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Jane Bailey*

Missing Privacy through Individuation:
the Treatment of Privacy in the Canadian
Case Law on Hate, Obscenity, and Child
Pornography

Privacy is approached differently in the Canadian case law on child pornography than in hate propaganda and obscenity cases. Privacy analyses in all three contexts focus considerable attention on the interests of the individuals accused, particularly in relation to minimizing state intrusion on private spheres of activity. However, the privacy interests of the equality-seeking communities targeted by these forms of communication are more directly addressed in child pornography cases than in hate propaganda and obscenity cases. One possible explanation for this difference is that hate propaganda and obscenity simply do not affect the privacy interests of targeted groups and their members. In contrast, this paper suggests that this difference in approach reflects the adoption of an individualistic approach to privacy that may unnecessarily place it in tension with equality. In so doing, it sets the stage for an exploration of more social approaches to privacy that may better enable exploration of privacy's intersections with equality and its collective value to the community as a whole.

Dans la jurisprudence canadienne sur la pornographie juvénile, la protection des renseignements personnels n'est pas traitée de la même façon que dans les affaires de propagande haineuse et d'obscénité. Dans les trois contextes, les analyses des renseignements personnels accordent une attention considérable aux intérêts des accusés, particulièrement pour ce qui est de minimiser l'intrusion de l'État dans les sphères d'activités « privées ». Toutefois, le droit à la vie privée des groupes qui revendiquent l'égalité et qui sont ciblés par ces formes de communication est abordé de manière plus directe dans les affaires de pornographie juvénile que dans les affaires de propagande haineuse ou d'obscénité. Une explication possible de cette différence est que la propagande haineuse et l'obscénité n'ont tout simplement pas d'incidences sur le droit à la vie privée des groupes ciblés et de leurs membres. Cet article avance au contraire que la différence entre les approches reflète l'adoption d'une attitude individualiste de ce qui constitue la vie privée, attitude qui l'oppose peut-être inutilement à l'égalité. Ce faisant, il fournit la toile de fond pour un examen d'approches plus sociales de la vie privée, approches qui permettront peut-être de déterminer où se croisent le droit à la vie privée et l'égalité ainsi que leur valeur collective pour la communauté dans son ensemble.

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Introduction

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Introduction

Given the Supreme Court of Canada's broad interpretation of "expression" for constitutional purposes, hate propaganda, obscenity and child pornography are *Charter* protected, requiring justification of their legal restriction. Freedom of expression is perhaps most often characterized as an individual liberty – a right to express one's beliefs free from state intervention. In the context of hate propaganda and obscenity, the overriding justification offered for state intrusion on an individual's "expressive" freedom are broader social commitments to equality and multiculturalism.

Legislative restrictions on the individual *Charter* right to expression, free of state intrusion have been found justifiable on the basis that hate propaganda and obscenity undermine the ability of members of targeted minority groups and women to function as social equals. Such expression employs degrading and dehumanizing imagery and words that tend to promote attitudes accepting of discrimination and violence against those groups and their members. Closely tied to this equality approach is an analysis of the effects of hate propaganda and obscenity on the "dignity" of members of minority groups and women. While the privacy rights of those accused of offending state-imposed restrictions on hate propaganda

and obscenity are explicitly considered, the privacy rights of target groups and their members are not. The analysis of the justification for restrictions on child pornography reveals a somewhat different emphasis. In the child pornography context, greater focus is placed on the effect of the “expression” on the privacy and associated dignity rights of its immediate individual targets—the children abused in its production—rather than on broader social concerns as to the effect of its “message” on attitudes and behaviours toward children that serve to undermine the equality and dignity of that group and its members.

Why is it that the case law focuses on the privacy rights of the targets of child pornography, but never explicitly discusses the privacy rights of the targets of hate propaganda and obscenity? Perhaps the most intuitive response is that the privacy rights of target group members are simply not at play in the contexts of hate propaganda and obscenity. My project in this paper, and in a companion paper to follow in the next volume of this journal, is to expose and challenge assumptions about the nature of privacy and its relationship with equality that underlie both that response and much of the analysis in Canadian case law relating to hate propaganda, obscenity and child pornography. I will ultimately argue that while the best legal hope for equality-seeking groups may well continue to be promoting understanding and acceptance of principles of substantive equality, in some instances both the collective interests of those groups as a whole and the related interests of their individual members may also be served by cultivating a more social or collective understanding of privacy and its ends.

In this paper, I will address the first element of the overall project by setting out the situations in which privacy has been addressed in Canadian case law relating to hate propaganda, obscenity and child pornography. In the companion paper, I will situate the approach taken in that case law within the individualistic privacy paradigm that dominates western legal and philosophical thinking. I will then discuss its weaknesses from the perspective of equality-seeking groups such as those targeted by hate, obscenity and child pornography. Finally, I will suggest that insights offered in more contemporary approaches to privacy as a social value that have been raised within the context of concerns about data management may offer a helpful framework from which to develop a more equality-enhancing conception of the privacy interests of the targets of hate, obscenity and child pornography.

Part I of this paper discusses the way in which privacy has been analyzed in Canadian criminal and, where applicable, human rights case law relating to hate propaganda. Part II examines the Canadian analysis of privacy in

the context of obscenity. Part III reviews the analyses of privacy within Canadian case law on child pornography, noting that in contrast with the case law on hate and obscenity, the expression is specifically recognized as a violation of the privacy rights of those it targets. Part IV suggests that recognition of certain privacy-related interests of the individual children victimized in child pornography, and the absence of any similar analysis of the rights of the targets of hate propaganda and obscenity reflects a particular individualistic, negative liberty approach to privacy that may create unnecessary tension between privacy and equality. The conclusion sets the stage for the exploration of more social and collective approaches to privacy that might better accommodate recognition of privacy's intersections with equality and its broader value to the community as a whole. This will be the focus of the companion paper.

I. *Privacy and hate propaganda*

Many hate propagandists have relied, to varying degrees, on mechanisms such as pseudonymity and anonymity in efforts to dissociate their personal identities from their messages of hate.¹ Others have shunned these privacy mechanisms in favour of publicly associating (though not necessarily personally identifying) themselves with their messages of hate.² Although anonymity and pseudonymity in the online context have led to inquiry for the legal purpose of identifying those accused of hate propaganda-related

1. The masked "night rides" of members of the self-described "Invisible Order" of the Ku Klux Klan, founded in the U.S. in 1866, represent one prominent historic example of the use of disguise by hate propagandists: Kwame Anthony Appiah & Henry Louis Gates Jr., "The Ku Klux Klan, a brief biography" in *Africana The Encyclopedia of the African and African American Experience* (1999), online: <http://www.aaregistry.com/african_american_history/2207/The_Ku_Klux_Klan_a_brief_biography>. In the online context in 2006, a Canadian Human Rights Tribunal (CHRT) found that a respondent had communicated or caused to be communicated messages of hate contrary to the *Canadian Human Rights Act* R.S.C. 1985, c. H-6 using a pseudonym to prevent the establishment of a connection between his 'real space' personal identity and his online messages of hate: *Warman v. Winnicki*, 2006 CHRT 20 [Warman].

2. Individual hate propagandists, such as Ernst Zündel (see Theo Emery, "Massachusetts Lawyer Gives To Hate Groups" (Associated Press) *David Irving's Action Report* (9 December 2000), online: <<http://www.fpp.co.uk/online/00/12/Cotter091200.html>>), Richard Verrall (see: Manuel Prutschi, "Holocaust Denial Today" (1 January 1996), online: The Nizkor Project <<http://nizkor.com/ftp.py?people/v/verrall.richard/holocaust-denial-today>>) and William Luther Pierce (see "Extremism in America: William Pierce" (2005), online: The Anti-Defamation League <http://www.adl.org/learn/ext_us/Pierce.asp?LEARN_Cat=Extremism&LEARN_SubCat=Extremism_in_America&xpicked=2&item=wp>) all authored certain of their messages of vitriol using pseudonyms. Zündel, like David Irving (see Malte Herwig, "'Hitler? He was good in parts'" *The Observer* (22 January 2006), online: <<http://observer.guardian.co.uk/review/story/0,,1692086,00.html>>) and Australian Jack Vantogeren (see: Des Carters, "Perth: White Supremacist jailed for restaurant attack" *Perth Independent Media Centre* (21 December 2005), online: <<http://perth.indymedia.org/index.php?action=newswire&parentview=15193%22>>) would later choose to embrace notoriety in relation to his hateful cause: Manuel Prutschi, "The Zündel Affair" (2005), online: The Nizkor Project <<http://www.nizkor.org/hweb/people/p/prutschi-manuel/zundel-affair/za-08.html>>.

crimes or discriminatory practices,³ they have not figured prominently in the limited amount of privacy-related analysis carried out in Canadian case law relating to hate propaganda.⁴

Hate propaganda-related case law primarily analyzes the issue of privacy in terms of the notional public/private divide,⁵ focusing on drawing a line between publicly and privately disseminated hate propaganda and the centrality to a liberal democratic state of limiting state intrusion on “private” dialogue. A second strand of reasoning touches on what might be viewed as privacy-related rights of target group members, including dignity and autonomy,⁶ as well as their equality rights, without ever specifically characterizing the rights to dignity and autonomy as privacy-related or exploring potential intersections between those individual rights and equality. Nevertheless, I would suggest that the second strand of reasoning provides a solid foundation on which to build a more collective and equality-enhancing conception of privacy than the more individualistic, state-focused analysis hinging on the notional public/private divide.

1. *Privacy, harms and the public/private divide*

The attention of Canadian legal decision makers has focused on the need to limit government intrusion in the private sphere of accused persons in the context of both criminal and human rights prohibitions on hate propaganda. The analysis stems largely from the Supreme Court of Canada’s decisions in *Keegstra*⁷ and *Taylor*,⁸ with *Keegstra* focusing on the promotion of hatred provisions of the *Criminal Code*⁹ and *Taylor* focusing on the *Canadian Human Rights Act (CHRA)* prohibition on the telephonic communication of messages likely to expose target group members to hatred or contempt.¹⁰ The majority in *Keegstra* noted that the criminal provision constituted a justifiable infringement on the accused’s freedom of expression in that it

3. See e.g. *Warman*, *supra* note 1.

4. The privacy implications of certain alleged investigatory practices by the Canadian Human Rights Commission have come under scrutiny more recently: Colin Perkel, “Privacy Czar Probes Alleged Net Hack by Officials” *Toronto Star* (4 April 2008), online: <<http://www.thestar.com/News/Canada/article/410532>>.

5. This public/private divide and its rhetorical use to justify state inaction in matters essential to many equality-seeking groups is discussed in detail in: Judy Fudge & Brenda Cossman, eds. *Privatization, Law and the Challenge to Feminism* (Toronto: University of Toronto Press, 2002).

6. Anita Allen, *Uneasy Access: Privacy for Women in a Free Society* (New Jersey: Roman and Littlefield, 1988) at 42, 46, 47, 101; and Ruth Gavison, “Privacy and the Limits of the Law” (1980) 89 *Yale L.J.* 421 at 428, 444.

7. *R. v. Keegstra*, [1990] 3 S.C.R. 697 [*Keegstra*].

8. *Canada (Human Rights Commission) v. Taylor*, [1990] 3 S.C.R. 892 [*Taylor*].

9. *Criminal Code*, R.S.C. 1985, c. C-46, s. 319(1).

10. *Canadian Human Rights Act*, *supra* note 1, s. 13(1).

was tailored to apply only to public communication. Dickson C.J., writing for the majority stated:

In assessing the constitutionality of s. 319(2), especially as concerns arguments of overbreadth and vagueness, an immediate observation is that statements made 'in private conversation' are not included in the criminalized expression. The provision thus does not prohibit views expressed with an intention to promote hatred if made privately, indicating Parliament's concern not to intrude upon the privacy of the individual. Indeed, that the legislation excludes private conversation, rather than including communications made in a public forum, suggests that the expression of hatred in a place accessible to the public is not sufficient to activate the legislation.¹¹

In *Taylor* the Supreme Court of Canada referred to Dickson C.J.'s reasoning in *Keegstra* and found that while people often use telephones in situations where they reasonably expect their communication will not be intruded upon by third parties, the *CHRA* provision at issue probably did not apply to that kind of telephonic communication. The Court found that the provision focused on repeated communication of hateful messages for the more public purpose of gaining "converts" to the position conveyed in those messages and probably did not encompass "communications between ... acquaintances espousing hate propaganda."¹² In finding that the provision did not trench too far into the private sphere, the Court noted:

The connection between s. 2(b) and privacy is thus not to be rashly dismissed, and I am open to the view that justifications for abrogating the freedom of expression are less easily envisioned where expressive activity is not intended to be public, in large part because the harms which might arise from the dissemination of meaning are usually minimized when communication takes place in private, but perhaps also because the freedoms of conscience, thought and belief are particularly engaged in a private setting.¹³

As it did in *Keegstra*, the Court concluded in *Taylor* that it may be more difficult for the state to justify regulating "private" communications – communications not intended for dissemination beyond a group of acquaintances of undefined scope (even if communicated in what might otherwise be seen as a "public place"). Two privacy-related reasons were offered in support of that conclusion. The first posits that it is more

11. *Supra* note 7 at para. 112.

12. *Supra* note 8 at para. 77.

13. *Ibid.*

difficult for the state to justify intrusion on communications in respect of which individuals hold a reasonable expectation of privacy because the harms arising from private communication are likely to be less serious than those arising from more broadly disseminated communication.¹⁴ The second plays on the notion of the public/private divide and the metaphoric existence of two separate spheres of activity – one rightfully accessible by others and one rightfully walled off from others, especially where the “other” is the state or its agents.¹⁵

Both of these approaches to privacy also surface in the context of the dismissal of individuals from teaching positions for reasons relating to their “off-duty” promotion of hatred. In *Ross v. New Brunswick School District No. 15*¹⁶ the respondent, who was then employed as an elementary school teacher, had publicly espoused racist and discriminatory remarks about Jews outside of his place of employment. The Human Rights Commission of New Brunswick’s Board of Inquiry upheld a complaint that the school board was discriminating in the provision of a public service by continuing to employ Ross in a teaching position. In upholding the Board’s decision, the Supreme Court of Canada noted the importance of minimizing public scrutiny of the personal off-duty conduct of teachers, while acknowledging the way in which that conduct could poison the atmosphere within the school and the classroom. LaForest J., writing for the court, stated:

I do not wish to be understood as advocating an approach that subjects the entire lives of teachers to inordinate scrutiny on the basis of more onerous moral standards of behaviour. This could lead to a substantial invasion of the privacy rights and fundamental freedoms of teachers. However, where a ‘poisoned’ environment within the school system is traceable to the off-duty conduct of a teacher that is likely to produce a corresponding loss of confidence in the teacher and the system as a whole, then the off-duty conduct of the teacher is relevant.¹⁷

Here, LaForest J. expresses concern for privacy as a right against undue surveillance in one’s personal sphere, but recognizes that activity in one’s personal space, if publicly known, may pollute the environment in other public spaces, such as the classroom. In *Ross*, then, the Court implicitly recognizes the leakage or interconnection between the “private” and the “public” spheres. Similar reasoning has been carried from the human

14. *Ibid.*

15. *Ibid.*

16. [1996] 1 S.C.R. 825 [*Ross*].

17. *Ibid.* at para. 45.

rights and criminal law contexts into the employment law context, where arbitrators have ruled that public expressions of racism outside of the workplace may nevertheless properly form part of the grounds justifying dismissal of a public high school teacher.¹⁸

Concerns for minimizing state regulation in the “private” sphere of communication have also arisen in the context of online hate propaganda. In both *Schnell v. Machiavelli*¹⁹ and *Warman*,²⁰ the Canadian Human Rights Tribunal (CHRT) focused on this issue, concluding in *Warman* that:

S. 13(1) is aimed not at private communications with friends, but rather at a series of messages that form a larger-scale, public scheme for the dissemination of certain ideas or opinions, designed to gain converts from the public.²¹

The case law, then, seems to insist on a relatively negative and individualistic understanding of privacy as a right to exclude others from a notionally separate “private” sphere. The analysis reflects a classically liberal understanding of the need for a “room of one’s own”²² within which one is free to develop one’s personality and thoughts free from outside (especially governmental) intrusion. In so doing, it minimizes the risk of harms emanating from so-called private spaces, and seemingly ignores the degree to which “private” individual thought and action intersects and interacts with “public” collectives. Despite the predominance of this individualistic approach to human flourishing and the absence of any explicit recognition of the privacy-related rights and interests of target groups and their members, some Canadian decision-makers’ exploration of the dignity-related interests of target groups members may sow the seeds for a more collective understanding of privacy and its related functions.

2. “Dignity” of target group members

Canadian case law relating to hate propaganda does not specifically address the “privacy” rights of target group members. It does, however, discuss what I will argue are the integrally related concepts of “dignity” and “identity.” In so doing, this body of case law provides fundamental

18. See e.g. *Re Peel Board of Education and the Ontario Secondary School Teachers’ Federation (Fromm)* (2002), 105 L.A.C. (4th) 15 (O.L.R.B.); *Kempling v. BC College of Teachers* (2005), B.C.J. No. 1288 (QL).

19. *Schnell v. Machiavelli and Associates Emprize Inc.* (2002), 43 C.H.R.R. D/453 at para. 129 [*Schnell*]. For similar reasoning see: *Warman v. Harrison*, 2006 CHRT 30 at para. 44; *Warman v. Bahr*, 2006 CHRT 52 at paras. 25-26; *Warman v. Termaine*, 2007 CHRT 2 at para. 119.

20. *Warman*, *supra* note 1.

21. *Ibid.* at para. 36.

22. Virginia Woolf, “A Room of One’s Own” (1928), online: eBooks@Adelaide <<http://etext.library.adelaide.edu.au/w/woolf/virginia/w91r/>>.

building blocks for a discourse about the relationship between privacy (or at least privacy-related interests) and equality. The first traces of this judicial discourse were articulated by Dickson C.J., writing for the majority, in *Keegstra*:

In my opinion, a response of humiliation and degradation from an individual targeted by hate propaganda is to be expected. A person's sense of human dignity and belonging to the community at large is closely linked to the concern and respect accorded the groups to which he or she belongs The derision, hostility and abuse encouraged by hate propaganda therefore have a severely negative impact on the individual's sense of self-worth and acceptance. This impact may cause target group members to take drastic measures in reaction, perhaps avoiding activities which bring them into contact with non-group members or adopting attitudes and postures directed towards blending in with the majority. Such consequences bear heavily in a nation that prides itself on tolerance and the fostering of human dignity through, among other things, respect for the many racial, religious and cultural groups in our society.²³

Here, Dickson C.J. acknowledges intersections between private and public that help to develop a better understanding of the relationship between privacy and equality. The Chief Justice recognizes that one's individual sense of dignity and self-worth are not simply matters developed in some individual "private" sphere – as seemed to be suggested in the Court's analysis of the freedoms of conscience, thought and belief of hate propagandists. Rather, these matters are at least in part a function of the aspects of one's being that are tied to belonging to a group, and the way in which members of the broader "public" perceive of and treat that group. Once we recognize the interaction between the so-called "spheres," or at least the very porous nature of the notional wall between them, both potential individual and collective costs are rendered more evident.

First, the individual target group member may choose, as Dickson C.J. hypothesized, to attempt to distance him or herself from that group in order to avoid the negative social consequences associated with membership in it. Accompanying this incursion on the individual's ability to self-define is an equally troubling collective concern. If hate propaganda has the effect of encouraging members of target groups to modify their identities

23. *Keegstra*, *supra* note 7 at para. 65. In 2005, the Supreme Court of Canada referred to its reasoning in *Keegstra*, stating that "hate speech always denies fundamental rights," including the dignity and equality rights of target group members and noting "[t]he equality and the life, liberty and security of the person of target-group members cannot but be affected": *Mugesera v. Canada (Minister of Citizenship and Immigration)*, [2005] 2 S.C.R. 100 at para. 147.

in order to “pass”²⁴ more easily among members of socially dominant groups (for example by shunning association with their cultural and linguistic heritage), equality and multicultural commitments favouring diversity will inevitably suffer. Moreover, a society which fails to respond to “expression” likely to encourage efforts to “pass” simply in an effort to be treated equally can hardly be imagined a “free” or “democratic” one.

Second, Dickson C.J. elaborated not just the ways in which the self-identity of target group members may be affected by reactions and conduct within the “public” sphere, but also the ways in which hate propaganda may shape perceptions in that sphere:

The message of the expressive activity covered by [the willful promotion of hatred section of the *Criminal Code*] is that members of identifiable groups are not to be given equal standing in society, and are not human beings equally deserving of concern, respect and consideration. The harms caused by this message run directly counter to the values central to a free and democratic society ... in a nation which venerates the equality of all persons.²⁵

The Chief Justice concluded that restrictions on hate propaganda were justified, in part, because state intervention might interrupt this interactive public/private process in a way that could ultimately promote the dignity of target group members. Recognizing the interchange between public and private spheres and accepting positive state action as a mechanism for securing individual liberty represents a significant departure from, and seems difficult to reconcile with, the more dichotomous approach to the public and private spheres that animated the same Court’s analysis of the privacy interests of the accused. If one recognizes the interplay between the public and the private in terms of the dignity and self-worth of target group members, why should one necessarily accept that the “private” consumption and dissemination of hate propaganda is any less likely to harm the interests of target group members?²⁶

24. Of course, in many instances, “passing” is not only morally, but also physically problematic, given the immutable nature of many personal characteristics targeted by hate groups. As noted by M. Sullaway, in the context of hate crimes, “[p]erhaps victims of hate crimes, who are targeted specifically because of their membership in a particular group, are less able to preserve an illusion of control because the illusion of prevention is not available: he or she cannot change race, ethnicity, sexual orientation and so forth, even if he or she desired to”: M. Sullaway, “Psychological Perspectives on Hate Crime” (2004) 10 *Psychol. Pub. Pol’y, & L.* 250 at 265.

25. *Keegstra*, *supra* note 7 at para. 79.

26. For analyses of the extent to which insular groups that might be characterized as “private” may prove to be ideal breeding grounds for the fomentation of hatred, as well as the escalation of discriminatory attitudes and beliefs, see C. Sunstein, “The Law of Group Polarization” (2002) 10 *J. Pol. Phil.* 175 and C. Turpin-Petrosino, “Hateful Sirens...Who Hears Their Song? An Examination of Student Attitudes Toward Hate Groups and Affiliation Potential” (2002) 58 *J. Soc. Issues* 281.

Iacobucci and Cory JJ., without questioning the argument that private communication of falsehoods ought to be protected against government intrusion, nevertheless accepted in their dissent in *Zündel* that the government should not consistently be seen as the “villain,”²⁷ stating that:

... history also teaches us that minorities have more often been the objects of speech than its subjects. To protect only the abstract right of minorities to speak without addressing the majoritarian background noise which makes it impossible for them to be heard is to engage in a partial analysis. This position ignores inequality among speakers and the inclination of listeners to believe messages which are already part of the dominant culture.²⁸

Here, the dissenting justices adverted to the possibility suggested in *Keegstra* that government intervention can sometimes serve to foster goals such as free expression, autonomy and dignity. State-imposed limits might work toward those objectives by publicly denouncing hateful discourse which serves to preserve the dominance of socially empowered groups in part by making it difficult for members of minority groups to enter into the discourse that helps to shape public perceptions of the identities of those groups and their members.

The dignity and autonomy interests of target group members also figure prominently in decisions relating to the *CHRA* provision prescribing remedies for telephonic communication likely to expose target groups to hatred or contempt,²⁹ the constitutionality of which the Supreme Court of Canada analyzed in *Taylor*. Drafted in the affirmative language of human rights, rather than the negative language of constitutional freedoms from government intrusion, the provision itself seems to compel an analysis that moves beyond the public/private divide to recognize the degree to which one’s identity is shaped not only in “private” moments where individuals are alone with their thoughts, but through the interaction of “public” and “private” spheres. As the Court noted in *Taylor*:

messages of hate propaganda undermine the dignity and self-worth of target group members and, more generally, contribute to disharmonious relations ... as a result eroding the tolerance and open-mindedness that must flourish in a multicultural society which is committed to the idea of equality.³⁰

27. *R. v. Zündel*, [1992] 2 S.C.R. 731, S.C.J. No. 70 at para. 204 (QL).

28. *Ibid.* at para. 211.

29. *Canadian Human Rights Act*, *supra* note 1, s. 13(1).

30. *Taylor*, *supra* note 8 at 919.

Since *Taylor*, the impact of hate propaganda on the dignity and self-worth of target group members has figured prominently in CHRT analyses under the telephonic communication provision of the *CHRA*. In *Citron v. Zündel*,³¹ the Tribunal quoted the preceding passage from *Taylor*, noting the way in which messages vilifying Jews as a group of ‘liars, cheats, criminals and thugs’ was likely to expose individual members of that group to hatred or contempt.³² The Tribunal went on in *Warman v. Warman*³³ to explicate the dignity-related harms the provision was designed to address, as well as their connection to the broader social commitment to equality:

The purpose of section 13 of the *Canadian Human Rights Act* is to remove dangerous elements of speech from the public discourse. The removal of these elements of speech from the public discourse promotes equality, tolerance, and the dignity of the person. It also protects the members of minorities from the psychological harm caused by the dissemination of racial views. These views result inevitably in prejudice, discrimination and the potential of physical violence.

...

The messages prohibited by the section rob the victims of their dignity as persons and justifies their unequal treatment. This is not permissible.³⁴

The wording of the telephonic communication provision of the *CHRA* promotes recognition of the inter-relationship between the dignity of individual target group members and broader commitments to equality by requiring appointed tribunals to determine whether the communication complained of, which almost always generalizes about a particular group, is likely to expose individual members of that group to hatred or contempt. The CHRT in *Schnell*³⁵ reflected on the social science evidence presented in support of a complaint that communications equating gays and lesbians with pedophiles was likely to expose individual members of the gay and lesbian community to hatred or contempt. The experts’ description of how hate propaganda works clearly explicates the ways in which “expression” about target groups is designed to, and can have the effect of, spurring negative attitudes and conduct toward members (or perceived members) of those groups. These goals are pursued by means

31. *Citron v. Zündel* (2002) 41 C.H.R.R. D/274 at paras. 140, 176 [*Zündel*].

32. Quoting from Dickson C.J. in *Keegstra*, the CHRT further noted that messages can be vilifying and thus expose individual group members to hatred or contempt even where they include communication of truths or partial truths: *ibid.* at paras. 185-87.

33. 2005 CHRT 36, 55 C.H.R.R. D/148.

34. *Ibid.* at paras. 36-37. See also: *Warman*, *supra* note 1 at para. 50.

35. *Schnell*, *supra* note 19.

of dehumanizing portrayals of the group as animalistic and predatory and thus deserving of discriminatory and violent treatment:

According to Dr. Adam, this identification with animality has had serious consequences because it has given warrant to treat a sector of the population, gays and lesbians, as animal-like, to treat them the way animals might be treated and, therefore, not fully deserving of civil rights and full participation in a democratic society.³⁶

The expert evidence presented went beyond the potential effect of hate propaganda in terms of generating reactions against individual members of target groups, to underscore the extreme negative consequences these dehumanizing messages may have on target group members' internal sense of identity and self-worth, particularly those who are young:

the consequences for a gay or lesbian person reading negative materials about homosexuals are that they themselves feel shameful, they feel negatively about themselves, it takes away from their self-esteem. This can lead to self-destructive behaviour such as drug and alcohol use, getting into exploitive relationships, depression and suicide.³⁷

As will be discussed in Parts II and III, the approaches to privacy taken in the hate propaganda context that invoke the public/private divide, the connections between privacy and freedoms of conscience and belief, and the dignity interests of members of target groups also surface, to varying degrees, in the legal analyses of obscenity and child pornography. However, it is only in the context of child pornography that the privacy rights of members of the target group are explicitly considered.

36. *Ibid.* at para. 65.

37. *Ibid.* at para. 84.

II. *Privacy and obscenity*

Like participants in the hate propaganda trade, the creators³⁸ and consumers³⁹ of pornography⁴⁰ have, from time to time, and to varying degrees sought to protect their privacy using mechanisms such as ‘nymity’. As a result, ‘nymity has been used to shield the identities of pornography consumers, as a mechanism for protecting the identity and location of target group members (such as children involved in online chat), and as an instrument of law enforcement in child luring cases.⁴¹ As with hate propaganda, however, the purveyors and consumers of pornography have not universally embraced ‘nymity,⁴² nor have they consistently sought to dissociate their identities from the expression and conduct in which they have engaged.⁴³

‘Nymity is a relatively predominant theme in terms of popular discussions about privacy protection,⁴⁴ particularly in the online

38. One need only do a quick online search of Amazon.ca or peruse the shelves of Chapters to find a multiplicity of sexually explicit works authored by “anonymous.” As in the case of hate propaganda, many authors of such works have relied on anonymity in order to avoid social and sometimes legal repercussions associated with writing and distributing materials perceived to transgress acceptable social boundaries and sometimes laws: J, *The Sensuous Woman* (New York: Dell Publishing Company, Inc., 1969) (a woman’s manual on female sexuality), and Anonymous, *Go Ask Alice* (New York: Avon Books, 1982) (a book about teenage experiences with drugs and sex).

39. In the online context, in particular, many pornography consumers rely on ‘nymity in accessing and posting material, as well as in engaging in the creation of real-time pornography, sometimes including cyber-rape, in chat rooms and online virtual worlds: Donna M. Hughes, “‘Welcome to the Rape Camp’: Sexual exploitation and the Internet in Cambodia” (2000) 6 J. Sexual Aggression 29, online: University of Rhode Island <<http://www.uri.edu/artsci/wms/hughes/rapecamp.htm>>; and Julian Dibbell, “A Rape in Cyberspace (Or TINYSOCIETY, and How to Make One)” (1998), online: <<http://www.juliandibbell.com/texts/bungle.html>>. “Nymity” is a term meant to express any means of concealing one’s identity, such as anonymity, pseudonymity, etc. See Ian Kerr & Alex Cameron, “Nymity, P2P & ISPs: Lessons from *BMG Canada Inc. v. John Doe*” in K.J. Strandburg & D.S. Raicu, eds., *Privacy and Technologies of Identity: A Cross-Disciplinary Conversation* (New York: Springer, 2005) 269.

40. The use of the term “pornography” here is not intended to divide the “good” from the “bad,” but simply to recognize that sexually explicit materials (both licit and illicit) have historically and continue to be written under the auspices of anonymity.

41. K.K. Campbell, “Online and Anonymous: Total anonymity on the Net is an illusion, but is it a must for the Net’s future? Is it even desirable?” *The Toronto Star* (30 September 1999) at p. 1.

42. One might suspect that the use of ‘nymity may correlate with the perceived gravity of the pornography in issue. While a wide spectrum of extremely explicit adult pornography remains perfectly legal, ‘nymity may be more attractive as an avoidance mechanism for those involved in child pornography and adult pornography falling into the obscene category.

43. In the offline context, figures like Larry Flynt and Hugh and Christie Hefner have specifically opted away from ‘nymity, choosing instead to closely and publicly align their identities with the pornographic material they produce. For further discussion, see Ariel Levy, *Female Chauvinist Pigs: Women and the Rise of Raunch Culture* (New York: Free Press, 2005) at 35-43.

44. Allen, *supra* note 6 at 35, 37, 42; Alan Westin, *Privacy and Freedom* (New York: Atheneum, 1967) at 41, 69, 331. See also Jacquelyn Burkell and Peter West, “Names, Nyms, Addresses and Reputations: The Experience of Anonymity in the Wired World,” online: Identity Trail Project <<http://www.idtrail.org/content/view/117/42/>>.

pornography context. Apart from situations in which the use of 'nymity has presented a barrier to identification for law enforcement agencies or prosecutions, the privacy discussion in obscenity-related case law centres around the notion of the dichotomous public/private sphere. As in the hate propaganda context, however, the dignity of target group members, which I have suggested in Part I are likely to be integral to developing an equality-enhancing conception of privacy, are also addressed.

1. *Minimizing intrusion on the "private" expressive sphere*

In *R. v. Butler*⁴⁵ the Supreme Court of Canada considered the constitutionality of then section 163(2) of the *Criminal Code* – part of the obscenity provisions. The Court held that while section 163(2) violated the free expression rights of the purveyors of obscenity, the restriction was justifiable in a free and democratic society, in part because the restraint involved only public acts, and therefore did not impinge on viewing obscene materials in one's home.⁴⁶ Without expressly referring to its public/private divide analysis from *Keegstra*, the majority once again invoked that divide in analyzing the legitimacy of the legislative restriction:

... I would note that the impugned section, with the possible exception of subs. 1, which is not in issue here, has been held by this Court not to extend its reach to the private use or viewing of obscene materials. *R. v. Rioux* ... unanimously upheld the finding of the Quebec Court of Appeal that s. 163(2) ... does not include the private viewing of obscene materials. Hall J. affirmed the finding of Pratte J. [that]:

'[TRANSLATION] ... showing obscene pictures to a friend or projecting an obscene film in one's own home is not in itself a crime nor is it enough to establish intention of circulating them nor help to prove such an intention.'

This Court also cited with approval the words of Hyde J.:

'Before I am prepared to hold that private use of written matter or pictures within an individual's residence may constitute a criminal offence, I require a much more specific text of law than we are now dealing with. It would have been very simple for Parliament to have included the word 'exhibit' in this section if it had wished to cover this situation.'

Accordingly, it is only the public distribution and exhibition of obscene

45. [1992] 1 S.C.R. 452 [*Butler*].

46. Section 163 made it an offence to, among other things, make, print, publish, distribute or circulate obscene materials, or to possess them for those purposes, as well as to sell or expose such materials to public view: *Criminal Code*, *supra* note 9, ss. 163(1), (2). It was the latter sub-section, relating to sale or public exposure that was at issue in *Butler*, *ibid.*

materials which is in issue here.⁴⁷

Here, the Court pays homage to a notion of privacy firmly entrenched in the public/private divide, premising the legitimacy of governmental restrictions on activity, in part, on the basis that the state-imposed restriction did not trench on activities, such as the exhibition of obscene materials, within one's home. The approach harkens back to eighteenth century thinking about "man's home as his castle"⁴⁸ that (as will be discussed in the companion paper) has formed the basis for a powerful gendered legacy which isolates the domestic abuse of women and children as matters outside of the proper scope of state intervention.

The dissent in *Butler*, per Gonthier and L'Heureux-Dubé J.J., offered the following different, but related, take on privacy in its attempt to explain why the representation of what would otherwise constitute legal sexual activity might nevertheless be justifiably restricted by the state:

Obscene materials ... convey a distorted image of human sexuality, by making public and open elements of the human nature which are usually hidden behind a veil of modesty and privacy.⁴⁹

This element of the dissenting opinion reiterates the concept of the public/private divide – suggesting that certain elements of human nature ought to remain hidden from public view. Here the public/private divide does not focus on avoidance of state intrusion in certain individual spheres of activity, but instead focuses on non-state induced public revelation of certain aspects of human sexual nature which the dissent suggests are better kept behind closed doors. Perhaps most troublesome from an equality-seeking perspective is the degree to which this line must be interpreted to suggest that sexuality (representing the dissent suggests, "our encounter with our animality"⁵⁰) can or should be segregated into a "private" realm. Treating sexuality as a "secret," as a topic not to be dealt with in the public realm, has too frequently inured to the disbenefit of members of socially disempowered groups, such as women and adolescents, for whom public education on issues such as disease and pregnancy prevention is

47. *Butler*, *ibid.* at 506-07.

48. Perhaps first articulated at common law in *Semayne's Case* (1604), 77 E.R. 194, 5 Co. Rep. 91, as noted by the Supreme Court of Canada in *R. v. Silveira*, [1995] 2 S.C.R. 297 at para. 41.

49. *Butler*, *supra* note 45 at 513.

50. *Ibid.* the dissent quoting with approval D.A. Downs, *The New Politics of Pornography* (Chicago: University of Chicago Press, 1989).

essential.⁵¹ The focus of concern ought not to be on what seems to be a morality-based notion that sex is private, but on an equality-based notion that certain representations of sexuality dehumanize and degrade women, falsely portraying them as sex objects ripe for abuse, and undermine their ability to self-define, both privately and publicly. Certain aspects of this more equality-based concern are captured in the Court's analyses of "dignity" and "consent" in the context of obscenity.

2. *Dignity of target group members*

In concluding that the government was justified in imposing restrictions on degrading and dehumanizing obscene material, the *Butler* majority referred to its analysis of the dignity interests of target group members in *Keegstra*. In particular, the majority noted both its incipient effect on attitudes and behaviours toward target groups and their members, as well as the potential harms of hateful content in terms of the self-dignity of group members.⁵² Relying on this form of analysis the majority in *Butler* reasoned:

Among other things, degrading or dehumanizing materials place women (and sometimes men) in positions of subordination, servile submission or humiliation. They run against the principles of equality and dignity of all human beings. In the appreciation of whether material is degrading or dehumanizing, the appearance of consent is not necessarily determinative. Consent cannot save materials that otherwise contain degrading or dehumanizing scenes. Sometimes the very appearance of consent makes the depicted acts even more degrading or dehumanizing.⁵³

Here the majority reasoning reflects two dignity-related concerns. First, depictions of women as subordinate, servile and humiliated may affect social perceptions of women and their proper place in society, forming the impetus and basis for discrimination and violence against them. Second, the Court suggests that even where a direct target of obscenity—the woman appearing in the production—consents to having degrading and dehumanizing acts committed against her, the government will nevertheless have a suitable justification for its restriction. In other words, one woman's "consent" to being dehumanized and degraded, and to having a record

51. For statistics on the importance of public education on reducing sexually transmitted disease and unwanted pregnancy, see The Society of Obstetricians and Gynecologists of Canada, "Sex Facts in Canada 2006," online <http://www.sexualityandu.ca/media-room/pdf/Sex-Stats-Fact-Sheet_e.pdf>; and "Adolescent Sexual and Reproductive Health in Canada: A Report Card in 2004" (2004) 13 *Can. J. Human Sexuality* 67 at 67-81, online: The Sex Information and Education Council of Canada (SIECCAN) <<http://www.sieccan.org/pdf/mckay.pdf>>.

52. *Supra* note 45 at para. 158.

53. *Ibid.* at para. 50.

made of that degradation, does not negate the valid social concern about the ways in which obscenity can shape and feed discriminatory, and even violent, attitudes toward women.⁵⁴ This approach seems sensible given the social and economic realities that, as Catherine MacKinnon has noted, compel the most socially disadvantaged women to “consent” the most.⁵⁵ Moreover, it suggests an appropriate level of suspicion that individual women may effectively waive women’s collective and individual right to live free from the stereotypes perpetuated in obscenity.⁵⁶

Even in the context of articulating the potential dignity-related harms of obscenity to the target group stereotyped in its imagery, the Supreme Court of Canada insisted on maintaining the public/private divide. The analysis appears to be missing a recognition of harms that do not fit neatly into any category, but comprise certain elements of all three. Included among these harms are the loss of liberty, autonomy and equality experienced by members of targeted groups by virtue of the public or private⁵⁷ conveyance and absorption of dehumanizing and degrading messages that restrict their ability to self-define. These harms may arise whether or not targeted group

54. The conflation of sex and violence and the sexualization of violence against women were discussed in some detail by the Ontario Court of Appeal in *R. v. Smith* (2005), 76 O.R. (3d) 435. In that case, Dr. Neil Malamuth testified that in his study, one third of men were sexually aroused by sexual violence, while ten percent of men were sexually aroused by non-sexual acts of violence committed by men against women: *ibid.* at para. 12. Malamuth further testified that the impugned material in the case fused sex with violence by “portraying the misogynistic dominant male silencing women through violence; disengaging moral restraint by placing blame on the victim; and normalizing the assailant’s behaviour by portraying the assailant in a positive manner”: *ibid.* at para. 13. In his analysis, regardless of whether viewing the material would cause men to physically lash out against women, it “could lead to desensitization; greater acceptance of and tolerance for violence against women; decreased empathy; increased risk of sexual aggression; and greater acceptance of myths about violence against women, such as the belief that women actually enjoy being raped, controlled or dominated in violent ways”: *ibid.*

55. The presumption that direct targets of pornography must be taken to have consented has been met with powerful evidence as to the abuse and exercises of power, as well as systemically disempowering conditions surrounding many adults’ participation in the pornography industry: Christopher Kendall, *Gay Male Pornography* (Vancouver: UBC Press, 2004) and Catharine MacKinnon & Andrea Dworkin, eds., *In Harm’s Way: The Pornography Civil Rights Hearings* (Cambridge: Harvard University Press, 1997).

56. These dignity-related concerns have also been reflected and reiterated in judicial analyses of the public indecency provisions of the *Criminal Code*, *supra* note 9. In *Labaye* the Supreme Court of Canada noted that publicly conveyed “[c]onduct or material that perpetuates negative and demeaning images of humanity is likely to undermine respect for members of the targeted groups and hence to predispose others to act in an anti-social manner towards them,” *R. v. Labaye*, 2005 SCC 80, [2005] 3 S.C.R. 728 at paras. 46-47.

57. The *Labaye* dissent posits gradations of public and private, perhaps reflecting an acknowledgment of the fragility of the supposed dichotomy between the two, but nevertheless seemingly accepts the notion that a certain public aspect is an essential component in justifying state intervention: *ibid.* at para. 101.

members “consensually” participate in the conveyance of that message.⁵⁸ As discussed in Part III, even as Canadian courts have recognized explicitly the privacy interests of the children abused in production of child pornography, they have not adopted this more textured approach.

III. *Privacy and child pornography*

Because of the social stigma attached to being involved with child pornography,⁵⁹ both its Canadian consumers and producers have tended to rely heavily on various methods of ‘nymity in order to shield their personal identities from being connected with it. As the trade in child sexual abuse and its imagery moves online, ‘nymity (or at least the illusion of ‘nymity)⁶⁰ has become the privacy mechanism of choice not only for those previously involved in this trafficking, but for many men who had no previously recognized sexual interest in children.⁶¹ By minimizing the social risks associated with “real space” modes of participating in this trade, such as by regular mail, the ‘nymity of the online child pornography trade may play a central role in furthering the commodification of child sexuality.⁶²

Canadian case law on child pornography explicitly addresses both the privacy rights of accused persons and those of the children abused in its production. Discussion of the privacy rights of those accused arises most frequently in three areas: (i) search and seizure; (ii) concerns around the public stigma attached to convicted offenders should they be listed on public sex offender registries or required to provide DNA samples for inclusion in centralized databanks; and (iii) restrictions on “private” forms of expression. As in the hate propaganda and obscenity contexts, case analysis on these issues tends to characterize privacy as a negative liberty, as a right against state intrusion in the so-called “private” sphere. Child pornography case law is, however, markedly different than that involving hate propaganda and obscenity. Although it also addresses the “dignity” interests of children, judicial analysis in child pornography cases explicitly adverts to the privacy rights of its direct targets – the children abused in its production.

58. As I will discuss in detail in Part III, it is at these intersections that I suggest an equality-enhancing approach to privacy might be located.

59. M. Taylor & E. Quayle, *Child Pornography: An Internet Crime* (New York: Brunner-Routledge, 2003) at ix.

60. Campbell, *supra* note 41.

61. Taylor & Quayle, *supra* note 59 at 43, 78, 91.

62. For further detail, see Jane Bailey, “Confronting Collective Harm: Technology’s Transformative Impact on Child Pornography” (2007) 56 U.N.B.L.J. 65.

1. *Minimizing state intrusion in the “private” sphere of the accused*a. *Limits on search and seizure*

A significant body of Canadian case law on child pornography has developed in relation to search and seizure, both before trial and as an ongoing condition of probation or community sentencing after conviction. Given the context in which they arise, these analyses unsurprisingly tend to reiterate an account of privacy that focuses on the individual’s interest in excluding the state from “private” locations and personal possessions.

At least two Canadian cases have determined that reasonable expectations of privacy exist in relation to digital data, such as email, stored in areas controlled by and accessible to third parties.⁶³ In both cases, however, the courts allowed the digital information seized as a result of tips from private third parties to be admitted into evidence. As the Saskatchewan Court of Queen’s Bench summarized it:

One’s computer and contents are usually private. Detection of such alleged offences only results from circumstances such as experienced by Hounjet [a computer repair company], or from repair work being completed on an electronic mailbox as experienced in [*Weir*].⁶⁴

In a similar vein, one Canadian court concluded that an accused did not have a reasonable expectation of privacy in his Internet Protocol address [IP address], since it had been published in each of his communications to others in an online chatroom.⁶⁵ This analysis informed the court’s conclusion that it was reasonable to admit evidence seized from the accused’s home pursuant to a warrant premised in part on his IP address, which Canadian authorities had obtained from foreign law enforcement agents.

Searches of homes yielding seizures of computers have resulted in numerous decisions that extend protection of locational privacy in the home to home computers. While in all cases reiterating the traditional “man’s home as castle” motif, in some of these cases, the pornographic images seized as a result were admitted into evidence.⁶⁶ In others, however, the “sanctity” of an individual’s home against state intrusion resulted in

63. With respect to email see *R. v. Weir* (1998), 181 D.L.R. (4th) 30, aff’d 2001 ABCA 181, 156 C.C.C. (3d) 188 [*Weir*]. With respect to contents of computers taken for repair, see *R. v. Morelli*, 2005 SKQB 381, (2005), 272 Sask. R. 282 [*Morelli*].

64. *Morelli*, *ibid.* at para. 27.

65. *R. v. Smith*, 2005 BCCA 334, (2005), 30 C.R. (6th) 20.

66. *R. v. Henricks*, [1999] B.C.J. No. 1246 (B.C.S.C.) (QL); *R. v. Lefave*, [2003] O.J. No. 3861 (Ont. Sup. Ct. J.) (QL).

exclusion of the evidence seized.⁶⁷ As the Newfoundland Supreme Court concluded:

Clearly, the home has been held to be the most sacred of sanctuaries where proper judicial authorization becomes mandatory in order to gain access. It is the one area where privacy interests have been protected with the full force of the *Charter*....

The police were well aware that the search to be conducted was on a private dwelling. The police were aware that the type of evidence seized was a family computer, which had the potential to contain highly personal and confidential information. Computers in homes today contain very personal e-mail, they will contain business records, communication between family members and many other private communications.⁶⁸

In another case involving someone convicted of possession of child pornography, the Manitoba Court of Appeal acknowledged the high level of locational privacy typically associated with the home.⁶⁹ However, it concluded that those sentenced to probation following conviction for such offences “had a diminished, but not non-existent, expectation of privacy.”⁷⁰ As a result, the Court modified the imposed sentence to permit warrantless searches of the convicted person’s home only between 9 a.m. and 6 p.m. Canadian courts have similarly been called upon to define the reasonable expectations of privacy of those convicted of certain sex offences in relation to requirements to supply genetic material and information for inclusion in crime registries.

b. *Minimizing stigmatization of sex offenders – crime registries*

Legally mandated inclusion of bodily fluid samples and/or other information from those convicted of certain types of offences – in particular sex-related offences – has recently become a prominent tool for law enforcement. Child pornography offences are included both

67. *R. v. Aucoin* (2002), 211 Nfld. & P.E.I.R. 109 at paras. 12, 57 (Nfld. S.C. (T.D.)) [*Aucoin*]; *R. v. James* (2000), C.C.C. (3d) 549 at paras. 47, 65 (Ont. Sup. Ct. J.); and *R. v. Lemon*, [2004] O.J. No. 6043 at para. 4 (QL) (Ont. Sup. Ct. J.).

68. *Aucoin*, *ibid.* at paras. 12, 57.

69. *R. v. Woroby*, 2003 MBCA 41, (2003) 174 C.C.C. (3d) 128 at para. 27.

70. *Ibid.* at para. 28, citing Hill J. in *R. v. Forsyth*, [1995] O.J. No. 4173 at para. 33 (Gen. Div.) (QL).

within the DNA registry⁷¹ under the *Criminal Code* and the Ontario⁷² and federal⁷³ information registries. The case law relating to them sometimes includes judicial analysis of the privacy concerns of convicted offenders. Of particular focus in these analyses is the stigmatizing effect registries may have on those convicted of child pornography offences.

Unsurprisingly, the cases discussing the DNA registry focus upon bodily privacy and concerns surrounding state imposed intrusions on physical autonomy. In two appellate cases involving men convicted of child pornography offences, both courts noted the diminished expectations of privacy and personal control of those convicted of offences and the minimal physical discomfort associated with providing the samples.⁷⁴ Nonetheless, the Alberta Court of Appeal reiterated the importance of the connection between informational control and human dignity previously outlined by the Supreme Court of Canada in *Dyment*:⁷⁵

The taking of a DNA sample also raises privacy concerns, relating to the highly personal information contained in an individual's DNA. In *R. v. Dyment*, LaForest J. commented that '[g]rounded in man's physical and moral autonomy, privacy is essential for the well-being of the individual.' He went on to observe ... that 'the use of a person's body without his consent to obtain information about him, invades an area of personal privacy essential to the maintenance of his human dignity.'⁷⁶

71. The National DNA Databank (the NDNAD) was created in 1998 with the coming into force of the *DNA Identification Act*, S.C. 1998, c. 37. A court may now, upon sentencing someone convicted of a child pornography offence, order the offender to provide a DNA sample for inclusion in the NDNAD if the court is satisfied it is "in the best interests of the administration of justice" to do so: *Criminal Code*, *supra* note 8, ss. 487.051, 487.04.

72. In April 2001, with the proclamation of *Christopher's Law (Sex Offender Registry)*, S.O. 2000, c. 1, the Ontario Sex Offender Registry (OSOR) came into being: Ontario Ministry of Community Safety and Correctional Services, "Ontario Sex Offender Registry," online: <http://www.mcscs.jus.gov.on.ca/English/police_serv/sor/sor.html>. Ontario residents convicted of certain offences, including child pornography offences, are required to enter their name, address, date of birth and other prescribed information into a register that is available to provincial and municipal police forces, but not to the general public.

73. In 2004, several years after creation of the OSOR, a federal sex offender registry was established with the creation of the *Sex Offender Information Registration Act*, S.C. 2004, c. 10 (SOIRA). Like the OSOR, SOIRA creates a database that is not accessible by the general public and requires registration of certain information about those convicted of sexual offences, including child pornography offences, within that database. In contrast with the OSOR, a convicted offenders' information will only be included in the federal registry if the court accepts a prosecutorial request for inclusion. Under s. 490.012(4) of SOIRA, a court may decline to do so where the impact of registry on the individual's privacy or liberty would be "grossly disproportionate" to the public interest in societal protection.

74. *R. v. North*, 2002 ABCA 134, (2002) 303 A.R. 321 [*North*]; *R. v. Elder*, 2002 MBCA 133, (2002), 170 Man. R. (2d) 14 [*Elder*].

75. *R. v. Dyment*, [1988] 2 S.C.R. 417 at 427 [*Dyment*].

76. *North*, *supra* note 74 at para. 48.

Informational privacy is also at play in the context of judicial analyses of prosecutorial requests that those convicted of child pornography offences register information with the federal sex offender registry provided for under SOIRA.⁷⁷ Unlike the situation under the Ontario registry, registration in the federal registry is subject to judicial discretion. As a result, courts are specifically called upon to weigh the impact of registration on the individual accused against societal protection through effective investigation of sex-related crimes. While some courts have assessed the privacy impacts upon registrants to be relatively minor,⁷⁸ others have focused on the stigmatizing effects and loss of informational control associated with registration, particularly insofar as those convicted of child pornography offences are then effectively labeled “sex offenders.”⁷⁹ As the Ontario Court of Justice put it in *R. v. Have*:

In my opinion, the impact of an Order on any offender, including the defendant, is substantial. Subjecting the individual to an obligation for ten years enforceable by prosecution and imprisonment is, in itself, a significant infringement on liberty. The subject is required to provide information that he otherwise could keep private and to which the state would have no right of access. ... [T]here is substantial stigma attaching to an individual who is subject to registration, even if only in his mind. It may undermine treatment, rehabilitation and re-integration into the community. Finally, I would add that there may be a fine line between the legitimate police “tracking” of offenders and the harassing of them. There is no control against harassment except the judgment and restraint of the local police force.

...

The defendant is subject to some additional impact in that on the making of an Order, he is labeled a “sex offender,” a somewhat inaccurate and more stigmatic label than his crime might otherwise be thought to carry.⁸⁰

The analyses of privacy conducted under the rubric of the DNA and information registries reiterate both the paradigmatically individualistic account of privacy and its seemingly necessary opposition to broader social goals, such as community protection. They include both bodily and informational accounts, and also recognize the stigmatizing effects

77. *Sex Offender Information Registration Act*, *supra* note 73.

78. *R. v. Ayoob*, [2005] O.J. No. 4874 (Sup. Ct. J.) (QL); *R. v. G.H.K.*, 2005 BCPC 618, (2006), B.C.W.L.D. 2239; *R. v. Saint-Jacques*, 2005 CM 31, 2005 CarswellNat 6527.

79. *R. v. Have*, 2005 ONCJ 27, (2005) 194 C.C.C. (3d) 151 [*Have*]; *R. v. Tylek*, 2006 ABPC 85, (2006), A.W.L.D. 2193; and *R. v. Juane*, 2005 BCPC 645, [2006] B.C.W.L.D. 2742.

80. *Have*, *ibid.* at paras. 12-13.

of labelling as an interference with personal autonomy – particularly in considering the effects of police use of such information. Canadian courts have also been clear about the ways in which regulation of possession of child pornography can negatively impact upon personal autonomy.

c. *Limits on “private” possession*

In *Sharpe*⁸¹ the Supreme Court of Canada held that the *Criminal Code* prohibition on private possession of child pornography was a constitutionally justifiable restriction on freedom of expression, save for two situations in which the provision would otherwise apply. In its reasons, the majority appealed directly to the conceptions of privacy it had referred to in *Keegstra* and *Taylor*, but noted key differences between the public behaviour addressed in the hate propaganda provisions at issue in those cases and the prohibition on private possession of child pornography:

[T]he private nature of much child pornography cuts two ways. It engages the fundamental right to freedom of thought. But at the same time, the clandestine nature of incitement, attitudinal change, grooming and seduction associated with child pornography contributes to the harm it may cause children, rather than reduces it.⁸²

Here, the majority reiterates concerns stated in *Keegstra* and *Taylor* about state intrusion on private communication, engaging freedoms of thought and conscience, but differentiates child pornography because the very private nature of its use heightens, rather than reduces the risk of harm to its targets. Not only does the majority recognize the clearly distinguishable aspect of child pornography involved in its use to privately persuade children that their sexual abuse is acceptable, it also suggests that child pornography has a clandestine nature that escalates the risk of incitement of physical offences against children or changes in adult attitude that might lead to such offences. In other words, while accepting that the private consumption of child pornography escalates the risk of the development of harmful attitudes that might incite offences against children, the majority continues to hold to its position that private communication and consumption of hate is less likely to be harmful to target group members than its public communication.

Despite having recognized the way in which private consumption of child pornography escalates its risks of harm, the majority went on to identify two classes of materials caught by the possession provisions that

81. *R. v. Sharpe*, 2001 SCC 2, [2001] 1 S.C.R. 45.

82. *Ibid.* at para. 26.

it considered to be too private for the state to intrude upon, finding that the risk of harm in these situations was significantly reduced:

- (i) “self-created, privately held expressive materials,” such as journals or diaries not involving real children in their production and “intended solely for the eyes of their creator”,⁸³ and
- (ii) visual recordings created by or depicting the person possessing them, so long as no unlawful sexual activity is depicted, they are held for private use and they were made with the consent of those depicted.

In discussing these exceptions, the majority characterized the first to involve “exceedingly private expression,”⁸⁴ and noted that both may be essential to individual self-fulfillment, particularly “for young people grappling with issues of sexual identity and self-awareness” and for whom private expression of a sexual nature may be crucial to personal growth and sexual maturation.⁸⁵ In the final analysis, the majority concluded that, with respect to these two categories of material:

The restriction imposed by s. 163.1(4) regulates expression where it borders on thought. Indeed, it is a fine line that separates a state attempt to control the private possession of self-created expressive materials from a state attempt to control thought or opinion. The distinction between thought and expression can be unclear. We talk of “thinking aloud” because that is often what we do: in many cases, our thoughts become choate only through their expression. To ban the possession of our own private musings thus falls perilously close to criminalizing the mere articulation of thought.⁸⁶

This having been said, unlike in the contexts of hate propaganda and obscenity, the Supreme Court of Canada went on in the context of child pornography to deal more directly with the privacy and dignity implications for the direct targets of child pornography – those children abused in its production

2. *The privacy and dignity rights of children abused in production*

Once the majority outlined in detail the privacy related interests of the accused in the criminalization of possession of child pornography, both the majority and the dissent went on to elaborate on the privacy interests of the children commodified in child pornography. The majority alluded

83. *Ibid.* at para. 75.

84. *Ibid.*

85. *Ibid.* at paras. 107-109.

86. *Ibid.*

to the privacy interest of children harmed by continued circulation of their image following their abuse in the manufacture of pornography:

The child is traumatized by being used as a sexual object in the course of making the pornography. The child may be sexually abused and degraded. The trauma and violation of dignity may stay with the child as long as he or she lives. Not infrequently, it initiates a downward spiral into the sex trade. Even when it does not, the child must live in the years that follow with the knowledge that the degrading photo or film may still exist, and may at any moment be being watched and enjoyed by someone.⁸⁷

The dissent,⁸⁸ written by L'Heureux-Dubé J. was more explicit in its acknowledgment of the privacy rights of the children involved:

We recognize that privacy is an important value underlying the right to be free from unreasonable search and seizure and the right to liberty. However, the privacy of those who possess child pornography is not the only interest at stake in this appeal. The privacy interests of those children who pose for child pornography are engaged by the fact that a permanent record of their sexual exploitation is produced. This privacy interest is also triggered when material which is created by teenagers in a 'consensual environment' is disseminated.⁸⁹

The comments of both the majority and the dissent in *Sharpe* represent a landmark in terms of judicial recognition of the impact that child pornography has on the children used in its production with respect to their ability to maintain control over the capture and circulation of their images. This type of reasoning has since been repeated in subsequent decisions.⁹⁰ Broadening the focus of inquiry from the privacy rights of the accused to include the privacy interest of members of socially disadvantaged groups protected by impugned legislation represents an important step forward for equality. Further, recognition of this interest could be extremely meaningful in regaining control for groups within our communities, such

87. *Ibid.* at para. 92.

88. Three justices dissented from the majority's conclusion that the two categories of "private" child pornography had to be "read out" of the provision in order for it to survive constitutional scrutiny.

89. *Ibid.* at para. 189.

90. See e.g. *R. v. Kwok* (2007), W.C.B. (2d) 533 at para. 51 (Ont. Sup. Ct.) in which the court quoted the following from a victim witness statement in a child pornography trial: "The absolute worse (*sic*) thing about everything that happened to me was that Matthew [her abuser] put my pictures on the internet. He traded them with other people like baseball cards. What kind of people want to see pictures of a little girl being abused in this way?...I know that these pictures will never end and that my 'virtual' abuse will go on forever." See also *R. v. Treleaven*, 2006 ABPC 99, (2006), 400 A.R. 201 at para. 25; *R. v. C. (L.A.)*, 2005 ABPC 217, (2005), 386 A.R. 102 at para. 54; *R. v. Clemens*, [2007] O.J. No. 3830 at para. 37 (Ont. Sup. Ct. J.) (QL); *R. v. I. (J.E.)*, 2003 BCSC 1992, 204 C.C.C. (3d) 137 at para. 14.

as women and children, whose bodies, images and sexuality have been publicly commodified not only through legally prohibited materials, but through increasingly “mainstream” sources.⁹¹ The account of privacy adopted, however, remains a primarily individualistic one, focused fundamentally upon control over information about one’s self and one’s image.

IV. *Observations on trends within Canadian case law*

The Canadian case law relating to the intersections between privacy and obscenity, hate propaganda and child pornography reveals at least three discernable trends. First, the essence of privacy is primarily being developed in the context of the rights of those accused as against the state. As a result, privacy is predominantly characterized as a right or interest attaching to each individual with both intrinsic and functional value. Some cases, such as *North*,⁹² underscore privacy’s intrinsic value as a basic condition of each individual’s humanity, integrally connected with dignity and autonomy. Other cases focus on privacy’s functional value in a liberal state in preserving individuality and autonomy through reserving space and time within which the individual is left alone (especially by the state) to reflect upon and develop his or her own interests and identity.⁹³ In both forms of analysis, the focus is on the relationship between the individual and the state, with the privacy interest predominantly viewed as a mechanism for limiting state intrusion.

The second notable trend is that the privacy interests of only certain targets of these forms of expression – the individual children abused in the production of child pornography - have been specifically taken into account. Given the context in which the right to privacy has developed and the related choice of most Canadian courts to envision it fundamentally as a negative individual right to control information about oneself, this limited attention to the privacy of the targets of harmful “expression” is perhaps unsurprising. The dignity and autonomy of individual children abused in the production of child pornography can easily be fit within this paradigm in that they are unable to control others’ access to images and information about intimate aspects of their person. Recognition of these interests, however, may also be important for other equality-seeking

91. I have discussed elsewhere, in some depth, the broader social threat of dehumanization through commodification in child pornography: Bailey, *supra* note 62. See also Catharine MacKinnon, *Toward a Feminist Theory of the State* (Cambridge: Harvard University Press, 1989) at 195-96.

92. *North*, *supra* note 74 at paras. 46-48 and *Dyment*, *supra* note 75 at paras. 17, 21-22.

93. *Sharpe*, *supra* note 82 at para. 107; *Gavison*, *supra* note 6 at 446-48; *Allen*, *supra* note 6 at 42-43.

groups – particularly where they are taken into account in the context of affirming state action, rather than in the articulation of reasons for confining or restricting state action. In the context of restrictions on child pornography, the state is arguably playing both a privacy and equality-affirming role by taking action that seeks to restrain one individual's ability to interfere with the ability of the member of a socially vulnerable group to control access to him or herself. The analysis, however, does not go beyond an individualistic account of privacy to, for example, consider the collective interest in maximizing the space available for children to make meaningful choices about their identities (including their sexuality) without undue inundation by pre-packaged imagery of what that identity ought to look like.

In contrast, the third notable trend in the case law is the glaring absence of analysis of the privacy interests of the targets of obscenity and hate propaganda. In the cases of obscenity and hate, we see decision-makers focusing on the concept of the "dignity" of the members of the collective, rather than on their "privacy". In response to the argument that the most intuitive explanation for this absence is that obscenity and hate propaganda do not trigger the privacy interests of those they target, I want to suggest that this is not necessarily the case. It may be that the privacy interests of the targets of obscenity and hate propaganda are not taken into account because of the individualistic and negative conception of privacy that has developed in the context of legal assessments of the rights of those accused and those convicted. Further, targeted groups may find it difficult to frame an argument that characterizes state action as essential to their enjoyment of privacy in the context of the prevailing notion that having privacy means keeping the state out.

Conclusion

When privacy is discussed in Canadian case law relating to hate propaganda, obscenity and child pornography, the predominant account is a negative, individualistic one. Stressing the importance of minimizing state intrusion in private spheres of expression and minimizing state-facilitated branding of those convicted of related crimes in order to protect individual development and flourishing of the consumers of these kinds of "expression," the cases focus predominantly on the rights of the accused with little consideration of any privacy-related rights for those targeted directly or indirectly by them. Notwithstanding that the predominant account places significant emphasis on distinguishing public and private spheres, the case law relating to hate and obscenity recognizes that self-definition, fulfillment and development can be profoundly impacted upon

by attitude-shaping messages promulgated in the “public” realm. In these contexts, the analysis of harms takes a collective bent, by analyzing the impact of the message about a group on the dignity and autonomy of its individual members and on social goals such as equality. In the context of child pornography, however, courts have explicitly recognized the privacy rights of the individual children abused in its production. Here again, the individualistic account of privacy predominates, focusing solely on those individual children, with virtually no discussion of the impact of the message conveyed on the autonomy and equality of children as a group.

One option would be for individuals who belong to groups targeted for discrimination as the result of hate propaganda and obscenity to assert a violation of their right to privacy in order to bring themselves within the current individualistic model. If the claims of individual children abused in production of child pornography can be made to fit within the current model, it seems reasonable to expect that the claims of certain individual targets of hate propaganda and obscenity could also be brought within that framework. However, I would suggest that diversion of judicial attention from the relatively well-accepted collective harms of hate and obscenity toward an individualistic privacy harm is unlikely to be an equality-enhancing proposition for targeted groups and their members.

It is to this issue that I will turn in this article’s forthcoming companion paper, which will appear in the next volume of this journal. In that paper, I will situate the negative, individualistic approach to privacy taken in the Canadian case law on hate, obscenity and child pornography within the context of a well-established western theoretical and legal paradigm. After exploring the unfortunate results experienced by equality-seeking groups in prior attempts to assert what are fundamentally group-based concerns within the context of the paradigmatic individualistic model of privacy, I will draw on more social and collective analyses of privacy as possible bases for developing collectively-oriented privacy claims for groups targeted for discrimination and abuse in hate propaganda, obscenity and child pornography. I will suggest that a social account of privacy offers the possibility of re-imagining privacy as a producer of substantive equality, rather than its competitor.

