WHEN RIGHTS COLLIDE

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Since I am the lead-off speaker for this conference, I should take particular note of the title: "When Rights Collide". In case you did not know, I wrote a book a few years ago entitled "When Freedoms Collide".[1] It began to occur to me that I was selected as the keynote speaker here in order to offset any chance that I would sue over this bald plagiarism. Your program planners astutely understood the extent of my vanity. In short, flattery will get you *everywhere*.

In view of the circumstances leading up to this conference, I suppose it is no secret that the key colliding rights at issue here are freedom of speech and equality. And I suppose it is also no secret that virtually everyone here claims to be a believer in *both* of these rights. Since neither is absolute but both are fundamental, the question is how far each of these rights should prevail over the other in what situations.

To put this issue in historical perspective, let me read to you from the minutes of a Queen's University senate meeting for 29 October 1943. What I am about to read comes under the heading "Statistics on Jewish Registration":

> At McGill University ... Jewish students ... are admitted only on an academic standing of 75 percent or over; other students are admitted on standing of 60 percent or over. This regulation is publicly known, and seems to operate without any friction.

In such a short period, a mere interlude in history – fifty years – the changes are nothing short of monumental. In the 1930s, a boatload of Jews, fleeing the horrors of Nazism, was unceremoniously turned back at the Canadian border without any political repercussions. In the 1970s, boatloads of Vietnamese, fleeing the horrors of Communism, were not only allowed to come here, but in many cases also subsidized to do so. In the 1940s, job discrimination based on race, creed, and gender was not only legally permissible, but was also morally acceptable. In the 1990s, such discrimination has become unlawful and is considered immoral.

Does this mean we are living in an inter-group Utopia? Far from it. Indeed, my organization, the Canadian Civil Liberties Association, continues to document situations of unacceptable discrimination in today's society. It is important, however, to acknowledge the magnitude of the changes that have occurred.

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[1] A.A. Borovoy, *When Freedoms Collide* (Toronto: Lester & Orpen Dennys, 1988).

Yesterday's discrimination was practised shamelessly with public approval; today's discrimination is practised surreptitiously over public objection.

Thus, what must be addressed is not whether the changes are significant – that part is obvious. The key question is: how did it all happen?

In my view, one of the most critical factors was freedom of speech. In the universities, scholars used their academic freedom and tenure to conduct research, write books, and teach classes that challenged the then widespread beliefs in racial superiority. In the community, aggrieved people and their allies used their freedom of speech to raise non-violent hell about the practice of discrimination: they organized test cases, picket lines, demonstrations, and delegations to governments.

To be sure, free speech is not an absolute. But it is nevertheless the lifeblood of the democratic system in general and the universities in particular. It is the road to improvement: in the community, it enables non-violent pressure for change; in the universities, it facilitates the search for truth. In this sense, freedom of speech is a strategic freedom – a freedom on which other freedoms depend. Democrats believe that injustice and error are less likely to occur or endure in an atmosphere of free public debate. As a wise old trade unionist once observed, freedom of speech is the "grievance procedure" of a democratic society.

For all of these reasons, I have become increasingly disquieted by the extent to which freedom of speech has lost its prestige, particularly among so many of its beneficiaries – ethnic minorities, women, university students, and equality-seekers in general. Of course, these constituencies like so many others are divided on such questions. What is troubling, however, is the growing number who are campaigning actively for additional and wider restrictions against speech.

In more and more Canadian universities, for example, there are speech codes or anti-harassment policies that purport to regulate permissible speech in campus settings: classrooms, newspapers, debates, and the like. Since I have already acknowledged that free speech cannot be treated as an absolute, this means there could be *some* circumstances in which it is properly restricted. In this connection, I should note that there are certain anti-harassment restrictions to which I think no reasonable person can validly object. To the extent that a policy says, for example, that positions of power cannot be used to obtain sexual favours, there is no serious quarrel.

The existing and proposed anti-harassment policies, however, extend much further. They encompass speech that is seen as unacceptably racist, sexist, or homophobic. Thus the question here is how far should speech be infringed in order to accommodate the components of equality – feelings of safety, dignity, and

comfort for those who have been long-term victims of discrimination. In the context of a keynote address, it is not possible for me even to address, much less to resolve, the panoply of potential conflicts in this area. But I can hope to identify some of the recurring fallacies that plague the ongoing debates.

Fallacy #1

You can restrict the free speech of your enemies without significantly risking the free speech of your friends.

In the absence of a law that prohibits offensive remarks about women, Blacks, or Aboriginal peoples as such, a law of this kind will inevitably be used against those it was designed to protect. Somewhere around 1970, for example, Canada prohibited the wilful promotion of "hatred" based on race, religion, and ethnicity.[2] I cite this law because it is considerably narrower than any of the university anti-harassment policies.

"Hatred", nevertheless, is a vague word. We know that freedom of speech is often most important when it expresses strong disapproval. But the problem is: where does strong disapproval end and "hatred" begin? The line is murky at best.

The actual experience bolsters the concern. The anti-hate law was inspired principally by a resurgence of anti-Semitic and anti-Black propaganda. While this law has been used against a couple of *genuine* hate mongers, it has also targeted anti-American demonstrators, French-Canadian nationalists, a film in support of South Africa's Nelson Mandela, a pro-Zionist book, a Jewish community leader, and Salman Rushdie's *Satanic Verses*. Even if these cases did not result in enduring criminal convictions or property seizures, equality-seekers have no basis for consolation. Those constituencies whose interests equality-seekers wish to champion have been unwarrantedly harassed by the very law that was designed to protect them.

In the case of the anti-American protesters, their right to conduct a legitimate demonstration was suppressed and they spent a couple of days in jail before the charges against them were withdrawn. In the case of the French-Canadian nationalists, they were charged and convicted at trial. It was not until they appealed that their convictions were upset. Anyone who has suffered the ordeal of a criminal trial will be able to assure you that, regardless of the outcome, a prosecution is no picnic. In the case of the Mandela film, it was detained at the border for at least a month. I do not know what inconvenience and disadvantage this caused to the anti-apartheid activists who were trying to bring the film into the

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[2]*Criminal Code*, R.S.C. 1985, c. C-46, s.319 [previously R.S.C. 1970, c. C-34, s.281.2 (en. 1st Supp., c.11, s.1)].

country. But it does not take a lot of imagination to conceive of how such a delay might have hurt their cause.

In some of the other cases, the process did not get beyond the initial investigation. But an investigation itself can be an intimidating experience. Freedom of speech cannot viably work if you have to look over your shoulder, worried about a criminal charge or a property seizure.

The situation is similar in the case of pornography. Just after the obscenity section of the *Criminal Code*[3] was upheld as constitutional by the Supreme Court of Canada[4], a lesbian publication became the target of a criminal prosecution. This led some lesbian groups to complain bitterly to LEAF, the mainstream feminist group whose arguments proved so persuasive to the Supreme Court of Canada. But why should anybody be surprised that, when you enact vague laws muzzling speech, the most vulnerable people are likely to suffer from it?

Fallacy #2

There can be no meaningful free speech without equality.

One of the current arguments for restrictions on campus speech claims that, where there are unequal relations, free speech serves the interests of the more powerful against the less powerful. Even if this were the case, what should be done about it? In short, how is greater equality to be secured in an atmosphere where free speech is being increasingly restricted?

As noted above, such restrictions are very likely, at some point, to nail the very groups they were designed to protect. This means that the road to equality will have to rely increasingly on what the existing power structure is prepared to deliver. If equality-seekers do not have faith in the power structure when there is a more vigorous free speech, why should they have faith in it when there is a *less* vigorous free speech?

Such faith is akin to a belief in the tooth fairy.

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[3]R.S.C. 1985, c. C-46.

[4]*R.* v. *Butler*, [1992] 1 S.C.R. 452.

Fallacy #3

The university should be philosophically no less committed to equality[5] than it is to free speech.

If the philosophy of equality is to be accepted as an institutional truth for the university, on what basis should this happen? Is it because a belief in equality accords with rational analysis? Many believers in equality – myself included – indeed believe that the weight of rational argument supports equality. Suppose, however, someone comes along with an argument that challenges this hypothesis? Do we dismiss the analysis without subjecting it to the process of intelligent inquiry? If we are so dismissive, we will no longer be able to claim that our support for equality is rationally based. If, however, we subject the argument to analysis, we will no longer be treating equality as an institutional truth.

If we do not use rational analysis, on what basis then would the university render equality intellectually unchallengeable? Religion? Ideology? Dogma? How could the university promote the methods of inquiry as the basis for discovering truth and simultaneously exempt certain positions from those methods? If equality is eligible for such exceptional treatment, why not other values and ideologies?

As soon as raw dogma can become the basis for exalting any principles or values, then raw power will become the chief factor in determining the scope of academic freedom. Even if equality-seekers can write a lot of the rules today, they cannot count on being able to do so in perpetuity. To whatever extent they succeed in politicizing the university, they are paving the way for their adversaries to do likewise when *they* have the power to do so. Equality-seekers have a better chance – for today *and* tomorrow – if the university is as neutral as humanly possible with respect to those philosophies and ideologies that appeal to human loyalty. The chief commitment of the university itself should be to the *process* through which the members of the campus community ultimately reach their *own* conclusions about the ideologies they will support.

This does not mean, of course, that such a process cannot question the legitimacy of the process itself. Indeed, the very nature of free inquiry is that nothing is intellectually untouchable – including free inquiry.

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[5]This does not address the university's current (and, I might add, proper) duty to be fair and equal in its treatment of campus members. The issue here is whether such duties – and the philosophy of equality in general – are intellectually challengeable in campus debates and discussions.

Fallacy #4

Much depends upon whether you support individual or group rights.

Almost invariably, a claim labelled "individual" can as easily be described as "group" without any logical difficulty. Consider, for example, the rape-shield law which prohibited the admission of virtually any part of a woman's sexual history during a trial in which she claimed to have been sexually assaulted. So often, this conflict has been described as one between an individual accused and women as a group. But why could the conflict not be as easily described as involving individual women and accused men as a group?

In any event, what difference does it make? There are no absolutes to resolve such conflicts. Inevitably, claims have to be balanced against each other to determine their relative impact on the shared interests and values of the affected parties and those of the total society. The labels "individual" and "group" contribute nothing to the resolution of the conflict.

Fallacy #5

The propensity to over-prohibit.

Not infrequently, we Canadians may start out with a legitimate case for some kind of restriction on speech but then we wind up prohibiting almost everything remotely related to it. There was some basis, for example, for the law to prohibit the disclosure of certain government secrets. We live in a dangerous world and the revelation of some material could conceivably damage our country's vital interests. But that was an argument for a narrow restriction on the leaking of certain defence and national security information. It was not a case for the overboard prohibition in the *Official Secrets Act*[6] that would make it an offence to disclose virtually any information acquired in the government service.

Another example of this phenomenon occurred in connection with our laws regarding prostitution. As a result of a Supreme Court of Canada decision in the late 1970s,[7] we in Canada learned that our prostitution laws did not quite accomplish what was intended. In the result, the prostitutes and the johns returned en masse to many of the street corners in this country. People understandably complained. Families were unable to walk down certain streets

[6] R.S.C. 1985, c. O-5.

[7] *R.* v. *Hutt*, [1978] 2 S.C.R. 476.

without being harassed by would-be participants in the sex trade. Property values, of course, were also affected. It was legitimate that something should be done.

But what did our parliamentarians do? They made it an offence for any person to communicate in any way with any other person in any public place – not just street corners – for the purpose of engaging in prostitution or obtaining the sexual services of a prostitute. Suppose a guest in a hotel lobby ever so discreetly approached a bellhop and asked where a prostitute might be found? Or, suppose the same question were asked of a cab driver by a passenger, or a customer in a drugstore (you know what wonderful resources pharmacists can be)? Or suppose a couple of friends were walking quietly down the street discussing the subject, or sitting on a park bench talking about it? A crime? When I suggested this in a television exchange I had with an upper echelon police official a number of years ago, he pooh-poohed what I said. He assured me that the police had no interest in enforcing the law as broadly as that. I told him that I did not dispute what he said, but if that is the case, why do the police *need* a law as broad as that?

Indeed, how are you supposed to legislate in a democracy? I would have thought that the idea is to limit as much as possible any restrictions on our fundamental freedoms. We should exact a heavy onus from those who seek to restrict such freedoms. We should require that they demonstrate the priority of the ends to be served and the necessity of the means to be used. Even at that, any such measures we enact should be accompanied by effective safeguards to minimize the risks of abuse. I fear that in Canada the law-makers frequently adopt a completely different tack. They create wide powers capable of restricting our freedoms and then they simply trust that such powers will not be abused.

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In many ways, the speech codes or anti-harassment policies adopted at Canadian universities reflect one, or a combination, of the above fallacies. I suppose the first question that should be asked is exactly what these policies are designed to accomplish. As indicated, there is little objection to curbing speech which would exploit a position of power to obtain sexual favours. But most such policies in this country are much wider. When asked for the rationale, supporters invariably trot out some story of a professor telling hurtful, off-colour jokes about women or homosexuals. While it would be hard to criticize a measure that focused on such gratuitous abuses of student dignity, the greatest number of anti-harassment policies at Canadian universities are wider even than this. And there is some indication that such breadth may well be intentional.

Consider, for example, the policy at the University of New Brunswick. It appears to be modelled on a proposal that originated with the Canadian Association of University Teachers. The policy bans, among other things, "conduct of a sexual nature" that includes "verbal abuse of a sexual nature when

it creates an intimidating, hostile, or offensive environment." What in the world does all this mean? The language contained in most university anti-harassment policies is quite similar. Perhaps it would be helpful to examine how this language has actually been interpreted. The following represents a short litany of a few of the incidents that have occurred on Canadian campuses in response to the language in their policies.

My first example occurred in the late 1980s at York University in Toronto. In an attempt to sensitize his students to feminist legal theory, a young male law teacher gave them a hypothetical anti-pornography law to analyze. He divided his class randomly into two and told half the class to write a legal factum arguing that this law was unconstitutional; the other half of the class was to write a legal factum supporting the opposite conclusion. Some of the women in his class complained to the sexual harassment office and, shortly thereafter, this young law teacher found himself in a meeting with two of the office's counsellors. Although the counsellors advised him that he was not then the target of a sexual harassment complaint, they warned him that some of his female students were suffering identity crises from this assignment, and that if such a situation were to recur, he could very well become the target of a formal complaint.

What is a legal education supposed to be about if not how to argue all sides of a question? Here we have a law teacher employing a rather high-minded approach and he is effectively warned never to do it again. In any event, what he did – like it or not – is not analogous to telling hurtful, off-colour jokes at anyone's expense.

My second example comes from Ryerson Poytechnical University in Toronto which had an anti-harassment policy that, among other things, purported to prohibit unwelcome speech addressed not only to gender but also to race and sexual orientation. At Ryerson in late 1990, the gay and lesbian club was planning to have a "campus awareness" day. In an attempt to obtain and publish opinions from various students, the campus newspaper approached a couple of engineering students who used words such as "immoral, unacceptable, abnormal, and nonsense" to describe the planned campus awareness day. While I have no difficulty categorizing these comments as unimpressive, to say the least, I must note that they do not qualify as among the worst homophobic invective I have ever heard. In any event, an anti-harassment complaint was filed against the engineering students in December of 1990.

It was not until February 1991 that the complaints were dismissed. But the dismissal was on the very narrow grounds that the remarks of the engineering students were not "unsolicited" as required by the University's anti-harassment policy. The newspaper had approached the students; they had not initiated the issue. I was on the Ryerson campus a few months later at an open forum where I asked what difference, if any, it should have made if those students had indeed

initiated the issue either with a letter, an article, or a comment at a meeting. Would anyone say that such comments should not be allowed at a contemporary university? To this day, I have not received a reply to that question. I am bothered that a university would leave a question of that kind in such doubt. What a situation to create at an institution of higher learning!

My third example comes from the University of Western Ontario. A Spanish professor encountered a student from Iran, who was having difficulty with the Spanish equivalent of the verb "condemn". In an attempt to help him understand, she talked about the kind of experiences suffered by people in his country. This led him to file a complaint of ethnic harassment against her. Although she learned about the complaint in January of 1992, it was finally dismissed in June of that year. She had to endure five months of suspense about her career and her future. She also incurred legal bills of more than $6000. Significantly, the President of the University rejected her November 1992 request to be compensated for such out of pocket expenses. Luckily, she had the fortitude to persist. Finally, in March 1993, the university agreed to pay at least her legal bills. We cannot expect everyone in such a situation to be as tenacious as she was.

The next example concerns a 1992 business seminar at Seneca College in Toronto. Some students who were planning the seminar posted a picture of the Queen as she appears on two-dollar bills. The picture showed the Queen with talk bubbles coming out of her mouth – she was commenting on the upcoming seminar. A complaint was filed because of this alleged insult to the British heritage. The college ordered the students to remove the picture and, rather than weather the ordeal of the complaint process, the students obeyed.

This brings me to the celebrated case at this university – the one involving Professor Yaqzan at the end of 1993. The professor, you will recall, wrote an article in the campus press which argued that a woman should understand that a visit to a man's quarters after hours implies her consent to sexual intercourse. He also described date rape of "promiscuous" women as an "inconvenience" rather than a "moral outrage".

By now, it must be clear that I think it was unacceptable to impose any kind of employment sanctions upon him for writing the article that he did. Just to establish my own credentials on the subject of this professor, you might be interested to know that he has attacked me too. This is not a case of defending someone of like mind. In fact, I thought his piece was quite foolish. Nevertheless, my concern is that on a university campus, in a community of adults seeking truth, opinions of this kind must receive, not discipline, but discussion. That is what a university is supposed to be about.

Once more, it is pertinent to observe that no one even suggested that Professor Yaqzan was making gratuitously crude jokes at anyone's expense –

either inside or outside the classroom. What he did was express a non-conforming opinion that deeply offended many members of the university community. Why should *that* be a disciplinary matter?

None of this is to deny that certain forms of verbal insult could undermine the viability of an academic community. For such purposes, however, harassment must be seen as a synonym for taunting, hectoring, or pestering. We can all imagine situations in which verbal expressions of this kind could reach the point of unacceptability. But there is no reason to condition any prohibitions in this area on the prohibited grounds in the anti-harassment policies. Pestering, for example, can become unacceptable even if it has nothing to do with categories such as race, gender, or sexual orientation. By formulating anti-harassment policies in these terms, universities convey the message that there are taboo areas for discussion on campus. Such a consequence subverts the very mission of a university.

On the issue of unacceptable hectoring or pestering, it must be asked to what extent an anti-harassment policy is necessary. As far as the professor-student relationship is concerned, there is good reason to believe that ordinary ethical codes for faculty or discipline for cause would suffice to curb delinquent professors. And the normal control that professors exercise over their classes would likely suffice to curb delinquent students. As far as the student-student relationship is concerned, the question is whether the informal pressures of the student community might not suffice to address any excesses.

At this point, I do not attempt to answer these questions but I do ask them. How serious and prevalent a problem would there be without such an anti-harassment policy? Can excessive pestering and hectoring by students against students be stopped only by the kind of prohibitions and machinery that are contemplated by these anti-harassment policies? To what extent, in short, is the game worth the candle?

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Now that I have talked about the fallacies that are committed and the incidents that have occurred, I have something to say directly to the students themselves. I am increasingly concerned about some of the positions that students have been taking in many of these debates. For someone like me who attended university during the era of U.S. Senator Joe McCarthy, it is especially disconcerting to see students as campaigners for censorship. Again, let me take you through a few actual incidents.

To begin with, the Student Union at the University of New Brunswick called for the disciplining of Professor Yaqzan. Instead of mounting the barricades to

defend his right to dissent, the students mounted the barricades to suppress that right. Unfortunately, the students at this university are not alone.

At the University of Western Ontario in the mid-1980s, the student council received an application for recognition from a pro-Palestinian organization on campus. The student council came up with one reason after another to refuse it. One of the reasons will illustrate the repressive proclivities involved. Members of the student council complained that the group in question was taking a stand, rather than being neutral, on the issues in the Middle East. Imagine denying recognition to a campus group because it stands for something! Another reason that the student council gave was that the council itself might become tainted by the group's pro-Palestinian views. Yet, in that university at that time, the student council had already recognized the Liberal Party club, which was defending cruise missile testing, and the New Democratic club, which was opposing it. Somehow, no one seemed to worry that the student council would be tainted by either of these positions. If there was ever a clear cut case of political discrimination, this was it.

Around the same time, at the University of Ottawa, the student council revoked the recognition that had been enjoyed by the Jewish Student Union because of the Union's support for what the student council called "the racist state of Israel". Apart from the vacuity of this analysis (I do not oppose the right of student council members to have wrongfully nasty views about Israel), I do claim that a student council has no business arrogating to itself the right to determine what views students on campus should be able to hold on such matters. Moreover, the fact that these positions were later rescinded at both universities should not greatly console any of us. It is disquieting to realize how far students were prepared to go in support of a repressive policy.

About a year ago at McGill University, a psychiatrist was invited to lecture on what he calls "false memory syndrome" – his theory that a number of therapists induce people to "remember" sexual experiences they never had. Unfortunately, the psychiatrist never got to deliver the lecture. As soon as he rose to speak, many students interrupted him with noise makers and shouting. It soon became clear that the meeting could not proceed. The university cancelled it.

At the University of Toronto, there was a debate in the fall of 1991 regarding a campus anti-harassment policy. The Graduate Student Union considered the draft policy too deferential to free speech. The following is an extract from the Graduate Students' letter on the subject:

> Rather than tying the limits of debate to a vague notion such as the reasonable exercise of speech – reasonable as defined by whom – acceptable to whom, we feel it would be much more productive to limit freedom of expression to ideas and expressions which are free of prejudice.

This is an example of the intellectual prowess of the Graduate Student Union at the University of Toronto in 1991. Can you imagine trying to outlaw prejudice on a university campus? To paraphrase these students themselves, "prejudice" as defined by whom and monitored by whom?

Historically, the role of students has been to question the values of their elders and those of society at large. The idea has been to hold these values up to criticism, debate, and challenge. That is what students are supposed to do. How can they play this role in a setting where speech is seriously and significantly muzzled? It follows that in order to recover their traditional function, students must be prepared to defend the right to a vigorous free speech.

Invariably, this will mean going to bat for the free speech of people you do not like. Whether the target is a neanderthal sexist, a reactionary right-winger, or, as in my university days, a Communist, freedom of speech must be protected. For these purposes, it does not matter what ideology is involved. All members of the campus should be free to speak their minds.

I want to leave you with one of the most inspiring statements I have ever heard on the need to champion the rights and freedoms of unpopular people. The statement was made by a Protestant minister in Germany after the Nazi regime:

> First, they arrested the Communists – but I was not a Communist, so I did nothing Then they came for the Social Democrats – but I was not a Social Democrat, so I did nothing. Then they arrested the trade unionists – and I did nothing because I was not one. And then they came for the Jews and the Catholics, but I was neither a Jew nor a Catholic and I did nothing. At last they came and arrested me – and there was no one left to do anything about it.[8]

This statement, wrung from the agony of Hitler's Germany, stands as a model for democrats in all countries for all time. The freedom of no one is safe unless the freedom of *everyone* is safe.

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[8]Quote by Pastor Martin Niemoller, a German Protestant minister who had been interned in Nazi concentration camps from 1937-45.