WHEN FREEDOMS COLLIDE: THE CASE FOR OUR CIVIL LIBERTIES by A. Alan Borovoy (Toronto: Lester and Orpen Dennys, 1988) pp. X + 419.

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I. INTRODUCTION

"When Freedoms Collide" explains how its author, A. Alan Borovoy, would resolve some classic conflicts between rights. Borovoy's central theme is that the freedoms considered most precious in a democratic society inevitably collide. When that happens, every problem or situation must be analyzed on its own merits to determine which of the alternative solutions is likely to produce the "least bad" results. The civil liberties issues which he sees as being at the forefront, and chooses to discuss, are freedom of expression, police powers, equality and involuntary civil commitment. He also discusses the misuse of civil liberties ideals, citing foetal rights, freedom of association, privacy, self-incrimination and the role of the Courts as areas where misconceptions of rights are common. The book consists of fourteen chapters in all. Two chapters address expressive rights, three deal with police powers, two with the welfare state, one with civil commitment and one on equality. There are four miscellaneous chapters which address "recurring fallacies" or misguided solutions to civil liberties dilemmas, the wisdom of entrenching the *Charter of Rights and Freedoms*,[1] the interrelationship between civil liberties and the use of force in international relations.

At the outset, the author makes it very clear that he has not written a book about what the law is, but rather what the law should be. Consequently, there is almost no reference to case law, statutes, or even the *Canadian Charter of Rights and Freedoms*. Primarily the book consists of factual examples which raise civil liberties issues followed by the author's comments and anecdotes. For legal analysts accustomed to beginning argumentation from basic legal principles the book is highly impressionistic. This drawback limits its practical use since the propositions advanced lack foundation to support them.

It is very clear that Borovoy's approach is based upon a specifically liberal ideological perspective with a strong commitment to democracy. Negative liberty or non-intervention in the personal life of individuals is a cornerstone of his philosophy. Consequently the scope of the discussion of freedoms is limited to a view of the universe where autonomous, self-determined indi-

1. *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.

viduals attempt to interrelate with the democratic state. He relies on the free-market model of human society that tends to either ignore or assimilate differences between groups. He feels the best protection for minorities lies in their use of the fundamental freedoms of association, assembly, the press and expression, especially expression. These fundamental freedoms, combined with the rule of law and the presumption of innocence are appropriate and adequate restraints to check the abuses of power by majorities against minorities within a democratic system.

The chapters which deal with situations where individual citizens confront the exercise of coercive power by the state are well suited to Borovoy's approach. For example, the author's treatment of the appropriate ambit of police powers, discretionary law enforcement and limits of national security intelligence gathering reasonably maximize individuals' rights and freedoms. Although the analysis may suffer somewhat from the lack of references to legal sources, it is nevertheless sound and the points are well made.

The same cannot be said for the chapters dealing with equality-related rights. In this review, the topics of equality, abortion and freedom of expression are used to examine the validity of Borovoy's approach to rights.

II. EQUALITY

In the equality section, Borovoy discusses the extent to which human rights legislation should interfere with freedom of choice in services, employment and accommodation. He concedes that human rights legislation prohibiting discrimination is an appropriate restriction on freedom of choice in public life but only to the extent that discrimination inflicts "corrosive indignity" and denies equal opportunity. In his opinion, legislated affirmative action programs requiring numerical targets, goals or quotas to redress past discrimination, go too far.

He recognizes that systemic discrimination is a problem which should be addressed, but says affirmative action should only extend to mandating more wide-ranging employment searches. For example, he suggests equal opportunity for disadvantaged groups could be achieved through requiring employers with government contracts to place employment advertisements in the non-white press or through encouraging native applicants to apply for job openings. He argues that private, systemic discrimination could be adequately addressed by holding public hearings into employment practices. The public pressure generated by these hearings would cause employers to cease discriminatory practices. Borovoy's suggestions however, neither take into account nor address extensive studies which conclusively show that voluntary programs fail to achieve improvement for disadvantaged groups, whereas legally enforced affirmative action programs with targets achieve significant, positive results.[2]

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2. See for example, Blumrosen, *Improving Equal Employment Opportunity Laws: Lessons from the United States Experience in Research Studies, of the Royal Commission on Equality in Employment* (1985) at 423; Belton, "Title VII of the Civil Rights Act of 1964: A Decade of Private Enforcement and Judicial Developments" (1976) 20 St. Louis U.L. Jour. 225; Jones, "The Development of the Law Under Title VII since 1985: Implications of the New Law", 30 Rutgers L. Rev.

Borovoy opposes goals and quotas because of the harm they do to the dominant group. He says such employment schemes require essentially innocent "whites" (presumably he means white males, as women are clearly a disadvantaged group) to pay the price. As well as citing "reverse discrimination", he voices concerns about a dimunition in standards of performance. He asks, "how often would the pressure to fill a non-white target, goal or quota lead employers to reject more qualified whites?" "In such circumstances," he says, "could it not be said that the whites were victims of racial discrimination?" He makes this comment while at the same time conceding that such white people may enjoy certain advantages in society over non-whites because of the discrimination committed by their predecessors.

The underlying assumption informing Borovoy's analysis of systemic discrimination and affirmative action is that workplace standards or qualifications can be measured objectively. He fails to see that for the most part, qualifications are imbued with social and cultural values. Evidence suggests that those in power consistently use such qualifications to ensure continued dominance by members of their group, or at least favour those qualifications which reflect their own self-image.[3] By unquestioningly accepting the perspective of the privileged, Borovoy's approach is more likely to perpetuate systemic discrimination than eliminate it. One would think members of historically, socially and economically disadvantaged groups should merit greater concern in a competition for opportunity than those belonging to the dominant majority whose disproportionate hold on power is acknowledged to be illegitimate.[4]

From a woman reader's point of view, Borovoy's approach to equality is troubling. Curiously, he limits his discussion of discrimination to the categories of race, creed and ethnicity, seeing them as the "original" categories of exclusion and, presumably, the most important. Even though race, creed and ethnicity were the first groups protected by human rights legislation, arguably the truly "original" discrimination in human relationships is gender based.[5] However, gender discrimination is all but absent from the equality discussion except for a one sentence reference to it in the equality chapter under the heading "Human Rights Law Beyond Racism".[6] This is followed by a much longer discussion on the issue of whether or not discrimination on the basis of length of hair or the wearing of beards is an appropriate issue to be addressed by human rights law. Given that Borovoy acknowledges that women comprise 50% of the population (in reality it is 52%) one would think that gender discrimination would deserve more than a mere sentence in the equality chapter. Because of this omission, none of the many unique and important equality and discrimination issues which society is trying to come to terms with in the gender category are dealt with. One would think gender specific issues

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3. *Ibid.*
4. See *Andrews* v. *Law Society of British Columbia*, [1989] 1 S.C.R. 143 at 154 where Wilson J. states, "s.15 [of the Canadian Charter of Rights and Freesoms] is designated to protect those gorups who suffer social, political and legal disadvantage in our society."
5. Brownmiller, *Against our Will: Men, Women and Rape* (New York: Simon and Schuster, 1975); French, *Beyond Power: on Women, Men and Morals* (N.Y.: Summit Books, 1985).
6. A.A. Borovoy, *When Freedoms Collide: the case for our civil liberties* (Toronto: Lester and Orpen Dennys, 1988) at 241.

such as sexual harassment, pregnancy discrimination and equal pay would merit consideration in any serious book about colliding freedoms. In these times of greater concern and awareness of the status of women, ignoring issues central to their freedoms not only is a major fault, but an implicit acceptance of prevailing ideologies of white male supremacy. Other gender and race related discussions in the book reflect this bias, specifically in the areas of abortion and freedom of expression.

III. ABORTION

The issue of the right to reproductive freedom versus the rights of the unborn is dealt with in the chapter on "Some Fundamental Misconceptions about our Fundamental Freedoms".[7] The author uses the abortion rights controversy as an example of how some people use civil liberties concepts in a misinformed or confused way. He says anti-abortionists are wrong to package their arguments in civil libertarian terms. He says their insistence that foetal rights be constitutionally protected in the absence of consideration of women's rights is a fundamental *non sequitur*. He says women should be able to make their own decisions regarding their physical and psychological health. Although he expresses some concern with the use of a subjective health standard, (women might seek abortions for what he believes may be frivolous reasons) he concludes that as between women having the decision-making power as opposed to "outsiders", it is less bad to risk allowing abortions when the woman's pain is tolerable, than to risk denial when her pain is intolerable.

While his analysis would provide some positive results for women's liberty, Borovoy's justification of reproductive choice in terms of avoidance of pain is a narrow one. It avoids dealing with the broader issues which pervade the entire debate — those of gender inequality and devaluation of women. The issue of reproductive freedom involves much more than isolated acts of abortion. Womens' equality and autonomy rights are not fully dealt with unless abortion is seen as one aspect of an overall right of women to control their own bodies and physical integrity. If women's equality was the starting point of the discussion, the question would not address "tolerable pain" but instead would ask, what limit, if any, may the state put upon womens' efforts to control their reproductive capacity? All women, pregnant as well as non-pregnant would be considered when the balancing questions were asked. The direct harm principle which underlies Borovoy's approach does not permit a broader, contextualized investigation. By placing the focus on the individual's right to health, the relationship between reproduction and a woman's reality is not considered.

For example, Borovoy's "pain" justification for abortion leads to the conclusion that abortions performed for reasons other than physical or mental health would be illegitimate. His health standard would significantly limit womens' reproductive control because it does not allow for personal considerations other than health in the balancing process, nor does it allow for the right to effective birth control. If contraception fails and a woman becomes pregnant against her will, abortion may be a necessary part of controlling her procreative power for

7. *Ibid.* at 244.

financial, marital or other non-health related reasons. If the broader right to control reproductive capacity through abortion is not recognized, women could be forced to bear unwanted children or alternatively, be coerced into using methods of birth control that are less likely to result in pregnancy, but which create serious health risks. Both alternatives violate personal autonomy and physical integrity. Whether or not women should be coerced into assuming long term health risks through mandatory use of fail-safe birth control methods is an issue which deserves discussion as much as whether they should be coerced into bearing children.[8]

Another problematic liberal assumption underlying Borovoy's views on abortion is that men and women are autonomous individuals who act freely and equally in matters of sexuality, and as a result, the law should not interfere in private matters of marriage and procreation. This privacy approach has lead to a "hands off' attitude to public scrutiny of matters in the private realm, which in turn has led to a serious sexual and physical oppression of women.[9] A more compelling theory he does not explore is that in their sexuality, women are not autonomous individuals, nor are they equal to men.[10] Much of the oppression and violence they experience, occurs in the "private" domain in the name of sexual freedom.[11] It has been persuasively argued that the public/private dichotomy is a false one, and that the state is implicated in the private sphere.[12] When abortion is seen as a purely private matter, it can mask sexual inequality, violence and oppression, and provide a rationale for limiting access to services like abortion. In the United States, the privacy doctrine has led to denial of public funding of abortion,[13] and the denial of use of public facilities and public employees to assist in abortion,[14] with the result that reproductive freedom exists for some privileged women, but not others. Only those with sufficient money to attend private clinics are assured of control over their own bodies. Borovoy, however, seems to adopt the privacy doctrine without considering or balancing competing rights when he states, "The fact that women may be allowed to have abortions does not mean that doctors, nurses, or other health providers must be obliged to perform them."[15]

An equality analysis of abortion and reproductive rights would expose women's reality, underline the unequal enjoyment of liberties between men and women and make links between reproduction and social and economic disad-

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8. Olsen, "The Supreme Court 1988 Term Comment" (1989) 103 Harv. L. Rev. Vol. 105 at 111.
9. Law, "Rethinking Sex and the Constitution" (1984) 132 U. PA. L. Rev. 955 at 1020, n.233.
10. See MacKinnon, *Towards a Feminist Theory of the State*, Cambridge, Mass.: Harvard Univ. Press, 1989), p. 25.
11. Olsen, "Statutory Rape: A Feminist Critique of Rights Analysis" 63 Tex. L. Rev. 388.
12. Olsen, "The Family and the Market: A Study of Ideology and Legal Reform" (1983) 96 Harv. L. Rev. 1497; (Olsen, "The Myth of State Intervention in the Family" (1985) 18 U. Mich. J.L. Ref. 835; See also MacKinnon, *Feminism Unmodified*, (Cambridge, Mass: Harvard Univ. Press, 1987) at 93-102.
13. *Harris* v. *McRae* 448 U.S. 297 (1980). See also Tribe, "The Abortion Funding Conundrum: Inalienable Rights, Affirmative Duties, and the Dilemma of Dependence" (1985) 99 Harvard Law Review 330 at 338; and MacKinnon, *supra*, note 9.
14. In *Harris* v. *McRae*, *ibid.*, the U.S. Supreme Court upheld a ban on the use of public facilities, employees and funds.
15. *Supra*, note 6 at 258.

vantagement.[16] Only women become pregnant and experience the physiological, social and economic ramifications of pregnancy. History shows that women's biological uniqueness has provided a pretext for social and legal disadvantagement.[17] Their career and life options have been limited,[18] and legal restrictions continue to be placed on them because of their biological destiny.[19]

The social imperative that women as a group must bear children, and the social custom that they undertake the primary responsibility for childcare, will always limit their options in the public domain unless there is a willingness to see the links between reproduction, child rearing and equal opportunity, as well as a preparedness to redress the resulting disadvantage through a purposive and meaningful interpretation of rights.

The scope of considerations allowed by Borovoy's analysis however, is limited to those concerning individual autonomy rather than the broader assessment of group disadvantagement that an equality approach permits.

IV. FREEDOM OF EXPRESSION

Of all the fundamental freedoms, Borovoy sees freedom of expression as the most crucial in a democratic society. He embraces the classical view of free speech, which has as its two underlying premises the propositions that governments derive their limited powers from the citizenry, and that the people, as ultimate sovereigns, are competent to determine their own destinies. Within this context, he identifies the fundamental values which society derives from the freedom: attaining truth, exercising the democratic prerogative of self-government, and satisfying the need for personal enrichment and fulfillment. These vital interests, he explains, are essential to preventing tyranny and the smothering of creative and intellectual pursuits.

Borovoy's paradigm for thinking about the functions of free speech is the "marketplace of ideas". In this marketplace, citizens meet as equals, and no idea is suppressed. The purpose of the "get-together" is to come to wise decisions for the general good based on a hearing of all viewpoints. If relevant

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16. *Morgentaler* v. *The Queen*, [1988] 1 S.C.R. 30, per Wilson J. at 172; see also Martin, "Persisting Equality Implications of the Bliss Case", in Mahoney and Martin eds., *Equality and Judicial Neutrality* (1987) at 195; *Thornburgh* v. *American College of Obstetricians and Gynecologists*, 476 U.S. 747 at 772 (1985); *Webster* v. *Reproductive Health Services* 109 S. Ct. 3040 (1989) at 3067 (Blackmun diss.); Regan, "Rewriting *Roe* v. *Wade*" (1979) 77 Mich. L.R. 1569; Ginsberg, "Some Thoughts on Autonomy and Equality in Relation to *Roe* v. *Wade*" (1985) 63 N.C.L. Rev. 375; Law, "Rethinking Sex and the Constitution" (1984) 132 U. PA. L. Rev. 955 at 1020.

17. *Canadian Air Line Flight Attendants' Association* v. *Pacific Western Airlines Ltd.* (1979), 105 D.L.R. (3d) 477 (B.C.S.C.) affirmed at (1981), 124 D.L.R. (3d) 688 (C.A.); *R.* v. *Palmer*, [1937] 3 D.L.R. 493 (C.A.); Royal Commission on the Status of Women in Canada, *Report*, paras. A. 206-210, at 277-288.

18. An example of womens' legal and social disadvantagement because of their reproductive capacities is *Bliss* v. *Attorney-General of Canada*, [1979] 1 S.C.R. 183, where it was held that discrimination on the basis of pregnancy was permissible, thus resulting in women being penalized in access to workplace benefits such as maternity leave and pension benefits. It was not until 1989 the case of *Brooks* v. *Canada Safeway* (1989), 10 C.H.R.R. D/927 (S.C.C.) that the Supreme Court overruled the decision.

19. Bill C-43, *An Act Respecting Abortion*.

information in the form of opinion, doubt, disbelief or criticism is not heard, the result of the deliberations will be ill-considered or unbalanced.

The objective of free speech is thus result-oriented. Practical, concrete benefits are said to flow to the community from this process and, as a result, almost all forms of speech should be protected. When it comes to extremist speech on the periphery of the freedom, Borovoy argues that it, too, must be protected. If it is not, the important, highly valued speech at the core of the freedom is threatened.

The author divides the chapter on freedom of expression into two sections, one on "The Effort to Limit Unpleasant Disruption",[20] which deals with demonstrations, picketing and sedition, and the other on "The Effort to Ban Offensive Material",[21] which deals with scandalizing the courts, defamation, hate propaganda, false news and pornography.

For the purposes of critically evaluating his theory, I propose to examine the categories of hate propaganda and pornography.

In the area of hate propaganda, Borovoy has no objection to laws prohibiting the incitement of racial violence in situations of imminent peril. He strenously objects however, to laws limiting public wilful promotion of group hatred. In support of this view, he relies on the theoretical principles outlined above, as well as practical considerations. Any limits on the free speech principle depend on the exact context in which the speech occurred, and whether the words used in such circumstances are of such a nature so as to create a clear and present danger.[22]

On the practical side, he maintains that prosecuting hatemongers is counterproductive and dangerous.[23] He argues that the courts provide a forum for hate propagandists to reach a far larger audience than would otherwise be possible. By wrapping themselves in a martyr's cloak, they are able to elevate their cause to a level that it does not deserve. He also suggests that, because of vagueness in definition, anti-hate legislation may be abused. He fears that the law could result in inappropriate prosecutions of innocent groups or be used to silence intemperate remarks made in moments of passion. Finally, he maintains that, since hatemongers are such a small minority of obscure individuals who command no substantial audience or following, there is no need for legislative measures to deal with them.

On the issue of pornography, Borovoy consistently argues that restrictions are inappropriate because of definitional problems. He claims that pornography cannot be separated from artistic and educational works, and cites a number of examples of artistic depictions of rape, bestiality, incest and sexual abuse of children, which he feels would be improperly "caught" by pornography laws.[24]

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20. *Supra*, note 6 at 21.
21. *Ibid.* at 33.
22. Borovoy relies on the American case law for this principle as enunciated by Holmes J. in *Schenck v. U.S.A.* 249 U.S. 47 (1919).
23. *Supra*, note 6 at 40-41.
24. *Ibid.* at 54, 56, 57 and 59.

Borovoy also doubts that pornography is harmful. He questions the social science research which has concluded that males exposed to violent pornography are more aggressive toward women than those who have not been so exposed. He claims that laboratory experiments cannot be relied upon to predict "real life" reactions.[25] He draws an analogy between males exhibiting violent tendencies toward females in a laboratory setting and hockey players who exhibit violent tendencies on the ice but are, otherwise, peace-loving individuals. He says, "[t]here is some indication that hockey players . . . are generally no more violent than anyone else in 'real life' ". He further argues that unrestricted pornography may be beneficial to society because of its potential cathartic effect. Borovoy asks (but does not answer) the question, "for how many men does such material serve as an instrument to sublimate their aggressive propensities?"[26]

There are three categories of pornography which Borovoy argues may be legitimately limited: (1) pornography publicly displayed; (2) pornography depicting torture and killing of real women and children; (3) the sexual abuse of children.

On the issue of public display, Borovoy supports his position by relying on the private/public distinction.[27] On the one hand, he says no laws should constrain what adults can consume in private, but on the other, laws regulating the public display of pornography may be justified because no one should be forced to look at something which they do not wish to look at.[28]

Borovoy would prohibit expression featuring real torture and killing, and child pornography involving real children in sexual encounters, because they present a variant on the "clear and present danger" test. "An arguable case" can be made for legal prohibition he says, because the marketplace provides an incentive to pornographers to commit violent crimes for profit. However, if the same torture, killings and child abuse were "simulated" rather than real, he says it would be far more dangerous to prohibit these depictions than it would be to provide unlimited production, sale and distribution of them. He feels it is "less bad" to risk the promotion of such ideas through pornography than to risk limiting them, notwithstanding they exist in a societal context where physical and sexual abuse of women and children is endemic.

In lieu of proscribing simulated violent pornography, Borovoy suggests that more emphasis be placed on counselling rape victims to charge their assailants, increasing shelter and assistance for battered women, campaigning against sex discrimination, and otherwise doing good deeds for women which would not limit access to pornography or otherwise threaten freedom of expression. Many

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25. *Ibid.* at 62-63.

26. Borovoy does not consider the work of many scholars and commentators who have discredited the catharthis theory. For example see Bart and Jozsa, "Dirty Books, Dirty Films and Dirty Data" in *Take Back the Night*, Lederer ed., (N.Y.: Morrow, 1980) at 208; Griffin, "Sadism and Catharsis: The Treatment is the Disease", *ibid.* at 141-147; Russell, "Pornography and Violence: What does the New Research Say", *ibid.* at 302.

27. The arguments addressing the distinction, above, apply equally to pornography.

28. Although this issue has been raised and litigated in Canada by women's anti-pornography groups, Borovoy cites the American literary critic, Irving Howe, for support (at 64).

assumptions which underlie the author's perspective on freedom of expression are highly questionable both on theoretical and practical levels.

The first problem arises with his assumption that a commitment to the democratic system of government requires an unqualified commitment to free speech. While it is true that a democratic society cannot tolerate a unilateral denial of the freedom of its citizens to express their views, it is surely consistent with democracy that citizens can choose to limit certain forms of speech. If the citizenry decides, in accordance with democratic procedures, to prohibit hate propaganda or pornography, it is not a case of the "government" undermining the right to speech, but rather one of citizens deciding upon acceptable limits of certain forms of conduct. Section one of the *Canadian Charter of Rights and Freedoms*[29] embodies this concept by permitting limitations on speech activity if those limitations are justified as being reasonable in the context of a free and democratic society. It is hard to imagine how the unhindered, wilful promotion of group hatred or pornography could be characterized as either elemental to the structure of democracy, or an advancement in the protection of our freedoms.[30] In setting up his freedom of expression/democracy equation it seems Borovoy falls victim to the "either-or fallacy" he counsels others to avoid in Chapter 1 of the book.

A second problematic assumption underpinning Borovoy's freedom of expression theory is that hate propaganda or pornography laws necessarily put the government in the position of being the singular antagonist infringing individuals' rights. Arguably a more accurate characterization is that those who promote hatred, violence or degradation of a class are aggressors in a social conflict between unequal groups.

By prohibiting the public, wilful promotion of group hatred on the basis of race, religion or ethnicity[31] or the violent, degrading or dehumanizing sexual exploitation of women and children, the government advances the interests of the disadvantaged as against the groups represented by the hatemongers and pornographers. The Supreme Court has stated that where groups conflict, governments must draw a line between their claims, marking where one set of claims legitimately begin and the other fade away.[32] If governments fail to make these assessments and draw lines, they fail to fulfill their responsibility of maintaining social harmony in the society. When viewed in the context of mediation, it could be argued that hate propagandists and pornographers must justify limiting the equality rights of minority groups and women[33] just as the government must justify limiting freedom of expression.

A third criticism is the degree to which Borovoy relies upon the truth-seeking rationale to defend hate propaganda and pornography. While the general propo-

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29. *Supra*, note 1.

30. But see MacKinnon, *supra*, note 10 at 195-214, who argues that the liberal state constructs the social order in the interests of men through its substantive policies. She sees pornography as a political practice, an institution of gender inequality which institutionalizes the sexuality of male supremacy. Liberal morality of the kind Borovoy espouses would be seen as a disguise for the presence and interests of male power which underly his theory.

31. *Criminal Code*, R.S.C. 1985, c. C-46, s.319(2).

32. *Irwin Toy* v. *Quebec*, [1989] 1 S.C.R. 927 at 990.

33. See the text associated with note 36, below.

sition that open discussion advances the pursuit of truth cannot be questioned, the way Borovoy uses the truth rationale pushes the claim too far. For example, in cases such as *Keegstra*[34] and *Zundel*,[35] the proposition that messages claiming Jews are inferior or that the Holocaust is a hoax, could be "true" is hardly a persuasive basis upon which to defend such speech. Similarly, opinions advocating the sexual torture or degradation of women in pornography whether "simulated" or real, cannot be said to contribute to truth-seeking. The content in both examples fundamentally contradicts the basic egalitorian principles and values of Canadian society.[36] The more society believes in the immorality or falseness of the speech, the weaker is the "truth" justification.

While it can be argued that these forms of extremist speech may be of value through educating the population about racial hatred and misogyny,[37] it is far from clear that an open confrontation with hate propaganda and pornography in the marketplace of ideas leads to a richer belief in the truth. It is more likely, particularly in the case of pornography, that the opposite result occurs. Debasement of women in pornographic magazines, books, movies, films or television, on street corner news-stands, on covers of record albums and in shop windows is an ever increasing phenomenon. Three surveys indicate that sales of pornographic magazines in Canada increased by 326.7 percent between 1965 and 1980. This represents an increase of at least fourteen times the growth of the Canadian population during the same period.[38] Furthermore, the messages in pornography that women and children are sex objects available to be violated, coerced, and subordinated at the will of men is replicated in real life statistics which are also increasing at a very rapid rate. Widespread sexual assault, wife battery, sexual harassment and sexual abuse of children[39] indicate that the competing idea, that women as human beings are equal to men and that children must be treated with dignity and respect, is not emerging from the marketplace in any significant way. The "value" of pornography as a truth-seeking device in these terms ranges from remote to none. It makes no sense to suggest that the uninhibited activity of pornographers is important to maintaining a belief that what they have to say is wrong. Rather than serving as a means

34. *R.* v. *Keegstra* (1988), 43 C.C.C. (3d) 150 (Alta. C.A.) rev'g. (1984), 19 C.C.C. (3d) 254 (Alta. Q.B.).

35. *R.* v. *Zundel* (1987), 31 C.C.C. (3d) 97 (Ont. C.A.).

36. The *Canadian Charter of Rights and Freedoms* as the supreme law of Canada is probably the best statement of basic Canadian values. The messages in hate propaganda and pornography are contrary to the equality guarantees in s.15 and s.28, and the multiculturalism values in s.27.

37. The general point is argued by Chafee, *Free Speech in the United States*, (Cambridge, Mass: Harvard University Press, 1941) at 33.

38. Report of the Committee on Sexual Offences Against Children and Youths (Badgley ed., 1984).

39. See Department of Justice, *Special Committee on Pornography and Prostitution* (1983) at 11; L. Clark and D. Lewis, Rape, *The Price of Coercive Sexuality*, (Toronto: Women's Press, 1977) at 61 which states that incidents of rape increased by 174% between 1961 and 1971 in Canada. In the period 1969-1973, it increased 76%; Armstrong, "Wife Beating: Let's Stop it Now" (July, 1983) Canadian Living 89, states that one women in ten is beaten by her husband or common law spouse; Report of the Committee on Sexual Offences Against Children and Youth, *supra* at 180-183, states that 50% of women and 30% of men are victims of unwanted sexual acts, incidents occurring before adulthood.

to discover truth, pornography conceals the truth about women and takes away or chills their speech through a system of sexism.[40]

If one looks at other areas of social life where the primary objective is the pursuit of truth, the marketplace of ideas is not the model used. In the criminal justice system, for example, speech is recognized as being important to the goal of learning the truth, but at the same time its potential to undermine the truth is clearly recognized. Parties may present their arguments as they wish, but speech that is "inflammatory", or highly emotive, may be excluded because of its potential prejudicial effects on the judgment of the judge or jury. In other words, it is recognized that certain forms of speech can undermine the truth. In the case of highly emotive hate speech[41] directed against minorities and women, where the speech seeks to subvert the truth-seeking process itself, a forceful argument can be made that the interests of seeking truth work against, rather than in favour of, speech,[42] and the values relied upon to support freedom of speech lose their force. Borovoy's view that the truth will always win out in a free marketplace of ideas may be an example of the "Pollyanna Fallacy" he describes in Chapter 1.[43]

A further proposition central to Borovoy's thesis, which requires some comment, is his assertion that there is little, if any, tangible harm that can result from the mere expression of words. This is evident by his description of hate propaganda and pornography as "offensive material".[44]

By describing hate propaganda and pornography as "offensive", he trivializes and avoids looking at all the real harms of extremist speech. This, combined with his unquestioning use of the clear and present danger test as a line-drawing device, avoids any analysis of the social meaning of what is being done by hate propagandists and pornographers in at least three major ways.

First, the "offensive" categorization wrongly places the harm within the victim's control. It suggests that if the victim is harmed, it is her or his own fault because they could, or should, have avoided it — by averting their eyes or not listening.[45] This form of victim blaming ignores the essence of discrimination, which is not how members of disadvantaged minorities feel about themselves, but rather how they are viewed by members of the dominant majority.

Second, it avoids looking at the effect of hate speech, and pornography, which is to promote inequality and group disadvantage. When the speech is viewed as a practice of discrimination[46] rather than as an avoidable irritant, the analysis changes. It makes sense to limit hate propaganda and pornography when their real harms include group-based enmity, ill-will, degradation and prejudice which produce exclusion and subordination of the target group. Stereotyping and stigmatization of historically disadvantaged groups are legally

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40. MacKinnon, *supra*, note 10 at 205-206.
41. In *R.* v. *Andrews and Smith* (1988), 2 O.A. 161 (Ont. C.A.), Cory J. described hatred as "one of the most extreme emotions known to human kind" at 78.
42. Bollinger, "The Tolerant Society" (Clarendon Press, 1986) at 57-58.
43. *Supra*, note 6 at 10-11.
44. *Ibid.* at 33.
45. *Ibid.* at 33-34.
46. *Canadian Human Rights Act*, R.S.C. 1985, c. H-6, as am., s.13(1).

recognized harms deserving sanction because they shape the social image and reputation of group members often controlling their opportunities as individuals more powerfully than their individual abilities do.[47]

The harm women suffer as a result of pornography is described in thousands of scholarly articles dealing with the prevalence, content and effects of pornography. Several hundred research centres in the United States, Canada, England and Australia have undertaken laboratory and field studies on over one hundred thousand subjects concerning the effect of media depicted aggression, including sexual aggression. These scientists have employed a wide variety of methodological approaches, stemming from a wide variety of disciplines and theoretical perspectives. While the conclusions emanating from this comprehensive body of literature indicate that violent and aggressive pornography is a direct contributor to violent and aggressive behaviour,[48] it cannot be conclusively proven that pornography causes direct harm to women. The same causal and methodological problems arise in this kind of research as in research which attempts to positively prove that alcohol causes traffic deaths or smoking causes cancer. Borovoy is wrong, however in dismissing the evidence because it doesn't prove beyond a reasonable doubt that pornography is physically injurious.[49] Evidence of potentially serious harm has justified government regulation of the tobacco and alcohol industries as well as many others where health and safety are concerned. The effects of pornography on women should be of no less concern when so much evidence suggestive of harm exists. Moreover, evidence demonstrating that exposure to pornographic material produces scientifically measurable harm to society has never been necessary to support government regulation.[50]

Thirdly, both the "offensive" categorization as well as "the clear and present danger" limitation assume words are only a prelude to action, and only harmful "acts" should be prohibited. As pornography and hate propaganda are not conclusively linked to "acts", Borovoy argues they cannot be prohibited. This analysis fails to explain the many laws that presently prohibit purely linguistic behaviour. For example, laws prohibiting bribery, treason, blackmail, conspiracy, many forms of harassment, threatening and discrimination are prohibitions of "acts" consisting solely of words. The problem with the action/harm distinction is that it only comprehends linear, individualized harm of the "John

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47. This was the general conclusion of a number of groups and committees which have investigated the issue including, "Equality Now", The Report of the Special Parliamentary Committee on Participation of Visible Minorities in Canada Society, (1984), at 35-40; "Hatred and the Law", Report of the Special Committee on Racial and Religious Hatred, Canadian Bar Association, (1984) at 8-12. See also *Beauharnais* v. *Illinois*, 343 U.S. 250 (1951) (U.S.S.C.).

48. Final Report, Metro Toronto Task Force on Public Violence Against Women and Children, (1984) at 74. See also Diane E.H. Russell, "Pornography and Rape: a Casual Model", (1988) 9 Political Psychology at 41-74; "Pornography and Violence: What Does the New Research Say?" in Lederer, *Take Back the Night*, at 218; N. Malamuth and E. Donnerstein, eds., *Pornography and Sexual Aggression* (Orlando Fla.: Academic Press, 1984); D.L. Mosher and H. Katz, "Pornographic Films, Male Verbal Aggression Against Women, and Guilt", in *Technical Report of the Commission on Obscenity and Pornography*, Vol. 8 (Washington, D.C.: U.S. Government Printing Office, 1971): M. McManus, ed., *Final Report of the Attorney General's Commission on Pornography* (Nashville: Rutledge Hill Press, 1986).

49. *Supra*, note 6 at 63.

50. *R.* v. *Fringe Products Inc. and 497906* Ontario Ltd., unreported, Jan. 26, 1990 (Ont. Dist. Ct.) p. 14.

hit Mary'' variety.[51] It does not take into account the fact that words in and of themselves are capable of causing more widespread harm.[52] As a line-drawing device, the action/word distinction is inaccurate, and misleading.

To individualize the concept of harm as Borovoy does, is to refuse to respond to the true nature of hate speech and pornography and to erect yet another barrier to the achievement of equality for disadvantaged groups. A more open-minded posture and willingness to give genuine consideration to important countervailing interests in society is required to adequately analyze the highly complicated, analytical and empirical questions underlying the question of harm.

Finally, Borovoy's arguments regarding definition must be addressed. He pleads helplessness to deal with ''vile pornography'' and ''malevolent'' hate propaganda through the argument that it is impossible to draw the distinctions required to avoid suppressing the wrong material.[53]

He correctly points out that words capable of more than one precise meaning may create opportunities for unintended distinctions to be drawn and that if imprecise words are used to describe a criminal offence, the law can be misused or misinterpreted to cause an unjust result.[54] However, he is not correct when he suggests that unless we have absolute certainty in words, we cannot have laws. This is a false suggestion because in any legal system, uncertainty is inevitable. The choice does not exist between a legal system without uncertainty and one with it. Open-ended words such as ''reasonable'' or ''dangerous'' create opportunities for abuse, but they are a starting point of a principled approach. The words ''hatred'' and ''pornography'' should be similarly viewed. Although exact precision in language is the optimum, imperfection cannot be used to foreclose action. To merely ask how much uncertainty any given law carries with it is an incomplete inquiry. The companion question of how much uncertainty we are prepared to live with given the interests the law is trying to protect, must also be asked. It is a question of balance in every case. Contours and content have been given to words like ''hatred'' and ''pornog-

51. MacKinnon, *supra*, note 10 at 206.

52. *Supra*, note 6 at 42-44, p. 54-58.

53. *Supra*, note 6 at 42-45.

54. For example, see M. Matsuda, ''Public Responses to Racist Speech: Considering the Victim's Story'' (1989) Michigan L.R. 2332; R. Delgado, ''Words that Wound: A Tort Action for Racial Insults, Epithets and Name-Calling'' (1982) 17 Harv. Civil Rights Lib. L.R. 133; C. Lutz, ''They Don't All Wear Sheets: A Chronology of Racist and Far Right Violence, 1980-1986'' (C. Lutz compl.), (1987). These authors describe in detail the harm suffered by victims of extremist hate speech. These injuries go far beyond mere offensiveness, ranging from psychic wounding to genocide. As well as creating an environment of discrimination, coercion and violence, it is reported that victims of hate speech experience a sense of personal violation and insecurity for their personal safety and well-being.

raphy''[55] and this process will continue as more cases come before the courts or as legislatures re-evaluate existing legislation.

Borovoy's conviction that the original, liberal meanings and purposes underlying the development of the free speech principle continue to have overriding contemporary significance may explain why newer purposes are overlooked in his analysis. For example, to make his ''slippery slope'' argument, he uses pre-*Charter* cases where works such as *Lady Chatterly's Lover* and *Fanny Hill*[56] were prosecuted under obscenity laws (albeit unsuccessfully). By drawing the reader's attention to such examples, Borovoy associates the freedom of expression argument with the preservation and protection of works considered to be of great merit. By not examining speech in its context and in relation to other constitutional rights the author forces an analogy to be drawn between important literary works and pornography. The reader, in turn, is tempted to end his or her thinking with a grateful genuflexion to the freedom of speech principle, seeing it as an essential tool to preserve important freedoms from state control.[57] This is a clever and convenient argument, but it diverts the legal analysis away from the social meaning of what is being done by pornography and forces a constitutional defence of it on neutral ground. This, in turn, reduces society's responsibility for the result being reached, and protects freedom of expression as a process without a public context or egalitarian dimension. It does not allow for any consideration as to whether or not free speech might have the result of diminishing, eradicating or colliding with the freedoms of others.[58]

V. CONCLUSION

In conclusion, Borovoy's book on ''Colliding Freedoms'' is consistently faithful to the liberal view of the state. The subtitle for the book is ''Our Civil Liberties'' but the author's perspective comprehends something less than a fully inclusive and comprehensive concept of rights. Civil liberties are assumed to be attainable within social and legal structures as they presently exist. Consequently any contextual analysis of the experience of disadvantaged members of society to whom civil liberties are largely inapplicable is, for the most part, ignored. It is apparent that liberal views are not as neutral as theorists like

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55. See *R.* v. *Andrews and Smith*, *supra*, note 41; *R.* v. *Keegstra*, *supra*, note 34; *R.* v. *Zundel*, *supra*, note 35; *R.* v. *Rankine* (1983) 9 C.C.C. (3d) 53 (Ont. Cty. Ct.); *R.* v. *Ramsingh* (1984) 14 C.C.C. (3d) 230 (Man Q.B.); *R.* v. *Wagner* (1985), 36 A.R. Pt. III (Alta. Q.B.); *R.* v. *Red Hot Video* (1985), 18 C.C.C. (3d) (B.C.C.A.); *Towne Cinema Theatres* v. *R.*, [1985] 1 S.C.R. 494, 45 C.R. (3d) 1, 18 D.L.R. (4th) 1 (S.C.C.).

56. *Supra*, note 6 at 54-55.

57. Bollinger, *supra*, note 42 at 241.

58. Quigley J. in *R.* v. *Keegstra* (1984), 19 C.C.C. (3d) 254 at 258 and 268 recognized that hate speech ''negates or limits the rights and freedoms of such target groups, and in particular denies them the right to the equal protection and benefit of the law without discrimination.'' He also recognized that limits on hate speech protect the freedom of expression of the target groups:

> ''. . . s.281.2(2) of the *Code* cannot rationally be considered to be an infringement which limits ''freedom of expression'', but on the contrary it is a safeguard which promotes it. The protection afforded by the proscription tends to banish the apprehension which might otherwise inhibit certain segments of our society from freely expressing themselves upon the whole spectrum of topics, whether social, economic, scientific, political, religious or spiritual in nature.''

Borovoy would have us believe. When tested against the theories and analyses of those who seek social equality with the dominant white, male elite, liberalism reveals itself as limited in scope and inherently biased. The centrality of the autonomous and undifferentiated individual to the liberal theory shows how its abstract principles fail to address the historically specific oppression actually experienced by dominated groups.

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