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## Are Hate Speech Provisions Anti-democratic?: An International Perspective

Robin Edger

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# ARE HATE SPEECH PROVISIONS ANTI-DEMOCRATIC?: AN INTERNATIONAL PERSPECTIVE

ROBIN EDGER\*

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## INTRODUCTION

There is currently a public debate in Canada over whether it is legitimate for the government to restrict hate speech. Canada currently has both criminal and civil legal provisions that restrict hate speech.<sup>1</sup> Public criticism of these sorts of governmental restrictions

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\* LL.B., University of Saskatchewan; LL.M. candidate, Osgoode Hall Law School. This article benefited from the author's many discussions on the article's topic with Jesse Rosenberg. All opinions and inadvertent errors belong to the author.

on hate speech seemed to gain traction after Human Rights Commissions and Tribunals in Canada received and pursued two complaints in particular: a complaint against *The Western Standard* and a complaint against *Maclean's*.

In February 2006, *The Western Standard*, a conservative magazine from Alberta, Canada, republished images depicting the Islamic prophet Muhammed that were originally published by the *Jyllands-Posten*, a Danish newspaper.<sup>2</sup> Syed Soharwardy, an Imam at a mosque in Calgary, Canada, submitted a complaint to the Alberta Human Rights Commission against Ezra Levant and his magazine, *The Western Standard*, on the grounds that this publication constituted a hate message.<sup>3</sup>

There are provincial Human Rights Commissions in every Canadian province, except for British Columbia, and there is a federal Human Rights Commission in Ottawa.<sup>4</sup> The various Commissions are governed by their respective provincial and federal "Human Rights Acts," which prohibit discrimination based on race, gender, or other enumerated traits.<sup>5</sup> This prohibition applies situationally to discrimination in housing, employment, and other settings.<sup>6</sup> These Acts are intended to recognize the right to equality,

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1. See Canadian Human Rights Act, R.S.C. 1985, c. H-6 §§ 2-4, 13 (establishing a civil remedy for the communication of hate messages); Criminal Code, R.S.C. 1985, c. C-46 § 319 (Can.) (criminalizing communications that incite or willfully promote "hatred against any identifiable group").

2. See EZRA LEVANT, SHAKEDOWN: HOW OUR GOVERNMENT IS UNDERMINING DEMOCRACY IN THE NAME OF HUMAN RIGHTS 129-133 (2009) (adding that the original publication intended to make "a point about the West's fear of insulting Islam").

3. *Id.* at 134-36.

4. See *Resources*, CAN. HUMAN RIGHTS COMM'N, <http://www.chrc-ccdp.ca/links/default-en.asp> (last visited Aug. 31, 2010).

5. See, e.g., Alberta Human Rights Act, R.S.A. 2000, c. A-25.5 § 3 (Can.) (extending protection to classes of persons identified by their race, religion, color, gender, physical or mental disability, age, ancestry or origin, marital status, profession, family status, or sexual orientation).

6. See, e.g., *id.* §§ 3-5, 7; The Human Rights Code, C.C.S.M. 2010, c. H-175 §§ 14-17 (Can. Man.) (asserting the right to be free from discrimination in employment, contracts, rental of premises, purchase of real property and other benefits or services); Human Rights Code, R.S.O. 1990, c. H.19 §§ 2, 5-6 (Can. Ont.) ("Every person has a right to equal treatment with respect to the occupancy of accommodation . . . [,] employment . . . [,] and] membership in any trade union, trade or occupational association or self-governing profession without

and to regulate those actions which might infringe on this right, even in the private sphere.

Section 13 of the Canadian Human Rights Act (“CHRA”) prohibits hate messages.<sup>7</sup> The human rights codes of British Columbia, Alberta, Saskatchewan, and the Northwest Territories include similar provisions.<sup>8</sup> Through these provisions the Commissions are given the authority to accept and to investigate complaints about hate messages, and to forward the complaints to their respective Human Rights Tribunals if they find that the complaints have merit and if the parties cannot reach a mediated compromise.<sup>9</sup> Commissions may also dismiss a complaint at certain designated points in an investigation.<sup>10</sup> At the Tribunal, the Commission argues on behalf of the complainant out of the broader public interest in the complaint.<sup>11</sup>

The Alberta Human Rights Commission accepted and investigated the complaint against Ezra Levant and *The Western Standard*.<sup>12</sup> Later, a similar complaint on the same issue was brought by the Edmonton Council of Muslim Communities (“ECMC”).<sup>13</sup> Levant received a copy of the complaints,<sup>14</sup> and wrote *Western Standard’s* reply to the Commission.<sup>15</sup> The Commission offered to set up a conciliation meeting between the complainants and Levant, to which Levant replied, “[T]here could be only one form of ‘conciliation’ that

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discrimination . . .”).

7. Canadian Human Rights Act, R.S.C. 1985, c. H-6 §§ 3(1), 13 (describing the prohibition as against discriminatory messages transmitted telephonically that are likely to expose individuals to hatred or contempt because of an identifiable characteristic such as their race, national or ethnic origin, color, and religion).

8. RICHARD MOON, REPORT TO THE CANADIAN HUMAN RIGHTS COMMISSION CONCERNING SECTION 13 OF THE CANADIAN HUMAN RIGHTS ACT AND THE REGULATION OF HATE SPEECH ON THE INTERNET 4 (2008).

9. See *Investigation of Section 13 Complaints*, CANADIAN HUMAN RIGHTS COMMISSION, [http://www.chrc-ccdp.ca/proactive\\_initiatives/hoi\\_hsi/qa\\_qr/page3-en.asp#34](http://www.chrc-ccdp.ca/proactive_initiatives/hoi_hsi/qa_qr/page3-en.asp#34) (last visited Aug. 31, 2010).

10. See R.S.C. 1985, c. H-6 §§ 41, 43, 53 (authorizing dismissal when the complaint is frivolous, beyond the jurisdiction of the Commission, or unsubstantiated, among other disqualifying circumstances).

11. *Id.* § 51.

12. See LEVANT, *supra* note 2, at 139 (claiming that the investigation lasted nine hundred days and involved “no fewer than fifteen government bureaucrats”).

13. *Id.* at 141.

14. *Id.* at 136.

15. *Id.* at 139.

I would accept: that these complainants reconcile themselves to Canadian values, and leave their fascist, Saudi-style approach to free speech overseas.”<sup>16</sup> Presumably because of this response, the meeting was not held.<sup>17</sup> The Commission subsequently communicated a possible compromise between the parties to Levant, which Levant rejected.<sup>18</sup> After these pre-investigation measures failed to bring closure to the complaint, the Commission requested an investigative interview of Levant, which he accepted after setting certain terms.<sup>19</sup> The Commission interviewed Levant in January of 2008 at Levant’s lawyer’s office.<sup>20</sup>

As a result of the complaint, Levant received only three communications from the Commission and one interview. Shortly thereafter, Soharwady withdrew his complaint<sup>21</sup> and the Commission dismissed the complaint submitted by the ECMC.<sup>22</sup> While this may seem relatively innocuous, the resulting uproar was anything but.

One of Levant’s terms for being interviewed by the Commission was that he be allowed to record the interview.<sup>23</sup> The Commission agreed, and he later posted a video recording of the interview on YouTube.<sup>24</sup> Levant used the interview as a forum to make a “passionate case against government censorship and against the Islamic fascists who had hijacked the [Human Rights

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16. *Id.* at 141.

17. *Id.*

18. *Id.* at 141-42.

19. *Id.* at 142-43 (noting that he failed in his bid to make the interview open to the media, but he was allowed to bring his wife and a colleague, and he was given permission to record the proceedings).

20. *Id.* at 143.

21. *See id.* at 152 (expressing frustration at the way Soharwardy “abandoned” the complaint and walked away from the matter); Syed Soharwardy, *Why I’m Withdrawing my Human Rights Complaint Against Ezra Levant*, THE GLOBE AND MAIL (Can.), Feb. 15, 2008, <http://www.theglobeandmail.com/news/national/article667533.ece> (articulating a preference for this matter to be handled in “the court of public opinion” instead of a human rights commission).

22. LEVANT, *supra* note 2, at 152.

23. *Id.* at 143-144 (stating the original condition was that Levant could make an audio recording of the interview, though consent was given for video recording at the meeting itself).

24. *Id.* at 143-48 (comparing the interview to an interrogation which he could not refuse because he feared a search of his office under Section 23 of the Alberta Human Rights Citizenship and Multiculturalism Act).

Commissions].”<sup>25</sup> Levant called the actions of the Commission “a violation of two hundred and fifty years of Canadian law,”<sup>26</sup> amongst other things, and also quoted from the Universal Declaration of Human Rights.<sup>27</sup> Between Levant’s writings about the issue on his personal website and the video of the interview, the complaint against Levant became highly publicized and was eventually covered by mainstream news sources.<sup>28</sup> Levant and his supporters did not argue, however, that the complaint against Levant was unjustified. Instead, they made a much broader claim against the ability of Human Rights Commissions to censor speech at all.<sup>29</sup>

Levant’s interview may not have received much publicity if not for the fact that a month prior to the interview, the Canadian Islamic Congress had filed a complaint against *Maclean’s* magazine with the Canadian Human Rights Commission, the Ontario Human Rights Commission, and the British Columbia Human Rights Tribunal.<sup>30</sup> The two Commissions received the complaints, vetted them, and dismissed them without any investigatory interviews. However, British Columbia has not had a Commission to perform these functions since the provincial government abolished it as a cost-saving measure in 2003.<sup>31</sup> Instead, human rights complaints in British Columbia go directly to the province’s Human Rights Tribunal

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25. *Id.* at 146.

26. *Id.* (adding that their actions also violated British common law).

27. *Id.* See generally Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948).

28. LEVANT, *supra* note 2, at 163-65.

29. See Soharwardy, *supra* note 21 (acknowledging Levant’s argument that perhaps human rights commissions should have narrower mandates, but rejecting his argument that they should be completely abolished).

30. Elmasry v. Roger’s Publ’g Ltd., 2008 BCHRT 378 (Can.); Complaint to the Ontario Human Rights Commission, Elmasry v. Rogers Publ’g Ltd., No. LHOR-72JP9D (2007) (Can. Ont.), available at <http://www.steynonline.com/images/macleans%20hr%20on%20elmasry.pdf>; Complaint to the Canadian Human Rights Commission, Elmasry v. Rogers Publ’g Ltd. (2007) (Can.), available at <http://www.steynonline.com/images/macleans%20hr%20canadian%20hrc%20redacted.pdf>.

31. See The Canadian Association of Statutory Human Rights Agencies, *Regarding the Government of British Columbia’s Draft Human Rights Code Amendment Act Bill 53*, ONTARIO HUM. RTS. COMMISSION (Sept. 2002), <http://www.ohrc.on.ca/en/resources/submissions/CASHRAsubmission?page=CASHRAsubmission-Evaluati.html> (contending the commissions were “complicated, inefficient, and slow”).

(“Tribunal”), which may then either dismiss the complaint, attempt to mediate the complaint, or have an administrative hearing over the complaint.<sup>32</sup> There is no opportunity for the Tribunal to investigate the complaint outside of a hearing.<sup>33</sup>

The Tribunal chose to hold a hearing about the complaint in regards to an article that had appeared in *Macleans*'s magazine, titled “The Future Belongs to Islam,” which was an excerpt from a book, *America Alone: The End of the World as We Know It*, written by one of their columnists, conservative Mark Steyn.<sup>34</sup> The hearing's purpose was to decide whether the magazine had published an article that amounted to hate speech.<sup>35</sup> It was not scheduled until the following summer, but the fact that a mainstream magazine was set to attend such a hearing added to the growing chorus of those questioning a Human Rights Commission's authority to deal with hate messages.<sup>36</sup> While the British Columbia Human Rights Tribunal did ultimately dismiss the complaint against *Macleans*'s,<sup>37</sup> the campaign already had enough sympathies within the governing Conservative Party of Canada that the Federal Justice Committee held hearings about the possibility of changing or repealing section 13 of the CHRA.<sup>38</sup>

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32. *Guide 1 - The BC Human Rights Code and Tribunal*, BRIT. COLUMBIA HUM. RTS. TRIBUNAL, 1-2, [http://www.bchrt.bc.ca/guides\\_and\\_information\\_sheets/guides/Guide1\\_2005.pdf](http://www.bchrt.bc.ca/guides_and_information_sheets/guides/Guide1_2005.pdf) (last visited Aug. 31, 2010).

33. *See id.* (listing pre-hearing mediation and the hearing process as the only two means by which the Tribunal handles complaints).

34. *See* Mark Steyn, *The Future Belongs to Islam*, MACLEAN'S (Can.), Oct. 20, 2006, [http://www.macleans.ca/culture/entertainment/article.jsp?content=20061023\\_134898\\_134898](http://www.macleans.ca/culture/entertainment/article.jsp?content=20061023_134898_134898) (describing the evolution of Europe into “Eurabia” because of “demographic decline; the unsustainability of the social democratic state; and civilizational exhaustion”). *See generally* MARK STEYN, *AMERICA ALONE: THE END OF THE WORLD AS WE KNOW IT* (2006).

35. *See Elmasry*, 2008 BCHRT at ¶¶ 4-6 (setting forth the duty of the Tribunal to investigate the allegations that the article exposed Muslims “to hatred and contempt, on the basis of their religion”).

36. *See, e.g., Are the Canadian Human Rights Commission/Tribunal a Kangaroo Court?*, THE FREEDOM-SITE, [http://www.freedomsite.org/legal/dec17-07\\_chrt\\_a\\_kangaroo\\_court.html](http://www.freedomsite.org/legal/dec17-07_chrt_a_kangaroo_court.html) (last visited Aug. 31, 2010) (collecting quotations of bloggers, journalists, and parties to CHRT actions, lamenting the court's lack of standards, internal consistency, and accountability).

37. *Elmasry*, 2008 BCHRT at ¶ 6.

38. *See Writers Call for Probe into Human Rights Commission*, CBC NEWS, <http://www.cbc.ca/canada/story/2009/10/05/human-rights-commission.html> (last updated Oct. 6, 2009) (noting the presence of Levant and Steyn at one of the

The general campaign, led by Levant and Steyn, is broader than just the repeal of section 13. While the campaign is directed at section 13, it is also based on a certain ideological view of the legitimacy of governmental regulation of hate speech in general, as well as government regulation of discrimination between private citizens.<sup>39</sup> Section 13 has simply been the most politically pragmatic target, given the media's and the governing party's sympathy for the Levant-Steyn argument.<sup>40</sup>

The leaders and members of the campaign, as well as the media, use certain arguments in support of their position that would just as easily apply to criminal laws regulating hate speech. This is because they base their arguments upon the general illegitimacy of any government restriction on speech. Steyn provides an example of this: "Canadians do not enjoy the right to free speech. They enjoy instead the right to government-regulated, government licensed, government-monitored, government-approved speech—which is not the same thing at all."<sup>41</sup> Similarly, Levant often argues that government restrictions on hate speech are unnecessary: "We don't need laws to control the more reckless users—or abusers—of free speech. The community itself will naturally marginalize people who are excessively rude or bigoted."<sup>42</sup>

The arguments of this movement often suggest that government regulation of discriminatory speech is undemocratic. Levant states, "[c]ensorship, I like to point out, is a Saudi and Soviet value, not a Canadian one."<sup>43</sup> Steyn provides an example of this as well:

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Justice Committee hearings).

39. See *id.* (describing how Steyn prefers "social disapproval, activist parents, [and] a school board firing[] to a law restricting what individuals can say and think"). See generally LEVANT, *supra* note 2.

40. See Joseph Brean, *Ottawa Urged to Scrap Hate Speech Law*, NATIONAL POST (Can.), Nov. 23, 2008, <http://www.nationalpost.com/news/story.html?id=988228> (addressing the Conservative Party's 2008 vote to officially sanction repeal of section 13); cf. Richard Moon, *The Attack on Human Rights Commissions and the Corruption of Public Discourse*, 73 SASK. L. REV. 93, 124 (2010) (claiming the persistence of small online opinion websites in voicing their sympathy for Levant's argument ultimately forced the mainstream media to take notice of the opposition to section 13).

41. Mark Steyn, *Foreword* to LEVANT, *supra* note 2, at x.

42. LEVANT, *supra* note 2, at 178–79.

43. *Id.* at 180.



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This is not North Korea or Sudan, Ceausescu's Romania or Saddam's Iraq. If it were, what's going on would be easier to spot. So if, like hundreds of thousands of viewers around the world, you go to YouTube and look at the videos of Ezra Levant's interrogation, you will find not a jackbooted thug prowling a torture chamber but a dull bureaucrat asking soft-spoken questions in a boring office. Nevertheless, she is engaged in a totalitarian act.<sup>44</sup>

Is this correct, though? Are hate speech provisions anti-democratic? In an effort to answer this question, this paper will examine international law and standards on hate speech provisions, as well as domestic law from some democracies around the world. While doing this, it will also offer some analysis of these provisions and the case law and arguments that apply to them.

## I. INTERNATIONAL COVENANTS TO WHICH CANADA IS A PARTY

### A. THE UNIVERSAL DECLARATION OF HUMAN RIGHTS

The Universal Declaration of Human Rights ("UDHR") does not explicitly prohibit speech that advocates hatred based on race, religion, or other like categories.<sup>45</sup> However, Article 7 of the UDHR states: "All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration *and against any incitement to such discrimination.*"<sup>46</sup> It should also be noted that the right to freedom of expression, as all rights contained within the document, is subject to a general limiting clause, which contains the following at Article 29(2):

In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.<sup>47</sup>

So, although there is nothing within the UDHR that prescribes

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44. Steyn, *supra* note 41, at x.

45. G.A. Res. 217 (III) A, *supra* note 27.

46. *Id.* art. 7 (emphasis added).

47. *Id.* art. 29(2).

hate speech restrictions, there would seem to be room within the UDHR for hate speech laws. It could certainly be argued that hate speech laws have the purpose of securing due recognition and respect for the rights and freedoms of others (the right to equality), and therefore fall within Article 29(2).<sup>48</sup> However, there are certainly those who would argue the opposite.<sup>49</sup>

In the aforementioned recent Canadian debate, those opposing restrictions on hate messages have not characterized the restrictions as a balance between free speech and equality, but instead as a response to people being offended by speech.<sup>50</sup> Levant argues this view as follows:

As a society, we need to go back to first principles and think about the difference between real rights—such as property rights, freedom of speech, and freedom of religion<sup>51</sup>—and the fake rights promoted by the [Human Rights Commissions], such as the made-up right not to be offended.<sup>52</sup>

In moving the discussion from the balance of rights to the “made-up right not to be offended,” Levant strengthens his argument against constraining free speech.<sup>53</sup> For, while many would understand why

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48. See Kathleen Mahoney, *Hate Speech, Equality, and the State of Canadian Law*, 44 WAKE FOREST L. REV. 321, 351 (2009) (asserting that a “culture of respect” cannot be sustained without prohibitions on hate crimes, and by extension, hate speech).

49. See, e.g., Henri Astier, *Speech Row Rocks Multi-Ethnic Canada*, BBC NEWS, <http://news.bbc.co.uk/2/hi/americas/7273870.stm> (last updated Mar. 24, 2008) (noting a former pro-CHRC advocate’s disappointment that the legitimate goals of equality have sidelined important rights such as free speech).

50. See, e.g., Stephen Brooks, *Hate Speech and the Rights Cultures of Canada and the United States*, THE 49TH PARALLEL (Spring 2004), <http://www.49thparallel.bham.ac.uk/back/issue13/brooks.htm> (framing the Canadian debate as one between a legitimate right to free speech and a constitutional protection against false statements which are offensive and hurtful).

51. Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, *being* Schedule B to the Canada Act, 1982, c. 2, 8 (U.K.) [hereinafter Canadian Charter]. The Canadian Charter explicitly enumerates fundamental freedoms including the “freedom of thought, belief, opinion and expression, [and] . . . freedom of the press and other media of communication,” but it indirectly establishes the right to property through the right against unreasonable searches and seizures. *Id.*

52. LEVANT, *supra* note 2, at 176.

53. *Cf. id.* (emphasizing how small changes in the language of the debate can have significant effects, such as when *Maclean’s* lawyer referred to Steyn as a

we need to find appropriate balances between two competing legitimate rights like free speech and equality, many would also think that legitimate rights should not be constrained by lesser concerns like perceived offenses.<sup>54</sup>

If Levant and other like-minded advocates are correct in this view, then perhaps hate speech laws are not a limitation for the purpose of securing due recognition and respect for the rights and freedoms of others, and should not fall under that part of Article 29(2). It is certainly understandable why Levant may think that hate speech provisions respond to public offense rather than equality concerns: all hate speech is offensive. But this offense is not the harm being balanced against free speech in deciding whether we ought to restrict discriminatory publications; it is the harm to everyone's individual interest in being treated equally that is being balanced. This is the source of Levant's mistake on this point.

Hate speech is speech that advocates the inferiority of a person or group based on their race, religion, gender, sexual orientation, or a like quality.<sup>55</sup> This sort of speech fosters a climate of intolerance and inequality. While such speech is certainly offensive, it is not the offensiveness that justifies its regulation. Instead, it is the speech's detrimental effect upon equality that supports such regulation.<sup>56</sup>

Hate speech is not just speech that is both offensive and based upon race, religion, gender, sexual orientation, or a like quality. For example, consider the cartoons that the *Western Standard* published.<sup>57</sup> While these cartoons were in regards to religion, and

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“target” instead of a “respondent”).

54. See Salim Mansur, *Protect Hate Speech, Even if Offensive*, TORONTO SUN, Mar. 6, 2010, [http://www.torontosun.com/comment/columnists/salim\\_mansur/2010/03/04/13114116.html](http://www.torontosun.com/comment/columnists/salim_mansur/2010/03/04/13114116.html) (arguing that offensive speech deserves the most protection from restriction).

55. See generally Canadian Human Rights Act, R.S.C. 1985, c. H-6 § 3 (“[P]rohibited grounds of discrimination are race, national or ethnic origin, colour, religion, age, sex, sexual orientation, marital status, family status, disability and conviction for which a pardon has been granted.”); Mahoney, *supra* note 48, at 325-26 (describing hate speech as the vilification of different political, religious, and cultural groups).

56. See Mahoney, *supra* note 48, at 328 (noting that while courts and legislatures recognize free speech as “integral” to maintaining a free and safe democratic society, it can nonetheless be constitutionally curtailed when speech “undermine[s] or destroys the rights of others”).

57. E.g., *Muhammad Cartoon Gallery*, HUM. EVENTS (Feb. 2, 2006),

were certainly offensive to some, that alone did not make them hate speech. They did not advocate that Muslims were of inherently lesser value than people of other religions, thereby engaging their right to equality.<sup>58</sup> It is not clear whether this reasoning was behind the complaint's dismissal; it is only used here as an example of speech that may be religiously offensive, but is not tantamount to hate speech.

Therefore, any restrictions upon hate speech need to have the promotion of equality as their goal rather than the amelioration of offense.<sup>59</sup> These sorts of hate speech restrictions would be solely "for the purpose of securing due recognition and respect for the rights and freedoms of others," therefore falling within the first part of Article 29(2).<sup>60</sup> The second part of Article 29(2), "meeting the just requirements of morality, public order and the general welfare in a democratic society," is preceded by a conjunctive "and," so therefore must also be satisfied if the limitation is to fall within the article.<sup>61</sup>

It would seem that this second part of Article 29(2) is also met by what is referred to above as "legitimate hate speech restrictions," though many of the terms used are fairly broad and open to interpretation. It could certainly be argued that hate speech is immoral and potentially disruptive of public order, and that legitimate hate speech restrictions seek to ameliorate these negative effects.<sup>62</sup> Whether legitimate hate speech restrictions "promote the general welfare in a democratic society" is open to debate as well, but it is at least arguable that they do. Most would agree that hate speech diminishes welfare, but there are many others who believe that hate speech legislation is worse.<sup>63</sup> These claims will continue to

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<http://www.humanevents.com/article.php?id=12146>.

58. There is also the side issue of whether, even if the cartoons did constitute hate speech, their publication is acceptable in terms of newsworthiness. This issue is not substantially relevant to the current discussion, so it will not be addressed in this article.

59. See Mahoney, *supra* note 48, at 351 (promoting hate speech restrictions as a means to protect victims from irreparable harm).

60. G.A. Res. 217 (III) A, *supra* note 27, art. 29(2).

61. *Id.*

62. See Mahoney, *supra* note 48, at 326 (suggesting that some of the worst crimes against humanity, such as ethnic cleansing in Rwanda and the former Yugoslavia, may have been the result of a failure to adequately control hate speech).

63. Compare *id.* at 351 (arguing that hate speech has the tendency to breed

be examined throughout this paper.

Although it is an important document in international law, the UDHR is only a declaration.<sup>64</sup> Recognizing the need for an international binding instrument on human rights, the U.N. Commission on Human Rights drafted the International Covenant on Civil and Political Rights.<sup>65</sup>

#### B. INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS

The International Covenant on Civil and Political Rights (“ICCPR”) is a binding instrument which codifies some the rights enumerated in the UDHR.<sup>66</sup> As of this writing, the ICCPR has 165 parties.<sup>67</sup> Canada is one of those parties; Canada did not register any reservations when becoming a party.<sup>68</sup>

While freedom of expression is protected by Article 19 of the ICCPR, there is also a limitation on freedom of expression contained therein. Article 19 states, in part:

(2) Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.

(3) The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary: (a) For respect of the rights or reputations of others; (b) For the protection of national security or of public order (*ordre*

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civil unrest), *with id.* at 348 (noting, however, that restrictions on free speech might lead to “tyranny”).

64. G.A. Res. 217 (III) A, *supra* note 27.

65. International Covenant on Civil and Political Rights, pmbl., *adopted* Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR].

66. See Mariana Mello, Note, Hagan v. Australia: *A Sign of the Emerging Notion of Hate Speech in Customary International Law*, 28 LOY. L.A. INT'L & COMP. L. REV. 365, 370 (2006) (commenting on the ICCPR's binding character, and giving emphasis to those provisions that “address[] the problem of hate speech”).

67. Status of the International Covenant on Civil and Political Rights, UNITED NATIONS TREATY COLLECTION, [http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-4&chapter=4&lang=en](http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&lang=en) (last visited Aug. 31, 2010) [hereinafter Status of the ICCPR].

68. *Id.*

*public*), or of public health or morals.<sup>69</sup>

Immediately following this Article is an explicit prohibition of hate speech in Article 20. Specifically, Article 20(1) states, “[a]ny propaganda for war shall be prohibited by law,”<sup>70</sup> and Article 20(2) states, “[a]ny advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.”<sup>71</sup> Article 20(2) constitutes a clear restriction on hate speech. It is not as inclusive as this author’s preferred definition of hate speech—there is no mention of gender, sexual orientation, or like categories within the Article. It should be observed that Malta and the United States have both registered reservations with regard to Article 20(2) of the ICCPR.<sup>72</sup>

The first Optional Protocol to the ICCPR established a committee of human rights experts to oversee implementation of the Covenant, review reports submitted by states parties, and receive complaints from individuals who claim that their rights have been violated, provided that the individuals have exhausted all available domestic remedies.<sup>73</sup>

In 1981, John Ross Taylor and his political party, the Western Guard, submitted a claim to the Canadian Human Rights Commission alleging that the Canadian government was infringing upon “their right to hold and maintain their opinions without interference under Article 19(1) of the [ICCPR] and their right to freedom of expression under Article 19(2) . . . .”<sup>74</sup> The Canadian

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69. ICCPR, *supra* note 65, art. 19.

70. *Id.* art. 20(1).

71. *Id.* art. 20(2).

72. Status of the ICCPR, *supra* note 67 (displaying Malta’s reservations against the ability to limit public officers’ freedom of expression, and the United States’ reservations declaring that Article 20 will not be interpreted to restrict the freedom of speech as it is protected under the United States Constitution); see Stephanie Fariior, *Molding the Matrix: The Historical and Theoretical Foundations of International Law Concerning Hate Speech*, 14 BERKELEY J. INT’L L. 1, 43 (1996) (stating that as of 1992, the United States and Malta were the only two parties to enter reservations to Article 20(2)).

73. Optional Protocol to the International Covenant on Civil and Political Rights arts. 28, 40, *adopted* Dec 16, 1966, 999 U.N.T.S. 171.

74. Fariior, *supra* note 72, at 46; see *Canada v. Taylor*, [1990] 3 S.C.R. 892, para. 44 (Can.) (noting that Mr. Taylor’s complaint was rejected by the United Nations Human Rights Committee).

Human Rights Tribunal, however, found John Ross Taylor and the Western Guard to be in breach of the CHRA's section 13.<sup>75</sup> Mr. Taylor and the Western Guard Party had instituted and promoted a telephone message service in Toronto whereby any member of the public could listen to a pre-recorded message that would change from time to time, but was generally of the theme that can be gathered from the following excerpt:

White people the world over need to awaken to the fact that the white race is under attack [by] an international conspiracy of communist agents originally financed by the New York Jewish Banking House . . . . God and Nature intended races to live apart. The seventh commandment means thou shalt not race mix.<sup>76</sup>

The Tribunal ordered Taylor and the Western Guard Party to cease using the telephone to “communicate repeatedly the subject matter which has formed the contents of the tape-recorded messages referred to in the complaints.”<sup>77</sup>

Subsequently, Taylor submitted his complaint to the ICCPR Human Rights Committee (“Committee”), which declared the claim inadmissible on grounds that domestic remedies had not been exhausted,<sup>78</sup> but also stated:

[T]he opinions which Mr. [Taylor] seeks to disseminate through the telephone system clearly constitute the advocacy of racial or religious hatred which Canada has an obligation under article 20(2) of the Covenant to prohibit.<sup>79</sup> In the Committee's opinion, therefore, the communication is, in respect of this claim, incompatible with the provisions of the [ICCPR] . . . .<sup>80</sup>

In another case, the Committee reviewed a complaint from a French author, Robert Faurisson, who had stated in an interview that

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75. *Smith and Lodge v. Western Guard Party*, 1979 CHRT 1, para. 41 (Can.), available at [http://www.chrt-tcdp.gc.ca/search/files/t001\\_0179de\\_07\\_20.pdf](http://www.chrt-tcdp.gc.ca/search/files/t001_0179de_07_20.pdf).

76. *Id.* at Schedule #9.

77. *Id.* para. 42.

78. U.N. Human Rights Comm., *Decision of the Human Rights Committee under the Optional Protocol to the ICCPR Concerning Communication No. 104/1981*, at 236, U.N. GAOR, Supp. No. 40 (A/38/40) (Apr. 6, 1983) [hereinafter *1983 HRC Decision*].

79. *Taylor*, 3 S.C.R. at para. 44.

80. *1983 HRC Decision*, *supra* note 78, at 236; *Farrior*, *supra* note 72, at 46-47.

there had been no gas chambers used for the extermination of Jews in Nazi concentration camps.<sup>81</sup> Faurisson was convicted for these assertions under French hate speech law.<sup>82</sup>

The Committee determined that the restriction satisfied the principle of legality and was imposed for a legitimate purpose.<sup>83</sup> They then turned to whether the restriction was necessary to meet the government's aim. The French government successfully argued that the author's revisionist arguments were promoting anti-Semitism and that the restriction was necessary to combat racism.<sup>84</sup> Therefore, the Committee held that the restriction on the applicant's right to freedom of expression was consistent with Article 19 of the ICCPR.<sup>85</sup>

In *Ross v. New Brunswick School District No. 15*, the New Brunswick Human Rights Tribunal had ordered a teacher's transfer to a non-teaching position because of his anti-Semitic writings, and this decision was upheld by the Supreme Court of Canada.<sup>86</sup> The Committee held that this restriction did not violate Article 19<sup>87</sup> because it had "the purpose of protecting the 'rights or reputations' of persons of Jewish faith, including the right to have an education in the public school system free from bias, prejudice and intolerance."<sup>88</sup>

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81. U.N. Human Rights Comm., *Views of the Human Rights Committee under Article 5, Paragraph 4, of the Optional Protocol to the ICCPR Concerning Communication No. 550/1993*, ¶ 2.1, U.N. Doc. CCPR/C/58/D/550/1993 (Nov. 8, 1996) (noting that Faurisson did not deny the existence of the Holocaust, but questioned the existence of gas chambers as a method of extermination).

82. *Id.* ¶ 2.6 (quoting Faurisson's assertion that the "myth" of the gas chambers was a "dishonest fabrication").

83. *Id.* ¶¶ 9.5-.6 (holding that the French conviction was consistent with the Covenant's restriction of speech rights because it upheld the anti-discrimination rights of others).

84. *Id.* ¶ 9.7.

85. *Id.* ¶ 10; see Onder Bakircioglu, *Freedom of Expression and Hate Speech*, 16 TULSA J. COMP. & INT'L L. 1, 34-35 (2008) (suggesting that Faurisson's statements also constituted "incitement" under Article 20(2) of the ICCPR).

86. *Ross v. New Brunswick Sch. Dist. No. 15*, [1996] 1 S.C.R. 825 (Can.) (noting that once removed from a teaching position, a further provision terminating his employment if he published any anti-Semitic writings was a violation of his freedom of expression under the Canadian Charter of Rights and Freedoms).

87. U.N. Human Rights Comm., *Views of the Human Rights Committee under Article 5, Paragraph 4, of the Optional Protocol to the ICCPR Concerning Communication No. 736/1997*, ¶ 11.6, U.N. Doc. CCPR/C/70/D/736/1997 (Oct. 18, 2000).

88. *Id.* ¶ 11.5; Bakircioglu, *supra* note 85, at 35.



It seems clear, with reference to the document and the quasi-jurisprudential history of the Committee, that under the ICCPR hate speech restrictions are not considered anti-democratic. To get a broader perspective of international law, this article now examines the Convention on the Elimination of Discrimination.<sup>89</sup>

### C. CONVENTION ON THE ELIMINATION OF DISCRIMINATION

The International Convention on the Elimination of All Forms of Racial Discrimination (“CERD”) prohibits incitement to racial hatred.<sup>90</sup> Over 170 states are a party to the CERD.<sup>91</sup> Article 4 of the CERD reads as follows:

States Parties condemn all propaganda and all organizations which are based on ideas or theories of superiority of one race or group of persons of one colour or ethnic origin, or which attempt to justify or promote racial hatred and discrimination in any form, and undertake to adopt immediate and positive measures designed to eradicate all incitement to, or acts of, such discrimination and, to this end, with due regard to the principles embodied in the Universal Declaration of Human Rights and the rights expressly set forth in article 5 of this Convention, inter alia:

(a) Shall declare an offence punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin, and also the provision of any assistance to racist activities, including the financing thereof;

(b) Shall declare illegal and prohibit organizations, and also organized and all other propaganda activities, which promote and incite racial discrimination, and shall recognize participation in such organizations or activities as an offence punishable by law;

(c) Shall not permit public authorities or public institutions, national or local, to promote or incite racial discrimination.<sup>92</sup>

Article 4 of the CERD is much broader and more comprehensive

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89. International Convention on the Elimination of All Forms of Racial Discrimination, Dec. 21, 1965, 660 U.N.T.S. 195 [hereinafter CERD].

90. *Id.* art. 4.

91. Bakircioglu, *supra* note 85, at 28.

92. CERD, *supra* note 89, art. 4.

than the ICCPR. It also requires the enactment of legislation rather than granting a specific right. Article 20(2) of the ICCPR prohibits incitement to discrimination, hostility or violence, while Article 4 of the CERD requires legislation that not only prohibits such incitement but also makes “an offense punishable by law” the dissemination of ideas based on racial superiority or hatred, the creation or participation in organizations which promote racial discrimination, and the provision of any assistance, financial or otherwise, to racist activities.<sup>93</sup>

Stephanie Farrow notes another difference between the ICCPR and the CERD, which is that the latter “requires that incitement be made an offense, whereas Article 20 of the [ICCPR] only requires that incitement be punishable by law, which could be met by a civil or administrative remedy in addition to criminal sanction.”<sup>94</sup> It is not entirely clear why the term “offense” could not mean a civil offense, but if Farrow is correct, then one wonders whether Canada is doing enough to meet its obligations under the CERD when it applies civil remedies to hate speech through its Human Rights Commissions rather than applying the criminal laws it enacted to prohibit hate speech.<sup>95</sup> Still, even if the CERD requires Canada to make hate speech a criminal offense, as it has done, the CERD is silent on whether Canada may also make civil prohibitions of hate speech and choose to apply them in place of criminal sanctions. However, by doing so, Canada may be breaching the spirit of the CERD if not the letter. It should also be noted that Farrow’s interpretation of the phrase “offense punishable by law” is in line with the interpretation promulgated by the U.N. Committee on the Elimination of Racial Discrimination (“CERD Committee”).<sup>96</sup> However, not all states

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93. Compare *id.*, with ICCPR, *supra* note 65, art. 20(2).

94. Farrow, *supra* note 72, at 48.

95. *But cf. Hate Jurisdictions of Human Rights Commissions: A System in Need of Reform*, B’NAI BRITH CANADA, <http://www.bnaibrith.ca/files/290808.htm#remedy> (last visited Aug. 31, 2010) (arguing that civil remedies are better suited for hate speech crimes than criminal sanctions because they “lessen the chilling effect on freedom of speech”).

96. See Rep. of the Comm. on the Elimination of Racial Discrimination, ¶ 391, U.N. Doc. A/35/18; GAOR, 35th Sess., Supp. No. 18 (1980) (“[C]ivil suits could drag on for long periods and . . . in order to provide effective protection, discrimination should be designated at least a criminal offence.”), *cited in* Farrow, *supra* note 72, at 51.

parties have agreed with this interpretation.<sup>97</sup>

### 1. Due Regard Clause

As quoted above, the first paragraph of Article 4 states that the various prohibitions are taken “with due regard to the principles embodied in the [UDHR] and the rights expressly set forth in article 5 of this Convention.”<sup>98</sup> Article 5 of the CERD guarantees equal treatment before the law in the enjoyment of a number of rights, including the right to freedom of opinion and expression.<sup>99</sup>

There is some debate over what this “due regard” clause means. Onder Bakircioglu, in his article, *Freedom of Expression and Hate Speech*, outlines three perspectives on this issue.<sup>100</sup> The first perspective is promoted by the United States, which argues that this clause precludes states parties from implementing any measure which would impair or limit any of the rights in the UDHR or Article 5 of the CERD.<sup>101</sup> As will be discussed later in more detail, the United States takes a unique and absolutist view towards freedom of speech when it comes to hate speech provisions, so its view of the due regard clause is probably more in line with its view of free speech than it is an honest reading of what the clause states. On its face, the argument that a general clause renders moot the specific prohibitions that follows it seems absurd; why would a treaty be written in such a self-defeating way?

A second interpretation, historically promulgated by Canada, Austria, Italy and France, takes the view that states parties must reconcile the fundamental rights and freedoms memorialized in the UDHR and Article 5 of the CERD with the duties enshrined in Article 4 of the CERD, creating equilibrium between the two.<sup>102</sup> In this view, these fundamental freedoms are not unconditional; rather,

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97. See Fariior, *supra* note 72, at 51 (noting that some members, such as Belgium, have interpreted the phrase “punishable by law” to allow for civil penalties, as opposed to criminal penalties).

98. CERD, *supra* note 89, art. 4.

99. *Id.* art. 5.

100. See Bakircioglu, *supra* note 85, at 28-29 (noting the various interpretations of the “due regard” clause as well as the many reservations to the CERD, which weaken the CERD’s effectiveness overall).

101. *Id.* at 28.

102. *Id.*

they are subject to limitations present in other instruments.<sup>103</sup> However, if the balance that is struck involves enacting legislation that is any less expansive than what is called for in Article 4, then the treaty would still be self-defeating, but to a more limited extent than in the first perspective. If the balance is struck in a way that gives full effect to Article 4, then what are the fundamental freedoms balanced against? Perhaps the idea of striking a balance between fundamental freedoms and the CERD is the wrong intellectual paradigm through which to interpret the power of the due regard clause.

A third perspective argues that states parties may have an obligation to enact legislation to effectuate the meaning of the CERD and may not refuse to do so simply in order to guard civil rights.<sup>104</sup> With regard to this perspective, Bakircioglu states:

In other words, this approach denies that the “with due regard” clause has any influence on the obligations of Contracting Parties. This view was rightly criticized on the ground that it did not take account of Article 30 of the Universal Declaration, where nothing in the declaration may be interpreted as implying for any state, group or person any right to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms set forth herein.<sup>105</sup>

Bakircioglu’s characterization of this third interpretation does not seem to follow from his introduction to it. The notion that states parties must enact legislation to implement the CERD does not mean that the due regard clause has no influence on the contracting parties whatsoever. One could hold the opinion that states parties must enact legislation to implement Article 4, but that the due regard clause prevents them from enacting legislation that is more expansive than that Article, because further expansiveness would be incompatible with the fundamental freedoms enshrined in the UDHR and Article 5.<sup>106</sup> This interpretation avoids the problem of assuming that Article

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103. *Id.*

104. *Id.*

105. *Id.* at 28-29.

106. See Laurence R. Helfer, *Forum Shopping for Human Rights*, 148 U. PA. L. REV. 285, 336, 339 (1999) (explaining that the CERD generally calls for giving more weight to a state’s obligation to criminalize racist speech than its duty to protect the right to free expression, but that a careful balancing of both the right to freedom of expression and the right to be protected from racial discrimination is

4 of the CERD is self-defeating, while also acknowledging that the due regard clause exists for a purpose.

## 2. Redress

Though the CERD does not grant rights and instead requires the enactment of legislation,<sup>107</sup> private citizens of states parties may still seek redress through the CERD if their state fails to actively prosecute cases of alleged discrimination.<sup>108</sup> The CERD Committee's judgments so far have not been sympathetic to the judicial decisions of states parties that have chosen not to prosecute cases of alleged discrimination on freedom of speech grounds.

A decision that is illustrative of this attitude is *Jewish Community of Oslo v. Norway*.<sup>109</sup> In this case, the CERD Committee examined a complaint regarding a Supreme Court of Norway decision that overturned a lower court's conviction under a section of the Norwegian Penal Code prohibiting "a person from threatening, insulting, or subjecting to hatred, persecution or contempt, any person or group of persons because of their creed, race, color or national or ethnic origin."<sup>110</sup> The conviction was based upon a racist speech that Terje Sjolie, the leader of a group called the Bootboys, delivered during an organized march in commemoration of the Nazi

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still required because states may not greatly curtail one right to protect the other); see also Fariior, *supra* note 72, at 52 (explaining that when freedom of expression competes with the right to freedom from racial discrimination, the general interpretation is that freedom from racial discrimination should be given greater weight).

107. See CERD, *supra* note 89, art. 6 (requiring states parties to "assure to everyone within their jurisdiction effective protection and remedies, through the competent national tribunals and other State institutions, against any acts of racial discrimination . . .").

108. See *id.* art. 14 (requiring, however, that before the Committee can hear the complaint, the state party in which the complaint resides must have issued a declaration "recogniz[ing] the competence of the Committee to receive and consider communications from individuals or groups of individuals within its jurisdiction").

109. See U.N. Comm. on the Elimination of Racial Discrimination, *Opinion of the Committee on the Elimination of Racial Discrimination Under Article 14 of the CERD concerning Communication No. 30/2003*, ¶¶ 10-12, U.N. Doc. CERD/C/67/D/30/2003 (Aug. 15, 2005) [hereinafter *2005 CERD Decision*] (finding that the defendant's acquittal by the Supreme Court of Norway constituted a violation of Articles 4 and 6 of the CERD).

110. *Id.* ¶¶ 2.5-8; The General Civil Penal Code art. 135a (2005) (Nor.).

leader Rudolf Hess.<sup>111</sup> The majority of the Norwegian Supreme Court concluded that the speech did not amount to approval of the persecution and mass extermination of the Jews; it merely expressed support for National Socialist ideology.<sup>112</sup>

The CERD Committee found that the Norwegian Court's decision was in error. It concluded that Sjolie's statements contained a message of racial superiority or hatred, and characterized that message as incitement to racial discrimination.<sup>113</sup> Thus, the CERD Committee concluded that his acquittal violated the CERD.<sup>114</sup>

It is clear from the above that the CERD does not categorize hate speech provisions as anti-democratic. As noted, Canada is a party to the CERD, as it is to the ICCPR and the UDHR. This article now examines how the Supreme Court of Canada has dealt with the obligations contained in these instruments, and their possible application to domestic hate speech cases.

## II. USE OF CANADIAN INTERNATIONAL OBLIGATIONS IN HATE SPEECH JURISPRUDENCE

In the leading Canadian hate speech case, *R. v. Keegstra*, Chief Justice Dickson canvassed the field of international human rights law in drafting his four-to-three majority opinion.<sup>115</sup> *Keegstra* dealt with the constitutional validity of section 319(2) of the Criminal Code, which prohibits the willful promotion of hatred, other than in private conversation, toward any "identifiable group," defined in section 318(4) as "any section of the public distinguished by colour, race, religion, ethnic origin or sexual orientation."<sup>116</sup> The crux of the case

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111. 2005 CERD Decision, *supra* note 109, ¶ 2.1.

112. *Id.* ¶ 2.7.

113. *See id.* ¶ 10.4 (considering the statements to be at least an incitement to racial discrimination, if not also to violence).

114. *Id.* ¶ 10.5; *see Bakircioglu, supra* note 85, at 31 (noting that while the Committee's decision provided clear guidelines to assess whether speech is acceptable under the CERD, there is still doubt as to whether criminal punishment is the appropriate enforcement mechanism to eliminate discrimination).

115. *See* [1990] 3 S.C.R. 697, paras. 69-77 (Can.) (highlighting the importance of looking beyond domestic concerns when arguing in support of legislative action to restrict hate speech).

116. Criminal Code, R.S.C. 1985, c. C-46, §§ 318(4), 319(2) (Can.); *Keegstra*, [1990] 3 S.C.R. at paras. 8, 26, 112, 114, 120.

was whether section 319(2) infringed on the guarantee of freedom of expression found in section 2(b)<sup>117</sup> of the Canadian Charter of Rights and Freedoms (“Charter”) in a manner that could not be justified under section 1<sup>118</sup> of the Charter.<sup>119</sup>

The accused, James Keegstra, was a high school teacher from the early 1970s until he was removed from his job in 1982.<sup>120</sup> In 1984, Keegstra was charged with “unlawfully promoting hatred against an identifiable group” under section 319(2) (then section 281.2(2)) of the Criminal Code because he allegedly communicated anti-Semitic statements to his students.<sup>121</sup> The court described the type of speech as follows:

Mr. Keegstra’s teachings attributed various evil qualities to Jews. He thus described Jews to his pupils as “treacherous,” “subversive,” “sadistic,” “money-loving,” “power hungry” and “child killers.” He taught his classes that Jewish people seek to destroy Christianity and are responsible for depressions, anarchy, chaos, wars and revolution. According to Mr. Keegstra, Jews “created the Holocaust to gain sympathy” and, in contrast to the open and honest Christians, were said to be deceptive, secretive and inherently evil. Mr. Keegstra expected his students to reproduce his teachings in class and on exams. If they failed to do so, their marks suffered.<sup>122</sup>

Chief Justice Dickson examined the constitutional validity of section 319(2) in light of the Charter’s guarantee of freedom of expression.<sup>123</sup> Finding that the legislation did violate section 2(b) of the Charter, Chief Justice Dickson then turned to a section 1 analysis of whether the legislation was nonetheless justified in a free and

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117. Canadian Charter, *supra* note 51, at c. 2(b) (“Everyone has the following fundamental freedoms . . . (b) freedom of thought, belief, opinion and expression . . .”).

118. *Id.* at c. 1 (“The [Canadian Charter] guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.”).

119. *Keegstra*, [1990] 3 S.C.R. at paras. 6, 49-50 (highlighting that the section 1 analysis must be cognizant of the circumstances of the particular case as well as the rights promoted within the Charter itself).

120. *Id.* para. 2.

121. *Id.*

122. *Id.* para. 3.

123. *See id.* paras. 6, 19-25 (beginning by exploring the history of section 319(2), which was enacted when existing criminal provisions against libel were insufficient to address hate propaganda).

democratic society.<sup>124</sup> To help with this examination, Chief Justice Dickson reviewed the state of international law on hate speech restrictions, and studied Canada's international commitments in particular:

Generally speaking, the international human rights obligations taken on by Canada reflect the values and principles of a free and democratic society, and thus those values and principles that underlie the Charter itself. Moreover, international human rights law and Canada's commitments in that area are of particular significance in assessing the importance of Parliament's objective under [section] 1. As stated in *Slaight Communications Inc. v. Davidson*,

Canada's international human rights obligations should inform not only the interpretation of the content of the rights guaranteed by the Charter but also the interpretation of what can constitute pressing and substantial [section] 1 objectives which may justify restrictions upon those rights.<sup>125</sup>

Chief Justice Dickson further analyzed the hate speech provisions of the CERD and the ICCPR as well as the aforementioned decision issued by the United Nations Human Rights Committee in the matter of *Taylor v. Canada*.<sup>126</sup> The Chief Justice found the hate speech provisions of the CERD and the ICCPR persuasive:

That the international community has collectively acted to condemn hate propaganda, and to oblige State[s] Parties to [the CERD] and [the ICCPR] to prohibit such expression, thus emphasizes the importance of the objective behind [section] 319(2) and the principles of equality and the inherent dignity of all persons that infuse both international human rights and the Charter.<sup>127</sup>

Justice McLachlin also addressed international law on hate speech

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124. *Id.* paras. 33-36, 44 (finding that under the *Irwin Toy* analysis, (1) Keegstra's teachings did amount to "expression irrespective of the particular meaning or message sought to be conveyed," and (2) the restriction of his speech by section 319(2) was meant to restrict his freedom of expression).

125. *Id.* para. 70 (citations omitted) (quoting *Slaight Commc'ns Inc. v. Davidson*, [1989] 1 S.C.R. 1038, para. 23 (Can.)).

126. *Id.* para. 74 (emphasizing that the 1983 *HRC Decision*, *supra* note 78, stands for the proposition that discriminatory messages communicated by a telephone system can be considered advocating racial or religious hatred and their restriction does not violate freedom of expression under the ICCPR).

127. *Id.* para 77.



provisions in her dissent.<sup>128</sup> However, rather than review international norms when balancing breaches of freedom of expression with the section 1 requirement of a free and democratic society, Justice McLachlin considered international law only when defining the right to freedom of expression.<sup>129</sup> Because of this, Justice McLachlin did not consider international law important to her section 1 analysis:

The international tradition tends to define freedom of expression in a way which accommodates state legislation curtailing hate propaganda, thus precluding any debate about whether such measures infringe freedom of expression, and, if so, whether they are justified. I have suggested that this is not the model of the Canadian Charter, which consistent with the pre-Charter quasi-constitutional status accorded to freedom of expression in this country posits a broad and unlimited right of expression under [section] 2(b), a right which can be cut back only under [section] 1 upon the state demonstrating that the limit or infringement of the freedom is reasonably justified in a free and democratic society.<sup>130</sup>

And so, international law holds no persuasive value here for Justice McLachlin because rather than construing the right broadly and then looking to international law when determining whether any limit of that right is justifiable in a democratic society, her view is that international law constrains the right itself. However, some might argue that even if Justice McLachlin is correct in her assertion, a balancing approach is inherent to the international model of the right.<sup>131</sup>

Justice McLachlin also commented upon the influential value of Canada's international obligations:

Canada's international obligations, and the accords negotiated between international governments may well be helpful in placing Charter interpretation in a larger context. Principles agreed upon by free and democratic societies may inform the reading given to certain of its

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128. *See id.* para. 269 (McLachlin, J., dissenting).

129. *See id.* paras. 269-70 (reiterating that Canada is not bound to follow international law in its interpretation of the Canadian Charter, but also noting that the court should take it into account when deciding cases).

130. *Id.* para. 270.

131. *See* Kevin Boyle, *Hate Speech—The United States Versus the Rest of the World*, 53 ME. L. REV. 487, 494 (2001) (arguing that Article 19 of the ICCPR calls for limitations of rights in order to protect the rights of others, thus inherently calling for the weighing of conflicting rights).

guarantees. It would be wrong, however, to consider these obligations as determinative of or limiting the scope of those guarantees. The provisions of the Charter, though drawing on a political and social philosophy shared with other democratic societies, are uniquely Canadian. As a result, considerations may point, as they do in this case, to a conclusion regarding a rights violation which is not necessarily in accord with those international covenants.<sup>132</sup>

It seems that Canada's international obligations are not particularly persuasive for Justice McLachlin. However, Justice McLachlin's consideration of American domestic law in the dissent proved to be somewhat more convincing for her.<sup>133</sup> This article will return to this in the later section on domestic law.

### III. INTERNATIONAL COVENANTS TO WHICH CANADA IS NOT A PARTY

In *Keegstra*, the court also reviewed international law based on a convention to which Canada is not a party: the European Convention for the Protection of Human Rights and Fundamental Freedoms ("ECHR").<sup>134</sup> The relevant section of the ECHR is Article 10, which reads as follows:

(1) Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers . . . .

(2) The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for

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132. *Keegstra*, [1990] 3 S.C.R. at para. 273 (McLachlin, J., dissenting) .

133. *See id.* paras. 210-213 (observing that both the United States Constitution and the Canadian Charter place "a high value on free expression," and thus among foreign law systems, American jurisprudence bears the most relevance to Canadian constitutional law).

134. *Id.* paras. 75-76 (majority opinion); The European Convention for the Protection of Human Rights and Fundamental Freedoms, Apr. 11, 1950, 213 U.N.T.S. 221 [hereinafter ECHR].

maintaining the authority and impartiality of the judiciary.<sup>135</sup>

Chief Justice Dickson, in *Keegstra*, noted that the language of Article 10(2) “bears significant resemblance to that of [section] 1 of the Charter.”<sup>136</sup> While this provision does not explicitly require hate speech regulation, Chief Justice Dickson noted it has been interpreted by the European Commission of Human Rights (“Commission” or “European Commission”) to permit hate speech restrictions.<sup>137</sup>

There certainly does seem to be a similarity between “necessary in a democratic society” and the Charter’s section 1 test of “demonstrably justifiable in a free and democratic society.”<sup>138</sup> The similarity between a measure that is “necessary” and a measure that is “demonstrably justifiable,” tempts one to wonder if Justice McLachlin in *Keegstra* underestimated the similarities between Canadian constitutional law and international human rights law, at least that which is codified in the ECHR. If anything, “necessary” may be a more onerous test than “demonstrably justifiable.” An infringement could certainly be justifiable without being necessary, but it is difficult to see how it could be necessary without being justifiable. Of course, the burdens of the respective tests may not be in line with the difficulties implied by the semantics. They are being applied by different courts that may have at least somewhat different values and ideas of what a democratic society is.

It should also be noted that the ECHR has other provisions regarding the freedom of expression that are not similar to anything in the Charter.<sup>139</sup> Chief Justice Dickson stated in *Glimmerveen v. Netherlands*,<sup>140</sup> “the leading pronouncement of the Commission,”<sup>141</sup>

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135. *Id.* art. 10.

136. *Keegstra*, [1990] 3 S.C.R. at para. 76.

137. *See id.* (asserting that certain restrictions on speech are constitutionally justifiable in Canada in light of the determination that similar restrictions reviewed by the Commission were considered acceptable).

138. *Compare* ECHR, *supra* note 134, art. 10, *with* Canadian Charter, *supra* note 51, at c. 1.

139. *See* ECHR, *supra* note 134, art. 10 (listing additional justifications for limiting freedom of expression, including national security, territorial integrity, and public safety concerns).

140. App. No. 8348/78, 8406/78, 18 Eur. Comm’n H.R. Dec. & Rep. 187 (1979).

141. *Keegstra*, [1990] 3 S.C.R. at para. 76.

that justification for the decision to restrict hate speech was found elsewhere. Rather than Article 10(2) of the ECHR, the European Commission emphasized Article 17,<sup>142</sup> which states:

Nothing in this Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention.<sup>143</sup>

*Glimmerveen* involved two members of a white supremacist group, named *Nederlandse Volks Unie*, who argued that their right to freedom of speech had been violated by their conviction for possession, with intent to distribute, leaflets containing racist messages.<sup>144</sup> A Dutch court decided that those messages incited racial discrimination.<sup>145</sup> In applying Article 17, the European Commission found that the defendants were trying to use the right to freedom of speech “to engage in . . . activities which are . . . contrary to the text and spirit of the [ECHR] and which right, if granted, would contribute to the destruction of . . . rights and freedoms.”<sup>146</sup> This is exemplary of how Article 17 has generally been interpreted.<sup>147</sup>

One might argue that by using the notion of equality to justify hate speech restrictions, states are acting in a way that destroys an individual right in the name of human rights more generally, much in

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142. See *Glimmerveen*, 18 Eur. Comm’n H.R. Dec. & Rep. at 194-95 (finding that Article 17 describes the “duties and responsibilities” undertaken by one who exercises his freedom of expression).

143. ECHR, *supra* note 134, art. 17.

144. *Glimmerveen*, 18 Eur. Comm’n H.R. Dec. & Rep. at 188.

145. *Id.*

146. *Id.* at 196; see Farris, *supra* note 72, at 66-67 (noting the Commission’s holding that the leaflets amounted to racial discrimination under both the ECHR and the CERD).

147. See Jan Arno Hessbruegge, *Human Rights Violations Arising from Conduct of Non-State Actors*, 11 BUFF. HUM. RTS. L. REV. 21, 33-34 (2005) (explaining that states parties may find themselves “in a position of conflicting obligations, where [they] cannot protect one person’s right without limiting the rights of another,” but that under Article 17, a person’s rights and freedoms cannot be used to justify activities aimed at the destruction of rights or freedoms of others); see also Jean-Francois Flauss, *The European Court of Human Rights and the Freedom of Expression*, 84 IND. L.J. 809, 837-39 (2009) (“The refusal to protect hate speech is generally based on an application of the restriction clause of Article 10(2), read expressly or impliedly through the lens of Article 17.”).

the same way that racist individuals try to use freedom of speech to shield their attempts to destroy their targets' equal rights. However, neither the European Commission nor the Supreme Court of Canada has ever interpreted Article 17 in this manner in a hate speech case.

In *X v. Federal Republic of Germany*, the European Commission examined a complaint from a citizen of Germany who had publicly displayed pamphlets describing the Holocaust as an "unacceptable lie and a Zionistic swindle."<sup>148</sup> The applicant had been court-ordered not to repeat those statements; he was criminally convicted on a charge of incitement to hatred and given a one year prison term.<sup>149</sup> He then filed a complaint with the European Commission claiming that his right to freedom of expression had been breached.<sup>150</sup> The Commission found against the applicant, and upheld this restriction on freedom of expression.<sup>151</sup>

Likewise in *Garaudy v. France*,<sup>152</sup> the European Court of Human Rights ("European Court" or "court") upheld the conviction of an individual who had authored a book denying the Holocaust.<sup>153</sup> The court stated:

There can be no doubt that denying the reality of clearly established historical facts, such as the Holocaust, as the applicant does in his book, does not constitute historical research akin to a quest for the truth. The aim and the result of that approach are completely different, the real purpose being to rehabilitate the National-Socialist regime and, as a consequence, accuse the victims themselves of falsifying history. Denying crimes against humanity is therefore one of the most serious forms of racial defamation of Jews and of incitement to hatred of them.<sup>154</sup>

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148. App. No. 9235/81, 29 Eur. Comm'n H.R. Dec. & Rep. 194, 195 (1982).

149. *Id.* at 196.

150. *Id.* (noting the applicant alleged his freedom of expression was "suppress[ed] of truth for political purposes," and supported his claim through "scientific research" which the applicant believed proved that the Holocaust never happened).

151. *See id.* at 197-99 (acknowledging that the applicant's freedom had in fact been infringed, but that such interferences are permissible if "prescribed by law and necessary in a democratic society"); *see* Farrior, *supra* note 72, at 68 (noting that historical discrimination against Jews was relevant to the Commission's reasoning).

152. 2003-IX Eur. Ct. H.R. 369.

153. *Id.* at 376, 403.

154. *Id.* at 396-97.

Clearly, the court is not willing to show deference to academic freedom when reviewing cases of Holocaust denial.<sup>155</sup>

The court may show more deference to freedom of the press, though perhaps only in cases where the defendant is charged with disseminating hatred instead of expressing it.<sup>156</sup> In what was actually the first hate speech case to go to the court, *Jersild v. Denmark*, a journalist named Jens Olaf Jersild had been convicted by a Danish court for conducting and broadcasting an interview with three members of a racist youth group. During the course of the interview, the interviewees made racist statements about immigrants and ethnic groups.<sup>157</sup> As a result of his conviction, Jersild was ordered to pay damages for aiding and abetting the dissemination of racist statements.<sup>158</sup> He appealed to the intermediate appellate court, and then to the Danish Supreme Court, but both courts upheld his conviction.<sup>159</sup> Thereafter, he appealed to the European Court.<sup>160</sup>

The court found in the journalist's favor by a vote of twelve-to-seven.<sup>161</sup> It employed a three-part test in deciding whether the conviction was consistent with ECHR obligations. The conviction met the first two parts but failed the third. The first two parts—that the interference was proscribed by law and that the interference pursued a legitimate aim—were only dealt with briefly.<sup>162</sup> The crux of the case was whether the interference was “necessary in a democratic society.”<sup>163</sup>

The *Jersild* court took the view that in determining whether the conviction was “necessary,” an important factor was whether the

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155. See Bakircioglu, *supra* note 85, at 39 (explaining that the European Court takes a strict approach in cases regarding “revisionist theories that deny the existence of crimes against humanity”).

156. See *id.* at 39-40 (discussing how the treatment of *Jersild v. Denmark*, App. No. 15890/89, 19 Eur. H.R. Rep. 1 (1995), demonstrates that the court is more tolerant of incidental dissemination of hate speech in order to preserve the freedom of the press).

157. 19 Eur. H.R. Rep. at 1, 3-8 (observing that the youths were found to have violated Danish anti-hate speech law themselves).

158. *Id.* at 14-15.

159. *Id.*

160. *Id.* at 13.

161. *Id.* at 30.

162. *Id.* at 14-16.

163. See *id.* at 14-18 (highlighting that “necessary” under Article 10(2) ECHR jurisprudence means that there is a “pressing social need”).

applicant's intent was to propagate racist views.<sup>164</sup> While the court did recognize that but for Jersild's interview the youths' racist remarks would not have been disseminated to such a large audience, the court found that the program intended only to "expose, analyse and explain this particular group of youths," and thereby deal with a matter of public concern.<sup>165</sup> Accordingly, the state should not interfere.<sup>166</sup> The court was clearly influenced by the importance of the role of the press and concerns about a chilling effect that this sort of interference could produce, stating:

The punishment of a journalist for assisting in the dissemination of statements made by another person in an interview would seriously hamper the contribution of the press to discussion of matters of public interest and should not be envisaged unless there are particularly strong reasons for doing so.<sup>167</sup>

The court concluded that the government interference with the journalist's right to freedom of expression was not "necessary in a democratic society."<sup>168</sup> In a test reminiscent of the Canadian Supreme Court's proportionality test used in its Charter analysis, the European Court found that the means used here "were disproportionate to the aim of protecting 'the reputation or rights of others.'"<sup>169</sup>

It must be noted though that despite the decision in *Jersild* the European Court and the European Commission are generally consistent in applying hate speech legislation, particularly to the hatemongers themselves. A recent example is *Norwood v. United Kingdom*, where the court upheld the conviction of a British citizen who displayed a poster in the window of his house that read, "Islam out of Britain—Protect the British People."<sup>170</sup> In *B.H., M.W., H.P.*,

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164. *Id.* at 16 (noting that the applicant did not utter the words himself, but acted as a conduit for the racist views).

165. *Id.* at 17, 27.

166. *Id.* at 17-18, 28.

167. *Id.* at 28.

168. *See id.* (taking into consideration the applicant's purpose for the dissemination, as well as potential societal repercussions of disallowing such dissemination when evaluating the question of "necessity").

169. *Id.* (concluding that Jersild's conviction constituted a violation of Article 10 of the ECHR); *see* Farrior, *supra* note 72, at 71-72 (explaining that the court did not believe that Jersild had participated in the discriminatory remarks and that he had, in fact, "disassociated himself" from the remarks made by the youths).

170. App. No. 23131/03, 40 Eur. H.R. Rep. SE111, 113 (2004) (noting the

and *G.K. v. Austria*, the Commission dismissed a complaint that legislation outlawing activities inspired by National Socialist ideology infringed upon the complainants' right to freedom of expression, finding that the legislation fell within the Article 10(2) exception to that right, and that the actions of the complainants were prohibited by Article 17.<sup>171</sup>

It seems clear that under international law, hate speech provisions are not only permissible in a human rights-based democratic state, but necessary for the purpose of guaranteeing equality. Also, many of the cases referenced thus far involve convictions under domestic hate speech laws in democratic countries. In fact, other than in the United States, every major Western democracy has hate speech provisions.<sup>172</sup> This trend is considered below. In particular, the jurisprudence of the United States is reviewed at length, as it serves as an exception to international jurisprudence and the jurisprudence of every other Western democracy.

#### IV. DOMESTIC LAW FROM OTHER COUNTRIES

##### A. WESTERN DEMOCRACIES

The hate speech provisions of many Western democracies have already been discussed in the section on international jurisprudence above.<sup>173</sup> In addition to those, as the Canadian Supreme Court briefly noted in *Keegstra*, a great many countries have enacted hate speech provisions, including New Zealand, Sweden, and India.<sup>174</sup> This is not an exhaustive list, but it should give the reader a further indication

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message was accompanied by a photograph of the World Trade Center terrorist attack).

171. See App. No. 12774/87, Eur. Comm'n H.R. Dec. & Rep. 62, para. 2 (1989), available at <http://www.echr.coe.int/echr/en/hudoc/> (follow "HUDOC database" hyperlink; then search using the case name or Application No. under "Decisions").

172. See Alexander Tseis, *Dignity and Speech: The Regulation of Hate Speech in a Democracy*, 44 WAKE FOREST L. REV. 497, 521-523 (2009) (comparing the historical trend of using criminal law to control hate speech, because of its tendency to incite violence, with the more recent trend of basing hate speech restrictions on principles of international law).

173. See *supra* Parts II-III.

174. *R v. Keegstra*, [1990] 3 S.C.R. 697, para. 107 (Can.); see Tseis, *supra* note 172, at 521 (adding Australia, Austria, Belgium, Brazil, Canada, Cyprus, Denmark, England, France, Germany, Ireland, Israel, Italy, and Switzerland to the list of states that have hate speech provisions).



that every major Western democracy except for the United States has hate speech provisions.

Below, this article reviews jurisprudence on hate speech in the United States at much greater length than it has for other countries. It does so at the risk of creating a false equivalency between the breadth of international legal acceptance of American views and the views of the rest of the Western democratic world. This author accepts this risk as a cost of accurately explaining the American legal position.

### B. UNITED STATES

In *Keegstra*, both the majority and the dissent opinions reviewed American jurisprudence with regard to hate speech provisions. In his judgment, Chief Justice Dickson noted:

Those who attack the constitutionality of [section] 319(2) draw heavily on the tenor of First Amendment jurisprudence in weighing the competing freedoms and interests in this appeal, a reliance which is understandable given the prevalent opinion that the criminalization of hate propaganda violates the Bill of Rights.<sup>175</sup>

American courts, since the 1970s, have taken an absolutist view toward the right to freedom of expression that disallows hate speech restrictions. A landmark case displaying this viewpoint is *Collin v. Smith*,<sup>176</sup> decided by the Court of Appeals for the Seventh Circuit in 1978. In *Collin*, the court struck down, on First Amendment grounds, a municipal ordinance that prohibited public demonstrations inciting violence, hatred, abuse or hostility toward a person or group due to their race or religion.<sup>177</sup>

The American test for when political speech— which American jurisprudence considers hate speech to be—enjoys constitutional protection was enunciated in *Brandenburg v. Ohio*.<sup>178</sup> In that case, the accused had given a speech at a Ku Klux Klan rally in which he made derogatory statements towards Blacks and Jews and suggested

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175. *Keegstra*, [1990] 3 S.C.R. at para. 52.

176. 578 F.2d 1197 (7th Cir. 1978).

177. *Id.* at 1199, 1207, 1210 (concluding that the ordinance was overbroad but implying that a narrower ordinance might survive constitutional scrutiny).

178. 395 U.S. 444, 448 (1969).

that some “revengeance” would be taken if the United States government continued to “suppress the white, Caucasian race.”<sup>179</sup> The accused was convicted under an Ohio law that prohibited the advocacy of crime as a means of political reform.<sup>180</sup> The Supreme Court overturned the conviction, stating:

[T]he constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing *imminent lawless action* and is likely to incite or produce such action. As we said in *Noto v. United States*, ‘the mere abstract teaching . . . of the moral propriety or even moral necessity for a resort to force and violence, is not the same as preparing a group for violent action and steeling it to such action.’ A statute which fails to draw this distinction impermissibly intrudes upon the freedoms guaranteed by the First and Fourteenth Amendments. It sweeps within its condemnation speech which our Constitution has immunized from governmental control.<sup>181</sup>

Since *Brandenburg*, the Supreme Court has never found that speech met the “imminent lawless action” test.<sup>182</sup>

In the more recent case of *R.A.V. v. City of St. Paul*, the Supreme Court again made clear that laws seeking to specifically regulate hate speech will be struck down.<sup>183</sup> In *R.A.V.*, the accused was convicted of violating a hate crime provision that prohibited the placement of an object or symbol on public or private property that one reasonably knows “arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender.”<sup>184</sup> Specifically, the defendant had set up and burned a cross on the lawn of a black family who

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179. *Id.* at 445-47.

180. *See id.* at 444-45 (“The Ohio Criminal Syndicalism statute [provides criminal sanctions for] . . . ‘advocating the duty, . . . necessity, or propriety of crime, sabotage, violence, or unlawful methods of terrorism as a means of accomplishing industrial or political reform’ and for ‘voluntarily assembl(ing) with any society, group, or assemblage of persons formed to teach or advocate the doctrines of criminal syndicalism.’”).

181. *Id.* at 447-48 (emphasis added) (citations omitted) (quoting *Noto v. United States*, 367 U.S. 290, 297-98 (1961)).

182. Bakircioglu, *supra* note 85, 15-17 (emphasizing the stricter nature of the new test developed by the *Brandenburg* Court, which may ultimately lead to further legal uncertainty on which elements are necessary to constitute an offense).

183. 505 U.S. 377, 393-94 (1992).

184. *Id.* at 380.

lived across the street from where he was staying.<sup>185</sup> The accused challenged the provision as violating his freedom of expression under the First Amendment.<sup>186</sup> The Supreme Court agreed and overturned his conviction.<sup>187</sup>

In *R.A.V.*, the city of St. Paul had argued that the provisions were constitutional because they regulated “fighting words.”<sup>188</sup> Indeed, the Supreme Court had previously excluded threatening words, or “fighting words,” from the scope of First Amendment protection because “[f]ighting words are not a means of exchanging views, rallying supporters, or registering a protest; they are directed against individuals to provoke violence or to inflict injury.”<sup>189</sup> However, while the Court in *R.A.V.* reiterated that fighting words were outside the scope of First Amendment protection, they found that it was nonetheless unconstitutional to single out certain types of fighting words for censure based on the underlying message expressed.<sup>190</sup> Justice White, in his concurring opinion, stated, “[t]he mere fact that expressive activity causes hurt feelings, offense, or resentment does not render the expression unprotected.”<sup>191</sup> While this is undoubtedly true, the ordinance in question was not directed at hurt feelings or offense. It also was not directed at resentment broadly, but at a certain form of resentment: that which comes from being made to feel as if one is not an equal member of society. Rather than balance free speech with equality concerns, however, American jurisprudence consistently characterizes the issue as one which pits free speech against offense.<sup>192</sup> Because, as previously noted, there is

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185. *Id.* at 379.

186. *Id.* at 380.

187. *See id.* at 396 (explaining that the ordinance violated the Constitution because it was “limited to favored topics,” or in other words, the ordinance favored particular biases and types of content).

188. *Id.* at 381.

189. *Id.* at 401 (White, J., concurring).

190. *See id.* at 396 (majority opinion) (suggesting that just as the cross-burning individuals have a right to freedom of expression, legislators can also express their hostility towards these racial biases, but cannot enact legislation which singles out racial biases).

191. *Id.* at 414 (White, J., concurring).

192. *See* Toni M. Massaro, *Equality and Freedom of Expression: The Hate Speech Dilemma*, 32 WM. & MARY L. REV. 211, 223, 234 (1991) (elucidating the civil rights account in American First Amendment jurisprudence which posits that the First Amendment is “about balancing harms and values in speech” and

no right not to be offended, the American jurisprudence in regards to hate speech provisions is absolutist.

Justice Scalia, in his majority judgment in *R.A.V.*, outlines the hazards of provisions that restrict speech based on content:

Displays containing some words—odious racial epithets, for example—would be prohibited to proponents of all views. But “fighting words” that do not themselves invoke race, color, creed, religion, or gender—aspersions upon a person’s mother, for example—would seemingly be usable *ad libitum* in the placards of those arguing *in favor* of racial, color, etc., tolerance and equality, but could not be used by those speakers’ opponents. One could hold up a sign saying, for example, that all “anti-Catholic bigots” are misbegotten; but not that all “papists” are, for that would insult and provoke violence “on the basis of religion.” St. Paul has no such authority to license one side of a debate to fight freestyle, while requiring the other to follow Marquis of Queensberry rules.<sup>193</sup>

It should be noted that a sign saying that “all papists are misbegotten” would probably not be caught by the provision that was at question in this case, since the provision was directed at burning crosses and Nazi symbols. Furthermore, there is probably some room—between the outer limits of the Marquis of Queensberry rules and repeatedly burning a cross on someone’s lawn because of their race—within which racists could make an argument. But the problems with Justice Scalia’s reasoning go deeper than these two errors.

Justice Scalia sets up the debate as between two groups: one group that is advocating the position that people of certain races are inherently inferior, and another group that is advocating equality. While the targets of the racist position are having their right to equality breached, the targets of the equality advocates are not. The existence of the right to equality recognizes that all races, genders, sexual orientations, and like categories of people shall be treated equally with regard to these inherent qualities.<sup>194</sup> The right to equality does not recognize that those who advocate against equality

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sometimes violates the strict equality principle).

193. *R.A.V.*, 505 U.S. at 391-92.

194. See Boyle, *supra* note 131, at 491-93 (highlighting the slow evolution of international principles to reflect racial equality from the emancipation of slaves in the United States to the inclusion of the Japanese at the First World War Conference to the end of Apartheid in South Africa).

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shall be treated equally with regard to their opinion. So it is certainly true that a sign reading “Blacks” with a line through that word might be found to be unlawful, whereas a sign reading “Racists” with a line through it might not. That is because the former engages the right to equality, while the latter does not.

This aside, the American position on hate speech restrictions is clear. While it is obviously out of step with the rest of the major Western democracies, it is not necessarily anti-democratic. However, the above review does put some context behind claims that other Western democracies’ hate speech provisions are not in line with democratic principles.

### CONCLUSION

As this article notes in the Introduction, the current Canadian discussion on the legitimacy of government action to restrict hate speech is being dominated by a group arguing that hate speech restrictions are anti-democratic. In an effort to investigate this argument, this article examined international law and standards on hate speech provisions, as well as domestic law from some Western democracies. In doing so, it uncovered wide acceptance of hate speech restrictions both in international law and in every Western democracy other than the United States. This article also made the point that Canadian international obligations to implement hate speech provisions, as well as other international legal standards in favor of hate speech provisions, have been determined to be legally persuasive by the Supreme Court of Canada—though by a majority of only one justice.

During the course of this examination, this article also noted how Levant’s movement and American jurisprudence balanced the competing rights engaged by hate speech provisions, and argued that these positions were incorrect. While Levant and American jurisprudence view hate speech provisions as a balance between free speech and offense, this article argued that hate speech provisions must balance free speech and equality. In other words, in order to be legitimate, hate speech provisions must have the promotion of equality as their concern rather than the amelioration of offense.

It appears that if Levant, Steyn and their movement want to argue that hate speech restrictions are anti-democratic, they must also

acknowledge that the international standard and every Western democracy, save for the United States, disagrees. While this alone does not disprove their argument, it does provide some helpful context in its assessment.