'Bad Tendencies' in the ECtHR's 'Hate Speech' Jurisprudence

Stefan Sottiaux*

European Court of Human Rights – Canadian Charter of Rights and Freedoms – 'Hate speech' – *Féret* – *Le Pen* – *Keegstra* – Commonalities between Canadian and ECtHR jurisprudence –Development of uniform test of incitement – Sharp distinction from US Supreme Court jurisprudence on freedom of expression

Introduction

In the spring of 1918, American union leader and five-time presidential candidate for the Socialist Party Eugene Debs delivered a speech denouncing the American participation in World War I. Debs, known for his oratory, expressed sympathy for those imprisoned for opposing the war and obstructing the draft. For this, he was sentenced to ten years` imprisonment and disenfranchised for life. His conviction was based on the Espionage Act of 1917, a federal law which was adopted in an intensely patriotic war atmosphere to protect the American war effort against disloyal utterances.[1] The Supreme Court decision upholding Debs' conviction became one of the best-known examples of the application of the 'bad tendency' test, a test allowing the restriction of speech with the mere tendency to cause social harm.[2] The question, according to Justice Holmes, who delivered the opinion of the Court, was whether 'the words used had as their natural tendency and reasonably probable effect to obstruct the recruiting service and (…) the defendant had the specific intent to do so in his mind.'[3] Debs' intent, Holmes continued, could simply be inferred from the natural tendency of his words: 'if (…) he used words

* Stefan Sottiaux (M.Jur. Oxford 2000, Ph.D Antwerp 2006) is a professor of constitutional law and discrimination law at the Catholic University of Leuven and is an attorney at the Brussels Bar.

[1] Section 3 of the Espionage Act made it a crime, *inter alia*, to 'wilfully cause or attempt to cause insubordination, disloyalty, mutiny, or refusal of duty, in the military or naval forces of the United States.'

[2] *Debs* v. *United States*, 249 US 211 (1919). *See* generally G.R. Stone, 'The Origins of the "Bad Tendency Test": Free Speech in Wartime', *Supreme Court Review* (2002) p. 411.

[3] *Debs* v. *United States*, *supra* n. 2, at p. 216.

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tending to obstruct the recruiting service he meant that they should have that effect.'[4] *Debs* was not an isolated case. The 'bad tendency' formula, which can be traced back to the English common law and the work of Blackstone,[5] served to justify the suppression of a wide range of pacifist, socialist, communist and other 'utterances endangering the foundations of government.'[6] Today, it is seen as a misguided interpretation of the First Amendment because of its failure to protect legitimate political speech. In response to the deficiencies of the 'bad tendency' test, its successors would demand a tighter connection between the expression and the possible dangerous consequences as well as separate a requirement of subjective intent.[7]

While the 'bad tendency' test has long vanished from the American constitutional landscape,[8] it seems to have started a new life across the Atlantic in the European Court of Human Rights' Article 10 jurisprudence. This article argues that the test has made a remarkable comeback in the Strasbourg Court's most recent attempts to grapple with the problem of hate speech. The European version of the age-old formula figures most prominently in two cases decided in 2009 and 2010: *Féret* v. *Belgium* and *Le Pen* v. *France*.[9] The aim of this article is to analyse both decisions and, more generally, offer a critical account of the Article 10 'hate speech' cases. While the American experience may be useful in shedding light on the dangers of the 'bad tendency' analysis, the First Amendment tradition is less helpful when looking for alternatives to the current European approach. The story of American exceptionalism in rejecting 'hate speech' bans is too familiar to require repeating.[10] Rather than focussing on the Euro-American divide, our critical assessment of the Article 10 cases is based on a comparison with the lead-

[4] Ibid.

[5] *See* G.R. Stone, *supra* n. 2 at p. 432-433. According to Blackstone, it is legitimate to punish 'any dangerous or offensive writings, which, when published, shall (…) be adjudged of a pernicious tendency,' in order to preserve the 'peace and good order' (W.M. Blackstone, 4 *Commentaries of the Laws of England* (Cavendish 2001) p. 36, cited in G.R. Stone, *supra* n. 2 at p. 432).

[6] *Abrams* v. *United States*, 250 US 616 (1919). For an overview *see*, e.g., D.M. Rabban, 'The First Amendment in Its Forgotten Years', 90 *Yale Law Journal* (1981) p. 514; G.R. Stone, *Perilous Times, Free Speech in Wartime* (W.W. Norton & Company 2004).

[7] The 'bad tendency' test was replaced by the 'clear and present danger' test. *See*, e.g., *Schenck* v. *United States*, 249 US 47, 52 (1919); *Brandenburg* v. *Ohio*, 395 US 444, 447 (1969) (speech cannot be punished unless it is directed to inciting and likely to incite imminent unlawful action).

[8] *See*, however, I. Molnar, 'Resurrecting the Bad Tendency Test to Combat Instructional Speech: Militias Beware', 59 *Ohio State Law Journal* (1998) p. 1333.

[9] ECtHR 16 July 2009, Case No. 15615/07, *Féret* v. *Belgium*; ECtHR 20 April 2010, Case No. 18788/09, *Le Pen* v. *France*.

[10] *See*, e.g., K. Boyle, 'Hate Speech: The United States Versus the Rest of the World?', 487 *Maine Law Review* (2001) p. 53. On American exceptionalism, *see*, e.g., M. Ignatieff (ed.), *American Exceptionalism and Human Rights* (Princeton University Press 2005).

ing Canadian case of *R.* v. *Keegstra*.[11] Such a Euro-Canadian comparison is warranted for various reasons.[12] The European Convention on Human Rights and the Canadian Charter of Rights and Freedoms bear important similarities, as both are rooted in a political tradition that is concerned with balancing private and public interests and protecting the equality and dignity of all citizens. In this respect, they take a more community-oriented approach than their libertarian American counterpart.[13] The shared philosophy underlying the Convention and the Charter is perhaps best reflected in their similarly worded limitation clauses.[14]

At first sight, this common background is confirmed by looking at the treatment of hate speech regulations by the courts in Strasbourg and Ottawa. In Part I of this article, I will demonstrate that their overall approach is very similar: both courts refuse to follow the American lead, have regard to the relevant international instruments, agree on the goals of suppressing 'hate' propaganda and seek to harmonise freedom of expression with a commitment to human dignity and equality. However, as Part II argues, agreement about the guiding principles and an analogous constitutional setting did not, as one would expect, result in a uniform 'hate speech' standard. In the end, the boundary between protected and unprotected speech is drawn very differently under the Charter and the Convention. The potentially harmful consequences of 'hate speech' play an important role in the proportionality analysis of both courts. However, whereas *Keegstra* refers to the dangerous tendencies of 'hate speech' as one of the justifications for *some form* ofregulation, the European Court seems to elevate 'bad tendency' as the proper criterion for restricting such speech. For the Canadian Supreme Court, by contrast, the bad tendency of 'hate' propaganda is only the beginning of its analysis. To satisfy the requirements of the proportionality test, the Court goes on to formulate a number of conditions limiting the potentially (over)broad reach of the Canadian 'hate speech' ban to the active, intentional and public promotion of hatred, thus requiring more than a 'bad tendency' to justify proscription. Part III of this

[11] *R.* v. *Keegstra*, 3 SCR 697 (1990).

[12] For an early comparison between the Canadian and European approaches to 'hate speech', *see* C. McCrudden, 'Freedom of Speech and Racial Equality', in P.B.H. Birks (ed.), *Pressing Problems in the Law, Vol. 1, Criminal Justice and Human Rights* (Oxford University Press 1995) p. 125.

[13] For a comparison between the American and European/Canadian rights tradition, *see*, e.g., C. L'Heureux-Dube, 'The Importance of Dialogue: Globalisation and the International Impact of the Rehnquist Court', 34 *Tulsa Law Journal* (1998) p. 15; M.A. Glendon, *Rights Talk: The Impoverishment of Political Discours* (The Free Press 1991).

[14] Compare Section 1 of the Canadian Charter (allowing 'reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society') and the common limitation clauses of Arts. 8 to 11 of the European Convention (allowing restrictions 'in accordance with the law and necessary in a democratic society'). Both the European Court and the Canadian Supreme Court rely on a proportionality test to review interferences with a protected right. *See* ECtHR 7 Dec. 1976, Case No. 5493/72, *Handyside* v. *United Kingdom* and *R.* v. *Oakes* [1986] 1 SCR 103.

article defends the Canadian solution as a more successful attempt at balancing the competing rights and interests implicated 'in hate speech' cases. Finally, Part IV explores possible alternatives for the current European approach.

Féret, *Le Pen* and *Keegstra*: A transatlantic comparison

Facts

Féret and *Le Pen* are of course not the first 'hate speech' rulings of the European Court.[15] They are two more decisions in a long line of cases dealt with either under the abuse of rights provision of Article 17 or the free speech guarantee of Article 10.[16] However, and despite the fact that *Féret* was a Chamber decision and *Le Pen* was declared inadmissible, both cases merit special attention. To begin with, the type of speech at issue in *Féret* and *Le Pen* is representative for the current anti-immigration and anti-Islam discourse found in many European countries. Hence, national authorities seeking to suppress this type of speech may find support in them.[17] Secondly, *Féret* was decided by a narrow 4-3 majority, with both the opinions of the Court and the dissenting judges being well-reasoned as compared to other recent 'hate speech' cases. As the Court decided not to refer the case to the Grand Chamber, the divided result in *Féret* is likely to remain a point of reference for some time.

The facts can be summarised as follows: the applicants, M. Daniel Féret and M. Jean-Marie Le Pen, were the respective presidents of the Belgian and French far-right political party, the '*Front National',* known for their strong opposition to

[15] *See*, e.g., ECtHR 23 Sept. 1994, Case No. 15890/89, *Jersild* v. *Denmark*; ECtHR 23 Sept. 1998, Case No. 24662/94, *Lehideux and Isorni* v. *France*; ECtHR 4 Dec. 2003, Case No. 35071/97, *Gündüz* v. *Turkey*; ECtHR 22 Oct. 2007, Case Nos. 21279/02 and 36448/02, *Lindon, Otchakovsky-Laurens and July* v. *France*; ECtHR 10 July 2008, Case No. 15948/03, *Soulas and Others* v. *France*;ECtHR 4 Nov. 2008, Case No. 72596/01, *Balsytè-Lideikiené* v. *Lithuania*; ECtHR 16 July 2009, Case No. 10883/05, *Willem* v. *France*. For a discussion of the recent 'hate speech' decisions, *see* U. Belavusau, 'A Dernier Cri from Strasbourg: An Ever Formidable Challenge of Hate Speech (*Soulas & Others* v. *France*, *Leroy* v. *France*, *Balsytè-Lideikiene* v. *Lithuania*)', 16 *European Public Law* (2010) p. 373. For a discussion of the earlier case-law, *see*, e.g., E. Brems, 'State Regulation of Xenophobia versus Individual Freedom: The European View', *Journal of Human Rights* (2004) p. 481.

[16] On the interplay between Arts. 10 and 17 in 'hate speech' cases, *see* D. Keane, 'Attacking Hate Speech under Art. 17 of the European Convention of Human Rights', 25 *Netherlands Quarterly of Human Rights* (2007) p. 642.

[17] For another example of a case involving this type of expression, *see* the case against the Dutch politician Geert Wilders, currently pending before the Amsterdam criminal court. *See* R. Lawson, 'Wild, Wilder, Wildst: Over de ruimte die het EVRM laat voor de vervolging van kwetsende politici' [Wild, Wilder, Wildest: On the Room Left by the ECHR for the Prosecution of Offensive Politicians], 33 *NJCM-Bulletin* (2008) p. 469.

non-European immigration and their anti-Islam ideology. Both were convicted by a criminal court, Féret for 'publicly inciting racism, hatred and discrimination,' Le Pen for the 'provocation of discrimination, hatred and violence.' Mr. Féret's conviction was based on a number of electoral leaflets, posters and party publications of which he was the editor-in-chief. In examining the content of the incriminating documents, the European Court observed that they relied on the cultural differences between Belgian nationals and the targeted minority, and represented immigrant communities as 'criminal-minded' and eager to exploit the benefits of the Belgian system.[18] For example, one of the leaflets maintained that a centre for refugees and asylum seekers disrupts the life of local residents, and further contained 'simplified and undocumented' proposals, thus creating an 'irrational amalgam'.[19] Another leaflet deplored the use of taxpayers' money to support foreigners rather than nationals in need of assistance, and concluded with the slogan 'Belgians and Europeans first!' Still another leaflet – entitled 'The Attacks on the USA: It's the Couscous Clan!' – associated all Muslims with terrorism.[20] Féret, who was a member of parliament at the time of his conviction, was sentenced to 250 hours of community service and a ten-year period of ineligibility to stand for parliamentary elections. The Strasbourg Court found no violation of Article 10.

The discourse that led to Mr. Le Pen's conviction appealed to the same anti-immigration sentiments. The case originated in a statement he made in an interview with the daily newspaper *Le Monde*: 'The day there are no longer 5 million but 25 million Muslims in France, they will be in charge.'[21] For this, a Paris criminal court imposed a fine of 10,000 Euros. Le Pen then commented on his conviction in the weekly magazine *Rivarol* in the following terms: 'When I tell people that when we have 25 million Muslims in France we French will have to watch our step, they often reply: "But M. Le Pen, that is already the case now!" – and they are right.'[22] Again, Le Pen was sentenced to a fine of 10,000 Euros. He filed a complaint with the European Court alleging a violation of Article 10 of the Convention. In rejecting the application, the Court drew attention to the fact that the impugned message set the French people against a religious group and presented that group as a threat to the dignity and security of the French people.[23] The Court also referred to the case of *Soulas* v. *France*, in which it had held that the specific problems linked to the settlement of immigrants in France justify a wide margin of allowance in this respect.[24]

[18] *Féret* v. *Belgium*, *supra* n. 9 at para. 69.
[19] Ibid. at para. 71.
[20] Ibid.
[21] *Le Pen* v. *France*, *supra* n. 9.
[22] Ibid.
[23] Ibid.
[24] Ibid. *See Soulas and Others* v. *France*, *supra* n. 15 at paras. 36-38.

Compared to the *Front National* discourse considered in *Féret* and *Le Pen*, the speech involved in the leading Canadian Supreme Court case of *R.* v. *Keegstra* was of a more extreme and openly racist nature.[25] James Keegstra was a secondary school teacher who, for almost a decade, used his classroom to communicate anti-Semitic beliefs to his students. He depicted Jews to his pupils as 'treacherous', 'subversive', 'sadistic', 'money-loving', 'power hungry' and 'child killers'.[26] He also taught his class that the Jewish people seek to destroy Christianity and created the Holocaust to gain sympathy.[27]Moreover, he expected his pupils to reproduce his theories and ideas in class and on their exams in order to avoid bad grades. Keegstra was charged under Section 319 of the Criminal Code, which proscribes the 'wilful promotion of hatred against an identifiable group through the communication of statements other than in private conversation.' Relying on the right to freedom of expression, Keegstra challenged the constitutionality of the offence. In 1990, in a closely divided decision, the Supreme Court declined to find a violation.

Common grounds

When reading the European and Canadian cases, one can only be struck by the many parallels between them. There clearly is a great deal of intellectual common ground between the two highest courts. To start with, their reasoning is grounded on the same normative premises. Thus, as far as the values informing the free speech guarantees in Article 10 of the Convention and Section 2(b) of the Charter are concerned, great emphasis is placed on the democratic function of freedom of expression. It is a settled principle in the Convention jurisprudence that freedom of political debate is of fundamental importance in a democratic society.[28] This is translated into a heightened standard of scrutiny: only 'very strong' reasons can justify restrictions on political speech.[29] A similar picture emerges across the Atlantic. According to *Keegstra*, the connection between freedom of expression and the political process is the 'linchpin' of Section 2(b): 'Freedom of expression is a crucial aspect of the democratic commitment, not merely because it permits the best policies to be chosen from among a wide array of proffered options, but additionally because it helps to ensure that participation in the political process is open to all persons.'[30]

[25] *R.* v. *Keegstra*, *supra* n. 11. For a recent confirmation of the principles set out in *Keegstra*, *see Mugesera* v. *Canada (Minister of Citizenship and Immigration)*, [2005] 2 SCR 100.

[26] *R.* v. *Keegstra*, *supra* n. 11 at para. 3.

[27] Ibid.

[28] *Féret* v. *Belgium*, *supra* n. 9 at para. 63.

[29] Ibid.

[30] *R.* v. *Keegstra*, *supra* n. 11 at para. 89. The Canadian Supreme Court recognised that 'hate' propaganda is expression of a type which would generally be categorised as 'political'. Ibid. at para. 90.

The same level of agreement exists when it comes to the possibility of restricting political speech. As is well known, the limitation clauses of Article 10(2) of the Convention and Section 1 of the Charter provide a framework for balancing freedom of speech against other rights and interest. This balancing exercise is informed by the other values underlying the Convention and the Charter, in the case of 'hate speech' the principles of equality and dignity. Thus, in *Féret*, *Le Pen* and other 'hate speech' cases, the Strasbourg Court emphasised the vital importance of combating racial discrimination and respect for the equal dignity of all human beings.[31] In *Keegstra*, the strength of the objective behind the prohibition of 'hate speech' was enhanced by the Charter values of equality and multiculturalism.[32]

A second example of the common ground in matters of 'hate speech' is the openness the Strasbourg and Ottawa courts display towards international law. Both make reference to the 'relevant international instruments' forbidding the dissemination of 'hate' propaganda: the 1966 International Convention on the Elimination of All Forms of Racial Discrimination (Article 4) (CERD) and the 1966 International Covenant on Civil and Political Rights (Article 20) (ICCPR). In addition, the Court in *Keegstra* relied on a number of early Article 17 Convention decisions as providing 'aid in illustrating the tenor of the international community's approach to hate propaganda and free expression.'[33] According to the Court, the international community's commitment to prohibiting 'hate' propaganda underscored the importance of the legislative objective of Canada's 'hate speech' ban. The same approach can be found across the Atlantic. In *Jersild* v. *Denmark*, the object and purpose pursued by the CERD were considered to be of great weight in determining whether a conviction is necessary within the meaning of Article 10(2).[34] Subsequent cases have similarly referred to the main UN treaties.[35] However, unlike their Canadian colleagues, the Strasbourg judges have not yet looked at the relevant Charter jurisprudence.[36]

[31] *Féret* v. *Belgium*, *supra* n. 9 at para. 63; *Le Pen* v. *France*, *supra* n. 9. *See also Jersild* v. *Denmark*, *supra* n. 15 at para. 30; *Soulas and Others* v. *France*, *supra* n. 15 at para. 42.

[32] *R.* v. *Keegstra*, *supra* n. 11 at para. 80. In the opinion of Chief Justice Dickson, writing for the majority, the harms caused by 'hate speech' 'run directly counter to the values central to a free and democratic society, and in restricting the promotion of hatred Parliament is therefore seeking to bolster the notion of mutual respect necessary in a nation which venerates the equality of all persons.' Ibid. para. 76.

[33] Ibid. at p. 61.

[34] *Jersild* v. *Denmark*, *supra* n. 15 at para. 30.

[35] *See*, e.g., *Gündüz* v. *Turkey*, *supra* n. 15 at para. 21; *Soulas and Others* v. *France*, *supra* n. 15 at para. 42.

[36] The European Court did look at the Canadian Charter in ECtHR 6 May 2003, Case No. 44306/98, *Appleby and Others* v. *United Kingdom*, para. 31. This was not a 'hate speech' case however.

The final common feature is perhaps the most significant: both courts seem fullytoagree with each other about the reasons for suppressing 'hate' propaganda. Usually two kinds of harm are associated with 'hate speech', and the European and Canadian courts rely on both of them. The first type is the individual harm suffered by the members of the target group. A tremendous amount of research has been devoted to the physical, psychological and social effects of hate speech.[37] In *Keegstra*, Chief Justice Dickson was sensitive to these arguments:

> It is indisputable that the emotional damage caused by words may be of grave psychological and social consequence. (…) In my opinion, a response of humiliation and degradation from an individual targeted by hate propaganda is to be expected. A person's sense of human dignity and belonging to the community at large is closely linked to the concern and respect accorded the groups to which he or she belongs. The derision, hostility and abuse encouraged by hate propaganda therefore have a severely negative impact on the individual's sense of self-worth and acceptance. This impact may cause target group members to take drastic measures in reaction, perhaps avoiding activities which bring them into contact with non-group members or adopting attitudes and postures directed towards blending in with the majority.[38]

A similar concern for the emotional or psychological injury experienced by the target group can be inferred from the observation in *Féret* that personal attacks, injuring or defaming certain groups, violate the dignity and security of the person and are not protected by Article 10.[39] In this connection, the Court has repeatedly held that there is a duty to avoid as far as possible expressions that are 'gratuitously offensive' to others and thus an infringement of their rights.[40]

The second harmful effect of 'hate speech' is that which flows from its influence upon society at large. It is in this context that the possible 'bad tendencies' of 'hate speech'come to the fore. The fear is that the spread of hateful views may generate or reinforce hatred in the community and ultimately result in hateful attitudes, discrimination or violence. This, in turn, may damage the target group's position in the community or threaten social stability. These concerns find their most forceful articulation in the Article 10 decisions. The xenophobic and discriminatory statements and proposals of Mr. Féret were '*inevitably* of such a nature as to arouse, particularly among the less informed members of the public, feelings of distrust,

[37] *See*, e.g., C.R. Lawrence, 'If He Hollers Let Him Go: Regulating Racist Speech on Campus', *Duke Law Journal* (1990) p. 431; M.J. Matsuda, et al., *Words That Wound* (Westview Press 1993).

[38] *R.* v. *Keegstra*, *supra* n. 11 at para. 61.

[39] *Féret* v. *Belgium*, *supra* n. 9 at para. 73.

[40] *See*, e.g., ECtHR 31 Jan. 2001, Case No. 64016/00, *Giniewski* v. *France*, para. 43; *See also Jersild* v. *Denmark*, *supra* n. 15 at para. 35 ('There can be no doubt that the remarks in respect of which the Greenjackets were convicted were more than insulting to members of the target groups.')

rejection or hatred towards foreigners.'[41] In *Le Pen*, the applicant's statements were found to be 'susceptible to instill feelings of rejection and hostility against the targeted community.'[42] Furthermore, in *Féret*, the Court saw a direct relationship between 'hate' propaganda and social peace and political stability in a democratic society.[43] The majority even went so far as to impose an obligation on political parties to avoid resort to 'humiliating or vexatious' proposals or attitudes, 'because such behaviour risks instigating reactions among the public which are incompatible with a serene social climate and could undermine confidence in the democratic institutions.'[44] The potentially dangerous consequences of 'hate speech' were also raised in *Keegstra*, although in slightly more cautious terms. According to Chief Justice Dickson,

> [i]t is (…) *not inconceivable* that the active dissemination of 'hate' propaganda can attract individuals to its cause, and in the process create serious discord between various cultural groups in society. Moreover, the alteration of views held by the recipients of 'hate' propaganda may occur subtly, and is not always attendant upon conscious acceptance of the communicated ideas.[45]

Indeed, there is at least a '*possibility* that prejudiced messages will gain some credence, with the attendant result of discrimination, and perhaps even violence, against minority groups in Canadian society.'[46] Although the Court conceded that it is difficult to prove a causal link between a specific statement and hatred of an identifiable group, it concluded that the criminal law can be used to prevent the risk of serious harm.[47]

It will be clear by now that the judicial review of the European and Canadian hate speech laws has taken place against a very similar theoretical background. In both systems, the issue has been framed as a conflict between the right to freedom of expression and the values of equality and non-discrimination advanced by 'hate speech' regulations. The ensuing balancing inquiry has been informed by the same concerns: the democratic importance of freedom of speech on the one hand and the harmful consequences of 'hate' propaganda on the other hand. As the ultimate testimony of the common ground between Strasbourg and Ottawa, we could,

[41] *Féret* v. *Belgium*, *supra* n. 9 at para. 69.

[42] *Le Pen* v. *France*, *supra* n. 9.

[43] *Féret* v. *Belgium*, *supra* n. 9 at para. 73 ('Political discourse that incites hatred based on religious, ethnic or cultural prejudices poses a danger for social peace and political stability in a democratic state').

[44] *Féret* v. *Belgium*, *supra* n. 9 at para. 77.

[45] *R.* v. *Keegstra*, *supra* n. 11 at para. 62.

[46] Ibid.

[47] Ibid.

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finally, refer to their unequivocal rejection of the American free speech tradition. In his opinion for the majority in *Keegstra*, Chief Justice Dickson conceded that two hundred years of practical experience in protecting fundamental rights could not be overlooked.[48] His opinion contains a detailed account of the major debates in United States relevant to the criminalisation of 'hate' propaganda. However, in view of the important differences between the two countries, in particular the special role given to equality and multiculturalism in the Canadian Constitution, US First Amendment doctrine was not decisive in the Canadian context.[49] Apart from an occasional reference in a dissenting opinion, no comparable discussion of American constitutional jurisprudence can be found in the European 'hate speech' cases.[50] This absence only confirms the common view that American precedents cannot be transplanted to the European context.

A refusal to follow the American path also follows from the rather critical reception of the 'free marketplace of ideas' rationale, which is at the heart of First Amendment doctrine.[51] The belief that the free competition of ideas guarantees that the best ones will survive, is met with scepticism in European and Canadian courtrooms. According to Chief Justice Dickson, we should not 'overplay the view that rationality will overcome all falsehoods in the unregulated marketplace of ideas.'[52] In discussing the harmful effects of hate propaganda, he cited a 1965 Report of the Special Committee on Hate Propaganda (the Cohen Committee) which was rather critical of John Milton's classic argument:

> In the 18th and 19th centuries, there was a widespread belief that man was a rational creature, and that if his mind was trained and liberated from superstition by education, he would always distinguish truth from falsehood, good from evil. (…) We cannot share this faith today in such a simple form. While holding that over the long run, the human mind is repelled by blatant falsehood and seeks the good, it is too often true, in the short run, that emotion displaces reason (…).[53]

[48] *R.* v. *Keegstra*, *supra* n. 11 at para. 51.

[49] Ibid. at para. 52.

[50] *See* the discussion of the 'clear and present danger' standard in the dissenting opinion of Judge G. Bonello in several subversive speech cases decided on 8 July 1999. E.g., ECtHR 8 July 1999, Case No. 24122/94, *Sürek* v. *Turkey (No. 2)*.

[51] *See Abrams* v. *United States*, *supra* n. 6 at p. 630 (Holmes, J., dissenting) ('the best test of truth is the power of the thought to get itself accepted in the competition of the market').

[52] *R.* v. *Keegstra*, *supra* n. 11 at para. 87. In her dissenting opinion, Justice McLachlin joined in this critique, but would not negate 'the essential validity of the notion of the value of the marketplace of ideas.' Ibid. at para. 174.

[53] *R.* v. *Keegstra*, *supra* n. 11 at para. 62. *See* Report to the Minister of Justice of the Special Committee on Hate Propaganda in Canada (Cohen Committee), Queen's Printer, Ottawa, 1996.

The Cohen Committee noted that individuals can be persuaded to believe 'almost anything' if information or ideas are communicated using the right technique in the proper circumstances.[54] In similar, though somewhat more elitist, terms, the European Court in *Féret* held that the leaflets would arouse, 'particularly among the less informed members of the public', feelings of distrust and hatred towards foreigners.[55] The Court's paternalistic stance was heavily criticised in the dissenting opinion authored by Judge Andràs Sajó and joined by Judges Vladimiro Zagrebelsky and Nona Tsotsoria. In Sajó's opinion, the majority saw 'human beings, and a whole social class of "nitwits" ["nigauds"], as incapable of replying to arguments and counter-arguments, due to the irresistible drive of their irrational emotions.'[56] This, Sajó argued, was at odds with the very idea of freedom of expression, which is based on the fact that we hold human beings to be sufficiently rational to be capable to make an informed choice.[57]

Two functions of 'bad tendency'

The preceding analysis has focussed on the main principles guiding the decision-making process in the cases dealt with under the Convention and the Charter. Contrary to what one might expect, the many similarities that were identified did not result in a uniform 'hate speech' standard. In weighing the countervailing interests at stake, the European Court and the Canadian Supreme Court have come to rather different solutions. To understand the contrasting results, it is useful to take a closer look at the actual function performed by the notion of 'bad tendency' in the Courts' reasoning. Let us start with the Canadian approach. In *Keegstra*, the bad tendencies of 'hate' promotion played a crucial role at the first stage of the Court's balancing inquiry. Chief Justice Dickson had little difficulty in accepting the argument that preventing the harmful effects of 'hate speech' amounts to a 'pressing and substantial' legislative objective.[58] When one reads the speculative and conditional language used by the Court and the Cohen Committee, it becomes readily apparent that both were concerned not so much with present harm, but rather with the potential future dangers of 'hate speech'. Thus, it was not 'inconceivable', or there was a 'possibility', that the dissemination of 'hate' propaganda might cause socially undesirable attitudes or actions.[59] In other words, the majority located the harm of expressions of hatred in their inherent tendencies

[54] *R.* v. *Keegstra*, *supra* n. 11 at para. 62.
[55] *Féret* v. *Belgium*, *supra* n. 9 at para. 69.
[56] Ibid.
[57] Ibid.
[58] *R.* v. *Keegstra*, *supra* n. 11 at para. 65.
[59] Ibid. at para. 63.

rather than their actual consequences.[60] It spoke of 'simple tendencies', rather than the actual or even likely consequences of hateful statements.[61]

This being said, the role of 'bad tendency' in the Supreme Court's reasoning should not be overstated. Although the first prong of the Section 1 justification test was in large part based on an assessment of the pernicious tendencies of 'hate speech', this was only the beginning of the Court's reasoning.[62] According to the classic formulation of the proportionality test in *R.* v. *Oakes*, the Court must next ascertain whether the law is rationally connected to its objective (1), impairs 'as little as possible' the right to freedom of expression (2) and whether there is a reasonable balance between the effects of the ban and the legislative objective (3).[63] The first part of the inquiry was easily met. Although the rational connection between means and ends was disputed by Justice McLachlin, the majority was convinced that the suppression of 'hate speech' contributes to the reduction of its harmful effects.[64] However, more interesting from a comparative perspective was the Court's least restrictive means analysis. Under the second branch of the *Oakes* test, the means must be carefully tailored in order to minimise the impairment of freedom of expression. In this respect, the Court took great pains to emphasise the definitional elements restricting the scope of Section 319(2) of the Criminal Code. It formulated a strict interpretation of the terms of the offence so as to avoid the suppression of 'merely unpopular or unconventional communications.'[65]

To begin with, the Court observed that only statements intended to be public are covered by Section 319(2) of the Criminal Code.[66] Private statements are not included. The Court then went on to focus on the intention requirement and noted that the term 'wilfully' is a 'stringent' standard of *mens rea*: 'the mental element is satisfied only where an accused subjectively desires the promotion of hatred or foresees such a consequence as certain or substantially certain to result from an act done in order to achieve some other purpose.'[67] In other words, it will not be

[60] T. Heinrichs, 'Gitlow Redux: "Bad Tendencies" in the Great White North', 48 *Wayne Law Review* (2002) p. 1101 at p. 1144.

[61] Ibid.

[62] A. Herschorn, 'Causation of Harm and the Charter Guarantee of Freedom of Expression', 14 *National Journal of Constitutional Law* (2003) p. 217 at p. 257.

[63] *R.* v. *Oakes*, *supra* n. 14 at p. 139.

[64] *R.* v. *Keegstra*, *supra* n. 11 at para. 97 et seq. McLachlin saw three reasons why the suppression of 'hate speech' may not further its proper objectives and even detract from them. First, the extensive media publicity of 'hate speech' prosecutions may promote the cause of hate-mongers. Secondly, the suppression of expression may bring sympathy for the accused. Thirdly, historical evidence (the existence of 'hate speech' legislation in pre-Hitler Germany) gives reasons to be suspicious about its effectiveness in contributing to the cause of equality. *See* ibid. para. 289 et seq.

[65] Ibid. at para. 105.

[66] Ibid.

[67] Ibid. at para. 111.

sufficient to prove that the act was done recklessly or negligently. The stringency of the intention requirement was confirmed in the case of *Mugesera* v. *Canada*, where the Court held that 'the speaker must desire that the message stir up hatred.'[68] It further added that the necessary *mens rea* will usually be inferred from the statements made.[69] Next, the Court gave a narrow interpretation to the words 'promotes' and 'hatred'. The former indicates 'active support or instigation' or, following the French version of the term (*formenter*), 'to stir up', which is more than 'simple encouragement or advancement.'[70] As regards the latter, the Court noted that 'hatred' connotes 'emotion of an intense and extreme nature that is clearly associated with vilification and detestation.'[71] Hence, only the most intense forms of dislike fall within the ambit of this offence.[72] In *Mugesera* the Court added that in order to determine whether the speech conveyed hatred, the analysis must focus on the speech's audience and on its social and historical context.[73] In the light of the above considerations, and given the various defences listed in Section 319(3), the Court concluded that the Canadian 'hate speech' ban was a narrowly confined and proportionate means of achieving the goal of suppressing 'hate speech'.[74]

The approach taken by the Strasbourg Court in *Féret* and *Le Pen* is different. To start with, there is no talk of 'bad tendency' in the Court's examination of the objectives of the impugned measures. Under the 'legitimate goals' heading, it briefly refers to the goals of preventing disorder and protecting the reputation and rights of others. The discussion of the potential consequences of 'hate speech' is incorporated in the Court's balancing exercise under the 'necessary in a democratic society' standard. In this respect, there are two important differences in comparison with the use of 'bad tendency' arguments in *Keegstra*. First, the notion of harm underlying the Court's reasoning is much broader. In addition to preventing personal injury and harmful persuasion, the Court is also concerned with preserving 'political stability' and a 'serene social climate.'[75] The broad nature of these objectives will stretch the potential reach of the concept of 'hate speech'.[76] The second difference concerns the function of 'bad tendency': the tendency of

[68] *Mugesera* v. *Canada (Minister of Citizenship & Immigration)*, [2005] 2 SCR 100 at para. 104.
[69] Ibid. at para. 105.
[70] *Keegstra*, *supra* n. 11 at para. 115.
[71] Ibid. at para. 116.
[72] Ibid. *See also Mugesera* v. *Canada*, *supra* n. 68 at para. 101.
[73] *Mugesera* v. *Canada*, *supra* n. 68 at para. 103.
[74] *Keegstra*, *supra* n. 11 at para. 132.
[75] *Féret* v. *Belgium*, *supra* n. 9 at para. 77.
[76] One may wonder whether the aim of preserving 'political stability' and a 'serene social climate' is compatible with a dynamic and open democratic system. *See* D. Voorhoof, 'Politicus die haat zaait is strafbaar' [Politician Who Fosters Hate Is Punishable], *Mediaforum* (2009-2010) p. 372 at p. 376.

'hate' propaganda not only serves to justify the adoption of some form of 'hate speech' regulation, but has become a test by itself.

To understand this last point, we must look at the language the Court uses and the logic of its reasoning. The starting point is a very broad definition of 'hate speech', inspired by a recommendation of the Committee of Ministers of the Council of Europe.[77] Following this definition, 'hate speech' refers to 'all forms of expression, which spread, incite, promote or justify hatred based on intolerance.'[78] Sometimes, the Court simply declares that 'expressions constituting 'hate speech', which may be insulting to particular individuals or groups, are not protected by Article 10 of the Convention.'[79] These are, of course, vague and broad terms. What is, for instance, meant by 'hatred based on intolerance?' When is speech 'insulting?' Nowhere does the Court attempt to define these notions or to formulate a standard by which the Contracting States' attempts to suppress 'hate speech' can be judged. How, then, does the Court determine whether an expression is a form of 'hate speech' unprotected by Article 10? Its reasoning essentially consists of three steps. First, the Court looks at the content of the impugned message. Thus, in *Féret* en *Le Pen* some of the language under review was found to be xenophobic or Islamophobic. Other leaflets were considered to contain discriminatory, offensive and vexatious proposals. In a second step, the Court observes that such language is 'susceptible to instil' or 'of such a nature as to arouse' feelings of rejection, hostility or hatred against the targeted community.[80] In other words, the impugned expressions have a 'tendency' to persuade the members of the public to adopt hateful or discriminatory attitudes. In a third and final step, the Court infers from this tendency that the impugned expression 'clearly' incites to racial discrimination and hatred (1) and, moreover, reveals the intention of its author to incite to such actions or attitudes (2).[81] In other words, both the nature of the act – incitement – and the intention of its author are inferred from the tendency of the words used: language that is 'susceptible to cause' feelings of hatred is equated with intentional incitement to hatred. To put it in the words of Judge Sajó: a possibility becomes an inevitability.[82] In *Le Pen*, this last step proved to be superfluous: the mere tendency sufficed to justify the restriction.[83]

[77] *See* Committee of Ministers of the Council of Europe, Recommendation No. R (97) 20, adopted on 30 Oct. 1997.

[78] Ibid. For references to this definition in the case-law, *see*, e.g., *Féret* v. *Belgium*, *supra* n. 9 at para. 64; *Gündüz* v. *Turkey*, *supra* n. 15 at para. 40.

[79] *See*, e.g., *Jersild* v. *Denmark*, *supra* n. 15 at para. 35.

[80] *Féret* v. *Belgium*, *supra* n. 9 at para. 69; *Le Pen* v. *France*, *supra* n. 9.

[81] *Féret* v. *Belgium*, *supra* n. 9 at paras. 70-71 and 78.

[82] *Féret* v. *Belgium*, *supra* n. 9.

[83] *Le Pen* v. *France*, *supra* n. 9.

One may question whether the type of speech involved in *Le Pen* and *Féret* can properly be qualified as intentional incitement to racial hatred and discrimination if, following *Keegstra*, incitement is to mean 'active support or instigation', the intention requirement is to imply 'a subjective desire to stir up hatred', and 'hatred' is to connote 'emotion of an intense and extreme nature that is clearly associated with vilification and detestation.' As the dissenting judges observed, much of the speech involved in *Féret* was aimed not so much at inciting the members of the general public to act in a racist or discriminatory manner, but at criticising the sitting government's immigration policies as part of an electoral strategy.[84] The leaflets (with the exception of the 'couscous clan' cartoon, which associated Muslims with terrorism), contained only vague political proposals addressed to the government and other political parties. The hateful and discriminatory undertone of the *Front National* discourse is one thing, to infer from this intentional incitement quite another. The real test the Strasbourg Court uses to justify the suppression of 'hate speech' is not 'intentional incitement', but the dangerous tendency of the impugned discourse. This was, of course, not left unnoticed by the dissenting judges in *Féret*, for whom the new notion of a 'dangerous discourse' would herald the suppression of a wide category of speech.

The bad tendencies of 'bad tendency'

Our discussion so far has revealed a dual use of 'bad tendency' arguments in 'hate speech' cases. First, the potentially dangerous consequences of 'hate' promotion have been advanced as a general argument in favour of some form of 'hate speech' regulation. As noted, such laws are seen as a means of preventing attitudinal or behavioural changes caused by the spread of hatred in the community. Secondly, the concept of 'bad tendency' has functioned as a test to draw the line between protected and unprotected forms of expression. Both uses of 'bad tendency' have been criticised. As far as the first use of the concept is concerned, courts and commentators can roughly be divided into two camps: the believers and the non-believers. The central point of disagreement between the two concerns the question of causation. According to the believers, 'hate speech' is the poison that leads to hatred, discrimination and violence. A whole range of historical, sociological and psychological evidence is mounted to prove the long-term harms caused by 'hate speech'.[85] A recent title, representative of this tradition, is Alexander Tsesis' book

[84] *See also* D. Voorhoof, *supra* n. 76 at p. 376.

[85] For an overview, *see*, e.g., D. Kretzmer, 'Freedom of Speech and Racism', 8 *Cardozo Law Review* (1987) p. 445 at p. 463-465.

Destructive Messages: How Hate Speech Paves the Way for Harmful Social Movements.[86] Using historical examples such as the Holocaust, and slavery in the United States, the author seeks to establish a 'causal link' between 'hate speech' and the human rights violations against Jews and African Americans. This sort of reasoning has been heavily criticised by the non-believers.[87] The central claim of the non-believers is twofold. First, it would be difficult, if not impossible, to prove a causal connection between 'hate speech' and certain types of social harm. In any event, there is not, at present any convincing empirical evidence supporting the causal claim. For instance, the historical correlation of 'hate' propaganda and atrocities such as genocide would be insufficient to establish causation: 'hate speech' could simply have been a symptom of already entrenched beliefs or attitudes.[88] Secondly, there is no evidence that 'hate speech' laws are effective in preventing or reducing the likelihood of the feared harms; they may even prove to be counterproductive. Justice McLachlin's dissent in *Keegstra* was in large part based on this argument.[89] The existence of 'anti-hate' legislation in pre-Hitler Germany is often cited in this respect.

Leaving the debate about the different causal claims concerning the effects of 'hate speech' and the restrictions of such speech aside, we turn to a second problem related to the use of 'bad tendency' arguments. Those sceptical of the 'bad tendency' rationale argue that the category of expression with a 'tendency' to cause hatred, discrimination or violence is much wider than what is commonly understood by the notion of 'hate speech', even if broadly defined.[90] A very wide range of statements may contribute to a harmful environment by conveying discriminatory messages, prejudices and stereotypes. A classic example is the publication of research on the correlation between ethnicity and crime. It is argued that the more mainstream and (apparently) more rational forms of expression may be far more dangerous than crude racist propaganda, which is likely to be caught by 'hate speech' prohibitions. The problem is systemic: inequality and subordination result

[86] A. Tsesis, *Destructive Messages: How Hate Speech Paves the Way for Harmful Social Movements* (New York University Press 2002).

[87] *See*, e.g., A.C. Desai, 'Attacking Brandenburg with History: Does the Long-Term Harm of Biased Speech Justify a Criminal Statute Suppressing It?', 55 *Federal Communications Law Journal* (2003) p. 354; A. Herschorn, *supra* n. 62; C.E. Baker, 'Autonomy and Hate Speech', in I. Hare and J. Weinstein (eds.), *Extreme Speech and Democracy* (Oxford University Press 2009) p. 139; W.B. Wendel, 'The Banality of Evil and the First Amendment', 102 *Michigan Law Review* (2004) p. 1404.

[88] C.E. Baker, *supra* n. 87 at p. 146.

[89] *See supra* n. 64.

[90] *See*, e.g., C.E. Baker, *supra* n. 86 at p. 146-155; R. Moon, 'Hate Speech Regulation in Canada', 36 *Florida State University Law Review* (2008) p. 79; R. Post, 'Hate Speech', in I. Hare and J. Weinstein (eds.), *Extreme Speech and Democracy* (Oxford University Press 2009), p. 123 at p. 134-136; W.B. Wendel, *supra* n. 86.

from a system of both ordinary and extreme speech that perpetuates and reinforces already existing discriminatory attitudes and behaviours.[91] Hence, we are faced with a dilemma: either 'hate speech' bans are under-inclusive and ineffective as they do not reach the most dangerous subset of harmful expression, or we end up targeting such a vast domain of expression (e.g., academic work, literature, jokes) so as to undermine meaningful free speech protection.

A recent decision of the Strasbourg Court demonstrates that this is not merely a theoretical problem. In the case of *Aksu* v. *Turkey*, the Court was confronted with the use of stereotyped images of Roma in two publications, a book and a dictionary.[92] The applicant, a Turkish national of Roma origin, filed a complaint under Article 14 of the Convention, alleging that the refusal of the domestic courts to award compensation in a civil lawsuit against the author and publisher of both works amounted to discrimination on the ground of ethnic identity. The complaints were rejected by a narrow 4 to 3 majority. The majority observed that the book (entitled *The Gypsies of Turkey*) was an academic study, focusing on the history and socio-economic living conditions of the Roma people, and that the author had no intention to insult the Roma community. The Court attached particular importance to the fact that the author had sought only to portray the perception of Roma people in Turkish society.[93] As regards the offensive dictionary entries, the majority noted that 'the definitions provided by the dictionary were prefaced with the comment that the terms were of a metaphorical nature.'[94] The dissenting judges, by contrast, were concerned with the 'bad tendencies' of the language involved. Having observed that 'prejudice is the breeding-ground of discrimination and exclusion', it made the following observation: 'Stereotypes are ready-made opinions that focus on peculiarities, and prejudices are preconceived ideas that lead to bias: they are dangerous because they reflect or even induce an implicit discrimination.'[95] The dissenting opinion then pushed the 'bad tendency' logic to its natural conclusion, namely that no intention to insult the Roma was required to intervene.[96] Indeed, if we are concerned with the potential long-term harms caused by discriminatory speech, the question of intention becomes superfluous.

[91] R. Moon, *supra* n. 89 at p. 91-93.

[92] ECtHR 27 July 2010, Case No. 4149/04 and 41029/04, *Aksu* v. *Turkey*. The applicant submitted that the book entitled 'The Gypsies of Turkey' contained several expressions that humiliated and denigrated Gypsies. It stated that Gypsies were engaged in illegitimate activities, lived as 'thieves, pickpockets, swindlers, robbers, usurers, beggars, drug dealers, prostitutes and brothel keepers' and were polygamist and aggressive. The dictionary contained several entries highly offensive to Roma (e.g., 'Gypsy' (çingene): (metaphorically) stingy).

[93] Ibid. at para. 56.

[94] Ibid. at para. 57.

[95] Ibid. at para. 2.

[96] Ibid.

This brings us to the second function of 'bad tendency', namely its use as a judicial standard for deciding free speech cases. For an assessment of the Strasbourg Court's current 'hate speech' jurisprudence, it is not necessary to take sides in the debate about causality. Indeed, in the Convention case-law, the function of 'bad tendency' is not limited to providing a general justification for restricting certain types of potentially harmful expression. The Court goes further and engages in 'bad tendency' analysis to decide individual cases. While one may reasonably disagree about the propriety of 'bad tendency' as a general rationale, the case against 'bad tendency' as an actual test becomes all the more compelling. History has shown that courts using 'bad tendency' as an actual test will not be able adequately to protect freedom of expression and will, sooner or later, end up sanctioning the suppression of legitimate political speech. As mentioned in the introduction, in the United States the formula long served to justify the suppression of speech considered to be morally or politically wrong.[97] In a way, modern First Amendment doctrine was born out of a rejection of the 'bad tendency' legacy. In the 1940s, American free speech scholar Zechariah Chafee described the test in the following words:

> an English eighteenth-century doctrine, wholly at variance with any true freedom of discussion, because it permits the government to go outside of its proper field of acts, present or probable, into the field of ideas, and condemn them by the judgement of a judge or jury, who, human nature being what it is, consider a doctrine they dislike to be so liable to cause harm some day that it had better be nipped in the bud.'[98]

This quote perfectly captures the problematic nature of the 'bad tendency' test: not only is the category of speech with a tendency to cause social harm potentially limitless; to use it as a test would allow decision-makers to suppress or to sanction the suppression of speech with which they disagree. 'Bad tendency' is simply too broad and vague a notion to provide meaningful free speech protection.

Towards a uniform incitement test

The foregoing analysis of the pitfalls of the 'bad tendency' test strongly suggests that the European Court's current 'hate speech' approach is in need of re-evaluation. What conclusions follow from our discussion so far? As a preliminary step, it is important that the Court should clearly distinguish between the different types of harm that 'hate speech' legislation seeks to prevent. At present, the Court cites

[97] *See supra* n. 6.
[98] Z. Chafee, *Free Speech in the United States* (Harvard University Press 1941) p. 322.

a great variety of individual and social ills that may be caused by expression of hatred, without indicating how they will ultimately affect its proportionality analysis. However, the solutions may vary according to the different kinds of harm involved. As mentioned, the main distinction is that between direct harm to the members of the target group, and indirect harm through the spread of hateful views in the wider community. In what follows, I will focus only on restrictions aimed at the second type of harm. Indeed, the legislation at issue in *Féret*, *Le Pen* and *Keegstra* is meant to protect against the dangers of persuasion: hence the notions of 'incitement', 'provocation' and 'promotion'. There is little doubt that Article 10 allows for restrictions on threatening or insulting language aimed at protecting against harms of the first type. However, the problem of how to define this category is beyond the scope of the present article.

How should the Court treat the Contracting States' response to the second type of harm – i.e., the spread of hateful views in society? How is the Court to prevent the national authorities from using 'hate speech' legislation to target political expression over broadly? It is submitted that a proper balance between the right to freedom of expression and the value of equality would require the Court to abandon its 'bad tendency' approach for a genuine 'incitement' standard. In devising such a test, the Court might find inspiration in *Keegstra* as well as in its own case-law on violence-conductive speech (I will return to this second point later). As described above, the Supreme Court in *Keegstra* sought to square the Canadian 'hate speech' provision with the right to freedom of expression by prescribing a narrow, Charter-conforming definition of the offence: the active, intentional and public support of hatred, the latter being defined as an emotion of an extreme nature. Of course, as a supranational organ, the Court in Strasbourg is not in a position to offer a similarly binding interpretation of domestic European 'hate speech' laws. Nonetheless, it could, by way of definitional balancing, formulate a number of limiting conditions, similar to those listed by the Canadian Supreme Court under its minimal impairment analysis.[99]

How, then, does the *Keegstra* incitement approach differ from a 'bad tendency' inquiry? A first difference relates to the *content* of the impugned message. By imposing a strict interpretation of the term 'promotes', the Court draws a line between speech whose content is merely discriminatory and speech whose content incites discrimination or hatred. Of course, the concept of 'incitement' is not limited to words which literally invite the listener to engage in certain behaviour or adopt certain attitudes. The nature of an expression depends on the circumstances surrounding it and the intention of the speaker. An expression which,

[99] On definitional balancing in free speech cases, *see* M.B. Nimmer, 'The Right to Speak from Times to Time: First Amendment Theory Applied to Libel and Misapplied to Privacy', 56 *California Law Review* (1968) p. 935.

taken literally, does not counsel action may, given the context, nevertheless be interpreted as (indirect) incitement.[100] A second condition limiting the potentially over-broad reach of 'hate speech' provisions is the requirement of intent. As has been seen, a stringent *mens rea* requirement was a decisive factor in the Canadian Supreme Court's proportionality analysis. According to Chief Justice Dickson, the mental element is an invaluable means of reducing the potentially over-broad scope of the targeted expression.[101] Its purpose is to avoid the 'chilling' of legitimate speech.[102] As the Supreme Court put it in *Canada* v. *Taylor*, 'an individual open to condemnation and censure because his or her words may have an unintended effect will be more likely to exercise caution via self-censorship.'[103] In the Canadian context, 'willful blindness' or knowledge as to the consequences is sufficient to satisfy the *mens rea* requirement: 'the hate-monger must intend or foresee as substantially certain a direct and active stimulation of hatred against an identifiable group.' In this respect, the *Keegstra* approach distinguishes itself from the American incitement test, which is generally said to require a (more protective) *mensrea* of purpose.[104] According to Larry Alexander, who criticises the *mensrea* of purpose requirement, a *mens rea* of knowledge would be sufficient to counter the 'chilling' effects.[105]Leaving this debate aside, it is often noted that proving one's mental state is difficult and that there are dangers associated with guessing at a

[100] *See* L. Alexander, 'Incitement and Freedom of Expression', in D. Kretzmer and F.K. Hazan (eds.), *Freedom of Speech and Incitement against Democracy* (Kluwer Law International 2000) p. 101 at p. 105-106.

[101] *Keegstra*, *supra* n. 11 at para. 120.

[102] L. Alexander, *supra* n. 100 at p. 108.

[103] *Canada (Human Rights Commission)* v. *Taylor*, [1990] 3 SCR 697, p. 43.

[104] For the difference between intent as 'knowledge' and intent as 'purpose', *see* the dissenting opinion of Justice Holmes in *Abrams* v. *United States*, 250 US 616, 626 (1919): '[T]he word "intent" as vaguely used in ordinary legal discussion means no more than knowledge at the time of the act that the consequences said to be intended will ensue. (…) But, when words are used exactly, a deed is not done with intent to produce a consequence unless that consequence is the aim of the deed. It may be obvious, and obvious to the actor, that the consequence will follow, and he may be liable for it even if he regrets it, but he does not do the act with intent to produce it unless the aim to produce it is the proximate motive of the specific act, although there may be some deeper motive behind. (…) A patriot might think that we were wasting money on aeroplanes, or making more cannon of a certain kind than we needed, and might advocate curtailment with success, yet even if it turned out that the curtailment hindered and was thought by other minds to have been obviously likely to hinder the United States in the prosecution of the war, no one would hold such conduct a crime.'

[105] L. Alexander, *supra* n. 99 at p. 107-109 (arguing that a *mens rea* of purpose is not required because neither the value of free speech as information nor the danger of the speech to legitimate interests turns on the speaker's purpose). *See* also F. Schauer, 'Intentions, Conventions, and the First Amendment: The Case of Cross-Burning', *Supreme Court Review* (2003) p. 197 at p. 216-224.

speaker's purpose.[106] In this connection, the Supreme Court observed that the necessary mental state can be inferred from the nature of the statements: '[i]n many instances, evidence of the mental element will flow from the establishment of the elements of the criminal act of the offence. The speech will be such that the requisite guilty mind can be inferred.'[107] However, what distinguishes the Canadian from the European approach is that intention is to be inferred from the conduct of the speaker and the nature of the words (i.e., incitement) not from their mere tendencies.

The various elements of the *Keegstra* incitement standard are not completely foreign to the Convention case-law. In fact, the adoption of a *Keegstra*-like incitement test would allow the Court to bring its 'hate speech' jurisprudence in line with its case-law on subversive and violence-conductive speech. The current Article 10 standard for assessing interferences with speech advocating violence or speech otherwise harmful to national security was announced in a series of cases decided in 1999.[108] The central question in these cases is whether the challenged utterances 'incite to violence against an individual, a public official or a sector of the population.'[109] The complexities of this test are beyond the scope of this article.[110] It suffices to note that the Court's inquiry focuses both on the nature of the words used and the intention of the speaker. A good illustration of this approach can be found in the case of *Sürek (No. 1)* v. *Turkey*, which concerned the publication of two readers' letters in a weekly review, both strongly condemning the Turkish suppression of the Kurdish people in their struggle for independence.[111] Declining to find a Convention violation, the Court noted that the statements revealed 'a clear intention to stigmatise the other side to the conflict by the use of labels such as "the fascist Turkish army", "the TC murder gang" and "the hired killers of imperialism" alongside references to "massacres", "brutalities" and "slaughter".'[112] The letters, the Court continued, 'amounted to an appeal to bloody revenge by stirring up base emotions and hardening already embedded prejudices.'[113] In addition to content and intention, the Court's incitement test is also concerned with the probable effects of an expression. This is evidenced by the routinely cited

[106] For a discussion of *mens rea* requirements and freedom of speech, *see* E. Volokh, 'Crime-Facilitating Speech', 57 *Stanford Law Review* (2005) p. 201 at p. 266-284 (noting that an intent test tends to deter speakers who fear that they might be assumed to have bad intentions, for instance because of their political background).

[107] *Mugesera* v. *Canada (Minister of Citizenship & Immigration)*, *supra* n. 64 at para. 105.

[108] *See*, e.g., ECtHR 8 July 1999, Case No. 26682/95, *Sürek* v. *Turkey (No. 1)*.

[109] Ibid. at para. 61.

[110] For a discussion, *see* S. Sottiaux, *Terrorism and the Limitation of Rights, the ECHR and the US Constitution* (Hart Publishing 2008) p. 88-100.

[111] *Sürek* v. *Turkey (No. 1)*, *supra* n. 108.

[112] Ibid. at para. 62.

[113] Ibid.

phrase that 'in such a context the content of the letters must be seen as capable of inciting to further violence (…).'[114] It is important to note that the Court's evaluation of the context of an expression not only serves the purpose of discovering the meaning of the words used and the intention of the author, but is also aimed at assessing the probable impact of the expression. An important factor, for instance, is the medium used to convey the message: views made public by means of a literary work,[115] in a periodical whose circulation is low,[116] through poetry,[117] or to a limited group of people attending a commemorative ceremony,[118] have a lesser effect than views dispersed through the mass media. Other contextual factors to which the Court attaches importance in calculating the possible consequences of an expression are the authority of the speaker[119] and the security situation prevailing at the time or in the region where the message is dispersed.[120]In this respect, the question arises as to whether the European incitement standard should include the conditions of likelihood and imminence, which are both important aspects of the First Amendment *Brandenburg* test.[121] While *Keegstra* makes no separate mention of these elements, the dissenting opinion in *Féret* seems to hint at a 'clear and present' danger approach.[122] Since the imminence requirement finds its justification in the 'free market place of ideas' rationale – the idea being that, in the absence of an imminent threat, dangerous speech should be countered by more speech –, it seems rather unlikely that the Strasbourg Court would adopt such a condition. Nonetheless, if the Court is to guard against the suppression of pure thought, it should require a minimum of potential harm.[123]

Although the Article 10 incitement test and the *Keegstra* approach are not exactly the same, the similarities are striking. Unlike its Canadian counterpart, the Court in Strasbourg never explicitly listed the various components of its incitement inquiry as independent requirements to be satisfied in each case. Nevertheless, the

[114] Ibid.

[115] ECtHR 8 July 1999, Case No. 23500/94, *Polat* v. *Turkey*, para. 47; ECtHR 8 July 1999, Case No. 23462/94, *Arslan* v. *Turkey*, para. 48.

[116] ECtHR 8 July 1999, Case No. 24246/94, *Okçuoglu* v. *Turkey*, para. 48.

[117] ECtHR 8 July 1999, Case No. 23168/94, *Karatas* v. *Turkey*, para. 52.

[118] ECtHR, 8 July 1999, Case No. 24919/94, *Gerger* v. *Turkey*, para. 50.

[119] ECtHR 25 Nov. 1997, Case No. 18954/91, *Zana* v. *Turkey*, para. 50 (statements of a former mayor of an important Turkish city); ECtHR 20 Jan. 2000, Case No. 35402/97, *Hogefeld* v. *Germany* (main representative of terrorist organization).

[120] *Sürek* v. *Turkey (No. 1)*, *supra* n. 108 at para. 62.

[121] *Brandenburg* v. *Ohio*, *supra* n. 7 at p. 447.

[122] *Féret* v. *Belgium*, *supra* n. 9 (according to the dissenting judges, incitement requires that the illegal act directly flows from the expression or is at least 'substantially and truly' fostered by it).

[123] *See* in this respect F.M. Lawrence, 'Violence-Conductive Speech: Punishable Verbal Assault or Protected Political Speech', in D. Kretzmer and F.K. Hazan (eds.), *Freedom of Speech and Incitement Against Democracy* (Kluwer Law International 2000) p. 11 at p. 22-23.

European standard functions as a multi-faceted test, allowing the Court to take into account a variety of factors in its overall assessment: the content of the expression, the likelihood and seriousness of its consequences, and the speaker's intention. The case-law indicates that the test gives more structure and predictability to the Court's Article 10 adjudication than a case-by-case application of the democratic necessity test. What is important is that the speaker- and context-based inquiry focuses on incitement and not on mere tendencies. The incitement to violence test is thus a more narrowly tailored means of dealing with persuasive speech than the 'bad tendency' test in 'hate speech' cases. It is hard to see the justifications for treating differently the various categories of persuasive speech: the prevention or the reduction of violence, discrimination and hatred seem equally weighty Convention objectives.

Concluding observation

In an article published in 1995, Christopher McCrudden contrasted the emerging Euro-Canadian 'hate speech' approach with the free speech orthodoxy of the United States Supreme Court, welcoming the former for giving due weight to equality based arguments.[124] However, he also noted important differences within the Euro-Canadian tradition:

> The Canadian approach is one which we could worse than emulate in Europe. It avoids the pitfalls of blinkered 'neutrality'. It places freedom of speech squarely in its primary political context. It is sceptical of a naïve view of the free market- place of ideas. At the same time it is principled. It has real bite when necessary in protecting appropriate freedom of speech.[125]

McCrudden was rather critical about the Convention jurisprudence at that time:

> The level of scrutiny adopted by the Commission (…) is so lacking in strictness as to be almost non-existent. The approach taken seems too cavalier in its dismissal of freedom of speech arguments. There is a justified fear that if casualness of approach is adopted in this context, then the Commission might well adopt a similarly casual approach in other contexts, allowing too little content to freedom of speech protection, and too much latitude to the state.[126]

Unfortunately, today, this observation is as relevant as it was 15years ago. Although the Court has departed from its approach of summarily dismissing 'hate speech'

[124] C. McCrudden, *supra* n. 12.
[125] Ibid. at 146.
[126] Ibid. at 139.

cases under Article 17, its newly adopted 'bad tendency' analysis lacks the 'real bite' necessary to distinguish 'dangerous discourse' from actual incitement. Drawing on the Canadian precedents, this 1995 article argued for the adoption of a genuine and uniform incitement test for the treatment of the various categories of persuasive speech. While such a test may be vulnerable to the argument that it fails to capture the more moderate but perhaps equally harmful instances of discriminatory or xenophobic speech, the alternative would open the door to undermining the very idea of freedom of expression.

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