

THE CONSTITUTIONALITY OF THE GROUP LIBEL OFFENCES IN THE CANADIAN CRIMINAL CODE

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I. Introduction

In 1965, the Honourable Guy Favreau, Minister of Justice, established a parliamentary committee whose mandate was to study and report upon the problems associated with the dissemination of hate propaganda in Canada. The Special Committee on Hate Propaganda, which became known as the Cohen Committee,¹ was instructed to prepare recommendations on the suppression and control of group libel in the event that it concluded that the situation was serious enough to warrant government action.²

After conducting an intensive investigation, the Cohen Committee reported that the circulation of hate literature, the delivery of speeches and other activities designed to promote hatred against groups in the Canadian community were present in eight provinces — British Columbia, Alberta, Saskatchewan, Manitoba, Ontario, Quebec, New Brunswick, and Nova Scotia. The heaviest concentration of individuals and organizations responsible for propagating hatred was in the Province of Ontario with Quebec and New Brunswick following as the next principal areas of distribution of hate literature.³ According to the Committee, fourteen organizations were primarily responsible for the dissemination of the hate material.⁴ Most of the “literature” was imported from the United States, largely from three sources, namely: the American Nazi Party in Arlington, Virginia; the headquarters of an anti-Black and anti-Semitic association called the National States Rights Party in Birmingham, Alabama; and an anti-Semitic organization in New Jersey.⁵

Special technical studies were commissioned by the Committee to examine the social and psychological effects of hate propaganda on the vilified groups. It was discovered that the main victims of the hatemongers were Blacks and Jews.⁶ These subjects of group libel reacted in one of three ways. Some individuals responded in an aggressive manner, either by verbally attacking their provokers or by physically retaliating against those who denounced them. Others reacted by accepting their low status in the Canadian community. This took the form, on the part of those vilified, of

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1. The Special Committee on Hate Propaganda was chaired by Maxwell Cohen, Dean of McGill University Law School.

2. See *Report to the Minister of Justice of the Special Committee on Hate Propaganda in Canada* (Ottawa: Queen's Printer, 1986) (Chair: M. Cohen) at 1. [hereinafter the Cohen Committee].

3. *Ibid.* at 5 and 12.

4. *Ibid.* at 14.

5. *Ibid.* at 12-13.

6. *Ibid.* at 30.

resignation to the fact that certain economic, political and social opportunities would never be available to them simply because they belonged to a particular religious, ethnic or racial group. A significant number of those who believed that they were branded and thus prevented from improving their standard of living, joining particular social clubs or being considered as serious political candidates, suffered from psychological illnesses. The third type of reaction was one of avoidance. Many Jewish people and other immigrants changed their names in order to outwardly disassociate themselves from the targeted groups. Others physically and economically segregated themselves from the racial, ethnic or religious group to which they belonged.⁷

Another matter to which the Cohen Committee gave serious attention was that of the effects of hate propaganda on members of the public who were encouraged to participate in the vilification of Jews, Blacks and other groups in Canadian society. According to the Committee, historical and experimental studies demonstrated that people are volatile and can be persuaded to believe outlandish, false and pernicious statements about groups distinguished by colour, race, religion or ethnicity. Particularly in times of economic and social stress, people seek a scapegoat for their problems and are highly susceptible to the views of fanatics and demagogues.⁸ The Committee expressed deep concern about the impact that the mass media had on members of the public who were exposed to the views of a hatermonger. Not only did the advent of television and radio allow the hate propagandist to reach millions of Canadians, but the average Canadian was no longer able to debate the arguments of the hate promoter who resorted to the mass media to broadcast his views (by contrast to the person who handed out hate pamphlets or delivered a speech on a street corner).⁹

The Special Committee on Hate Propaganda concluded that despite the fact that the volume of hate propaganda was not large and that none of the organizations which promoted hatred was a powerful force in Canada, the situation constituted a "clear and present danger to the functioning of a democratic society."¹⁰ Although the level of hate propaganda had not reached crisis proportions, in the opinion of the Committee, legislative action on the part of the Canadian government was not only warranted but was clearly necessary.

An examination by the Cohen Committee of the existing provisions in the *Criminal Code*¹¹ of Canada revealed that none of the offences contained therein provided adequate protection to a group subjected to libel.¹² For example, sections 261 to 281, which concern defamatory libel, basically preclude a group from instituting legal proceedings thereunder and are solely applicable to libellous statements directed against individu-

7. *Ibid.* at 30.

8. *Ibid.* at 175.

9. *Ibid.* at 8.

10. *Ibid.* at 24.

11. R.S.C. 1970, c. C-34.

12. *Supra*, note 2 at 49. See also M. Gropper, "Hate Literature: The Problem of Control" (1965) 30 *Sask. Bar Rev.* 181 at 187-190.

als. Section 262 of the *Criminal Code* defines defamatory libel as matter which is:

like to injure the reputation of any person by exposing him to hatred, contempt or ridicule, or that is designed to insult the person of or concerning whom it is published.

The definition of person is not broad enough to include an unincorporated group. Therefore, in order to successfully launch a prosecution under these provisions of the *Code*, it is necessary to establish that the libel exposed every member of the group, individually, to hatred.¹³

Nor is the crime of sedition outlined in sections 60–62 of the *Criminal Code* considered to be appropriate for the suppression and control of group libel. The landmark decision of the Supreme Court of Canada in *Boucher v. The King*¹⁴ held that it is not sufficient for the Crown in a sedition case to establish that the accused had the intent to promote feelings of ill-will and hostility between different classes of persons. In order to secure a conviction for sedition, it is also necessary to prove that the individual had the intent to incite violence, unlawful conduct or resistance to established authority.¹⁵ The Cohen Committee concluded that the sedition offence does not provide satisfactory protection to libelled groups because it does not extend to situations wherein incitement to violence is not intended by the hatemongers, the threat of violence emanates from the vilified groups, or there is incitement to hatred short of violence.¹⁶

Similarly, section 177 of the *Criminal Code*, which provides that it is an offence to wilfully publish material which is known to be false, does not apply to many group libel cases.¹⁷ Firstly, this provision requires government counsel to establish that the accused is cognizant of the fact that the material which he published is false. This imposes a difficult if not an impossible burden on the prosecution since a significant number of libellers believe that the material they are distributing contains only the truth. Secondly, section 177 is restricted to statements of fact and has no application to matters of opinion. Lastly, this offence only extends to written material and not to oral statements.¹⁸

After canvassing further provisions of the *Criminal Code*, as well as other legislation such as the *Post Office Act*,¹⁹ the *Customs Act*,²⁰ and the *Broadcasting Act*,²¹ the Cohen Committee reached the conclusion that no statute existed in Canada which comprehensively treated the problem of

13. *Supra*, note 2 at 45.

14. *Boucher v. The King* (1950), 1951 S.C.R. 265, [1951] 2 D.L.R. 369, 99 C.C.C. 1.

15. See the Cohen Committee, *supra*, note 2 at 39 and Gropper, *supra*, note 12 at 188.

16. *Supra*, note 2 at 39.

17. Section 177 of the *Criminal Code* provides that "every one who wilfully publishes a statement, tale or news that he knows to be 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 for imprisonment for two years." See also *supra*, note 2 at 45.

18. See Stephen S. Cohen, "Hate Propaganda: The Amendments to the *Criminal Code*" (1971) 17 *McGill L.J.* 740 at 765.

19. R.S.C. 1970, c. P-14.

20. R.S.C. 1970, c. C-40.

21. R.S.C. 1970, c. B-11.

hate propaganda directed against groups.²² Before the Committee could present draft legislation to the Minister of Justice, however, it felt compelled to address the question of whether laws which criminalize the dissemination of hate materials violate free speech.

In 1960, *The Canadian Bill of Rights*²³ was enacted by the Parliament of Canada. It was an ordinary statute which could be repealed by the federal legislature and which had no application to provincial laws. Subsection 1(d) of the *Bill of Rights* explicitly declares that freedom of speech is a fundamental freedom. It was emphasized by the Cohen Committee that freedom of speech is a qualified and not an absolute right. That is, although there exists a strong presumption in favour of free and unrestricted speech, this presumption can be rebutted if it is established that the expression "imperils vital community interests."²⁴ In the Committee's view, the right of an individual to promote hatred against a group must be balanced against the community interest in protecting group reputation and in preserving public order.²⁵ In ascertaining the constitutionality of a group defamation statute, the court must consider the degree to which "the freedom of expression in question enriches the life of the speaker, contributes to the liberation and enlargement of other minds and encourages responsible discussion of the community interest."²⁶ The Cohen Committee had little difficulty in arriving at the conclusion that while the material distributed and the speeches delivered by the hate propagandist had little social value, they were responsible for serious injury to the Canadian community. The Committee proposed that three offences be added to the *Criminal Code*, namely: (1) the advocacy of genocide; (2) public incitement of hatred that is likely to breach the peace; (3) the wilful promotion of hatred. The members of the Committee were of the opinion that the community interest to be protected by the addition of these new provisions clearly outweighed in importance the individual's right to free speech.

The Cohen Committee perceived the proposed amendments to the *Criminal Code* to be of tremendous importance in codifying and clarifying the rules of social interaction as well as altering cultural norms.²⁷ It was of the firm conviction that the targeted groups would be subjected to significantly less psychological and physical abuse if society was "clearly disassociated from the hatemongers so that the latter would not appear to operate with at least the implicit approval of a large majority."²⁸ As a result of the report submitted to the Minister of Justice by the Special Committee on Hate Propaganda, group defamation became part of the criminal law of Canada. In 1970, the *Criminal Code* was amended to include the three group libel offences suggested by the Cohen Committee.²⁹

22. *Supra*, note 2 at 51. See also Gropper, *supra*, note 12 at 190.

23. *The Canadian Bill of Rights*, S.C. 1960, c. 44; reprinted in R.S.C. 1970, App. III. [hereinafter *Bill of Rights*].

24. *Supra*, note 2 at 7.

25. *Ibid.* at 60.

26. *Ibid.* at 8.

27. *Ibid.* at 221-222.

28. *Ibid.* at 224.

29. R.S.C. 1970, c. 11 (1st Supp.) s.1. The provisions are set out in Appendix I.

The intention of this paper is to determine the constitutionality of the three group libel offences added to the *Criminal Code* in 1970. Three possible interpretive approaches to the freedom of expression clause found in subsection 2(b) of the *Canadian Charter of Rights and Freedoms*³⁰ will be examined. The first is premised on the notion that certain categories of speech, such as group libel, are not protected by the Constitution. The second approach involves the application of the "clear and present danger" test. Finally, the suitability of "the balancing of interests test" as an interpretive technique will be considered. The merits as well as the adverse features of these three approaches will be described. Each will then be applied to the hate propaganda sections of the *Criminal Code* in order to demonstrate that the approach selected by the courts will be crucial to the determination of whether these provisions are constitutional.

This article will also examine the amendments to the hate propaganda sections of the *Criminal Code* proposed by both the Parliamentary Task Force on the Participation of Visible Minorities in Canada and the Special Committee on Pornography and Prostitution in their respective reports. Finally, the current approach of the courts to the freedom of expression clause will be analyzed in order to determine whether the notion that group libel is unprotected speech, the clear and present danger test, or the balancing standard is likely to become the established touchstone for ascertaining the constitutionality of group libel statutes. By way of conclusion, the author's view as to the manner in which Canadian courts should examine legislation which prohibits individuals from engaging in expression which abuses particular groups will be presented.

II. Three Approaches to an Interpretation of the Freedom of Expression Clause in the Canadian Charter of Rights and Freedoms

The Supreme Court of Canada has carefully articulated the general approach which a court ought to adopt in determining whether a right or freedom guaranteed under the *Charter* has been violated in three recent decisions: *R. v. Oakes*;³¹ *R. v. Big M Drug Mart Ltd.*;³² and *Hunter v. Southam Inc.*³³ Dickson C.J.C., who wrote the majority opinion in all three cases, stated that the *Charter* is a purposive document;³⁴ "its purpose is to guarantee and to protect, within the limits of reason, the enjoyment of the rights and freedoms it enshrines."³⁵ According to the Chief Justice, the *Charter* is

30. Part I of the *Constitution Act*, 1982, being Schedule B of the *Canada Act 1982* (U.K.), 1982, c. 11.

31. (1986), [1986] 1 S.C.R. 103, 24 C.C.C. (3d) 321, 50 C.R. (3d) 1. [hereinafter *Oakes* cited to C.C.C.]

32. (1985), [1985] 1 S.C.R. 295, 18 D.L.R. (4th) 321, 18 C.C.C. (3d) 395. [hereinafter cited to C.C.C.]

33. (1984), 11 D.L.R. (4th) 641, 14 C.C.C. (3d) 97 (S.C.C.). [hereinafter cited to C.C.C.]

34. *Oakes*, *supra*, note 31 at 333; *Big M Drug Mart Ltd.*, *supra*, note 32 at 423; and *Hunter*, *supra*, note 33 at 106.

35. *Supra*, note 33 at 106.

intended to restrain the government from acting in a manner inconsistent with the rights and freedoms enshrined therein. It is not to be regarded as authorization for governmental action.³⁶

The Supreme Court of Canada further indicated that the ambit of a *Charter* right or freedom is to be ascertained by an examination of the purpose of the guarantee in light of the interests that it was intended to protect.³⁷ In particular, the following matters ought to be analyzed: the character and the larger objects of the *Charter* itself; the language chosen to articulate the specific right or freedom; the historical origins of the concepts enshrined; and, where applicable, the meaning and purpose of other specific rights and freedoms within the text of the *Charter* with which it is associated.³⁸ Dickson C.J.C. commented that the courts must interpret *Charter* rights and freedoms "generously", with the objective of guaranteeing for individuals the "full benefit of the *Charter's* protection," and should refrain from approaching the document in a legalistic manner.³⁹

For the first time in Canadian constitutional history, freedom of expression has been entrenched in the Constitution of Canada. Subsection 2(b) of the *Canadian Charter of Rights and Freedoms* provides:

2. Everyone has the following fundamental freedoms:

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

Such provision imposes an obligation on the judiciary to be vigilant in protecting the right to freedom of expression and to hold that laws which restrict or abrogate this fundamental right are of no force or effect. Yet, it is clear from an examination of section 1 of the *Charter* that freedom of expression is not an absolute right.⁴⁰

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

The limitation in section 1 enables the Parliament of Canada or a provincial legislature⁴¹ to promulgate a statute which has the effect of circumscribing one of the guaranteed rights, provided that the law is reasonable

36. *Ibid.*

37. *R. v. Big M Drug Mart Ltd.*, *supra*, note 32 at 423.

38. *Ibid.* at 424.

39. *Ibid.*

40. *R. v. Oakes*, *supra*, note 31 at 346; *Re Ontario Film and Video Appreciation Society and Ontario Board of Censors* (1984), 147 D.L.R. (3d) 58, 41 O.R. (2d) 583, 5 C.R.R., 373 at 379-380 (H.C.), *aff'd* (1984), 5 D.L.R. (4th) 766, 2 O.A.C. 388, 7 C.R.R. 129 (C.A.); *R. v. Red Hot Video* (1985), 18 C.C.C. (3d) 1, 45 C.R. (3d) 36, 15 C.R.R. 206 (B.C.C.A.); *Re Federal Republic of Germany and Rauca* (1982), 125 D.L.R. (3d) 638, 41 O.R. (2d) 225, 4 C.C.C. (3d) 385 (C.A.); *R. v. Keegstra* (1985), 19 C.C.C. (3d) 254 (Alta. Q.B.); *Luscher v. Deputy Minister of National Revenue (Customers and Excise)* (1985), [1985] 1 F.C. 85, 45 C.R. (3d) 81, 15 C.R.R. 167 (C.A.).

41. Section 32 of the *Charter* states that the *Charter* applies to both the Parliament of Canada and the Legislature of each Province.

and justifiable in a democratic society. The party challenging the constitutionality of the law has the burden of establishing that a fundamental right guaranteed in the *Charter* has been interfered with or denied. If the challenger is successful, the burden of proof then shifts to the government which must establish on a balance of probabilities that the impugned statute, by-law, or regulation satisfies the requirements of section 1 and is therefore constitutionally valid.⁴² Constitutional scholar Peter Hogg has suggested that although the section 1 limitation clause is designed to aid the court in articulating more precise standards to determine the scope of the guaranteed rights and freedoms in the *Charter*, the vague terms “reasonable” and “demonstrably justified” do not offer the courts very much guidance.⁴³ It has also been noted that although there exists in Canada a widespread consensus that freedom of expression is essential to the proper functioning of a democratic system, there have been few attempts in this country (as compared to the United States) to examine the theoretical foundations of this proposition.⁴⁴

The American counterpart to the freedom of expression clause in the Canadian *Charter* is the First Amendment to the United States Constitution which provides:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.⁴⁵

While the *American Bill of Rights*⁴⁶ does not contain a provision analogous to section 1 of the Canadian *Charter*, the courts of the United States have interpreted the rights enumerated in the First Amendment to be qualified and have upheld laws which place restrictions on these fundamental freedoms.⁴⁷ An examination of decisions of the United States judiciary is instructive as it provides assistance to Canadian courts in their own deliberations on the scope to be accorded to subsection 2(b) and section 1 of the *Charter*, and in particular, whether or not — and in what circumstances — group libel legislation can withstand a constitutional challenge.

A. Group Libel as a Category of Unprotected Speech

An approach worthy of consideration by the Canadian courts is that certain forms of expression, such as the defamation of a group, are not protected by the freedom of expression clause contained in the *Canadian*

42. *Oakes*, *supra*, note 31 at 346; *Hunter*, *supra*, note 33 at 116; *Luscher*, *supra*, note 40 at 85 [cited to C.R.]; *Re Ontario Film and Video*, *supra*, note 40 at 386 [cited to C.R.R.].

43. P.W. Hogg, “A Comparison of the *Canadian Charter of Rights and Freedoms* with the *Canadian Bill of Rights*,” in W.S. Tarnopolsky and G.A. Beaudoin, *The Canadian Charter of Rights and Freedoms* (Toronto: Carswell, 1982) at 9.

44. Clare F. Beckton, “Freedom of Expression in Canada — How Free?” (1983) 13 *Man. L.J.* 583 at 586.

45. U.S.C.A. Const. Amend. 1.

46. U.S. Const. Art. I, Amend. 1–10.

47. Hogg, *supra*, note 43 at 91. See, e.g., *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942); *Roth v. United States*, 354 U.S. 481 (1957); *Miller v. California*, 413 U.S. 15 (1973).

Charter of Rights and Freedoms. In 1952, the United States Supreme Court held in *Beauharnais v. Illinois*⁴⁸ that group libel is a category of speech which falls outside the protection of the First Amendment. The accused, Beauharnais, was the Founder and President of the White Circle League of America, whose primary purpose was to maintain the segregation of the black and white races in Chicago. In the early 1950's, the League became concerned that some blacks were interested in moving into white residential neighbourhoods. It thus embarked on a campaign to pressure the City Council of Chicago to enact laws which would prohibit blacks from purchasing property in districts predominantly inhabited by caucasians. Beauharnais personally distributed anti-black leaflets on the streets of Chicago in order to solicit membership for his organization and to persuade individuals to sign a petition to be presented to the Mayor in support of the proposed legislation. The central parts of the leaflet are reproduced in the Supreme Court judgment:

The lithograph complained of was a leaflet setting forth a petition calling on the Mayor and City Council of Chicago 'to halt the further encroachment, harassment and invasion of white people, their property, neighbourhoods and persons, by the Negro ...' Below was a call for 'One million self respecting white people in Chicago to unite.' With the statement added that 'If persuasion and the need to prevent the white race from becoming mongrelized by the negro will not unite us, then the aggressions ... rapes, robberies, knives, guns and marijuana of the negro, surely will.' This, with more language, similar if not so violent, concluded with an attached application for membership in the White Circle League of America, Inc.⁴⁹

At trial, Beauharnais was found guilty of contravening section 224 of the *Illinois Criminal Code*⁵⁰ and was fined \$200. The constituent elements of the group libel offence of which he was convicted were as follows:

It shall be unlawful for any person, firm or corporation to manufacture, sell, or offer for sale, advertise or publish, present or exhibit in any public place in this state any lithograph, moving picture, play, drama or sketch, which publication or exhibition portrays depravity, criminality, unchastity, or lack of virtue of a class of citizens, of any race, colour, creed or religion which said publication or exhibition exposes the citizens of any race, colour, creed, or religion to contempt, derision, or obloquy or which is productive of breach of the peace or riots ...⁵¹

One of the grounds of appeal was that the Illinois statute violated freedom of speech guaranteed in the First Amendment.⁵² As stated by the Su-

48. *Beauharnais v. Illinois*, 343 U.S. 250 (1952).

49. *Ibid.* at 252.

50. Ill. Rev. Stat. ch. 38, Div. 1, para. 471 (1949).

51. *Ibid.* s. 224.

52. Note that the Fourteenth Amendment has been interpreted by the courts in such a way as to render the First Amendment applicable to state legislatures.

preme Court, the issue to be decided was whether the State of Illinois was permitted to punish individuals for criminal libel directed at “designated collectives and flagrantly disseminated.”⁵³ In a 5:4 decision, the Court upheld the Illinois group libel provision and affirmed *Beauharnais*’ conviction. Mr. Justice Frankfurter, who delivered the majority opinion, relied heavily on the well known passage from *Chaplinsky v. New Hampshire*⁵⁴ in which Murphy J. had listed four classes of speech — one of which is libel — as being unprotected by the Constitution:

Allowing the broadest scope to the language and purpose of the Fourteenth Amendment, it is well understood that the right of free speech is not absolute at all times and under all circumstances. There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or “fighting” words — those which by their very utterance inflict injury or tend to incite an immediate breach of the peace. It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.⁵⁵

The two level theory of the First Amendment emerged from the *Chaplinsky* decision. According to this theory, speech at the first level is to be accorded full First Amendment protection. However, there is a lower tier composed of certain categories of speech, such as libel and obscenity, which do not come within the ambit of the freedom of speech clause in the American Constitution.⁵⁶ It was the view of the Supreme Court in *Chaplinsky* that some forms of expression constitute an assault in and of themselves even if the words are not accompanied by physical action. It was recognized by the judiciary that psychological harm was deserving of the same proscriptions as physical injury.⁵⁷

The court in *Beauharnais v. Illinois* stated that group libel was to be treated in the same manner as libel directed against an individual.⁵⁸ Frankfurter J. explained that libellous utterances directed against a group adversely affect the reputations of individuals who are members of the targeted religious, ethnic or racial group:

. . . a man’s job and his educational opportunities and the dignity accorded to him may depend as much on the reputation of

53. *Supra*, note 48 at 258.

54. *Supra*, note 47.

55. *Ibid.* at 571–572.

56. Lawrence H. Tribe, *American Constitutional Law* (New York: The Foundation, 1978) at 670.

57. For further discussion on this point see Hadley Arkes, “Civility and the Restriction of Speech: Rediscovering the Defamation of Groups” (1974) *Sup. Ct. Rev.* 281 at 308.

58. *Supra*, note 48 at 263.

the racial and religious group to which he ... belongs, as on his own merits.⁵⁹

The Supreme Court also stated that group defamation is responsible for promoting tension and unrest within society. More specifically, it observed:

... wilful purveyors of falsehood concerning racial and religious groups promote strife and tend powerfully to obstruct the manifold adjustments required for a free, ordered life in a metropolitan polyglot community.⁶⁰

Therefore, the foundation of the Supreme Court's decision that the states have the constitutional right to promulgate criminal group libel statutes is that these laws provide protection to individual members of the targeted group and enhance public peace and order within the community.

According to Frankfurter J., a group libel statute must satisfy the "rational relation test" in order to be valid. That is, the law must bear a rational relation to the State objective of preventing racial disorder caused by persons and organizations which promote hatred. Legislation which is a "wilful and purposeless restriction unrelated to the peace and well-being of the State" is unconstitutional.⁶¹ It was held by the Court that there existed a rational connection between the group libel provision in the *Illinois Criminal Code* and the State's objective of preventing the racial strife which emanated from the dissemination of hate propaganda in Chicago.

The four dissenting judges did not concur with the majority for three primary reasons. Black J. and Douglas J. were of the view that the law of criminal libel is restricted to individuals and does not extend to groups. According to these Justices, broadening the scope of the law of criminal libel to include the defamation of groups constituted a clear violation of the First Amendment. It was thought that section 224 of the *Illinois Criminal Code* prevented Beauharnais from exercising his constitutional right to discuss racial issues of public concern.⁶² Mr. Justice Reid, by contrast, felt that the law did not pass constitutional muster because it was unnecessarily vague. For example, the terms "virtue," "decision" and "obloquy" in section 224 of the *Code* were not precisely defined.⁶³ Finally, it was stated in the dissenting judgment of Jackson J. that only group libel laws which meet the "clear and present danger" test do not violate the freedom of speech clause in the First Amendment.⁶⁴ This doctrine will be examined shortly.

What is the current judicial status of *Beauharnais v. Illinois*? Do American courts continue to endorse the notion that libel as a category of speech, because it does not contribute to an enlightened discussion of sub-

59. *Ibid.*

60. *Supra*, note 48 at 259.

61. *Ibid.* at 258. See also Donald A. Downs, "Skokie Revisited: Group Hate Speech and the First Amendment" (1985) 60 *Notre Dame L. Rev.* 629 at 646 and Loren P. Beth, "Group Libel and Free Speech" (1954-55) 39 *Minn. L. Rev.* 167 at 175.

62. *Supra*, note 48 at 272.

63. *Ibid.* at 303.

64. *Ibid.* at 299.

jects of public concern but rather causes substantial injury to the targeted groups and tends to incite breaches of the peace, should not be protected by the First Amendment? Despite the fact that the *Beauharnais* decision has not been explicitly overruled by the United States Supreme Court, and that in the opinion of some legal scholars⁶⁵ *Beauharnais* is sound law, the prevailing view is that it is of doubtful constitutional validity,⁶⁶ particularly in light of *New York Times v. Sullivan*.⁶⁷

The case of *New York Times v. Sullivan*, decided in 1965, involved a civil libel action instituted by an elected Commissioner of the City of Montgomery, Alabama, to recover damages for defamatory criticism of his official conduct. The United States Supreme Court flatly rejected the principle that libel, as a class of speech, did not fall within the parameters of the free speech clause in the First Amendment. In the words of Brennan J., “[l]ibel can claim no talismanic immunity from constitutional limitations.”⁶⁸ The Court held that in a civil libel action, a public official is precluded from recovering damages unless he can establish that the statement relating to his official conduct was made with “actual malice.” That is, the action will only be successful if the public figure can prove that the individual or organization which made the statement knew that the statement was false, or was reckless as to whether or not it was false.⁶⁹

The principles enunciated in *New York Times v. Sullivan* were applied in the criminal case of *Garrison v. Louisiana*.⁷⁰ In *Garrison*, a District Attorney was charged under Louisiana’s *Criminal Defamation Statute*⁷¹ for calling state judges lazy and inefficient at a press conference and for criticizing them for preventing him from enforcing the state vice laws. The United States Supreme Court affirmed the statement in *New York Times* that the state’s power to impose sanctions for criticism of the conduct of public officials is limited in criminal law, as in civil cases, to situations involving untrue statements concerning official conduct made with either knowledge of their falsity, or with reckless disregard as to whether they were false or not.⁷²

Some judges and legal commentators argue that in these decisions the Supreme Court only modified the law of libel as it relates to public figures. For example, in *New York v. Ferber*⁷³ White J. commented:

65. Mark E. Fields, “Validity of Group Libel Laws — *Beauharnais v. Illinois*” (1953) 38 *Cornell L. Rev.* 240 at 244 and Claude Ellis Bankester, (1952–53) 5 *Ala. L. Rev.* 125 at 129.

66. Arkes, *supra*, note 57 at 286; Mark S. Campisano, “Group Vilification Reconsidered” (1979–80) 89 *Yale L.J.* 308 at 309; Downs, *supra*, note 61 at 647; “Race Defamation and the First Amendment” (1965–66) 34 *Fordham L. Rev.* 653 at 667; *Collin and the National Socialist Party of America v. Smith*, 578 F.2d 1197 (7th Cir., 1978); *Anti-Defamation League of B’nai B’rith Pacific Southwest Regional Office v. Federal Communications Commission*, 403 F.2d 169 at 173 (D.C. Cir., 1968); *American Booksellers Association Inc. v. William H. Hudnut III, Mayor, City of Indianapolis* 771 F.2d 323 (7th Cir., 1985); Beckton, *supra*, note 44 at 589; Cohen, *supra*, note 18 at 758.

67. 376 U.S. 254 (1963).

68. *Ibid.* at 269.

69. *Ibid.* at 279–280.

70. 379 U.S. 64 at 67 (1966).

71. La. Rev. Stat. 1950, Tit. 14, paras. 47–50.

72. *Supra*, note 70 at 67.

Leaving aside the special considerations when public officials are the target, *New York Times v. Sullivan*, 376 U.S. 254 (1964), a libelous publication is not protected by the Constitution. *Beauharnais v. Illinois*, 343 U.S. 250 (1952).⁷⁴

Others such as Tribe are of the view that the two level theory of the First Amendment established in *Chaplinsky v. New Hampshire* has been collapsing ever since *New York Times v. Sullivan* was decided.⁷⁵ In *Criminal Libel and Free Speech*, John Kelly is highly critical of the *Beauharnais* and *Chaplinsky* judgments for establishing a legal rule which in its absolute terms removes a category of speech from constitutional protection by blanket definition. He contends that the danger of this view of the First Amendment is that valid public criticism may be "stifled by an unthinking application of a general rule developed originally to cover a highly limited class of cases."⁷⁶ In sum, given that several cases (beginning with *New York Times v. Sullivan*) have questioned the authority of *Beauharnais*, that very few prosecutions have been instituted under state criminal libel laws and that academic criticism of *Beauharnais* is widespread, it is clear that the principles enunciated in *Beauharnais v. Illinois* are not widely endorsed by the American legal community.⁷⁷

It has been argued that narrowing the principles in *Beauharnais* results in greater accord between laws which criminalize group defamation and First Amendment principles. For example, Donald Downs contends that it is essential to distinguish between general group libel laws (such as the statute involved in *Beauharnais*) which should be subject to the First Amendment, and targeted intimidation which the states have the constitutional right to prohibit.⁷⁸ The critical issue to be decided, according to Downs, is whether the primary purpose of the speech is communication or the infliction of harm. He suggests that racial vilification aimed at discrete groups causes serious and direct injury in contrast to other types of "unpopular dispute-causing speech" which does not.⁷⁹ In Downs' view, references to race and ethnicity are "uniquely noxious and nefarious" for two related reasons:⁸⁰ Firstly, an individual is not able to change these characteristics; and secondly, the qualities of unalterability increase the intimidation of the message. Downs criticizes the group libel offence involved in *Beauharnais* for not requiring an intent on the part of the speaker to encourage others to verbally or physically assault the targeted group. He argues that the Illinois legislature also should have prescribed the degree of virulence or vilification necessary to be demonstrated in order to secure a guilty ver-

73. *New York v. Ferber*, 458 U.S. 747 (1982) at 763.

74. *Ibid.* See also the dissenting judgment in *Collin v. Smith*, *supra*, note 66 at 1218.

75. *Supra*, note 56 at 670.

76. John Kelly, "Criminal Libel and Free Speech" (1957) 6 *U. Kan. L. Rev.* 295 at 325. For similar criticism see the comments of Skelly Wright J. in *Anti-Defamation League v. Federal Communications Commission*, *supra*, note 66.

77. See, e.g., the comment entitled "Defamation" (1955) 69 *Harv. L. Rev.* 875 at 901.

78. Downs, *supra*, note 61 at 647.

79. *Ibid.* at 651.

80. *Ibid.* at 654.

dict. The mere publication of racist expression was prohibited under Illinois law even in the absence of demonstrated harm. It is Downs' opinion that Beauharnais should not have been convicted because he did not intentionally direct his speech against a specific target. Had he circulated the leaflets in front of homes belonging to blacks or distributed the hate material directly to members of the black race, these acts would have constituted acts of intimidation and would have been punishable by the state.⁸¹

B. The Clear and Present Danger Test

A second approach which ought to be examined by Canadian courts in determining whether group libel laws infringe the freedom of expression clause in the *Charter* is that of using the clear and present danger test which derives from the judgment of Mr. Justice Holmes in *Schenck v. United States*.⁸² The modern formulation of this test provides that,

. . . the constitutional guarantees of free speech and free press do not permit a state to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.⁸³

Applying this test to a group libel statute, three conditions must be met before a state is justified in punishing an individual for defaming a group. Firstly, the hatemonger must encourage his listeners to resort to violence. Secondly, the words of the speaker must be likely to incite or produce violent acts. Finally, the violent reaction must be imminent. Hence it is clear that under this doctrine successful prosecutions for group libel are limited to cases wherein the hate propagandist has made an appeal to his audience to engage in violent conduct, and there was a danger of imminent violence. The clear and present danger test is not satisfied in circumstances in which a speaker advocates illegal action at some time in the future.⁸⁴

The theoretical foundation for the clear and present danger doctrine is that the state is permitted to interfere with the free speech rights of an individual only if his words are likely to cause public disorder or a breach of the peace. This test is considered by some legal writers to be highly appropriate for criminal group libel cases. It is maintained that it protects the social groups which are being vilified and at the same time ensures that the civil liberties of the speaker are not unduly abridged. That is, free speech may only be interfered with under this test if it can be established that the words of the speaker are likely to result in imminent danger to the community.⁸⁵

Nevertheless, a large number of legal scholars contend that the clear and present danger standard is inadequate to and should not be utilized in

81. *Ibid.* at 664.

82. 249 U.S. 47 (1919).

83. *Brandenburg v. Ohio*, 395 U.S. 444 (1969) at 447.

84. *Hess v. Indiana*, 414 U.S. 105 (1973). See also *Cohen*, *supra*, note 18 at 754.

85. See "Race Defamation and the First Amendment," *supra*, note 66 at 674 and *Kelly*, *supra*, note 76 at 321.

group defamation cases.⁸⁶ For example, it has been argued that under this doctrine individuals cannot be successfully prosecuted for verbally assaulting a religious, racial or ethnic group unless they are likely to elicit a violent response from their listeners.⁸⁷ Secondly, it is very difficult to establish that the speaker's words will produce an "imminent" violent reaction.⁸⁸ Edward Kallgren, in his article entitled "Group Libel",⁸⁹ is critical of the temporal limitation attaching to the clear and present danger test. He points out that there is frequently a time lag between a speech which advocates violence against a particular group and the specific incidents of violence⁹⁰ (whether they be the violent responses of individuals who share the beliefs of the hatemonger or the reactions of vilified groups to the words of the speaker). It has also been suggested that while the clear and present danger test serves to protect the community from imminent threats of riot or social chaos, it is not concerned with preserving the reputation and dignity of the targeted group. Hence Hadley Arkes denounces the test because the right of the individual to speak freely is determined by the reaction of his audience. He also condemns the message which the doctrine of clear and present danger conveys to the public. It teaches members of the vilified groups that before they can expect the law to protect them, they must be prepared to resort to violence.⁹¹

In summary, it is evident that there exists much opposition to the application of the clear and present danger test in group libel cases. It has been observed that had this standard been employed in *Beauharnais v. Illinois*, the accused in all likelihood would not have been convicted.⁹² It is highly doubtful that counsel for the government could have persuaded the Court beyond a reasonable doubt that the leaflet circulated by Beauharnais would have likely caused its readers to engage in violent acts against blacks residing in the City of Chicago. Loren Beth concludes his discussion of the clear and present danger test with the following observation:

[T]he clear and present danger doctrine . . . not only provides no definite guide for judicial conduct, but is also exceedingly naive and archaic in its conception of the processes of opinion formation. It assumes amounts of rationality and orderliness in discussion which simply do not exist in the modern world — if indeed they ever did. Also, it completely ignores the rise of mass communications media, which give to vilifiers weapons never before possessed with which to carry on large scale, organized campaigns of defamation. It ignores the present ur-

86. Arkes, *supra*, note 57 at 323; James Jay Brown and Carl L. Stern, "Group Defamation in the U.S.A." (1964) 13 *Clev-Mar. L. Rev.* 7 at 20; Beth, *supra*, note 61 at 172; Edward E. Kallgren, "Group Libel" (1953) 41 *Calif. L. Rev.* 290 at 298; Cohen, *supra*, note 18 at 754; Alan Regel, "Hate Propaganda: A Reason to Limit Freedom of Speech" (1984-85) 49 *Sask. L. Rev.* 303 at 309.

87. Regel, *supra*, note 86 at 310.

88. Fields, *supra*, note 65 at 243.

89. Kallgren, *supra*, note 86.

90. *Ibid.* at 298.

91. Arkes, *supra*, note 57 at 323.

92. See e.g., Beth, *supra*, note 61 at 172 and Fields, *supra*, note 65 at 243.

banization of American society, which raises problems of the maintenance of public order, and also produces a close contact between social groups, which did not exist on such a scale in an agrarian society. Finally, it ignores the fact that in an industrial society, systematic vilification of social groups is one of the elements which leads to the various economic discriminations which are a too prevalent feature of American life.⁹³

C. The Balancing Standard

A third method employed to determine the constitutionality of group libel legislation involves using a balancing standard. This has been the approach of the United States Supreme Court to the First Amendment in numerous decisions. On a case by case basis, the individual's right to free speech is balanced against the state's purpose in promulgating the particular statute or regulation in question. Generally, there is a presumption of unconstitutionality with respect to laws which on their face prohibit discussion of an entire subject or which restrict particular viewpoints. The judiciary strictly scrutinizes the legislation and will uphold it only if the state can demonstrate that the law serves a compelling purpose and is narrowly drawn to serve that purpose.⁹⁴

The development of the public forum theory renders the state's task of establishing the constitutionality of the legislation even more difficult. According to this doctrine, the right to use a public place for expressive activity can only be interfered with for highly compelling reasons.⁹⁵ Originally, for the purpose of the public forum theory, a public place was limited to a street, sidewalk or park. The concept has been expanded by the courts to include such facilities as a public library,⁹⁶ a municipal theatre,⁹⁷ and a letter box.⁹⁸

It is important to note that the balancing approach to First Amendment cases has met with substantial criticism. It has been strenuously argued that weighing the community interest against the fundamental right of an individual to speak freely is an arbitrary and capricious test. As one author states, "balancing tends to suggest an intuitive and, possibly, idiosyncratic judgment which might come out just as defensibly on one side as the other."⁹⁹

The application of the balancing standard approach to group libel legislation would proceed in the following manner. Once it was estab-

93. Beth, *ibid.* at 174.

94. Downs, *supra*, note 61 at 646. See also *Perry Education Association v. Perry Local Educators' Association*, 460 U.S. 37 (1983); *Central Hudson Gas and Elec. Corp. v. Public Service Comm'n*, 100 S.Ct. 2343 (1980); *Consolidated Electric Co. v. Public Service Comm'n*, 447 U.S. 530 (1980).

95. See the decision of Roberts, J. in *Haague v. CIO*, 307 U.S. 496 (1939) which played a major role in the evolution of the public forum theory. See also *Grayned v. City of Rockford*, 408 U.S. 104 (1972).

96. *Brown v. Louisiana*, 383 U.S. 131 (1966).

97. *Southeastern Promotions Ltd. v. Conrad*, 420 U.S. 546 (1976).

98. See the opinion of Brennan, J. in *Postal Service v. Council of Greenbergh Civic Association*, 453 U.S. 114 (1981).

99. Arkes, *supra*, note 57 at 310.

lished by the party challenging the law that his right to free speech was denied, it would be incumbent on the state to demonstrate there is compelling reason to sustain the existence of a statute which curtails the right of an individual to incite hatred against or advocate the genocide of a particular group in the community. Counsel for the government may argue that there are several objectives which the state seeks to accomplish by enforcing its group defamation statute. Firstly, it is attempting to minimize if not eradicate the physical and socio-psychological harm suffered by various defamed racial, ethnic and religious groups. Secondly, by limiting the channels open to the hate propagandist to attract converts, fewer people will be persuaded to hold prejudicial beliefs and, consequently, minority groups will be afforded greater opportunities to participate in the economic and political spheres of society. Finally the government may also contend that it is the intent of the legislation to foster public peace and order and to promote harmony between different segments of society. Provided that the statute is narrowly drawn to achieve these legislative goals, the court may be persuaded that protection of targeted groups and the preservation of public order are values which outweigh the right of individuals to incite hatred. However, it is to be noted that where a person circulates hate literature or delivers a hate speech in a park or other public forum, the court may be more reluctant to allow the legislature to interfere with the individual's constitutional right of free speech.

III. The Hate Propaganda Provisions in the Canadian Criminal Code

The *Criminal Code* contains three substantive offences dealing with group libel. They are the advocacy of genocide,¹⁰⁰ public incitement of hatred likely to breach the peace,¹⁰¹ and the wilful promotion of hatred.¹⁰²

A. The Advocacy of Genocide

Section 281.1 of the *Criminal Code*, which provides that it is an indictable offence to advocate or promote genocide, is considered to be the least controversial of the three group libel offences. Genocide is defined in subsection 281.1(2) as the intent to destroy in whole or in part any "identifiable group" by either killing its members or deliberately inflicting on the group conditions of life calculated to bring about its physical destruction. Subsection 281.1(4) defines "identifiable group" as any section of the public distinguishable by colour, race, religion or ethnic origin. It is clear from an examination of this section that the intellectual advocacy of genocide unaccompanied by physical acts is punishable.¹⁰³ However, it is to be noted that the consent of the Attorney-General must be obtained in order to launch proceedings under section 281.1 of the *Code*. This requirement is

100. *Supra*, note 11, s. 281.1.

101. *Ibid.* s. 281.2(1).

102. *Ibid.* s. 281.2(2).

103. This point is made by Mark MacGuigan in "Proposed Anti-Hate Legislation" (1967) 15 *Chitty's L.J.* 302.

designed to prevent frivolous and unmeritorious prosecutions from being instituted.¹⁰⁴

Does section 281.1 of the *Criminal Code* satisfy the requirements for constitutionality set out in *Beauharnais v. Illinois*? In the event that the *Beauharnais* approach is adopted in Canada, and, provided that it can be established that section 281.1 bears a rational relation to Parliament's objectives of reducing racial disorder and protecting vilified groups, the offence of advocacy of genocide could be regarded as constitutional. More specifically, the judiciary could hold that group libel is a category of speech which is not protected by the freedom of expression clause in the *Charter of Rights and Freedoms*.

It is submitted that a court could easily be persuaded that section 281.1 meets the rational basis standard put forth in *Beauharnais*. As mentioned earlier, the Cohen Committee reported that at least fourteen organizations existed in Canada whose activities were devoted to promoting hatred against minority groups. Participants in these libellous acts were present in eight out of the ten Canadian provinces. In the Committee's view, hate propaganda constituted a very serious problem which demanded immediate address by the government. A convincing argument could be made that a rational connection exists between an offence which prohibits persons from advocating the physical destruction of an "identifiable group" and the state's objectives of preventing racial strife and mitigating the physical and emotional abuse suffered by members of a vilified group. Cognizant of the fact that advocating the physical destruction of a group distinguishable by race, colour, ethnicity or religion may result in the imposition of a five-year prison sentence, an individual or organization may be deterred from engaging in such conduct.

If the principles enunciated in *Beauharnais* were imported into Canada, it is arguable that in the case of group libel suits it would not be necessary for the courts to determine whether the impugned law satisfied the requirements of section 1 of the *Charter*. This view is based on the premise that since group libel statutes do not violate the freedom of expression clause in subsection 2(b), the courts need not consider the further question of whether they are reasonable and can be demonstrably justified in a free and democratic society (as section 1 requires). However, the rational relation test articulated in *Beauharnais* is very similar to the language of section 1 of the *Charter*. Therefore, although technically the courts may not refer to the latter in determining whether group libel legislation is constitutional, the standard borrowed from *Beauharnais* would approximate the test contained in section 1.

The next issue to be addressed is whether section 281.1 of the *Criminal Code* meets the clear and present danger test. Is a person who advocates physical extermination of a group "inciting imminent lawless action" and is his speech likely to produce a violent reaction on the part of the audience? Clearly section 281.1 of the *Code* satisfies that part of the test which

104. *Supra*, note 11, s. 281.1(3). See also Cohen, *supra*, note 18 at 772-773.

requires the speaker to encourage his audience to engage in acts of violence. In a section 281.1 offence, the speaker is advocating the physical destruction of a group distinguishable by race, colour, ethnicity or religion. However, the second requirement of the clear and present danger test which demands that the speaker be likely to elicit an immediate physical reaction on the part of his audience is not incorporated into the language of section 281.1. Nonetheless, it could still be argued that where it is likely that the speaker will in fact have this effect on his listeners, the criteria of the test are satisfied.

Still, the utility of the clear and present danger doctrine for a section 281.1 offence must be seriously considered. It is questionable whether people will react to the hate propagandist's advocacy of genocide with such immediacy. This test does not capture the member of the audience who is fully committed to participating in acts which will physically destroy a race but who chooses to devise a plan to be implemented some time afterward. There are numerous situations in which the speaker will not cause the immediate physical responses which the clear and present danger test demands.

Finally, what would be the effect if the balancing standard were applied by the courts to section 281.1 of the *Criminal Code*? After it were established by the accused that section 281.1 constituted a violation of subsection 2(b) of the *Charter*, it would be incumbent upon the prosecution to prove that there were compelling reasons to uphold the legislation and which outweighed the right of the accused to promote genocide. Counsel for the government could submit that Parliament had a duty to protect racial, ethnic and religious groups from physical injury and that this interest must take precedence over the right of persons to advocate destruction of members of these groups. In the context of a *Charter* discussion, Clare Beckton suggests that speech which promotes genocide should be accorded little value in a section 1 analysis.¹⁰⁵ Similarly, Natan Lerner, an American legal scholar, comments:

If the communication is designed to stir up ill-will and is fraudulent, it is not in a constitutional sense an effort to communicate ideas and is therefore subject to the police powers of the state. Since society gains little or nothing by group defamation, its interest in avoiding the embitterment of group relations outweighs the abstract right of freedom of expression.¹⁰⁶

The Cohen Committee reported that the hate material which was being circulated "could not in any sense be classed as sincere, honest discussion contributing to legitimate debate, in good faith, about public issues in Canada."¹⁰⁷ Accordingly, the powerful and valuable state objectives in-

105. Clare F. Beckton, "Freedom of Expression" in *The Canadian Charter of Rights and Freedoms*, *supra*, note 43 at 103.

106. Natan Lerner, "International Definitions of Incitement to Racial Hatred" (1968) *N.Y. Law Forum* 49 at 50.

107. *Supra*, note 2, at 773.

tended to be served by section 281.1 of the *Criminal Code* appear to outweigh the right of an individual to free speech.

It is essential to note that section 281.1 of the *Criminal Code* has an important shortcoming. There is no requirement in this offence that an individual promote genocide in a public place in order to be convicted. Defence counsel may argue that by virtue of the overbreadth doctrine an accused cannot be found guilty of a section 281.1 crime even if he has advocated genocide in a park, on the street or at some other public place. According to the overbreadth doctrine as it has developed in the United States, a person whose conduct is within a statute's proscription and who can be constitutionally punished is still permitted to escape the consequences of legislation which is overinclusively drafted.¹⁰⁸ The law will be considered by the court to be void on its face "if it does not aim specifically at evils within the allowable area of government control, but sweeps within its ambit other activities that constitute an exercise of protected expression or associational rights."¹⁰⁹ The rationale for this doctrine is that overbroad laws tend to have a deterrent impact or a "chilling effect" on protected speech.¹¹⁰

Over the last twenty-five years, the courts have restricted the application of the overbreadth doctrine. The United States Supreme Court has held that a law will not be voided unless its deterrence of protected activities is substantial.¹¹¹ As well, the courts have refused to strike down criminal laws unless a significant number of people have been improperly prosecuted under them. Finally, litigants who fall within the "hard-core" of a statute's sweep will not be able to persuade a court that the law is void pursuant to the overbreadth doctrine.¹¹²

It is my view that a constitutional challenge to section 281.1 of the *Criminal Code* on the ground that the provision is overbroad would not necessarily be successful. A court would not strike down this offence unless it could be demonstrated that a substantial number of people had been prosecuted for promoting genocide in the private domain. Moreover, an accused who publicly advocated the physical destruction of an ethnic, racial or religious group and whose activities therefore fell within constitutionally unprotected behaviour would not be able to successfully invoke the overbreadth doctrine.

B. Public Incitement of Hatred Likely to Breach the Peace

Subsection 281.2(1) of the *Criminal Code* provides that,

Every one who, by communicating statements in any public place, incites hatred against any identifiable group where such

108. See "The First Amendment Overbreadth Doctrine" (1970) 83 *Harv. L. Rev.* 844 at 847.

109. *Supra*, note 56 at 710.

110. See Henry P. Monaghan, "Overbreadth" [1981] *Sup. Ct. Rev.* 1 at 27; *Tribe, supra*, note 56 at 718; *Supra*, note 108 at 847; and Beckton, *supra*, note 105 at 84.

111. *Broadrick v. Oklahoma*, 413 U.S. 601 (1973). See also *supra*, note 108 at 850 and *Tribe, supra*, note 56 at 712.

112. See, e.g., *Monaghan, supra*, note 110 at 23. See also *Haig v. Agee*, 101 S.Ct. 2766 (1981) at 2783 n.61 and *Brown v. Louisiana, supra*, note 96 at 147-148.

incitement is likely to lead up 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.

Unlike the offences of advocacy of genocide and the wilful promotion of hatred, it is not necessary to obtain the permission of the Attorney General to lay a charge of public incitement of hatred likely to breach the peace. The reason for this exception is that in situations in which hate material is likely to cause public disorder, the police will generally not have time — if social chaos is to be averted — to secure the approval of the Attorney General to lay a charge.

In order to obtain a guilty verdict under subsection 281.2(1) of the *Code*, the Crown must prove beyond a reasonable doubt that the statement was made in a public place, that it incites hatred against an “identifiable group” and that a likely effect of the statement will be that those who heard it will breach the peace.¹¹³ The mental element required by this offence is that the speaker incited hatred either with reasonable foresight that a breach of the peace would occur or was reckless as to the consequences of his statement.¹¹⁴ Subsection 281.2(1) is clearly a preventative section; it permits the police to institute charges against the speaker before a riot or public disorder erupts. This provision has been criticized by Canadian legal scholars because it allows the behaviour of an audience to determine whether an individual will be subjected to a criminal trial.¹¹⁵

The suggestion that subsection 281.2(1) of the *Criminal Code* satisfies the *Beauharnais* test has merit. To recapitulate, the Cohen Committee reported that the pamphlets, books and other hate material which vilified racial, ethnic or religious groups in Canada had attained serious proportions. A rational relation exists between the Parliament’s objective of reducing social disorder and racial strife and subsection 281.2(1) which makes it an offence to communicate statements inciting hatred in a public place where such incitement is likely to breach the peace. Employing this analysis, a court would conclude that the freedom of expression clause in subsection 2(b) of the *Charter* had not been denied.

Of the three substantive offences contained in the hate propaganda section of the *Criminal Code*, the language of subsection 281.2(1) most clearly resembles the clear and present danger test.¹¹⁶ It requires that the speaker intends to incite hatred with recklessness or with reasonable foresight that his words will elicit a physical reaction from his audience.¹¹⁷ Therefore, the criterion of the clear and present danger test of encourag-

113. See R.E. Hage, “The Hate Propaganda Amendment to the *Criminal Code*” (1970) 28 *Faculty Law Review* 63 at 64 and Cohen, *supra*, note 18 at 773.

114. *R. v. Buzzanga and Durocher* (1980), 101 D.L.R. (3d) 488, 25 O.R. (2d) 705, 49 C.C.C. (2d) 369 (C.A.) [hereinafter cited to O.R.]

115. See Hage, *supra*, note 113 at 69 and Cohen, *supra*, note 18 at 773.

116. Beckton, *supra*, note 105 at 104.

117. *Supra*, note 114 at 717.

ing members of the audience to engage in acts of violence is satisfied. Furthermore, the requirement that the speaker's statement will likely incite or produce violence is also reflected in this provision of the *Criminal Code*. However, it is to be observed that subsection 281.2(1) does not specifically require that the violent reaction be "imminent." Nevertheless, the fact that it is not necessary for an enforcement officer to obtain the consent of the Attorney General in order to lay a charge — in contrast to the other hate propaganda offences which require such consent — seems to imply that the likelihood of public disorder be imminent.

If, alternatively, the courts were to apply the balancing standard provided in section 1 of the *Charter*, would subsection 281.2(1) of the *Criminal Code* be declared to be of full force and effect? The suggestion that the state has a compelling interest in averting public disorder caused by speakers who vilify groups in public with the intention of inciting audiences to violent reactions is persuasive indeed. Subsection 281.2(1) is narrowly drawn to serve this state purpose. The desirability of preventing the social chaos and violent reactions precipitated by defamatory speech outweighs in value the right of hatemongers to engage in unrestricted speech.

C. The Wilful Promotion of Hatred

The third group libel offence contained in the *Criminal Code* appears in subsection 281.2(2) which provides that,

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.¹¹⁸

Subsection 281.2(3) enumerates the following four defences which may be available to a person charged under subsection 281.2(2):

No person shall be convicted of an offence under subsection (2)

- (a) if he establishes that the statements communicated were true;
- (b) if, in good faith, he expressed or attempted to establish by argument an opinion upon 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 be true; or
- (d) if, in good faith, he intended to point out, for the purpose of removal, matters producing or tending to produce

118. Note that the definitions of "communicating," "identifiable group," and "statement" provided in s. 281.2(7) of the *Criminal Code* apply to s. 281.2(2).

feelings of hatred towards an identifiable group in Canada.

The mental element required by this third group libel offence is that the accused *wilfully* promote hatred against an "identifiable group." This has been interpreted by the Ontario Court of Appeal to mean either that the accused intended to promote hatred against an identifiable group, or that he foresaw that the promotion of hatred against this group was extremely likely or certain to result from his words or written material.¹¹⁹ Unlike the situation involving the offence of public incitement of hatred likely to breach the peace (subsection 281.2(1)), an individual prosecuted under subsection 281.2(2) will not be found guilty if he was merely reckless as to the consequences of his behaviour. The explanation for this difference is that the conduct proscribed in subsection 281.2(2) — that is, the wilful promotion of hatred — does not pose as much of a direct threat to public order as does that proscribed in subsection 281.2(1) (which prohibits individuals from inciting hatred in a public place which is likely to breach the peace).¹²⁰

It might very well be superfluous for Canadian courts to contemplate whether any of the three approaches outlined above should be used to determine the constitutionality of subsection 281.2(2), as this provision would appear to be of no force or effect in light of the void for vagueness doctrine. That is, it is not clear whether only persons who promote hatred in a public place can be successfully prosecuted. The ambiguity arises from the words "other than in private conversation." Unfortunately, the legislative draftsmen have failed to provide a definition of "private conversation." Is this phrase to be interpreted as a conversation between two people in a public place or a discussion between persons on private property?¹²¹ Does "private" refer to the quantity of people involved or to the place and time in which the conversation takes place?¹²² The only definition of "private" in the *Criminal Code* appears in subsection 158(2) which describes the offences of buggery, bestiality and acts of gross indecency. This section provides that an act is not considered to have been committed *in private* if it is committed in a public place, or, if more than two persons take part or are present. Should this interpretation of "private" be imported into the hate propaganda section of the *Criminal Code*, then what a person says within the confines of his home may be the subject of a subsection 281.2(2) prosecution if the statements are communicated to three or more people.

Canadian courts have already adopted the vagueness doctrine in interpreting section 1 of the *Charter*. It has been stated by several appellate courts that an important determinant of whether a law which infringes a fundamental freedom constitutes a "reasonable limit" within the meaning

119. *Supra*, note 114 at 721. The accused were charged under s. 281.2(2) of the *Criminal Code* with wilfully promoting hatred against French Canadians by circulating copies of a handbill. See also Walter Tarnopolsky, "Freedom of Expression v. Right to Equal Treatment: The Problem of Hate Propaganda and Racial Discrimination" [1967] *U.B.C. L. Rev.* 43 at 60.

120. *Supra*, note 114 at 717.

121. Hage, *supra*, note 113 at 71.

122. Cohen, *supra*, note 18 at 777.

of section 1 is whether it is ascertainable, understandable and precisely defined. According to the Federal Court of Appeal in *Luscher v. Deputy Minister, Revenue Canada, Customs and Excise*,¹²³ the type of conduct proscribed by a statutory provision must be fully evident to the average Canadian. As Hugessen J., in the same case, observed:

A limit which is vague, ambiguous, uncertain, or subject to discretionary determination is, by that fact alone, an unreasonable limit. If a citizen cannot know with reasonable tolerable certainty the extent to which the exercise of a guaranteed freedom may be restrained, he is likely to be deterred from conduct which is in fact lawful and not prohibited. Uncertainty and vagueness are constitutional vices when they are used to restrain constitutionally protected rights and freedoms. While there never can be absolute certainty, a limitation of a guaranteed right must be such as to allow a very high degree of predictability of legal consequences.¹²⁴

It has also been held that, in particular, a criminal statute must be drafted with a high degree of precision.¹²⁵

In sum, it appears that subsection 281.2(2) of the *Criminal Code* would not withstand a constitutional challenge on the ground of vagueness. This provision fails to specify whether the offence covers only conversations held in a public place, or also applies to statements made in a private home, building or club. In addition, it is not clear whether the number of people addressed by the speaker is of importance in securing a conviction under subsection 281.2(2) of the *Code*.

Still, it has been argued that there exist several safeguards against the dangers inherent in the vague language of subsection 281.2(2). Stephen Cohen, for example, contends that it is unlikely that a person would be caught in his home making scurrilous and abusive statements about a particular religious, racial or ethnic group, and that in such event, the problem of proof for the prosecution would be insurmountable. He also suggests that the necessity of having to obtain the consent of the Attorney-General to institute proceedings serves to ensure that frivolous cases are not brought before the courts.¹²⁶ With all due respect to Cohen, it is my view that this is simply not persuasive evidence that individuals would not be falsely prosecuted under subsection 281.2(2) of the *Criminal Code*. As well, Cohen's position does not address the further problem that residents of Canada might be reluctant to exercise their fundamental rights of free expression for fear that their conduct could fall within the uncertain parameters of the wilful promotion of hatred provision.

123. *Luscher v. Deputy Minister of National Revenue*, supra, note 40 at 86 [cited to F.C.]; *R. v. Robson* (1985), 19 D.L.R. (4th) 112, 45 C.R. (3d) 68 at 72 (B.C.C.A.) [cited to C.R.]; *Re Ontario Film and Video*, supra, note 40 at 583 [cited to O.R.]. See also H.R.S. Ryan, "The Trial of Zundel: Freedom of Expression" (1984) 44 C.R. (3d) 334 at 345.

124. *Luscher*, *ibid.* at 85.

125. See *R. v. Red Hot Video Ltd.*, supra, note 40 at 6 [cited to C.C.C.]. See also *Cramp v. Board of Public Instruction of Orange County*, 368 U.S. 278, 82 S.Ct. 275, 7 L.Ed. 2d. 285 (U.S. Fla., Dec. 11, 1961) and *Coates v. City of Cincinnati*, 402 U.S. 611, 91 S.Ct. 1686, 29 L. Ed. 2d 214 (U.S. Ohio, Jun. 1, 1971) (No. 117).

126. Cohen, supra, note 18 at 777-778.

On the hypothesis that subsection 281.2(2) of the *Criminal Code* did survive a void for vagueness challenge, does this group libel offence satisfy the principles articulated in *Beauharnais v. Illinois*? Any suggestion that this provision meets the “rational basis test” espoused by Frankfurter J. is tenuous. It is unlikely that Crown counsel would be able to persuade the court that this provision is “related to the peace and well-being of the state.” As previously mentioned, there is no requirement that the communication be likely to breach the peace; nor does the offence stipulate that the statement promoting hatred be uttered in a public place. One must question whether an overriding state interest is threatened by people discussing matters in a relatively private setting.¹²⁷ In the context of an obscenity case, the British Columbia Court of Appeal has held that in the privacy of the home, a citizen has the constitutional right to see, hear and read all material which is not harmful to others.¹²⁸ It could possibly be argued that the wilful promotion of hatred against a racial, ethnic or religious group, even within the confines of one’s home, is detrimental to the public interest in that it fosters prejudicial beliefs and perhaps persuades those gathered to inflict psychological and physical injury on members of the vilified group. However, it is my opinion that the scope accorded to subsection 281.2(2) by the courts will ultimately determine whether it satisfies the rational relation test propounded in *Beauharnais*. That is, only if the courts narrowly construe this provision to apply solely to statements made in a public place will the submission that this offence is rationally related to the peace and well-being of the state be accepted.

Mr. Justice Quigley of the Alberta Court of Queen’s Bench, for example, has restricted the application of subsection 281.2(2) of the *Criminal Code* to the defamation of a group in public in holding that:

. . . [it] deals with a social value, specifically the recognition of the right of a particular group of individuals characterized by colour, race, religion, or ethnic origin to be protected from wilfully promoting hatred at the *public* level.¹²⁹

Further in his judgment, Quigley J. stated that the object of this legislative provision is to “control those who *publicly* defame groups as opposed to an individual.”¹³⁰

It was held by Quigley J. in *R. v. Keegstra* that the speech prohibited in subsection 281.2(2) is not protected by the freedom of expression clause in subsection 2(b) of the *Charter*. In its analysis of this group libel offence, the Court took an approach similar to that adopted in *Beauharnais v. Illinois*. The Court stated that the preamble and section 1 of the *Canadian Bill of Rights*, inasmuch as these statements embody both the historical and current beliefs of the Canadian people, are important aids to interpreting subsection 2(b) of the *Charter*.¹³¹ Moreover, the Court stated that the equality and multiheritage provisions in the *Charter* must also be examined in

127. Hage, *supra*, note 113 at 68.

128. *R. v. Red Hot Video Ltd.*, *supra*, note 125 at 23.

129. *Keegstra*, *supra*, note 40 at 259. [emphasis added]

130. *Ibid.* at 271. [emphasis added] See also pp. 267–268 of the judgment.

131. *Ibid.* at 266.

order to determine the scope of the freedom of expression clause in subsection 2(b).

Subsection 15(1) of the *Charter* provides that,

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.

According to Quigley J., subsection 15(1) is an affirmation that every individual human being has dignity and worth and that freedom cannot be preserved unless it is founded upon respect for moral and spiritual values.¹³² Section 27 of the *Charter* extends that recognition to identifiable collectives, stating:

This Charter shall be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians.

The Court in *R. v. Keegstra* held that it was inconsistent with the preservation and enhancement of the multicultural heritage of Canadians to construe the freedom of expression clause in the *Charter* as the right to publicly and wilfully promote hatred against a group distinguished by race, ethnic origin, colour, or religion. Quigley J. concluded his judgment with the statement:

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 the members 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.¹³³

Like Frankfurter J. in *Beauharnais*, Quigley J. was of the opinion that the offence of promoting hatred against a group, "cannot rationally be considered to be an infringement which limits 'freedom of expression.'"¹³⁴ Accordingly, he held that it was unnecessary to determine whether subsection 281.2(2) of the *Criminal Code* satisfied the reasonable limits requirement of section 1 of the *Charter*.

Section 281.2(2) does not appear to satisfy the requirements of the clear and present danger test. Firstly, the provision on its face is not restricted in its application to the wilful promotion of hatred in public. Moreover, it would be straining the language of subsection 281.2(2) to sug-

132. *Ibid.* at 267-268.

133. *Ibid.* at 268.

134. *Ibid.*

gest that an element of the offence is that the speaker encourage his listeners to engage in violent acts (as is demanded by the clear and present danger test). It follows from this that the criterion of "imminent violence" is not an aspect of this group libel offence which could be relied upon to support its validity in the face of a constitutional challenge. Therefore, if the courts were to adopt the clear and present danger test as an approach to determining the constitutionality of subsection 281.2(2), it would likely be held to be of no force or effect.

Would the balancing standard approach facilitate the sustainment of subsection 281.2(2) of the *Criminal Code* in the face of a constitutional challenge? The first question that must be posed is: What is the public interest which Parliament is striving to protect? Is it the purpose of the Parliament of Canada to punish an individual who, in his home among friends, intentionally vilifies and promotes hatred against mulattos, Jehovah's Witnesses or French Canadians? Or, is the Government's object to prosecute a private businessman who, within the confines of his office, attempts to persuade his colleagues that a particular racial group is destroying the economy of the country?

In either of the hypotheticals just mentioned, the prosecution would be confronted with the difficult task of convincing courts that some public interest outweighs the right of these individuals to speak freely on these subjects. In contrast to situations wherein genocide is advocated, in these cases there is no compelling reason to believe that the targeted groups would be subjected to physical harm as a direct result of private expressions of hatred. It could perhaps be argued that encouraging others to have negative feelings about particular groups fosters prejudicial behaviour — at least on the part of converts. Examples of such negative behaviour may include refusal to sell property to members of the defamed group, openly making derogatory remarks to people possessing certain racial or ethnic characteristics, or causing physical injury to persons on account of their race or ethnicity. The state, it could be submitted, has an obligation to protect these members of the Canadian community from such physical and psychological abuse. Notwithstanding these arguments, it is to be expected that courts would strictly scrutinize the criminal provision and would be extremely reluctant to give licence to its restriction on the highly valued right of free expression. More exactly, there is simply not a strong enough connection between the conduct proscribed in subsection 281.2(2) and perceived harm to the public.

IV. Proposed Amendments to the Group Libel Offences in the Criminal Code

In December of 1983, the Parliamentary Task Force on the Participation of Visible Minorities in Canada was established. In its 1984 Report entitled *Equality Now*,¹³⁵ the Committee condemned provincial

135 *Report of the Special Committee on the Participation of visible Minorities in Canadian Society: Equality Now* (Ottawa: Canadian government Publishing Centre, 1984) (Chair: Bob Daudlin) at 69 and *passim*.

Attorneys-General for failing to institute proceedings under the hate propaganda section of the *Criminal Code*. No more than six prosecutions had been launched since these group libel offences had been added to the *Code* in 1970 despite the fact that hate literature was now being distributed in virtually every part of Canada and had significantly increased in volume.

The organizations which propagate group libel have directed their attacks against blacks, Jews, Roman Catholics, East Indians, aboriginal peoples and French Canadians. Moreover, Canada itself had become a major producer and a significant exporter of hate propaganda material to Europe in general and to West Germany in particular.¹³⁶ The country was no longer merely a receptacle for handbills, books and magazines published in the United States and Europe. The Task Force therefore proposed several amendments to sections 281.1 and 281.2 of the *Criminal Code* which were designed both to increase the number of prosecutions commenced under these provisions and to secure as many convictions as possible.

It was also in 1983 that the Government of Canada created a Special Committee on Pornography and Prostitution known as the Fraser Committee. The Fraser Committee was requested to study problems associated with the presence of pornography and prostitution in the country and to propose solutions to the same. Accordingly, the Committee suggested comprehensive legislative changes in its 1985 Report which included the repeal of and additions to certain subsections of the group libel offences in the *Criminal Code*.¹³⁷

Both the Task Force on Visible Minorities and the Fraser Committee proposed that subsection 281.2(2) of the *Criminal Code* be changed from a specific intent to a general intent crime.¹³⁸ In other words, it was the view of these bodies that the Crown should not be required to prove that the accused specifically intended to promote hatred against a group in order to secure a conviction under this provision. It was felt that the removal of the word "wilfully" from subsection 281.2(2) would not excessively broaden the scope of the offence. Under the proposed amendment, the Crown would only be required to establish beyond a reasonable doubt that the accused intended to *defame* a group; an individual who unwittingly or accidentally communicated a hate message could not be found guilty under this suggested amendment.¹³⁹

This recommendation has been condemned by some commentators as a dangerous curtailment of free speech. They argue that an awareness by the speaker of the effect his communications will have on his audience should continue to remain an essential ingredient of the crime. As one author notes:

136. *Ibid.*

137. *Report of the Special Committee on Pornography and Prostitution*, Volume I (Ottawa: Canadian Government Publishing Centre, 1985) (Chair: Fraser) at 317-324. [hereinafter the Fraser Committee]

138. *Ibid.* at 323. See also the Committee on Visible Minorities, *supra*, note 141 at 70.

139. The Fraser Committee, *supra*, note 143 at 322.

This proposal would dangerously extend the scope of the offence and could expose to criminal sanctions persons who had no desire or intent to incite hatred, and were unaware of the possible tendency of their publications. Any published criticism of an identifiable group could subject a publisher who was innocent of any wrongful intent to prosecution, with all its degrading and expensive and possibly punitive consequences. Even if acquitted, the accused person could pay heavily for an honest and innocent expression of opinion or an unguarded slip of the tongue. Criminal sanctions for ideas should be confined to publishers who intend, or at least are aware of, the tendencies of their utterances.¹⁴⁰

The Minister of Justice, however, ultimately endorsed the recommendation of the two Committees that "wilfully" be deleted from subsection 281.2(2) of the *Code*.¹⁴¹

The Task Force on Visible Minorities and the Fraser Committee also proposed that subsection 281.2(6) of the *Criminal Code* be repealed so that it would no longer be necessary to obtain the consent of the Attorney General to initiate proceedings under subsection 281.2(2).¹⁴² It was argued that this would facilitate the access of private citizens to the criminal system and would increase the number of group libel prosecutions launched by the government. It was felt that the *Charter* would adequately protect any person who believed he had been unfairly prosecuted.¹⁴³

The proposal to dispense with the consent of the Attorney-General was met with criticism by those who subscribed to the view that subsection 281.2(6) was necessary to ensure that individuals would not be arbitrarily subjected to criminal prosecution for legitimately expressing their opinions about a particular racial or ethnic group. Ryan, for example, maintained that particularly where a restriction on the fundamental right of free expression is involved, there must exist abundant safeguards to limit the number of unprincipled, ill-advised or hasty decisions to criminally charge an individual.¹⁴⁴ He suggested instead that the *Criminal Code* be amended to provide an appeal to a superior court judge from the refusal of the Attorney-General to institute proceedings under subsection 281.2(2).¹⁴⁵ Still, despite these criticisms and alternative proposals, the Minister of Justice finally approved the recommendation of the Committees to dispense with the Attorney-General's consent.¹⁴⁶

The Committee on Visible Minorities also attacked the ambiguous language in subsection 281.2(3) of the *Code*. It submitted that it was uncer-

140. Ryan, *supra*, note 123 at 350.

141. Minister of Justice and Attorney General of Canada, News Release: "Justice Minister proposes Measures Against Hate Propaganda," June 1, 1984, at 1-2.

142. Committee on Visible Minorities, *supra*, note 141 at 70; the Fraser Committee, *supra*, note 143 at 318.

143. Committee on Visible Minorities, *ibid*.

144. See Ryan, *supra*, note 123 at 351.

145. *Ibid*.

146. *Supra*, note 147 at 3-4.

tain whether the onus of establishing any of the four defences was at all times on the accused or whether the Crown had to discharge the burden of disproving any defence raised. The Committee recommended that the Ministry of Justice draft amendments which would make it clear that it was not incumbent on the Crown to disprove any of the four defences enumerated in subsection 281.2(3).¹⁴⁷ This proposal was also endorsed by the Minister of Justice.¹⁴⁸

In addressing the problem of pornography, the Fraser Committee recommended an amendment to the *Criminal Code* which would have the effect of significantly broadening the scope of section 281.2. It was suggested that "sex" be added to the definition of "identifiable group" in subsection 281.1(4).¹⁴⁹ The impetus behind this proposal was the belief that pornography causes or at least reflects a social tendency to hate women; it "inhibits the equality of women and their access in economic and political spheres to opportunities by inculcating in society the idea of women's subordination."¹⁵⁰ The Committee emphasized that section 15 of the *Charter* guarantees equality and equal protection of the law without discrimination on the basis of sex. Section 28 of the *Charter* reinforces this in providing that the rights enumerated therein are guaranteed equally to both male and female persons. According to the Committee, the right of women to equality is threatened by pornography because the message conveyed by pornographic materials is that women as a class are inferior to men.¹⁵¹

It is important to appreciate that the Fraser Committee had taken the view that the obscenity provision in the *Criminal Code*, with its overtones of sexual morality, was inappropriate to cases involving pornography. It affirmed the criticism expressed in *Saskatchewan Human Rights Commission v. Engineering Students of the University of Saskatchewan*,¹⁵² to the effect that women were made to take a circuitous route and employ the blunt instrument of obscenity law to prevent many of the widespread manifestations of hatred against them. In that case, the Saskatchewan Board of Inquiry had recommended that the definition of "identifiable group" in the hate propaganda section of the *Criminal Code* be amended by the Parliament of Canada to include women.¹⁵³

The Fraser Committee contended that subsection 281.2(2) of the *Code* (that is, the wilful promotion of hatred provision) was the most appropriate of all the group libel crimes to offences involving pornography. It did propose, however, the following additional change:

147. *Supra*, note 141 at 71.

148. *Supra*, note 147 at 2.

149. *Supra*, note 143 at 317-324.

150. *Ibid.*

151. *Ibid.* at 24.

152. (1984), 5 C.H.R.R. D/2074 (Sask. Bd. of Inquiry) at D/2083. The Board held that two newspaper issues published by the Engineering students at the University of Saskatchewan promoted violent and demeaning treatment of women contrary to s. 14(1) of *The Saskatchewan Human Rights Code*, S.S. 1979, s. 24.1. The Board stated that the newspaper editions promoted an "image of women which was less than human . . . perpetuating a social climate discriminatory to women who are already targets of manifold discrimination and horrible violence." *Ibid.* at 2089.

153. *Ibid.* at D/2083.

The text of subsection 281.2(2) should be amended to make it clear that graphic representations which promote hatred would be covered by the provision. The subsection could prohibit "publishing statements or visual representations or any combination thereof, other than in private communications" which promote hatred against any identifiable group.¹⁵⁴

The Committee further pointed out that broadening the scope of section 281.2 of the *Criminal Code* to cover the wilful promotion of hatred against women would have tremendous symbolic value. The criminal law of a country plays an essential role in shaping and influencing people's behaviour. The Committee was therefore of the opinion that human dignity and equality rights should be protected by the criminal law and was highly critical of the view that it be limited solely to protecting individuals from tangible harm that is narrowly defined.¹⁵⁵

In making its recommendations, the Fraser Committee was significantly influenced by American legal literature and legislation relating to pornography (particularly, in the case of the latter, by the legislation drafted by Andrea Dworkin and Catherine MacKinnon). Caryn Jacobs, for example, had argued that pornographic material legitimizes and normalizes the subordination of women as a class,¹⁵⁶ it incites violence against women as a class and thus infringes an individual woman's right to bodily safety.¹⁵⁷ Jacobs criticized the American legal system for protecting the public from obscene materials in order to combat moral corruption while ignoring the more serious threats to the physical safety of women and the equality of the sexes.¹⁵⁸ More recently, Catherine MacKinnon has proposed that pornography be treated as a category of unprotected speech (that is, speech outside the protection of the First Amendment).¹⁵⁹ She believes that *Beauharnais v. Illinois* — which, as she points out, has never been overruled or formally limited in any way — should be resurrected to provide protection to women as a group against the tangible and intangible harms generated by the consumption of pornographic material.

It was not until 1982 in the case of *New York v. Ferber*¹⁶⁰ (which upheld criminal prohibitions against child pornography), that the United States Supreme Court for the first time openly acknowledged that human exploitation and abuse are involved in the production of pornography. In contrast to earlier obscenity decisions of the Court, the *New York v. Ferber* judgment is based upon a finding of tangible harm to the victim rather than on the moral harm to the viewer. In this case a bookstore owner had

154. *Supra*, note 143 at 324.

155. *Ibid.* at 322–323.

156. C. Jacobs, "Patterns of Violence: A Feminist Perspective on the Regulation of Pornography" (1984) 1 *Harv. Women's L.J.* 5. See also M. Baldwin, "The Sexuality of Inequality: The Minneapolis Pornography Ordinance" (1984) 2 *Law and Inequality: Journal of Theory and Practice* 629 at 640.

157. Jacobs, *ibid.* at 43.

158. *Ibid.* at 29.

159. C.A. MacKinnon, "Pornography, Civil Rights, and Speech" (1985) 20 *Harv. L.R.* – *C.L. L. Rev.* 1 at 29, 31, and 62–63.

160. *Supra*, note 73.

been convicted under a New York statute for selling films which depicted young boys engaged in masturbation. Under the legislation in question, it was a criminal offence for a person to knowingly promote a sexual performance by a child under 16 years of age. The Court indicated that the state had wide latitude to proscribe material which depicts sexual acts involving children or lewd exhibitions of children's genitalia and accordingly held that child pornography constituted a category of speech outside the protection of the First Amendment.¹⁶¹

White J., who delivered judgment for the Court, stated that the use of children as subjects in pornography is injurious to the psychological, emotional and mental health of children.¹⁶² More importantly, the Court regarded that the distribution of pornographic material which depicts minors engaged in sexual activity was directly related to the sexual abuse of children.¹⁶³ White J. articulated several reasons why the obscenity test established in *Miller v. California*¹⁶⁴ was inappropriate to cases involving child pornography. Firstly, the question of whether a work taken as a whole appeals to the prurient interests of the average person is simply not relevant to the issue of whether a child has been psychologically or physically harmed in the production of pornography. Secondly, a film which sexually exploits a child may not meet the "patently offensive" requirement of the *Miller* obscenity test. Finally, a work of serious literary, artistic, political or social value may nonetheless contain the hardest core of child pornography.¹⁶⁵ After affirming the principles enunciated in *Chaplinsky v. New Hampshire* and *Beauharnais v. Illinois*, the Supreme Court held that the "evil to be restricted in child pornography so overwhelmingly outweighs the expressive interests, if any, at stake, that no process of case by case adjudication is required."¹⁶⁶

It was the expectation of proponents of regulation that the reasoning of *New York v. Ferber* would not be restricted to child pornography but would be extended to all pornographic material. In February of 1987, however, these hopes were dashed when the United States Supreme Court affirmed without reasons the decision of the Court of Appeal in *American Booksellers Association, Inc. v. William B. Hudnut*¹⁶⁷ that an Indianapolis pornography ordinance interfered with free speech. The ordinance in question generally defined pornography as the graphic sexual subordination of women — whether in pictures or in words — and specifically prohibited production and distribution of materials in which:

- (1) Women are presented as sexual objects who enjoy pain or humiliation; or
- (2) Women are presented as sexual objects who experience sexual pleasure in being raped; or

161. *Ibid.* at 756.

162. *Ibid.* at 756–758.

163. *Ibid.* at 759.

164. 413 U.S. 15 (1973).

165. *New York v. Ferber*, *supra*, note 73 at 761.

166. *Ibid.* at 763–764.

167. 771 F.2d 323 (1985).

- (3) Women are presented as sexual objects tied up or cut up or mutilated or bruised or physically hurt, or as dismembered or truncated or fragmented or severed into body parts; or
- (4) Women are presented as being penetrated by objects or animals; or
- (5) Women are presented in scenarios of degradation, injury, abasement, torture, shown as filthy or inferior, bleeding, bruised, or hurt in a context that makes these conditions sexual; or
- (6) Women are presented as sexual objects for domination, conquest, violation, exploitation, possession, or use, or through postures or positions of servility or submission or display.¹⁶⁸

Moreover, the ordinance provided that anyone who was injured by someone who had seen or read pornography had a right of action against the maker or seller of that pornographic material.¹⁶⁹

Easterbrook J., writing for the Court of Appeal, held that the First Amendment obliges the state to leave the evaluation of ideas to its citizens. He stated that an essential feature of the United States legal system which separates it from others is that the American people have the absolute right to propagate ideas and opinions which the government considers to be pernicious, wrong or hateful.¹⁷⁰ The Court criticized the ordinance for prohibiting speech that subordinates women and presents them as enjoying pain, humiliation or rape even in cases where the work as a whole is of tremendous literary and political value. It also condemned the ordinance for permitting speech which portrays women in positions of equality regardless of the sexual explicitness involved.¹⁷¹ Although the Court acknowledged that depictions of subordination tend to perpetuate subordination and that this is manifested in the work force by low wages, and in the home and on the streets by insult, injury, battery and rape, it refused to uphold the constitutionality of the Indianapolis ordinance. It drew an analogy to the fact of racial bigotry, anti-Semitism, violence on television and the biases of reporters, all of which influence American culture and shape American socialization, yet all of which represent forms of protected speech, however "insidious."¹⁷² Thus it is evident that the United States Supreme Court, in affirming the judgment of Easterbrook J., is unwilling to extend the protection afforded child victims of pornography to women who might be similarly victimized.¹⁷³

168. *Ibid.* at 324. (MacKinnon and Dworkin drafted this ordinance).

169. *Ibid.* at 325.

170. *Ibid.* at 327-328.

171. *Ibid.* at 325.

172. *Ibid.* at 330.

173. Other United States Supreme Court decisions which hold that the states have wide latitude to regulate matters concerning the health and welfare of children include: *F.C.C. v. Pacifica*, 438 U.S. 326 (1978); *Ginsberg v. New York*, 340 U.S. 629 (1968); *Prince v. Massachusetts*, 321 U.S. 158 (1944).

V. The Approach of Canadian Courts to the Freedom of Expression Clause in the Charter

An examination of the relatively few decisions which have interpreted subsection 2(b) of the *Charter* reveals that the courts have taken a fairly consistent approach to the freedom of expression clause. The majority of judges have adopted a balancing of interests standard and do not, for the most part, approve of the notion that certain categories of speech are beyond the ambit of *Charter* protection (*Beauharnais v. Illinois*). Nor has the clear and present danger test been regularly employed by courts to justify legislation which restricts the right to free speech (*Brandenburg v. Ohio*).

The courts have followed a two step approach to *Charter* interpretation. It must first be established by the party challenging the legislation that the fundamental right to freedom of expression has been breached. Once it has been determined that subsection 2(b) of the *Charter* has been infringed, government counsel must prove, pursuant to section 1, that the denial or limitation of the right is reasonable and is demonstrably justifiable in a free and democratic society.¹⁷⁴ As stated by the British Columbia Court of Appeal in *R.v. Red Hot Video Ltd.*, any restriction on the right to freedom of expression must meet the requirements of section 1.¹⁷⁵

Red Hot Video involved the constitutionality of section 159 of the *Criminal Code* which makes it an offence to print, publish, distribute or circulate obscene material. The British Columbia Court of Appeal refused to adopt the American approach to obscenity articulated, for example, in *Ginsburg v. New York*¹⁷⁶ which proposes that obscenity as a class of speech is not protected by the First Amendment. However, the Court did hold that although the obscenity provision in question clearly violated the freedom of expression clause contained in subsection 2(b) of the *Charter*, it was nonetheless constitutional because it satisfied the requirements of section 1.

Similarly, in *Re Federal Republic of Germany and Rauca* it was stated that the laws of defamation, sedition, obscenity and any other limitations on free speech were all subject to a section 1 balancing of interests test.¹⁷⁷ In *Canadian Human Rights Commission v. Taylor*,¹⁷⁸ the defendants were charged with communicating telephone messages likely to expose to hatred named members of the Jewish faith contrary to section 13 of the *Canadian Human Rights Act*.¹⁷⁹ The Federal Court of Appeal held that although the provision *prima facie* constituted a violation of subsection 2(b) of the

174. *Re Federal Republic of Germany and Rauca*, *supra*, note 40 at 240 [cited to O.R.]. See also Keegstra, *supra*, note 40 at 258.

175. *Supra*, note 40 at 22. [cited to C.C.C.]

176. *Supra*, note 179. See also *Roth*, *supra*, note 47.

177. *Supra*, note 40 at 240. cited to O.R.

178. (1987), 78 N.R. 180 (Fed. C.A.).

179. S.C. 1975-76, c. 33. Subsection 13(1) of the *Act* provides: "It is a discriminatory practice for a person or a group of persons acting in concert to communicate telephonically or to cause to be so communicated, repeatedly, in whole or in part by means of the facilities of a telecommunication undertaking within the legislative authority of Parliament, any matter that is likely to expose a person or persons to hatred or contempt by reason of the fact that that person or those persons are identifiable on the basis of a prohibited ground of discrimination"

Charter, it remained of full force and effect because a prohibition against inciting hatred on racial grounds is a reasonable restriction on free speech within the meaning of section 1.

Given the trend established in this line of cases, it appears likely that a court would first consider that the group libel offences contained in the *Criminal Code* constitute a *prima facie* violation of the right to freedom of expression entrenched in subsection 2(b) of the *Charter*, and would then require the government to satisfy it that the terms of section 1 have been met before judging such provisions to be constitutionally valid.

There exists judicial consensus that the government must meet a heavy burden to convince a court that a limitation on the right to free speech is justified. One court has stated that the government must establish that the speech sought to be restricted "causes or threatens to cause real and substantial harm to the community"¹⁸⁰ in order for the impugned legislation to come within the meaning of section 1 of the *Charter*. Other decision-makers have held that only where the speech sought to be restricted has no redeeming social interest should the state be permitted to interfere with the right to free expression.¹⁸¹ Still other courts have regarded that the factors of rationality, proportionality and comparison ought to be considered.¹⁸² According to this view, the court should examine:

1. The objective or rational basis of the limitation (rationality);
2. The extent of the limitation which is to be balanced against its rationality (proportionality); and
3. The laws and practices in other democratic countries (comparison).

In assessing the rationality of the law, a court will examine the purpose for which the statute, regulation or by-law was enacted. Was it designed to protect particular social groups from harm? Was it enacted to prevent breaches of the peace? In a word, a court will attempt to ascertain whether or not a rational basis exists for the curtailment of a fundamental right.

The proportionality factor involves an examination of the degree to which the impugned law interferes with a constitutional right. For example, a court will assess whether the limitation has only a marginal effect upon the general right to free expression. The restriction on the individual's constitutional right will then be balanced against the state's interest in enacting the legislation in question.

Finally, the third element requires a court to compare the challenged legislation with similar statutes from other democratic countries. One

180. *R. v. Red Hot Video*, *supra*, note 40 at 22-23. [cited to C.C.C.]

181. *Saskatchewan Human Rights Commission v. Waldo* (1984), 5 C.H.R.R. D/2075 at D/2082.

182. *Keegstra*, *supra*, note 40 at 271; *Black v. Law Society of Alberta* (1984), 13 D.L.R. (4th) 436 (B.C.C.A.) at 467. see also *Re Southam Inc. and The Queen* (No. 1) (1983), 41 O.R. (2d) 113 (C.A.) at 129-30; *Quebec Protestant School Boards v. A.G. Quebec* (No. 2) (1983), 140 D.L.R. (3d) 33 (Que. S.C.) at 71-78.

judge has expressed the view that the court has discretion in deciding whether or not to examine similar laws from other jurisdictions.¹⁸³

VI. Conclusion

In the event that Canadian courts employ the test of rationality, proportionality, and comparison in interpreting section 1 of the *Charter*, at least two of the group libel offences contained in the *Criminal Code*, (namely, the advocacy of genocide (section 281.1) and public incitement of hatred likely to breach the peace (subsection 281.2(1))) will in all likelihood be held to be constitutional. Over twenty years ago, the Cohen Committee was convinced that the production and distribution of hate propaganda in Canada constituted a serious problem and described in detail the psychological and physical abuse to which many racial, ethnic and religious groups are subjected. It felt that the real danger attending the proliferation of group libel was that the average Canadian, particularly in times of social or economic stress, could be persuaded to adopt the callous and pernicious views of hatemongers. In 1984, the Committee on Visible Minorities in Canadian Society reported that group libel currently presented a much more acute problem than it did in the 1960's when the Cohen Committee proposed the *Criminal Code* be amended to include group libel offences.

The respective testimonies of these two Committees, as well as that of the Fraser Committee, lend support to the contention that these two group libel offences, which *prima facie* impose restrictions on the right of freedom of expression, would nonetheless satisfy the test of rationality, proportionality and comparison. It is difficult to dispute that provisions which punish an individual for encouraging others to kill members of an identifiable group or deliberately inflict on the group conditions of life calculated to bring about its physical destruction, or which prohibit an individual from inciting hatred in public where such behaviour is likely to breach the peace, are rationally based. Given the recent upsurge of group libel in Canada, Parliament has an ongoing public duty to protect vilified groups from potential physical injury as well as the psychological illnesses which result from exposure to hate material, and to avert the social disorder or riots which are likely to result from public incitements to hatred.

Section 281.1 and subsection 281.2(1) also appear to satisfy the criterion of proportionality. A strong argument can be made that the public interest in protecting groups from physical harm, feelings of low self-esteem and insecurity, and the belief that many economic and political opportunities are closed to them because of their ethnicity, race, colour or religion outweighs the right of an individual to advocate the physical extermination of that group. Similarly, the state's interest in maintaining the public peace and preventing the escalation of racial strife outweigh the right of an individual to incite hatred in public. Finally, a comparison of

183. See *Keegstra*, *supra*, note 40 at 276-277.

similar group libel legislation in other countries, for example, Great Britain,¹⁸⁴ reinforces the view that section 281.1 and subsection 281.2(1) of the Canadian *Criminal Code* are constitutionally sound.

It is, however, dubious whether the offence of wilful promotion of hatred (subsection 281.2(2)) satisfies the rationality test. If the courts interpret this provision to include statements made in the private domain, its purported rational underpinning is seriously undercut. What purpose does it serve to permit the state to criminally punish a person for making derogatory remarks or inciting hatred against a group in his home or on other private property? Even if the application of this provision of the *Criminal Code* is restricted to statements made in public, it cannot seriously be contended that the public interest in preventing expressions of wilful promotion of hatred is as important as that of controlling the advocacy of genocide or the incitement of hatred likely to breach the peace.

In the event that a court comes to the conclusion that subsection 281.2(2) is rationally based, it must then determine whether the state's interest in enacting this provision outweighs the individual's right to free speech. It could be argued that the four defences listed in subsection 281.2(3) serve to minimize the intrusion on the individual's right to free expression. In other words, if the speaker can establish that his statements are true, that he was stating his opinion on a religious subject in good faith, that the discussion was for the public benefit or that his objective was to eradicate feelings of hatred directed against a particular group, the prosecution would not be successful. Moreover, it could also be contended that the requirement of securing the Attorney-General's consent to initiate proceedings under subsection 281.2(2) is an important safeguard against undue interference with the constitutional right of free speech. Nevertheless, given that the offence does not require that any detrimental effect or harm result from the wilful promotion of hatred, I would submit that in this instance there is no rational basis for interfering with the right to freedom of expression.

The courts of Canada are presently engaged in the process of closely scrutinizing the various approaches taken by the American judiciary to the First Amendment. From the few decisions rendered since the inception of the *Charter* it appears likely that the courts, in applying section 1, will employ a balancing standard in assessing the constitutional validity of such legislation as the group libel provisions of the *Criminal Code*. It is my view that this approach is both correct and desirable. The courts should carefully weigh the state's purpose in enacting legislation which restricts an individual's right to speak freely on the subject of his choice and only uphold laws which are designed to protect important societal interests and are narrowly drawn to serve those purposes.

184. See, e.g., the *Race Relations Act* (U.K.), 1976, c. 74.