
Criminal Responses to Hate-Motivated Violence: Is Bill C-41 Tough Enough?

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Following an apparent upsurge in hate-motivated violence, Parliament enacted Bill C-41 which received Royal Assent on July 13, 1995. This Bill requires judges to treat proof that an accused was motivated by group hatred as an aggravating factor in sentencing. The author argues that Bill C-41, although a step in the right direction, fails to condemn hate crime strongly enough. She argues for the adoption of hate-crime provisions similar to those that exist within the United States. These provisions permit penalties for acts of hate-motivated violence to be increased beyond the maximum for violence that is not motivated by hatred. Many of the provisions also create a distinct offence for violent acts committed with a hateful motive. The author argues that creating a distinct offence for hate-motivated violence and permitting enhanced penalties is a better use of the criminal law than is Bill C-41. She argues that an explicit provision condemning hate crime provides recognition that such violence is different from, and frequently more heinous than, other types of violence. Such a provision would also constitute an important denunciation of hate-motivated violence and would provide groups who face such violence better redress.

Suite à une augmentation de la violence motivée par la haine, le Parlement a adopté la loi C-41 qui a reçu l'*assentiment* royal le 13 juillet 1995. Cette loi exige des juges qu'ils considèrent la preuve qu'un accusé a été motivé par une haine de groupe comme un facteur aggravant dans la détermination de la sentence. L'auteure suggère que la loi C-41, bien qu'elle constitue un pas dans la bonne direction, n'affirme pas de manière suffisamment claire que les crimes haineux sont inacceptables au Canada. Elle opte pour l'adoption de dispositions semblables à celles qui existent aux États-Unis. Ces dernières permettent d'augmenter les peines pour les actes de violence motivée par la haine au-delà des limites maximales déterminées pour les actes dont la violence n'est pas motivée par la haine. Plusieurs de ces dispositions créent également un crime distinct pour les actes violents commis avec des motifs haineux. L'auteure soutient que la création d'un crime distinct pour les actes violents motivés par la haine et l'augmentation des peines font un meilleur usage du droit pénal que la loi C-41. Elle considère qu'une disposition expresse condamnant les crimes haineux permet de reconnaître qu'une telle violence est différente et souvent plus haineuse que les autres types de violence. Une telle disposition constituerait de plus une dénonciation importante de la violence motivée par la haine et fournirait une meilleure réparation aux groupes qui sont victimes de cette violence.

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Toronto, June 1993: Three Tamil men are violently assaulted by white youths. One of them dies as a result of the attack.¹ Saskatoon, 1991: Aboriginal trapper Leo Lachance is shot to death as he leaves a pawn shop. Pawn shop owner, Carney Nerland — a member of the Aryan Nations — pleads guilty to manslaughter and is sentenced to four years in prison.² Montreal, November 1992: Two gay men are murdered in separate incidents of gay bashing.³ Vancouver, September 1992: A gay man requires eight metal plates and thirty-eight screws to reconstruct his face after being attacked by a gang of youths.⁴ Toronto, 1993: The Heritage Front, a white supremacist group, sets up a telephone hotline and actively recruits in high schools and on college campuses.⁵ Toronto, 1992. The Native Canadian Centre and a book store displaying books opposing fascism are spray painted with swastikas on the same night that a small Jewish cemetery is defaced with anti-Semitic slogans.⁶ Within fourteen months of these events, swastikas are painted on four synagogues in Toronto, and a Holocaust memorial is defaced with the words, "six million isn't enough."⁷ In Vancouver, a synagogue is vandalized with blood stains, and the Jewish Community Centre receives a bomb threat.⁸

Introduction

Canada appears to be witnessing an upsurge⁹ in hate-motivated violence.¹⁰ This raises the question — is the criminal justice system responding adequately to the

¹ P. Small, "Refugee Slashed by Two Men in Third Attack on Tamils" *The Toronto Star* (22 June 1993) A6.

² "Inquiry into Death of Trapper Questioned[,] Saskatchewan Indian Shot by White Supremacist" *The Toronto Star* (23 November 1993) A11.

³ I. Peritz, "Montreal Gay Killings: 'Tip of Iceberg'" *The Toronto Star* (26 December 1992) B5.

⁴ V. Janoff, "Darkness at the edge of town: Sexual politics turns violent as toughs stalk West End gays" *The Vancouver Sun* (12 September 1992) D4.

⁵ J. Armstrong, "Racists Target Kids in Schools, Report Says" *The Toronto Star* (11 March 1993) A4.

⁶ "Jewish Group Posts Reward After Vandals Hit at Natives" *The Toronto Star* (30 November 1992) A26; D. Brazao, "Racists deface walls of Jewish cemetery" *The Toronto Star* (7 December 1992) E7.

⁷ "Vandals attack 3 Metro synagogues" *The Toronto Star* (24 September 1992) A4; "Swastikas painted on synagogue and cars" *The Toronto Star* (5 April 1993) A6; K. Hudson, "Anti-Semitic Slogans Deface Memorial in Park" *The Toronto Star* (5 August 1993) N.Y. 1.

⁸ K. Bolan, "Anti-Semitic incidents last year highest on record, report says" *The Vancouver Sun* (25 February 1994) A3.

⁹ Since police forces in Canada have not kept accurate statistics on hate-motivated violence, it is unclear whether there has been a real upsurge or whether there is greater media attention focused on the problem and greater social recognition that racist violence is unacceptable. However, given that scapegoating and racist actions tend to increase during periods of economic downturn, an increase in racist violence would not be surprising. Statistics released by the Toronto Police force, which began to compile bias crime statistics in January 1993, appear to support this hypothesis. During the first six months of that year, police identified "a definite bias" as the motive in 75 criminal assaults, with the annual total reaching 155. Figures released by the Metropolitan Toronto Police Hate Crime Unit for the first six months of 1994 refer to 112 bias crimes (see G. Swainson, "Hate Crimes on Increase Among Teens Figures Show" *The Toronto Star* (23 June 1994) N.Y. 4).

¹⁰ I use the term "hate-motivated violence" to refer to violence based on a person's racial, religious, or ethnic identification, as well as on the victim's sexual orientation or disability. See *infra* notes 26-28, 57 and accompanying text.

problem of violence motivated by hate? At present, although the *Criminal Code*¹¹ contains provisions dealing with hate propaganda,¹² it does not specifically address hate-motivated violence. Hate-motivated violence is prosecuted instead under the standard criminal provisions governing violent acts, such as assault, manslaughter or mischief. The bigoted nature of any incident, assuming it enters into the process at all, is considered only as a factor in sentencing.

In June 1994, the Canadian government announced its intention to take an aggressive stand against hate crime. Minister of Justice Allan Rock introduced legislation¹³ to amend the *Criminal Code* to require judges, when passing sentence, to consider an offender's biased motive as a factor tending to increase the severity of the offence. Although the media portrayed Bill C-41 as a significant change and as a potential interference with the independence of the judiciary,¹⁴ the Bill actually does little to alter the current law. Under the Bill, hate crimes would continue to be prosecuted under existing *Criminal Code* provisions, and the accused's bigoted motive would only be considered at sentencing. The only significant difference between existing sentencing principles and the proposed amendments is that, under the latter, the *Criminal Code* would explicitly require consideration of an accused's biased motive as an element in sentencing.

In contrast to the existing Canadian approach to hate crime and to Parliament's codification of it, many jurisdictions in the United States have enacted provisions directed specifically at the problem of hate-motivated violence.¹⁵ These provisions increase the criminal penalties for offences involving violence motivated by hatred above those that attach to offences where group-based hatred is not an issue. Many also create a civil cause of action for victims of such violence. Despite considerable dispute over the constitutional validity of these statutes, the Supreme Court of the United States recently held that Wisconsin's hate-crime law¹⁶ did not violate the United States Constitution.¹⁷

In light of the increase in hate crimes Canada appears to be witnessing, the time is ripe to consider how the criminal law should respond to this type of violence, and specifically, whether Bill C-41 is the best approach our criminal law has to offer. In

¹¹ R.S.C. 1985, c. C-46 [hereinafter *Criminal Code*].

¹² *Ibid.* at ss. 318-19.

¹³ Bill C-41, *An Act to Amend the Criminal Code (Sentencing) and Other Acts in Consequence Thereof*, 1st Sess., 35th Parl., 1995 (assented to 13 July 1995, S.C. 1995, c. 22) [hereinafter Bill C-41].

¹⁴ See especially: D. Vienneau, "Ottawa Aims to Put Fewer in Prison But New Liberal Bill is Tough on Hate Crimes" *The Toronto Star* (14 June 1994) A1; "Combating Hate Crimes: Enlightened Step by Federal Government Will Be of Little Use If Left in a Vacuum" *The Ottawa Citizen* (27 June 1994) A9; H. Levy, "Punishing the Idea Behind the Crime" *The Toronto Star* (5 July 1994) A15.

¹⁵ See e.g., *supra* notes 16, 20-22 and accompanying text.

¹⁶ Wis. Stat. Ann. § 939.645 (West Supp. 1992) [hereinafter Wisconsin Statute].

¹⁷ See *Wisconsin v. Mitchell*, 113 S. Ct. 2194, 124 L. Ed. (2d) 436 (1993) [hereinafter *Mitchell* cited to S. Ct.].

this paper, I advance an argument in support of adopting U.S.-style hate-crime provisions. I suggest in Part I that Bill C-41 does not represent a strong enough commitment to denouncing hate-motivated violence and to ensuring that perpetrators of such violence receive sufficient disapprobation. In Part II, I draw upon the experience of the United States to canvass potential weaknesses of hate-crime legislation, both in terms of practical difficulties of enforcement and in terms of potential constitutional hurdles. Throughout this discussion, I attempt to show that there are no constitutional obstacles to enacting U.S.-style hate-crime provisions in Canada, and further, that even though U.S.-style hate-crime provisions may have some practical limitations, Bill C-41 does not appear to offer any advantages over the United States's approach. I conclude by arguing that, if we are serious about our commitment to harmonious inter-group relations, hate-crime provisions present a better use of the criminal law than does Bill C-41.

My argument in support of U.S.-style hate-crime provisions is qualified, however, by a number of concerns. First, although at first glance hate-crime legislation may appear to be a progressive measure offering protection and a means of redress for groups which have been victimized by hatemongers, upon greater reflection it may not be as constructive. Like many other criminal law reforms, hate-crime provisions may be little more than symbolic gestures, incapable of contributing to the solution of deeply-entrenched social problems. Second, if the hate-crime provisions turn out to be ineffective in yielding convictions — as seems to have been the case in the United States — they may do more harm than good. Rather than signalling that hate crime will be treated seriously, they may, in fact, send the opposite message. Third, once hate-crime legislation is in place, we may be tempted to believe that, because we have taken measures to combat hate-motivated violence, no further action is needed. Notwithstanding these problems, I believe that the creation of strong hate-crime legislation is important in a society that prides itself on its ethics of tolerance and multiculturalism and, yet, is plagued by deep undercurrents of hate.

Throughout the ensuing discussion, it is important to keep in mind the limited parameters of the debate, namely, the response of the criminal justice system to the problem of hate-motivated violence. The criminal-justice system is only one of many possible mechanisms for addressing hate-motivated violence, and arguably, it has only a very small role to play in rooting-out the causes of such violence. Hate-crime legislation should not, therefore, be seen as a panacea for eradicating hate crime, as should be clear from the experience of the United States where high levels of hate crime persist.¹⁸ This paper focuses on the limited question of whether the

¹⁸ For example, the Los Angeles County Commission on Race Relations recorded a 6.4 percent increase in hate crimes from 1992 to 1993 (see D. Hamilton, "Combating Hate: Crimes Against Minorities are Increasing Across the Board" *The Los Angeles Times* (17 May 1994) B1). The Boston Police Department reported that hate crimes in that city doubled between 1989 and 1994 (see I.A.R. Lackshmanan, "Hate-crime Reports rise in Boston" *The Boston Globe* (20 June 1994) 1). Both California and Massachusetts have a full range of hate-crime statutes.

criminal-justice system is making the best contribution it can to deterring racist violence and to ensuring that those who commit hate-motivated crime receive appropriate disapprobation.

I. The Case for Strong Hate-Crime Legislation

A. *The Development of Hate-Crime Legislation in the United States and its Applicability to Canada*

A brief overview of the hate-crime legislation that has proliferated in the United States over the last decade serves as a useful way to begin discussing the nature of such provisions and the reasons in favour of their enactment. During the late 1970s and the early 1980s, the United States experienced an upsurge in violence against members of racial and religious minorities as well as an increase in other hate-group activities, such as cross burnings and the defacing of synagogues.¹⁹ In response, several state legislatures began to consider legislation to deter racist violence, provide mechanisms of redress for victims of such violence, and express social disapproval of racist activities. In 1981, Oregon became the first state to enact criminal provisions specifically directed at hate-motivated violence.²⁰ Other states quickly followed suit, and by 1991 well over one-half of the states had enacted criminal provisions against hate-motivated violence.²¹ If civil remedies are also taken into account, forty-seven states had passed some form of legislation to combat hate-motivated violence by 1993.²²

Many of the states based their criminal provisions, at least, in part on model legislation drafted by the Anti-Defamation League of B'nai B'rith ("A.D.L.").²³ Having documented rising anti-semitism in the late 1970s, the A.D.L. began to ad-

¹⁹ See H. Mazur-Hart, "Racial and Religious Intimidation: An Analysis of Oregon's 1981 Law" (1982) 18 *Willamette L. Rev.* 197. One of the most notorious examples of this increase in hate-group activity was the 1977 attempt by the neo-Nazi National Socialist Party of America to march through Skokie, Illinois, a suburb of Chicago, which had a large population of Jewish survivors of the holocaust (see S. Gellman, "Sticks and Stones Can Put You in Jail, But Can Words Increase Your Sentence? Constitutional and Policy Dilemmas of Ethnic Intimidation Laws" (1991) 39 *U.C.L.A. L. Rev.* 333).

²⁰ Since revised as Or. Rev. Stat. Ann. ss. 166.165 (1991) [hereinafter Oregon Statute]. It is perhaps more accurate to call this statute the first modern hate-crime law. United States federal statutes passed after the Civil War have been used to address hate-motivated violence, but for the most part, they have not yielded convictions. For further discussion of these statutes, see G. Padgett, "Racially-Motivated Violence and Intimidation: Inadequate State Enforcement and Federal Civil Rights Remedies" (1984) 75 *J. Crim. L. & Criminology* 103.

²¹ See e.g.: Wisconsin Statute, *supra* note 16; Ohio Rev. Code Ann. s. 2927.12 (Baldwin 1992). See also: M.Z. Goldberg, "Statutes Combat Hate Crimes in 46 States, ADL Reports" (1992) 28:2 *Trial* 88; Anti-Defamation League, *Hate Crimes Statutes: A 1991 Status Report* (New York: A.D.L., 1992) [hereinafter *Hate Crimes Statutes*].

²² See J. Levin & J. McDevitt, *Hate Crimes* (New York: Plenum Press, 1993) at c. 13.

²³ See *Hate Crimes Statutes*, *supra* note 21 at 20.

vocate the creation of hate-crime legislation, and in 1981, it released a model statute which it hoped would form the basis of legislation at the state level.²⁴ The A.D.L. recommended the creation of two criminal offences: institutional vandalism and intimidation. Institutional vandalism prohibited the vandalism of cemeteries, places of worship, community centers, or schools, all of which are common forms of anti-Semitic activity.²⁵ The offence of intimidation was based on the principle that crimes motivated by racial or religious hatred are more heinous than those which are not and provided that certain offences could be punished more harshly when motivated by hatred. Since the initial release of its model legislation, the A.D.L. has broadened its intimidation provision to include crimes committed because of the victim's sexual orientation. The provision, thus, now addresses gay and lesbian bashing, crimes which have become increasingly prevalent over the last few years.²⁶ The A.D.L. model now provides the following definition of intimidation:

- A. A person commits the crime of intimidation if, by reason of the actual or perceived race, color, religion, national origin or sexual orientation of another individual or group of individuals, he violates Section _____ of the Penal Code (insert code provision for criminal trespass, criminal mischief, harassment, menacing, assault and/or other appropriate statutorily proscribed criminal conduct).
- B. Intimidation is a _____ misdemeanor/felony (the degree of the criminal liability should be at least one degree more serious than that imposed for the commission of the offense).²⁷

²⁴ See Gellman, *supra* note 19 at 339.

²⁵ The A.D.L. defines institutional vandalism as follows:

- A. A person commits the crime of institutional vandalism by knowingly vandalizing, defacing or otherwise damaging:
 - i) Any church, synagogue or other building, structure or place used for religious worship or other religious purpose;
 - ii) Any cemetery, mortuary or other facility used for the purpose of burial or memorializing the dead;
 - iii) Any school, educational facility or community center;
 - iv) The grounds adjacent to, and owned or rented by, any institution, facility, building, structure or place described in subsections (i), (ii) or (iii) above; or
 - v) Any personal property contained in any institution, facility, building, structure or place described in subsections (i), (ii) or (iii) above (*Hate Crimes Statutes, supra* note 21 at 4).

The A.D.L. proposes that the penalties for institutional vandalism should vary based on the amount of damage caused to the property. According to A.D.L. statistics, by 1991, 36 states had enacted provisions prohibiting institutional vandalism (see *ibid.* at 22-23).

²⁶ See C. Petersen, "A Queer Response to Bashing: Legislating Against Hate" (1991) 16 *Queen's L.J.* 237.

²⁷ *Hate Crimes Statutes, supra* note 21 at 4. The A.D.L. also expanded its model legislation to include two additional components: a civil action for institutional vandalism and intimidation; and pro-

According to A.D.L. statistics, by 1991, twenty-eight states had passed legislation akin to the offence of intimidation.²⁸

The offence of intimidation alters the criminal law's traditional response to hate-motivated violence in two ways. First, it creates a distinct criminal offence focused on the hatred precipitating the accused's action. In the absence of a provision of this sort, prosecution would proceed under one of the generic offences included within the crime of intimidation — for example, assault — and the accused's hateful motive would be considered only at the point of sentencing. Intimidation, thus, emphasizes the bigoted nature of the accused's actions rather than the particular violent act by which the accused expressed his or her antipathies. Second, intimidation increases the maximum penalty for hate-motivated violence *above* that available for the underlying violent offence. Thus, while in a particular jurisdiction assault might carry a maximum penalty of five-years imprisonment,²⁹ by deeming intimidation to be "one degree more serious"³⁰ than the underlying offence of assault, the provision increases the penalty that can be imposed on a person who commits an assault because of hatred of a group to which the victim belongs.³¹

Four aspects of the A.D.L.'s intimidation provision merit further discussion. First, although the offence will generally involve inter-group violence, intimidation is not intended to penalize inter-group violence *per se* but is, instead, designed to cover instances in which the violence is *caused* by group hatred. The A.D.L. explained the scope of the offence in the following way:

The conduct targeted by the legislation ... is distinct from other criminal behavior. These are not incidents where the victim is coincidentally the member of a group different from the criminal's, or where the criminal — in the course of a burglary or a mugging — realizes his victim's status and utters a racist or anti-Semitic remark. These crimes occur *because* of the victim's actual or perceived status; where race, religion, ethnicity or sexual orientation is the *reason* for the crime. In the vast majority of these cases, but for this personal characteristic, no crime would occur.³²

visions requiring states to keep records of hate crime and to train police officers to identify and to respond effectively to hate crime (see *ibid.* at 4-5). Although the four components may be seen to constitute a comprehensive package of legislative action to respond to hate crime, a discussion of the non-criminal provisions is beyond the scope of this paper (but is explored *ibid.* at 2-3).

²⁸ See *ibid.* at 22-23.

²⁹ Under the *Criminal Code*, the maximum penalty for simple assault prosecuted by indictment is a term of imprisonment not exceeding five years (*supra* note 11 at s. 266(a)).

³⁰ In general, the U.S. states have highly-structured sentencing mechanisms which conceive of severity by degrees (see United States Sentencing Commission, *Federal Sentencing Guidelines Manual* (St. Paul, Minn.: West, 1994)).

³¹ Although the A.D.L. uses U.S. terminology when it speaks of increasing the severity of the offence by "degrees", as I explain below at the text accompanying notes 35ff, the same result could be obtained in Canada in a number of ways.

³² Brief of *Amici Curiae* the Anti-Defamation League *et al.*, in *Mitchell*, at 7 [hereinafter A.D.L.

Thus, intimidation deals only with a specific kind of inter-group violence and would not apply simply because the accused and the victim happen to belong to different racial, ethnic or religious groups, or have different sexual orientations.

Second, it is the accused's *perception* of the victim's race, religion, or sexual orientation, rather than the victim's *actual* identity, that is relevant to the offence. Thus, individuals will be guilty of intimidation if they assault a person they believe to be, for example, Jewish, whether or not that person is *in fact* Jewish. What matters is the accused's intention to assault a Jewish person to express hatred of Jewish people, not whether the accused was correct in his or her belief that the victim was Jewish. The crime of intimidation, therefore, can be made out even where the accused's ascription of characteristics to the victim was completely erroneous.

Third, although initially conceived as a response to violence by racist groups against racial and religious minorities, the A.D.L. provision is drafted to be race and religion neutral, with the result that it punishes crimes motivated by group hatred regardless of the identity of the accused or of the victim. Thus, people of colour can be convicted of intimidation if by reason of racial hatred they assault someone of a different racial group. In fact, in *Mitchell*, where the United States Supreme Court upheld Wisconsin's intimidation provision, the accused was an African-American man and the victim was a white youth.³³ Since the condemnation of hate-based violence embodied in intimidation statutes works to the benefit of members of the majority, as well to the benefit of members of minority groups, intimidation statutes cannot be said to offer "special" protection to minorities.

Finally, the A.D.L. provision is broad enough to cover not only violence directed at persons whom the accused perceives as members of the hated group but also includes violence directed at members of the *accused's* own group who are targeted because of their association with the hated group. Thus, white supremacists could be convicted of a hate crime for assaulting a white man who is part of an inter-racial couple, if the assault was motivated by an abhorrence of inter-racial dating or miscegenation.³⁴ While the non-white member of the couple would not be the direct target of the violence, the assault would still have been perpetrated "by reason of" his or her race and association with the immediate victim.

There are two principal ways in which a provision analogous to the A.D.L. intimidation provision could be drafted in Canada. The first and most obvious course would be to enact an omnibus hate-crime provision akin to the A.D.L.'s model. Such a provision could set out the violent offences that, when coupled with a hateful motive, would constitute "intimidation". This provision could either specify the penalty increase for each underlying offence (as the A.D.L. model does) or simply

Brief in *Mitchell*].

³³ See *ibid.* For a discussion of this case, see text accompanying notes 74-85.

³⁴ See e.g. *United States v. Wood*, 780 F.2d 955 (11th Cir. 1986).

impose a penalty distinct from that of the underlying offence. Alternatively, a provision analogous to section 85 of the *Criminal Code* could be enacted. Section 85 states that a person who uses a firearm while committing an indictable offence or while fleeing from committing or attempting to commit an indictable offence is guilty of a separate offence and is liable to imprisonment for a minimum of one year³⁵ and a maximum of fourteen years.³⁶ Since section 85 also stipulates that the sentence for this offence is to be served consecutively to the sentence for the underlying indictable offence, its effect is to increase the sentence for indictable offences committed with a firearm. A crime of ethnic intimidation could be drafted along these lines to provide that a person who has committed a specific violent offence and who was motivated by group hatred would be guilty of the offence of intimidation in addition to the underlying violent offence. That person would then be subject to a statutorily-mandated minimum sentence to be served consecutively to the sentence for the underlying violent crime.

Second, the sentencing provisions of the *Criminal Code* could be amended to provide for an increased sentence where a person has been found guilty of specified violent offences and has been shown to have been motivated by group hatred. In other words, rather than creating a distinct offence of intimidation, Parliament could simply increase the maximum sentence for designated offences when these offences were motivated by group hatred. Since it would focus on sentencing, this approach would differ from Bill C-41 in only one key respect: it would permit the *maximum penalty to be increased beyond* the maximum available for an offence not motivated by hatred.³⁷ This approach has been adopted in several U.S. states.³⁸

³⁵ According to section 85(1)(d), this minimum is increased to three years for second or subsequent offences or "in the case of a first offence committed by a person who, prior to January 1, 1978, was convicted of an indictable offence, in the course of which or during his flight after the commission or attempted commission of which he used a firearm" (*Criminal Code*, *supra* note 11 at s. 85(1)(d)).

³⁶ This provision has been slightly altered by Bill C-68, *An Act Respecting Firearms and Other Weapons*, 1st Sess., 35th Parl., 1994-95, cl. 139 (passed by the House of Commons 13 June 1995) [hereinafter Bill C-68]. The new section 85 would not apply to the following offences: criminal negligence causing death; manslaughter; attempted murder; causing bodily harm with intent and using a firearm; sexual assault with a weapon; aggravated sexual assault; kidnapping; hostage-taking; robbery; or extortion (Bill C-68, *ibid.*).

³⁷ This approach bears some similarity to the existing murder provisions of the *Criminal Code*, which distinguish between murder in the first and second degree. The distinction does not create two separate murder offences but, rather, declares certain murders—including those that are planned and deliberate or those committed in the course of certain offences involving domination—to merit a longer term of parole ineligibility than others (*Criminal Code*, *supra* note 11 at s. 231). While the maximum punishment for both forms of murder is life imprisonment, a person found guilty of first-degree murder may be eligible for parole after 25 years whereas someone convicted of second degree murder will be eligible for parole after 10 years (*ibid.* at ss. 742, 744). Hate-motivated violence could be handled in a similar way by saying that the presence of a hateful motive does not alter the substantive offence committed but, instead, makes the offence more serious and justifies increasing the maximum penalty beyond the existing level. The key difference, of course, between the murder provisions and a sentencing-enhancement approach to hate crime is that the penalty in murder remains the same, whereas the penalty for violent offences would be increased where the offence was motivated by group hatred.

For reasons which I will discuss below,³⁹ the first of these two options is more appealing. While both proposals would have the effect of increasing sentences for hate-motivated violence,⁴⁰ recognizing this form of violence as a distinct offence is a more powerful way of condemning such behaviour than simply providing for the possibility of an increased sentence for the underlying crime. Either approach would, however, be a stronger denunciation of hate-motivated violence than is Bill C-41.

B. The Arguments In Favour of Enacting U.S.-Style Hate-Crime Legislation in Canada

Under Canada's current law, the fact that an accused acted with a biased motive in committing an offence does enter into the criminal process but only at the point of sentencing. According to accepted sentencing principles, hatred acts as an aggravating factor which increases the severity of the accused's crime and, hence, the sentence to be imposed. This principle was articulated in 1977 in *R. v. Ingram*,⁴¹ a case involving a vicious assault of a Tanzanian man by two young white men.⁴² In increasing the sentence imposed by the trial court, the Court of Appeal held that the presence of racist hatred renders an assault particularly abhorrent:

It is a fundamental principle of our society that every member must respect the dignity, privacy and person of the other. Crimes of violence increase when respect for the rights of others decreases, and in that manner, assaults such as occurred in this case attack the very fabric of our society. Parliament's concern for the incitement of racial hatred is reflected in s. 281 [now s. 319] of the *Criminal Code*. An assault which is racially motivated renders the offence more heinous. Such assaults, unfortunately, invite imitation and repetition by others and incite retaliation. The danger is even greater in a multicultural, pluralistic urban society. The sentence imposed must be one which expresses the public's abhorrence for such conduct and their [*sic*] refusal to countenance it.⁴³

³⁸ See *e.g.* Wisconsin Statute, *supra* note 16.

³⁹ See Parts I.B. and II.C., below.

⁴⁰ The second option might not be as effective in increasing sentences, since it does not compel judges to impose a higher sentence where a crime is motivated by group hatred. Nonetheless, the experience in the United States has shown that, where provisions of this sort are invoked, they have led to the imposition of a higher penalty. See *e.g.*, the trial court's reasoning in *Mitchell* as described in the United States Supreme Court's judgment (*Mitchell*, *supra* note 17).

⁴¹ (1977), 35 C.C.C. (2d) 376 (Ont. C.A.) [hereinafter *Ingram*].

⁴² The case does not explicitly state that the accused were white. However, this conclusion is readily discerned from the court's rendition of the facts. The court notes that before the assault, one of the accused had become verbally abusive and "racially insulted a non-white T.T.C. guard" (*Ingram, ibid.* at 378). Further, the court notes that the victim of the assault was a "brown-skinned native of Tanzania" (*ibid.*). By pointing out that the victim was non-white while failing to comment on the race of the accused, the court, in my view, relies on an unstated norm that people are white unless otherwise described.

⁴³ *Ingram, ibid.* at 379.

A year later, in *R. v. Atkinson*,⁴⁴ the Ontario Court of Appeal applied this reasoning to homophobic assaults against gay men.⁴⁵ In 1991, the Attorney General of Ontario issued guidelines to Crown Attorneys quoting the *Ingram* and *Atkinson* decisions and stating that prosecutors should bring the presence of a racial motive to the attention of the sentencing judge. The Attorney General re-issued these guidelines in March 1993, following several widely-publicized incidents of racist violence.⁴⁶ Thus, it appears to be accepted within Canadian criminal law that the presence of a hate-based motive renders violent conduct more serious with the result that a more severe sentence should be imposed.

The provisions of Bill C-41 concerned with hate crime would simply codify this practice. Section 718.2 of the Bill provides that a court imposing a sentence shall consider "evidence that the offence was motivated by bias, prejudice or hate based on race, national or ethnic origin, language, colour, religion, sex, age, mental or physical disability, sexual orientation or any other similar factor" as aggravating factors.⁴⁷ The fact that an accused was motivated by group hatred would thus lead courts to impose a sentence towards the harsher end of the existing sentencing range but would *not* permit the courts to *increase* the sentence beyond the maximum currently available.

Four arguments suggest that the law's current treatment of hate crime — and, by implication, the provisions contained in Bill C-41 — may be inadequate and support the creation of a distinct hate crime offence. First, making hate-motivated violence into a distinct crime is recognition that such violence constitutes a specific form of harm that differs in significant ways from other types of violence. Hate-motivated violence is not simply an attack on the individual who happens to be the immediate target of the assault but also constitutes an affront to minority communities and runs counter to Canada's core values of equality and multiculturalism. The

⁴⁴ (1978), 43 C.C.C. (2d) 342, 5 C.R. (3d) S-30 [hereinafter *Atkinson* cited to C.C.C.].

⁴⁵ The trial judge had not viewed the accused's homophobia as an aggravating factor. In holding that the trial judge had erred, the Court of Appeal stated:

The learned trial judge appears to have been of the opinion that what was stated in the case of *R. v. Ingram and Grimsdale*, was not relevant since that case was concerned with a racially motivated attack. While in *R. v. Ingram and Grimsdale* the attack was racially motivated, the principles set forth in the judgment are not limited to such an attack. The motive for the assaults in this case should have been considered by the trial judge as an aggravating factor in imposing sentence. We think the learned trial Judge erred in failing to give effect to this principle in imposing the sentences under appeal (*Atkinson*, *ibid.* at 344).

⁴⁶ Specific guidelines were sent to Crown Attorneys in May 1993 to reinforce the importance of seeking greater penalties where offences were hate motivated (see Ontario, Ministry of the Solicitor General and Correctional Services, Release, "Justice Guidelines in Response to Hate Motivated Crime" (22 July 1993)).

⁴⁷ Bill C-41, *An Act to Amend the Criminal Code (Sentencing) and Other Acts in Consequence Thereof*, 1st Sess., 35 Parl., 1994-1995, (as passed by the House of Commons 15 June 1995), cl. 178.2(a)(i).

accused's selection of a victim by reason of race, religion, ethnicity, or sexual orientation demonstrates that the violent conduct is directed not only at the immediate victim but also at the entire group of which the victim is — or is perceived by the perpetrator to be — a member. Thus, hate-motivated violence is, in effect, a form of group intimidation intended to express loathing towards a particular group and to instill fear among that group as a whole.⁴⁸ As a result, hate-motivated violence affects entire minority communities, because they know that they are all potential targets of such violence. Moreover, the harmful effects of hate-motivated violence directed at members of one minority community may spill over to other minority groups. Bigots seldom limit their hatred to one group and many members of minority groups know that, although they were not targeted this time, they could be next on the list.⁴⁹

In addition, research in the United States indicates that hate-motivated violence may be more brutal and result in greater physical and psychological injury to the victim than other forms of violent conduct. In its brief to the United States Supreme Court, the A.D.L. summarized one study in the following way:

Research on bias-motivated crimes is in its infancy, but the available evidence indicates that these crimes are generally much more violent and have a significantly greater community impact than other crimes. One researcher, for example, analyzed 452 hate crime cases in Boston during the period between 1983 and 1987. The data revealed that 74% of bias-motivated assault incidents (including assault and battery and assault with a dangerous weapon) involved some physical injury to the victim. The national figure for all assault cases was 29%. Remarkably, these bias motivated assault incidents involved hospitalization of their victims over four times more often than is the case with other assaults.⁵⁰

According to a 1989 study conducted by the National Institute Against Prejudice and Violence, also cited by the A.D.L., the psychological effects experienced by victims of hate-motivated violence also tend to be more severe than for victims of

⁴⁸ This goal is often achieved. For instance, following a vicious beating of a Tamil man, his friends told the media that "everybody in the Tamil community" was afraid not only of the attacks but of retaliation for reporting them (R. Dimanno, "The quiet dignity of a Tamil beaten by racists" *The Toronto Star* (16 June 1993) A7).

⁴⁹ In addition, bigots often fail to distinguish one minority group from another. For example, in the much publicized murder of Vincent Chin, a Detroit autoworker beat a Chinese-American man to death with a baseball bat because he believed Mr. Chin to be Japanese (see Levin & McDevitt, *supra* note 22 at 58).

⁵⁰ A.D.L. Brief in *Mitchell*, *supra* note 32 at 7 [citations omitted]. The A.D.L. relied on J. McDevitt, *The Study of the Character of Civil Rights Crimes in Massachusetts (1983-1987)* (Boston: Centre for Applied Social Research, Northeastern University, 1989). See also Levin & McDevitt, *ibid.* One reason hate-motivated violence is likely to be more severe than other assaults is that it is often perpetrated by groups of offenders. Using information drawn from the National Crime Survey, Levin and McDevitt reported that 64 percent of hate crime in the United States was committed by multiple offenders as compared with 25 percent of all other violent crime (Levin & McDevitt, *ibid.* at 16).

violence that is not hate inspired. The study found that victims of hate-motivated violence experience on average "21% more of the standard psychophysiological symptoms of stress than did victims of similar acts of ordinary violence or abuse".⁵¹ These results provide additional support for viewing hate-motivated violence as different from and more severe than other forms of violence.⁵²

By requiring judges to consider the accused's hateful motive at the time of sentencing, Bill C-41 implicitly recognizes the harmful effects of hate-motivated violence on minority communities and on Canadian society as a whole. However, Bill C-41's approach of redressing biased motives through the sentencing process may not sufficiently underscore the distinctive nature of hate-motivated crime. Prosecuting the accused with a standard, non-hate specific, offence may fail to emphasize the extent to which the accused's action was an expression of hatred of an entire group as effectively as would a prosecution under a specific hate-crime provision. Furthermore, under Bill C-41 the accused's hateful motive can *at most* increase his or her penalty to the existing maximum for the underlying offence. To account fully for the extent of the individual and social harms caused by hate crime, it is, I would argue, necessary to augment the penalties available for such crimes.

The second argument in favour of enacting provisions specifically directed at hate crime derives from the role the criminal law plays in demarcating the boundaries between acceptable and unacceptable conduct. By deeming certain activities to be subject to state sanction, the criminal law plays a normative or symbolic role in instructing citizens about the types of conduct that give rise to social disapprobation. The symbolic aspect of the criminal law has featured prominently in feminist scholarship.⁵³ For example, in advocating law reform to abolish the rule that a man could not, by definition, rape his wife,⁵⁴ and to ensure that spousal abuse is treated seriously by police and prosecutors,⁵⁵ many feminist scholars have argued that legal rules or their selective implementation have created a cultural climate that condones violence against women. The premise behind feminist arguments for changing the law and for improving enforcement is that the messages enshrined in the criminal law can be a powerful force in shaping attitudes and altering behaviour.⁵⁶ The symbolic aspect of the criminal law also has a role to play in combatting racism and

⁵¹ Quoted in the A.D.L. Brief in *Mitchell*, *ibid.* at 8.

⁵² This research, however, is still in its preliminary phases, and there is no comparable body of Canadian research.

⁵³ See e.g. C. MacKinnon, *Feminism Unmodified: Discourses on Life and Law* (Cambridge, Mass.: Harvard University Press, 1987); C. MacKinnon, *Only Words* (Cambridge, Mass.: Harvard University Press, 1993); K. O'Donovan, *Sexual Divisions in Law* (London: Weidenfeld and Nicolson, 1985).

⁵⁴ In Canada, the United States, and England, the crime of rape was defined until recently to exclude marital rape (see e.g. *Criminal Code*, R.S.C. 1970, c. C-34, s. 143). In Canada, this was not changed until 1983 by *An Act to Amend the Criminal Code*, S.C. 1980-81-82, c. 125, ss. 6, 19.

⁵⁵ See D. Martin and J. Mosher, "UnKept Promises: The Experiences of Immigrant Women and with the Neo-Criminalization of Wife Abuse" (1995) 8 C.J.W.L. 1 [forthcoming].

⁵⁶ See S. Edwards, "Violence Against Women: Feminism and the Law" in L. Gelsthorpe & A. Morris, eds., *Feminist Perspectives in Criminology* (Philadelphia: Open University Press, 1990) 145.

hate-motivated violence. Making hate-motivated violence into a distinct criminal offence sends a strong normative message that such violence is unacceptable and will not be tolerated in a society committed to pluralism. Considering motive in the sentencing process is not as powerful a statement, since it does not constitute an explicit denunciation of hate-motivated violence but treats hatred as only one of the many factors going to the severity of the crime.

Third, one can argue that absent an explicit criminal provision condemning hate-motivated violence, the criminal law fails to serve the needs of groups who are most likely to be the victims of hate crime. The argument here is that the criminal law has been formulated primarily by white men and reflects their views about the type of behaviour that ought to be subject to criminal sanction. As white male law-makers are far less likely to view themselves as potential victims of hate crime than are members of minority groups,⁵⁷ they may never have contemplated the criminal law's role in responding to hate crimes, nor viewed these crimes as requiring specific action. Although hate-motivated violence is not new to Canada,⁵⁸ the fact that hate crime has not been the subject of significant public disapproval until recently supports this analysis. Since minorities are more likely to be targets of hate-motivated violence than members of the majority group,⁵⁹ the absence of provisions designed specifically to address such violence raises the question of whether the criminal law confers equal protection on all citizens given the different types of harm they are likely to face. If one accepts the previous arguments concerning the distinctive nature of hate crime and the importance of the normative messages embodied in the criminal law, the answer — even after Bill C-41 — is that it does not.⁶⁰

⁵⁷ Some white men have been subject to hate-motivated violence. For example, Jewish men, although racially "white", and gay white men have been targets of hate-motivated violence, but historically neither had been in a strong position to influence the development of the criminal law.

⁵⁸ For an account of incidents culminating in the Christie pits-riot in Toronto in 1933, see Y. Glickman, "Anti-Semitism and Jewish Social Cohesion in Canada" in O. McKague, ed., *Racism in Canada* (Saskatoon: Fifth House, 1991) 45 at 51ff. See also S.A. Speisman, *The Jews of Toronto: A History to 1937* (Toronto: McClelland & Stewart, 1979). For a study of the treatment of aboriginal persons in Canada, see Manitoba, *Report of the Aboriginal Justice Inquiry of Manitoba*, vols. 1, 2 (Winnipeg: Queen's Printer, 1991). Additionally, the Ku Klux Klan has been operating in Canada since 1921, when cross burnings and other activities were reported in and around Toronto, Hamilton, Ottawa, Sault Ste. Marie, and Niagara Falls. By 1922, the Klan was also active in Western Canada, and implicated in the deaths of ten students in the arson at St. Boniface College in Winnipeg (see W. Kinsella, *Web of Hate: Inside Canada's Far Right Network* (Toronto: Harper Collins, 1994) at 11ff.).

⁵⁹ I use the terms "minority" and "majority" cautiously since how one constructs these terms will vary according to the context. For example, in the case of racial violence, while "white" persons are the majority, some will fall within minority groups in other contexts. A Jewish woman, notwithstanding the colour of her skin, is part of a religious minority and a potential target of anti-Semitism. A gay white man is also part of a minority group frequently subjected to hate-motivated violence.

⁶⁰ Hate-crime offences may be seen as an anti-discrimination measure within the criminal law. Just as the goal of human-rights legislation is to ensure that minorities receive equal protection of the law, hate-crime legislation would attempt to ensure that the criminal law addresses the harms minorities are likely to suffer.

Finally, the creation of a crime of intimidation may make it easier for authorities to compile statistics on the incidence of hate crime. Assuming assiduous charging and prosecution of conduct giving rise to intimidation, the level of hate-motivated violence could be tracked by following the conviction rate for the offence of intimidation, as well as for any other hate-specific offence.⁶¹ Determining the frequency of hate-motivated violence under the current system is, however, more complicated since it requires scrutiny of all violence-related offences. In addition, since the hateful nature of the offence will not be apparent from the charge itself, compilation of hate-crime statistics requires a recording and retrieval system that takes into account the facts of the case and the factors considered in sentencing and does not focus simply on the disposition. While this argument for creating a specific hate crime is, perhaps, less compelling than the others, it is, nonetheless, worthy of consideration.⁶²

II. Arguments Against U.S.-Style Hate-Crime Legislation

An examination of the criticism that U.S. hate-crime provisions have attracted provides valuable insight into the potential pitfalls of enacting such provisions. Despite widespread agreement — at least on the rhetorical level — that hate crime is deplorable, many commentators question the wisdom of enacting A.D.L.-style hate-crime provisions. The most vociferous criticism has focused on the constitutional validity of these provisions and, in particular, on their potential conflict with free speech. Critics also question the effectiveness of hate-crime legislation, often pointing to the fact that few convictions have been entered under such laws. Finally, some critics question the appropriateness of using the criminal law to tackle problems as complex as group hatred. I will examine each of these objections to assess

⁶¹ Regardless of the regime in which one attempts to compile statistics on hate crime, vigorous charging and prosecution are key. Anecdotal evidence from defence lawyers suggests that under the current system, despite the Crown's duty to bring a racist motive to the attention of the trial judge in sentencing, in the course of plea bargaining the Crown and the defence sometimes agree to omit motive from the judge's consideration. In these cases, the fact that the accused committed a hate crime will not be recognized, with obvious implications for the collection of accurate hate-crime statistics. The introduction of a crime of intimidation would not eliminate this problem. Plea bargaining would continue to occur with the defence attempting to persuade the Crown to drop the charge of intimidation in exchange for a conviction for the underlying violent offence. Even though this practice would skew the collection of hate-crime statistics, data collection would still be easier for a discrete hate-crime offence.

⁶² Similar arguments can be made for creating a crime of institutional vandalism. Most acts of institutional violence are currently prosecuted under the crime of mischief (see *e.g.* *R. v. Moyer* [1994] 2 S.C.R. 899, 92 C.C.C. (3d) 1). Just as prosecuting racist assault under the general offence of assault fails to focus on the hateful aspect of the crime, prosecutions for mischief fail to emphasize the hateful nature of institutional vandalism and its impact on the community being vandalized. There is also symbolic value in the statement that vandalism for the purpose of expressing hatred is off limits. An equal protection argument analogous to the one made in favour of the crime of intimidation can be made to support an offence of institutional vandalism. Finally, confining prosecutions of hate-motivated vandalism to a single offence would also facilitate the collection of statistics on hate crime.

if they assist in determining whether Canadians should eschew U.S.-style hate-crime legislation in favour of the Bill C-41 approach. My analysis of these criticisms suggests that there are no serious reasons why A.D.L.-style hate-crime legislation should not be enacted in Canada.

A. *Constitutional Concerns*

Until the Supreme Court of the United States declared that Wisconsin's hate-crime provision did not violate the United States Constitution, concern that hate-crime provisions were unconstitutional was widespread. Hate-crime provisions were thought to violate the constitution in three ways: (1) by infringing the freedom of speech and thought protected by the First Amendment; (2) by violating the guarantee of equal protection; and (3) by violating the due process clause of the Fourteenth Amendment through vagueness.⁶³ Of these, the freedom of speech challenge was viewed as the most damaging in light of the stringent protection courts in the United States have accorded to speech.

Although the constitutional validity of hate-crime statutes is settled in the United States, similar arguments could be made in Canada were U.S.-style hate-crime legislation to be enacted. Thus, I will explore each of the above challenges, as well as arguments against hate-crime legislation that could be brought under section 7 of the *Canadian Charter of Rights and Freedoms*.⁶⁴ My focus throughout this discussion will be to demonstrate that the *Charter* poses no impediments to the enactment of U.S.-style hate-crime legislation in Canada.

1. Freedom of Speech and Freedom of Expression

Until *Mitchell*, hate-crime statutes were viewed as violating free speech in two ways: (1) they were seen to constitute a thought crime; and (2) they were regarded as violating the doctrine of overbreadth.⁶⁵ On the basis of these arguments, hate-crime provisions had been struck down by the supreme courts of Wisconsin and Ohio.⁶⁶

⁶³ See U.S. Const. Amend. I, V, XIV § 1. For a discussion of the vagueness doctrine, see *McCrary v. State* 429 So. 2d 1121 (Ala. Ct. App. 1982) [hereinafter *McCrary*].

⁶⁴ Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter *Charter*].

⁶⁵ In the United States, overbreadth is an independent constitutional doctrine which applies solely to First Amendment claims (see *McCrary*, *supra* note 63). For a detailed discussion of the overbreadth doctrine in the United States, see Part II.A.1.a., below. For a detailed discussion of the Canadian version of the doctrine, see Part II.A.1.b.iii., below.

⁶⁶ See: *State v. Mitchell*, 485 N.W.2d 807 (Wis. 1992) [hereinafter *Mitchell* (Wis. S.C.)]; *State v. Wyant*, 64 Ohio St.3d 566, 597 N.E.2d 450 (1992) [hereinafter *Wyant I* cited to N.E.2d]. See *contra State v. Wyant*, 68 Ohio St.3d 162, 624 N.E.2d 722 (1994) [hereinafter *Wyant II* cited to N.E.2d].

a. *Hate Crimes as "Thought Crimes" and the Doctrine of Overbreadth*

The argument that hate-crime provisions punish thoughts derives from the fact that the violent actions forming the basis of hate crimes are already criminal offences. According to this argument, the only element differentiating hate-based offences from "simple" offences is the accused's expression of group hatred. Hate-crime provisions, therefore, do nothing more than punish an accused's hateful motive for engaging in, what is already, a criminal offence. This amounts to creating a thought crime in which the accused is punished more severely for subscribing to racist beliefs and for expressing them through violent conduct.⁶⁷ While such beliefs are undoubtedly heinous, the First Amendment prohibits the state from choosing among competing viewpoints, thereby dictating to its citizens which opinions they may hold.⁶⁸ This protection is most important where the beliefs in question are "reviled by society"⁶⁹ and are, consequently, more easily suppressed. Thus, while the state is legitimately entitled to punish the accused's violent conduct, it may not increase the punishment on the basis of the discriminatory thought that motivated the conduct.

The overbreadth argument is slightly more complicated. Unlike in Canada, where overbreadth forms part of the proportionality analysis within section 1 of the *Charter* or falls within a section 7 analysis,⁷⁰ in the United States, overbreadth exists as an independent basis for challenging legislation under the First Amendment. The overbreadth doctrine refers to laws which, though directed at an activity that the government is entitled to control, sweep within their grasp activity protected by the First Amendment. Where a protected activity is a significant part of the law's target, and no satisfactory way of separating constitutional from unconstitutional ap-

⁶⁷ The court in *Wyant I* framed its analysis in the following way:

The question before us is not whether the government can regulate the [violent] conduct itself. Clearly the government can, and has already done so by criminalizing the behavior in the predicate statutes. The issue here is whether the government can punish the conduct more severely based on the thought that motivates the behavior (*Wyant I*, *ibid.* at 457 [footnotes omitted]).

⁶⁸ See, for example, the poetically expressed view of Justice Jackson in *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 63 S. Ct. 1178 (1943) [hereinafter *Barnette* cited to U.S.]: "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion" (*ibid.* at 642).

⁶⁹ *Wyant I*, *supra* note 66 at 458.

⁷⁰ In *R. v. Nova Scotia Pharmaceutical Society*, [1992] 2 S.C.R. 606, 93 D.L.R. (4th) 36 [hereinafter *N.S. Pharmaceutical* cited to S.C.R.], the Supreme Court held that overbreadth was not an independent constitutional doctrine in Canada but, instead, is part of the minimal impairment component of the section 1 proportionality test (*ibid.* at 629). However, two years later, in *R. v. Heywood*, [1994] 3 S.C.R. 761, 120 D.L.R. (4th) 348, the Court held that overbreadth can be considered in determining whether legislation conforms to the principles of fundamental justice in section 7.

plications of the law exists, the law will be void for overbreadth.⁷¹ Invalidating the entire law is appropriate because a gradual removal of the law's unconstitutional aspects would result in a chill on free speech; to avoid running afoul of the law, individuals would engage in self-censorship and refrain from validly exercising their right to free speech. The importance of free speech within the constitutional framework of the United States renders this situation unacceptable.

In the case of hate-crime statutes, the overbreadth argument stems from the use of the accused's statements as evidence that his or her crimes were inspired by hate. The accused's speech, uttered either during the incident or before it occurred, will often be the most compelling — if not the only — evidence that the accused committed a hate crime. Relevant statements would clearly include blatantly racist comments but, the argument goes, might also include less heinous speech, such as ethnic jokes or remarks made in the course of serious intellectual inquiry. All of these forms of speech are protected by the First Amendment.⁷² Thus, hate-crime provisions are said to be overbroad because, by permitting the accused's statements to be used to prove an element of the offence, they sweep constitutionally protected speech within their ambit. Susan Gellinan, a vigorous opponent of hate-crime legislation, puts this argument in the following way:

Anyone charged with one of the underlying offenses could be charged with ... [a hate crime] as well, and face the possibility of public scrutiny of a lifetime of ... ethnic jokes to serious intellectual inquiry. Awareness of this possibility could lead to habitual self-censorship of ... one's ideas, and reluctance to read or listen publicly to the ideas of others, whenever one fears that those ideas might run contrary to popular sentiment on the subject of ethnic relations.⁷³

In other words, hate-crime legislation might have a chilling effect on speech as people would be forced to censor themselves in order to avoid prosecution for a hate crime should they, at some future point, commit a violent act.

For reasons which Canadian courts would likely find instructive, the Supreme Court of the United States rejected both the thought-crime and overbreadth arguments in *Mitchell*. That case involved the prosecution of an African-American man for an assault on a white youth under Wisconsin's hate-crime statute. Mitchell and a number of other African-American men and youths had been discussing a scene from the movie *Mississippi Burning*,⁷⁴ in which a group of white men beat a young African-American boy who was praying. In the course of this discussion, Mitchell

⁷¹ See L.H. Tribe, *American Constitutional Law*, 2d ed. (Mincola, N.Y.: Foundation Press, 1988) at 1022.

⁷² In U.S. jurisprudence, bigoted comments are protected speech so long as they do not fit within one of the categories of speech excluded from constitutional protection. Types of speech outside of First Amendment protection include obscenity and "fighting words" (*R.A.V. v. St. Paul*, 112 S. Ct. 2538, 120 L. Ed. (2d) 305 (1992) [hereinafter *R.A.V.* cited to S. Ct.]).

⁷³ Gellman, *supra* note 19 at 360-61.

⁷⁴ Alan Parker, dir. (Orion Pictures, 1988).

asked the group whether they felt “hyped up to move on some white people?”⁷⁵ Shortly after, a white youth walked by and Mitchell said, “You all want to fuck somebody up? There goes a white boy; go get him.”⁷⁶ Mitchell then counted to three and pointed in the youth’s direction. The group beat the boy so severely that he was in a coma for four days. Mitchell was convicted of aggravated battery. Although the maximum penalty for aggravated battery is normally imprisonment for two years, Wisconsin’s hate-crime provision increased the maximum to seven years where the offence had been motivated by group hatred.⁷⁷ The court sentenced Mitchell to four years imprisonment because his actions had been motivated by racial hatred. Mitchell appealed the increase of his sentence, arguing that Wisconsin’s hate-crime provision violated the United States Constitution, and in particular, that it violated his constitutional guarantee of free speech.

The Supreme Court of the United States gave three principal reasons for rejecting Mitchell’s “thought crime” challenge. First, the Court stressed that judges passing sentence have traditionally considered the accused’s motive for acting, and that using motive as either a mitigating or aggravating factor in sentencing was entirely appropriate.⁷⁸ Even where the accused’s motive could be said to consist of discriminatory thoughts or beliefs, nothing in First Amendment jurisprudence prevented courts from taking these motives into account. While it would be impermissible to increase an accused’s sentence *simply because* he or she held offensive beliefs, where the beliefs related directly to the crime, the guarantee of free speech *did not* prohibit consideration of the reasons the accused acted.⁷⁹

⁷⁵ *Mitchell*, *supra* note 17 at 2196.

⁷⁶ *Ibid.* at 2196-197.

⁷⁷ Wisconsin Statute, *supra* note 16 at § 939.645(1)(b). The provision permitted enhancement of the maximum penalty for violent offences where the accused “[i]ntentionally select[ed] the person against whom the crime is committed ... because of the race, religion, color, disability, sexual orientation, national origin or ancestry of that person”. The statute was amended in 1992, though the amendments do not concern the issue at hand (see *infra* note 136).

⁷⁸ See *Mitchell*, *supra* note 17 at 2199. The Court’s reasons here are somewhat less than satisfactory, as they fail to explain precisely why it is legitimate to consider the accused’s motive in passing sentence.

⁷⁹ The Court explained this distinction by reference to its decisions in *Dawson v. Delaware*, 112 S. Ct. 1093, 117 L. Ed. (2d) 309 (1992) [hereinafter *Dawson* cited to S. Ct.] and *Barclay v. Florida*, 463 U.S. 939, 103 S. Ct. 3418 (1983) [hereinafter *Barclay*]. In *Dawson*, the Court held that at a hearing as to whether the accused should be subject to the death penalty, the State could not introduce evidence that Dawson was a member of a white-supremacist prison gang. That evidence, they said, shed no light on the severity of the crime Dawson had committed and “proved nothing more than Dawson’s abstract beliefs” (*Dawson*, *ibid.* at 1098). In rejecting the admissibility of this evidence, the Court stated: “[T]he Constitution does not erect a *per se* barrier to the admission of evidence concerning one’s beliefs at sentencing simply because those beliefs and associations are protected by the First Amendment” (*Dawson*, *ibid.* at 1094). In *Barclay*, the Court held that evidence that the accused belonged to the Black Liberation Army and desired to provoke a race war was admissible in sentencing as it was directly related to the murder of a white man of which he had been convicted.

Second, the Court noted that intimidation provisions simply formalize existing judicial practice by providing, as a matter of policy, that hate crimes merit stiffer sentences. There was nothing wrong in legislating an increase in the maximum sentence available for crimes motivated by hatred since “the primary responsibility for fixing criminal penalties lies with the legislature.”⁸⁰ In the Court’s view, the State’s justification for this increase — that hate-inspired violence inflicts greater individual and societal harm — provided “an adequate explanation for its penalty-enhancement provision over and above mere disagreement with offenders’ beliefs and biases.”⁸¹ In accepting the validity of this justification, the Court quoted Blackstone: “[I]t is but reasonable that among crimes of different natures those should be most severely punished, which are the most destructive of the public safety and happiness.”⁸²

Finally, the Court drew an analogy between the use of motive in hate-crime provisions and the use of motive in anti-discrimination laws: both types of statutes use motive in the same way, namely, to prove that a person acted in a discriminatory fashion. Citing an earlier decision⁸³ that established that anti-discrimination laws comport with the First Amendment, the Court held that the guarantee of free speech posed no constitutional impediment to the use of motive in hate-crime provisions.⁸⁴ Thus, primarily on the basis that courts may legitimately consider motive in sentencing, the United States Supreme Court rejected the argument that Wisconsin’s hate-crime provision created a thought crime and, thereby, violated the First Amendment.

The Court rejected Mitchell’s overbreadth argument with only summary consideration. The chill argument, the Court noted, depended on “the prospect of a citizen suppressing his bigoted beliefs for fear that evidence of such beliefs will be introduced against him at trial” should he or she in the future commit a serious offence. The Court deemed this prospect too speculative to sustain an overbreadth claim.⁸⁵ In addition, the Court noted that the First Amendment does not prevent the introduction into evidence of an accused’s speech to establish the existence of a motive to commit an offence or of the mental state required for criminal culpability.

⁸⁰ *Mitchell*, *supra* note 17 at 2200.

⁸¹ *Ibid.* at 2201.

⁸² W. Blackstone, *Commentaries on the Laws of England*, C.M. Haar, ed., vol. 4 (Boston: Beacon Press, 1962) at 14, cited *ibid.*

⁸³ See *Hishon v. King & Spalding*, 467 U.S. 69, 104 S. Ct. 2229 (1984).

⁸⁴ The Court also noted that nothing in *Mitchell* contradicted its decision in *R.A.V.* In that case, the Court held that a municipal ordinance prohibiting the use of words that insult or that are likely to provoke violence on the basis of race, color, creed, religion or gender violated the First Amendment in that it prohibited only some insults or words likely to provoke violence and, thus, was not content neutral (*R.A.V.*, *supra* note 72). The Court distinguished the cases on the grounds that the ordinance in *R.A.V.* “was explicitly directed at expression”, whereas the statute in *Mitchell* was “aimed at conduct unprotected by the First Amendment” (*Mitchell*, *supra* note 17 at 2200-201).

⁸⁵ See *Mitchell*, *ibid.* at 2201. The Court also characterized the chill argument as “far more attenuated and unlikely than that contemplated in traditional ‘overbreadth’ cases” (*ibid.*).

On the contrary, accused persons' statements are routinely used for these purposes so long as they comport with evidentiary rules of relevance and admissibility. Use of the accused's speech as evidence that his or her actions were hate inspired did not, the Court concluded, render hate-crime provisions invalid on the basis of overbreadth.

b. Hate-Crime Provisions and Section 2(b) of the Charter

While arguments similar to the thought crime and overbreadth challenges could be made under section 2(b) of the *Charter*, differences in wording between the Canadian and U.S. constitutional guarantees as well as differences in constitutional doctrine would result in the arguments taking a different form. In the United States, it is necessary to argue that hate-crime provisions punish *thought* rather than *conduct* to receive protection under the constitutional guarantee of free speech. No such maneuvering need occur in Canada, however, under the more broadly framed Constitutional guarantee of freedom of *expression*, which protects most forms of expressive conduct.⁸⁶ To separate the "thought" aspect of hate crime from the "conduct" aspect would, in fact, be at odds with the Canadian approach to freedom of expression, which considers both the form and content of the expression in question. The Canadian equivalent of the thought-crime argument would focus squarely on hate-motivated violence as a form of expressive activity that conveys messages about particular groups. The argument would be as follows: because hate crime is expressive activity, punishing it more severely than other forms of criminal activity restricts the accused's right to express certain ideas in a violent form.

The overbreadth argument would be recast in a similar fashion. As in the United States, the argument in Canada would be that the prosecution might use statements the accused made before the violent act to prove that the accused acted out of hatred. So long as these statements did not fall afoul of the hate-propaganda

⁸⁶ U.S. jurisprudence has interpreted the First Amendment as protecting speech and not conduct. However, the distinction between speech and conduct is not always clear. A useful discussion of the way courts in the United States have drawn this distinction is found in the California case of *Re Joshua H*, 17 Cal. Rptr.2d 291 (Ct. App. 1993) [hereinafter *Joshua H*], which upheld California's hate-crime provision. The court explained the speech/conduct distinction as follows:

Of course, the distinction between speech and conduct is not as clear-cut as the last paragraph suggests. Some conduct is so "expressive" that it is entitled to First Amendment protection. Examples include flag desecration and burning ... displaying of a red flag ... wearing of black armbands to show opposition to war ... draft card burning ... and peaceful demonstration and picketing ... To be protected as "expressive conduct," the activity must be "sufficiently imbued with elements of communication to fall within the scope of the First and Fourteenth Amendments," for as the court noted in *United States v. O'Brien*, "[w]e cannot accept the view that an apparently limitless variety of conduct can be labeled "speech" whenever the person engaging in the conduct intends thereby to express an idea." (*Joshua H*, *ibid.* at 299 [citations omitted]).

This approach to the guarantee of free speech is very different from the Canadian approach to the definition of free expression.

provisions of the *Criminal Code*, they might well be protected under section 2(b) of the *Charter*. Allowing the accused's speech to be used in evidence could be said to have a chilling effect on constitutionally acceptable expression, if there is a risk that people will desist from making bigoted statements as a result of the enactment of hate-crime provisions. Thus, by permitting the accused's *non-violent* expressions of group hatred — and perhaps even the accused's associations with groups known to espouse bigoted ideas — to be used as evidence of his or her hateful motive, hate-crime provisions could be said to have the *effect* of violating section 2(b)⁸⁷ — and potentially section 2(d), freedom of association.⁸⁸

Before subjecting each of these arguments to a formal section 2(b) analysis, some general comments on their persuasiveness should be made. For both political and jurisprudential reasons, the Canadian equivalents of the thought-crime and overbreadth arguments would not prove as vexing to hate-crime legislation as their counterparts have in the United States. First, as a general matter, there is greater social tolerance for measures designed to combat discrimination in Canada than in the United States.⁸⁹ Although Canada, like the United States, has experienced its share of historical racism,⁹⁰ and bigotry continues to be a pressing concern,⁹¹ Cana-

⁸⁷ As I argue in greater detail, below, framing this argument as an independent violation of section 2(b) arising from the effects of hate-crime legislation more accurately captures the nature of the overbreadth argument than does subsuming it in the section 1 analysis.

⁸⁸ A similar argument could be made for freedom of association. Subject to concerns of admissibility, to be discussed below at text accompanying notes 147-57, the accused's association with groups known to espouse racist ideas could also be used as evidence that the accused committed a hate crime. For the reasons I discuss, below, at Part II.A.1.b.ii, I do not think this argument would be successful.

⁸⁹ For example, the absence of any significant public outcry following *R. v. Keegstra*, [1990] 3 S.C.R. 697, 61 C.C.C. (3d) 1 [hereinafter *Keegstra* cited to S.C.R.], suggests that Canadians accept the hate crime provisions of the *Criminal Code* as a valid anti-racist measure. In the United States, provisions of this sort would likely be met with great hostility. For a discussion of the problems of enacting hate speech provisions in the United States, see M. Matsuda, "Public Response to Racist Speech: Considering the Victim's Story" (1989) 87 Mich. L. Rev. 2320.

⁹⁰ Instances of racism in Canada's past include the long and brutal history of the treatment of First Nations peoples at the hands of European Canadians. People of African origin were enslaved within Canada, particularly in Maritime provinces and in parts of Ontario, until the practice was outlawed throughout the British Empire in 1833. The Canadian government implemented restrictive immigration policies, the most notorious of which was the head tax on Chinese immigrants, to limit the number of non-white immigrants to Canada. It also ordered the internment of Japanese-Canadians during the Second World War. Anti-Semitism has also been a prominent feature of the Canadian historical landscape (see: Glickman, *supra* note 58; J.L. Elliott & A. Fleras, "Immigration and the Canadian Ethnic Mosaic" in P.S. Li, ed., *Race and Ethnic Relations in Canada* (Toronto: Oxford University Press, 1990) 51; J.S. Frideres, "Policies on Indian People in Canada" in Li, ed., *ibid.* 98; H. Johnston, *The Voyage of the Komagata Maru: The Sikh Challenge to Canada's Colour Bar* (Dehli: Oxford University Press, 1979); K.V. Ujimoto, "Racism, Discrimination and Internment: Japanese in Canada" in B.S. Bolaria & P. Li, eds., *Racial Oppression in Canada*, 2nd ed. (Toronto: Garamond Press, 1988) 127; B.S. Bolaria & P. Li, "From Slavery to Indentured Labour: Blacks in Canada" in Bolaria & Li, eds., *ibid.*, c. 8.

⁹¹ For example, in both Toronto and Montreal there have been suspicious police shootings of people

dians, rightly or wrongly, pride themselves on being an accommodating and tolerant nation in which newcomers can celebrate their ethnicity, rather than feeling that they have to shed their cultural identity at the border. Canadians are also less likely than those in the U.S. to conceive of violent expressions of group hatred as implicating a constitutional right, much less a right to expression. Within the Canadian social and political context, hate-crime provisions are apt to be seen as one of many available tools to eradicate racism and promote congenial ethnic relations, rather than as illegitimate government intrusion on free expression.

Second, Canadian jurisprudence, informed by this social and political context, suggests that hate-crime legislation would withstand scrutiny under section 2(b) of the *Charter*. Based on the Supreme Court's approach to freedom of expression, there are strong reasons to believe that hate-crime provisions would not violate section 2(b) on either argument.⁹² Even if the provisions were found to violate section 2(b), the Supreme Court in *Keegstra* and *R. v. Butler*⁹³ demonstrated its willingness to uphold restrictions on free expression where the expression in question conflicts with important social values and only minimally advances the interests that freedom of expression is meant to protect. This suggests that hate-crime provisions could be upheld under section 1.

i. The Canadian Equivalent of the Thought-Crime Argument

While the Supreme Court has never specifically considered whether violent forms of expression are protected under section 2(b), its decisions clearly imply that expression taking a violent form will not be constitutionally protected. Despite embracing a wide and inclusive interpretation of expression within section 2(b), the Supreme Court has, from its earliest pronouncement on freedom of expression in

who are members of minority groups (see *e.g.*: G. Baker, "Police racist toward blacks: coroner" *The [Montreal] Gazette* (7 May 1992) A1; R. DiManno, "Unit that probes police shootings being emasculated" *The Toronto Star* (5 October 1994) A7), and in Toronto police are alleged to have subjected a Jamaican tourist to a strip search on the street (see *e.g.*: P. Mascoll, "Police strip search outrages Jamaican visitor" *The Toronto Star* (13 September 1993) A6; P. Mascoll, "Police report on strip search leaves questions" *The Toronto Star* (16 October 1993) A22). Racism in the armed forces has been exposed through the international embarrassment of the Somalia affair, and in the Canadian Legion arguably racist views surfaced over the issue of permitting veterans to wear turbans. In addition, overtly racist individuals (including Ernst Zundel and Jim Keegstra) and groups (including the Ku Klux Klan and the Heritage Front) remain active in Canada. For an academic treatment of racism in the 1990s, see V. Satzewich, *Deconstructing a Nation: Immigration, Multiculturalism & Racism in '90s Canada* (Halifax: Fernwood, 1992).

⁹² I will make this argument at Part II.A.1.b.i., below.

⁹³ [1992] 1 S.C.R. 452, 89 D.L.R. (4th) 449 [hereinafter *Butler* cited to S.C.R.]. In *Butler* the Supreme Court found that the obscenity provisions of the *Criminal Code* which prohibited the distribution and sale of obscene material (*supra* note 11 at s. 163) violated section 2(b), but upheld the provisions under section 1. The case is an example of the Supreme Court's willingness to permit limitations on expression, provided the limitations are in service of important social interests and realized in a way as to be proportionate to Parliament's objectives.

R.W.D.S.U. v. Dolphin Delivery Ltd.,⁹⁴ clearly stated that violence is a *form* of expression that will not be given constitutional protection. The Court has reiterated the exclusion of violence from section 2(b) in subsequent cases. For example, in *Irwin Toy Ltd. v. Quebec (A.G.)*,⁹⁵ in which the Supreme Court established the framework for analyzing freedom of expression claims, the Court drew a distinction between regulating expression based on its form and regulation based on content. While section 2(b) protects the content or substance of expression regardless of the meaning conveyed, it does not protect all forms of expression.⁹⁶ Physical violence is an unprotected form. Thus, although freedom of expression will *prima facie* protect any attempt to convey meaning,⁹⁷ and although violence may have expressive content, expressive activity that takes a violent form will lose its constitutional protection. Hate-motivated violence would seem to fit squarely within what the Court described in *Keegstra* as the “rare cases” in which an activity with expressive content is not protected by section 2(b) because it is “communicated in a physically violent form”.⁹⁸

This conclusion may give rise to the concern that exempting all violent forms of expression from scrutiny under section 2(b) of the *Charter* would allow the state to punish certain messages expressed through violence more harshly than others *based on the content* of the message being conveyed. For example, one might argue that if violent messages are not protected by section 2(b), nothing prevents Parliament from amending the *Criminal Code* to provide that violence deemed “political” should be subject to twice the normal penalties of “non-political” violence. To prevent this, one could argue that it is necessary to confer section 2(b) protection on expression of a violent nature. This argument, however, fails to take into account the presence of other rights in the *Charter* that limit the state’s ability to enact restrictive provisions in the criminal realm. As I will argue below,⁹⁹ the concern that the state should not be free to make content-based distinctions within the category of violent forms of expression is addressed more appropriately under section 7 of the *Charter*.

⁹⁴ [1986] 2 S.C.R. 573, 33 D.L.R. (4th) 174.

⁹⁵ [1989] 1 S.C.R. 927, 58 D.L.R. (4th) 577 [hereinafter *Irwin Toy* cited to S.C.R.].

⁹⁶ See *ibid.* at 968-70. This distinction was reiterated in *Keegstra*, *supra* note 89 at 729, 731 and in *Reference Re ss. 193 and 195 of the Criminal Code*, [1990] 1 S.C.R. 1123, 56 C.C.C. (3d) 65 [hereinafter *Prostitution Reference* cited to S.C.R.], where Lamer J. (concurring) noted that unprotected forms of expression often involve “direct attacks on the physical integrity and liberty of another” (*ibid.* at 1182).

⁹⁷ The Court stated:

We cannot, then, exclude human activity from the scope of guaranteed free expression on the basis of the content or meaning conveyed. Indeed, if the activity conveys or attempts to convey a meaning, it has expressive content and *prima facie* falls within the scope of the guarantee (*Irwin Toy*, *supra* note 95 at 969).

⁹⁸ *Keegstra*, *supra* note 89 at 729.

⁹⁹ See the discussion, below, at Part II.A.4.

Assuming that courts continue to adhere to the distinction between restrictions on the form of expression and restrictions on its content, I am of the view that the Canadian equivalent of the thought-crime argument would be rejected. In the event that a court were to depart from this analysis and hold that a hate-crime statute did violate section 2(b), however, I believe that the violation would be justified under section 1.

ii. Section 1 of the *Charter*

The Supreme Court's analysis in *Keegstra* provides a useful basis for predicting the fate of hate-crime provisions under a section 1 analysis. *Keegstra* involved a challenge to one of the hate-propaganda provisions of the *Criminal Code* — section 319(2) — under section 2(b) of the *Charter*. Section 319(2) made it an offence to communicate statements, other than in private conversation, to wilfully promote hatred of a group identifiable by colour, race, religion, or ethnic origin. The Supreme Court agreed that this provision violated freedom of expression because it restricted the *non-violent* expression of ideas but held — by a five-to-four majority — that the violation could be justified under section 1. Given the similarity between the expression prohibited by the hate-propaganda provisions and the expressive aspect of hate-inspired violence, the *Keegstra* analysis would have a direct bearing on a determination of the validity of hate-crime legislation under section 1.

Three aspects of the Court's reasoning in *Keegstra* are of particular relevance. The first concerns the Court's discussion of the government's objective in seeking to curtail hate propaganda. Both the majority and the dissent characterized this objective as twofold: (1) preventing harm to members of groups targeted by hate propaganda and, thus, safeguarding individual dignity; and (2) protecting society from the social discord, including violence, that might result from the acceptance of hateful messages.¹⁰⁰ Both judgments stressed the importance of this objective and agreed that it satisfied the first hurdle of the *Oakes*¹⁰¹ test. The objective of hate-crime legislation would closely parallel that of section 319(2). It could be described as recognizing the distinct harm which hate-motivated violence poses to the individual victims of that violence, to the group(s) to which the individual belongs, to other minority groups, and to Canadian society generally. The similarity between the objectives suggests that hate-crime legislation would satisfy the first branch of the *Oakes* test.

Second, the majority regarded the message contained in hate propaganda as tenuously linked to the three core values which are protected by freedom of expression: (1) the search for truth; (2) participation in the political process; and (3) individual self-fulfilment.¹⁰² This is significant since the Supreme Court has repeat-

¹⁰⁰ *Keegstra*, *supra* note 89 at 736-37, Dickson C.J.; and at 811-12, McLachlin J.

¹⁰¹ *R. v. Oakes*, [1986] 1 S.C.R. 103, 53 O.R. (2d) 719 [hereinafter *Oakes*].

¹⁰² See *Keegstra*, *supra* note 89 at 759-67, Dickson C.J. In contrast, McLachlin J. held that hate propaganda implicated all three values (see *ibid.* at 864).

edly held that restrictions on types of expression that lie on the periphery of freedom of expression will be easier to justify under the proportionality part of the *Oakes* test than limitations on types of expression which are close to the core.¹⁰³ In the majority's view, hate propaganda failed to promote the search for truth since there was very little chance that statements intended to promote hatred would be true or that the vision of society implicit within such statements would lead to a better world.¹⁰⁴ Hate propaganda also failed to advance the value of individual fulfilment since the articulation of hatred conflicts with the individual fulfilment of members of a targeted group.¹⁰⁵ Finally, the wilful promotion of hatred against an identifiable group could not be seen to foster participation in the political process since the view that not all persons are entitled to equal dignity and respect, inherent within statements promoting hatred, is inimical to the democratic participation of all persons.

All these arguments could be made even more strongly in the case of expression curtailed by hate-crime provisions. Violent expressions of group hatred are even more tenuously related to the values underlying freedom of expression than the promotion of group hatred through non-violent means. While it is possible to reject the majority's view and to argue that non-violent expressions of group hatred have some social value — as did the dissent in *Keegstra* — it is much more difficult to claim that violent expressions of hatred have any redeeming social value worthy of constitutional protection.

Finally, there is much to suggest that even the dissenting justices in *Keegstra* would have an easier time upholding hate-crime provisions under section 1. The dissent found that the hate-propaganda provisions failed all three components of the *Oakes* proportionality test based on flaws from which hate-crime provisions, arguably, do not suffer. They found that the provision lacked a rational connection to the government's objective because it potentially promoted, rather than curtailed, racist speech through the media coverage given the accused's message during his or

¹⁰³ Wilson J. (concurring) in *Edmonton Journal v. Alberta (A.G.)*, [1989] 2 S.C.R. 1326, 64 D.L.R. (4th) 174 [hereinafter *Edmonton Journal* cited to S.C.R.] stated:

One virtue of the contextual approach, it seems to me, is that it recognizes that a particular right or freedom may have a different value depending on the context. It may be, for example, that freedom of expression has greater value in a political context than it does in the context of disclosure of the details of a matrimonial dispute. The contextual approach attempts to bring into sharp relief the aspect of the right or freedom which is truly at stake in the case as well as the relevant aspects of any values in competition with it (*Edmonton Journal*, *ibid.* at 1355-356).

See also: *Prostitution Reference*, *supra* note 96 at 1136; *Rocket v. Royal College of Dental Surgeons*, [1990] 2 S.C.R. 232 at 246-47, 71 D.L.R. (4th) 68; *Butler*, *supra* note 93 at 500-501. In *Keegstra*, the majority explicitly held that the violation of section 2(b) was easier to justify because the expression curtailed by section 319(2) "stray[ed] some distance from the spirit of s. 2(b)" (*Keegstra*, *supra* note 89 at 766).

¹⁰⁴ See *Keegstra*, *ibid.* at 762-63.

¹⁰⁵ See *ibid.* at 763.

her prosecution.¹⁰⁶ The provision failed the minimal-impairment test because it was overbroad, catching more expressive conduct than could be justified by the objectives of promoting social harmony and individual dignity,¹⁰⁷ and because non-criminal remedies were available to combat hate propaganda. Finally, the provision failed the last element of the *Oakes* test; in the dissent's view, non-violent hate propaganda implicated all three values at the core of freedom of expression — the search for truth, participation in the democratic process, and individual self-fulfilment — and, therefore, the benefit derived from the legislation did not outweigh the magnitude of the violation.

It would be difficult to argue that hate-crime provisions are not rationally connected to the objective of recognizing and redressing the harms that hate-motivated violence causes. Increasing the maximum penalty available for violent crimes motivated by hatred is rationally linked to the desire to acknowledge that such conduct inflicts great harm on individual victims, on minority groups, and on the larger society. As a result, hate-crime provisions are not prone to the rational connection criticism that McLachlin J., writing for the dissent in *Keegstra*, levied against section 319(2). McLachlin J. was of the view that criminal hate-propaganda laws are not rationally connected to the objective of protecting minority groups from harm because the criminal prosecution of persons accused of wilfully spreading hatred serves to give hatemongers a public platform they otherwise would not have. This concern would be far less compelling in the case of hate-motivated violence. While prosecutions under section 319(2) would focus on the *content* of the accused's statements and whether the accused intended to foment hatred, trials for hate-motivated violence would focus on the *violent act* of the accused, and whether it was motivated by racial animosity. Since proof of racial enmity would not generally involve detailed scrutiny of an accused's non-violent writings or statements¹⁰⁸ but would, instead, focus on statements the accused made at the time of the assault, hate-crime prosecutions are unlikely to provide the accused with a platform for articulating and defending racist beliefs.

¹⁰⁶ McLachlin J. also questioned the effectiveness of section 319(2) on the basis that the hate-propaganda laws existing in Germany in the 1930s did not prevent the Nazi rise to power and the subsequent atrocities (see *Keegstra*, *ibid.* at 854).

¹⁰⁷ The dissent was concerned that its definition of "offending speech" would catch expressions that should be protected by the *Charter*. In particular, the dissent worried that the wide range of meaning attributable to the word "hatred", the imprecision entailed in determining whether an accused could raise the defences that the statements were made in good faith on religious subjects or were statements on matters of the public interest that he or she believed to be true, and the fact that the section applied to all forms of public communication would have a chilling effect on expression (see *Keegstra*, *ibid.* at 855).

¹⁰⁸ Subject to concerns about admissibility, such statements might, however, be introduced into evidence in some cases. For example, if the accused is charged with a hate crime in a beating of a Jewish man and is the author of a number of anti-Semitic diatribes, the sentiments contained within those writings would be relevant to the issue of whether the attack was motivated by anti-Semitism (see text accompanying notes 150ff).

Hate-crime provisions also do not suffer from the same minimal-impairment concerns McLachlin J. perceived in section 319(2). Although her reasons were not altogether clear, she appeared to hold the view that the section failed the minimal-impairment part of the *Oakes* test because, through a combination of overbreadth and vagueness, it caught more expressive activity than its objective warranted. Section 319(2) was overbroad, according to McLachlin J., because it potentially covered a wide range of expression with the result that people who made statements “primarily for non-nefarious reasons”¹⁰⁹ could be subject to criminal conviction. McLachlin J.’s concern stemmed primarily from her view that the term “hatred” was vague and subjective and, therefore, capable of denoting a broad spectrum of emotions ranging from “the most powerful of virulent emotions lying beyond the bounds of human decency”, on the one hand, to “active dislike”, on the other.¹¹⁰ Thus, people could be convicted under section 319(2) for making statements designed to contribute to political or social debate where they knew that their statements would have the *effect* of promoting dislike of a group, even if they did not actually desire to promote hatred.¹¹¹ In addition, because section 319(2) applied to all statements *other than* those made in private conversation, McLachlin J. expressed concern that “the circumstances in which the offending statements are prohibited [are] virtually unlimited.”¹¹² Thus, forms of expression on which society places a high value could conceivably fall afoul of section 319(2): “Speeches are caught. The corner soapbox is no longer open. Books, films and works of art — all these fall under the censor’s scrutiny because of s. 319(2) of the *Criminal Code*.”¹¹³

¹⁰⁹ *Keegstra*, *supra* note 89 at 857.

¹¹⁰ *Ibid.* at 855-56.

¹¹¹ McLachlin J.’s reasoning was based on her interpretation of the term “wilful”. She accepted the definition set down by the Ontario Court of Appeal in *R. v. Buzzanga* (1979), 25 O.R. (2d) 705, 101 D.L.R. (3d) 488, as either proof of intention or conscious purpose to promote hatred or proof that the accused foresees that the promotion of hatred against an identifiable group is certain to result from the communication.

¹¹² *Keegstra*, *supra* note 89 at 858-59.

¹¹³ *Ibid.* at 859. McLachlin J. also believed the vagueness in the definition of the hateful expression prohibited by section 319(2) would have a substantial chilling effect on valid expression. As she vividly put it:

Given the vagueness of the prohibition of expression in s. 319(2), one may ask how speakers are to know when their speech may be seen as encroaching on the forbidden area. The reaction is predictable. 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. Novelists may steer clear of controversial characterizations of ethnic characteristics, such as Shakespeare’s portrayal of Shylock in “The Merchant of Venice”. Scientists may well think twice before researching and publishing results of research suggesting difference between ethnic or racial groups. Given the serious consequences of criminal prosecution, it is not entirely speculative to suppose that even political debate on crucial issues such as immigration, educational language rights, foreign ownership and trade may be tempered. These matters go to the heart of the traditional justifications for protecting freedom of expression (*Keegstra*, *ibid.* at 860).

It is difficult to see how a hate-crime provision would be vulnerable to McLachlin J.'s overbreadth concerns. Whereas it was possible to argue that the legislation in *Keegstra* would capture too much non-violent expression because it specifically targeted non-violent statements in a broad and undefined fashion, the same argument does not arise in hate-crime provisions. Hate-crime provisions restrict a narrow and clearly delineated form of expression, namely, violent expressions of group hatred. Since there could be no prosecution without an act of violence, under no circumstances could hate-crime provisions sweep non-violent expressions of bigotry — however heinous these may be — within their ambit. Hate-crime provisions could only be said to be overbroad insofar as they risked encompassing too much violence — that is, violent acts that are not, in fact, motivated by group hatred. Since the prosecution would be required to prove the accused's hate-based motivation beyond a reasonable doubt, this is not likely to be a problem.¹¹⁴

Finally, hate-crime provisions would not be vulnerable to the concerns McLachlin J. raised under the last part of the *Oakes* test — that of proportionality between the objective of the legislation and its effects. McLachlin J.'s reasoning in *Keegstra* was based on her view that the kind of non-violent expression prohibited by section 319(2) of the *Criminal Code* implicated the values on which freedom of expression was founded. In the context of hate-motivated violence, this argument is difficult to sustain since the expression of hatred through violence can hardly be said to strike at the heart of section 2(b). The highly tenuous nature of the expression involved in hate-motivated violence could hardly outweigh the benefit that hate-crime provisions would seek to confer.

Keegstra, therefore, suggests that even if hate-crime provisions were found to violate section 2(b) of the *Charter* because they impose a higher penalty on violence intended to promote group hatred than on other forms of violence, they would still be sustained under section 1. Further support for this view can be derived from *Butler* in which the Supreme Court unanimously held that the obscenity provisions of the *Criminal Code* could be justified under section 1 even though these provisions violated section 2(b). As in *Keegstra*, the Court's reasoning was based on an assessment of the importance of the expression in fostering the values underlying section 2(b). Both *Keegstra* and *Butler* indicate the Supreme Court's willingness to uphold restrictions on freedom of expression in circumstances where the expression lies far from the core of section 2(b) and causes or threatens significant social harm.

¹¹⁴ McLachlin J., also, held that section 319(2) failed the minimal-impairment test since non-criminal remedies — such as human rights legislation — were available to combat hate propaganda in a more appropriate and effective fashion than criminal provisions. Given that violence is properly within the domain of the criminal law, this argument is less compelling in the case of hate-crime provisions.

iii. The Canadian Version of the Overbreadth Argument

The argument that hate-crime provisions violate section 2(b) of the *Charter* by allowing into evidence the accused's non-violent statements is based on the *effects* of the provisions, rather than their *purpose*. The purpose of hate-crime provisions is not to infringe on non-violent expressions of group hatred. Nonetheless, hate-crime provisions could have this effect by chilling non-violent speech if people avoid commenting on controversial issues for fear of being charged, in the future, with a hate crime.

Since *R. v. Big M Drug Mart Ltd.*,¹¹⁵ it has been clear that legislation with a valid purpose may be found to violate the *Charter* if it has the *effect* of infringing *Charter* rights. However, as the Court indicated in *R. v. Edwards Books and Art Ltd.*,¹¹⁶ for an effects-based challenge to succeed, the impugned law must have more than a trivial or insubstantial effect but must reasonably or actually threaten¹¹⁷ the right in question. Thus, not every law that potentially affects freedom of expression will violate section 2(b).

There are two reasons why it will be difficult to establish that hate-crime provisions have the effect of violating free speech. First, the chill which may potentially arise from the use of the accused's speech as evidence in the prosecution of hate crime is, as the United States Supreme Court noted in *Mitchell*, highly speculative. To consider the chill as a serious threat one would have to assume that people wishing to relate racist jokes or to explore ethnic differences through scientific or artistic inquiry would refrain from doing so, contemplating that they may at some later date attack, maim, or even kill a member of an identifiable group. This scenario is highly unrealistic. Further, not all of the accused's prior statements would be admissible since statements introduced at trial must comply with the rules of evidence. For example, racist jokes told by an accused are not likely to be highly probative of the issue of whether he or she committed a violent act to express racial hatred, unless they are accompanied by additional evidence that the accused harboured racist views.¹¹⁸ Thus, it is not at all clear that hate-crime provisions would "reasonably or actually" threaten freedom of expression.

Second, as the United States Supreme Court noted in *Mitchell*, use of the accused's prior statements in the case against him or her is not unique to the prosecution of hate crime. The rules of evidence allow the use of an accused person's statements in criminal trials to prove various aspects of the Crown's case, including motive and *mens rea*. For example, in a murder trial the accused's declarations of animosity towards the deceased could be admissible to demonstrate motive. Use of these comments could be said to have a chilling effect on free expression because people might

¹¹⁵ [1985] 1 S.C.R. 295, 18 D.L.R. (4th) 321.

¹¹⁶ [1986] 2 S.C.R. 713, 35 D.L.R. (4th) 1.

¹¹⁷ *Ibid.*

¹¹⁸ See *infra* notes 149ff and accompanying text.

refrain from expressing their resentment of particular individuals, knowing that these statements could be used against them in the future. More to the point, statements evincing bigoted attitudes on the part of the defendant are used in human rights complaints to establish discrimination. These statements are used in much the same way as in hate-crime prosecutions. To suggest that use of the accused's prior speech violates free expression is to cast doubt on the use of speech in all of these contexts. It is difficult to imagine courts accepting an argument that evidentiary use of speech — even if it could be said to have a chilling effect — violates section 2(b).

Even if courts were to accept the argument that hate-crime provisions chill free expression, this violation would be justified with little difficulty under section 1. The analysis here would, to a large degree, mirror that conducted for the claim that the purpose of hate-crime legislation violates free expression. However, because the analysis would focus on the *effect* of hate-crime provisions on non-violent *expression*, some differences would arise under the minimal impairment and balancing aspects of the *Oakes* test. The courts would have to determine whether hate-crime legislation impairs non-violent expression as little as possible, and if so, whether the effects on non-violent expression are nonetheless so grievous that they outweigh the benefits of the provision. Hate-crime legislation should clear the first of these hurdles since, given the distinct harms posed by hate-motivated violence, there is no less restrictive way of attaining the objective underlying hate-crime provisions. The approach proposed in Bill C-41 is no less restrictive, since it gives rise to the same “chill” arguments as do U.S.-style hate-crime provisions.¹¹⁹ Finally, having established that it is highly unrealistic that hate-crime provisions would create any substantial chill on free expression, the requirement of balancing the effects of the legislation against its objective would not pose an obstacle to the validity of the provisions.

2. Equal Protection

Hate-crime provisions may be seen to violate the equal-protection clause of the Fourteenth Amendment in two ways. First, they allegedly treat offenders differently based on their beliefs because they permit people who commit hate crimes to be punished more harshly. Thus, hate-crime provisions are said to discriminate against bigoted *offenders*. Second, the statutes are said to discriminate among classes of *victims* because they confer greater protection to persons harmed by reason of race, religion, sexual orientation, or disability than they do to persons harmed for other reasons. Although the Oregon Court of Appeal accepted the second argument,¹²⁰ most courts have rejected both equal-protection claims outright.

¹¹⁹ Whether the accused is subject to an enhanced penalty, as under the U.S.-style, hate-crime provisions or would simply receive a sentence towards the higher end of the existing sentencing range, as in Bill C-41, the same potential chill on free expression would arise. Simply knowing that his or her speech could be used in evidence as proof of an aggravating factor under Bill C-41 could motivate the accused to refrain from engaging in bigoted speech.

¹²⁰ See *State v. Beebe*, 680 P.2d 11 (Or. Ct.App. 1984), app. den'd 683 P.2d 1372 (1984).

While similar challenges could be made under section 15 of the *Charter*, Canadian courts are also unlikely to perceive such arguments as serious obstacles to the validity of hate-crime legislation. To trigger section 15, an applicant must establish that the legislation in question discriminates on one of the grounds expressly enumerated in section 15 or on analogous grounds.¹²¹ According to the test established by the Supreme Court in *Andrews v. Law Society of British Columbia*,¹²² discrimination will be made out when the law places burdens on or denies benefits to members of a particular group.¹²³ Any justification or consideration of the reasonableness of the distinction would occur under section 1.¹²⁴

The first equality argument, based on the beliefs of the offender, fails to surmount the first hurdle in section 15. The potentially harsher punishment imposed on perpetrators of hate crimes — as compared with the punishment imposed on people whose violent crimes are not motivated by group hatred — arises from the offender's expression of bigoted beliefs through violence. This is clearly not a distinction based on race, national or ethnic origin, colour, religion, sex, age, mental or physical disability, or any analogous ground.

The claim based on the victim's identity is slightly more complicated. Hate-crime statutes distinguish between people harmed by reason of such characteristics as race, religion, or sexual orientation — grounds which are analogous to or enumerated in section 15 — and those harmed for other reasons. They do not, however, on their face, confer greater protection on any particular group since they are drafted in neutral terms. Since all victims of hate-motivated violence receive the same degree of protection, hate-crime statutes do not *explicitly* give certain groups greater protection than others and would not violate section 15 on this basis.

It would, however, be possible to bring a challenge using disparate impact analysis. Arguably, hate-crime provisions have the effect of conferring greater protection on minority than on majority victims because minorities are more likely to be victims of hate crimes. By treating violence against members of the majority less severely, hate-crime provisions could be said to deny majority victims equal protection and equal benefit of the law and, consequently, could be said to violate section 15.¹²⁵

¹²¹ Section 15 prohibits discrimination based on "race, national or ethnic origin, colour, religion, sex, age or mental or physical disability."

¹²² [1989] 1 S.C.R. 143, 56 D.L.R. (4th) 1 [hereinafter *Andrews* cited to S.C.R.].

¹²³ See *ibid.* at 174-75, McIntyre J.

¹²⁴ See *ibid.* at 176. The courts have not, however, followed this analysis. See *infra* note 126.

¹²⁵ This argument depends on the claim that there is no real difference between hate-motivated violence and other types of violence. If there is no meaningful distinction between the two, minority Canadians could be said to be receiving greater protection than majority Canadians because their assailants would face stiffer sentences.

While Canadian courts would almost certainly reject this argument, it is unclear from the case law whether they would do so under section 15 or under section 1.¹²⁶ One possibility is that courts would find no discrimination and, thus, no violation of section 15. They could reach this result by holding that, although the “beneficiaries” of hate-crime legislation will more often be members of minority groups, the legislation neither imposes a burden on majority group members nor denies a benefit to them. All persons, regardless of their identity, are protected by hate-crime legislation; that the protection is invoked more frequently by members of minority groups is simply a function of who is victimized by this form of violence and demonstrates why these provisions are necessary. Alternatively, courts could accept that hate-crime provisions have a disparate impact on majority group Canadians and demand that this be justified under section 1.

Whether they conduct their analysis under section 15 or under section 1, the courts would undoubtedly find any disparate treatment justified on the basis that governments are entitled to — and, in some instances, should — create criminal offences to address the harms more likely to be encountered by some groups in society. For example, although women and girls are more likely to be victims of sexual assault than males, courts are unlikely to strike down the sexual assault provisions on the basis that they provide greater protection to females. So long as a rational basis can be demonstrated for treating hate-motivated crime more severely than crimes committed for other reasons, the *Charter* guarantee of equality should not preclude the creation of a specific offence proscribing a type of violence that is more likely to confront gays, lesbians, and racial and religious minorities. In fact, as I have discussed earlier, hate-crime provisions can be seen to promote equal protection of the law, by ensuring that the criminal law responds fairly to the different harms faced by Canada’s minority groups.¹²⁷

¹²⁶ The courts have not yet established a consistent framework for section 15. For example, *Andrews* suggests that discrimination will be found any time a distinction has the effect of imposing burdens or granting benefits to some groups and not to others. Once discrimination is demonstrated, the justification for the distinction is to be assessed under section 1. In *Weatherall v. Canada (A.G.)*, [1993] 2 S.C.R. 872, 105 D.L.R. (4th) 210, *R. v. Swain*, [1991] 1 S.C.R. 933, 5 C.R. (4th) 253, and *R. v. Hess*, [1990] 2 S.C.R. 906, 59 C.C.C. (3d) 161 [hereinafter *Hess* cited to S.C.R.], however, the Court did not appear to follow this analysis, finding in these cases that distinctions did not violate section 15. For example, in *Hess*, Wilson J. for the majority held that the statutory rape provision of the *Criminal Code* (see *supra* note 54 at s. 146(1), as am. by S.C. 1972, c. 13, s. 70), which made it an offence for men to have sexual intercourse with female persons under the age of 14, did not violate section 15. Although she acknowledged that the provision placed a burden on male offenders that it did not place on female offenders and granted protection to young females that it denied to young males, Wilson J. found it did not discriminate because the prohibited act could “as a matter of biological fact” only be committed by a male against a female (*Hess, ibid.* at 930). This analysis amounts to considering the justification for a distinction based on sex under section 15. See also the Court’s approach to section 15 in *Egan v. Canada (A.G.)*, [1995] 2 S.C.R. 513, 124 D.L.R. (4th) 609.

¹²⁷ See text accompanying notes 57-60, above.

3. Vagueness

The final constitutional challenge that has been raised in the United States is that hate-crime provisions are unconstitutionally vague and, thus, violate the Fourteenth Amendment. While the specific arguments depend upon the wording of the various statutes, opponents point to four areas which are allegedly vague. First, critics claim that the term "race" is vague. Second, they argue that hate-crime statutes fail to specify with sufficient precision the degree to which an offender must be motivated by group hatred. The language commonly employed requires an accused to act "by reason of"¹²⁸ the race of an individual or group or to "intentionally select" the victim "because of"¹²⁹ that person's race. This language could, opponents argue, cover anything from situations in which race is the sole reason for acting to those where it is the predominant reason, a substantial reason, or even a barely contributing reason. Third, opponents claim that provisions using the "by reason of" language fail to set out a *mens rea* requirement.

The fourth vagueness argument requires a more detailed explanation. The A.D.L. model stipulates that the accused must act "by reason of" the race of "another person". Some critics contend that this language fails to specify whether the accused must act to express hatred of the group to which the victim is perceived to belong, or whether this wording could also incorporate situations in which victims are chosen simply because of their *association* with members of the reviled group. Would, for example, hate-crime provisions apply to a case in which a white man is attacked by white supremacists because of his relationship with a woman of colour? This attack would occur "by reason of" the race of another person even though that other person was not the immediate victim. The concern with the imprecision of the phrase "by reason of" can be taken a step further. If two white men have an argument about members of a racial minority which culminates in one assaulting the other, would the assault have occurred "by reason of" race, thus bringing it within the provision? Does the phrase "by reason of the race of another person" limit the offence to persons who choose their victims to demonstrate group hatred, or is the language so broad as to include violence arising from disagreements over racial or religious questions that may be said to occur "by reason of" race?

Although courts have invalidated hate-crime statutes on vagueness grounds,¹³⁰ opponents of such legislation concede that the vagueness concerns are not insurmountable since they may be remedied through better drafting.¹³¹ Furthermore, in light of the stringent test articulated by the Supreme Court in *N.S. Pharmaceutical*, the vagueness arguments would not render hate-crime legislation unconstitutional in Canada. According to that case, vagueness can be raised under section 7: vague laws violate the principles of fundamental justice by failing to give fair notice of

¹²⁸ See text accompanying note 27, above.

¹²⁹ See Wisconsin Statute, *supra* note 16.

¹³⁰ See *Wyant I*, *supra* note 66.

¹³¹ See Gellman, *supra* note 19 at 357.

the scope of prohibited conduct and by failing to limit judicial discretion.¹³² Legislation will not be vague, however, merely because it is capable of supporting a range of judicial interpretations. A statute will violate section 7 only if it “so lacks in precision as not to give sufficient guidance for legal debate.”¹³³ Mr. Justice Gonthier described this test in the following way:

A vague provision does not provide an adequate basis for legal debate, that is for reaching a conclusion as to its meaning by reasoned analysis applying legal criteria. It does not sufficiently delineate any area of risk, and thus can provide neither fair notice to the citizen nor a limitation of enforcement discretion. Such a provision is not intelligible, to use the terminology of previous decisions of this Court, and therefore it fails to give sufficient indications that could fuel a legal debate. It offers no grasp to the judiciary. This is an exacting standard, going beyond semantics.¹³⁴

None of the vagueness claims would meet this “exacting standard”. “Race” would not be vague, because it is a term used intelligibly in many legal contexts, including human rights legislation and the *Charter*. Similarly, the degree to which race must have factored into the accused’s motivation is susceptible of resolution through judicial interpretation. For example, the two members of the Wisconsin Supreme Court who considered this argument in *Mitchell* concluded that on its “ordinary common sense meaning” the phrase “because of” must be interpreted to mean that the victim’s status was a substantial factor in the perpetrator’s decision.¹³⁵ Of course, rather than leaving this issue to judicial interpretation, Parliament could explicitly stipulate a requisite degree of motivation in the statute itself. In fact, while its provision was being considered by the courts, Wisconsin amended its statute to provide that it applied when the offender was motivated “in whole or in part” by the victim’s status.¹³⁶

The *mens rea* concern is also easily answered. The general rule for construing criminal law provisions which fail to specify *mens rea* is that they require recklessness. However, because it is difficult to conceive how a person can recklessly choose to attack another by reason of race, courts would be likely to interpret a hate-crime provision as requiring intent. Again, Parliament could circumvent any uncertainty simply by stipulating that the selection of the victim be intentional, as do many of the provisions in the United States.¹³⁷

¹³² Vagueness can also be raised under section 1 in determining whether a limitation is “prescribed by law”.

¹³³ *N.S. Pharmaceutical*, *supra* note 70 at 643.

¹³⁴ *Ibid.* at 639-40.

¹³⁵ These members dissented because they disagreed with the majority’s view that the provision violated the First Amendment. The majority did not consider the vagueness issue because their analysis under the First Amendment was sufficient to strike down the statute.

¹³⁶ On May 13, 1992, the Wisconsin legislature amended its hate-crime provision to provide that it would apply where the accused selected his or her victim “in whole or in part because of the actor’s belief regarding” the victim’s status (see *Mitchell (Wis. S.C.)*, *supra* note 66 at note 12, p. 813).

¹³⁷ See *e.g.*: Wisconsin Statute, *supra* note 16; Oregon Statute, *supra* note 20.

The final issue concerning the relationship between the identity of the victim and the phrase “by reason of” involves a policy decision regarding the scope of hate-crime provisions as well as questions of drafting. As a matter of policy, Parliament would have to decide whether to limit the provisions to inter-group violence or to extend their application to cases in which members of one group attack other members of their own group because of the latter’s sympathy for another group. For example, would an attack by heterosexual men on other heterosexual men who supported gay rights fall within the provision’s ambit? In many people’s minds, hate-inspired violence between members of different groups is the paradigm which hate-crime provisions are meant to counter. There are, however, strong arguments for including hate-inspired, intra-group violence within hate-crime legislation. Such violence has many of the same effects as hate-motivated, inter-group violence. Not only does it convey a message of group hatred, but it also threatens people who associate with members of the despised group by causing them to fear that they, too, will become targets of violence. Thus, because it aims to prevent members of different groups from mixing, hate-based intra-group violence is destructive to the goals of pluralism and social harmony.

Whatever the resolution of the policy issue, the question remains whether the terms “by reason of” or “because of” are sufficient to indicate that group hatred must have motivated the accused’s actions. To avoid the possibility that disagreements between members of one group about another racial or religious group might fall within the terms of the statute, Parliament might wish to specify that the offence is concerned with violent expressions of group hatred. This could be accomplished by defining the offence as intentionally selecting the victim to express hatred on one of the prohibited grounds. Using more precise language could avoid any concern with vagueness under section 7.¹³⁸ Although it would be wise for Parliament to draft a hate-crime provision in this way, it is also possible that courts would reach the same interpretation of the provision’s scope without the clarifying statutory language.

4. Hate Crime and Section 7 of the *Charter* — Can Parliament Punish Acts Inspired by Certain Motives More Harshly Than Others?

In Canada, hate-crime provisions may face an additional constitutional hurdle to those they have confronted in the United States. This challenge arises from the spectre of Parliament passing legislation providing that violence brought about by certain motivations should be treated much more harshly than violence resulting from other motivations. For example, Parliament might seek to pass a law provid-

¹³⁸ It would also address any possible overbreadth concerns that might arise under the section 1 analysis for a violation of section 2(b). These concerns would focus on whether hate-crime provisions were narrowly tailored to capture only those offenders using violence to express their hatred of a particular group, or whether they could encompass other violence as well (see text accompanying notes 109-114ff).

ing that politically-motivated assaults or assaults occurring in the course of labour disputes would be punishable by life imprisonment. The same assault performed in another context might, however, carry a maximum penalty of five years imprisonment.¹³⁹ Increasing the maximum penalty for violence triggered by certain motivations could be seen to violate the principles of fundamental justice if there is no basis to justify the increase, or if the increase is disproportionate to the severity of the harm caused. On this argument, hate-crime provisions could be challenged on the grounds that there are no compelling reasons to support treating offences inspired by group hatred more severely than others, or that the increased maximum penalty amounts to punishment that is disproportionate to the severity of the crime.¹⁴⁰

Since this argument focuses, in part, on the ability of Parliament to single-out certain kinds of motivations for greater punishment, it bears some similarity to the thought-crime argument in the United States. In my view, a formulation of these concerns as a violation of section 7 of the *Charter* has a better chance of success than an argument brought under freedom of expression because of the exclusion of violent forms of expression from protection under section 2(b). Nonetheless, these section 7 arguments would be unlikely to succeed for two reasons. First, as set out earlier in this paper,¹⁴¹ there are compelling policy reasons justifying a penalty increase. Hate crime can be seen to threaten the multicultural fabric of Canadian society in a way that non-hate motivated crimes do not. Further, the penalty increase available in hate-motivated offences does not mean that all cases of hate-motivated violence will necessarily be treated more harshly than other violent acts. Increasing the maximum penalty simply allows judges more latitude in passing sentence than they would have for offences that are not inspired by hatred. Thus, hate-motivated violence will not always be treated more severely than even the most heinous "ordinary" offence.

Second, the argument depends in part on the magnitude of the sentence increase Parliament seeks to impose. A hate-crime provision might be held unconstitutional if, for example, Parliament were to provide that any act of hate-motivated violence, no matter how brutal, could be punished by life imprisonment. Assuming, however, that Parliament proposes a measured range of sentence increases for violence motivated by hatred, there is no reason that hate-crime provisions would violate section 7.

Finally, a slight variation of this argument could also be made. On this version, hate-crime provisions could be seen to violate the principles of fundamental justice

¹³⁹ This is the existing maximum sentence for simple assaults tried by indictment (*Criminal Code*, *supra* note 11 at s. 266).

¹⁴⁰ The notion that the sentence reflect the severity of the crime is well established within Canadian law. Bill C-41 states this explicitly:

718. A sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender (Bill C-41, *supra* note 13 at cl. 718.1).

¹⁴¹ See text accompanying notes 48ff, above.

by making an accused's motive, which is normally not part of a criminal offence, an element of the offence. Courts are unlikely to accept this argument. So long as Parliament provides adequate justifications for motive constituting an element of the offence, there is nothing in the principles of fundamental justice that would preclude Parliament from passing legislation that takes motive into account. On the contrary, harsher punishment for crimes which pose greater harm to the individual (and to society generally) accords with the basic tenets of the legal system, the norms represented by the principles of fundamental justice. If the accused's motivation is a way of identifying these more harmful crimes, the principles of fundamental justice should pose no impediment to making motive an element of an offence.¹⁴²

B. Effectiveness Concerns

The second set of concerns regarding hate-crime provisions relates to their effectiveness. Although such provisions have existed in various states for some time, there have been few charges laid and even fewer successful prosecutions.¹⁴³ Further, given the level of racial animosity and racial violence that persists throughout the United States, it is hard to make a compelling case that hate-crime provisions have had much of an impact in combatting violent expressions of group hatred, let alone in reducing prejudice and racism in that country. Examining these problems of effectiveness is important to determine the degree to which they are peculiar to the United States or are inherent in hate-crime provisions, as well as the extent to which they would be circumvented by adopting the Bill C-41 approach.

¹⁴² Some commentators in the United States also question the notion that there is always a firm distinction between motive and mental states, such as intent or purpose, which often constitute the *mens rea* of an offence. For example, in *Joshua H*, the California Court of Appeal dismissed the idea of a firm distinction in the following way:

"Intent" and "motive" as used by the court to distinguish between the "what" and "why" of the crime are relative rather than absolute concepts, the definition of which turns simply on where one chooses as a starting point. [The] example of the crime of burglary ... illustrates the point. Breaking and entering could be the "what" of the crime and the perpetrator's purpose of taking property could be the "why." Under that construct, the burglar's "motive" is relevant to the crime charged. Alternatively, breaking and entering for the purpose of taking property could be defined as the "what" and the desire to obtain money to pay debts the "why." In that case, the burglar's "motive" is irrelevant. There is no reason why one construct is *a priori* more correct than the other (*Joshua H*, *supra* note 86 at 301-302).

See also Note, "Combatting Racial Violence: A Legislative Proposal" (1988) 101 Harv. L. Rev. 1270 [hereinafter "Combatting Racial Violence"].

¹⁴³ See: T.K. Hernández, Note, "Bias Crimes: Unconscious Racism in the Prosecution of 'Racially Motivated Violence'" (1990) 99 Yale L.J. 845; "Combatting Racial Violence", *ibid.*; M.L. Fleischer, "Teeth for a Paper Tiger: A Proposal to Add Enforceability to Florida's Hate Crimes Act" (1990) 17 Fla. St. U. L. Rev. 697. This situation may be changing somewhat since the decision in *Mitchell*.

The paucity of convictions under hate-crime statutes may be due to a combination of several factors. It may, in part, result from the reluctance of prosecutors to lay charges under legislation of questionable constitutional validity.¹⁴⁴ The volatility of race trials in the United States may also be a factor. Because highly visible prosecutions risk bringing strained racial tensions to the boiling point, prosecutors may either consciously or unconsciously attempt to avoid making race central to the trial. Overt racism by key players in the justice system may also account for the low prosecution and conviction rates. Racist police officers, for example, might not investigate hate-crime vigorously and might even resist laying a charge under a hate-crime provision. Discussion of these considerations is conspicuously absent from the literature in the United States, which has, instead, focused on two explanations of the provisions' poor track record: (1) the need to prove racial motivation beyond a reasonable doubt; and (2) the operation of unconscious racism in the prosecution of hate crime.

1. Problems of Proof: Proof Beyond a Reasonable Doubt and the Use of Similar Fact Evidence

Since hate-crime provisions make biased motivation an element of the offence, the prosecution is required to prove racial motivation beyond a reasonable doubt. Commentators have argued that this burden will be next to impossible to meet and consequently that it will yield few convictions.¹⁴⁵ The difficulty in obtaining convictions, it is contended, will dissuade prosecutors from proceeding with hate-crime charges, prosecuting the accused, instead, with the violent offence underlying the hate-crime charge. Requiring the prosecution to prove motive will, therefore, make hate-crime provisions unenforceable and, thereby, undermine the objective of the provisions.

Commentators have offered two principal reasons as to why motive may be difficult to prove beyond a reasonable doubt. First, they argue that motive differs from other mental states that figure in the criminal process because it lies more deeply within the accused's sole knowledge and, thus, is not susceptible to standard techniques of proof. For example, in determining whether the accused committed a crime requiring intention, the trier of fact may be assisted by the inference that a person normally intends the natural and probable consequences of his or her actions. While the triers of fact would still have to decide, on the evidence, whether the accused did act intentionally,¹⁴⁶ the availability of a simple inference would as-

¹⁴⁴ Although no statistical analysis has yet been conducted, anecdotal evidence from those working in the field suggests that hate-crime prosecutions have increased since the decision in *Mitchell* (Telephone conversation with Steven Freeman, Director of the Legal Department of the A.D.L. (19 May 1995)).

¹⁴⁵ See generally: J. Morsch, "The Problem of Motive in Hate Crimes: The Argument Against Presumptions of Racial Motivation" (1992) 82 *J. Crim. L. & Criminology* 659; Fleischauer, *supra* note 143; "Combatting Racial Violence", *supra* note 142; J. Mason & J. Thompson, "Racial and Religious Harassment: Idaho's Response to a Growing Problem" (1985) 21 *Idaho L. Rev.* 85.

¹⁴⁶ Intention is a subjective mental state defined as knowledge that consequences are substantially

sist them in reaching a conclusion. In contrast, it is more difficult to infer an accused's motive from the actions themselves. For example, a jury might easily infer that an accused who, without provocation, assaulted a stranger standing alone at a bus stop acted intentionally. In the absence of other evidence, however, the accused's motive is less clear. The accused could have been motivated by a fear of strangers, by homophobia, by racism, or by some combination of the three. Without considerably more evidence, it will be difficult to prove beyond a reasonable doubt which of these factors motivated the accused. Thus, the argument goes, motive is much more elusive than other mental states, and it may be virtually incapable of being proved.

Second, commentators argue that the evidence necessary to prove a biased motive may often be inadmissible.¹⁴⁷ Unless the accused's motive is clear from statements uttered during the commission of the crime or from demonstrative acts, such as painting swastikas, proof of motive will require evidence showing that the accused has made bigoted remarks in the past, belongs to racist organizations, or has been involved in prior incidents of hate-motivated violence. The problem with this evidence is that it relates to the accused's character and, thus, raises problems of admissibility. As a general rule, the prosecution cannot seek to admit evidence of the accused's bad character unless the accused has first placed his or her character in issue.¹⁴⁸ Character evidence is, *prima facie*, inadmissible because it invites the trier of fact to convict on the ground that the accused is a bad person, not because they are convinced that the accused committed the offence.

The rules of evidence in both the United States and Canada permit some exceptions to this general exclusionary rule. Under the similar fact evidence rule,¹⁴⁹ evidence of the accused's bad character or disposition can be tendered by the prosecution if it is relevant to an issue in the case beyond showing that the accused is the sort of person likely to commit a criminal offence.¹⁵⁰ On the traditional view of the rule, character evidence establishing identity, motive, intent, the presence of a system or plan, or evidence tending to rebut the defences of accident, mistake, or innocent association would be admissible since it would not be used merely to infer guilt from the accused's past misconduct.¹⁵¹ Although this would appear to allow the

certain to follow from one's actions. To show that an accused acted intentionally, the prosecution would have to establish that the accused had this state of awareness, not simply that a reasonable person would have foreseen the likelihood of the consequences materializing.

¹⁴⁷ Morsch, *supra* note 145 at 669-70.

¹⁴⁸ For a discussion of character evidence in the United States, see E. W. Cleary, ed., *McCormick on Evidence*, 3rd ed. (St. Paul, Minn.: West, 1984). For a Canadian discussion, see J. Sopinka, A.W. Bryant & S.N. Lederman, *The Law of Evidence in Canada* (Toronto: Butterworths, 1992) at c. 10.

¹⁴⁹ Numerous commentators have argued that the similar fact rule is really a misnomer (see e.g. Sopinka, Bryant & Lederman, *ibid.* at 478-79).

¹⁵⁰ *Makin v. New South Wales (A.G.)*, [1891-1894] All E.R. Rep. 24 (P.C.).

¹⁵¹ See: Cleary, *supra* note 148; Sopinka, Bryant & Lederman, *supra* note 148. In the recent decision in *R. v. B.(C.R.)*, [1990] 1 S.C.R. 717, 55 C.C.C. (3d) 1 [hereinafter *B.(C.R.)*], the Supreme Court has broadened the similar fact evidence rule (see *infra* notes 154ff and accompanying text).

introduction of character evidence tending to show the accused's motive, according to one U.S. commentator, courts have been extremely wary of admitting evidence of the accused's bigoted character and have done so "only where the evidence involves statements made at the time of alleged criminal activity which reasonably explain the defendant's behavior".¹⁵²

Neither argument regarding the difficulty of proving motive provides a persuasive explanation for the scarcity of convictions under hate-crime statutes. The first argument is convincing only to the extent that proving motive is significantly different from proving the other mental states that routinely appear in criminal trials. While motive may sometimes be more difficult to establish than intention or recklessness, the method of proof remains the same regardless of the state of mind at issue. In each case, the trier of fact must infer the accused's subjective state of mind from the actions the accused is alleged to have performed as well as the statements the accused is alleged to have made. Further, although the simple inference used to establish intent is not available to prove motive, neither is it available to prove purpose, which is the mental state at issue in a number of crimes. The accused's purpose in acting is similar to motive since it is more deeply embedded within the accused's knowledge than intent, yet purpose is clearly provable.¹⁵³

The motive argument also assumes that in the vast majority of cases of hate-inspired violence there will be insufficient evidence to prove motive beyond a reasonable doubt. This, however, is unlikely. While there will certainly be hard cases where the evidence is ambiguous, there will also be many cases in which there will be ample evidence of the accused's biased motive. For example, if a group of youths belonging to a white-supremacist organization assault a person of colour waiting at a bus stop, it is not difficult to infer that the assault was motivated by racial hatred. Further, since hate crimes are seldom perpetrated in silence, evidence of bigoted remarks uttered in the course of the violence will frequently be available. By using statements made at the time of the offence, prior racist statements, and evidence of membership in racist groups — evidence which may well be available

¹⁵² Morsch, *supra* note 145 at 670. Morsch cites as an example *United States v. Ebens*, 800 F.2d 1422 (6th Cir. 1986) in which the court held that evidence of racial slurs against African-Americans made by the accused was not admissible where the victim was Asian.

¹⁵³ Although the difficulties in proving motive do not appear to be nearly as arduous as commentators have claimed, it is worth briefly considering the proposals that have been advanced to circumvent them. Some commentators have argued for a presumption of racial motivation in all cases of inter-group violence such that accused persons who attack a member of another group would have the onus of establishing that their conduct was not racially motivated (see: Fleischauer, *supra* note 143; "Combating Racial Violence", *supra* note 142). Other commentators go further, arguing that this presumption should only apply where the victim is a member of a racial minority and the accused is white (see *e.g.* "Combating Racial Violence", *ibid.*). While these measures would undoubtedly increase the number of convictions for inter-group violence, they conflict with the presumption of innocence and would not likely withstand challenge under section 11(d) of the *Charter*. The proposal limiting the presumption to white persons who attack non-white victims might also conflict with section 15 of the *Charter*.

in many cases of racist violence — the prosecution should be able to establish motive beyond a reasonable doubt.

The need to rely on character evidence is also not likely to constitute a fatal impediment to hate-crime prosecutions in Canada where, as in the United States, character evidence is admissible to prove the accused's motive or intent so long as its probative value outweighs its prejudicial effect.¹⁵⁴ Although the probative value would have to be balanced with the prejudice in each case, evidence establishing the accused's membership in — or support of — bigoted groups, past racist activities, or a history of making bigoted statements should generally be admissible; evidence of this sort is highly probative of the accused's motive when considered in conjunction with the circumstances of the violent act. In contrast, evidence that an accused had a penchant for racist jokes would not in itself be admissible, because racist jokes are regrettably all too common to be highly probative of bias. Similarly, bigoted statements uttered years before the offence might be inadmissible if there is nothing to suggest continued animosity.¹⁵⁵

Finally, it is worth considering whether either of these alleged impediments to proving motive in a hate-crime provision would be alleviated by Bill C-41. In my view, Bill C-41 does not appear to possess any significant advantage over the creation of an independent hate crime. Since the standard of proof at sentencing is the same as during the trial, under Bill C-41 the Crown would still have to prove biased motive beyond a reasonable doubt before it could be considered an aggravating factor in sentencing.¹⁵⁶ The Crown may derive some benefit under the Bill from the fact that rules of evidence are relaxed at sentencing, permitting the introduction of evidence that would be inadmissible at trial. It is unlikely however, that this benefit would be significant enough to outweigh the advantages of enacting a separate hate-crime offence.

2. Unconscious Racism or Bigotry¹⁵⁷

Commentators have also posited that unconscious racism on the part of prosecutors prevents them from effectively prosecuting hate crimes and even of perceiving hate crimes when they occur.¹⁵⁸ Unconscious racism refers to racist attitudes and

¹⁵⁴ In the recent decision in *B.(C.R.)* the majority of the Supreme Court of Canada extended the similar fact rule, holding that similar fact evidence is admissible when it is highly probative and outweighs any prejudicial effect, whether or not it fell within one of the traditional categories (see *B.(C.R.)*, *supra* note 151).

¹⁵⁵ See *R. v. Barbour*, [1938] S.C.R. 465, [1939] 1 D.L.R. 65.

¹⁵⁶ See *R. v. Gardiner*, [1982] 2 S.C.R. 386, 140 D.L.R. (3d) 612. This is also clear from Bill C-41 itself. It provides that, "[w]here there is a dispute with respect to any fact that is relevant to the determination of a sentence ... the prosecutor must establish, by proof beyond a reasonable doubt, the existence of any *aggravating fact* ..." (Bill C-41, *supra* note 13 at cl. 724(3)(e) [emphasis added]).

¹⁵⁷ I use the term "racism" here because the U.S. literature I summarize focuses on racism. As I explain below, however, the phenomenon is not limited to racism but applies to other forms of bigotry.

¹⁵⁸ See e.g. Hernández, *supra* note 143.

beliefs that are so deeply ingrained within a culture that, for the most part, they go unrecognized.¹⁵⁹ Lawrence describes this phenomenon in the following way:

Americans share a common historical and cultural heritage in which racism has played and still plays a dominant role. Because of this shared experience, we also inevitably share many ideas, attitudes, and beliefs that attach significance to an individual's race and induce negative feelings and opinions about non-whites. To the extent that this cultural belief system has influenced all of us, we are all racists. At the same time, most of us are unaware of our racism. We do not recognize the ways in which our cultural experience has influenced our beliefs about race or the occasions on which those beliefs affect our actions. In other words, a large part of the behavior that produces racial discrimination is influenced by unconscious racial motivation.¹⁶⁰

On this theory, even though most prosecutors are not overtly racist,¹⁶¹ they (like the rest of us) will approach their jobs with socially-condoned beliefs, which may impair their ability to handle hate-motivated violence.

Unconscious racism may hinder prosecutors from acknowledging violence as racially motivated by causing them to deny the existence of racism in all but the most egregious cases. In other words, prosecutors may be willing to attribute violence to causes other than group hatred. Further, unconscious racism may affect the vigour with which prosecutors approach cases in which the victim is a member of a minority group. Hernández, for example, cites evidence indicating that prosecutors in the United States have been more willing to accept the "decisions of minority assault victims to forego prosecution rather than those of white assault victims".¹⁶² She also points to research on the death penalty which demonstrates that "prosecutors are more rigorous in their investigation of cases involving white victims than they are of cases involving Black victims."¹⁶³ In the context of hate crimes, these tendencies may lead prosecutors to accept plea bargains to lesser offences rather than embark upon the onerous task of prosecuting the hate crime. Prosecutors may also be willing to accept plea bargains if, because of unconscious racism, they believe that the accused's hateful motive will be difficult to prove.

¹⁵⁹ See C.R. Lawrence III, "The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism" (1987) 39 Stan. L. Rev. 317. Other writers refer to this phenomenon as cultural racism.

¹⁶⁰ *Ibid.* at 322.

¹⁶¹ This discussion of unconscious bigotry is not meant to ignore the extent to which overt racism, sexism, and homophobia operate within the criminal-justice system, generally, and will hamper hate-crime statutes, specifically. Overtly racist police officers may intentionally investigate hate crimes less thoroughly, giving a well-meaning prosecutor insufficient evidence on which to build a case. Similarly, overtly racist judges and jurors may be less likely to convict of hate crime.

¹⁶² Hernández, *supra* note 143 at 854, citing F.W. Miller, *Prosecution: The Decision to Charge a Suspect with a Crime* (Boston: Little, Brown, 1969) at 175-76.

¹⁶³ Hernández, *ibid.* at 853, citing M.L. Radelet & G.L. Pierce, "Race and Prosecutorial Discretion in Homicide Cases" (1985) 19 Law & Soc. Rev. 587. This research was introduced in *McKlesky v. Kemp*, 481 U.S. 279, 107 S. Ct. 1756 (1987) in which the accused challenged the constitutional validity of the death penalty on the basis of racial discrimination.

Although the literature in the United States focuses specifically on racism, the unconscious acceptance and transmission of stereotypes also occurs in other forms of bigotry, such as sexism and homophobia. The Supreme Court of Canada tacitly recognized this in the context of gender when it held in *R. v. Lavallee*¹⁶⁴ that expert evidence on the psychology of wife battering was admissible to explain how a woman who killed her batterer could have been acting in self-defence. The Court recognized that jurors might be prone to stereotypes about battered women — including the claim that battered women enjoy the violence inflicted upon them — and that expert evidence was needed to offset these misconceptions. The stereotypes may be said to be examples of unconscious sexism. In a similar vein, Cynthia Petersen provides startling examples of deeply-ingrained hetero-sexism in her discussion of the widespread refusal to recognize homophobic animus in two well-publicized incidents of gay bashing. In the first case, a gay activist was brutally murdered by a gang of fifteen youths while sitting in a bus stopped outside a Montreal subway station. Even though the youths repeatedly shouted “faggot” during the assault, the police refused to recognize the murder as an instance of anti-gay violence.¹⁶⁵ The denial of hetero-sexism in the murder of Kenneth Zeller is even more glaring. Zeller was murdered in a Toronto park by five male youths. Petersen relates:

Trial testimony revealed that members of the gang had agreed to go to the park to “beat up a fag.” Yet the media and the public at large denied that anti-gay sentiment was involved in the crime. At the sentencing hearing, defence counsel presented some 20 character witnesses who suggested explanations for the murderous assault. These included the disinhibiting effect of alcohol and the force of adolescent peer pressure, but did *not* include homophobia. The hockey coach of three of the accused admitted that they would occasionally call opposing players “gay,” but only if the players were perceived to be “clumsy” athletes. He added: “Never was the term spoken with any hostility.” A clinical psychiatrist called to give expert testimony stated that the fact that one of the boys yelled “you fucking faggot” while he chased then beat Kenneth Zeller to death “did not indicate hostility toward homosexuals.” The phrase, he opined, was used only to please the group.¹⁶⁶

As these examples illustrate, the concern with unconscious bigotry should apply not only to prosecutors but also to the police who lay the initial charge, conduct the investigation, and provide the prosecution with the evidence for trial. Unconscious bigotry on the part of police officers may affect their decision to charge the accused with a hate crime as well as the zeal with which they proceed with the investigation. Similarly, the unconscious bigotry which hinders police and prosecutors from perceiving the hateful motive behind particular acts of violence may also make judges and juries reluctant to convict an accused of a hate crime unless the evidence is overwhelming.

¹⁶⁴ [1990] 1 S.C.R. 852, 55 C.C.C. (3d) 97.

¹⁶⁵ Petersen, *supra* note 26 at 246.

¹⁶⁶ *Ibid.*

It is hard to accept, as some commentators in the United States have suggested, that prosecutors' unconscious bigotry, alone, accounts for the low number of convictions under hate-crime statutes. It is, however, possible that unconscious bigotry on the part of all of the main players in the criminal-justice system diminishes the effectiveness of hate-crime legislation. This raises two questions: is the presence of unconscious bigotry a reason to eschew the creation of U.S.-style hate-crime legislation in favour of the Bill C-41 approach, and further, is it a reason for rejecting any attempt to address the special nature of hate-motivated violence? The answer to both of these questions is clearly no. For the same reasons that unconscious bigotry may undermine the efficacy of U.S.-style hate-crime provisions, it would also impede the effectiveness of Bill C-41. Furthermore, it can be no excuse to say that we will not attempt to confront hate-motivated violence because deeply-ingrained bigotry makes this process difficult.

The problem of unconscious bigotry underscores the limitations inherent in relying solely upon the criminal law to solve social problems and points to the need for education. Until we become more aware of the ways in which bigoted attitudes shape our culture, the legal initiatives aimed at addressing hate crime will not be as effective as they could be. While there is no easy or short-term solution to unconscious bigotry, any lasting solution will require a greater social consciousness of the ways in which bigoted beliefs shape our culture.

C. *The Limitations of the Criminal Law: Political Concerns*

The final set of objections to hate-crime provisions questions the wisdom of using the criminal law to attempt to eradicate or reduce hate-motivated violence. Commentators in the United States have raised two main concerns in this regard. First, critics speculate that hate-crime charges will be laid more often against members of minority groups who lash out against white victims than against white offenders.¹⁶⁷ The prevalence of unconscious bigotry suggests this may, indeed, be a problem. White police officers, who still constitute the majority in police forces across the country, may be more willing to attribute a hateful motive to a minority offender than to a white offender. Officers may, for example, be better able to identify with white victims and, therefore, might be more likely to perceive violence against white victims as motivated by hate. However, to the extent that unconscious bigotry may determine who is charged with hate crimes, it will also be a problem in sentencing. Police officers may be more likely to furnish prosecutors with evidence of a hateful motive when the offender is a member of a minority group, with the result that minorities will disproportionately face stiffer sentences. Thus, regardless of whether Bill C-41 or U.S.-style hate-crime legislation is adopted, vigilance will be required to ensure that the law is not being applied in a discriminatory manner.

Second, critics query whether hate-crime legislation can have any significant effect in reducing hate crime or whether it is largely a symbolic gesture. Although a

¹⁶⁷ See *e.g.* Gellman, *supra* note 19.

symbolic denunciation of hate crime may be valuable in itself by performing an educative function, it is clearly an insufficient response to the problem of hate-motivated violence. Passing a hate-crime provision may, however, end up being the only response that is implemented because it allows people to believe they have taken effective action and may lessen their inclination to do more. As Gellman warns:

Notwithstanding the self-affirming and educative value of such [symbolic] gestures, however, there is the danger of their distracting us from taking action that would be more than merely symbolic. A purely symbolic action *may* stimulate us to take further, substantive action. But to the extent that ... [symbolic action] *satisfies* our desire to "do something," we will be that much less likely to contact our elected officials to press for more effective action. In the same way, if enacting a largely ineffective ethnic intimidation statute allows us to feel that we have taken steps to eliminate bigotry and bias-related crime and thus reduces somewhat or even entirely our feeling of the urgency of doing more, the enactment of that law ultimately *slows* the process of combatting bigotry.¹⁶⁸

A more radical version of this criticism focuses on three reasons for which the state may find criminal responses to hate crime appealing. First, enacting criminal legislation is often a relatively easy way for government to claim that it is addressing a social problem. For example, it is much easier to pass a criminal law condemning hate-motivated violence than it is to devise and implement the multiple strategies that a more comprehensive response would demand.

Second, criminal legislation may be comparatively inexpensive. Although creating additional criminal offences or increasing criminal penalties may increase the costs associated with law enforcement and incarceration, the government may avoid the cost of the development and implementation of educational programs aimed at curbing bigotry. At times, use of the criminal law may be false economy since the costs to the justice system may be greater than the costs of social programs which might avoid engagement with the criminal process. For example, to the extent that improving the economic conditions of lower-income Canadians might reduce the rate of addiction to illegal drugs, paying for economic and social programs may be a more cost-effective allocation of resources than paying for the personnel necessary to combat the drug problem through the criminal-justice system.

Third, the process of enacting criminal provisions regarding hate crime attracts considerable media attention, as do trials conducted under hate-crime provisions. The publicity provides the government with free political mileage in a way that less-visible educational strategies do not. This is particularly significant when, as now, the electorate perceives crime to be a serious problem, and accordingly, "law and order" responses are politically popular.¹⁶⁹

¹⁶⁸ *Ibid.* at 389.

¹⁶⁹ See e.g.: A. Mitchell, "Views on Crime Distorted, Study Says Random Incidents Called Chief

Finally, as numerous critical scholars have noted, the criminal justice system is rarely an instrument of progressive social change.¹⁷⁰ Changes in the criminal law do not tend to bring about fundamental social reform nor do they normally empower those whom they seek to protect.¹⁷¹ According to this critique, the criminal law will do little to dismantle the social power structure that gives rise to hate-motivated violence. The symbolic effect of hate-crime provisions will be largely illusory.

These concerns with the limitations of the criminal law are important. They are useful reminders that the criminal law alone is not a sufficient response to social problems, and that non-criminal avenues must be explored. These criticisms, however, do not offer much guidance on the question of which criminal-law remedy should be adopted where a number of responses are available. Given that violence — including violence motivated by group hatred — is conduct that should be subject to criminal sanction, the appropriate question is not *whether* criminal remedies should be pursued, but *which* of the criminal remedies can best contribute to the solution of this problem. These concerns do not help us to determine whether the bigoted motivation behind violent crimes should be a factor in sentencing, whether it should be the subject of a specific criminal offence, or even further, whether it should be considered at all in the criminal process.

Conclusion

My assessment of the arguments for and against U.S.-style hate-crime provisions leads me to conclude that we should adopt similar legislation in Canada. Hate-crime laws constitute a powerful statement that hate-motivated violence is unacceptable and will not be tolerated in a society committed to equality and multiculturalism. While Bill C-41 conveys a similar message, it fails to do so as forcefully. Since there seem to be no compelling reasons for adopting the weaker denunciation of hate crime over the stronger, I believe that we should embrace the United States approach and permit penalty enhancement when violent crime is motivated by group hatred.

I do have some hesitation, however, in making this recommendation. First, hate-crime provisions, if enacted, might not be vigorously enforced. Such provisions will only contribute to reducing hate crime to the extent that they are enforced

Factor" *The [Toronto] Globe and Mail* (31 December 1994) A1; D. Hawaleshka, "Torontonians Feel It's More Dangerous Than Five Years Ago" *The [Toronto] Globe and Mail* (14 June 1994) A8.

¹⁷⁰ See e.g.: L. Snider, "Feminism, Punishment and the Potential of Empowerment" (1994) 9 *Cdn. J. of L. & Soc.* 75; M. Mandel, *The Great Repression: Criminal Punishment in the Nineteen-Eighties* (Halifax: Garamond Press, 1991).

¹⁷¹ For a discussion of the inability of the criminal law to empower women abused by their intimate partners, see D. Martin & J. Mosher, "The Promise That Was Not Kept: The Neo-Criminalization Response to Wife Battering: Challenges Based on the Experiences of Immigrant Women" (1996) 9 *C.J.W.L.* [forthcoming].

in a non-discriminatory manner, and that they yield convictions where warranted. If they fail on either of these scores, hate-crime provisions may be counterproductive because they will send a message that our opposition to hate crime is purely rhetorical. Once enacted, hate-crime provisions must be carefully monitored to ensure that they are not doing more harm than good.

Second, the enactment of hate-crime legislation may provide Parliament with an excuse to avoid enacting other, potentially more effective, measures against hate crime. The enactment of hate-crime legislation — whether in the form of Bill C-41 or in the form of U.S.-style intimidation provisions — cannot be the only response to hate-motivated violence. As discussed above, the criminal law can play only a small role in eliminating the underlying causes of group hatred. Educational strategies aimed at preventing the development of bigoted attitudes must also be pursued. Economic measures may also be needed given the role that economic factors play in the marginalization and stigmatization of many minority groups and given the increase of intergroup tension during tough economic times. The passage of hate-crime legislation may provide Parliament with an excuse to avoid undertaking more difficult and more costly measures to combat group hatred yet may offer the weakest prospect of bringing about significant social change.

Despite these concerns, however, I believe that U.S.-style hate-crime provisions should be enacted. Even if the provisions can make only a modest contribution to the reduction of violence motivated by group hatred, they play a part in a broader solution. To this end, it may be helpful to offer some brief observations on the policy decisions involved in drafting a hate-crime provision and some thoughts as to what, in broad terms, a Canadian provision might look like.

The enactment of U.S.-style hate-crime provisions in Canada presents five main policy questions. The first question relates to the forms of group hatred to be proscribed. Most intimidation statutes in the United States prohibit violence motivated by the victim's race, religion, or national origin.¹⁷² Some, however, go further and add sexual orientation, disability, age and gender to this list.¹⁷³ Bill C-41 takes an even more inclusive approach by listing hatred on the basis of race, national or ethnic origin, language, religion, sex, age, mental or physical disability, sexual orientation, or *other similar factors* as aggravating factors in sentencing.

A second question concerns the offences to which hate-crime legislation would apply. Most U.S. statutes, following the A.D.L. model, list a number of specific offences that, when committed with a hateful motive, constitute the offence of intimidation. Such a list usually includes assault and often includes the offences of harassment and menacing.¹⁷⁴ Again, Bill C-41 adopts a broader approach. Rather than

¹⁷² See *Hate Crime Statutes*, *supra* note 21 at 4.

¹⁷³ See *ibid.* California, for example, includes all three of these grounds. It also includes colour and creed (Cal. Pen. Code tit. 7, §186.21 (1995)).

¹⁷⁴ The Ohio provision, for example, includes menacing, aggravated menacing, criminal endanger-

curtailing its application to a number of specified offences, Bill C-41 provides that evidence that an offence was motivated by bias, prejudice or hate is a consideration in sentencing in any case. Parliament would have to decide whether to retain this broad approach or to limit hate-crime legislation to a number of specified acts of violence.

Third, Parliament must decide whether to limit the ambit of a hate-crime provision to inter-group violence or whether to extend the legislation to situations in which the accused attacks a member of his or her own group because of that member's association with members of a disliked group. The language of the A.D.L. provision sustains the broader approach. Bill C-41 is ambiguous on this point but could, arguably, be interpreted as also supporting the broader interpretation since it does not expressly limit consideration of the accused's hateful motive to circumstances in which the accused and the victim are members of different groups.¹⁷⁵

The fourth issue relates to the necessity of choosing between creating a substantive offence to proscribe hate-motivated violence or to simply amend the *Criminal Code's* sentencing provisions to enhance sentences beyond the existing maximum where an offence is motivated by group hatred. Both of these approaches are in use in the United States.

ing, criminal mischief and certain types of telephone harassment (See *Wyant II*, *supra* note 66 at 725). The A.D.L. model provision suggests that the offences of assault, criminal harassment, menacing, trespass, and criminal mischief should be included in a hate-crime provision as well as "any other appropriate statutorily proscribed criminal conduct". The full text of this provision can be found at the text accompanying note 27, above.

¹⁷⁵ The exact wording of the relevant provision of Bill C-41 is as follows:

718.2 A court that imposes a sentence shall also take into consideration the following principles:

(a) a sentence should be increased or reduced to account for any relevant aggravating or mitigating circumstances relating to the offence or the offender, and, without limiting the generality of the foregoing,

(i) evidence that the offence was motivated by bias, prejudice, or hate based on race, national or ethnic origin, language, colour, religion, sex, age, mental or physical disability, sexual orientation or any other similar factor ...

For the purposes of this argument, it is significant that the final wording of this provision, shown here, was changed from earlier versions. The previous wording could have been interpreted to preclude application of this section where the offence was not motivated by the race of the victim. When the Bill was presented for first reading, clause 718.2(a)(i) provided that the sentencing judge had to consider "evidence that the offence was motivated by bias, prejudice, or hate based on the race, nationality, colour, religion, sex, age, mental or physical disability or sexual orientation *of the victim*". It is also worth noting that this earlier incarnation did not include reference to language or ethnic origin as grounds of hatred, nor did it include the generic catch-all "any other similar factor" (Bill C-41, *An Act to Amend the Criminal Code (Sentencing) and Other Acts in Consequence Thereof*, 1st Sess., 35th Parl., 1994 (1st reading 13 June 1994) [emphasis added]).

Finally, the degree to which the maximum penalty for committing a hate-motivated crime should be increased beyond the existing maximum for the underlying violent offence will have to be determined. Parliament must also decide whether to impose a mandatory minimum-sentence for the presence of a hate-based motive.

In my view, a vigorous response to hate-motivated violence would entail the creation of a separate offence of intimidation that would explicitly recognize hate crime as a distinct form of violence and, therefore, as a distinct offence. Creating a separate offence acknowledges in a more direct and forceful way than a response focused simply on sentencing that hate crime causes distinct harms to its victims, to minority groups, and to the fabric of Canadian society. This offence could be modelled along the lines of section 85 of the *Criminal Code*, which, by requiring the imposition of a minimum term of imprisonment for indictable offences committed with a firearm, has the effect of deeming offences committed with a firearm to be more heinous than those committed without. Like section 85, which is charged along with the underlying offence, an accused would be charged with the offence of intimidation in addition to the generic offence of violence. An offence of intimidation would also — like section 85 — impose a mandatory term of imprisonment to be served consecutively to the sentence for the underlying violent offence. While the sentencing range for the offence of intimidation would be determined by Parliament and would depend on whether the offence was indictable or punishable solely upon summary conviction, I suggest that for indictable offences a minimum sentence of imprisonment for six months and a maximum of five years might be appropriate.¹⁷⁶

I also favour a broad approach to the policy questions involving the scope of the offence of intimidation. In this respect, some of the features of Bill C-41 are laudable. The grounds of hatred to be proscribed should be broadly defined — as

¹⁷⁶ Drafting intimidation in this way might lead to problems with the *Kienapple* principle, prohibiting multiple convictions for the same delicts (see: *R. v. Kienapple* (1974), [1975] 1 S.C.R. 729, 44 D.L.R. (3d) 351 [hereinafter *Kienapple*]; *R. v. Prince*, [1986] 2 S.C.R. 480, 33 D.L.R. (4th) 724 [hereinafter *Prince* cited to S.C.R.]). It could be argued that the subject matter of intimidation is not sufficiently different from the subject matter of the related violent offence to warrant convictions for two offences. The outcome of this argument is not certain, however, given that in both *Kienapple* and *Prince*, the Supreme Court appears to leave scope for multiple convictions where Parliament clearly intends to abrogate the *Kienapple* rule. For example, in *Prince*, the court stated: "It has been a consistent theme in the jurisprudence from *Quon*, through *Kienapple* and *Krug* that the rule against multiple convictions in respect of the same cause, matter or delict is subject to an expression of Parliamentary intent that more than one conviction be entered when offences overlap ..." (*Prince*, *ibid.* at 498). If, however, my proposed offence of intimidation is objectionable based on *Kienapple*, I would favour drafting intimidation to look very much like the A.D.L. offence such that offences of violence coupled with a hateful motive would constitute the offence. On this model, charges for the offences of violence would not be laid in addition to charges of intimidation and these offences would be lesser included offences for which convictions could be registered if the greater offence of intimidation were not established.

they are in Bill C-41 — so as to include sexual orientation, language, disability, and gender in addition to the standard grounds of race, ethnic or national origin, and religion. All of these denote forms of group hatred that a pluralistic society should condemn. While the inclusion of sexual orientation within Bill C-41 sparked considerable opposition, particularly from members of the Reform Party,¹⁷⁷ it is, in my view, crucial that sexual orientation be a prohibited ground of hatred within any hate-crime provision, given the well-documented level of homophobic violence.¹⁷⁸ The offences to which intimidation can apply should also be defined inclusively, as they are in Bill C-41. Rather than restricting the crime to a specific set of violent offences, intimidation could be drafted to apply to all offences.¹⁷⁹ Finally, I support the view that intimidation should not be limited to inter-group violence but should also apply where members of one group harm another member of their own group to express dislike for a different group. To my mind, violence of this sort is clearly hate-motivated violence and should be covered by hate-crime provisions.

Legislation of this type would, in my view, make a better contribution to redressing hate-motivated violence than does Bill C-41. As one element of a broader strategy aimed at eliminating group hatred and promoting congenial inter-group relations, such a provision merits serious consideration.

¹⁷⁷ Four Liberal M.P.s — Tom Wappel, Daniel McTeague, Paul Steckle and Roseanne Skoke — also voted against the Bill. Opponents expressed the view that the inclusion of sexual orientation would be a backhanded way of creating “special rights” for gays and lesbians under other statutes and would give protection to pedophiles for their actions (see T.T. Ha, “Sex Orientation Dispute Hounds Justice Minister” *The [Toronto] Globe and Mail* (16 June 1995) A4). In my view, these arguments are completely without merit.

¹⁷⁸ See e.g. Petersen, *supra* note 26.

¹⁷⁹ Although intimidation will have no relevance to many offences listed in the *Criminal Code*, I believe it is better to draft a provision to apply to all offences, rather than to attempt to list offences beforehand and risk omissions. An alternative option would be to denote a group of offences by using the language Parliament has used in Bill C-72, which provides that the “drunkenness defence” will not apply to any offence “that includes as an element an assault or any other interference or threat of interference by a person with the bodily integrity of another person” (Bill C-72, *An Act to Amend the Criminal Code (Self-induced Intoxication)*, 1st Sess., 35th Parl., 1994-1995, cl. 1 (assented to 13 July 1995, S.C. 1995, c. 32, and in force 15 September 1995)).