THE CRIMINALIZATION OF HATE PROPAGANDA: A CLASH OF IDEALS BETWEEN CANADA AND THE UNITED STATES

Eric Wolfman*

I. INTRODUCTION .............................................................. 543
II. THE COMPPELLING INTEREST IN CRIMINALIZING HATE SPEECH ............................................................... 544
III. THE HISTORY OF GROUP LIBEL AND DEFAMATION LAW ................................................................. 546
IV. THE INTERNATIONAL PROSPECTIVE ON HATE PROPAGANDA ................................................................................. 549
   A. The United Nations .................................................. 549
   B. Criminalization of Hate Propaganda in Canada ............................................................................................................ 553
V. HATE PROPAGANDA AND THE FIRST AMENDMENT IN THE UNITED STATES ........................................ 564
VI. CONCLUSION ................................................................ 575

I. INTRODUCTION

This paper will attempt to make the case that the criminalization of racist speech in the form of hate propaganda could survive a First Amendment challenge. Section I examines the elemental harms caused by hate propaganda and the compelling reasons why such speech should be criminalized.

Section II gives a brief overview of the history of group libel and defamation law. An examination of the history of group libel shows that the concept of punishing speech that defames and disrupts society has been well established since the formation of organized society.

Section III looks briefly at the response of the international community to the problems associated with hate propaganda. Part A examines the actions taken by the United Nations and the European

* J.D. Candidate Nova Southeastern University, May, 1996; Hons. B.A. University of Western Ontario. The Author would like to thank Nova Southeastern University Professors Pearl Goldman, Johnny C. Burris, John B. Anderson, Douglas L. Donoho, and Robert M. Jarvis, for their guidance and insight into all aspects of the law.
Community in their efforts to eliminate hate propaganda. Part B examines, in depth, the Canadian response to hate propaganda. Canada's free speech jurisprudence, along with its Charter of Rights and Freedoms, is similar to that of the United States. Canada's multicultural society is also comparable to the cultural make-up of American society. As a model for the criminalization of hate propaganda, the United States could look to the Canadian experience for guidance.

Part IV briefly examines the fundamental values of free speech associated with the First Amendment. It then goes on to examine First Amendment jurisprudence as pronounced by the decisions of the United States Supreme Court. By examining the holdings and dicta in the various cases dealing with First Amendment issues, an argument can be made for the constitutional criminalization of hate propaganda.

II. The Compelling Interest in Criminalizing Hate Speech

Racially defamatory speech or hate propaganda, the precursor to racial hatred and discrimination, should not be classified as constitutionally protected speech. The value of such speech is so slight, it does not merit the respect of the First Amendment. It is in fact "rotten fruit in the marketplace of ideas.”

Racist expression harms the very marketplace of ideas that the First Amendment is designed to foster. Racist hate messages are rapidly increasing and are widely distributed in the United States through a variety of technologies and media. Race is a constant subtext of daily life in America. The negative effects of hate messages are real and immediate for its victims. "Victims of vicious hate propaganda have experienced physiological symptoms and emotional distress ranging from fear, rapid pulse rate, difficulty in breathing, nightmares, post-traumatic stress disorder, hypertension, psychosis, and suicide.” The blows of racist

3. See BUREAU OF JUSTICE STATISTICS SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 1993. Congress considered the problem of hate crimes serious enough to pass the Hate Crime Statistics Act, 28 U.S.C. § 534 (1990), which required the Attorney General to collect and publish data about crimes that manifest evidence of prejudice based on race, religion, sexual orientation, or ethnicity. Id.
messages have been labeled "spirit murder" in recognition of the psychic destruction victims experience.¹ In recommending the need for criminal and administrative sanctions for willfully promoting hatred against an identifiable group, one must consider the tension between the First Amendment and the Fourteenth Amendment. In an argument as to the hierarchy of rights, ultimately, history has taught us that without equality, freedom of speech is an illusion.

The threat of hate groups like the Ku Klux Klan, the Neo-Nazi Skinheads, and the growing "White Aryan Resistance," goes beyond their repeated acts of illegal violence. Their presence, and the active dissemination of racist propaganda, means that citizens are denied personal security and liberty as they go about their daily lives. "Violence is a necessary and inevitable part of the structure of racism. It is the final solution, as fascists know, barely held at bay while the tactical weapons of segregation, disparagement, and hate propaganda do their work."⁶ The growth of the "Aryan Movement" and the "White Militias," coupled with their recruitment of the youth of America, are real threats to the very fabric of American society.

"The historical connection of all the tools of racism is a record against which to consider a legal response to racist speech."⁷ It is well known that notions of racial superiority are commonly associated with practical schemes for denying certain political or economic rights to members of the group under attack.⁸ "In the political [and] economic struggle, modern democracy operates through the interplay of group activities. [I]t is through participation in groups that persons contribute to the social welfare and develop their individual capacities."⁹

Hate propaganda used to disparage identifiable groups are attacks on the pluralistic forces which make up a democratic society and, by inference, on the individual members of the group who associate or identify with their group affiliations.¹⁰ An attack on one group within a society is an attack on the whole society. What is needed in this situation is a series of public and institutional practices which can inculcate respect

---


6. Matsuta, supra note 4, at 2335.

7. Id.


9. David Riesman, Democracy and Defamation: Control of Group Libel, 42 COLUM. L. REV. 727, 731 (1942); see also Post, supra note 2 (discussing the effects of defamation).

10. Riesman, supra note 9, at 731.
for the principle of equality and demonstrate that equality has a community status superior to that of a pious slogan. The educational impact of the criminal law can be of great value. In order to advance the argument for proscribing the dissemination of hate propaganda, the legislature would have to prove, among other things, the particular and distinct harms caused by racist expression.

Richard Delgado, recognized the real harms caused by hate propaganda, and suggested a tort remedy for injury from racist words. Those who have suffered the emotional distress associated with the effects of hate propaganda should have a remedy at law. However, this remedy ignores the intrinsic harm caused to society as a whole by the dissemination of hate propaganda.

One contemporary theory for regulating racist speech is that there is an elemental wrongness associated with racist expression, regardless of the presence or absence of particular empirical consequences such as grievous, severe psychological injury. The toleration of fascist expression is inconsistent with respect to the principle of equality that is at the heart of the Fourteenth Amendment. If the Fourteenth Amendment is thought to enshrine an anti-discrimination principle, then any speech which supports racial prejudice or discrimination should be subject to regulation. Ultimately, hate propaganda, as a class of speech, communicates the message of racial inferiority.

The key to criminalizing hate propaganda is to show that this type of speech does not deserve the protection of the First Amendment. Those who profess the view that free speech is an "absolute," never offer convincing reasons why keeping one's mouth shut, under pain of punishment, should always be considered a greater evil than any mischief which may result from publishing the words of hate. The danger and mischief which the dissemination of hate propaganda and racial superiority lead to are such that, as a class of speech, they deserve no more protection than that offered to obscenity.

III. THE HISTORY OF GROUP LIBEL AND DEFAMATION LAW

Since Roman times the state has had an interest in controlling the propagation of hate or libelous speech against individuals or groups.


12. Post, supra note 2, at 272.
Whoever insulted the magistracy of the Roman republic made themselves guilty of "laesio majestatis pipuli Romani." Later, the Emperor was protected under the law of "libelli famosi" against "viros illustres," and such libel was punished with deportation or by capital punishment. "During the Middle Ages, defamation was largely a matter for the ecclesiastical courts." The provision for peaceful means of redress for attacks on reputation seems to have originated with organized society. Early Germanic laws such as the "Lex Salica" and the "Norman Costumal" sought to prevent blood feuds which by their persistent violence tore societies apart.

Attempts to prevent the propagation of scurrilous statements about particular groups in the Anglo-American legal tradition are extremely old. The Star Chamber took over prosecutions of scurrilous statements in 1488, shortly after the development of the printing press and the corresponding capacity for wide publication to the masses. The Star Chamber's focus was on protecting the Christian Monarch as well as the protection of private rights. Further, the Star Chamber wanted to suppress dueling, and in order to accomplish this end, "it would punish defamatory libels on private citizens who had suffered insult."

"With the religious decline, as a result of the Renaissance and Reformation, temporal attitudes toward defamation replaced ecclesiastical ones." Except for political offenses, the civil courts usurped the field of defamation. In 1641, the Star Chamber was abolished and the Court of King's Bench took over the criminal jurisdiction of the realm. In libel actions, "the role of the jury was limited to . . . deciding whether the defendant had published the statement in question, while its defamatory character was a 'question of law' for the royally appointed judge."

The earliest instance where defamation or libel was made criminal occurred in 1275, when the offense of "De Scandalis Magnatum" was created. De Scandalis Magnatum prohibited "any false News or Tales,
whereby discord, or occasion of discord or slander may grow between the
King and his People, or the Great Men of the Realm." \(^{23}\) The aim of the
statute was to prevent false statements which could threaten the security of
the state in a society dominated by extremely powerful landowners.\(^{24}\) *De
Scandalis Magnatum* was part of a system of remedies for defamation
available to all subjects.\(^{25}\) Queen Elizabeth I punished defamation with the
loss of an ear for spoken words and the loss of a hand for written words.\(^{26}\)
*De Scandalis Magnatum*, however, was rarely employed, and was
abolished in England in 1888.\(^{27}\)

The first known attempt to prosecute group libel was made in
London in 1700, in the case of *King v. Alme & Nott*.\(^{28}\) The defendants
were indicted for a libel entitled, "List of Adventures in the Ladies
Invention, being a Lottery."\(^{29}\) The persons against whom the libel was
directed could not be determined. The King's Bench ruled that the
original indictment had been insufficient since the persons libeled were
unknown.\(^{30}\)

The leading case of *King v. Osborne*, decided in 1732, has
traditionally been regarded as establishing the doctrine that group libel is
an indictable offense.\(^{31}\) In *Osborne*, a paper was published charging that
Portuguese Jews had burned to death a Jewish woman and her bastard
child whose father was a Christian, and that such instances were frequent.\(^{32}\)
As a result, when mobs attacked and beat Jews in various parts of the city,
the peace was actually breached. The court ruled:

Though an information for criminal libel might be
improper, such defamatory accusations necessarily tend to
raise tumults and disorders among the people, and inflame
them with an universal spirit of barbarity against a whole
body of men, as if guilty of crimes scarce practicable and

\(^{23}\) 3 Edw. 1, ch. 34 (1275); see Sir William Holdsworth, A HISTORY OF ENGLISH LAW,
Vol. III (5th ed. 1942); Zundel, 95 D.L.R.4th, at 217 (outlining a history of English libel law).
\(^{25}\) Vechten Veeder, *supra* note 16.
\(^{27}\) Id. at 39.
\(^{29}\) Tanenhaus, *supra* note 28, at 267.
\(^{30}\) Id.
\(^{31}\) Id. at 268; King v. Osborne, 94 Eng. Rep. 406 (1732).
\(^{32}\) Osborne, *supra* note 31, at 406.
totally incredible, and deserves to be punished as misdemeanors.\textsuperscript{33}

"The use of hate propaganda against racial and religious groups not only hurts the groups as collectivities [sic], and the individual members of such groups, but adversely affects the stability and welfare of the community itself."\textsuperscript{34} The act of defaming a specific and identifiable group has been given various labels over time: "group libel," "group defamation," "racial defamation," "racist speech," and "hate propaganda." The term hate propaganda is most appropriate. The Supreme Court of Canada has defined the term "hate propaganda" to denote "expression intended or likely to create or circulate extreme feelings of opprobrium and enmity against a racial or religious group."\textsuperscript{35}

Group defamation in the form of hate propaganda is not the basic cause of prejudice and intergroup tensions. Whether the hate-monger will have any success in influencing other individuals depends to a large degree on the potential responsiveness of the audience. History has taught that the more often the message is repeated, the more likely it is to gain acceptance and be acted upon.\textsuperscript{36} The case for or against racists' freedom of speech depends on the utility of interference versus the utility of noninterference. This in turn depends, at least in part, on the nature of the society in which one lives and the particular situation with which one is confronted. The international community, in recognizing this concept, historically and presently has endeavored, through the United Nations, to overcome the problem with a number of conventions and resolutions.

IV. THE INTERNATIONAL PROSPECTIVE ON HATE PROPAGANDA

A. The United Nations

International legal norms within the international community concerning hate speech began to crystallize shortly after the Second World War. The memory of Nazi Germany's use of hate propaganda and the Holocaust spurred the international community to eliminate racial discrimination.\textsuperscript{37} Most nations have adopted legislation proscribing racial

\textsuperscript{33} Id. at 425.
\textsuperscript{34} Tanenhaus, supra note 28, at 261.
\textsuperscript{36} Nazi Germany provides an excellent example of this phenomenon, as does modern day Bosnia and Rwanda.
defamation and incitement of racial hatred. If the harm of racist hate messages is significant, and the truth value marginal, the doctrinal space for regulation of such speech is a fortiori. An emerging international standard seizes this possibility. The international community has chosen to address the issue by outlawing racist hate propaganda.

The Charter of the United Nations, in its first article, lists among the aims of the organization, "promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, religion or language." In 1948, the General Assembly adopted the Universal Declaration of Human Rights drafted by the Commission on Human Rights without dissent. The Declaration is wide ranging in scope. After listing a comprehensive catalogue of personal freedoms, the Declaration makes the specification that all are entitled to those freedoms without distinction of any kind, such as race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

The United Nations, following its founding principles, passed the International Convention of the Elimination of All Forms of Racial Discrimination which was signed by the United States on September 28, 1966. However, it has yet to be ratified by the United States. One hundred countries have ratified the Racial Discrimination Convention. Article 4 of the Racial Discrimination Convention provides:

State 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

38. See generally Jones, supra note 1; Matsuta, supra note 4; Smolla, supra note 37 (providing an in-depth history of the United Nations' response to hate propaganda).

39. Smolla, supra note 37, at 191.

40. U.N. CHARTER art. 1, para. 3.


42. Id.


44. See Jones, supra note 1.
end, with due regard to rights expressly set forth in Article 5 of this Convention, inter alia:

(a) Shall declare an offense 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 organization or activities as an offense punishable by law;

(c) Shall not permit public authorities or public institutions, national or local, to promote or incite racial discrimination.

Under this treaty, states are required to criminalize racial hate messages. Recognizing the conflict in the values between the concepts of free speech and prohibiting dissemination of ideas of racial superiority or hatred, the treaty recognizes the rights of freedom of speech, association, and conscience.

The Preamble to the Racial Discrimination Convention states explicitly that “any doctrine of superiority based on racial differentiation is scientifically false, morally condemnable, socially unjust and dangerous, and that there is no justification for racial discrimination.” The community of nations has thus made a commitment, with the support of the United States, to the elimination of racism. The United Nations has recognized that racist hate propaganda is illegitimate and properly subject to control under the international law of human rights. The procedures for signature and ratification allow reluctant states to reject antipropaganda laws that would interfere with the right of free speech by specific reservation of the article.

The response of the international community to the threat posed by hate propaganda is evidenced by the passage of specific criminal

45. Racial Discrimination Convention, supra note 43.
46. Id. at art. 4, 5; see also Jones, supra note 1; Matsuta, supra note 4 (outlining the history of the “hate propaganda” treaty).
47. Racial Discrimination Convention, supra note 43.
legislation. The United Kingdom under the Race Relations Act, has criminalized incitement to discrimination and incitement to racial hatred.\footnote{48} The Race Relations Act specifically prohibits racial defamation. The requisite \textit{mens rea} to complete the offense is the intention to "stir up hatred" by the publishing of an utterance, or the utterance of words that are racially defamatory.\footnote{49} The \textit{actus reus} consists of oral or written words that are likely to stir up hatred against a particular segment of the community on the basis of colour, race, ethnic or national origins.\footnote{50} Sweden also prohibits the defamation of a race:

If a person publicly or otherwise in a statement or other communication which is spread among the public threatens or expresses contempt for a group of a certain race, skin colour, national creed, he shall be sentenced for agitation against ethnic group to imprisonment for at most two years, or if the crime is petty, to a fine.\footnote{51}

Other European nations have committed to antipropaganda measures. Germany and Denmark have prohibited the dissemination of hate propaganda. Under the European Convention for the Protection of Human Rights and Fundamental Freedoms, "all European Community states are required to eliminate hate propaganda."\footnote{52}

\begin{itemize}
\item \footnote{48} Race Relations Act of 1965, ch. 73, 6(1) (amended 1976 & 1986). Section 6(1) of the Act provides:
\begin{quote}
A person shall be guilty of an offense under this section if, with intent to stir up hatred against any section of the public in Great Britain distinguished by colour, race or ethnic or national origin if:
\begin{itemize}
\item (a) he publishes or distributes written matter which is threatening, abusive or insulting;
\item or,
\item (b) he uses in any public place or at any public meeting words which are threatening, abusive, or insulting, being matter or words likely to stir up hatred against that section on grounds of colour, race or ethnic or national origins.
\end{itemize}
\end{quote}
\item \footnote{49} Id.
\item \footnote{50} Id.
\item \footnote{52} European Convention for the Protection of Human Rights and Fundamental Freedoms, 1950, 213 U.N.T.S. 221.
\end{itemize}
B. Criminalization of Hate Propaganda in Canada

In order to prove the assertion that the application of criminal sanctions against the propagation of hate propaganda would not impair free speech rights to the point of undermining a fundamental concept of ordered liberty, it is necessary to examine a jurisprudence comparable to the United States. Canada's free speech jurisprudence allows for criminal sanction for the dissemination of hate propaganda. By comparing the rationale used in Canada, a jurisdiction with similar free speech jurisprudence to that of the United States, it may be possible to extrapolate a rule of law that would allow for the criminalization of hate speech in the United States.

In 1982, Canada passed the Constitution Act, entrenching the Charter of Rights and Freedoms into the Constitution of Canada. The relevant sections of the Charter that effect this discussion are:

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

2. Everyone has the following fundamental freedoms:
   (a) freedom of conscience and religion
   (b) freedom of thought, belief, opinion and expression, including freedom of the press and other media communication;
   (c) freedom of peaceful assembly; and
   (d) freedom of association ... .

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

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

---

The concept of freedom of speech has long been established in Canadian jurisprudence. "The freedom to express oneself openly and fully is of crucial importance in a free and democratic society and has been recognized by Canadian courts prior to the enactment of the Canadian Charter of Rights and Freedoms." Freedom of expression has been noted by the Canadian Supreme Court as an essential value of Canadian parliamentary democracy "well before the advent of the Canadian Bill of Rights," which was passed by Parliament in 1960. Freedom of speech has been protected by the Canadian judiciary to the extent possible before the specific freedom was entrenched in the Charter.

Canada has a history of attempts to prosecute libel as a crime. However, the Criminal Code provisions "did not focus specifically upon expression propagated with the intent of causing hatred against racial, ethnic or religious groups." Canadian "common law has long seen defamation as a tortious action, but only where a litigant could show that his reputation has been damaged by offending statements directed toward himself as an individual."

In 1966, in response to the increase of racist sentiment in Canada, and mindful of its commitments to the United Nations, the Canadian government appointed a special committee to study problems associated with the spread of hate propaganda in Canada. The opening paragraph of the report reflects the tone of the special committee.

This report is a study in the power of words to maim, and what it is that a civilized society can do about it. Not every abuse of human communication can or should be controlled by law or custom. But every society from time to time draws lines at the point where the intolerable and the impermissible coincide. In a free society such as our own, where the privilege of speech can induce ideas that may change the very order itself, there is bias weighted heavily in favour of the maximum of rhetoric whatever the cost and consequences. But that bias stops this side of

57. Keegstra, 61 C.C.C.3d at 22.
58. Id. at 19.
59. Id.
injury to the community itself and to individual members or identifiable groups innocently caught in verbal cross-fire that goes beyond legitimate debate.60

In light of the special committee report, the Canadian government realized a need to prevent the dissemination of hate propaganda without unduly infringing freedom of expression. With this concept in mind, the Canadian government passed amendments to the Canadian Criminal Code which covered the advocation of genocide, public incitement of hatred likely to lead to a breach of peace, and the willful promotion of hatred.61 Section 319(2) of the Criminal Code of Canada provides that "everyone who, by communicating statements, other than in private conversation, willfully promotes hatred against any identifiable group is guilty of an offense."62 Subsection (3) allows for a number of defenses, in particular 3(a), which provides that "the accused shall not be convicted if he establishes that the statements communicated were true."63

In *Regina v. Keegstra*, the Canadian Supreme Court announced their base line rationale for constitutional decision making associated with challenges to the regulation of hate propaganda.64 Keegstra, a secondary school teacher was charged with the offense of willfully promoting hatred against an identifiable group contrary to section 319(2) of the Canadian Criminal Code. The charges arose out of his anti-Semitic teachings in the classroom in Eckville, Alberta. The evidence established that he had systematically denigrated Jews and Judaism in his classes. He described Jews by such epithets as "subversive, sadistic, money loving, power hungry, and child killers as well as teaching that Jewish people seek to destroy Christianity, and are responsible for depressions, anarchy, chaos, wars, and revolution."65 He advised his students they must accept his views as true unless they were able to contradict them, and expected his

60. *Id.* at 20.
62. Canadian Criminal Code, R.S.C. 1985 § 319(2)[hereinafter Hate Propaganda Statute].
63. *Id.* The reverse onus provision providing for the accused to prove the truth of the statement as an affirmative defense was also upheld by the Supreme Court. *Keegstra*, 61 C.C.C.3d at 72. Paragraph 3(b) and (d) refer to good faith expression of arguments on a religious subject, statements relevant to any subject of public interest for the public benefit and where the accused in good faith intended to point out, for the purpose of removal, matters producing or tending to produce feelings of hatred. This language in the statute takes care of concerns about "slippery slope," "overbreadth" and "underbreadth" arguments.
64. *Keegstra*, 61 C.C.C.3d 1.
65. *Id.* at 12.
students to recite these notions in essays and examinations if they were to receive good grades.66

The values of free speech to Canadian society announced in Keegstra are similar to those values expressed in the United States and protected by the First Amendment. "Freedom of expression was entrenched in the Charter so as to ensure that everyone can manifest their thoughts, opinions, beliefs, . . . however unpopular, distasteful or contrary to the mainstream."67 "Such protection is . . . fundamental because in a free, pluralistic and democratic society [Canadians] prize [the] diversity of ideas and opinions for their inherent value both to the community and to the individual."68

In upholding the constitutionality of the hate propaganda regulation, the Court engaged in a two-part analysis similar to the analysis used by the United States Supreme Court when it decides First Amendment challenges to governmental regulations. The Court first examined the regulation to determine whether it infringed the Charter guarantee of freedom of expression. It then determined if the regulation could be saved by Section 1 of the Charter.

In answering the first question, the Court asked "does the coverage of Section 2(b) [of the Charter] extend to the public and willful promotion of hatred against an identifiable group?"69 The Court found that the reach of the free speech clause was wide, and that expression deserves protection if it serves individual and societal values in a free and democratic society.70

In this "application analysis," the Court asked whether the Charter guarantee of freedom of expression applied to the Hate Propaganda Statute. The Court examined whether the regulation was "content/viewpoint based" or "content neutral" in regard to its effect and on its face. In this sense, the inquiry is similar between the two jurisdictions. The Court stated "if the activity that is to be regulated conveys or attempts to convey a meaning, it has expressive content and prima facie falls within the scope of the guarantee."71 The term "expression as used in . . . the Charter embraces all content of expression, irrespective of the particular meaning or message sought to be conveyed."72 In other words, is the purpose of the statute in question a

66. Id.
67. Id. at 23.
68. Id.
70. Id. at 22.
71. Id. at 24.
72. Id.
regulation of speech or does it regulate conduct? The United States Supreme Court uses a similar analysis in determining whether the purpose of a governmental regulation reaches expression or only conduct.\textsuperscript{73}

In determining that the purpose of the regulation was to restrict the content of the expression, the Court stated:

The guarantee of freedom of expression will necessarily be infringed by government action having such a purpose. If, however, it is the effect of the action, rather than the purpose, that restricts an activity, [section] 2(b) [of the Charter] is not brought into play unless it can be demonstrated by the party alleging an infringement that the activity supports rather than undermines the principles and values upon which freedom of expression is based.\textsuperscript{74}

It appears that if the Court had found the purpose of the regulation was to restrict conduct solely, and that free expression was only incidentally affected, the free speech section of the Charter would not be applicable, and the challenge to the statute would have failed. This analysis is similar to American courts when it refers to over-inclusiveness and the chilling effects of regulations on the freedom of expression.\textsuperscript{75}

Based on the express language of the statute and its direct effect on expression, the Court found that Parliament’s purpose behind the Hate Propaganda Statute was to prohibit those communications which are intended to promote hatred against identifiable groups. The purpose of the government was to regulate expression, and that purpose was based on the content of the communication. Therefore, the Court determined the hate speech statute did in fact infringe on the free speech section of the Charter.\textsuperscript{76}

In dicta, the Court examined the nature of hate propaganda, and rejected any notion that hate propaganda was analogous to a direct threat

\textsuperscript{73} See generally United States v. O’Brien, 391 U.S. 367 (1968) (upholding draft card burning regulation as a restraint on conduct); Tinker v. Des Moines Indep. Community Sch. Dist., 393 U.S. 503 (1969) (banning school children from wearing arm bands struck down as regulation of expression); Texas v. Johnson, 491 U.S. 397 (1989) (striking down state flag burning statute as a restraint on expression); United States v. Eichman, 496 U.S. 310 (1990) (striking down federal flag burning statute as a restraint on expression). In each case the Supreme Court’s threshold question was whether the regulation was directed at conduct or the expressive intent in the conduct.

\textsuperscript{74} Keegstra, 61 C.C.C.3d at 24.

\textsuperscript{75} See generally R.A.V. v. City of St. Paul, 505 U.S. 377 (1992) (outlining the Court’s most recent analysis on over-inclusive and under-inclusive regulations dealing with hate speech and the enhanced penalty statute).

\textsuperscript{76} Keegstra, 61 C.C.C.3d at 25.
of violence." In Canada, as in the United States, violence as a form of expression receives no protection. The Court declined to exclude the protection of the guarantee of freedom of expression to hate propaganda via this line of reasoning.\textsuperscript{78}

The Court declared all activities conveying or attempting to convey meaning are considered expression for the purpose of the Charter.\textsuperscript{79} "The content of expression is irrelevant in determining the scope of the Charter provision."\textsuperscript{80} The Hate Propaganda Statute prohibits the communication of meaning which is repugnant, but the repugnance stems from the content of the message as opposed to its form. In the view of the Court, hate propaganda is categorized as expression, bringing it within the coverage of the free expression clause of the Charter. Since the Court determined that the Hate Propaganda Statute did come within the ambit of the free expression clause, the second part of the analysis was to determine whether the statute could be saved by Section 1 of the Charter. Section 1 of the Charter states: "the Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."\textsuperscript{81} This section of the Charter allows for a limit on a right or freedom if the government can establish that the impugned state action has an objective of "pressing" and "substantial" concern in a free and democratic society. "Only such an objective is of sufficient stature to warrant overriding a constitutionally protected right or freedom."\textsuperscript{82} In order to justify a limit on a right or freedom in a free and democratic society, the government must establish that the impugned state action has an objective of pressing and substantial concern, and that the regulation is within "proportion" between the demonstrated objective and the impugned measure.\textsuperscript{83} In effect, Section 1 of the Charter entrenches a level of scrutiny that falls between the strict scrutiny standard and the intermediate scrutiny standard used in United States' courts.

United States' courts have developed differing "levels of scrutiny" in deciding governmental actions and constitutional questions. "The general rule is legislation is presumed to be valid and will be sustained if

\textsuperscript{77. Id. at 26.}
\textsuperscript{78. Id.}
\textsuperscript{79. Id.}
\textsuperscript{80. Id.}
\textsuperscript{81. Canadian Charter of Rights and Freedoms, supra note 53.}
\textsuperscript{82. Keegstra, 61 C.C.C. 3d at 28.}
\textsuperscript{83. Id.}
the classification drawn by the statute is rationally related to a legitimate state interest.”84 This level of scrutiny has been labeled “rational basis scrutiny” or “weak scrutiny.” However, when legislation is based on discrimination or when state laws impinge on personal rights protected by the Constitution, “[such] laws are subjected to strict scrutiny and will be sustained only if they are suitably tailored to serve a compelling state interest.”85 To satisfy strict scrutiny, the state must show that the statute furthers “a compelling state interest by the least restrictive means available.”86

United States’ courts use intermediate scrutiny in analyzing the constitutionality in such instances as gender based discrimination or commercial speech restrictions.87 In Craig v. Boren, the Court introduced intermediate scrutiny when it stated “[t]o withstand constitutional challenge, . . . classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives.”88 Therefore, depending on the effect of the state action under question, the United States’ courts will use a different type of scrutiny in examining the constitutional validity of the state action.

Values and principles essential to a free and democratic society guided the Canadian Supreme Court in determining whether the government had a pressing and substantial interest in restricting hate propaganda. Those principles embody “. . . respect for the inherent dignity of the human person, commitment to social justice and equality, accommodation of a wide variety of beliefs, respect for cultural and group identity, and faith in social and political institutions which enhance the participation of individuals and groups in society.”89

The principles the Court relied on in determining a pressing and substantial governmental interest in terms of freedom of expression, widened the scope in which the Canadian government may infringe upon fundamental freedoms as opposed to the United States’ model. Courts in

84. City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 440 (1985). Justice White analyzed the three levels of scrutiny courts use in determining constitutional questions. Id. The dissent of Justice Marshall in which he outlines the use and need for intermediate scrutiny is most enlightening. Id. at 455 (Marshall J., dissenting).
85. Id. at 440.
88. Boren, 429 U.S. at 197.
89. Keegstra, 61 C.C.C.3d at 29.
the United States restrict content-based infringements upon freedom of expression to situations where the government has a compelling interest. The Canadian Court concluded Parliament's purpose in enacting the legislation was to prevent the harm caused by hate-promoting expression. The Court came to this conclusion based on its examination of the information before Parliament.

In comparison to American jurisprudence, the Court required the Crown, as prosecutor, to prove it in fact, Section 1 of the Charter applied to the regulation in question. However, the Court also examined Parliament's motives for passing the legislation. Therefore, the Court must find that it was reasonable to believe, in light of the information before Parliament, that the regulation was necessary to achieve the government's substantial and pressing interest. Again, the Canadian Court applied a hybrid analysis used by American courts. The Court used a heightened level of factual analysis, which requires the Crown to "prove it in fact" that the government has a pressing and substantial interest in overriding the fundamental freedom. In addition, it examined whether it was reasonable to believe that Parliament had a substantial and pressing concern based on the information before the legislature.90

In determining Parliament's pressing and substantial concern in enacting the Hate Propaganda Statute, the Court also addressed other Charter provisions and international agreements to which Canada is a party.91 The Court gave special attention to Canada's obligations under the many International Conventions dealing with the regulation of hate propaganda, especially those embodied in the United Nations Convention on the Elimination of All Forms of Racial Discrimination.92 In light of those commitments the Court stated "the prohibition of hate-promoting expression is considered to be not only compatible with a signatory nation's guarantee of human rights, but is as well an obligatory aspect of this guarantee."93

In Keegstra, the Court examined other sections of the Charter, specifically Sections 15 and 27.94 These sections represent a strong

90. See generally Kassel v. Consolidated Freightways Corp., 450 U.S. 662 (1981) (outlining three levels of factual analysis that United States' courts use in analyzing the necessary levels of proof the government must meet in determining the elements of each constitutional "scrutiny" test).

91. Keegstra, 61 C.C.C.3d at 39, 43.

92. Id. at 39; See also International Convention on Civil and Political Rights, 1966, 999 U.N.T.S. 171.

93. Keegstra, 61 C.C.C.3d at 42.

94. Id. at 43; Canadian Charter of Rights and Freedoms, supra note 53.
commitment to the values of equality and multiculturalism, and underline the great importance of Parliament's objective in prohibiting hate propaganda. Section 15 of the Charter can be equated with the Fourteenth Amendment of the United States Constitution. "The purpose of Section 15 is to ensure equality in the formulation and application of the law."\textsuperscript{95}

The promotion of equality entails the promotion of a society in which all are secure in the knowledge that they are recognized at law as human beings equally deserving concern, respect, and consideration. The Court reasoned that government sponsored hatred on group grounds would violate Section 15 of the Charter. "Parliament promotes equality and moves against inequality when it prohibits the willful public promotion of group hatred on these grounds. It follows government action against group hate, because it promotes social equality as guaranteed by the Charter, deserves special constitutional consideration under Section 15."\textsuperscript{96}

After finding the measure in question was of a pressing and substantial concern, the second part of the test involved assessing the "proportionality" between the governmental objective and the impugned measure. It is interesting to note the United States Supreme Court used a proportional standard in \textit{In re R.M.J.}, finding the state may regulate commercial speech if it shows it has "a substantial interest and the interference with speech [is] in proportion to the interest served."\textsuperscript{97}

In determining the proportionality of the measure the Canadian Supreme Court applied a three-part test first established in \textit{Regina v. Oakes}.\textsuperscript{98} First, the government must prove the measure, adopted is "carefully designed to achieve the objective in question; [the measure] must not be arbitrary, unfair, or based on irrational considerations."\textsuperscript{99} In other words, the measure cannot raise to the level of a pretext. Second, even if there is a pressing and substantial governmental interest, "the means . . . should impair 'as little as possible' the right or freedom in question . . . ."\textsuperscript{100} This test can be equated to the concept of overbreadth and vagueness as employed by American courts. Third, "there must be a proportionality between the effects of the measures which are responsible for limiting the Charter right or freedom, and the objective which has been identified as of 'sufficient importance.'"\textsuperscript{101}

\begin{thebibliography}{99}
\bibitem{95} Keegstra, 61 C.C.C.3d at 43.
\bibitem{96} Id. at 44.
\bibitem{99} Keegstra, 61 C.C.C.3d at 28.
\bibitem{100} Id.
\bibitem{101} Id.
\end{thebibliography}
The proportionality of the measure can be compared with the "most narrowly tailored" standard in the United States under a strict scrutiny standard. In *Keegstra*, the Court found the means used by Parliament to further the objective of prohibiting hate propaganda were proportional to its ends.

Although guaranteed, the freedoms known throughout Canadian society are limited by Section 1 of the Charter. The underlying values of Canada's free and democratic society guarantee both the rights in the Charter and, in appropriate circumstances, justify limitations upon those rights. Therefore, the Court recognized in the case of hate propaganda, even though it infringed upon the guarantee of freedom of expression, the government had a substantial and pressing interest in criminalizing this type of expression. The Court held the statute was not irrational and was connected to the stated substantial governmental interest. The Court also found the Hate Propaganda Statute was "narrowly tailored" or in "proportion" to the substantial governmental interest.

In order for Section 1 of the Charter to "save" a particular regulation, the Crown must prove its case in fact. Canadian courts will also examine the basis for the legislature's motive in passing regulations which infringe on Charter rights. Therefore, in sustaining a regulation which infringes on a Charter right or freedom, the objective of the limitation must be of sufficient importance to warrant overriding a constitutionally protected right or freedom.

To prevent trivial justification, such objectives must relate to concerns which are pressing and substantial in a free and democratic society. The imposition must meet the qualifications of rational connection, minimum impairment, and a proportionality of purpose and effects. The measures must be carefully designed to achieve the objective in question and must not be arbitrary, unfair, or based on irrational considerations. The means should impair as little as possible on the right in question, and there must be a proportionality between the effects of the limiting measure and the objective. The more severe the damaging effects of the measure, the more important the objective must be.\(^{102}\)

In addressing the overbreadth and vagueness concerns of the proportionality test, the Court, in a detailed analysis, concluded that the trier of fact, with proper instruction from the judge, could make the necessary inferences to meet these concerns.\(^{103}\) The Court also found the terms of the offense possessed definitional limits which acted as safeguards.

---

102. *See generally* Regina v. Ladouceur, O.A.C. LEXIS 179 at *1 (Ont. 1987) *available in* LEXIS, Canada library, Ont file (using the same analysis in relation to arbitrary police detention and unconstitutional search and seizures, as decided by the Ontario Appellate Court).

to Parliament’s objective. “Hatred is not a word of casual connotation. To promote hatred is to instill detestation, enmity, ill-will, and malevolence in another.”

In Regina v. Andrews, a companion case heard at the same time as Keegstra, the Court upheld the Hate Propaganda Statute as it impacted on the distribution of literature. The accused, a member of a white supremacist organization known as “the Nationalist Party of Canada,” was convicted of distributing anti-Semitic literature. The Court did not give any special significance to the so-called political status claimed by the accused.

In Canadian Human Rights Commission v. Taylor, the Court upheld a contempt order against an accused for instituting a telephone message service where members of the public could dial a telephone number and listen to a prerecorded message which “exposed persons identifiable on the basis of race and religion to hatred or contempt.” Under the Canadian Human Rights Act, it is a “discriminatory practice for a person to use the telephone to communicate repeatedly any matter likely to expose persons to hatred or contempt by reason of the fact that those persons are identifiable on the basis of a prohibited ground of discrimination.” Using the same reasoning as in Keegstra, the Taylor Court upheld the trial court’s finding that the “Western Guard” failed to comply with the Human Rights Commission’s cease and desist order.

The Supreme Court, however, drew the line when it came to the prohibition of publishing false news in Regina v. Zundel. Zundel was charged with “willfully publishing a statement, tale or news that he knows is false and that causes or is likely to cause injury or mischief to a public interest.” Zundel published and distributed a pamphlet which questioned

104. Regina v. Andrews, 77 D.L.R.4th 128, 137 (Can. 1990). This case was a companion appeal heard along with the Keegstra case. Id. at 130.

105. Id.

106. Id. at 132.


the occurrence of the Holocaust. The Court held that in this case the statute could not pass the proportionality test as announced in *Keegstra*. The Court found the statute vague and overbroad in its scope and difficult to determine the meaning of "a statement" as worded in the Code. The Court also could not determine whether the statement was false, with sufficient accuracy to make falsity a fair criteria for denial of constitutional protection. The chilling effect of the statute on legitimate expression "outweighs its minimal benefit given the alternative means of prosecution of speech detrimental to racial tolerance [available to Parliament]."

It can be seen from the examination of the Canadian experience and those of the international community that it is possible and reasonable for a free and democratic society to criminalize hate propaganda. The fundamental concept of ordered liberty associated with the rights to self-expression are neither diminished nor chilled. In light of the multicultural nature of society, it has been recognized by the international community that the need to protect the fundamental rights of equality require a minimal infringement on the right of free speech.

V. HATE PROPAGANDA AND THE FIRST AMENDMENT IN THE UNITED STATES

It is interesting to note in each of the above cited Canadian cases that the Canadian Supreme Court examined American First Amendment jurisprudence in relation to hate speech. The Canadian Supreme Court, in comparing Canadian constitutional history to that of the United States, examined the relevant American case law and the academic literature and concluded that "... the precedents are somewhat mixed, but the relaxation of the prohibition against content-based regulation of expression in certain areas indicates that American courts are not loath to permit the suppression of ideas in some circumstances." The international reaction to hate speech may seem broad, but every western democracy draws a distinction in their laws between hate propaganda and other speech. The United States stands alone in the degree to which it has decided legally to tolerate racist rhetoric.

112. Zundel, 95 D.L.R.4th at 278.
113. Id. at 257, 258, 272.
114. Id.
115. Id. at 275.
116. Keegstra, 61 C.C.C.3d at 34, 35.
In order to make the case for criminalizing the dissemination of hate propaganda in the United States it is necessary to touch upon the fundamental values associated with the First Amendment. Thomas Emerson has grouped the values sought by society in protecting the right to freedom of expression into four broad categories. The first value is one of "individual self-fulfillment." The right to freedom of expression is justified because it allows for individuals to attain and realize their true potential as human beings. Second, free expression is necessary as a means of attaining the truth. In theory, rational judgment is arrived at by considering all the facts and arguments which can be put forth in any proposition. Third, freedom of speech allows an individual to participate as members of society in social and political decision making. The right of all individuals to freely communicate with others is regarded as an essential principle of a democratically organized society. Finally, freedom of expression maintains the balance between stability and change in society. Open discussion is a method of achieving an adaptable and more stable community, and maintains the balance between differences of opinion and general consensus.

Hate propaganda has no place in relation to the fundamental values that Emerson expounds. Disseminators of hate propaganda do not attain, nor do they realize their true potential as human beings. In fact, those people who promote hate propaganda inhibit their victims from attaining their true potential as human beings. Hate propaganda has no bearing on the attainment of truth. It often dissuades individuals from participating as full members of society. It creates instability and discord in society. As far as promoting change in society, the true goal of hate propaganda is to roll back the gains minorities have made over the past forty years.

Prevailing First Amendment dogma maintains that speech may not be penalized merely because its content is racist. Conventional American free speech jurisprudence holds racist speech qualifies for the very highest

---

119. Id. at 879.
120. Id. at 880.
121. Id. at 882.
122. Id. at 883.
123. Emerson, supra note 118, at 884.
124. Id. at 886.
125. Id. at 887.
levels of First Amendment protection, perhaps even absolute protection, because it is thought of as "opinion" or "viewpoint." Even if racist speech communicates little in the way of intellectual argument, the prevailing dogma refuses to continence any distinction between the cognitive and the emotive elements of speech, and the communicative thought and feeling are equally protected.

Membership in groups which advocate racist positions may not be made illegal, and advocacy of ideas such as racial or religious genocide may not be outlawed. Only if such speech is on the very verge of ripening into immediate violence may the speech be penalized. If hate violence comes from the reactions of others to the hate-filled speech, American orthodoxy is that the hecklers must be arrested, not the speakers. However, considering the global response to hate propaganda, a reevaluation of hate propaganda in relation to the ideals of the First and the Fourteenth Amendments may lead to a conclusion contrary to the prevailing First Amendment dogma.

Racial equality and tolerance are not just good ideas but the law of the land, the declared public policy of the United States. Thomas Hobbs stated, "that the actions of men proceed from their opinions", and racist opinions lead to an atmosphere of race-hate, an insensitivity that fosters acts of palpable violence and discrimination. "Even John Stuart Mill permits the state to intrude on individual liberty when its exercise will injure another."

In the context of First Amendment jurisprudence the Supreme Court has created a dichotomy of approaches to constitutional decision making. American courts must decide whether speech or conduct is involved. Does the speech communicate thought or emotion? Does the regulation affect the statement of facts or opinions? Is the regulation content-based or content-neutral? Is the government property a forum or a nonforum? Is the speech political or nonpolitical, commercial or noncommercial, for children or adults? In Gertz v. Robert Welch Inc., the Supreme Court stated "under the First Amendment there is no such thing as a false idea." But Justice Powell also stated in the next sentence "there is no constitutional value in false statements of fact, [n]either the

---

126. Smolla, supra note 37, at 172.
129. Smolla, supra note 37, at 174.
130. Id.
131. Id. at 175.
intentional lie nor the careless error materially advances society’s interest in ‘uninhibited, robust, and wide-open’ debate on public issues.”

In striking down Louisiana’s criminal defamation statute, the Court stated in Garrison v. Louisiana the use of calculated falsehood would put a different cast on the constitutional question. Justice Brennan, as did Justice Powell in Gertz, cited Chaplinsky v. New Hampshire asserting:

[c]alculated falsehood falls into that class of utterances which are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality. Hence the knowingly false statement and the false statement made with reckless disregard of the truth, do not enjoy constitutional protection. 

Clearly, any regulation which criminalized hate propaganda would be one that was content based, and when challenged, as it surely would be, would be subject to strict scrutiny. The key to advancing the argument for applying criminal sanctions against those who promote hate propaganda is to place such propaganda in the unprotected speech category. In effect, if hate speech can be put into the same category as pure falsehood, or analogized as an obscenity then it could be constitutionally criminalized. Hate propaganda is a calculated falsehood of such slight social value that it does not deserve constitutional protection.

In Chaplinsky, the Supreme Court established the “fighting words doctrine.” Since then, the Court has followed a course of categorizing different levels of speech and providing different tests as to the level of protection afforded each category. A review of relevant case law as developed by the Supreme Court’s decisions on issues affecting the First Amendment will illustrate a possible rationale for constitutionally criminalizing hate propaganda.

In 1949, the Court in Terminiello v. City of Chicago overturned a disorderly conduct conviction which resulted when Terminiello’s oratory caused a riot. Terminiello was found guilty of disorderly conduct arising out of an address he delivered to over eight hundred persons in an auditorium. Over a thousand people had gathered outside the auditorium

133. Id. at 340.
136. Id.
to protest the meeting. Terminiello, in his speech, condemned the conduct of the crowd outside and vigorously criticized various political and racial groups whose activities he denounced as "inimical to the nation's welfare." The facts show that between the two groups a riot almost ensued. Justice Jackson in his vigorous dissent, and after a lengthy recitation of the facts found that the resulting violence was a riot.

The Court took exception to the charge of the jury, in which breach of the peace was defined as, "speech that stirs the public to anger, invites dispute, brings about a condition of unrest, or creates a disturbance." The Court declared the very function of free speech under the American system of government is to invite dispute. Because the ordinance, as construed by the trial court, permitted the conviction of Terminiello if his speech stirred people to anger or invited public dispute, the conviction could not stand. The Court reasoned the statute was applied more broadly than the "fighting word doctrine" first announced in Chaplinsky. Realizing the implications of the Court's holding, Justice Jackson, admonished the Court "to take heed lest we walk into a well from looking at the stars."

Two years later however, in Feiner v. New York the Court upheld New York State's disorderly conduct statute under similar circumstances as Terminiello. Feiner was arrested because the content of his speech was creating the possibility of a riot on a street corner in Syracuse, New York. Feiner, using a loud speaker, was making derogatory remarks concerning President Truman, the American Legion, and other local political officials. He was also, "endeavoring to arouse the Negro people against the whites, urging that they rise up in arms and fight for equal rights." The New York statute was very similar to that of the City of Chicago's statute.

138. Id. at 2.
139. Id.
140. Id. at 17 (Jackson, J., dissenting).
141. Id. at 4.
143. Id. at 6.
144. Id.
145. Id. at 14 (Jackson, J., dissenting).
147. Id. at 317.
148. Id.
149. Id. at 319 n.1 (providing the wording of the New York State statute under question).
The Court in upholding Feiner's conviction did not cite to Terminiello. The Court declared “[a] state may not unduly suppress free communication of views, religious or other, under the guise of conserving desirable conditions.” However, “when the speaker passes the bounds of argument or persuasion and undertakes incitement to riot the police are not powerless to prevent a breach of the peace.” The Court’s finding in Feiner is almost in complete opposition to Terminiello. The Court determined the deliberate defiance by the petitioner to the police by not stopping his speech convinced the Court they could not reverse this "conviction in the name of free speech." The only constant in the Supreme Court’s approach to First Amendment adjudication is its “pendulum” approach in determining the constitutionality of regulations that concern freedom of expression.

Group libel as a category of speech has seldom been tested by the Supreme Court. In Beauharnais v. Illinois the Court upheld an Illinois group libel statute. Illinois’ statute made it a crime to, “exhibit in any public place any publication which portrays depravity, criminality, unchastity, or lack of virtue of a class of citizens of any race, color, creed or religion to contempt, derision, or obloquy.” Beauharnais distributed a leaflet that called for, “a halt to further encroachment, harassment and invasion of white people, their property, neighborhoods and persons, by the Negro.”

The Court stated:

[[there are certain well defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, libelous, and the insulting or fighting words which by their very utterance inflict injury or tend to incite an immediate breach of the peace.]]

---

150. Id. at 320.
152. Id.
155. ILL. REV. STAT. ch. 38 para. 471 (1949).
156. Beauharnais, 343 U.S. at 256.
157. Id. at 255-56.
The Court rejected the argument that prohibiting libel of a creed or of a racial group, "is but a step from prohibiting libel of a political party."\(^{158}\) The Court answered, "even though a power may be abused it is not a reason for denying Illinois the power to adopt measures against criminal libels sanctioned by centuries of Anglo-American law."\(^{159}\) Justice Frankfurter equated such libelous utterances as being in the same class as obscene speech.\(^{160}\)

The dissents in *Beauharnais* are as significant as Justice Frankfurter's majority opinion. Justice Reed assumed the power of the state to pass group libel laws, but dissented on the ground that the statute in question was too vague.\(^{161}\) Justice Jackson agreed group libel laws fall within the power of the states, but that in this case the defendant had no opportunity to prove a defense, such as fair comment, truth, or privilege.\(^{162}\) Justice Douglas suggested that defamatory conduct directed at a race or group in the United States could be made an indictable offense, since like picketing, it would be free speech plus. However, he would have required either a conspiracy or a clear and present danger to support an indictment.\(^{163}\) Based on *Beauharnais* it appears that the criminalization of hate speech could be found constitutional.

It is important to note that the Supreme Court has never overruled *Beauharnais*. In fact, the Court has continued to cite to it favorably, particularly in obscenity cases.\(^{164}\) Commentators assert that *New York Times Co. v. Sullivan*,\(^{165}\) overruled the Court's finding in *Beauharnais*.\(^{166}\) The Court in *Sullivan* held that the Constitution limits state power in civil actions brought by a public official for criticism of his official conduct.\(^{167}\) Damages would be awarded only for a false statement "made with actual malice."\(^{168}\) The statements had to be made with knowledge that they were

\(^{158}\) *Id.*

\(^{159}\) *Id.* at 263.

\(^{160}\) *Id.* at 266.

\(^{161}\) *Beauharnais*, 343 U.S. at 283 (Reed, J., dissenting).

\(^{162}\) *Id.* at 294 (Jackson, J., dissenting).

\(^{163}\) *Id.* at 302 (Douglas, J., dissenting).


\(^{166}\) Lasson, *supra* note 153, at 35.

\(^{167}\) *Sullivan*, 376 U.S. at 254.

\(^{168}\) *Id.* at 279, 280.
false or with reckless disregard for the truth of the matter. However, *Sullivan* was expressly limited to actions brought by public officials against critics of their official conduct. The Court stated that no category of speech falls completely outside of the First Amendment, but the Court was simply ensuring that a state could not remove speech from judicial scrutiny merely by putting a label on it.

The Court in *Garrison v. Louisiana* expanded the scope of the *Sullivan* standard by invalidating Louisiana’s criminal libel statute. In reversing Garrison’s criminal conviction, the Court still expressed some limits to the scope afforded free speech by First Amendment protection. The Court stated:

> [t]hat speech used as a tool for political ends does not automatically bring it under the protective mantle of the Constitution. For the use of the known lie as a tool is at once at odds with the premises of democratic government, and with the orderly manner in which economic, social, or political change is to be effected.

The Court cited the same language it used in *Chaplinsky*. The Court also reiterated in *Sullivan*, that both a knowingly false statement, and the false statement made with reckless disregard of the truth, do not enjoy constitutional protection. It is difficult to imagine any circumstance which an opinion or message expressed in hate propaganda could possibly be construed as anything but falsehood made with a reckless disregard for the truth.

Cases that lend support to the contention that the criminalization of hate propaganda would be constitutional are those concerning obscenity. It can be argued not only that hate propaganda rises to the same level of obscenity but also, it is in fact, an obscenity. However, in examining the obscenity cases, what the Court says in its opinions does not necessarily reflect the law which emerges.

In addressing the level of protection afforded obscenity under the First Amendment, the Court in *Roth v. United States* stated, “[i]n the light of this history, it is apparent that the unconditional phrasing of the

169. *Id.*
170. *Id.* at 269.
172. *Id.* at 75.
173. *Id.*
174. *Id.*
First Amendment was not intended to protect every utterance. In Roth had been convicted of mailing material that was obscene, lewd, lascivious, or a filthy publication, contrary to a federal statute. In upholding Roth's conviction, the Court cited Beauharnais with approval. It concluded that since obscenity is not protected, constitutional guarantees were not violated in this case merely because it was not proved the obscene material would perceptibly create a clear and present danger of antisocial conduct, or induce its recipients to such conduct.

In Roth, the Court conducted an extensive review of the historical treatment by the states of obscenity. It also acknowledged the international community's treatment of obscenity. The Court concluded that obscenity is not within the area of constitutional protection, finding:

> [a]ll ideas having even the slightest redeeming social importance . . . have the full protection of the guaranties, unless excludable because they encroach upon the limited area of more important interest. But implicit in the history of the First Amendment is the rejection of obscenity as utterly without redeeming social importance. This rejection for that reason is mirrored in the universal judgment that obscenity should be restrained, reflected in the international agreement of over 50 nations, in the obscenity laws of all of the 48 states, and in the 20 obscenity laws enacted by the Congress from 1842 to 1956.

Thus, the Court is not reluctant to survey international law as well as state law when it looks for legal guidance. In light of the present day treatment of hate propaganda by the international community, any examination of the law of the international community by the Court would show hate propaganda is not worthy of constitutional protection.

If it can be proven that hate propaganda has no redeeming social importance, and that it encroaches upon the limited area of a more important interest, then clearly hate propaganda also would not merit First Amendment protection. If, as the Court held, obscenity is afforded no constitutional protection, the discussion would have ended. However, in an attempt to avoid the "slippery slope" of having its holding spread to

176. Id. at 48.
178. Roth, 354 U.S. at 483.
179. Id. at 481.
180. Id. at 484, 485 (emphasis added).
legitimate material worthy of First Amendment protection, the Court went on to announce a test for determining what constitutes obscenity. By announcing a standard for judging obscenity the Court in effect, gave obscenity a modicum of First Amendment protection.

In 1973, the Court modified its test for obscenity regulation in the case of *Miller v. California.* The major effect of the decision was to tighten the definitional elements of what constitutes obscenity and how the lower courts were to apply those standards. The test announced in *Miller* required the states to ensure that their legislation be narrowly drawn and very specific as to what constituted obscene material. However, the Court was consistent in maintaining obscene material is unprotected by the First Amendment. What this means to those who would draft regulations concerning hate propaganda is that the definitional elements of the regulation would have to be very specific and narrowly construed.

The Supreme Court has been willing to abridge constitutional protections when governments attempt to legislate for the welfare of children. The Court "[has] sustained legislation aimed at protecting the physical and emotional well-being of youth even when the laws have operated in the sensitive area of constitutionally protected rights." If it could be proven in fact that hate propaganda bears heavily and pervasively on the welfare of children then it would be permissible to consider messages of hate without First Amendment protection. In *New York v. Ferber,* the Court held that when it came to children and obscenity, the standard used for adults was not satisfactory. The Court recognized and classified child pornography as a category of material outside the First Amendment's protection. The Court stated "[w]hen a definable class of material . . . bears so heavily and pervasively on the welfare of children . . . the balance of competing interest is clearly struck and that it is permissible to consider these materials as without the protection of the First Amendment." The Court was concerned with safeguarding the physical and psychological welfare of children, and considered such state interest compelling.


183. *Id.* at 764.

184. *Id.* at 756.

185. *Id.* at 763.

186. *Id.* at 764.

In upholding New York's child pornography statute, the Court stated, "it is the content of an utterance that determines whether it is a protected epithet or an unprotected 'fighting comment.'" The Court reiterated its holding in *Beauharnais* that libelous publication is not protected by the Constitution and further stated: "It is not rare that a content-based classification of speech has been accepted because it may be appropriately generalized that within the confines of the given classification, the evil to be restricted so overwhelmingly outweighs the expressive interest . . . at stake . . . ." The dicta used by the Court leads one to believe, if it can be proven in fact the physical, emotional, and psychological welfare of children can be and is irreparably harmed by exposure to hate propaganda, it could be classified as speech not protected by the First Amendment.

The Court in *Ginsberg v. New York*, sustained a law protecting children from exposure to nonobscene literature. In *FCC v. Pacifica Foundation*, the Court held the Government's interest in the well-being of its youth justified special treatment of indecent broadcasting received by adults as well as children.

The Court has not limited the abridgment of fundamental rights solely when obscenity affects the welfare of children. In *New Jersey v. T.L.O.*, the Court, in balancing the school's legitimate need to maintain an environment in which learning can take place with that of the school child's legitimate expectations of privacy, required some easing of the restrictions to which searches by public authorities are ordinarily subject. The Court has also allowed school authorities to suppress student newspapers, and the content of speech in the school setting.

The dissemination of hate propaganda through commercial telephone services, on-line computer services, and printed material is pervasive in American society. Hate propaganda reaches both the adult and juvenile population of the United States equally. The psychological harm caused by exposure to messages of hate is both palpable and invidious. By being exposed, and having access to hate propaganda the youth of America are being sent a message that such ideas are tolerable.

188. *Id.* at 763.
189. *Id.*
and acceptable. By criminalizing hate propaganda, and eventually eliminating its wide spread dissemination, it may be possible to reduce the levels of hate, distrust, and bigotry, which are pervasive in American society. If as the Court has stated, the physical and psychological welfare of children is a compelling state interest, then the criminalization of hate propaganda is certainly justified.

The most serious objection raised to the constitutionality of criminalizing hate propaganda is it would be a content based regulation. It puts the state in the censorship business, with no means of assuring the censor's hand will stop at hate speech and not pass into areas of legitimate expression. The "slippery slope" argument arises most often when legislatures or the Supreme Court do not carefully define the language they use in their pronouncements.194

Slippery slopes can best be countered by drafting legislation which narrowly define exactly what constitutes hate propaganda. The Canadian experience shows this is possible. The language of the Supreme Court in past cases dealing with the First Amendment has shown that freedom of expression is not an absolute. Regulations criminalizing hate propaganda, if narrowly tailored and specific, can survive strict scrutiny. The government can prove it in fact, that the harms associated with the dissemination of hate propaganda are real, and the interest in eradicating such hate speech is compelling.

VI. CONCLUSION

In light of the "New World Order" that is dawning, it is only fitting the United States should join the international community in recognizing the real harms created by hate propaganda. The best means of accomplishing this is for Congress to ratify the International Convention of the Elimination of All Forms of Racial Discrimination, without reservations.

Any regulation which criminalizes the dissemination of hate propaganda would be based on the content of the speech. Therefore, to sustain a constitutional challenge such regulation must pass a strict scrutiny test. The government would have to prove it in fact, the harms associated with hate propaganda, rise to a level of a compelling state interest. Ample evidence is available for any state to prove the inherent and real harm caused by the dissemination of hate propaganda. The state can also show the elimination of these harms is a compelling governmental interest based on American history and the international response to hate propaganda.

The regulation would have to be narrowly tailored, such that there could be no chance of finding it overinclusive, nor underinclusive. The definitional terms as to what constitutes hate propaganda would have to be very precise. Drafting such legislation is not impossible. The Canadian and British statutes provide an excellent model. The regulation would have to provide a provision for defenses. It should also express when a breach of the statute does or does not occur. This would avoid a challenge as to the vagueness or overbreadthness of the regulation.

Regulations that would criminalize hate propaganda pose no threat to the fundamental values of free expression which are protected by the First Amendment. Fundamental concepts of ordered liberty, would be enhanced rather than being diminished. The values associated with the modern application of the Fourteenth Amendment would be greatly enhanced and would give those individuals who are the target of hate propaganda a realization that American society is truly egalitarian. It is time American society lived up to the immortal words of the Declaration of Independence that truly all “people” are created equal.