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Remarks

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- not exactly as delivered -

1. Introduction

First, I want to congratulate B'nai Brith on its extraordinary efforts in organizing this conference. I would like to thank them and the conference chair, Professor Michael Geist, for giving Blakes and the Centre for Innovation Law and Policy the opportunity to co-sponsor this event, and for allowing me this rather humbling position among so many expert and dedicated speakers.

It has been suggested that, as of April 2005, the number of websites promoting violence against specific groups has gone from a single one in 1995, to 5,000.

It is common ground, I know, to my audience that in Canada that we have a variety of legal tools with which to mute speech of hatred, genocide and incitement to violence. Section 319 (2) of the *Criminal Code* provides:

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

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

an offence punishable on summary conviction.

Defences are set out in Section 319(3). Amongst them is truth, which is an absolute defence.

There are similar provisions in Section 13 of the *Human Rights Act*. Other speakers have discussed the procedural distinctions and advantages of these provisions, and I won't.

It is often asserted that these powers of the state impinge, justifiably or not, on the right to freedom of speech protected under the *Charter*. In this context of the reasonable fears for an important *Charter* right and the equally reasonable apprehension of the harms of hate speech, I would like to address three questions:

- i) How should we best understand the co-existence of Section 319(2), in particular, and the guarantee of freedom of speech under Section 2(b) of the *Charter of Rights and Freedoms*?

- ii) How valuable is it to keep our parochial, Canadian house clean while from outside our borders the Internet teems with hatred?
- iii) Why do we need 319(2) given the efficacy of the *Human Rights Act*?

In addressing these questions I find, as one does in law, much inspiration in precedential texts, and in particular the judgement of Mr. Justice Dickson in the *Keegstra* case.

2. Charter

Justice Dickson said "...One must be careful not to accept blindly that the suppression of expression must always and unremittingly detract from values central to freedom of expression." This insight buttresses the court's sustaining of section 319(2) in *Keegstra*.

While *Keegstra* makes it the law that that any restriction of speech amounts to an infringement of Section 2(b), requiring a justification under section 1, the argument seems to be compelling that restrictions on hate speech, rather than infringing speech, actually facilitates it by protecting voices and participants and by decontaminating social discourse with blatant and harmful untruth.

One of the speakers at yesterday's plenary session referred to the "fundamental role of propaganda in the Holocaust". The Protocols of the Elders of Zion, blood libels, the ravings of David Ihenakew – these are still published. They prove that to take any comfort in the efficacy of the free exchange of ideas to efficiently root out violent falsehood is disingenuous. If I recall correctly from my Jewish history studies, arguably the first record of anti-Semitic speech occurred in the first century C.E. My memory might err, but it is not necessary that the date be precise; it is enough to say that a truly self-regulating market should have been able to correct itself over a period of roughly 2000 years.

In modern times, the recently arrested Toronto plotters appear to have been influenced by hate sites on the Internet. Hate speech's real harms are why our society confirmed the jurisdiction of the Canadian Human Rights Tribunal over the Internet, and conferred of the powers to require Internet service providers to take down hate sites, in the *Anti-Terrorism Act*. There were objections that it was inappropriate to link hate to terrorism, at the time that the *Anti-Terrorism Act* was introduced. Indeed, there were many fair criticisms of that Act when it was introduced; however, amongst those fair criticisms is not the linking of hate speech to terrorism. Hate speech causes real harm. The propagation of its message of the unworthiness, of the dehumanization, of the victim is a prerequisite to terrorist violence. We must not lose sight of the importance of the war on hate speech to the war on terror. I say this not because the war on terror justifies infringing freedoms which should otherwise have been considered sacrosanct. If anything, the opposite is true. It is the continued spread of falsehoods and hate speech, which have always justified the provisions of the *Criminal Code* and the *Human Rights Act*, which greatly exacerbate terrorism, and conflict. As Justice Dickson so well put it in *Keegstra*:

“Indeed, expression can be used to the detriment of our search for truth; the state should not be the sole arbiter of truth, but neither should we overplay the view that rationality will overcome all falsehoods in the unregulated marketplace of ideas. There is very little chance that statements intended to promote hatred against an identifiable group are true, or that their vision of society will lead to a better world. To portray such statements as crucial to truth and the betterment of the political and social milieu is therefore misguided.”

To assert the unrestricted liberty of speech has no more inherent logic than to assert the unrestricted liberty of action. The harms caused by restricted action are evident in crimes against the person and property. The harm to the person is grave, so even the most enthusiastic libertarian acknowledges that constraints are required. The harms of hate speech are no less grave and no less demonstrable and, therefore, no less needing correction. Hate speech denies its targets their proper status as speakers; they are degraded and dehumanized. In other words, it is speech purposely designed to effectively rob others of their equal right to speech. Slanders on the group are meant to make the utterances of its individual members suspect. No one whose very actions are intended to so diminish the individuality of others can herself claim protection for the speech that causes it; it is a claim for privilege, for inequality. The irony that this claim to privileged speech coincides with a concurrent claim of racial superiority is undoubtedly clearer to you in the audience, than to those who make it.

In this regard, Justice Dickson further said:

“The extent to which the unhindered promotion of this message furthers free expression values must therefore be tempered insofar as it advocates with inordinate vitriol an intolerance and prejudice which view as execrable the process of individual self-development and human flourishing among all members of society.”

And as Minister of Justice Irwin Cotler further commented:

“Indeed, it is this teaching of contempt, this demonizing of the other, this standing assault on human security, this is where it all begins. This assaultive speech isolates and ostracizes minorities who are then left vulnerable to hate-motivated attacks.”

Thus, the sections of the *Criminal Code* and the *Human Rights Act* are not limitations on Freedom. They represent a refined understanding of what freedom is and its inherent responsibilities. It is true as Madame Justice MacLaughlin averred, in the *Keegstra* decision, that there are matters of opinion that are not justifiable. However, there is a large class of known falsehoods that are spoken with evil intent and which are easily identified and condemned. No rule of law is vitiated because of difficulties discriminating amongst examples of behaviour at the margins of its application. The

loud proclamation of “fire” in a crowded theatre may be punished. Where its crier erred for a waft of external smoke, not; and so, in even the most obvious cases, an enquiry into the state of mind of the speaker needs to be made.

The “marketplace of ideas” is a wonderfully optimistic notion, but an analogy of only limited value. Educated people share precepts of knowledge that allow their perceptions of evolving truths a degree of objectivity. Hate propaganda is its antithesis; a sphere of speech in which norms of understanding between speaker and audience are lacking – or, deliberately, viciously, abused. We should not hesitate to keep ideas of entirely unmerchanted quality out of public discourse; we might think of it as reasonable consumer protection.

Failure to require evidence of actual hatred for a conviction was cited by the minority judgement in *Keegstra* as a further flaw of Section 319(2). But justice should prevent harm, not require it; this is a spurious argument.

I turn now to the question of the Internet and its efforts on our abilities to police speech.

Ultimately, the Internet, by allowing the freer flow of information and the evasion of censorship by tyrannical regimes, is more a force for good than bad. The marketplace of ideas plays its role as its trade results in the increasing sway of reason over the world. Part of that assertion of reason is the control of injurious falsehood in it, not the unreasoned and unreasonable blind faith in its benign, and invisible, hand. Volunteers and Internet activists champion and pursue norms of scholarship as well as pandering to baser instincts. And I believe that the Canadian lesson will stand for something on the Internet. I believe that to apply the powers granted by the *Criminal Code* and the *Human Rights Act* will both help to clean up our little corner of the Internet, and to stand as a shining example of behaviour of nations that value the rights of their citizens. We must increase our efforts, and not give in to a sense of defeat. As with all rules, particularly those that balance freedoms, we must continue to apply them with firmness, consistency, and wisdom, if the norms of behaviour we want to encourage are to be reinforced in society.

It was suggested in the dissent in *Keegstra* that to prosecute hate speech risks giving it legitimacy and exposure. But in the modern age, can the exposure of speech on the Internet be increased? We should not neglect the power of expressing society’s condemnation and disgust with such behaviour by criminal prosecution. Indeed, murders inspire copycat crimes, but we would consider it ludicrous to proceed from there to an argument to decriminalize murder. We cannot expunge hate from the world but we can contribute to that end by condemnation and criminalization.

Canada has asserted jurisdiction over Internet and other activities where there is a real and substantial connection to Canada. While the application of this test can lead to the assertion of national jurisdiction over content on foreign Internet servers, the enforcement is difficult, except to the extent that effective filters are put in place to limit Canadian access.

Certainly the Internet makes for great difficulty of enforcement. Law in this age of the Internet is a conundrum. Law is national and limited by borders, and the Internet is not. Seeds of hatred planted on servers in Iran, Syria and the United States yield their rank fruit around the world. To say so is trite and true in all of its many variations of networked speech, including copyright infringement, libel, stock market manipulation and other forms of postings. Indeed, the Internet, by spreading speech so much more effectively, amplifies its message. Readers often lack scepticism and an understanding of the benchmarks for truth, which ignorance greatly enhances the effect of hate speech. It is speech that feeds on and encourages error and ignorance. It also greatly enhances the importance of hate speech regulation just as it does the importance of intellectual property laws. The Internet makes law enforcement harder. That is a shame, but the answer is not to accept defeat but rather the proportional expansion of our efforts and availment of our opportunities to speak truth.

Dickson C.J. addressed the specific issue for having both the *Criminal Code* and *Human Rights Act* provisions in *Keegstra* and provided the following justification:

"Though the fostering of tolerant attitudes among Canadians will be best achieved through a combination of diverse measures, the harm done through hate propaganda may require that especially stringent responses be taken to suppress and prohibit a modicum of expressive activity. At the moment, for example, the state has the option of responding to hate propaganda by acting under either the *Criminal Code* or human rights provisions. In my view, having both avenues of redress at the state's disposal is justified in a free and democratic society. I see no reason to assume that the state will always utilize the most severe tool at hand, namely, the criminal law, to prevent the dissemination of hate propaganda. Where use of the sanction provided by s. 319(2) is imprudent, employing human rights legislation may be the more attractive route to take, but there may equally be circumstances in which the more confrontational response of criminal prosecution is best suited to punish a recalcitrant hate-monger. To send out a strong message of condemnation, both reinforcing the values underlying s. 319(2) and deterring the few individuals who would harm target group members and the larger community by intentionally communicating hate propaganda, will occasionally require use of the criminal law."

Perhaps, then, this is the reason why we need both the power in Section 319 and the powers of the *Human Rights Act*. We need to stain such behaviour with the ignominy of criminalization. We need the powers of punishment and imprisonment that criminalization brings. And we need it as a badge of the seriousness with which we view the harm occasioned by hate speech.