Hate Promotion and Freedom of Expression: Truth and Consequences

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..........[he] pointed out the skill and art of the orator—how everything important to his purpose was said at the exact moment when he had brought the minds of his audience into the state most fitted to receive it; how he made steal into their minds, gradually and by insinuation, thoughts which, if expressed in a more direct manner would have aroused their opposition.

From the Autobiography of John Stuart Mill

1. Introduction

It is possible to draft a justifiable law that imposes criminal penalties on hate promotion. This is not to say that one can draft laws the terms of which literally and perfectly distinguish the legitimate from the illegitimate exercise of freedom of speech. Laws affecting freedom of expression must be interpreted in political context.* Legal rights, like freedom of speech, depend on the existence of a liberal or tolerant community; yet speech can move even a majority of the community to intolerance. More precisely, speech can move some citizens to hate those whom they are morally and legally obligated to treat as equals. It is possible to describe accurately the kind of speech capable of arousing such hatred and thereby to lay the basis for a sound distinction between illegitimate and legitimate political speech.

The discussion will initially focus on Canada’s hate propaganda law, and will conclude with an interpretation of the Canadian Charter of Rights and Freedoms. It will be argued that Canadian law inchoately recognizes the potentially illiberal power of persuasive speech, and makes sense only when seen in the light of this distinctly political problem. The problem can be stated simply. Hate promotion is intended to split the community apart; it forces men to talk across a divide. It makes free speech difficult, if not impossible, even where it does not succeed in arousing hatred. Hate promotion is an attack on free speech and ultimately on democracy. Distrust of identifiable groups is easy to generate and difficult to overcome. There is no good reason to protect the wilful promotion of hatred; our concern for freedom of expression is a sufficient reason for its suppression. The community which remains inactive in the face of hate propaganda denies itself the benefits of freedom of expression, while securing nothing of value in return.

2. Hate Promotion

(i) R. v. Keegstra

Keegstra1 is a case which puts cherished principles to the test by bringing them into conflict. It pits our love of free speech against our abhorrence of racial hatred. James
Keegstra, a high school teacher in a small Alberta town, was convicted of wilfully promoting, in his classes, hatred of the Jews. Some of Keegstra’s students seem to have adopted his beliefs. Before trial Keegstra brought an unsuccessful motion for a Judicial declaration that s.319(2) of the Criminal Code infringed the Canadian Charter of Rights and Freedoms. Keegstra was then tried by a jury and was convicted. On appeal he again argued that the law was unconstitutional. The Alberta Court of Appeal agreed, reasoning that the law was unconstitutional in three ways. (a) The law offended the presumption of innocence which is protected by s.11(d) of the Charter; (b) the law offended the freedom of expression which is protected by s.2(b) of the Charter; and, (c) the law failed to satisfy the test established by s.1 of the Charter for justifiable intrusions into Charter rights.

(a) The presumption of innocence

S.319(3) of the Code requires that the defence of truth (in answer to a charge of hate promotion) must be established by the accused on a balance of probabilities. This contrasts with the usual rule in criminal cases that an accused who raises even a doubt in his favour about the existence of a defence is acquitted. An accused person may be found guilty of promoting hatred even though he raises a reasonable doubt that the things he said were true; the prosecution need not prove beyond a reasonable doubt the falsity of statements

2. The Criminal Code, R.S.C. 1970, c. C-34 (hereafter Code). The section considered in Keegstra was then numbered s. 281.2(2). It has since been re-enacted as s. 319(2) by R.S.C. 1985, c. C-46. The precise citation for the relevant provisions of the Code is R.S.C. 1970 (1st Supp.) c. 11, s. 1. The subsections most relevant to the discussion are set out below. The present section numbers are given first, followed by the old section numbers enclosed in square brackets. Only the most recent Code section numbers are used throughout this essay, except where a section has been both renumbered and otherwise amended, in which case old section numbers are also cited.

318. [281.1] (1) Every one who advocates or promotes genocide is guilty of an indictable offence and is liable to imprisonment for five years,

(2) In this section, “genocide” means any of the following acts committed with intent to destroy in whole or in part any identifiable group, namely,

(a) killing members of the group; or

(b) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction.

(3) No proceeding for an offence under this section shall be instituted without the consent of the Attorney General.

(4) In this section, “identifiable group” means any section of the public distinguished by colour, race, religion or ethnic origin.

319. [281.2] (1) Every one who, by communicating statements in any public place, incites hatred against any identifiable group where such incitement is likely to lead to a breach of the peace is guilty of

(a) an indictable offence and is liable to imprisonment for a term not exceeding two years; or

(b) an offence punishable on summary conviction.

(2) 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 a term not exceeding two years; or

(b) an offence punishable on summary conviction.

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

(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 on a religious subject;

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

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

(6) No proceeding for an offence under subsection (2) shall be instituted without the consent of the Attorney General.

(7) In this section, “communicating” includes communicating by telephone, broadcasting or other audible or visible means; “identifiable group” has the same meaning as in s. 318 [s. 281.1];

“public place” includes any place to which the public have access as of right or by invitation, express or implied; “statements” include words spoken or written or recorded electronically, or electromagnetically or otherwise, and gestures, signs or other visible representations.

which promote hatred. Obliging an accused person to prove a defence is the same as presuming him to be guilty.4

(b) Freedom of Expression

The Alberta Court of Appeal also held that the onus cast on the accused by s.319(3) offends freedom of expression. The section makes it too easy to convict people who promote hatred by telling the truth. S.319(3) recognises mistaken belief in truth as a defence only if the belief in truth was reasonable and in respect of “any matter of public interest, the discussion of which was for the public benefit”. This defence, the Court concluded, does not go far enough: the Charter requires that mere belief in truth, however unreasonable, should be a defence to the charge of promoting hatred. Imposing the standard of reasonableness, let alone truth, against hate promoters will inhibit public debate—the life blood of democracy.5

(c) S.1 of the Charter

A law which offends a particular Charter right can be saved if it meets the test established by s.1 of the Charter: is the law such a reasonable limit “prescribed by law as can be demonstrably justified in a free and democratic society”?6 In dismissing Keegstra’s earlier pretrial motion, Quigley J. had reasoned that s.319(2) was “demonstrably justifiable” on two grounds. It served the end of equality as stated in, and protected by, s.15 of the Charter. It also preserved and enhanced the multicultural heritage of Canadians, an end which is supposed to guide the interpretation of Charter rights. To the contrary, Kerans J. in the Court of Appeal held that these ends did not make the limit on free speech imposed by s.319(2) “reasonable”. S.15 of the Charter applies to inequality created by government; s.319(2) of the Code applies to inequality created by private individuals.7 More importantly, no section of the Charter constitutes a legally enforceable orthodoxy in matters of expression. Freedom of expression is an individual liberty which can only be overridden by an extraordinarily weighty public policy or collective goal. Our commitment to the “marketplace of ideas” requires Canadians to presume that those who promote hatred will be unsuccessful in fomenting hatred among the majority of Canadians.8

The Alberta Court of Appeal did hold that S.319(2) does serve a purpose capable of justifying a limit on free expression: protection of group reputation. However the law goes farther than is reasonable. Freedom of expression prevails over the right of vilified indi-

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4. Keegstra, supra n. 1 at 216-22. Charter, supra n. 3 at s. 11(d). The text of s. 11(d) is:  
   (d) to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal;

5. Id. at 216, 221-2 and 222-25.

6. Charter, supra n. 3 at s. 1. The full text of s. 1 is:  
   1. The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

7. Keegstra, supra n. 1 at 267-8 (Q.B.) and at 228-9 (C.A.) See, Retail, Wholesale and Department Store Union, Local 580 v. Dolphin Delivery Limited (1986), 2 S.C.R. 573; 33 D.L.R. (4th) 175 (S.C.C.) (hereafter Dolphin Delivery cited to D.L.R.). Compare R. v. Andrews and Smith, (1988), 65 O.R. (2d) 161, 28 O.A.C. 161 (Ont. C.A.) (hereafter Andrews) in which the Ontario C.A. upheld s. 319(2) against an attack based on s. 2(b) of the Charter. Cory J. (at 179) said that the law offended freedom of expression, but that s. 27 “...in itself gives a very clear indication that s. 1 of the Charter should be applied in this case. The clause coupled with the Canadian multicultural heritage gives the strongest possible direction to apply s. 1.” Grange and Krever JJ. A. held that s. 319(2) did not offend s. 2(b). Grange J. said (at 192) that s. 27 “...can only reinforce my view that no protection is offered by s. 2(b) to the conduct of the appellants”.

8. Id. at 221-2, 225, 226-9, 231 and 232-4.
individuals and groups to good reputation until it is proven that the hatemonger has actually fomented hatred. Hatred is a certain harm to its objects, but vilification is not. S.319(2) is insupportable under s.1 because it does not require proof that a hatemonger has actually aroused hatred.9

3. S.319 (2) of the Criminal Code

The Keegstra decision held that the Charter renders void criminal laws that forbid the expression of false opinions. But is a criminal law that forbids the promotion of hatred the same as a criminal law that forbids the expression of false opinions? In what does the wilful promotion of hatred consist; what conduct does the crime of hate promotion proscribe? The answer to this question is presented below in the form of a commentary on different elements of the crime of hate promotion.

(i) Other than in private conversation

S.319(2) applies to statements communicated “other than in private conversation”. The phrase “private conversation” in s.319(2) is not defined by the Code, and has not been judicially considered.10 It is reasonable to think that the phrase was included to distinguish mere belief or discussion from proselytizing: one’s hate is not a crime but the promotion of hatred is. The phrase “private conversation” prevents the section from infringing on freedom of thought and belief, both of which are protected by s.2(b) of the Charter. Imagine the section as though it applied to private conversation. We all sometimes speak our mind to friends in private as though we were talking to ourselves alone. A legal prohibition respecting private conversation comes close to the supervision of thought and belief. The supervision of private thought, in effect, requires men to conform their privately held and expressed opinions to a public standard. It treats the mere subscription to some opinion as if it were a public harm. We cannot expect people to think whatever government holds it is desirable for them to think, but we can expect people not to act in ways that harm other people. It is not reasonable to assume that privately expressed hatred will lead to manifest harm. When privately venting their anger or frustration people say many hurtful things which they do not really believe, or which fear or shame would keep them from saying in public.11

Private conversation implies a certain intimacy between participants: we expect our friends to respect the confidentiality of our conversations. A man who speaks hatefully in private conversation is, almost by definition, speaking to someone who either shares his views, or who is unlikely to repeat them: hateful private conversation is likely to be nothing worse than preaching to the converted. The exclusion of private conversation serves as a threshold test of an intention to promote hatred. The essence of promotion is reaching

9. Id. at 216, 228-30, 233-34 and 236-38.
10. The phrase “private communication” is defined by s. 183 of the Code, supra n. 2. Among other things, a private communication is one “made under circumstances in which it is reasonable for the originator thereof to expect that it will not be interpreted by any person other than the person intended by the originator thereof to receive it.”
11. The argument that the section was designed to protect individual privacy is reinforced by noticing that an authorization to intercept private communications is not available in respect of an offence committed under s. 319(2), although it is available in respect of the offence of advocating or promoting genocide under s. 318: presumably the gravity of the latter offence justified an intrusion on privacy which could not similarly be justified in the case of s. 319(2).
out to others whose views are unknown to the speaker, and whose reaction to hate promotion therefore cannot be gauged in advance. Reaching out to an audience whose composition is not known in advance by the speaker is a necessary condition for a rational inference that the speaker intended to promote hatred. So it makes sense that the reach of s.319(2) is limited to speakers who address others unknown to them (as at an open rally) or to speakers who intend to have their message carried to unknown others (as by the random distribution of pamphlets).

But would not a requirement of “communicating statements in any public place” be more straightforward, while serving the same purpose as the requirement of “communicating statements other than in private conversation”? The answer is no. The present wording focuses on the nature of the communication rather than on the nature of the place of communication. The most important element in determining the privacy of a conversation is the speaker’s expectation of privacy. The most important element in determining the public nature of a place is the openness of access to it. The word “publicly”, interpreted to mean the same as “in a place open to public access”, provides insufficient protection to freedom of thought and belief. It is possible to have private conversations in a public place, say at a restaurant table or on the subway. Perhaps the word “publicly” would be interpreted to include an element of intentional dissemination, but it is more likely that it would not be so interpreted. In the best imaginable case the word “publicly” would do no harm worse than creating an uncertainty which judicial interpretation could repair. It does not improve the law to substitute a word which creates uncertainty for a phrase which is relatively clear.

(ii) “Identifiable group” means any section of the public distinguished by colour, race, religion, or ethnic origin

Promoting hatred is only a crime when the “identifiable group” is “a section of the public”. The phrase “a section of the public” is undefined, but is most reasonably interpreted to mean the Canadian public. Reason supports the literal interpretation of the phrase. Determining whether a particular remark promotes hatred often requires a judgment about the state of relations among different groups in some foreign country. It is difficult enough to make such judgments in a domestic setting. It will often be even more difficult, if not impossible, to judge conditions in foreign countries. Finally, s.319(2) draws a sensible distinction between foreign and domestic groups as objects of hate promotion. The extended definition of “identifiable groups” incorporated into s.319(2) by s.319(7) does not include groups distinguished by their national origin. In foreign affairs nations meet as nations

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12. This view is adopted by the Law Reform Commission of Canada which recommended that the seemingly awkward phrase “other than in private conversation” be replaced by the straightforward word “publicly”. See, Law Reform Commission of Canada Report: Recodifying Criminal Law (Ottawa: Law Reform Commission, 1987) (President: Mr. Justice Allen M. Linden) at 100 (hereafter LRC Report).
13. See e.g. s. 319(7) of the Code, supra n. 2.
14. J. B. Sykes, ed., The Concise Oxford Dictionary, 7th ed. (Oxford: Oxford University Press) at 832 (hereafter Concise Oxford) defines “public” in its primary sense as “of or concerning the people as a whole”. It defines “people” in its primary sense as persons “composing community, tribe, race or nation.” “Public” in this context is a synonym for the “Canadian nation or people”. The definitions of “public department”, “public officer” and “public stores” found in s. 2 of the Code, id. support this interpretation. All three definitions refer to activities or institutions operated on behalf of the Canadian people. Furthermore, the word appears in s. 319(1) and (7) as part of the phrase “public place”, where it is given the same meaning as it has in s. 150 (the definition section for Part V of the Code), which applies to “Sexual Offenses, Public Morals and Disorderly Conduct” and s. 197 (the definition section for Part VII of the Code), which applies to “Disorderly Houses, Gaming and Betting”. In all these sections an interpretation of the word public to mean anything other than the Canadian public would extend the Code’s jurisdiction far beyond the reach of Canadian law enforcement, and also the legitimate reach of Canadian law.
and come into enmity or alliance depending on their interests and goals. We may sometimes
have good reason to express hate of foreign enemies. In domestic affairs different groups
are only permitted to be enemies in a highly attenuated sense. Every group in Canada is
expected to settle its differences through some political or judicial process. Identifiable
groups which form a section of the Canadian public are bound together by a common
agreement which transcends their particular quarrels. It is almost definitive of hate promotion
that it attempts to destroy this common agreement.

If “public” in s.319(2) means Canadian public Kerans J. is wrong to argue that, had
Churchill been a Canadian, his remark that “the long dark night of barbarism had descended
over Europe” would have been hate promotion. The reasons for thinking Kerans J. wrong
are worth pursuing. Churchill’s speech is an example of powerful wartime rhetoric which
castigates an enemy without promoting hatred; the speech therefore supports the conclusion
that a ban on hate promotion will not inhibit vigorous political debate. The barbarism to
which Churchill referred was Nazism. The Nazis and their allies were not a group within
the Canadian public. Even if the remark is taken to refer generally to Germans, s.319(2)
does not protect groups distinguished merely by national origin. Surely, though, it would
have been obvious that “barbarism” was meant to suggest that Germans, due to some ethnic
defect, were inhuman? But had Churchill meant to promote hatred against an ethnic or racial
group (which is what Kerans J. assumes he wanted to do, albeit with justification) why would
he have been coy? Why did he speak of barbarism simply, and not of German barbarism?

“Barbarism” connotes “the sort of thing one might expect from a foreigner” and denotes
an “uncivilized condition”. Europe, Churchill implies, is constituted by its adherence
to a standard of conduct from which tyranny is a barbarous departure. Europe’s enemies,
who are also Britain’s enemies, are not cited by their colour, race, religion, or ethnic origin.
Barbarians are known by their actions; they are participants in “the foulest and most soul-
destroying tyranny which has ever darkened and stained the pages of history”. Churchill
does not speak of the Germans as a race, although he does refer to the “bludgeoned races”
who are sheltering behind Britain and France. He uses “race” to suggest a bond that extends
across national borders. His speech argues for a common bond among all civilised peoples,
and so an obligation on Britain to fight for the peoples of Europe, and for “mankind”. Churchill
had no place for the simple-minded view which assesses the worth of nations
by the colour, race, religion, or ethnic origin of their inhabitants. Churchill’s memorable
formulation makes of Nazism a problem for all people who think themselves just. The
rhetorical power of Churchill’s remark derives from his appeal to a universal standard
which transcends national or racial differences. Churchill’s highminded rhetoric is not
hate promotion.

15. Keegstra, supra n. 1 at 221. The quotation is from a speech delivered May 14, 1940 as the French army crumbled before
the Nazis. The passage quoted in Keegstra occurs in the penultimate paragraph of the speech, and reads, in context, as
follows:
Side by side, unaided except by their kith and kin in the great Dominions and by the wide Empires which rest beneath
their shield – side by side, the British and French peoples have advanced to rescue not only Europe but mankind from
the foulest and most soul-destroying tyranny which has ever darkened and stained the pages of history. Behind them –
behind us – behind the Armies and fleets of Britain and France – gather a group of shattered states and bludgeoned
races: the Czechs, the Poles, the Norwegians, the Danes, the Dutch, the Belgians – upon all of whom the long night
of barbarism will descend, unbroken even by a star of hope, unless we conquer, as conquer we must; as conquer we
shall.

vol. VI 6220 at 6224.

48-9.
The Supreme Court of Canada has not ruled definitively on the constitutionality of defences that an accused must prove on a balance of probabilities. More precisely, the question is whether the imposition on an accused of the burden of proof on a balance of probabilities is objectionable because it imposed on the accused the burden of proof on a balance of probabilities.

(iii) Wilfully promotes hatred

The Keegstra decision says that s.319(2) imposes a daunting standard of reasonableness on public debate. This conclusion was reached without considering the effect of the mens rea of wilfulness. In R. v. Buzzanga and Durocher the Ontario Court of Appeal decided that “wilful promotion” is synonymous with “the intentional promotion of hatred”. Hatred is promoted intentionally by people who communicate statements with the conscious purpose of promoting hatred against an identifiable group or by people who communicate statements for some other purpose, but who foresee that the promotion of hatred against an identifiable group is certain, or morally certain, to result from their communication. In other words, one who speaks for the sole purpose of communicating what one believes to be the truth, and who does not foresee that the communication will promote hatred, has not “wilfully” promoted hatred. More simply, a person charged under s.319(2) can secure an acquittal by raising a reasonable doubt about his or her intention. Kerans J. was therefore wrong to hold that s.319(3) is the sole defence available to those who communicate falsehoods which they believe to be true. His view would be true only if s.319(2) incorporated a mens rea of recklessness instead of a mens rea of wilfulness. The statutory defences created by s.319(3) are by and large superfluous for any person who spoke with the pure intention of telling the truth. Even a liar who promotes hatred without intending to, or without seeing that hate promotion was a certain consequence of his lies, has not committed an offence under s.319(2).

(iv) If he “establishes” that the statements communicated were true

(a) The Presumption of Innocence

The Alberta Court of Appeal argued that the defence created by s.319(3)(a) was objectionable because it imposed on the accused the burden of proof on a balance of probabilities. The Supreme Court of Canada has not ruled definitively on the constitutionality of defences that an accused must prove on a balance of probabilities. More precisely, the question

17. Kerans J. only deals with this requirement in an aside: supra n. 1 at 240.
19. Id. at p. 386. See also Andrews, supra n.7 at 184.
20. Id. at 381.
21. For this reason Cory J. ’s examples in Andrews, supra n.7 at 168 are inapplicable to s. 319(2). Cory J. cites the attempts of religious men to ban the works of Darwin and Galileo to support the conclusion that “The protection provided for freedom of expression must be wide enough to permit persons to set forward new and different ideas no matter how upsetting those ideas may be to identifiable groups.” Cory J. argues that the expression of provocative new ideas can only be protected if hate mongering is also protected by s. 2(b). However s. 319(2) does not allow a new idea to be treated as hate promotion only because an identifiable group feels enmity towards it, or even because the idea leads to enmity against an identifiable group. The section does not apply to those who intend only to tell the truth.
22. Defences which an accused must prove on a balance of probabilities will be referred to as “accused onus defences”. The Supreme Court of Canada in R. v. Holmes (1988), 1 S.C.R. 914; 41 C.C.C. (3d) 497 (S.C.C.) (hereafter Holmes cited to S.C.R.); considered whether a section of the Code imposed an onus on the accused to prove a defence on a balance of probabilities. A majority of the court decided that the section imposed no extraordinary burden of proof on the accused. McIntyre J. at (947-9) and the Chief Justice at (933-36) both ruled on the constitutionality of defences which an accused must prove on a balance of probabilities. McIntyre J. said that some accused onus defences do not offend the Charter’s presumption of innocence; the Chief Justice held that all such defences offend the presumption of innocence. Kerans J. was left to choose between these opposing views. He chose to follow the Chief Justice, but only halfway: Kerans J. could have eliminated the offence to s. 11(d) by excising the offending word “establish” from s. 319(3)(a) of the Code, as the Chief Justice excised (Id. at 941) the offending words “the proof of which lies upon him” from s. 351(1) of the Code. See, Keegstra, supra n.1 at 219-20. See also R. Mahoney, “The Presumption of Innocence: A New Era” (1988), 67 Can. Bar Rev. 1 (hereafter Mahoney “Presumption”); see also R. v. Appleby (1971), [1972] S.C.R. 303, 3 C.C.C. (2d) 354 (S.C.C.); R. v. Oakes (1986), 1 S.C.R. 103; 50 C.R. (3d) 1 (S.C.C.) (hereafter Oakes cited to C.R.).
is whether accused onus defences are to be viewed, as they were in *Keegstra*, as presumptions of guilt. The affirmative argument holds a defence to be a negatively stated element of a crime. Murder, on this view, is properly defined as culpable homicide in the absence of, say, insanity (or automatism, or self defence, etc.). Requiring an accused to prove a defence, on this view, is the same as requiring an accused to disprove his guilt; an accused onus defence in effect is a presumption of guilt which an accused must dispel. The opposing argument holds that true defences are properly characterised as admissions of guilt coupled with exculpatory explanations. In such cases the Crown has exhausted the presumption of innocence by proving, beyond a reasonable doubt, the positive elements which it must establish in order to have a case left to the jury. An accused onus true defence does not presume guilt but only states that guilt has already been proved, although acquittal is still possible. On this view, the threshold question in deciding whether an accused onus defence offends s. 11(d) is whether it is a negatively stated element of crime or a true defence. The disputed question is whether accused onus defences are ever consistent with the presumption of innocence.

(b) The defence of truth

There is a strong argument that s.319(3)(a) is a true defence. Truth is the only s.319(3) defence which the accused must establish. The word "establish", used in a defence, has been judicially held to impose on an accused a burden of proof on a balance of probabilities. Nowhere in s.318 and s.319, but for s.319(3)(a), is there any indication of an intention to impose an extraordinary burden of proof on the accused. Why should it be more difficult to prove the defence of truth than it is to prove the other statutory defences to a charge under s.319(2)?

Of the four s.319(3) defences only truth does not negative a *mens rea* of wilfulness. The promotion of hatred is not merely a matter of what is said. Hate promotion is also, and even predominantly, a matter of how and when things are said. It is quite possible for the same truth to be communicated in a way that wilfully promotes hatred, and in a way that does not wilfully promote it. The presence of truth does not negative a *mens rea* of hate promotion. An accused whose primary intent was to speak the truth, and who did not foresee that his communication was certain to promote hatred, would not need...
to raise the defence of truth. There is no reason to raise a defence that must be proved on a balance of probabilities, when one could secure a similar result by merely raising a doubt about one’s intention. So there is no need to raise a defence of truth unless one had an intention of promoting hatred. The defence of truth is an admission of wilfully promoting hatred coupled with an exculpatory explanation.

(c) S.11(d) of the Charter and accused onus defences

Although s.281.2(3) does not presume guilt, there are accused onus defences which do. The problem is that formally similar devices may have markedly different effects in different contexts. Is there a reliable test that distinguishes presumptions of guilt from true accused onus defences?

The initial step in distinguishing a true defence from a presumption of guilt is to determine the purpose of the offence. The next step is to ask whether there is a rational connection between the purpose of the law and the conduct which it prescribes. If the answer is no, it is reasonable to conclude that the law is either irrational, or presumes the existence of those elements of the offence which it requires the accused to disprove in his own defence. If the answer is yes one final question must be asked: does the impugned defence exculpate the accused by showing that he did not commit the sort of act which it is the law’s purpose to punish. If the answer to this question is yes, it is reasonable to conclude that the defence functions as a presumption of guilt. If the answer is no, it is reasonable to conclude that the section functions as a true accused onus defence which is inoffensive to the presumption of innocence.

The purpose of s.319(2) is the suppression of hate promotion. The question is whether proof that a person wilfully promoted hatred, without proof that the person did so by speaking falsely, serves this purpose. Is falseness an essential element of hate promotion? The full response to this question is found infra under the heading “Truth and Passion.”

The conclusion advanced there is that place and manner of expression, not truth or falsehood, are the essential elements of hate promotion. A true thought can be expressed so as to enlighten or enrage; it is similarly so with a false thought. It is not possible simply to read a statement and conclude that it promotes hatred in the legally relevant sense; one must know to whom the statement was made, and under what conditions, before this conclusion can rationally be drawn. The purpose of s.319(2) does not logically require the Crown to prove the truth or falsity of statements which promote hatred. It follows that truth is a defence to hate promotion because the value of truth is taken to outweigh the value of

30. See Andrews, supra n. 7 at 192-3. But cf. Whyte, supra n. 25 at 38: “The trial of an accused in a criminal matter cannot be divided neatly into stages, with the onus of proof on the accused at an intermediate stage and the ultimate onus on the Crown.” The argument is that the Crown has not succeeded in proving wilful hate promotion until a judge or jury has found guilt, yet an accused must decide whether to raise the defence before the jury has even begun to deliberate. The presumption of innocence must therefore be applied as though a man were factually innocent until a verdict of guilt is pronounced against him. See Mahoney, “Presumption”, supra n. 22 at 13-18 and Holmes, supra n. 22 at 934. This argument rests, however, on an incomplete view of the trial process. A proper jury instruction in a s. 319(3)(a) defence should not be considered until the jury has found, beyond a reasonable doubt, that the accused wilfully promoted hatred. In practice, no burden is cast on an accused until after a provisional finding of guilt is made. The only practical effect of the defence is on tactical decisions; in particular, whether to call evidence, and, if so, of what kind. This is a decision that need not be made until after the Crown’s case is in, and has withstood any motion brought for a directed verdict. It is also a decision which every accused must make in every criminal case. Most importantly, an accused may select his own defence. Only an accused who cannot credibly deny an intention to promote hatred would rely on the statutory defence of truth. An accused who did not intend to promote hatred would simply raise a defence of no intent.

31. See also discussion supra under the heading (i) Other than in private conversation.
punishing hate promoters, and not because true statements are incapable of promoting hatred. Truth is exculpatory of hate promotion because we value truth, not because the presence of truth is logically inconsistent with hate promotion. Put differently, a person who had no intention of promoting hatred would not rely on the s.319(3)(a) defence, but would seek to create a reasonable doubt about his mens rea. The defence of truth does not offend the presumption of innocence.

(d) S.1 of the Charter and the defence of truth

Even if s.319(3)(a) is held to presume that material which promotes hatred is false, there is a strong argument that it is, in the words of s.1 of the Charter, a reasonable limit prescribed by law which is demonstrably justifiable in a free and democratic society. The Supreme Court has established a two part test to determine whether a law satisfies s.1 of the Charter. One part of the test asks whether the measure is carefully designed to achieve, and rationally connected with, the objective of the legislation.32 What, then, is the objective of s.319(2)? The full response to this question is found infra under the headings “Freedom of Expression and Reputation” and “Freedom of Expression and Persuasion”. The conclusion advanced there is that the objective of s.319(2) is to safeguard mutual tolerance, and thereby to protect freedom of expression. The presumption that material which promotes hatred is untrue is the same presumption on which the law as a whole rests: there is no objective basis for treating identifiable groups of Canadian citizens as fundamentally unequal to all other Canadians. The attempt to promote hatred, that is, to convince people that their interests are fundamentally and intrinsically opposed to the interests of some identifiable group of Canadians attacks our common interest in mutual tolerance. The defence is rationally connected with the purpose of the law; the accused onus defence of truth is a detail which expresses the principle on which the law as a whole is based. The defence and the crime are completely coherent.

The next part of the test asks whether the “impugned measure impairs the right or freedom as little as possible.”33 Keegstra said that few accused onus defences could pass this test. Any purpose served by an accused onus defence will almost always be served just as well by merely requiring the accused to bring the defence into issue. However, the Supreme Court’s decision in R. v. Whyte34 casts doubt on the validity of Keegstra’s argument. There are three arguments which support the conclusion that s.319(3)(a) meets the minimal interference test. These arguments are made in detail elsewhere in this essay and are therefore stated only summarily here. (a) Hate promotion against identifiable groups is highly unlikely to be true; and the section does not affect anyone who simply wants to express even very upsetting truths.35 (b) Hate promotion consists less in what is said than in how and when it is said; it is therefore sound public policy to require wilful hate promoters to be certain that they are speaking the truth since their method of persuasion is objectionable.36 (c) Most importantly, it is virtually impossible to prove (or disprove) assertions about the characteristics possessed by identifiable groups.37

32. Whyte, supra n. 25 at 40.
33. Id. at 41.
34. Id. n. 25.
35. See supra nn. 17 and 32 and accompanying text. See infra under the heading “The Marketplace of Ideas.”
36. See supra under the heading “Other than in private conversation”. See infra n. 46 and accompanying text.
37. See infra text accompanying n. 40. See also infra under the headings “Freedom of Expression and Persuasion” and “Hate Promotion and Ordinary Opinion.”
The final element of the s.1 test asks “whether there is proportionality between the effects of the impugned measure and the objective being advanced”. The test asks two questions. How important is the objective advanced by s.319(2); and, are the “effects” caused by s.319(3)(a) proportional with the importance of the objective served? The first question is answered infra under the headings “Freedom of Expression and Reputation” and “Freedom of Expression and Persuasion” where it is argued that s.319(2) serves the important objective of protecting freedom of expression. The answer to the second question is that the effects of s.319(3)(a) are moderate and reasonable. S.319(3)(a) presumes the existence of facts which are unprovable. It is certainly no easier to prove that a group is not hatable than it is to prove that an intoxicated man behind the wheel of a car has no intention of moving it. Put differently, how would it ever be possible to establish that the members of an identifiable group did not possess some detestable characteristic attributed to them by a hate promoter? If disproof of truth was an element of the offence which the Crown had to prove the offence would be rendered unprovable. Finally, the defence does not operate solely as a presumption of innocence. The defence presumes guilt insofar as it presumes that hateful statements are untrue: the defence is a true defence as it accepts as exculpatory an excuse which does not negative any element of the s.319(2) offence. In most imaginable cases the defence of truth is a true defence: we do not say that one who has promoted hatred by a truthful statement has not promoted hatred, but only that our respect for truth causes us to excuse the offence. The defence of truth does not presume falsity so much as it does that truth is not exculpatory of hate promotion.

(v) Hatred

Hatred is a strong word, for a powerful passion. The power of the word is captured in the anger which enemy feels towards enemy: hatred places its objects outside the protection of ordinary decency. Fiction supplies a realistic example of how hatred makes cruelty a pleasure:

Life was better if you were no one’s victim. The old man said he had been a Maderista in his youth, then changed his fidelity to Zapata. It had been a just and proper pleasure to shoot his enemies.

The use of “hatred” in s.319(2) limits the application of the section to extreme materials. Hateful statements, for the purpose of s.319(2), are those which suggest that Canadians

38. Oakes, supra n. 22 at 26.
39. Whyte, supra n. 25 at 44-5.
41. The Keegstra trial judge charged the jury that hatred is “an emotion of extreme dislike or aversion, detestation, abhorrence”. This charge was approved in Andrews, as was the reasoning of the Andrews trial judge that “...hatred went farther than such emotions as prejudice, mere dislike, ridicule or contempt.” Andrews, supra n. 7 at 166 and 179. Hate propaganda is not the same thing as libel, although s. 319(2) is often said to attack group defamation. See e.g. S. Cohen, “Hate Propaganda – The Amendments to the Criminal Code” 17 McGill L.J. 740.; M. Cohen, “The Hate Propaganda Amendments – Reflections On A Controversy” (1970) Alta L. Rev. 103; M. MacGuigan, “Proposed Anti-Hate Legislation”. (November, 1967) Chitty’s L.J. 302. See also Chaplinsky v. New Hampshire (1942), 315 U.S. 568; 62 S. Ct. 766 (U.S.S.C.) Beauharnais v. Illinois (1952), 343 U.S. 250; 72S. Ct. 725 (U.S.S.C.), Kerans J. wrongly assumed that s. 319(2) is exactly analogous to the tort of defamation, see e.g. Keegstra, supra n.1 at 221 and 236. A better analogy is to the criminal law descendants of the common law offence of scandalum magnatum. See, Report of the Special Committee on Hate Propaganda in Canada, (Ottawa, Queen’s Printer, 1966) (Chair: M. Cohen) Appendix I, p. 73 (hereafter Cohen Report); R. v. Zundel (1987), 58 O.R. (2d) 129; 56 C.R. (3d) 1 at 16-19 (Ont. C.A.) (hereafter Zundel cited to C.R.); F.R. Scott, “Publishing False News” (1952), 30 Can. Bar Rev. 37; Boucher v. The King (1950), 1 D.L.R. 657 (S.C.C.), reheard at (1951), S.C.R. 265, 2 D.L.R. 369 (S.C.C.); and, Code, supra n. 2 at s. 59 and s. 181. See also Martin’s Criminal code 1955, J.C. Martin, Q.C. ed., (Toronto, Cartwright & Sons, 1955) at s. 60 and s. 166 with accompanying annotations.
should treat an identifiable group in their midst as enemies. Hate promotion denies the fundamental equality of all; it is an attempt to dissolve the bonds which restrain people as they pursue their competitive interests. Hate promotion, by suggesting that some men are by nature less worthy than others, attacks the ground of our reasonable non-violent way of life.

4. The Marketplace of Ideas

The Alberta Court of Appeal applied a version of the American “clear and present danger” rule as the test for compliance with s.1 of the Charter. The Court held that freedom of expression protects all speech, except that which causes immediate and manifest harm, from criminal sanctions. The clear and present danger rule is the legal expression of a political belief; the best test of truth is a free competition among different ideas for public acceptance. This idea is often summarily stated by the expression, ubiquitous in discussion of free speech, “the marketplace of ideas.” The Keegstra decision raises for us questions about what a marketplace of ideas really is, and how it functions. For example, is a classroom (presided over by a teacher who is given authority because of his knowledge and maturity and peopled with students who are expected to defer to their teacher’s authority) a free marketplace? Surely the freedom of such a marketplace must be protected by some standard other than the decision of the students to accept their teacher’s views? More precisely, the class will only be as free as its teacher is willing, or required, to let it be.

The Keegstra decision interprets the marketplace of ideas as an expression of confidence in the common bonds which unite Canadians. It is reasonable to believe, as the Alberta Court of Appeal does, that our way of life (which renounces violent self help) is, for most Canadians, far preferable to the alternatives. Furthermore, the principle that it is generally better to allow ideas to compete for public acceptance than it is to impose ideas through force, even legally sanctioned force, does follow logically from the Court of Appeal’s faith in Canadians’ decency. The question is whether the Court was correct in interpreting this principle to mean that no idea can ever be banned from the marketplace of ideas?

The essence of the marketplace of ideas is that it makes a variety of ideas available for public consideration and choice. The marketplace of ideas is a free market; it grants admission, on equal terms, to every idea. If the marketplace refuses to admit ideas on equal terms it ceases to be free. It follows logically that the terms of admission to the market


must include mutual tolerance among all the participants active in it. Ideas are to be sold through persuasive argument not force or threat of force. Tolerance is the one principle which the marketplace is not free to reject. Freedom of expression, as we understand it, cannot therefore be supported solely on the basis of the “marketplace of ideas”. A totally free marketplace would be free to stop being a marketplace.

It is wrong to say, as Keegstra does, that the Charter neither creates nor permits the imposition of a public orthodoxy in matters of speech. We must have some collective standard, i.e. a public orthodoxy in matters of speech, if we are concerned to protect freedom of expression. If there is no such standard what reason is there to fear, as Keegstra does, that the law prohibiting hate promotion might also prohibit the expression of truth? Keegstra is self contradictory. On the one hand the Court relies on the values of truth and free discussion as the ground for voiding a criminal law which attacks hate promotion; on the other hand the Court denies that there is such a thing as a public orthodoxy in matters of speech. The Keegstra court relied on a public orthodoxy which it did not defend. The alternatives available to us contrast starkly. Either we value free argument in which case we are bound to a standard that requires us to reject intolerance as unworthy; or, the only standard for freedom of expression is the decision of the marketplace, which means that freedom of expression rests on no durable or permanent standard. Keegstra undoubtedly chose the latter alternative intending to protect freedom of expression, but succeeded only in leaving freedom of expression theoretically defenceless.

Freedom of expression was, presumably, entrenched in the Charter under the heading ‘fundamental freedoms’ precisely to indicate its permanent importance in a democratic society. It therefore is not reasonable to interpret s.2(b) as meaning that the market is entirely free to accept any idea it wants. Put differently, if s.2(b) of the Charter is interpreted as making market acceptance the basis of free expression the market is left free to arbitrarily shut some groups or individuals, and even s.2(b) itself, out of the marketplace. To speak politically, freedom of expression either means something more than majority rule in matters of expression, or, in theory, it means little. The only sensible interpretation of freedom of expression, as a legal right, is that it denies to everyone, including a united majority of the public, the right to arbitrarily deny freedom of expression to anyone. Positively stated, freedom of expression is based on, and expresses, the principle of tolerance. If we value freedom of expression we cannot attach very much, if any, value to the promotion of intolerance. Intolerance, and particularly hatred, are ideas which cannot stand on an equal footing with the other competitors in the marketplace. This does not mean that we are obligated to impose criminal sanctions on the promotion of intolerance. We may believe, for example, that hate promotion is valueless but less of a threat to freedom of expression than is censorship. What we cannot reasonably believe, if we value freedom of speech, is that the Charter imposes no public orthodoxy in matters of speech. The question is not whether the Charter imposes such an orthodoxy, for it clearly does, but rather how we may protect the orthodoxy which the Charter establishes. Should we suppress hate promotion? What are the reasons for thinking hate promotion dangerous, and, is the law capable of distinguishing hate promotion from upsetting, but legitimate expression?

5. Truth and Passion

Recall the argument that there are hateful truths that cannot be intentionally communicated without a moral certainty of promoting hatred. This means that the mere expression
of some ideas would always constitute proof of the *mens rea* of wilfulness. If prosecuted, 
the sole defence available is s.319(3)(a), which requires the accused to prove truth on a 
balance of probabilities. Say a scientist believes that mankind is composed of races whose 
important characteristics are genetically determined. It is plausible that the communication 
by the scientist of the conclusion that black people are genetically disposed to violence 
would always constitute hate promotion. S.319(2) seems capable of inhibiting the expression 
of truth, or at least of conclusions which their exponents believe to be true. Might s.319(2), 
for example, interfere with the public communication of genetic research, and even of 
conclusions less provocative than the hypothetical given above?

The above argument is unconvincing. Not the mere communication of a truth makes 
it hateful, but rather its communication in a particular way at a particular time. Truth alone 
should not exculpate hate promotion. To fully appreciate why, it is necessary to consider 
hatred, and the associated emotional states of rage and anger. Hatred is a passion: that 
is, a force so powerful that its urging seems rational even when completely unreasonable. 

A book on criminology, describing the circumstances in which murder occurs, catches 
the capacity of rage to hide us from ourselves:

Rights are asserted and disputed, greed claimed and denied, sexual prerogatives demanded 
and rejected. A fight begins. Someone picks up a knife or gun. A body falls, a neighbour 
screams, the police arrive, the culprit is encountered, still standing with the weapon in his 
hand, gazing in drunken bewilderment at his victim.44

The bewildered murderer is a man shocked by an act which he cannot accept as his own: 
anger (fueled by alcohol), not he, committed murder. In some sense when angered we 
are not entirely ourselves; we have all spoken in anger things which we regretted saying 
once calm. The promotion of hatred, which is an extreme form of anger, is a vastly different 
thing from the communication of truth. It is hard to imagine one who intends to commu­
nicate the truth promoting hatred of an identifiable group.

The same truth can be expressed to enlighten or to enrage. A speaker who intends to 
promote the truth will try to engage the critical capacity of his audience; a speaker who 
intends to promote hatred will try to overwhelm the critical capacity of his audience. For 
example, an article in a social science journal describing the predominance of single parent 
families in the black community, and the social consequences of this fact, is unlikely to 
promote hatred. The same article delivered as a speech to a meeting of white citizens con­
cerned about rising crime rates, and disposed to blame the problem on the moral inadequacy 
of their black neighbours, is likely to constitute hate promotion.45 It can fairly be assumed 
that the article was intended to provoke reasoned consideration of a social problem while 
the speech was intended to inflame. The truth is not likely to arouse passionate hatred 
unless expressed provocatively. Passion is as satisfied with an opportune lie as with an 
opportunite truth.

S.319(2) does not forbid the expression of truth or even of particular teachings or mes­
ages but does prohibit certain means of communication. An intention of promoting hatred 
is inferred from the appeal to passion and not simply from the content of a statement. There 
is no reason why the presence of truth, or a belief in truth, should exculpate one from

45. The hypothetical is not fanciful. Cj. Andrews, supra n. 7 at 165 under heading "Excerpts portraying members of racial 
minorities as responsible for increases in the rate of violent crime" with J.Q. Wilson, *Thinking About Crime*, 2d ed. 
promoting hatred against an identifiable group. To offend s.319(2) a speaker must commu-
nicate hateful matter (whether true or false) in a way likely to arouse hatred. It is highly
unlikely that this combination of circumstances could arise unintentionally. It is hard
to believe that s.319(2) is capable of having a "chilling effect" on free and vigorous debate.

6. John Stuart Mill's On Liberty

(i) Sophistry and Intemperateness

The Keegstra decision claims that a ban on hate promotion is likely to inhibit free and
spirited public debate. A ban on hate promotion is likely to benefit the strong while harming
the weak. Political parties, especially successful ones, all wield nasty weapons which they
are happy to deny their opponents but slow to deny themselves. The decision cites John
Stuart Mill's On Liberty to support these views. It is arguable that the passage cited from
On Liberty does not support the Court's views. On Liberty enjoys great authority as a classic
text in the history of free expression; it is important not to lend Mill's authority to an

46. The Law Reform Commission of Canada shares this view. See L.R.C. Report, supra n. 12 at title V, p. 100, s. 21(1). S.
21(1) is meant to replace s. 319(2) and reads as follows:
21(1) Stirring up hatred. Everyone commits a crime who publicly stirs up hatred against any identifiable group.
The comment to s. 21(1) explains why none of the existing statutory defences to hate promotion are retained:
The defences contained in subsection 281.2(3) have also been omitted as unnecessary. In most cases where an accused
knows that what he says is true, expresses in good faith an opinion on a religious subject, points out on reasonable grounds
matters relevant to the public interest or intends to remove matters tending to produce hatred towards an identifiable
group, he does not have the purpose of stirring up hatred. In the rare case, however, where such a purpose could be
proved, conviction would be merited - if extremists of one religion make true statements in order to stir up hatred against
members of another, does their truthfulness detract from their stirring up hatred?

47. The same point was made by the Ontario Court of Appeal in Buzzanga, supra n. 18 at 387.

48. "Chilling effect" is a term of art in American constitutional law. It refers to laws which serve some legitimate purpose
but which are also, in theory, capable of infringing on constitutional rights. See e.g. Brandenburg v. Ohio (1969), 395
U.S. 444; 89 S. Ct. 1827 (U.S.C.C.). In the context of free speech, the doctrine is applied to laws which, read literally,
apply to a wide range of circumstances. The fear is that such laws inhibit free speech because of uncertainty about their
real scope. Potential speakers may, for example, remain silent because a law appears to apply to their proposed speech,
even though it does not. See W.B. Lockhart, Y. Kamisar and J.H. Choper, Constitutional Law: Cases-Comments-Questions,

49. See Dolphin Delivery, supra n. 7; F. Canavan, Freedom of Expression: Purpose As Limit (Carolina: Carolina Academic
argument which he did not make. It is equally important to know what Mill really did say about hate promotion.  

In the passage cited in Keegstra Mill discusses sophistical arguments, “to suppress facts or arguments, to misstate the elements of the case, or misrepresent the opposite opinion”. Mill opposes sophistical to truthful argument, and distinguishes both from intemperate argument. It is common, argues Mill, to buttress an opinion, “even though it be a true one”, with lies or other deceits. Sophistry is deceitful, but often persuasive. Sophistries are often advanced in good faith, and are hard to “bring home” to the culprit. It is hard to prove that a misrepresentation was deliberate; it is therefore hard to prove that a speaker deliberately mislead his audience. There is a great temptation to use sophistic devices because the benefits of using them may be great, and the chances of detection slim. Even if a misrepresentation is detected the chances are that the speaker will be seen as sloppy rather than deceitful. Still, sophistry is lying; it seems to be a practice which honorable and decent speakers would not engage in.

Sophistical argument is neither uncalculated nor innocent. Sophistry and good faith seem mutually exclusive, yet Mill says they are not. It seems to Mill that sophistry is consistent with good faith when it is used to a good end. Taken in context, the passage cited in Keegstra refers to sophistical arguments made by men who, “in many other respects do not deserve to be considered ignorant or incompetent”, are acting for the public good, but who believe that merely stating the truth is not enough to gain public agreement. Sophistry retains the form of reasoned argument, even while appealing to passion. Sophistry is the way that the knowledgeable deceive the unknowledgeable; only the knowledgeable can detect omissions, misrepresentations, and untruths.

Intemperateness, in contrast to sophistry, is an evil which the ignorant or unscrupulous work on the immoderate. Mill never says in On Liberty that there is such a thing as good faith intemperateness. Intemperate speech does not preserve even the outward form of

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50. See Keegstra, supra n. 1 at 224-5 and 239. The text quoted below is from J.S. Mill On Liberty (Indianapolis: Hackett Publishing Co., 1976) at 51-2. The part of the text cited by Kerans J. is enclosed in square brackets [ ].

Undoubtedly, the manner of asserting an opinion, even though it be a true one, may be very objectionable and may incur severe censure. But the principal offenses of this kind are such as it is mostly impossible, except by accidental self-betrayal, to bring home to conviction. The gravest of them is, to argue sophistically, to suppress facts or arguments, to misstate the elements of the case, or to misrepresent the opposite opinion. But [ all this, even to the most aggravated degree, is so continually done in perfect good faith by persons who are not considered, and in many other respects may not deserve to be considered, ignorant or incompetent, that it is rarely possible, on adequate grounds conscientiously to stamp the misrepresentation as morally culpable, and still less could law presume to interfere with this controversial misconduct. ] With regard to what is commonly meant by intemperate discussion, namely invective, sarcasm, personality, and the like, the denunciation of these weapons would deserve more sympathy if it were ever proposed to interdict them equally to both sides; but it is only desired to restrain the employment of them against the prevailing opinion, against the unprevailing they may not only be used without general disapproval, but will be likely to obtain for him who uses them the praise of righteous zeal and honest indignation. Yet whatever mischief arises from their use is greatest when they are employed against the comparatively defenceless; and whatever unfair advantage can be derived by any opinion from this mode of asserting it accrues almost entirely to received opinions. The worst offence of this kind which can be committed by a polemic is to stigmatize those who hold the contrary opinion as bad and immoral men. To calumny of this sort, those who hold any unpopular opinion are peculiarly exposed, because they are in general few and unimportant, and nobody but themselves feels much interested in seeing justice done them; but this weapon is, from the nature of the case, denied to those who attack a prevailing opinion: they can neither use it with safety to themselves, nor, if they could, would it do anything but recoil on their own cause. In general, opinions contrary to those commonly received only can obtain a hearing by studied moderation of language and the most cautious avoidance of unnecessary offense, from which they hardly ever deviate in the slightest degree without losing ground, while unmeasured vituperation employed on the side of the prevailing opinion really does deter people from professing contrary opinions and from listening to those who profess them.

51. The Oxford English Dictionary (Oxford: Oxford University Press, 1981) at 435-6 defines "sophistically" as "(to argue) in a sophistical manner; fallaciously; with deceptive subtlety". "Sophistical" means, primarily, "given to the use or exercise of sophistry". "Sophistry" is primarily defined as "specious but fallacious reasoning; employment of arguments which are intentionally deceptive." See also Mill's use of the word "sophisticating" in On Liberty, Id. at 32.
reason. This difference provides substance to the claim that intemperateness is even baser than sophistry. Only the knowledgeable can detect sophistry, and no one can possibly be knowledgeable about every matter of public concern. The attentive can always detect intemperateness, which distinguishes itself by a resolute failure to address the matter at hand on its merits. This is true of all the devices, “invective, sarcasm, personality and the like”, which Mill specifically identifies as comprising intemperateness. It is, for example, not hard to see that a speaker is attacking his opponent’s character rather than answering his opponent’s arguments. Intemperateness is meant to open a gap between speaker and audience; it is designed to suggest that some speaker is, by his nature, unworthy of serious attention, no matter what he says. Thus, Mill writes, the preeminent form of intemperateness is “to stigmatize men who hold the contrary opinion as bad and immoral men”. At the extreme, intemperateness is a form of hate promotion. The passage from *On Liberty* cited in *Keegstra* reflects a distinction between sophistry and intemperateness which is equivalent to the distinction between lying and hate promotion recognized by s.319(2). It is clear that Mill opposed a prohibition of sophistry. His view of intemperateness is less clear.

(ii) On Liberty and the wilful promotion of hatred

What would claim to ban “intemperate discussion”, Mill argues, is likely to ban it only in the service of unpopular causes. Mill seems to have thought that intemperateness would only appear as such to the public when directed against a popular figure; abuse of an unpopular figure would seem to the public simply the expression of truth. Mill does not argue against legal prohibitions on intemperate argument as such; he actually argues against incomplete or spurious prohibitions on intemperate argument. A ban on intemperate argument is only acceptable, argues Mill, if it applies impartially to popular and unpopular intemperate speakers. Although Mill argues that an impartial ban on intemperateness is unlikely, he does not say that it is impossible. Indeed, by drawing our attention to the tendency of popular causes to act intemperately Mill proves that he is himself immune to the influence of popular indignation; Mill sets an example of thoughtful even handedness for law makers to follow.

Two questions arise: does s.319(2) attack intemperateness or only unpopular opinions, and, if it bans intemperate argument, does it apply impartially to both popular and unpopular causes? S.319(2) attacks intemperate argument: hate promotion, in the context of s.319(2), does not consist simply in the opinions expressed but rather in the combination of opinion and inflammatory expression. S.319(2) attacks the worst example of Mill’s worst type of intemperateness. Mill would allow laws which impartially attack those who calumnize individuals; s.319(2) is a law attacking those who calumnize whole identifiable groups. Furthermore, s.319(2) applies impartially to everyone who promotes hatred against identifiable groups, regardless of motive. In Canada, it is even a crime to promote hatred in the service of a popular or justifiable cause. S.319(2) meets Mill’s test for justified legal attacks on intemperate argument.

But might Mill’s discussion of intemperateness be as irrelevant to hate promotion as was his discussion of sophistry? Hate promotion is similar to, but not identical with, ordinary intemperateness. Mill was concerned to protect weak groups from the tyranny of the majority. He did not expect the weak to act intemperately; they, presumably, would want to bring the majority over to their side. On Mill’s understanding, hate promotion makes sense only as an attack by the majority against the weak. It is certainly an open question whether
the hatemonger or his victim is more likely to be the unpopular and defenceless party. At best, hate promotion is likely to be an attempt by one unpopular group to gain the affection of the majority by attacking another unpopular group. The ban on hate promotion is likely to protect the weak rather than harm them. S.319(2) serves the same reasonable end by limiting speech that Mill would serve by freeing it.

7. Summary

It has been argued here that s.319(2) suppresses wilful hate promotion, and no other kind of expression. The fear that the section might threaten other kinds of speech is obviated by its mens rea requirement of wilfulness, and by its attention to the form of communication, rather than simply to hateful content. It is hard to imagine a concrete threat that s.319(2) would pose to free and vigorous public debate. More simply, the crime of wilfully promoting hatred attacks a form of expression which can be specified with considerable precision.

8. Hate Promotion and Harm

(i) Individual Freedom and Group Harm

The question remains; why suppress hate promotion? Hatred, particularly hatred of minority groups is, after all, a disreputable passion. It is hard to believe that hate promotion is convincing to a significant number of people; it is difficult to imagine what real harm it causes beyond injuring the feelings of reviled groups. Kerans J. treated the so-called Cohen Report2 as authoritatively identifying the harm which s.319(2) was meant to remedy. Kerans J. summarised the harm identified by the Cohen Report into two categories, which, for ease of exposition, are herein identified as “public disorder” and “reputational integrity”. Under the heading “public disorder” come the fear that in a time of “stress” hate promotion may provoke violence against minority groups, and the fear that the anger of vilified groups will lead to violence unless salved by the criminal prosecution of hate promoters. Kerans J. ridicules the first fear as the “possibility of a possibility”.5 The second fear is dismissed as a “heckler’s veto”: a form of blackmail which the angry practice against public speakers whom they dislike. The threat of a hostile response should never be allowed to silence

52. Supra n. 41. s. 319(2) has its origin in the Cohen Report.
53. See Keegstra, supra n. 1 at 226-28. Kerans J. did not fully represent the two sides of the Cohen Report’s argument. The Cohen Report emphasized the harm that hate promotion causes vilified groups. It put less emphasis on the nature of the threat which hatemongers pose to a multicultural society, like Canada. This was prudent, for the latter argument is easy to misunderstand as it appears to have been in Keegstra at 227. The Cohen Report argued that in a multicultural society friction is inevitable. Many citizens of mass democracies feel powerless but cannot even discern the real causes of their dissatisfaction. Confused and unhappy, they tend to seek simple answers; i.e. to cast blame for their own powerlessness on minority groups. Therefore, the conditions for successful hate promotion are always present in a multicultural mass democracy; hate promotion is always a real threat to social order. It is prudent to attack the threat rather than wait for actual harm; the potential consequences of successful hate promotion are so awful that we cannot justify a social experiment in absolute tolerance. It is, however, fair to view the Cohen Report’s argument as opposing the marketplace of ideas. The Cohen Report does not assume, as Kerans J. says it does, that society is unconcerned with truth. Rather, it argues that it is difficult, if not impossible, to reach the hatemonger’s audience and correct the damage done after he has spoken. He who speaks first in a mass democracy is likely to speak most effectively. The Cohen Report is careful to note that there is good reason to believe that truth will triumph in the long run, if we vigilantly defend against hate promotion now. Cohen Report, id. at 7-10, 14, 18, 25-29, 31-2, 59-61, 64 and 175-76. Cf. Andrews, supra n. 7 at 168-9 and 190-92.
the expression of an opinion. Curiously, Kerans J. does agree that the indignation of vilified groups is just. Hate promotion offends the group right to "reputational integrity". This group right rests on the severe psychological distress which attends the loss of group reputation. But a solid reputation, he argues, will not succumb to every attack. A law against hate promotion which does not require proof that a speaker actually aroused hatred goes beyond the protection of reputation. So, Kerans J. concludes, the harm caused by the mere promotion of hatred is not enough to justify limiting freedom of expression.

(ii) Freedom of Expression and Reputation

Harm to reputation, as understood by Keegstra, means the pain suffered on being diminished in another’s eyes. It is hard to distinguish this “reputational integrity” from vanity, a sentiment whose power, and disreputability, we admit even while denying its hold over us; our vanity makes us want to avoid appearing vain. In a contest between freedom of expression and the right to high self regard, it is not surprising that freedom of expression triumphs. However, s.319(2) is not directed primarily to the pain of the vilified: the word "reputation" does not even appear in the section. If there is a criminal offence that protects "reputational integrity" it is defamatory libel, which protects personal reputation from exposure to insult, contempt, ridicule, or hatred. “Reputational integrity” is too bland a phrase to capture what is lost by the objects of hatred, and does not accurately render into words the harm at which s.319(2) is directed.

Chief Justice Dickson, writing about the presumption of innocence, expresses the harm to reputation caused when someone is subjected to a credible public denunciation:

An individual charged with a criminal offence faces grave social and personal consequences, including potential loss of physical liberty, subjection to social stigma and ostracism from the community, as well as other social, psychological and economic harms. In light of the gravity of these consequences, the presumption of innocence is crucial. It ensures that, until the state proves an accused’s guilt beyond all reasonable doubt, he or she is innocent. This is essential in a society committed to fairness and social justice. The presumption of innocence confirms our faith in humankind; it also reflects our belief that individuals are decent and law-abiding members of the community until proven otherwise.

An accused criminal is likely to be viewed as an outsider, as someone who does not accept the fundamental premises of decent behaviour. So, the wilful promotion of hatred is akin to excommunicating a group from the community. Reputation, in this primary sense, is

54. Keegstra, id. at 227. The Cohen Report does not argue that we should silence hate promoters simply to forestall a violent reaction from their opponents. Rather, it argues that maligned identifiable groups are justified in expecting legal protection from hate promotion. A violent response to hate promotion is as much a product of legal inaction as of hate promotion.
55. Keegstra, id. at 228-30. The phrase “reputational integrity” is from David A.J. Richards, Toleration and the Constitution (Oxford: Oxford University Press, 1986) at 197 (hereafter Toleration). Richards’s view of reputation is derived from John Rawls, A Theory of Justice (Oxford: Oxford University Press, 1972) (hereafter Theory). See Theory at 175-82 and 440-46 for the theoretical basis of the concept “reputational integrity”. See also the passage cited by Kerans J. from Richards’s book. See also, R. Moon, “The Scope of Freedom of Expression” (1985) 23 Osgoode Hall L. J. at 331. “Reputational integrity”, according to Toleration, is an aspect of “equal treatment” which is capable of being offset against free speech rights: “equal respect must accord appropriate weight to general goods defined by our interests in reputational integrity and control over information central to the autonomous self-definition of a personal life.” (Toleration at 196.) The concept “reputational integrity” is an interpretation of equality, and, in particular, of equal respect among private persons. Kerans J. therefore contradicted himself by introducing this notion into the judgment as a s.1 justification for a s.2(b) breach, after rejecting the argument that s. 15 of the Charter provides a s. 1 justification for s. 319(2) of the Code.
56. Code, supra n. 2 at s. 298(1).
57. Oakes, supra n. 22 at 13.
the mutual conviction of likemindedness which makes a community. Hatred of identifiable groups corrodes communal feeling. John Stuart Mill made a similar point when he wrote in *On Liberty* that the most objectionable form of intemperate discussion "is to stigmatise those who hold the contrary opinion as bad and immoral men." Verbal stigmatizing threatens the very principle on which civilised discussion depends. It is one thing to dismiss an opinion as wrong; it is another altogether to dismiss an opinion solely because of who holds it.

(iii) Freedom of Expression and Persuasion

When a vilified group is forced to rely on the Charter to protect its freedom of expression from official attack it is likely that its freedom of expression has already been irreparably damaged. Freedom of expression means more than just the bare right to speak. No one would say that a person who was permitted to say anything at all, but only privately, had freedom of expression. There is but a small difference between refusing to let one publish opinions altogether, and convincing others that one can never be taken seriously because of one’s ethnic origin. The loss of reputation attendant on hate promotion, in some circumstances, reduces, or even destroys, the value of free expression. It is worth little to talk when no one is listening.

The fear that hate promotion may diminish the value of free expression points to a larger problem. This is the necessity, which every speaker faces, of bridging any gap that separates him from his unpersuaded audience. There is an art to persuasion. A good speaker chooses images and examples which are likely to strike a responsive chord; he emphasizes some things while suppressing or understating others; and, he puts his arguments in an order that is likely to bring his audience along with him. Lawyers compendiously refer to all these matters as advocacy.

It is not always possible to persuade simply by relying on the merit of an argument. It is particularly difficult to persuade on merit alone when the speaker has a much better understanding of the question than his audience does. For example, we are often asked to hold opinions about affairs in countries which we have not visited, and whose native tongue we do not speak. So our opinions are often formed by experts. More precisely, our opinions are often formed by those whom we accept as experts. But how can we decide who is an expert without relying on experts? In many areas only an expert can tell who is, and who is not, an expert. This is the basis, in part, for Mill’s observation that sophistical argument is largely undetectable; only an expert knows when a specialised area of knowledge has been misrepresented. When choosing experts we rely on reputation, which is different from selecting an expert because he is an expert. It is a commonplace of forensic art that an expert witness is of little value unless, in addition to his specific expertise, he knows how to persuade nonexperts that he is an expert. Trust, not expertise, determines expert credibility.

58. *Supra* n. 50 and following text.
59. The author acknowledges, with gratitude, his debt to Professor C. Orwin of the University of Toronto for introducing him to the ideas which appear prominently in this section of the essay. See C. Orwin, “Democracy and Distrust” (Summer 1984), *The American Scholar* 313 and C. Orwin, “The Just and the Advantageous in Thucydides” (June 1984), *American Political Science Review* 485.
60. John Stuart Mill was acutely aware of the problem of persuasion. His awareness is evident in the epigraph to this essay; in the reasoning underlying his distinction between “sophistical” and “intemperate” speech (*supra* text following n. 50), and, in J.S. Mill, *Autobiography* (New York: Bobbs Merrill, 1957) at 30.
When we are incapable of passing rational judgment on an expert’s qualifications, we do the next best thing and pass judgment on the expert. We ask ourselves whether he is the sort of person who judges the matter in issue in the same way we would were we experts. Whenever a knowledgeable speaker addresses a less knowledgeable audience he must persuade his audience that he is trustworthy. That means the speaker must persuade his audience that aside from his special knowledge he is an ordinary person. The problem of trust is omnipresent. A hate promoter need only plant doubts about the character or intentions of some identifiable group to impair its freedom of expression. Put differently, hate promotion need only convince people that an identifiable group is different from the majority of people in order to impair the malformed group’s freedom of expression. A member of a malformed group, speaking to an audience which doubts his character and intentions, will have a hard time generating the trust which is a prerequisite to persuasion. Hate promotion threatens the ability to persuade without which freedom of expression is worthless.

(iv) Hate promotion and ordinary opinion

It has been argued that experts must make themselves seem ordinary to be persuasive. This is especially true of spurious experts, like hate promoters. The shoddier the goods the more persuasive must be the advertisement. Yet hate promoters do not seem to have much in common with ordinary people. Most people do not foment hatred against identifiable minorities. Some critics argue that hate propaganda should be ignored because prosecution will only give hate promoters more publicity than they could ever obtain if left alone. Yet the prosecution of any crime may bring publicity. No one objects to the prosecution of murderers on the ground of publicity. Surely it is not the publicizing of hate promoters to which the critics object, but the possibility that the publicity may reach a receptive audience. Is there reason to fear that hate propaganda is attractive to ordinary people?

It is easier to arouse than to overcome distrust of groups identifiable by colour, race, religion, or ethnic origin. Everyone knows that identifiable differences sometimes correlate with less obvious differences. Only those who know a group well know how extensive are the hidden differences which correlate with the more obvious differences. Hate promoters claim to have an insider’s knowledge of group character. The problem is that the hate promoter’s claims have a surface plausibility. After all, there are real differences among different groups. Is it not reasonable to think that a specialist might know more about those differences than the ordinary person does? A person can find some individual member of an identifiable group quite agreeable to know without being forced to question his belief that the group as such is odious.61 Hate promotion plays on, but is not likely to be refuted by, ordinary experience.

It is reasonable to fear hate propaganda. Identifiable groups do sometimes conflict with one another. For example, a majority of parents may wish to have prayers said in the public schools; a minority (all, or almost all, adherents to the same minority religion) may oppose prayer in the public schools. Once locked in conflict it is hard to assess an opponent’s character fairly; we shudder at the thought of a judge trying his own cause. Ordinarily,

61. Hitler’s Mein Kampf makes cunning use of precisely these rhetorical techniques. See Adolf Hitler, Mein Kampf, trans. Dr. Alvin Johnson (New York: Book of the Month Club with Houghton Mifflin, 1939) vol. I, c. II “Years of Study and Suffering in Vienna” at 66-84.
our self interest is restrained by our sense of justice; that is, by our sense that we have something in common with our opponents, and so owe them a certain civility. Hate propaganda attempts to overcome our ordinary restraint by arguing that self interest and justice are perfectly congruent. Tolerance is presented by hate propagandists as self destructive: we cannot rely on those who are fundamentally strangers to our way of life to reciprocate our tolerance. The message of hate propaganda is that justice consists in helping one’s friends and harming one’s enemies; a friend’s interests are congruent with one’s own; strangers, foreigners are enemies bent on harming us; only fools are kind to their enemies. Where there are real conflicts among identifiable groups there is fertile ground for hate promotion. There are ordinary sentiments to which hate propagandists appeal.

It is prudent to share the Cohen Report’s fear that at a time of real social distress hate propaganda could generate violence. A more immediate fear is that hate propagandists will arouse, or exacerbate, distrust of and between identifiable minority groups. Where doubts exist about the fundamental loyalties of some identifiable group, it will be difficult for it to speak persuasively in self defence. Vilification attacks freedom of expression by undercutting our willingness to listen to one another. The disparity between knowledge and ignorance, which often forces us to trust rather than to reason, is intractable. We could never eradicate the differences of taste, interest, intellect, education, and experience which leave men differently situated to judge the merits of different arguments. Similarly, it is hard to imagine how we could eliminate the love of one’s own property and well being which inclines us towards hatred of our competitors. We cannot hope to eliminate the importance of trust as an element of persuasion, and we should not hope to, or attempt, to eliminate every form of intemperate speech. Yet it is prudent and just to attack hate promotion. Hate promotion is nothing but extreme opposition to democracy: it is a direct attack on the one truth which all citizens must accept if they are to be a community rather than a loose gathering of tribes. Hate promotion mocks and weakens freedom of expression. Mocks, because it takes shelter under a principle to which it is opposed; weakens, because it creates distrust.

But the case for s.319(2) should not be put solely in terms of harm forestalled. There is some reason to hope that through the criminal law we can advance the cause of truth and vigorous self expression. We ourselves can discredit, through fair criminal convictions, the vulgar political types who stoop to play on the lowest human passions. In effect, the criminal law can put the hate promoter’s means to just use. We then strive to come as close as is humanly possible to the ideal marketplace of ideas in which every speaker receives a fair hearing on the merits of his arguments.

9. Freedom of Expression

(i) Charter Interpretation

The crime of hate promotion is a useful starting point for the interpretation of s.2(b) of the Charter. S.319(2) addresses concrete problems which must be kept in mind when

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62. See e.g. the summary of the facts in Zundel, supra n. 41 at 13-15.
63. This is similar to an argument made in the Cohen Report. (See supra n. 53). See also Beauharnais v. Illinois, supra n. 41; Andrews, supra n. 7, and Terminiello v. Chicago (1949), 69 S. Ct. 894; 337 U.S. 1 (U.S.S.C), particularly at U.S. pp. 6-7 and pp. 13-24. In these cases, the actual words of the individuals charged with fomenting race hatred are reproduced. Further examples of hate propaganda which has been distributed in Canada are found in the Cohen Report at Appendix III at 260.
defining the scope of s.2(b) of the Charter, and expresses a reasonable Canadian tradition in the construction of the right to free speech. This is not to say that the scope of s.2(b) is limited by the traditional understanding of free expression. Rather, it is to question the view that s.2(b) should be read literally as protecting all communicative acts, so that any limitation on communication must be justified under s.1.

The following interpretation of s.2(b) of the Charter is meant to follow the Supreme Court of Canada’s direction that the Charter should be interpreted purposively, keeping in mind the language of the particular Charter provision; any connection with other Charter rights; and, the traditional Canadian understanding of those rights which had legal existence before the Charter. S.2(b) of the Charter read in context, and read purposively, contains an internal standard which excludes some speech from its protection. The Charter recognizes that expression plays different roles in different contexts, including harmful roles which ought to receive no Charter protection since they hinder the ends which s.2(b) of the Charter is meant to advance.

(ii) The language of s.2 of the Charter

The arrangement and language of the different s.2 freedoms expresses a definite view about the proper approach to freedom of expression cases. S.2(b) is found in association with other fundamental freedoms. In order of appearance the rights move progressively outward from matters which relate most closely to inner being (conscience, religion, thought, belief and opinion) to matters which relate most closely to external or common relationships (expression, freedom of the press and other media of communication, peaceful assembly and association). In this list, expression occupies a medial position being connected both with the formation of individual character as expressed in conscience, religion, thought, opinion, and belief and the means by which the social rights of assembly and association are realised. Expression is essential to self government, in the different senses of self formation and political or social activity. When construing Charter rights the connection of

64. Charter, supra n. 3 at s. 2. The text of s. 2 is:
2. Everyone has the following fundamental freedoms:
(a) freedom of conscience and religion;
(b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;
(c) freedom of peaceful assembly;
(d) freedom of association.
66. See Andrews, supra n. 7 at 173.
67. This is essentially the position taken in Zundel, supra n. 41 at 20-24 and 28-29. Kerans J. rejected this approach arguing that it reads s. 2(b) as though it merely codified the law which preexisted the Charter, see Grier, supra n. 43 at 84. However, the Ontario Court of Appeal did not read s. 2(b) as Kerans J. says they did. Rather, the court argued that none of the wide range of material it considered in Zundel, including pre-Charter Canadian case law, supported the view that freedom of expression is an unlimited right. The Court explicitly avoided defining the scope of s. 2(b) protection, holding only that s. 2(b) did not protect the knowing dissemination of lies contrary to the public interest. With this conclusion Kerans J. expressly agreed in Keegstra, supra n. 1 at 223-24. See also Andrews, supra n. 7 at 173-178, 176-78 and 189-92. Mr. Justice Kerans also objects to Zundel’s definition of a “freedom” as the residue which remains after the scope for legitimate intrusion on freedom of expression has been defined. However, Kerans J. agrees that s. 2 should not be interpreted as protecting everything someone wants to do, which is the same as saying that a freedom is what remains after the scope of legitimate incursion has been defined. The real dispute is about the breadth of the remainder, not its character as remnant.
68. No specific interpretation of the word “freedoms” is advanced herein. The use of the plural implies that section 2 is meant to protect a number of different things, not one thing called “freedom”. Mr. Justice Kerans treats freedom as a synonym for “human autonomy”, a phrase which he says controls the meaning of all the other words of s. 2. He recognizes that this view creates enormous problems for the application of s. 2(b), as it renders the concrete wording of the section meaningless. Interpreting s. 2(b) as though it reads “everyone has human autonomy” extends the protection of the section to virtually anything that anybody wishes to do, see Grier, supra n. 43 at 545.
thought, an internal human process, with expression, a social process, requires us to consider both the desire of speakers to be heard and the effect of speech on audiences. For example, the peacefulness (or disorderliness) of an assembly will have something to do with what is said at that assembly, and it may therefore be reasoned that speech which is meant to disorder an assembly is less worthy of Charter protection, than is speech which is temperate and thought provoking. The structure of s.2(b) suggests that the legal weight of a given expression must be assessed in the light of the end which it serves, and, in particular, as it advances or hinders those ends which justify s.2 as a whole, viz., the formation of individual character and meaningful participation in political or social activity.

The meaning of section 2(b) is grasped in part by asking what it has in common with the other s.2 rights; the picture is completed by noticing the differences between s.2(a) and (b). Two difficulties emerge in s.2: why is it necessary to grant a separate protection to “conscience and religion”, and why is the right of free expression stated together with the rights of thought, opinion, and belief? It might seem that the freedom of “conscience and religion” is otiose, since these freedoms fall within “thought, opinion and belief”. The protection of thought, opinion and belief would seem to be otiose, since these cannot in any event be attacked unless expressed. As well, the right to act in accordance with one’s own thoughts, opinions, and beliefs could have been protected by a clause which applied literally to all communicative acts.

(iii) Conscience and Religion

Why are conscience and religion separated out for special protection in s.2(a)? Conscience and religion are connected phenomena: their presence is manifest in depth of personal conviction, rather than in the rational articulation of the grounds of conviction. We do not deny that a man is following his conscience only because he acts unreasonably. The same is true of religious belief. This is not to say that either concept forecloses rational articulation, but only that rationality is not a necessary condition for the existence of either. This is particularly true in the case of conscience, as distinct from religion. The former carries the connotation of satisfying one’s own sense of what is desirable or good, while the latter carries the additional connotation of organised system of belief, or, more simply, tradition. Thought, opinion, and belief, which are bound together by the common element of reason, are linguistically and logically separate terms from conscience and religion; the former terms express the reasonable, although perhaps partial or tentative, articulation of truth. The phrase “conscience and religion” points to that which is valuable precisely because it is held to be so by an individual: the phrase “thought, opinion and belief” points to that which is valuable because it can be articulated and defended, even though it may

69. The argument is supported by the ordinary meanings of the terms thought, belief and opinion. See the Concise Oxford, supra n. 14.
not be true.70 The movement progressively outward in the subsections of s.2 is mirrored in the movement from “conscience and religion” to “thought, belief and opinion”. S.2(a) is directed at internal conviction, while s.2(b) is directed at the search for truth—the exercise in common of the human capacity for thoughtful deliberation.

(iv) Thought, Opinion, Belief and Expression

The phrase “thought, opinion and belief” colours the meaning of the word “expression”. Expression is not meant to extend the protection of s.2(b) to all communication—whether by word or deed—that answers some inner need. If expression meant all expressive conduct, the word “conscience”, which points towards inner conviction without necessary regard to its reasonableness, would be found in s.2(b) rather than s.2(a). More significantly, if “expression” means all acts which communicate something, then s.2(b) would seem to apply to almost everything anyone does. For example, a murder may communicate hatred, but that does not seem a good reason to think that the law of murder must be defended as infringing freedom of expression. A better view is that the word “expression” in s.2(b) is meant to eliminate sterile debate about whether the medium of expression, or the purpose served by some communication, is to control the scope of s.2(b).71 The use of “expression” may also be taken to indicate that s.2(b) is not limited to the protection of communication connected with politics, narrowly conceived; rather, the protection extends to all expression which conduces to the formation of “thought, belief and opinion”.

(v) s.2(b) of the Charter and s.319(2) of the Code

In every freedom of expression case, the desire of a speaker to be heard and the effect of his words on his audience must both be considered. The Charter’s terms require a broad judgment to be made whether a given utterance seeks to arouse reason, or to dull it. The Charter protects expression which conduces to the formation of thought, opinion and belief, which is not the same as saying that the Charter protects only the truth. It is a minimum standard rather than an ideal.

The dual purpose of free expression may be stated as the formation of individual character and the promotion of a vigorous political and social life. The two are related. An inde-

70. Kerans J. equates conscience and expression, see Grier and Juhelka, supra n. 43. Cory J. and Grange J. disagree in Andrews, supra n. 7 about the nature of the relation between conscience and expression. Cory J. distinguished (at 178) the accused in Andrews (who expressed “a sincerely held opinion”) from the accused in Zundel, supra n. 41 (“who wilfully published a statement known to be false”). The latter was not protected by s. 2(b), although the former was. To this view Grange J. replied (Andrews at 192): “...assuming that there was a sincere belief, that in my view does not minimize the offence. Indeed, it may make it more dangerous if not more heinous. Certainly the effect of promoting hatred is potentially more inimical to our society and our values than the spreading of false news”. It is submitted that the dispute illustrates the danger of reducing freedom of expression to freedom of conscience: the latter is all encompassing, the former is not. Conscience levels the distinctions which are implicit in the structure of s. 2, particularly the distinction between privately held belief and publicly expressed opinion. In effect, Kerans J. and Cory J. acted as though section 2(b) said that all beliefs “expressed” should be treated equally simply because they are beliefs; in contrast, Grange J. ’s reading of the section makes sense both of the words used in s. 2(b), and of the distinction between conscience and expression. While the distinction advocated does not reduce free expression to the protection of political expression, narrowly conceived, it does reject the “individual autonomy” rationale for free expression as an interpretation of s. 2(b). See supra n. 68. Insofar as “autonomy” is a synonym for self-consciousness, or conscience simply, it is a matter dealt with under s. (a). S. 2(b) focuses not on the internal satisfaction attendant on communication but rather on communication as the process by which reason links different men in conversation, and acts to shape internal consciousness.

Independently minded people is essential to democracy because democratic government is
drawn from the citizen body, is selected by the citizens in response to election campaigns
and shapes and responds to the people’s needs and desires. These purposes are served
by arguments which appeal to reason even when the conclusion advanced is almost certainly
unjustifiable. Learning to reject conclusions, or to judge arguments, is part of independence.
An attempt to eliminate all errors might eliminate all independence. The goal is to prepare
individuals to decide for themselves how to live their own lives, and to be critical about
the actions of their own government. Or, to restate a point made above, the goal is to create
an atmosphere in which arguments are considered on their merit alone. Having stated the
desideratum we are compelled to ask how it may be secured.

(vi) Private opinion and public expression

The Charter teaches that speech has both a private and a public dimension. Insofar
as speech (or expression) plays a public role, it may be subjected to a more stringent legal
supervision without requiring s.1 justification. The example given was advocacy of a dis­
orderly assembly. This bifurcation in the purpose and degree of protection to be accorded
speech is both recognized and respected by s.319(2). The section is designed to attack
the public advocacy of hatred, and to protect the expression of hateful opinions in cir­
cumstances where privacy is achieved and public harm is unlikely. Both the Charter, and
s.319(2), recognise that one dimension along which the value of speech can be assessed
is the extent of its impact on public life. On this dimension, s.319(2) respects the
Charter’s distinction of conscience and expression, and attempts to draw a rational line between
speech that is not a public matter of concern and speech that is.

S.319(2) focuses on public advocacy; this raises the question how such advocacy is
to be assessed under the Charter. The broad question is whether the expression in question
is pointed towards the formation of “thought, belief and opinion”. This question divides
further along two dimensions: the form of the appeal made and its substance. Viewed for­
mally, the attempt to arouse hatred is necessarily also an attempt to inflame; which is to
say, to bypass reason and the reasonable considerations that moderate the anger of thoughtful
people. Hate promotion is distinguishable from the promotion of falsehoods in a manner
that is not intended to foreclose critical scrutiny. Hate promotion is intended to inflame
passions that render thought impossible.

Along the second dimension, viz., content, hate promotion is similarly objectionable.
Hate promotion attacks freedom of expression; it urges its audience to refuse to consider
the views expressed by members of an identifiable group. Taken alone, it will be rare that
an idea as such can be denied Charter protection on the ground that it is untrue. But, where
the idea seeks to undermine the Charter right under which it seeks protection (freedom
of expression); seeks to undermine other substantive goals of the Charter (in this case
equality before the law, and multiculturalism); attempts to undercut the tolerance which
makes freedom of expression possible and meaningful for all Canadians; and, cannot ration­
ally be justified as serving any beneficial purpose, it is reasonable to deny it protection
on the ground that it is both untrue and contrary to the purposes of the Charter.

The final dimension along which speech claiming s.2(b) protection must be assessed
is the effect it is designed to have on its audience. In this case, there are two dominant
audiences to be considered: the maligned, and those who partially or wholly accept the
calumny as true. The latter audience is rendered less open, or even closed, to reasonable persuasion. This audience is removed from the marketplace of ideas. Those swayed by hatred or prejudice are not capable of full participation in the lives of their communities, or of bringing reason to bear on the their own lives. They are less than they may be as individuals, and dangerous as citizens. The maligned are excluded from the exercise of freedom of speech in proportion with the hate promoter’s success. Success, in this context, is not confined to fomenting hatred, but includes also exciting doubts about the character and intentions of the maligned group. Hate promotion attacks the maligned group’s capacity to persuade and so renders less valuable, if not meaningless, its freedom of expression. It would be wrong to attack every speaker who attempts to arouse distrust as such; not all distrust is unjustified. We should, for example, distrust hate promoters. But we can attack those who attempt to excite extreme distrust, i.e. hatred. This is to say, we can attack those who would deny the humanity of a group of their fellow citizens and so threaten the tolerance on which freedom of expression depends. The attack against hate promotion is a defence of free speech.