# *Keegstra*, *Butler*, and Positive Liberty: A Glimmer of Hope for the Faithful

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*Through an examination of two recent decisions of the Supreme Court of Canada on the freedom of expression guarantee in the* Canadian Charter of Rights and Freedoms, R. *v.* Keegstra *and* R. *v.* Butler, *the author argues for a unitary vision of the* Charter *grounded on the concept of positive liberty. Positive liberty, understood as the ability of individuals to be their own masters and to participate in society with equal dignity and respect, is to be contrasted with negative liberty, or the absence of external impediments, which informed the dissent in* Keegstra. *Legislation that impairs the negative liberty of one individual still may be consistent with the goal of enhancing the positive liberty and, correspondingly, the political equality of other members of society. Moreover, as implied in* Butler, *to the extent that positive liberty is a fundamental political value in a free and democratic society, the courts are bound to uphold it under the* Charter. *By recognizing the importance of legislation designed to enhance respectively the political equality of ethnic minorities and women, the majority decisions in* Keegstra *and* Butler *represent a return to this earlier vision of the* Charter *in which the two stages of analysis—the establishment of an infringement by the rights-claimant and the attempted justification of the infringement by the state—are unified under the concept of positive liberty.*

*Par une analyse de deux arrêts récents de la Cour suprême du Canada portant sur la liberté d'expression garantie dans la* Charte canadienne des droits et libertés, *à savoir* R. *c.* Keegstra *et* R. *c.* Butler, *l'auteur préconise une vision unifiée de la* Charte *fondée sur le concept de liberté positive. La liberté positive, qui signifie la capacité des individus d'être maître de soi et de prendre part à la société avec dignité et respect égaux, s'oppose au principe de la liberté négative, ou l'absence de contraintes externes, qui est à la base de l'opinion dissidente dans* Keegstra. *Une loi qui porte atteinte à la liberté négative d'un individu peut néanmoins être compatible avec l'amélioration de la liberté positive et, en conséquence, avec la promotion de l'égalité politique d'autres membres de la société. En plus, il est sous-*

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*entendu dans* Butler *que dans la mesure où la liberté positive est une valeur politique fondamentale dans le cadre d'une société libre et démocratique, la* Charte *oblige les tribunaux à la soutenir. En reconnaissant l'importance des lois favorisant l'égalité politique respective des minorités ethniques et des femmes, les opinions majoritaires dans* Keegstra *et* Butler *adoptent à nouveau la vision de la* Charte *selon laquelle les deux étapes analytiques, à savoir la nécessité pour le revendicateur d'établir une atteinte à ses droits et la mise en avant de justifications par l'État, se réunissent dans la notion de liberté positive.*

In two recent decisions, *R.* v. *Keegstra*[1] and *R.* v. *Butler*,[2] the Supreme Court of Canada upheld the validity of criminal provisions that were found to infringe the freedom of expression guarantee in the *Canadian Charter of Rights and Freedoms*.[3] In each decision, the impugned legislation was upheld on the ground that it protected the interests of certain disadvantaged or vulnerable groups and was therefore a justifiable limitation on freedom of expression. In *Keegstra*, for instance, the Court found that the objective of the hate propaganda provisions of the *Criminal Code*[4] was to "prevent the pain suffered by target group members and to reduce the racial, ethnic and religious tension in Canada."[5] Similarly, in *Butler*, the Court held that the obscenity provision was meant to prevent the "harm associated with the dissemination of pornography" and was therefore "sufficiently pressing and substantial to warrant some restriction on full exercise of the right to freedom of expression."[6]

What is remarkable about both of these cases is that while, in the result, the interests of certain vulnerable groups were protected, the *Charter* claim was itself rejected. That a fundamental freedom must be limited so that the rights of a vulnerable group can be protected may suggest to some a basic problem with the logic of the *Charter*. Indeed, it may be thought by *Charter* skeptics that what is going on is not about rights or freedoms, but about balancing the interests of competing groups or individuals. This may lead to a deeper skepticism about rights or, at a theoretical level, about liberal democratic theory generally. To answer these criticisms, it is necessary to delve into the theoretical foundations of the *Charter* and its assumptions about both the concept of liberty and the legitimate role of the state.

The first section of the article outlines the problems associated with two concepts —liberty and democracy—that are crucial to an understanding of the *Charter*. In McLachlin J.'s dissent in *Keegstra*, she articulates a view of freedom of expression

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1. *R.* v. *Keegstra* (1990), 61 C.C.C. (3d) 1 [hereinafter *Keegstra*].
2. *R.* v. *Butler* (1992), 70 C.C.C. (3d) 129 (S.C.C.) [hereinafter *Butler*].
3. *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B of the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter *Charter*]. Section 2(b) reads: "Everyone has the following fundamental freedoms: . . . (b) freedom of thought, belief, opinion and expression, including freedom of the press and other media" [hereinafter s. 2(b)].
4. R.S.C. 1985, c. C-46, s. 319(2).
5. *Supra*, note 1 at 45.
6. *Supra*, note 2 at 160.

based on the concept of *negative liberty*. But negative liberty, understood as the absence of external impediments, is unable to make sense of the two stages of *Charter* analysis. Moreover, by incorporating utilitarian cost-benefit considerations into the analysis through a majoritarian view of democracy, her decision ultimately undermines the concept of a right. The article advances the view that democracy should be understood not in the majoritarian sense, but rather as a commitment to a particular political order in which the freedom of individuals to be their own masters and to participate in society with equal dignity and respect—in short, their *positive liberty*—is a fundamental political value.

The *Butler* decision also confronts the problem of democracy, but from a slightly different angle. In this decision, the issue is whether democracy can be regarded as a licence to legislate morality, where "morality" is understood to mean the particular "tastes" and "preferences" of the majority of citizens. In confronting this problem, the Supreme Court of Canada is forced to articulate a distinction between conventional morality and political morality. Threats to political morality, to fundamental political values, are held to be legitimately within the concern of the Legislature in a free and democratic society. It is the protection of these values that is mandated by the *Charter*.

A misinterpretation of the related concepts of rights and democracy results in an incoherent picture of the *Charter* in which rights are understood as shields against state action but expendable in the face of majoritarian considerations. This view of the *Charter* inevitably leads to the "*ad hoc*" balancing of rights against other amorphous interests at the s. 1 stage of analysis. As some legal scholars have remarked, however, this picture of the *Charter* is inconsistent with the idea of the *Charter* as a unitary document.[7]

The second section of this article explains how the decisions of the majority in *Keegstra* and *Butler* embrace a unitary approach to the *Charter* in which the same values underlie both the finding of an infringement of a right and the s. 1 justification of the infringement. What emerges from these decisions is the view that the real concern of the *Charter* is not the negative liberty of individuals, but rather their *positive liberty*, without which any concept of negative liberty is meaningless in the first place. This concern for positive liberty in turn suggests a heightened role for the concept of political equality in s. 1 jurisprudence, and in the theoretical foundations of the *Charter* itself.

## I

Rights are often conceived as protecting individuals from the state-imposed will of the majority. When someone has a right, that person is legally protected from a particular kind of interference by the state. Accordingly, one dimension of the

7. See, for instance, L. Weinrib, "The Supreme Court of Canada and Section One of the Charter" (1988) 10 Supreme Court L.R. 469 and R. Colker, "Section 1, Contextuality, and the Anti-Disadvantage Principle" (1992) 42 U.T.L.J. 77.

*Charter* is that it "guarantees the rights and freedoms set out in it."[8] At the same time, rights are commonly understood not to be absolute. This is not surprising, since the rights of one individual or group may conflict with the legitimate claims of others. Thus, a necessary second dimension of the *Charter* is that it makes rights and freedoms "subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."[9]

One of the central enigmas of the *Charter* is the relationship between the guarantee and the limitation of the right or freedom. This problem is intensified by the methodology of *Charter* analysis, by which any alleged infringement is assessed on the basis of a two-stage analysis. At the first stage, the court must determine whether the right has been infringed by the state. If it has been, the court must then proceed to the second stage to determine whether the infringement is justified under s. 1.[10]

But what precisely is necessary to justify the infringement of a *Charter* right? On one view, an infringement is justified only if it is consistent with democratic principles. If, however, democracy is understood in a manner inconsistent with the concept of a right, the relationship between the two stages of *Charter* analysis is hopelessly obscured. Moreover, even to begin to define democracy, it is essential to understand what is meant by a right in the first place. McLachlin J.'s reasons in her dissent in *Keegstra* and the struggle to define obscenity in *Butler* illustrate the problems that arise when these basic concepts—liberty and democracy—are uncritically invoked by the courts.

## The Dissent in *Keegstra*: Negative Liberty and Harm

James Keegstra, a secondary school teacher in Alberta, taught his students that Jews were responsible for many of the ills of society and expected his students to reproduce these anti-Semitic views in their exams:

> Mr. Keegstra's teachings attributed various evil qualities to Jews. He thus described Jews to his pupils as "treacherous," "subversive," "sadistic," "money-loving," "power-hungry" and "child killers." He taught his classes that Jewish people seek to destroy Christianity and are responsible for depression, anarchy, chaos, wars and revolution.

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8. *Supra*, note 3, s. 1.
9. *Ibid.*
10. The second stage of analysis is conducted pursuant to the *Oakes* test: *R.* v. *Oakes*, [1986] 1 S.C.R. 103, 26 D.L.R. (4th) 200, 24 C.C.C. (3d) 321 [hereinafter *Oakes* cited to C.C.C.]. In this case, Dickson C.J.C. set out the structure of a s. 1 analysis to determine whether a limitation of a right was demonstrably justified in a free and democratic society: first, the objective of the legislation must be of "sufficient importance" and must "relate to concerns which are pressing and substantial in a free and democratic society." If the legislation passes this first test, it is then scrutinized under the "proportionality test" to determine (1) whether the measures adopted are "rationally connected" to the objective in question; (2) whether the means employed impair "as little as possible" the right or freedom; and (3) whether the deleterious effects of the measure are proportionate to its objective or purpose (at 348).

> According to Mr. Keegstra, Jews "created the Holocaust to gain sympathy" and, in contrast to the open and honest Christians, were said to be deceptive, secretive, and inherently evil.[11]

Keegstra was charged with wilfully promoting hatred contrary to s. 319 of the *Criminal Code*.[12] The Supreme Court of Canada had to decide whether s. 319 infringed the freedom of expression guarantee in s. 2(b) of the *Charter*.[13]

The majority (Dickson C.J.C.) and the dissent (McLachlin J.) agreed that there was an infringement but disagreed as to whether it was justified under s. 1. The majority held that because hate propaganda effectively undermines the democratic values that freedom of expression seeks to promote, and because it rejects "the view that all citizens need be treated with equal respect and dignity," the infringement was justified in a free and democratic society. This article defends the view that Dickson C.J.C.'s judgment, together with the decision of the Supreme Court in *Butler*, provides a coherent political vision of the *Charter*. For now, however, it is instructive to focus on the dissent.

In her dissenting judgment, McLachlin J. found that freedom of expression was so fundamental a right that it could be limited only in the most extreme circumstances, and then, only in the most limited way. She concludes, in her s. 1 analysis, that the legislation is invalid since it is both overbroad and vague; in her view, s. 319 was not sufficiently streamlined to catch all and only those cases in which hate propaganda is truly harmful.

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11. *Supra*, note 1 at 12.

12. Section 319 of the *Criminal Code* [hereinafter s. 319] provides:

319(2) Every one who, by communicating statements, other than in private conversation, wilfully promotes hatred against any identifiable group is guilty of
  (a) an indictable offence and is liable to imprisonment for a term not exceeding two years;
  (b) an offence punishable on summary conviction.

(3) No person shall be convicted of an offence under subsection (2)
  (a) if he establishes that the statements communicated were true;
  (b) if, in good faith, he expressed or attempted to establish by argument an opinion upon a religious subject;
  (c) if the statements were relevant to any subject of public interest, the discussion of which was for the public benefit, and if on reasonable grounds he believed them to be true; or
  (d) if, in good faith, he intended to point out, for the purpose of removal, matters producing or tending to produce feelings of hatred towards an identifiable group in Canada.

(6) No proceeding for an offence under this subsection (2) shall be instituted without the consent of the Attorney General.

(7) In this section,
  "communicating" includes communicating by telephone, broadcasting or other audible or visible means;
  "identifiable group" has the same meaning as in section 318 [that is, any section of the public distinguished by colour, race, religion or ethnic origin];
  "public place" includes any place to which the public have access as of right or by invitation, express or implied;
  "statements" includes words spoken or written or recorded electronically or electro-magnetically or otherwise, and gestures, signs, or other visible representations.

13. *Supra*, note 3.

McLachlin J.'s view of freedom of expression is significant for two reasons. First, it seems to embrace an approach to rights that is rooted in the concept of negative liberty. This view of rights is committed to curtailing government activity in order to minimize the external, state-imposed constraints on the pursuit of private interests and goals. Negative liberty is secured to the extent that such restrictive legislation is avoided. Accordingly, the state is necessary only to guarantee that the individual is minimally hindered in his or her pursuits; it is merely an instrument of individuals to secure their private interests.

Second, in recognizing that there are circumstances in which rights might be limited pursuant to s. 1, McLachlin J. is forced to justify such limits on utilitarian grounds. Thus, the second stage of *Charter* analysis is regarded as "essentially a cost-benefit analysis":

> On the one hand, how significant is the infringement of the right or freedom in question? On the other hand, how significant is the benefit conferred by the impugned legislation? Weighing these countervailing considerations, has the state met the burden upon it of establishing that the limit on the constitutionally guaranteed freedom or right is reasonable and demonstrably justified in a free and democratic society?[14]

By embracing negative liberty as a conceptual framework for *Charter* rights and freedoms, McLachlin J. is necessarily committed to regarding s. 1 as a utilitarian, "*ad hoc*" balancing of fundamental rights against competing, amorphous interests. In "Two Concepts of Liberty," Isaiah Berlin distinguishes between negative and positive liberty.[15] Negative liberty is the absence of external impediments or external obstacles: "Political liberty in this sense is simply the area within which a man can act unobstructed by others."[16] The idea of negative liberty as a sphere of absolute freedom from state coercion is often regarded as the cornerstone of liberal thought. Positive liberty, in contrast, is the freedom to be one's "own master" and to participate in the collective decisions.[17]

Berlin's primary concern here is that any concept of positive liberty is necessarily inimical to a plurality of individual goals or values, and ultimately results in an authoritarian political order:

> Pluralism, with the measure of negative liberty that it entails, seems to me a truer and more human ideal than the goals of those who seek in the great, disciplined, authoritarian structures the ideal of "self-mastery" by classes, or peoples, or the whole of mankind. It is truer, because it does, at least, recognize the fact that human goals are many, not all of them commensurable, and in perpetual rivalry with one another.[18]

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14. *Supra*, note 1 at 122.
15. I. Berlin, "Two Concepts of Liberty" in M. Sandel, ed., *Liberalism and Its Critics* (New York: New York University Press, 1984) at 15–36.
16. *Ibid.* at 15–16.
17. *Ibid.* at 22–23.
18. *Ibid.* at 33.

What is crucial for defenders of negative liberty is that the state is neutral with regard to conceptions of the good. The role of the state is simply to maximize negative liberty and to ensure that each individual is equally free to pursue his or her goals, unconstrained by external impediments.

Rights, accordingly, are crucial to protect the individual from collective decisions that dictate a particular ideal. In the context of freedom of expression, the state must recognize the right of the individual to express his or her ideas, whatever their content. To make a distinction between kinds of speech on the basis of content would be to abandon this seemingly neutral role and to embrace a particular vision of the good. This concern is implicit in McLachlin J.'s discussion of freedom of expression:

> Attempts to confine the guarantee of free expression only to content which is judged to possess redeeming value or to accord with the accepted values strikes at the very essence of the freedom, reducing the realm of protected discussion to that which is comfortable and compatible with current conceptions. If the guarantee of free expression is to be meaningful, it must protect expression which challenges the very basic conceptions about our society.[19]

McLachlin J. adopts a model of rights that is committed to protecting speech, whatever its content.

There comes a point, however, when Keegstra's right to say whatever he likes interferes with the rights of others. John Stuart Mill describes the legitimate circumstances in which the state may proscribe individual action in *On Liberty*: "The only purpose for which power can rightly be exercised over any member of a civilized community, against his will, is to prevent harm to others."[20] Thus, any limitation on rights must be grounded in the concept of harm. But how is harm to be understood? One way is a narrow, external one. It focuses solely on the extent to which the conduct in question impedes the actions of others. Accordingly, Keegstra's actions were not harmful since, presumably, it was open to others to counter his speech;[21] *their* liberty to speak out was not impeded. Alternatively, harm could be understood broadly, including within its scope the very capacity of individuals to participate meaningfully in society. Thus, Keegstra's speech would be harmful since it undermines the ability of Jews to participate in society with equal respect.

In the context of *Charter* litigation, however, when a harm is regarded as a legitimate basis for limiting rights, harm is often construed narrowly. The question is simply whether the conduct interferes with the negative rights of others. On this understanding of harm, only to the extent that a person's activities create external obstacles to the exercise of liberty must those activities be constrained by the state.

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19. *Supra*, note 1 at 107.

20. J.S. Mill, *On Liberty* (Harmondsworth, U.K.: Penguin, 1986) at 68.

21. That someone could have countered Keegstra's speech was dubious on the facts of this case, since the hate propaganda was disseminated in the closed setting of a classroom (a point mysteriously overlooked by both the majority and the dissent).

The idea that harm may be a legitimate reason for limiting rights is imported into the *Keegstra* decision by McLachlin J., but with an ostensibly wider vision of what harm might include:

> Freedom of expression protects certain values which we consider fundamental—democracy, a vital, vibrant and creative culture, the dignity of the individual. At the same time, free expression may put other values at risk. It may harm reputations, incite acts of violence. It may be abused to undermine our fundamental governmental institutions and undercut racial and social harmony.[22]

So freedom of expression, while crucial, is not absolute. But depending on what the concept of harm encompasses, the scope of freedom of expression will be more or less wide. As will become clear, the problem with McLachlin J.'s understanding of liberty is that it is still tied to the narrow understanding of harm described above.[23]

According to Catherine MacKinnon, the classical liberal approach to rights[24] and its commitment to state neutrality make it blind to structural injustices such as, in the context of pornography, the subordination of women:

> The liberal theory underlying the First Amendment law further believes that free speech, including pornography, helps to discover the truth. Censorship restricts society to partial truths. . . . Laissez-faire might be an adequate theory of the social preconditions for knowledge in a nonhierarchical society. But in a society of gender inequality, the speech of the powerful impresses its view upon the world, concealing the truth of the powerless under that despairing acquiescence that provides the appearance of consent and makes protest inaudible as well as rare.[25]

Liberal theory, in protecting individuals from state interference, allegedly cannot probe beyond the external, physical harms created by rampant negative liberty. It is unable to comprehend disparities in political power or internal, psychological barriers created and perpetuated by negative social stereotypes.

For McLachlin J., words seem to be mere ideas that are open to scrutiny and disagreement and that, when deemed unreasonable, can simply be rejected. But since it is impossible to determine in advance which ideas are unreasonable, everything is permitted:

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22. *Keegstra, supra*, note 1 at 81.
23. See L. Weinrib, "Hate Promotion in a Free and Democratic Society: *R.* v. *Keegstra*" (1991) 36 McGill L.J. 1416 at 1442 for a discussion of the problems with McLachlin's empirical approach. As Weinrib remarks, "McLachlin J.'s discussion denies the normative function of the criminal law, and ignores the care that went into the drafting of s. 319" (at 1443).
24. The classical view is often attributed to Mill. However, Mill's understanding of rights is not necessarily committed to the narrow view: see *infra*, note 92 and accompanying text.
25. C. MacKinnon, *Feminism Unmodified* (Cambridge, Mass.: Harvard University Press, 1987) at 156. See also A. Dworkin, "Against the Male Flood" (1985) 8 Harv. Women's L.J. 351.

> It is impossible to imagine a vigorous political debate on a contentious issue in which the speakers did not seek to undermine the credibility of the ideas, conclusions and judgment of their opponents. Yet such a debate is essential to the maintenance and functioning of our democratic institutions.[26]

The possibility that ideas can have a damaging effect on the ability of individuals to participate in the political process is disregarded by McLachlin J. because she refuses, on the basis of precedent,[27] to inquire into the *content* of the expressive activity in question. Instead of reconsidering the appropriateness of the neutrality doctrine in the light of the circumstances of this case, she confines her analysis to the "neutral" task of assessing the form of the activity.[28] In her s. 2(b) analysis, she therefore finds "nothing in the form of such [hateful] statements which subverts democracy or our basic freedoms in the way in which violence or threats of violence may."[29]

This commitment to "neutrality" is precisely what MacKinnon considers the fatal flaw of liberalism:

> Liberal morality cannot deal with illusions that *constitute* reality because its theory of reality, lacking a substantive critique of the distribution of social power, cannot get behind the empirical world, truth by correspondence.[30]

Because McLachlin J. refuses to look at the deeper psychological and political consequences of hate propaganda, she is forced, in her s. 1 analysis, to assess the more tangible harms: the risk that benign speech will be proscribed, or the possibility that the legislation will backfire or be ineffectual. These potential problems she weighs against freedom of expression in her overtly utilitarian calculus, an approach that seems manifestly at odds with the concept of a right.[31] But this approach is

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26. *Supra*, note 1 at 100. This permissive approach to "words" is echoed in her judgment in *R.* v. *Seaboyer and Gayme* (1991), 66 C.C.C. (3d) 321 at 341 (S.C.C.) [hereinafter *Seaboyer*]. The issue was whether the provisions of the *Criminal Code* limiting the admissibility of evidence relating to the complainant's prior sexual conduct were constitutional. McLachlin J. held that the danger that negative gender stereotypes would undermine the testimony of the complainant was an inadequate justification for limiting the accused's ss 7 and 11(d) rights.
27. See, for instance, *Ford* v. *Quebec (A.G.)* (1988), 54 D.L.R. (4th) 577; *Irwin Toy Ltd.* v. *Quebec (A.G.)* (1989), 58 D.L.R. (4th) 577.
28. See Weinrib, *supra*, note 23 at 1438. Weinrib suggests that in the light of Canada's international commitments relating to the control of hate propaganda, a reconsideration of the neutrality doctrine would have been appropriate.
29. *Supra*, note 1 at 99.
30. *Supra*, note 25 at 162.
31. See Wilson J.'s comments to this effect in *Singh* v. *Minister of Employment and Immigration*, [1985] 1 S.C.R. 177 at 218 [hereinafter *Singh*].

inevitable when harm is regarded as non-political;[32] that is, when harm to positive liberty is not at issue, limitations on rights can be justified only on empirical, utilitarian considerations.[33]

I shall return to the concept of positive liberty and the integral role that it has in resolving the problem of harm within both the rights paradigm and the analytic framework of the *Charter*. For now, the crucial point is that in embracing negative liberty as a model of *Charter* rights, the relationship between the first stage (the determination of the infringement) and the second stage (the justification of the infringement) becomes obscured. Rights must be weighed against other considerations, but it is unclear what these considerations ought to be and what weight they should have. The result is that in adopting a model of negative liberty the courts must engage in a process of "*ad hoc*" balancing that is both unprincipled and arbitrary.

## The Dissent in *Keegstra*: Democracy and Majoritarianism

Another problem with McLachlin J.'s approach to the *Charter* is that its utilitarian underpinnings imply a procedural view of democracy. What must be safeguarded, on this view, is the mechanism for making collective decisions; whether the mechanism itself is substantively adequate is beyond the scope of her analysis.[34] What will become clear in this section is that the "free and democratic society" in s. 1 cannot coherently be understood in terms of majoritarianism.

McLachlin J.'s view of democracy in *Keegstra* is both vague and uncertain. She seems to oscillate between the narrow view that democracy means simply "democratic institutions"[35] and the somewhat broader view that democracy requires a form of "participatory government."[36] In either context, however, her view of democracy is an institutional, procedural one. Freedom of expression is important because it is "instrumental in promoting the free flow of ideas essential to political democracy and the functioning of democratic institutions."[37] Coupled with the view

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32. By non-political, I mean unconcerned with or oblivious to political power and structural inequities (see MacKinnon, *supra*, note 25).
33. For Lorraine Weinrib, *supra*, note 7, the idea that s. 1 of the *Charter* embodies the same values as those behind the rights (see *Oakes*, *supra*, at note 10) themselves militates against the utilitarian conception of s. 1: "The identity of values and underlying rights and their limits accounts for the pattern that we have seen in the [early *Charter*] judgments, the consistent rejection of considerations foreign to the enterprise of guaranteeing rights—such as cost, efficiency, custom and convenience—as inappropriate to the second stage of Charter argument" (at 494–95).
34. The dangers of the procedural or majoritarian approach to democracy are also apparent when we turn to the *Butler* decision. In his majority decision, Sopinka J. explains that the definition of obscenity should not be regarded as a function of the prevailing attitudes of community. To understand obscenity in this way would be to embrace as legitimate legal moralism, the view that the law can proscribe any activity that the majority finds offensive.
35. *Supra*, note 1 at 99. When discussing the"workings of democracy," she refers to political debates among "for example, cabinet ministers or members of the opposing party" (at 99).
36. *Ibid.* at 113.
37. *Ibid.* at 78.

that freedom of expression is the "pivotal freedom on which all others depend,"[38] the inevitable conclusion is that rights are important only to the extent that they contribute to the smooth functioning of a procedural democracy.

This understanding of democracy is challenged by Samuel Freeman in "Constitutional Democracy and the Legitimacy of Judicial Review." For Freeman, judicial review can be justified only when democracy is understood as a substantive commitment to political equality:

> Rather than seeing democracy in procedural terms, we might conceive its essential features in terms of the equal freedom and independence of its citizens. This fundamental democratic value is specified by equal rights of self-determination, and equal participation in the political procedures that settle laws and basic social institutions affecting citizens' life-prospects. The focus here is not upon individuals' unconstrained preferences and their equal consideration in (maximizing) the aggregate satisfaction of interests, but on the capacity and interest of each person to rationally decide and freely pursue his interests, and participate on equal terms in political institutions that promote each person's good.[39]

The procedural mechanisms of democracy are secondary to the concern that each person be equally capable of participating in the democratic process. Individuals must not be prevented from contributing either to the community or to the wider social discourse merely because of non-procedural constraints.

In *Carter* v. *Saskatchewan (A.G.)*,[40] McLachlin J. seems very much aware of the importance of positive liberty. She even appears to agree that one of the purposes of rights is to augment positive liberty and political equality. In *Carter*, the Supreme Court was asked whether a disparity in the population among the provincial constituencies in Saskatchewan would violate the right to vote guaranteed in s. 3 of the *Charter*.[41] The proposed electoral boundaries would have provided that ridings in the sparsely populated north would comprise fewer voters than those in the south, and therefore each voter in the northern ridings would have a proportionally greater voice in the Legislature (through the elected representative) than his or her southern neighbours.[42]

McLachlin J. upholds the validity of the disparity, citing the importance of effective representation in her reasons. She explains that "geography, community history, community interests and minority representation may need to be taken into account to ensure that our legislative assemblies effectively represent the diversity

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38. *Ibid.*

39. S. Freeman, "Constitutional Democracy and the Legitimacy of Judicial Review" (1991) 9 *Law and Philosophy* 327 at 331.

40. (1991), 5 C.R.R. (2d) 1 [hereinafter *Carter*].

41. Section 3 provides: "Every citizen of Canada has the right to vote in an election of members of the House of Commons or of a legislative assembly and to be qualified for membership therein."

42. The numerical disparity among the southern ridings themselves was also challenged under s. 3.

'of our social mosaic."[43] The argument here, in contrast to the dissent in *Keegstra*, seems to be that a formal requirement of the democratic process (the right to an equal vote) may have to yield to more substantive goals of equality and effective "minority representation." In a particularly revealing passage, she cites Dickson C.J.C.:

> The concerns which Dickson C.J.C. in *Oakes* associated with a free and democratic society—respect for the inherent dignity of the human person, commitment to social justice and equality, respect for cultural and group identity, and faith in social and political institutions which enhance the participation of individuals in society—are better met by an electoral system that focuses on effective representation than by one that focuses on mathematical parity.[44]

McLachlin J. seems to consider the mathematical parity of electoral boundaries a greater impediment to democracy than the "pain and indignity upon individuals" caused by hate propaganda in *Keegstra*.[45]

*Carter* raises the issue of political equality. In *Carter*, political equality is understood as an equal say in representative government. But in any political system where the vote of each counts equally, the "tyranny of the majority" is an ever-present danger. For this reason, what is imperative is not that the view of the majority always prevail, but rather that individuals be capable of participating with equal respect and dignity within the political process. This view was eloquently articulated by Alexis de Tocqueville in his treatise on democracy:

> It is possible to imagine an extreme point at which freedom and equality would meet and be confounded together. Let us suppose that all the people take part in the government, and that each one of them has an equal right to take part in it. As no one is different from his fellows, none can exercise a tyrannical power; men will be perfectly equal, because they are all entirely free. To this ideal state democratic nations tend.[46]

For de Tocqueville, the vision of a "free and democratic society" envisioned in s. 1 of the *Charter* would not be regarded as paradoxical, but rather as an expression

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43. *Supra*, note 40 at 10.

44. *Ibid.* note 39 at 13.

45. *Supra*, note 1 at 85.

46. A. de Tocqueville, *Democracy in America*, ed. by Richard D. Heffner (Harmondsworth, U.K.: Penguin, 1984) at 189. In his political writings on the French Revolution and the American polity, Alexis de Tocqueville is acutely aware of a profound tension between equality and liberty. His concern is that the demands of equality would level the aristocratic structure of society and yield to the widespread suppression of liberty. De Tocqueville warns of a depraved passion for equality that makes us prefer "equality in slavery" to "inequality with freedom." But this result is not inevitable, for he finds a political solution to tyranny in the pervasive political activity of America. It is in this political activity that his understanding of positive liberty is found.

of the true nature of democracy. The equal political condition of individuals is intimately connected to their freedom.

Liberty is enabling; it gives us the ability to take control of the larger impersonal forces that affect our lives. What is crucial is not our ability to be free from constraints, but rather to be able to determine precisely what those constraints will be. This notion of liberty, however, relies on an understanding of equality, and particularly of political equality. What Freeman, de Tocqueville, and other liberal democrats want to do is to build into the concept of liberty (and rights) a substantive notion of equality. Not only does this project make sense of the political structure of democracy; it also provides a coherent picture of the relationship between *Charter* rights and the limitation of those rights in a "free and democratic society." The problem now arises that once we admit that the concept of a right is linked to a political vision of society, it becomes necessary to draw a clear line between a political and a moral vision of society. The decision in *Butler* reveals that if this line is not firmly established, the danger of state-sanctioned moralism or cultural hegemony emerges.

## *Butler*: Democracy and the Danger of Legal Moralism

In *Butler*, the Supreme Court of Canada had to decide whether the obscenity provisions in s. 163[47] of the *Criminal Code* violate s. 2(b) of the *Charter*. The definition of obscenity for the purposes of these provisions is found in subsection (8), which provides:

> **(8)** For the purposes of this Act, any publication a dominant characteristic of which is the undue exploitation of sex and any one or more of the following subjects, namely, crime, horror, cruelty and violence, shall be deemed to be obscene.

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47. Section 163 of the *Criminal Code*, *supra*, note 4 [hereinafter s. 163], provides:

163.(1) Everyone commits an offence who,
- (a) makes, prints, publishes, distributes, circulates, or has in his possession for the purpose of publication, distribution or circulation any obscene matter, picture, model, phonograph record or other thing whatever, or
- (b) makes, prints, publishes, distributes, sells or has in his possession for the purpose of publication, distribution or circulation a crime comic.

(2) Everyone commits an offence who knowingly, without lawful justification or excuse,
- (a) sells, exposes to public view or has in his possession for such a purpose any obscene written matter, picture, model, phonograph record or other thing whatever;
- (b) publicly exhibits a disgusting object or an indecent show . . . .

(5) For the purposes of this section, the motives of the accused are irrelevant.

(6) Where an accused is charged with an offence under subsection (1), the fact that the accused was ignorant of the nature or presence of the matter, picture, model, phonograph record, crime comic or other thing by means of or in relation to which the offence was committed is not a defence to the charge. . . .

To determine the constitutional validity of s. 163, the Court had first to clarify the meaning of "undue exploitation" in subsection (8) to determine what kinds of materials would be prohibited.

Sopinka J. considers three tests used by the courts: the community standard of tolerance test, the degradation or dehumanization test, and the internal necessities test or artistic defence. The community standards test asks whether the "Canadian community as a whole" would tolerate other Canadians being exposed to the impugned materials.[48] The degradation or dehumanization test focuses primarily on materials that portray sex in conjunction with cruelty and violence;[49] in some jurisdictions, however, such materials have been held to include degrading or dehumanizing material that do not contain such violence but that place women "in positions of subordination, servile submission or humiliation."[50] Finally, the internal necessities test or artistic defence exempts from the prohibition materials in which the "undue exploitation" is required for the "serious treatment of a theme," having regard to "the author's artistic purpose, the manner in which he or she has portrayed and developed the story, the depiction and interplay of character and the creation of visual effect through skilful camera techniques."[51]

The problem, however, is that the case law had not adequately explained the relationship of these tests to one another. In clarifying these tests, Sopinka J. explains that the overriding consideration is the risk of harm, based on a community standard of tolerance. He proposes the following approach: "The courts must determine as best they can what the community would tolerate others being exposed to on the basis of the degree of harm that may flow from such exposure."[52] Harm, he explains, involves the creation of a predisposition "to act in an anti-social manner" and involves behaviour that the society regards as "incompatible with its proper functioning."[53] He therefore proposes the following test:

> [T]he portrayal of sex coupled with violence will almost always constitute the undue exploitation of sex. Explicit sex which is degrading or dehumanizing may be undue if the risk of harm is substantial. Finally explicit sex that is not violent and neither degrading nor dehumanizing is generally tolerated in our society and will not qualify as the undue exploitation of sex unless it employs children in its production.[54]

Sopinka J. is apparently concerned that the test for obscenity will be based on the "individual tastes of judges" and thus endeavours to determine a "norm that

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48. *Towne Cinema Theatres Ltd.* v. *The Queen*, [1985] 1 S.C.R. 494.
49. *R.* v. *Doug Rankine Co.* (1983), 9 C.C.C. (3d) 53 (Ont. Co. Ct.).
50. *Per* Sopinka J. in *Butler, supra*, note 2 at 22, referring to *R.* v. *Ramsingh* (1984), 14 C.C.C. (3d) 230 (Man. Q.B.). and *R.* v. *Wagner* (1985), 43 C.R. (3d) 318 (Alta. Q.B.).
51. *Butler, supra*, note 2 at 149, referring to *Brodie* v. *The Queen*, [1962] S.C.R. 681 and *R.* v. *Odeon Morton Theatres Ltd.* (1974), 16 C.C.C. (2d) 185.
52. *Butler, supra*, note 2 at 150.
53. *Ibid.* at 151.
54. *Ibid.*

will serve as an arbiter in determining what amounts to an undue exploitation of sex."[55] However, rather than developing criteria independent of *community* tastes and biases, he decides that the arbiter "is the community as a whole."[56] In spite of the reference in Sopinka J.'s test to the "risk of harm" to society, the community still seems to have the final say in the definition of harm, and thus of obscenity. The danger of majoritarianism once again emerges.

On this understanding of s. 163 and the "undue exploitation" of sex, Sopinka J. turns to the issue of freedom of expression. His finding of a s. 2(b) violation is deferential to the "generous approach to the protection afforded by s. 2(b)" in *Keegstra*, and remains faithful to the view that "activities cannot be excluded from the scope of the guaranteed freedom on the basis of the content or meaning being conveyed."[57] Despite this cursory treatment of the issue, however, concerns about the content of the obscene materials resurface at the s. 1 stage of analysis.

Sopinka J. alludes to two possible ways of characterizing the objective of the obscenity provisions: the defence of public morality and the safeguarding of fundamental political values. On the first view, adopted by the Court in the 19th-century decision on obscenity, *R.* v. *Hicklin*, the provision is meant to protect society from the "corruption of morals."[58] On this view, the public interest in a "decent" society is linked to public morality or the common understanding of good and evil. Sopinka J. regards this approach with suspicion:

> To impose a certain standard of public and sexual morality, solely because it reflects the conventions of a given community, is inimical to the exercise and enjoyment of individual freedoms, which forms the basis of our social contract. D. Dyzenhaus . . . refers to this as "legal moralism" of a majority deciding what values should inform individual lives and then coercively imposing those values on minorities.[59]

The point here is that, for liberals, the imposition by the state of a particular public vision of morality, specifically sexual morality, is inimical to individual freedom.[60]

The view that society is justified in legally enforcing morality is defended by Patrick Devlin in "Morality and the Criminal Law."[61] For Devlin, a common moral vision is essential for the proper functioning of a society. On that basis, he argues, criminal provisions that prohibit homosexuality, if homosexuality is deeply offensive to the public sense of morality, are entirely legitimate. This vision of the criminal law, which echoes the *Hicklin* view of the corruption of morals, assumes

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55. *Ibid.* at 150.
56. *Ibid.*
57. *Supra*, note 2 at 153.
58. (1868), L.R. 3 Q.B. 360 cited by Sopinka J. in *Butler*, *supra*, note 2 at 142.
59. *Butler*, *supra*, note 2 at 156. The David Dyzenhaus article to which Sopinka refers is "Obscenity and the Charter: Autonomy and Equality" (1991) 1 C.R. (4th) 367.
60. See R. Dworkin, "Liberty and Moralism" in *Taking Rights Seriously* (Cambridge, Mass.: Harvard University Press, 1978) at 240–58.
61. In *The Enforcement of Morals* (Oxford: Oxford University Press, 1965).

that the moral views of the majority can be imposed on an opposing minority. This is what David Dyzenhaus means by "legal moralism."[62]

The problem with legal moralism is that it confounds public morality with political morality or basic political values. The second view of the purpose of the obscenity provisions is to protect these fundamental values. Although Sopinka J. does not distinguish clearly between public morality and political morality, he recognizes the legitimacy of legislation with regard to the latter:

> I cannot agree with the suggestion . . . that Parliament does not have the right to legislate on the basis of some fundamental conception of morality for the purposes of safeguarding the values which are integral to a free and democratic society.[63]

Much of the criminal law, he explains, is based on "conceptions of right and wrong and the mere fact that a law is grounded in morality does not automatically render it illegitimate."[64]

This qualification of the illegitimacy of legal moralism tends to obscure the apparent distinction between moral and political values. Moral values (or "conventional morality"), in Devlin's sense, concern the actual views of the community regarding the propriety of certain types of behaviour. It concerns what is sometimes regarded as lifestyle choices of a personal, rather than a public, nature. In contrast, political values are linked to the very nature of the political order and the relationship between the individual and the state. Sopinka J.'s conclusion that the overriding purpose of the legislation is the "avoidance of harm to society"[65] is equivocal between the corresponding versions of the legislative objective described above. Thus, "harm to society" may as easily refer to Devlin's moral harm as to political harm.

The reason for this ambiguity becomes clear in Sopinka J.'s subsequent discussion of the "shifting purpose" doctrine, according to which the "purpose of legislation may shift or be transformed over time by changing social conditions."[66] This doctrine was expressly rejected by the Court in *R.* v. *Big M Drug Mart Ltd.* Having already observed that the initial purpose of obscenity legislation was the prevention of corruption of morals,[67] Sopinka J. seems compelled to characterize the legislative objective abstractly, as the prevention of harm, to avoid contradicting *Big M Drug Mart* by admitting the further objective of protecting fundamental political values. Thus, he is able to claim both that "moral corruption" and "harm" are linked[68] and that while the prevention of harm is still the overarching objective of

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62. *Supra*, note 59.
63. *Butler*, *supra*, note 2 at 156.
64. *Ibid.*
65. *Ibid.* at 157.
66. (1985), 18 D.L.R. (4th) 321 at 352 (S.C.C.) [hereinafter *Big M Drug Mart* cited to 18 C.C.C. (3d) 385].
67. *Butler*, *supra*, note 2 at 142.
68. *Ibid.* at 157.

the legislation, the understanding of what "harm" consists of may have changed.[69] In successfully, albeit obliquely, avoiding the conclusion that the purpose of the legislation has shifted, he is forced to conclude that the legislation has a dual—moral and political—character.

But Sopinka J. is quick to offer this *caveat* from the decision of the majority in *Keegstra*: the prevention of harm is intimately linked to the sense of dignity of the affected group. His concern seems to be political rather than moral (in the sense of these terms described above):

> This Court has thus recognized that the harm caused by the proliferation of materials which seriously offend the values fundamental to our society is a substantial concern which justifies restricting the otherwise full exercise of the freedom of expression. In my view, the harm sought to be avoided in the case of the dissemination of obscene materials is similar. . . . [I]f true equality between male and female persons is to be achieved, we cannot ignore the threat to equality resulting from exposure to audiences of certain types of violent and degrading material. Materials portraying women as a class of objects for sexual exploitation and abuse have a negative impact on the "individual's sense of self-worth and acceptance."[70]

The vision of a society committed to equal dignity and respect in this passage implicitly acknowledges Catherine MacKinnon's concern[71] that pornography results in structural injustices, and embraces a genuine concern for positive liberty. Sopinka J.'s recognition of these fundamental political values leads him to the conclusion that the s. 2(b) infringement is justifiable in a free and democratic society.

The concurring (minority) decision of Gonthier J., referring to Ronald Dworkin's "Liberty and Moralism,"[72] makes the theoretical distinction between what I have called the "moral" and the "political" somewhat sharper. For Dworkin, conventional morality refers to a community's "morals" or "morality" or "moral position" (what Dworkin refers to as the morality in the "anthropological sense"), while morality in the political sense presupposes a more general and overarching moral principle or theory (hence "fundamental"). The latter type of morality is defined by a "wide consensus among holders of different conceptions of the good and is necessary before the state can intervene in the name of morality."[73] For Gonthier J., prohibitions against obscenity are concerned with the "fundamental [political] conception of morality":

> [O]ne of the chief aspirations of morality is the avoidance of harm. It is well grounded, since the harm takes the form of violations of the principle of human equality and

69. *Ibid.* at 158.

70. *Supra*, note 1 at 35.

71. See my discussion of MacKinnon's views on pornography and liberalism, *supra*, note 25 and accompanying text.

72. *Supra*, note 60.

73. *Butler*, *supra*, note 2 at 178, *per* Gonthier J.

> dignity. Obscene materials debase sexuality. They lead to the humiliation of women, and sometimes to violence against them. This is more than just a matter of taste.[74]

Fundamental political values, rather than conventional morality, thus define the legitimate role of the state in a democratic society.

The proportionality branch of the *Oakes* test is applied by Sopinka J. on the understanding that the purpose of s. 163 is the amelioration of gender inequities in society. Thus, Sopinka J. can agree with the "anti-censorship feminists"[75] that "good pornography" that portrays sexual relations as a "celebration of human sexuality"[76] between equals is not harmful to society or, presumably, to positive liberty. The proportionality test therefore focuses on the extent to which the obscenity provisions, which prohibit materials harmful to society, are proportionate to the harm caused by the limitation to freedom of expression.

In his assessment whether the measures adopted in the legislation are rationally connected to the objective, Sopinka J. rejects McLachlin J.'s narrow approach to harm in *Keegstra* and adopts Dickson C.J.C.'s more generous approach:

> [T]o predicate the limitation of free expression on actual harm gives insufficient attention to the severe trauma suffered by members of those identifiable groups targeted by hate propaganda. Second, it is clearly difficult to prove a causative link between a specific statement and hatred of an identifiable group.[77]

Sopinka J. concludes that Parliament "was entitled to have a 'reasonable apprehension of harm'" and that the link between the legislation and the objective of restricting "the negative influence" of pornography on social attitudes toward women is sufficiently rational.[78]

The minimal impairment analysis cites five features of the legislation that relate to its breadth: (1) s. 163 does not prohibit sexually explicit material ("good

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74. *Ibid.*

75. See, for instance, R. West, "Pornography as a Legal Text: Comments from a Legal Perspective" in Guber & Hoff, eds, *For Adult Users Only: the Dilemma of Violent Pornography* (Bloomington and Indianapolis: Indiana University Press, 1989) at 108–30.

76. *Butler*, *supra*, note 2 at 161. Sopinka J. refers to R. West, "The Feminist-Conservative Anti-Pornography Alliance and the 1986 Attorney General's Commission on Pornography Report" (1987) 4 Am. Bar Found. Res. Jo. 681.

77. Per Dickson C.J.C. in *Keegstra*, *supra*, note 1, as cited in *Butler*, *supra*, note 2 at 163. Curiously, Sopinka J. also cites McLachlin J. (dissenting) where she acknowledges the "wrenching impact" of hate propaganda on members of the target group, but then remarks that the link between the speech and the harm suffered is impossible to assess with precision (*Butler* at 164, citing *Keegstra* at 118–19). The latter point, however, forms the basis of McLachlin J.'s overbreadth argument that leads her to declare unconstitutional the hate propaganda provisions. In another curious passage, Sopinka J., having just declared the harm suffered in *Butler* to be of a similar nature to the harm in *Keegstra*, goes on to distinguish *Keegstra* on the ground that while the dissent in *Keegstra* found there to be no rational connection between the harm and the legislation, "the same cannot be said [in *Butler*]." This remarkable and paradoxical concession can perhaps be explained by the fact that McLachlin J. signed on to Sopinka J.'s judgment in *Butler*.

78. *Butler*, *supra*, note 2 at 164.

pornography"); (2) "materials which have scientific, artistic or literary merit are not captured by the provision"; (3) more specific legislation has been shown to be "destined to fail"; (4) the provision does not extend to the private viewing of obscene materials; and (5) less intrusive measures would be ineffective.[79] For these reasons, the Court concludes that the impairment of freedom of expression is minimized.[80]

It appears initially that in the last stage of the proportionality test Sopinka J. intends to engage in the "*ad hoc*" balancing of interests characteristic of the McLachlin J. dissent in *Keegstra*. The question, he explains, is whether the "effects of the law so severely trench on a protected right that the legislative objective is outweighed by the infringement."[81] In spite of the use of the language of balancing, however, the final assessment seems to turn not on the notion that the effects of the legislation necessarily "outweigh" the curtailing of free expression, but on the particular empowering nature of the objective of the obscenity provision:

> The objective of the legislation, on the other hand, is of fundamental importance in a free and democratic society. It is aimed at avoiding harm, directly or indirectly, to individuals, groups such as women and children, and consequently to society as a whole, by the distribution of these materials. *It thus seeks to enhance respect for all members of society, and non-violence and equality in their relation to each other.* I therefore conclude that the restriction on freedom of expression does not outweigh the importance of the legislative objective [emphasis added].[82]

The crux of the reasoning in this passage, and throughout the decision, is that the legislation is meant to ameliorate the social condition and status of a particular group in society.

To be fair, we may overlook Sopinka J.'s use of the language of balancing. It is hard to imagine how even a non-utilitarian judge could decide this case without "balancing" something. Indeed, even *Oakes*, which concretized the structure of

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79. *Ibid.* note 2 at 164–67.

80. I want to comment briefly on the last three points. With regard to (3), it is unclear why the failure of prior attempts to define obscenity more precisely should be relevant to whether the existing legislation "impairs as little as possible" freedom of expression. Rather, what seems crucial is whether the Court, through judicial interpretation, is able to arrive at a coherent and reasonably predictable test. Moreover, points (4) and (5) seem paradoxical. In his discussion of (4), Sopinka J. explains that the obscenity provisions have not been extended "to the private use or viewing of obscene materials," but then suggests in point (5) that restrictions on the "time, manner and place" of the viewing are inconsistent with a recognition of the harmful nature of obscene materials generally on the status of women. He explains: "Once it has been established that the objective is the avoidance of harm . . . it is untenable to argue that these harms could be avoided by placing restrictions on access to such material" (*Ibid.* at 43). But if the harm occurs regardless of the restrictions on time and place, his discussion of the private-public distinction in point (4) seems superfluous. On the basis of the argument in point (5), the extension of the obscenity provisions into the private realm would be justified.

81. *Ibid.* at 167–68.

82. *Ibid.* at 168.

*Charter* analysis, employs this imagery.[83] The ability of the right to promote the broader goals of the *Charter* needs to be assessed against the effectiveness of the legislation in securing those same goals. This linking of the purpose of the right and the limitation, however, assumes a unitary vision of the *Charter*. The next section of the article will explain how this unitary approach can be illustrated through the concept of positive liberty.

## II

Before turning to the unifying vision of the *Charter*, it is necessary to review the substantive components of the *Keegstra* dissent and the *Butler* decision. In *Keegstra*, McLachlin J. adopted a view of rights that seems to have its roots in the concept of negative liberty. On this model, liberty and rights require the absence of external obstacles to individual action. However, by conceiving rights in this way, the only justification for their limitation is the notion of harm, understood in a narrow, empirical manner. The concept of democracy is also used to give significant weight to majoritarianism and, obliquely, to the "*ad hoc*" and unprincipled balancing of rights and interests.

In *Butler*, however, the concept of democracy takes on a slightly different complexion; it becomes entwined with the idea of a common community standard on matters of sexual morality. But this vision of democracy confounds the idea of a public morality in matters regarded as personal, lifestyle choices with fundamental values on which the political structure of the society depends. Lifestyle choices are regarded as beyond the scope of the Legislature in a free and democratic society, while the preservation of fundamental political values seems almost to be its *raison d'être*. The decision in *Butler* relies on this theoretical distinction between the moral and the political; the *Charter* is necessary to protect the fundamental *political* values of society. To the extent that the political structure is a free and democratic one, these values seem to embody respect, dignity, and political equality for all persons and therefore the positive liberty or empowerment of the disadvantaged. Thus, the *Butler* decision, which follows the lead of the majority in *Keegstra*, provides a basis for a unified vision of the *Charter*.

### *Keegstra*: Positive Liberty and the Unitary Charter

The majority in *Keegstra*, it will be recalled, held that the hate propaganda provision is a justifiable limitation on freedom of expression under s. 1. Dickson C.J.C. grounds his approach on the unitary vision characteristic of the early *Charter* jurisprudence. He explains that a free and democratic society "embraces the very same values and principles which Canadians have sought to protect and further

83. In setting out the *Oakes* test, *supra*, note 10, Dickson C.J.C. explains that the courts must "balance the interests of society with those of the individuals or groups" (at 348).

by entrenching specific rights and freedoms in the Constitution" and refers to the following passage from *Oakes*:

> The court must be guided by the values and principles essential to a free and democratic society which I believe embody, to name but a few, respect for the inherent dignity of the human person, commitment to social justice and equality, accommodation of a wide variety of beliefs, respect for cultural and group identity, and faith in the political institutions which enhance participation of individuals and groups in society. The underlying values of a free and democratic society are the genesis of the rights and freedoms guaranteed by the Charter and the ultimate standard against which a limit on a right or freedom must be shown to be reasonably and demonstrably justified.[84]

This passage reveals both a unitary vision of the *Charter* and a substantive conception of positive liberty. Accordingly, the *Charter* is committed not merely to the protection of the individual from external interference from the state, but also to the furthering of equality and social justice.

Dickson C.J.C. is thus able to characterize hate propaganda as antithetical to these values, such that "members of identifiable groups are not given equal standing in society" and are undeserving of "concern, respect, and consideration."[85] Hate propaganda is inimical to the notion, underlying positive liberty, that individuals should be their own masters and should have a say in the decisions that affect their liberty. The impugned provisions of the *Criminal Code* are meant to nullify the socially destructive effects of this kind of expression, which is "anathemic to democratic values."[86] The majority in *Keegstra* concludes that the provisions are neither vague nor overbroad, but are necessary to "send a strong message of condemnation" and both to reinforce the values underlying the legislation and to deter others from intentionally disseminating hate propaganda.[87]

Lurking behind this judgment is a concern that the *Charter* not be self-defeating. To the extent that rights militate against the *Charter*'s underlying vision of society, they should be limited:

> In interpreting and applying the Charter I believe that the courts must be cautious to ensure that it does not simply become an instrument of better suited individuals to roll back legislation which has as its object the improvement of less advantaged persons.[88]

Dickson C.J.C., in this brief passage, captures an important truth about the *Charter* and about the nature of rights in general: when stripped of their purpose, rights can be as debilitating as they can be progressive. A right can be used improperly as a

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84. *Keegstra*, *supra*, note 1 at 29, citing *Oakes*, *supra*, note 10 at 346.

85. *Keegstra*, *supra*, note 1 at 44.

86. *Ibid.* at 50.

87. *Ibid.* at 65.

88. *Edwards Books and Art Ltd.* v. *The Queen* (1986), 35 D.L.R. (4th) 1 at 49 (S.C.C.) [hereinafter *Edwards Books*], Dickson C.J.C.

shield from appropriate state intervention or as a sword against others, or both. An appreciation of the social and historical context is necessary to determine when to limit the right. What links rights and limitations is the notion of positive liberty.

## Positive Liberty in a Free and Democratic Society

In our modern context, the threat to individual liberty comes not just from the state but also from the underlying social and cultural myths and stereotypes embedded in our institutions,[89] as well as the intractable economic forces that lead to other kinds of disparities in power. Some scholars have argued that rather than inhibiting government action, the modern state should protect its citizens from the unpredictable forces of corporate power: "The reality is that power rests predominantly outside the public service, and predominantly in the corporate sector. Judicial review does nothing to constrain that abuse of power."[90] Others, like MacKinnon, argue that the major problem with the liberal state is its inability to address the structural obstacles to political liberty:

> If one group is socially granted the positive freedom to do whatever it wants to another group, to determine that the second group will be and do this rather than that, no amount of negative freedom legally guaranteed to the second group will make it the equal of the first. For women, this has meant that in civil society, the domain in which women are distinctively subordinated and deprived of power, has been placed beyond the reach of legal guarantees. . . . The negative state cannot address their situation in any but an equal society—the one in which it is needed the least.[91]

Liberalism, in its commitment to neutrality, is blind to these economic and social injustices.

But liberalism need not be committed to the narrow, neutral role ascribed to it by these critics. Even Mill, the reputed founder of modern liberal thought, recognized in "The Subjection of Women" that there are invisible structural forces which perpetuate social inequality. For Mill, the subordinate status of women is not natural but a "result of forced repression in some directions, unnatural stimulation

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89. See L'Heureux-Dubé J.'s dissent in *Seaboyer, supra*, note 26. In the context of sexual assault, she makes the following observation about the pervasiveness of the myths and stereotypes that plague social perceptions of consent (at 341): "[I]ndividuals involved in the processing of complaints are a product of our larger society. While it is clear that those who are so involved hold and utilize stereotypical beliefs about women and rape, this should not be taken to mean that, perhaps as a result of their close association with the matter they are unique in this respect. . . . This baggage belongs to us *all*."

90. Ison, "The Sovereignty of the Judiciary" (1986) 27 Les Cahiers de Droit 503 as reproduced in J.M. Evans *et al.*, *Administrative Law*, 3d ed. (Toronto: Emond Montgomery, 1989) 642–45 at 643.

91. C. MacKinnon. *Towards a Feminist Theory of the State* (Cambridge, Massachusetts: Harvard University Press, 1989) at 164–65.

in others."[92] Until these obstacles are removed, women could never develop to their true potential. The problem with the traditional liberal approach to liberty is that the most dangerous obstacles to human development are thought to be those imposed by the state. What Mill recognized, and what MacKinnon and many others remind us today, is that these external obstacles are harmful to personal development when they are internalized.

Positive liberty is concerned with the barriers, whether internal or external, that prevent individuals from even reaching a position in which negative liberty would be meaningful. Charles Taylor brings into focus the distinction between external and internal obstacles:

> The advantage of the view that freedom is the absence of external obstacles is its simplicity. It allows us to say that freedom is being able to do what you want, where what you want is unproblematically understood as what the agent can identify as his desires. By contrast an exercise-concept of freedom requires that we discriminate among motivations. If we are free in the exercise of certain capacities, then we are not free, or less free, when these capacities are in some way unfulfilled or blocked.[93]

What Taylor's view implies in the context of the *Charter* is that to the extent that legislation is aimed at enhancing positive liberty (for instance, self-esteem and dignity) by removing external obstacles (cultural, economic, and structural barriers), negative "rights" should not be allowed to undermine these objectives. Consider, in the context of equality rights, this passage from the ground-breaking American decision on racial segregation, *Brown* v. *Board of Education*:

> To separate [black children] from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone.[94]

As the court in *Brown* implicitly concedes, true equality requires at the very least that these structural and psychological obstacles be removed.

The concept of positive liberty does not therefore spell the end of liberalism or of the idea of a charter of rights so long as rights are understood in terms of their purpose. This is recognized by Ronald Dworkin in *Taking Rights Seriously*, in which he argues that the "central concept" underlying rights is not liberty but equality.[95] On this formulation of liberalism, the central concept is the "equal

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92. J.S. Mill, "The Subjection of Women" in Rosemary Agonito, ed., *History of Ideas on Woman* (New York: G.P. Putnam's Sons, 1977) 225–48 at 239.

93. C. Taylor, "What's Wrong with Negative Liberty" in *Philosophy and the Human Sciences: Philosophical Papers 2* (Cambridge, U.K.: Cambridge University Press, 1985) 211–29 at 215. For an insightful communitarian dicussion of equality, see M. Waltzer, *Spheres of Justice* (New York: Basic Books, 1983).

94. 347 U.S. 483 at 494 (1954) [hereinafter *Brown*].

95. See "What Rights Do We Have?" in *Taking Rights Seriously*, *supra*, note 60 at 266–78.

concern and respect" of individuals or, in the more abstract formulation of John Rawls, the equal liberty of all.[96]

These views, in the context of the *Keegstra* and *Butler* cases, indicate the need for a revised understanding of both s. 1 and the *Oakes* test. What the courts must openly acknowledge is that in order to allow individuals to exercise fully their negative rights, there must first be a commitment to political equality; that is, the need to remove social and structural barriers that impede disadvantaged individuals and groups must take theoretical primacy over negative liberty. This is not to say that negative rights are not important, but rather that the exercise of these rights must be understood in the light of a commitment to social justice. Individuals need to be protected from majoritarian and moralistic fiats of power, but they still need the state to confront and subdue the invisible forces that create real obstacles to equality. So, positive liberty can also be understood to require the removal of obstacles, but obstacles of a different kind. It is with this understanding that we must approach s. 1 and the limitation of rights in a free and democratic society.

The foregoing analysis suggests the following approach to the *Charter*. First, the right must be defined and articulated in the light of its purpose within the context of a liberal democracy. The definition of the right is not as important as what the right represents; namely, the claim of a particular person (or group) to equal respect—to be treated (as Kant would say) as an end, not a means to an end.[97] The right must therefore be interpreted broadly, in the manner set out by the Supreme Court in its early *Charter* decisions. Dickson C.J.C. forcefully articulates this purposive approach in *Big M Drug Mart*:

> [T]he purpose of the right or freedom in question is to be sought by reference to the character and the larger objects of the *Charter* itself, to the language chosen to articulate the specific right or freedom, to the historical origins of the concepts enshrined, and

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96. In *A Theory of Justice* (Cambridge, Mass.: Harvard University Press, 1971), Rawls proposes two principles:
First: each person is to have an equal right to the most extensive basic liberty compatible with a similar liberty for others.
Second: social and economic liberties are to be arranged so that they are both (a) reasonably expected to be to everyone's advantage, and (b) attached to positions and offices open to all (at 60).
Rawls envisions a system of liberties in which one liberty can be restricted only for the sake of another liberty. The result is a system of liberties that constitutes the basis for a broad, *equal liberty for all*. Thus, the best arrangement of this system of liberties "depends upon the totality of limitations to which they are subject, upon how they hang together in the whole scheme by which they are defined" (at 202). In my opinion, there is room within liberal theory to incorporate positive liberty. In fact, many "radical" social democrats argue that one can consistently embrace political liberalism (the view that "individuals should have the possibility to organize their lives as they wish, to choose their own ends, and to realize them as they think best") and, at the same time, reject "economic liberalism or individualism": C. Mouffe, "Radical Democracy or Liberal Democracy?" (1990) 20 Socialist R. 57 at 58. See also F. Cunningham, *Democratic Theory and Socialism* (Cambridge, U.K.: Cambridge University Press, 1987).

97. See I. Kant, *Groundwork of the Metaphysic of Morals*, trans. H.J. Paton (New York: Harper & Row, 1964) at 101.

> where applicable, to the meaning and purpose of the other specific rights and freedoms with which it is associated within the context of the *Charter*. The interpretation should be . . . a generous, rather than a legalistic one, aimed at fulfilling the purpose of the guarantee and securing for individuals the full benefit of the *Charter*'s protection.[98]

This focus on the purpose of the guarantee must continue to inform the first stage of analysis. But it cannot be confined to this preliminary stage.

Second, the values that underlie the right must be addressed again at the second stage, for it is only in pursuing these values that the Legislature may legitimately limit a right. What I have tried to indicate is that these values concern the equal status and respect of all individuals, as individuals. Ruth Colker argues that the unifying principle of the *Charter* implicit in a "free and democratic society" is the "anti-disadvantage" principle. She explains that the anti-disadvantage principle "is predicated on the assumption that the courts have the responsibility to ensure that the legislative process fully protects the needs and interests of disadvantaged groups."[99] Far from rejecting liberalism, however, Colker, like Dworkin, is comfortable with the role of rights within the broad framework of a liberal democratic society.

At the second stage, then, the court, in characterizing the purpose of the legislation, must do so in terms of its ability to secure positive liberty. Where the purpose of the legislation is the promotion of political equality, the same values that underpin the right make the limit on the right *prima facie* justifiable. Thus, to the extent that the legislation is aimed at treating persons as ends, rather than means, the rights claim is thereby disqualified.

Whether the limitation is ultimately justified, then, depends on whether it trenches upon the negative right only as much as is necessary to ameliorate the position of disadvantaged members of society. This is precisely what Dickson C.J.C. is trying to show in *Keegstra*, when he characterizes the legislation in this manner:

> In my opinion, it would be impossible to deny that Parliament's objective in enacting s. 319(2) is one of utmost importance. Parliament has recognized the substantial harm that can flow from hate propaganda, and in trying to prevent the pain suffered by target group members and trying to reduce racial, ethnic and religious tension, Canada has decided to suppress the wilful promotion of hatred against identifiable groups.[100]

The characterization of the objective of the impugned legislation is decisive in justifying the limit. The more serious is the threat to positive liberty posed by the exercise of the right, and the more closely linked is the legislation to the reversal of the detrimental conditions perpetrated or aggravated by an assertion of that right, the more reasonable will be the limit. The proportionality test must be understood primarily as an assessment of the objective in the light of the importance of positive

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98. *Supra*, note 66 at 423–24.

99. *Supra*, note 7 at 86.

100. *Keegstra*, note 1 at 45.

liberty and the amelioration of conditions inimical to the exercise of the right in the first place.

The limitation of a right for the purpose of promoting positive liberty is very different from a limitation justified for reasons of cost and efficiency. The former justification must be regarded as the more appropriate, if not the only appropriate, one.[101] What this focus on positive liberty and equal political status suggests is the theoretical primacy of the *concept* of equality in the overall structure of the *Charter*:

> In light of the Charter commitment to equality, and the reflection of this commitment in the framework of s. 1, the objective of the impugned legislation is enhanced in so far as it seeks to ensure the equality of all individuals in Canadian society.[102]

It is important to note that, in this passage, Dickson C.J.C. is suggesting that only the *principles* that underlie s. 15 are relevant:

> As noted in *Big M Drug Mart*, promoting equality is an undertaking essential to any free and democratic society . . . . The *principles underlying s. 15* of the Charter as thus integral to the s. 1 analysis [emphasis added].[103]

Rights must thus be understood in terms of their value not in promoting liberty for its own sake, but in promoting liberty for the sake of the equal enjoyment of the benefits of participation in political life. Positive liberty thus embodies a claim by every member of society to the elimination of barriers, whether cultural, historical, psychological, or otherwise, to participation as an equal. To the extent that hate propaganda and obscenity are inimical to this goal, they are legitimately restricted.

## Conclusion

> Freedom has appeared in the world at different times and under various forms; it has not been exclusively bound to any social condition, and it is not confined to democracies. Freedom cannot, therefore, form the distinguishing characteristic of democratic ages. The peculiar and preponderating fact which marks those ages as its own is the equality of condition; the ruling passion of men in those periods is the love of this equality.

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101. It may be objected that the government does not have an unlimited pool of resources and, therefore, that considerations of efficiency must outweigh rights in certain cases. Where resources are limited, however, there remains a question about the appropriate distribution of these resources. Cases like *Singh, supra*, note 31, suggest that the courts must approach these issues sensitive to these distributional problems. It may be that in certain situations where rights are limited, the government is, indeed, trying to extend resources (and hence positive rights) as widely as possible, thus giving priority to considerations of equality, rather than rights, narrowly understood. This suggests that when attempting to justify a particular piece of legislation, the government must attempt to show in what ways its legislation furthers the political status or dignity in a manner consistent with the basic political values of the society.

102. *Per* Dickson C.J.C. in *Keegstra, supra*, note 1 at 44.

103. *Ibid.* at 43.

> Ask not what singular charm the men of democratic ages find in being equal, or what special reasons they may have for clinging so tenaciously to equality rather than to the other advantages which society holds out to them: equality is the distinguishing characteristic of the age they live in; that, of itself, is enough to explain why they prefer it to all the rest.[104]

What is definitive of democracy is not freedom, but political equality. This was, for de Tocqueville, what distinguished the non-hierarchical structure of 19th-century American society from the status-based societies of the old world. In rejecting these inegalitarian structures and traditions, America embraced the belief in a society free from distinctions based on status or rank. Of course, de Tocqueville was only partially right; for, in place of aristocracy, baronry, and clergy, there developed in America other distinctions based on ethnicity, class, gender, and the like. But de Tocqueville was right that distinctions based on status were, and continue to be, inimical to the functioning of a modern liberal democracy.

A concept of rights understood in terms of positive liberty attempts to shatter these modern barriers of "status." As we have seen, both *Keegstra* and *Butler* uphold legislation designed to shatter not only the external but also the internal barriers created and perpetuated by hate propagnada and obscenity. In so doing, they implicitly acknowledge the theoretical primacy of positive liberty in the *Charter* and, more concretely, the rights of ethnic minorities and women to be treated with dignity and respect. The recognition of these aims places *Keegstra* and *Butler* comfortably within the framework of the early jurisprudence and the unified vision of the *Charter* expressed in *Oakes* and *Big M Drug Mart.*

These decisions all serve as a reminder that while the two stages of *Charter* analysis are treated as distinct (and there may be sound procedural reasons for doing this), theoretically and substantively the two stages are united. In these decisions is the vision of a society that treats all of its members with respect, and does everything in its power to ensure that each citizen is fully able to choose his or her own lifestyle. It is a liberal vision, but one that takes the concept and practice of liberty seriously. Liberty is, first and foremost, an empowering principle.

Some scholars have lamented the passing of this vision of the *Charter.* But while recent case law often neglects the principles proclaimed in these early judgments, the decisions of the Supreme Court of Canada in *Keegstra* and *Butler* provide a glimmer of hope for the faithful.

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104. De Tocqueville, *supra*, note 46 at 190.