
More Censorship or Less Discrimination? Sexual Orientation Hate Propaganda in Multiple Perspectives

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If hate propaganda pits anti-censorship advocates against anti-discrimination advocates, sexual minorities occupy an ambiguous position in this debate. Because they often find themselves fighting *against* censorship—and have, at least in the United States, made more gains in this area than in that of equal protection—sexual minorities have traditionally promoted strong freedom of expression values. However, recent advances in jurisprudence interpreting the *Canadian Charter of Rights and Freedoms*, particularly the inclusion of sexual orientation as an analogous prohibited ground for discrimination under section 15, have prompted sexual minorities to pursue a vigorous anti-discrimination agenda. This agenda recently culminated in the Supreme Court of Canada's decisions in *Vriend v. Alberta* and *M. v. H.*, which, by reading sexual orientation into a provincial human rights statute and extending spousal support to same-sex couples, provide considerable authority for extending Canada's *Criminal Code* hate propaganda provisions to sexual minorities. At the same time, a growing body of comparative and international law—in particular the United Nations Human Rights Committee's recent decision in *Toonen v. Australia*—has extended the norm of anti-discrimination to sexual minorities. These developments, combined with Canada's well-established commitment to criminalizing hate and its emerging commitment to substantive equality, suggest that sexual orientation hate propaganda is best analyzed as an issue of discrimination, not censorship. This conclusion should commend the extension of hate propaganda measures to protect sexual minorities to even those gay rights activists who dread further incursions into civil liberties.

Les minorités sexuelles occupent une position ambiguë dans le débat sur la propagande haineuse, qui oppose les partisans de mesures anti-censure à ceux de mesures anti-discrimination. En effet, parce qu'elles doivent souvent défendre leur propre liberté d'expression et ont, surtout aux États-Unis, connu dans ce domaine des succès plus significatifs que dans celui de l'égalité de protection, les minorités sexuelles se sont faites les défenseurs de la liberté d'expression. Les progrès récents de la jurisprudence sous la *Charte canadienne des droits et libertés*, dont l'inclusion de l'orientation sexuelle au nombre des motifs analogues de discrimination prohibée, ont toutefois mené ces minorités à faire de la lutte judiciaire contre la discrimination une priorité. Leur action mena à des résultats concrets à travers les décisions de la Cour suprême du Canada dans *Vriend c. Alberta* et *M. c. H.*, qui supportent par une autorité considérable l'extension des dispositions du *Code criminel* portant sur la propagande haineuse aux minorités sexuelles. Le droit comparé et international — en particulier la décision du Comité des droits de l'Homme des Nations Unies dans *Toonen c. Australie* — permet également de constater un élargissement des normes anti-discrimination aux minorités sexuelles. Ces développements récents, s'ajoutant à l'engagement du Canada à criminaliser les manifestations de haine et à celui, plus récent, à protéger le droit à l'égalité, mènent à la conclusion que la propagande haineuse relative à l'orientation sexuelle doit être analysée en termes de discrimination plutôt que de censure. Cette conclusion devrait mener même les activistes homosexuels qui craignent les limitations aux droits de la personne à supporter l'extension des mesures contre la propagande haineuse afin de protéger les membres des minorités sexuelles.

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Prologue: The Third Wave

WASHINGTON, DC—The bulletin board of the Matthew Shepard Online Resources Web site ... was shut down Monday as a result of a coordinated attack by thousand[s] of anti-gay fans of pro-wrestler Mick Foley. Foley's supporters, angered that the slain student was winning a Time magazine online poll for "Man of the Year" ... overwhelmed the board with a continuous onslaught of anti-Shepard and anti-gay messages, requiring the site to be temporarily shut down.

"On the same day Matt's mom announced the Matthew Shepard Foundation, thousands of wrestling fans descended onto my site to belittle Matt's death and attack gay people," said John Aravosis, ... who has been managing the site since Shepard's attack and death. "They wrote 'AIDS kills fags, and so do I', and called Matt 'faggot', 'little queer,' and 'Dead Homo of the Year.' It was absolutely sickening" ...¹

North America is undergoing a "third wave" of hate propaganda, the first having been the rise of anti-Jewish and anti-Black hate propaganda in the 1960s, and the second the expansion and prosecution of those efforts in the 1970s and 1980s.² The third wave is characterized by the dissemination of cyberhate, the expansion of target groups, and the corresponding rise in hate crimes directed at women and members of minority groups.³ The interplay of these three trends is poignantly illustrated by the above news release, which describes how Web-savvy bigots sought to drown out public sympathy for Matthew Shepard, the University of Wyoming student who was brutally tortured and left to die because he was gay. After days of hate-filled postings, several regular visitors to the site begged the systems operator to dismantle the bulletin board, effectively destroying an online community of activists and mourners.⁴ In a twist of irony, the so-called "marketplace of ideas" functioned to silence members of a vulnerable minority.

Despite its promises of "electronic democracy", the information superhighway too often collapses into Darwinian struggles such as this one. Chris Gosnell writes, "It

¹ Wired Strategies, News Release, "Virtual Violence Closes Shepard Message Board" (17 December 1998), online: Wired Strategies <<http://www.wiredstrategies.com/shepardx.html>> (date accessed: 8 April 1999).

² Library of Parliament, *Hate Propaganda* by P. Rosen, rev. ed. (Ottawa: Canada Communication Group, 1996) at 1-4.

³ See generally C. Gosnell, "Hate Speech on the Internet: A Question of Context" (1998) 23 Queen's L.J. 369; M.-F. Major, "Sexual-Orientation Hate Propaganda: Time to Regroup" (1996) 11:1 Can. J. L. & Soc. 221 [hereinafter "Sexual-Orientation Hate Propaganda"]; National Coalition of Anti-Violence Programs, *Anti-Lesbian, Gay, Bisexual and Transgendered Violence in 1997*, 4th ed. (Detroit: Triangle Foundation, 1998).

⁴ Wired Strategies, *supra* note 1.

is a paradox that a medium with almost limitless potential for fostering diverse forms of social exchange across traditionally impermeable boundaries and borders, may also create and antagonize those divisions.⁵ Indeed, even though Canadians are supposedly protected from hate promotion through a variety of criminal and administrative sanctions, messages like the one above are currently protected by the Constitution of the United States, no matter where they are transmitted.⁶ In light of this protection, it may be somewhat optimistic to suggest that expanding Canada's sanctions would reduce sexual orientation hate propaganda. As I shall argue, however, such expansion may be a necessary first step in combatting this proliferating form of vilification.

The idea of expanding of Canada's anti-hate laws to protect sexual minorities has recently attracted legislative attention at both the federal and provincial levels. In October 1999, NDP member of Parliament Svend Robinson introduced a private member's bill⁷ that would expand the definition of "identifiable group" respecting hate propaganda in the *Criminal Code*⁸ to include "any section of the public distinguished by ... sexual orientation." The impetus behind Robinson's bill was, among other things, the anti-gay hatred generated by the Kansas-based Reverend Fred Phelps.⁹ Phelps, whose message of hatred and homophobia is widely available on the Internet, gained notoriety in Canada when he threatened to stage an anti-gay demonstration on the front lawn of the Supreme Court.¹⁰ Along with specific attacks such as those directed at Matthew Shepard, Phelps's invective represents a growing body of hate

⁵ Gosnell, *supra* note 3 at 439.

⁶ The First Amendment to the U.S. Constitution protects freedom of speech:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances (U.S. Const. amend. I).

The U.S. Supreme Court has withheld First Amendment protection from speech that poses a "clear and present danger that [it] will bring about the substantive evils that Congress has a right to prevent" (*Schenck v. United States*, 249 U.S. 47, 52 (1919)), which has further been held to include "'fighting' words" (*Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942)), and "inciting or producing imminent lawless action and ... likely to incite or produce such action" (*Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969)). To the extent that speech is merely "offensive conduct", however, it has been held not to fall within the "clear and present danger" exception. See *Cohen v. California*, 403 U.S. 15, 22 (1971).

⁷ Bill 263, *An Act to amend the Criminal Code (hate propaganda)*, 2d Sess., 36th Parl., 1999 (1st reading 26 October 1999).

⁸ R.S.C. 1985, c. C-46.

⁹ Bill 263, *supra* note 7, cl. 1.

¹⁰ See e.g. J. Tibbetts, "Robinson's Bill Would Ban Hatred against Gays" *The [Montreal] Gazette* (28 October 1999) A9; *House of Commons Debates* (4 April 2000) at 5703 (S. Robinson).

¹¹ See e.g. J. Tibbetts, "Police Can't Use Hate Laws to Ban Phelps: Anti-Gay Preacher Labels Supreme Court Judges 'Nine Heretics'" *The Ottawa Citizen* (25 June 1999) F6.

propaganda aimed at silencing and persecuting sexual minorities and inciting violence against them.

Given the difficult questions of censorship and discrimination raised by this issue, my aim is to examine the prohibition of sexual orientation hate propaganda from a variety of perspectives: those of the victim (Part I), Canadian legislation (Part II), international law (Part III), other jurisdictions (Part IV), and the strategic advocate (Part V). These multiple perspectives will facilitate a legal analysis of Canada's approach to sexual orientation hate propaganda (Part VI). I shall conclude by reflecting on the importance of a holistic approach to this important issue.

I. The Victim's Perspective

Does it really matter that the debate over free speech appears to become more heated when it is the free speech interests of those in a dominant group that are at stake? I think it is a phenomenon to which we should pay close attention.¹²

The pureness of ... legal categories ... collapses under the experiences of lesbians and gay men.¹³

The harm inflicted by sexual orientation hate propaganda defies traditional legal categories such as libel and defamation. Critical race theorist Mari J. Matsuda explains that just as the harm caused by racist speech cannot be analyzed apart from the structural reality of racism, so the harm caused by sexual orientation hate propaganda must begin with an analysis of homophobia.¹⁴ Matsuda refrains from conducting such an analysis, however, claiming that it "require[s] a separate analysis [from racist speech] because of the complex and violent nature of gender subordination, and the different way in which sex operates as a locus of oppression."¹⁵ This task is partially performed by William B. Rubenstein, former director of the American Civil Liberties Union Lesbian and Gay Rights Project. He focusses on the way in which idealizations of heterosexual love operate to silence—or "closet"—people who violate these roles.¹⁶ According to Rubenstein, lesbians, gay men, bisexuals, transgendered persons, and

¹² J.C. Love, "Tort Actions for Hate Speech and the First Amendment: Reconceptualizing the Competing Interests" (1992) 2 L. & Sex. 29 at 33.

¹³ W.B. Rubenstein, "Since When Is the Fourteenth Amendment Our Route to Equality?: Some Reflections on the Construction of the Hate Speech Debate from a Lesbian/Gay Perspective" (1992) 2 L. & Sex. 19 at 20.

¹⁴ M.J. Matsuda, "Public Response to Racist Speech: Considering the Victim's Story" (1989) 87 Mich. L. Rev. 2320 at 2331-32. See also R. Delgado, "Campus Antiracism Rules: Constitutional Narratives in Collision" (1991) 85 Nw. U.L. Rev. 343.

¹⁵ *Ibid.* at 2332.

¹⁶ Rubenstein, *supra* note 13.

transvestites (to whom I refer collectively as “sexual minorities”¹⁷) disappear from the media and into their personal lives as if they do not exist. There is “an absolute ban on speaking about lesbian and gay issues,” he writes, “other than writing the word ‘fag-got’ or ‘dyke’ on the wall of the bathroom.”¹⁸ Thus, while racism and homophobia are both supremacist ideologies that profoundly undermine the identities of their victims, the hallmark of homophobia is the *invisibility* of its victims.¹⁹ This invisibility—the antithesis of freedom of expression—is both encouraged and exacerbated by the very hate-mongers who invoke freedom of expression values.²⁰

In addition to critical theorists, social psychologists offer a valuable perspective on the structure of homophobia. Countless experts have discussed the way in which rigid gender roles create a culture of deviance,²¹ perpetuate sexism and patriarchy,²² and further an ideology of heterosexism.²³ Most experts agree that homophobia is more than a visceral fear of lesbians and gay men; it is, for lack of a conclusive definition, an ideology of perceived sexual deviance that operates to silence, subordinate, and exploit anyone who violates traditional gender roles.

The above phenomena—closetry, deviance, sexism, and supremacy—form the context of homophobia against which hate propaganda works its harms. These harms are not just those of individual libel writ large; they are, seen contextually, the implements of heterosexual domination.²⁴ First among them is a range of physiological and psychological traumas experienced by members of the targeted group, all of which exacerbate existing feelings of vulnerability and isolation.²⁵ Second, these effects ex-

¹⁷ I credit this term to J.D. Wilets, “International Human Rights Law and Sexual Orientation” (1994) 18 *Hastings Int'l & Comp. L. Rev.* 1 at 4.

¹⁸ Rubenstein, *supra* note 13 at 22.

¹⁹ See also Love, *supra* note 12 at 35; A.A.M. Mattijssen & C.L. Smith, “Dutch Treats: The Lessons the U.S. Can Learn from How the Netherlands Protects Lesbians and Gays” (1996) 4 *Am. U.J. Gender & L.* 303 at 314; *M. v. H.*, [1999] 2 S.C.R. 3 at para. 308, 171 D.L.R. (4th) 577, Bastarache J., concurring.

²⁰ Rubenstein defends the intuitive view that this “silencing” is a reason to expand free speech as much as possible (*supra* note 13 at 25-26). I prefer the view that this “silencing” confirms that hate propaganda is inimical to freedom of expression.

²¹ See J. Harry, “Derivative Deviance: The Cases of Extortion, Fag-Bashing, and Shakedown of Gay Men” (1982) 19 *Criminology* 546.

²² See G.M. Herek, “On Heterosexual Masculinity: Some Psychical Consequences of the Social Construction of Gender and Sexuality” (1986) 29 *Am. Behav. Sci.* 563.

²³ See *ibid.*; G.M. Herek, “Beyond ‘Homophobia’: A Social Psychological Perspective on Attitudes toward Lesbians and Gay Men” (1984) 10 *J. Homosexuality* 1.

²⁴ In contrast, if one looks at the law of libel in its historical context, one sees that it is usually invoked by privileged people with a good reputation to protect. See Love, *supra* note 12 at 32-33.

²⁵ See R. Delgado, “Words That Wound: A Tort Action for Racial Insults, Epithets, and Name-Calling” (1982) 17 *Harv. C.R.-C.L. L. Rev.* 133; “Sexual-Orientation Hate Propaganda”, *supra* note 3 at 227; Matsuda, *supra* note 14; J. Peters, “When Fear Turns to Hate and Hate to Violence: The Persecution of Gays Is Increasing” (1991) 18:1 *Hum. Rts.* 22 at 25, 30.

tend beyond the targeted group, causing particular detriment to freedom of expression, freedom of association, and democracy.²⁶ Third, sexual orientation hate propaganda reinforces (and is reinforced by) the other tools of homophobia, which include harassment, gay bashing, overt and covert discrimination, extortion, stigmatization, murder, and genocide.²⁷ Finally, the absence of protection from hate propaganda—particularly in jurisdictions such as Canada, where other target groups receive protection—signals to members of sexual minorities that they are second class citizens not entitled to equal protection of the law.²⁸ It is the individual and combined effect of

²⁶ See Note, “A Communitarian Defense of Group Libel Laws” (1988) 101 Harv. L. Rev. 682.

²⁷ See J. Alter, “Trickle-Down Hate: Conservatives Have to Take Care That Their Condemnation of ‘Sin’ Doesn’t Turn Ugly”, online: *Newsweek.com* <<http://www.newsweek.com>> (date accessed: 8 April 1999); E. Faulkner, “Lesbian Abuse: The Social and Legal Realities” (1991) 16 Queen’s L.J. 261; “Sexual-Orientation Hate Propaganda”, *supra* note 3; Harry, *supra* note 21; G.M. Herek, “Hate Crimes against Lesbians and Gay Men: Issues for Research and Policy” (1989) 44 Am. Psychol. 948; “Hate Crimes against Gay, Lesbian and Bisexual Americans Are a Serious National Problem”, online: Human Rights Campaign <<http://www.hrc.org/issues/hate/index.html>> (date accessed: 16 August 2000); S.J. Lowe, “Words into Stones: Attempting to Get beyond the Regulating Hate Speech Debate” (1992) 2 L. & Sex. 11; National Coalition of Anti-Violence Programs, *supra* note 3; Peters, *supra* note 25; C. Petersen, “A Queer Response to Bashing: Legislating against Hate” (1991) 16 Queen’s L.J. 237; Canada, Department of Justice, *Disproportionate Harm: Hate Crime in Canada: An Analysis of Recent Statistics* by J.V. Roberts (1995); M. Shaffer, “Criminal Responses to Hate-Motivated Violence: Is Bill C-41 Tough Enough?” (1995) 41 McGill L.J. 199.

²⁸ See *Vriend v. Alberta*, [1998] 1 S.C.R. 493, 156 D.L.R. (4th) 385 [hereinafter *Vriend*]. Commenting on the silence respecting sexual orientation in the *Individual’s Rights Protection Act*, R.S.A. 1980, c. I-2 [hereinafter *IRPA*], Cory J. held:

[The] exclusion, deliberately chosen in the face of clear findings that discrimination on the ground of sexual orientation does exist in society, sends a strong and sinister message. The very fact that sexual orientation is excluded from the *IRPA*, which is the Government’s primary statement of policy against discrimination, certainly suggests that discrimination on the ground of sexual orientation is not as serious or as deserving of condemnation as other forms of discrimination. It could well be said that it is tantamount to condoning or even encouraging discrimination against lesbians and gay men. Thus this exclusion clearly gives rise to an effect which constitutes discrimination.

The exclusion sends a message to all Albertans that it is permissible, and perhaps even acceptable, to discriminate against individuals on the basis of their sexual orientation. The effect of that message on gays and lesbians is one whose significance cannot be underestimated. As a practical matter, it tells them that they have no protection from discrimination on the basis of their sexual orientation. Deprived of any legal redress they must accept and live in constant fear of discrimination. These are burdens which are not imposed on heterosexuals (*Vriend, ibid.* at paras. 100, 101).

See also “Sexual-Orientation Hate Propaganda”, where Major concludes that “[m]embers of a group who do not receive legal protection but are the targets of outbursts of hate propaganda often perceive themselves as doubly persecuted, simply because they live in a society that protects other groups but not the group to which they identify” (*supra* note 3 at 231); *House of Commons Debates* (4 April

these interconnected tools of homophobia, and not the mere pluralization of individual defamation or libel, that ultimately justifies state sanction of anti-gay hate propaganda.

II. Sanctions against Sexual Orientation Hate Propaganda

For generations, Canadian legislation did not effectively address hate propaganda of any kind, let alone that directed toward sexual minorities.²⁹ Prior to 1970, a web of highly restrictive *Criminal Code* provisions, including sedition, public mischief, mailing obscene or scurrilous material, defamatory libel, intimidation, and spreading false news, failed to capture the pestilent activities of Canada's worst hate-mongers.³⁰ Because of the virtually insurmountable standard of proof in civil proceedings, the law of tort proved similarly ineffective.³¹ Debates over hate propaganda focused on how to adapt these inadequate sanctions to the unique context created by the complexity of homophobia, leaving victims of hate speech searching for an appropriate pigeonhole in which to insert their grievances. Much like the American practice of "categorization",³² this approach provided maximum protection to hate-mongers and denied substantive equality to groups historically treated as unequal.³³ In the last generation, however, Canada has developed a range of criminal and administrative sanctions and possibly civil remedies.

A. Criminal Sanctions

Sections 318 and 319 of the *Criminal Code* contain Canada's most powerful sanctions against hate propaganda. These provisions are also the sole anti-hate propaganda sanction to discriminate overtly on the basis of sexual orientation:

2000) at 5703 (S. Robinson) (commenting that the exclusion of sexual orientation from s. 318(4) of the *Criminal Code* "sends a very destructive message").

²⁹ See Canada, *Report to the Minister of Justice of the Special Committee on Hate Propaganda in Canada* (Ottawa: Queen's Printer, 1966) [hereinafter *Cohen Report*]; W. Kaplan, "Maxwell Cohen and the Report of the Special Committee on Hate Propaganda" in W. Kaplan & D. McRae, eds., *Law, Policy, and International Justice: Essays in Honour of Maxwell Cohen* (Montreal & Kingston: McGill-Queen's University Press, 1993) 243 at 244.

³⁰ Kaplan, *ibid.* at 244.

³¹ *Ibid.*

³² Rather than adopting a contextual approach to hate propaganda—one that examines hate propaganda from the victim's perspective and balances that against other countervailing interests—U.S. courts have attempted (unsuccessfully) to fit extremist speech into one of several inadequate categories. See *supra* note 6. See also *e.g. Doe v. University of Michigan*, 721 F. Supp. 852 (E.D. Mich. 1989); *American Booksellers Association v. Hudnut*, 771 F.2d 323 (7th Cir. 1985); *Collin v. Smith*, 578 F.2d 1197 (7th Cir. 1978).

³³ See Note, "First Amendment—Racist and Sexist Expression on Campus—Court Strikes Down University Limits on Hate Speech" Case Comment on *Doe v. University of Michigan* (1989) 103 Harv. L. Rev. 1397.

318. (1) Every one who advocates or promotes genocide is guilty of an ... offence ...
- (2) In this section, "genocide" means any of the following acts committed with intent to destroy in whole or in part any identifiable group ...
- (4) In this section, "identifiable group" means any section of the public distinguished by colour, race, religion or ethnic origin.
319. (1) Every one who, by communicating statements in any public place, incites hatred against any identifiable group where such incitement is likely to lead to a breach of the peace is guilty of [an offence] ...
- (2) Every one who, by communicating statements, other than in private conversation, wilfully promotes hatred against any identifiable group is guilty of [an offence] ...³⁴

The genus of these provisions continues to shape legal and political debates over their expansion. When Don Boudria, M.P., introduced a bill to add age as an identifiable criterion to Canada's hate propaganda legislation,³⁵ Jean Charest, M.P., responded that "it is obvious based on the historical background of the provisions relating to hate propaganda, that these provisions were originally intended and are still intended to protect visible minorities, religious groups and ethnic minorities in Canada. ... What the hon. member is proposing today is a definition that goes beyond the *genus*."³⁶ Charest found support for this claim in the *Cohen Report*,³⁷ the landmark report that has since been called the "proximate cause of the passage of hate propaganda legislation in Canada."³⁸ To say that the *Cohen Report* still resonates would be a gross understatement. As William Kaplan observes, "Almost all commissions of inquiry make recommendations. Cohen's special committee led to the passage of a law; one which to the present day raises important questions about the limits to freedom in Canadian society."³⁹ Whether unregulated types of hate propaganda fall within the *Cohen Report's* vision is therefore a crucial question for strategic advocates.

Cohen's committee focussed on the corrosive *effects* of hate propaganda and the didactic function of criminal law. While it acknowledged that the number of people and organizations purveying hate was small, it concluded that "the damage which hate propaganda can cause is not necessarily related to its volume ..."⁴⁰ On the contrary,

³⁴ *Criminal Code*, *supra* note 8, ss. 318, 319.

³⁵ Bill C-207, *An Act to amend the Criminal Code (hate propaganda—age group)*, 2d Sess., 34th Parl., 1989 (1st reading 7 April 1989; 2d reading 28 September 1990).

³⁶ *House of Commons Debates* (28 September 1990) at 13601 (J. Charest).

³⁷ *Supra* note 29.

³⁸ Kaplan, *supra* note 29 at 244.

³⁹ *Ibid.*

⁴⁰ *Cohen Report*, *supra* note 29 at 27, cited in Kaplan, *ibid.* at 257.

the small number of materials circulating in Canada at the time were found to be "deeply hurtful to the minority groups at which they [were] aimed" and to have both "a deleterious effect on society" and "a tendency to encourage other discriminatory social practices."⁴¹ These findings, coupled with the basic conviction that minority groups were entitled to the protection of the criminal law, drove the committee's recommendations and defined subsequent debate in the House of Commons and the Senate. After almost five years, Parliament enacted the above provisions,⁴² sections 281.1 to 281.3 of the *Criminal Code* (now sections 318 and 319), which prohibit (1) the advocacy or promotion of genocide, (2) the incitement of hatred against any identifiable group, and (3) the wilful promotion of hatred against any identifiable group. In addition to restricting the definition of an "identifiable group" to "any section of the public distinguished by colour, race, religion or ethnic origin," the statute provides four statutory defences and requires the consent of the attorney general as a prerequisite for any prosecution. These restrictions helped to persuade the Supreme Court that subsection 319(2) of the *Criminal Code* infringed the *Canadian Charter of Rights and Freedoms*⁴³ as little as possible.⁴⁴

Legislative efforts to expand the definition of "identifiable group" began just before the Supreme Court of Canada upheld the constitutionality of part of the hate propaganda provisions. In fact, the bill on which Charest commented was neither the first nor the only one introduced by Boudria. Between 1988 and 1994 Boudria introduced a series of bills that sought to add "age" to the list of prohibited grounds, thereby halting the importation into Canada of trading cards depicting the mutilation of children.⁴⁵ In Boudria's view, the popular trading cards known as "Garbage Pail Kids" and a product known as the "serial killer board game" constituted hate propaganda against children.⁴⁶ Although Boudria drew a comparison between Garbage Pail Kids and obscene pornography, he did not propose the inclusion of "gender" in the

⁴¹ *Cohen Report, ibid.*

⁴² R.S.C. 1970 (1st Supp.), c. 11, s. 1.

⁴³ Part 1 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter *Charter*].

⁴⁴ *R. v. Keegstra*, [1990] 3 S.C.R. 697, 117 N.R. 1 [hereinafter *Keegstra* cited to S.C.R.]. *Keegstra* was part of a trilogy of hate propaganda cases, with *R. v. Andrews*, [1990] 3 S.C.R. 870, 77 D.L.R. (4th) 128, and *Canada (Human Rights Commission) v. Taylor*, [1990] 3 S.C.R. 892, 117 N.R. 191. *Keegstra* was affirmed in *R. v. Keegstra*, [1996] 1 S.C.R. 458, 197 N.R. 26. See also *J.R.T. and W.G.P. v. Canada* (No. 104/1981), printed in *Report of the Human Rights Committee*, UN GAOR, 38th Sess., Supp. No. 40, UN Doc. A/38/40, Annex XXIV (1983) 231, 4 H.R.L.J. 193.

⁴⁵ See Bill C-204, *An Act to amend the Criminal Code (hate propaganda—age group)*, 1st Sess., 34th Parl., 1988 (1st reading 16 December 1988); Bill C-207, *supra* note 35; Bill C-223, *An Act to amend the Criminal Code (hate propaganda—age group)*, 3d Sess., 34th Parl., 1991 (1st reading 3 June 1991); Bill C-214, *An Act to amend the Criminal Code (hate propaganda—age group)*, 1st Sess., 35th Parl., 1994 (1st reading 11 February 1994; 2d reading 15 March 1994).

⁴⁶ *House of Commons Debates* (16 December 1988) at 157 (D. Boudria); *ibid.* (7 April 1989) at 230; *ibid.* (28 September 1990) at 13597; *ibid.* (15 March 1994) at 2315-16.

list of identifiable grounds.⁴⁷ The limited scope of his bill drew criticism from Pierrette Venne, M.P., who proposed that “[i]nstead of designating a few ‘identifiable’ groups, the law should prohibit any form of hate propaganda against any group. Public incitement to kill women, welfare recipients or homosexuals is no different than inciting people to kill Jews, Catholics or Muslims.”⁴⁸ Boudria’s bills were eventually dropped from the order paper, largely because the Department of Justice had already begun to research the issue.⁴⁹

Between 1990 and 1996 there were six proposals to add sexual orientation to the list of identifiable groups. Robinson sought twice to add both sexual orientation and gender to the list,⁵⁰ citing “an increasing amount of material promoting hatred and violence against lesbians and gay men and against women in Canada.”⁵¹ On the first reading of Bill C-326, Robinson stated that “[t]he purpose of this bill is to send out a clear message from Parliament, despite the Neanderthals in some sections of the Conservative Party, that this hate literature will not be tolerated in Canada.”⁵² This cause was taken up a year later by Peter Milliken, M.P., who had been receiving complaints from the Kingston Police Services Board about comments in the press that promoted hatred against persons with HIV and AIDS.⁵³ Milliken sought in 1992 to add age, sex, sexual orientation, and mental or physical disability to the list of identifiable groups,⁵⁴ though he removed “age” from his proposal in two subsequent bills.⁵⁵ Only one member of Parliament, Margaret Mitchell, has proposed a comprehensive overhaul of sections 318 and 319, which would include expanding the list of identifiable groups and the grounds for prosecution and removing the *mens rea* requirement from subsection

⁴⁷ *Ibid.* (28 September 1990) at 13599.

⁴⁸ *Ibid.* (15 March 1994) at 2317 (P. Venne).

⁴⁹ *Ibid.* at 2319-21 (R. MacLellan). See *infra* note 60 and accompanying text.

⁵⁰ The first of Robinson’s proposals, Bill C-326, *An Act to amend the Criminal Code (hate propaganda)*, 2d Sess., 34th Parl., 1990 (1st reading 27 June 1990), was introduced approximately six months before the constitutionality of s. 319(2) of the *Criminal Code*, *supra* note 8, was upheld in *Keegstra*. His second proposal, Bill C-247, *An Act to amend the Criminal Code (hate propaganda)*, 3d Sess., 34th Parl., 1991 (1st reading 19 June 1991), was introduced approximately six months after the release of *Keegstra*.

⁵¹ *House of Commons Debates* (27 June 1990) at 13172 (S. Robinson).

⁵² *Ibid.*

⁵³ Note that the ground concerning hate propaganda related to HIV/AIDS might also be physical disability.

⁵⁴ Bill C-350, *An Act to amend the Criminal Code (hate propaganda)*, 3d Sess., 34th Parl., 1992 (1st reading 10 June 1992; 2d reading 26 November 1992).

⁵⁵ This was to reflect some concerns discussed in private members’ hour. See *House of Commons Debates* (3 May 1993) at 18817 (P. Milliken); Bill C-429, *An Act to amend the Criminal Code (hate propaganda)*, 3d Sess., 34th Parl., 1993 (1st reading 3 May 1993); Bill C-256, *An Act to amend the Criminal Code (hate propaganda)*, 2d Sess., 35th Parl., 1996 (1st reading 29 March 1996).

319(2).⁵⁶ This proposal died before the 36th Parliament convened, and only Robinson has proposed similar amendments subsequently.

At least three events stalled the House of Commons debate over these amendments: the release of *Keegstra*, the government's establishment of a working group on hate propaganda, and the election of the 36th Parliament. In *Keegstra*, the Supreme Court held seven to zero that subsection 319(2) of the *Criminal Code* (wilful promotion of hatred) violated the freedom of expression guarantee in the *Charter*,⁵⁷ but a narrow majority (four to three) saved the provision as a reasonable limit under section 1.⁵⁸ By applying a *purposive* approach to section 1, one that emphasized the values and international obligations underlying the enactment of subsection 319(2) of the *Criminal Code*, the majority refuted the powerful contention that that provision was vague, overbroad, and rarely applied.⁵⁹ Interestingly, this laudable approach to section 1 of the *Charter* echoed the pre-*Charter* sentiments of Maxwell Cohen, who responded to similar objections by stressing the symbolic effects of the legislation. Indeed, when examining *Keegstra* and the *Cohen Report* side by side, one is bound to conclude that the prevailing approach to hate propaganda in Canada is to emphasize "values" over "volume"—that is, the importance of prohibiting hate speech per se rather than the actual volume of hate speech in circulation.

The release of *Keegstra* prompted the Department of Justice to establish a working group on hate propaganda and to charge it with investigating the possibility of (1) expanding the list of identifiable grounds, (2) removing the *mens rea* requirement from sections 318 and 319, and (3) removing the consent of the attorney general as a

⁵⁶ Bill C-431, *An Act to amend the Criminal Code (hate propaganda)*, 3d Sess., 34th Parl., 1993 (1st reading 5 May 1993).

⁵⁷ Section 2 of the *Charter*, *supra* note 43, reads as follows:

2. Everyone has the following fundamental freedoms: ...

(b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication ...

The Court rejected the argument that hate propaganda constitutes violent expression (as discussed in *Irwin Toy v. Quebec (A.G.)*, [1989] 1 S.C.R. 927, 58 D.L.R. (4th) 577) and is thus inimical to the values of freedom of expression. On the Court's narrow reading of the violence exception, see R. Moon, "The Supreme Court of Canada on the Structure of Freedom of Expression Adjudication" (1995) 45 U.T.L.J. 419 at 424-35; K. Mahoney, "R. v. *Keegstra*: A Rationale for Regulating Pornography?" Case Comment (1992) 37 McGill L.J. 242 at 246-50. Moon also argues that the Court's s. 2(b) *Charter* analysis is inconsistent with that for s. 1 (*ibid.* at 466).

⁵⁸ Section 1 of the *Charter*, *ibid.*, provides as follows:

1. The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

⁵⁹ See L.E. Weinrib, "Hate Promotion in a Free and Democratic Society: *R. v. Keegstra*" Case Comment (1991) 36 McGill L.J. 1416 at 1431-32.

prerequisite for prosecution.⁶⁰ As originally constituted, the FPT Working Group never released any recommendations to the general public, and its existence was put forth at least once as an excuse not to send amendment proposals to the parliamentary committee stage.⁶¹ That said, the challenge faced by Parliament, as well as by *Charter* lawyers at the Department of Justice, is intricate. Because the *Keegstra* Court cited the narrow list of identifiable grounds, the *mens rea* requirement, and the consent of the attorney general as reasons why subsection 319(2) survived the “minimal impairment” branch of the section 1 analysis, proponents of an expanded provision may have to establish a specific pressing and substantial objective to withstand future *Charter* challenges.⁶² Yet this completely misses the point of expanding the identifiable grounds. If the value of prohibiting hate propaganda really does trump the question of the volume of hate propaganda in circulation, the government should analyze the expansion of identifiable groups as a symbolic anti-discrimination measure, not an unnecessary act of censorship.

B. Other Provisions

Public debate surrounding the above sanctions should not obscure the panoply of other remedies available to victims of hate propaganda.⁶³ First, there are a number of legislative measures that rely on the definition of “identifiable groups” in subsection 318(4) of the *Criminal Code*, including the following examples:

⁶⁰ The working group [hereinafter FPT Working Group] was composed of federal, provincial, and territorial ministers of justice (interview with M. Berlin & E. Lief, Department of Justice Criminal Law Policy Section (1 March 1999)).

⁶¹ *House of Commons Debates* (15 March 1994) at 2321 (R. MacLellan). The FPT Working Group has changed over the years and is no longer active in its original form, having evolved after several years into a diversity working group. In 1998 this diversity working group released several recommendations that were approved in principle by the federal and provincial ministers responsible for justice at a meeting in Regina (J. Bronskill, “Criminal Code Updates to Toughen Hate Laws: ‘Unanimous Support’ among Justice Ministers for Proposed Changes” *The Ottawa Citizen* (25 November 1998) A3). The “ministers responsible for justice approved for consideration, subject to an in-depth charter [sic] review, a number of recommendations which would further ensure that hate crimes are dealt with firmly” (*House of Commons Debates* (4 April 2000) at 5703 (J. Manley)).

⁶² In the debate over Bill C-350, *supra* note 54, Scott Thorkelson, M.P., commented that to expand the list of identifiable grounds, one would have to establish “a pressing and substantial objective in Canada of a significantly substantial amount of hate propaganda aimed at particular groups [not currently covered by the definition]” (*House of Commons Debates* (26 November 1992) at 14133 (S. Thorkelson)).

⁶³ See especially I. Cotler, “Hate Speech, Equality, and Harm under the Charter: Towards a Jurisprudence of Human Dignity for a ‘Free and Democratic Society’” in G.-A. Beaudoin & E. Mendes, eds., *The Canadian Charter of Rights and Freedoms*, 3d ed. (Scarborough: Carswell, 1996) 20-1 at 20-12 to 20-55. What follows borrows heavily from Professor Cotler’s piece.

- Sections 184.2, 320, and 319(4) of the *Criminal Code* authorize the interception, seizure, and forfeiture of hate materials by agents of the state. All of these provisions are related to an offence defined in sections 318, 319(1), or 319(2) of the *Criminal Code*.
- The *Canada Post Corporation Act*⁶⁴ authorizes the minister responsible for the Canada Post Corporation to remove a person's mail privileges where there are reasonable grounds for believing that person is committing an offence.⁶⁵ "Offence" of course includes the offences in sections 318, 319(1), and 319(2) of the *Criminal Code*.
- The *Customs Tariff Act*⁶⁶ prohibits the importation into Canada of, among other things, material that constitutes hate propaganda within the meaning of the *Criminal Code*.⁶⁷
- The *Broadcasting Act*,⁶⁸ which is administered by the C.R.T.C., requires licensed broadcasters both to "encourage the development of Canadian expression by providing ... programming that reflects Canadian ... values"⁶⁹ and to abide by the *Criminal Code*. Any licensee who permits his or her broadcasts to be used for the wilful promotion of hatred runs afoul of section 319(2) of the *Criminal Code* and thus of the C.R.T.C.'s licensing requirements.

This widespread reliance on the *Criminal Code*'s definition of "identifiable groups" furthers the case for expanding that provision.

Second, Canada provides a range of remedies that would be unaffected by the expansion of subsection 318(4) of the *Criminal Code*. While some of these provisions have been either struck down⁷⁰ or interpreted narrowly⁷¹ by the courts, others have

⁶⁴ R.S.C. 1985, c. C-10.

⁶⁵ *Ibid.*, s. 43.

⁶⁶ R.S.C. 1985 (3d Supp.), c. 41.

⁶⁷ *Ibid.*, s. 114, Sch. VII. This provision creates a discretion that is often exercised prejudicially against sexual minorities. For example, Canadian customs officials routinely confiscate same-sex pornography on the grounds that such literature constitutes "hate propaganda". See *infra* note 130.

⁶⁸ S.C. 1991, c. 11.

⁶⁹ *Ibid.*, s. 3(1)(d)(ii), cited in Cotler, *supra* note 63 at 20-39, n. 141.

⁷⁰ For example, the *Criminal Code*, *supra* note 8, s. 181, provides as follows:

181. Every one who wilfully publishes a statement, tale or news that he knows is false and that causes or is likely to cause injury or mischief to a public interest is guilty of [an offence] ...

In *R. v. Zundel*, [1992] 2 S.C.R. 731, 95 D.L.R. (4th) 202, the Supreme Court narrowly struck down this historical provision, distinguishing *Keegstra* on the grounds that the impugned provision was vague and lacked an identifiable purpose.

generated a substantial amount of litigation. In particular, the *Canadian Human Rights Act*⁷² provides that repeated telephonic communication of “any matter that is likely to expose a person or persons to hatred or contempt by reason of the fact that that person or those persons are identifiable on the basis of a prohibited ground of discrimination”⁷³ constitutes a discriminatory practice. In 1996 Parliament fulfilled a promise made four years earlier to add “sexual orientation” to the list of prohibited grounds in that act.⁷⁴ This amendment extended Canada’s most-litigated hate propaganda provision to sexual minorities, though it remains to be seen whether it further affects the constitutionality of the statute.⁷⁵ The amendment also brought the *CHRA* in line with similar statutes in Quebec, Manitoba, New Brunswick, Nova Scotia, and Ontario, all of which acknowledged sexual orientation as a prohibited ground for discrimination.⁷⁶ Today human rights legislation in every province recognizes sexual orientation as a prohibited ground for discrimination.⁷⁷

Third, there are a number of remedies that, with progressive development, might one day enlarge Canada’s anti-hate regime. For example, the *Criminal Code* prohibits defamatory libel against individuals, defining such libel as “matter published, without lawful justification or excuse, that is likely to injure the reputation of any person by exposing him to hatred, contempt or ridicule, or that is designed to insult the person of or concerning whom it is published.”⁷⁸ Although these provisions have been interpreted not to cover “group libel” such as that directed toward sexual minorities,⁷⁹ the distinction between individual and group libel cannot always be sharply drawn. Not only does group libel implicitly target “each and every individual” in that group—an admittedly abstract proposition—but much group libel implicitly singles out particular individuals. A recent example that I discuss below was an online message to a specific

⁷¹ For example, the *Criminal Code*, *ibid.*, ss. 59, 61, prohibits seditious libel, but this has been interpreted narrowly by the Supreme Court. See *R. v. Boucher*, [1951] S.C.R. 265, [1951] 2 D.L.R. 369, holding that intent to incite violence, public disorder, or hatred or contempt against the administration of justice is an element of the offence of seditious libel. For a lengthier discussion, see Cotler, *supra* note 63 at 20-31.

⁷² R.S.C. 1985, c. H-6 [hereinafter *CHRA*].

⁷³ *Ibid.*, s. 13(1).

⁷⁴ *Ibid.*, s. 3(1), as am. by S.C. 1996, c. 14, s. 2.

⁷⁵ Not surprisingly, House of Commons debate over adding “sexual orientation” to the *CHRA* focussed on whether this amendment would create “special rights” for sexual minorities.

⁷⁶ See “Sexual-Orientation Hate Propaganda”, *supra* note 3 at 234, n. 50.

⁷⁷ *IRPA*, *supra* note 28 (as altered by the reading-in remedy in *Vriend*, *supra* note 28 at para. 179); *Human Rights Code*, R.S.B.C. 1996, c. 210, ss. 7-14; *Human Rights Code*, R.S.M. 1987, c. H175, s. 9(2)(h); *Human Rights Act*, R.S.N.B. 1973, c. H-11, Preamble, ss. 3-7; *Human Rights Code*, R.S.N. 1990, c. H-14, ss. 6-9, 12, 14, 18, 19; *Human Rights Act*, R.S.N.S. 1989, c. 214, s. 5(1)(n); *Human Rights Code*, R.S.O. 1990, c. H.19, s. 1; *Human Rights Act*, R.S.P.E.I. 1988, c. H-12, s. 1(1)(d); *Charter of Human Rights and Freedoms*, R.S.Q. c. C-12, s. 10; *The Saskatchewan Human Rights Code*, S.S. 1979, c. S-24.1, ss. 9-19.

⁷⁸ *Supra* note 8, ss. 298-301.

⁷⁹ See *Genest v. R.* (1933), 71 Que. S.C. 385, cited in Cotler, *supra* note 63 at 20-30, n. 109.

gay Web site visitor that read, "I Hate Fags." Internet communications such as this, both personalized and public, blur the distinction between individual and group libel, thus expanding the possibility for criminal sanction.

Finally, there is little promise in pursuing civil remedies for hate propaganda in Canada. Common law courts have severely restricted any cause of action in group libel, requiring that a specific individual be personally targeted in the libellous statement.⁸⁰ In addition, the Supreme Court of Canada's decision in *Bhadauria v. Seneca College of Applied Arts & Technology*⁸¹ foreclosed the possibility of a tort of discrimination, choosing instead to vest the whole of anti-discrimination law in administrative tribunals. Similarly, there appears to be no delictual remedy for group libel under the civil law of Quebec, despite the Quebec Court of Appeal's decision in *Ortenberg v. Plamondon*.⁸²

III. An International Perspective

Although five major international human rights documents contain specific limitations on hate speech, and three others contain general limitations on speech, none includes sexual orientation among its identifiable grounds.⁸³ The general limitation

⁸⁰ See S.S. Cohen, "Hate Propaganda—The Amendments to the Criminal Code" (1972) 17 McGill L.J. 740 at 741-49; N. Lerner, "Group Libel Revisited" (1987) 17 Israel Y.B. Hum. Rts. 184 at 188.

⁸¹ [1981] 2 S.C.R. 181, 124 D.L.R. (3d) 193.

⁸² (1914), 24 B.R. 69 & 385 (C.A.). While in this case the court recognized an individual's right to sue a group libeller, the court clarified that the suit disclosed no cause of action in group libel, only one for personal defamation. Moreover, the subsequent case of *Germain v. Ryan* (1918), 53 C.S. 543, held that no action for group libel exists when the size of the group is so large that it cannot be concluded that the individual plaintiff was personally targeted. See Cohen, *supra* note 80. There are, however, several avenues in the civil law of Quebec for pursuing a tort of discrimination. These are discussed in Cotler, *supra* note 63 at 20-48.

⁸³ *Universal Declaration of Human Rights*, GA Res. 217(III), UN GAOR, 3d Sess., Supp. No. 13, UN Doc. A/810 (1948) 71 [hereinafter *Universal Declaration*]; *International Covenant on Civil and Political Rights*, 19 December 1966, 999 U.N.T.S. 171, Can. T.S. 1976 No. 47, 6 I.L.M. 368 (entered into force 23 March 1976, accession by Canada 19 May 1976) [hereinafter *ICCPR*]; *International Convention on the Elimination of All Forms of Racial Discrimination*, GA Res. 2106(XX), UN GAOR, 21 December 1965, 660 U.N.T.S. 195 [hereinafter *CERD*]; *Convention on the Prevention and Punishment of the Crime of Genocide*, 9 December 1948, 78 U.N.T.S. 277, Can. T.S. 1949 No. 27 (entered into force 12 January 1951) [hereinafter *Genocide Convention*]; *Convention for the Protection of Human Rights and Fundamental Freedoms*, 4 November 1950, 213 U.N.T.S. 221, Eur. T.S. 5 (entered into force 3 September 1953) [hereinafter *European Convention*]; *Banjul Charter on Human and Peoples' Rights*, O.A.U. Doc. CAB/LEG/67/3/Rev.5, 21 I.L.M. 58 (1981) [hereinafter *African Charter*]; *American Convention on Human Rights: Pact of San José, Costa Rica*, 22 November 1969, 1144 U.N.T.S. 123, O.A.S.T.S. 36, 9 I.L.M. 673 [hereinafter *American Convention*]; *Conference on Security and Co-operation in Europe: Final Act*, 1 August 1975, 14 I.L.M. 1292 [hereinafter *Final Act*]. For a brief critique of the omission of sexual minorities from hate speech conventions, see E.

clause in the *Universal Declaration* provides that “[t]hese rights and freedoms may in no case be exercised contrary to the purposes and principles of the United Nations,”⁸⁴ of which one of the significant goals is to promote and encourage respect for human rights and fundamental freedoms “without distinction as to race, sex, language, or religion.”⁸⁵ The *ICCPR* modifies this list of identifiable grounds slightly, requiring states to prohibit “[a]ny advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence ...”⁸⁶

In addition to these comprehensive human rights treaties, a number of specialized treaties oblige states to prohibit racial and religious hate propaganda. One of the strongest statements on hate propaganda in international law is in the *CERD*, which requires signatories to “adopt immediate and positive measures to eradicate all incitement to, or acts of, such discrimination ... [by declaring] punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement to such acts ...”⁸⁷ Similarly, the *Genocide Convention*, which provides that “[d]irect and public incitement to commit genocide” shall be punishable, defines genocide as “acts committed with intent to destroy, in whole or in part, a national, ethnical [*sic*], racial or religious groups [*sic*] ...”⁸⁸

Finally, regional conventions in Europe, Africa, and Latin America omit sexual orientation from their enumerated grounds of discrimination. Like the *Universal Declaration*, neither the *European Convention* nor the *African Charter* explicitly requires states to proscribe hate propaganda; however, the *European Convention* affirms equality and non-discrimination rights on the basis of “sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.”⁸⁹ These rights have been interpreted by both the European Court of Human Rights and the European Commission of Human Rights to permit restrictions on speech that promotes racial and ethnic hatred.⁹⁰ Regional documents also require states to prohibit hate propaganda. The Helsinki *Final Act* does so indirectly in its article on respect for human rights and fundamental freedoms, which requires participating states to act in conformity with the *Charter of the*

Heinze, *Sexual Orientation: A Human Right: An Essay on International Human Rights Law* (Dordrecht: Martinus Nijhoff, 1995) at 269-70.

⁸⁴ *Universal Declaration*, *ibid.*, art. 29(3).

⁸⁵ *Charter of the United Nations*, 26 June 1945, Can. T.S. 1945 No. 7, 59 Stat. 1031, art. 1(3).

⁸⁶ *ICCPR*, *supra* note 83, art. 20. The Human Rights Committee jurisprudence, which has held that art. 20 is compatible with art. 19, is discussed in E.F. Defeis, “Freedom of Speech and International Norms: A Response to Hate Speech” (1992) 29 *Stan. J. Int’l L.* 57 at 83.

⁸⁷ *CERD*, *supra* note 83, art. 4.

⁸⁸ *Genocide Convention*, *supra* note 83, arts. 2, 3.

⁸⁹ *European Convention*, *supra* note 83, art. 14.

⁹⁰ The jurisprudence is discussed in Defeis, *supra* note 86 at 98-103.

United Nations and the *Universal Declaration*.⁹¹ The *American Convention* is more specific, requiring states to prohibit "propaganda for war and any advocacy of national, racial, or religious hatred ... against any person or group of persons on any grounds including those of race color, religion, language, or national origin ..."⁹²

This cursory analysis of international human rights documents reveals that some group classifications are always protected, some are only sometimes protected, and still others are never protected. Yet despite this apparent hierarchy of minority claimants in international law, recent jurisprudence has affirmed the *universal* application of international human right norms.⁹³ In *Toonen v. Australia*,⁹⁴ the United Nations Human Rights Committee went as far as to interpret discrimination based on "sex" as including sexual orientation, thus finding Tasmania's anti-sodomy statute in breach of Australia's obligations under the *ICCPR*. Although this was a tentative judgment in many respects—not least because it failed to recognize sexual orientation as an "other status"⁹⁵—it cast doubt on any domestic statute that discriminates on the basis of sexual orientation. For this reason, international law might be interpreted to compel the criminalization of sexual orientation hate propaganda in Canada and other countries.

IV. A Comparative Perspective

A comparison of domestic remedies for hate propaganda reveals the same hierarchy of minority-rights claimants that pervades international law. Although "free and democratic societies in every region of the world have now enacted ... [hate propaganda] legislation,"⁹⁶ most of this legislation exhibits the same underinclusiveness as Canada's.⁹⁷ The United Kingdom specifically targets racial incitement, having drawn the line at "racist speech" that is "threatening, abusive or insulting".⁹⁸ Germany prohibits "inciting the public to race hatred," and it has also enacted specific proscriptions

⁹¹ *Final Act*, *supra* note 83, art. 1(VII).

⁹² *American Convention*, *supra* note 83, art. 13(5) [emphasis added].

⁹³ See Wilets, *supra* note 17 at 3, 119-20.

⁹⁴ (No. 488/1992), UN Doc. CCPR/C/50/D/488/1992 (1994), printed in *Report of the Human Rights Committee*, UN GAOR, 49th Sess., Supp. No. 40, UN Doc. A/49/40, Appendix (1994) 226 [hereinafter *Toonen*]. The case is discussed in Wilets, *ibid.* at 51, n. 209.

⁹⁵ *ICCPR*, *supra* note 83, art. 2(1).

⁹⁶ See Cotler, *supra* note 63 at 20-61.

⁹⁷ In addition to the sources cited below, comparative hate propaganda law is discussed in S. Coliver, ed., *Striking a Balance: Hate Speech, Freedom of Expression and Non-discrimination* (London: Article 19, 1992); Cotler, *ibid.*; N. Lerner, *The Crime of Incitement to Group Hatred: A Survey of International and National Legislation* (New York: World Jewish Congress, 1965); H. Schwartz, "Defamation and Democracy" (1996) 3 *Parker Sch. J. E. Eur. L.* 217.

⁹⁸ See E. Barendt, Book Review of Coliver, *ibid.* [1993] *Pub. L.* 208 at 210. For critiques of the British regime from the point of view of other countries, see L. Johannessen, "A Critical View of the Constitutional Hate Speech Provision" (1997) 13 *S. Afr. J. Hum. Rts.* 135 at 141; A. Scahill, "Can Hate Speech Be Free Speech?" (1994) 4 *Australasian Gay & Lesb. L.J.* 1 at 8.

on Holocaust denial.⁹⁹ South Africa's hate propaganda legislation has its roots in the African National Congress's *Bill of Rights*, which was designed to dismantle apartheid and reduce systemic racism.¹⁰⁰ Many other African nations have enacted hate propaganda legislation, most of which mirrors those nations' obligations under the *CERD*.¹⁰¹ As these examples illustrate, many nations have used hate propaganda laws to address a particular experience with racial or religious persecution. Such laws aim to conclude a historical narrative that begins with persecution and ends with reconciliation, and enshrines a vision of racial and religious harmony into the criminal law. Just as sexual minorities are absent from these narratives, so too are they absent from anti-hate legislation.

Nevertheless, a growing minority of jurisdictions have prohibited sexual orientation hate propaganda, either in a criminal or civil context. Following a strong condemnation of its treatment of sexual minorities, Ireland added sexual orientation to its *Prohibition of Incitement to Hatred Act 1989*, thus making it a "criminal offence to incite hatred on the basis of sexual orientation."¹⁰² Norway and Denmark have also criminalized some forms of verbal abuse against sexual minorities, the latter having made it illegal "to utter publicly or deliberately, for the dissemination in a wider circle, a statement or remark, by which a group of people are threatened, derided or humiliated on account of their ... sexual orientation."¹⁰³

The Netherlands and New South Wales provide particularly helpful examples of how to use different strategies to combat sexual orientation hate propaganda. In 1993 the government of New South Wales passed the *Anti-Discrimination (Homosexual Vilification) Amendment Act*,¹⁰⁴ which outlaws all homosexual vilification that does not take place during the course of religious instruction.¹⁰⁵ This act contains two types of proceedings: (1) a civil complaint procedure to the Anti-Discrimination Board about a "public act" that incites hatred toward, serious contempt for or severe ridicule of a person or group of persons on the ground of their homosexuality; and (2) criminal proceedings permitted by the attorney general where threats of physical harm towards persons or property are made or where there is incitement to threats of such physical harm on the ground of a person's homosexuality.¹⁰⁶ A number of social and political

⁹⁹ B.A. Appleman, "Hate Speech: A Comparison of the Approaches Taken by the United States and Germany" (1996) 14 *Wis. Int'l L.J.* 422 at 432. For a critical perspective, see Johannessen, *ibid.* at 141.

¹⁰⁰ Johannessen, *ibid.* at 137; E. Neisser, "Hate Speech in the New South Africa: Constitutional Considerations for a Land Recovering from Decades of Racial Repression and Violence" (1994) 10 *S. Afr. J. Hum. Rts.* 336.

¹⁰¹ Defeis, *supra* note 86 at 118-19.

¹⁰² Scahill, *supra* note 98 at 4, n. 2; Wilets, *supra* note 17 at 82.

¹⁰³ Danish Penal Code, art. 266b, cited in Wilets, *ibid.* at 82; Defeis, *supra* note 86 at 98.

¹⁰⁴ (N.S.W.), 1993, No. 97.

¹⁰⁵ For a discussion of the federal law in Australia, see Scahill, *supra* note 98 at 6.

¹⁰⁶ *Ibid.* at 5. For an excellent overview of the substance of the act, see generally *ibid.*

factors contributed to the enactment of this legislation, chief among them the release of the Anti-Discrimination Board's inquiry into HIV/AIDS-related discrimination.¹⁰⁷ This report proposed the introduction of homosexual vilification legislation on the grounds that "public vilification of gay men encouraged and incited discrimination and violence against gay men."¹⁰⁸ Combined with public pressure from the lesbian and gay community and an increase in gay bashing and murders, this finding galvanized key members of Parliament into proposing the bill three times in one year. Aside from a few objections that it would interfere with freedom of speech, the bill passed with little public debate.

In the area of civil remedies, a recent decision of the highest court in the Netherlands signals substantial progress in the redress of sexual orientation hate propaganda. In *Van Zijl v. Goeree*,¹⁰⁹ the Dutch Supreme Court (Hoge Raad) issued an injunction against the further publication of an anti-gay article entitled "Sodom is Everywhere", which was published by a militant religious group led by the Reverend Goeree.¹¹⁰ The article contained numerous slurs against lesbians and gay men, including warnings that lesbians and gay men would be punished with AIDS by God. The following were among the statements:

Now that homosexuality has been legalized, the new death appears. It is the result of sin: AIDS!

A consequence of homosexuality is AIDS which, without possibility of appeal, brings about death.

Being a lesbian is rewarded. AIDS passes by the door of lesbian women. At the moment, anyway. Ten years ago, the homosexuals were rewarded like this. They didn't have AIDS. God lets no-one [*sic*] ridicule him.

Those who practice homosexuality incurs [*sic*] a blood-guilt comparable to a murderer. He deserves the death penalty.

Homosexuality leads irrevocably to damnation. Legalization of homosexuality is the product of a reprehensible government leading the country into ruin.¹¹¹

These slurs prompted a distressed AIDS nurse to seek both an injunction and damages for each day the article appeared in print. Although the plaintiff was not named in the article, he feared that readers of the pamphlet would accuse him of being responsible for the transmission of the virus. The Hoge Raad balanced these fears against the pamphleteer's freedom of religion, ultimately deciding in the plaintiff's favour. In its ruling, the court noted that the propaganda diminished the plaintiff's posi-

¹⁰⁷ *Ibid.* at 2.

¹⁰⁸ *Ibid.*

¹⁰⁹ (1990) RvdW Nr.41 (HR Neth) [hereinafter *Goeree*].

¹¹⁰ See generally Mattijssen & Smith, *supra* note 19.

¹¹¹ Quoted in *ibid.* at 303.

tion in society and thus violated his right to equal treatment under the Dutch Constitution. This right, which prohibits discrimination "on any grounds whatsoever",¹¹² thus functioned to limit the right to free speech.

On the one hand, such a ruling would appear to exert little influence on Canadian courts. One reason is that Dutch courts apply non-discrimination principles to the private, as well as the public, sector,¹¹³ while Canada applies its equality provisions only to state actors. The *Charter* restricts its own application to "the Parliament and government of Canada ... and ... of each province,"¹¹⁴ effectively leaving Canadians with non-constitutional remedies for discrimination by private actors. Moreover, Canadian courts have all but foreclosed civil remedies for group libel and the tort of discrimination. As discussed above, a cause of action in libel requires that an individual have been personally targeted, and no cause of action in discrimination exists at all.¹¹⁵ Finally, even if the *Charter* did apply to private actors in Canada, the tension between rights and responsibilities—in this case, between the right to free speech and the responsibility to treat people equally—is entrenched in the Dutch Constitution, while it is not so entrenched in the *Charter*. Article 6 of the Dutch Constitution refers to "each person's responsibility before the law," thus according less status to freedom of expression than that of a "fundamental freedom".¹¹⁶ In sum, it would appear that Canadian law is not structured in a way that could accommodate the Hoge Raad's reasoning.

On the other hand, *Goeree* contains normative principles that merit the attention of Canadian courts and legislators. First, the court's emphasis on hate propaganda as a violation of equality rights suggests that expanding even Canada's *Criminal Code* to protect sexual minorities may be constitutionally required. Rather than adopting the view that additional protection constitutes a further offence to freedom of expression values, Canadian courts might balance such an offence (assuming there is one) against the equality guarantee in subsection 15(1) of the *Charter*.¹¹⁷ Second, Van Zijl's testimony suggests that a cause of action in group libel may not be as far-fetched as is traditionally believed. As a gay man with a prominent AIDS-related position at a local hospital, Van Zijl had a reasonable apprehension that readers of the article would accuse him of transmitting the AIDS virus. Depending on the surrounding circumstances, he may have believed that the article implicated him personally. As I shall

¹¹² *Ibid.* at 306.

¹¹³ *Ibid.*

¹¹⁴ *Supra* note 43, s. 32.

¹¹⁵ See *supra* notes 80, 81, and accompanying text.

¹¹⁶ Mattijssen & Smith, *supra* note 19 at 307, n. 13.

¹¹⁷ The *Charter*, *supra* note 43, s. 15(1), sets out equality rights as follows:

15. (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

discuss below, such circumstances may be said to conform to the common law test for group libel. Finally, and most important, the court's recognition of sexual orientation hate propaganda marks a watershed for hate propaganda jurisprudence and the rights of sexual minorities generally. By combining a commitment to regulating hate propaganda with a constitutional obligation to protect sexual minorities, the *Goeree* decision calls on Canada to do the same.

In contrast to the countries just discussed, the United States has remained a "conspicuous exception" to the worldwide trend toward criminalizing hate propaganda.¹¹⁸ "It was to be expected," writes Abraham S. Goldstein, "... that the United States would enter a 'reservation' to the UN Covenant on Human Rights, signifying that its approval did not include the Covenant's prohibition of group libel."¹¹⁹ Having clung to strong First Amendment values, the United States now resorts to regulating group hatred only after it has turned to violence. It is not until the commission of an anti-gay hate crime that federal hate crimes legislation kicks in, providing the relatively small mercy of an increased sentence or a hate-crimes statistic.¹²⁰ Meanwhile, scholars continue to debate whether the Supreme Court's decision in *Beauharnais v. Illinois*¹²¹ is still good law, and municipalities and college campuses struggle to fine-tune their hate speech regulations so as to survive First Amendment scrutiny.¹²²

Although the First Amendment exerts a profound influence on the hate propaganda debate, Dickson C.J.C. held in *Keegstra* that Canada "must not hesitate to depart from the path taken in the United States."¹²³ Civil libertarians are quick to disparage such departures, claiming that they represent a naïveté about the courts' ability to prevent mass censorship.¹²⁴ The better view is that the divergence stems from different

¹¹⁸ A.S. Goldstein, "Group Libel and Criminal Law: Walking on the 'Slippery Slope'" (1993) 22 *Israel Y.B. Hum. Rts.* 95 at 95.

¹¹⁹ *Ibid.* at 96.

¹²⁰ The federal *Hate Crimes Statistics Act*, 28 U.S.C. § 534 (1966), calls for states and localities to voluntarily report all hate crimes to the FBI, which in turn compiles these statistics into an annual report. Furthermore, 28 U.S.C. § 994 (1984) provides for tougher sentencing when it is proven beyond a doubt that a crime committed was a hate crime. The latter provides limited protection to sexual minorities, however, because federal law enforcement agencies do not have jurisdiction over anti-gay hate crimes. Indeed, 18 U.S.C. § 245 (1968), which allows federal investigation and prosecution of hate crimes, does not cover hate violence based on sexual orientation, gender, or disability. There is currently a bill pending before Congress, the *Hate Crimes Prevention Act of 1999*, H.R. 1082, S. 622, 106th Cong. (1999), which would expand this provision to include serious, violent hate crimes against members of sexual minorities. See Human Rights Campaign, *supra* note 27.

¹²¹ 343 U.S. 250 (1952), upholding the constitutionality of a group libel ordinance.

¹²² See e.g. R.M. Hulshizer, "Securing Freedom from Harassment without Reducing Freedom of Speech: *Doe v. University of Michigan*" (1991) 76 *Iowa L. Rev.* 383; M.-F. Major, "American Campus Speech Codes: Models for Canadian Universities?" (1996) 7 *E.L.J.* 13.

¹²³ *Supra* note 44 at 743.

¹²⁴ See N. Strossen, "Balancing the Rights to Freedom of Expression and Equality: A Civil Liberties Approach to Hate Speech on Campus" in Coliver, *supra* note 97, 295.

normative conclusions about the value of freedom of expression as against equal protection and non-discrimination.¹²⁵ These conclusions reflect a society's deepest aspirations, including whether it wishes to place the community above the individual and to recognize any group as a potential beneficiary of legal protection. Having diverged from the American path, Canada is now obliged to do so equitably.

V. Strategic Dilemmas

*[T]he journey between free speech and racial defamation is redolent of that between Charybdis and Scylla.*¹²⁵

*Hiding their orientation, gays and lesbians are easy targets of hate speech because they are often silent and invisible. The price of fighting back—of making their own voices heard—is often too dear a price to pay for becoming a part of the political process.*¹²⁷

The perspectives provided above reveal a range of options for reducing sexual orientation hate propaganda. Before turning to these options, however, it is important to address two strategic questions. First, is it prudent for sexual minorities to advocate further incursions into civil liberties? Second, how would identifying sexual orientation as a prohibited ground for hate propaganda affect other unidentified grounds, such as gender, age, and disability?

A. Freedom "of" or Freedom "from"?

If hate propaganda laws pit anti-censorship advocates against anti-discrimination advocates,¹²⁸ sexual minorities occupy an ambiguous position in this debate. Because they often find themselves fighting *against* censorship—and have, at least in the

¹²⁵ See e.g. Keegstra, *supra* note 44; Goldstein, *supra* note 118; Mahoney, *supra* note 57 at 252. A third view is that the disagreement stems from differences in political culture and the relative success of lobby groups. For this view, see Mattijssen & Smith, *supra* note 19 at 310-18. They explain that "[t]he Goeree decision ... cannot be dismissed as a product of either restrictive attitudes toward speech, or a society which automatically grants protection to lesbians and gays. As with any other legal rights extended to outsiders, the momentum is frequently started by core interest groups" (*ibid.* at 310).

¹²⁶ D. Partlett, "From Red Lion Square to Skokie to the Fatal Shore: Racial Defamation and Freedom of Speech" (1989) 22 Vand. J. Transnat'l L. 431 at 436.

¹²⁷ Mattijssen & Smith, *supra* note 19 at 314.

¹²⁸ It should be noted that hate propaganda laws need not be rooted in ideas of equality and non-discrimination. Some authors emphasize the value of "personhood" instead. See e.g. Love, *supra* note 12 at 34.

United States, made more gains in this area than in the area of equal protection¹²⁹—sexual minorities have traditionally promoted strong freedom of expression values. These values have protected their right to form campus organizations, organize gay pride marches, distribute gay-positive literature, and sponsor highways. Most recently in Canada, freedom of expression has been invoked as a shield against overbroad obscenity laws.¹³⁰ As civil libertarians are quick to observe, such efforts are not intended to place freedom of expression above equality; on the contrary, the former is seen as a vehicle by which sexual minorities are “equalized” with the rest of society.¹³¹ Conversely, any restrictions on freedom of expression are seen as a potential threat to the liberation of sexual minorities. As Rubenstein has eloquently observed:

Coming from the perspective of doing lesbian and gay rights work, I am wary of attempts to restrict speech. I say this not because I am wrapped up in a narrative of the grandeur of free speech, but rather because, for lesbians and gay men, much of our oppression has been a “silencing” of us and much of our liberation has come through the mechanism of the First Amendment. We are, after all, engaging in “the love that dare not speak its name.”¹³²

Yet if it is hate propaganda that contributes to this silencing, sexual minorities are caught in a quandary. While restrictions on hate propaganda might be manipulated in discriminatory ways, such restrictions might also embolden sexual minorities to express their sexuality publicly.

In a way unparalleled in the United States, recent advances in Canadian *Charter* jurisprudence, beginning with the inclusion of sexual orientation as an analogous prohibited ground of discrimination under subsection 15(1),¹³³ have prompted sexual minorities to pursue a vigorous equality agenda.¹³⁴ This agenda gained momentum with

¹²⁹ Rubenstein, *supra* note 13 at 21-26 (concluding at 19 that “the Fourteenth Amendment has provided very little—if any—equality for lesbians and gay men, while, by contrast, the First Amendment has been the only consistent friend of lesbian and gay rights litigators since Stonewall”).

¹³⁰ As when, for example, customs officials seize non-violent gay pornography on the grounds that it constitutes “obscenity”. See *Little Sisters Book & Art Emporium v. Canada (Minister of Justice)* (1996), 131 D.L.R. (4th) 486, 18 B.C.L.R. (3d) 241 (S.C.), *aff’d* (1998), 54 B.C.L.R. (3d) 306, [1999] 12 W.W.R. 445 (C.A.), leave to appeal to S.C.C. granted (1999), 59 C.R.R. (2d) 188 (note), 239 N.R. 193 (note).

¹³¹ Rubenstein writes that “[w]hen the First Amendment vindicates our rights of association, we are made whole, we have been equalized,” while “[t]he Fourteenth Amendment, which is supposed to guarantee our right to equal protection of the laws, has never done so” (*supra* note 13 at 24, 25).

¹³² *Ibid.* at 21-22.

¹³³ *Egan v. Canada*, [1995] 2 S.C.R. 513, 124 D.L.R. (4th) 609 [hereinafter *Egan*].

¹³⁴ See, most recently, *Foundation for Equal Families v. Canada* (1999), 36 C.P.C. (4th) 201 (Ont. Sup. Ct. J.), leave to appeal to Div. Ct. granted, [1999] O.J. No. 3119 (Sup. Ct. J.), online: QL (OJRE), an omnibus suit against the attorney general of Canada challenging all statutes that discriminate against same-sex relationships. The appeal was stayed, [2000] O.J. No. 1995 (Sup. Ct. J.), online: QL (OJRE), on the ground of mootness in light of then-Bill C-23, now the *Modernization of Benefits and Obligations Act*, S.C. 2000, c. 12 (assented to 29 June 2000).

the Supreme Court's decision in *Vriend*,¹³⁵ which, by reading sexual orientation into a provincial human rights statute, provides considerable authority for similarly extending Canada's *Criminal Code* hate propaganda provisions. In the context of same-sex relationships, the Supreme Court's recent decision in *M. v. H.*¹³⁶ provides similar authority. In holding that the exclusion of same-sex couples from Ontario's spousal support regime constituted unjustifiable discrimination under subsection 15(1) of the *Charter*, the Court reiterated its finding in *Egan* and *Vriend* that discrimination includes exclusion from "a process that could confer an economic or other benefit."¹³⁷ Outside Canada, a similar body of comparative and international law—not least the Human Rights Committee's recent decision in *Toonen*—has extended the norm of anti-discrimination to sexual minorities. These developments, combined with Canada's well-established commitment to criminalizing hate and its emerging commitment to substantive equality,¹³⁸ suggest that sexual orientation hate propaganda is best analyzed in terms of equality, not censorship.

It comes as no surprise, therefore, that the debate over sexual orientation hate propaganda divides the lesbian and gay community. In 1992 Rubenstein remarked that

the hate speech debate, on a personal level, makes me very anxious because it seems to pit friends against each other. It pits friends against each other in the sense that while we are all engaged in the same process of overcoming oppression on a larger level, we are engaged in an argument about what the *means* to fighting that oppression should be.¹³⁹

A recent episode of this "argument" arose in response to the proposed television show of Dr. Laura Schlessinger, whose conservative views on homosexuality were recently exposed by the Gay & Lesbian Alliance Against Defamation. In the midst of this controversy, the *National Post* reported that the proposed "Dr. Laura Show" has cre-

¹³⁵ *Supra* note 28.

¹³⁶ *Supra* note 19.

¹³⁷ *Ibid.* at para. 66 [emphasis added]. The impugned provision was the *Family Law Act*, R.S.O. 1990, c. F3, s. 29 [hereinafter *FLA*], which excluded same-sex couples from the definition of "spouse". A definition of "same-sex partner" has been subsequently added to s. 29 by the *Amendments Because of the Supreme Court of Canada Decision in M. v. H. Act*, 1999, S.O. 1999, c. 6, s. 25(2).

¹³⁸ See especially *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497, 170 D.L.R. (4th) 1 [hereinafter *Law*]. *Law* has already been widely cited; see e.g. *Delisle v. Canada (Deputy A.G.)*, [1999] 2 S.C.R. 989, 176 D.L.R. (4th) 513; *British Columbia (Public Service Employee Relations Commission) v. British Columbia Government and Service Employees' Union (B.C.G.S.E.U.)*, [1999] 3 S.C.R. 3, 176 D.L.R. (4th) 1; *M. v. H.*, *ibid.*; *Corbière v. Canada (Minister of Indian and Northern Affairs)*, [1999] 2 S.C.R. 203, 173 D.L.R. (4th) 1; *Winko v. British Columbia (Forensic Psychiatric Institute)*, [1999] 2 S.C.R. 625, 175 D.L.R. (4th) 193. *Law* will be discussed in Part VI.A, below.

¹³⁹ Rubenstein, *supra* note 13 at 26.

ated "a rift in the gay and lesbian community that has pitted activist against activist, and Melissa Etheridge against Ellen DeGeneres."¹⁴⁰ According to the *National Post*, DeGeneres "has called Schlessinger's rhetoric 'very dangerous,'" while Etheridge "is on the record as saying that Schlessinger 'has her own opinion. If people want to listen to it, it's fine ... I don't believe in slutting anybody up.'"¹⁴¹

It may be argued, however, that sexual minorities need not choose between "freedom of expression" and "equality" agendas. The careful crafting of subsection 319(2) of the *Criminal Code* isolates a narrow genre of speech that, in the case of sexual minorities, functions to silence many forms of expression and even cause physical harm.¹⁴² Extending this protection to sexual minorities may interfere with the civil liberties of hate-mongers, but it would ultimately be healthy for democracy. Such protection may, for example, encourage more sexual minorities to perform the all-important speech act of coming out. Furthermore, while the Fourteenth Amendment has betrayed sexual minorities in the United States, the same cannot be said of the impact of subsection 15(1) of the Canadian *Charter*. Not only has this provision extended legal equality to sexual minorities, but it has, as suggested above, indirectly promoted freedom of expression. As Rubenstein acknowledges, "[L]esbian/gay equal protection cases are almost always about speech because they rarely arise in the absence of the speech-act of 'coming out' ... [A] lesbian or gay man must 'come out' to be recognized as being gay ..."¹⁴³ In addition to these speech acts, media coverage of subsection 15(1) cases amplifies the voices of sexual minorities in the marketplace of ideas. Such publicity illustrates that, in the final analysis, equality and freedom of expression need not be at loggerheads.

B. A Hierarchy of Claims?

A second strategic dilemma posed by the expansion of Canada's anti-hate regime is how to reconcile the claims of competing groups. The *Criminal Code* currently identifies colour, race, religion, and ethnic origin as prohibited grounds for hate propaganda, reflecting a strong focus on the category of "racist speech". This focus, as we have seen above, is also reflected in international treaties and European, Australian, and African statutes. Canadian legislators have begun to realize, however, that hate propaganda also affects members of sexual minorities, women, children, and persons with disabilities. In some cases, the same propaganda targets more than one of

¹⁴⁰ J. Weiner, "Gays and Lesbians Divided over Silencing Dr. Laura: Movement to Kill TV Show" *National Post* (8 March 2000) B2.

¹⁴¹ *Ibid.* Interestingly, *The New York Times*, which ran a full-page ad exposing Dr. Laura's views, chose not to expose a rift in the lesbian and gay community in their coverage of the controversy.

¹⁴² In *Keegstra*, for example, Dickson C.J.C. held that "the sense in which 'hatred' is used in s. 319(2) does not denote a wide range of diverse emotions, but is circumscribed so as to cover only the most intense form of dislike" (*supra* note 44 at 778).

¹⁴³ *Supra* note 13 at 20, 25.

these excluded groups, as in the cases of anti-AIDS propaganda (targeting both gay men and persons with HIV) and anti-lesbian propaganda (targeting both lesbians and women more generally). While it would be dangerously reductive to collapse these categories,¹⁴⁴ it would be imprecise to isolate “sexual orientation” as the only unprotected ground. For this reason, one might adopt the wording of Bills C-429, C-256, and C-431, all of which define “identifiable group” as “any section of the public distinguished by colour, race, religion, ethnic origin, sex, sexual orientation, or mental or physical disability.”¹⁴⁵

This approach presents its own strategic quandaries. For example, including “sex” in the list of identifiable groups may incriminate many forms of non-violent pornography that are not currently caught by the *Criminal Code*. To the extent that such pornography “wilfully promotes hatred” against women, some advocates might view this as a welcome supplement to the obscenity provisions in the *Criminal Code*.¹⁴⁶ Others might view it as a dangerous incursion into civil liberties, one that could once again impugn the constitutionality of those provisions. As many feminists argued in *R. v. Butler*,¹⁴⁷ it is the *violent* nature of pornography—as opposed to the non-violent nature of hate propaganda—that immunizes the obscenity provisions in the *Criminal Code* from subsection 2(b) of the *Charter*:

While hate propaganda and pornography are similar in some respects, they have qualitative differences. They are similar in their express or implied intent, which is to distort the image of a group or class of people, to deny their humanity, to make them such objects of ridicule and humiliation that acts of aggression against them are viewed less seriously. The major difference between them is the method used to achieve the desired effects. In some pornography, the sexual use and abuse of women are direct, visual portrayals. Unlike most hate propaganda, pornography often involves real violence where women are coerced and sexually assaulted so that pornography can be made of them.¹⁴⁸

As Kathleen Mahoney points out, the Supreme Court’s subsection 2(b) analysis in *Keegstra* demands this distinction. In including hate propaganda within the ambit of subsection 2(b), the Court characterized hate propaganda as a “non-violent” form of expression, one “attempting to convey meaning” through methods other than “through physical harm.”¹⁴⁹ By distinguishing hate propaganda from pornography on precisely this point, Mahoney implies that criminalizing non-violent forms of pomog-

¹⁴⁴ See *e.g.* Wilets, *supra* note 17 at 4.

¹⁴⁵ See *supra* notes 55, 56. Major makes this suggestion in “Sexual-Orientation Hate Propaganda”, *supra* note 3 at 226.

¹⁴⁶ *Supra* note 8, s. 163. See *e.g.* J. Gentles, “A Legal Remedy for Sexual Injustice” (1995) 5 *Australian Gay & Lesb. L.J.* 65 (relying on the work of Catharine MacKinnon).

¹⁴⁷ [1992] 1 S.C.R. 452, 89 D.L.R. (4th) 449, rev’g (1990), 73 Man. R. (2d) 197, [1991] 1 W.W.R. 97 (C.A.) [hereinafter *Butler*].

¹⁴⁸ Mahoney, *supra* note 57 at 258 [footnote omitted].

¹⁴⁹ *Keegstra*, *supra* note 44 at 731, 732.

raphy would be unconstitutional. This was a powerful concession in *Butler*, but it may frustrate any effort to add “sex” to subsection 318(4) of the *Criminal Code*.

A related danger is that legislating new identifiable grounds in subsection 318(4) of the *Criminal Code* may expand the legislation beyond any “reasonable limit” on freedom of expression, making it unconstitutional. In *Keegstra* it was the precisely the limited number of “identifiable grounds” in this subsection that assuaged the Supreme Court’s fears of overbreadth; in finding that subsection 319(2) targeted only “low value expression”, Dickson C.J.C. noted that “[t]he act to be targeted is ... the intentional fostering of hatred against particular members of our society, as opposed to any individual.”¹⁵⁰ Yet as *Egan*, *Vriend*, and *M. v. H.* have recognized, a member of a sexual minority who experiences discrimination is not “any individual”. As Human Rights Watch and the International Gay and Lesbian Human Rights Commission eloquently write, sexual orientation

defines a profound and rooted aspect of each individual’s personality and humanity. ... For heterosexuals as well as for lesbians, gay men, bisexuals and transgendered persons, identifying and voicing one’s sexual orientation can be as important to the constitution and growth of a self as can one’s race, ethnicity, gender, or religious conviction. Like those categories, it can be a significant side of the identity one shows the world.¹⁵¹

In a slightly different vein, Marie-France Major has argued that the wording of subsection 318(4) ought to be “consonant with the principle that such [targeted] groups are of a *primordial* nature, as opposed to a *voluntary* nature,” and to abide “by the distinction between ‘instrumental’ and ‘constitutive’ affiliations.”¹⁵² In light of the Supreme Court’s acknowledgement that sexual orientation may or may not be primordial, the latter distinction shows more promise in terms of maintaining the constitutionality of the provision. As Major explains, constitutive associations “play an essential role in defining the identity of members ... [M]embership in these groups is at the very basis of personal identity ... ”¹⁵³ Bearing this principle in mind, the final section of this paper will build on Major’s proposals for protecting sexual minorities from hate propaganda.

¹⁵⁰ *Ibid.* at 772, 777.

¹⁵¹ Human Rights Watch & International Gay and Lesbian Human Rights Commission, *Public Scandals: Sexual Orientation and Criminal Law in Romania* (New York: Human Rights Watch and IGLHRC, 1998) at 2.

¹⁵² “Sexual-Orientation Hate Propaganda”, *supra* note 3 at 229-30.

¹⁵³ *Ibid.* at 230 [footnote omitted].

VI. Options for Reform

A. Challenging the Criminal Code

Keeping these strategic points in mind, one solution is to challenge the constitutionality of the definition of “identifiable grounds” in subsection 318(4) of the *Criminal Code*. Although Major recently advised against such a challenge,¹⁵⁴ her reason for doing so—that the Supreme Court would be unlikely to apply the reading-in remedy in this instance—may not apply after *Vriend*. Moreover, the Court’s landmark decision in *Law* signals progress toward substantive equality and away from the notorious relevancy test. Combined with the Court’s recognition of sexual orientation as an analogous ground of discrimination, these developments draw the gap in subsection 318(4) into further suspicion.

By recently substituting a “purposive” and “contextual” approach to section 15 for a rigid and formulaic one,¹⁵⁵ the Supreme Court has significantly elevated the perspective of the subsection 15(1) claimant. According to *Law*, the crux of a subsection 15(1) violation now appears to be a conflict between the *purpose* of subsection 15(1) and the *effect* of an impugned law, the purpose being as follows: -

[T]o prevent the violation of essential human dignity and freedom through the imposition of disadvantage, stereotyping, or political or social prejudice, and to promote a society in which all persons enjoy equal recognition at law as human beings or as members of Canadian society, equally capable and equally deserving of concern, respect and consideration.¹⁵⁶

This purpose contains both a negative component (“to prevent”) and a positive component (“to promote”), thus expanding state responsibility under the *Charter*. To determine whether the effects of the impugned law conflict with this purpose, courts are required to undertake three “broad inquiries”. These inquiries, which harmonize the three-part test in *Andrews v. Law Society of British Columbia*¹⁵⁷ with subsequent jurisprudence, are as follows:

First, does the impugned law (a) draw a formal distinction between the claimant and others on the basis of one or more personal characteristics, or (b) fail to take into account the claimant’s already disadvantaged position within Canadian society resulting in substantively differential treatment between the claimant and others on the basis of one or more personal characteristics? ... Second, was the claimant subject to differential treatment on the basis of one or more of the enumerated and analogous grounds? And third, does the differential treatment discriminate in a substantive sense, bringing into play the *purpose* of s.

¹⁵⁴ *Ibid.* at 237-38.

¹⁵⁵ See *Law*, *supra* note 138 at paras. 40-55, 59-75.

¹⁵⁶ *Ibid.* at para. 51.

¹⁵⁷ [1989] 1 S.C.R. 143, 56 D.L.R. (4th) 1.

15(1) of the *Charter* in remedying such ills as prejudice, stereotyping, and historical disadvantage?¹⁵⁸

The first of these inquiries relates to differential treatment, and the second and third “are concerned with whether the differential treatment constitutes discrimination in the substantive sense ...”¹⁵⁹ Throughout, the “conflict” between purpose and effects is to be assessed from the claimant’s perspective, taking into account a number of contextual factors.¹⁶⁰ This crucial aspect of the *Law* methodology is particularly sympathetic to victims of hate propaganda, whose perspective is frequently drowned out by freedom of expression discourse. Moreover, the *Law* methodology recently led to a finding of discrimination on the basis of sexual orientation in *M. v. H.*¹⁶¹

Given the empirical, psychological, comparative, and international perspectives discussed above, the list of identifiable grounds in the *Criminal Code* clearly violates subsection 15(1) of the *Charter*. Seen from the perspective of the victim—who is in this case protected by an analogous prohibited ground of discrimination—the effect of subsection 318(4) of the *Criminal Code* conflicts with both the “negative” and “positive” objectives outlined in *Law*. First and foremost, the provision denies members of sexual minorities recourse to their country’s most potent and symbolic sanction against hate propaganda. While they do receive protection on the basis of their race, ethnic origin, nationality, religion, and language, members of sexual minorities are denied protection on the basis of their sexual orientation. This leaves them with only the most formal equality to the heterosexual population, an equality that was deemed “impoverished” by a unanimous Supreme Court in *Vriend*.¹⁶² Referring to the exclusion of “sexual orientation” as a ground of discrimination in the *IRPA*, Cory J. held:

It is true that gay and lesbian individuals are not entirely excluded from the protection of the *IRPA*. They can claim protection on some grounds. Yet that certainly does not mean that there is no discrimination present. For example, the fact that a lesbian and a heterosexual woman are both entitled to bring a complaint of discrimination on the basis of gender does not mean that they have *equal* protection under the Act. Lesbian and gay individuals are still denied protection under the ground that may be the most significant for them, discrimination on the basis of sexual orientation.¹⁶³

¹⁵⁸ *Law*, *supra* note 138 at para. 39.

¹⁵⁹ *Ibid.*

¹⁶⁰ These include pre-existing disadvantage, the relationship between the “ground” at issue and the claimant’s characteristics or circumstances, the ameliorative purpose or effects of the impugned law on another group, and the nature of the interest affected (*ibid.* at paras. 63-75).

¹⁶¹ *Supra* note 19 at paras. 46-48.

¹⁶² *Supra* note 28 at para. 76.

¹⁶³ *Ibid.* at para. 77.

Such discrimination conflicts with the “negative” purpose of subsection 15(1), which is “to prevent the violation of human dignity and freedom through the imposition of disadvantage, stereotyping, or political or social prejudice ...”¹⁶⁴

Conversely, the gap in subsection 318(4) of the *Criminal Code* contravenes the “positive objective” of subsection 15(1) of the *Charter*, which is “to promote a society in which all persons enjoy equal recognition at law as human beings or as members of Canadian society, equally capable and equally deserving of concern, respect and consideration.”¹⁶⁵ By undertaking to criminalize hate propaganda and then excluding a targeted group, the legislature shirks an obvious opportunity to promote such a society. As Major notes, “When a group is covered as a protected class, the law sends a statement about inclusion of such group within society. Quite apart from any protection that the law can give, simple inclusion within the ambit of the law sends a message of full membership within the community.”¹⁶⁶ Given that one of the purposes of subsection 15(1) is now to promote a society in which all persons enjoy equal recognition at law, such a message may, in fact, be constitutionally required.

The counter-argument, of course, is that hate propaganda is an issue of censorship, not discrimination. Indeed, because the Court in *Keegstra* held that subsection 319(2) of the *Criminal Code* violated subsection 2(b) of the *Charter*, any expansion of the provision is likely to be perceived as an increase in state-sanctioned censorship.¹⁶⁷ Yet this view, which relies on the Court’s finding that “the communications restricted by s. 319(2) cannot be considered as violence,”¹⁶⁸ misrepresents the lived experiences of members of sexual minorities. Not only does the victim’s perspective demand that even non-violent speech be excluded from the ambit of subsection 2(b)¹⁶⁹—an argument that was lost on the Court in *Keegstra*—but hate propaganda may in fact be “analogous to violence.”¹⁷⁰ While Dickson C.J.C. does not provide any guidance as to what such an “analogy” would look like, it is the case that hate propa-

¹⁶⁴ *Law, supra* note 138 at para. 51.

¹⁶⁵ *Ibid.*

¹⁶⁶ “Sexual-Orientation Hate Propaganda”, *supra* note 3 at 226 [footnote omitted].

¹⁶⁷ Because the *Charter, supra* note 43, does not apply to courts by virtue of its s. 32, a court’s reading “sexual orientation” into s. 318(4) of the *Criminal Code* could not properly be analyzed as a violation of the *Charter*’s s. 2(b). Thus it is unclear precisely how the Crown might invoke freedom of expression arguments as a shield against the reading-in remedy. That said, the Crown might argue that the court ought to apply s. 15(1) jurisprudence in harmony with s. 2(b) “values”, an argument contemplated by cases such as *R.W.D.S.U. v. Dolphin Delivery*, [1986] 2 S.C.R. 573, 33 D.L.R. (4th) 174 [hereinafter *Dolphin Delivery*]; *Hill v. Church of Scientology of Toronto*, [1995] 2 S.C.R. 1130, 126 D.L.R. (4th) 129.

¹⁶⁸ *Keegstra, supra* note 44 at 732.

¹⁶⁹ See Mahoney, *supra* note 57 at 247.

¹⁷⁰ *Keegstra, supra* note 44 at 731.

ganda can traumatize and otherwise psychologically injure its victims.¹⁷¹ Moreover, hate propaganda constitutes an act of discrimination. As Mahoney argues, “[T]he regulation of hate propaganda should not be invalidated by the doctrine of free speech any more than legal regulation of racial segregation is invalidated by the same doctrine.”¹⁷² This ought to persuade any court—or for that matter the Parliament of Canada—that it can expand the *Criminal Code* hate propaganda provisions in conformity with the values of subsection 2(b).

In defending its choice of “identifiable groups” under section 1 of the *Charter*, the government may invoke the genus of Canada’s hate propaganda legislation. Because this legislation was enacted only after years of research and debate, powerful arguments may be advanced in support of the continued omission of sexual orientation. First, one could argue that the legislation was intended to model emergent provincial fair-housing and fair-employment acts, none of which included sexual orientation. Similarly, one could argue that the legislation was inspired by the recently-adopted *CERD*,¹⁷³ even though that convention did not include “language” or “religion”. Finally, one could argue that the empirical evidence fuelling the enactment of Canada’s hate speech laws revealed widespread hate propaganda only on the basis of colour, race, religion, and ethnic origin. Such arguments were used to stonewall Boudria’s bills to add “age” to the list of identifiable grounds, and it is likely that they would be repeated in a constitutional challenge.

However, it is the *exclusion* of sexual orientation, not the *inclusion* of the existing grounds, that must be the focus of a section 1 analysis. Moreover, following the Court’s analysis in *Vriend*, this exclusion must be *justified*, not merely *explained*. Thus, one could say of the above arguments what Iacobucci J. said of the Alberta government’s submissions in *Vriend*:¹⁷⁴

¹⁷¹ Recall that in *Keegstra*, the Court departed from its position in *Dolphin Delivery*, *supra* note 167, that threats of violence were not protected speech (*Keegstra*, *ibid.* at 731-32). See Mahoney, *supra* note 57 at 246.

¹⁷² *Ibid.* at 248 [footnote omitted].

¹⁷³ *Supra* note 83.

¹⁷⁴ These arguments included the following:

The *IRPA* is inadequate to address some of the concerns expressed by the homosexual community (e.g. parental acceptance);

attitudes cannot be changed by order of the Human Rights Commission;

despite the Minister asking for examples which would be ameliorated by the inclusion of sexual orientation in the *IRPA* (e.g. employment), only a few illustrations were provided;

codification of marginal grounds which affect few persons raises objections from larger numbers of others, adding to the number of exemptions that would have been needed to satisfy both groups (*supra* note 28 at para. 113 [references omitted]).

[A]lthough ... [they] go some distance toward explaining the Legislature's choice to exclude sexual orientation ... this is not the type of evidence required under the first step of the *Oakes* test. At the first stage of that test, the government is asked to demonstrate that the "objective" of the omission is pressing and substantial. An "objective", being a goal or a purpose to be achieved, is a very different concept from an "explanation" which makes plain that which is not immediately obvious. In my opinion, the above statements fall into the latter category and hence are of little help.¹⁷⁵

By analogy, the continued omission of sexual orientation from the provision is difficult to justify on any principled grounds. Anti-gay prejudice has reached epidemic proportions in Canada, and such prejudice "manifests the same social and psychological dynamics as racial and other ethnic prejudices."¹⁷⁶ This analogy is supported by substantial social science evidence, and it has been judicially recognized in many jurisdictions.¹⁷⁷ In the final analysis, the success of a constitutional challenge will depend on channelling this evidence into an attack on the object and purpose behind limiting the identifiable groups in subsection 318(4).

If the public reaction to *Vriend* is any indication, a remedy such as reading "sexual orientation" into subsection 318(4) is likely to generate considerable debate over judicial activism.¹⁷⁸ On the one hand, such a remedy might be viewed as a premature intrusion into parliamentary sovereignty; after all, the drafters of Canada's anti-hate law already earned the deference of the Supreme Court in *Keegstra*, and the current Liberal government has appointed at least one working group to investigate several amendments. On the one hand, for a court to intervene at this juncture may be viewed as an inappropriate intrusion into parliamentary sovereignty. On the other hand, the Supreme Court has already begun to develop a set of criteria by which to gauge the appropriate level of deference to give the legislature in a particular context. In his concurring judgment in *M. v. H.*, Bastarache J. applied a set of criteria that he began developing in *Thomson Newspapers Co. v. Canada (A.G.)*,¹⁷⁹ thereby laying the foundation for a strict application of the test in *R. v. Oakes*.¹⁸⁰ The six criteria Bastarache J.

¹⁷⁵ *Ibid.* at para. 114.

¹⁷⁶ "Sexual-Orientation Hate Propaganda", *supra* note 3 at 227 [footnote omitted].

¹⁷⁷ *Ibid.*

¹⁷⁸ See e.g. A. Mitchell, "Phone-in Talk Show Reflects Full Spectrum: Strong Emotions Colour Most Responses" *The Globe and Mail* (3 April 1998) A4; "Foes of Gay Ruling Bombard Klein" *The Globe and Mail* (8 April 1998) A4; B. Laghi, "Alberta's Gay-Rights Fight Turns Ugly: Tory Caucus under Pressure to Override Supreme Court of Canada Ruling" *The Globe and Mail* (9 April 1998) A1; B. Laghi, "Rage Finds Its Voice in Alberta Gay Rights: The Depth of Anger over Last Week's Supreme Court Ruling Surprised Even Premier Ralph Klein" *The Globe and Mail* (11 April 1998) A1.

¹⁷⁹ [1998] 1 S.C.R. 877, 159 D.L.R. (4th) 385.

¹⁸⁰ [1986] 1 S.C.R. 103, 26 D.L.R. (4th) 200.

found relevant in *M. v. H.* may apply equally to the exclusion of sexual minorities from Canada's anti-hate legislation.¹⁸¹

B. Revisiting Group Defamation

A less promising legal solution is to develop the criminal law of group defamation. Because most legal systems provide civil and criminal remedies for victims of individual libel, it has been argued that it is inconsistent to deny to an entire group a protection that we afford to individuals.¹⁸² As the Special Conference on Anti-Semitism and the Nazi-Fascist Revival concluded in 1962, "[T]he present position whereby individuals, and even several individuals, but not a group, may be libelled or slandered, [is] illogical, and [falls] short of democratic society's duty to protect its minority groups."¹⁸³

Although both common law and civil law courts have rejected this type of argument,¹⁸⁴ one wonders why there has been so little movement to revive it.¹⁸⁵ International law is increasingly more attuned to the role of groups in the social process, and courts have long recognized group libel that is directed at a particular individual. Thus, although Canada's group defamation provisions are highly restrictive, an increasing number of fact scenarios might fall within its purview. In particular, messages of hate posted on online bulletin boards often mention, respond to, or implicate particular individuals, even if such messages are directed at entire groups. Consider the following examples of hate propaganda culled from the Matthew Shepard Online Bulletin Board:

[In response to a request to dismantle the Matthew Shepard Online Bulletin Board, December 14, 1998] Whats wrong ... hate the fact that some people dont liek [sic] gays or their lifestyles? Can't deal with it so you have to go cry-

¹⁸¹ Unfortunately, the scope of this paper precludes a discussion of this emerging development in Canadian constitutional law. However, it bears mentioning that the six factors identified by Bastarache J. were (1) the nature of the interest affected by the exclusion; (2) the vulnerability of the group affected; (3) the possibility of isolating the challenged provision from the complex legislative scheme; (4) the presence or absence of evidence of the government establishing priorities or arbitrating social needs; (5) whether any consideration was given to the *Charter* right to equal concern and respect; and (6) whether the government's interest in setting social policy could be met without imposing undue hardship on the excluded group (*M. v. H.*, *supra* note 19 at paras. 304-21). Further, in applying these criteria Bastarache J. observed a number of things about the *FLA*, *supra* note 137, s. 29, that may also be observed of s. 318(4) of the *Criminal Code*, most notably that it "perpetuates a legal invisibility which is inconsistent with the moral obligation of inclusion that informs the spirit of our *Charter*" and that there is "clear evidence of adverse impact on a vulnerable group" (*M. v. H.*, *ibid.* at paras. 308, 309).

¹⁸² See generally "Group Libel Revisited", *supra* note 80.

¹⁸³ Cited in *ibid.* at 191-92.

¹⁸⁴ See Cohen, *supra* note 80 at 741-46.

¹⁸⁵ *Ibid.* at 749.

ing to their sysadmins? This is why special interest groups liek [sic] yours are hated in this country, because you cry and bitch and stomp your feet when you realize that you are in a lost and dying cause.¹⁸⁵

In Reply to: I Will Remember You: For Matthew posted by Andrew on December 15, 1998 at 11:09:53:

I HATE FAGS!!!!!!!!!!!!!!!!!!!!¹⁸⁷

These examples illustrate the impact of sexual orientation hate propaganda on particular individuals. A reasonable person might believe that the above remarks were directed at either "sysadmin", "Andrew", or another author, even though they expressed hatred toward an entire group. The same would be true if a hate-monger responded to a regular columnist in a gay newspaper with a vitriolic attack on all members of sexual minorities. From an advocacy perspective, collecting narratives such as these might create some progress toward a viable criminal sanction against group defamation. In this regard, the *Goeree* decision in the Netherlands underscores the impact of group libel on particular individuals.

Conclusion: Towards a Model of Holistic Advocacy

In isolating options for reform, the strategic advocate must consider at least three forms of advocacy: legal, political, and cultural.¹⁸⁸ A *Charter* challenge aimed at reading sexual orientation into section 318 of the *Criminal Code* is merely a "legal" strategy—as opposed to a political or cultural one—and it is only one of many legal strategies, in addition to litigating other *Charter* provisions or pursuing civil or administrative remedies. The struggle against sexual orientation hate propaganda must also be waged outside the courtroom, as illustrated by recent efforts at law reform, Web sites such as www.stopdrlaura.com,¹⁸⁹ and the pioneering efforts of the Gay & Lesbian Alliance Against Defamation.¹⁹⁰ While this article has focussed on the advantages of a constitutional challenge, these advantages must be weighed carefully against the costs of litigation and the relative advantages of other options.

In 1996 Major concluded that "it appears to be prudent and more farsighted to continue to seek protection for gays and lesbians through legislative action."¹⁹¹ Due to

¹⁸⁵ P. Kof, online: Matthew Shepard Online Resources <<http://www.wiredstrategies.com/shepardx.html>> (posted 14 December 1998; date accessed: 8 April 1999).

¹⁸⁷ Mick Foley Is God, online: *ibid.* (posted 15 December 1998; date accessed: 8 April 1999).

¹⁸⁸ See C.J. Davidson & M.G. Valentini, "Cultural Advocacy: A Non-Legal Approach to Fighting Defamation of Lesbians and Gays" (1992) 2 L. & Sex. 103.

¹⁸⁹ Online: Stop Dr. Laura: A Coalition against Hate <<http://www.stopdrlaura.com>> (date accessed: 30 June 2000).

¹⁹⁰ See online: Gay & Lesbian Alliance Against Defamation <<http://www.glaad.org/org/index.html>> (date accessed: 30 June 2000).

¹⁹¹ "Sexual-Orientation Hate Propaganda", *supra* note 3 at 237-38.

recent developments in the legal landscape—the use of the reading-in remedy in *Vriend*, the purposive and contextual approach to equality in *Law*, the contextual approach to deference in *M. v. H.*, and the slow progress of the Liberal government's hate propaganda working group, among others—litigation may now be a more effective tool. This is not to suggest that political and legal advocacy exclude one another, nor that they are the only options. It is to suggest, at the very least, that extending Canada's hate propaganda regime to protect members of sexual minorities may be a promising way to usher in the *Law* era.
