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Commission de reforme du droit du Canada

CRIMINAL LAW

hate propaganda

Working Paper 50

Canada

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Law Reform Commission
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Working Paper 50

HATE PROPAGANDA

1986

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This Working Paper presents the views of the Commission at this time. The Commission's final views will be presented in its Report to the Minister of Justice and Parliament, when the Commission has taken into account comments received in the meantime from the public.

The Commission would be grateful, therefore, if all comments could be sent in writing to:

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Anti-Semitism does not fall within the category of ideas protected by the right of free opinion.
Indeed, it is something quite other than an idea. It is first of all a passion.

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Anti-Semite and Jew

I supported free speech for Nazis when they wanted to march in Skokie in order to defeat Nazis. Defending my enemy is the only way to protect a free society against the enemies of freedom.

Arych Neier,
Defending My Enemy: American Nazis, the Skokie Case, and the Risks of Freedom

Introduction

Our *Criminal Code* prohibits not only physical attacks but also some verbal attacks. The publication of certain words may be regarded as harmful to the public interest. Offences such as seditious libel, defamatory libel and hate propaganda fall into this category.

In our Working Paper entitled *Defamatory Libel*,[1] we examined the limitations that the criminal law imposes on freedom of expression in the context of attacks on the reputation of a person. In accordance with the principle that criminal law should only be used with restraint and having concluded that criminal law was not an effective weapon in the fight against defamation, we recommended the abolition of the offence of defamatory libel.[2]

In contrast to the offence of defamatory libel, the *Code* offences relating to hate propaganda are directed against attacks on certain groups in our society. In fact, these provisions grant greater protection to such groups because the attacks prohibited are not always of a defamatory nature.

The existence of these offences in Canadian criminal law nevertheless raises several questions. Is the attack on the dignity and the equality of the person so serious and socially reprehensible that the intervention of criminal law is both plausible and necessary? Is the undertaking given to the international community to make any racial discrimination a punishable offence an overriding factor?

These offences also provoke a lively debate between the supporters of an absolute right of freedom of expression in this context, and those who believe that such a right must be limited in order to promote the maintenance and encouragement of the multicultural heritage of Canadians. Our present criminal law attempts to strike a balance between these two positions.

In order to assess the role criminal law can play with regard to hate propaganda, we shall examine the present law, expose uncertainties and list weaknesses in organization, style and form. We shall study the legislation of a few foreign jurisdictions and present an up-to-date account of international measures to eliminate racial discrimination. Finally, we shall propose legislative amendments designed to improve the hate propaganda provisions.

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1. Law Reform Commission of Canada, *Defamatory Libel* [Working Paper 35] (Ottawa: Supply and Services, 1984).

2. *Id.*, pp. 59-60.

CHAPTER ONE

The Law relating to Hate Propaganda

I. The History of Hate Propaganda Crimes

In order to understand properly the evolution in Canada of the hate propaganda offences, it seems necessary not only to describe the history behind these provisions, but also to discuss certain related offences drawn from English law.

A. English Law

In 1275, some defamatory attacks took on a criminal aspect by the creation of the offence *De Scandalis Magnatum*. It was hoped in this way to prohibit the spreading of false rumours of a nature that would sow discord between the king and great men of the realm.[3] In other words, this crime had the effect of protecting certain people belonging to a particular group against damaging statements.

Despite the fact that this offence does not relate directly to hate propaganda, it remains nevertheless significant as being the foundation for section 177 of the Canadian

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3. The statutory criminal offence, *De Scandalis Magnatum*, prohibited the telling or publishing of

> any false News or Tales, whereby discord, or occasion of discord or slander may grow between the King and his People, or the Great Men of the Realm: and he that doth so, shall be taken and kept in Prison, until he hath brought him into the Court, which was the first Author of the Tale (3 Edw. 1, c. 34, *The Statutes of the Realm*, Vol. 1 (1810, reprinted London: 1963, Dawsons of Pall Mall), p. 35).

Various commentators have noted that the statute was directed against false statements which, in a society of powerful and armed magnates, could necessarily endanger the security of the state. See, for example, J. Kelly, "Criminal Libel and Free Speech" (1958), 6 *Kansas L. Rev.* 295, p. 297; *Starkie's Treatise on the Law of Slander and Libel*, 3rd ed. (London: Butterworths, 1869), p. 177; W. Holdsworth, *A History of English Law* (London: Sweet and Maxwell, 1966), Vol. III, p. 409. As D.A. Elder points out in "Kentucky Criminal Libel Law and Public Officials — An Historical Anachronism?" (1981), 8 *N. Ky. L. Rev.* 37, p. 40:

> Explicitly to secure the established order, English law had adopted for the first time what was, in essence, a criminal libel law — a statute with the intendment and precedential impact of legal authorization of direct curtailment of free expression critical of public institutions and personages.

In fact, the statutory offence of *scandalum magnatum* was little used. It was finally abolished in England by the *Statute Law Revision Act, 1887*, 50 & 51 Vict., c. 59.

Criminal Code, spreading false news, which was recently used in a prosecution for publishing hate propaganda. This section will be analyzed later in the course of this Paper.

At common law, the civil law does not protect against group defamation. At most, it protects the members of a group as individuals. They must prove that the defamatory words were aimed at them as individuals.[4]

On the other hand, at common law, the criminal law covers group defamation. The case of *R.* v. *Osborn*,[5] tried in 1732, is the origin for criminal prosecution for group defamation. Osborn published accusations that Jews, recently arrived from Portugal, living on Broad Street in London, on learning that a Jewish woman had had sexual relations with a Christian, had burned and killed her and her illegitimate child. This libel caused some disturbances, and mobs attacked the Jews in different parts of the city. The court found Osborn guilty, not of libel *per se*, but of having published a libel that caused a breach of the peace. Since then, a defamatory libel on a group can be prosecuted if the words spoken are of a nature that breaches the public peace.[6]

B. Canadian Law

Before the hate propaganda crimes were inserted in the *Criminal Code*, Canadian legislation did not adequately repress hate propaganda.

Unlike English criminal law, our offence of defamatory libel only applies to defamatory attacks upon a person.[7] The definition of the expression "person" in section 2 of our *Criminal Code* is not restricted to physical persons but also covers public bodies, corporations, societies and companies. However, groups having common characteristics such as race, religion, colour and ethnic origin are not included in this definition.[8]

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4. S.S. Cohen, "Hate Propaganda — The Amendments to the Criminal Code" (1971), 17 *McGill L.J.* 740, pp. 741-6.

5. *R.* v. *Osborn* (1732), 2 Barn. K.B. 166, 94 E.R. 425; W. Kel. 230; 25 E.R. 584; 2 Swanst. R. 503n, 36 E.R. 717. While the report in Barnardiston suggests that the case was a libel upon a group, the other reports indicate that the court saw the case as causing a breach of the peace by inciting the mobs against the Jews. See "Race Defamation and the First Amendment" (1965-66), 34 *Fordham L. Rev.* 653, pp. 654-6. For other criminal prosecutions for libels against groups, see *R.* v. *Williams* (1822), 5 B. & Ald. 595; 106 E.R. 1308 (a libel upon the clergy of the diocese of Durham) and *Re Gathercole* (1838), 2 Lewin 237; 168 E.R. 1140 (a libel upon the Scorton nunnery). J.C. Smith and B. Hogan, *Criminal Law*, 5th ed. (London: Butterworths, 1983), state at page 775:

> A libel on a class of persons is not actionable unless the class is so small, like a body of trustees or directors, that it might be taken to refer to each member individually, or it is otherwise so worded as to appear to refer to an individual. It is possible, however, that a libel intended to excite public hatred against a class, such as the clergy of Durham or the Justices of the Peace of Middlesex is indictable, though no individual's reputation be harmed. [Footnotes omitted]

6. M. Gropper, "Hate Literature — The Problem of Control" (1965), 30 *Sask. Bar Rev.* 181, pp. 186-7. See also: D.R. Fryer, "Group Defamation in England" (1964), 13:1 *Clev.-Mar. L. Rev.* 33, pp. 46-7; and P.J. Belton, "The Control of Group Defamation: A Comparative Study of Law and Its Limitations" (1960), 34 *Tul. L. Rev.* 299, pp. 301-3.

7. Cohen, *supra*, note 4, p. 765.

8. See *Ex parte Genest* v. *R.* (1933), 71 Qué. S.C. 385.

With respect to seditious libel, the Supreme Court of Canada in the case of *Boucher* v. *The King*[9] interpreted the term "sedition" in a restrictive way. In that case, Boucher, a farmer living in Québec, was convicted at trial for having published a seditious libel contrary to the then sections 133, 133A and 134 of the *Criminal Code* (now sections 60, 61 and 62). The document, entitled *La haine ardente du Québec pour Dieu, pour le Christ et pour la liberté est un sujet de honte pour tout le Canada*, dealt in a general way with the vindictive persecution that Jehovah's Witnesses in Québec suffered as brothers in Christ.

The Supreme Court acquitted Boucher and held that the intention to produce feelings of hatred and ill will between different classes of His Majesty's subjects is not sufficient in itself to constitute a seditious intent. There must also be an intention to disturb the established order or to resist authority: "No one would suggest that the document is intended to arouse French-speaking Roman Catholics to disordering conduct against their own government, and to treat it as directed, with the same purpose, towards the Witnesses themselves in the province, would be quite absurd."[10]

As for spreading false news, this offence was interpreted in a restrictive way in the case of *R.* v. *Carrier*.[11] Following the acquittal of Carrier for conspiracy to publish a seditious libel similar to the one in *Boucher*, the Court of Queen's Bench (Criminal Division) decided that he could not be convicted, on the same facts, with spreading false news. The court held that the expression "whereby injury is or is likely to be occasioned to any public interest" should be interpreted in the light of the definition of sedition as set out in the *Boucher* case.

From that point on, it appeared clear that in order to suppress hate propaganda sufficiently, new provisions had to be added to our *Criminal Code*. But the status quo was maintained in our criminal law for several years.[12]

However, the necessity for intervention by legislators in this area was felt as early as 1933, when Nazi propaganda began to be distributed in several regions of the country.

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9. *Boucher* v. *The King*, [1951] S.C.R. 265.

10. *Id.*, p. 291, *per* Rand J. For commentaries on the *Boucher* decision, see F.A. Brewin, "Criminal Law — Sedition — Witnesses of Jehovah — Civil liberties — Consultation among Members of Appellate Court" (1951), 29 *Can. Bar Rev.* 193; M. Fenson, "Group Defamation: Is the Cure Too Costly?" (1964-65), 1 *Man. L.J.* 255, pp. 269-81. For a history of seditious libel in England, in United States, and Canada, see M.R. MacGuigan's study in the *Report of the Special Committee on Hate Propaganda in Canada* (Ottawa: Queen's Printer, 1966), Appendix I, pp. 73-170 (hereinafter cited as the Cohen Committee). See also M.G. Freiheit, "Free Speech and Defamation of Groups by Reason of Color or Religion" (1966), 1 *R.J.T.* 129, pp. 134-9; Gropper, *supra*, note 6, pp. 187-8.

11. *R.* v. *Carrier* (1951), 104 C.C.C. 75 (Qué. K.B., Criminal Side). For comments on this decision, see: Cohen, *supra*, note 4, p. 765; Gropper, *supra*, note 6, pp. 188-9; Fenson, *supra*, note 10, p. 278.

12. Cohen, *supra*, note 4, p. 768.

The province of Manitoba enacted a statute at that time in order to combat this propaganda.[13]

Furthermore, on the international level, nations agreed on the necessity of establishing general standards for the respect of persons and minorities because the conscience of all had been shocked by the revelation of the inhumane practices of totalitarian regimes both of the right and the left — the most unforgettable example being the genocidal policies applied by the Third Reich.[14]

For many observers, it was clear that despite the crushing defeat of Hitler and of Germany, Naziism remained alive during the post-war period, as evidenced by the persistence of certain kinds of racist propaganda, the incitement to hatred of identifiable groups and even in some cases the incitement to genocide in otherwise democratic societies.[15]

The first demands for legislation suppressing hate propaganda with respect to religious and ethnic groups go back to March 1953. At that time, some traditionally vulnerable minority groups took their case before the Joint Committee of the House of Commons and the Senate studying the revision of the *Criminal Code*.[16] However, hate propaganda continued to exist during this period and a rise in such activity was witnessed at the end of the 1950s and the beginning of the 1960s.[17]

In January 1965, the then Minister of Justice, the Honourable Guy Favreau, appointed a special committee to study the problems with respect to the spread of hate propaganda in Canada.[18]

In its conclusions, the *Report of the Special Committee on Hate Propaganda in Canada* emphasized that existing Canadian law could not provide a sufficiently effective

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13. *The Libel Act*, S.M. 1934, c. 23, s. 13A, now *The Defamation Act*, R.S.M. 1970, c. D20, s. 19(1). See also: Z. Chafee, *Government and Mass Communications* (Hamden, Connecticut: Archon Books, 1965), p. 117; P. Paraf, *Le racisme dans le monde* (Paris: Petite bibliothéque Payot, 1981), p. 189; W.S. Tarnopolsky, "The Control of Racial Discrimination" in R.St.J. Macdonald and J.P. Humphrey, eds., *The Practice of Freedom* (Toronto: Butterworths, 1979), p. 295.

14. M. Cohen, "Human Rights and Hate Propaganda: A Controversial Canadian Experiment" in S. Shoham, ed., *Of Law and Man* (New York and Tel Aviv: Sabra Books, 1971), pp. 59-60.

15. M. Cohen, "The Hate Propaganda Amendments: Reflections on a Controversy" (1971), 9 *Alta. L. Rev.* 103, p. 105.

16. B.G. Kayfetz, "The Story behind Canada's New Anti-Hate Law" (May-June 1970), *Patterns of Prejudice* 5. See also Fenson, *supra*, note 10, pp. 271-6.

17. Cohen, *supra*, note 15, p. 104. See also W.S. Tarnopolsky, "Freedom of Expression v. Right to Equal Treatment" (Centennial Edition 1967), *U.B.C. L. Rev. — C. de D.* 43, p. 45. For a detailed study of the activities of the Canadian Nazi Party in Toronto during the mid-1960s, see M.R. MacGuigan, "Hate Control and Freedom of Assembly" (1966), 31 *Sask. Bar Rev.* 232.

18. Canada, Debates of the House of Commons, 2nd Session, 26th Parliament, Vol. XI, February 25, 1965, pp. 11716-7.

legal basis to prevent and combat hate propaganda.[19] The Cohen Committee recommended at that time that it would be desirable to draft a Bill to amend the *Criminal Code* in order to include provisions with respect to hate propaganda.[20]

In its desire to harmonize its legislation with the principles of the *International Convention on the Elimination of All Forms of Racial Discrimination*[21] and the *Convention on the Prevention and Punishment of the Crime of Genocide*,[22] and in view of the Cohen Committee's recommendations and the fundamental principles of the *Canadian Bill of Rights*,[23] Parliament attempted to correct some of the defects in our criminal law. In effect, to affirm some principles of international law and to denounce unequivocally certain racist practices in our society, Parliament undertook to penalize discriminatory attitudes through the criminal law.

In 1970, the Canadian Parliament added certain hate propaganda offences to the *Criminal Code*.[24] These are advocating genocide, public incitement of hatred, and wilful promotion of hatred.

II. The Present Law

The present *Criminal Code* contains four offences that deal directly or indirectly with hate propaganda: advocating genocide; public incitement of hatred; wilful promotion of hatred; and, spreading false news.

A. Advocating Genocide

Section 281.1 of the *Criminal Code* makes it criminal to advocate genocide:

> (1) Every one who advocates or promotes genocide is guilty of an indictable offence and is liable to imprisonment for five years.

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19. Cohen Committee, *supra*, note 10, p. 59. For some criticisms of the report, see R.E. Hage, "The Hate Propaganda Amendment to the Criminal Code" (1970), 28 *U.T. Faculty L.R.* 63.

20. Cohen Committee, *supra*, note 10, pp. 69-71.

21. See *infra*, notes 64 to 67 inclusive.

22. See *infra*, notes 68 and 69.

23. *Canadian Bill of Rights*, R.S.C. 1970, Appendix III.

24. *An Act to amend the Criminal Code*, R.S.C. 1970 (1st Supp.), c. 11, amending R.S.C. 1970, c. C-34. For some comments on the evolution of the Bill with respect to hate propaganda, see: Kayfetz, *supra*, note 16, pp. 6-8; Tarnopolsky, *supra*, note 17, pp. 45-6; Cohen, *supra*, note 4, pp. 767-71; Gropper, *supra*, note 6, pp. 182, 196-9. See also Canada, House of Commons, Standing Committee on Justice and Legal Affairs, *Minutes of Proceedings and Evidence*, No. 8 (February 10, 1970); No. 9 (February 17, 1970); No. 10 (February 24, 1970); No. 11 (February 26, 1970); No. 12 (March 3, 1970).

(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.

No prosecution for this offence can be instituted without the consent of the Attorney General.[25]

B. Public Incitement of Hatred

Subsection 281.2(1) of the *Criminal Code* deals with a person who publicly incites hatred:

Every one who, by communicating statements in any public place, incites hatred against any identifiable group where such incitement is likely to lead to a breach of the peace, is guilty of

(*a*) an indictable offence and is liable to imprisonment for two years; or

(*b*) an offence punishable on summary conviction.

Thus, the basis of the offence is the incitement of hatred in a "public place" that is likely to bring about a breach of the peace. The *Criminal Code* defines the term "public place" as including "any place to which the public have access as of right or by invitation, express or implied; ...."[26]

C. Wilful Promotion of Hatred

Subsection 281.2(2) of the *Criminal Code* covers the case of a person who wilfully promotes hatred:

Every one who, by communicating statements, other than in private conversation, wilfully promotes hatred against any identifiable group is guilty of

(*a*) an indictable offence and is liable to imprisonment for two years; or

(*b*) an offence punishable on summary conviction.

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25. *Criminal Code*, s. 281.1(3). All references to the *Criminal Code* are to R.S.C. 1970, c. C-34, as amended.

26. *Criminal Code*, s. 281.2(7).

This offence can be distinguished from the one in subsection 281.2(1) of the *Criminal Code* because it does not require that the activity in question be likely to bring about a breach of the peace. For example, if a person distributes pamphlets of a racist nature and such a distribution is not likely to bring about a breach of the peace, the communication of these pamphlets may be covered by *Code* subsection 281.2(2). Furthermore, the communication of the statements must occur "other than in private conversation."

For this offence, Parliament enacted certain defences in order to guarantee that freedom of expression would be respected.[27] Subsection 281.2(3) of the *Criminal Code* provides that the person who wilfully promotes hatred shall not be convicted:

> (*a*) if he establishes that the statements communicated were true;[28]
>
> (*b*) if, in good faith, he expressed or attempted to establish by argument an opinion upon a religious subject;[29]
>
> (*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;[30] 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 towards an identifiable group in Canada.[31]

No prosecution shall be instituted for this offence without the consent of the Attorney General.[32]

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27. To compare the defences as proposed by the Cohen Committee with those subsequently enacted, see: the Cohen Comittee, *supra*, note 10, pp. 65-6; and Cohen, *supra*, note 4, pp. 775-7.

28. During the proceedings of the House of Commons Standing Committee on Justice and Legal Affairs, No. 11 (February 26, 1970), Mark MacGuigan stated at page 11:35:

> It seems to me very important that we not extend the ambit of this statute too wide, that we keep the unrestricted defence of truth, because ... it would not be seemingly for someone who is taking a position which could be demonstrably shown to be true ... to be convicted because of the circumstances in which he uttered the word.

29. The legislative history of this defence demonstrates that it was added to the *Criminal Code* in order to compensate for the addition of the criterion of religion to the definition of "identifiable group." The Senate asked for a compensatory defence to establish unequivocally that a good-faith discussion on a religious subject would not be prohibited. In other words, the purpose of this defence is to assure that religious debates are not inhibited. However, this compensatory logic was questioned throughout the Parliamentary debates. See Canada, House of Commons, Standing Committee on Justice and Legal Affairs, *Minutes of Proceedings and Evidence*, No. 11 (February 26, 1970), pp. 11:22–11:33. This defence was not included among the recommendations of the Cohen Committee, *supra*, note 10.

30. The Cohen Committee, *supra*, note 10, argued at page 65 that "at a minimum" this defence was required.

31. This defence covers the case of a statement that would constitute an attempt to convince other citizens to eliminate the cause of this hatred. For example, an Indian Chief in Canada with grievances against the White population in Canada who set out those grievances in order to have them corrected, could invoke paragraph 281.2(3)(*d*) as a defence. See Canada, Debates of the House of Commons, 2nd Session, 28th Parliament, Vol. VI, April 6, 1970, p. 5553.

32. *Criminal Code*, s. 281.2(6).

This provision specifies that there must be a wilful incitement to hatred. What is the meaning of the term "wilfully"? The decision in *R.* v. *Buzzanga and Durocher*[33] makes it clear that the word "wilfully" in this context means intending to promote hatred.

In 1977, Buzzanga and Durocher, two Franco-Ontarians, were accused, pursuant to subsection 281.2(2) of the *Criminal Code*, of having wilfully promoted hatred against French Canadians in Essex County in Ontario by distributing highly anti-French-Canadian handbills. They were convicted at trial. However, in September 1979, the Ontario Court of Appeal set aside the convictions and ordered a new trial.

The Court of Appeal considered that the intention of the two accused, which was to provoke a reaction among French Canadians in their battle to have a French school built in the region, did not correspond to the intention to promote hatred required by the word "wilfully." However, the court held that "wilfully" was not restricted to desiring to promote hatred:

> I agree, however (assuming without deciding that there may be cases in which intended consequences are confined to those which it is the actor's conscious purpose to bring about), that, as a general rule, a person who foresees that a consequence is certain or substantially certain to result from an act which he does in order to achieve some other purpose, intends that consequence. The actor's foresight of the certainty or moral certainty of the consequence resulting from his conduct compels a conclusion that if he, none the less, acted so as to produce it, then he decided to bring it about (albeit regretfully), in order to achieve his ultimate purpose. His intention encompasses the means as well as to his ultimate objective.[34]

This interpretation has the effect of including in the intention to achieve a result, the consciousness by the agent that his actions will certainly or almost certainly bring about that result. This form of *mens rea* excludes recklessness.[35]

In a recent trial decision, *R.* v. *Keegstra*,[36] the accused, ex-mayor and ex-teacher in Eckville, Alberta, was found guilty of having wilfully promoted hatred against the Jewish people by teaching in such a way as to deny the existence of persecution of Jews and to claim that the Holocaust was nothing but a hoax perpetrated by a Jewish conspiracy.

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33. *R.* v. *Buzzanga and Durocher* (1979), 49 C.C.C. (2d) 369 (Ont. C.A.).

34. *Id.*, pp. 384-5.

35. *Id.*, p. 381. For comments on the decision in *R.* v. *Buzzanga and Durocher*, see: M. Manning, *Rights, Freedoms and the Courts: A Practical Analysis of the Constitution Act, 1982* (Toronto: Emond-Montgomery, 1983), p. 603; J. Fortin and L. Viau, *Traité de droit pénal général* (Montréal: Thémis, 1982), pp. 140-1.

36. *R.* v. *Keegstra*, Alta. Q.B., July 20, 1985, Mackenzie J. (unreported). Keegstra was sentenced to pay a $5000 fine. At the time of the publication of this Paper, Keegstra was appealing his conviction, while the Crown was cross-appealing his sentence. For an analysis of the *Keegstra* affair, see: S. Mertl and J. Ward, *Keegstra: The Trial, the Issues, the Consequences* (Saskatoon: Western Producer Prairies Books, 1985); D. Bercuson and D. Wertheimer, *A Trust Betrayed: The Keegstra Affair* (Toronto: Doubleday Canada, 1985).

The pre-trial decision of *R.* v. *Keegstra*,[37] given in response to a constitutional challenge to this crime, is a landmark decision concerning freedom of expression in relation to hate propaganda.

In order to evaluate the justification of the restrictions that may be imposed on the rights and freedoms guaranteed by the *Canadian Charter of Rights and Freedoms*,[38] Mr. Justice Quigley tried to balance freedom of expression with the right to equality guaranteed by section 15 of the Charter and the right under section 27 which provides that every interpretation of the Charter must be consistent with the preservation and enhancement of the multicultural heritage of Canadians.[39] He concluded in the following way:

> In my view, the wilful promotion of hatred under circumstances which fall within s. 281.2(2) of the *Criminal Code* of Canada clearly contradicts the principles which recognize the dignity and worth of identifiable groups, singly and collectively; it contradicts the recognition of moral and spiritual values which impels us to assert and protect the dignity of each member of society; and it negates or limits the rights and freedoms of such target groups, and in particular denies them the right to the equal protection and benefit of the law without discrimination.
>
> Under these circumstances, it is my opinion that s. 281.2(2) of the *Code* cannot rationally be considered to be an infringement which limits "freedom of expression," but on the contrary it is a safeguard which promotes it. The protection afforded by the proscription tends to banish the apprehension which might otherwise inhibit certain segments of our society from freely expressing themselves upon the whole spectrum of topics, whether social, economic, scientific, political, religious, or spiritual in nature. The unfettered right to express divergent opinions on these topics is the kind of freedom of expression the Charter protects.[40]

D. Common Definitions

(1) Identifiable Group

For the three offences listed above, the communication of a statement must be directed against an "identifiable group," the definition of which can be found in *Code* subsection 281.1(4):

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37. *R.* v. *Keegstra* (1984), 19 C.C.C. (3d) 254 (Alta. Q.B.). For an examination of a Canadian statute dealing with hate propaganda in relation to the *International Convenant on Civil and Political Rights*, see *John Ross Taylor and the Western Guard Party* v. *Canada* (1984), 5 C.H.R.R. D/2097. For a comment on how international law may be used to interpret the Charter, see D. Turp, "Le recours au droit international aux fins de l'interprétation de la Charte canadienne des droits et libertés : un bilan jurisprudentiel" (1984), 18 *R.J.T.* 353.

38. *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, which is Schedule B to the *Canada Act 1982*, c. 11 (U.K.).

39. Subsection 15(1) of the Charter states: "Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability." Section 27 of the Charter states: "This Charter shall be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians."

40. *R.* v. *Keegstra*, *supra*, note 37, p. 268.

In this section "identifiable group" means any section of the public distinguished by colour, race, religion or ethnic origin.

(2) Communicating Statements

With respect to offences provided in subsections 281.2(1) and (2) of the *Criminal Code*, the incitement of hatred and the wilful promotion of hatred must be the result of "communicating statements." The *Code* defines these terms in the following way in subsection 281.2(7):

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

...

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

E. Forfeiture and Seizure

When a person is found guilty of these offences, the presiding magistrate or judge may order anything by means of or in relation to which the offence was committed, to be forfeited to Her Majesty.[41] Furthermore, *Code* section 281.3 provides for the issuance of a warrant of seizure by a judge who is satisfied by information upon oath that there are reasonable grounds for believing that any publication, copies of which are kept for sale or distribution in premises within the jurisdiction of the court, is hate propaganda. "[H]ate propaganda," defined in section 281.3(8) of the *Code*, "means any writing, sign or visible representation that advocates or promotes genocide or the communication of which by any person would constitute an offence under section 281.2."

F. Spreading False News

Section 177 of the *Code* makes spreading false news an offence:

Everyone who wilfully publishes a statement, tale or news that he knows is false and that causes or is likely to cause injury or mischief to a public interest is guilty of an indictable offence and is liable to imprisonment for two years.

The origin of this offence in our *Criminal Code* goes back to the crime of *De Scandalis Magnatum* of 1275.[42] Only a few decisions have been rendered on this subject.

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41. *Criminal Code*, s. 281.2(4). By subsection 281.2(5), telephone, telegraph, or other communication facilities owned by a person engaged in providing a communication service to the public are exempt from forfeiture.

42. F.R. Scott, in "Publishing False News" (1952), 32 *Can. Bar Rev.* 37, examines the history of this offence. Scott, at page 47, also foresaw that this offence could be used to protect racial and religious groups from hateful attacks.

In the case of *R.* v. *Hoaglin*,[43] the accused, a merchant in Alberta, advertised a closing sale in the following way:

> We have decided to leave Canada .... Americans not wanted in Canada. Investigate before buying lands and taking homesteads in this country.

The accused was found guilty. This false news was considered to be contrary to the public interest because it was in Canada's interest to attract immigrants.

In the decision of *R.* v. *Carrier*,[44] mentioned earlier, the Québec Court of Appeal (Criminal Division) held that the term "that causes or is likely to cause injury or mischief to a public interest" had to be interpreted in relation to the definition of sedition as formulated in the case of *Boucher*.

In the case of *R.* v. *Kirby*,[45] it was decided that an underground newspaper's parodying of another newspaper (*The Gazette*), containing a false story that the mayor of Montréal had been killed by a drug-crazed hippie, was not sufficient to justify a conviction pursuant to then section 166 (now 177) of the *Criminal Code*. This underground newspaper did not cause injury or mischief to the public interest even though it may have caused some embarrassment or inconvenience to the editor-in-chief of *The Gazette*.

However, the recent decision in *R.* v. *Zundel*[46] demonstrated that this provision could be used to combat hate propaganda. The accused was found guilty of having knowingly spread false news by publishing a pamphlet entitled "Did Six Million Really Die?" and provoking thereby racial and social intolerance. He was, however, acquitted on a charge of having wilfully caused injury or mischief to the public interest by publishing a pamphlet claiming that there exists a Communist and Jewish conspiracy on an international scale.

In effect, it seems clear that section 177 of the *Criminal Code* can apply in cases of hate propaganda. Moreover, it would seem to cover both written and oral statements.[47]

Parliament had in mind three specific offences to combat hate propaganda. History has shown, however, that these offences are rarely prosecuted. The type of hate propaganda described in section 281.1 of the *Criminal Code*, advocating genocide, is rarely found. As for *Code* subsections 281.2(1) and (2), the difficulty in proving some of their elements seems to be an obstacle to prosecution. For example, the consequence of a public incitement of hatred is not necessarily a likelihood of a breach of the peace. More obvious are the element of intention in, and the defences attached to, the crime of wilful

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43. *R.* v. *Hoaglin* (1907), 12 C.C.C. 226 (N.W.T. S.C.).

44. *R.* v. *Carrier*, *supra*, note 11.

45. *R.* v. *Kirby* (1970), 1 C.C.C. (2d) 286 (Qué. C.A.).

46. *R.* v. *Zundel*, Ont. District Ct.; convicted Feb. 28, 1985; sentenced March 25, 1985, Locke J. (unreported). At the time of the publication of this Paper, Zundel was appealing his conviction. For an analysis of the Zundel trial, see H.R.S. Ryan, "The Trial of Zundel, Freedom of Expression and the Criminal Law" (1985), 44 *C.R.* (3d) 334.

47. Scott, *supra*, note 42, pp. 43-4.

promotion of hatred. Furthermore, section 281.1 and subsection 281.2(2) of the *Code* require the consent of the Attorney General before the institution of proceedings in order to avoid futile and unjustified prosecutions. If these difficulties seem to close the door to prosecutions in relation to hate propaganda, do not the *Zundel* case and *Code* section 177 reopen that door?

III. Defects of Organization, Form, Style and Uncertainty in the Present Law

Having examined the present law, we can see that it has obvious imperfections. No doubt the central issue is: Should these crimes exist at all? And if so, what should they prohibit? This, however, will be analyzed in Chapter Two, Part II, dealing with the role of the criminal law in relation to hate propaganda. In the following discussion, we will examine the defects of organization, form, style and uncertainty in these provisions.

A. Organization, Form and Style

One of the basic principles in the organization of offences in the *Code* is the need to assure easy reference. It seems appropriate to us that a definition that applies to several offences should be found in a separate provision, either at the beginning of the *Code*, or at the beginning of a group of offences to which the definition applies. The definition of the term "identifiable group" applies to all of the offences that specifically relate to hate propaganda and is of fundamental importance in the application of these provisions. However, this definition is found at present in section 281.1 of the *Criminal Code*. It should be put into a separate definition section.

Where in the *Code* should the existing provisions relating to hate propaganda be incorporated? At this time, they are found in Part VI, which is entitled "Offences against the Person and Reputation."

Assuredly, hate propaganda may attack a "person" who is part of a group. However, Parliament has placed the emphasis primarily on statements that are directed against an "identifiable group." For their part, Mewett and Manning submit that the gravamen of these offences is the danger to the tranquility of the state.[48] In our view, in a new Code these offences should be included among offences against society.[49]

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48. A.W. Mewett and M. Manning, *Criminal Law*, 2nd ed. (Toronto: Butterworths, 1985), pp. 447-8.

49. See also N. Lerner who shows that some statutes claim that these offences under the *International Convention on the Elimination of All Forms of Racial Discrimination* should be viewed as offences against society. N. Lerner, *The U.N. Convention on the Elimination of All Forms of Racial Discrimination*, 2nd ed. (Alphen aan den Rijn, The Netherlands and Rockville, Maryland, U.S.A.: Sijthoff & Noordhoff, 1980), p. 44.

Also, the present forfeiture provision in section 281.3 should not be placed among these crimes. Section 281.3 creates *in rem* proceedings for the seizure and forfeiture of hate propaganda. This Commission has already recommended that it should be removed from the *Code* and incorporated into federal regulatory legislation.[50] On the other hand, subsections 281.2(4) and (5) govern the forfeiture of material after conviction for a hate propaganda offence. While they would be a useful component of post-seizure procedure,[51] it is open to question whether they belong among these crimes or among provisions on sentencing.

B. Uncertainty

Among these offences, several uncertainties must be noted. For one, does the term "communicating statements," found in subsections 281.2(1) and (2), include all types of statements? In its examination of section 13 of the *Canadian Human Rights Act*,[52] the Standing Committee of the House of Commons on Justice and Legal Affairs heard arguments that the existing provisions of the *Criminal Code* did not apply to hate messages recorded and transmitted by telephone.[53] In a recent article, Julian Sher has argued that the present definition of the term "communicating" would not cover certain technical innovations such as computer technology.[54] Does the transmission of hate messages from a data-processing centre to one's computer constitute a "communication" within the meaning of subsection 281.2(7) of the *Criminal Code*?[55] Is a computer considered a means of visual communication? Finally, the Report of the Special Committee on Pornography and Prostitution has concluded that the definition of the term "statement" included in the *Criminal Code* would not cover all graphic images.[56]

Also uncertain is the notion of "private conversation." At what point does one speak loud enough that a private conversation stops being private? In what circumstances and within the hearing range of how many people does a private conversation stop being

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50. Law Reform Commission of Canada, *Search and Seizure* [Report 24] (Ottawa: Supply and Services, 1984), pp. 51-3.

51. See: Law Reform Commission of Canada, *Post-Seizure Procedures* [Working Paper 39] (Ottawa: Supply and Services, 1985); and *Disposition of Seized Property* [Report 27] (Ottawa, LRCC, 1986).

52. *Canadian Human Rights Act*, S.C. 1976-77, c. 33, s. 13(1):

> 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.

53. See W.S. Tarnopolsky, *Discrimination and the Law in Canada* (Toronto: Richard DeBoo, 1981), p. 339.

54. J. Sher, "The Propaganda of Hatred" (December 1984), LXIV:744 *The Canadian Forum* 20.

55. "High-Tech Hatred," *Newsweek*, December 24, 1984, p. 20.

56. Report of the Special Committee on Pornography and Prostitution, *Pornography and Prostitution in Canada*, (Ottawa: Supply and Services, 1985), Vol. 1, p. 323 (hereinafter cited as the Fraser Committee).

private?[57] Does it include a conversation between two people in a public place or a conversation among three people meeting in a private place and planning a strategy for the transmission of hate propaganda?[58] Should the term "private conversation" be interpreted in the same way as the term "private communication" found in section 178.1 of the *Criminal Code*?[59]

On another subject, why should a definition of "hate" not be found in the *Criminal Code*? At present, only "hate propaganda" is defined in the *Code*.[60]

With respect to section 177 of the *Code*, it is unclear which statements it catches. What is the meaning of the term "causes or is likely to cause injury or mischief to a public interest"? The case of *R.* v. *Carrier*[61] interpreted this expression in a narrow way in concluding that a publication must attack established authority. But the decision in *Zundel*[62] broadens the scope of this provision.

It is not surprising that the existing law has certain defects. Some of these offences are relatively young. But it is not desirable that our criminal law should include such defects. Nevertheless, to resolve these difficulties is not sufficient. It is essential that these hate propaganda crimes be re-examined so as to be consistent with the direction that our criminal law ought to take.

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57. See W.S. Tarnopolsky, *The Canadian Bill of Rights*, 2nd ed. (Toronto: McClelland and Stewart, 1975), p. 191.

58. See Hage, *supra*, note 19, p. 71.

59. Section 178.1 defines "private communication" in relation to the offence of wiretapping as meaning any oral communication or any telecommunication made under circumstances in which it is reasonable for the originator thereof to expect that it will not be intercepted by any person other than the person intended by the originator thereof to receive it. Central to this definition is the concept of a reasonable expectation of privacy.

60. *Criminal Code*, s. 281.3(8) states: "'Hate propaganda' means any writing, sign or visible representation that advocates or promotes genocide or the communication of which by any person would constitute an offence under section 281.2; ...."

61. *R.* v. *Carrier*, *supra*, note 11.

62. *R.* v. *Zundel*, *supra*, note 46.

CHAPTER TWO

Proposed Reforms

I. Freedom of Expression versus Freedom from Hate: The Search for a Balance

In the context of hate propaganda, the search for the proper role of the criminal law is especially difficult because it forces us to revisit the conflict between freedom of expression and the interest of the state in criminalizing speech injurious to the public. The resolution of this conflict was the most difficult part of our Working Paper entitled *Defamatory Libel*. Undoubtedly, it will be the most difficult part of this Paper as well.

The criminal law has attempted to find a balance between freedom of expression and preserving the peace of society by criminalizing some, but not all words. But the fact that the criminal law draws a balance is no guarantee that the balance chosen is the right one. As we argued in our *Defamatory Libel* Working Paper, the mere fact that the criminal law has prohibited words in the past is not enough to continue to criminalize them.[63] In addition, that the state has outlawed words in the past does not justify its creating new crimes against words. In effect, the state must be shown to have a proper interest in controlling words within the context of modern society. This requires us to look beyond our present law.

In this regard, one useful approach is to look at laws beyond our own borders and at other proposals for reform of our present hate propaganda crimes.

A. International Obligations

(1) The *International Convention on the Elimination of All Forms of Racial Discrimination*[64]

This Convention, to which Canada is a party, imposes on the member states the obligation to introduce in their national legislation offences to deal with racial discrim-

63. *Supra*, note 1.

64. *International Convention on the Elimination of All Forms of Racial Discrimination* (1969) 660 U.N.T.S. 212. Canada signed the Convention on August 24, 1966 and ratified it on October 14, 1970. See Secretary of State, *International Convention on the Elimination of All Forms of Racial Discrimination: Sixth Report*

ination.[65] For our criminal law, Article 4 of this Convention is the most important.[66] It requires the member states to prohibit, by their criminal law, the dissemination of hate propaganda and all organizations that incite racial discrimination.[67]

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of Canada, August 1979 to July 1982 (Ottawa: Supply and Services, 1983). On August 24, 1984, the date for the closing of the thirtieth session of the Committee for the Elimination of Racial Discrimination, 124 states were party to the *International Convention on the Elimination of All Forms of Racial Discrimination*. See United Nations, Official Records, General Assembly, *Report of the Committee on the Elimination of Racial Discrimination*, Thirty-fourth Session, Supplement No. 18, A/34/18 (New York: 1984), para. 1, p. 1. See also P. Tremblay, "Convention internationale sur l'élimination de toutes les formes de discrimination raciale" (1966), 26 *R. du B.* 360. For documentation with respect to the Convention, see D. Vincent-Daviss, "Human Rights Law: A Research Guide to the Literature — Part 1: International Law and the United Nations" (Fall 1981), 14 *N.Y.U. J. Int. L. & Pol.* 209, pp. 278-80.

65. States themselves must take on the main responsibility for their respective territories in the battle against racial discrimination and its elimination. International action can only supplement the actions of the nations concerned and cannot replace national actions. See: H. Santa Cruz, *La discrimination raciale* (New York: United Nations, 1977), p. 45 ff.; N. Lerner, *The Crime of Incitement to Group Hatred: A Survey of International and National Legislation* (New York: World Jewish Congress, 1965), p. 79; T. Buergenthal, "Implementing the U.N. Racial Convention" (1977), 12 *Tex. Int. L.J.* 187.

    Article 4 of the Convention does not apply automatically. Even if the Convention is not incorporated or adopted as part of internal law, Article 4 can only be applied if internal laws are designed to enforce its provisions. See: United Nations, J. Inglés, *Study on the Implementation of Article 4 of the International Convention on the Elimination of All Forms of Racial Discrimination*, May 18, 1983, A/Conf./119/10, para. 216, p. 108; and T. Meron, "The Meaning and Reach of the International Convention on the Elimination of All Forms of Racial Discrimination" (1985), 79 *Am. J. Int. L.* 283, p. 297. See also N. Lerner, "Curbing Racial Discrimination — Fifteen Years CERD" (1983), 13 *Israel Year Book on Human Rights* 170, pp. 173-4.

66. Article 4 of the *International Convention on the Elimination of All Forms of Racial Discrimination*:

    > States Parties condemn all propagranda and all organizations which are based on ideas or theories of superiority of one race or group of persons of one colour or ethnic origin, or which attempt to justify or promote racial hatred and discrimination in any form, and undertake to adopt immediate and positive measures designed to eradicate all incitement to, or acts of, such discrimination and, to this end, with due regard to the principles embodied in the Universal Declaration of Human Rights and the rights expressly set forth in Article 5 of this Convention, *inter alia*:
    >
    > (a) *Shall declare an offence punishable by law all dissemination of ideas based on racial superiority or hatred*, incitement to racial hatred, as well as all acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin, and also the provision of any assistance to racist activities, including the financing thereof;
    >
    > (b) Shall declare illegal and prohibit organizations, and also organized and all other *propaganda* activities, which promote and *incite racial discrimination*, and shall recognize participation in such organizations or activities as an offence punishable by law;
    >
    > (c) Shall not permit public authorities or public institutions, national or local, to promote or *incite* racial discrimination. [Emphasis added]

    Article 4 is the key article in the Convention. For studies of Article 4 of the Convention, see Inglés, *supra*, note 65, and T.D. Jones, "Article 4 of the International Convention on the Elimination of All Forms of Racial Discrimination and the First Amendment" (1980), 23 *Howard L.J.* 429.

    Among the international instruments at the United Nations and other specialized organizations dealing directly or indirectly with hate propaganda, see the *Convention for the Protection of Human Rights and Fundamental Freedoms* (1950) 213 U.N.T.S. 222, Art. 10; *International Covenant on Civil and Political Rights* (1976) 999 U.N.T.S. 172, Art. 20(2); *Universal Declaration of Human Rights*, 217 General Assembly, Third Session, Official Records, Part 1, Res. 217A(III), A/810(1948), p. 71, Art. 29; *United Nations Declaration on the Elimination of All Forms of Racial Discrimination*, General Assembly, Eighteenth Session, Official Records, Res. 1904, Supplement No. 15, A/5515, p. 35. For a comparative study of these different legal instruments with respect to the incitement of hatred, see: S.J. Roth, "Anti-Semitism and International Law" (1983), 13 *Israel Year Book on Human Rights* 208, pp. 214-7; and G. Sacerdoti, "New Developments in Group Consciousness and the International Protection of the Rights of Minorities" (1983), 13 *Israel Year Book on Human Rights* 116, p. 131. See also J.J. Seeley, "Article Twenty of the International Covenant on Civil and Political Rights: First Amendment Comments and Questions" (1970), 10 *Va. J. Int. L.* 328.

(2) The *Convention on the Prevention and Punishment of the Crime of Genocide*[68]

This Convention, to which Canada is also a party, provides a comprehensive definition of genocide. It also provides that the contracting parties will undertake to ensure the compliance on a national level of the Convention's provisions and to impose effective penalties for those found guilty of genocide.[69]

In this regard, the present definition of "genocide" in our *Code* does not include all components of the Convention definition. It omits other acts specified in the Convention, namely, causing serious bodily or mental harm to members of the group, imposing measures intended to prevent births within the group, and forcibly transferring children of one group to another.

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67. The second group of offences that must be declared punishable pursuant to paragraph (b) of Article 4 of the Convention concern formally established organizations and all other propaganda activities which promote and incite racial discrimination as well as participation in such organizations or activities. When it ratified the Convention, Canada made no reserve and issued no interpretative declaration although no provision implementing paragraph (b) of Article 4 is contained in the *Criminal Code*. See Inglés, *supra*, note 65, para. 185, p. 90; House of Commons, Special Committee on Participation of Visible Minorities in Canadian Society, *Equality Now* (Ottawa: Supply and Services, 1984), pp. 77-8 (hereinafter cited as *Equality Now*); Secretary of State, *supra*, note 64, pp. 10-6.

    Canada justifies its negative position with respect to the limitation of the right to freedom of association by reference to the *reserve* provided in the preamble for Article 4 of the Convention; that is to say the clause "with due regard" to the principles of human rights. The following is cited from the United Nations *Report of the Committee on the Elimination of Racial Discrimination*, *supra*, note 64, para. 266, p. 60:

    > He [the representative of Canada] pointed out that according to the Canadian Government that provision was to be interpreted in the light of the rest of the article, which contained an explicit reference to the principles embodied in the Universal Declaration of Human Rights. Since Article 19 and 20 of that Declaration guaranteed freedom of opinion, expression, and association, it was conceivable that conflicting requirements might arise, in which case an effort would, however, have to be made to reconcile them. That was why Canada considered that each case covered by Article 4(b) had to be examined on its own merits.

68. *Convention on the Prevention and Punishment of the Crime of Genocide* (1948) 78 U.N.T.S. 278.

69. *Id.*, Articles II, III and V:

    > *Article II*: In the present Convention, genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such: (a) Killing members of the group; (b) Causing serious bodily or mental harm to members of the group; (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; (d) Imposing measures intended to prevent births within the group; (e) Forcibly transferring children of the group to another group.
    >
    > *Article III*: The following acts shall be punishable: (a) Genocide; (b) Conspiracy to commit genocide; (c) Direct and public incitement to commit genocide; (d) Attempt to commit genocide; (e) Complicity in genocide.
    >
    > *Article V*: The Contracting Parties undertake to enact, in accordance with their representative Constitutions, the necessary legislation to give effect to the provisions of the present Convention and, in particular, to provide effective penalties for persons guilty of genocide or of any of the other acts enumerated in Article III.

B. Foreign Jurisdictions

(1) The *Convention for the Protection of Human Rights and Fundamental Freedoms*[70]

In *Glimmerveen and Hagenbeek* v. *The Netherlands*,[71] the appellant had been convicted of inciting racial discrimination under Article 137(e) of the Dutch Penal Code, prohibiting the expression of views "that incite to hatred against or discrimination of or violent behaviour towards people by reason of their race, religion, or other conviction unless those views are expressed for the purpose of imparting information." He had in his possession, with a view to distribution, a pamphlet advocating the removal of guest-workers, such as Turks, from the Netherlands. The European Commission of Human Rights rejected his argument that this activity fell within the protective ambit of Article 10 of the Convention, which guarantees freedom of expression, subject to certain limitations.[72]

(2) France

In its battle against racism, France punishes the defamation of a person or a group of persons on the grounds of their origin or their belonging or not belonging[73] to an ethnic group, a nation, a race or a specified religion.[74] In order to guarantee more effective

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70. *Convention for the Protection of Human Rights and Fundamental Freedoms*, *supra*, note 66.

71. *Glimmerveen and Hagenbeek* v. *The Netherlands* (1979), 4 E.H.R.R. 260. For comments on this decision, see R. Genn, "Beyond the Pale: Council of Europe Measures against Incitement to Hatred" (1983), 13 *Israel Year Book on Human Rights* 189, pp. 202-5.

72. *Convention for the Protection of Human Rights and Fundamental Freedoms*, *supra*, note 66, Article 10:

> 1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent states from requiring the licensing of broadcasting, television or cinema enterprises.
>
> 2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, or the prevention of disorder or crime, or the protection of health or morals, or the protection of the reputation or rights of others, or preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

For a study of Article 10 of the *Convention for the Protection of Human Rights and Fundamental Freedoms*, see: D.J. Harris, "Decision on the European Convention on Human Rights during 1979, Freedom of Speech," [1979] *Brit. Year Book Int. L.* 257; and Y. Tajima, "Protection of Freedom of Expression by the European Convention" (1969), 2 *R.D.H.* 658.

73. As for the expression "not belonging," Foulon-Piganiol emphasized the example of the Second World War where [TRANSLATION] "not belonging to the Aryan race was sufficient justification for the execution of many Frenchmen." See Y. Madiot, *Droits de l'homme et libertés publiques* (Paris: Masson, 1976), p. 239.

74. For an examination of the defamation of groups in French law, see: Belton, *supra*, note 6, pp. 314-42; J. Peytel, "Group Defamation in France" (1964), 13:1 *Clev.-Mar. L. Rev.* 64; R. Vouin, "La répression de la discrimination raciale en France" (1972), 5 *R.D.H.* 177; J. Foulon-Piganiol, "Nouvelles réflexions sur la diffamation raciale" (1970), *D.* 163; J. Foulon-Piganiol, "Réflexions sur la diffamation raciale" (1970), *D.* 133; Madiot, *id.*, p. 238 ff.; H. Blin, "L'évolution législative et jurisprudentielle du droit de la presse au cours des vingt ou trente dernières années" in *Aspects nouveaux de la pensée juridique, recueil d'études en hommage à Marc Ancel* (Paris: Éditions A. Pedone, 1975), Vol. II: Études de science pénale et de politique criminelle, pp. 314-6; C. Entrevan, "Réflexions sur le problème des discriminations humaines dans le système démocratique français" in *Annuaire français des droits de l'homme* (Paris: Éditions A. Pedone, 1974), Vol. 1, pp. 180-245.

suppression of racial defamation, the Act of July 1, 1972,[75] specifies that the crimes of defamation and racial insult no longer require the deliberate intention to incite hatred against a group of citizens or residents in the country.[76] It is sufficient that the objective result — that the victim be defamed or insulted — exist for the offence to be committed.[77]

(3) The Federal Republic of Germany

With its strong commitment to redress the crimes of Nazi Germany, the Federal Republic of Germany has strengthened its penal law to attack the spreading of hatred in many ways. The West German Penal Code prohibits not only genocide,[78] but also attacks on human dignity by inciting hatred against parts of the population in a manner tending to breach the peace,[79] the organization of unconstitutional political parties[80] (such as neo-Nazi parties), the dissemination of propaganda from these parties,[81] and the importation, storage, or use of emblems of these parties.[82] It also prohibits writings that describe acts of violence against human beings in a cruel or otherwise inhuman manner which express glorification or the harmlessness of such acts of violence, or that instigate to race hatred.[83]

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75. Law No. 72-546, July 1, 1972, (D. 1972, 328). This law modified, first of all, the law of 1881 on the press (D.P. 81, 4.65). It punishes by way of an imprisonment of one month to one year and a fine of 2,000 to 300,000 francs (or either of these punishments alone), anyone who [TRANSLATION] "incites discrimination against or hatred or violence towards a person or group of persons because of their origin or their belonging or not belonging to an ethnic group, a nation, a race or a specified religion." This statute provides punishment for cases where there is incitement to hatred but where there has been no defamation or insult. It is also aimed at an attack directed at a physical person alone: such a person may join the proceedings as a civil party.

    The statute allows any association — which (1) was regularly established for five years before the date when the facts allegedly occur and (2) according to its constitution, is formed to combat racism — to exercise the right accorded to a civil party in cases of provocation, defamation or racial insult. Furthermore, this extension of the rights of association is accompanied with the possibility of ordering the administrative dissolution (law of January 10, 1936) of groups that incite discrimination or even that promote racist ideas.

    Also, the law of 1972 creates new offences. Section 187-1 of the Penal Code punishes "any person invested with public authority or any citizen in charge of a ministry of the public service" who, for discriminatory reasons, refuses to another person the benefits of a right that they could claim. Sanctions are also provided when the discrimination is made in relation to an association, a society or its members. Section 416 of the Penal Code punishes discrimination in supplying goods or services to a person, an association or a society as well as discrimination in the refusal to hire, the firing or the offering of employment subject to a discriminatory condition. For comments on this law, see: J. Foulon-Piganiol, "La lutte contre le racisme (Commentaire de la loi du 1er juillet 1972)" (1972), *D.* 26; Entrevan, *id.*, pp. 194-200.

76. See *Répertoire de droit pénal et de procédure pénale*, 2nd ed. (Paris: Relais, 1981), Vol. II: Jurisprudence générale Dalloz, "Diffamation," Section 4, Article 1, pp. 37-8.

77. Inglés, *supra*, note 65, para. 95, pp. 52-3.

78. The West German Penal Code, s. 220a.

79. *Id.*, s. 130.

80. *Id.*, s. 84. On this subject, see also P. Franz, "Unconstitutional and Outlawed Political Parties: A German-American Comparison" (Winter 1982), 5 *Bost. Coll. Int. & Comp. L. Rev.* 51.

81. The West German Penal Code, s. 86.

82. *Id.*, s. 86a.

83. *Id.*, s. 131.

In addition, the denial of the Holocaust is punishable as an insult to every Jew living in Germany.[84] By recent amendment, cases of insult on persons who died as victims of the National Socialist or any other violent and arbitrary or criminal regime will be officially prosecuted, unless members of the victim's family object.[85]

(4) The United Kingdom

Section 6 of the *Race Relations Act 1965*[86] prohibited incitement to racial hatred where there was the intent to stir up hatred.[87] Prosecutions under this section were brought not only against some members of the National Socialist Movement, but also against Black Power advocates for using words that would stir up hatred against Whites.[88] The *Race Relations Act 1976*[89] replaced this offence with a new offence of incitement to racial hatred by enacting a new section 5A of the *Public Order Act 1936*. It provides:

> (1) A person commits an offence if —
>
> (a) he publishes or distributes written matter which is threatening, abusive or insulting; or
>
> (b) he uses in any public place or at any public meeting words which are threatening, abusive or insulting,
>
> in any case where, having regard to all the circumstances, hatred is likely to be stirred up against any racial group in Great Britain by the matter or words in question.

Thus, the new offence does not require an intent to stir up racial hatred. A variety of defences also exist relating to written statements, and fair reports of Parliament and court proceedings. The consent of the Attorney General is required to prosecute.[90]

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84. Pursuant to a judgment passed by the Federal Court of Justice (Bundesgerichtshof) on September 18, 1979.

85. See Press Release, Embassy of the Federal Republic of Germany, "Federal Republic of Germany Prosecutes Denial of Nazi Holocaust," Ottawa, March 18, 1985.

86. *Race Relations Act 1965*, c. 73, s. 6 (U.K.). For an analysis of this law, see: D.G.T. Williams, "Racial Incitement and Public Order," [1966] *Crim. L.R.* 320; M. Partington, "Race Relations Act 1965: A Too Restricted View?" [1967] *Crim. L.R.* 497; B.A. Hepple, "Race Relations Act 1965" (1966), 29 *Modern L. Rev.* 306, pp. 313-4.

87. Subsection 6(1) of the *Race Relations Act 1965*, *supra*, note 86, provided:

> (1) A person shall be guilty of an offence under this section if, with intent to stir up hatred against any section of the public in Great Britain distinguished by colour, race, or ethnic or national origins —
>
> (*a*) he publishes or distributes written matter which is threatening, abusive or insulting; or
>
> (*b*) he uses in any public place or at any public meeting words which are threatening, abusive or insulting, being matter or words likely to stir up hatred against that section on grounds of colour, race, or ethnic or national origins.

88. For some commentaries, see A. Dickey, "Prosecutions under the Race Relations Act 1965, s. 6 (Incitement to Racial Hatred)," [1968] *Crim. L.R.* 489.

89. *Race Relations Act 1976*, c. 74, s. 70 (U.K.).

90. See Smith and Hogan, *supra*, note 5, pp. 744-5; U. Prashar, "Race and Law," in Ministry of State, Multiculturalism Directorate, *Race Relations and the Law* (Ottawa: Supply and Services, 1983), p. 105. See also Inglés, *supra*, note 65, para. 130, p. 65.

England has also created a specific crime of genocide, with the definition of genocide being that set out in Article II of the Genocide Convention.[91]

(5) The United States

(a) *Present Law*

In the 1952 case of *Beauharnais* v. *Illinois*,[92] the United States Supreme Court in a narrow five-to-four decision upheld the conviction of a person under section 224a of the Illinois Criminal Code which provided that it was a crime to exhibit in any public place a publication which "portrays depravity, criminality, unchastity, or lack of virtue of a class of citizens, of any race, color, creed or religion" when it "exposes the citizens of any race, color, creed or religion to contempt, derision, or obloquy or which is productive of breach of the peace or riots ...."[93] In upholding the validity of this legislation, the court argued that libelous statements did not fall within the realm of constitutionally protected free speech.

However, in *Garrison* v. *Louisiana*,[94] the Supreme Court held that some libelous statements caught by state criminal libel statutes did fall within the realm of constitutionally protected free speech. As a result, the validity of the *Beauharnais* decision as it would affect present penal laws has been thrown into serious doubt. As one American commentator recently argued about group libel offences in state penal laws:

> Criminal defamation laws are virtually non-existent in modern criminal codes. But even if such statutes exist and are constitutional, no group libel is actionable under them unless it presents a "clear and present danger" of causing violence. It is thus evident that if criminal actions for group defamation can be maintained at all, they will only be permitted under a very limited set of circumstances.[95]

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91. *Genocide Act 1969*, c. 12 (U.K.).

92. *Beauharnais* v. *Illinois*, 343 U.S. 250 (1952). Beauharnais accused Blacks of being rapists, robbers, knife and gun carriers, marijuana smokers and mongralizers of the white race. For comments on group libel in the United States, see: L.P. Beth, "Group Libel and Free Speech" (1955), 39 *Minn. L. Rev.* 167; J. Tanenhaus, "Group Libel" (1950), 35 *Cornell L.Q.* 261; Kelly, *supra*, note 3; "Group Libel Laws: Abortive Efforts to Combat Hate Propaganda" (1952), 61 *Yale L.J.* 252; "Statutory Prohibition of Group Defamation" (1947), 47 *Colum. L. Rev.* 595; "Developments in the Law of Defamation" (1956), 69 *Harv. L. Rev.* 875; J.J. Brown and C.L. Stern, "Group Defamation in the U.S.A." (1964), 13:1 *Clev.-Mar. L. Rev.* 7; "Race Defamation and the First Amendment," *supra*, note 5; "Group Libel and Criminal Libel" (1952), 1 *Buffalo L. Rev.* 258; J. Pemberton, "Can the Law Provide a Remedy for Race Defamation in the United States?" (1968), 14 *N.Y.L.F.* 33; "Supreme Court, 1951 Term" (1952), 66 *Harv. L. Rev.* 89, pp. 112-4; H. Arkes, "Civility and the Restriction of Speech: Rediscovering the Defamation of Groups," [1974] *Sup. Ct. Rev.* 281; "Group Vilification Reconsidered" (1979-80), 89 *Yale L.J.* 308.

93. Ill. Rev. Stat., c. 38, s. 471 (1949) (repealed 1961). The Illinois Legislature has revised its group libel statute. The provision is now drafted as follows:

> (a) a person commits criminal defamation when, with intent to defame another, living or dead, he communicates by any means to any person matter which tends to provoke a breach of the peace. *Ill. Ann. Stat.*, c. 38, s. 27-1 (Smith-Hurd, 1969).

94. *Garrison* v. *Louisiana*, 379 U.S. 64 (1964).

95. E.T. Marcus, "Group Defamation and Individual Actions: A New Look at an Old Rule" (1983), 71 *Calif. L. Rev.* 1532, p. 1547.

(b) *Proposed Reform*

The American Law Institute, in a tentative draft, proposed the following hate propaganda offence:

> A person is guilty of a misdemeanor if, with purpose to foment hatred against [anyone or against] any racial, national, or religious group, or to intimidate, he publicly:
>
> (a) disseminates any derogatory falsehood, with knowledge of the falsity; or
>
> (b) suggests, recommends, justifies, or participates in any concerted unlawful action; or
>
> (c) makes indecent or abusive utterance, gesture, or display; or
>
> (d) participates in any demonstration, procession, or gathering in disguise or to perform any intimidating act.
>
> As used in this section, intimidate means to cause anyone to fear for the safety of his person, property, business, or civil rights. Activity under paragraphs (a), (b), and (c) is public if it is done by means of radio, television, newspaper, magazine, handbill, or other multiple-reproduced communication, or by any mechanical device for amplifying sound for large audiences, or by any exhibition or performance open to the public or any substantial segment of the public, or if it is directed indiscriminately to hearers or viewers in any public place. Activity under paragraph (d) is public if it occurs in any public place or in any private place open to public observation.[96]

Thus, this tentatively proposed offence required a purpose to foment hatred and a stringent element of publicity, as well as protecting truthful statements. Even so, the American Law Institute was wary about the usefulness of a group libel offence. In fact, this section was not included in the *Proposed Official Draft of the Model Penal Code*.

C. Other Proposals for Reform of Our Hate Propaganda Crimes

The Special Parliamentary Committee Report on Participation of Visible Minorities in Canadian Society, *Equality Now*,[97] recommended: (1) the removal of the "wilfully" requirement from subsection 281.2(2), so that it would no longer be necessary to prove that the accused intended to promote hatre; (2) the removal of the requirement of the consent of the Attorney General to a prosecution under subsection 282.2(2); and (3) clarifying that the burden of proof is on the accused to raise the defences provided for by that subsection.[98] The Special Committee on Racial and Religious Hatred[99] of the

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96. The American Law Institute, *Model Penal Code*, Tentative Draft No. 13 (Philadelphia: ALI, 1961), Section 250.7, pp. 41-2.

97. *Equality Now*, *supra*, note 67.

98. *Id.*, pp. 70-1.

99. Canadian Bar Association, Special Committee on Racial and Religious Hatred, *Hatred and the Law* (1984).

Canadian Bar Association differed from the conclusions in *Equality Now* in two respects. First, it believed that requiring the consent of the provincial Attorney General could prevent frivolous prosecutions. Second, it believed that two of the existing defences to a charge under subsection 281.2(2) should be abolished. These were: (1) a good-faith opinion on a religious subject; and (2) a reasonable belief in the truth of the statements if they were relevant to the public interest and were discussed for the public benefit.[100] The Fraser Committee[101] also recommended the removal of the "wilfully" requirement and the consent of the Attorney General. But, unlike the other reports, it advocated enlarging the definition of "identifiable group" to include the categories of sex, age, and mental or physical disability, at least insofar as the definition applies to section 281.2 of the *Code*.[102]

While these laws and these proposals are useful to us in some degree, those who have either passed laws or have proposed reforms in this area have not adequately considered the fundamental principle of restraint which must shape our criminal law. This principle was put forth by this Commission in *Our Criminal Law*[103] and was subsequently approved by the federal government in *The Criminal Law in Canadian Society*.[104] Clearly, to draw proper boundaries for crimes of promoting hatred, we have to consider this principle.

II. Freedom of Expression versus Freedom from Hate: The Balance

Although recently created, our hate propaganda crimes are still problematic. On the one hand, they have been generally accepted by the Canadian public — so much so, in fact, that recent public reports advocate their expansion. However, ever since their creation, these crimes have been criticized by some civil libertarians as a "retrograde" step, as unjustifiable in a democratic society.

Should these crimes exist at all? Or, put another way: If there were no previously existing crimes of hate propaganda, would it be necessary to create them?

No activity should be made a crime without good reason, because making crimes involves repression and punishment. As Jeremy Bentham observed, "[a]ll punishment is

100. *Id.*, pp. 13-4.

101. Fraser Committee, *supra*, note 56.

102. *Id.*, pp. 317-22.

103. Law Reform Commission of Canada, *Our Criminal Law* [Report 3] (Ottawa: Supply and Services, 1976).

104. Government of Canada, *The Criminal Law in Canadian Society* (Ottawa: 1982).

mischief: all punishment in itself is evil."[105] It causes suffering to the person being punished, loss of liberty to everyone in society, and great expense to the taxpayer. Hence the need to justify the use of criminal law by those who wish to use it.

However, crimes of hate propaganda need special justification. Prohibiting the promotion of hatred conflicts with freedom of expression,[106] perhaps the most fundamental value in our society. As Thomas Berger has stated: "Freedom of speech is in a sense man's calling, the necessary condition of all other freedoms."[107]

However, even freedom of expression is not absolute. For example, our criminal law has justifiably recognized that it is a crime to counsel another to commit a crime, to commit perjury, to commit contempt of court, and to defraud by deceit. As Oliver Wendell Holmes remarked: "The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre, and causing a panic."[108]

On the other hand, our criminal law has refused to prohibit expressions which, although hurtful, are not seriously harmful. For example, not every vulgar abuse or insult is a crime. Instead, crimes which do catch insults are restrictively defined as to place or person — such as causing a disturbance in or near a public place, or the type of contempt of court known as scandalizing the court. There is just one exception to this — our present

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105. J. Bentham, *An Introduction to the Principles of Morals and Legislation* (Oxford: Clarendon Press, 1879), p. 170.

106. Recently, some have argued that expressing hatred against an identifiable group is not part and parcel of the "freedom of expression" guarantee of paragraph 2(*b*) of the Charter. Nowhere is this more clearly stated at present in Canadian law than by Quigley J. in *R.* v. *Keegstra*, *supra*, note 37, p. 268. He initially concludes:

> '[F]reedom of expression' as used in s. 2(*b*) of the Charter does not mean an absolute freedom permitting an unabridged right of speech or expression. In particular, I hold that s. 281.2(2) of the *Criminal Code* does not infringe upon the freedom of expression granted by s. 2(*b*) of the Charter.

If promoting hatred against an unidentifiable group is not part of "freedom of expression" from the outset, the effect is that it is unnecessary to determine whether crimes of hate propaganda are a demonstrably justifiable reasonable limit upon freedom of expression by resort to section 1 of the Charter.

With all due respect, we disagree with this approach. Freedom of expression is not defined restrictively by paragraph 2(*b*) of the Charter. Therefore, any kind of expression should fall within its ambit. This includes expressions made in public or in private, expressions of reason, expressions of passion — love as well as hate — expressions which help, and expressions which harm. To argue that some expressions are not part of the "freedom of expression" guarantee of paragraph 2(*b*) of the Charter could result in a patchwork of different degrees of protection for different kinds of speech, devoid of consistency and principle. How are courts to distinguish between expressions which do not initially fall within the "freedom of expression" guarantee, and those which do, but can be curtailed by resort to the reasonable limitation clause of section 1 of the Charter? Could not one avoid trying to meet the criteria imposed by the section 1 limitation clause by holding that the expression is not protected by paragraph 2(*b*)?

Finally, this approach is unnecessary. While it is used by the United States Supreme Court (for example, for hate propaganda in the now arguably outdated case of *Beauharnais* v. *Illinois*, *supra*, note 92, there is a necessary reason for doing so: there is no limitation clause in its Bill of Rights. But section 1 of the Charter permits demonstrably justifiable reasonable limits upon any Charter freedom or right, including freedom of expression. Therefore, there is no need to resort to the argument that "freedom of expression" means only those which are constitutionally protected.

107. T. Berger, *Fragile Freedoms* (Toronto: Clarke, Irwin, 1981), p. 134.

108. *Schenck* v. *United States*, 249 U.S. 47 (1919), p. 52.

crime of defamatory libel which covers insult to any person. But the original rationale for this crime was the belief that libels would likely cause a breach of the peace. This rationale is now archaic, and for this among other reasons, we have recommended abolition of this crime.

In effect, the general principle underlying crimes which limit freedom of expression seems to be that words should be prohibited only when they cause or threaten to cause serious harm, such as personal injury (for example, incitement to murder), damage to an important institution (for example, perjury or contempt of court, which damages the criminal justice system), and property loss (for example, fraud).

Do our crimes of hate propaganda fall within this general principle? There are three kinds of crimes to examine here: (1) crimes dealing with genocide; (2) crimes dealing with promoting hatred; and (3) the crime of publishing false news.

A. Genocide

Genocide is so repulsive an act that the United Nations has adopted the *Convention on the Prevention and Punishment of the Crime of Genocide* (hereinafter referred to as the Genocide Convention) which prohibits genocide, and Canada has ratified it. The Convention divides the crime of genocide into two parts. First, there is the act of genocide itself. Second, there are means by which the act of genocide is furthered — for example, attempting, incitement, and conspiracy. Had a crime of genocide been created, the counselling provisions of the *Code* would have covered incitement to genocide. Instead, the Cohen Committee believed that the act of genocide was adequately covered by existing crimes (for example, murder, assault) and proposed only a crime of advocating or promoting genocide in order to fill a perceived gap in the law.[109] For example, others later argued that inciting to commit murder would probably not cover incitement to genocide, because murder relates to killing specific individuals, not destroying a group.[110] The result is that the advocacy or promotion of genocide is made a specific crime by section 281.1 of the *Code*, whereas the present crime of murder would cover the killing of a person who was the victim of genocide.

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109. The Cohen Committee, *supra*, note 10, states at page 62:

> [B]ecause existing Canadian law already forbids most substantive aspects of genocide in that it prohibits homicide or murder *vis-à-vis* individuals, ... we deem it advisable that the Canadian legislation which we urge as a symbol of our country's dedication to the rights set out in the Convention should be confined to "advocating and promoting" genocide, acts which clearly are not forbidden at present by the *Criminal Code*.

110. This point was made by J.A. Scollin, Director, Criminal Law Section of the Department of Justice, during the Proceedings of the Senate Committee on Legal and Constitutional Affairs, *First Proceedings on Bill S-21*, No. 1 (February 13, 1969), p. 11 (the Senate's proposed hate propaganda Bill):

> My position is that there is no offence just now under the *Criminal Code* that I, as a prosecutor, could frame a proper valid charge under. In respect to an individual or the identifiable individual there might be incitement or conspiracy and there might be a charge. There is no charge in advocating or promoting genocide. In law there would be no charge.

Should this Commission recommend in this Paper the creation of a crime of genocide as defined by the Genocide Convention?

The act of genocide, involving the actual destruction of all or part of a group, is conceptually distinct from crimes of inciting or promoting hatred. Genocide is usually an act of extreme physical violence — murder. By contrast, crimes of promoting hatred involve the use of words or images which at most create the risk of physical violence. Accordingly, a crime of genocide could well be treated differently from these crimes. For example, were our new Code to contain a crime of genocide, one could strongly argue that it should have universal application, like piracy.[111] On balance, then, this Commission believes that any decision whether or not to create a crime of genocide should not be made in this Paper, but should be deferred for future consideration.

Unlike a crime of genocide, the crime of advocating or promoting genocide is clearly a crime of promoting hatred. The Cohen Committee was right in persuading Parliament that this activity should be criminalized. But the present definition of this crime gives rise to two concerns. First, is the definition of "identifiable group" too narrow? Second, should the definition of the act of "genocide" be expanded to include the entire definition given by the Genocide Convention?

Regarding the first question, we shall recommend later on in this Paper that the definition of "identifiable group" should be expanded for the other crimes of promoting hatred. Therefore, two options are available: (1) restrict the definition of "identifiable group" to those groups presently protected; or (2) expand the definition to include those groups to be protected by our other crimes of promoting hatred. For consistency, these crimes should have the result of protecting the same groups. Therefore, we recommend the latter option.

Regarding the second question, expanding the present definition of "genocide" to include the entire definition given by the Genocide Convention would catch causing serious bodily or mental harm to members of the group, imposing measures to prevent births within the group, and forcibly transferring children of the group to another group. Concern was expressed during the course of consultations that such an expansion would be too vague and could have a chilling effect on freedom of expression. For example, would advocates of abortion or therapeutic sterilization find themselves at risk, given that the proposed offence would protect groups identifiable on the basis of gender, age, or mental or physical disability? We agree that this crime should be clearly defined to avoid such uncertainties. Therefore, we recommend that the present definition of "genocide" be retained.

In effect, the present definition of the crime of advocating or promoting genocide should be substantially unchanged. However, one modification to the present definition is necessary: the word "urging" should be added to the phrase "advocating or pro-

111. For example, this Commission's Working Paper 37, *Extraterritorial Jurisdiction* (Ottawa: Supply and Services, 1984), discusses the crime of genocide in the chapter relating to offences committed outside Canada by anyone.

moting." This change is recommended for two reasons. First, it ensures that the crime clearly applies to catch abstract advocacy in support of genocide as well as more forcefully urging people to commit genocide. Second, the wording of the crime is made more consistent with a related aspect of the new Code now being prepared by this Commission — "furthering" a crime, in which the word "urging" is also to be used.

Should the offence of advocating genocide retain the requirement of the consent of the Attorney General to begin a prosecution? This issue will be examined later in relation to the crime of wilfully promoting hatred. For consistency, our recommendation there also applies to this crime.

B. Publishing False News

While advocating genocide is the most harmful of the hate propaganda crimes, publishing false news is surely the least. Section 177 prohibits the wilful publication of a statement, tale or news which the publisher knows is false and that causes or is likely to cause injury or mischief to a public interest.

In principle, it is justifiable for the criminal law to catch conduct which causes public alarm. Suppose someone were to broadcast falsely that a nuclear missile was heading towards Ottawa. One can easily imagine the resulting fear and panic that would engulf the community. This poses such a threat to public order that it should be made criminal. However, while there is a need for a crime to cover causing public alarm, is section 177 the right crime for the job?

In our view, no. Section 177 is flawed in two major ways — it is anachronistic and too broad.

Clearly it is anachronistic. Indeed, the offence is derived from the quasi-seditious offence, *De Scandalis Magnatum*, first put into the English statute books in 1275. This was created in order to protect the great nobles of the realm from slanderous songsters.[112] Since then, it has developed into what it is now.

It is too wide, because it is too vague. It is too vague because it catches any statement which the publisher knows is false, if likely to cause "mischief to a public interest." But what is "mischief to a public interest?" While this phrase may appear to catch only harmful conduct, the appearance is deceptive. Unfortunately, the reported prosecutions

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112. Veeder, in "The History and Theory of the Law of Defamation, Part 1" (1903), 3 *Colum. L. Rev.* 546, at page 554, states about the statutes creating the offence, *De Scandalis Magnatum*:

> We know from their context and from contemporaneous history that their immediate cause is to be found in the plain speaking and homely wit of the Lollard rhymes current in the days of the peasants' revolt. The political songs current in the Plantaganet times sounded the voice of the people in public affairs. Indeed, for centuries the song and ballad writers were the only spokesmen of the people in political affairs.

under this offence, save for the *Zundel* case, seem unwarranted: for example, a conviction of an angry store owner for saying that Americans were not wanted in Canada;[113] a trial conviction (later overturned on appeal) of an underground newspaper printing a false story that the mayor of Montréal was killed by a dope-crazed hippie.[114]

On the other hand, does section 177 serve a useful purpose when used to prosecute persons like Zundel? Surely not. Using section 177 for this purpose is inappropriate for two reasons. First, denials of the Holocaust should be dealt with for what they are — a form of hate propaganda. Second, on principle, if Parliament intends that promoting hatred be dealt with in a certain way and creates safeguards such as the requirement of the Attorney General's consent to avoid an abusive application of the criminal law, a private prosecutor should not be able to avoid these safeguards by offence shopping elsewhere.

We therefore recommend that section 177 should be abolished and that, while there may well be a need for a restrictive crime of causing public alarm, it should be defined in such a manner that it could never be used to prosecute hatemongers.

C. Crimes of Promoting Hatred

Unlike advocating genocide and publishing false news, crimes of promoting hatred pose major problems. The crimes of promoting hatred referred to here are those two offences created in the present section 281.2 of the *Code*: (1) inciting hatred against any identifiable group where such incitement is likely to lead to a breach of the peace; and (2) the wilful promotion of hatred against any identifiable group.

These crimes of promoting hatred raise four major issues: (1) Do such expressions of hatred cause a substantial enough harm to warrant repression by the criminal law? (2) Assuming the need to create these offences, should they extend to individuals as well as groups? (3) Which groups should these crimes protect? (4) What restrictions should be placed on these crimes?

(1) The Harm Involved

Because the harm involved relates to hatred, it is necessary to understand what hatred means. As previously noted, there is no *Code* definition of "hatred." But this is not a defect in this legislation. The ordinary meaning of the word will suffice. Hatred is not mere passive dislike. *The Shorter Oxford Dictionary* defines hatred to include "active dislike, detestation; enmity, ill will, malevolence." *Le petit Robert* defines "la haine" as "sentiment violent qui pousse à vouloir du mal à [quelqu'un] et à se réjouir du mal qui lui arrive." In effect, hatred is enmity.

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113. *R.* v. *Hoaglin* (1907), 12 C.C.C. 226 (N.W.T. S.C.).

114. *R.* v. *Kirby* (1970), 1 C.C.C. (2d) 286 (Qué. C.A.).

Promoting enmity is clearly dysfunctional to society. It stirs up hatred among social groups. It can even lay the foundation for physical attacks upon persons or property. Preventing such harm justifies the use of the criminal law.

(2) Individuals or Groups?

Clearly, promoting hatred about an individual can cause serious harm. For example, he or she could be the victim of character assassination. Arguably, a consistent approach in dealing with the promotion of hatred requires that protection should extend to individuals as well as groups. Indeed, some have argued that an expansion of some kind is needed to catch those who deliberately avoid coming within the hate propaganda crimes by directing their hostility against something less than entire groups.[115]

Forceful as this argument is, we do not accept it, for three reasons. First, less social damage is caused when the attack is made upon a specific individual rather than a group. Second, a person would not be able to escape liability when the attack, ostensibly against a subgroup, is in fact an attack against the group itself.[116] Third, unlike an attack upon a group, a hateful attack upon an individual's reputation gives rise to an adequate civil remedy: a defamation suit. Given these factors, it is consistent with the fundamental principle of using the criminal law with restraint to continue to restrict these crimes to protect only identifiable groups.

(3) Which Groups?

In a principled *Code*, one would expect that the groups chosen for protection would be selected on the basis of principle, rather than on an *ad hoc* basis.

Clearly, one would not want to protect all identifiable groups for two reasons. First, it would create a vague offence. Potentially, the number of groups within any society is infinite. Any "identifiable group" would include not just socially important groups (for example, religious groups), but also socially unimportant groups (for example, all fans of "Star Trek"). Second, such an expansion would infringe unjustifiably upon freedom of expression. Making a crime that could conceivably catch challenging and hostile views made against political or economic groups intrudes into the heated discussions on matters of public interest so vital to the health of any democratic society.

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115. See, for example, the statement by The Honourable Roy McMurtry, Attorney General for Ontario to the Parliamentary Special Committee on Participation of Visible Minorities in Canadian Society, October 20, 1983. He argues, at page 11, that comments directed solely to a certain segment of the racial or religious group would not be caught even though the effect would tend to produce hatred against the entire group; for example, the word "zionist." This argument is referred to in *Equality Now*, *supra*, note 67, at page 71.

116. *Equality Now*, *supra*, note 67, p. 71, states:

> The Committee does not believe that the Criminal Code has to be amended to deal with this problem. This type of material is subject to criminal sanction because it defiles an identifiable group in a general sense and not because it attacks all members of an identifiable group. Even if such hate propaganda purports to caricature only a part of a racial group, it should still be subject to prosecution under the present provisions of the Criminal Code in appropriate circumstances.

Accordingly, these crimes should protect only those socially important groups which are an integral part of the Canadian social fabric and which are most capable of being harmed by hatred directed against them.

Which groups are these? Certain groups have been harmed by hate propaganda in the past — for example, ethnic, religious, or racial groups. Others might be harmed in the future — for example, the mentally handicapped, or the elderly.

Unfortunately, while the principle seems obvious, it will not do to create an open-ended definition of "identifiable group" in line with this principle; for then the crime becomes too vague. As a result, we are forced to rely upon an *ad hoc* list of groups which fall within this principle.

The question then is, Which list? The present one, or another? An excellent way to select criteria for protecting groups from hatred is to choose criteria which are clearly prohibited grounds of discrimination under Canadian law. While such criteria can be found in various human rights codes,[117] the strongest statement of protection from discrimination is found in subsection 15(1) of the Charter. Although open-ended, this guarantees equality rights to individuals characterized by the specifically enumerated criteria of "colour, race, ethnic origin, religion, national origin, sex, age, or mental or physical disability." If the Charter protects against individual discrimination on the basis of these specific criteria, it is entirely reasonable that groups characterized by the same criteria be protected by the criminal law when they are subjected to vicious expressions of hatred.

Of the new criteria for identifying groups proposed here, the most notable is probably that of "sex." No doubt, judges will encounter two major arguments in this regard: first, that the expanded crime will now catch pornography; and second, that it will now catch hatred directed against homosexuals and lesbians.

While not binding on judges, our view is that our proposal to protect sexual groups should have two qualifications. First, the recommended inclusion of sexual groups is not proposed to combat the evil inherent in pornography. For several reasons, we believe that the evil of pornography is best dealt with by way of clearly defined pornography offences, not by way of crimes of hate propaganda.[118] Instead, only the most vicious kinds of woman hating and, incidentally, man hating — that is, those done intentionally — will be caught.

Second, groups identifiable on the basis of "sexual orientation" are not intended to be included within the "sex" category. But should such groups be protected? Admittedly, "sexual orientation" is not specifically set out within subsection 15(1) of the Charter. However, the open-ended provisions of subsection 15(1) arguably do protect against discrimination on the basis of "sexual orientation." Indeed, the recent Report of the Par-

117. A list of Canadian human rights legislation is provided in Schedule A to this Paper.

118. These reasons are outlined in Schedule B to this Paper.

liamentary Committee on Equality Rights supports this view.[119] But more important, in recent history, homosexuals have been subjected to hateful attacks which led to their physical harm. After all, homosexuals were also victims of the genocidal policies of the Nazis.[120] Nonetheless, we would welcome further public feedback before making a specific recommendation on this issue.

(4) What Restrictions?

In one sense, the present crimes of promoting hatred in section 281.2 are unnecessarily restricted. Both crimes prohibit the "communication" of "statements" which promote hatred. While these terms are broadly defined, this Paper has already pointed out that there is uncertainty as to whether they would cover all means of communicating hatred — for example, hate propaganda displayed on a computer screen, or all forms of visual representations.[121] Since what is relevant is the promotion of hatred, all means of promoting hatred should be clearly covered.

The substance of these crimes, however, must surely be defined restrictively. This is because they must not infringe unreasonably upon the fundamental values of freedom of expression, truth, and privacy.

The first *Code* offence to be examined here is inciting hatred in a public place where such incitement is likely to lead to a breach of the peace. Two major issues arise. First, should this crime exist at all, or should all matters dealing with breaches of the peace be dealt with exclusively by offences designed to protect public order — that is, causing a disturbance, unlawful assembly, or riot? Second, assuming that this crime should exist, should it be defined in a more precise manner?

What is this crime primarily designed to prevent — a breach of the peace, or a specific kind of promoting hatred against any identifiable group? While both elements are present, our view is that the latter element is the more dominant. Therefore, this crime should continue to exist as part of the package of offences designed to combat hate propaganda.

At the same time, however, the present crime is defective by its failure to be more precise in its *actus reus* and *mens rea* requirements.

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119. Report of the Parliamentary Committee on Equality Rights, *Equality for All* (Ottawa: Supply and Services, 1985), p. 29. Some legal commentators have also reached the same conclusion. See, for example, J.E. Jefferson, "Gay Rights and the Charter" (1985), 43:1 *U.T. Faculty L.R.* 70; and N. Duplé, "Homosexualité et droits à l'égalité dans les Chartes canadienne et québécoise" (1984), 25 *C. de D.* 801.

120. For a harrowing account of the persecution of the homosexuals of Western Europe under the Nazis, see F. Rector, *The Nazi Extermination of Homosexuals* (New York: Stein and Day, 1981). Homosexuals were required to wear triangular pink cloth patches in the concentration camps for identification, and were treated savagely. Rector estimates that at least 500,000 gays died in the Holocaust (p. 116). Yet, he points out that this genocide of homosexuals "still lies buried as a virtual historical secret" (p. 111).

121. See *supra*, page 15 of this Working Paper for a discussion of possible limitations of the present definition.

There are three problems with the *actus reus*. First, the crime requires that a person "incite" hatred. A better word is "fomenting," to be discussed later in relation to the crime of wilfully promoting hatred.

Second, the incitement must be one which is likely to cause a "breach of the peace." This phrase, used in the context of police powers of arrest, has already been criticized by this Commission because of its vagueness.[122] It should no longer be used to define this offence. Instead, a more precise definition of the harm to be prevented is needed. Our tentative view is that fomenting to hatred in a public place should be made criminal only when it is likely to cause harm to a person or damage to property.

Third, while this crime covers only a statement communicated "in a public place" which is likely to cause a breach of the peace, these statements in theory can include those made in a private conversation.[123] Broader protection for privacy must be provided. Only fomenting hatred "publicly" in a public place should be made criminal.[124]

The *mens rea* component is vague. On the one hand, Martin J.A. in the *Buzzanga* case argued in *obiter* that this offence seemed to be one of recklessly inciting.[125] On the other hand, this Commission has argued that, in the context of secondary liability for crimes, inciting should have the restricted *mens rea* of intent or purpose, not recklessness.[126] Acting consistently with the latter view, we believe that the crime of fomenting hatred in a public place should have the restricted *mens rea* of intent or purpose to foment hatred.

The great difficulty with this offence is defining with reasonable certainty when a "heckler's veto" situation could arise. To what extent should a person be punished

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122. Law Reform Commission of Canada, *Arrest* [Working Paper 41] (Ottawa: LRCC, 1985), pp. 88-9.

123. During the proceedings of the House of Commons Standing Committee on Justice and Legal Affairs on the proposed hate propaganda legislation, a member of the Committee, Mr. Hogarth, argued that if the hatred was expressed in a public place but in a private conversation, it should not be made a crime. Then Justice Minister John Turner responded:

> [T]he gravamen of the offence is the incitement likely to lead to a breach of the peace .... The breach of the peace might arise from an escalation of a private conversation in a public place and that is the foundation of the offence .... Whether or not incitement begins in a private conversation in a public place or by way of a declaration from a public platform in a public place is incidental. If it escalates into a situation that is likely to lead to a breach of the peace, then the offence in our view is committed.
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> Canada, House of Commons, Standing Committee on Justice and Legal Affairs, *Minutes of Proceedings and Evidence*, No. 10 (February 24, 1970), pp. 10:64-10:65.

124. The effect of this proposal would be that an incitement to hatred expressed in a private conversation or other private manner in a public place (for example, a café), would not be caught by the offence. This is reasonable. As a practical matter, it is unlikely that a private conversation will lead to a breach of the peace. But assuming it does, there is a danger that the reason it does is because others have overheard the private conversation and reacted violently to it. In this situation, it seems that an unjustifiable "heckler's veto" has arisen and the responsibility for endangering the public peace should rest upon the shoulders of the "hecklers."

125. *R.* v. *Buzzanga and Durocher*, *supra*, note 33, p. 381.

126. Law Reform Commission of Canada, *Secondary Liability: Participation in Crime and Inchoate Offences* [Working Paper 45] (Ottawa: LRCC, 1985), pp. 28-31.

because others react hostilely to his or her views? By restricting this crime to the intentional and public fomenting of hatred in a public place likely to cause harm to a person or damage to property, we anticipate that a "heckler's veto" situation will not often arise. On those occasions when it does arise, it would be justifiable to punish the fomenter of hatred, given the dangerous situation which he or she has helped to create.

The second *Code* offence to be examined here is that of wilfully promoting hatred. Of all the crimes of promoting hatred presently existing, this offence is the most problematic. More so than the other offences, it prohibits mere words, without more. It raises several issues: (1) Is the definition of the *actus reus* precise enough? (2) What *mens rea* is needed for the crime? (3) Should truth be a defence? (4) Are other defences needed? and (5) Should there be a requirement that the Attorney General consent to the prosecution?

The *actus reus* of the crime requires at present two flawed components: (1) "promoting" hatred; and (2) a communication which is "other than in private conversation."

First, the term "promotes" does not describe accurately enough why the criminal law should catch such conduct. The spreading of hatred is a crime against the social order because it creates ill will and hostility towards powerless groups. A more precise term than "promotes" to describe what the law should prevent is "foment." It is defined by *The Shorter Oxford Dictionary* to mean in part "[t]o rouse or stir up; to excite, irritate." Indeed, the French definition of this crime already uses the verb "fomenter."

Second, the phrase, "other than in private conversation" does not appear to protect other private communications, such as a private letter to a friend.[127] This does not give enough protection to the fundamental value of privacy. After all, the major danger of this conduct is that it will poison the public in its attitude towards identifiable groups. Therefore, the offence should be reworded to drop the "private conversation" exemption and to catch instead the person who "publicly" foments hatred against any identifiable group. "Publicly" should not be defined. Judges can apply their common sense to interpret it.

The crucial issue involving *mens rea* is whether the crime should retain the word "wilfully" or an equivalent phrase which makes the crime effectively one of specific intent, or whether "wilfully" should be dropped altogether to create a crime of reck-

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127. The "private conversation" exemption was explained by Mr. David Lewis during the proceedings of the House of Commons Standing Committee on Justice and Legal Affairs, No. 11 (February 26, 1970), pp. 11:11-11:12:

> [T]he only exception I think ought to be made is that of communicating these things in an impermanent way, which is by conversation. If it is in writing, *whether between two people* or more than two, once it is in writing it is in a permanent way which can be circulated. [Emphasis added]

In other words, the "private conversation" exemption was intended to cover only private *oral* communications, not private written ones.

By contrast, the offence of fomenting group hatred proposed by the American Law Institute in its Tentative Draft No. 13, *supra*, note 96, proposed a stringent publicity requirement that adequately safeguarded the fundamental value of privacy.

lessness. The preferred view of many persons, as reflected in *Equality Now* and the Fraser Committee report, is that the "wilfully" requirement must be dropped.

With respect, we do not share this view. The principle of restraint requires lawmakers to concern themselves not just with whom they want to catch, but also with whom they do not want to catch. For example, removing an intent or purpose requirement could well result in successful prosecutions of cases similar to *Buzzanga*, where members of a minority group publish hate propaganda against their own group in order to create controversy or to agitate for reform. This crime should not be used to prosecute such individuals.

In effect, this crime should be used only to catch the most extreme cases of fomenting hatred, when the accused is motivated by enmity. Accordingly, we recommend that this crime should continue to be one of intent or purpose. This is best achieved by removing the "wilfully" requirement and substituting in its place an "intentionally" or "purposely" requirement. This change in wording would not result in any change to the *mens rea* requirement for this crime as set out in *Buzzanga and Durocher*,[128] but it would avoid the problems inherent in the word "wilfully," which has been defined inconsistently in criminal law.[129]

Should there be a defence of truth for the crime? As the law now stands, there is. Some consultants argued that truth should not be a defence because it does not outweigh the harm caused.

This raises an important policy issue: When should the criminal law punish a person for publishing the truth? One can concede that there are occasions when the criminal law should do so. For example, our revised crime of intentionally fomenting hatred in a public place has no defence of truth, nor any other defences. But the reason for denying defences there is that an immediate threat to public peace exists — the likelihood of harm to a person or damage to property.

By contrast, the crime of intentionally fomenting hatred does not require the existence of an immediate threat to the public peace. Thus, it is broader in scope. Here, the criminal law must respect truth as a fundamental value. Otherwise, we put at risk not just hatemongers but also legitimate scholars who, for a variety of motives, inject themselves into areas of controversy by publishing factually accurate material critical of socially important groups within our society.

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128. In *Buzzanga and Durocher*, *supra*, note 33, the Ontario Court of Appeal defined "wilfully" in the context of promoting hatred to mean (a) having the conscious purpose to promote hatred or (b) foreseeing that the promotion of hatred was certain or morally certain the result. This definition corresponds with the definition of intent/purpose for crimes requiring intent/purpose in this Commission's upcoming tentative draft Code.

129. See J. Fortin and L. Viau, *supra*, note 35, pp. 140-2.

What about the remaining defences?[130] Are they needed? Undoubtedly, many persons believe that the present range of defences is too broad, that it prevents the crime from being effective. For example, two of the remaining defences — those of an opinion on a religious subject and of a purpose to remove feelings of hatred — require that the accused act in "good faith." Some argue that all that "good faith" means is that the accused honestly believe what he or she says, thus permitting the sincere fanatic to raise a successful defence.

Nonetheless, our view is that the defences, rather than operating to acquit the accused when he or she wilfully promotes hatred, appear more to be examples of not wilfully promoting hatred.[131] If a person wilfully or intentionally foments hatred, it seems that the person acts in bad faith, not good faith. By analogy, for the defence of qualified privilege in defamation law, a person does not act in good faith even when he or she honestly believes the defamation, if the dominant motive is to give vent to personal spite, ill will, or some other improper purpose.[132] Indeed, cases such as *Keegstra* and *Buzzanga* suggest that where a person has in fact wilfully promoted hatred, judges and juries are reluctant to find that the defences apply to acquit the accused.[133]

Are these defences needed, however, as long as this crime remains one of intent or purpose? There is an important psychological advantage in retaining these defences because they reflect how highly our society values freedom of expression. After all, these remaining defences existed beforehand elsewhere in the *Code* as defences to other crimes which limit freedom of expression — namely, blasphemous libel, defamatory libel, and sedition.[134] They were created as defences here out of caution to ensure that statements of fact or opinion expressly permitted in other contexts would not be caught by this crime, and to ensure that minority groups would not be prosecuted under a crime designed to protect them. Therefore, they should be retained.

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130. Aside from truth, the three remaining defences in subsection 281.2(3) of the *Criminal Code* are:

> (*b*) if, in good faith, he expressed or attempted to establish by argument an opinion on a religious subject;
>
> (*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 the 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 towards an identifiable group in Canada.

131. See Cohen's analysis of these defences in *supra*, note 4, pp. 775-7.

132. For an excellent analysis of this issue in defamation law, see *Horrocks* v. *Lowe*, [1975] A.C. 135 (H.L.).

133. For example in *Buzzanga and Durocher*, *supra*, note 33, Martin J.A. stated at page 389: "The exemption contained in s. 281.2(3)(*d*) is, in my view, provided out of abundant caution, and where a person has 'wilfully' promoted hatred, the cases in which the exemption may successfully be invoked must be comparatively rare."

Also, in the *Keegstra* case, Keegstra was convicted of wilfully promoting hatred notwithstanding the existence of these defences: see Mertl and Ward, *supra*, note 36.

134. See *Criminal Code*, ss. 260(3), 273, 61(*d*).

Should the crime of fomenting hatred (and, incidentally, the offence of advocating genocide) continue to require the consent of the Attorney General as a pre-condition to prosecution?

Because it is unclear exactly what does foment hatred, without safeguards there could be unwarranted prosecutions. For example, a complaint was made in Alberta in 1984 that the movie, "Red Dawn," about a fictional Communist invasion of the United States, promoted hatred against Russians and Cubans.[135] In 1975, some young people were arrested by Toronto police for distributing leaflets saying "Yankee go home."[136]

In general, safeguards are provided, initially by the requirement that an information be laid before a justice of the peace, later by the power of the Crown to stay a prosecution. But is freedom of expression so fundamental to our society that it is justifiable to take special care to ensure that the power to prosecute crimes which limit freedom of expression will not be abused?

On the one hand, requiring the consent of the Attorney General prior to a prosecution is an effective safeguard to prevent at the outset the cost and burden of a criminal trial, especially in an area of political sensitivity. On the other hand, this requirement of consent can prevent those who are the victims of hate propaganda from launching a prosecution. For example, Ernst Zundel was prosecuted under section 177 because the Ontario Attorney General refused to give his consent to prosecute him for wilful promotion of hatred.[137]

Whether there should be the requirement of the consent of the Attorney General for certain crimes is one of the issues being studied in a forthcoming Working Paper on the Powers of the Attorney General. For this reason, we defer making any recommendations on this issue as it relates to crimes of hate propaganda until that study is completed.

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135. See the editorial, "Red Yawn," *Edmonton Journal*, Thursday, September 13, 1984, p. A6.

136. See Mertl and Ward, *supra*, note 36, p. 38.

137. See Ryan, *supra*, note 46, p. 339.

Conclusion

There is no easy solution to the problem of spreading hatred. Even among civil libertarians who believe strongly in protecting freedom of speech, opinion is divided as to whether these crimes are necessary.

These proposals may not meet with overwhelming approval from the public. On the one hand, visible minorities may regard with dismay the decision to retain, for the revised offence of fomenting hatred, the *mens rea* requirement of intent or purpose and all the existing defences. On the other hand, civil libertarians may be disappointed that we did not advocate abolition of the offence of wilfully promoting hatred, and indeed may shudder at the proposal to expand the definition of "identifiable group" to protect those groups enumerated specifically in subsection 15(1) of the Charter. Both sides may argue that the Commission has failed to act boldly and imaginatively on an important social issue.

Nonetheless, the proposals made here are entirely consistent with our view that, while the criminal law should uphold fundamental values, it should nonetheless be applied with restraint.

Admittedly, the very existence of these crimes of fomenting hatred is open to two fundamental objections. First, they encroach upon freedom of expression in an unjustifiable manner. In other words, restricting freedom of expression for some restricts freedom of expression for all. Second, they may not do what they are expected to do. After all, the Weimar Republic had crimes of hate propaganda; yet Hitler still came to power.

The crimes proposed in this Paper, however, infringe upon freedom of expression in a justifiable manner by ensuring that only the most serious kinds of hatred are caught by the criminal law. Moreover, these crimes will do what they are expected to do, in two ways: first, by underlining the fundamental values of equality and dignity; second, by deterring others from engaging in such activity.

Admittedly, too, the restricted definition of these crimes is open to the fundamental objection that they do not propose adequate legal controls on the propagation of hatred.

The issue here, however, is to what extent the *criminal law* must be used to combat fomenting hatred against identifiable groups. Given its coercive and brutal nature, criminal law must be used with restraint. It should be used as the last resort, not the first. Of course, our society can use other means to deal with the spreading of hatred. The work of human rights commissions is all-important in helping to eliminate attitudes which support discrimination. Perhaps a more effective way to deal with fomenting hatred would be to ensure that these commissions play a stronger role in combatting such attitudes.

But the role of the criminal law must be limited to preventing the most harmful hatreds being aimed at clearly socially important groups. Otherwise, in the name of fighting hatred, our society runs the risk of creating unjustifiable repression.

The crimes dealing with hate propaganda should be amended or altered in the following manner.

Recommendations

General

Groups

1. All these crimes should protect those groups identifiable on the basis of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

Placement

2. The definition of "identifiable group" should be removed from the offence of advocating genocide and put into a separate definition section.

3. These crimes should be placed in our new Code in a chapter on Offences against Society.

Specific Offences

Genocide

4. (1) Whether there should be a crime of genocide in our new Code should not be resolved by this Paper, but should be deferred for future consideration.

(2) The crime of advocating or promoting genocide should be retained. However, the crime should be modified to catch "advocating, promoting, or urging" genocide. Also, any recommendation concerning the requirement of the Attorney General's consent should await the results of a forthcoming Commission Working Paper on the Powers of the Attorney General.

Publishing False News

5. Section 177, the crime of publishing false news, should be abolished. Any new offence designed to deal with causing public alarm should be defined in a precise enough manner to prevent its being used to prosecute hatemongers.

6. (1) Both crimes should be amended to catch clearly any means by which hatred is fomented.

(2) The crime of inciting hatred in a public place where such incitement is likely to lead to a breach of the peace should be redefined in the following manner:

> **Any person who intentionally [purposely] and publicly foments hatred in a public place where it is likely to cause harm to a person or damage to property commits a crime. ["Public place" would continue to be defined as including any place to which the public have access as of right or by invitation, express or implied.]**

(3) The crime of wilfully promoting hatred, other than in private conversation, against any identifiable group, should be redefined in the following manner:

> **(a) Any person who intentionally [purposely] and publicly foments hatred against any identifiable group commits a crime.**
>
> **(b) No person shall be convicted if he or she**
>
> > **(i) uses the truth and proves such truth;**
> >
> > **(ii) in good faith, expresses an opinion upon a religious subject;**
> >
> > **(iii) uses anything which, on reasonable grounds, he or she believes to be true and which was relevant to any subject of public interest, the discussion of which was for the public benefit; or**
> >
> > **(iv) in good faith, intended to point out, for the purpose of removal, matters producing or tending to produce feelings of hatred towards an identifiable group in Canada.**
>
> **(c) Any recommendation concerning the requirement of the Attorney General's consent should await the results of a forthcoming Commission Working Paper on the Powers of the Attorney General.**

Forfeiture Provisions

7. In accordance with a recommendation made in our Report on *Search and Seizure*,[138] section 281.3, dealing with *in rem* proceedings for seizure and forfeiture of hate propaganda, should be taken out of the *Code* and put into federal regulatory legislation.

It is open to question whether subsections 281.2(4) and (5), which govern the forfeiture of material after conviction for a hate propoganda offence, belong among these crimes or among provisions dealing with sentencing.

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138. *Supra*, note 50.

SCHEDULE A

Canadian Legislation on Human Rights and Freedoms

Canadian Bill of Rights, R.S.C. 1970, Appendix III.
Canadian Charter of Rights and Freedoms, Part I of the *Constitution Act, 1982* which is Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.
Canadian Human Rights Act, S.C. 1976-77, c. 33.
Charter of Human Rights and Freedoms, R.S.Q. 1977, c. C-12.
Civil Rights Protection Act, S.B.C. 1981, c. 12.
Criminal Code, R.S.C. 1970, c. C-34, as amended.
Fair Practices Ordinance, R.O.N.T. 1974, c. F-2.
Fair Practices Ordinance, R.O.Y.T. 1971, c. F-2.
Human Rights Act, C.S.N.S. 1979, c. H-24.
Human Rights Act, R.S.N.B. 1973, c. H-11.
Human Rights Act, S.P.E.I. 1975, c. 72.
Individual's Rights Protection Act, R.S.A. 1980, c. I.2.
Ontario Human Rights Code, R.S.O. 1980, c. 340.
The Human Rights Act, R.S.M. 1970, c. H175.
The Newfoundland Human Rights Code, R.S.N. 1970, c. 262.
The Saskatchewan Human Rights Code, S.S. 1979, c. S-24.1.

SCHEDULE B

Pornography and Hate Propaganda

Many feminists assert that pornography promotes hatred against women. As Susan Brownmiller states, "[p]ornography is the undiluted essence of anti-female propaganda."[139] Indeed, some point out the similarities between pornography directed against women, and hate propaganda directed against Jews and Blacks.[140]

The Fraser Committee accepted this argument. So, in addition to a highly detailed three-tier system of criminal controls on pornography, it proposed the use of the hate propaganda section 281.2 of the *Code* to help deal with the evil inherent in pornography. As the Committee stated:

> If one accepts the argument that pornography is an expression of misogyny, then use of the hate propaganda section of the *Code* in this connection is particularly attractive. If the evil seen in pornography is the communication of an untrue message which expresses or propagates hatred against women, it seems logical that this *Code* provision, and not one dealing with sexual morality, should be aimed against it.[141]

In examining the harm caused by pornography, the Fraser Committee emphasized the harm it causes to the constitutionally entrenched value of equality. But, to remain consistent with this argument, it recommended that the offence be expanded to include all those groups specifically enumerated in section 15 of the Charter.[142]

However, the Committee recognized that for this section to be effective in combatting the evil of pornography, other changes had to be made. First, the "wilfully" requirement had to be removed. As the Committee stated:

> In the area of pornography, a wilfulness requirement would place an almost impossible burden on the prosecutor. The effect of material may be to engender hatred of women, but persons may all too readily establish that this was not done "wilfully." The motive behind the publication may be described as sexual entertainment, or even profit; even an unattractive

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139. S. Brownmiller, *Against Our Will* (New York: Bantam Books, 1976), p. 443. See also: A. Dworkin, *Pornography: Men Possessing Women* (New York: Putnam, 1981); and L. Lederer, ed., *Take Back the Night: Women on Pornography* (New York: Morrow, 1980).

140. See, for example, S. Griffin, *Pornography and Silence* (New York: Harper Colophon Books, 1981), pp. 156-99.

141. Fraser Committee, *supra*, note 56, Vol. 1, p. 319.

142. *Id.*, pp. 320-2.

motive, other than hatred, would serve to defeat a prosecution where specific intent was required.[143]

Second, the requirement of the Attorney General's consent to a prosecution had to be removed.[144] Third, the offence should be redefined to include any visible representation.[145]

Nonetheless, the proposed reform of the hate propaganda crimes outlined in this Paper would not be effective in dealing with the harm caused by pornography, because an "intentionally" or "purposely" requirement for the revised offence of fomenting hatred is required. This would effectively prevent prosecutions under section 281.2 for pornography, except, perhaps, in the most extreme circumstances.

The debate over using crimes of hate propaganda to deal with pornography highlights certain problems.

The first problem concerns the assumption that pornography promotes hatred against women just as, say, a white racist promotes hatred against Blacks. Some object to this evaluation. For example, Ryan states:

> [T]he whole subject of pornography is intimately and inextricably related to the biological sexual urges of the human animal .... Hate is sometimes present as a motive, but the motivation is complex and is at least partly based on the sexual urge .... It [pornography] should not be broken up and in part confused with racial and religious hatred, which spring from other roots.[146]

The second problem is that expanding the hate propaganda crimes to catch pornography by adding the category of "sex" to the definition of "identifiable group" also catches non-pornographic statements of misogyny. But what other statements are misogynistic? An arguably extreme position is that taken by Andrea Dworkin:

> Antifeminism is always an expression of hating women: it is way past time to say so, to make the equation, to insist on its truth .... It is right to see woman hating, sex hatred, passionate contempt in every effort to subvert or stop an improvement in the status of women on any front, whether radical or reform .... This is true when the antifeminism is expressed in opposition to the Equal Rights Amendment or to the right to abortion on demand or to procedures against sexual harassment or to shelters for battered women or to reforms in rape laws. This is true whether the opposition is from the Heritage Foundation, the Moral Majority, the Eagle Forum, the American Civil Liberties Union, the Communist Party, the Democrats, or the Republicans.[147]

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143. *Id.*, p. 323.

144. *Id.*, p. 322

145. *Id.*, pp. 323-4.

146. Ryan, *supra*, note 46, pp. 349-50. For additional criticism of this general view of pornography as promoting hatred, see also B. Faust, *Women, Sex, & Pornography* (London: Melbourne House, 1980), and L. Duggan, N. Hunter and C. Vance, "False Promises: Feminist Antipornography Legislation in the U.S." in V. Burstyn, ed., *Women against Censorship* (Vancouver: Douglas & McIntyre, 1985), p. 130.

147. A. Dworkin, *Right-Wing Women* (New York: Wideview/Perigee, 1983), pp. 196-7.

The third problem is that an offence which is expanded to catch reckless promotions of hatred against a sexual group catches not just woman hating, but also man hating. There is a danger that the offence could be used to prosecute radical feminists for promoting hatred against men. For example, Varda Burstyn points out that:

> [I]n December, 1984, Joe Borowski, a former Manitoba cabinet minister and well-funded anti-abortion crusader, announced his intention to seek charges against *Herizons*, a Winnipeg-based feminist magazine, for a cartoon showing a construction site exploding, supposedly as a result of women's revenge against the workers. He has stated that this cartoon represents 'violence against men.'[148]

The fourth problem is, assuming that specific offences against pornography are to be created in our new Code, Will ensuring that crimes of hate propaganda also catch pornography be a substantially useful addition to the law? Admittedly, the Fraser Committee believed that its proposed revision of subsection 281.2(2) would complement its three-tiered scheme to deal with pornography.[149] But it is also clear that for the crime of promoting hatred to be effective in combatting pornography, it would have to catch much the same conduct as the specific crimes of pornography. Two issues arise. First, if there are specific crimes of pornography, then is there really a need to catch the conduct elsewhere? Second, while it may complement specific crimes of pornography to some extent, could not the crime of promoting hatred be used to undercut the safeguards provided by the more specific offences of pornography? What if a private prosecutor is determined to prosecute, and realizes that the crime of promoting hatred fails to provide the same defences as the pornography offences?

In effect, the principle of restraint in the application of the criminal law compels this Commission to deal with pornography, not under hate propaganda offences, but rather only under specific offences of pornography.[150] Such an approach enables the criminal law to define with better precision the kind of pornography it wishes to catch. It also prevents a possible misuse of the criminal law by preventing prosecutions which could have a chilling effect upon freedom of expression.

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148. Burstyn, *supra*, note 146, p. 159. For a newspaper report of this incident, see the *Winnipeg Free Press*, Tuesday, December 4, 1984, p. 3.

149. Fraser Committee, *supra*, note 56, p. 324.

150. Janet Erasmus, in *Pornography: Obscenity Re-examined* (October 1985), an unpublished Background Paper on pornography prepared for the Law Reform Commission of Canada, also recommends against using the hate propaganda crime of promoting hatred for pornography prosecutions.

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