

**The Right to Offend: Bill C-63 Goes a Little Too Far**

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“If anything, the freedom of expression is the right to offend”

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## I. Introduction

Canada’s legal framework, founded on the Canadian Charter of Rights and Freedoms, recognizes freedom of expression as a fundamental right. However, the growing concern over hate speech – particularly in the digital age – has led to ongoing debates on the limits of this right. The introduction of Bill C-63, the Online Harms Act, reflects the Canadian government’s latest attempt to address hate speech with stronger penalties, signalling the state’s ambition to further regulate expression. This essay examines the definition and challenges of hate speech, the government’s legitimate interest in its censorship as well as its overreach, and the landmark *R. v. Keegstra* case, which highlights the nuances of restricting hate speech in a free society.

## II. Hate Speech Defined

According to the Oxford English Dictionary, hate speech is “abusive or threatening speech or writing that expresses prejudice on the basis of ethnicity, religion, sexual orientation, or similar grounds.”<sup>2</sup> Merriam-Webster defines it as “speech expressing hatred of a particular group of people.”<sup>3</sup> The courts have described hate speech as any speech that wilfully promotes hatred or incites hate-based violence towards an identifiable group. In Canada, hate propaganda is regulated and criminalized in sections 318 - 320 of the Criminal Code. Section 318 addresses the

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<sup>1</sup> This is quoted by me but informed by John Stuart Mill’s position in *On Liberty*

<sup>2</sup> Oxford English Dictionary. (n.d.). Hate Speech, *In OED.com*. Retrieved October 25, 2024, from <https://www.oed.com/search/dictionary/?scope=Entries&q=hate%20speech>

<sup>3</sup> Merriam-Webster. (n.d.). Hate speech. *In Merriam-Webster.com dictionary*. Retrieved October 25, 2024, from <https://www.merriam-webster.com/dictionary/hate%20speech>

advocation and promotion of genocide<sup>4</sup> and defines what constitutes genocide.<sup>5</sup> Section 319 addresses public incitement of hatred,<sup>6</sup> the wilful promotion of hatred,<sup>7</sup> and the wilful promotion of antisemitism.<sup>8</sup> However, none of them define what “hatred” means. This lack of definition has steered some concern with the law as we have seen in court cases pertaining to hate speech or the promotion of hatred.<sup>9</sup> The grey area has begged the question of where the line is with respect to how much a law can infringe on the rights and freedoms prescribed in the Canadian Charter of Rights and Freedoms,<sup>10</sup> particularly section 2b.

Since the introduction of Hate as a criminal offence in Canada, the courts have struggled to arrive at a definite definition of what constitutes hate.<sup>11</sup> Historically, hate crimes have been punished or prosecuted when made in public settings but with the rise of the digital age, the lines between what is private and what is public have grown increasingly thinner, especially with social media. This begs the question of how we as a society can understand and implement the laws combatting hate. To do this, we would need to balance the interests of our freedom of expression and that of protecting society from *harm* fuelled by hate<sup>12</sup>. This approach would

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<sup>4</sup> *Criminal Code*, RSC (1985) c C-46, Section 318 (1)

<sup>5</sup> *Ibid.* Section 318 (2)

<sup>6</sup> *Ibid.* Section 319 (1)

<sup>7</sup> *Ibid.* Section 319 (2)

<sup>8</sup> *Ibid.* Section 319 (2.1); it is worth noting that these sections only apply to public speech which is defined in Section 319 (7).

<sup>9</sup> *Hansman v. Neufeld*, 2023 SCC 14. *Supreme Court of Canada*, <https://decisions.scc-csc.ca/scc-csc/scc-csc/en/item/19911/index.do>

*Canada (human Rights Commission) v. Taylor*, [1990] 3 SCR 892, *Supreme Court of Canada*, <https://decisions.scc-csc.ca/scc-csc/scc-csc/en/item/697/index.do>

*Saskatchewan (Human Rights Commission) v. Whatcott*, [2013] 1 SCR 467, *Supreme Court of Canada*, <https://decisions.scc-csc.ca/scc-csc/scc-csc/en/item/12876/index.do>

*R. v. Keegstra*, [1990] 3 SCR 697, *Supreme Court of Canada*, <https://decisions.scc-csc.ca/scc-csc/scc-csc/en/item/695/index.do>

<sup>10</sup> *Canadian Charter of Rights and Freedoms*, s 7, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK), 1982, c11

<sup>11</sup> Dissenting argument in *R. v. Keegstra*

<sup>12</sup> I emphasize harm as I would like to make a distinction between harm and offence which I believe our current government does not do properly.

ensure that we adhere to the foundations of liberty as outlined by John Stuart Mill in *On Liberty*.<sup>13</sup>

### III. Freedom from Harm or Freedom from Offence

One of the concepts explored in *On Liberty* is the Harm Principle. This holds that "the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant."<sup>14</sup> In the purest form, we can see how this is a sensible interest to have especially seeing the effects of hate around the world with events like the Holocaust. Hate is something that eats at the heart of a community and breeds violence and sorrow. It is important that we do not provide a fertile ground for the development of hate. However, as a democratic liberal society, our freedom of expression is arguably our most important freedom embedded in the *Canadian Charter of Rights and Freedom*.<sup>15</sup> No government has the right to impede this freedom on the basis of offence or perceived fear of harm (precrime).<sup>16</sup>

In early 2024, Minister of Justice Arif Virani introduced Bill C-63 (the Online Harms Act) in the House of Commons to create additional penalties for hate speech in Canada – up to life imprisonment. The bill is proposed to protect children from being exposed to hate on the internet. While exposure to hate is a valid concern, the Liberal government has taken a step too close to authoritarianism with this Bill. The proposed bill gives the government the ability to

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<sup>13</sup> Mill, John Stuart. *On Liberty*. Luton, Bedfordshire: Andrews UK Ltd., 2011. ProQuest Ebook Central.

<sup>14</sup> *Ibid* p. 18

<sup>15</sup> Canadian Charter of Rights and Freedoms, s. 1, 2(b).

<sup>16</sup> Jochelson, R., Gacek, J., Menzie, L., Kramar, K., & Doerksen, M. (2017). *Criminal Law and Precrime: Legal Studies in Canadian Punishment and Surveillance in Anticipation of Criminal Guilt* (1st ed.). Routledge. <https://doi-org.ezproxy.lib.ucalgary.ca/10.4324/9781315165950>

punish people on the basis of perceived fear that a hate-based crime is likely to occur.<sup>17</sup> It also allows for complaints to be filed anonymously completely disregarding the right to know your accuser and what you are been accused of. The bill proposes the creation of a Digital Safety Commission which laughs at the face of legal transparency. The commission would have the power to make online content inaccessible, investigate social media platforms without a warrant, conduct secret hearings, and impose hefty fines without proper justification among other powers. Among the infinite number of reasons why this is “doing too much”, the unfettered restrictions it imposes on freedom of expression say it all. For one, it would make it nearly impossible for Canadians or anyone on Canadian soil to criticize aspects of society that they do not agree with. The Marketplace of Ideas will cease to exist as people would rather self-censor than go through the rigorous process of justifying their speech.<sup>18</sup> By regulating what can and cannot be said online, the government positions itself as an infallible knower of truth. It creates a state where its ideas are *truth* and anything that falls outside of this is delinquent.<sup>19</sup> The effect on the individual can be astronomical as they would cease to exist outside of what has been prescribed as *truth*. This is too much power for any government to hold.

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<sup>17</sup> Bill C-63, An Act to enact the Online Harms Act, to amend the Criminal Code, the Canadian Human Rights Act and An Act respecting the mandatory reporting of Internet child pornography by persons who provide Internet service and to make consequential and related amendments to other Acts, First Session, 44th Parliament, 2024.

<sup>18</sup> Howard, Jeffrey W. “Free Speech and Hate Speech.” *Annual Review of Political Science*, vol. 22, no. 1, 2019, pp. 93–109, <https://doi.org/10.1146/annurev-polisci-051517-012343>.

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<sup>19</sup> Michel Foucault brings up these points in his discussion on the making of the delinquent in *Discipline and Punish*, and his discussion on subjectivity and truth in *The History of Sexuality*.

#### IV. R. v. Keegstra

Historically, there have not been many cases prosecuted for hate crimes in Canada. A key case that represents a defining moment in Canadian jurisprudence on hate speech is *R. v. Keegstra*. In this case, James Keegstra, a high school teacher in Alberta, was charged under section 319(2) of the Criminal Code for promoting hatred against Jews in his classroom and he argued that his teachings were protected under the Charter's freedom of expression clause, but the Supreme Court disagreed, upholding his conviction.

The Court's reasoning in *Keegstra* rested on the assertion that hate speech causes direct harm to both individuals and society by eroding dignity and fueling prejudice. Justice Dickson, writing for the majority, emphasized that hate speech laws are a legitimate restriction under section 1 of the Charter because they serve a pressing and substantial societal objective: to protect groups from discrimination and maintain social harmony.<sup>20</sup>

In upholding Keegstra's conviction, the Court set a precedent for how hate speech is treated under Canadian law, balancing the right to free expression against the potential harms of allowing hate speech. Notably, the Court stressed that a high threshold is required to criminalize speech under hate speech laws, underscoring that only the most egregious forms of hate are prosecuted. This reasoning has since influenced subsequent decisions, shaping Canada's approach to hate speech regulation.

In dissenting, Justice McLachlin argued that section 319(2) of the Criminal Code unjustifiably infringed on freedom of expression and that this infringement was not a reasonable limit under section 1 of the Charter. She argued that even offensive or hateful speech serves a social purpose

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<sup>20</sup>R. v. Keegstra, [1990] 3 SCR 697, paras. 84-85

by allowing ideas to be openly examined and challenged. In her view, criminalizing such speech risked suppressing dissenting voices and setting a dangerous precedent for governmental control over expression. This is a case where the tension between protecting vulnerable groups and protecting our freedoms was highlighted. I believe the decision reached by the courts in this case was valid and Keegstra's punishment was proportional.

## **V. Concluding Remarks**

*“Those who make peaceful revolution impossible make violent revolution inevitable.” ~JFK*

The issue of hate speech in Canada lies at the intersection of free expression and societal protection. Through the Charter and case law, Canadian jurisprudence has established that freedom of expression is fundamental but not absolute, especially when speech inflicts harm on vulnerable groups. The *Keegstra* case illustrates a situation where only the most harmful hate speech is restricted to preserve public order and individual dignity. This restriction is necessary for everyone in society to flourish. However, the limitations that Bill C-63 imposes undermine the efforts of the government to protect from harm and give them undue power to regulate what can be said. This overreach cannot be justified by any tenet of liberalism and should not be tolerated by our society.

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