

implicit in this form of legislation, and conversely my fear is that the enactment of such legislation, rather than diminishing what potential threat there may be here, tends to accentuate it and focus it. In that general, broad line of thinking, I would like to have your reaction.

Mr. Cohen: I think that is the fundamental question, Mr. Chairman. I would like to address myself very informally but very seriously to that question.

I do not know, Mr. Chairman, whether this is the kind of thing you want to launch into before lunch.

The Chairman: Well, I am just wondering. It is 12.30 now.

Mr. Cohen: No teacher can speak for less than 55 minutes, as you know.

The Chairman: Would you like to come back at 2.30? That means that we do not get rushed too badly and it means we do not have to cut off what might perhaps be the most important part of the testimony this morning.

Senator Roebuck: Let us go on until 1 o'clock. I cannot come back at 2.

Senator Lang: I have to go to a briefing session at a quarter to one.

The Chairman: What shall we do, then? Perhaps we should let the senators have the benefit of what you can tell us, sir, until one o'clock.

Mr. Cohen: Let me begin, then, by replying to Senator Lang by way of an exploration, very briefly, of what is implicit in his anxiety. He is worried that the adoption of this kind of legislation does not fit in with the philosophical and political and social syntax of our own traditions.

Senator Lang: That is it.

Mr. Cohen: Therefore, it really distorts the answer and does not give an answer. And so, it really requires me to explore with you whether this is literally true. Is it philosophically true that this kind of effort is alien to our traditions? Is it technically true that we—in the report—have not done it well so that it does not fit the traditions?

Let us look first at the philosophic answer and then at the technical answer.

On the philosophical side, I venture to say that the whole history of western law is a

constant search for balances between competing values. One has only to remember, really, how recent is the successful realization of some of these values, and how limited in some form they were, those that are implicit in Senator Lang's question—the values of free speech. One may argue that up to about 1825 or 1840, until the liquidation, say, of the remnants of the eighteenth century, the real battle in English law, and, therefore, in English political and social thought, was how to permit the exercise of the maximum freedom against restraints which, up to 1688 seemed a kind of absolute sovereignty and what was from 1688 to 1800 decreasingly absolute.

After all, "constitutional government," even in the United States, in the sense we take for granted today is barely 125 to 170 years old. So that the achievements of the civil liberties we talk about is not really as profoundly ancient as one assumes.

Secondly, one has to remember that they were achieved under very special conditions. By 1850 most of the battle had been won against the supremacy of the royal prerogative, whether it had to do with free debates in parliament or the capacity to arrest arbitrarily or with an immense variety of reserve powers which the Crown in theory had certainly until 1688, (though of course the Star Chamber had gone).

If you think of all the problems of civil liberties as they emerged by the time John Stuart Mill was writing, it was not really until just before his day that one began to see the real disappearance of the effects of the sixteenth, seventeenth and eighteenth centuries on English criminal law and English constitutional law. So, when we talk about the classical Canadian idiom as being part of the classical English idiom, it is a very recently won battle of only 150 or 175 years. When you say it is recently won, you must add that even its present content was never an absolute content.

Let me put it in the following terms: at the very height of laissez faire ideas, at the very height of personal freedom theories, at the very height of Herbert Spencer's social philosophy in the third or fourth quarter of the nineteenth century, you cannot argue even then that free speech was absolute. I suppose the most absolute expression of freedom in society, in terms of speech is, for example, Article I of the United States Bill of Rights.