Vanderbilt Journal of Transnational Law

Volume 38
Issue 2 *March 2005*

Article 4

2005

The "Privilege of Speech" in a "Pleasantly Authoritarian Country"

Hans C. Clausen

NOTES

The "Privilege of Speech" in a "Pleasantly Authoritarian Country": How Canada's Judiciary Allowed Laws Proscribing Discourse Critical of Homosexuality to Trump Free Speech and Religious Liberty

ABSTRACT

Giving credence to Alexis de Tocqueville's argument that in democratic societies the love of equality is greater than the love of freedom is a recently emerging trend among Western nations to legally proscribe speech critical of homosexuality. Such laws, in various forms, now exist in a large and growing minority of countries in Europe and North America. The goal of these laws is much grander than preventing discrimination against homosexuals; rather, the objective is seemingly to promote the social acceptance of gay and lesbian lifestyles. These laws provide for civil remedies and in some instances even criminal sanctions for speech considered offensive or degrading to homosexuals, and constitutional-rights objections to them—on the basis of speech and religious liberty guarantees—have been largely unavailing. Thus, achieving the social equality of homosexuals—conceived in sweeping terms—has, in many Western countries, outstripped legal protections for speech and religious freedoms.

In this Note, the Author examines Canada's extensive legal regime proscribing speech critical of homosexuality. The Author illustrates how the Canadian judiciary's zeal for promoting the social acceptance of homosexuality has greatly diminished fundamental legal protections for open discourse and religious liberty.

TABLE OF CONTENTS

I. INTRODUCTION 445
II. CANADA'S LEGAL REGIME PROSCRIBING SPEECH CRITICAL OF HOMOSEXUALITY 453
A. *Federal Criminal Penalties for Speech Critical of Homosexuality* 453
B. *Provincial Prohibitions of Speech Critical of Homosexuality* 464
1. British Columbia 465
2. Ontario 474
3. Saskatchewan 478
C. *Federal Broadcast Regulations of Speech Critical of Homosexuality* 481
1. Federal Actions Against the *Dr. Laura Schlessinger Show* 481
2. Federal Actions Against Dr. James Dobson's *Focus on the Family* 484
3. Federal Requirements to Broadcast Gay Cable Channel 486
III. A CRITIQUE OF CANADA'S HATE SPEECH REGIME AND ITS UNDERPINNINGS CONSIDERING THE SUPREME COURT OF CANADA'S DECISION IN *KEEGSTRA* 486
A. *The State's Putative Interest in Prohibiting "Hate Propaganda": The Asserted Values Promoted and Harms Avoided by Criminalizing Invective Speech* 487
1. "Balancing" the Value of Free Speech Against Its Danger 487
i. The Court's Failure Concerning the First Value of Open Discourse (Promoting the Common Good by Finding Truth) 488
ii. The Court's Failure Concerning the Second Value of Open Discourse (Providing for the Needs of the Political Process) 489
2. Individual "Authenticity," "Fulfillment," and Social Acceptance: The Court's Misguided Approach 490
3. Curing the Influence of Hate Speech: The Court's Endorsement of the

Paternalistic Control of Speech to Ensure the Rationality of Society 498
VI. CONCLUSION 500

I. INTRODUCTION

Alongside Interstate 5 near the town of Chehalis, Washington, U.S.A. sits what local residents have for more than thirty years referred to as the "Uncle Sam billboard."[1] On any given day, the mammoth sign—measuring 640 square feet on either of its two sides[2]—confronts an average of 50,000 commuters traveling north- or southbound with a giant picture of Uncle Sam next to the reactionary political and religious comments, updated frequently and stamped in large block-capital letters, of the billboard's arch-conservative owner, Al Hamilton[3] (a turkey farmer and breeder),[4] or—alternatively—of the fringe John Birch Society.[5] That the billboard has caused much consternation over the years—with anti-homosexual messages such as "AIDS IS A MIRACLE DISEASE. IT TURNS FRUITS INTO VEGETABLES"[6]—does not concern Hamilton. "I'm not trying to convert anyone to my way of thinking, but I want to make people think," he said.[7] Although the billboard has angered many—bullets and paintballs have been fired at the sign, and its support piling has also been lit on fire[8]—Hamilton himself seems to view the billboard as a vindication of his First Amendment liberties. When a local newspaper columnist wrote that Hamilton could do the community a great service by removing the offensive sign, Hamilton stomped into the columnist's office the next day to proclaim that he could "put anything [he] damn well please[d]" on the billboard.[9] In one instance, Hamilton set the billboard to read "THERE ARE NO BILLBOARDS

---

1. Janet Goetze, *Owner of Famed Political Billboard Hoped to "Make People Think,"* OREGONIAN, Nov. 14, 2004, at D09.
2. Washington v. Hamilton, 604 P.2d 1008, 1010-11 (Wash. Ct. App. 1979).
3. Sarah Kershaw, *Highway's Message Board Now Without a Messenger*, N.Y. TIMES, Nov. 28, 2004.
4. *Owner of "Uncle Sam" Billboard Dies*, COLUMBIAN, Nov. 11, 2004, at C2.
5. Tom Koenninger, *Free Speech Not Always Nice, but Vital*, COLUMBIAN, Dec. 1, 2004, at C7.
6. Sukie de la Croix, *Chicago Whispers*, WINDY CITY TIMES, Aug. 7, 2002, at http://www.windycitytimes.com/0outlines/aug7w02/whis.html (last visited Feb. 14, 2005).
7. Goetze, *supra* note 1.
8. Ron Judd, *Freeway Billboard Barbs a Sign of What Free Speech Really Means*, SEATTLE TIMES, Apr. 2, 2003, at A1.
9. Koenninger, *supra* note 5.

IN RUSSIA, CUBA, OR COMMUNIST CHINA."[10] Under the robust speech protections of the First Amendment to the U.S. Constitution,[11] all that now threatens the continuation of the Uncle Sam billboard[12]—aside from the infrequent and illegal attacks on it by private citizens—is Hamilton's recent death, at the age of 84,[13] which led the *Seattle Post-Intelligencer* to eulogize "[w]e thought the billboards cranky, but worth looking at. . . . That billboard is what makes America better because it celebrates a founding principle of our nation, the First Amendment. We completely disagree with Hamilton's view of the world, but praise his discourse."[14]

Just across the U.S.-Canada border, in British Columbia—not far from Hamilton's billboard in Chehalis, Washington—Chris Kempling's far more benign comments critical of homosexuality have not been as well tolerated—particularly by the government. Kempling, a public high school teacher and counselor, was initially suspended from his job for five months without pay[15] by the province's educational accreditation board for writing letters to the editor[16]—printed in the local newspaper,[17] but never introduced into any public school or classroom[18]—that argued, on the basis of

---

10. Issac Laquedem, *Alfred "Uncle Sam" Hamilton*, at http://isaac.blogs.com/isaac_laquedem/2004/11/alfred_uncle_sa.html (last visited Dec. 12, 2004).

11. *See* W. Bradley Wendel, *The Banality of Evil and the First Amendment*, 102 MICH. L. REV. 1404, 1420-21 (2004) (noting that "[l]iberal premises are evident in such familiar First Amendment maxims as the requirement of viewpoint neutrality, the Barnette anti-orthodoxy principle, and the exclusion of certain kinds of emotive harms as the basis for restrictions on speech").

12. Kershaw, *supra* note 3 (noting that "the future of Hamilton's billboard is uncertain"). Hamilton's sign, it should be noted, was the subject of legal action in the 1960s and 1970s. In the 1960s, under the auspices of Lady Bird Johnson's campaign to beautify national scenic roadways, the federal government asked Hamilton to remove his billboard. *See* Goetze, *supra* note 1. In 1971, then-state attorney general Slade Gorton sought the removal of Hamilton's billboard under Washington state's Scenic Vista's Act; Hamilton won the legal challenge. *See* Washington v. Hamilton, 604 P.2d 1008, 1014 (Wash. Ct. App. 1979). Neither of these governmental actions was based, *at* least ostensibly, on the objectionable nature of Hamilton's speech, but rather on nuisance and beautification grounds.

13. Kershaw, *supra* note 3.

14. *Uncle Sam Says . . .*, SEATTLE POST-INTELLIGENCER, Nov. 12, 2004, at B6.

15. Chris Kempling, *April 5th Message from Chris Kempling, at* http://www.ccrl.ca/issue_kempling.html (last visited Nov. 16, 2003) [hereinafter Kempling, April 5th Message]; *see* British Columbia Parents and Teachers for Life, *A New Summary of Events Related to the Chris Kempling Case*, at http://www.bcptl.org/rights.htm#summary (last visited Jan. 26, 2005).

16. Press Release, B.C. College of Teachers, B.C. Supreme Court Rules in College's Favour in Kempling Case (Feb. 4, 2004) *at* http://www.bcct.ca./documents/rel_kempling_feb04_04.pdf (last visited Feb. 14, 2005).

17. *Id.*

18. Ian Hunter, *Free Speech Falls Prey to 'Human Rights,'* NAT'L POST, Aug. 18, 2003, at A13.

scientific and scholarly research,[19] that homosexual relationships are unstable and gay sex risky.[20] He also criticized what he viewed as the pro-gay stance of the public education system.[21]

Kempling started writing his letters after being asked by presenters at a government-sponsored workshop to distribute copies of a gay-and-lesbian newspaper—which included advertisements for gay bathhouses, pornographic personal ads, and information about joining casual-sex and masturbation clubs—to students at his school.[22] He initially complained directly to his union and to the Minister of Education, but his complaints were ignored.[23] "When I realized that no one in authority was prepared to take any action, I decided to educate myself, and start writing directly to the public, to make parents aware of what was being proposed for their children," Kempling said.[24]

When the accreditation board learned of Kempling's letters, it launched a full inquiry: a government investigator was dispatched to Kempling's small town and was soon speaking with community leaders and Kempling's supervisors and colleagues.[25] Not long thereafter, Kempling—a thirteen-year employee of the public school system with an exemplary record[26]—found himself suspended and

---

19. Chris Kempling, *Speech to the Brethren—Oct. 19, 2002, at* http://www.the-grove.net/kempling/ (last visited Jan. 31, 2005) [hereinafter Kempling, *Speech to the Brethren*].

20. Margaret Wente, *COUNTERPOINT: Is This Man Fit to Teach?*, GLOBE & MAIL (TORONTO), Aug. 7, 2003, at A15.

21. *Id.* Kempling points out that the B.C. Teacher's Federation in 1999 passed a resolution calling for pro-gay themes to be taught to children in every grade from kindergarten through the twelfth. *See* Kempling, *Speech to the Brethren*, *supra* note 19. He also claims:

> In 1997, the BCTF [British Columbia Teachers' Federation] launched a campaign to eliminate homophobia and heterosexism. To that end they published and distributed to every school district, lesson aids written by the Gay and Lesbian Educators [(GALE)] of BC. In these lesson aids, GALE implies that everyone who does not support a pro-gay agenda is homophobic and needs to change their views. . . . In their lesson aid *Counselling Lesbian and Gay Youth*, the authors state that "we must dishonour the prevailing belief that heterosexuality is the only acceptable orientation even though that would mean dishonouring the religious beliefs of Christians, Jews, Muslims, etc."

Id. He also pointed to another teaching aid called *Famous Gays and Lesbians*, which asserts that the Biblical King David was the gay lover of Jonathan; Kempling called the aids "unprofessional, unethical, inaccurate, [and] propaganda." *Id.*

22. Chris Kempling, *Speech to Citizens of Quesnel—May 12, 2003, at* http://kencampbell.ca_Chris_Kempling_Speech.htm (last visited Jan. 31, 2005) [hereinafter Kempling, *Speech May 12*].

23. *Id.*

24. *Id.*

25. *Id.*

26. Hunter, *supra* note 18; Kempling, *Speech to the Brethen*, *supra* note 19 (stating that fourteen letters of commendation were in Kempling's personnel file).

lacking support from his peers, his bosses, his union,[27] and even the B.C. Civil Liberties Union.[28] Although no evidence existed that Kempling's letters caused any disturbance or controversy at his school[29]—nor did any students or parents complain of Kempling's letters or job performance[30]—the B.C. Supreme Court upheld the accreditation board's decision to suspend Kempling for writing his letters, stating that "the appellant's discriminatory expression is of low value . . . [and] is incompatible with the search for truth."[31]

The treatment that Kempling received is becoming less and less unusual: a strong trend has recently emerged among Western nations toward proscribing speech critical of homosexuality—either through the law or other indirect means. In 2003 legislators in Sweden amended that nation's constitution to prohibit critical speech directed at homosexuals.[32] Violators can be punished by up to four years in prison, and one Christian pastor has already been sentenced to jail under the new law.[33] In 1991[34] Ireland amended its *Prohibition to*

---

27. Wente, *supra* note 20.

28. David F. Dawes, *Kempling Takes BCCT to Court*, CANADIANCHRISTIANITY.COM, *at* http://www.canadianchristianity.com/cgi-bin/na.cgi?nationalupdates/030730kempling (last visited Jan. 31, 2005).

29. Chris Kempling, *Letter from Chris Kempling re:* Kempling v. B.C. College of Teachers, *at* http://www.ccrl.ca/index.php?id=140#1 (last visited Jan. 31, 2005) [hereinafter Kempling, Letter]; see Kempling v. Coll. Tchrs (B.C.), [2004] 27 B.C.L.R. (4th) 139, ¶ 41 (noting that there was "no evidence . . . of a poisoned school environment or specific complaints against [Kempling]").

30. Kempling, *Speech to the Brethen*, *supra* note 19 (stating that "[t]here were no complaints about what I had publicly written from teachers, none from students, none from parents, and most importantly, none from any member of the gay community. Not one, not ever.").

31. Kempling v. Coll. Tchrs. (B.C.), [2004] 27 B.C.L.R. (4th) 139, ¶ 96-97. In the interim between Kempling's initial five-month suspension and the bringing of this lawsuit, the College reduced Kempling's suspension to one month without pay. *See id.* ¶ 7; *see also British Columbia: Court Upholds Suspension of Anti-Gay Teacher*, NAT'L POST, Feb. 5, 2004, at A5.

32. Edwin Feuler, *"Hate Crime" Legislation Is an Assault on Free Speech*, CAPITALISM MAG., Dec. 19, 2002, *at* http://www.capmag.com/article.asp?ID=2231 (last visited Jan 31, 2005); Mark Steyn, *Intolerant Liberalism That Sees Gay Activists Deny Others the Right to a View*, IRISH TIMES, Aug. 9, 2003, at 9. Chapter 2, Articles 13 and 15 of the Swedish constitution provide that "[f]reedom of expression and freedom of information may be restricted [when speech] impl[ies] the unfavorable treatment of a citizen because he belongs to a minority group by reason of race, color, or ethnic origin." Gene Edward Veith, *Sweden's Shame*, WORLD MAG., Aug. 10, 2002. The amendment adds sexual orientation to the list of groups immune from "unfavorable" speech. *Id.*

33. Veith, *supra* note 32. In 2003 a Protestant minister was the first to be prosecuted and sentenced under the law. For publishing a sermon in his local newspaper that described homosexuality as "abnormal, a horrible cancerous tumor in the body of society" and homosexuals as "perverts, whose sexual drive the Devil has used as his strongest weapon against God," Pastor Ake Green received a one-month prison sentence. *Id.* In another portion of his sermon, Green tempered his message by stating that "[w]hat these people need, who live under the slavery of sexual immorality, is an abundant grace. . . . We cannot condemn these people. Jesus never belittled anyone. He offered them grace." *Id.* The prosecutor stated during Green's trial that

Incitement of Hatred Act of 1989 to include sexual orientation among groups protected from "hate speech."[35] Norway now also proscribes hate speech directed against sexual minorities.[36] In 1994 the government of New South Wales, Australia, passed the *Anti-Discrimination (Homosexual Vilification) Amendment Act*,[37] which subjects violators to up to six months' imprisonment.[38] Denmark similarly has made it a crime to "utter publicly or deliberately . . . a statement or remark by which a group of people are threatened, derided or humiliated on account of their . . . sexual orientation."[39] Although a minority, Western nations that legally proscribe speech critical of homosexuality are growing in number.[40]

Even in the absence of laws prohibiting "hate speech" directed against homosexuals, the citizens of many Western nations who speak critically of homosexuality are not necessarily free from governmental harassment. In 1996 New Zealand's Film and Literature Review Board unanimously banned two videos that presented the opinion that homosexuals contribute to the spread of AIDS; the videos also expressed opposition to recognizing gays and lesbians as minority groups entitled to special protections under the

---

"[c]ollecting Bible [verses] on this topic ... makes this hate speech." Dale Hurd, *Swedish Pastor Sentenced for "Hate Speech,"* CHRISTIAN WORLD NEWS, Sept. 10, 2004, *at* http://www.cbn.com/CBNNews/CWN/091004sweden.asp (last visited Jan. 31, 2005); *Swedish Minister Jailed for "Anti-Gay" Speech*, CATH. WORLD NEWS, *at* http://www.cwnews.com/news/viewstory.cfm?recnum=30655 (last visited Feb. 14, 2005); *Censoring the Bible*, NAT'L POST, Aug. 23, 2004. *Id.*

34. Exchange House Travelers Service, *Legislation and Other Milestones*, *at* http://www.exchangehouse.ie/legislation.htm (last visited Jan. 31, 2005).

35. Prohibition of Incitement to Hatred Act of 1989, *at* http://www.irishstatutebook.ie/ZZA19Y1989.html (last visited Jan. 31, 2005). In Ireland's debate over gay marriage, Catholic priests are being warned that distribution of Vatican materials describing homosexuality as a disorder and arguing that Catholics have a duty to oppose such unions may offend the Act. Liam Reid, *Legal Warning to Church on Gay Stance*, IRISH TIMES, Aug. 2, 2003, at 1.

36. Sexuality Information and Education Council of the United States, *Worldwide Discrimination: Laws and Policies Based on Sexual Orientation*, *at* http://www.thebody.com/siecus/report/discrimination.html (last visited Jan. 31, 2005) [hereinafter Sexuality Information].

37. Press Release, Lawlink NSW, Anti-Discrimination Board Annual Report 2000-2001 (Nov. 8, 2001), *at* http://www.lawlink.nsw.gov.au/adb.nsf/pages/launchar (last visited Jan. 21, 2005).

38. Stephanie Porowski, *Homosexual Activists Claim the Vatican Violates "Hate Laws,"* CONCERNED WOMEN FOR AMERICA, Aug. 7, 2003, *at* http://www.cwfa.org/articles/4416/CWA/family (last visited Jan. 31, 2005).

39. James D. Wilets, *The Human Rights of Sexual Minorities: A Comparative and International Law Perspective*, HUM. RTS., at 22, 25 (Fall 1995) (quoting Danish Penal Code art. 266(b)).

40. Jonathan Cohen, *More Censorship or Less Discrimination? Sexual Orientation Hate Propaganda in Multiple Perspectives*, 46 MCGILL L.J. 69, 86 (2000) (noting that "a growing minority of jurisdictions have prohibited sexual orientation hate propaganda, either in a criminal or civil context").

law.[41] The Board claimed that the videos were contrary to New Zealand's Human Rights Act because they depicted homosexuals as "inherently inferior . . . by reason of a characteristic which is a prohibited ground [of discrimination]."[42] A New Zealand Court of Appeal overturned the Board's ban, holding that the Board had authority only to regulate depictions of sex, violence, and crime—and not to censor opinions it found objectionable.[43] After the decision was announced, a parliamentary committee considered whether such speech should be banned.[44] Although no legislation has been produced, some New Zealand legislators are still pushing for a speech code to ban such material.[45]

The South African Film and Publication Board awarded *The Pink Agenda: Sexual Revolution in South Africa and the Ruin of the Family*, a book critical of homosexuality, an "R18" classification, thus preventing its sale to minors.[46] Conceding that the book's authors "draw on the tenets of fundamental Christian teachings . . . [and a] range of extra-religious material, including various studies and statistics[,] to construct an argument against the . . . practice of homosexuality[,]" the Board justified its regulation of the book on the grounds that the authors' argument was "procrustean, ill-substantiated, poorly researched and highly tendentious."[47]

Other examples include the Netherlands, where the Dutch Supreme Court granted an injunction and damages for the tort of discrimination against a religious group that published an antigay article titled "Sodom is Everywhere," which did not mention the plaintiff by name.[48] In Belgium, a civil rights group that receives government funding filed a lawsuit, under that country's antidiscrimination law, against a Catholic cardinal for declaring that, in his opinion, ninety-five percent of homosexuals are "sexual perverts . . . who have a serious problem."[49] In Spain, a Roman

---

41. Living Word Distrib. Ltd. v. Human Rights Action Group Inc., [2000] 3 N.Z.L.R. 570 ¶ 2.

42. *Id.* ¶ 18 (quoting the trial court's description of the Board's reasoning).

43. *Id.* ¶¶ 80-88.

44. Josie Clark, *Anti-Gay Hate Rights Under Review*, N.Z. HERALD, June 22, 2001.

45. *Call for Ban on Anti-Gay Videos*, PRESS N.Z., Mar. 6, 2003, at 3; *Health Harpies Poison Free Speech—Including Their Own*, INDEP. BUS. WKLY., Mar. 12, 2003, *available at* 2003 WL 11410060 (last visited Jan. 27, 2005).

46. Press Release, Film and Publication Board, *Anti-Pink Book Unsuitable for South African Children* (Feb. 28, 2002), *at* http://www.fpb.gov.za/pressrel/28feb2002.html (last visited Jan. 26, 2005).

47. *Id.*

48. Van Zijl v. Goeree, (1990) RvdW Nr.41 (HR Neth).

49. Ambrose Evans-Pitchard, *Cardinal Says Gays Are Perverts but Brothels Are OK*, Jan. 23, 2004, *available at* http://www.theage.com.au/articles/2004/01/22/1074732539474.html; *Rights Group Sues Cardinal Over Gay "Pervert" Comment*,

Catholic Primate is being sued for slander and incitement to discriminate stemming from his comments that same-sex marriage could hurt the country's social security system, which is currently facing insolvency because of low birth rates.[50] Catholic bishops in Ireland have been warned that dissemination of a Vatican publication describing homosexuality as "evil" could result in prosecution under that country's hate speech laws.[51] In 2002 street preacher Harry Hammond was convicted in Britain, fined £300, and required to pay court costs of £350 for violating the Public Order Act of 1986 by publicly displaying a placard with the words "Stop immorality. Stop homosexuality. Stop lesbianism."[52] In 2003 London police engaged in a formal hate-crimes inquiry against a Christian pastor for his view that homosexuals can change their sexual orientation with therapy.[53] Even in the United States, where legal protections for speech are particularly robust,[54] speech codes on the campuses of public universities can approximate the most extreme European laws.[55]

EXPATICA, Jan. 26, 2004, *at* http://www.expatica.com/source/site_article.asp?subchannel_id=48&story_id=4015 (last visited Jan. 26, 2005).

50. *Gay Group Sues After Sermon*, WASH. POST, Jan. 3, 2004, at B07.

51. Reid, *supra* note 35.

52. *The New Totalitarianism on Its Way to the USA*, ISSUES & VIEWS, June 17, 2002, *at* http://www.issues-views.com/index.php/sect/24000/article/24037 (last visited Jan. 26, 2005).

53. Richard Alleyne, *Bishop's Anti-Gay Comments Spark Legal Investigation*, DAILY TELEGRAPH, Nov. 10, 2003, at 2, *available at* 2003 WL 68022030 (last visited Jan. 27, 2005); *Homosexuality and Hate Speech: Defending Moral Principles Is Getting Riskier*, ZENIT NEWS AGENCY, Feb. 14, 2004, *available at* http://www.zenit.org/english/visualizza.phtml?sid=49050; Robert Knight, *When You Hear 'Civil Unions,' Recall Czechoslovakia*, Sweden, Mar. 3, 2004, *at* http://www.worldnetdaily.com/news/article.asp?ARTICLE_ID=37410.

54. Wendel, *supra* note 11.

55. *See, e.g.*, Mike S. Adams, *Hate Speech 101 (Revisited)*, Feb. 14, 2004, *available at* http://www.townhall.com/columnists/mikeadams/ma20040219.shtml (last visited Feb. 4, 2004) (The University of North Carolina at Wilmington's prohibitions against "offensive speech or behavior of a biased or prejudiced nature related to one's personal characteristics, such as race, color, national origin, sex, religion, handicap, age or sexual orientation."). As this Note went to press, the Author learned of the arrest, on October 10, 2004, of four Christians for protesting at a gay-pride rally, conducted on public grounds, in Philadelphia, Pennsylvania. The four were charged with three felony counts—criminal conspiracy, ethnic intimidation, and riot—and five misdemeanor charges, subjecting them, if convicted, to up to forty-seven years in prison. The city prosecutor in the case called the four protestors "hateful" and referred to Biblical passages condemning homosexuality as "fighting words." A municipal judge enjoined the four from protesting within 100 yards of any gay-and-lesbian event. Randy Hall, *Christian Protestors Face 47 Years in Jail for Encounter at "Gay Pride" Event*, CNSNews.com, *available at* http://www.crosswalk.com/news/1301801.html (last visited Feb. 27, 2005). No homosexuals participating in the gay-pride rally were arrested. The four Christians spent one night in jail; the charges against them were dropped in February 2005. Rocky Lore, *Charges Against Christian Protestors Dropped*, Tech News, Feb. 22, 2005, *available at* http://www.wpi.edu/News?TechNews/article.php?id=869 (last visited Feb. 27, 2005).

But perhaps the most extensive legal regime against speech critical of homosexuality exists—surprisingly—in Canada.[56] In September 2003 the Canadian House of Commons passed a bill adding "sexual orientation" to the list of groups protected against hate speech under the nation's criminal law.[57] Violators of the law can be sentenced to up to five years in prison.[58] Further, the Canadian Human Rights Act prohibits "hate speech" against homosexuals from being communicated over telephone lines and computer networks.[59] "Hate speech" disseminated by television or radio can be punished by the Canadian Radio-television and Telecommunications Commission (CRTC).[60] Literature deemed to be hate propaganda can be banned from importation under the Customs Tariff Act.[61] The Canada Post Corporation Act allows the government

---

56. Freedom House ranked Canada twenty-third for press freedom. *How Free Is the Canadian Press?*, NAT'L POST, May 3, 2004, *available at* 2004 WL 76448488 (last visited Jan. 27, 2005). Columnist John Leo has commented that "[i]n Canada, censorship is almost a national sport, like lacrosse and hockey." John Leo, *Well-Meaning Coercion Is a Sign of Our Times*, Oct. 14, 2002, *available at* http://www.townhall.com/columnists/johnleo/jl20021014.shtml (last visited Nov. 18, 2004).

57. R.S.C. 1985, c. C-46, s. 318; *see MPs Extend Hate-Crime Protection*, GLOBE & MAIL (TORONTO), Sept. 17, 2003, *available at* http://www.globeandmail.com/servlet/story/RTGAM.20030917.whate0917_2/BNStory/Front/.

58. R.S.C. 1985, c. C-46, s. 318. The penalty for advocating or promoting genocide against a protected group under § 318 is five years; for speech publicly inciting hatred or speech that willfully promotes hatred, the maximum penalty is two years' imprisonment under § 319. See R.S.C., ch. C-46, §§ 318, 319 (1985). Section 319, subsection (4), also provides for forfeiture of "anything by means of or in relation to which the offense was committed" in additional to "any other punishment imposed." *Id.*

59. The Canadian Human Rights Act, R.S.C., ch. H-6, § 1 *et seq.* (1985), *available at* http://laws.justice.gc.ca/en/H-6/30599.html (last visited Feb. 14, 2005), proscribes some forms of "hate speech" based on, *inter alia*, sexual orientation. The relevant portion of the Act provides:

> It is a discriminatory practice for a person or a group of persons acting in concert to communicate telephonically or to cause to be so communicated, repeatedly, in whole or in part by means of the facilities of a telecommunication undertaking within the legislative authority of Parliament, 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.

Id. The proscription also applies to internet transmissions, but not communications achieved by "means of the facilities of a broadcasting undertaking." *Id.* at § 13(2).

60. Broadcasting Act, ch. 11, 1991 S.C. (Can.).

61. Customs Tariff Act, R.S.C., ch. 41, § 114 (1985) (Can.). The Customs and Excise Branch of Revenue Canada is authorized to prohibit the importation into Canada of goods described in Schedule VII of the Act. Customs Tariff Code 9956 of that schedule includes this provision: "Books, printed paper, drawings, paintings, prints, photographs or representations of any kind that constitute hate propaganda within the meaning of s. 320(8) of the Criminal Code." *Id.* On December 23, 1987, Revenue Canada (Customs and Excise) issued guidelines for the interpretation of this provision.

to prohibit mail delivery when the mails are used to commit an offense.[62] Moreover, all the provinces provide an additional layer of legal protection to homosexuals against such speech,[63] and at least three provinces have shown particular zeal in prohibiting "hate speech" directed against homosexuals.[64]

This Note seeks to fill the void in the academic literature regarding Canadian legal prohibitions against hate speech directed at homosexuals.[65] It begins with a brief overview of the new federal legislation that adds "sexual orientation" to the list of groups protected under Canada's criminal hate speech law. It then describes provincial and federal regulatory bodies' depravations of free speech concerning criticism of homosexuality in an attempt to predict the form that judicial enforcement of the new federal criminal law may take. Finally, this Note ends with a discussion and criticism of the legal and political theories that inform the Canadian judiciary's hostility toward free speech in this area.

II. CANADA'S LEGAL REGIME PROSCRIBING SPEECH CRITICAL OF HOMOSEXUALITY

A. *Federal Criminal Penalties for Speech Critical of Homosexuality*

The history of Canada's federal legislation proscribing hate speech began in 1965, when the Minister of Justice, amid an increase in neo-Nazi activity in Canada and the United States, established the Cohen Committee to study hate speech.[66] When one of its members, Pierre Trudeau, became Prime Minister of Canada in 1970, Parliament acted upon the Committee's unanimous recommendation

---

See id. See also Revenue Canada, Memorandum D9-1-1, as revised Sept. 29, 1994 (outlining procedures for detention of potentially prohibited materials).

62. Canada Post Corporation Act, R.S.C., ch. C-10, § 1 *et seq.* (1985).

63. Sexuality Information, *supra* note 36.

64. Namely, British Columbia, Saskatchewan, and Ontario. *See infra* Part II.B.

65. Only Jonathan Cohen's student note for the *McGill Law Journal* addresses the subject directly. *See* Cohen, *supra* note 40. His treatment, however, is not comprehensive (as it does not consider the provincial laws, federal human rights legislation, or broadcast regulations), nor is it timely (as it was written before the passage of the federal law adding "sexual orientation" to the list of groups protected under Canada's federal hate crime law). *See id.* David E. Bernstein of the George Mason University School of Law has touched on this issue in passing. *See* David E. Bernstein, *Defending the First Amendment from Antidiscrimination Laws*, 82 N.C.L. REV. 223, 241-44, (2003); see also DAVID E. BERNSTEIN, YOU CAN'T SAY THAT! THE GROWING THREAT TO CIVIL LIBERTIES FROM ANTIDISCRIMINATION LAWS 71-72, 156-58 (2003).

66. Mirko Petricevic, *Preaching . . . or Spewing Hate?; A Thin Line Separates the Right of Canadians to Free Expression*, KITCHENER-WATERLOO REC., Feb. 1, 2003, at J8, *available at* 2003 WL 5180300 (last visited Jan. 27, 2005) [hereinafter Petricevic, *Preaching or Spewing*].

to add new offenses to Canada's criminal code.[67] The new law prohibited advocating genocide (s. 318), publicly inciting hatred likely to lead to a breach of the peace (s. 319(1)), and willfully promoting hatred (s. 319(2)) against any "identifiable group . . . distinguished by colour, race, religion, or ethnic origin"—but not sexual orientation.[68]

---

67. R. v. Keegstra, [1990] 3 S.C.R. 697, ¶ 232.

68. R.S.C., ch. C-46, §§ 318, 319 (2004) (Can.). Sections 318 and 319 added new rules to the criminal code prohibiting certain hate-related speech. First, § 318 proscribes the advocacy of genocide:

> [Advocating genocide] (1) Everyone who advocates or promotes genocide is guilty of an indictable offence and liable to imprisonment for a term not exceeding five years.
>
> [Definition of "genocide"] (2) In this section, "genocide" means any of the following acts committed with intent to destroy in whole or in part any identifiable group, namely,
>
> (a) killing members of the group; or
>
> (b) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction.
>
> [Consent] (3) No proceeding for an offence under this section shall be instituted without the consent of the Attorney General.
>
> [Definition of "identifiable group"] (4) In this section, "identifiable group" means any section of the public distinguished by colour, race, religion, ethnic origin or sexual orientation.

R.S.C., ch. C-46, § 318 (1985) (margin notes bracketed). Second, § 319, subsection (1) proscribes the public incitement of hatred:

> [Public incitement of hatred] (1) Everyone 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
>
> (a) an indictable offence and is liable to imprisonment for a term not exceeding two years; or
>
> (b) an offence punishable on summary conviction.

R.S.C., ch. C-46, § 319(1) (1985) (margin note bracketed). Third, § 319, subsection (2) proscribes the willful promotion of hatred:

> [Willful promotion of hatred] (2) Everyone who, by communicating statements, other than in private conversation, willfully promotes hatred against any identifiable group is guilty of
>
> (a) an indictable offence and is liable to imprisonment for a term not exceeding two years; or
>
> (b) an offence punishable on summary conviction.

R.S.C., ch. C-46, § 319(2) (1985) (Can.) (margin note bracketed). The willful promotion of hatred is limited by specified defenses:

> [Defences] (3) No person shall be convicted for an offence under subsection (2)
>
> (a) if he establishes that the statements communicated were true;
>
> (b) if, in good faith, the person expressed or attempted to establish by an argument an opinion on a religious subject or an opinion based on a belief in a religious text;

Between 1990 and 1996 six unsuccessful attempts were made by legislators to expand the definition of "identifiable group" to include homosexuals.[69] But in 2004 the Parliament passed bill C-250, extending the reach of sections 318 and 319 by adding "sexual orientation" to the list of bases upon which certain groups could be protected.[70]

The amendment's originator, Svend Robinson, an openly gay former member of the House of Commons, said that the legislation was intended to protect gays from violence.[71] This justification,

---

(c) if the statements were relevant to any subject of public interest, the discussion of which was for the public benefit, and if on reasonable grounds he believed them to be true; or

(d) if, in good faith, he intended to point out, for the purpose of removal, matters producing or tending to produce feelings of hatred toward an identifiable group in Canada.

R.S.C., ch. C-46, § 319(3) (1985) (margin note bracketed). For purposes of proscribing speech and conduct as the public incitement or willful promotion of hatred, the following definitions are provided:

[Definitions] (7) In this section,

"communicating" includes communicating by telephone, broadcasting or other audible or visible means;

identifiable group" has the same meaning as in section 318;

"public place" includes any place to which the public have access as of right or by invitation, express or implied;

"statements" includes words spoken or written or recorded electronically or electro-magnetically or otherwise, and gestures, signs or other visible representations.

R.S.C., ch. C-46, § 319(3) (1985) (Can.) (margin notes bracketed or omitted). Section 319, subsection (4) proscribed forfeiture beyond the other punishments laid out for committing offenses under Sections 318, 319(1), or 319(2):

[Forfeiture] (4) Where a person is convicted of an offence under section 318 or subsection (1) or (2) of this section, anything by means of or in relation to which the offence was committed, on such conviction, may, in addition to any other punishment imposed, be ordered by the presiding provincial court judge or judge to be forfeited to Her Majesty in right of the province in which that person is convicted, for disposal as the Attorney General may direct.

R.S.C., ch. C-46, § 319(4) (1985) (margin note bracketed).

69. Cohen, *supra* note 40, at 79.

70. The House of Commons approved the amendment, bill C-250, in September 2003 by a vote of 141-10. Darren Yourk, *Svend Robinson Admits to Theft*, GLOBE & MAIL, Apr. 15, 2004, *available at* 2004 WL 63966534. The Canadian Senate approved the bill, by a vote of 59-11, on April 28, 2004. Carol Lowes, *Hate Speech Quandary*, CHRISTIANITY TODAY, July 2004, *available at* http://www.christianitytoday.com/ct/2004/007/1.18.html (last visited Feb. 14, 2005). Royal assent was given by Canada's governor general, the representative of Queen Elizabeth II, on Apr. 29, 2004. Senator Landon Pearson, *Legislative Review: 3rd Session – 37th Parliament*, CHILDREN & THE HILL, Spring 2004, *at* http://www.sen.parl.gc.ca/lpearson/htmfiles/hill/25_htm_files/v25_default.htm (last visited Feb. 14, 2005).

71. Robinson stated in introducing the bill to the House of Commons that "[t]oo many gay and lesbian people are victims of crimes based solely on their sexual orientation. . . . This bill would send out a strong signal that Canada condemns all

however, is dubious: as critics of the amendment have shown, homosexuals—like all Canadians—were adequately protected before the amendment not only from crimes of violence, but also from the advocacy of violence against them.[72] Section 718.2 of the Criminal Code allows heightened punishment for hate crimes, including those motivated by the victim's sexual orientation.[73] Section 22 imposes criminal liability on anyone who counsels or advocates violence against any person when that counsel is somehow acted upon.[74] Moreover, under Section 810, anyone who fears that another will cause him personal injury or harm to his property can ask a judge to force the defendant into a recognizance to keep the peace; those refusing to enter the recognizance or violating its conditions can be imprisoned.[75] Given that these protections existed before the

---

violence including violence directed at gay, lesbian, bisexual and transgendered people." Mr. Svend Robinson, *Moved for Leave to Introduce Bill C-415, An Act to Amend the Criminal Code (Hate Propaganda)*, 37th Parliament, Nov. 22, 2001, *at* http://www.parl.gc.ca/37/1/parlbus/chambus/house/debates/117_2001-11-22/han117_1040-e.htm (last visited Jan. 21, 2005). Upon passage of the bill in the Commons, he stated "[t]he Parliament of Canada has said as gay and lesbian people, our lives are just as important, our safety is just as important as the lives of racial, religious and ethnic minorities." Kim Lunman, *MPs Vote to Protect Gays Under Hate Laws*, GLOBE & MAIL (TORONTO), Sept. 18, 2003, at A7.

72. *See, e.g.*, Catholic Civil Rights League, *Summary of Objections to Bill C250*, Sept. 8, 2003, *at* http://www.ccrl.ca/index.php?id=139 (last visited Jan. 26, 2005) (stating that "[e]xisting law is sufficient to stop people from advocating violence against [homosexuals]" and pointing to Sections 22 and 718.2 of the Criminal Code of Canada in support).

73. R.S.C., ch. C-46, § 718.2 (1985) (Can.). The pertinent portion of § 718.2 provides:

> A court that imposes a sentence shall also take into consideration the following principles: (a) a sentence should be increased or reduced to account for any relevant aggravating or mitigating circumstances relating to the offence or the offender, and, without limiting the generality of the foregoing, (i) evidence that the offence was motivated by bias, prejudice or hate based on race, national or ethnic origin, language, colour, religion, sex, age, mental or physical disability, sexual orientation, or any other similar factor....

Id.

74. R.S.C., ch. C-46, § 22 (1985) (Can.). This section provides:

> [Person counseling offence] (1) Where a person counsels another person to be a party to an offence and that other person is afterwards a party to that offence, the person who counselled is a party to that offence, notwithstanding that the offence was committed in a way different from that which was counselled.
>
> [Idem] (2) Every one who counsels another person to be a party to an offence is a party to every offence that the other commits in consequence of the counselling that the person who counselled knew or ought to have known was likely to be committed in consequence of the counselling.
>
> [Definition of "counsel"] (3) For the purposes of this Act, "counsel" includes procure, solicit or incite.

Id.

75. R.S.C., ch. C-46, § 810 (1985) (Can.).

amendment's passage—and that other vulnerable groups (such as women, the elderly, and the mentally and physically handicapped) were not extended the same protections under the amendment as homosexuals—it would appear that Robinson's genuine rationale was different from his stated rationale of protecting gays from violence.

Columnist John Leo argues that "[t]he churches seem to be the key target of C-250";[76] whether that claim is correct or not, many within Canada's evangelical community fear being punished under the new law. One minister in Guelph, Ontario, stated that the law would chill the speech of religious believers because of the possibility of criminal punishment determined by an untoward judiciary: "The bill will be used, I fear, by activist judges to censor the Bible and the Christian message on morality vis-à-vis homosexuality," he said.[77] The President of the Evangelical Fellowship of Canada (EFC) stated that "[w]e are deeply concerned about the chilling effect this legislation may have. We . . . want to ensure that . . . prohibiting hate speech does not criminalize the legitimate expression of religious belief. . . ."[78] Another official of the EFC claims that the new law is affording homosexual-rights activists a method of intimidating clergy: Christian ministers, she claims, are being harassed through menacing letters, phone calls, and e-mails, causing them to fear that their sermons are being monitored.[79] Some Christians worry that teaching the Bible's condemnation of homosexuality to their children could lead to civil liability if their children repeat those teachings in a public school.[80] Conservative Christians perhaps have reason to fear: as another evangelical leader noted, "[t]he wording of the legislation is so vague, there is no way of knowing how it will be interpreted."[81]

Other religious communities outside Christianity are also feeling the pinch of the new law.[82] Even outside religious circles, the new law seems to be chilling speech. For example, Dominic Tse, a Canadian of Chinese dissent, stated:

---

76. John Leo, *Stomping on Free Speech*, U.S. NEWS & WORLD REP., Apr. 19, 2004, at 14.

77. Mirko Petricevic, *Holy Words or Weapons; Hot Debate Over Hate Propaganda Bill Pits Conservative Christians Against Groups That Say Homosexuals Need Protection*, KITCHENER-WATERLOO REC., Sept. 13, 2003, at J8, *available at* 2003 WL 63086211 (last visited Feb. 14, 2005) [hereinafter Petricevic, *Holy Words or Weapons*].

78. Lowes, *supra* note 70.

79. Mary Rettig, *Canada's Hate Speech Law to Impact Same-Sex Marriage Debate*, May 24, 2004, *at* http://www.crosswalk.com/news/1264606.html (last visited July 12, 2004).

80. Leo, *supra* note 76.

81. Rettig, *supra* note 79.

82. *How Free Is the Canadian Press?*, *supra* note 56 (noting that "[o]bservant Christians and other religious groups fear the new law will eventually be read to ban the Bible, the Koran and other holy texts as hate literature and criminalize sermons and religious publications that condemn homosexuality as sinful").

> The Chinese culture has a long history of certain morals that we hold regardless of our religious affiliation. We believe some acts of sexual behavior are immoral and we want to make sure we have the right to have public debate on these issues. . . . We also know what it means to live under a society where you cannot speak your mind.[83]

Academicians also seem to be feeling the effect: some university professors are scared that the law will threaten free inquiry in the classroom and in their own publications.[84] Business owners might also be affected: one Member of Parliament (MP) fears that hotels may not be willing to risk criminal punishment and the expense of putting on a defense in order to place Gideon Bibles in their establishments.[85] The same concerns are affecting other businesses as well, including media outlets: in September 2003, *The Telegram*, Newfoundland's province-wide newspaper, refused to print a letter to the editor, signed by ten people, that expressed opposition to a local Catholic priest's teaching on homosexuality that deviated from official Church doctrine, because of legal advice that the letter "might be actionable under Canadian hate literature legislation."[86] Liberal Senator Anne Cools worries that the law exposes "millions of Canadians to criminal prosecution who hold moral opinions about sexuality":[87] with the current government of Liberal Prime Minister Paul Martin poised to introduce federal legislation authorizing gay

---

83. *Thousands Protest Inclusion of Sexual Orientation in Hate Propaganda Laws*, CANADIAN PRESS, Apr. 18, 2004, *available at* 2004 WL 76863578.

84. For example, Paul Nathanson, a professor of religious studies at McGill University in Montreal and a Jewish homosexual, opposed C-250: "What constitutes hatred [under the new law]? It seems to be anything that makes someone feel uncomfortable. But if we aren't free in the classroom, what's the point of having a university?" Steven Weatherbe, *With New Law, Is Christianity Hate Speech in Canada?*, NAT'L CATHOLIC REG., May 16-22, 2004, *available at* http://www.ncregister.com/archive/May/0516lead3.htm (last visited Jan. 26, 2005). John Stackhouse, a professor of religion and society at Regent College in Vancouver, worries that scholarly criticism of both homosexuality and laws favorable to homosexuals will be silenced by exposure to both criminal prosecution under the new law and civil litigation. *Id.*

85. Sharon Boase, *Protection of Gays Pits the Bible vs. Bill C-250*, HAMILTON SPECTATOR, Feb. 8, 2003, *available at* 2003 WL 4550762 (last visited Feb. 14, 2005) Boase quotes MP Vic Lowes as saying:

> A homosexual activist could go to the Holiday Inn, say, and tell them, "We'll sue you for the removal of those Bibles because they constitute hate literature." A commercial organization like that isn't going to argue with that kind of group. They'll simply remove it voluntarily to avoid the lawsuit.

Id.

86. Catholic Civil Rights League, *supra* note 72.

87. *Homosexual Hate Crime Signed Into Law; Chilling Effect on Free Speech, Religion and Importing Materials*, LIFESITENEWS.COM, Apr. 29, 2004, *at* http://www.lifesite.net/ldn/2004/apr/04042901.html (last visited Jan. 31, 2005) (quoting Senator Anne Cools) [hereinafter *Signed Into Law*].

marriage in January 2005,[88] Cools worries that the new law will effectively silence from the debate "those who hold opinions that homosexuality is sinful, immoral or unhealthy."[89]

Whatever chilling effect exists seems to stem from two perceived defects of the new law: (1) the vagueness of its language and (2) the insufficiency of its defenses. One cause of vagueness is the lack of a definition of "hatred" under § 319.[90] Janet Epp Buckingham of the EFC argues that "[w]ithout a clear definition of what is criminal hatred, it is ambiguous what public statements will be considered criminal."[91] Legal scholars note that the Supreme Court, in interpreting § 319 (without the new amendment), set the bar "pretty high": for a conviction to be achieved under that provision, the crime would have to involve "the most virulent form of vilification. . . ."[92] Amnesty International Canada echoes this view: "a conviction will result in only the clearest cases and most egregious circumstances."[93] Still, the Parliament's failure to provide a firm definition of hatred in § 319 seems suspicious in light of the fact that the term "genocide," which is proscribed in § 318, is carefully defined. Moreover, given that, as one official of the EFC has stated, "Christians have seen their rights to dissent restricted by case after case in the courts[,]"[94]

---

88. *Liberals to Introduce Same-Sex Marriage Bill in January*, CBC NEWS, Dec. 10, 2004, *available at* http://www.cbc.ca/story/canada/national/2004/12/09/martin-samesex041209.html. At the time this Note went to press, the government had introduced Bill C-38, a bill to extend civil marriage to gay couples. A vote of the House of Commons was expected by June 2005. Jason Misner, *Carr "Swamped by Comments" About Bill C-38; Politicians Stand Their Ground on Gay-Marriage Legislation*, BURLINGTON POST, March 18, 2005, *available at* 2005 WL 4198666.

89. Steve Weatherbe, *supra* note 84.

90. *Compare* § 319, which proscribes both "public incitement" and "willful promotion" of hatred without expressly defining hatred, R.S.C., ch. C-46, § 319(1), (2), (7) (1985), *with* § 318, which proscribes the advocacy of genocide and expressly defines genocide, R.S.C., ch. C-46, § 318(1), (2) (1985) (Can.).

91. *Signed Into Law*, *supra* note 87.

92. Petricevic, *Preaching or Spewing Hate*, *supra* note 66 (quoting Professor Ed Morgan of the University of Toronto and noting that the Supreme Court of Canada in *Keegstra*, the landmark case upholding the constitutionality of § 319, stated that hate "connotes emotion of an intense and extreme nature that is clearly associated with vilification and detestation"). This point is echoed by supporters of the law and gay activists. For instance, Laurie Arron, director of advocacy for EGALE Canada, the nation's leading organization for the promotion of gay rights, has said "[t]he threshold that the Criminal Code places on hate speech is so high that anybody expressing a religious opinion is not going to be caught by this law." *Thousands Protest Inclusion of Sexual Orientation in Hate Propaganda Laws*, CANADIAN PRESS, Apr. 18, 2004, *available at* 2004 WL 76863578 (last visited Feb. 14, 2005). Arron has also stated that it is "laughable" to believe that the new law will stifle debate about same-sex marriage. *Id.* Professor Morgan denies that portions of the Bible could be deemed to be hate literature under the new law because "it's not written with a willful intent to promote hatred." Petricevic, *Holy Words or Weapons*, *supra* note 77.

93. Lowes, *supra* note 70.

94. *Id.* (citing specifically the case of Hugh Owens, discussed below in Part IIB of this Note). This observation seems to be a common refrain among Christian

leaving the definition of hatred to judicial interpretation is not the safest course to protecting speech or religious liberties. Failure to define the term formally increases uncertainty of prosecution under the law and thus to some extent chills speech.

Although less important for the purposes of this Note, the term "sexual orientation" is also not defined in either § 318 or § 319. This has led some to worry that virulent criticism of any sexual behavior is potentially prohibited under the law. "[W]e are going to see pedophiles try to use this down the road as a protection because that is their sexual orientation," said one critic of the law.[95] John Leo suggests that "since C-250 does not mention homosexuality but focuses broadly on 'sexual orientation,' Canada's free-wheeling judiciary may explicitly extend protection to many 'sexual minorities.'"[96] Proponents of C-250 deny that this is an ambiguous feature of the new law. Svend Robinson, for example, claims that sexual orientation has "not once—never— . . . been . . . interpret[ed to mean anything] other than homosexual[s], heterosexual[s], bisexual[s] or in some cases the transgendered"; he also notes that the term "sexual orientation" has been recognized as meaning this much and no more by every level of government throughout the world for decades.[97] Still, the lack of a formal definition increases uncertainty of being prosecuted under the law, which in turn increases the law's chilling effect on speech.

The perceived insufficiency of the defenses listed in § 319(3) also concerns speakers potentially at risk of being prosecuted under the new law. Section 319(3) lists four defenses that extend constitutional protection to "hate speech":[98] (1) the assertion of a truthful statement;[99] (2) good-faith expression of a view on a religious subject or an opinion based on a religious text;[100] (3) assertions for the benefit

---

conservative leaders. For example, Brian Rushfeldt, executive director of Canada Family Action Coalition, has said "[the courts] pretty consistently override the rights of religion in favour of the rights of homosexuality." Petricevic, *Holy Words or Weapons*, *supra* note 77. Royal Hamel, a pastor in Guelph, Ontario, similarly stateed that judges cannot be trusted to protect religious liberties when those rights clash with those of homosexuals. *Id.*

95. Petricevic, *Holy Words or Weapons*, *supra* note 77 (quoting Brian Rushfeldt, executive director of the Canada Family Action Coalition).

96. Leo, *supra* note 76 (noting also that "[p]edophilia and sadism are among the conditions listed by the American Psychiatric Association under 'sexual orientation'").

97. Petricevic, *Holy Words or Weapons*, *supra* note 77.

98. *See* R.S.C., ch. C-46, § 319(3) (1985) (Can.); *see also* Stephen Brooks, *Hate Speech and the Rights Cultures of Canada and the United States*, 49th Parallel, *at* http://www.49th parallel.Bham.ac.uk/current/brooks.htm (last visited July 12, 2004). All the defenses listed in § 319(3) place the burden of proof on the accused. *See* R. v. Keegstra, [1990] 3 S.C.R. 697, ¶ 337 (noting that "the onus lies on the accused to prove these defences").

99, R.S.C., ch. C-46, § 319(3)(a) (1985) (Can.).

100. R.S.C. § 319(3)(b).

of the public, based on grounds reasonably believed to be true;[101] and (4) good faith attempts to point out hateful ideas for the purpose for their removal for discourse.[102] Religious groups opposed to the new law object that the defenses listed in § 319(3) expressly apply only to the proscription against the willful promotion of hatred in § 319(2), and not to the provision against public incitement of hatred in § 319(1) or to the advocacy of genocide in § 318.[103] Even some strong supporters of the law express the same criticism.[104] The lack of an extension of the listed defenses to public incitement of hatred has especial bite with those concerned with free speech and religious liberties.[105] As one official of the EFC states:

> The church is a public place, so if a pastor preaches a sermon that a gay or lesbian person feels is inciting hatred, . . . that might fall under this criminal code provision, and the defense does not apply to that. ... [W]e're . . . concerned that . . . religious freedom won't be protected.[106]

Moreover, it would appear that the first and third defenses—which require the speaker to establish the truth of his or her speech—would not be applicable to moral criticisms of homosexuality. Nor would the fourth defense have any bearing on such speech.

Considerable debate exists about whether the only remaining defense—the religious-exception defense—will be effective even under § 319(2). Supporters of the new law view it as wholly adequate.[107] But critics of the law note that the speaker must speak "in good faith" for

---

101. R.S.C. § 319(3)(c).

102. R.S.C. § 319(3)(d).

103. Art Moore, *"Bible as Hate Speech" Bill Nearing Vote*, WORLDNETDAILY.COM, Sept. 17, 2003, *at* http://www.wnd.com/news/article.asp?ARTCLE_ID=34639 (noting that "opponents point out the law addressed by [MP Svend] Robinson's amendment spells out three different types of actions or speech considered criminal, and only one can be excused by a religious defense") [hereinafter Moore, *Nearing Vote*].

104. *See, e.g.*, Marvin Kurtz, *The Free Speech Tipping Point*, GLOBE & MAIL (TORONTO), Sept. 24, 2003, at A25 (arguing "the defence should also apply to the related charge of public incitement of hatred").

105. *See, e.g.*, Petricevic, *Holy Words or Weapons*, *supra* note 77 (noting one Christian minister's complaint that the religious-exception defense does not apply to § 319(1)).

106. Rettig, *supra* note 79 (quoting Janet Epp Buckingham of the Evangelical Fellowship of Canada, who also claims that gay activists are already using the new law in this manner to intimidate clergy from teaching Biblical proscriptions against homosexuality to their congregations).

107. For example, Svend Robinson, the amendment's originator, has stated that the religious exception removes all legitimate concern that religious liberties may be infringed by the new law and that such concerns are "a mask for homophobia for people who don't want to be honest about the real reason why they don't want to include sexual orientation in the law." *"Bible As Hate Speech" Signed Into Law*, WORLDNETDAILY.COM (Apr. 30, 2004), *at* http://www.worldnetdaily.com/news/article.asp?ARTICLE_ID=38268.

the exception to apply;[108] their fear is that this requirement, to a considerable degree, narrows or vitiates the exception.[109] Many point to the treatment Ontario courts gave the exception in the prosecution of Mark Harding, a Christian minister, who was convicted under § 319(2) for hateful statements he made against Muslim Canadians and who invoked, unsuccessfully, the religious exception defense under § 319(3)(b). Although the trial and appellate courts in Harding's case seem to have reasonably and properly concluded that a large corpus of hateful speech cannot be immunized by the inclusion of a few unrelated references to a religious text,[110] the courts signaled an intent to interpret the religious exception narrowly. "It will be a rare case where one who intends to promote hatred will be found to be acting in good faith, or upon honest belief," wrote the judge in Harding's first appeal.[111] One opponent of the new law objects that "[w]hat they are saying is, that if you willfully promote hatred, you can use this defense, but no one in good faith would promote hatred[,] [s]o that 'good faith' clause almost eliminates the defense."[112] Many complain that this court's failure to interpret the exception more liberally is chilling speech.[113]

Another perceived failure that is perhaps chilling speech stems from the courts' interpretation of § 319(2)'s requirement that the offending speech be made "other than in private conversation...."[114] Critics point to a recent Ontario case in which the defendant was convicted and sentenced to eighteen months' imprisonment for sending hateful letters to several politicians.[115] Given that the letters were sealed, they should have qualified as private communications. But the court reasoned that because the communications were made

---

108. R.S.C., ch. C-46, § 319(3)(b) (1985) (Can.).

109. *See, e.g.*, Christian Coalition International (Can.), *Senate Version Form Letter Against Bill C-250, at* http://www.ccicinc.org/documents/formletterC250.html (last visited Feb. 14, 2005) (arguing that "the courts have signaled that they would provide a narrow interpretation to the [religious exception] defense").

110. *See* Regina v. Harding, [2001] D.L.R. 686, ¶ 46 (Ontario Ct. App. 2001) (quoting approvingly of the trial court's rejection of Harding's invocation of the religious-exception defense by reasoning that "religious opinion [cannot] be used with immunity as a Trojan Horse to carry the intended message of hate forbidden by § 319").

111. Regina v. Harding, [2001] O.R. 714, ¶ 16 ("paraphras[ing] . . . Chief Justice Dickson's statement in the Keegstra case[,]" discussed below in Part III of this Note).

112. Art Moore, *The Bible As "Hate Literature?"* (Oct. 21, 2002), *at* http://www.worldnetdaily.com/news/article.asp?ARTICAL_ID=29328 (quoting Bruce Cleminger of the Evangelical Fellowship of Canada).

113. *See, e.g.*, Boase, *supra* note 85 (noting one EFC official's concerns about how the courts interpreted the religious-exception defense in *Harding* and that the law will chill speech).

114. R.S.C., ch. C-46, § 319(2) (1985) (Can.).

115. Terry Heinrichs, *Hate Speech, Broadly Defined*, NAT'L POST, July 21, 2004, *available at* 2004 WL 85153360 .

public by the letters' recipients, the private-communication exception embedded in § 319(2) did not apply.[116]

Supporters of the new law point to a built-in safeguard that, they say, protects speech—namely, provisions in both § 318 and § 319 that require the consent of a provincial attorney general as a condition precedent for prosecution under the law.[117] But critics make several arguments that this safeguard for speech is insufficient. First, the consent requirement in § 319 extends only to willful promotion of hatred under § 319(2) and not to the public incitement of hatred under § 319(1) or to genocide under § 318.[118] Moreover, the safeguard is only as strong as a provincial attorney general's commitment to free speech. One scholar points to the prosecution and conviction of Mark Harding, described above, as one instance of the insufficiency of the consent provision: "[C]ases like Harding's seem to suggest it's not permissible to comment vigorously on world events."[119] Others argue that some provincial attorneys general "seem enthusiastic about applying Canada's hate speech law" and call some prosecutions under the law "frightening" and "gratutitous[,]" bordering on—if not crossing the line into—prosecutorial abuse.[120] The situation in Ontario is such that one newspaper editorialist commented "one can only wonder what new speech-suppressive arguments the Crown will advance" next.[121]

---

116. *Id.*

117. R.S.C., ch. C-46, §§ 318(3), 319(6) (1985) (Can.). One legal scholar argues that these provisions show that the Parliament is "trying extremely hard to make sure that there are checks and double checks so that we get the right balance between freedom of speech and prosecution of hate propaganda." Petricevic, *Preaching or Spweing*, *supra* note 66 (quoting Professor Ed Morgan of the University of Toronto).

118. "No proceeding for an offence under subsection [319](2) shall be instituted without the consent of the Attorney General." R.S.C., ch. C-46, § 319(6) (1985) (Can.).

119. Petricevic, *Preaching or Spewing*, *supra* note 66 (quoting Professor Robert Martin of the University of Western Ontario Faculty of Law).

120. Heinrichs, *supra* note 115 (pointing to the prosecution in *R. v. Elms* of an Ontario man for selling racists CDs at a music concert). Heinrichs notes:

> To secure conviction, the Crown would have had to prove both that Mr. Elms "communicated" the relevant statements and that he intended to promote hatred by doing so. But the Crown couldn't even prove the defendant had any knowledge of the lyrics. Instead, it relied on the strained argument that the "communication" element, as well as the law's intent requirement, could be satisfied by a simple showing that the accused "displayed," "offered for sale" or "sold" the CDs in question.
>
> Mr. Elms was ultimately acquitted. But the Crown's attempt to expand the reach of the law from those who wrote the lyrics . . . to a young peddler trying to make a buck . . . is a frightening development: Its reasoning would render criminally suspect a bookseller or librarian who made available a historical text such as *Mein Kampf*.

Id.

121. *Id.* (criticizing Ontario Attorney General Michael Bryant).

How rigorously the new federal law proscribing speech critical of homosexuality will be enforced—and what real effect it will have on speech—remains to be seen. But the Canadian Supreme Court's jurisprudence does not bode well for the protection of free speech in this area: the constitutionality of § 319, without the new amendment, was confirmed by the Supreme Court of Canada in *R. v. Keegstra* in 1990 and consistently affirmed in subsequent decisions.[122] Moreover, provincial proscriptions against "hate propaganda" regarding homosexuals—which are older than the federal provision and have been enforced—have not generally favored the protection of free expression either.[123] Provincial deprivations of free speech in this area may very likely signal the form that enforcement of the new federal law will take.

B. *Provincial Prohibitions of Speech Critical of Homosexuality*

Human rights legislation intended to ensure the equality of minorities in society—including homosexuals[124]—exists in every Canadian province, as does a powerful agency in each to enforce it.[125] The purpose of these enforcement bodies—usually called human rights commissions, whose members are unelected[126]—is, as one such commission described its mandate, to "reduce discrimination and promote social change leading to equal opportunity for all."[127] But in the course of enforcing provincial antidiscrimination laws, these commissions, many argue, have overstepped their proper bounds by

---

122. R. v. Keegstra, [1990] 3 S.C.R. 697; see, e.g., Ross v. N.B. Sch. Dist. No. 15, [1996] S.C.R. 825.

123. *See infra* Part II.B.

124. The Supreme Court of Canada ruled in *Vriend* that the provinces are required under the federal *Canadian Charter of Rights and Freedoms* to include homosexuals as a protected group under their Human Rights Codes. Vriend v. Alberta, [1998] S.C.R. 493.

125. United Nations Association in Canada, *Canada and Human Rights, at* http://www.unac.org/rights/actguide/canada.html (last visited Jan. 7, 2005) [hereinafter UNAC]. Human rights legislation also exists on the federal level in Canada; jurisdiction between the federal government and the provinces is determined by the constitutional division of powers—for example, federal human rights law controls in such areas as banking, national airlines, railways, and federal government employees, while provincial human rights law controls in such areas as public education, city government, restaurants, most businesses, and housing. *See* Canadian Human Rights Reporter, *Human Rights Primer, at* http://www.cdn-hr-reporter.ca/basics.htm (last visited Feb 2, 2004); see also UNAC, *supra.*

126. Ted Byfield, *Human Rights Commissions Becoming Too Powerful,* FIN. POST, Apr. 24, 1993 at S3.

127. Ontario Human Rights Commission, *About Us, at* http://www.gov.mb.ca/hrc/english/aboutus.html (last visited Jan. 7, 2005). The Ontario Human Rights Commission describes its role as "the elimination of discrimination in society. . . . " *About the Commission, at* http://www.ohrc.on.ca/english/about/index. shtml (last visited Jan. 7, 2005).

infringing on speech liberties and have otherwise become tools of secular-Left social engineering: "these commissions have taken it upon themselves to set forth the ethics and moral values of a new society."[128] One critic complains that, under the auspices of these commissions, "Canada is a pleasantly authoritarian country."[129] Others have gone further by describing these commissions as instruments of tyranny: "[t]he Ontario Human Rights Commission is possibly the closest thing Ontario has ever had to its own Gestapo," said one critic.[130] Another referred to them as "our version of the Inquisition" because their "ham-fisted totalitarianism [has made] ... 'offensive' in Canada synonymous with 'illegal.'"[131] Moreover, other agencies of the provincial governments have also infringed on free discourse in the name of promoting equality. The following is but a sample of the most noteworthy examples of provincial free-speech deprivations in this area.

1. British Columbia

The British Columbia College of Teachers (BCCT), an organ of the British Columbia government charged with the accreditation and regulation of that province's teaching profession,[132] in May 2003 found Chris Kempling, a public high school teacher and counselor, guilty of "conduct unbecoming a College member."[133] The BCCT determined that various letters expressing criticism of homosexuality that Kempling had written to newspapers, city officials, and

---

128. Byfield, *supra* note 126 (describing the opinion of REAL Women of Canada, a conservative political organization); *see also* Timothy Bloedow, *Human Rights Commission Likened to Gestapo*, OTTAWA TIMES, Dec., 1995, *available at* http://www.freedomparty.on.ca/freedomflyer/ff29_13.htm (last visited Jan. 7, 2005) (stating REAL Women's position that the human rights commissions "are almost exclusively composed of left-wing social engineers" whose members' beliefs reflect a "pro-homosexual bias and left-wing ideology"). REAL cites the example of a former mayor of London, Ontario, who was found guilty of discrimination against homosexuals by the Ontario Human Rights Commission because she refused to declare Gay Pride Day. REAL Women of Canada: Canada's Alternative Women's Movement, *Christians at Stake, at* http://www.realwomenca.com/newsletter/1999_Nov_Dec/article_4.html (last visited Jan. 7, 2005).

129. Leo, *supra* note 96 (quoting Alan Borovy, general counsel of the Canadian Civil Liberties Association).

130. Bloedow, *supra* note 128.

131. Hunter, *supra* note 18 (internal parentheses and punctuation omitted).

132. Trinity W. Univ. v. B.C. Coll. of Teachers, [1997] A.C.W.S. 62, at ¶ 23.

> It is the object of the college to establish, having regard to the public interest, standards for the education, professional responsibility and competence of its members, persons who hold certificates of qualification and applicants for membership and, consistent with that object, to encourage the professional interest of its members in those matters.

133. Press Release, *supra* note 16.

community leaders—none of which were introduced into Kempling's school or any classroom—were "derogatory and discriminatory" against gays.[134] There was no evidence of any controversy or harm at Kempling's school.[135] The BCCT, however, ruled that such evidence was unnecessary to find Kempling guilty of conduct unbecoming a member of the college.[136] Kempling called this decision, and its subsequent affirmance by the B.C. Supreme Court, "a serious blow to freedom of speech . . . and religion. . . . It means that teachers who happen to be Christians or who belong to other religions proscribing homosexuality may not comment publicly on the issue."[137]

Kempling started his letter-writing campaign in response to the following events:

> In August of 1996, I attended a Ministry of Education sponsored workshop in Vancouver on Youth at Risk. One of the sessions was entitled "Gay, Lesbian, and Bisexual Youth at Risk," and I thought it would be a good idea for me to find out more about this student group. In the session, the presenters . . . handed us a copy of *Xtra West* newspaper, the paper of the gay community in Vancouver, and recommended we use it in our classrooms and counseling office waiting rooms. They said, "But you may not want to look at the classified ads." Of course we all did. I was appalled by what I read. There were numerous advertisements for bathhouses, which are notorious venues for orgies and perversion. The personal ads were absolutely pornographic with people describing their genitalia in great detail and requesting partners for casual sex, including sex involving urine and feces. They gave us another resource booklet with addresses and phone numbers of programs and services for gay youth. I was a little confused by one called "Vancouver Jack" and asked what that was. I was told it was a masturbation club. When I realized that their workshop presenters actually wanted us to provide pornographic material to students and encourage them to join masturbation clubs, I was greatly disturbed and started writing letters privately, to my union and to the Minister of Education. Neither was concerned. When I realized that no one in authority was prepared to take any action, I decided to educate myself, and start writing directly to the public, to make parents aware of what was being proposed for their children.[138]

Kempling's main contention in his letters was that "[g]ay people are seriously at risk . . . because of their sexual behavior."[139] He argued two main points to support this contention: (1) that most homosexual

---

134. J. Fraser Field, *Chris Kempling and the BCCT*, *at* http://catholiceducation.org/articles/education/ed0167.html (last visited Nov. 16, 2003).

135. Kempling, *April 5th Message*, *supra* note 15.

136. Moore, *Nearing Vote*, *supra* note 103.

137. Chris Kempling, *A Message From Chris Kempling—Feb. 4, 2004*, British Columbia Parents and Teachers for Life, *at* http://www.bcptl.org/rights.htm (last visited Jan. 26, 2005).

138. Kempling, *Speech May 12*, *supra* note 22.

139. Frank Stirk, *Court Rejects Kempling's Appeal*, *at* http://www.canadianchristianity.com/cgi-bin/na.cgi?nationalupdates/040211court (last visited Dec. 28, 2004).

relationships generally are unstable and promiscuous and (2) that gay sex poses serious health risks.[140] In support of his arguments, Kempling relied on numerous scientific studies. Among them was a 1980 study published in the *New England Journal of Medicine* finding that its homosexual participants had, on average, 100 sex partners a year;[141] a 1982 study by the U.S. Center for Disease Control finding that the homosexual men with AIDS who were studied had an average of 1,100 sex partners, most of whom were strangers;[142] a 2001 study done in Holland that compared the mental illness rates of heterosexuals and homosexuals, finding that gays had incident rates three to nine time higher than that of the general population;[143] and a 1994 social scientific study that found the average age of death was forty-two for gay men (thirty-eight if AIDS was the cause of death) and forty-four for lesbians.[144]

Also objectionable to the BCCT—for whatever reason—was Kempling's claim that homosexuals constitute only two to three percent of the population[145]—as opposed ten percent, the figure claimed by Canada's chief homosexual-rights lobby and perpetuated by the BCCT.[146] Kempling relied on three different studies to substantiate his figure.[147]

The BCCT also objected to Kempling's claim that there is no "definitive proof" that homosexuality is inherited or unchangeable.[148] Kempling relied not only on anecdotal evidence to support his argument, but also on studies published by the American Psychological Association and the *Journal of Marriage and Family Therapy* showing the success of so-called "reparative therapy," by which homosexuals seek "conversion" into heterosexuals.[149] Kempling also relied on a new study by Dr. Leon Spitzer, a "champion" of the homosexual rights movement who was largely responsible for removing homosexuality from the American Psychological

---

140. Janet Steffenhagen, *BC Teachers' College Opposes Teacher's Homosexuality Views*, CANADIAN PRESS, Apr. 16, 2003, *available at* 2003 WL 18920318. Kempling also argued that the three major religions consider homosexuality immoral. *Id.*

141. Kempling, *Speech May 12*, *supra* note 22.

142 *Id.*

143. *Id.*

144. *Id.*

145. *Id.*

146. *Id.* Of course, these studies do not prove Kempling's contention that homosexual relationships are necessarily promiscuous or risky: that some or even most gay relationships are such does not prove that all are.

147. *Id.* Kempling cited the 1948 Kinsey Report, a 1994 study by Edward Laumann of the University of Chicago, and a 2001 study done in Holland. *Id.* Kempling also impeached the BCCT's figure on the ground that it was based on an unrepresentative study in which "26% of the men . . . were prison inmates [who were asked] . . . if they had had sex with another man in the last year." *Id.*

148. *Id.*

149. *Id.*

Association's list of disorders in 1973, which also shows the success of reparative therapy.[150]

Most objectionable to the BCCT was Kempling's statement that "I refuse to be a false teacher saying that promiscuity is acceptable, perversion normal, and immorality is simply diversity of which we should be proud."[151] The BCCT viewed this statement as an expression of an intent to discriminate against homosexual students.[152] This reading, however, may distort Kempling's purpose, which was to state his objection to what he viewed as the education system's pro-gay bias and the disinformation that in his view it is spreading to vulnerable students. Kempling stated:

> I am in trouble, because I stood up and said that teachers should not be encouraging behaviour which puts children at risk. . . . [T]he risks of practicing the gay lifestyle are life threatening, life shortening, and a detriment to mental health. . . . We harangue kids repeatedly about the dangers of tobacco, alcohol, drugs, drinking and driving, reckless driving and other high risk activities. I find it amazing that the BC Teachers Federation believes it acceptable to teach children that engaging in homosexual behaviour is safe, normal, and okay.[153]

The BCCT initially suspended Kempling from employment for five months without pay, a decision that Kempling appealed directly to the college.[154] At the appeal hearing, Kempling's lawyer pointed out that the lengthy suspension was unwarranted because there was no controversy at the school.[155] He also noted that the suspension appeared unfair in the light of other disciplinary actions the college had taken against teachers guilty of criminal offenses—such as assault, theft, threats, and even inappropriate sexual conduct with students—in which the BCCT issued only letters of reprimand.[156] The BCCT did not grant Kempling the opportunity to testify during

---

150. *Id.*

151. Dawes, *supra* note 28.

152. John Russell, the vice president of the B.C. Civil Liberties Union who intervened on the side of the BCCT, stated in response:

> The Supreme Court has held that public schools must reflect and uphold standards of tolerance, respect and equality where homosexuals are concerned. By publicly refusing to be a false teacher about the supposed perversity and immorality of homosexuality, Mr. Kempling has clearly promised to violate those legally mandated requirements. Clearly, this is unacceptable.

Press Release, British Columbia Civil Liberties Union, *Kempling Case: Civil Libertarians to Argue That Teachers Have No Right to Express Intention to Discriminate* (July 28, 2003), *available at* http://www.bccla.org/pressrelease/03kempling.html.

153. Kempling, *Speech May 12*, *supra* note 22.

154. Kempling, *April 5th Message*, *supra* note 15.

155. *Id.*

156. *Id.*

the appeal.[157] After the appeal hearing, the BCCT reduced Kempling's sentence to one month's suspension without pay.[158]

Kempling appealed this decision to the Supreme Court of British Columbia in July 2003,[159] and the court affirmed the BCCT's latter ruling,[160] holding that there was "sufficient evidence for a finding that [Kempling] made and published discriminatory statements."[161] While conceding that Kempling "did write . . . in support of legislation extending some legal rights to homosexuals and . . . of the need for tolerance for homosexuals[,]" the court stated "this does not change the overall thrust of the bulk of his published writings."[162]

In reaching its decision, the court rejected a number of persuasive arguments supporting Kempling's position. First, the court refused to accept Kempling's argument that speech must be directed toward a particular individual to constitute discrimination.[163] Relying on British Columbia's Human Rights Act,[164] the court deduced, without substantiation,[165] that "non-

---

157. *Id.* Kempling was also not allowed to speak for himself during the BCCT's initial hearing in November 2002. *Id.*

158. *Id.*

159. *Id.*

160. Kempling v. Coll. Tchrs. (B.C.), [2004] 27 B.C.L.R. (4th) 139, ¶¶ 117-19.

161. *Id.* ¶ 34. The court pointed to four excerpts from Kempling's letters to support this holding:

> Thus my main concern with giving same sex couples legal rights in child custody issues is due to the obvious instability and short term nature of gay relationships. . . . My second concern is how can children develop a concept of normal sexuality, when their prime care-givers have rejected the other gender entirely?
>
> Gay people are seriously at risk . . . because of their sexual behavior, and I challenge the gay community to show some real evidence that they are trying to protect their own community members by making attempt [sic] to promote monogamous, long lasting relationships and to combat sexual addictions.
>
> The majority of religions consider [homosexual] behavior to be immoral, and many mental health professionals, including myself, believe homosexuality to be the result of abnormal psycho-social influences. . . . Homosexuality is not something to be applauded.
>
> [After relating statements by others asserting that homosexuals are promiscuous] I refuse to be a false teacher saying that promiscuity is acceptable, perversion is normal, and immorality is simply 'cultural diversity' of which we should be proud.

Id.

162. *Id.* ¶ 37.

163. *Id.* ¶ 38.

164. The relevant provisions forbid publication or display of any statement that "is likely to expose a person or group or class of persons to hatred or contempt because of . . . sexual orientation. . . ." *Id.* ¶ 38 (quoting the B.C. Human Rights Code, R.S.B.C., ch. 211, § 7(1)(b) (1996) (Can.)).

165. Although the court cited no support for this proposition, one portion of the opinion seems to imply that this is the position of the BCCT. *Id.* ¶ 5.

discrimination is a core value of the educational system" and that Kempling had violated "acceptable standards of professional conduct" by publishing statements deemed discriminatory by the BCCT.[166] Applying a standard of review akin to rational basis in U.S. courts, the court still made no real effort to question the BCCT's finding that Kempling's letters were discriminatory.[167] Nor did the court declare upon what basis Kempling could have known that he was acting unprofessionally.[168]

Second, the court found irrelevant the fact that the BBCT's punishment of Kempling was based on his off-duty conduct.[169] Moreover, the court considered unimportant the fact that "no evidence . . . of a poisoned school environment or specific complaints against [Kempling]" existed in the record.[170] The court reasoned that Kempling's letters constituted harm "because [Kempling] explicitly linked [discriminatory] content to his . . . professional standing as a teacher and counselor . . . [which] taint[ed] all of [his writings] in the eyes of students and the public."[171] The court attempted to bolster

---

166. Kempling v. Coll. Tchrs. (B.C.), [2004] 27 B.C.L.R. (4th) 139, ¶ 39.

167. *Id.* ¶¶ 31-32. In Canadian legal terminology, the label is "reasonableness simpliciter," which the Court described as follows: "A decision will be unreasonable only if there is no line of analysis within the given reasons that could reasonably lead the tribunal from the evidence before it to the conclusion at which it arrived." *Id.* ¶ 32.

168. *See generally id.*

169. *Id.* at ¶ 40. The court quoted from *Attis v. N.B. Dist. No. 15 Bd. of Educ.*, [1996] 1 S.C.R. 825:

> Teachers are seen by the community to be the medium for the educational message because of the community position they occupy, they are not able to 'choose which hat they will wear on what occasion . . .; teachers . . . may be perceived to be wearing their teaching hats even off duty. . . . The integrity of the education system also depends to a great extent upon the perceived integrity of teachers. . . . [T]he activities of teachers outside the classroom . . . may conflict with the values which the education system perpetuates.

Id.

170. *Id.* at ¶ 41.

171. *Id.* at ¶¶ 42-44. The court provided excerpts of Kempling's letters to substantiate its holding. These included:

> Some readers may be wondering why I am putting my professional reputation on the line over the homosexuality issue. . . .
>
> Sexual orientation can be changed and the success rate for those who seek help is high. My hope is that students who are confused over their sexual orientation will come to see me.
>
> The majority of religions consider [homosexual] behavior to be immoral, and many mental health professionals, including myself, believe that homosexuality to be the result of abnormal psyco-sexual influences.
>
> I refuse to be a false teacher saying that promiscuity is acceptable, perversion is normal, and immortality is simply "cultural diversity" of which we should be proud. Section 95(2) of the School Act states that teachers must "inculcate the highest moral standards."

this argument by noting that Kempling lives in a small town and was highly active in public service and well-known in the community; thus, the court concluded, it was reasonable to assume that the students and the public would more readily identify his writings with his teaching position.[172] But the court could point to no assertion—explicit or implicit—that Kempling was speaking on behalf of the public school system or in his capacity as public school employee, but only that he was speaking generally as a "teacher" or "counselor."[173] Moreover, the court could not cite evidence that anyone connected Kempling's letters to the public school system—whereas Kempling could not only point to several homosexual students who said that they were unaware of the controversy, but also to specific evidence that he treated homosexual students impartially.[174]

Finally, the court rejected Kempling's argument that his acts should not be considered "conduct unbecoming a BCCT member" because they were less serious than other disciplinary actions taken by the BCCT involving teachers' sexual misconduct with students and other criminal behavior[175] in which only letters of reprimand were issued.[176] The court stated:

> There is no authority that . . . conduct of a publicly discriminatory nature . . . is necessarily less serious [than sexual or criminal conduct by teachers against their students]. Discrimination is a serious issue in public schools and in the larger society. Given the notoriety of [Kempling] and his published writings in the community, a failure . . . to find his conduct unbecoming would amount to a public condonation of discrimination by a member of the teaching profession, done ostensibly in his professional capacity.[177]

But the court gave no justification for leveling a more severe punishment on Kempling than it would on a teacher who sexually molested a minor student—nor did the court justify the "message" that it was sending to the public by punishing Kempling more harshly than such a teacher. It might be argued that Kempling's punishment, in light of the far-less-severe penalties given to other teachers guilty of seemingly more serious violations, substantiates Kempling's contention that the public school system has a strong pro-gay bias.

Id. at ¶ 43. The court refrained from quoting—or even mentioning that Kempling had cited and discussed—numerous scientific and social science studies that provide support for his claims. *See generally id.*

172. Kempling v. Coll. Tchrs. (B.C.), [2004] 27 B.C.L.R. (4th) 139, ¶ 45.

173. *Id.* ¶ 43.

174. Kempling, *Letter*, *supra* note 29. Kempling also noted that "[i]n fact, a prominent homosexual interviewed by College investigators offered no opinion that what I had written pub[l]icly was upsetting to homosexual people." *Id.*

175. *Kempling*, [2004] 27 B.C.L.R. ¶ 51.

176. Kempling, *April 5th Message*, *supra* note 15.

177. *Kempling*, [2004] 27 B.C.L.R. ¶ 52.

Finding reasonable the BCCT's decision that Kempling's letter writing constituted "behavior unbecoming a member," the court turned to Kempling's constitutional claim that the ruling against him violated his speech and religious liberties. Applying a standard of review akin to strict scrutiny in U.S. courts,[178] the court still found no violation of either,[179] holding that the Canadian constitution "does not protect the . . . right to express . . . strictly personally-held, discriminatory views with the authority of . . . a public school teacher/counselor."[180]

In affirming the BCCT's decision over Kempling's free-speech claims, the court relied entirely on *Walker v. Prince Edward Island,* a decision of the Prince Edward Island Supreme Court, which held that the speech rights of accountants were not violated by a law prohibiting them from engaging in public accounting and auditing unless they were members of a provincial accreditation institute.[181] In *Walker,* the P.E.I. Supreme Court reasoned that the law reasonably restricted the speech of non-member accountants because "the respondents are free to express themselves ... so long as they do not purport to be doing so with the authority of . . . a public accountant."[182] By analogy, the British Columbia court reasoned that Kempling's free speech rights were not infringed so long as he refrained from making discriminatory comments about homosexuals *in his capacity as a teacher and counselor.*[183] Thus, "[w]hat [Kempling] is being sanctioned for is not the expression of any particular view per se. The purpose . . . of the disciplinary action . . . is to sanction him for his off-duty expression of personally-held discriminatory views purportedly with the authority . . . of a . . . teacher and counselor. . . ."[184] Kempling's freedom of religion claims were rejected for the same reason.[185] The court failed entirely to consider whether Kempling's case was distinguishable from *Walker* on the ground that "all parties [in *Walker*] acknowledge ... [that the legal restraint on unaccredited accountants is based upon] a pressing and substantial concern"[186]—namely, protecting the public from the enormous financial damage that could be wrought by unqualified

178. In Canadian legal terminology, this heightened standard of scrutiny is called "correctness." *Id.* ¶ 19.

179. *Id.* ¶¶ 78, 82.

180. *Id.* ¶ 73.

181. *Id.* ¶ 74; *see* Walker v. Prince Edward Island, [1995] 2 S.C.R. 407.

182. *Walker,* [1995] 2 S.C.R. ¶ 7.

183. *Kempling,* [2004] 27 B.C.L.R. ¶ 77.

184. *Id.* ¶ 75.

185. *Id.* ¶ 80. The court stated "there is no authority for the proposition that s. 2(a) [of the *Canadian Charter of Rights and Freedoms*] guarantees freedom to state or manifest one's strictly personal beliefs with the purported authority or capacity of one's professional status." *Id.*

186. *Walker,* [1995] 2 S.C.R. ¶ 13.

accountants. Neither did the court consider whether the two cases could be distinguished on the ground that the law in *Walker* "presents a narrow, well-defined restriction"[187] or on the ground that "the expressive aspects of public accounting and auditing functions are really quite limited. . . ."[188]

In sum, the B.C. Supreme Court employed surprisingly weak legal reasoning to uphold a controversial decision to suspend the license of a teacher and counselor and, far more important, to punish the exercise of a citizen's free speech rights. Kempling did nothing more than inform the public of his opinion on an important policy topic, substantiated by scientific research produced and published by reputable sources, subjected to peer review, and claimed to be objective. Of course, these studies do not prove several of Kempling's generalizations about homosexual relationships. But the crucial point is that the court could uphold the BCCT's punishment of Kempling only by flagrantly disregarding Kempling's declaration of the need for tolerance, summarily labeling Kempling's letters "discriminatory," tenuously reasoning that his letters spoke for the public school system or teaching profession, conveniently ignoring that no specific harm was caused by the letters at his school, and turning a blind eye to other teachers' far more serious infractions.

Although the punishment leveled by the BCCT and affirmed by the B.C. Supreme Court against Kempling was arguably light—a mere one-month suspension from his duties without pay[189]—the collateral costs to Kempling have been enormous. The controversy damaged Kempling's personal and professional reputation to the extent that he lost the support of his supervisors[190] after a "long and unblemished teaching career, and . . . notable record of community service."[191] Kempling fears being blacklisted as a teacher: "All of the teacher certification bodies on the continent get a copy of [the BCCT's disciplinary action against him]."[192] Litigation costs have forced Kempling to solicit the public for contributions to a legal defense trust fund.[193] He is attempting to sell his house and plans to move from the

187. *Id.*
188. *Id.*
189. *Kempling*, [2004] 27 B.C.L.R. ¶¶ 7, 117.
190. Frank Stirk, *Suspended Teacher Quits*, 17 CHRISTIAN WK. 4, May 13, 2003 available at http://www.christianweek.org.Stories/vol17/no04/story1.html (last visited Feb. 7, 2004).
191. *Kempling*, [2004] 27 B.C.L.R. ¶ 63.
192. Stirk, *supra* note 190.
193. *See* Catholic Civil Rights League, *How to Contribute Financially to Chris Kempling's Legal Defence, at* http://www.ccrl.ca/issue_kempling.html (last visited Nov. 16, 2003).

small British Columbia town[194] where he has lived for 23 years.[195] "It has been quite hard on my family," he said.[196]

2. Ontario

In 1996 Scott Brockie, the owner and operator of a Toronto print shop, received a letter from the Ontario Human Rights Commission, ordering him, before even granting him a hearing, to pay $5,000 and apologize to a complainant organization charging him with discrimination based on sexual orientation,[197] an offense contrary to the provisions of the Ontario Human Rights Code.[198] Two weeks earlier, Brockie, a self-proclaimed born-again Christian,[199] had declined the request of Ray Brillinger and the Canadian Lesbian and Gay Archives, the world's second-largest gay promotional archive,[200] to print letterhead and envelopes for the organization because providing printing services to a gay advocacy group violated his religious conscience.[201] "I don't want to be involved in any way, shape

---

194. *Id.*

195. Kempling, *Speech May 12*, *supra* note 22.

196. Stirk, *supra* note 190.

197. Canadian Ass'n for Free Expression, *Scott Brockie—Christian Victim of Militant Homosexual Lobby and Their Human Rights Commission Allies*, *at* http://www.canadianfreespeech.com/updates/brockie/scott_brockie_under_attack.html (last visited Jan. 14, 2004) [hereinafter *Scott Brockie*]. All dollar amounts referred to in this Note are in Canadian dollars.

198. Specifically, "[e]very person has a right to equal treatment with respect to services, goods and facilities, without discrimination because of . . . sexual orientation." Ontario Human Rights Code, R.S.O. 1990, ch. H-19, §1 (Can.), *available at* http://www.e-laws.gov.on.ca:81/ISYSquery/frame/IHT75fc.c (last visited Jan. 12, 2005). "No person shall infringe or do, directly or indirectly, anything that infringes a right under this Part." *Id.* § 9.

> A right of a person under Part 1 is infringed where a requirement, qualification or factor exists that is not discrimination on a prohibited ground but that results in the exclusion, restriction or preference of a group of persons who are identified by a prohibited ground of discrimination and of whom the person is a member.

Id. § 11. "A right under Part 1 is infringed where the discrimination is because of relationship, association or dealings with a person or persons identified by a prohibited ground of discrimination." *Id.* §12.

199. Phinjo Gombu, *Company Fined for Refusing Gay Group's Printing Job*, TORONTO STAR, Mar. 3, 2000, *available at* 2000 WL 15574569.

200. Ontario (Human Rights Comm'n) v. Brockie, [1999] 37 C.H.R.R. D/12, ¶ 4 (Ont. Bd. of Inquiry). The aim of the organization is to "publicize[] homosexuals and their contributions to society." Ontario (Human Rights Comm'n) v. Brockie, [2002] 161 O.A.C. 324, ¶ 4.

201. Press Release, Ontario Human Rights Comm'n, *Refusal to Print Stationery Containing Words "Gay and Lesbian" Ruled Discriminatory* (Mar. 2, 2000), *available at* http://www.ohrc.on.ca/english/news/e_pr_refusaltoprint.shtml.

or form in promoting something that I am totally opposed to," Brockie said.[202]

Brockie refused to abide by the order, and the Commission instituted an investigation against him.[203] After three years the Commission's Board of Inquiry found Brockie guilty of discrimination and upheld the $5,000 fine.[204] The Board, in its opinion in the case, noted that the complaint required it to "balance the religious rights of Brockie . . . with the equality rights of Brillinger, and members of the Archives,"[205] but in holding against Brockie, the Board ended its opinion by admitting that "it may be difficult to see any 'balance' in an imposition of a penalty against [him]."[206] In an opinion loaded with an outpouring of sympathy for the plight of homosexuals in society,[207] the court expressed little to no concern for Brockie's religious conscience.[208] Moreover, the Board apparently considered it irrelevant that the purpose of Brillinger's organization was homosexual *advocacy* and that its holding required Brockie to assist the promotion of an organization that advocated a position with

---

202. Gombu, *supra* note 199, at 1. Brockie also stated that "I don't have a problem with people who are gay. I can't force them to change. However, I don't think I have to support that cause. . . . We must promote the family, but we must not hate those who are gay." *Scott Brockie*, *supra* note 197, at 1.

203. *Scott Brockie*, *supra* note 197, at 2.

204. *Id.*

205. Ontario (Human Rights Commission) v. Brockie, [2000] 37 C.H.R.R. D/15, ¶ 29 (Ont. Bd. of Inquiry).

206. *Id.* ¶ 47.

207. For example, the Board stated:

> [f]ailure to protect the rights of homosexuals from discrimination because of sexual orientation results in a silencing on a part of our society and a marginalization of certain of its members. . . . [L]esbians and gays modify their behavior to avoid the impact of prejudice. . . . Concealment of their sexuality has had deleterious psychological and emotional effects on homosexuals . . . [that] must be harmful to personal confidence and self-esteem ... [and prevents] lesbians and gays [from] liv[ing] open and proud lives.

Id. ¶¶ 34, 35, 36, 26, 44. It seems that the feelings of restriction and marginalization that Brockie—or other religious objectors to homosexual behavior—felt as a result of the decision did not concern the Board. Brockie said later that "[t]o hear an adjudicator say I'm not allowed to take my beliefs to work is preposterous, is an abomination." *Scott Brockie*, *supra* note 197, at 3.

208. The Board did say that:

> Brockie remains free to hold his religious beliefs and to practice them in his home, and in his Christian community. . . . What he is not free to do, when he enters the public marketplace and offers services to the public in Ontario, is to practice those beliefs in a manner that discriminates against lesbians and gays by denying them a service available to everyone else. He must respect the publicly-arrived-at community standards embodied in the Code.

Brockie, [2000] 37 C.H.R.R. ¶¶ 47, 48.

which he strongly disagreed.[209] Brockie's acceptance of other printing work that did not involve homosexual advocacy from individual gay clients [210] in no way assisted the Board in distinguishing the different nature of those jobs from the one Brillinger requested; in fact, the Board rejected Brockie's argument on this score by not even addressing it.[211] Furthermore, the Board clearly indicated that it intended its order to be punitive:

> It is only through an award of damages of this magnitude that . . . indicate[s] the seriousness of the breach that occurred here. . . . While it is apparent . . . that nothing in this decision will persuade Brockie of the serious impact of his discriminatory action, . . . [it is to be] hope[d] that others will be informed by it.[212]

On Brockie's appeal from the Board of Inquiry's order, the Ontario Division Court modified and narrowed the order by genuinely "balanc[ing]"[213] Brillinger's right to be free from discrimination in the marketplace against Brockie's right "not [to] be demeaned by being conscripted to support a cause with which he disagrees because of honestly held and sincere religious belief."[214] The court focused its attention on the question whether Brockie's religious freedom was infringed "beyond . . . what is reasonable and can be demonstrably justified in a free and democratic society, under § 1 [of the *Charter*]."[215] Finding that the goal of eliminating discrimination against homosexuals was a legitimate, pressing, and substantial governmental concern,[216] the court also determined that the Board's means were not entirely connected to the objective:

> The Board's order was directed to . . . the . . . printing services for ordinary materials such as letterhead. . . . In this regard the Board's

---

209. The Board failed to address this issue directly, but in its opinion it stated that "allowing Brockie to rely on his religious freedom to deny a service could result in an erosion of other services that are currently available to lesbians and gays." *Id.* ¶ 45. But this argument holds only if the services that Brockie was asked to provide to a gay advocacy organization are analogous to other kinds of services—for example, public accommodations. *Id.* The Board's argument, therefore, seems to indicate that the fact that Brockie was being asked to assist in an advocacy activity with which he disagreed had no bearing on the Board's decision. *Id.*

210. *Scott Brockie, supra* note 197, at 1 (quoting Brockie as stating that "[w]e do work for clients that are gay").

211. *See Brockie*, [2000] 37 C.H.R.R. ¶¶ 39-40.

212. *Id.* ¶ 52.

213. Ontario (Human Rights Comm'n) v. Brockie, [2002] 161 O.A.C. 324, ¶ 56.

214. *Id.* ¶ 19.

215. *Id.* ¶ 45. Part I, § 1 of the Charter, to which the court refers here, states "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." *Id.*

216. *Brockie*, [2002] 161 O.A.C. ¶ 47 (stating that "the Board's order was to punish the discrimination and to prevent a repetition of it. . . . The Code's prohibition of discrimination because of sexual orientation reflects the pressing and substantial concern of the issue as determined by the Legislature").

> order was correct. However, the order would also extend to other materials such as brochures or posters with editorial content espousing causes or activities clearly repugnant to the fundamental religious tenets of the printer.[217]

The order, the court stated, could have been "less intrusive [on Brockie's religious rights] while at the same time achieving its objectives. . . . [T]he impact of the Board's order could be so broad as to extend beyond what is reasonably necessary to assure [*sic*] the rights of Mr. Brillinger and his organization to freedom from discrimination."[218] The court further explained:

> If any particular printing project ordered by . . . any gay or lesbian person, or organization . . . contained material that conveyed a message proselytizing and promoting the gay and lesbian lifestyle or ridiculed [Brockie's] religious beliefs, such material might reasonably be held to be in direct conflict with the core elements of Mr. Brockie's religious beliefs. On the other hand, if the particular printing object contained a directory of goods and services that might be of interest to the gay and lesbian community, that material might reasonably be held not to be in direct conflict with the core elements of Mr. Brockie's religious belief. These examples are but illustrations of the balancing process that is indicated in this case. There can be no appropriate balance if the protection of one right means the total disregard of another.[219]

The court rightly modified the Board's order, "in order to balance the conflicting rights[,]" to read that Brockie could not be required "to print material of a nature which could reasonably be considered to be in direct conflict with the core elements of his religious beliefs or creed."[220]

Still, since Brillinger only requested that Brockie print letterhead, envelopes, and business cards for his organization,[221] Brockie's "victory" in this case was merely technical. The Board's $5,000 award against him remained.[222] This partially successful appeal allowed Brockie initially to recover a total of $25,000 from the Ontario Human Rights Commission in a separate action for litigation costs;[223] on appeal that decision was reversed on the ground that Brockie's "success [in the appeal to the Ontario Divisional Court] was miniscule compared to [the Commission's] success on the other issues."[224] Although Brockie vindicated an important right on appeal, he was required to pay the Ontario Human Rights Commission's litigation costs of $15,000 and Brillinger's costs before the Divisional Court of $5,000; moreover, Brockie's own litigation cost approached

---

217. *Id.* ¶¶ 48, 49.
218. *Id.* ¶¶ 52, 57.
219. *Id.* ¶ 56.
220. *Id.* ¶ 58.
221. *Id.* ¶¶ 6, 59.
222. *Id.* ¶ 59.
223. Ontario (Human Rights Comm'n) v. Brillinger, [2002] O.J. No. 4860.
224. Ontario (Human Rights Comm'n) v. Brockie, [2004] 185 O.A.C. 366, ¶ 4.

$100,000.[225] Neither court explained how Brockie was supposed to know before these decisions were announced which print jobs he could legally refuse and which he could not under the Ontario Human Rights Code.[226]

3. Saskatchewan

In 1979 the provincial legislature of Saskatchewan passed into law the Saskatchewan Human Rights Code.[227] Among its provisions is the extraordinary § 14:

> 14(1) No person shall publish or display, or cause or permit to be published or displayed, ... any notice, sign, symbol, ... statement or other representation:
>
> (a) tending or likely to tend to deprive, abridge or otherwise restrict the enjoyment by any person or class of persons of any right to which that person or class of persons is entitled under law; or
>
> (b) that *exposes or tends to expose* to hatred, *ridicules, belittles or otherwise affronts the dignity of any person or class of persons on the basis of a prohibited ground.*;
>
> (2) Nothing in subsection (1) restricts the right to freedom of expression under the law upon any subject.[228]

The Code allows for private enforcement, and the legislature created a Board of Inquiry within the provincial human rights commission to hear private allegations of violations of the Code.[229]

In 1997 three gay men filed complaints with the Board alleging that an advertisement run by the largest newspaper in the province violated the Code.[230] The advertisement was placed by a prison guard, Hugh Owens.[231] It offered for sale bumper stickers that displayed, on its left side, references to four Bible passages that condemn homosexuality.[232] In the middle was an equal sign, and on

---

225. *Id.*

226. *See generally, Brockie,* [2004] 185 O.A.C. 366; *Brockie,* [2002] 161 O.A.C. 324; Ontario (Human Rights Comm'n) v. Brockie [2000] 37 C.H.R.R. D/15 (Ont. Bd. of Inquiry); Ontario (Human Rights Comm'n) v. Brockie, [1999] 37 C.H.R.R. D/12 (Ont. Bd. of Inquiry); Ontario (Human Rights Comm'n) v. Brillinger, [2002] O.J. No. 4860.

227. Saskatchewan Human Rights Act, S.S. ch. S-24-1 (1979), *available at* http://www.qp.gov.sk.ca/documents/English/Statutes/Statutes/S24-1.pdf (last visited Feb. 19, 2005).

228. *Id.* § 14(1) (emphasis added).

229. *Id.*

230. Hellquist v. Owens, [2002] 228 Sask. R. 148; Hellquist v. Owens, [2001] 40 C.H.R.R. D/197, ¶¶ 5-6 (Saskatchewan Hum. Rts. Bd. of Inquiry).

231. *Id.*

232. The references were to *Romans 1, Leviticus 18:22, Leviticus 20:13,* and *1 Corinthians 6:9.* The sticker cited only the references and did not quote the text of the Bible. *Hellquist,* [2002] 228 Sask. R. ¶ 7. The text of the cited passages state:

> For this cause God gave them up unto vile affections: for even their women did change the natural use into that which is against nature. And likewise also the

the right side was a picture of two stick figures holding hands with the "prohibited symbol"—a red circle with a diagonal bar—on top.[233] The Board held that the advertisement exposed the complainants to hatred and ridicule and was an affront to their dignity based on their sexual orientation, contrary to § 14(1).[234] It concluded:

> The use of the circle and the slash combined with the passages of the Bible herein make the meaning of the advertisement unmistakable. It is clear that the advertisement is intended to make the group depicted appear to be inferior or not wanted at best. When combined with the Biblical quotations, the advertisement may result in a much stronger meaning. It is obvious that certain of the Biblical quotations suggest more dire consequences and there can be no question that the advertisement can objectively be seen as exposing homosexuals to hatred or ridicule.[235]

The Board also concluded that none of the free speech protections of the *Canadian Charter of Rights and Freedoms* protected Owens' speech.[236] The Board prohibited both Owens and the newspaper from publishing or displaying the stickers in question and ordered each to pay damages of $1,500 to each of the three complainants.[237]

On appeal the Saskatchewan Court of Queen's Bench upheld the Board's decision.[238] In its analysis, the court focused on the particular language of § 14.1: "or which exposes or tends to expose to hatred, *ridicules, belittles or otherwise affronts the dignity of* any person, any class of persons o[r] a group of persons . . . [because of race, color, sexual orientation, etc.]"[239] In reaching its holding, the court dismissed Owens' argument[240] that the shocking breadth of this

---

> men, leaving the natural use of the woman, burned in their lust one toward another; men with men working that which is unseemly, and receiving in themselves that recompence of their error which was meet. And even as they did not like to retain God in their knowledge, God gave them over to a reprobate mind, to do those things which are not convenient; Being filled with all unrighteousness, fornication, . . . [w]ho knowing the judgment of God, that they which commit such things are worthy of death, not only do the same, but have pleasure in them that do them.

Romans 1:26-32 (King James). Thou shalt not lie with mankind, as with womankind: it is abomination. *Leviticus* 18:22 (King James). If a man also lie with mankind, as he lieth with a woman, both of them have committed an abomination: they shall surely be put to death; their blood shall be upon them. *Leviticus* 20:13 (King James). Know ye not that the unrighteous shall not inherit the kingdom of God? Be not deceived: neither fornicators, nor idolaters, nor adulterers, nor effeminate, nor abusers of themselves with mankind, nor thieves, nor covetous, nor drunkards, nor revilers, nor extortioners, shall inherit the kingdom of God. 1 *Corinthians* 6:9-10 (King James).

233. *Hellquist*, [2002] 228 Sask. R. ¶ 7.
234. *Hellquist*, [2001] 40 C.H.R.R. ¶¶ 28.
235. *Id.*
236. *Id.* ¶ 32.
237. *Id.* ¶ 35.
238. *Hellquist*, [2002] 228 Sask. R. ¶¶ 21-33.
239. *See id.* ¶ 23 (emphasis in original).
240. *Id.* ¶ 29.

provision—which would, on its face, seem to criminalize the publication or broadcast of even racist or sexist jokes—distinguished his case from the federal precedent, *R. v. Taylor*.[241] In *Taylor*, the Supreme Court of Canada upheld the constitutionality of the Canadian Human Rights Act, which proscribes a far narrower range of communication than Saskatchewan's Human Rights Code—specifically, that which "exposes a person or persons to *hatred or contempt* [rather than "ridicules" or "belittles," as in the Saskatchewan Code[242]] by reason of the fact that that person or those persons are identifiable on the basis of a prohibited ground of discrimination."[243] In other words, the court used the reasoning of a decision upholding the constitutionality of a comparatively narrow restriction on speech to sustain the validity of a far broader one—and without providing anything more than, in its own words, a "rather perfunctory"[244] explanation. Moreover, the court ignored its own conclusion that

> section [14.1] requires, by implication, that the message have a specific effect or effects in order to be caught by that section. The message must not only ridicule, belittle or otherwise affront the dignity of the person or the class, *it must be such as to cause or be likely to cause others to engage in one or more of the discriminatory practices prohibited by ss. 9 through 13* [which are, discrimination in occupations (§ 9), the purchase of property (§ 10), occupancy of commercial unit or housing accommodation (§ 11), places open to the public (§ 12), education (§ 13)] *and 15 through 19* [which are, discrimination in contracts (§ 15), employment (§ 16), membership in professional and trade associations (§ 17), trade unions (§ 18), employment forms or advertisements (§ 19)].[245]

The court made no such finding—yet it still upheld the Board's decision against Owens.[246] Furthermore, the court insisted that the "objective test" employed by the Supreme Court of Canada in *Taylor* applied in Owens' case.[247] This meant that "the intention of the appellant in placing the ad [was] irrelevant."[248] In other words, even had Owens *unintentionally* made only a racist or sexist comment, he could have been punished under the Code.

---

241. Can. (Human Rights Comm'n) v. Taylor, [1990] 3 S.C.R. 892.
242. Saskatchewan Human Rights Act, *supra* note 227.
243. Canadian Human Rights Act, *supra* note 59, §13.1 (emphasis added).
244. Hellquist v. Owens, [2002] S.K.Q.B. 506, ¶ 33.
245. *Id.* ¶ 59 (emphasis in original).
246. *Id.* ¶ 33.
247. *Id.* ¶¶ 8, 17.
248. *Id.* ¶ 17.

C. *Federal Broadcast Regulations of Speech Critical of Homosexuality*

1. Federal Actions Against the *Dr. Laura Schlessinger Show*

The illegality of speech critical of homosexuality in Canada can also be seen in the way federal regulators have treated the nation's broadcasters. Two decisions of the Canadian Broadcast Standards Council (CBSC) in particular show that federal regulators have been especially reluctant to protect speech rights.

In February 2000 the Ontario and Atlantic Regional Councils of the CBSC disciplined two radio stations for broadcasting several episodes of the *Dr. Laura Schlessinger Show* in which the host made numerous statements critical of homosexuality and homosexual political activism.[249] One of the complainants from the public stated:

> The "Dr. Laura" program contains regularly made abusive and discriminatory comments about gays and lesbians, ranging from frequent characterization of sexual behavior as "deviant," to implied and explicit comments linking homosexuality to paedophilia, to describing children being raised by lesbians parents as "victims" to frequent comments of a gay "agenda" to, among other things, get [*sic*] access to children for propaganda purposes in schools. There are also comments made that somehow gays can "change" their sexuality, comments made . . . without fair presentation of opposing views. I ask the CBSC to find that the program is in breach of Clauses 2 . . . and 6 . . . of the *CAB* [Canadian Association of Broadcasters] *Code of Ethics*.[250]

Clause 2 of the *CAB Code of Ethics* states:

> [B]roadcasters shall endeavor to ensure, to the best of their ability, that their programming contains no abusive or discriminatory material or comment which is based on matters of race, national or ethnic origin, colour, religion, age, sex, [sexual orientation], marital status or physical or mental handicap.[251]

---

249. Canadian Broadcast Standards Council, Ontario Regional Council, *CFYI-AM re the Dr. Laura Schlessinger Show*, Feb. 9, 2000, *available at* http://www.cbsc.ca/english/decisions/decisions/2000/000510.htm [hereinafter CBSC, Ontario]; Canadian Broadcast Standards Council, Atlantic Regional Council, *CJCH-AM re the Dr. Laura Schlessinger Show*, Feb. 15, 2000, *available at* http://www.cbsc.ca/english/decisions/decisions/2000/000510.htm [hereinafter CBSC, Atlantic].

250. CBSC, Ontario, *supra* note 249, at 2.

251. *Id.* at 4 (Brackets appear in original). The Councils noted:

> Sexual orientation has been "read in" the human rights provisions since 1994. The Councils do not consider it necessary to review at length the CBSC decisions which have carefully explained and restructured Clause 2 so as to ensure that it reflects sexual orientation as one of the grounds of protection in the Code as it is in the *Canadian Charter of Rights and Freedoms*, the *Radio Regulations, 1986*, the *Television Broadcasting Regulations, 1987, the*

Clause 6(3) of the CAB *Code of Ethics* states:

> It is recognized that the full, fair and proper presentation of news, opinion, comments and editorial is the prime and fundamental responsibility of the broadcast publisher.[252]

Summarizing the *Code*, the CBSC declared that "[f]reedom of expression does not . . . impinge upon the right of persons in Canada . . . to be free from abusively discriminatory comment based upon their sexual orientation."[253] The inquiry, said the Councils, was whether the *Dr. Laura Show* crossed the line.[254]

The Councils held that the *Dr. Laura Show* violated the *Code* in two respects. First, it held that particular monologues Dr. Schlessinger gave on her show, in which she argued that there is a strong connection between male homosexual tendencies and pedophilia, constituted "abusively discriminatory comment based on sexual orientation in violation of the *CAB Code of Ethics*."[255] Of particular concern to the Councils was this statement made by Dr. Schlessinger: " 'Paedophilia and child molestation have zero to do with being gay . . .' and that's not true."[256] The Council held that such a "generalized allegation . . . that . . . paedophilia is more common among members of the gay community than the heterosexual community, without some support or substantiation of that position, would be a risk that such broadcasts could be in breach of Clauses 2 and 6 of the *CAB Code of Ethics*."[257] The Councils seem to have ignored that immediately after making the offending statement, Schlessinger stated, "How many letters have I read on the air from gay men who acknowledge that a huge portion of the male homosexual populous is predatory on young boys[?]"[258] The Councils also failed to credit Schlessinger's statement, made during a different episode of her show, citing studies by "Dr. Aarden VanWeg . . . that although there are more paedophilies that are heterosexual, percentage wise in the population, it is much greater in the homosexual community. . . . No, not every homosexual is a paedophile. Obviously not. But a greater percentage, much greater."[259]

Canadian Human Rights Act and all other relevant federal and provincial human rights legislation, as required by the Supreme Court of Canada.

Id.

252. *Id.*
253. *Id.* at 7.
254. *Id.*
255. *Id.* at 15.
256. *Id.* at 14.
257. *Id.* at 15.
258. *Id.* at 14.
259. *Id.*

The Councils also found that Dr. Schlessinger's repeated claims that homosexuality is deviant behavior violated the *Code*.[260] The Councils admitted that Schlessinger's comments in this vein, considered individually and in isolation from one another, were merely "critical and discriminatory (. . . not *abusively* discriminatory)[,]" but that "their cumulative effect" turned Dr. Schlessinger's opinion "[in]to abusively discriminatory comment . . . exceed[ing] the codified bounds of freedom of expression."[261] Of particular concern to the Councils was Dr. Schlessinger's refusal to accept the change in the American Psychological Association's position on whether homosexuality is deviant behavior.[262] Conceding that the Association's position in 1952 was that homosexuality was a pathology, the Councils condemned the fact that "the host consistently and vehemently asserted . . . that the sexual behavior of gays and lesbians is either abnormal, aberrant, deviant, disordered, a biological error or dysfunctional, despite the fact that the *professional associations* responsible for such issues do *not* consider that homosexuality is even sufficiently abnormal to be characterized as pathological. . . ."[263] Moreover, the Councils' rejected Dr. Schlessinger's distinguishing between criticism of *homosexuality* and of *homosexuals*.[264] The Councils stated:

> [T]he host's argument that she can "surgically" separate the individual persons from their *inherent* characteristics so as to entitle her to make comments about the *sexuality* which have no effect on the *person* is fatuous and unsustainable. . . . To use such brutal language as she does about such an essential characteristic flies in the face of Canadian provisions relating to human rights. . . . Since the sexual practices of gays and lesbians *define* them as homosexuals and are inseparable from their *personas*, any attempt by the host to justify her statements

---

260. *Id.* at 21.

261. *Id.* at 17.

262. *Id.* at 17.

263. *Id.* The Councils ignored professional dissent from the APA's official position. For example, former APA president Robert Perloff went so far as to say in a speech to the 2001 APA Convention that "[t]he APA is too goddamn politically correct . . . and too goddamn obeisant to special interests!" He has also stated that:

> I believe that APA is flat out wrong, undemocratic, and shamefully unprofessional in denying NARTH [a research organization whose members consider homosexuality to represent a developmental disorder or who simply defend the right to conversion therapy for those who desire it] the opportunity to express its views and programs in the APA Monitor and otherwise under APA's purview.

Linda Ames Nicolosi, *Former APA President Condemns APA for Barring Research*, National Association for Research & Therapy of Homosexuality, *available at* http://www.narth.com/docs/barring.html (last visited Mar. 19, 2004).

264. The Councils' quoted Dr. Schlessinger as saying that "[t]he [homo]sexual orientation is clearly an error. . . . I have never called homosexuals errors." CBSC, Ontario, *supra* note 249, at 18.

> on the basis that she is speaking about the *practices* rather than the *individuals* must fail.[265]

Because of their violations of the *CAB Code of Ethics,* the radio stations in question were required by the CBSC to air during peak listening hours a statement that said, in part, that "the broadcaster aired comments . . . which were abusively discriminatory with respect to gay and lesbian persons . . . by broadcasting comments of Laura Schlessinger describing the behavior of gays and lesbians as aberrant, an error, deviant and dysfunctional, and by making a generalized allegation concerning a link between homosexuality and paedophilia. . . ."[266]

2. Federal Actions Against Dr. James Dobson's *Focus on the Family*

The Prairie Regional Council of the CBSC in 1997 responded to public complaints against "Homosexuality: Fact or Fiction?," a particular radio broadcast of *Focus on the Family.*[267] The Council quoted from one complaint letter, which stated that the broadcast "made many disparaging remarks regarding homosexuality and gay people in general. ... [S]uch statements should not be allowed on the public airwaves."[268]

The broadcast featured Christian psychologists, counselors, and educators who challenged the assertion that homosexual tendencies are genetically ingrained in human beings and inseparable from personal identity.[269] Among the broadcast's participants was an ex-homosexual who described his transformation into a heterosexual.[270] One of the participants commented that "gay science . . . really has very flimsy foundations";[271] another referred to "the false use of statistics in research [supporting the argument that sexual orientation is genetically determined]."[272] Other participants referred to "the homosexual agenda . . . [being] push[ed] onto our country . . . [and] into the schools."[273] Another commented that "the gay rights movement is not about tolerance, *it's about harnessing government*

---

265. *Id.* at 19.
266. *Id.* at 21.
267. Canadian Broadcast Standards Council, Prairie Regional Council, *CKRD re Focus on the Family*, CBSC Decision 96/97-0155, decided Dec.16, 1997, *available at* http://www.cbsc.ca/english/decisions/decisions/1997/971216i.htm (last visited Nov. 16, 2003) [hereinafter CBSC, Prairie].
268. *Id.* at 3.
269. *Id.* at 1-2.
270. *Id.* at 2.
271. *Id.*
272. *Id.*
273. *Id.*

and corporate power to affirm homosexuality and persecute those who oppose it."[274]

In reaching its decision on the matter, the CBSC first commented that "there is a fine line to be drawn between comment which may constitute the simple expression of opinion and that which is abusively discriminatory. . . ."[275] It also considered the Canadian Radio-television Telecommunications Commission's *Religious Broadcasting Policy,* which states that "[the] licensing of religious programming . . . . must be accompanied by *rigorous* guidelines on ethics to assist broadcasters of religious programming and to guard against egregious intolerance and exploitation."[276] The CBSC noted that the Commission's guidelines require that religious programming "demonstrate tolerance, integrity and social responsibility"[277] and that "[n]o programs shall have the effect of abusing or misrepresenting any individual or group . . . [nor] shall [they] . . . call into question the human rights or dignity of any individual or group."[278]

The Council stated its final decision in these words:

> While *Focus on the Family* is free to describe the homosexual lifestyle as sinful, . . . the program under consideration here has gone much further. It has treated support for the movement as "flimsy" and has disparaged that support. . . . Moreover, it has attributed to the gay movement a malevolent, insidious and conspiratorial purpose, a so-called "agenda," which, in the view of the Council, constitutes abusively discriminatory comment on the basis of sexual orientation, contrary to the provisions of Clause 2 of the *CAB Code of Ethics.*[279]

As a result, the Council ordered the offending radio stations to air, during prime time, a statement saying, in part, that the program in question violated the *CAB Code of Ethics* for the reasons above.[280]

---

274. *Id.* at 3 (emphasis in original).
275. *Id.* at 6.
276. *Id.*
277. *Id.* at 7.
278. *Id.*
279. *Id.* One might respond to the Councils' objection that no one can truthfully attribute a "malevolent, insidious and conspiratorial purpose" to the gay rights movement by pointing, for example, to the publication of books such as AFTER THE BALL: HOW AMERICA WILL CONQUER ITS FEAR AND HATRED OF GAYS IN THE 1990S, whose authors lay out a program of public persuasion, "a bold plan for conquering. . . . 'bigotry' by exploiting the mass media." MARSHALL KIRK & HUNTER MADSEN, AFTER THE BALL: HOW AMERICA WILL CONQUER ITS FEAR AND HATRED OF GAYS IN THE 1990S (1989). The authors draw from the thought-control methods used by communists during China's Cultural Revolution. Charles W. Socarides, *Thought Reform and the Psychology of Homosexual Advocacy, at* http://www.leaderu.com/orgs/narth/1995papers/socarides.html (last visited Mar. 19, 2004).
280. CBSC, Prairie, *supra* note 267, at 8.

3. Federal Requirements to Broadcast Gay Cable Channel

Not only are federal regulators in Canada cracking down on the broadcast of speech critical of homosexuality, they are also requiring some broadcasters to promote pro-homosexual speech. In November 2000 the CFTC licensed PrideVision TV, the world's first gay cable channel, as a "category 1" service, meaning that cable and direct-satellite companies are required to carry it.[281] Subscribers to digital television would have no choice but to pay for the service, but it would not be added to, or available in, basic cable packages.[282] The CFTC justified licensing the station by stating that "PrideVision will bring added diversity to the Canadian broadcasting system by providing a unique service with the potential to create understanding and reduce stereotyping of a significant portion of Canadian society."[283] At the time of the CFTC's decision to license PrideVision, critics charged bias on the CFTC's part because of its refusal to license Christian Crossroads Television Systems in 1997 and Eternal World TV, a Catholic cable channel, in 2000.[284]

III. A CRITIQUE OF CANADA'S HATE SPEECH REGIME AND ITS UNDERPINNINGS CONSIDERING THE SUPREME COURT OF CANADA'S DECISION IN *KEEGSTRA*

This section critiques the assumptions and consequences of Canada's proscriptions against homosexual "hate propaganda" by considering the Supreme Court of Canada's landmark decision in 1990 upholding the federal criminal hate speech regime, *Keegstra,* and various provincial court opinions holding against speakers critical of homosexuality.

---

281. PrideVision homepage, *at* http://www.pridevisiontv.com/strand/aboutus.asp (last visited Jan 22, 2005).

282. Media Awareness Network, PrideVision TV, *at* http://www.media-awareness.ca/english/issues/stereotyping/gays_and_lesbians/gay_pridevision.cfm (last visited Jan. 22, 2005); Barbara Schecter & Sinclair Stewart, *Shaw Boss Predicts "Consumer Revolt" Over PrideVision: No Free Preview on Shaw*, NAT'L POST, Aug. 24, 2001, *available at* 2001 WL 25983347.

283. Canadian Radio-television and Telecommunication Commission, Decision CTRC 2000-456, Dec. 14, 2000, *available at* http://www.crtc.gc.ca/archive/ENG/Decisions/2000/DB2000-456.htm (last visited Jan. 22, 2005).

284. REAL Women of Canada, *The CRTC and Homosexual Broadcasting*, *at* http://realwomenca.com/newsletter/2000_May_Jun/article_5.html (last visited Dec. 30, 2004); REAL Women of Canada, *CRTC Licenses Christian Station*, *at* http://www.realwomenca.com/newsletter/1998_July_Aug/article_14.html (last visited Dec. 30, 2004). Both channels were subsequently licensed. *See CRTC Adds 19 New Foreign Services*, BROADCASTER, July 2001, *available at* http://www.broadcastermagazine.com/issues/2001/jul01/page19.asp (last visited Jan. 22, 2005).

A. *The State's Putative Interest in Prohibiting "Hate Propaganda": The Asserted Values Promoted and Harms Avoided by Criminalizing Invective Speech*

Keegstra concerned the constitutionality of § 319(2) of the criminal code, which prohibits the "willful promotion of hatred"[285] against identifiable groups specified in § 318.[286] In 1985 James Keegstra, a public school teacher in Alberta, was prosecuted for disseminating racist and anti-Semitic opinions at his school and for indoctrinating his students with Jewish-conspiracy theories of history[287]—including holocaust denial.[288] In upholding the validity of Keegstra's conviction under § 319(2), the Court explained the bases upon which the defendant's "privilege of speech"[289] was constitutionally infringed. Below is a critique of those bases.

1. "Balancing" the Value of Free Speech Against Its Danger

Although the *Keegstra* Court recognized that § 2(b) of the *Charter*[290]—akin to the First Amendment's Free Speech Clause—considered alone "protect[s] . . . a very wide range of expression"[291] and the "[c]ontent [of the expression] is irrelevant" under its protections, the Court immediately qualified this liberal protection of speech because § 2(b) analysis, alone, "operates to leave unexamined the extent to which the expression *at stake in a particular case* promotes freedom of expression principles."[292] Accordingly, § 1[293] of the *Charter* qualifies § 2(b). "[T]he s. 1 analysis of a limit upon s. 2(b) cannot ignore the nature of the expressive activity which the state seeks to restrict. . . . [I]t is . . . destructive of free expression

---

285. R.S.C., ch. C-46, § 319(2) (1985).

286. *Id.* § 318(4).

287. Luke McNamara, *Criminalising Racial Hatred: Learning From the Canadian Experience*, 1 AUSTL. J. HUM. RTS. 1 (1994), *available at* http://mpd.selkirk.bc.ca/webdev/arcom/viewcontent.asp?ID=134 (last visited January 4, 2005).

288. Steven Plaut, *The Israeli Left's Holocaust Denial Connection*, (June 23, 2004), *at* http://www.frontpagemag.com/articles/authors.asp?ID=13639 (last visited Dec. 12, 2004).

289. R. v. Keegstra, [1990] 3 S.C.R. 697, ¶ 26.

290. "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." CAN. CONST. (Constitution Act, 1982) pt. I (Canadian Charter of Rights and Freedoms), § 2(b).

291. *Id.*

292. R. v. Keegstra, [1990] 3 S.C.R. 697, ¶ 87 (emphasis in original).

293. "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." CAN. CONST. (Constitution Act, 1982) pt. I (Canadian Charter of Rights and Freedoms), § 1.

values . . . to treat all expression as equally crucial to those principles at the core of s. 2(b)."[294]

The analysis of speech under § 1 employs a "contextual approach[,]"[295] one that, the Court explained, "[p]lace[s] the conflicting values in their factual and social context. . . ."[296] Under this balancing approach, said the Court, one first must "assess[ ] the importance of the freedom of expression interest at stake on the facts of the case"[297] and then "consider those interests which argue[ ] for restriction."[298] Applying this approach in *Keegstra,* the Court framed the issue thus:

> One must ask whether the expression prohibited by s. 319(2) is tenuously connected to the values underlying s. 2(b) so as to make the restriction "easier to justify than other infringements." . . . [T]he question [is] . . . whether, and to what extent, the expressive activity prohibited by s. 319(2) promotes the values underlying the freedom of expression.[299]

A majority of the Court seems to have had little difficulty in concluding, as a general matter, that "the expression intended to promote the hatred of identifiable groups is of limited importance when measured against the free expression of values."[300]

i. The Court's Failure Concerning the First Value of Open Discourse (Promoting the Common Good by Finding Truth)

Two values, the Court posited, are at the core of § 2(b) protections of speech. First, "the need to ensure that truth and the common good are attained . . . in the process of determining the best course to take in our political affairs."[301] The Court rejected the argument that because "it [is] impossible to know with *absolute* certainty which . . . statements are true, or which ideas obtain the greatest good[,] . . . [we should] permit the communication of all expression."[302] It stated that "the greater the degree of certainty that a statement is erroneous or mendacious, the less its value in the quest for truth."[303]

But the failure of this reasoning is clear. Without absolute knowledge of the truth, one could never be in a position to assess

---

294. *Keegstra*, [1990] 3 S.C.R. ¶ 87.
295. *Id.* ¶ 88. The Court took this approach from *Rocket v. Royal Coll. of Dental Surgeons of Ontario*, [1990] 2 S.C.R. 232. *Rocket* was a commercial speech case.
296. *Keegstra*, [1990] 3 S.C.R. ¶ 87.
297. *Id.* ¶ 88.
298. *Id.*
299. *Id.* ¶ 90.
300. *Id.* at ¶ 91.
301. *Id.* ¶ 92.
302. *Id.* (emphasis in original).
303. *Id.*

accurately even the likelihood that a statement is true—and certainly would have no basis for claiming that "[t]here is very little chance that statements intended to promote hatred against an identifiable group are true, or that their vision of society will lead to a better world."[304] *Some* knowledge would be required to make this assessment, but such as assessment, without absolute knowledge, would always be questionable—which points to the need for full and free discussion. More important, the Court here implied that it is the government (i.e., either the legislature or the courts) which is to ascertain "the degree of certainty that a statement is erroneous or mendacious";[305] the dangers to speech and religious liberties, among other freedoms, that this assertion implies are too obvious to require elaboration.

ii. The Court's Failure Concerning the Second Value of Open Discourse (Providing for the Needs of the Political Process)

The second rationale for the protection of free expression is its connection to the political process, which the Court described as important "because it permits the best policies to be chosen among a wide array of proffered options, but additionally because it helps to ensure that participation in the political process is open to all persons."[306] Admitting that "[t]he state . . . cannot act to hinder or condemn a political view without to some extent harming the openness of Canadian democracy and . . . muzzl[ing] the participation of a few individuals in the democratic process,"[307] the Court stated that "[t]he suppression of hate propaganda . . . [constitutes a] degree of . . . limitation [that is] not substantial."[308] The Court further stated that although "hate propaganda is . . . 'political' [expression]," it is "expression [that] can work to undermine our commitment to democracy where employed to propagate ideas anathemic [sic] to democratic values . . . [of] respect and dignity [of the individual]."[309] The Court even argued that by "rejecting hate propaganda . . . the state can best encourage the protection of values central to freedom of expression. . . . *[T]he reaction to various types of expression by a democratic government may be perceived as meaningful expression on behalf of the vast majority of citizens.*'[310] In sum, the Court held that

> given the unparalleled vigor with which hate propaganda repudiates and undermines democratic values, and in particular its condemnation

304. *Id.*
305. *Id.*
306. *Id.* ¶ 93.
307. *Id.* ¶¶ 94-95.
308. *Id.*
309. *Id.* ¶ 95.
310. *Id.* ¶ 96 (emphasis added).

> of the view that all citizens need be treated with equal respect and dignity so as to make participation in the political process meaningful, . . . the protection of such expression as integral to the democratic ideal [is not] so central to the s. 2(b) rationale.[311]

The shortcomings of this reasoning are also apparent. The ungrounded assumption is made that target groups of hate speech need the "respect and dignity" of society before they can be full participants in the political process, when, in fact, the rights to speak freely, vote, assemble, petition the government, and so forth are generally sufficient. The far more expansive notion of political rights the Court discussed gives license to the government to infringe other freedoms: the Court here even stated that the government's criminal prosecution of "hate speech" constitutes a speech act that deserves constitutional protection!

2. Individual "Authenticity," "Fulfillment," and Social Acceptance: The Court's Misguided Approach

The harm of foremost concern to the Court in *Keegstra* was not what one would expect it to be—violence against vulnerable minorities sparked by invective rhetoric—but rather the "emotional damage"[312] suffered by the targets of such speech. The Court explained:

> The derision, hostility and abuse encouraged by hate propaganda . . . have a severe negative impact on the individual's sense of self-worth and acceptance. The impact may cause target group members to . . . avoid[ ] activities which bring them into contact with non-group members or adopt[ ] attitudes and postures directed towards blending in with the majority.[313]

Thus, the Court listed several vacuities—"self-fulfillment,"[314] "self-autonomy,"[315] "self-development,"[316] and "human flourishing"[317]—as core components of speech protections. The Court reasoned that hate speech "inhibits th[ese] process[es] [because] it limits [expression] and hence arguably works against freedom of expression values."[318] Apparently the Court's argument is that target groups of hate speech are constitutionally entitled to a "comfort zone" (i.e., some measure of societal acceptance) so that their members are able to engage in the difficult task of "self-flourishing."

---

311. *Id.* ¶ 97.
312. *Id.* ¶ 64.
313. *Id.* ¶ 65.
314. *Id.* ¶ 93.
315. *Id.*
316. *Id.*
317. *Id.*
318. *Id.*

This reasoning also has severe flaws. First, it requires the government to favor the speech rights of target groups over those of the speakers of "hate"—which will necessarily infringe upon the "self-fulfillment rights" of the latter in favor of the former. *Kempling v. BCCT*,[319] outlined above, is a fine example. There, the Supreme Court of British Columbia held that Kempling's letters constituted conduct unbecoming a member of the teacher's college because, in part, his comments made gay students "more likely to feel threatened and isolated. . . ."[320] If one presumes that Kempling's statements inhibited gay students' ability to achieve their own "self-development[,]" but one must also presume that the court's holding inhibited Kempling from achieving his own "self-development" as a Christian who objects to homosexual behavior on religious and rational grounds, because the ruling not only inhibited his ability to speak on the subject, *but also resulted in his ostracism from his community and profession.*[321] Why Kempling's "self-development" should matter less than a hypothetical gay student's was not sufficiently explained by the court. On its face, such treatment would seem to violate Kempling's rights under § 15 of the *Charter*, which guarantees "equal protection . . . of the law . . . without discrimination. . . ."[322]

A second failure of the Court's reasoning here is that, in order to apply these concerns to homosexuals, an argument is needed to justify the defining of gays as a group requiring or deserving the protections against hate speech. One obvious argument is that homosexuals are at risk of being victims of violent hate crimes, [323] which hate propaganda can arguably incite. This might be a legitimate governmental concern, but it does not seem to be the primary focus of the case law and academic literature; rather, the

---

319. Kempling v. Coll. of Teachers (B.C.), [2004] 27 B.C.L.R. 4d 139.

320. *Id.* ¶ 88 (quoting from Attis v. N.B. Sch. Dist. No. 15, 133 D.L.R. (4th) 1, ¶¶ 82-3).

321. Kempling said that the BCCT, during its adjudications, "compared me to White Supremacist Nazi hatemongers." Kempling, *Speech May 12*, *supra* note 22. "That really hurt," he said. *Id.* The BCCT also said that Kempling's conduct was arguably worse than other teachers' "sexual or criminal conduct" directed against their own students. Kempling v. Coll. Tchrs. (B.C.), [2004] 27 B.C.L.R. (4th) 139, ¶ 52. The British Columbia Supreme Court's decision in his case induced Kempling to quit his job and move from a town in which he had lived and worked for twenty-three years. Kempling, *Speech May 12*, *supra* note 22. Kempling said after the ruling that he lost the support of his supervisors. *Id.* He also worries about being blacklisted from the teaching profession because the BCCT's disciplinary action against him is distributed to all teacher certification bodies in North America. Stirk, *supra* note 190.

322. CAN. CONST. (Constitution Act, 1982) pt. I (Canadian Charter of Rights and Freedoms), § 15(1).

323. Cohen, *supra* note 40, ¶ 75.

primary focus is limiting discrimination[324]—specifically, an expansive notion of discrimination that includes not only concerns about "equal rights and opportunities without discrimination[,]"[325] but also "the dignity and worth of the human person."[326] Under this rubric, of foremost concern is the

> [f]ear [that] discrimination will logically lead to concealment of true identity[,] and this must be harmful to personal confidence and self-esteem. . . . The potential harm to the dignity and perceived worth of gay and lesbian individuals constitutes a particularly cruel form of discrimination.[327]

While the first two issues—violence and discrimination (in, say, employment or housing) against gays—may be legitimate concerns of the law, the latter—guaranteeing the "dignity" of gays—is not, for several reasons.

First, the argument that homosexuals are entitled to such a sweeping claim of "dignity" is questionable. That argument relies on the notion that sexual orientation is "an innate or unchangeable characteristic"[328] and inherent to one's identity.[329] This claim has

---

324. I am, of course, not arguing that hate crimes against gays are not a concern of Canadian courts or of Canadian legal academics. Instead, what emerges from the case law and commentary is a strong need for homosexuals to feel "comfortable" in society and "accepted" by the community. See, e.g., Ontario (Human Rights Comm'n) v. Brockie, [2000] 37 C.H.R.R. D/15 (Ont. Bd. of Inquiry) (in which the Ontario Board of Inquiry commented, *"[p]erhaps the most important* [effect of "hate speech"] is the psychological harm which may ensue. . . .") (emphasis added); *see also, e.g.*, Bruce MacDougall, *Silence in the Classroom: Limits on Homosexual Expression and Visibility in Education and the Privileging of Homophobic Religious Ideology*, 61 SASK. L. REV. 41 (1998). In this essay, Professor MacDougall's primary concern is not "the perpetuation of homophobia" (which might include hate crimes against gays), but rather "the inferiorization and marginalization of homosexuality [in society]" and "self-hatred in homosexuals." *Id.* at 42.

325. Insurance Corp. of B.C. v. Heerspink, [1992] 2 S.C.R. 145.

326. R. v. Keegstra, [1990] 3 S.C.R. 697, ¶ 9 (quoting the Canadian Bill of Rights, R.S.C. 1985, App. III).

327. Ontario (Human Rights Comm'n) v. Brockie, [2000] 37 C.H.R.R. D/15, ¶ 26 (Ont. Bd. of Inquiry).

328. CBSC, Ontario, *supra* note 249. For example, the Council's decision against Dr. Schlessinger relied on the notion that "[t]he sexual practices of gays and lesbians are as much a part of their being as the colour of one's skin or the gender. . . . or ethnicity of an individual." In none of cases mentioned in this Note is there any citation to evidence that homosexuality is genetically determined. *Id.*

329. *E.g., id.; see also*, Marie-France Major, *Sexual-Orientation Hate Propaganda: Time to Regroup*, 11-SPG CAN. J.L. & SOC'Y 221 (arguing that the prohibition of hate speech against homosexuals is justified because "gays and lesbians [are] groups of a primordial nature, as opposed to a voluntary nature. . . . This makes the group reputation and standing in society all the more important to the personal realization of the individuals who make up the group." Major, *supra* at 230. In *Egan*, the Supreme Court of Canada first recognized sexual orientation as a "protected group" under § 15(1) of the *Charter*, which states that "[e]very 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,

never been conclusively demonstrated, and studies that have attempted to prove the connection have consistently failed.[330] Two researchers at Stanford and Harvard, respectively, have commented that "recent studies seeking a genetic basis for homosexuality suggest that . . . we may be in for a new molecular phrenology, rather than true scientific progress and insight into behavior. . . . [T]he data in fact provide strong evidence for the influence of the environment."[331] Twin studies have been particularly damaging to the claim that sexual orientation is genetically determined: British researchers in 1992 published a study of identical twins showing that when one of the pair was gay, the chances of the other being gay was less than fifty percent.[332] Another twin study done at the University of Queensland (Australia), drawing from data collected from more than 14,000 twin pairs, found the correlation rate was thirty-eight percent for males and thirty percent for females.[333] Such studies and others have led the director of the Center for Development and Health Genetics at Pennsylvania State University to comment that "[r]esearch into heritability is the best demonstration I know of the importance of the environment."[334] Moreover, the success of so-called

---

national or ethnic origin, colour, religion, sex, age or mental or physical disability." Egan v. Can., [1995] 124 D.L.R. (4th) 609, ¶ 5. The Court used "the analogous ground approach" to, in effect, read in sexual orientation into § 15(1): "[the expressed groups in section 15(1)] encompass groups defined by an innate or unchangeable characteristic which . . . include[s] sexual orientation." *Id.*

330. In 1993 SCIENCE, a prestigious journal of scientific research, published the now-famous study of Dean Hamer that pointed to the possibility of a gene responsible for determining one's sexual orientation. D. H. Hamer et al., *A Linkage Between DNA Markers on the X-chromosome and Male Sexual Orientation*, SCIENCE, July 16, 1993, 321-27. While press accounts of the study implied that such a gene exists, the study disclaimed to have so proved. *See, e.g, Research Points Toward a Gay Gene*, WALL ST. J., July 16, 1993, at B1. Moreover, Dean Hamer explicitly rejected the notion that sexual orientation could be determined by one's DNA: "From twin studies, we already know that half or more of the variability in sexual orientation is not inherited. Our studies try to pinpoint the genetic factors. . . . not negate the psychosocial factors." Anastasia Toufexis, *New Evidence of a 'Gay Gene'*, TIME, Nov. 13, 1995, at 95 (quoting Hamer). Further, the Hamer study was heavily criticized by the scientific community. One expert commented that "[a]s it is, the Hamer study is seriously flawed. Four months after its publication in Science, a critical commentary appeared in the same publication. It took issue with the many assumptions and questionable use of statistics that underlie Hamer's conclusions. . . ." Jeffrey Satinover, *The Gay Gene?*, at http://www.homosexuellt.com/infosida/show_article.asp?Idnr=94 (last visited Nov. 8, 2004) [hereinafter Satinover, *Gay Gene*].

331. Billings & Beckwith, J. TECH. REV., July 1993, at 60.

332. Michael King & Elizabeth McDonald, *Homosexuals Who Are Twins: A Study of 46 Probands*. 160 BRIT. J. OF PSYCHIATRY 407, 407-09 (1992).

333. N.E. Whitehead, *The Importance of Twin Studies*, *at* http://www.narth.com/docs/whitehead2.html (last visited Nov. 8, 2004) (referring to the study as proof that there is no direct link between one's genes and one's sexual orientation).

334. Quoted in Satinover, *Gay Gene*, *supra* note 330. The twin studies conclusively prove that sexual orientation is not *determined* by one's genes. That is,

reparative or conversion therapy—in which the goal is to "convert" a homosexual subject into a heterosexual—has been recently demonstrated,[335] and such therapy is gaining acceptance among academic psychologists.[336] Even the Supreme Court of Canada, in its first decision on the matter, conceded that the issue was debatable.[337] In sum, if disagreement exists within the scientific community about the very points upon which proponents of hate speech proscriptions rely to justify such laws, it is implausible to suggest that no legitimate grounds exist for debate about whether homosexuals are entitled to society's acceptance on a basis analogous to race or ethnicity. Yet this is precisely what many Canadian courts and administrative agencies have held.[338]

Second, such a questionable foundation is an inappropriate and insufficient basis for criminal law sanctions. Proponents of hate speech laws emphasize that among the purposes of such laws is the "didactic" function they have on society.[339] One Canadian legal scholar quotes the words of John Turner, a former Canadian Minister of Justice, approvingly:

---

sexual orientation is not an inherited trait; rather, the most that can be claimed is that certain genetically inherited traits may predispose one to become homosexual. See JEFFREY SATINOVER, HOMOSEXUALITY AND THE POLITICS OF TRUTH 113-17 (1996) (arguing that homosexual orientation is heritable, but not inheritable: certain unknown "associated traits"—perhaps anxiety, sensitivity, aesthetic sense, intelligence—may predispose one to be gay; but whether and the extent to which these behavioral traits are inheritable is unknown); *see also*, Satinover, *Gay Gene*, *supra* note 330 (quoting from his book).

335. Robert L. Spitzer, 32 ARCHIVES OF SEXUAL BEHAV. 5, 469-72 (Oct. 2003). This study thus rebuts that claim that sexual orientation is an inherent part of one's identity.

336. *See*, Mark Yarhouse & Warren Throckmorton, *Ethical Issues in Attempts to Ban Reorientation Therapies*, 39 PSYCHOTHERAPY: THEORY, RES., PRAC., TRAINING 1, 66-75 (2002) (supporting the effectiveness of "change therapies"); see also Christopher Rosik, *Motivational, Ethical, and Epistemological Foundations in the Clinical Treatment of Unwanted Homoerotic Attraction*, J. MARITAL & FAM. THERAPY, 13-28 (2003) (arguing that therapists must support a client's desire to abandon homosexuality).

337. In *Egan*, although the Court called sexual orientation "a deeply personal characteristic that is either unchangeable or changeable only at unacceptable personal cost," it conceded that "whether or not sexual orientation is based on biological or physiological factors . . . may be a matter of some controversy. . . ." Egan v. Can., [1995] 124 D.L.R. (4th) 609, ¶ 5.

338. *See, e.g.*, CBSC, Ontario, *supra* note 249, noting that

> gays and lesbians constitute a group benefiting from overwhelming judicial and legislative acknowledgment of gay and lesbian rights. . . . Since the sexual practices of gays and lesbians define them as homosexuals and are inseparable from their personas, any attempt . . . to justify . . . statements on the basis. . . . [of speaking of] the practices rather than the individuals must fail).

339. *See, e.g.*, Major, *supra* note 329. The Cohen Report also noted the didactic effects of the criminal law. Cohen, *supra* note 40, at 4.

> [The criminal law] is not merely a sanction or control process. It is reflective and declaratory of the moral sense of a community. It seeks not merely to proscribe but to educate. It seeks to set forth a threshold of tolerance and standards of minimum order and decency.[340]

Not only are hate speech laws that protect homosexuals grounded on debatable assumptions, the effect of these laws when infused with criminal punishments makes debate of those assumptions not just illegal, but unacceptable by society. In other words, important political speech is doubly—and powerfully—chilled.[341] Moreover, normative descriptions of dignity are highly contingent, making "it ... hard to see how human dignity can be quantified in a way that does not beg all the hard questions about using it as a policy measure."[342] Thus, employing human dignity as a basis for legal decision-making allows the judiciary to run roughshod over competing conceptions of dignity: for example, what makes equality and social acceptance central to human dignity rather than the free exercise of the religious or intellectual impulses is not, and cannot, be fully explained or justified by any court.[343]

Third, such a stance renders the government an active player in the "culture wars" by allowing it to impose an orthodoxy, which greatly endangers a host of constitutional rights—most obviously, aside from freedom of speech, freedom of religion. For example, in

---

340. Major, *supra* note 329.

341. *See On the Power That the Majority in America Exercises Over Thought, in* ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 243-245 (Harvey C. Mansfield & Delba Winthrop, trans., University of Chicago Press 2000) (1835) (arguing that, in democratic societies, once the majority has decided a particular issue, further debate outside narrowly prescribed bounds is not tolerated because of the enormous moral force that the majority has over the lone individual).

342. David A. Hyman, *Does Technology Spell Trouble with a Capital "T"?: Human Dignity and Public Policy*, 27 HARV. J. L. & PUB. POL'Y 3, 17 (2003). Of course, it could be argued that the insistence on using human dignity as a justification for stifling speech constitutes a cloak for the imposition of political correctness, which destroys the willingness to ask the uncomfortable—but crucial—political-philosophical questions that underlie the legal analysis here. *See generally*, ALLAN BLOOM, THE CLOSING OF THE AMERICAN MIND (1987) (considering the nature of democracy in the post-modern United States and arguing that the political "openness" of our age actually constitutes a profound closing).

343. For a competing notion of human dignity, one that stands in stark contrast to the Keegstra Court's conception of dignity, *see* Kevin J. Hasson, *Religious Liberty and Human Dignity: A Tale of Two Declarations*, 27 HARV. J. L. & PUB. POL'Y 81, 88-89 (2003) (arguing that the religious impulse is at the core of human dignity and constitutes the "ultimate freedom" because of its centrality to the "universal thirst for meaning and purpose in life"). For an excellent secular political-philosophical rebuttal of the conception of human dignity as equality and an argument that its implications for human living are dire, *see generally*, BLOOM, *supra* note 342 (condemning "doctrinaire [Left] historicism and relativism as threats to the self-awareness of those who honestly seek it") (quoting ALLAN BLOOM, GIANTS AND DWARFS 20 (1990)). For a religiously conscious rebuttal, see RICHARD M. WEAVER, IDEAS HAVE CONSEQUENCES 1 (1948) (describing the decay of Western civilization as the result of the choice of moral impotence and arguing that "modern man has become a moral idiot").

Hall v. Powers, an Ontario court granted an injunction against a Catholic high school from prohibiting a seventeen-year-old gay student from bringing a male date to the school's prom.[344] The school's principal rejected the student's request because granting permission to bring a male date would constitute "an endorsement and condonation of conduct which is contrary to Catholic church teachings."[345] The court framed the issue as "a balance . . . between conduct essential to the proper functioning of a Catholic school and conduct which contravenes . . . Charter rights."[346] The court's chief difficulty in granting the injunction was overcoming the school's constitutional claims under § 93 of the Constitutional Act of 1867, [347] which protects the rights of the Catholic church in Canada as they existed in 1867.[348] The court skirted this difficulty by flagrantly violating the provision, saying that the "proper approach is to look at the rights as they existed in 1867 but then to apply 2002 common sense."[349] The court determined the content of today's "common sense" by looking to *Bob Jones University v. United States,* in which the U.S. Supreme Court held that the government has a right to demand that public funds not be used for discriminatory purposes.[350] It then resorted to the familiar refrain of Canadian courts in justifying the granting of the injunction:

> Canadian law has accepted that homosexuality is not a mental illness or a crime but rather an innate characteristic not easily susceptible to change. Stigmatization of gay men rests largely on acceptance of inaccurate stereotypes—that gay men are mentally ill, emotionally

---

344. Hall v. Powers, [2002] 213 D.L.R. (4th) 308.

345. *Id.* ¶ 4.

346. *Id.* ¶ 33.

347. "Nothing in any such law shall prejudicially affect any Right or Privilege with respect to Denominational Schools which any Class of Persons have by Law in the Province at the Union." *Id.* ¶ 35. Section 93 is still valid under the Charter, which states "[n]othing in this Charter abrogates or derogates from any rights or privileges guaranteed by or under the Constitution of Canada in respect to denominational, separate or dissentient schools." CAN. CONST. (Constitution Act, yr) pt. I (Canadian Charter of Rights and Freedoms), § 29.

348. *Hall*, [2002] 213 D.L.R. ¶ 36. A court considering § 93 must engage in a two-step inquiry. First, "one must determine whether there was a right or privilege enjoyed by a particular class of persons by law at the time of Confederation." Second, "what was the extent of the power of the Trustees at the time of Confederation, [and] in what measure is this power a 'Right or Privilege with respect to Denominational Schools'[?]" *Id.* Traditionally, "the fundamental premise for the existence of Catholic education is that everything in a Catholic school is about religion. It is expected that catholicity will be imbued in all school activities and reflected in the behavior of all members of the school community." Greg M. Dickerson, *Injunction Orders Catholic School Board to Permit Same-Sex Partner at School Prom*, 12 EDUC. & L.J. 355, 358 (2003).

349. *Hall*, [2002] 213 D.L.R. ¶ 43. The court cited no precedent or any other authority justifying this approach.

350. Bob Jones Univ. v. United States, 461 U.S. 574 (1983). It goes without saying that this case is not binding authority on a Canadian court.

> unstable, incapable of enduring or committed relationships, . . . and prone to abuse children. Scientific studies in the last fifty years have discredited these stereotypes.[351] . . . The praiseworthy object . . . of the *Charter* is to prevent discrimination and promote a society in which all are secure in the knowledge that they are recognized as human beings equally deserving of concern, respect and consideration.[352]

The difference in the outcomes of this case and *Kempling* illustrates how the court's promotion of homosexual acceptance can too easily trump religious liberties: in *Kempling,* the court found that Kempling could be censured for his speech simply "[b]ecause non-discrimination is a core value of the educational system . . . [and] [n]on-discrimination includes recognizing homosexuals' right to equality, dignity, and respect. . . ."[353] But a core value of the Catholic school in *Hall*—namely, conformity with Church doctrine (which proscribes homosexuality)—was violated by Hall's bringing a gay date to his prom.[354] Yet the *Hall* court rejected the school administration's concern that Hall's actions violated one of its religion's core values:

> An injunction [to override the school's refusal to grant permission to Hall to bring a gay date] will not compel or restrain teachings with the school and will not restrain or compel any change or alteration to Roman Catholic beliefs. . . . However, if the order is not granted, [the harm will be] the effects of this sort of exclusion [which] are pervasive, serious and contribute to an atmosphere of self destructive behavior among gay youth.[355]

Such coerced promotion of homosexuality in a Catholic school ignores the mission of these schools and violates religious freedom. One education professor's statement summarizes well the hypocrisy of Canadian jurisprudence as reflected in *Kempling* and *Hall.*

> All schools exist to transmit social norms and this is done not only in the formal curriculum but in the informal aspects of school life. . . . Certainly many a teacher has been dismissed when their conduct—even off-hours—has fallen short of modeling those values. This educative role is all the more prominent in Catholic education where the central assumption grounding the idea of "the Catholic school" is that catholicity infuses everything in and about the school—its activities and people. . . . [I]f the message were that homosexual dating is sinful, then the duplicity of countering the message by granting same-sex couples permission to attend would arguably undermine the educative function.[356]

---

351. The court provided no citation to any such studies.
352. *Hall,* [2002] 213 D.L.R. ¶ 18.
353. Kempling v. Coll. Tchrs. (B.C.), [2004] 27 B.C.L.R. (4th) 139, ¶ 5.
354. See Dickerson, *supra* note 348.
355. *Hall,* [2002] 213 D.L.R. ¶¶ 55-56.
356. Dickerson, *supra* note 348, at 365.

3. Curing the Influence of Hate Speech: The Court's Endorsement of the Paternalistic Control of Speech to Ensure the Rationality of Society

The Supreme Court of Canada also declared another harm that hate speech codes are intended to cure: "[hate speech's] influence on society at large."[357] The Court noted that the Cohen Committee, the parliamentary committee that recommended hate speech proscriptions be added to Canada's criminal laws, claimed that "individuals can be persuaded to believe 'almost anything' if information or ideas are communicated using the right technique and in the proper circumstances."[358] It quoted the Committee's report at length:

> [W]e are less confident in the 20th century that the critical faculties of individuals will be brought to bear on the speech and writing which is directed at them. In the 18th and 19th centuries, there was a widespread belief that man was a rational creature, and that if his mind was trained and liberated from superstition by education, he would always distinguish truth from falsehood, good from evil.[359]

The Court commented:

> We cannot share this faith today in such a simple form. . . . [I]t is too often true, in the short run, that emotion displaces reason and individuals perversely reject demonstrations of truth put before them. . . . The success of modern advertising, the triumphs of impudent propaganda such as Hitler's, have qualified sharply our belief in the rationality of man. . . . We act irresponsibly if we ignore the way in which emotion can drive reason from the field. . . .
>
> [T]he alternation of views held by the recipients of hate propaganda may occur subtly, and is not always attendant upon conscious acceptance of the communicated ideas. . . .
>
> The threat of the self-dignity of target group members is thus matched by the possibility that prejudiced messages will gain some credence, with the attendant result of discrimination, and perhaps even violence, against minority groups in Canadian society.[360]

But the insufficiency of this argument is evident: it is an indictment not only of hate speech, but also of all speech liberties generally—and, taken to its logical conclusion, would require the abolition of democracy itself. It reflects a deep lack of faith in citizens' ability to distinguish truth from error, faults the "marketplace of ideas" as inadequate and even dangerous, and claims that the coercive force of government—in the form of hate speech laws—is the solution. The grave danger in this reasoning is that the sweeping goals that the government is to have in mind when enforcing its hate speech codes—

---

357. R. v. Keegstra, [1990] 3 S.C.R. 697, ¶ 66.
358. *Id.*
359. *Id.*
360. *Id.* ¶¶ 66-67.

not just violence and discrimination against homosexuals, but also the promotion of societal acceptance of gays—may infringe on speech and religious liberties.

An excellent example of how far the Canadian judiciary will to go to promote social acceptance of homosexuals—and how much such promotion can infringe on other rights—was seen in *Chamberlain v. Surrey School District*.[361] At issue was a public school board's refusal to approve supplemental instructional materials for kindergarten and first-grade students that included depictions of same-sex families.[362] The presiding trial judge in the case found that the Board reached its decision out of a concern that parents would object to the presentation of such materials to their young children.[363] Overturning the school board's decision and requiring the inclusion of such books in the curriculum, the Supreme Court of Canada stated that "[t]he Board's concern with age appropriateness was . . . misplaced."[364]

The Court reasoned that "[b]ehind all [of the Board's] considerations hovered the moral and religious concerns of some parents and the Board with the morality of homosexual relationships."[365] This, the Court said, "violate[d] principles of secularism."[366] As the dissenters in the case correctly noted, the majority read the term "secular" far too broadly: "The requirements that education be 'secular' and 'non-sectarian' refer to keeping schools free from inculcation or indoctrination in the precepts of any [particular] religion and does not prevent persons with religiously based moral positions on matters of public policy from participating in deliberations concerning moral education in public schools."[367]

The Court recognized that the relevant provincial law "contemplates extensive parental involvement at the stage of selecting books for use in a particular classroom."[368] The Court also noted that the guidelines mandate "that where 'sensitive content' is concerned, teachers should 'consider the appropriateness of any resource from the perspective of the local community.'"[369] But the Court concluded that "parent concerns must be accommodated in a way that respects diversity. Parental views, however important, cannot override the imperative . . . to mirror the diversity of the

---

361. Chamberlain v. Surrey Sch. Dist., [2002] 4 S.C.R. 710.
362. *Id.* ¶ 1.
363. *Id.* ¶ 45.
364. *Id.* ¶ 69.
365. *Id.* ¶ 55.
366. *Id.* ¶ 58.
367. *Id.* ¶ 139.
368. *Id.* ¶¶ 29-30.
369. *Id.* ¶¶ 31-32.

community and teach tolerance and understanding of difference."[370] Stating that "[t]olerance is always age appropriate,"[371] the Court referenced statutory language that "learning resources" used in the classrooms must be "appropriate in terms of age [and] maturity . . . [and be] free from gratuitous . . . propaganda"[372] to *support* its holding.[373]

VI. CONCLUSION

The error of the Canadian judiciary described in this Note stems ultimately from the paradoxical nature of the course it has taken: honoring the progressive goal of legislators to promote the social acceptance of gays by upholding the constitutionality of profoundly conservative means—governmental control over speech—to achieve it. The danger of this course is apparent: as is well-illustrated in this Note, the consequences for individual speech and religious liberties can be, and have been, devastating.

Hans C. Clausen*

---

370. *Id.* ¶ 33. The Court noted one solution that objecting parents can take: "send . . . [their children] to private or religious schools where their own values and beliefs may be taught." *Id.* ¶ 30. But lower court rulings such as Hall call this solution into question.

371. *Id.* ¶ 69.

372. *Id.* ¶ 36.

373. For an example of one Canadian legal scholar's enthusiasm for governmental promotion of homosexual acceptance to young children in public schools, see Bruce MacDougall, *supra* note 324. MacDougall argues, in part, that "[s]ociety loses much of its rationality when it comes to homosexuality and children" and that young children should be exposed to "positive . . . expression or images of homosexuals and homosexuality in schools." *Id.* at 1.

* J.D. Candidate, Vanderbilt University Law School, 2005. A.B., University of Chicago, 1995. My thanks to Richard Owen and David Housholder for their insightful criticisms of an earlier draft of this Note. The tremendous dedication of Lauren Spitz, Megan Short, and Faye Johnson to the *Journal* made possible the time for me to write this Note, and I thank them especially. My thanks also to the entire *Journal* staff for their assistance in the preparation of this manuscript for publication. My mention of the persons above in no way implies their endorsement of my views herein; the errors and shortcomings of this Note are entirely my own.