base their strategy and intent on exclusion of their target audience whereas “I & We” deliberative democrats base their standards of conduct on mutual respect and procedural fairness and rationality.

If the prevention of group harm is one important basis for the regulation of communication, the definition of legally proscribed speech will depend on one's understanding of the nature of the group harm at issue and the way in which communication is seen as causing that harm. Protecting group differences will require proactively protecting communities in certain ways. This includes prohibition of illocutionary hate speech against identifiable disadvantaged groups. While the “I & We” context is egalitarian and just in its form and function, the hate propagandist's is irrational, undemocratic and inherently unjust.

Values of Toleration and Mutual Respect in an “I & We” Deliberative Democracy

The value of toleration is fundamental to a multicultural and pluralistic “I & We” deliberative democracy. The importance of the ideal of toleration is that it permits individuals and groups to engage in rational discussion and debate each other's issues and ideas that may be diametrically opposed. Yet such rational deliberation is dependent not merely on toleration but also upon the mutual recognition and respect of each rational interlocutor as a member the speech/expressive community.

Habermas's DE starts from the assumption that even moral problems are

capable of being solved in a rational and cognitive way.⁷⁰ This is against amoral scepticism, which asserts that questions of practical reason could not be decided on rational grounds. Both DE and "I & We" philosophy recognize the reality that deliberation and decision-making do not take place in a socio-political or legal vacuum. Thus rational deliberation includes factors such as emotion, intuition, experience and history as being partly constitutive of a balanced process of reasoned deliberation itself.

This is why absolute tolerance of all expression, regardless of its form and function, amounts to nothing more than a relativist amorality, as here there are no principled reasons for, or against, accepting or rejecting differing beliefs, arguments and forms of expression. The "I & We" paradigm maintains that imposing restrictions on ourselves (recognizing our responsibilities must equally be considered with our corresponding rights) is necessary to mutual recognition. Restraint on unabashed individualistic self-interests is a constitutive part of our freedom as rational individuals and members of particular communities in a pluralistic multicultural society.

In affirmation of the interdependence of solidarity, sacrifice and toleration promoted in an "I & We" deliberative democracy, Cohen-Almagor states that "By restricting our own liberty, we agents grant liberty to another."⁷¹ Cohen-Almagor further adds that "...tolerance also sets its own confines...unrestrained toleration should not be accorded to those who would deny respect to others."⁷² Tolerance is a complex attitude toward the behaviour and beliefs of others. George P. Fletcher

maintains that its complexity consists in both normative moral disapproval (or at least cultural rejection) and the avoidance of interference.⁷³ The case for tolerance turns on its being the least problematic way for pluralistic individuals and groups to live together in a pluralistic, multicultural and deliberative society.

Tolerance is a pragmatic way to live with neither indifference toward the moral and socio-political shortcomings of others nor total acceptance of contrary ways of life. The “I & We” paradigm holds that toleration minimally relies on a formal sense of respect for the moral and socio-political equality of each citizen as a rational interlocutor. If there is no initial recognition of the rationality and membership in the speech/expressive community of those “other” individuals and groups that we deliberate with, then there is no reason to tolerate (let alone respect) those with whom we deeply disagree. Mere toleration, however, is not sufficient for “I & We” deliberative democracy which requires mutual respect among citizens for public deliberative fora to effectively and consistently function according to principles of non-discrimination and non-repression.

Tolerance must entail at least a respect for a fellow deliberator’s status as a rational interlocutor with potentially persuasive and important points of view and arguments to contribute. Such mutual respect does not mean agreeing with another individual’s or group’s arguments and ideas. Rather, mutual respect in an “I & We” society entails the possibility that deliberators themselves are willing to compromise and even potentially change their minds on at least some issues. Deliberation, for Habermas and, in “I & We” fora, occurs when the participants in communicative

action take up the issue of whether a contested claim of normative legitimacy can be rationally vindicated or criticized through arguments.⁷⁴

Mere toleration as a fundamental and underlying principle of an “I & We” deliberative democracy would, in Adeno Addis’s view, be, inadequate. Addis states, “to tolerate is not necessarily to respect”.⁷⁵ That is, toleration by the majority can be based on indifference and non-respect. Majority toleration might be prepared to tolerate a minority culture in the sense that it will not use the coercive power of the state to prohibit the practices, beliefs and critical ideas of minority and marginalized groups. However, the majority might continue to believe that the cultural practices are at odds with the dominant group’s “norms” or that they have little merit. Addis holds that “To be tolerated as the strange ‘other’ is to be simultaneously defined as one whose legitimacy in the polity is not fully secure”.⁷⁶

Conversely, to treat individuals with mutual respect entails, at least partly, respecting their differentiated group perspectives and public policy concerns and the forms of life which give depth and coherence to others’ identities. And to treat those differentiated “other” forms of life with respect means to engage them- not to simply tolerate them as strange and alien. The “I & We” paradigm, therefore, views tolerance as a minimal prerequisite required in deliberation, while mutual respect of the other is the ideal facilitated and striven for in “I & We” fora. One can hardly develop the empathy, civility and reciprocal respect required for a meaningful sense of solidarity for those one only knows as the “caricatured other”.

“Respect” is an attitude and a moral feeling first acquired through processes

of communicative/expressive socialization. This implies that the basis for respect can be disturbed if the conditions for developing a sense of self-worth and appreciation from others are lacking. Respect may cease to be an aspect of our life experience, or it may deteriorate in a culture given to extreme forms of atomised individualism and indifference in the face of expressions of hate and intolerance.

The "I & We" paradigm supports Addis's position that a society that acknowledges the fact of multicultural pluralism (and its normative desirability) without providing the institutional means through which the ethic of reciprocal empathy, respect and inclusiveness are cultivated is a society that allows disadvantaged groups to be tolerated at best as the marginal other or at worst- blatant and systemic discrimination, conflict, violence and exclusion based on their group affiliation(s) and membership(s).⁷⁷ Political poverty is exacerbated in a society where the socio-political and legal access points of citizen participation and deliberation is premised and structured on formal equality of opportunity and liberal ideals of individual merit and competition in the "market-place of ideas".

"I & We" philosophy recognizes our own human potential for tolerance, mutual respect and self-determination when we see each other as fellow rational interlocutors in civil society. Jean-François Lyotard argues that there is harm and a wrong when the "other" (identifiable group member) is excluded from the speech/expressive community "for the wrong is the harm to which the victim cannot testify, since he or she cannot be heard."⁷⁸ Rainer Forst also affirms the deliberative potential for deconstructing hateful and exclusionary messages arguing that

in order for experiences of exclusion and misrecognition to be transformed in a positive way into strategies of resistance and participation, they need to be recast as claims to legal, political and social respect and inclusion that can be 'generally and reciprocally justified' to community members and to outside communities and groups to whom disadvantaged groups must appeal for solidarity.⁷⁹

An "I & We" society rejects an uncritical view of dominant perspectives, ideology and pre-determined conceptions of "truth" in socio-political and legal access points (i.e. deliberative fora) that function to maintain the privileged status quo of dominant groups. A pluralistic "I & We" society not only recognizes the existence of a multiplicity of values, but also makes their pursuit a real option available to all of its members.⁸⁰ To treat persons as equals, that is, with equal concern and respect, is to institutionally arrange for all individuals and groups to receive a fair equality of opportunity to have their concerns and ideas heard in deliberative fora that contribute to making living a "good" (defined individually and collectively) life possible. "I & We" philosophy argues that the political poverty hate expression/speech engenders and exacerbates must be actively addressed by instituting public fora, resources and special rights of disadvantaged groups targeted by hate.

The practical realization of debate and refutation of hateful perlocutionary expression necessitates a positive institutional duty to facilitate the practical conditions whereby representatives from targeted groups can assert their social perspective. Habermas supports such a move when, in his conception of DE and the "ideal speech situation", he recognizes that, absent the necessary material resources to facilitate expanded deliberation in "ideal" fora, such a deficiency does

not lead to free, diverse and open discourse.⁸¹ Habermas argues that free and open discourse requires a variety of antecedent conditions ranging from considerations of cultural tradition to the distribution of material resources.⁸²

Such a positive institutional duty on the state to provide disadvantaged groups with the necessary financial and information resources in “I & We” deliberative fora must also guarantee the capacity and capability of targeted group deliberators to an effective right of reply and debate by capable group representatives where perlocutionary hate propaganda is present. This will require the state working with representatives of disadvantaged groups facilitating “I & We” public fora to provide the necessary resources to ensure such substantive procedures of deliberation are provided. The “I & We” paradigm holds that the details of the guarantee must themselves be the subject of deliberations, but should be guided by the substantive principles of non-discrimination and non-repression.

A genuine sense of solidarity and social integration in multicultural and pluralist societies will develop only through a public process where minorities and majorities are linked in “I & We” institutional dialogue, along with the numerous non state socio-political access points and public spaces in civil society. It is a reflexive public dialogue where there is a need for disadvantaged groups “...to be both the subjects and authors of institutional entitlements to deliberative participation.”⁸³

The Facilitative Affinity of Habermas’s DE and “Ideal Speech Situation” and “I & We” Fora in Redressing Hate Propaganda

The fundamental principle of Habermas’s DE, that has significant implications for “I & We” fora, is his conception of (U) where valid norms can

emerge entailing an ideal where

all affected can accept the consequences and the side effects its [a proposed moral norm's] general observance can be anticipated to have for the satisfaction of everyone's interests (and these consequences are preferred to those of known alternative possibilities for regulation).⁸⁴

Habermas's principle of U is one that intends to set the procedural conditions for impartial judgement insofar as it "constrains all affected to adopt the perspectives of all others in the balancing of interests."⁸⁵

This notion of "ideal role taking" is essential to "I & We" fora in the context of hate propaganda because it provides the opportunity for a sense of the group's experiences and perspectives to be shared, concerning the impact of hate expression, with other non group members and with the public at large. The ideal speech situation, like that of "I & We" fora and its foundational principles of non-discrimination and non-repression, facilitates a procedure where a diversity of interests can be rationally deliberated. Habermas argues that

...from this interlocking of perspectives there emerges an ideally extended *we-perspective* from which all can test in common whether they wish to make a controversial norm the basis of their shared practice; this should include mutual criticism of the appropriateness of the languages in terms of which situations and needs are interpreted.⁸⁶

Members of a targeted disadvantaged group are unique individuals that have their own particular perspectives and interests. Hate mongers, however, focus their propaganda on common attributes and shared characteristics of all group members with the aim of negating individual identity, status and opportunity. In light of the hate monger's strategy, "I & We" philosophy argues that part of a strategy of a group's effective response to hate expression will, thus, include the articulation of

the view that all individual rational interlocutors deserve recognition and respect as such and these particularities cannot rationally be negated by virtue of group commonalities and affiliations.

Peter Swan, citing Iris Marion Young, argues that the tendency in modern political thought to emphasize what citizens have in common is problematic because it undervalues differences (disadvantaged group members do not constitute a homogeneous bloc).⁸⁷ Moreover this propensity for generality and commonality by participatory democrats threatens to suppress differences among citizens (and differentiated groups).⁸⁸

Young contends that systems of political representation cannot represent individuals in their particularity, but rather should represent aspects of a person's life experience, identity, or activity when he has affinity with others.⁸⁹ Similarly with group representation it is the communal interests and perspectives that have a commonality in redressing hate conveyances that have attacked all members based on shared and immutable characteristics and attributes. While an acceptable strategy of group representation must be receptive to individual member's inputs- "I & We" philosophy argues that its fundamental discourse must present a relatively unified deliberative response to redress perlocutionary hate propaganda.

Young further avers that representing a social group consists primarily in representing the perspectives members of group have derived from their structural social positioning.⁹⁰ Thus a significant component of differentiated group perspective concerns questions, assumptions and particular experience more than

final answers or conclusions. This is not to say, however, that only the voices of the disadvantaged groups directly affected by a public policy need to be heard and considered. Simply privileging the experience of oppression or domination cannot form the basis for a “communicative democracy”.⁹¹ Swan argues that there would be a “deficit of legitimation” and a risk of imposing a form of closure on public debate by excluding other voices and preventing competing goods from being raised in public.⁹²

Circumscribing the ideal speech situation are “Rules of Reason”⁹³ that facilitate the DE idealization of the force of the better argument in deciding the normative rightness of claims. In this idealized deliberative context the participants must “be motivated solely by the desire to reach a consensus about the truth of statements and the validity of norms.”⁹⁴ In the ideal speech situation everyone affected by a proposed norm has free access to all the discourse activities and opportunities to participate should be equally distributed.⁹⁵ It is the principles of non-discrimination and non-repression, in “I & We” fora and guaranteed response of targeted groups that perform a similar function to that of the rules of reason in the “ideal speech situation”.

All rational interlocutors in “I & We” fora and DE must be able to introduce argumentative assertions as well as question those of others. Further, it should be a forum in which everyone can openly express his or her true feelings, intentions, needs and desires. Only when needs or interests can be communicatively shared instead of institutionally stratified is there a possibility of reaching a more truthful interpretation of an individual's particular needs.⁹⁶ The rules of reason in this

deliberative ideal actively work against hidden agendas; motives or obstacles to discourse created by deception, power asymmetries, political poverty, ideology and coercion.

Habermas acknowledges that these procedural rules must further be complemented by a sense of solidarity between participants.⁹⁷ Such solidarity involves concern for the well being of both one's fellow human beings and of the community at large. For Habermas, the general conditions of the ideal speech situation and the rules of reason, especially as coupled with this sense of solidarity, describe the necessary conditions of a deliberative democratic polity. At the same time, these conditions and rules establish the legitimacy of pluralism in "I & We" fora. That is, a diversity of communities and participants, while following the same set of rules of reason, egalitarian principles of non-discrimination, non-repression and mutual respect offer specific guidelines for a discourse community as it seeks to resolve different ethical issues-such as the issues of hate propaganda and free speech/expression.

The point of deliberation in DE and "I & We" fora is that all needs and interests can be introduced into discourse; this requires that group particularity and desire can also be introduced. Indeed in redressing perlocutionary hate expression it is an essential part of a systemic strategy of effective deliberative redress and refutation of hate. The substantive principles of non-discrimination, non-repression and the procedural guarantee of a right of rational response of target group members when hate expression is at issue are foundational to "I & We" philosophy.

“I & We” fora and the material and information resources enabling members of groups targeted by hate provide political equality and a fair equality of deliberative opportunity, rather than political poverty for the addressees of perlocutionary hate propaganda. To be able to contest those hateful images and realize a more expansive and diverse democratic deliberation Habermas’s conception of discourse ethics sets out the ideal speech situation, what an “I & We” deliberative democracy should have as its ideal procedure. This idea can also function as a critique of the deficits of actually existing public spheres/fora, particularly those that are marked by hate propaganda. They are, in other words, marked by political poverty, not political equality as understood from an “I & We”, deliberative democratic perspective.

Addressing these deficits will require resources from the government including financial, the sharing of information and organization structures with representatives of the group targeted to have the possibility of rebutting perlocutionary hate expression/speech. In the context of hate propaganda and the deficits of real world public spheres or fora (deficits which go far beyond the presence of hate propaganda to include material, information, organization equality to enable potential rebuttal by groups targeted by hate) for the addressees of hate propaganda to be effective authors, or to have a reasonable capacity and capability to influence public policy and initiatives of concern to group members. Special deliberative rights and facilitating material and information resources guaranteeing representation of group members targeted by perlocutionary hate is fundamental to addressing their political poverty.

The essential meaning and implications of the egalitarian “I & We” principles for public participation must be generalizable as valid normative principles and procedural practices that all rational interlocutors must be capable of accepting. While every rational and debatable idea possesses a claim to equal validity and hearing within a democratic society, consideration of context and intentions must be taken into account and they may require the introduction of procedural constraints. A legitimate question arises asking who decides what “harm” matters? It is the legislature and judiciary and numerous other deliberative “I & We” public fora and public spaces that decides what forms of expression/speech constitutes significant harm and should accordingly be censored or potentially debated in the case of perlocutionary hate conveyances.

It is through legislation that is subject to the contestation citizens in public fora as well as judicial review that significant harm is and should be defined.⁹⁸ Although there is never likely to be one simplistic and universalistic theory of freedom of expression (and its potential regulation of hate propaganda) that can always determine the correct balance between other competing values, it is plausible to follow a principled “I & We” approach, which facilitates an ideal speech situation still in pursuit of egalitarian deliberative ideals affirming mutual respect among rational interlocutors in expanded deliberation.

An “I & We” deliberative democracy provides as a framework of systemic response to hate propaganda three options including, firstly, a principled framework for censorship/criminal prohibition of illocutionary hate propaganda. Secondly, “I &

We” philosophy argues for a framework that proactively engenders governmental responsibility to provide deliberative fora offering a fair equality of opportunity or political equality among rational interlocutors. Thirdly, the “I & We” approach affirms special rights of representation (i.e. a guaranteed right of reply for representatives of groups targeted by hate) for the addressees of perlocutionary hate propaganda.

This “I & We” framework responds to the harms in hate propaganda (like the Critical Race Theorists), while respecting freedom of expression (better than Critical Race Theorists) and treating it as entailing both communal and individual rights and responsibilities as rational interlocutors in the speech/expression community. To perceive the “other” (e.g. persons with a different ethnicity, nationality, religion, culture, language etc. than ourselves) not simply as an object or obstacle to overcome (or exclude from the speech/expression community in the case of hate propaganda), but another rational being with a different belief system or perspective is to acknowledge and respect the equivalence of their humanity as a fellow rational interlocutor.

The “I & We” paradigm argues that where deliberative fora founded on principles of non-discrimination and non-repression effectively function in a democratic state, deliberative power relations can be relations of relative reciprocity rather than purely relations of asymmetrical domination. If knowledge and deliberative opportunity is always related to power in some form, then the task of the power-reflexive methodology employed by the “I & We” approach is to guide knowledge toward a greater reciprocity of power via deliberative fora (rather than powerfully using knowledge and deliberative opportunity to dominate and exclude

one another in the liberal “market-place of ideas”). Thus, the “I & We” power-reflexive approach seeks to replace old hierarchical links between power asymmetries, knowledge and deliberative opportunity with new modes of self-critical knowledge production, reciprocal respect and a fair equality of deliberative opportunity.

Endnotes

1. Peter Swan. "Environmental Justice & Minority Ecological Rights: Do We Need Minority Rights?," Do We Need Minority Rights? J. Räikkä (ed.) (Netherlands: Kluwer Law International, 1996), p. 188. Analyzing the public policy issue of environmental risk management Swan asserts that members of vulnerable and historically disadvantaged groups are often systematically denied the opportunity to participate in the risk decisions that directly affect their community (Swan, 1996: 181).

2. (Ibid.)

3. Sheldon Wolin, "What Revolutionary Action Means Today," in Democracy 2 (1982), 18. Cited in Abramson & Bussiere "Free Speech & Free Press: A Communitarian Perspective," 228.

4. Gary Rodrigues LL.B (Editorial supervisor) Pocket Criminal Code, (Toronto: Carswell, 1999, Part VIII, 225).

It is noteworthy that Canada has incorporated a hate speech provision in its criminal code that imposes responsibility upon those who express hatred toward others. For example, hate expression may be blatant, including racist speech and intimidation of minority groups. Harmful expression may also be very subtle and systemic, including: media presentation of particular groups and individuals and exploitative advertising that promotes prejudice and stereotypes.

In Canadian criminal law, the crimes of hate propaganda are the only crimes that are designed to protect certain groups from certain hateful conduct. They protect certain identifiable groups from generally, the destructive effects of wilful promotion of hatred. These hate propaganda crimes include: a) advocating or promoting genocide, b) inciting hatred in a public place where such incitement is likely to lead to a breach of the peace and c) wilfully promoting hatred, in a public place where such incitement is likely to lead to a breach of the peace and d) wilfully promoting hatred, other than by private communication, against an "identifiable group".

5. Thomas Flynn. "Foucault as parrhesiast: his last course at the college de France," in Freedom And Equality, Dr. Shannon Bell editor, Vol.1, York University: Beta Reproductions Inc., Winter 1996, 273.

6. Stanley Fish. "There's No Such Thing As Free Speech And It's A Good Thing, Too," in Debating P.C.: The Controversy Over Political Correctness On College Campuses, Paul Berman ed., New York: Dell Publishing, 1992, 237.

7. (Fish, 1992: 237)

Fish maintains that there are special contexts, for example radio talk shows, which constitute artificially bounded spaces designed to ensure that talking is not taken seriously (Ibid.).

8. In typical the case of a symbolic act such as flag burning, while the intent is to portray intense political, social and perhaps moral disagreement it is a legitimate form of expressive civil protest. The context of the individual or group burning the flag is crucial- as used as part of a political, or social protest it presents a strong message of disapproval. While illocutionary in form (the burning cannot directly be responded to- unless a dialogue follows) and acknowledging that it is a degrading expressive act aimed at a particular government or nation, it does not target a particular ethnic, religious or racial group (historically or presently oppressed and discriminated against). If, however, a flag representative of a religious, ethnic, or group of persons having a homosexual orientation (although my thesis does not address this issue in the context of hate propaganda) is targeted it does constitute hate propaganda- hence it ought not be allowed.

9. Judith P. Butler. Excitable Speech: A Politics of the Performative, New York: Routledge, 1997, 3.

10. (Butler, 1997: 9)

11. (Butler 1997: 34)

12. (Ibid.)

13. (Ibid.)

14. Charles R. Lawrence III. "If He Hollers Let Him Go: Regulating Racist Speech on Campus," 53-88, in Words That Wound: Critical Race Theory, Assaultive Speech, & the First Amendment, Boulder, Colorado: Westview Press, 1993, 58.

15. (Butler, 1997: 18)

16. (Butler, 1997: 23)

17. (Ibid.) Iris Marion Young in "Deferring Group Representation," 349-377, in Nomos XXXIX Ethnicity and Group Rights, Ian Shapiro and Will Kymlicka eds., (New York: New York University Press, 1997), 365 asserts that structural social (and political) locations arise from group differentiations that exist in a society, collective attributes that have cultural and practical meanings for the way people interact or the status they have.

18. (Butler, 1997: 19)

19. (Butler, 1997: 39)

20. (Ibid.)

21. For instance, a police organization that collects race statistics in their crime committal reports and uses such data to justify the allocation of additional resources and efforts to target a particular community (perlocutionary expression in the form of racial profiling) may legitimately face accusations of racial bias and prejudice. While the police are

expressing their belief in a probability to commit crime based on race they are using statistics that may be rationally debated and refuted (e.g. in their methodology, relevance and reasonability in making assumptions and drawing conclusions) in public fora. Representatives from the targeted group may argue that the tendency to over-police a particular area may lead to a self-fulfilling prophecy of arresting individuals targeted in their racial profiles by virtue of a disproportionate police presence and predisposed mindset.

22. Mari Matsuda offers a plausible scenario of perlocutionary expression that seemingly contains hateful messages in the case of "the dead wrong scientist." Such a case entails a social scientist who makes a case for racial inferiority in an academic setting based on what is presented as scientific evidence. Mari J. Matsuda. Outsider Jurisprudence, 188. Various theories of genetic predisposition to violence, cultural lag and race/intelligence correlation might fall into this category. Not all views deserve the dignity of an academic forum. For example, poorly documented, racially biased work does not meet the professional standards required of academic writing. If a writer manages to come up with a theory of racial inferiority supported by credible evidence (or so claimed), that theory may deserve an audience. A fundamental principle of academic freedom asserts that ignorant views need not be heard but unpopular academically tenable views ought to be considered. Assuming that the dead wrong social science theory of inferiority is free of any illocutionary message of hate propaganda and persecution- the ordinary academic solution of rigorous critical analysis is sufficient.

23. (Butler, 1997: 2)

24. Mari J. Matsuda. The Cost of Free Speech, London: Farber and Farber, 1990, 56.

25. Leon E. Trakman. "Transforming Free Speech, Rights and Responsibilities," Vol.56 No.3 Ohio State Law Journal, (WestLaw: OHSLJ pp. 1-89), 10.

26. Richard Delgado. "Words that Wound: A Tort Action for Racial Insults, Epithets and Name-Calling," 17 Harv. C.R.C.L. LREV, (1982) 133, 137.

27. Charles Lawrence III. "If He Hollers Let Him Go: Regulating Racist Speech on Campus," in Duke Law Journal, 431 (1990), 439.

28. Mari Matsuda. "Public response to Racist Speech: Considering the Victim's Story," 87 Michigan Law Review, (1989) 2320, 2358.

29. (Trakman, 1995: 12-13)

30. (Trakman, 1995: 13)

31. (Trakman, 1995: 14)

32. (Ibid.)

33. P. Finn, "Bias Crime: Difficult to Define, Difficult to Prosecute," (Summer, 1988) 3

Criminal Justice, no 2, 19, 20.

34. A recent study conducted by the League for Human Rights for the Commission on Systemic Racism in the Ontario Criminal Justice System is indicative of how statistics alone fail to convey a full sense of the impact on the victim that is particularly true for hate motivated propaganda and crimes. This research consisted of a series of focus groups with members of several ethnic minorities. The general conclusion: racially motivated propaganda and hate crimes is an issue of serious concern to all groups studied producing widespread negative feelings, fear, anger and isolation for the whole community (South Asian, Asian, Muslim, Jewish, Black; Aboriginal communities in Toronto) Julian V. Roberts. Working Document: Disproportionate Harm: Hate Crime In Canada: An Analysis of Recent Statistics. (Ottawa: Department of Justice-Research, Statistics and Evaluation Directorate, 1995), 4.

Individuals who are not members of one of the communities usually targeted may have difficulty comprehending the seriousness of hate propaganda or hate crimes. We can all appreciate the potential impact of a break and enter, or an assault, but it may be harder for some people to fully appreciate the impact of a hateful conveyance of expression either on the specific individual or community targeted. This may explain why police officers interviewed by the League for Human Rights acknowledged that hate propaganda and racially motivated crime was not an issue for Torontonians in general (League for Human Rights of B'nai Brith Canada. Victim Impact of Racially Motivated Crime, Downsview, Ontario, 1993, 12-13). And, since racial minorities are under-represented among criminal justice professionals the effect may be that the seriousness of hate propaganda and hate crimes is not fully appreciated by the criminal justice system (League for Human Rights, 1993: 13).

35. (Ibid.)

36. J. Levin and J. McDevitt. Hate Crimes: The Rising Tide of Bigotry and Bloodshed. New York: Plenum Press, 1993.

37. (Levin and McDevitt, 1993).

38. Canadian Association of Chiefs of Police. A Resource Guide: Hate Crimes in Your Back Yard, Ottawa: Solicitor General of Canada, 1996, 11.

Figure 2. "HATE/VIOLENCE PYRAMID" indicates the bottom-up progressive escalation of hate propaganda including: prejudices and hate expression and discrimination to violent hate crimes.

<p><u>LIFE THREATENING ACTS</u></p>
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<p>-Assassination -Arson -Bombing -Genocide -Lynching</p>
<p>EXTERMINATION</p>

<p style="text-align: center;">↑</p> <p style="text-align: center;"><u>ACTS OF VIOLENCE</u></p> <p style="text-align: center;">-Assault -Riots -Vandalism -Terrorism</p> <p style="text-align: center;">PHYSICAL ATTACK</p>
<p style="text-align: center;">↑</p> <p style="text-align: center;"><u>ACTS OF VIOLENCE</u></p> <p style="text-align: center;">-Harassment -Exclusion of persons from: Social Privileges, Employment, Educational Opportunities, Housing</p> <p style="text-align: center;">DISCRIMINATION</p>
<p style="text-align: center;">↑</p> <p style="text-align: center;"><u>ACTS OF PREJUDICE</u></p> <p style="text-align: center;">-Members of disliked Groups are avoided at all costs</p> <p style="text-align: center;">AVOIDANCE</p>
<p style="text-align: center;">↑</p> <p style="text-align: center;"><u>ACTS OF INDIRECT PREJUDICE</u></p> <p style="text-align: center;">-Feelings about disliked groups are discussed with like-minded friends</p> <p style="text-align: center;">-Antagonism is expressed -Rumours and Stereotypes form</p> <p style="text-align: center;">VERBAL/EXPRESSIVE REJECTION</p>

Barry, Levin. "Law Enforcement Training Manual: Bias Crimes" Bay Area Hate Crime Investigators' Association, 1992.

39. Sanderson. "Investigation of Religious Bias-Motivated Crimes," in N. Taylor (ed.) Bias Crime: The Law Enforcement Response. Chicago: Office of International Criminal Justice, 1991, 43. Hate propaganda concerns expressive conveyances to its targeted audience. Hate crimes, on the other hand, entail an offender who is motivated to make a threat of violence, or carry out a violent action based on a characteristic of the victim as a member of an identifiable, group which the offender feels some animosity.

40. (Roberts, 1995: 18)

41. A.C. Cairns and C. Williams, "Constitutionalism, Citizenship and Security in Canada: An Overview," in Citizenship and Society in Canada, 1, 3 (A.C. Cairns and C. Williams eds., 1985)

42. (Trakman, 1995: 17)

43. (Trakman, 1995: 31)

44. James Bohman. "Deliberative Democracy and Effective Social Freedom: Capabilities, Resources and Opportunities", in Deliberative Democracy: Essays on Reason and Politics, (Cambridge, Massachusetts: MIT Press, 1997), 341.

45. (Bohman, 1997: 333)

46. Robert C. Post. Constitutional Domains: Democracy, Community, Management, Cambridge, Massachusetts: Harvard University Press, 1995, 314.

47. (Post, 1995: 312)

48. (Post, 1995: 313)

49. (Ibid.)

50. (Ibid.)

51. (Ibid.)

52. (Ibid.)

53. Thomas McCarthy. "Kantian Constructivism and Reconstructivism: Rawls and Habermas in Dialogue," 44-63, in Ethics 105 (October 1994), 48. Habermas asserts that independent public forums, distinct from both the economic system and the state administration, having their locus rather in voluntary associations, social movements and other networks and processes of communication in civil society- including the mass media- are the basis of popular sovereignty (McCarthy, 1994: 49).

54. (Post, 1995: 317)

55. (Post, 1995, 318)

56. (Ibid.)

57. Report on Systemic Racism and Discrimination In Canadian Refugee and Immigration Policies, (Montréal: Canadian Council for Refugees, 1st November, 2000), 9. <http://www.web.net/~ccr/antiracrep.html>

58. Saskatchewan (Human Rights Commission) v. Bell (1994), 114 D.L.R. (4th) 370 [hereinafter, *Bell*].

59. (*Saskatchewan v. Bell*, 1994: 3)

60. (Ibid.)

Section 14 of the Saskatchewan Human Rights Code states that a practice will be found to be discriminatory if (1) published or displayed on any lands or premises, (2) a notice, sign, symbol, emblem, article, statement or other representation, (3) the purpose or effect of which,

- (a) exposed or tended to expose to hatred, belittles, ridiculed, or otherwise affronted the dignity of the racial and religious groups depicted therein; and
- (b) caused or tended to cause others to engage in a discriminatory practice against those groups of persons in contravention of Part III of the Code.

61. (*Saskatchewan v. Bell*, 1994: 25)

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62. (*Saskatchewan v. Bell*, 1994: 25-26)
 63. (*Ibid.*)
 64. (*Saskatchewan v. Bell*, 1994: 26)
 65. (*Saskatchewan v. Bell*, 1994: 27)
 66. (*Ibid.*)
 67. (*Ibid.*)
 68. (Post, 1995: 318)
 69. Kathleen Mahoney. "Hate Speech: Affirmation or Contradiction of Freedom of Expression", University of Illinois Law Review [1996] 789, 754.
 70. <http://caae.phil.cmu.edu/Cavalier/Forum/meta/background/agimmler>
 Dr. Antje Gimmler, (translation) "The Discourse Ethics of Jürgen Habermas," 1-5, *Lehrstuhl für Philosophie II from Moralbewußtsein und Kommunikatives*, (Handeln, Frankfurt, 1983), 2. For Habermas, stripping the Enlightenment project of its universalist intention suspends its emancipatory dimension. If the conception of human beings as rational autonomies and correlative requirement of consent can not be defended as universal in some strong fashion, then we paralyze our capacity to be critical of norms and politics which contradict this conception of human beings and the democratic politics this free humanity requires.
<http://caae.phil.cmu.edu/Cavalier/Forum/meta/background/HaberIntro.html>, 2.
 - 71 . Raphael Cohen-Almagor. The Boundaries of Liberty and Tolerance, (Gainesville, Florida: University Press of Florida, 1994), 59.
 72. (Cohen-Almagor, 1994: 59-60)
 73. George P. Fletcher. "The Case for Tolerance," in Looking Backward: A Critical Appraisal of Communitarian Thought, Derek L. Phillips ed., Princeton, New Jersey: Princeton University Press, 1993, 229.
 74. The Theory of Communicative Action, Vol. 1, translated by Thomas McCarthy (Boston: Beacon Press, 1984), 19.
 75. Adeno Addis. "On Human Diversity and the Limits of Toleration," 112-153, in Nomos XXXIX: Ethnicity And Group Rights, Ian Shapiro & Will Kymlicka eds., New York: New York Press, 1997, 120.
 76. (*Ibid.*)
 77. (Addis, 1997: 126)
 78. Jean-François Lyotard. "The Other's Right," in On Human Rights (New York: Basic

Books, 1993), 144.

79. Rainer Forst. "Justice, Reason and Critique: Basic Concepts of Critical Theory," in D. Rasmussen, ed., The Handbook of Critical Theory, (1996). 31.

80. J.S. Andrews. "Liberal Equality and the Justification of Multicultural, Civic Education," in The Canadian Journal Of Law And Jurisprudence, Vol.VII, No.1 (London, Ontario: University of Western Ontario, January 1994), 126.

81. David Held. Introduction to Critical Theory: Horkheimer to Habermas. (Berkeley: University of California Press, 1980), 396.

82. (Ibid.)

83. Peter D. Swan. "Environmental Justice & Minority Ecological Rights: Do We Need Minority Rights?," 179-213, in Do We Need Minority Rights? J. Räikkä (ed.) (Netherlands: Kluwer Law International, 1996), 181.

84. Jürgen Habermas, "Discourse Ethics: Notes on Philosophical Justification," 43-115, in Moral Consciousness and Communicative Action, (Cambridge: MIT Press, 1990), 65

85. (Ibid.)

86. Jürgen Habermas. "Reconciliation through the Public Use of Reason: Remarks on John Rawls's Political Liberalism, in "Journal of Philosophy (XCII:3 [March, 1995] 117-8).

87. (Swan, 1996: 195)

88. (Ibid.)

89. (Young, 1997: 362)

90. (Young, 1997: 370)

91. (Swan, 1996: 202-203)

92. (Swan, 1996: 181)

93. Robert Alexy. "The Rules of Reason," 165-167, (1990).

94. J.M. Bernstein. Recovering Ethical Life: Jürgen Habermas and the Future of Critical Theory, (New York: Routledge, 1995), 50-51.

95. (Rasmussen, 1992: 26-27)

96. (Rasmussen, 1992: 27)

97. (Habermas, 1995: 117-118)

98. For example, is the diminishing of the hate monger's liberty a bad thing? Fundamentally the issue is whether acts of this sort should be allowed a place in a liberal democratic society. If allowed, then racism and bigotry are potentially to be included among the social values of a liberal framework that encompasses conceptions of the good (as a moral and ethical relativism set in). The values of persons committed to oppressing others through hate propaganda through hateful expression ought to be explicitly excluded if they are not to be implicitly included.

Chapter 3

Jurisprudence and Hate Expression in Canada: Toward an “I & We” Methodology

But every society from time to time draws lines at the point where the intolerable and the impermissible coincide...where the privilege of speech can induce ideas that may change the very order itself, there is bias weighted heavily in favour of the maximum of rhetoric whatever the cost and consequences. But that bias stops this side of injury to the community itself and to the individual members of identifiable groups innocently caught in verbal crossfire that goes beyond legitimate debate.¹

A key part of a deliberative democracy is the judiciary. It maintains an impartial but also interdependent relation with the political arena including, the legislature, executive and civil society. Along with public fora and other political access points for citizen participation and deliberation, the judiciary of a democratic society (notably its Supreme Court) plays a crucial role in interpreting and helping to legitimize (or delegitimize) particular legislation, proposed laws and public policy for constitutional and socio-political compliance.² In Canada a major premise of modern adjudication is that freedom of expression is a central feature of liberal democracy.³ The far-reaching influence and authority of the Supreme Court of Canada case law on freedom of expression is ignored at the cost of substantive progress toward an expanded and more tolerant deliberative democracy.

The expansive guarantee of freedom of expression is found in s. 2(b) of the *Canadian Charter of Rights and Freedoms (Charter)*⁴ giving everyone "...freedom of thought, belief, opinion and expression including freedom of the press, and other media of communication."⁵ In this third chapter I will consider what Constitutional resources there are in the *Charter* and what directions the Canadian courts (particularly the Supreme Court) are taking which are supportive of "I & We" philosophy. I will also assess the deficits or weaknesses in the Court's trajectory and suggest what further developments are required in order to meet the requirements of a more egalitarian and just deliberative democracy.

Judicial analysis of freedom of expression in the context of hate propaganda concerns itself with setting limits on harmful conveyances in an attempt to develop an approach to balance competing “democratic ideals.” Going beyond merely balancing liberal values with communitarian concerns for individual and group rights the “I & We” approach is juxtaposed in this chapter to the adjudication of the Canadian judiciary in its approach to balancing freedom of expression and hate propaganda. Using the “I & We” paradigm I critically analyze the rationales behind the approach the judiciary has taken based on purposively selected provincial Court of Appeal and Supreme Court of Canada decisions. The case law I examine addresses the balance between freedom of expression and hate propaganda in its particular guises of anti-Semitism, racism and the analogous issue of obscenity. This case law includes, *Zundel* in the Ontario Court of Appeal, *Zundel* in the Supreme Court of Canada and the Supreme Court decisions in *Andrews*, *Keegstra*, *Taylor*, *Butler* and *Ross*.

The case law critiqued can be broadly grouped into two main rationales for analysis, albeit with significant overlap of issues, judicial concerns, approaches and reasoning in various cases. The first rationale sets out the judiciary's conceptual approach to the values underlying s. 2(b) when considering the type of expression that should be protected in the *Charter*. Structuring this rationale in the case law examined is the Supreme Court case of *Irwin Toy* and the test for expressive inclusion it developed. A second rationale in the jurisprudence concerns the judiciary's approach in justifying any reasonable restrictions of s. 2(b)'s guarantee via s. 1 of the *Charter*. Although not specifically addressing hate propaganda both *Oakes* and *Irwin Toy* are significant “turning point” decisions for the approach the

Court takes in considering the underlying Constitutional values of and reasonable restrictions on expressive freedom.

In the case law I critique there are underlying crosscutting issues of judicial concern for the values of freedom of expression and the approach the judiciary takes in considering other “democratic ideals” (e.g. toleration, mutual respect, dignity, and fair equality of deliberative opportunity etc.). The judiciary’s consideration of different “democratic ideals” in each case is a significant factor in formulating conceptions of harm conveyed to disadvantaged groups targeted by hate and the question of historical “truth” as a value of expressive freedom. While the rationales or decisions of particular cases may appear either supportive of or in opposition to the “I & We” paradigm there is no recognition of the principled methodology of “I & We” philosophy.

Before proceeding, it should be acknowledged that consensus on difficult questions about expressive freedom cannot realistically be achieved. It is inevitable that perceptions of the *Charter’s* equilibrium in setting the balance between freedom of expression and hate propaganda will vary somewhat from case to case and issue to issue. In such circumstances, the first and foremost goal is to propose an “I & We” principled framework as developed in the preceding two chapters. The aim will be to give the jurisprudence in the next generation a more coherent rationale to ground shifting perceptions of equilibrium in a structure of flexible yet principled and consistent judicial analysis.

The right to freedom of expression cannot be protected by a flawed methodology; likewise a sound methodology cannot emerge from a flawed conception of the expression guarantee. “I & We” philosophy argues it is the Court’s

methodology not the results in particular cases that hold the key to freedom of expression's future. A lack of structure, principle and consistency in the Supreme Court's adjudication has developed its freedom of expression review into an *ad hoc* exercise that exalts flexibility and judicial discretion at the expense of principle and consistency. The Court needs to develop rules of justification supportive of "I & We" ideals that establish a flexible approach while maintaining judicial discretion but in a more consistent and principled methodology for balancing the values of expressive freedom at stake in diverse contexts.

The "I & We" paradigm identifies the building blocks that can provide a foundation for the judiciary's approach to analyzing Canada's freedom of expression guarantee in s. 2(b) of its *Charter*. Firstly, a principled approach to judicially balance freedom of expression and hate propaganda requires acceptance of the perlocutionary/illocutionary distinction by the Canadian judiciary as guiding structure of analysis. This expressive distinction should be acknowledged both in the Court's initial conception of s. 2(b) values and in the structure of the s. 1 analysis provided for in Canada's Constitution that functions to justify reasonable limits on rights and freedoms. Secondly, a principled judicial approach following "I & We" principles requires the judiciary's support and facilitation of a positive obligation on the state for redressing the harm of perlocutionary hate propaganda in public fora based on principles of non-discrimination and non-repression.

There is judicial support in Supreme Court case law for arguing the state has a positive obligation to facilitate the practical strategies and means of redressing and preventing blatant and systemic forms of discrimination and hate. I will evaluate the varying degrees of judicial support enunciated by the above-mentioned cases

on freedom of expression and hate propaganda (notably the arguments by Dickson C.J.C. in *R. v. Keegstra*). Affirmation of the state's positive obligation to implement just public policy initiatives is found in the Supreme Court cases including, *Schacter*, *Haig* and *Native Women's Association of Canada*.

Fundamental to the government's positive obligation to publicly redress perlocutionary hate propaganda is the judiciary's support for the existence of a guaranteed right of rational reply by representatives of disadvantaged groups targeted by perlocutionary expressive hate. Illocutionary hate conveyances must be assessed in the initial s. 2(b) evaluation of the structure of the particular form and function of expression and censored by the judiciary from s.1 analysis. The judiciary should explicitly indicate the rationale behind regulating illocutionary expression at their initial s. 2(b) analysis results from the particular irrational and harmful form and function characteristic of such conveyances. In other words illocutionary hate propaganda should be excluded from s. 2(b) as expression not worthy of constitutional protection. Further, analysis of the form and function of illocutionary hate necessitates an evaluation of the content of such expression when the harmful effect of its conveyance is instantaneous with its utterance. There must be a temporal disconnect between utterance and harm conveyed and experienced.

Drawing on those building blocks, this chapter explains how the Court's methodology in approaching s.2 (b) and s. 1 analysis could be modified to support "I & We" philosophy both to achieve stronger protection for expressive freedom and to promote principled and more consistent decision-making in the future. The Court's conceptualization of the right to freedom of expression in s. 2(b) analysis is based on an assumption of *absolute* content neutrality. Its *ad hoc* s. 1 review is

premised on the converse proposition that the content or value of the expression should determine the degree of constitutional protection it receives. If *Charter* methodology is to have any coherence this dichotomy must be resolved.

The key for judicial resolution of this dichotomy is a principled "I & We" approach which first analyzes perlocutionary hate expression in a context to develop a standard that focuses on the deliberative *values* at stake, rather than on the substantive *content* of particular expressive activity. If the production of criticism, satire, anger or resentment were a sufficient reason for judicial regulation much speech/expression would be regulatable simply because, out of the mainstream, it raises new ideas or is critical of the status quo. This would be an impermissible prohibition on socio-political and legal dissent.⁶ On the other hand, judicial analysis of illocutionary hate expression requires a shift in the conception of s. 2(b) from a purely formalistic and valueless provision that constitutionally validates and protects any expressive conveyance to a critical analysis of the form and function of expressive rights. Illocutionary expression too often silences its targeted victims and deepens inequality that diminishes, rather than contributes to, the vigorous debate and dialogue liberals' properly desire.

The Charter as a More Balanced Judicial Tool in Considering Individual and Group Rights and Responsibilities

Through the s. 1 Constitutional provision the Canadian judiciary has attempted to balance (albeit in an *ad hoc* formulation as it has developed in its jurisprudence) the *Charter's* communitarian potential and its liberal democratic values Canada hoped to avoid the contradictions of American doctrine.⁷ Under the American Constitution the balancing under the First Amendment⁸ takes place in

defining the scope of the right. In the United States (US) certain categories of speech were excluded from the First Amendment because limitations were impossible to reconcile with the text's absolute prohibition on abridgments of free speech. Unlike the US Constitution that unequivocally favours expressive rights, the *Charter* shows no preference for either side of the equation; nor does it address the relationship between the two. As a result, one of the most difficult questions the Supreme Court of Canada considered in the early years of *Charter* interpretation was whether the s. 2(b) guarantee could be restricted or whether limits could only be imposed under s. 1 analysis.

The Canadian judiciary's failure to recognize the principled illocutionary/perlocutionary distinction potentially allows the instantaneous harm conveyed by illocutionary hate propaganda to disseminate rationally uncontested. Harm in the form of perlocutionary hate is potentially permitted by the Court's failure to provide support for a principled deliberative framework or procedure (e.g. affirming a guaranteed right of reply from members of groups targeted by hate) to facilitate rational debate and potential public refutation of perlocutionary hate propaganda. These inadequacies, along with the Court's formalistic conception of the expressive guarantee in s. 2(b) of the *Charter*, prevent a consistent and principled judicial evaluation of racial and religious fairness and justice.

When liberal-minded justices insist they abhor racist speech but that it is private, and protected under s. 2(b)'s formalistic conception in the *Charter* regardless of its form and function they deny its public harm (and the unique harms to identifiable group members) and its ability to limit the human and civil rights of an entire targeted group.⁹ It is thus an individualistic fault based conception of harm

that can only call for potential individual redress. However, when hateful expression inflicts harm on an identifiable group a systemic remedy taking individual and group rights and responsibilities (going beyond concerns for individual autonomy, deliberative rights and notions of harm) into consideration is needed if practical and effective redress is to be achieved.

The main thrust of this liberal argumentation asserts that judges should not examine “the value of speech at issue, compare it against the harm of speech, and announce a judgement based on weighing value against harm.”¹⁰ The rationale for such a stance is that in any such judgements there is far too large a risk of bias and discrimination. It is misleading to not acknowledge the existence of the many laws that already (usually with justification in terms of some other cost) restrict free speech.¹¹ Furthermore, there is no automatic slide to more censorship if there is a principled and guiding rational structuring judicial discretion that delineates between perlocutionary and illocutionary expression.

The entrenchment of the *Charter* with the patriation of the Canadian Constitution in 1982 can be seen as a watershed for the authoritative expansion of judicial interpretation of rights, and their corresponding responsibilities.¹² The *Charter*, unlike the *American Bill of Rights*, explicitly sets the stage for a more balanced liberal and communitarian analysis with the potential for supporting “I & We” principles given its attention to multiculturalism, minority-language rights, necessary limitations and its strong language on equality. Before the entrenchment of the *Charter*, the courts’ ability to strike down legislation as unconstitutional rested largely on the grounds of improper jurisdiction (between the federal and provincial governments).¹³ Although a federal *Bill of Rights* has existed since 1960 and is still

in effect it has been ineffective since it is applicable only to actions of the federal government and lacks supreme authority (it was not entrenched).

Patrick Monahan gives support to the greater capacity of the Canadian judiciary relative to the US judiciary to evoke a generally more balanced constitutional interpretation (with communitarian sensitivities) and applications through the *Charter* maintaining "...it appears to invite the judiciary to "balance" the interests of individuals with those of the collectivity."¹⁴ Christopher Manfredi affirms Monahan's assertion of the expanding role of the Canadian judiciary stating that "[b]road, open-ended phrases like 'freedom of expression'...inevitably require that judges inject substantive content into vague constitutional guarantees."¹⁵

Monahan is one of the few constitutional scholars who expressly tries to avoid a discourse of absolutes characteristic of libertarianism and communitarianism when discussing the relations between the individual and groups as set out in the *Charter*. For example, in the language rights provisions of the *Charter* Monahan points out "the exercise of individual rights [is] expressly contingent on the presence of community."¹⁶ Although the *Charter* is fundamentally an individual-based guarantee of rights and freedoms (and their corresponding responsibilities) against the government it is important to recognize its capacity for more collective and proactive initiative on the part of the state.¹⁷

A critical analysis of the *Charter* with comparisons to particular aspects of the American *Bill of Rights* can give insight into the form and function of the constitutional "tools" judicially interpreted and applied. The *Charter* will necessarily play a fundamental part as an interpretive guidepost (in lending democratic and egalitarian justifications for rights and deliberative responsibilities to individuals and

groups in public fora) in any social, political and legal movement towards an “I & We” approach.

At a 1988 conference on the Canadian and American constitutional perspectives on group defamation, Kathleen Mahoney argued Canada's concept of equality has emphasized a more contextual and collective approach (more receptive in considering group interests and claims) rather than an individualistic one as evidenced in the US.¹⁸ A series of Canadian Supreme Court decisions over the last decade seems to affirm Mahoney's observation that the Canadian constitutional approach to freedom of expression is a more inclusive and broad approach. Canadian jurisprudence, although inconsistent in its conception of the values underlying s. 2(b) and its s.1 methodology, has *generally* been more aware of the uniquely harmful impacts of hate expression on the members of identifiable groups historically and presently discriminated against.

Before undertaking a critical examination of the Ontario Court of Appeal and Supreme Court of Canada case law on expressive freedom and its justifiable limitations it is essential to place their judicial reasoning in the context of the entrenchment of the *Charter*. Since 1986 the Court has considered limits on offensive communications including hate propaganda,¹⁹ the analogous case of obscenity²⁰ and has addressed the constitutionality of restrictions on false²¹ and discriminatory²² expression. Despite the inconsistencies and inadequacies of the Canadian approach examined later in this chapter, the Canadian judiciary has avoided the more limited individualistic view of rights and responsibilities that USSC decisions have generally emphasized in weighing competing claims as though group concerns were non-existent and ignoring the social realities in which they

operated.

Manfredi effectively describes, in a manner consistent with an “I & We” approach, what ought to be an integral part of the Canadian judiciary’s purposive approach to interpretation of all *Charter* rights. Manfredi argues for a more tolerant and participatory society maintaining that, “...the essence of this doctrine is the good of the individual is not conceivable apart from some regard for the good of the whole.”²³ In my view, the perceived liberal capacity of the *Charter* (taking communitarian sensibilities into account) gives some explanation for its initial adoption and on-going popularity especially among public and private interest groups concerned with equality and liberty.

A major socio-political and ideological difference can be seen in Canada’s rejection of the individualist “melting pot” approach to cultural diversity adopted in the US in favour of a relatively collective “mosaic” approach. One of the objectives of the drafters of the *Charter* was to develop a bilingual, multicultural country and pluralistic mosaic.²⁴ As a result, *Charter* commitments are different in many respects from the commitments of the American *Bill of Rights*.

Contrasting the Proactive Canadian and Reactive American Constitutional Approaches to Freedom of Expression/Speech

The *Charter’s* goals of greater substantive equality and the protection of individual and group rights and responsibilities encompass Constitutional provisions indicating interpretation is to be supportive of a multicultural and tolerant society. The *Charter* is not neutral on equality; rather, there is a proactive commitment to ending discrimination and oppression. The argument that hate propaganda may be constitutionally regulated in a manner supportive of “I & We” principles engages

sections 15²⁵ and 27²⁶ of the *Charter*.

Canadian adjudication consistent with its contextual approach in balancing freedom of expression with other democratic ideals, included as s. 1 of the *Charter*, an explicit statement giving the government and courts power to impose justifiable restrictions.²⁷ These restrictions would be "...subject only to such reasonable limits as can be demonstrably justified in a free and democratic society".²⁸ The American *Bill of Rights* has no similar balancing section supportive of communitarian principles. Justice Bertha Wilson quite pointedly criticizes the general American judicial approach arguing the Court looks to the "framers intent"²⁹ to constitutional interpretation (implying a conservative and absolutist rights interpretation).

The libertarian "framers intent" approach evokes the notion that laws should be interpreted in light of what we know about the intended meaning and purpose of the drafters. Conversely, the Canadian judicial approach has evidenced (in at least some of its adjudication) a "contextually purposive approach" (moderate liberalism with communitarian sensitivities) to constitutional interpretation. Justice Wilson describes this approach as based on the premise that the *Charter's* purpose is to protect from an overbearing majority those typically "shut out" of the political process including the poor, oppressed, powerless and racial minorities.³⁰ "I & We" philosophy argues that, ultimately, the true test of rights and responsibilities will be how well they serve the less privileged, discriminated against and least popular segments of society.

The American guarantee of freedom of speech in the First Amendment of its *Bill of Rights* has been defined to regard inequality as a distinction: a differentiation indifferent to whether dominant or subordinated groups are hurt or helped. The

“marketplace of ideas” approach, as succinctly expressed by Justice Oliver Wendell Holmes, holds “the best test of truth is the power of thought to get itself accepted in the competition of the market.”³¹ There is a faith that truth will prevail if left alone, often expressed in the openly competitive laissez-faire model taken from bourgeois economics and applied to the expressive “marketplace of ideas” metaphor. The marketplace becomes the battlefield when we are assured truth will prevail while grappling in an encounter with falsehood.

The problem with viewing a democratic society’s public forum as an economic marketplace is that power and context differentials clearly skew opportunities to participate for some individuals and groups. When hate propaganda is at issue exclusion, inequality, harm and political poverty increases to those disadvantaged individuals and groups targeted.³² The problem arises in the reality that some groups and individuals (especially those historically discriminated against) may be blatantly or systemically disadvantaged and prevented from having their views heard or responded to because of hate propaganda.

Moreover the *Charter* speaks of “freedom of expression” not freedom of speech as in the American constitution. This freedom is not accorded any special priority since it is but one of many values given a place in the *Charter*. The most important substantive provision relevant to the egalitarian approach (affirmative of relative communitarian principles to freedom of expression) is s. 15, the equality section. It actually contains four equality guarantees, an open-ended list of prohibited grounds and an affirmative action provision to allow for beneficial programs for disadvantaged groups or individuals.

The multicultural provision in s. 27 is meant to assist in the adjudication of

Charter issues as an interpretive guide. The Canadian *Charter* explicitly emphasizes multiculturalism is an important Canadian goal. Section 27 provides that the Charter “shall be interpreted in a manner consistent with the preservation and enhancement of the multi-cultural heritage of Canadians.”³³ This provision is particularly important when courts are required to balance the freedom of expression and corresponding responsibilities of hate propagandists against the multiculturalism ideal and the powerful equality provision in s. 15 of the *Charter*.

The Canadian judiciary have regarded themselves to a degree so far uncharacteristic of the US as giving meaning to more collective group rights and liberties that may even transcend national boundaries. Canadian courts have drawn extensively from the legal materials of other countries (including the US) and from sources of international law (e.g. the United Nations Convention on the *Elimination of All Forms of Racial Discrimination*).³⁴ The Canadian Supreme Court has said when values such as equality and freedom from racism enjoy status as international human rights they will generally be ascribed a weightier degree of importance under the s. 1 analysis.³⁵

Judicial Support of the State's Positive Obligation to make Freedom of Expression Effective and Consistent with an “I & We” Deliberative Democracy

A more balanced and egalitarian deliberative democracy goes beyond formal liberal democratic notions of public participation in the “marketplace of ideas” to facilitate socio-political, economic and legal conditions facilitative of Bohman’s “adequate public functioning.” It necessitates a proactive impetus and positive obligation on the state, individuals and groups to establish and affirm egalitarian principles and public fora, in the context of redressing hate propaganda in its

various guises (e.g. anti-Semitism, bigotry and racism) and expands deliberation among a diversity of rational interlocutors. The criminal prosecution of hate mongers reassures members of the target groups their equality is affirmed and the ideas of the hate mongers are publicly refuted and possibly rejected. Chief Justice Dickson in *R. v. Keegstra*, a 1992 Supreme Court of Canada case concerning hate propaganda, stated that, "...hate propaganda legislation and trials are a means by which the values beneficial to a free and democratic society can be publicized."³⁶ In cases such as *Keegstra* the Supreme Court of Canada is clear that if we are to live in a society without discrimination the harm of hate speech must be proactively redressed.³⁷

The Court in *Schacter v. Canada*, a 1992 case, said s. 15 of the *Charter* is indeed a hybrid of positive and negative protection. Moreover, a government may be required to take positive steps to ensure the equality of peoples or groups who come within the scope of s. 15.³⁸ I argue it might well be in the context of a particular equality claim those positive steps may involve the provision of means of expression to certain groups to make "multicultural pluralism" a real option available to all citizens. Furthermore, the Supreme Court in the 1993 case *Haig v. Canada* maintained a situation might arise in which, in order to make a fundamental freedom meaningful, a posture of restraint would not be enough. In the Court's view a positive government action might be required (i.e. legislative intervention aimed at preventing certain conditions which muzzle expression, or ensuring public access to certain kinds of information).³⁹

Sopinka J., writing in *Native Women's Association of Canada v. Canada*, considers that the decision in *Haig* leaves open the possibility where (in certain

circumstances) positive government action may be required in order to make freedom of expression meaningful.⁴⁰ In circumstances where government does provide a deliberative forum, it must not do so in a discriminatory fashion contrary to the *Charter*. L'Heureux-Dubé J. (also writing in *Native Women's Association*) argues that *Haig* is consistent with a broad approach to the interpretation of s. 2(b) of the *Charter*, in that it underlies the possible consequences of unequal financing of viewpoints and the importance of promoting a variety of views.⁴¹ It is also recognized in *Haig* "that a philosophy of non-interference may not in all circumstances guarantee the optimal functioning of the 'marketplace of ideas'".⁴²

In *Haig*, Dubé J. argues in certain circumstances funding or consultation may be mandated by the Constitution by virtue of the fact that when the government does decide to facilitate the expression of views it must do so in a manner that is mindful of the *Charter*.⁴³ Dubé J. adds it is in this respect one must note that the circumstances in which the government may be held to a positive obligation in terms of providing a specific platform of expression ultimately depends on the nature of the evidence presented by the parties.⁴⁴ Recognition of the need for positive government intervention to enhance communicative opportunities may also be developed under s. 1 of the *Charter* (consistent with "I & We" philosophy).

"I & We" philosophy builds upon the above case law (i.e. cases including *Schacter*, *Haig*, and *Native Women's Association*) going further than Supreme Court of Canada jurisprudence. It indicates the government may indeed have positive obligations to facilitate deliberative access and opportunities as well as a guarantee a right of reply when perlocutionary hate expression is at issue. Accordingly, this will require a variety of enabling resources (e.g. financial, information, publicity and

organizational) by government to proactively redress and prevent both blatant and systemic discrimination.

**Foundations for A Balanced Judicial Approach to Expressive Freedom:
Section 1 and The Oakes Test**

The existence of s. 1 of the *Charter* is affirmative of a more balanced approach, which partly accounts for the distinct judicial analytical frameworks applied by the Canadian and American judiciaries. The presence of s. 1 in the *Charter* can require (if it is legally proven the right or freedom violated is within the *Charter's* protection) the analysis to be split up into two distinct stages.⁴⁵ Section 1 embodies the idea that constitutional rights in the *Charter* are not absolute. The first stage requires a Court to determine the scope and content of the right and decide whether the right has been breached. In the second stage, the court determines whether any limitation on the right can be reasonably justified (under the civil standard, namely, proof by a preponderance of probability) in the context of a free and democratic Canadian society.⁴⁶

An "I & We" conception of s. 2(b) holds that when illocutionary hate expression is at issue it is precisely the form and function of the conveyance that is necessarily at issue. Moreover, hate expression in a perlocutionary form necessitates the resources to enable guaranteed representation from members of groups targeted to rationally rebut hateful messages in deliberative fora. "I & We" philosophy argues s. 1 provides a balanced conceptual framework for judicially determining whether hateful expression should be permitted. "I & We" philosophy argues that judicial discretion is required along with a principled methodology to delineate whether expressive conveyances ought automatically receive the

constitutional protection of s. 2(b) merely because it conveys meaning.

The two tiered test from the 1986 Supreme Court case *R. v. Oakes* asks firstly, if the state has an objective of a “pressing and substantial” nature to limit a *Charter* right.⁴⁷ It is necessary that an objective relate to concerns which are pressing and substantial in a free and democratic society before it can be characterized as sufficiently important. Second, a proportionality requirement attempts to consider and balance individual and group interests, rights and responsibilities, asking if the means are rationally connected to the ends.⁴⁸ Chief Justice Dickson affirms a balanced approach constitutive of the proportionality test asserting

although the nature of the...test will vary depending on the circumstances, in each case courts will be required to balance the interests of society with those of individuals and groups.⁴⁹

If a rational connection is found the Court asks if there has been a minimal infringement of the right in achieving the objective through the means chosen.⁵⁰ Chief Justice Dickson, writing in the majority in *Keegstra*, refers to the Court’s discussion in *Oakes* (supportive of balancing liberal and communitarian concerns) for “the ideals that inform our understanding of a free and democratic society.”⁵¹

Chief Justice Dickson, writing in *Oakes*, supports a balanced deliberative approach in considering both individual and group rights and responsibilities stating “it may become necessary to limit rights and freedoms in circumstances where their exercise would be inimical to the realization of collective goals of fundamental importance.”⁵² This was in significant part due to the “interpretive guide post” influence of s. 15 of the *Charter*. As Dickson C.J.C. has observed, however, any functional democracy requires both freedoms and internal limits, in order to balance

social forces of order and dissent, of the individual and collective will, and of certainty and flexibility:

[T]he values and principles essential to a free and democratic society...I believe embody, to name but a few, respect for the inherent dignity of the human person, commitment to social justice and equality, accommodation 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...The rights and freedoms...are not, however, absolute.⁵³

The recognition that the rights of groups to be free from hate conveyances can outweigh the expressive rights of an individual marks a significant development (and first step towards an “I & We” philosophy) in freedom of expression jurisprudence, in the context of hate propaganda. The Court’s recognition in *Keegstra* that boundaries between individual and group rights and responsibilities must be approached in a more balanced way (rejecting US First Amendment absolutism⁵⁴) demonstrates the *Charter’s* potential to propose more egalitarian and fair equality of opportunity based relationships between the state, deliberative fora and its citizens.

The “*Irwin Toy Test*”: An Imbalance of Judicial Discretion in s. 2(b) Analysis

Although not directly relating to the issue of limits on expression in hate propaganda, the 1989 *Irwin Toy Ltd. v. Quebec (Attorney General)* case was the first Supreme Court case to consider the scope of freedom of expression and develop an unprecedented approach to s. 2(b) and s. 1 analysis.⁵⁵ At issue was the validity of a Quebec law that banned all commercial advertising aimed at children under 13 years of age.⁵⁶ The results of *Irwin Toy* would have very significant indirect consequences for limits on freedom of expression when hate propaganda is at issue for disadvantaged individuals and groups. Although not addressing the issue

of hate propaganda the ruling in *Irwin Toy* is a “turning point” in the Court’s methodology in considering what constitutes expression under s. 2(b) of the *Charter* and in its s. 1 analysis.

In *Irwin Toy* the Court held in broad, abstract terms activity which intends to convey a meaning is *prima facie* protected by s. 2(b) and proposed an unqualified principle of freedom, stating “everyone can manifest their thoughts, opinions, beliefs, indeed all expressions of the heart and mind, however unpopular, distasteful or contrary to the mainstream.”⁵⁷ The Court’s definition of expressive freedom was subject to an exception for violent forms of expression.⁵⁸ By declaring, “we prize diversity of ideas...for their inherent value,” the Court effectively rejected the distinction between valuable and valueless expression.⁵⁹ In contrast, in the case of illocutionary hate propaganda “I & We” philosophy maintains such expression is inherently valueless as rationally irrefutable.

Irwin Toy’s definition of expression has had significant but unforeseen consequences for s. 2(b) and its role in the s. 1 analysis. Ironically, the Court’s overgenerous interpretation of the guarantee rendered its underlying values irrelevant. In building a foundation for s. 2(b), *Irwin Toy* explained that expressive freedom is prized because it promotes values of democratic government, truth seeking and self-realization.⁶⁰ By including all attempts to convey any meaning, however, *Irwin Toy* truncated the entitlement side of the balancing equation between expressive rights and protection of “vulnerable group” interests and inadvertently excluded the right’s underlying values from the analysis.⁶¹ Apart from its violent forms exception, *Irwin Toy* simply asks whether activity is sufficiently communicative to be considered expression under s. 2(b).⁶²

Irwin Toy failed to fit s. 2(b)'s values into the *Charter's* structure of analysis. *Irwin Toy* and *Oakes* resulted in the creation of abstract standards that provided little or no guidance for resolving concrete questions about the scope of expressive freedom. *Irwin Toy's* unqualified definition of the right created a further complication: the suggestion that all expressive activity is inherently valuable conferred a kind of formal absoluteness on s. 2(b) that made weighing other values against it a potentially awkward, inconsistent and unprincipled exercise. Rather than solve those problems, the majority upheld the prohibition on children's advertising by lowering the standard of review under s. 1.

Justice McIntyre's dissenting remarks that the Court's decision represented a "small abandonment of a principle," but one of vital importance, would be prescient.⁶³ McIntyre J. also declared the principle that freedom of expression should not be suppressed, "except in cases where urgent and compelling reasons exist, and then only to the extent and for the time necessary for the protection of the community."⁶⁴ *Irwin Toy* volunteered a definition of expression and modified the *Oakes* test without providing a principled blueprint for s. 2(b) adjudication.

The consequence of the *Irwin Toy* case developing a "test" to decide when expression is protected under s. 2(b) represented a departure from earlier lower court decisions (hereby presuming initial constitutional inclusion in s. 2(b) regardless of principle, form and function). *Irwin Toy* permits too much hate expression in the form of illocutionary hate conveyances in the s. 1 analysis. Automatic constitutional protection of all expression regardless of its form and function is problematic if there is no possibility of a rational response (i.e. it is illocutionary hate propaganda) and its expressed harm is instantaneous (i.e. there is no temporal separation between

conveyance and affect). Permitting such expression weakens the purposive guarantees enshrined in s. 2(b).

Judicial discretion ought to be employed (I argue taking “I & We” philosophy into account) in considering whether an expressive conveyance can reasonably be determined to be illocutionary or perlocutionary in form and function prior to inclusion in s. 2(b)’s constitutional protection. Judicial balancing of the rights and responsibilities of speaker and listener before the s.1 analysis would facilitate a more efficient and effective use of resources, (e.g. judicial, monetary and qualitative) by publicly excluding, illocutionary hate conveyances. “I & We” philosophy argues for a modification of the *Irwin Toy* test whereby hate speech ought to be considered a form of violent speech, a verbal assault on particular groups constituting a form of violence, an attack (i.e. hate expression incapable of being rationally responded to and falling outside of s. 2(b) protection) that has violent overtones.⁶⁵

**Adjudication Affirmative of Balanced Liberal/Communitarian Principles:
Zundel in the Ontario Court of Appeal**

One such case that promoted a purposive approach supportive of a balanced “I & We” philosophy, in considering notions of individual and group harms from hate propaganda, was the *Zundel* (1987) Ontario Court of Appeal decision.⁶⁶ Howland C.J.O. in the Ontario Court of Appeal developed this purposive approach citing Dickson C.J.C. in *Big M Drug Mart* (1985) stating

the meaning of a right or freedom guaranteed by the *Charter* was to be ascertained by analysis of the *purpose* of such a guarantee; it was to be understood, in other words, in the light of the interests it was meant to protect.⁶⁷

Ernst Zundel was convicted under s. 177 [now s. 181]⁶⁸ of the Criminal Code (C.C.)

the “spreading of false news”⁶⁹ provision for publishing so-called Holocaust revisionist literature asserting that the Holocaust was a hoax. The essential nature of the offence created by s. 177 reads as follows:

every one who wilfully publishes a statement, tale or news that he knows is false and that causes or is likely to cause injury or mischief to a public interest is guilty of an indictable offence and is liable to imprisonment for two years.⁷⁰

Although s. 177 was at the time ruled constitutional; Zundel's sentence was quashed by the Ontario Court of Appeal in 1987 and a new trial was ordered.⁷¹ Zundel was convicted in trial court for writing a pamphlet containing false and harmful anti-Semitic propaganda with “no belief in its truth.”⁷² The Ontario Court of Appeal threw out the conviction on the ground that the standard of knowledge had been too low.⁷³ Zundel could only be convicted, they held, if he ‘knew’ his pamphlet was false, not merely, if he was reckless.⁷⁴

Zundel's writings employed many of the techniques of the hate propagandist (e.g. by a selective presentation of facts, appealing to supposed scholarly authorities and research and underlying everything- blatant lying)⁷⁵ to couch his hate in the façade of critical scholarship on the Holocaust. The irrational material in the pamphlet amounted to little more than illocutionary epithets and hateful conveyances promoting gross lies. The court was faced with considering Zundel's rights and responsibilities to freedom of expression and balancing them with the rights to dignity, mutual respect and fair equality of opportunity to participate in society of those targeted in his hate propaganda.

Howland C.J.O. states that freedom of expression must necessarily consider the corresponding rights and freedoms of other persons.⁷⁶ Further, it contemplates the existence of a social order in which other persons must not be denied similar

rights.⁷⁷ Howland C.J.O.'s balanced approach to s. 2(b) adjudication is evidenced in his citation of Dickson C.J.C.'s judgement in *Big M Drug Mart* stating

freedom means that, subject to such limitations as are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others, no one is to be forced to act in a way contrary to his beliefs or his conscience.⁷⁸

In this appeal it is not necessary to give an all-embracing definition of "freedom of expression" but merely to decide whether "spreading false news" within s. 177 of the Code is encompassed within that fundamental freedom.⁷⁹

A court operating under "I & We" principles would prohibit all hateful expression falling within an illocutionary form at the initial analysis of the purpose of s. 2(b) values. Hateful expression in a perlocutionary form and function should fall under s. 2(b) constitutional protection, so long as there existed "I & We" public fora where representatives from the targeted group could respond. The Ontario Court of Appeal, however, had no such political guarantees of public deliberative fora and its underlying "I & We" principles including a guaranteed right of response. In their absence, I maintain the court correctly rejected Zundel's illocutionary hate propaganda as expression worthy of s. 2(b) protection. Such illocutionary hate expression was not worthy of being constitutionally protected because its form and function negated the possibility of rational response and the harm it conveyed to the group it targeted was instantaneous with its dissemination.

Zundel's lawyer, Doug Christie, argued s. 181 was a violation of his client's s. 2(b) right to freedom of expression.⁸⁰ Zundel's defence at trial was that he had an honest belief in the truth of what was written in the pamphlet.⁸¹ The court rejected this argument approaching the issue in a more balanced manner considering competing values, rights and responsibilities, entailing a compromise

drawn between notions of individual liberty and the group's collective welfare. Essentially what the court said was some types of speech ought not be considered as expression under s. 2(b)'s protection.

The court reasoned that not all speech should receive Constitutional protection especially when other values such as substantive equality, freedom from discrimination and protection of the dignity and opportunity of minorities are at stake.⁸² The result in the *Zundel* Ontario Court of Appeal case was that no such purpose under any component of the contextual *ad hoc* approach was served under s. 2(b). The Court asserted it is the claimant's burden of proof to demonstrate their particular form of expression meets the scope of purposes in s. 2(b). "I & We" philosophy affirms the spirit of the Court's reasoning and its decision in the *Zundel* Ontario Court of Appeal case, as one that should inform judicial discretion in analyzing whether particular expressive conveyances fall within the protection of s. 2(b) before any s. 1 balancing considerations are employed.

Historically, there have been three broad purposes for the protection of freedom of expression, which have served as useful judicial guideposts of consideration.⁸³ This "purposive approach"⁸⁴ has included generally an important democratic character calling for expression that promotes and enhances democratic ideals. Another historical purpose has been the search for truth and rationality in freedom of expression.⁸⁵ A third approach has entailed an artistic purpose striving for the self-fulfilment of individuals intellectually, spiritually and physically.⁸⁶ In accordance with the its contextual *ad hoc* approach the court argues

it is difficult to see how such conduct would fall within any of the previously expressed *rationales* for guaranteeing freedom of expression. Spreading falsehoods knowingly is the antithesis of seeking truth through the free exchange of ideas. It would appear to have no social or moral value which

would merit constitutional protection. Nor would it aid the working of parliamentary democracy or further self-fulfilment.⁸⁷

I maintain Zundel's revisionist intent to discredit the historical record and human experience of the Holocaust had no reasonable or rational search for 'truth'. Nor did Zundel intend a political, social, moral, artistic or other purpose other than to wilfully and intentionally discriminate and cause harm especially among Jews (a historically discriminated-against group). Rather, Zundel's expression was hate mongering of lies, selective presentation of "facts" and use of pseudo-science derived from statements of supposed expert authorities manipulated to obscure the historical record. An "I & We" philosophy recognizes the unique amplification of harm to Jews as a historically discriminated against group when anti-Semitic expression is produced and reproduced.

The *Zundel* decision at the provincial appeal level had an important impact on the nature of Canadian trial process (affirming a more balanced "I & We" approach) by shifting the onus onto the claimant to prove their constitutional rights had been violated. Only then would the government apply s. 1 in an attempt to justify limitations. For the purposes of taking proactive measures facilitating "I & We" principles to redress blatant and systemic discrimination, the legally verifiable intent of the hate propagandist is secondary to preventing and regulating its dissemination. As with systemic forms of discrimination the priority is stopping and deconstructing the structures producing and reproducing hate propaganda whether intentional or not.

A Substantive Conception of Individual and Group Harm in *Andrews*

A substantive conception of harm (as defined by the Supreme Court) played a central role in Regina v. Andrews (1990)⁸⁸ in affirming the values of fair equality

of deliberative opportunity for rational interlocutors and multicultural diversity. The appellant, Mr. Andrews, was the leader of a racist and bigoted nationalist political organization, which published a threatening bi-monthly pamphlet, the *Nationalist Reporter*.⁸⁹ Numerous materials from the appellant's home were seized including copies of a Holocaust denying pamphlet, and racist and bigoted mimeographed sticker cards.⁹⁰

Andrews was charged under s. 319(2) of the C.C. for "unlawfully communicating statements other than in private conversation, which wilfully promote hatred against an identifiable group."⁹¹ Thus, the constitutional question considered was whether s. 319(2) infringed freedom of expression in s. 2(b), and if so, whether it could be upheld under s. 1 as a reasonable limit demonstrably justified in a free and democratic society.⁹² Andrews was convicted at trial and his appeal to the Ontario Court of Appeal was dismissed. At the Court of Appeal Andrews argued s. 319 of the C.C. was unconstitutional as it infringed the s. 2(b) freedom of expression guarantee of the *Charter*.⁹³ The majority of the Court of Appeal held the wilful promotion of hatred did not come within s. 2(b) and accordingly did not violate the *Charter*.⁹⁴ On further appeal to the Supreme Court, the majority held while s. 319(2) infringes s. 2(b), it is a reasonable limit within s. 1 of the *Charter*.⁹⁵

In approaching the s. 1 inquiry, Cory J. A. in the Supreme Court referred to the consensus in the international community stating "hate propaganda should be suppressed by the criminal law; a consensus evident both in international human rights conventions and in the domestic law of many democratic countries."⁹⁶ Recognizing the crucial role played by expression, Mr. Justice Cory, in the Ontario Court of Appeal of *Andrews*, felt the *Charter* must serve to protect the expression

of new and different ideas no matter how upsetting those ideas may be to identifiable groups.⁹⁷

Expanding the diversity of issues and ideas open for deliberation by rational interlocutors is one of the fundamental aims in form and function of a more inclusionary and critical public fora. Similarly, the judiciary should not, in Ackerman's words, be "conversationally restrained" in its approach to considerations of perlocutionary hate propaganda. Cory J. A. maintained freedom of expression was never intended by the framers of the *Charter* to be absolute. Citing the s. 2(b) interpretation of the Ontario Court of Appeal in *Zundel*, Cory J. A. argued the Court must necessarily have regard to the corresponding rights and freedoms of other persons.⁹⁸ Moreover, s. 2(b) contemplates the existence of a social order in which other persons must not be denied similar rights.⁹⁹

At the same time, Justice Cory was sensitive to the importance of enabling Canadians who are members of identifiable groups (e.g. by race, ethnicity, religion, nationality etc.) to carry on their lives without being victimized by "the deliberate, vicious promotion of hatred against them."¹⁰⁰ In support of this view, he quoted extensively from the 1966 *Report of the Special Committee on Hate Propaganda in Canada* (the Cohen Commission).¹⁰¹ Justice Cory noted that although the Cohen Commission recognized the necessity of a strong presumption against limiting free expression it permitted restraints on expressive activity in order to suppress hate propaganda. Such potential limits (on hateful expression intended to harm and exclude) were seen to be necessary and justifiable in a multicultural and pluralistic nation such as Canada.¹⁰²

In commenting specifically on the scope of s. 2(b), Justice Cory maintained

the *Charter* demanded a wide and liberal interpretation (supporting *Irwin Toy's* approach to s. 2(b)) of free expression and preferred to gauge the reasonableness of a government regulatory provision under s. 1.¹⁰³ Cory J. A. noted that although the decision in the Ontario Court of Appeal of *Zundel* had excluded from the scope of s. 2(b) intentional spreading of false news such exclusion was explainable because the communications at issue in *Zundel* did not fall within any of the rationales for guaranteeing freedom of expression.¹⁰⁴

In contrast, a conviction under s. 319(2) does not require proof an individual knows his or her communications to be false. Cory J. A. rejected the Alberta Court of Appeal's contention in *R. v. Keegstra* that s. 319(2) could not be saved under s. 1 because it did not require proof that acceptance of the hate monger's message had caused actual harm, or the serious risk of it to the identifiable group targeted.¹⁰⁵ Hence it is the effects, the consequences of such hate expression (whether blatant or more subtle and systemic), that is crucial in the rational behind s. 319(2). In the trial level court of *Andrews*, the judge found that the appellants were expressing a sincerely held belief.¹⁰⁶ Justice Cory concluded "offensive as it may seem", the activity caught by s. 319(2) falls within the purview of s. 2(b).¹⁰⁷ Supportive of "I & We" principles Cory J.A. maintained s. 27 of the *Charter* strongly affected the s. 1 analysis stating:

the *Charter* has recognized and emphasized the importance of our background by providing that the *Charter* itself is to be interpreted so as to preserve and enhance our multicultural heritage. The clause coupled with the Canadian multicultural heritage gives the strongest possible direction to apply s. 1.¹⁰⁸

Cory J.A. concluded that s. 319(2) is supported by a valid s. 1 objective.¹⁰⁹

Instrumental in reaching this conclusion was his rejection of the argument that the

dissemination of hate propaganda represents little or insignificant harm to society and targeted groups in a unique manner (a substantive difference with American libertarian jurisprudence).¹¹⁰ He was unable to discount the danger presented to individuals and groups targeted by such expression, noting s. 319(2) was introduced into the C.C. only after extensive study by the Cohen Commission.¹¹¹ Cory J.A. maintained the public and wilful promotion of hatred against identifiable groups is the very antithesis of all essential values behind the aim of s. 319(2).¹¹²

In the concluding part of his judgement, Cory J.A. in the Ontario Court of Appeal in *Andrews*, explained why his position regarding s.1 differed from of the Alberta Court of Appeal in *Keegstra* (a case concerning the regulation of hate propaganda).¹¹³ Most importantly, he rejected the Alberta court's contention that s. 319(2) could not be saved under s. 1 because it did not require proof acceptance of the hate monger's message had caused *actual* harm, or the serious risk to the identifiable group.¹¹⁴ In the view of Cory J.A., much of the C.C. is aimed at crime where no harm has actually been occasioned.¹¹⁵ Cory J.A. observed the scope of the impugned provision was restricted because it did not apply to statements communicated in private.¹¹⁶ Moreover, there was a stringent *mens rea* component requiring a conscious purpose of promoting hatred, or foresight its promotion was morally certain to result from the communication.¹¹⁷

Judicial Considerations of the Power Relation of Speaker, Audience and the Context of Expressive Dissemination

A key case in the contextual development of the Canadian interpretation and balancing of expression principles in the context of hate propaganda occurs with the 1990 *R. v. Keegstra* case.¹¹⁸ This was the first case to confront expressive

guarantees with equality requirements under the *Charter*.¹¹⁹ James Keegstra was a high school teacher in Alberta whose teachings attributed various evil qualities to Jews.¹²⁰ An asymmetrical power imbalance existed in that Keegstra, as an adult, and high school teacher had authority over and significant influence on his teenaged students (a captive audience) taught to respect and accept their teacher's guidance. According to Keegstra, the Holocaust was a myth created by Jews to gain sympathy.¹²¹ Keegstra was dismissed as a teacher in 1982 and in 1984 he was charged under s. 319(2) (then s. 281.2(2)) of "unlawfully promoting hatred against an identifiable group," and making anti-Semitic statements to students.¹²²

Keegstra appealed to the Court of the Queen's Bench in Alberta seeking an order quashing the charge on a number of grounds primarily arguing s. 319(2) unjustifiably infringed his s. 2(b) freedom of expression *Charter* rights and the reverse onus for proving truth in s. 319(3)(a) violated his right to be presumed innocent.¹²³ The court dismissed his application and Keegstra was tried and convicted. On appeal in 1988 to the Alberta Court of Appeal raising the same *Charter* issues the court unanimously accepted his arguments.¹²⁴ It is from this decision that the crown appealed to the Supreme Court of Canada.¹²⁵ The majority of the Court held that the appeal should be allowed and accordingly ss. 319(2) and 319(3)(a) of the C.C. were deemed constitutional.¹²⁶

The contextual approach was not assigned a concrete role in the s. 1 analysis until Chief Justice Dickson's majority Supreme Court opinion in *Keegstra*. In *Keegstra* the C.C.'s prohibition against hate propaganda raised two questions about *Irwin Toy*. The first was whether hate propaganda could be excluded from the *Charter* under the judicially created exception to s. 2(b) for violent forms of

expression.¹²⁷ Rather than exclude any form of hate expression from the *Charter*, Dickson C.J.C. chose to support *Irwin Toy*'s decision that s. 2(b) protects all expression.¹²⁸ Stating it is "beside the point"¹²⁹ that hate propaganda is obnoxious, he held that "the context of expression is irrelevant in determining the scope of the guarantee."¹³⁰ *Keegstra* raised a second question about *Irwin Toy* and its two levels of review under s. 1.¹³¹ *Irwin Toy* diluted *Oakes* by reading a reasonableness requirement into key parts of the test. In doing so, it maintained s. 1's standard of justification could be relaxed in cases posing difficult questions about social and economic policies or involve legislation that seeks to protect the vulnerable.

At the outset of Dickson C.J.C.'s analysis he announced that it is "dangerously misleading to conceive of s. 1 as a rigid and technical provision,"¹³² and repeated the warning that a "rigid or formalistic approach must be avoided."¹³³ Although the function of s. 1 is justification of limitations, he held the Court should consider "the right or freedom at stake and the limit proposed by the state."¹³⁴ Thus, a "proper judicial perspective" on the synergetic relation between the values underlying the *Charter* and the facts of a case could be attained by treating s. 1 as a "gauge which is sensitive to the values and circumstances particular to an appeal...."¹³⁵ Through this link between facts and values at stake in particular cases and the contextual approach, the content of expressive activity entered the s. 1 analysis in *Keegstra*.

Chief Justice Dickson asserted Parliament has recognized the substantial harm that can flow from hate propaganda and in trying to prevent the pain suffered by target group members and to reduce racial, ethnic and religious tension in Canada, has decided to suppress the wilful promotion of hatred against identifiable

groups.¹³⁶ Chief Justice Dickson argued there is harm done to members of the target group evidencing “indisputable emotional damage caused by words, which may be of grave psychological and social consequence...a response of humiliation and degradation from an individual targeted by hate is to be expected.”¹³⁷ “I & We” philosophy supports Dickson’s statement that “a person’s sense of human dignity and belonging to the community at large is closely linked to the concern and respect accorded to the groups to which he or she belongs.”¹³⁸ Dickson C.J.C. maintains, “open participation must involve to a substantial degree the notion all persons are equally deserving of respect and dignity.”¹³⁹

Emphasizing the importance of s. 319(2) as a legislative tool to combat hate propaganda Dickson C.J.C. states

few concerns can be as central to the concept of a free and democratic society as the dissipation of racism, and the especially strong value, which Canadian society attaches to this goal, must never be forgotten in assessing the effects of an impugned legislative measure.¹⁴⁰

Dickson C.J.C. argues s. 319(2) of the C.C. does not merely regulate the form and tone of expression, it strikes directly at its content and at the viewpoints of individuals, in widely diverse domains, whether artistic, social or political.¹⁴¹ The entire Court agreed the objective of the legislation was indeed pressing and substantial in a society that prides itself on tolerance and the respect for human dignity.¹⁴²

The majority held there is a rational connection between the legislation at issue and the goal of reducing harm to members of identifiable groups subject to racism. Moreover, the majority concluded the law minimally impaired free speech rights since the proscription did not cover private communications and only applied where stringent subjective *mens rea* of wilfulness was met.¹⁴³ Under the first branch

of *Oakes*, Dickson C.J.C. argued equality and multiculturalism are sufficiently important objectives to justify limits on expressive freedom. Only after reaching this conclusion did the Chief Justice turn to s. 2(b).¹⁴⁴

At that stage, Dickson C.J.C. went on to consider s. 2(b)'s values under the second branch of *Oakes* the "proportionality" test. There, Keegstra employed the contextual and *ad hoc* rationales, which are intended to protect expressive freedom in order to dilute the requirements of proportionality and thereby justify the limit. On commencing his analysis, the Chief Justice conceded that he had "commented at length upon the way in which the suppression of hate propaganda furthers values basic to a free and democratic society."¹⁴⁵ Once having made that observation, he echoed Wilson J.'s concerns in *Edmonton Journal*¹⁴⁶ about placing a premium on abstract principles and stated context was necessary under s. 1 to offset the "high value" s. 2(b) places on freedom of expression in the abstract."¹⁴⁷

Contextualizing abstract principle meant examining "the expression at stake in a particular case"¹⁴⁸ to determine whether its content is at the "core" of s. 2(b)'s values or is only "tenuously connected" to them.¹⁴⁹ After creating a "core-values" analysis, Dickson C.J.C. found hate propaganda was of limited importance when measured against free expression values,¹⁵⁰ because it "contributes little to the aspirations of Canadians or Canada" and fails to promote the guarantee's values of truth-seeking, self-realization, or democratic debate.¹⁵¹ Indicative of the Court's *ad hoc* approach Dickson C.J.C. argued limits on expressive activity that "strays some distance from the spirit of s. 2(b)" might be easier to justify."¹⁵²

After declaring the Court should reject the premium s. 2(b) places on abstract principle, the Chief Justice cited those very same principles to lower the standard

of review under s. 1. In this way, a definition of freedom which deemed the content of expression irrelevant under s. 2(b) supported the converse proposition under s. 1, i.e., that valueless expressive activity is entitled to little or no protection under the *Charter*. McLachlin J., in dissent, argued the Court majority effectively assumed expressive activity that is valueless must also be harmful. Although hate propaganda unquestionably strays from democratic values, value and harm are not automatically synonymous as the illocutionary/perlocutionary distinction recognizes.

After endorsing *Irwin Toy's* principle of freedom for all expression regardless of form and function under s. 2(b), Dickson C.J.C. engaged in an explicit assessment of the value of particular expression under s. 1.¹⁵³ *Keegstra's* justificatory bias was also reinforced by the Chief Justice's decision to exclude s. 2(b)'s values from the first branch of *Oakes*. Although McLachlin J. and Dickson C.J.C. agreed s. 2(b) protects hate propaganda, they reached that conclusion by different routes. Dickson C.J.C.'s interpretation of the guarantee rested on a particular conception of the *Charter's* structure and its separation of the rights and their limits.

Meanwhile, McLachlin J. confronted the distinction between valuable and valueless expression under s. 2(b) and concluded, "for s. 2(b) to be meaningful it must protect expression which challenges even the very basic conceptions about our society."¹⁵⁴ Although she, unlike the Chief Justice, would have excluded threats of violence from s. 2(b), hate propaganda did not in her view fall within that exception (concluding statements promoting hatred are not akin to violence or threats of violence).¹⁵⁵

The Chief Justice viewed ss. 2(b) and 1 as separate structural concepts and therefore did not address the contradiction between his content-neutral definition of the right and his content-based analysis of reasonable limits. In dissent, McLachlin J. did attempt to integrate her conception of the entitlement into s. 1 analysis. Under s. 2(b), she rejected the suggestion that equality and multiculturalism could take precedence over expressive freedom.¹⁵⁶ In McLachlin J.'s view any suggestion the value of particular expressive activity should determine the standard of review deflects attention from s. 1's requirement that the government demonstrate the reasonableness of its infringement. As a result, she urged the Court not to be distracted from the question by the offensiveness of anti-Semitic views.

Human Rights Legislation Affirming the "I & We" Approach in Principle, but Lacking in Systemic Remedy for Redressing Hate Expression

A third appeal in the trilogy of Supreme Court cases (including *Andrews & Keegstra*) which challenged the hate propaganda provisions of the C.C. is *Canada (Human Rights Commission) v. Taylor* (1990).¹⁵⁷ In 1979, complaints were filed with the Canadian Human Rights Commission (CHRC) alleging that John Ross Taylor and the Western Guard Party (a racist hate group) were repeatedly communicating messages by telephone which were likely to expose Jewish people to hatred and contempt. Taylor and the Western Guard Party produced recorded messages, which played to those who called a number listed under "White Power Message" in the Toronto telephone book.¹⁵⁸

The issue in Taylor's appeal to the Supreme Court was whether s. 13(1)¹⁵⁹ of the *Canadian Human Rights Act* and the Canadian Human Rights Tribunal's

cease and desist order violates the s. 2(b) guarantee of freedom of expression.¹⁶⁰ Section 13(1) of the Act provides it is a discriminatory practice for a person to use the telephone to communicate *repeatedly*¹⁶¹ any matter likely to expose persons to hatred or contempt because of the fact those persons are identifiable based on a prohibited ground of discrimination (for example their race or religion).¹⁶²

Writing for the majority, Dickson C.J.C. found s. 13(1) violated Taylor's and the Western Guard Party's s. 2(b) rights as "expression" no matter what the content, as long as it is not communicated in violent forms.¹⁶³ Dickson C.J.C. argued that s. 13(1) may be viewed as aimed at enhancing and protecting group cultural identity and hence furthering the multicultural heritage in Canada to which the *Charter* gives express recognition.¹⁶⁴

The majority found s. 13(1) is a justifiable limit on freedom of expression within the meaning of s. 1 of the *Charter*. In applying the s.1 analysis to legislatively restricting hate propaganda, Dickson C.J.C. argued a meaningful consideration of the principles central to a free and democratic society requires reference to the international community's acceptance of the need to protect minority groups from intolerance and psychological pain caused by such expression.¹⁶⁵ The Court's reasoning (supportive of a more balanced "I & We" deliberative approach) evoked the view that hate propaganda undermines the dignity and self-worth of minority racial and religious groups and erodes the tolerance and open-mindedness which are essential in a multicultural society.¹⁶⁶

The Court determined the purpose of s. 13(1) is to promote equality and to prevent harm, which hate propaganda causes to targeted groups.¹⁶⁷ The Court majority affirmed the important objective behind s. 13(1) could only be altered by

ignoring intent and emphasizing discriminatory effects.¹⁶⁸ Moreover, the purpose and impact of human rights codes is to prevent discriminatory effects, rather than to stigmatize and punish those who discriminate.¹⁶⁹

Dickson C.J.C. argued a pressing and substantial concern existed which was heightened in importance because it is supported by other sections of the *Charter*, namely ss. 15 and 27, and by international human rights instruments to which Canada is a signatory.¹⁷⁰ Dickson C.J.C. expresses ideas fundamental to an “I & We” deliberative approach maintaining

[t]hese *Charter* provisions indicate that the guiding principles in undertaking the s. 1 inquiry include respect and concern for the dignity and equality of the individual and a recognition that one's concept of self may in large part be a function of membership in a particular group.¹⁷¹

The Court majority argued once it is accepted that hate propaganda produces effects deleterious to the guiding principles of s. 2¹⁷² of the *Canadian Human Rights Act*, there remains no question that s. 13(1) is rationally connected to the aim of restricting activities antithetical to the promotion of equality and tolerance in society.¹⁷³ “I & We” philosophy argues such hate propaganda produces effects that are deleterious to the objective of a fair equality of deliberative opportunity for rational interlocutors. Thus, there is clearly a rational connection between the restriction on communicating illocutionary hate messages and the objective of promoting equality for racial and religious minorities.

The Court majority¹⁷⁴ rejects the argument (advanced in the minority opinion of McLachlin J.) that there is no rational connection because s. 13(1) does not, in fact, reduce hate propaganda.¹⁷⁵ In combating discrimination, legislative efforts to suppress hate propaganda are not the only means available but they are considered one effective strategy against intolerance by the international

community. In its approach to s.1 analysis the Court held “content neutrality is still an influential part of free expression doctrine when weighing competing interests under s. 1 of the *Charter*.”¹⁷⁶ Indicative of the Court’s *ad hoc* approach it reasoned the unusually extreme extent to which the expression at stake in this appeal attacks the s. 2(b) rationale, however, requires the proportionality analysis be carried out with the recognition the suppression of hate propaganda does not severely abridge free expression values.¹⁷⁷

The Court majority ruled that the important objective of s. 13(1) can only be achieved by ignoring intent (for the purposes of regulating and prohibiting hate propaganda and holding the perpetrator(s) responsible) and thus the minimal impairment requirement of the *Oakes* test is satisfied.¹⁷⁸ The Canadian Civil Liberties Association- CCLA (an intervener affirming libertarian justifications of freedom of expression rights on behalf of Taylor) argued the right is not impaired as little as possible by s. 13(1) because the words “hatred” and “contempt” are inherently vague and do not precisely define the scope of the discriminatory practices.¹⁷⁹ The Supreme Court argued s. 13(1) satisfies the test enunciated in the majority *Irwin Toy* stating, “absolute precision in the law exists rarely, if at all. The question is whether the legislature has provided an intelligible standard according to which the judiciary can do its work.”¹⁸⁰ The test of vagueness affirmed by the Court is whether the intention and impact of the order is ascertainable to a person of average intelligence reading it in good faith.¹⁸¹

The majority of the Court found telephonic communication to be a particularly effective means of conveying hate messages since the speaker “...provides no realistic means of questioning the information or the views presented

and is subject to no counterargument in that particular communications context.”¹⁸² The Court heard expert testimony from Dr. Rene-Jean Ravault in support of the contention telephone is ideally suited to the effective transmission of prejudicial beliefs. Dr. Ravault argued “through subtle manipulation and juxtaposition of material” the hate monger might effectively give “...a veneer of credibility to the content of the [his] messages.”¹⁸³

Unlike the C.C. provisions in *Andrews* and *Keegstra*, s. 13(1) of the *Human Rights Act*¹⁸⁴ does not, without prior warning, attach a penalty to expression. A cease and desist order which must necessarily precede a contempt order brings to the attention of the person the fact his or her messages are likely to have a harmful effect.¹⁸⁵ Continuing such messages after such a ruling cannot be said to occur without wilful intent regarding the effect of the message. Emphasizing a purposive approach embracing tenets of a more balanced “I & We” philosophy the majority concluded s. 13(1) to be a reasonable limit on the right to freedom of expression within the meaning of s. 1. The order was a part of a lengthy decision, which allowed for no doubt as to the subject matter which Taylor and the Western Guard Party were enjoined from communicating.

A Harms Based Equality Approach in *Butler*: Analogizing the Harm from Hate Propaganda and Obscenity

The 1992 Supreme Court case *Regina v. Butler*¹⁸⁶ recognized the distinct harm to women as an identifiable and vulnerable group caused by obscene expression. Butler operated a shop selling and renting “hard core” videotapes and magazines as well as sexual paraphernalia was charged under s. 163 of the C.C.¹⁸⁷ By the time *Butler* reached the Supreme Court in 1992- the 1990 Supreme Court

Keegstra case had been decided. In affirming the idea that expression could be more than speech, that it could amount to discrimination, *Keegstra* established a legal foundation for arguing in *Butler* that pornography could be constitutionally regulated on a “harms based equality theory” taking individual and group harms from pornographic expression into account.¹⁸⁸

Irwin Toy’s principle of freedom for all expressions of the heart and mind deemed the content or value of expressive activity to be irrelevant under s. 2 (b). By the time *Butler* was decided, however, the Court’s s. 2(b) methodology espoused the opposite proposition: that the status of expressive activity is contingent on its value and thoughts or ideas which “stray some distance” from s. 2(b)’s core should receive little or no protection under the *Charter*.¹⁸⁹ The Court in *Butler* referred to their analysis of s. 2(b) in *Keegstra*, maintaining activities cannot be excluded from constitutional protection based on the content or meaning being conveyed.¹⁹⁰

The Court held “both the purpose and effect of s. 163 is specifically to restrict the communication of certain types of [harmful] materials based on their content.”¹⁹¹ The Court in *Butler* acknowledged the government appreciated that the protection of morals was an insecure foundation for justification of the infringement of free speech (as it raised the subjective question of whose morals at any particular time constituted ‘community standards’) and contended the principle objective was to prevent harm to society.¹⁹² Accordingly, the majority argued s. 163 of the C.C. is a reasonable limit prescribed by law within the meaning of s. 1 of the *Charter*.¹⁹³

An “I & We” deliberative approach would argue the “community standards” test alone is an inadequate and flawed principle to base s. 163(8) on. The high degree of relativism in different community’s “standards” and individual standards

within communities would ensure the standards would be those of the more powerful individuals and groups. As a general guidepost (albeit with a limited and diffuse guidance) to be considered, however, the “community standards” test may plausibly prove marginally useful, as one broad contextual factor in considering possible judicial regulation of hateful and obscene expression.

Primary justification for s. 163(8) in an “I & We” approach fundamentally rests with the instantaneous harm conveyed from illocutionary obscene material and the negation of any rational response from pornographic expression (recognizing there are different classifications and forms of obscene expression). In considering whether s. 163(8) is a limit prescribed by law the Court cited the reasoning in *Irwin Toy*, maintaining that vagueness must be considered in light of whether the law provides “an intelligible standard according to which the judiciary must do its work.”¹⁹⁴ Thus, the overriding objective of s. 163(8) is not moral disapprobation, but avoidance of harm to society (especially women as a targeted group).¹⁹⁵

Sopinka J.A. asserts the Supreme Court has recognized the harm caused by the proliferation of materials which seriously offended the values fundamental to our society, is a substantial concern which justifies restricting the full exercise of freedom of expression.¹⁹⁶ Sopinka J.A. argues “the kind of expression which is sought to be advanced does not stand on equal footing with other kinds of expression....”¹⁹⁷ That proposition led to deferential application of the proportionality test. Instead of explaining why the s. 2(b) right should be protected, as might be expected, expressive freedom’s rationales enabled the Court to designate offensive activity as “low value.”¹⁹⁸

The majority asserted the rational connection between s. 163(8) and the

objective of Parliament to restrict the message of obscenity, which degrades and dehumanizes, is analogous to the harm of hate propaganda.¹⁹⁹ The Court argued that the provision is aimed at avoiding harm, which Parliament has reasonably concluded will be caused directly or indirectly, to individuals, groups such as women and children and consequently to society as a whole, by the distribution of these materials.²⁰⁰ The majority holds it is sufficient in this regard for Parliament to have a reasonable basis for concluding harm will result and this requirement does not demand actual proof of harm.²⁰¹

Firstly, to predicate the limitation of free expression upon proof of actual hatred (of an individualistic sort) gives insufficient attention to the severe psychological trauma suffered by members of those identifiable groups (admittedly to varying degrees) targeted by hate propaganda. Secondly, it is difficult to quantifiably prove in all cases a direct and individualistic causative link between specific statements and hatred of individual members of an identifiable group.²⁰²

**A "Textualist" Dissent in *Keegstra* and the Supreme Court *Zundel* Appeal:
Affirming a Libertarian Approach**

Zundel was granted leave to appeal to the Supreme Court in 1992 on the constitutionality of the law from his Ontario Court of Appeal conviction for breach of s. 181 of the C.C.²⁰³ The Supreme Court trial was not based on the global question of the Holocaust but on more than two dozen specific claims from Zundel's pamphlet that could be shown to be false.²⁰⁴ The Supreme Court in a 4:3 decision freed Zundel of the charges, holding that the law under which he was twice convicted was an unconstitutional violation of the *Charter* guarantee of freedom of expression.²⁰⁵ The Court majority held Zundel's s. 2(b) freedom of expression rights

were infringed by s. 181 of the C.C. and could not be saved by s. 1 of the *Charter*.²⁰⁶

The minority dissent written by McLachlin J. in *Keegstra* confirms her cautious “textualist” approach (more in line with the American judicial “framer’s” approach), which seeks to “...constrain judges through an objective theory of interpretation.”²⁰⁷ McLachlin J. asserts the best way to suppress hate propaganda is to leave it open to debate in the “marketplace of ideas.” McLachlin J. rejected the argument restricting hate propaganda via s. 319(2) was a rational and proportionate means of achieving social harmony and equality.²⁰⁸

When the dissent in *Keegstra* voted to tip the balance between limitation of a fundamental deliberative right, and a conflicting objective, which the state asserts, in favour of individual freedom (to express hate propaganda) they were ideologically close to a significant libertarian shift in policy-making authority. Like the majority, the minority assumes that “freedom of expression must in certain circumstances give way to countervailing considerations”²⁰⁹ but it just does not believe the present case is one of those circumstances.

The importance of *Keegstra* lies not only in the Supreme Court’s upholding the constitutionality of the hate propaganda law but the judicial recognition that the expression of racial hatred may undermine the achievement of constitutionally protected rights and freedoms. For example, as Chief Justice Dickson observed the constitutional right to cultural diversity may be undermined by hate propaganda if the victim seeks to become “culturally invisible.”²¹⁰ Likewise, the constitutional right to racial equality may be unfairly infringed by racial hate propaganda.

“I & We” philosophy affirms the Chief Justice’s reasoning because it

recognizes freedom of expression not as an end in itself, but a means of advancing equal respect for persons within the community. The majority decision of the Supreme Court in *Keegstra* recognizes that while freedom of expression is of great importance to the treatment of persons with equal respect, other freedoms and rights are crucial to the promotion of such value. The majority dismissed the motion arguing freedom of expression operates as a trump card over other rights and freedoms.²¹¹

Shortly following the decision in the *Keegstra* case, Zundel's appeal of his conviction to the Ontario Court of Appeal was dismissed, whereupon Zundel appealed to the Supreme Court of Canada. In the *Zundel* case the Supreme Court gave a majority decision that rejected in part the purposive approach (as undertaken in the 1987 Ontario Court of Appeal case of *Zundel*). Rather, it was a libertarian approach (reminiscent of the American "framer's intent" approach) the Court majority in *Zundel* case espoused to effectively negate a balanced and purposive approach. Whereas McLachlin J. had been the minority dissenting view in the Ontario Court of Appeal case, with the addition of several new like-minded more libertarian members to the Supreme Court, McLachlin J. now represented the majority opinion. Such a shift in the ideological realignment of the Supreme Court lends support to the argument for a consistent and principled methodology that is less vulnerable to the ideology of a particular Justice or a Court in flux.

The majority opinion in the Supreme Court decision of *Zundel*²¹² held, in affirmation of *Irwin Toy*, that "all communications which convey or attempt to convey meaning are protected by s. 2(b) [of the *Charter*]...the context of the communication is irrelevant."²¹³ Thus, the Court held an expressive conveyance regardless of its

content, truth or falsity or whether it serves any of the purposive values underlying s. 2(b) is of no consequence in preventing automatic constitutional protection.²¹⁴ Conversely, an “I & We” deliberative approach recognizes hate propaganda (in a form and function negates any rational response and automatically conveys harm to its target audience) as an expressive conveyance is not protected by s. 2(b) of the *Charter* and its prohibition is precisely for the content and viewpoint it conveys. On the other hand, hate expression whose form is conducive to rational and reasoned response is recognized by a balanced “I & We” deliberative approach and acknowledged as protected expression under s. 2(b).

The Court relying on the expansive ruling in *Irwin Toy* maintained the falsity of the publication cannot take it outside the purview of s. 2(b), nor can its lack of values underlying the freedom of expression guarantee, it is enough that those who publicly and wilfully promote hatred convey or attempt to convey a meaning.²¹⁵ Similarly, constitutional protection under s. 2(b) must therefore be extended to the deliberate publication of statements known to be false which convey meaning in a non-violent form.²¹⁶ McLachlin J. maintains that s. 181 “undeniably” has the effect of restricting freedom of expression, therefore, imposes a limit on s. 2(b).²¹⁷ McLachlin J. argues to now convert s. 181²¹⁸ into a provision directed at encouraging racial harmony (by censoring hate propaganda) is to go beyond any permissible shift in emphasis and purpose which the legislature had intended in drafting the provision.²¹⁹

The Court minority argues suppression of the publication of deliberate and injurious lies is rationally connected to the aim of s. 1 in protecting society (especially historically targeted individuals and groups) from the harms caused by

calculated falsehoods.²²⁰ The minority held the “minimum impairment” requirement in the *Oakes* test was satisfied.²²¹ The Court held the regulation came into play only where the deliberate publication of falsehoods is likely to seriously injure a public interest that the impugned section is invoked.²²²

In support of his contention s. 181 met the requirements of the *Oakes* test, Justice Cory argued s. 181 is arrived at restricting “not all lies but only those wilfully published and likely to injure the public interest.”²²³ Thus s. 181 provides maximum protection (procedural safeguards) to the accused since it requires the Crown to establish beyond a reasonable doubt the accused wilfully intended publication of false statements of fact presented as truth and their publication caused or was likely to cause injury to the public interest.²²⁴ Significantly, both the majority and dissent in *Zundel* rejected the conclusion of the Ontario Court of Appeal, which maintained intentional lies are not protected by s. 2(b) of the *Charter*.

“I & We” philosophy argues that just as the “community standards” test as applied to obscenity law (as in *Butler* [1992] for example) must necessarily respond to changing socio-political norms, so too should the test define “injury to a public interest” take into account the changing values of Canadian society. Further, the “community standards” test must also respond to the recognition of the commonalities and distinct harms to individuals and identifiable groups from hate propaganda. Those values encompass multiculturalism and a fair equality of deliberative opportunity (precepts specifically included in the provisions of the *Charter*) and fundamental to an “I & We” philosophy. The “I & We” approach argue s. 181 ought to be interpreted taking into account evolving socio-political and legal realities, which reasonably and practically support a modernized reading of the s.

181 as a permissible shift in emphasis built into the wording of the legislation.

Although McLachlin J. superficially acknowledged the values underpinning the historical purposive approach to freedom of expression, she inconsistently argued an act of expression falls within protection of the *Charter* regardless of whether it affirms any purposive values. McLachlin J. maintained even deliberate lies can on occasion “promote truth, political or social participation, or self-fulfilment....”²²⁵ A balanced “I & We” deliberative approach, however, maintains even where hate propaganda is capable of being debated (via its ideational content), unless and until adequate public deliberative “I & We” fora (guaranteeing a right of reply from groups targeted by hate) exist, its dissemination ought to be prohibited.²²⁵

McLachlin J. did not accept what she considered to be a far too expansive and untraditional interpretive approach. By applying (in an analysis reminiscent of the American “framer’s” approach) the very out dated and essentially artificial definition of the false news s. 181 dating back to thirteenth century England McLachlin J. precluded any reasonable and realistic purposive interpretation applicable to the modern era.²²⁷ McLachlin J. further argued in expanding the interpretation of s. 181 the Court would be arbitrarily re-defining the purpose of the statute in effect violating the principle of Parliamentary sovereignty.²²⁸

The dissenting justices in the *Zundel* Supreme Court case were led by Justice Peter Cory. Justice Cory asserted the courts ought to interpret the constitution in relation to the era they are living (hence, strive to close the gap between legal and socio-political evolution). As the context changes the constitution ought to be interpreted according to Lord Sankey’s “living tree” analogy evolving

with society (as opposed to the American “framer’s intent” approach based on adherence to tradition).

The minority opinion held false statements aimed at perpetuating the unequal participation and treatment of groups already disadvantaged, along s. 15 enumerated or analogous grounds, do not foster a diversity of participation in society but hinder and prevent it.²²⁹ Those in the target group have their capacity and status as fellow interlocutors diminished or negated and are reduced to some single aspect of their identities (e.g. based on race, ethnicity, nationality, religion etc.). The Supreme Court has repeatedly emphasized the *Charter* ought not be manipulated as a tool to undercut the progressive achievements of disadvantaged individuals and groups (most especially those historically disadvantaged).

Hate propaganda condenses the individual targeted group member’s uniqueness and diversity into an undifferentiated bloc based on stereotypes, lies, prejudice, racism, religious bigotry etc. Citizens in both the majority and minority lose the opportunity for a diverse and meaningful participation in a fully open society when access to the perspectives of minorities is lost. The Court minority argues, “a free society is one built upon reasonable debate in which all of its members are entitled to participate.”²³⁰ In a deliberative democracy concerned with liberal and communitarian concerns Zundel’s pamphlet would be prohibited as illocutionary hate propaganda lacking in rational ideational content capable of reasoned debate.

Judicial Conceptions of “Truth”, Opinion and Fact in the Supreme Court

The *Zundel* cases (both the 1987 Ontario Appeal and the 1992 Supreme Court case) critically examine the relationship between what one “reasonably” believes is or could plausibly be the “truth”. This debate is directly linked to the

judicial question of the constitution of hate propaganda when the claim of "truth" or its promotion is raised by the perpetrator(s) of hate propaganda.²³¹ McLachlin J. in *Keegstra* argued to confine the justification for granting freedom of expression to the promotion of truth is arguably wrong, because however important truth may be certain opinions are incapable of being proven either true or false.²³² While the dissenting judges found the fact Zundel's case involved deliberate lying relevant to their conclusion the limit imposed by law was "reasonable," the majority held the distinction between lying and telling the truth was irrelevant.²³³

The court minority held the aim of s. 181 has the effect of protecting the vulnerable in society and as such is a pressing and substantial concern.²³⁴ The minority argued the focus of s. 181 is on manipulative and injurious false statements of fact disguised as authentic research.²³⁵ The publication of such lies makes the concept of multiculturalism in a true democracy impossible to attain.²³⁶ For Holocaust survivors, it is a deep and grievous denial of the significance of the harm done to them and thus belittles their enormous pain and loss.²³⁷ They have, indeed, suffered cruelly from the publication of falsehoods concerning their cultural or group identity. An "I & We" philosophy supports the minority's contention "false statements aimed at perpetuating the unequal participation and treatment of groups already disadvantaged along s. 15 enumerated or analogous grounds do not foster full participation in society but prevent it."²³⁸

The Court minority argues statements couched as "revisionist history" may be taken to be allegations of fact rather than submissions of opinion, despite protestations to the contrary.²³⁹ The pamphlet purports to be a serious scholarly endeavour. The focus of s. 181 is on manipulative and injurious false statements

of fact disguised as authentic research or pseudo-science. The minority opinion argues

by couching their hate propaganda as the banal product of disinterested research, the purveyors of these works seek to circumvent rather than appeal to the critical faculties of their audience.²⁴⁰

The work of serious historians who allege they have arrived at reasoned conclusions after thorough examination of primary sources is a form of expression accorded great authority.²⁴¹ The appellant argues history is all interpretation. It is submitted that there is no objective historical truth because we do not understand facts in any unmediated fashion but through the lens of a theoretical perspective.²⁴²

Much of the reasoning in the *Zundel* case focuses on whether the expression in question purports to be a statement of fact or of mere opinion. The Court heard testimony from defence expert Dr. Fann stating that a factual claim may be distinguished from an expression of opinion by virtue of its capacity to be tested and verified.²⁴³ Conversely, expressions of opinion are merely subjective and therefore cannot be proved or disproved. The courts deal with the question of relative truth and falsity of statements on a regular basis. As pointed out in the Supreme Court minority opinion in *Zundel*, every case in which the charge is fraud or the making of a false prospectus the court must determine whether false statements have been made.²⁴⁴ So too can historical "facts" be shown to be relatively true or false in the context of s. 181.

The jury also had to determine whether cumulative effect of these errors rendered Zundel's pamphlet as a whole a false statement or tale. The Crown exposed the hate mongering techniques in Zundel's pamphlet.²⁴⁵ On and on the Crown showed the appellant misrepresented the work of historians, misquoted the

work of historians, misquoted witnesses, fabricated evidence and cited non-existent authorities.²⁴⁶ Zundel's lawyer, Doug Christie, put forward the same "marketplace of ideas" reasoning in the Supreme Court case as he argued in Zundel's Ontario Court of Appeal case arguing "...its not for the courts to decide which interpretation is correct and which is false."²⁴⁷ "I & We" philosophy affirms there are many ideas and expressions, which cannot be verified, yet, are valuable. However, where such expression contains perlocutionary hateful messages there must be a guaranteed opportunity for rational deliberative debate by representatives of the group(s) targeted.

Zundel's lawyer Doug Christie asked the Court whether as a society we are going to allow proof of the "truth" about history through experts who were not there?²⁴⁸ Christie argued that one's belief the Holocaust did not happen could be considered a reasonable topic for debate because some of its facts may not be "absolutely" proven or they are obscured in history. What Christie attempted to argue is since no one can absolutely show his or her opinion to be better than anyone else's freedom is protected not because it is valuable but because there is no moral sanction for any belief or in the validity of any principles or values. Christie's assertion that because the truth of some details of the Holocaust could not be proven "absolutely" one should be sceptical and doubt their beliefs are irrational. "I & We" philosophy argues the "truth" of the Holocaust is beyond a reasonable doubt and not open to revisionist illocutionary hate propaganda.

While it is true no depiction of history can be absolutely proved or disproved, although it may be shown to be more or less reasonable, rational and probable (Zundel was not convicted for unintentionally misrepresenting factual material) but

for entirely and deliberately misrepresenting its contents with a wilful intent to spread hate. In affirming this argument the minority opinion (partially supportive of “I & We” principles) asserted “...racism with footnotes and chapter headings is still fundamentally racism and should be treated as such.”²⁴⁹

Asymmetrical Power Relations, Differing Expressive Contexts and the Necessity of a Systemic Approach to Redressing Hate Propaganda

Ross v. New Brunswick (1996)²⁵⁰ is the most recent Supreme Court case involving the balancing of freedom of expression and hate propaganda. In a unanimous ruling consistent with its developing contextual and *ad hoc* approach (although supportive of “I & We” principles) the Supreme Court upheld the decision of a Board of Inquiry in Attis v. New Brunswick Board of School Trustees District No. 15, which ruled the Board of School Trustees discriminated with respect to a public service because it failed to take appropriate action against a teacher (as per the *New Brunswick Human Rights Act*)²⁵¹ Malcolm Ross who made repeated hateful public attacks on Jewish people outside his class-room.

The constitutional issues of concern in the appeal from the Board of Inquiry’s order include: (1) whether a School Board, which employs a teacher who publicly makes invidiously discriminatory statements, discriminates with respect to services it offers to the public pursuant to s. 5(1) of the *Act*; (2) whether an order to rectify the discrimination, infringes upon the teacher’s freedom of expression and freedom (among other constitutional issues) under s. 2(b) of the Charter.²⁵² The Court held the constitutionality of the board’s order to be determined under s. 1 analysis must be applied flexibly to achieve a proper balance between individual rights and community needs and with close attention to context.²⁵³ The Court cited the dissenting Ryan J.A. of the New Brunswick Court of Appeal case of *Ross* asserting

the rights and freedoms guaranteed by the *Charter* had to be measured against the underlying values and principles of a free and democratic society such as 'the inherent dignity' of the human being, commitment to social justice and equality and respect for cultural and group identity.²⁵⁴

Dickson C.J.C. argued expression promoting the hatred of identifiable groups is of limited importance as measured against freedom of expression values.²⁵⁵ The board determined the primary purpose of the respondent's form of expression is "to attack the truthfulness, integrity, dignity and motives of Jewish persons."²⁵⁶ The final "core" value said to underlie or justify the protection accorded by s. 2(b) is participation in a democratic process.²⁵⁷ The Court argued the respondent's expression is expression that undermines democratic values in its condemnation of Jews and the Jewish faith.²⁵⁸ Moreover, it impedes meaningful participation in social and political decision-making by Jews, an end wholly antithetical to the democratic process.

Ross publicly made racist, discriminatory and bigoted comments about Jewish people during his off-duty time and this created a "poisoned environment"²⁵⁹ in the school district, negatively affecting the Jewish children and other minority students. Ross's writings and statements communicating his anti-Semitic views included books, letters and interviews with local media.²⁶⁰ This resulted in an atmosphere in the school district where anti-Jewish sentiments flourished, where students engaged in anti-Semitic acts.

The Court recognized teachers are inextricably linked to the integrity of the school system and have significant influence over their students (a captive audience in an asymmetrical power relation).²⁶¹ The Supreme Court upheld the Board of Inquiry's finding that although there was no direct evidence students engaging in anti-Jewish behaviour were directly influenced by Ross's teachings.²⁶² Sopinka J.

argued it is sufficient the board found it “reasonable to anticipate” there was a causal relationship between the respondent’s conduct and the harm—the poisoned educational environment.²⁶³

In determining whether the order can be saved by s. 1 of the Charter, as a reasonable limit on expression rights, the Supreme Court considered the educational and employment environments in the context of anti-Semitism.²⁶⁴ The Court argued young children are less likely to make an intellectual distinction between comments a teacher makes in the school and those the teacher makes outside the school.²⁶⁵ An “I & We” philosophy is supportive of the Courts view a contextual approach that must be invoked when balancing the respondent’s freedom to make discriminatory statements against the right of the children in the school board “to be educated in a school system that is free of bias, prejudice, and intolerance.”²⁶⁶ The Supreme Court also upheld the Board of Inquiry’s (as part of a public institution) partially “I & We” affirming conclusion the School Board had a duty to maintain a positive school environment for all persons served by it and that it failed to do so.²⁶⁷

Regarding the employment context, the Court found the state, as employer, has a duty to ensure the fulfilment of public functions is undertaken in a manner that does not undermine public trust and confidence.²⁶⁸ In an “I & We” deliberative democracy there is a positive responsibility on the state and public fora to redress and prohibit blatant and systemic forms of hateful expression. In considering the context of anti-Semitism the Court maintained Ross must not be permitted to use the *Charter* to roll back advances made by Jewish persons to combat discrimination against them.²⁶⁹ These rights must be balanced against the respondent’s

expressive right to make discriminatory and hateful statements.

The Court argues that the Board's order maintains a commitment to the eradication of discrimination in the provision of educational services to the public.²⁷⁰ The Court adds this is a pressing and substantial objective based upon jurisprudence, Canada's international obligations and the values constitutionally entrenched, which justifies overriding Mr. Ross's rights to freedom of expression.²⁷¹ Specifically the Court refers to ss. 15 and 27 of the *Charter*, in which the values of equality and multiculturalism are enshrined and strengthen the 'substantial weight' to be given to the objective of preventing the harmful effects associated with hate propaganda.²⁷²

In discussing the School Board's expression restrictions imposed on the respondent, Malcolm Ross, the Court cited Dickson C.J.C. in *Keegstra* in his analysis of the effect hate invective has on society asserting

...the democratic process is subverted and individuals are denied respect and dignity simply because of racial or religious characteristics...given the unparalleled vigour 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.²⁷³

Similarly, the Court in *Ross* maintained the expression restrictions imposed by the School Board should attract a less "searching degree of scrutiny" and be easier to justify under s. 1.²⁷⁴

The Supreme Court held hate expression "silences the views of those in the target group and thereby hinders the free exchange of ideas leading our search for political truth."²⁷⁵ It impedes the meaningful participation in social and political decision-making public fora by Jews and is wholly antithetical to values of individual

autonomy and self-development of group members as rational interlocutors. The decision in *Ross* is supportive of “I & We” philosophy in considering both individual and group rights and responsibilities regarding freedom of expression and hate propaganda. The Court’s approach in *Ross* however is indicative of a contextual and *ad hoc* framework of analysis (rather than a principled and consistent “I & We” methodology) that reaches an “I & We” result.

“I & We” philosophy argues the focus of the criminal law with respect to the public expression of hatred should be not only its perpetrators but also those who have authority or control over the perpetrators and aid and abet the harm by condoning it. The benefit of such an approach is that it promises to be a rather more efficient use of resources than the prosecution of the perpetrators.²⁷⁶ The *Ross* case highlights the need for systemic remedial powers when power is allocated to and shared by different statutory authorities. An “I & We” deliberative democracy would grant to the human rights legislation of each Canadian jurisdiction remedial and procedural powers to boards of inquiry to effect systemic redress.

An “I & We” Judicial Methodology for the Future

Whatever one’s views about the wisdom of legalizing questions of rights and limits, there can be little doubt that the *Charter* has challenged Canadians to articulate, debate and grapple with fundamental assumptions about democratic governance. Jamie Cameron argues s. 2 (b) has been a lightening rod for divisions about the meaning of a “free and democratic society” under a regime of constitutional rights.²⁷⁷ In its adjudication, since patriation of the *Charter*, of freedom of expression cases, the Supreme Court has often challenged the individualistic civil liberties tradition centered on the individual’s oppositional relationship to the state.

It has done so by emphasizing the importance of the interdependence of the relationship of the individual as a member of multiple groups to one another.

A more structured approach might create nuances in the “Oakes test” based on the Court’s assessment of the competing values and “democratic ideals,” institutional as well as substantive that are at stake. The important point is that under an “I & We” approach judicial analysis would take place within a framework of principles and procedures explaining and rationalizing the underlying assumptions of s.1 review in a more coherent and consistent approach. Not only would expressive freedom (perlocutionary in the context of hate propaganda) be less at risk of subjective perception, a principled basis for drawing distinctions between s. 2(b) claims would promote a requirement of a sufficient evidentiary base for a reasoned anticipation of harm, as well as values of consistency and proportionality.

Though context is a fundamental concept of s. 1 analysis, the *Charter’s* rights and freedoms require a framework of principle for their consistent protection. In the circumstances an “I & We” methodology that contextualizes s. 1’s principles of justification can respond to the need for issue-specific solutions without compromising the requirement that limits on the *Charter’s* rights and freedoms be demonstrably justified. My project in this chapter has had two main objectives. The first was to create a sounder structure, framework, or foundation of principle for s. 1 analysis. Grounding the analysis in an “I & We” structure can avoid, or at least minimize, the unpredictability and inconsistency of the first generation case law of *Charter* jurisprudence. The second was to embrace the role that s. 2(b)’s values play under s. 1: to develop an “I & We” equilibrium in the *Charter’s* equation and, in

so doing, to secure a stronger place for those values in the jurisprudence.

Supreme Court jurisprudence has recognized that some Canadians suffer historic and current exclusion because of their group membership and it recognizes that intellectual pluralism does not and cannot mean that hate propaganda will be given the same substantive defence and constitutional protection as tolerance and mutual respect. Adjudication of the Supreme Court of Canada largely evidences a contextual and *ad hoc* reasoning, of the differing power levels (in terms of age and status of rational interlocutors) and deliberative fora, when deciding whether restrictions on hate expression are justified. Although inconsistent, the Canadian adjudicative approach relative to the American has the potential of moving towards an “I & We” approach in considering notions of harm and rights and responsibilities of individuals and groups.

Endnotes

1. Maxwell Cohen, Report of the Special Committee on Hate Propaganda in Canada, (Ottawa: Queen's Printer, 1966), Preface, [hereinafter, the Cohen Committee].

2. Peter H. Russell, The Judiciary In Canada: The Third Branch of Government, (Toronto: McGraw Hill Ryerson Ltd., 1987), 35.

This political recognition of the judiciary suggests that, as the political reality of rights adjudication asserts itself into the minds of the general population, potential conflict may occur over the overt political nature of judicial review. The Canadian judiciary's lack of public accountability too will likely be increasingly scrutinized, as the judiciary's decisions can no longer hide behind the façade of neutrality. Perhaps greater popular accountability will be introduced or greater limits on the scope of judicial activism in reviewing public policy will occur.

3. Kent Greenawalt, "Free Speech In The United States And Canada," in Law and Contemporary Problems, V.55 No.1 (Winter 1992), 5.

4. *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act*, 1982 being Schedule B to the *Canada Act* 1982 (U.K.), 1982, c.11 [hereinafter, *Charter*].

5. Kathleen E. Mahoney, "Recognizing the Constitutional Significance of Harmful Speech: The Canadian View of Pornography and Hate Propaganda," 277-290, in The Price We Pay: The Case Against Racist Speech, Hate Propaganda, and Pornography, Laura Lederer and Richard Delgado eds., New York: Hill And Wang, 1995, 280.

6. What is seemingly hateful expression (in perlocutionary form) may sometimes meet one or more historical justifications. For example literature may contain racial slurs and describe a race of people in what would otherwise be considered hatemongering but in the context of a book it may have as its purpose a capacity to inform and enlighten readers on how some groups or persons by virtue of their skin colour for example have historically been persecuted. It's purely satirical socio-political commentary. It may be a depiction or statement about society- telling a story in words, sounds, images, or symbols to get its mean(s) conveyed.

7. Accordingly, the United States Supreme Court (USSC) argues that certain kinds of speech falling within narrowly defined prohibited categories, of what amounts to 'non-speech' (a judicially constructed categorization for exclusion) Chaplinsky v. New Hampshire, 315 U.S. 568 (1942) (excluding the lewd, the obscene, the profane, the libelous and the insulting or "fighting words" from the First Amendment) has been modified by New York Times v. Sullivan, 376 U.S. 254 (1964) and the principle of content neutrality. In this categorization, speech and conduct are fused (in a theoretically opaque formulation) to create "fighting words", entailing the conveyance of an individually quantifiable harm to those individuals targeted (hence, no judicial consideration of systemic harm to an entire targeted group albeit effecting individual members differentially). Restricting the right to free speech in this way would not be necessary in

Canada because reasonable limits on expressive freedom can be saved under s. 1 of the *Charter*.

8. United States Constitutional Amendment I [hereinafter First Amendment] Under the American *Bill of Rights* the First Amendment provides that Congress shall make no law "abridging the freedom of speech, or of the press; or of the right of the people peaceably to assemble, and to petition the government for a redress of grievances."

9. The use of mass media is paired with careful political organizing and strategic alliances i.e. one of the most effective propaganda techniques hate mongers have developed is their alliance with anti-censorship organizations and civil libertarians. Laura Lederer. "Pornography and Racist Speech as Hate Propaganda", 131-156, in The Price We Pay: The Case Against Racist Speech, Hate Propaganda, and Pornography, Laura Lederer and Richard Delgado editors, (New York: Hill and Wang, 1995), 133-134. This has in some instances shifted the debate over their product of hate to one of free speech and First Amendment Rights in the US and freedom of expression rights in Canada.

10. (*Ibid.*)

11. There are laws on patents, copyright, contracts in restraint of trade, protection of trade secrets, intellectual property, misleading or dangerous advertising, and consumer protection, libel, slander, treason, conspiracy to commit crimes, official secrets, breach of confidence and obscenity to name a few. As Mari Matsuda points out, "in many of these areas the law has been stable for many years or sometimes in retreat back up the hill" Mari Matsuda, The Cost of Free Speech (London: Farber and Farber, 1990), 56.

12. (Sheldrick, 3rd Jan. '95 "Civil Liberties: An Introduction," 10th Jan. '95 "The Rights Debate and the Charter: Reconciling Judicial Review and Democratic Accountability").

Professor, Jacob Ziegel, of the University of Toronto, has just completed a study of the rationale for a more open process of selecting judges for the Institute for Research on Public Policy. The nub of his reasoning is that, since we have made the Court 'intensely political,' it is 'critical to inject a democratic and balancing note in the appointing process.' "Choosing Judges", in The Globe and Mail, Opinion A16, Toronto: Thomson Canada Limited, Thurs. 18 July, 1999. In a parliamentary democracy, the government in power should be ultimately responsible for choosing judges. But the general notion that potential judges should appear before an open committee of some kind, be questioned as to their views and, in the process, be unveiled to Canadians whose lives will be effected by rulings is an idea whose time has come. A deliberative democracy is a process whereby decision-making must seem fair, open and rational to the people who are being governed.

13. Charron J.A. in Zundel v. Boudria, et al., (1999) argues that the Charter has changed the balance of power between the legislative and the executive on the one hand, and the courts on the other hand, by requiring that all laws and government action must conform to the fundamental principles laid down in the Charter.

<http://www.ontariocourts.on.ca/decisions/1999/November/Zundel.htm>

Charron J.A. asserts that as a practical matter, this means that, subject to the override provision in s. 33 of the Charter, the courts may be called upon to rule that laws and government acts are invalid (*Ibid.*). To this extent, the Charter has impinged on the

supreme authority of the legislative branches.

14. Patrick Monahan, Politics and the Constitution: The Charter, Federalism, and the Supreme Court Of Canada, (Toronto: Carswell, 1987), 29.

15. Christopher Manfredi, Judicial Power and the Charter: Canada and the Paradox of Liberal Constitutionalism, Toronto: McClelland & Stewart, 1993. 40.

16. (Monahan, 1987: 112)

Monahan is arguing that there is a more balanced and flexible compromise between group and further individual rights and freedoms within the *Charter*. For example, constitutional provision in sections 25 and 35 guarantee special protection to Aboriginal peoples. Sections 16 to 23 protect minority language rights that reflect a commitment to group difference by protecting a collective feature- the cultural language of groups.

17. Certainly not all scholars affirm the dual nature of the *Charter*-asserting individual and group rights and responsibilities. Mary Ellen Turpel, for example, argues that the *Charter* represents a rights tradition that is individual and property bases. Turpel maintains that "There are no conceptual directions leading from the *Charter*, legal literature or Canadian history to support a collectivist idea of rights are culturally distinct (non-European) peoples, if such a theory is conceivable, or the toleration of community organized around collective and divergent (non-European) values." M.E. Turpel "Aboriginal Peoples and the Canadian *Charter*: Interpretive Monopolies, Cultural Differences", Canadian Human Rights Yearbook 6 (1989, 90), 23.

18. Kathleen Mahoney. "The Canadian Constitutional Approach To Freedom Of Expression in Hate Propaganda And Pornography," 77-105, in Law and Contemporary Problems, Vol. 55 No. 1, (Winter 1992), 78.

19. R. v. Keegstra (1990), 124 D.L.R. (4th) 289 [hereinafter *Keegstra*]; R. v. Andrews (1990), 77 D.L.R. (4th) 128 [hereinafter, *Andrews*] (upholding s. 319(2) of the Criminal Code, R.S.C. 1985, c. C-46).

20. R. v. Butler (1992), 89 D.L.R. (4th) 449 [hereinafter *Butler*] (upholding the definition of obscenity under s. 163(8) of the Criminal Code).

21. Zundel v. The Queen et al. (1992), 95 D.L.R. (4th) 303 [hereinafter *Zundel*] (invalidating s. 183 of the Criminal Code prohibiting the willful spreading of false news).

22. Canada (Canadian Human Rights Commission) v. Taylor (1990), 75 D.L.R. (4th) 577 [hereinafter *Taylor*] (upholding a human rights complaint about hateful telephone messages); and Ross v. New Brunswick School District No. 15 (1996), 133 D.L.R. (4th) 1 [hereinafter *Ross*] (upholding a discrimination complaint arising from a school teacher's off-duty anti-Semitic expressive activity).

23. (Manfredi, 1993: 40-41)

24. Steven Warren Simpson, Ph.D. Cultural Crossroad: A Comparative Analysis of the Constitutional Protection For the Freedom of Expression In Canada And The United States, University Microfilms International (UMI) Dissertation Services,: An Arbor

Michigan, 1993, 206-207.

25. Section 15 of the *Charter* states:

S. 15(1) Every individual is equal before and under the law and has the right to the equal protection of the law without discrimination and in particular, without discrimination based on race, national and ethnic origin, colour, religion, sex, age or mental or physical disability.

26. Section 27 of the *Charter* states:

S. 27 This Charter shall be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians.

27. (Greenawalt, 1992: 7)

28. (*Ibid.*)

29. (Mahoney, 1995: 279)

30. (Mahoney, 1995: 280)

31. Norman Dorsen, "Is there a right to stop offensive speech? The case of the Nazis at Skokie in *Liberties*, John Russell editor, (Vancouver: New Star Books, 1989), 124.

32. For example, in the mid-1980's Klansmen and neo-Nazis in the US discovered that public cable television would be an efficient forum through which to address the public and recruit new members. By mid 1991 more than thirty US cities carried white supremacist programming (Lederer, 1995: 133-134). In addition white supremacists publish newsletters, magazines and leaflets and now have highly sophisticated computer networks that link them nationally with other neo-Nazi, white supremacist and Aryan Nations groups (*Ibid.*).

33. (Mahoney, 1992: 79-80)

34. (Greenawalt, 1992: 6) Canada is a signatory to the United Nations Convention on the Elimination of All Forms of Racial Discrimination, in which Canada undertakes "to take state action to end racial discrimination in access to employment, housing, education and other social benefits and to control the dissemination of racial and religious hate propaganda through legal sanctions." International Convention on the Elimination of All Forms of Racial Discrimination, 21 December 1965, 660 U.N.T.S. 212 (signed by Canada 24th August 1966, entered into force 4th January 1969, ratified by Canada 14th October 1970).

35. (Mahoney, 1992: 88-89)

36. Macklem et al, Canadian Constitutional Law 2nd edition, Toronto: Emond Montgomery Publications Ltd., 1997, 765.

37. (Mahoney, 1995: 280) In a cross Canada study, Gabriel Weimann and Conrad Winn in Hate On Trial: The Zundel Affair, The Media, Public Opinion In Canada. Oakeville,

Ontario: Mosaic Press, 1986, asked 1,052 random respondents whether they heard of the *Zundel* trial in the Ontario Court of Appeal, and whether his claim that six million Jews did not die in the Holocaust was true, in an attempt to gauge the effect of the trial, on the public. The cardinal finding was that people familiar with the trial were less likely to express Holocaust based anti-Judaism than people unfamiliar with the trial (Weimann and Winn, 1986: 55). Weimann and Winn argue that their findings indicate that the trial may have had a narrow educational effect in teaching Canadians what really happened in Europe. The study found that Canadians who did not know whether Jews were at fault for their own victimization were almost twice as likely to be oblivious of the trial as those who considered Jews to be innocent- 75% vs. 42% (Weimann and Winn, 1986: 54). Those who said they did not know the number of Jewish casualties were much more apt to be unaware of the trial than those who accepted the six million estimate- 65% vs. 39% (*Ibid.*). Respondents were more apt to say that they became more sympathetic to Jews if they followed the trial (34%) than if they did not (24%) (Weimann and Winn, 1986: 62).

38. (Macklem et al, 1997: 843) Schacter v. Canada, [1992] 2 SCR 679 [hereinafter, *Schacter*].

39. (Macklem et al, 1997: 842-843) Haig v. Canada, [1993] 2 SCR 995 [hereinafter, *Haig*].

The Court in *Haig* held that s. 2(b) of the *Charter* does not impose upon a government, whether provincial or federal, any positive obligation to consult its citizens through the particular mechanism of a referendum (*Ibid.*). While the Court held the specific category of referendums presented no constitutional obligation on government to facilitate, it did not conclude this for other mediums of public expressive conveyance. L'Heureux-Dubé J. (Writing in *Native Women's Association*) held that *Haig* stands for the proposition that the government in that particular case was under no constitutional obligation to provide the right to a referendum under s. 2(b) of the *Charter* but that if and when the government does decide to provide a specific platform of expression, it must do so in a manner consistent with the *Charter* (Macklem et al, 1997: 848).

40. (Macklem et al, 1997: 846) Native Women's Association of Canada v. Canada, [1994] 3 SCR 627 [hereinafter, *Native Women's Association of Canada*].

41. (Macklem et al, 1997: 848)

42. (*Ibid.*)

43. (*Ibid.*)

44. (*Ibid.*)

45. Regina v. Oakes (1986), 26 D.L.R. (4th) 224 [hereinafter, *Oakes*].

46. (*Regina v. Oakes*, 1986: 226)

47. (*Regina v. Oakes*, 1986: 201-202)

48. (*Regina v. Oakes*, 1986: 202)

49. (Russel et al., 1993: 458)

Justice Dickson maintains that, "It may become necessary to limit rights and freedoms in circumstances where their exercise would be inimical to the realization of collective goals of fundamental importance" (Russel et al., 1993: 457).

50. (Russel et al., 1993: 457)

51. (Simpson, 1993: 213)

52. (Russel et al., 1987: 457) Also, see *R. v. Oakes*, 1986: 225

54. (*Regina v. Oakes*, 1986: 225)

55. Canada's departure from American free speech doctrine is clear. Under the First Amendment, social reality (i.e. asymmetrical power relations and contexts and harms to individuals and groups in the context of hate propaganda) is not explicitly considered when legislation regulating extremist speech is challenged. This is a critical difference from the Canadian approach because, depending on the asymmetries of speaker and audience and the context of expressive dissemination, a contextual analysis, can result, in a right or freedom and its corresponding responsibilities having different values and constitutional protections.

56. *Irwin Toy Ltd. v. Quebec (Attorney-General)* (1989), 58 D.L.R. (4th) 577 [hereinafter, *Irwin Toy*]. A five member panel decided the case; a majority of three issues a "by the Court" opinion (*Irwin Toy*, 1989: 577).

57. (*Irwin Toy*, 1989: 593)

The Court recognized the harm to children (a vulnerable "group" that would be prone to influence and exploitation) from commercial television advertising targeted at them. It is a reasonable assertion in the context of elementary or high school students (children and young adults) are in varying stages of academic and social development. Such students can be influenced especially by someone in a position of power and authority. Accordingly there ought to be prohibitions of hateful expression whether illocutionary or perlocutionary in form and function.

A university setting provides a different context and considerations for regulation of perlocutionary hate propaganda. Since an educational setting is one in which expression is privileged by definition the presumption will normally be in favour of its protection. The presumption is not absolute and can be overridden, as in Canadian law, by a judgment (difficult and sometimes imprecise) that is articulated in favour of other deliberative and democratic values. Without sacrificing its central purpose of critical education, a university cannot make its primary and dominant value that of "...fostering of friendship, harmony, civility, mutual respect...although it can seek to attain these ends". Robert C. Post. Constitutional Domains: Democracy, Community, Management, Cambridge, Massachusetts: Harvard University Press, 1995, 325. In some circumstances freedom of expression may pose a threat to that purpose, and at that point, it may be necessary to prohibit such hateful expression.

58. (*Irwin Toy*, 1989: 607)

59. (Ibid.)

60. (*Irwin Toy*, 1989: 606)

61. (*Irwin Toy*, 1989: 614)

62. (*Irwin Toy*, 1989: 607)

63. (Ibid.)

64. (*Irwin Toy*, 1989: 636)

65. (*Irwin Toy*, 1989: 637)

66. (*Irwin Toy*, 1989: 613)

From the substantial body of material submitted by the Attorney-General of Quebec as well as by the intervener, Gilles Moreau, president of the Office de la protection du consommateur, that the purported mischief at which the Act and regulations were directed was the harm caused by the message itself (Ibid.).

67. Zundel v. Ontario Court of Appeal (1987), 35 D.L.R. (4th) 338 [hereinafter, *Zundel* in the *Ontario Court of Appeal*].

68. (*Zundel, Ontario Court of Appeal*, 1987: 357)

69. Criminal Code, R.S.C. 1970, c. C-34 s. 177—now R.S.C. 1985, c. C-46 [rep. & sub. s. 181].

70. Harry M. Bracken, Freedom Of Speech: Words Are Not Deeds, (Westport Connecticut: Praeger Publishers, 1994), 52. The offence of “spreading false news”, and the essential ingredients of an offence created by s. 177 are:

- (a) wilful publication, and the publication must be of a statement, tale or news (the assertion of an opinion is not sufficient).
- (b) the assertion of fact must be false to the knowledge of the person who publishes it;
- (c) it does not have to be proved that the false assertion of fact actually caused injury or mischief to a public interest. It is sufficient if it is proved that it was likely to cause such injury or mischief (*Zundel, Ontario Court of Appeal*, 1987: 354).

71. (*Zundel, Ontario Court of Appeal*, 1987: 353) This and subsequent amending statutes were primarily designed to protect the peers and other great men against slanderous lies which might imperil or cause mischief to the public if the perpetrator were not punished (Ibid.).

72. (*Zundel, Ontario Court of Appeal*, 1987: 353)

73. Michael Mandel. The Charter of Rights and the Legalization of Politics in Canada, revised ed., (Toronto: Thompson Educational Publishers, Inc., 1994), 371.

74. (*Ibid.*)

The judgement of the Ontario Court of Appeal stated that “because of the errors we have noted—particularly those relating to...the misdirection on the essential elements of the offence—there must be a new trial” (*Ibid.*).

75. (*Ibid.*)

76. James A.C. Brown in Techniques of Persuasion: From Propaganda to Brainwashing, Markham, Ontario: Penguin Books Canada, 1963 lists eight techniques universally employed in propaganda campaigns. These include use of stereotypes, name substitution (i.e. racial epithets to dehumanize), selective presentation of facts (e.g. Supposed ‘group’ characteristics), lying, repetition (of a few themes such as genetic inferiority or conspiracy etc.), bold assertions of a single idea (in an attempt to hide inconsistencies and confuse reality), creation of an enemy (to dehumanize), appeal to authority (“pseudo-science”, supposed “experts”, famous people and even God and the Bible). Lederer, Laura J. “Pornography and Racist Speech as Hate Propaganda”, 131-156, in The Price We Pay: The Case Against Racist Speech, Hate Propaganda, and Pornography, Laura Lederer and Richard Delgado eds., (New York: Hill & Wang, 1995), 135.

77. (*Zundel, Ontario Court of Appeal*, 1987: 356)

78. (*Ibid.*)

79. *R. v. Big M Drug Mart Ltd.* (1985), 18 D.L.R. (4th) 321 at 354, cited by Howland C.J.O. in *Zundel, Ontario Court of Appeal*, 1987: 356 [hereinafter, *Big M Drug Mart*].

80. (*Ibid.*)

81. Doug Christie, The Zundel Trial & Free Speech, (Toronto: Citizens for Foreign Aid Reform Inc., C-FAR, 1985), 3-4.

82. (*Zundel, Ontario Court of Appeal*, 1987: 352)

83. (*Zundel v. Ontario Court of Appeal*, 1987: 390)

84. What is seemingly hateful expression (in a form where rational debate on its ideational content is possible) may sometimes meet one or more historical justifications. For example literature may contain racial slurs and describe a race of people in what would otherwise be considered hatemongering but in the context of a book it may have as its purpose a capacity to inform and enlighten readers on how some groups of persons by virtue of their skin colour for example have historically been persecuted. It's ideational content may depict a historical context, present reality, or may be purely satirical socio-political commentary. It may be a depiction or statement about society-telling a story in words, sounds, images, or symbols to gets its meaning(s) across.

85. (Sheldrick, Selected Lectures in Public Law II 3605.03B, 10th Jan. '95 "The Rights Debate and the Charter: Reconciling Judicial Review and Democratic Accountability, and 26/31 Jan. "Fundamental Freedoms: Freedom of Expression."

86. (ibid.)

87. (ibid.)

88. (*Zundel, Ontario Court of Appeal, 1987: 364-365*)

89. (*Regina v. Andrews, 128*)

90. (*Regina v. Andrews, 132*)

91. (ibid.)

The mimeographed sticker cards contained such racist and bigoted messages as "Nigger go home", "Hoax on the Holocaust", and "Hitler was right. Communism is Jewish." The *Nationalist Reporter* repeatedly identified blacks as "an inferior race of low intelligence, unclean, and freeloaders on the social support system. Moreover, it is incumbent upon the white race to stop immigration and bring about (by force if necessary) their repatriation to their places of origin" (*Regina v. Andrews, 134-135*).

92. (*Regina v. Andrews, 129*)

93. (ibid.)

Regarding the validity of s. 319(2)—in *Keegstra* the Alberta Court of Appeal held that the section infringed s. 2(b) and was not saved by s. 1 (*Regina v. Andrews, 131*). In contrast, in *Andrews* a majority in the Ontario Court of Appeal held that s. 2(b) was not infringed, while Cory J.A. found that although s. 319(2) breached freedom of expression it could be justified under s. 1 of the *Charter* (ibid.).

94. (ibid.)

95. (ibid.)

96. (ibid.)

97. (*Regina v. Andrews, 136-137*)

98. (*Regina v. Andrews, 135*)

99. (*Regina v. Andrews, 139*)

100. (ibid.)

101. (*Regina v. Andrews, 135*)

102. (*Regina v. Andrews, 136*)

The **Cohen Report** cited the risk of four consequences as justification for legislation to control racial hate propaganda: (a) civil disorder due to victim reaction; (b) breakdown of traditional values of individual worth and dignity; (c) damage to the victim's reputation; and (d) psychological stress suffered by victims (Cohen Report, 1966: 20). Notably lacking, however, was any criterion listing systemic harm conveyed to groups targeted by hate and corresponding legislative prohibition.

103. (*Regina v. Andrews*, 135)

104. (*Regina v. Andrews*, 136)

105. (*Ibid.*)

106. (*Regina v. Andrews*, 138)

Cory J.A. in the Ontario Court of Appeal asserts that much of the Criminal Code is aimed at crime where no harm has been occasioned (*Ibid.*). For example, the very serious crime of attempted murder may be established when no harm has been suffered by the intended victim. Although there may be no damage or injury occasioned, the serious crime of attempted murder is nonetheless committed.

107. (*Regina v. Andrews*, 136) The trial judge in *Andrews* held that, "Although it was utterly erroneous and expressed in the vilest of terms, it was nonetheless, an expression of a sincerely held opinion" (*Ibid.*). Therefore it should not be held to come within the regulated area, which must be very narrow and clearly antithetical to s. 2(b) (*Ibid.*).

108. (*Ibid.*)

109. (*Regina v. Andrews*, 136)

110. (*Regina v. Andrews*, 137)

111. (*Ibid.*)

112. (*Ibid.*)

113. (*Regina v. Andrews*, 142)

114. (*Regina v. Andrews*, 138)

115. (*Ibid.*)

116. (*Ibid.*)

117. (*Regina v. Andrews*, 137)

118. (*Regina v. Andrews*, 138)

As for the contrary conclusion of Cory J.A., Grange J.A. in the Ontario Court of Appeal in *Andrews* viewed as inconsequential the fact that an accused might sincerely believe in the truth or worth of communications (*Regina v. Andrews*, 139).

119. *Regina v. Keegstra* (1990), 124 D.L.R. (4th) 289 [hereinafter, *Keegstra*].

120. John Dixon, "The Keegstra Case: Freedom of Speech and the Prosecution of Hateful Ideas," in *Liberties*, John Russell ed. (Vancouver: New Star Books, 1989), 37-38.

121. (*Regina v. Keegstra*, 1990: 714)

122. (*Ibid.*)

123. (*Regina v. Keegstra*, 1990: 713)

Section 319(2) of the C.C. states:

Everyone who, by communicating statements, other than in public conversation, willfully 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.

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

- (a) if he establishes that the statements communicated were true;
- (b) if, in good faith, he expressed or attempts to establish by argument an opinion on a religious subject;
- (c) if the statements were relevant to any subject of public interest, the discussion of which was for the public benefit, and if on reasonable grounds he believed them to be true; or
- (d) if, in good faith, he intended to point out, for the purpose of removal, matters producing or tending to produce feelings of hatred toward an identifiable group in Canada.

(*Regina v. Keegstra*, 1990: 715-717).

124. (*Regina v. Keegstra*, 1990: 714)

125. (*Ibid.*)

126. (*Ibid.*)

Chief Justice Dickson's decision was joined by Wilson, L'Heureux-Dubé, and Gonthier J.J.; McLachlin J. dissented (LaForest and Sopinka J.J. concurring) (*Regina v. Keegstra*, 1990: 697).

127. (*Regina v. Keegstra*, 1990: 698)

Dickson C.J.C. argued that the reverse onus provision in s. 319(3)(a) represents a minimal impairment of the presumption of innocence (*Regina v. Keegstra*, 1990: 782-783). To require only that the accused raise a reasonable doubt, would excessively compromise the effectiveness of the offence in achieving its purpose (*Ibid.*).

128. (*Regina v. Keegstra*, 1992: note 3 at 730-733)

The Court argued that while s. 2(b) protects all context of expression, "certainly violence as a form of expression receives no such protection" (*Ibid.*).

129. (*Regina v. Keegstra*, 1990: 732)

130. (*Regina v. Keegstra*, 1990: note 3 at 730)

131. (*Regina v. Keegstra*, 1990: 732)

132. (*Regina v. Keegstra*, 1990: notes 39-41)

133. (*Regina v. Keegstra*, 1990: note 3 at 735)

134. (*Regina v. Keegstra*, 1990: 737)

135. (*Ibid.*)

136. (*Ibid.*)

137. (Macklem et al, 1997: 762)

138. (Macklem et al, 1997: 760)

139. (*Regina v. Keegstra*, 1990: 746)

140. (*Regina v. Keegstra*, 1990: 764)

141. (Macklem et al, 1997: 768)

Although Dickson C.J.C. affirms the utility of s. 319(2) of the *Charter* he pragmatically asserts that, "its role will be limited, that it is important not to hold any illusions about the ability of this one provision to rid society of hate propaganda and its associated harms" (Macklem et al, 1997: 767).

142. (Macklem et al, 1997: 772)

143. (*Ibid.*)

144. (*Regina v. Keegstra*, 1990: 700)

145. (*Regina v. Keegstra*, 1990: 755)

146. (*Regina v. Keegstra*, 1990: 759-760)

147. Edmonton Journal v. A.G. Alta., [1987] 41 D.L.R. (4th) 502 [hereinafter, *Edmonton Journal*].

148. (*Regina v. Keegstra*, 1990: 760)

149. (*Ibid.*)

150. (*Regina v. Keegstra*, 1990: 761)

As Justice Dickson asserts in *Oakes*, Some limits on rights and freedoms protected by the *Charter* will be more serious than others in terms of the nature of the right or freedom violated, the extent of the violation and the degree to which the measures which the measures which impose the limit trench upon the integral principles of a free and democratic society. Peter H. Russel et al. Federalism and the Charter: Leading Constitutional Decisions Ottawa: Carleton University Press, 1993, 458.

151. (*Regina v. Keegstra*, 1990: 762)

152. (*Regina v. Keegstra*, 1990: 766)

153. (Ibid.)

154. (*Regina v. Keegstra*, 1990: 730)

155. (*Regina v. Keegstra*, 1990: 842)

156. (*Regina v. Keegstra*, 1990: 829-832)

157. (*Regina v. Keegstra*, 1990: 846-848)

158. Canada (Canadian Human Rights Commission) v. Taylor (1990) 75 D.L.R. (4th) 577 A.C., [hereinafter, *Taylor*].

159. (*Canada v. Taylor*, 582)

The Tribunal summarized messages over a two year period beginning in mid 1977: "that a conspiracy which controls and programmes Canadian society is occurring: it is difficult to find out the truth about this conspiracy because our books, schools; media are controlled by the conspirators" (Ibid.). These conspirators are responsible for unemployment, inflation, weakens us by encouraging perversion, laziness, drug use and race mixing. These conspirators founded communism and are responsible for many of our economic problems. The conspirators are Jews. The messages also identified specific Jewish individuals by name (Ibid.).

160. (*Canada v. Taylor*, 581)

161. (Ibid.)

162. In the context of s. 13(1) the term "repeated" must comport a requirement for something in the way of a series of messages likely to expose a persons to hatred or contempt (*Canada v. Taylor*, 608).

163. (*Canada v. Taylor*, 581)

164. (*Canada v. Taylor*, 592)

165. (Ibid.)

166. (Ibid.)

167. (Ibid.)

168. (*Canada v. Taylor*, 584-585)

169. (*Canada v. Taylor*, 578)

170. (*Canada v. Taylor*, 604)

The Court majority maintained "absence of intent in s. 13(1) does not impinge so deleteriously upon s. 2(b) as to make intolerable the challenged provision's existence in a free and democratic society" (Ibid.).

171. (*Canada v. Taylor*, 594-595)

The majority asserts that the values of equality and multiculturalism are enshrined in ss. 15 and 27 further magnify the weightiness of Parliament's objective in enacting s. 13(1) (*Canada v. Taylor*, 595). As the harm flowing from hate propaganda works in opposition to these linchpin Charter principles, the importance of taking steps to limit its pernicious effects becomes manifest (*Ibid.*).

172. (*Ibid.*)

173. (*Canada v. Taylor*, 581)

Section 2 of the *Canadian Human Rights Act* sets out prohibited grounds of discrimination and include (though are not restricted to) race, national and ethnic origin, colour and religion (*Ibid.*).

174. (*Canada v. Taylor*, 597)

175. (*Canada v. Taylor*, 598)

176. (*Canada v. Taylor*, 625)

177. (*Canada v. Taylor*, 598)

178. (*Ibid.*)

179. (*Ibid.*)

The majority argued that intent to discriminate is not a precondition of a finding of discrimination under the *Ontario Human Rights Code*. The preoccupation with effects and not with intent, is readily explicable when one considers that systemic discrimination is much more widespread in our society than is intentional discrimination. To import a subjective intent requirement into human rights provisions rather than allowing tribunals to focus solely on effects would defeat one of the primary goals of anti-discrimination statutes where individual culpability may not be quantifiable. Accordingly, the importance of isolating effects (and hence ignoring specific intent) justifies this absence of a *mens rea* requirement (*Ibid.*).

180. (*Canada v. Taylor*, 598)

Individuals and groups in a free society assume that, whatever restriction it may be necessary to place on free speech—they will always have the right to say what is true. While I do support s. 13(1) I also concur with Dickson C.J.C.'s criticism that the exclusion of the defence of truth from s. 13(1) cannot but seriously increase the degree of infringement (to an intolerable degree) of freedom of expression which the provision effects (*Ibid.*).

181. (*Canada v. Taylor*, 621)

182. (*Ibid.*)

183. (*Canada v. Taylor*, 607)

184. (*Ibid.*)

185. (*Ibid.*) Canadian Human Rights Act, S.C. 1976-1977, c.33, s.13.

While human rights protection is primarily within provincial jurisdiction, the *Canadian Human Rights Act* has exclusive jurisdiction with respect to communications of racial hatred by means of telephone systems falling under federal authority (*Ibid.*).

186. (*Canada v. Taylor*, 604) A shortcoming of the federal Act is the limited remedies available to tribunals for breach of s. 13, namely a cease and desist order (*Ibid.*). The inadequacy of remedies for systemic discrimination reflects in part the faulty analysis of the expression of racial hatred by the judiciary and legislature. The "I & We" approach to preventing and redressing hate propaganda in a deliberative democracy necessitates human rights tribunals that can order respondents to undertake a systemic plan aimed at preventing, reducing or eliminating disadvantage to groups protected by the particular Act.

187. Regina v. Butler (1992), 89 D.L.R. (4th) 449 [hereinafter, *Butler*].

188. (*Regina v. Butler*, 449)

The Criminal Code s. 163(8) criminalizes:

any publication a dominant characteristic of which is the undue exploitation of sex, or of sex and any one or more of the following subjects, namely crime, horror, cruelty and violence, shall be deemed to be obscene.

189. (*Regina v. Butler*, 451) Sopinka J.A. (writing for the majority) asserted that "[h]arm in this context means that it predisposes persons to act in an anti-social manner. The stronger the inference of a risk of harm the lesser the likelihood of tolerance" (*Ibid.*).

190. (*Regina v. Butler*, 451)

191. (*Regina v. Butler*, 473)

192. (*Regina v. Butler*, 450)

The Court argued however that materials which have scientific, artistic or literary merit are not captured by the provision (*Ibid.*).

193. (*Regina v. Butler*, 465)

194. (*Regina v. Butler*, 450)

195. (*Regina v. Butler*, 475) cited in *Irwin Toy, supra*, at 617.

Sopinka J.A. argues that the fact that a particular legislative term is open to varying interpretations ("that it escapes precise technical definition") by the courts is not fatal- as long as a sensible meaning is attainable (*Ibid.*).

196. (*Regina v. Butler*, 450)

197. (*Regina v. Butler*, 479)

198. (*Regina v. Butler*, 482)

199. (*Regina v. Butler*, 482)

200. (*Regina v. Butler*, 478-479; 483)

201. (*Regina v. Butler*, 488)

202. (*Regina v. Butler*, 483) Sopinka J. found a rational connection between the harm conveyed and experienced by obscene conveyances because "it is reasonable to presume that exposure to images bears a causal relationship to changes in attitudes and beliefs" (*Ibid.*). Sopinka J.A. argues that in the face of inconclusive social science evidence, the approach adopted by our Court in *Irwin Toy* is instructive. In that case, the basis for the legislation was that television advertising directed at young children is *per se* manipulative. The Court made it clear that in choosing its mode of intervention, it is sufficient that Parliament had a reasonable basis (*Regina v. Butler*, 450).

203. In *Keegstra* the absence of absolute proof of a causative link between hate propaganda and hatred of an identifiable group was discounted as a determinate factor in assessing the constitutionality of the hate literature provisions of the Criminal Code (*Regina v. Butler*, 483-484).

204. Michael Mandel. The Charter of Rights and the Legalization of Politics in Canada revised edition, (Toronto: Thompson Educational Publishing, Inc., 1994), 371-372. Section 181 of the C.C. states

s.181 everyone who willfully publishes a statement, tale or news that he knows is false and that causes or is likely to cause injury or mischief to a public interest is guilty of an indictable offence and liable to imprisonment for a term not exceeding two years.

Zundel v. The Queen et al (1992) 9 D.L.R. (4th) 202-203, [hereinafter, *Zundel*]

205. (Mandel, 1994: 371)

206. (Mandel, 1994: 372)

207. (*Zundel v. The Queen*, 1992: 203-204)

The dissenting Justices argued that it is only if deliberate false statements are likely to seriously injure the rights and freedoms contained in the *Charter* that s. 181 is infringed (*Zundel v. The Queen*: 1992: 204).

208. (Monahan, 1987: 31)

209. (*Ibid.*)

210. (*Ibid.*)

211. Ian McKenna, "Canada's Hate Propaganda Laws-A Critique", in 26 Ottawa Law Review 159, 1994.

212. (*Ibid.*)

213. (*Zundel v. The Queen*, 1992: 202)

214. (Bracken, 1993: 52)

215. (*Zundel v. The Queen*, 1992: 203)

216. (*Zundel v. The Queen*, 1992: 223)

217. (*Ibid.*)

218. (Bracken, 1993: 68)

219. (*Zundel v. The Queen*, 1992: 203)

Section 181 is a section derived from 13th Century offence designed to protect the great men of the realm from the publication of false news or tales, which could threaten the security of the state (*Ibid.*).

220. (*Zundel v. The Queen*, 1992: 268-269)

McLachlin J. concluded that the Court's rejection of the doctrine of 'shifting purposes' in *Big M Drug Mart*, precluded her from accepting the approach of Cory and Iacobucci J.J., writing in dissent, who were willing to convert s. 181 into a provision directed at encouraging racial harmony (*Zundel v. The Queen*, 1992: 266). The majority in *Big M* held that it is not open to the government to assert *post facto* a purpose that did not originally animate the legislation (*Ibid.*).

221. (*Zundel v. The Queen*, 1992: 204)

222. (*Ibid.*)

223. (*Ibid.*)

224. (Sheldrick, 26/31 Jan. '95)

225. (*Ibid.*)

226. (Bracken, 1993: 87)

227. For example, if an individual writes an article perceived to contain hateful elements directed at an identifiable group (yet in a form where rational debate and rebuttal is possible); and wants to distribute them to the public- the state should have the constitutional right and responsibility to require such a person be prepared to have included a written rebuttal attached to the article. A written rebuttal by capable individuals including, at minimum, input from representatives from the group or groups targeted by the hate expression. Moreover, the dissemination of such materials ought to be regulated to the particular environment taking into account the particular audience receiving the materials (i.e. asymmetries of power and position, whether they are adults etc...).

228. Where as it was originally designed to protect thirteenth century noble men from false public accusations it has evolved into a mechanism to protect society's vulnerable individual and groups in the form of false news and accusations from those who hold the power levers (*Zundel v. The Queen*, 1992: 254-255). The provision facilitates and expands the protection from hateful expressive attacks on targeted groups, thus, affirming a more balanced "I & We" approach of inclusion and deliberative participation of a greater diversity of interlocutors.

229. (*Zundel v. The Queen*, 1992: 266) McLachlin J. concluded that the Court's rejection of the doctrine of 'shifting purposes' in *Big M Drug Mart*, precluded her from accepting the approach of Cory and Iacobucci J.J., writing in dissent, who were willing to convert s. 181 into a provision directed at encouraging racial harmony (*Ibid.*). The majority in *Big M* held that it is not open to the government to assert *post facto* a purpose that did not originally animate the legislation (*Ibid.*).

230. (*Zundel v. The Queen*, 1992: 232)

231. (*Zundel v. The Queen*, 1992: 226)

232. For example s. 319(3) of the C.C. indicates the importance of expanding deliberative ideas and arguments stating:

No person shall be convicted of an offence under subsection (2)(a) if (a) he establishes that the statements communicated were true, (b) if, in good faith, he expressed or attempted to establish by argument an opinion on a religious subject, (c) if the statements were relevant to any subject of public interest, the discussion of which was for the public benefit, and if on reasonable grounds he believed them to be true; or (d) if, in good faith, he intended to point out, for the purpose of removal, matters producing or tending to produce feelings of hatred toward an identifiable group in Canada (*Criminal Code* RSC 1985 c. C-46).

233. (Macklem et al, 1997, 714)

Dickson C.J.C. in *Keegstra* argued that whether or not a statement is susceptible to classification as true or false, such error should not excuse an accused who has willfully used a statement in order to promote hatred against an identifiable group (*Regina v. Keegstra*, 1990: 700).

234. (*Zundel v. The Queen*, 1992: 203)

235. (*Zundel v. The Queen*, 1992: 229)

236. (*Zundel v. The Queen*, 1992: 228)

237. (*Ibid.*)

238. (*Ibid.*)

239. (*Zundel v. The Queen*, 1992: 232)

240. (*Zundel v. The Queen*, 1992: 247)

241. (*Zundel v. The Queen*, 1992: 247)

242. (*Ibid.*)

243. (*Ibid.*)

244. (*Zundel v. The Queen*, 1992: 211)

245. (*Zundel v. The Queen*, 1992: 247)

246. (*Zundel v. The Queen*, 1992: 247)

247. (*Ibid.*)

By pointing to what he alleges to be new evidence, the appellant submits that some Jews died, as people will in wartime but that the "Final Solution to the Jewish Question" was never anything more than a plan to facilitate emigration to Madagascar (*Zundel v. The Queen*, 212). The pamphlet further asserted that the Holocaust is a myth fabricated by an immensely powerful Jewish-Zionist conspiracy to win lucrative war reparations from the Germans to make them feel ashamed and a pariah in the eyes of other nations and to win political and economic support for the State of Israel (*Ibid.*).

The pamphlet maintained that the Nazi concentration camps were only work camps-- that gas chambers were built by the Russians after the War-- that the millions who disappeared through the chimneys of the crematoria at Auschwitz, Sobibor, Majdanec and to US and changed their names. (*Zundel v. The Queen*, 1992: 209) The Crown went on to point the falsity of this claim displaying evidence of a diary extract on March 27, 1942 of Joseph Goebbels stating that the "Final Solution" was, in fact, genocide: "Not much will remain of the Jews. On the whole it can be said that about 60% of them will have to be liquidated, whereas only about 40% can be used for forced labour" (*Zundel v. The Queen*, 1992: 212).

The pamphlet also alleges that no documentary evidence exists of the Nazi plan to exterminate Jews. Again, the Crown gave evidence including speeches by Heinrich Himmler (head of the SS) on October 4, 1943 to his troops in Posen, in which he refers to the program of extermination of Jews. Himmler stated: "I also want to talk to you, quite frankly, on a very grave matter. Among ourselves it should be mentioned quite frankly and yet we will never speak of it publicly...I mean the cleansing out of the Jews, the extermination of the Jewish race..."(*Ibid.*).

248. (Weimann and Winn, 1986: 26)

249. (Christie, 1985: 8-9)

250. (*Zundel v. The Queen*, 1992: 247)

Some forms of expression, such as academic periodicals, are accorded more authority and have traditions of authority that influence their interpretation, while others, such as political signs or lampoons, have traditional hyperbolic rhetoric. The pamphlet at issue is disguised as the reasoned product of scholarly investigation and will very likely be accorded greater seriousness by the reasonable reader. Zundel's book *Did Six Million Really Die?* makes specific claims about concrete historical incidents and the contents of publicly accessible historical incidents (*Ibid.*).

251. Ross v. New Brunswick School District No.15 (1996) 133 D.L.R. (4th) 1, [hereinafter, *Ross*].

252. (*Ross v. New Brunswick*, 17) New Brunswick Human Rights Act [hereinafter, *Act*]. Section 5(1)(b) of the *Act* states:

5(1) No person directly or indirectly, alone or with another, by himself or by the interposition of another, shall

(b) discriminate against any person or class of persons with respect to any accommodation, services or facilities available to the public because of race, colour, religion, national origin, ancestry, place of origin, age, physical disability, mental disability, marital status, sexual orientation or sex.

253. (*Ross v. New Brunswick*, 11)

254. (*Ross v. New Brunswick*, 31)

255. (*Ross v. New Brunswick*, 13)

256. (*Ross v. New Brunswick*, 35)

257. (*Ross v. New Brunswick*, 35-36)

258. (*Ross v. New Brunswick*, 36)

259. (*Ibid.*)

260. (*Ross v. New Brunswick*, 6)

261. (*Ross v. New Brunswick*, 25)

The Board found Ross's comments spoke of Jews as the "synagogue of Satan" and that Judaism teaches that "...Jesus Christ is a bastard, a lewd deceiver, a false prophet who is burning in Hell" and that the Virgin Mary is a whore" (*Ibid.*). Ross continuously alleged that the Christian faith and way of life are under attack as a result of an international Jewish conspiracy headed by Jews (*Ibid.*). The Board also found that Ross's letters encouraged others to condemn all Jews and throw off the "yoke of Jewish domination" (*Ibid.*).

262. (*Ross v. New Brunswick*, 20)

The Court cites Allison Reyes in "Freedom of Expression & Public School Teachers" (1995), *Dal. J. Leg. Studies* 35, 42-- affirming the importance of teachers as an expressive medium asserting that 'Teachers are a significant part of the unofficial curriculum because of their status as 'medium'. In a very significant way the transmission of prescribed 'messages' (values, beliefs, knowledge) depends on the fitness of the 'medium' (the teacher)" (*Ibid.*).

263. (*Ross v. New Brunswick*, 38)

The board heard evidence from two students in the school board, whom it found to be credible witnesses (*Ross v. New Brunswick*, 19). Students gave evidence of repeated and continual harassment in the form of derogatory name-calling of Jewish students, carving of swastikas by other students into their own arms and the desks of Jewish children and general intimidation of Jewish students (*Ibid.*).

264. (*Ibid.*)

265. (*Ross v. New Brunswick*, 1)

266. (*Ross v. New Brunswick*, 33)

267. (Ibid.)

Children are also more likely to feel threatened and isolated by a teacher who makes comments denigrating personal characteristics of a group to which they belong (Ibid.).

268. (*Ross v. New Brunswick*, 6)

269. (*Ross v. New Brunswick*, 33)

270. (*Ross v. New Brunswick*, 34)

271. (*Ross v. New Brunswick*, 37-38)

272. (Ibid.)

273. (Ibid.)

274. (*Ross v. New Brunswick*, 35)

275. (Ibid.)

276. (*Ross v. New Brunswick*, 35-36)

277. If a school board of trustees is potentially liable criminally for condoning the dissemination of hate propaganda by its employees, it is more likely to implement hiring, training, discipline and other personnel policies designed to reduce the incidence of hate propaganda. Where the relevant authority is an employer, its power to discipline can extend to the expression of racial hatred beyond the workplace if such activity impairs the efficient functioning of the employer's operations in a broad sense.

278. Jamie Cameron. "The Past, Present, and Future of Expressive Freedom Under The Charter," 1-74, in Osgoode Hall Law Journal Vol. 35, Issue 1 (Spring, 1997), 73.

Conclusion **Towards a Canadian “I & We” Deliberative Democracy**

The special role given to substantive equality and multiculturalism in the *Charter* necessitates a departure from the view, seemingly prevalent in the United States at present, that the suppression of hate propaganda is incompatible with the guarantee of free expression. To value a multicultural deliberative democracy only for the opportunities it provides individuals to pursue their own interests, unfettered by communal responsibilities, is to permit public space to be used unabashedly for private ends. In considering freedom of expression in Canadian society, practical realities including multiculturalism and the need for tolerance and mutual respect, as goals within the *Charter* itself, ought to provide insight into how freedom of expression should be interpreted and applied in moving towards a more balanced deliberative democracy.

Establishing a more egalitarian and expanded deliberative democracy requires reciprocity and mutual respect, recognizing participants as fellow rational interlocutors, and a fair equality of deliberative opportunity. In its adjudication, the Supreme Court has often recognized the legal interpretation must be guided by these egalitarian values, if a fair equality of opportunity for deliberative participation is to be facilitated and expanded. The goal of a more humane and egalitarian deliberative democracy requires a new democratic conversation. A new deliberative conversation that avoids the counterproductive dichotomies of libertarian and communitarian conceptions of rights and responsibilities of individuals and groups is needed.

The libertarian defines liberty as the absence of government restrictions

on individual value choices in the “marketplace of ideas.” An “I & We” approach defines it as responsible, effective and expanded participation of a diverse citizenry in a deliberative democracy. The former endows the individual with rights that trump communal judgments (with little or no consideration of corresponding responsibilities to others and society), but the latter believes that “civic commitments and common action...furnish both content and guidance to the exercise of rights.”ⁱⁱ Since citizens live within the bounds and responsibilities of a community they do not have full rein to express themselves without regard to the potentially harmful consequences for others.

A balanced “I & We” approach is sensitive to liberal notions of individual autonomy, rights and responsibilities and communitarian considerations of larger group rights and responsibilities. In the context of balancing freedom of expression and hate propaganda “I & We” philosophy asserts that the rights and responsibilities of individuals and groups, speaker(s) and audience(s), must be equally considered. Deliberative “I & We” public fora call for a guaranteed and effective right of response from persons and groups who are targeted by hate expression in a form capable of rational debate and refutation. Balanced public fora must employ the substantive principles of non-discrimination and non-repression of critical ideas in their functioning if the facilitation of an expanded and more diverse deliberative democracy is to be striven for.

“I & We” philosophy emphasizes the danger of hate propaganda lies not fundamentally in creating attitudes of hatred where none exist but in its creating an environment in which existing attitudes are articulated, legitimized, perpetuated and amplified. The social harm flowing from the perpetuation of

attitudes of hate is not merely the risk of escalation into expressions and acts of racial or bigoted hatred but the perpetuation of barriers to the dismantling of systemic racial and bigoted discrimination which is the goal of official public policy in Canada. Matsuda describes the impact that unchecked racist speech may have on target group members stating

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 to tolerance. When...the courts refuse redress for racial insult, and when racist attacks are officially dismissed as pranks, the victim becomes a stateless person.ⁱⁱ

"I & We" philosophy argues that interdependence among rational interlocutors is possible only when the dignity of the person encompasses the dignity of the target as a condition of social and political life itself. "I & We" philosophy displaces ideological extremes in which expression is sanctioned or nullified dogmatically. It denies that expression invariably promotes the democratic or deliberative good; insists it is best protected when it is evaluated in light of the communal conditions under which it is exercised. The "I & We" approach identifies two related images of liberty: the liberty to be different (individually or as a member of a group) and the liberty to be respected by others on account of that difference.

An "I & We" deliberative democracy recognizes hate propaganda addresses itself to the crowd but appeals to each individual as a member of the group targeted and plays on the reliance of each one on group identity and affiliation for strength.ⁱⁱⁱ A legislative and judicial approach in weighing freedom of expression and hate propaganda facilitative of an "I & We" approach offers a plausible step towards the ideal of a more egalitarian and just society (conscious of blatant and systemic discrimination and strategies of prevention

and redress). Such an approach avoids the rather facile zero-sum dichotomy of the characterization of the liberal, as endorsing the self-interested lone-rights bearer, and the communitarian which treats the individual as indistinguishable from the group(s) to which he or she belongs.

Balanced “I & We” public fora offer a pragmatic and concrete mechanism of affirming the expansion of ideas and debate facilitating a fair equality of access and deliberative opportunity. Simultaneously such an approach promotes tolerance, respect and a sense of solidarity among rational interlocutors in a deliberative democracy by proactively affirming principles of non-repression and non-discrimination. If a multicultural deliberative democracy is not reducible to absolute self-expression, then citizens must learn and exhibit certain character traits that dispose them toward an interdependent good that balances individual and group interests. In the context of hate propaganda, legal regulation by the state (distinguishing perlocutionary from illocutionary hate speech) supportive of “I & We” public fora is crucial to expand deliberation amongst a diversity of rational interlocutors.

Expanding rational deliberation from a multicultural citizenry while simultaneously affirming fundamental democratic values of tolerance, autonomy and mutual respect requires constant socio-political and legal efforts and determination among all citizens. The “I & We” approach strives for the practical and effective realization of Habermas’s “ideal speech situation” (in the case of debatable perlocutionary hate expression in “I & We” fora) to groups targeted by hate propaganda. A socio-political and legal will and initiative is critical to secure the resources to establish such facilitative public fora in a deliberative democracy. Judicial recognition of the democratic legitimacy of “I &

We” principles and public fora, in the context of its adjudication of hate propaganda and freedom of expression, is also essential in the substantive movement towards an “I & We” deliberative democracy.

An “I & We” deliberative approach facilitates new ways of talking about freedom of expression and the corresponding responsibilities of its rational interlocutors and its principled limits in “I & We” public fora. Chief Justice John Sopinka maintains the two hundred years of American experience with its Constitution have been of immense assistance to our Court --that Canadian adjudication can learn from the virtues and mistakes of US jurisprudence-- as we grapple with our *Charter*.^{iv} It is easy to predict values in Canada will change but more problematic figuring out how far and in which direction the nation will evolve. It does not follow, however, that there is nothing that can be done to shape the present towards an “I & We” future so that past mistakes can be learned from and not repeated.

Endnotes

1. Sheldon Wolin, "What Revolutionary Action Means Today", in Democracy 2 (1982), 18. cited in Abramson & Bussiere "Free Speech & Free Press: A Communitarian Perspective", 228.

2. (*Zundel v. The Queen*, 1992: 228)

3. In the words of Mari Matsuda, in "Public Response to Racist Speech: Considering the Victim's Story", 87 Mich. L. Rev. 2320, 2358 (1989) those who "proclaim [the] racial inferiority" of members of racial minorities render the genus "at once alike and inferior."

4. Kent Greenawalt, Fighting Words: individuals, communities, and liberties of speech, (Princeton, N.J.: Princeton University Press, 1995), 43. Greenawalt concludes that we have benefited from being second in the field. Comparing our approach in balancing community values and individual rights he states:

It is hard not to be attracted by the flexible and intelligent evaluation of the Canadian Supreme Court that seems to be much more sensible than the categorical boxes and blindness to nuances of dominant American approaches. However, the cost of following the Canadian path would also certainly be reduced to protection for expression (Ibid.).

Bibliography

Addis, Adeno. "On Human Diversity and the Limits of Toleration," in Nomos1 XXXIX: Ethnicity And Group Rights, Ian Shapiro & Will Kymlicka eds., (New York: New York Press, 1997), pp. 112-153.

Alexy, Robert, "A Theory of Practical Discourse," Trans. David Frisby, in The Communicative Ethics Controversey, Seyla Benhabib and Fred Dallmayr, eds., (Cambridge: MIT Press, 1989), pp. 151-190.

-----, "The Rules of Reason," (1990), pp. 165-167.

American Booksellers Association Inc. et al v. Hudnut 771 F 2d 323 (UCSA, 7th Cir., 1985) affirmed 106 Sct. 1172 (1986).

Andrews, J.S. "Liberal Equality and the Justification of Multicultural, Civic Education," in The Canadian Journal of Law And Jurisprudence, Vol.VII, No.1 (London, Ontario: University of Western Ontario, January 1994), pp. 111-126.

Bakan, Joel. "Constitutional Interpretation and Social Change: You Can't Always Get What You Want (Nor What You Need)" in Readings In Law And Society, 156-161, fifth edition., Jane Banfield ed., North York, Ontario: Captus Press Inc., 1993.

Barber, Benjamin R. "Liberal Democracy and the Costs of Consent," in Liberalism & the Moral Life, Nancy E. Rosenblum ed., (Cambridge, Massachusetts: Harvard University Press, 1989), pp. 54-68.

Barendt, Eric. "Three Free Speech Theories," 8-22 in Freedom of Speech, London:Oxford University Press, 1985.

Bartholomew, Amy and Alan Hunt. "What's Wrong With Rights?" pp. 501-558, in 9 Law & Equality, 1990.

Benhabib, Seyla. "Toward a Deliberative Model of Democratic Legitimacy," in Democracy and Difference: Contesting the Boundaries of the Political, Seyla Benhabib editor, (Princeton, New Jersey: Princeton University Press, 1996), pp. 67-94.

-----, "Liberal Dialogue vs. A Critical Discourse," in Liberalism & the Moral Life, Nancy L. Rosenblum editor, (Cambridge, Massachusetts: Harvard University Press, 1989), pp. 143-157.

Bernstein, J.M. Recovering Ethical Life: Jürgen Habermas and the Future of Critical Theory, (New York: Routledge, 1995).

Bowman, James. "Deliberative Democracy and Effective Social Freedom: Capabilities, Resources and Opportunities", in Deliberative Democracy: Essays on Reason and Politics, (Cambridge, Massachusetts: MIT Press, 1997), pp. 321-347.

Bracken, Harry M. Freedom Of Speech: Words Are Not Deeds, Westport Connecticut: Praeger Publishers, 1994.

Brown, James A.C. Techniques of Persuasion: From Propaganda to Brainwashing, Markham, Ontario: Penguin Books Canada, 1963.

Butler, Judith P. Excitable Speech: A Politics of the Performative, (New York: Routledge, 1997).

Cairns A. C. and C. Williams, "Constitutionalism, Citizenship and Security in Canada: An Overview," in Citizenship and society in Canada, 1, 3 (A.C. Cairns and C. Williams eds., 1985).

Cameron, Jamie. "The Past, Present, and Future of Expressive Freedom Under The Charter," 1-74, in Osgoode Hall Law Journal Vol. 35, Issue 1 (Spring, 1997).

Canada (Canadian Human Rights Commission) v. Taylor (1990), 75 D.L.R. (4th) 577.

Canadian Human Rights Act, S.C. 1976-1977, c.33, s.13.

Canadian Charter of Rights and Freedoms, Part I of the *Constitution Act*, 1982 being Schedule B to the *Canada Act* 1982 (U.K.), 1982, c.11 [hereinafter, *Charter*].

Canadian Association of Chiefs of Police. A Resource Guide: Hate Crimes in Your Back Yard, (Ottawa: Solicitor General of Canada, 1996).

Christie, Doug. The Zundel Trial & Free Speech, Toronto: Citizens for Foreign Aid Reform Inc., C-FAR, 1985.

"Choosing Judges", in The Globe and Mail, Opinion A16, Toronto: Thomson Canada Limited, Thursday 18 July, 1999.

Chaplinsky v. New Hampshire, 315 U.S. 568 (1942).

Cohen-Almagor, Raphael. The Boundaries of Liberty and Tolerance, (Gainesville, Florida: University Press of Florida, 1994).

Cohen, Joshua. "Procedure and Substance in a Deliberative Democracy," in Democracy and Difference: Contesting the Boundaries of the Political, Seyla Benhabib editor, (Princeton, New Jersey: Princeton University Press, 1996), pp. 95-119.

Cohen, Maxwell. Report of the Special Committee on Hate Propaganda in Canada, (Ottawa: Queen's Printer, 1966), Preface.

Criminal Code RSC 1985 c. C-46.

D'Antonio, Michael. "I or We?" in http://www.mojones.com/MOTHER_JONES/MJ94/dantonio.html

Delgado, Richard. "Words that Wound: A Tort Action for Racial Insults, Epithets and Name-Calling," 17 Harv. C.R.C.L. LREV, (1982) 133, 137.

Dixon, John. "The Keegstra Case: Freedom of Speech and the Prosecution of Hateful Ideas," in Liberties, John Russell ed. Vancouver: New Star Books, 1989.

Dorsen, Norman. "Is there a right to stop offensive speech? The case of the Nazis at Skokie in Liberties, John Russell editor, (Vancouver: New Star Books, 1989).

Edmonton Journal v. A. G. Alta., [1987] 41 D.L.R. (4th) 502 [hereinafter, Edmonton Journal].

Etzioni, Amitai. The Spirit of Community: The Re-invention of American Society, (New York: Simon & Schuster), 1993.

----- A Responsive Society: Collected Essays on Guiding Deliberative Social Change, (San Francisco, California: Jossey-Bass Publishers), 1991.

----- "Old Chestnuts and New Spurs," in New Communitarian Thinking: Persons, Virtues, Institutions, and Communities, (Charlottesville, Virginia: University Press of Virginia, 1995), pp. 16-34.

Finn, P. "Bias Crime: Difficult to Define, Difficult to Prosecute," (Summer, 1988) 3 Criminal Justice, no 2, 19, 20.

Fish, Stanly. "There's No Such Thing As Free Speech And It's A Good Thing, Too," 231- 248, in Debating P.C.: The Controversy Over Political Correctness On College Campuses, Paul Berman ed., New York: Dell Publishing, 1992.

Fletcher, George P. "The Case for Tolerance," in Looking Backward: A Critical Appraisal of Communitarian Thought, Derek L. Phillips, ed., (Princeton, New Jersey: Princeton University Press, 1993).

Flynn, Thomas. "Foucault as parrhesiast: his last course at the college de France," in Freedom And Equality, Dr. Shannon Bell editor, Vol.1, York University: Beta Reproductions Inc., (Winter 1996).

Forst, R. "Justice, Reason, and Critique: Basic Concepts of Critical Theory," in D. Rasmussen, ed., The Handbook of Critical Theory, (1996).

Gimmler, Antje Dr. (translation) "The Discourse Ethics of Jürgen Habermas," Lehrstuhl für Philosophie II, Moralbewusstsein und Kommunikatives, (Handeln, Frankfurt, 1983), pp. 1-5.
<http://caae.phil.cmu.edu/Cavalier/Forum/meta/background/agimmler>

Gilmour, Glenn A. Working Document: Hate-Motivated Violence. (Ottawa: Department of Justice, Research and Statistics Directorate, May 1994).

Gould, Carol. "Social ontology and the question of foundationalism" in Rethinking Democracy, (Cambridge: Cambridge University Press, 1988), pp. 114-132.

Greenawalt, Kent. "Free Speech In The United States And Canada," in Law and Contemporary Problems, V.55 No.1 (Winter 1992).

-----, Fighting Words: individuals, communities, and liberties of speech, (Princeton, N.J.: Princeton University Press, 1995).

Griffith, William B. "Equality and Egalitarianism: Framing the Contemporary Debate," in The Canadian Journal Of Law And Jurisprudence, Vol. V11, No. 1 (January 1994), pp. 5-26.

Gutmann, Amy. "The Virtues of Democratic Self Restraint," in New Communitarian Thinking: Persons, Virtues, Institutions, and Communities, Amitai Etzioni ed., (Charlottesville, Virginia: University Press of Virginia, 1995), pp. 154-169.

-----, "Communitarian Critics of Liberalism," in New Communitarian Thinking: Persons, Virtues, Institutions, and Communities, Amitai Etzioni ed., (Charlottesville, Virginia: University Press of Virginia, 1995), pp. 120-140.

Habermas, Jürgen. "Three Normative Models of Democracy," in Democracy & Difference Contesting the Boundaries of the Political, Seyla Benhabib, ed. (Princeton New Jersey: Princeton University Press, 1996), pp. 21-30.

-----, "Reconciliation through the Public Use of Reason: Remarks on John Rawls's Political Liberalism, in "Journal of Philosophy (XCII:3 [March, 1995] pp. 117-8.

-----, "Discourse Ethics: Notes on Philosophical Justification," in Moral Consciousness and Communicative Action, (Cambridge: MIT Press, 1990), pp. 43-115.

-----, The Theory of Communicative Action, Vol. 1, trans. Thomas McCarthy (Boston: Beacon Press, 1984).

Haig v. Canada, [1993] 2 SCR 995 [hereinafter, *Haig*].

Held, David. Introduction to Critical Theory: Horkheimer to Habermas. (Berkeley: University of California Press, 1980).

Hobbes, Thomas. The Leviathan introduction edited by Edwin Curley, (Cambridge: Hackett Publishing Company, Inc., 1994).

<http://caae.phil.cmu.edu/Cavalier/Forum/meta/background/HaberIntro.html>, pp. 1- 5.

International Convention on the Elimination of All Forms of Racial Discrimination, 21 December 1965, 660 U.N.T.S. 212 (signed by Canada 24th August 1966, entered into force 4th January 1969, ratified by Canada 14th October 1970).

Irwin Toy Ltd. v. Quebec (Attorney General) (1989), 58 D.L.R. (4th) 577 [hereinafter, *Irwin Toy*].

Jacobs, Lesley A. "Equal Opportunity and Gender Disadvantage," in The Canadian Journal Of Law And Jurisprudence, Vol. VII, No. 1 (January 1994), pp. 61-72.

Knight, Jack and James Johnson. "What Sort of Political Equality Does Deliberative Democracy Require?", in Deliberative Democracy: Essays on Reason and Politics, (Cambridge, Massachusetts: MIT Press, 1997), pp. 279-320.

Kuhn, Thomas S. The Structure of Scientific Revolutions, 3rd edition (Chicago: The University of Chicago Press), 1996.

Kymlicka, Will. Liberalism, Community, and Culture, (Oxford, England: Clarendon Press, 1989).

-----, Communitarianism & Individualism, eds. S. Avineri and S. De-Shalit. (Oxford University Press, 1992, pp. 165-185.

Lawrence III, Charles R. "If He Hollers Let Him Go: Regulating Racist Speech on Campus," in Words That Wound: Critical Race Theory, Assaultive Speech, & the First Amendment, (Boulder, Colorado: Westview Press, 1993), pp. 53-88.

League for Human Rights of B'nai Brith Canada. Victim Impact of Racially Motivated Crime. (Downsview, Ontario, 1993).

Lederer, Laura J. "Pornography and Racist Speech as Hate Propaganda", 131-156 in The Price We Pay: The Case Against Racist Speech, Hate Propaganda, and Pornography, Laura Lederer and Richard Delgado eds., (New York: Hill & Wang, 1995).

Levin, J. And J. McDevitt. Hate Crimes: The Rising Tide of Bigotry and Bloodshed. (New York: Plenum Press, 1993).

Lucas, J. Principles of Politics, (Oxford U.P., 1966), pp. 243- 50.

Lyotard, Jean Francois. "The Other's Rights," in Shute, Steven and Susan Hurley eds. in On Human Rights, (New York: Basic Books, 1993), pp. 135-148.

Matsuda, Mari J. The Cost of Free Speech. (London: Farber and Farber), 1990.

----- . "Public Response to Racist Speech: Considering the Victim's Story," in Words That Wound: Critical Race Theory, Assaultive Speech, & the First Amendment, (Boulder, Colorado: Westview Press, 1993), pp. 17-52.

MacIntyre, Alasdair C. After Virtue: A Study in Moral Theory, (Notre Dame, Indianapolis: University of Notre Dame Press), 1984.

Macklem, P. et al. Canadian Constitutional Law, 2nd edition, Toronto: Emond Montgomery Publications Limited, 1997.

Mahoney, Kathleen. "The Canadian Constitutional Approach To Freedom Of Expression In Hate Propaganda And Pornography," 77-105, in Law and Contemporary Problems, Vol. 55 No. 1, (Winter 1992).

----- . "Recognizing the Constitutional Significance of Harmful Speech: The Canadian View of Pornography and Hate Propaganda", 277-290, in The Price We Pay: The Case Against Racist Speech, Hate Propaganda & Pornography, Laura Lederer and Richard Delgado eds., New York: Hill and Wang, 1995.

Mandel, Michael. The Charter of Rights and the Legalization of Politics in Canada revised edition, (Toronto: Thompson Educational Publishing, Inc., 1994).

Manfredi, Christopher. Judicial Power and the Charter: Canada and the Paradox of Liberal Constitutionalism, (Toronto: McClelland & Stewart, 1993).

McKenna, Ian B. "Canada's Hate Propaganda Laws-A Critique", in 26 Ottawa Law Review 159, 1994.

McCarthy, Thomas. "Kantian Constructivism and Reconstructivism: Rawls and Habermas in Dialogue," Ethics 105 (October 1994), pp. 44-63.

Michelman, Frank I. "How Can the People Ever Make the Laws? (A Critique of Deliberative Democracy)," in The Modern Schoolman, V.LXXIV, (May 1997), pp. 311-330.

Miller, D. "Arguments for Equality," in P. French et al. Eds. Midwest Studies in Philosophy VII (1982), pp. 73-87.

Monahan, Patrick. Politics and the Constitution: The Charter, Federalism, and the Supreme Court of Canada, (Toronto: Carswell, 1987).

Mill, John Stuart. On Liberty, edited, with an introduction, by Elizabeth Rapaport (Cambridge: Hackett Publishing Company, Inc., 1978).

Native Women's Association of Canada v. Canada, [1994] 3 SCR 627 [hereinafter, *Native Women's Association*].

New York Times v. Sullivan, 376 U.S. 254 (1964).

Post, Robert C. Constitutional Domains: Democracy, Community, Management, (Cambridge, Massachusetts: Harvard University Press, 1995).

-----, "Racist Speech, Democracy, and the First Amendment." In Speaking of Race, Speaking of Sex: Hate Speech, Civil Rights, and Civil Liberties, (New York: New York University Press, 1994), pp. 115-180.

Rasmussen, Douglas B. "Political Legitimacy and Discourse Ethics," in International-Philosophical-Quarterly, 32(1)(1992), pp. 17-34.

Rawls, John. Political Liberalism, (New York: Columbia University Press), 1993.

----- A Theory Of Justice, (Cambridge, Massachusetts: Belknap Press of Harvard University Press), 1971.

Report on Systemic Racism and Discrimination In Canadian Refugee and Immigration Policies, (Montréal: Canadian Council for Refugees, 1st November, 2000). <http://www.web.net/~ccr/antiracrep.html>

Rodrigues, Gary. (Editorial supervisor) Pocket Criminal Code, (Toronto: Carswell, 1999).

Roberts, Julian V. Working Document: Disproportionate Harm: Hate Crime In Canada: An Analysis of Recent Statistics. (Ottawa: Department of Justice-Research, Statistics and Evaluation Directorate, 1995).

Ross v. New Brunswick School District No.15 (1996), 133 D.L.R. (4th) 1 [hereinafter, *Ross*].

Russell, Peter H. et al. Federalism and the Charter: Leading Constitutional Decisions, Ottawa: Carleton University Press, 1993.

----- The Judiciary In Canada: The Third Branch of Government, Toronto: McGraw Hill Ryerson Ltd., 1987.

Regina v. Andrews (1990), 77 D.L.R. (4th) 128 [hereinafter, *Andrews*].

Regina v. Big M. Drug Mart Ltd., [1985] 1 SCR 295 [hereinafter, *Big M Drug Mart*].

Regina v. Butler (1992), 89 D.L.R. (4th) 449 [hereinafter, *Butler*].

Regina v. Keegstra (1990), 124 D.L.R. (4th) 289 [hereinafter, *Keegstra*].

Rehg, William S. J. "Legality And Deliberation In Epistemic Conceptions of Democracy: Between Habermas And Estlund," in Objectivity, Relativism and Truth, VLXXIV No. 4, (May 1997), pp. 335-374.

Reyes, Allison. "Freedom of Expression & Public School Teachers" in (1995), Dal. J. Leg. Studies, 35, 42.

Rosenblum, Nancy L. "Pluralism and Self-Defence," in Objectivity Relativism and Truth, edited by Richard Rorty, (Cambridge: Cambridge University Press, 1991), pp. 207-226.

Ryan, William. Equality, (New York: Pantheon Books), 1991.

Sheldrick, Byron M. (Professor) Selected Lectures in Public Law II 3605.03B, 3rd Jan. '95 "Civil Liberties: An Introduction," 10th Jan. '95 "The Rights Debate and the Charter: Reconciling Judicial Review and Democratic Accountability," and 26/31 Jan. "Fundamental Freedoms: Freedom of Expression."

Sandel, Michael J. "The Procedural Republic And The Unencumbered Self" in Political Theory, Vol.12 No.1, (1984).

----- . Liberalism and Its Critics. Michael Sandel ed., (Oxford: Basil Blackwell Ltd.), 1984.

----- . Liberalism and the Limits of Justice, (Cambridge: Cambridge University Press), 1982.

Sanderson, P. "Investigation of Religious Bias-Motivated Crimes," in N. Taylor (ed.) Bias Crime: The Law Enforcement Response. (Chicago: Office of International Criminal Justice, 1991).

Saskatchewan (Human Rights Commission) v. Bell (1994), 114 D.L.R. (4th) 370.

Shacter v. Canada, [1992] 2 SCR 679 [hereinafter, *Schacter*].

Simpson, Steven Warren, Ph.D. Cultural Crossroad: A Comparative Analysis of the Constitutional Protection For the Freedom of Expression In Canada And The United States, University Microfilms International (UMI) Dissertation Services: An Arbor Michigan, 1993.

Strange, Susan. States and Markets, 2nd ed. London: Pinter Publishers, 1994.

Swan, Peter D. "Environmental Justice & Minority Ecological Rights: Do We Need Minority Rights?," in Do We Need Minority Rights? J. Räikkä (ed.) (Netherlands: Kluwer Law International, 1996), pp. 179-213.

The Queen v. David Edwin Oakes, [1986] 1 S.C.R. 103 [hereinafter, *Oakes*].

Trakman, Leon E. "Transforming Free Speech, Rights and Responsibilities", Vol.56 No.3 Ohio State Law Journal, 899.

Turpel, M.E. "Aboriginal Peoples and the Canadian Charter: Interpretive Monopolies, Cultural Differences", in Canadian Human Rights Yearbook, 6 (1989, 90).

Walzer, Michael. "The Communitarian Critique of Liberalism," in New Communitarian Thinking: Persons, Virtues, Institutions, and Communities, ed. Amitai Etzioni, (Charlottesville, Virginia: University Press of Virginia, 1995), pp. 52-70.

Weimann, Gabriel and Conrad Winn. Hate On Trial: The Zundel Affair, the Media, Public Opinion In Canada, Oakville, Ontario: Mosaic Press, 1986.

Williams, Bernard. "The Idea of Equality," in Feinburg, ed., Moral Concepts, (Oxford U.P.), 1969.

Wolin, Sheldon. "What Revolutionary Action Means Today," in Democracy, 2 (1982), 18 cited in Abramson & Bussiere "Free Speech & Free Press: A Communitarian Perspective", 228.

Young, Iris Marion. "Deferring Group Representation," in Nomos XXXIX Ethnicity and Group Rights, Ian Shapiro and Will Kymlicka eds., (New York: New York University Press, 1997), pp. 349-377.

Zundel v. The Ontario Court of Appeal (1987), 35 D.L.R. (4th) 338 [hereinafter, *Zundel* in the Ontario Court of Appeal].

Zundel v. The Queen et al. (1992), 95 D.L.R. (4th) 202 [hereinafter, *Zundel*].

Zundel v. Boudria, et al (1999), Ont.CA.
<http://www.ontariocourts.on.ca/decisions/1999/November/Zundel.htm>