

### The War of Freedom of Expression

"Taking on anti-Semites and Holocaust deniers in the sanctified courtroom environment is like responding to someone who calls your mother a prostitute. By defending you raise the question that maybe she really was"

Anonymous source drawn  
from Weiman and Win, 1986.

The right to freedom of expression can be described as a war. It is a war that has lasted for centuries and may last for centuries more. It is a war between freedom of expression and social intolerance. In this war there are many battles. The battle on which this brief essay centers itself is the battle between freedom of speech and laws limiting that freedom; more specifically the ability to spread hate propaganda and the "hate laws". Included in the essay is a brief outline of one skirmish that has taken place (Keegstra ). Those who fight on the side supporting freedom of speech do so for several reasons. Braun declares that it is a basic democratic right to voice your own opinion . Douglas Christie has gained notoriety for his vigorous representation of high-profile, controversial clients, charged under the hate laws. He advocates freedom of speech for two main reasons: a) he finds it abhorrent that the state can legislate thoughts and words, and b) he often agrees with the views held by his clients. Others such as Noam Chomsky, a brilliant intellectual, argue not for the views expressed, but the ability to express them. Lining up on the other side of the battle you have: Derek Raymaker, David Kilgour, Victor Ramraj, and Bruce Elman. They argue that there is definitely a moral place for laws regarding hate speech, whether they are criminal or not. There was recently a new development in the Canadian war for freedom of expression. Introduced in April 1982 was a new and important strategic battleground.

With the Charter of Rights and Freedoms the war could be won or lost by either side. It was not long before the Charter saw battle.

In 1984, Jim Keegstra was charged with violating section 281 of the Criminal Code of Canada (now covered under section 318-320). Keegstra was a respected school teacher and mayor of the small town of Eckville, Alberta. This was no borderline fanatic; this was an elected official charged with promoting hate. However by the time Keegstra's trial rolled around he was no longer the mayor Eckville and his teaching license, revoked. The problem was, the very nature of s. 281 lent itself to legal debate under section 2 of the relatively new Charter of Rights and Freedoms. The defense counsel Doug Christie lost no time in challenging the legislation's constitutionality. In response, Crown prosecutor, Bruce Fraser, stated that Keegstra was being charged with promoting hatred; not expressing it. The Crown also stated that freedom of speech is not an absolute right . On November 5, 1984, Mr. Justice Quigley of the Alberta Queen's Bench wrote an eighty page decision upholding the constitutionality of section 281. In his decision he stated "It is my opinion that s. 281.2(2) cannot be rationally considered to be an infringement which limits 'freedom of expression' but on the contrary it is a safeguard which promotes it."

When the issue finally rose to the Supreme Court of Canada, the advocates of hate laws had won a very shallow victory. The split of the court was 4-3, leaving uncertainty as to who had actually won.

It is too subjective to view the problem of freedom of expression as "good" versus "evil". The debate raises the main issue of whether or not the people of Canada want the government to be passing any laws limiting our rights to think and speak. While it is nearly unanimous that violently acting on these views is illegal; the debate on laws against speech of any sort draws not only racists, but simple liberals who believe in the freedom of speech.

Braun outlines the argument against any criminal limitations on freedom of speech. First, he states that one of the basic premises of democracy is that: "A self-governing people that have the right and ability to decide for themselves whom to believe must surely have the right and ability to decide what to act on."

Another point made by Braun, in the same article, is that the right to legislate against words, even narrowly defined such as words of 'incitement' "tends to erode the political process of talking and genuine debate." Other such arguments rise up against the legitimacy of such hate laws.

Douglas Christie, in Zundel, declared that the right to a minority opinion was at stake. In his address to the jury he asked "What are we lobotomized idiots, that we can only accept the viewpoint of the majority? ... Do we never entrench the right to differ?" Christie also compared Zundel to Galileo, who dared to pronounce that the world was round. He also stated:

"For the sake of freedom, I ask you never to forget what is at stake here. That accused stands in the place of anyone who desire to speak their mind. Even if you don't agree with him, you must take it as a sacred responsibility not to allow the suppression of someone else's honest opinion."

Chomsky takes much the same road. Respected the world over is not necessarily Chomsky's views, but his ability to express them and his understanding of the problems society faces. In a 1988 interview Chomsky stated "...I wouldn't like the government to have the power to decide what you can hear." With respect to a French school teacher being tried for falsification of history he said,

".... Now that means that the state has the right to decide what is historical truth, and if it decides "this is historical truth" and you say something else, you're a criminal. In my view, that's a fantastic scandal, I don't care whether what the guy said is true, false, indifferent; I don't even give a damn what he said. The idea of giving the state the right to decide what's true, that's just straight, flat-out fascism."

Those who advocate the passing of "hate laws" such as sections 318 through 320 of the Criminal Code, also seem to be arguing from a largely moralistic standpoint. They also state that it is extremely difficult for the Crown to convict under the laws. Admittedly, yes it is, and that is the way it should be. Four proponents of these laws are Derek Raymaker, David Kilgour, Victor Ramraj and Bruce Elman. They all put forth different argument, each contention with its own merits.

Raymaker and Kilgour have stated that it is important to recognize that rights are never absolute. They also state that "Rights are given strength through the law, and therefore can be regulated through the law in reasonable circumstances as prescribed in s.1 of the Charter." This is a difficult stance to take in a democratic and supposedly "free" society. Are rights given by the state, or are they fundamental rights that the state must simply uphold? This is where the real difficulty lies. People in western democracies recognize ability to speak freely as an inherent right, and not as one generously given to us by our elected officials. In defense of the Kilgour and Raymaker argument, they also state that "...freedom of expression cannot simply exist without a system of redress for those groups who feel besieged by the hater's message." This is important. However, it should not be handled by criminal law. This issue could be addressed in civil law and human rights legislation without imposing criminal sanctions on the "hatemongers".

Victor Ramraj refers to both Ronald Dworkin and Lord Devlon in his paper . Ramraj's argument can be broken down into two main components; first he argues that the "concept" put forth by the Charter as a whole was to promote equality and the rights of minority and besieged groups. This is where positive and negative liberties enter the picture. The rights of minorities not to be condemned to listen to harmful messages and literature is a positive liberty, while the ability for someone to orate or write these views is a negative liberty. This is a reasonable argument, but is as limited as Kilgour's and Raymaker's. Although people may recognize the plight of minorities, that does not mean that we must condemn those responsible for spreading these views to criminal action. Ramraj's second main argument is that there is very definitely a place for morals in the law. This view is very clearly expressed in Lord Devlon's "Morality and the Criminal Law" . This argument is difficult to refute, after all this is itself a moral issue.

Finally, Bruce Elman represents the hard-line approach to the issue of limiting free speech. In his 1994 paper, he wrote, "Finally, there is important symbolic value in having a law prohibiting the dissemination of hate propaganda. Our society must make a clear statement as to the values which we deem of central importance.... we must be prepared to support these values with criminal sanctions if necessary." He also states in the same essay that imposing criminal sanction is less desirable than supporting these core values through human rights legislation or civil law.

There are multitudes of other arguments for either side of the war; those described in this essay seem to capture more of society than do others. As stated in the introduction, the war between freedom of expression and social intolerance may last for centuries. While the views discussed in this essay are not diametrically opposed, they are no where close to reaching a consensus. Those who advocate "hate laws" seem to be willing to negotiate; most agree that there is no need for criminal sanctions. Those that stand against any regulation of freedom of expression are steadfastly opposed to any sanctions, criminal or otherwise.

Before I was assigned this paper, I had never given much thought to this subject. Choosing on which side to fall, is not an easy decision to make. I have extremely high morals and principles. I detest racism in all its forms, and see it as one of the three corroding elements plaguing our society (the other two are drugs, and the subjectification of women). While I wish that racists could be shot into outer space, I have to side with Chomsky on this debate. I agree that there is little place for government intervention in freedom of speech. This is not an all encompassing view, of course; threats should be excluded, as well as words inciting harm. I would be willing to concede to civil law on the subject; so long as it was very carefully tailored.

My own feelings on the matter were best described by Justice McLachlin in her dissent in Keegstra:

"The vile of hate propaganda is beyond doubt... The danger here is not so much that the legislation will deter those bent on promoting hatred... The danger is rather that the legislation may have a chilling effect on legitimate activities important to our society by subjecting innocent persons to constraints born out of fear for the criminal process."

The split in that court decision has played an important factor in the continuation of the debate. Any given composition of the court may turn out a different decision. It will be interesting to see if the Supreme Court hears the issue again sometime in the near future. In my view, deciding the issue of freedom of speech does not necessarily matter, so long as we are debating it. If we are debating it that means that society recognizes the potential problems. As long as society recognizes the potential problems we will never be subject to the same conditions that led to the holocaust in World War Two Germany.

