Notes and Questions

1. Chief Justice Dickson found the U.S. free speech doctrine, in the version that departed from *Beauharnais*, inapplicable, given the language of the Canadian Charter, which contains an express limitation. Is there any specific in Canadian society that makes the "clear and present danger" test irrelevant? Is it an acceptable argument that the protection of speech should be social-context bound? What could be the U.S. response to Chief Justice Dickson's harm concerns? Consider the following arguments of the HCC regarding the constitutionality of the criminal provision that makes "incitement of hatred" against any race or nation punishable:

> the whipped-up emotions against the group threaten the honor, dignity (and life, in the more extreme cases) of the individuals comprising the group, and by intimidation restricts them in the exercise of their other rights as well (including the right of freedom of expression). The behavior criminally sanctioned contains such a danger to individual rights as well, which gives such weight to public peace that the restriction on the freedom of expression may be regarded as necessary and proportionate.

Decision 30/1992 (V.26.) AB hat.[u] In the Court's view, "the intensity of the disruption of public peace justifies the restriction of the right to freedom of expression even above and beyond the threshold of 'clear and present danger'."

2. The Canadian justices disagree as to the practical advantages of antiracist regulations. The nature and effective use of antihate laws in the Weimar Republic are contested. Some scholars argue that there were no applicable antihatred laws to use against the Nazis in Germany before Hitler took power. To be sure, there was no group libel protection against defamation on racial grounds. See David Riesman, *Democracy and Defamation: Control of Group Libel*, 42 Colum. L. Rev. 727 (1942). Most contemporary European countries have specific antihate language in their criminal codes (for Germany, see above). In addition, a number of European countries (including France and Belgium) established as an offense the negation and minimization of the Holocaust. Multiethnic societies, like India, are keen to suppress race-based incitement because of the country's high level of ethnic violence.

3. The dissenters in *Keegstra* cite numerous examples where publication or distribution was delayed or hampered because of prosecutorial or administrative doubt regarding the appropriateness of circulating material. Do you agree with Chief Justice Dickson that this is only "minimal" police impairment? Or is it the functional equivalent of censorship? Consider in this regard the objections of Justice McLachlin: "The combination of overbreadth and criminalization may well lead people desirous of avoiding even the slightest brush with the criminal law to protect themselves in the best way they can—by confining their expression to non-controversial matters." *R. v. Keegstra*, above, at 860.

u. In this abstract review case the Court found that punishment for "incitement of hatred" against nations and national, ethnic, and religious groups, among others, is constitutional as it satisfies proportionality requirements. But use of offensive or denigrating expressions against such groups cannot be criminalized as there are less burdensome means (e.g., civil liability) to protect these interests.

Is it not the case that the possibilities of prosecution are of sufficiently chilling effect? Compare with the Greek Constitution (1975), which allows forfeiture by order of the state prosecutor in a number of circumstances (Art. 14). Prepublication forfeiture (seizure) is constitutionally permitted when the publication is offensive to recognized religions, the personality of the President, discloses military secrets, intends to overthrow the state with violence, or violates public morality. Are such measures necessary to protect democracy? Note that the Greek Constitution was written after the collapse of a military dictatorship.

4. Chief Justice Dickson argues that "in assessing the proportionality of a legislative enactment to a valid governmental objective, however, s. 1 should not operate in every instance so as to force the government to rely upon only the mode of intervention least intrusive of a Charter right or freedom." See *Keegstra* above. Is this position accepted by other courts? Cf. the Hungarian decision below.

ROBERT FAURISSON v. FRANCE

Human Rights Committee (United Nations).[v]
UN Doc CCPR/C/58/D/550/1993 (1996).

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The facts as submitted by the author [i.e., Faurisson]

2.1 The author was a professor of literature at the Sorbonne University in Paris until 1973 and at the University of Lyon until 1991, when he was removed from his chair. Aware of the historical significance of the Holocaust, he has sought proof of the methods of killings, in particular by gas asphyxiation. While he does not contest the use of gas for purposes of disinfection, he doubts the existence of gas chambers for extermination purposes ("chambres à gaz homicides") at Auschwitz and in other Nazi concentration camps.

2.2 The author submits that his opinions have been rejected in numerous academic journals and ridiculed in the daily press, * * * nonetheless, he continues to question the existence of extermination gas chambers. * * *

2.3 On 13 July 1990, the French legislature passed the so-called "Gayssot Act," which amends the law on the Freedom of the Press of 1881 by adding an article 24 bis; the latter makes it an offence to contest the existence of the category of crimes against humanity as defined in the London Charter of 8 August 1945.

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2.5 Shortly after the enactment of the "Gayssot Act", Mr. Faurisson was interviewed by the French monthly magazine *Le Choc du Mois*.

v. Under the Optional Protocol to the International Covenant on Civil and Political Rights (ICCPR), a state that becomes party to the Protocol recognizes the competence of the Human Rights Committee to receive and consider communications from individuals, subject to the jurisdiction of the participating state, who claim to be victims of a violation by that state of a right enumerated by the ICCPR. The Committee may publish a summary of its findings in its annual report. The Committee members consist of 18 nationals of the ICCPR's member-states, serving in their personal capacity.

* * * Following the publication of this interview, eleven associations of French resistance fighters and of deportees to German concentration camps filed a private criminal action against Mr. Faurisson and Patrice Boizeau, the editor of the magazine *Le Choc du Mois*.[w]

[Faurisson and Boizeau were fined an equivalent of approximately US$50,000 for having committed the crime of "*contestation de crimes contre l'humanité*".]

2.7. * * * The Court of Appeal did, *inter alia*, examine the facts in the light of articles 6 and 10 of the European Convention of Human Rights and Fundamental Freedoms and concluded that the court of first instance had evaluated them correctly.

2.8 The author observes that the "Gayssot Act" has come under attack even in the French National Assembly. Thus, in June 1991, Mr. Jacques Toubon, a member of Parliament for the *Rassemblement pour la République* (RPR) and currently the French Minister of Justice, called for the abrogation of the Act. Mr. Faurisson also refers to the criticism of the Gayssot Act by Mrs. Simone Veil, herself an Auschwitz survivor.

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7.2. The State party * * * explains the legislative history of the "Gayssot Act." It notes, in this context, that anti-racism legislation adopted by France during the 1980s was considered insufficient to prosecute and punish, *inter alia*, the trivialization of Nazi crimes committed during the Second World War. The Law adopted on 13 July 1990 responded to the preoccupations of the French legislator vis-à-vis the development, for several years, of "revisionism," mostly through individuals who justified their writings by their (perceived) status as historians, and who challenged the existence of the Shoah. To the Government, these revisionist theses constitute "a subtle form of contemporary anti-semitism" which, prior to 13 July 1990, could not be prosecuted under any of the existing provisions of French criminal legislation.

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7.4. The State party recalls that article 5, paragraph 1, of the Covenant allows a State party to deny any group or individual any right to engage in activities aimed at the destruction of any of the rights and freedoms recognized in the Covenant.

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7.12. In support of its arguments, the State party refers to decisions of the European Commission of Human Rights addressing the interpretation of article 10 of the European Convention (the equivalent of para. 19 of the Covenant). In a case decided on 16 July 1982, / Case No. 9235/81 (*X. v. Federal Republic of Germany*), declared inadmissible 16 July 1982./ which concerned the prohibition, by judicial decision, of display and sale of brochures arguing that the assassination of millions of Jews during the Second World War was a Zionist fabrication, the

w. An amendment to the Press Act, 1881 granted standing to various human rights groups in hate-speech-publication cases, even if the association members were not directly injured.

Commission held that "it was neither arbitrary nor unreasonable to consider the pamphlets displayed by the applicant as a defamatory attack against the Jewish community and against each individual member of this community. By describing the historical fact of the assassination of millions of Jews, a fact which was even admitted by the applicant himself, as a lie and zionist swindle, the pamphlets in question not only gave a distorted picture of the relevant historical facts but also contained an attack on the reputation of all those * * * described as liars and swindlers." * * * The Commission further justified the restrictions on the applicant's freedom of expression, arguing that the "restriction was * * * not only covered by a legitimate purpose recognized by the Convention (namely the protection of the reputation of others), but could also be considered as necessary in a democratic society. Such a society rests on the principles of tolerance and broad-mindedness which the pamphlets in question clearly failed to observe. The protection of these principles may be especially indicated *vis-à-vis* groups which have historically suffered from discrimination."

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8.6. As to the violations of his right to freedom of expression and opinion, the author notes that this freedom remains severely limited: thus, he is denied the right of reply in the major media, and judicial procedures in his case are tending to become closed proceedings. * * * Precisely because of the applicability of the Law of 13 July 1990, it has become an offence to provide column space to the author or to report the nature of his defence arguments during his trials.

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Examination of the merits

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9.4. Any restriction on the right to freedom of expression must cumulatively meet the following conditions: it must be provided by law, it must address one of the aims set out in paragraph 3 (a) and (b) of article 19, and must be necessary to achieve a legitimate purpose.

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9.6. * * * [T]he rights for the protection of which restrictions on the freedom of expression are permitted by article 19, paragraph 3, may relate to the interests of other persons or to those of the community as a whole. Since the statements made by the author, read in their full context, were of a nature as to raise or strengthen anti-semitic feelings, the restriction served the respect of the Jewish community to live free from fear of an atmosphere of anti-semitism. The Committee therefore concludes that the restriction of the author's freedom of expression was permissible under article 19, paragraph 3 (a), of the Covenant.

9.7. Lastly the Committee needs to consider whether the restriction of the author's freedom of expression was necessary. The Committee noted the State party's argument contending that the introduction of the Gayssot Act was intended to serve the struggle against racism and anti-semitism. * * *