
Vriend v. Alberta: *Making the Private Public*

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Constitutions bind governments, not private persons. Or so it has always been assumed. Yet if constitutions bind not only what a government does but also what it does not do, then they bind private persons as much as governments; for in that case a government's failure to secure constitutional values in the dealings between private persons would be unconstitutional. If that is so, then the courts, not the legislatures, would have the exclusive power to decide whether the private should be made public and subjected to the public requirements of liberty and equality.

In *Vriend v. Alberta* the Supreme Court of Canada has confirmed that the *Charter* does not apply to private persons and so does not apply to government omissions generally. Yet the Court has also held that the *Charter* does apply to the discriminatory treatment of one private person by another on the basis of sexual orientation, in that it *does* apply to a government's failure to prohibit such treatment. Are these coherent conclusions? More importantly, are they the right conclusions for Canadians generally or for the gays and lesbians to whose benefit they were principally directed?

This comment explores the implications of holding governments liable for their failure to act in fulfillment of *Charter* values. Should constitutions bind private persons in this way? Should the courts take upon themselves ultimate authority over the values contained in the *Charter*? There are reasons to think not. Are there better ways, then, of using the Constitution to secure justice for gays and lesbians?

Les constitutions lient les gouvernements, non pas les personnes privées. Du moins c'est ce que l'on a toujours présumé. Cependant, si une constitution lie non seulement ce qu'un gouvernement fait, mais aussi ce qu'il ne fait pas, alors il lie également les personnes privées, parce que dans un tel cas le manquement du gouvernement à son devoir d'assurer les valeurs constitutionnelles dans le cadre de transactions entre personnes privées serait inconstitutionnel. Si tel était le cas, alors les tribunaux, et non les législatures, auraient le pouvoir exclusif de décider si le privé devrait devenir public et être subjugué aux exigences publiques de liberté et d'égalité.

Dans *Vriend c. Alberta* la Cour suprême du Canada a confirmé que la *Charte* ne s'appliquait pas aux personnes privées et qu'elle ne s'appliquait donc pas généralement aux omissions gouvernementales. Toutefois, la cour a également décidé que la *Charte* s'appliquait au traitement discriminatoire par une personne privée envers une autre en raison de son orientation sexuelle, dans le sens où la *Charte* s'appliquait au manquement du gouvernement d'avoir prohibé une telle discrimination. Peut-on concilier ces deux conclusions? De plus, sont-elles les bonnes conclusions pour les canadiens en général ou pour les personnes homosexuelles qu'elles ont cherché à bénéficier principalement?

La chronique en question explore la portée d'une décision de tenir les gouvernements responsables pour leur manquement d'agir dans l'esprit des valeurs contenues dans la *Charte*. Les constitutions devraient-elles lier les personnes privées d'une telle façon? Les tribunaux devraient-ils assumer une autorité ultime sur l'application de ces valeurs? Il existe de nombreuses raisons pour penser que non. Y a-t-il alors de meilleures façons d'utiliser la Constitution afin d'assurer la justice pour les personnes homosexuelles?

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Introduction

There is good reason to be grateful for the Supreme Court of Canada's decision in *Vriend v. Alberta*,¹ and yet as good or greater reason, unfortunately, to regret it. This may seem an overly harsh, even churlish response to what is clearly—in terms of its immediate consequences at least—an enlightened ruling. After all, *Vriend* corrected what was acknowledged by all but a few militant heterosexuals to be a grave injustice against gays and lesbians in Alberta, namely, the continuing refusal of their government to extend to them the full protection of anti-discrimination legislation, a protection that gays and lesbians had previously been accorded in virtually every other jurisdiction in Canada.

What is more, in achieving this end *Vriend* illustrated once again an attractive and yet unforeseen consequence of the entrenchment of the *Canadian Charter of Rights and Freedoms*;² it showed that in certain circumstances at least, the *Charter* enables a decision to be made that most agree should be made but that the legislature is, for one reason or another, politically incapable of making. Prior to *Vriend*, the government of Alberta had stoutly refused to accede to repeated demands that it add “sexual orientation” to the list of prohibited grounds of discrimination in the *Individual's Rights Protection Act*,³ despite the fact that those demands were widely recognized to be legitimate. Yet when the Supreme Court of Canada invoked the *Charter* to do precisely what the government of Alberta had refused to do, the government of Alberta acknowledged that the Court's decision to act in its stead had been right and proper. In effect, the *Charter* permitted the Supreme Court to break a political deadlock, a deadlock in which a government had been held hostage to a political position that it did not ultimately approve of. Had it not been for the *Charter*, no amendment to the *Individual's Rights Protection Act* could have been made, at least not for some time and not without significant changes in the political landscape. Yet once made, the amendment was broadly acceptable to the Alberta government and to the Alberta public. Clearly, then, not only gays and lesbians, but all Albertans who accept the justice of their cause have reason to be grateful to the *Charter* and to the Supreme Court.

Nor is *Vriend* an entirely isolated case in this respect. The sequence of events that took place in *Vriend* is simply the reverse of that which occurred in *R. v. Morgentaler*,⁴ where the Supreme Court removed from the *Criminal Code*⁵ provisions governing the obtaining of abortions. Subsequent events in Parliament made it clear that no majority in Parliament supported those provisions, but no majority in Parliament

¹ [1998] 1 S.C.R. 493, 156 D.L.R. (4th) 385 [hereinafter *Vriend* cited to S.C.R.].

² Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter *Charter*].

³ R.S.A. 1980, c. I-2. The Act is now known as the *Human Rights, Citizenship and Multiculturalism Act*, R.S.A. 1980, c. H-11.7.

⁴ [1988] 1 S.C.R. 30, 44 D.L.R. (4th) 385.

⁵ R.S.C. 1985, c. C-46.

could have removed or modified them either. Cases like these suggest intriguing and appealing prospects for the *Charter*. All are familiar with the idea that the *Charter* was entrenched so as to protect minorities from the will of the majority, at least in certain realms. What the *Charter* has done in each of these settings, however, is to protect minorities from the consequences of an absence of will on the part of the majority. In all those cases where democratic inertia, supported by the voice of a malign but politically significant minority, would otherwise prevent a change in the status quo and so ensure that an unjust state of affairs is maintained, the *Charter* supplies the necessary dynamic for change. This is undoubtedly a good thing. The Supreme Court's decision in *Vriend*, then, confirms that there is yet another reason to be grateful for the presence of the *Charter* in our political life.

So why is there as much reason to complain as to cheer? Surely in cases like this it is the result that matters, and the result in *Vriend* is not simply that a small measure of justice has been secured to a historically disadvantaged group in Canadian society, but that the capacity of the *Charter* to help others who find themselves in the same position as that group, namely, the position of being disadvantaged in their relations with their fellow citizens and unable to obtain the protection and support of their government, has been confirmed and extended.

Of course it is the result that matters here, but results matter for reasons and it is the startling weakness of the reasons in *Vriend* that brings its results into doubt. Another way to put this is to say that the reasons for judgment in *Vriend* are part of its result, and the weakness of those reasons is likely to cause as much harm to gays and lesbians as did the omission of sexual orientation from the *Individual's Rights Protection Act*, harmful as that was. It simply cannot be the case that a government is constitutionally liable for any failure on its part to enforce *Charter* values in dealings between private citizens, for otherwise the *Charter* would cease to be a constitutional document, limiting the power of the government over the people—as it states itself to be—and would instead become what all deny that it is or should be, namely, a political mandate or agenda, its content determined by the courts, limiting the power of the people over their government. If that assertion is true, as is the thesis of this comment, and if a government cannot be held liable for every failure to legislate, then one of two things follows. Either there is no constitutional liability for a government's failure to legislate (except in those rare cases where there is an explicit constitutional duty to legislate, as all were agreed there was not in *Vriend*), or a principled basis must be found that will enable the courts and the public to distinguish those omissions for which a government can be held constitutionally liable from those for which it cannot. *Vriend*, unfortunately, offers no such basis, and its failure to do so damages not only the reputation and standing of the Supreme Court, but the cause of gays, lesbians, and other disadvantaged groups in Canadian society.

I. The Facts

At the time that the events giving rise to his complaint took place, Delwin Vriend was employed as a coordinator in a laboratory at King's College in Edmonton. He was also a homosexual, a fact that he disclosed to College authorities, at their request,

in 1990. In early 1991, he was dismissed from his position at the College, purely on the ground of his homosexuality. At no point was it ever suggested by the College that, his homosexuality aside, Vriend had in any way failed to do his job. Nor was it ever suggested that the fact of his homosexuality had any functional bearing upon his capacity to discharge his duties as a laboratory coordinator, as it might conceivably have been suggested in certain unusual circumstances. On the facts, Vriend was dismissed solely because he was gay and without any pretence that not being gay constituted a *bona fide* occupational requirement in his particular field of employment.

In most parts of Canada, such treatment would have constituted unlawful discrimination. Not so in Alberta. At the time that the dismissal took place, that is to say, before Vriend's successful challenge to the law, Alberta's human rights legislation, the *Individual's Rights Protection Act*, offered no protection against discrimination on the basis of sexual orientation. What is more, the *Charter*, which did prohibit such discrimination,⁶ had been held in *RWDSU v. Dolphin Delivery Ltd.*⁷ to bind only governments, and so to have no application to private institutions such as King's College. The result of this gap in the law was that Vriend had no legal recourse for the wrong that had plainly been done to him. As the law then stood, private employers in Alberta were free to discriminate on the basis of sexual orientation, notwithstanding the fact that every employer in most other provinces and every public employer in Alberta would have been forbidden to do so.

Understandably but also bravely, Vriend refused to accept this state of affairs. Six months after his dismissal, he attempted to file a complaint with the Alberta Human Rights Commission alleging a breach of the *Individual's Rights Protection Act*. When the Commission rejected the complaint as inadmissible, as it was bound to do, he sought a declaration in the Alberta courts that the failure of the Alberta government to prohibit discrimination on the basis of sexual orientation constituted a violation of section 15 of the *Charter*. The Alberta Court of Queen's Bench granted Vriend the relief he sought, and ordered that a prohibition against discrimination on the basis of sexual orientation be read into the Act. The Alberta Court of Appeal reversed this decision, but the Supreme Court of Canada reversed again, allowed Vriend's appeal, and restored the order made by the trial judge.

II. Red Herrings

There is a real difficulty in analyzing *Vriend* and in addressing the very important issues that it raises, and that is that the case has become highly charged politically, and so has attracted to itself a number of arguments—whether about the content of gay rights or about the wisdom of judicial deference—that have no real bearing on the relatively straightforward question that Delwin Vriend sought to bring before the courts. What is more, these peripheral political arguments have not simply obscured,

⁶ *Egan v. Canada*, [1995] 2 S.C.R. 513, 124 D.L.R. (4th) 609 [hereinafter *Egan* cited to S.C.R.].

⁷ [1986] 2 S.C.R. 573, 33 D.L.R. (4th) 174 [hereinafter *Dolphin Delivery* cited to S.C.R.].

but have actually distorted the resolution of Vriend's straightforward question. It seems fair to say that in many respects his case has been hijacked by those who wish to use it as a vehicle for issues that it does not genuinely raise. Had this tendency to mistake and obscure the real issues in *Vriend* been confined to journalists and academics, there might have been little harm in it, for confusion is harmful only where clear guidance is both reasonably expected and reasonably depended upon, and few would dispute that journalistic and academic audiences today are anything other than highly skeptical of what they read. What is distressing in *Vriend*, then, is that quite unusually and quite seriously the tendency to mistake the issues in the case has actually entered into the reasons for judgment of the Alberta Court of Appeal and the Supreme Court of Canada, bodies from whom clear guidance is indeed both reasonably expected and depended upon. For that reason, it is important now to make clear what *Vriend* was not about, despite what the courts may have said.

First and most obviously, *Vriend* contributes little or nothing to the debate over the content of gay and lesbian rights. The once much contested question of whether sexual orientation should be added to the grounds of discrimination set out in Canada's human rights codes, and further, to the grounds of distinction prohibited by section 15 of the *Charter*, has long since been resolved in favour of gays and lesbians. By 1991, when Vriend launched his complaint, and certainly by 1997, when that complaint reached the Supreme Court of Canada, few if any people seriously pretended that gays were not both discriminated against in Canadian society and greatly disadvantaged as a result; or that such discrimination could in any way be said to be justified; or that a legal prohibition was not essential to removing that discrimination; or, what amounts to the same thing, that failure to enact a legal prohibition did not compound that discrimination. In short—and as its subsequent behaviour in response to the Supreme Court's decision tacitly recognized—the Alberta government certainly should have amended the *Individual's Rights Protection Act* so as to prohibit discrimination on the basis of sexual orientation, whether or not it was compelled to do so by the terms of the *Charter*. Vriend's case turned, therefore, not on the question of whether a change in the law was morally required, but on the question of whether the courts were the proper body to effect that change. Or to put the point in the language of the *Charter*, Vriend's case did not turn on the question of whether there had been a breach of section 15, or the question of whether such a breach could possibly be justified under section 1, but on the question of whether the *Charter* had any application to conduct that if constitutionally reviewable was indisputably unequal, discriminatory and unjustifiable. If the *Charter* applied, then the courts were empowered, indeed obliged, to remedy an obvious injustice. If the *Charter* did not apply, then the responsibility for remedying that injustice would have to remain with the legislature.

Second, and despite all that has been said on the subject by the Alberta Court of Appeal and the Supreme Court of Canada, not forgetting the *Toronto Globe and Mail*, *Vriend* contributes little or nothing to the debate over the proper degree of judicial deference to the legislature, whether generally or in the course of fashioning a remedy for the breach of a constitutional right or freedom. Once it had been decided that a failure to legislate was subject to *Charter* review and, what necessarily followed, that a failure to legislate against discrimination on the basis of sexual orientation

amounted to an unjustifiable breach of section 15 of the *Charter*, then the only possible remedy was to read the missing prohibition into the legislation. Just as with the issue of the moral status of sexual orientation discrimination, in 1992, when Vriend brought his application, and certainly by 1998, when the Supreme Court of Canada finally disposed of that application, few if any seriously pretended that the device of reading a provision into legislation was not, in certain circumstances at least, a legitimate remedy for the breach of a *Charter* right or freedom: the Supreme Court had decided as much in *Schachter v. Canada*⁸ and both academic and public opinion had rightly endorsed that decision.

It is true, of course, that in any particular case it remains a question, as it must, whether the circumstances of that case warrant such a remedy, and it is also true that in *Vriend* Major J. held that they did not. Yet on the facts of *Vriend* this is a highly implausible conclusion, and one that Major J. had obvious difficulty in finding arguments to support. In principle and in law the device of reading a provision into legislation in order to bring it into conformity with the terms of the *Charter* is unacceptable only where there is more than one way of remedying a constitutional defect, so that by reading the provision into the legislation the Court does not merely bring the legislation into line with the terms of the *Charter*—as it is constitutionally bound to do—but goes further, so as to make a political decision as to which of several equally constitutional options it prefers, a decision that is not governed by the terms of the *Charter* and that the Constitution gives it no power to make. This was not the case in *Vriend*, however, where the only possible response to the finding that a failure to prohibit discrimination on the basis of sexual orientation was itself discriminatory was to read that prohibition into the legislation.⁹ Once the Supreme Court had decided that a failure to prohibit discrimination on the basis of sexual orientation was a breach of the *Charter*, what other options were available to the Alberta legislature that ought to have been left to it by the Court? In the circumstances, the legislature could only have done what the Supreme Court had held it must do, in the terms laid down by the Court, unless it chose to invoke section 33, the notwithstanding clause, so as to oust the *Charter* obligation that the Court had identified, something that it remained as free to do in response to the Court's decision to read in as it would have been had the Court decided to strike down the entire statute or to stay its remedy.¹⁰ *Vriend* offered

⁸ [1992] 2 S.C.R. 679, 93 D.L.R. (4th) 1, curing a discriminatory act.

⁹ Subject to the comments in *infra* note 11.

¹⁰ It must be remembered that a decision to strike down a legislative provision or to read a provision into legislation does not actually do what it appears to do, for a court has no power to enact or to amend legislation. Provisions that are struck down remain in the statute book unless and until they are removed by the legislature; provisions that are read into legislation do not appear in the statute book unless and until they are enacted by the legislature. Constitutional declarations are just that: declarations as to the treatment that is to be given to legislation that is brought before the courts, so as to ensure that the content of that legislation, as enforced by the courts, is in accordance with the terms of the constitution. It follows that whichever course a court adopts, be it to strike down or to read in, the legislature will have to legislate if it wants its statute book to reflect the reading that the courts have decided to impose upon it, and that is something that the legislature is free to do or not to do. Ac-

no possibility of different ways of acting constitutionally, the choice among which should have been left to the Alberta legislature. It follows that the Supreme Court was bound by its own jurisprudence to read in the missing provision; the Alberta legislature was then free to rephrase the Court's requirements, or to repeal the *Individual's Rights Protection Act* altogether, subject to future constitutional challenge or an invocation of section 33.¹¹

III. Actions and Omissions

A further difficulty in analyzing and responding to *Vriend* arises from the extent to which the question of the Alberta government's responsibility for the treatment visited upon Vriend by King's College has been conflated with the question of whether and in what ways the exercise of that responsibility was discriminatory. This is not to suggest that there was ever any doubt that the treatment that Vriend experienced amounted to discrimination on the basis of sexual orientation. What was open to doubt—and what can be usefully clarified—is how and in what ways the Alberta government's behaviour exposed it to *Charter* review and ultimately to a finding of discrimination.

The essence of Vriend's claim was that he was discriminated against not only by King's College, but by the Alberta government as well. If that claim was a valid one it was because the Alberta government was responsible to Vriend for the manner in which he was treated by his employer and, furthermore, discriminated against him in the discharge of that responsibility. It will be clear, then, that the question of the scope of the Alberta government's responsibility and the question of its discrimination are quite separate issues, issues that are unfortunately sometimes run together in the Supreme Court's reasons for judgment despite the Court's evident desire to distinguish them. Yet it is vital to keep these issues separate for, as has already been indicated

cordingly, the legislature remains free to amend the requirements laid down by the court and, if it so wishes, to invoke s. 33 to insulate itself against those requirements.

¹¹ It is true that to show that the device of reading in is a legitimate remedy is not to show that it is the proper remedy, or that it is to be preferred to striking down the offending provision. According to the Supreme Court, the Alberta government was constitutionally entitled to repeal the entire *Individual's Rights Protection Act* if it so wished, rather than add "sexual orientation" to the Act's list of prohibited grounds of discrimination. The Court was confident, however, that the Alberta legislature would rather add the disputed ground than repeal the entire Act, and so held that reading in was the proper remedy in the circumstances. In fact, I find it difficult to see how repealing the entire Act would have been constitutional, for two reasons, which I will sketch here and expand upon in the balance of this comment. First, if the Court is correct in holding that underinclusiveness is constitutionally reviewable, then I find it difficult to see that permitting one form of discrimination is constitutionally unacceptable but permitting all forms of discrimination is constitutionally acceptable. After all, both permissions have an adverse impact on disadvantaged groups protected by the *Charter*, and surely the greater impact must be the more unjustifiable. Second, in my view it is not the legislature's act—in the form of the *Individual's Rights Protection Act*—but its failure to act that is discriminatory here, so that striking down the non-discriminatory Act as a remedy for the legislature's discriminatory failure to act would be incoherent.

above, only the first of them is open to real debate. The best way to untangle them is to be clear about the exact nature of the discrimination that Vriend suffered at the hands of the Alberta government.

Vriend's challenge was brought against several sections of the *Individual's Rights Protection Act*, on the ground that those sections were discriminatory and so breached section 15 of the *Charter* because of their failure to list sexual orientation as a prohibited ground of discrimination. Exactly how were those provisions discriminatory? A number of possibilities present themselves, depending on whether the Alberta government's role in relation to Vriend's employment amounted to a government action or a government omission and, further, on whether the discrimination alleged to flow from that action or omission was direct or indirect.¹²

Assume first what is in fact the more implausible possibility, that the Alberta legislature acted discriminatorily by enacting the *Individual's Rights Protection Act* in the form that it did, a form that although protecting Vriend and other homosexuals from a number of different types of discrimination, offered them no protection against the type of discrimination likely to concern them most, namely, discrimination on the basis of their sexual orientation.¹³ In other words, the question here is whether the Alberta legislature acted discriminatorily in prohibiting discrimination on the grounds of race, religious belief, colour, gender, physical disability, mental disability, age, ancestry and place of origin.

Clearly, in so formulating the *Individual's Rights Protection Act*, the legislature did not act so as to discriminate *directly* against gays and lesbians for the confinement of the law's protection to nine listed grounds, and the consequent failure to refer either to sexual orientation or to any other potential ground of discrimination, did not involve the drawing of an express distinction on the basis of sexual orientation. In short, there was nothing directly discriminatory in what the Alberta legislature *did*. To offer one body of people protection against discrimination is not to discriminate against any other body of people, unless the protected body of people is described in discriminatory terms. In this respect, the *Individual's Rights Protection Act* is to be contrasted to the provision of the Ontario *Human Rights Code*, 1981¹⁴ that was successfully challenged in *Re Blainey v.*

¹² By direct discrimination I mean intentional discrimination, or what is sometimes called a violation of formal equality; by indirect discrimination I mean adverse effect discrimination, or what is sometimes called a violation of substantive equality. See R. Wintemute, *Sexual Orientation and Human Rights* (Oxford: Clarendon Press, 1995) at 10 for a fuller description of the different terminology used in Canada, the United States and the United Kingdom to describe the two basic types of discrimination.

¹³ I am assuming here what is open to doubt, that all homosexuals see themselves primarily in terms of their sexual orientation, and that all suffer discrimination primarily on that basis rather than some other. It seems more likely in fact that many homosexuals take their race, or their religion, or their disability to be a more important element of their identity than their sexual orientation, and similarly that many homosexuals suffer more for their race, religion or disability than for their sexual orientation. However, nothing in what follows turns on the truth of what I have assumed.

¹⁴ S.O. 1981, c. 53, s. 19(2) [hereinafter *HRC*].

Ontario Hockey Association,¹⁵ which expressly excluded sporting activities from the HRC's protection against sex discrimination, thereby invoking a distinction that was a prohibited ground of discrimination in the *Charter*, and thus describing its protection against sex discrimination in sexually discriminatory terms.¹⁶

Nor was it claimed, and understandably so, that the *Individual's Rights Protection Act* indirectly discriminated against gays and lesbians in prohibiting certain listed grounds of discrimination that did not include sexual orientation, for discrimination of that kind could only be established if the groups protected by the prohibitions contained in the Act could be shown to be disproportionately heterosexual. It seems clear that no such proof would have been possible, given that the Act protected both dimensions of the binary distinctions that it prohibited, and so protected men as well as women, whites as well as blacks, the able-bodied as well as the disabled; in short, it protected people of both genders, all races, all colours, all ages, all abilities and all faiths. Even if one were to take the view, quite reasonably, that the benefit of the Act's prohibitions was intended to be and was in fact enjoyed by women, racial and religious minorities, the young, the old and the disabled, rather than their privileged counterparts, it seems implausible that those beneficiaries of the Act could ever have been shown to be disproportionately heterosexual.

The other, more plausible possibility then is that it was the Alberta legislature's *failure to act*, or *omission*, the *failure* to include sexual orientation as a prohibited ground of discrimination in the Act, the *omission* of sexual orientation from the list of prohibited grounds, that constituted unlawful discrimination.¹⁷ Clearly, this failure or omission could not be said to constitute *direct* discrimination, for it did not depend, explicitly or implicitly, upon a distinction on the basis of sexual orientation. This is not, as it might seem to be, simply a matter of form. In confining the grounds of discrimination protected by the Act to the nine grounds set out above, the legislature failed to prohibit a large number of grounds of discrimination, some of which are prohibited by the human rights codes of other provinces, some of which are prohibited by section 15 of the *Charter*,¹⁸ and many of which have yet to find recognition in

¹⁵ (1986), 54 O.R. (2d) 513, 26 D.L.R. (4th) 728 (C.A.) [hereinafter *Blainey*].

¹⁶ *Blainey* was a case of an indirectly discriminatory act. It has been argued by Dianne Pothier in "The Sounds of Silence: *Charter* Applications when the Legislature Declines to Speak" (1996) 7 Constitutional Forum 113 at 114, 116 that the difference between *Blainey* and *Vriend* is one of form only, and that form should not be allowed to prevail over substance. I agree that the difference is one of form but it seems to me that form matters here, as Pothier's own argument confirms. Pothier takes the view that the government is constitutionally responsible for deliberate omissions from a benefit that it has decided to confer, and the form of a law may make clear, as in *Blainey*, that an omission is deliberate.

¹⁷ On this view it is not, strictly speaking, the legislation that is constitutionally objectionable, but the absence of legislation.

¹⁸ I have in mind here the analogous grounds of discrimination of which sexual orientation is but one; the grounds listed in s. 15 are reproduced in the *Individual's Rights Protection Act*, albeit not in precisely the same terms.

any law, or indeed in the experience of any others than those who have been made to suffer on account of them. It is not as if, as sometimes seems to have been assumed,¹⁹ sexual orientation was the only ground of discrimination not included in the *Individual's Rights Protection Act*.

However, and just as clearly, the failure to include sexual orientation as a prohibited ground of discrimination in the Act did indeed constitute *indirect* discrimination on the basis of sexual orientation, for the impact of that failure was borne almost exclusively by homosexuals. No proof is needed to establish that it is homosexuals and not heterosexuals who bear the burden of discrimination on the basis of sexual orientation in our society, as indeed in every other society. Nor can there be any serious argument that the failure to prohibit sexual orientation discrimination did not constitute a disadvantage to those who suffered from that discrimination, so as to amount to a breach of section 15 of the *Charter*, or that the failure could be justified as reasonable within the terms of section 1. As has already been indicated above, if it is true that a legislature can be held constitutionally liable for a failure to legislate, then there was no possible answer to Vriend's claim of discrimination. Liability for omissions, or perhaps more accurately for a failure to act, was therefore the real issue in his case.

The point here is that the issue in *Vriend* was not what the legislature did but what it did not do. The significance of that issue is this. Given that the combination of what the legislature does and does not do embraces all imaginable human endeavour, to hold the legislature constitutionally liable for all that it has not done would be to render the legislature constitutionally liable for all acts and omissions within its jurisdiction or, to use the language of the *Charter*, all matters within its authority. This is, to put it mildly, a somewhat surprising claim as to the scope of the Constitution, one that has been denied by the courts and by most academic commentators. That does not mean, of course, that it is incorrect. In order to assess its correctness, however, it is necessary to look at least briefly at what constitutions are and should be about, so as to determine whether they properly embrace all legislative omissions or some only, and if they properly embrace some only, to determine which ones they embrace and which they do not.

IV. Constitutions as Constraints on Power

Constitutions describe the limits of political authority. Those limits protect the authority of other governments and of individuals. A federal constitution, for example, assigns different realms of authority to different governments. Each assignment determines what each level of government can and cannot do. If, as is the case in Canada, authority over international and inter-provincial trade is assigned to the federal government, and authority over trade within a province is correspondingly assigned to provincial governments, then each level of government is entitled to legis-

¹⁹ See Pothier, *supra* note 16 at 119: "Where the legislature enters the fray, but holds back in one particular aspect."

late within its own realm of authority—if it so decides and in whatever manner it decides—and is correspondingly forbidden to legislate within the realm of authority assigned to the other level of government. The assignment of a subject matter to one government limits the authority of that government and correspondingly protects the authority of another.

In the case of the relationship between individuals and the State, the limitation of authority is more explicit. Since constitutions assign plenary authority to the governments that they describe (a combination of governments in a federal State), they set no limits to that authority and, correspondingly, do nothing to secure the authority of individuals over the conduct of their own lives, unless and to the extent that those constitutions also contain a guarantee of individual rights and freedoms. A constitution that contains such a guarantee limits the powers otherwise assigned to any level of government and so protects the authority of the individual over the design and pursuit of his or her own plan of life.

This is an extremely brief sketch of the nature of a constitution, one which in no sense pretends to be a complete account of all that constitutions do. It does, however, reveal an important aspect of what constitutions do not do—at least as they are presently understood—and indeed should not be expected to do, for reasons that will be developed in a moment. What constitutions do not do is require a legislature to enact any laws, let alone laws of a particular kind. On the contrary, they assume a government's desire to exercise power and take for granted its will to legislate. Another way of putting this is to say that constitutions confer powers coupled with negative duties. Certain exceptions aside, constitutions do not require governments to govern, and that, it must be said, is a good thing, not because government is undesirable, but because democracy depends upon the capacity of democratically elected governments to decide for themselves whether and when to act. It is up to governments to decide how far to govern, and if they decide wrongly, as they often do, the people's remedy is at the ballot box, not the bar. Constitutions may diminish the capacity to govern by transferring some portion of it to other governments or to the people themselves, but they should not diminish the capacity to govern by transferring it to the courts. In other words, and as will be argued more fully below, it is one thing for the courts to police the relationship between two levels of government, or between governments and the people, and quite another thing for the courts to assume the task of government themselves.

So when a constitution assigns the authority to make criminal law to the federal government, as does the *Constitution Act, 1867*,²⁰ it does not tell that government what conduct to make criminal. Nor does the Constitution tell the federal government how to prosecute the crimes that it chooses to create, other than to set limits to prosecutorial behaviour through its guarantee of certain rights and freedoms to individuals, such as the right to a fair trial. The federal government may fail to criminalize conduct that

²⁰ (U.K.), 30 & 31 Vict., c. 3, s. 91(27), reprinted in R.S.C. 1985, App. II, No. 5.

should be made criminal; it may criminalize conduct that should not be made criminal; it may establish methods of prosecution that are morally unacceptable without violating an accused's right to a fair trial (although that might be difficult to do given the breadth of the constitutional right to a fair trial). If the government does any of these things it will face moral censure from the press and from the public. It may even jeopardize its chances of re-election. However, it will not thereby face censure from the courts, for in assigning authority over criminal law to the federal government the Constitution assigns to that government complete responsibility for the proper, *i.e.*, the moral, development of that branch of the law, and leaves to the Canadian people the task of holding the federal government to account for what it does and does not do in the discharge of its responsibility.

The *Charter* is no exception to this constitutional pattern, as the language of section 32 suggests and the Supreme Court's decision in *Dolphin Delivery* confirms. Freedom of expression does not oblige people to speak or to write, does not require that newspapers be published or that movies be made; nor does it require the government to foster or to regulate any of these activities. Similarly, the right to privacy does not oblige people to be private or require the government to foster privacy under the scrutiny of the courts. On the contrary, freedom of expression sets limits to whatever regulatory ambitions a government may have with respect to whatever expressive activity its population may choose to engage in, just as the right to privacy sets limits to whatever desire a government may have to intrude in whatever privacy its population may seek.

To say that this is the way things are is not, of course, to say that this is the way they should be. Could matters be otherwise then? Should the Constitution tell the government how to govern? After all, as is well known, there are exceptions to the general rule that constitutions give rise to negative rather than positive duties. For instance, the Canadian Constitution requires the federal government to maintain certain transportation links to British Columbia²¹ and to Prince Edward Island,²² and it requires provincial governments to provide certain educational services to members of minority religions²³ and to minority language groups.²⁴ Would it be desirable for these exceptions to be made the norm? This would require a revolutionary seizure of power by the courts, of course, but it might be argued that such a seizure would simply be a somewhat more dramatic version of what took place in the United States as the result of the Supreme Court's decision in *Marbury v. Madison*.²⁵

Even were such a shift in power possible, however, the answer to the question of whether it would be desirable must be no. One way of approaching that answer is to ask what the government would look like if the provisions of the Constitution were to

²¹ *British Columbia Terms of Union*, R.S.C. 1985, App. II, No. 10.

²² *Constitutional Amendment, 1993 (Prince Edward Island)*, C. Gaz. 1993.II.2022.

²³ *Constitution Act, 1867*, s. 93.

²⁴ *Charter*, s. 23.

²⁵ 5 U.S. (1 Cranch) 137 (1803), online: WL (SCT-OLD).

be treated as positive duties. It would then be for the courts to establish, for example, the government's role in relation to health care, which would mean deciding whether health care should be public or private or something in between, deciding the level of funding that health care should receive from the government, and deciding how that funding should be distributed. It would be for the courts to decide what kind of armed forces Canada should have, what their numbers and equipment should be, and what their policies and goals should be. It would be for the courts to set the direction for the economy, to establish the curriculum for the schools, to determine environmental policy—in short, to govern. Clearly this would be undesirable, for it would have the effect of transferring virtually all democratic authority from the people's present representatives to the authors of the Constitution and to the courts whose duty it is to interpret and enforce that Constitution.

In offering these examples from the division of powers, I do not mean to mock the proposal that the Constitution could and should be read in obligatory terms. The examples suggest the price of such an obligation in terms of democracy but they do not suggest that the price is never worth paying. While the examples make clear that the creation of such an obligation would be objectionable if framed in general terms, it remains entirely possible that the obligation might yet be attractive if it were confined to a limited number of subjects, such as the *Charter* perhaps, or certain sections of the *Charter*, particularly when one remembers that a number of aspects of the division of powers and of the *Charter* are already read in obligatory terms without giving rise to any concerns about the state of democracy in Canada. Indeed, the very existence of the *Charter* could be said to constitute a limitation on democracy and yet its presence in our Constitution has been accepted as compatible with both the practice and theory of democracy. Would it be desirable, then, if either the *Charter* as a whole or its guarantee of equality rights were to be read in obligatory terms, so as to impose upon the governments of Canada an obligation to secure the liberty and equality of all Canadians? In that case, the governments of Canada would have a positive duty to secure the rights and freedoms of Canadians, including the right to equality, a duty that would be interpreted and enforced by the courts.

Once again, however, the answer to that question must be no. Were section 15 of the *Charter*, for example, to be read in obligatory terms, it would be for the courts to determine the direction and the detail of human rights policy in Canada. It would be for the courts to establish the content of human rights codes, which would mean determining what grounds of discrimination are prohibited by the *Charter* and which of them must be prohibited in human rights codes in order to ensure that both public and private activity are governed by the principle of equality; deciding which realms of conduct, such as the provision of employment, services and accommodation, are to be addressed by human rights codes; deciding what justifications for discrimination should be accepted, thereby anticipating what would otherwise be decided in a section 1 analysis; deciding how human rights codes should be enforced and by what kinds of bodies; and so on. In other words, it would not simply be a matter of ensuring that the grounds of discrimination prohibited by section 15 were mirrored in the human rights codes of all Canadian jurisdictions, although that would clearly be required; the courts would have to ensure that the legislatures implemented whatever social and economic

policies were necessary to ensure the equality of all who are protected by the grounds of discrimination set out in the *Charter*.

This would be undesirable, not simply because it would take the courts well outside their recognized areas of expertise—for it is possible that the courts could be persuaded to acquire new areas of expertise (although it is a mystery why a society should want to transfer power from representative bodies to the courts only to ask the courts to function as if they were representative bodies)—and not simply because it would be undemocratic—for the existence of positive duties of limited scope is clearly compatible with democracy. Rather, it is undesirable because the issues of equality and non-discrimination are issues of such vital importance to a society of immigrants such as Canada that the moral responsibility for the manner in which we as a country come to terms with them must for the most part remain with individual Canadians and with their elected representatives. In other words, and as this comment has already indicated, it is one thing to limit the scope of democratic authority by insisting that the government not discriminate against Canadians unless it has powerful reasons for doing so—reasons that are capable of satisfying the courts—and quite another thing to eliminate democratic authority by insisting that the government have no voice in the enterprise of securing the equality of all Canadians, an enterprise that would then become the exclusive property of the courts.²⁶ It is one thing to transfer power to the people, subject to the scrutiny of the courts, and quite another thing to transfer power to the courts.²⁷

²⁶ In what follows, I will sometimes use the term “equality” as shorthand for the principle of equality and non-discrimination that is protected by s. 15 of the *Charter*, where “equality” and “non-discrimination” are treated as correlatives.

²⁷ It is commonly believed that the *Charter* transfers power from Parliament and the legislatures to the courts. In my view, however, the *Charter* transfers power from Parliament and the legislatures to the people. Freedom of expression, for example, transfers the power to govern expression to the people, not the courts. The power that is given to the courts to enforce that freedom is a new power, but it no more enables the courts to govern expression than their power to enforce the division of powers between the federal and provincial governments enables them to govern generally. Correspondingly, the power that is taken from Parliament and the legislatures is for the most part transferred to the people, acting individually and in combination; otherwise it falls into abeyance. Therefore, when the courts decide that certain acts of expression are constitutionally protected and that government regulation of those acts is constitutionally prohibited, they transfer the power to govern those acts from the people’s representatives to the people themselves. This is why bills of rights tend to be popular, to the dismay of those academics who think that the genuine interests of the people are always to be found in the expression of the democratic will.

Two further observations might be made here. First, while the moral right to freedom of expression (or any other freedom) may require government intervention if it is to be fully realized (an intervention that recognizes in the right a dimension that is sometimes known as positive liberty), that intervention is not and should not be part of what is guaranteed by the Constitution for the reasons given in the text. It follows that in this setting, the content of legal rights does not and should not correspond to the content of moral rights. Second, the reason why bills of rights normally do not contain social and economic rights is that it is in the nature of those rights to be understood as positive duties, the en-

The suggestion here, then, is that the ultimate responsibility for securing equality must rest with the Canadian people and with their political representatives. Let me go beyond that bald assertion by looking first at the reasons in support of preserving the responsibility of Parliament and the legislatures for securing equality. Canadian governments cannot govern successfully unless and until they develop a proper appreciation of the distinctive character of the particular community for whose well-being they are responsible and to whose judgment they are accountable. This is not simply a matter of a government's ability to appreciate the right way in which to design human rights legislation or employment equity programs in its particular jurisdiction. Rather, it is a matter of a government's ability to appreciate the right way in which to design the entire legislative program for a community the members of which have diverse backgrounds and commitments, a community that the government must understand properly in order to govern justly. In other words, a government that does not understand equality and what it requires cannot govern well, at least not in a pluralistic society such as Canada. Yet a government's capacity to understand equality would be seriously diminished if the mandate for equality were to be transferred from Parliament and the legislatures to the courts.

This is not, however, the only reason for preserving the responsibility of Parliament and the legislatures for securing equality. As far as individual Canadians are concerned, the formation of full relationships among members of different cultural, social and sexual communities once again requires a level of understanding and appreciation that is diminished when those relationships are specified in law. We would all be the poorer if every aspect of the relationship between homosexual and heterosexual were to be laid down in human rights codes and other legislation. It is of course essential that we treat one another with proper understanding and respect, but the fact is that we can only do so if we retain a significant measure of personal responsibility for our relationships with one another. This is but one reason why liberal societies like Canada's take individual freedom seriously, indeed constitutionally guarantee it.

Of course, to convert a legislature's power to secure equality (coupled with a duty not to violate equality) into a positive duty to secure equality is not necessarily to diminish the realm of private judgment. It is possible that the courts would be capable of setting out a positive duty that left as much responsibility to individuals as individuals now enjoy, perhaps more. This, though, is unlikely. The reason for thinking this is that there would be absolutely no point in converting a power into a positive duty if the consequence were to entrench the very sense of obligation that Canadian legislatures presently recognize, or something less demanding. That being the case, entrenchment of a positive duty to secure equality would in practice be bound to diminish the realm of private judgment in the construction of personal relationships among Canadians.

forcement of which would require—as the enforcement of civil and political rights does not—the transfer of governmental authority from the legislatures to the courts.

How essential is it, though, to secure a realm of private judgment in these matters? It may seem to some that I am seeking here to vindicate the importance of the distinction between the private and the public realms, a distinction that has been regularly disparaged by feminists among other social critics. If so, I would contend that this does not in fact put me at odds with feminists and other champions of equality, or at least with the substance of what they have argued. What feminists have done is to point out that the distinction between private and public in any particular culture is a moral distinction as well as a social fact, and to argue that many activities that are, at least in cultures that they are concerned with, private as a matter of social fact should, for sound moral reasons, be a matter of public concern. I do not disagree with any of this. What feminists have not done is to argue that there should no longer be a private realm, for they too are committed to personal freedom, provided that its exercise does not promote gender inequality or otherwise cause harm to others. Feminists simply want to ensure that, where women are concerned, free also means equal, as it has not done in the past. What is more, feminists have not argued that the distinction between private and public, whatever form it might take, should be a matter for the courts and the courts alone to determine. Some aspects of that distinction are for the courts to determine but the balance must remain with the legislature, or a feminist would have no reason to seek public office.

Third and last, it seems that the entrenchment of an obligation to secure equality would be almost certain to diminish the sensitivity of the law's response to the requirements of local circumstances and conditions, for the courts have no capacity and no obligation to represent local people and local circumstances. On the contrary, one of the functions of the courts is to be blind to such questions. By contrast, as this comment has already indicated, it is a fundamental part of the responsibility of any legislature to understand its constituency and to design a set of social obligations that is appropriate to that constituency.²⁸

Two things follow from all this. First, section 15 of the *Charter* does not and should not impose upon Parliament and the legislatures of Canada a duty to ensure the equality of all those within their respective jurisdictions. For that reason, Canadian governments cannot be held constitutionally liable merely for their failure to secure equality, either generally or in some particular respect. If they do not do what they should do for disadvantaged Canadians, they will to that extent be bad governments, but the responsibility for that fact will lie with them and the accountability for that fact will rest in the hands of their electors. The courts and the Constitution are not now—perhaps could not be, and certainly should not be—the only vehicles for the vindication of the moral rights of the Canadian people, in this case the moral right to equality. Nor should they be the only authority for the limitation of liberty that the vindication of those rights may require of other Canadians.

²⁸ This does not mean that I endorse the reasons of McClung J.A. in *Vriend v. Alberta* (1996), 184 A.R. 351, 141 D.L.R. (4th) 44 (C.A.).

Second, however, it may well be the case that a government can be held constitutionally liable for a failure to act in certain circumstances if, in all those circumstances, its failure to act can be said to amount to an act. Context can and often does reveal that what is from one perspective a failure to act is from another perspective an act. Such acts may attract constitutional liability in the same way as any other government act. In other words, while there cannot be liability for all omissions, even in the realm of equality, there may well be liability for certain omissions that can be shown in context not to be omissions but acts. In *Vriend*, then, it may well be that the failure of the Alberta government to legislate against discrimination on the basis of sexual orientation amounted to an act of discrimination against gays and lesbians in that province. While the omission of one or more grounds of discrimination from human rights legislation does not, in and of itself, constitute an infringement of section 15, the omission of a ground as prominent as sexual orientation might do so if other conditions were sufficient to make that omission an act. This possibility will be explored in Part VII, below.

What is critical in a case like *Vriend*, then, and what must be determined in what follows, is what it is that makes a failure to act into an act, what conditions must be met in order to establish constitutional liability for a legislative omission. Reasons must be found for departing from the general rule and for holding a legislature to be liable for its failure to act, in this case, reasons to hold that homosexuals in Alberta were actively discriminated against when their government refused to extend to them the benefit of its protection against discrimination. It may be that the Supreme Court has succeeded in identifying those reasons in *Vriend*, although it should be clear by now that I do not think so.

V. The Supreme Court's Reasons

Virtually all of what has been said above was assumed to be correct by the Supreme Court of Canada, although obviously not in quite the same terms. The Court assumed that not all government omissions are subject to *Charter* review. It assumed that *Dolphin Delivery* had been correctly decided. It suggested, however, that the terms of the Constitution did not forbid a constitutional challenge to certain government omissions, of which it took *Vriend* to be one. Unfortunately, at no point in its reasons did the Court explain what it was about *Vriend* that made the Alberta government's failure to prohibit discrimination on the basis of sexual orientation constitutionally reviewable. Instead, it by and large contented itself with rebutting the Alberta government's arguments that theirs was not a reviewable omission, as if to rebut the argument for one side was to make the argument for the other side, something that would only be true in a zero sum game, which *Vriend* clearly was not given that either the Alberta government or *Vriend* might have been either right or wrong for reasons other than those they offered to the Court.

A. Liability for Omissions

The Supreme Court, speaking through Cory J., dealt with the question of the application of the *Charter* to a failure to legislate in sixteen short paragraphs, six of which

were taken up with a digression on judicial deference, a subject that Cory J. rightly regarded as not being at issue in the case but nevertheless felt it necessary to address given its treatment in the courts below. Disregarding some further prefatory comments, Cory J. then devoted five paragraphs to the issue of the *Charter's* application to government omissions, two more paragraphs to the issue of the *Charter's* application to private activity, and one paragraph to the problem of mirroring. Even a Laconian would have had trouble addressing questions of such difficulty in so brief a compass, and since I am no Laconian, I will address them under this and the next two headings.

Cory J. began by observing that there is nothing in the language of section 32 of the *Charter* (which states that the *Charter* applies to the legislature and government of each province in respect of all matters within the authority of the provincial legislature), that would prevent the courts from treating government omissions as subject to the *Charter*.²⁹ This must surely be right, for otherwise a provincial government would not be subject to *Charter* review for a failure to fulfil its constitutional duties, duties that are set out in the *Charter* itself. To take the most obvious example, if section 32 ruled out any constitutional challenge to a provincial government's failure to act, it would be impossible to enforce the *Charter's* minority language educational rights, or indeed its voting rights. To read section 32 in that way would make the *Charter* a self-defeating document.

Cory J. further recognized, at least implicitly, that not all government omissions are subject to *Charter* review. Again this must surely be right, not simply because it amounts to conventional wisdom in the realm of constitutional law, and not simply because that conventional wisdom has been confirmed by the Supreme Court of Canada in *Dolphin Delivery*, but for the moral reasons that have been developed at some length in Part IV, above.

What Cory J. did not do, however, was offer any argument that might have explained how and why the particular omission before him differed from other omissions and so was subject to *Charter* review, an argument that would necessarily have involved describing the principles that govern liability for omissions in sufficient detail to make their application to *Vriend* clear. Yet such an argument was essential to the Court's decision, for unless the Court was willing to endorse the view that all government omissions are subject to constitutional challenge—a view that it in fact rejected—it was bound to show, through adequate reasons for its decision, how and why the omission before it was subject to challenge, unless it was prepared to act arbitrarily, as it should not have been here.

The subject of reasons and their importance will be revisited later in this comment. At this point, it is necessary to address Cory J.'s repeated description of the Alberta legislation as "underinclusive",³⁰ a description that was invoked at many points in his

²⁹ *Vriend*, *supra* note 1 at 532-33.

³⁰ *Ibid.* at 541, 545, 553.

reasons for judgment and that seems to be intended to carry much of the weight of his argument. The idea of underinclusiveness was in effect used by Cory J. to finesse the resolution of two separate questions: the question of the Alberta government's responsibility for its failure to act, and the further and consequent question of whether and in what ways the Alberta government's discharge of that responsibility was discriminatory.

Underinclusiveness is an idea borrowed from United States constitutional law, specifically from that body of doctrine known as "rationality review", a body of doctrine that has been developed by the United States Supreme Court in the course of interpreting and applying the fourteenth amendment to the United States Constitution, the equal protection clause. Quite apart from any general concerns one might have about borrowing from American constitutional law in order to solve problems of Canadian constitutional law,³¹ two things in particular need to be remembered about the fourteenth amendment and its relevance to the interpretation of the *Charter*.

First, the form of equality that the fourteenth amendment secures embraces both a prohibition against certain forms of discrimination and a prohibition against the use of unreasonable classifications in the design and implementation of legislation. Rationality review and its attendant idea of underinclusiveness are features of the fourteenth amendment's prohibition against the use of unreasonable classifications, a prohibition that insists upon the presence of a rational connection between a legislature's goals and the means chosen to achieve those goals. Second, in *Andrews v. Law Society of British Columbia*³² the Supreme Court of Canada rejected an earlier line of Canadian authority that had interpreted the form of equality that is guaranteed by section 15 of the *Charter* as a prohibition against the use of unreasonable classifications in the design and implementation of legislation. The Supreme Court held in *Andrews* that the Canadian and American constitutions were different in this respect, and that the equality guaranteed by section 15 is to be understood exclusively in terms of non-discrimination.

In the wake of *Andrews*, one might understandably object to judicial reliance upon the idea of underinclusiveness on the basis that underinclusiveness is part of rationality review, a form of review that was rejected in *Andrews*. In fact, however, it would be a mistake to object to the reasons of Cory J. on that basis, for it seems at least possible that the idea of underinclusiveness could be usefully employed in some setting other than rationality review. What makes the reasons of Cory J. objectionable is that they import the idea of underinclusiveness into the setting of a debate on discrimination, a setting in which to rely upon underinclusiveness is blatantly to assume one's conclusions. Let me explain.

³¹ See *R. v. Rahey*, [1987] 1 S.C.R. 588 at 639, 39 D.L.R. (4th) 481, La Forest J.: "Canadian legal thought has at many points in the past deferred to that of the British; the *Charter* will be no sign of our national maturity if it simply becomes an excuse for adopting another intellectual mentor."

³² [1989] 1 S.C.R. 143, 56 D.L.R. (4th) 1 [hereinafter *Andrews* cited to S.C.R.].

Underinclusiveness describes a particular kind of failure of fit between a legislature's goals and the classification that the legislature has used to achieve those goals. If the classification used by the legislature fails to embrace all those people who would be rationally understood as falling within the legislature's goals, then the classification is, from a rational point of view, underinclusive. This means that the idea of underinclusiveness expresses the outcome of a comparison between a classification and the purpose that the classification is deemed to serve. Laws that are found to be underinclusive as a result of that comparison are, under the fourteenth amendment, unequal.

This interpretation of underinclusiveness is not some special feature of American constitutional law. Rather, it is part of the very concept of underinclusiveness, for a classification can only be described as underinclusive by measuring it against some standard. When so measured, the classification may be found to be either underinclusive or overinclusive, depending on the standard that it is deemed to serve. In the setting of rationality review, legislative classifications are deemed to serve the legislature's purpose, and so are determined to be underinclusive or overinclusive by comparing them to that purpose—a purpose that is not itself subject to constitutional review. Whether or not this is an attractive interpretation of the concept of equality, it at least makes sense.

From the perspective of rationality review, if it was the purpose of the Alberta legislature to prohibit all forms of discrimination, then the classification that it used to achieve that purpose was clearly underinclusive and so irrational. From that perspective, Alberta's legislation would be *unequal because it was underinclusive*. In the setting of rationality review, underinclusiveness is the *basis* for a finding of inequality.

In the wake of *Andrews*, though, Alberta's rationality was not the issue before the Supreme Court in *Vriend*. The issue before the Court was whether Alberta's failure to extend the benefit of its human rights legislation to homosexuals was discriminatory. From that perspective the legislation could be said to be underinclusive only if it was discriminatory. In other words, in the setting of an inquiry into discrimination, the description "underinclusive" expresses the *conclusion* of a finding of discrimination.³³ In discrimination analysis, legislation is *underinclusive if it is unequal*, that is, if and only if it is discriminatory.

On that analysis, if the Alberta government acted discriminatorily in failing to protect homosexuals—something that it was the Supreme Court's task to determine—then the list of grounds of discrimination in its legislation was clearly underinclusive;

³³ In discrimination analysis, the standard against which legislation is found to be underinclusive is established not by the legislature's purpose but by the conclusion that the legislature has discriminated. To begin one's reasons for judgment by describing legislation as underinclusive, as Cory J. did, is to import a standard into one's reasons without acknowledging that one is doing so, the very standard that it is one's task to determine, the standard by which, in *Vriend*, sexual orientation should have been included in the *Individual's Rights Protection Act* and against which the Alberta government acted discriminatorily.

if it did not act discriminatorily, then that list of grounds was not underinclusive. It follows that for Cory J. to have *begun* his reasons for judgment by describing the grounds of discrimination set out in the *Individual's Rights Protection Act* as underinclusive was for him to assume the conclusions to the very questions that he had been asked to decide, namely, whether the Alberta government had behaved discriminatorily and, more fundamentally and more troublingly, whether the *Charter* rendered the Alberta government liable for its failure to act. Those assumptions may have been correct, but it would take an argument to know that, an argument that Cory J. did not offer and that the use of the label "underinclusive" blatantly short-circuits.

To complain about the Court's reasons in this way is not simply to engage in an academic cavil, to exhibit an unwarranted attachment to intellectual tidiness, as some might think. In certain settings it may well be that weak or absent or untidy reasons do not much matter, but they matter greatly here, as will be explained below. First, however, it is important to take a brief look at the remaining considerations to which Cory J. referred in the course of his judgment.

B. The Application of the Charter to Private Bodies

In the second part of his discussion of the application of the *Charter*, Cory J. acknowledged, quite rightly, that the *Charter* does not apply to the private actions of private actors. Indeed, that much at least seems to have been accepted by all parties. Constitutions bind governments, not citizens, as section 32 of the *Charter* makes clear and *Dolphin Delivery* has confirmed. Yet if a government's failure to bind the private actions of private actors to *Charter* values is *ipso facto* to be treated as a breach of the *Charter*, then the *Charter* effectively applies to those private actions, albeit in two stages, for it compels the government to compel private actors to abide by *Charter* values in their private conduct. On that reading of section 32, a government's failure to end discrimination, or to end any other infringement of a *Charter* value by a private actor, would in and of itself amount to a breach of the *Charter*. It follows that to apply the *Charter* to a government's failure to act (in the absence of a constitutional duty to act) is indeed to extend the *Charter* to the private actions of private actors, and thus to silently overrule *Dolphin Delivery*.

Unfortunately, once again this is an issue that Cory J. failed to address adequately, contenting himself instead with the truism that it would be unacceptable if any legislation that regulated private activity were for that reason immune from *Charter* scrutiny. This is a truism because it is surely indisputable. Were it not the case, then the governments of Canada would be virtually immune from *Charter* scrutiny, since virtually all legislation regulates private activity. If Alberta's case had truly depended on the contention that the *Individual's Rights Protection Act* should be immune from constitutional scrutiny because it regulated private activity, then Vriend's appeal should have been allowed from the bench. However, there is no evidence that the Alberta government ever pretended anything so foolish, so that Cory J. has here answered an argument that was not made, and in doing so has failed to confront the very real implications of his decision.

One of the sources of the error here—and indeed one of the reasons why Cory J. earlier allowed himself to call the *Individual's Rights Protection Act* underinclusive³⁴—is the all too common mistake of equating *Charter* values and *Charter* rights.³⁵ Freedom of speech is a *Charter* value, as is liberty, as is equality. Freedom of speech is only a *Charter* right, however, to the extent that section 32 renders some government liable for its infringement. In other words, the difference between a *Charter* value and a *Charter* right is the difference between a moral right and a legal right, the difference that in Canadian law is defined by the scope of section 32. *Charter* values bind all Canadians, but are not enforceable in law. *Charter* rights, on the other hand, bind only the actions of Canadian governments, but are fully enforceable in law. It follows that to say that something is a *Charter* value is not to say that it is a *Charter* right, at least in the absence of additional argument as to the scope of section 32. Furthermore, and what is the point here, to treat a *Charter* value as if it were a *Charter* right is, once again, to assume that section 32 embraces all government omissions as well as all government acts, and so to assume that the *Charter* embraces all private activity or, at a minimum, to assume that section 32 embraces the government omission that is at issue in the case at hand, and so to assume that the *Charter* embraces the private activity that is affected by that omission.

C. Mirroring

The Court's final, very brief consideration of the application of the *Charter* to government omissions took place in the context of its section 15 analysis.³⁶ Counsel for

³⁴ See *Vriend*, *supra* note 1 at 533: "The [*Individual's Rights Protection Act*] is being challenged as unconstitutional because of its failure to protect *Charter* rights, that is to say its underinclusiveness." If what the Act had failed to protect was a *Charter* right, *Vriend* could have invoked the *Charter* directly. In fact what the Act failed to protect was a *Charter* value, so that *Vriend* was forced to contend that the failure to protect a *Charter* value infringed a *Charter* right.

³⁵ Cory J. may have been led to believe that his decision in *Vriend* would not extend the *Charter*'s application to private activity by a belief that Alberta's failure to legislate, as reflected in the terms of the *Individual's Rights Protection Act*, affected *Charter* rights rather than *Charter* values. Such a belief could have led him to think that the *Individual's Rights Protection Act* differed from other legislation in affecting *Charter* rights, so that to apply the *Charter* to the failure to legislate that was implicit in its terms would not be to apply the *Charter* to the failure to legislate that is implicit in the terms of all legislation, and so would not be to apply the *Charter* to all that activity that is private simply because all governments have failed to regulate it, notwithstanding the impact of their failure upon *Charter* values.

³⁶ In fact, s. 15 was clearly not the proper place for consideration of this issue; s. 15 only comes into play once it has been decided that the *Charter* is applicable. If the *Charter* is applicable, then the question of discrimination falls to be determined according to the law laid down in *Andrews* and subsequent cases. It follows that in *Vriend*, s. 15 only came into play once the threshold question of whether the *Charter* applied to government omissions had been resolved. If the *Charter* applied to government omissions, then Alberta's omission was discriminatory and so contrary to s. 15, assuming that the omission had an adverse impact upon homosexuals, as it clearly did. The mirroring argument, however, is not a s. 15 argument about the presence or absence of discrimination, but a s. 32 argument

the Alberta government had argued that if the *Charter* compels Canadian governments to compel private actors to abide by *Charter* values in their private conduct, then the anti-discrimination provisions of human rights statutes must necessarily mirror the requirements of section 15. As has been indicated above, this simply follows from acceptance of the contention that the *Charter* applies to government omissions. Yet one might legitimately object to such a conclusion on the ground that endorsement of it would mean that the *Charter* applies to the private actions of private actors, contrary to section 32 and *Dolphin Delivery*.

Cory J., however, denied that the application of the *Charter* to government omissions meant that human rights codes must mirror the requirements of section 15. In his view, whether the omission of a ground of discrimination from a human rights code infringed the *Charter* would depend on the nature of the exclusion, the type of legislation, and the context in which it was enacted.³⁷ But how could this be so? In the course of his reasons in *Vriend*, Cory J. did not rely on any of these factors to find that Alberta's failure to mirror the requirements of section 15 was discriminatory, with one exception. He suggested that the *comprehensive* nature of the *Individual's Rights Protection Act* made its omission of sexual orientation as a ground of discrimination discriminatory. It would be different, Cory J. suggested, if the legislature had chosen to deal with only one type of discrimination: "In such a case it *might* be permissible to target only that specific type of discrimination and not another."³⁸

It seems clear that Cory J. has run together here the resolution of two separate questions, the question of the application of the *Charter* and the question of discrimination. He has tried to suggest that there is no need to be concerned at the prospect of a government being held liable for all omissions from its human rights legislation, and so no need to resist the application of the *Charter* to those omissions, for an omission will only give rise to liability for discrimination if the human rights legislation that it affects is comprehensive in its scope. An argument about the meaning of discrimination is thus used to address a concern about the scope of *Charter* liability. If the two questions are separated, as they must be, then there are two possible ways to read Cory J.'s judgment. On one reading, Cory J. intended to say that the comprehensiveness of a human rights statute may render a government *constitutionally liable* for any omissions from that statute. It would follow that there is no need to be concerned about the problem of mirroring, for a government omission will only

in support of the position that governments should not be held liable for their omissions, constitutional duties aside. Consideration of the mirroring argument implied that the omissions question had not been resolved, in which case s. 15 could not have come into play.

³⁷ *Vriend*, *supra* note 1 at 552-53. Cory J. was less than clear as to whether a failure to mirror the *Charter* would not necessarily be discriminatory and so contrary to s. 15, or whether it would be discriminatory but not necessarily unreasonable according to the terms of s. 1. The better view would appear to be that Cory J. believed that a failure to mirror the *Charter's* requirements in legislation would not necessarily be discriminatory, since if discriminatory, it is hard to imagine how it might be justified as reasonable.

³⁸ *Ibid.* at 548 [emphasis added].

give rise to *constitutional liability* if the legislation that it affects is comprehensive in its scope.

Part VII of this comment will show that there is some merit in this type of argument. However, it cannot be accepted as a good reading of what Cory J. intended to say, partly because it seems unlikely that he would have made what amounts to a section 32 argument in the context of an analysis of section 15, and partly because if he did in fact intend to make a section 32 argument in that setting, he did not begin to explain why the comprehensiveness of a human rights code should make omissions from that code constitutionally reviewable, as he surely would have been required to do.

The better reading of Cory J.'s judgment is that he intended to say that the comprehensiveness of a human rights statute may make omissions from that statute *discriminatory*. It would follow that there is still no need to be concerned about the problem of mirroring, for while governments are liable under section 32 for all their omissions, those omissions will only give rise to a finding of *discrimination* if the legislation that they affect is comprehensive in its scope. In other words, it is only if a human rights statute is comprehensive in its scope—so as to omit one ground of discrimination while covering all others—that the statute is likely to be found to be discriminatory. If, on the contrary, a human rights statute is limited in its focus so as to omit many grounds of discrimination while covering only one, then the statute is unlikely to be found discriminatory. To the extent that human rights legislation is limited rather than comprehensive in scope, then it will not have to mirror the terms of the *Charter*.

While this may be what Cory J. intended to say, it is not only an unsatisfactory analysis of discrimination, but offers small comfort to those who are concerned over the potential implications of constitutional liability for government omissions. As an analysis of discrimination, the position taken by Cory J. is surely implausible. Would it not be both natural and in line with the case law on section 15 to think that a human rights code that prohibited only one ground of discrimination while omitting ten others was more disadvantageous to vulnerable groups in Canadian society and so more discriminatory than a code that prohibited ten grounds of discrimination while omitting one? Would it not be natural to think that the absence of any human rights code would be even more disadvantageous to such groups and so even more discriminatory? Cory J. suggests otherwise. Yet if a government can be held liable under section 32 of the *Charter* for any and all of its omissions, it is difficult to see how and why comprehensive omissions on its part should be regarded as less discriminatory than limited omissions. What could make the omission of one ground of discrimination, rather than several, discriminatory and so contrary to section 15?³⁹ Did Cory J. mean to suggest that the *Individual's Rights Protection Act* would have been less discriminatory if it had omitted more grounds of discrimination, say discrimination on the ba-

³⁹ In fact, the Act omitted more than one ground of discrimination, as I have already indicated.

sis of physical or mental handicap as well as discrimination on the basis of sexual orientation?

Cory J. pointed out, probably correctly, that exclusion from a human rights statute's grounds of discrimination not only denies homosexuals the protection of the law, but may actually send a message to society that discrimination on the basis of sexual orientation is acceptable.⁴⁰ Even assuming that this is true, however, it would be just as true of any failure to mirror the requirements of section 15. It cannot explain why the Alberta government's failure to mirror the *Charter* was discriminatory but a more comprehensive failure to mirror the *Charter* might not have been, as Cory J. suggested.⁴¹

As a reassurance to those who are concerned over the potential implications of constitutional liability for government omissions, Cory J.'s reference to the idea of comprehensiveness offers small comfort. First and most obviously, since the basis for reassurance here is that while all government omissions are constitutionally reviewable not all are discriminatory, the argument implicitly accepts that any failure to mirror the terms of the *Charter* is constitutionally reviewable and simply seeks to contain the implications of that holding by its analysis of discrimination. Even were that analysis of discrimination correct, then, it would do nothing to relieve governments of liability for their failure to fulfil *Charter* values other than equality. Second, since Canadian governments, unlike governments in some other parts of the world, have consistently chosen to address the problem of discrimination through comprehensive human rights statutes, if omissions from comprehensive statutes are likely to be held to be discriminatory, then Canadian human rights statutes will indeed have to mirror the terms of the *Charter*.

Perhaps the best explanation for Cory J.'s reliance upon the idea of comprehensiveness is that it simply followed from his earlier reference to the idea of underinclusiveness. In the course of reaching his decision, Cory J. characterized the *Individual's Rights Protection Act* as "legislation that purports to provide comprehensive protection from discrimination for all individuals in Alberta."⁴² If that was indeed the purpose of the Act (as in fact it clearly was not), then the list of grounds of discrimination that the Alberta legislature chose to achieve that purpose was plainly underinclusive. Yet as was argued above, sensible as the idea of underinclusiveness may be in the context of rationality review, to rely upon it in the setting of an analysis of discrimina-

⁴⁰ *Vriend*, *supra* note 1 at 550.

⁴¹ To fail to prohibit a certain ground of discrimination is not necessarily to approve, let alone to authorize, discrimination on that ground. A legislature may legitimately take the view that it is up to each one of us, in the exercise of our individual moral responsibility, to determine what constitutes discriminatory behaviour on this ground and how best to prevent it. A failure to prohibit a certain ground of discrimination only becomes discriminatory when the circumstances show that the creation of a non-discriminatory environment depends upon government regulation, as in fact was probably the case in Alberta.

⁴² *Vriend*, *supra* note 1 at 548.

tion is to assume the conclusion that it is one's task to demonstrate. To characterize legislation as "comprehensive" is simply another way of characterizing it as "underinclusive", and suggests that despite its protestations to the contrary, the Court feels a continuing attachment to the idea of equality as rationality that it rightly rejected in *Andrews*.

VI. The Impact on Vulnerable Minorities

The gist of what was decided in *Vriend* seems to be this. The Supreme Court has denied that section 15 of the *Charter* imposes a duty upon the governments of Canada to secure equality and end discrimination in their respective jurisdictions, such that any failure to fulfil that duty would constitute a breach of the *Charter*.⁴³ The *Charter* does not make Canadian governments liable for the discriminatory behaviour of private actors. That is a conclusion that one might well have expected, for to have held otherwise would have been to overrule *Dolphin Delivery*, something the Court has shown no inclination to do.

On the other hand, the Supreme Court has insisted that a government's failure to secure equality can indeed give rise to constitutional liability, not because that failure violates a constitutional duty to secure equality among private actors—for the Court has held that no such duty exists—and apparently not because in light of all the circumstances a government's failure to secure equality can sometimes amount to a discriminatory act.⁴⁴ The *Charter* simply makes Canadian governments liable for their failure to prohibit discrimination by private actors on any ground of discrimination prohibited by the *Charter*, unless that failure is so complete that human rights legislation cannot be characterized as comprehensive, in which case it *might* not be discriminatory. That is plainly a conclusion that one could not have expected, for it flies in the face both of what was decided in *Dolphin Delivery* and one's best understanding of what constitutions are and should be about. Expectations aside, it is difficult to distinguish that conclusion from the conclusion that the Court rejects, namely, that the *Charter* does not make Canadian governments liable for the discriminatory behaviour of private actors. One is left at a loss as to how to reconcile the two positions taken by the Court, positions that more or less contradict one another. More generally, one is at a loss to understand what it is that makes a government constitutionally liable for its failure to act in fulfilment of *Charter* values.

Does this matter to anyone but legal scholars? If sexual orientation should clearly have been added to the grounds of discrimination prohibited by the *Individual's Rights Protection Act*, and if the Alberta government was unlikely to do any such thing in the foreseeable future, should the Supreme Court not be applauded for com-

⁴³ Unless, of course, the failure to fulfil the duty could be justified as reasonable within the terms of s. 1.

⁴⁴ See *Vriend*, *supra* note 1 at 533: "[I]t is not necessary to rely on this position in order to find that the *Charter* is applicable."

ing to the aid of Alberta's homosexuals, and indeed to the aid of all those who support the quest for a more inclusive society—a society that genuinely reflects the values set out in the *Charter*? Surely the quality of the reasons that the Court happened to offer for its conclusion was neither here nor there as far as Alberta's gays and lesbians were concerned. That being the case, is it not far-fetched to attribute to those reasons anything like the significance that attaches to the decision that the reasons purport to account for? How much do reasons matter, here or anywhere else?

The answer is that they matter greatly, not because there is some sort of aesthetic objection to untidy reasoning, but because the reasons in *Vriend* are likely to injure the cause not only of homosexuals, but of other disadvantaged groups as well as undermining the status of the Court. Let me try to explain what I mean.

A. Legal Implications

The first, although not necessarily the most important, reason to be concerned about the decision in *Vriend* is the potential scope of the constitutional obligation that it gives rise to. Since the Court offers no basis upon which to distinguish those omissions for which a government can be held liable from those omissions for which it cannot be held liable, there is a real possibility, one that is borne out by the tenor of the judgments in the case, that a government will be held liable for any failure to fulfil *Charter* values. I have already indicated that I agree with counsel for the Alberta government that if the *Charter* compels Canadian governments to compel private actors to abide by *Charter* values in their private conduct, then the anti-discrimination provisions of human rights statutes must necessarily mirror the grounds of discrimination set out in section 15. Indeed, it seems that Cory J. did not seriously question this, for he accepted that it followed from his decision that any failure to mirror the *Charter*'s grounds of discrimination would be vulnerable to constitutional challenge, and merely queried whether the concept of mirroring was not too simplistic, given that the Court would remain free to find that the omission of a ground of discrimination was either not discriminatory under section 15 or justifiable under section 1.⁴⁵ In light of the fact that in *Vriend* the Court treated the bare fact of exclusion as conclusive proof of discriminatory effect and, further, found itself unable to imagine any pressing governmental objective that could justify that exclusion, mirroring seems a fair description of what the Court has required.

The implications of mirroring do not stop there, however. If a failure to prohibit discrimination on certain *grounds* is itself discriminatory and contrary to the *Charter*, then a failure to prohibit discrimination in certain *settings* must also be discriminatory. Canadian human rights laws typically prohibit discrimination in employment, accommodation and the provision of services. By implication, however, they permit discrimination in all other settings. That permission must now be constitutionally vulnerable, as Cory J. appears to have recognized when he asserted that the consequence of

⁴⁵ *Ibid.* at 552-53.

his decision was that the constitutionality of a government's failure to prohibit certain acts of discrimination would have to be assessed "by taking into account the nature of the exclusion, the type of legislation, and the context in which it was enacted."⁴⁶ If that is right, then *Vriend* has given to Canadian courts the task of determining the appropriate anti-discrimination strategies for the various Canadian jurisdictions.

Nor do the implications of mirroring stop even there. While it is perfectly clear that the Court has not made the governments of Canada liable for their failure to fulfil the values set out in the Constitution as a whole, there seems no reason to distinguish the liability that the Court has recognized with respect to section 15 of the *Charter* from liability for a failure to fulfil those values that underlie other sections of the *Charter*, such as its guarantees of freedom of speech, privacy, and other personal liberties. If the *Charter* compels Canadian governments to compel private actors to abide by *Charter* values in their private conduct, then it must compel private actors to abide by all *Charter* values, not just the value of equality. If that is the case, then a government is likely to be found liable for a failure to enact legislation preventing people from limiting one another's liberties.

My concerns at these kinds of outcomes have already been explained in the course of the discussion above on the nature of constitutions, so that there is no need to dwell on them here.⁴⁷ For the reasons given above, such outcomes are damaging to the long-term interests not only of gays and lesbians, but of all disadvantaged Canadians, indeed, Canadians of every kind.

B. Political Implications

Suppose, however, that I am wrong in all that I have said under the previous heading. Assume that I have created a bogey by my description of the possible legal implications of the Supreme Court's decision in *Vriend*. After all, the Court expressly denied that the *Charter* rendered Canadian governments constitutionally liable for all their omissions, even if it failed to offer any basis upon which to distinguish the constitutional liability that it insisted upon from the constitutional liability that it denied. Assume, then, that *Vriend* merely established what no one can dispute that it established, namely, that the governments of Canada will, in certain circumstances, be found to be constitutionally liable for their failure to fulfil *Charter* values, and that the grounds on which they will be found liable, while not specified in *Vriend* itself, will be developed by the Court as and when it is asked to determine the constitutional validity of particular government omissions. There is just as much, perhaps more, reason to be concerned at this possibility.

The Supreme Court has suggested that incomplete human rights legislation—legislation that prohibits some but not all grounds of discrimination—is likely to be found to be discriminatory. It has also suggested that the absence of any human rights

⁴⁶ *Ibid.*

⁴⁷ See Part IV, above, particularly the text following *supra* note 27.

legislation is unlikely to be found to be discriminatory, however baffling that conclusion may seem in light of all else that the Court decided in *Vriend*. In doing so it has made human rights policy an all or nothing matter. From now on a government that is contemplating measures for the protection and benefit of those who have been disadvantaged on the basis of a particular ground of discrimination—such as race or sex—will have to decide whether it is prepared to extend those measures to all grounds of discrimination protected by section 15 of the *Charter*, or whether it would rather do nothing.

This prospect is likely to have two adverse effects on disadvantaged groups. First, the presence of constitutional liability is bound to multiply the resistance that policy makers all too often exhibit toward anti-discrimination initiatives, for it will increase the burden of those initiatives by foreclosing the possibility of their being approached in a piecemeal manner. Policy makers and the governments for whom they act are likely to ask why they should do anything new for women or racial minorities if it means that they will have to do it for every other disadvantaged group. Second, the requirement that all grounds of discrimination be addressed together makes it difficult if not impossible, even for a well-meaning policy maker, to direct or tailor legislation to the distinctive needs of particular groups. Human rights legislation is thus encouraged by the Court to be generic rather than context-sensitive, to treat disadvantage as a shared circumstance rather than as an affliction that takes different forms and requires different remedies for different groups of people.

What is even more damaging to the interests of disadvantaged groups is that *Vriend* pits those groups against one another in a contest for government recognition, so that they become rivals and not, as they should be, allies in the quest for justice at the hands of their privileged counterparts. At trial, in the Alberta Court of Appeal, and in the Supreme Court of Canada, homosexuals in Alberta were said to be distinguished from other disadvantaged groups, and so discriminated against by their inability to gain access to the protection offered by the *Individual's Rights Protection Act*.⁴⁸ In other words, the Act's denial to homosexuals of a benefit that it granted to other disadvantaged groups was said to constitute a discriminatory distinction. The courts' error here is the common one of interpreting section 15 as if it prohibited disadvantage to certain people rather than disadvantage on certain grounds. It overlooks the fact that the impugned distinction was not made on the ground of sexual orientation. Homosexuals are distinguished from heterosexuals by their sexual orientation. They cannot be distinguished from women or racial minorities on that basis, however,

⁴⁸ *Vriend*, *supra* note 1 at 541:

It is clear that the *Individual's Rights Protection Act*, by reason of its underinclusiveness, does create a distinction. The distinction is simultaneously drawn along two different lines. The first is the distinction between homosexuals, on one hand, and other disadvantaged groups which are protected under the Act, on the other. Gays and lesbians do not even have formal equality with reference to other protected groups, since those other groups are explicitly included and they are not.

for women and racial minorities are homosexual as well as heterosexual and in the same proportions as all other Canadians, or at least presumably so.

Even assuming that the error of finding discrimination in the distinctions among disadvantaged groups is unlikely to be repeated in future decisions, it is an inescapable consequence of the decision in *Vriend* that disadvantaged groups in search of protection from their governments are bound to look to and challenge the condition of other, more fully recognized disadvantaged groups, for it is only by doing so that they can acquire constitutional support for their cause. It follows, to pick some likely rivalries, that racial minorities will be prompted to attack the exclusive character of the benefits that women have won for themselves; that gays, lesbians and the handicapped will be prompted to attack the exclusive character of the benefits that have been won by racial minorities as well as women; that all disadvantaged groups will find themselves focusing upon the limited access to justice that has been won by their neighbours in disadvantage rather than upon the injustice of their own position in society and the extent to which that injustice is the product of a prohibited ground of discrimination. Given that the consequence of such rivalries is as likely to be no benefits for any of the disadvantaged as benefits for all, it is possible that their existence may suit the privileged. From the point of view of the disadvantaged, however, they are distracting at best, destructive at worst.

All this follows not from some exaggerated reading of what *Vriend* decided, as might be said of the concerns expressed under the previous heading. Rather, it follows from the bare fact that in rendering Canadian governments liable for their failure to extend the benefit of a particular human rights statute to all those who are discriminated against on a basis prohibited by section 15 of the *Charter*, *Vriend* indisputably encourages governments and citizens to assimilate the condition of each disadvantaged group to the condition of every other disadvantaged group, so as to assume that women, racial and religious minorities, the handicapped, the elderly and homosexuals all suffer similarly, all need similar support, and so should all be responded to together and in like manner.

C. *The Importance of Reasons*

It is customary for courts to offer reasons for judgment and to set out those reasons in sufficient detail, at sufficient length, and with sufficient clarity to account for the decision that they have rendered. It is not always necessary to do this of course. Certain appeals to the Supreme Court of Canada, for example, are dismissed with merely nominal reasons for judgment.⁴⁹ In a case such as *Vriend* however, where what is at stake is the well entrenched prejudice of a majority toward a vulnerable minority, it seems essential to offer clear and coherent reasons for judgment, and conversely, highly damaging to offer incomplete or contradictory reasons. There are two grounds for thinking this.

⁴⁹ See e.g. an appeal as of right such as *R. v. Bekoe*, [1998] 1 S.C.R. 90, online: QL (SCJ).

First, people who are being asked to change their view of the world, people such as those who opposed the prohibition in Alberta of discrimination on the basis of sexual orientation, need to be offered reasons whose force they can acknowledge. If, instead, those people recognize in the language of the Court's judgment the rhetoric of their ideological opponents, they will treat the Court as no more than one of those opponents, and will invoke against it whatever weapons they have in their political arsenal, weapons that are bound to diminish the authority and standing of the Court, including the weapon that the majority has reserved to itself for occasions such as this, the notwithstanding or override clause contained in section 33 of the *Charter*. The Court in *Vriend* expressly recognized that the Alberta legislature was entitled to invoke section 33,⁵⁰ despite the fact that using the override clause in circumstances such as these would nullify the *Charter* when it most mattered.⁵¹

Second (and more important in my view), reasons are the only weapon (short of terrorism, which is likely to be met by counter-terrorism) that a disadvantaged minority such as Alberta's homosexuals can hope to deploy against the majority. It is the claim to justice that reason and reason alone can establish that offers the only real possibility of overcoming the status, power and democratic authority of the majority so as to secure the well-being of the disadvantaged and excluded. Indeed, without good reason on their side, the disadvantaged will remain disadvantaged for the source of their condition is the weakness of their cause in all realms but that of reason. Therefore, they must insist upon reason, even if in the short term it costs them to do so, as might have been the case in *Vriend* had better reasons been insisted upon. The final issue to address, then, is whether good reasons can be found in support of a decision to read a prohibition against discrimination on the basis of sexual orientation into the *Individual's Rights Protection Act*.

VII. Alternative Solutions

As was already indicated, it seems at least possible to see the behaviour of the Alberta government in refusing to include sexual orientation as a ground of discrimination prohibited by the *Individual's Rights Protection Act* not as an omission, but as an act. While I have emphasized that a government cannot be held constitutionally liable for its omissions (a few positive duties aside), in certain marginal cases government behaviour that takes the form of an omission may in fact amount to an act, in this case an act of discrimination on the ground of sexual orientation, and so may be subject to constitutional challenge on the same basis as any other government act.

⁵⁰ See *Vriend*, *supra* note 1 at 565, 578, per Iacobucci J.

⁵¹ I am assuming here that the omission of sexual orientation from the grounds of discrimination set out in the *Individual's Rights Protection Act* could be shown to be discriminatory by developing an argument along the lines that I have tried to sketch under Part VII, below, namely, an argument that would show that in all the circumstances that omission amounted to an act, and more particularly, to an act of discrimination.

In the course of our everyday experience, we commonly recognize that certain failures to act are acts in their own right. If I run into a colleague on the street and fail to offer my hand or say hello I do not simply fail to act, as I would have if I had failed to telephone that colleague. On the contrary, my failure to engage in the socially expected greeting amounts to an act of rudeness, as my failure to telephone would not, unless of course a call had been promised. Similarly, we recognize that a failure to applaud a performance amounts to an act of criticism or censure; that a failure to defer to those in authority amounts to an act of disrespect, perhaps rebellion; that a failure to speak up for a friend amounts to an act of disloyalty. What these examples reveal is that social context affects the application of the distinction between acts and omissions. Context sometimes shows that what is an omission from one perspective is an act from another perspective. The same behaviour can function as both act and omission. This does not mean, of course, that the distinction between act and omission is indeterminate. Rather, it means that the distinction is always applied in some setting, that a given piece of behaviour may operate in several settings at once, and that the same piece of behaviour may therefore be at once an omission and an act.

Would it be accurate, then, to describe the Alberta government's failure to prohibit discrimination on the basis of sexual orientation as an act of discrimination in its own right? It seems to me that it might well be. The omission of a ground of discrimination as notorious as sexual orientation (with all due respect to the reasons of Sopinka J. in *Egan*⁵²), from legislation that has been held by the Supreme Court to possess quasi-constitutional status,⁵³ has powerful symbolic overtones. On the one hand, the implication of those overtones might be that the omission in itself amounted to a discriminatory act, in the same way that a failure to include someone in one's guest list might amount to an act of exclusion if the party was important enough and the person in question was an expected guest there. On the other hand, the implication of those overtones might be that the omission went beyond a legitimate recognition by the government of the existence of a private realm of individual moral responsibility, a realm in which each of us is expected to determine what constitutes discriminatory behaviour and how best to avoid it, so as to amount to an authorization from the Alberta government to the Alberta people to discriminate on the basis of sexual orientation.⁵⁴

⁵² *Supra* note 6 at 576.

⁵³ See e.g. *Canadian National Railway Co. v. Canada (Canadian Human Rights Commission)*, [1987] 1 S.C.R. 1114 at 1136, 40 D.L.R. (4th) 193.

⁵⁴ Notice that these arguments would be no less compelling if the legislation had prohibited only two grounds of discrimination rather than nine. They might even hold in the absence of any legislation. The reason is that the comprehensiveness of a law does not, in and of itself, make omissions from that law acts. Notice too that the deliberateness of an omission is not enough to make that omission an act. One must assume that in enacting legislation in a particular form, a responsible legislature has considered and rejected the various alternatives to that form, alternatives that are normally set out in cabinet submissions and/or are raised by the opposition in debate. It follows that every omission

I am not claiming that an argument along these lines would or should necessarily succeed. It may be that the best description of the Alberta government's behaviour is that it simply failed to act in circumstances where it was morally but not legally bound to act. If that is true, then the responsibility for that failure must lie with the Alberta government, and more to the point, the enforcement of that responsibility must be a matter for the people of Alberta, not the courts. As was argued above, if the courts possessed or were to be granted the power to right every wrong committed by government—even in the realm of *Charter* rights and equality—then government would to that extent be deprived of moral responsibility for its conduct, and democracy would be deprived of moral significance. As I have tried to make clear, such a consequence would be very much to the disadvantage of the disadvantaged. Making the private public by deciding, for example, that the elimination of discrimination requires a direct legal prohibition rather than a gradual, consensual evolution of social attitudes, is what government is very largely about. The burden of government does not and should not belong to the courts alone, but to the people of Canada and their representatives in Parliament and in the legislatures. Where a legislature does wrong there must indeed be a remedy, but not necessarily a *Charter* remedy.

from legislation is deliberate, so that to render Parliament and the legislatures liable for all their deliberate omissions would be to render them liable for all their omissions.