

Private Conscience, Identity and Equality: Limiting Free Speech for the Greater Good

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"Give me the liberty to know, to utter, and to argue freely according to conscience, above all liberties."

John Milton

Areopagitica, 1644 Even though same-sex marriage is now firmly situated in Canadian law, Canada's top Roman Catholic Cardinal, Marc Ouellet, continues to express great concern about the effect of the legislation on his religious freedom (Gloria Galloway, Ottawa, Same-sex foes risk charges, Cardinal fears, July 14, 2005 Globe and Mail at A1). Cardinal Ouellet is worried that vocal opponents of same-sex marriage will risk criminal charges for speaking out against homosexuality. Before a senate committee hearing arguments for and against Bill C-38, Cardinal Ouellet argued, "there's a type of climate that exists where we no longer feel we can express our opinion...[w]e realize if we say certain things we may get accused of homophobia or of hatred, bigotry...". His claim reveals a tension between the Cardinal's private beliefs, his desire (and right) to speak those beliefs publicly, and the possible consequence that he will promote hate by opposing a status quo that accepts, and indeed now celebrates gay and lesbian identities and same-sex marriage. A vibrant, free society is characterized by the vigor of its public debate and the extent to which it encourages its members to form and promote their own world-views. Our Canadian Constitution protects each person's right to convey opinions publicly, subject to few limitations. Cardinal Ouellet's concerns rightly attest to the fundamental importance of private conscience. The privacy of one's mind is perhaps the last realm of our lives to be virtually impermeable to the outside world, and the dissemination of our thoughts is something over which each individual is able to exercise total control. The sacredness of private conscience is reflected in our system of law with the basic precept that one cannot be punished for thoughts alone. It is in our minds that we enjoy the ultimate form of privacy — complete, uncensored freedom to think whatever we want without the risk of judgment or prosecution. The sanctity of the private mind provides the foundation upon which identity is built. In our most private conscience we define and re-define our identities, values and opinions. What good is private conscience if it must stay private, if we are not able to share the thoughts and beliefs that we have developed in our private minds? According to Cardinal Ouellet, the right to hold private beliefs is of little value without the complementary right to make private conscience public by speaking one's opinions freely. Considering the supremacy of freedom of expression in Canadian law and society, it would seem that Cardinal Ouellet may be right. The extension of private conscience is the freedom to speak one's mind, a highly-prized and protected value, labeled a "fundamental freedom" under section 2(b) of the Charter of Rights and Freedoms. One of the primary goals of strong protections for freedom of expression is to enable the pursuit of self-fulfillment and self-realization as an essential part of autonomy and identity. By speaking our private minds, each person is able to grow and further him or herself, others and society, and thus realize his or her full potential as a human being. Giving every individual the right to freely communicate his or her thoughts, aspirations and opinions is to affirm the dignity of each member of society. What goal could be more laudable, more worthy of protection? For Cardinal Ouellet there is no more important objective, even if in the course of pursuing his full potential through expression, the statements he utters amount to a violation of the equality rights of the gay and lesbian community. While private conscience and free expression are valuable rights that play a critical part in reaching the worthy goal of self-fulfillment, they also exist in a framework of other rights that must not be forgotten. The goals of autonomy and self-determination are heavily grounded in individualism, with little regard for the good of the collective whole. This makes sense given that our society is heavily focused on the advancement and satisfaction of the individual. The importance of free thought and speech stems from individualistic thinking, but at what cost to collective rights like equality? Equality requires cooperation, respect and tolerance, and occasionally, the silencing of opinions when it comes to public speech that offends the dignity and equality rights of another group. A collective outlook on rights may necessitate the sacrifice of individual goals; a sacrifice that, based on Cardinal Ouellet's comments, the religious community is not prepared to make when it comes to same-sex marriage.

This is not to say that group sensibilities inevitably take precedence over individual conscience. Indeed, it appears this is rarely the case. Cardinal Ouellet has the constitutional right to religious freedom and to express his religious conscience in all private conversation. If he is concerned about being prosecuted for the promotion of hatred against the gay and lesbian community in the course of his public religious teachings, he need only refer to section 319.3(b) of the Criminal Code, which reads "no person shall be convicted of an offence under subsection (2) [willful promotion of hatred] if, in good faith, the person expressed or attempted to establish by an argument an opinion on a religious subject or an opinion based on a belief in a religious text," to see that he is easily excused. It seems that the Cardinal's freedom of religious expression could effortlessly take priority over the equality rights of gay and lesbian persons. Cardinal Ouellet may continue to preach against same-sex marriage and homosexuality; not only that, but he will occupy an exclusive niche carved specifically to protect people who may willfully promote hatred with "religious justification". The Cardinal can stop worrying and continue to seek self-fulfillment through religious expression,

knowing that he is protected by the law. Conversely, gay and lesbian persons must continue to worry about the ongoing attack by members of the religious community on their dignity and thus, their equality rights. Everyone has a right to security of the person, and public expression that attacks, marginalizes and degrades the gay and lesbian community violates their security, no matter if it comes from the pulpit or the newspaper. Why does freedom of religious expression for one group ‘trump’ the equality rights of another? There is some indication that this may not be set in stone. In *Owens v. Saskatchewan* (HR Commission) [2002] S.J. No.732, the Saskatchewan Queen’s Bench ruled that Hugh Owens was guilty of violating section 14.1(b) of the Saskatchewan Human Rights Code, which prohibits the publication or display of any material “which exposes to hatred, ridicules, belittles or otherwise affronts the dignity of any person, any class of persons or a group of persons because of his or their race, creed, religion…sexual orientation…” Owens placed an advertisement in the Saskatoon Star Phoenix newspaper for bumper stickers with four Bible passages condemning homosexuality and a graphic of two men holding hands with a line drawn through it, indicating “no” to homosexuality. The ad was placed to coincide with Saskatoon’s Gay Pride celebrations. In his judgment, Barclay J. said: “[w]hen the use of the circle and slash is combined with the passages of the Bible, it exposes homosexuals to detestation, vilification, and disgrace. In other words, the Biblical passage (sic) which suggest that if a man lies with a man they must be put to death exposes homosexuals to hatred” (at para.21). If the publication of Biblical passages vilifying homosexuality can constitute an expression of hatred sufficient to offend the equality rights of gays and lesbians, why is speaking those same passages as religious teaching a protected right?

There is not a straightforward resolution to the conflict between free expression as it is used to convey private conscience and further individual identity, and the equality rights of a group that may be undermined by someone else’s quest for fulfillment. Must the achievement of a civil society be at the expense of a free society? We believe the answer is no, however in the fine art of balancing rights, where individual freedoms may eclipse collective rights like equality, some sort of prioritizing must take place. In weighing the value of public religious speech against equality, it seems necessary to ask exactly how the condemnation of gay and lesbian persons furthers Cardinal Ouellet’s self-fulfillment. In *R v. Keegstra* [1990] 3 SCR 697, the Supreme Court stated (per Dickson C.J.), “[h]ate propaganda contributes little to the aspirations of Canadians or Canada in either the quest for truth, the promotion of individual self-development or the protection and fostering of a vibrant democracy where the participation of all individuals is accepted and encouraged.” This is true no matter what form the expression of hate assumes. Though freedom of expression is central to the full realization of private conscience and is protected under the Charter as a fundamental freedom, there is no right more essential than living with dignity and security in a society free from hatred – goals that only full, unrestricted equality rights can guarantee.