

General Introduction: Free Speech, Democracy, and the Suppression of Extreme Speech Past and Present

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1. The Enduring yet Troubled Marriage of Free Speech and Democracy

Free speech and democracy have had a long and ambivalent relationship. From the dawn of modern democracy, it was recognized that the right of the people to criticize government, laws, and social conditions was inherent in the very concept of rule by the people. As James Madison, the architect of the United States Constitution, explained: in a democracy ‘[t]he people, not the government, possess the absolute sovereignty’;¹ it therefore follows that the ‘censorial power is in the people over the government and not in the government over the people’.² But also from the outset, democratic governments have claimed that there must be limits to such criticism: that speech can appropriately be suppressed when it becomes so extreme as to pass beyond the limits of legitimate protest. On this view, despite the First Amendment, ratified as part of the Bill of Rights in 1791, Congress passed the Sedition Act of 1798 which made it a crime to publish any ‘false, scandalous, and malicious writing’ with the intent to ‘defame’ the government or bring it ‘into contempt or disrepute’ or to excite against the government ‘the hatred of the good people of the United States . . .’³ Fourteen men, mostly prominent newspaper publishers critical of the Adams administration, were prosecuted under the Act during its two and a half years of existence.⁴ In addition to publishers, Congressman Matthew Lyon, a member of the opposition

¹ Virginia Resolutions, in 4 J. Elliot (ed.), *Debates in the Several State Conventions on the Adoption of the Federal Constitution*, Vol. 4 (1836), 569–70.

² 4 Annals of Congress 934 (1794).

³ Act of 14 July 1798, 1 Stat. 596.

⁴ A. Lewis, *Freedom for the Thought That We Hate: A Biography of the First Amendment* (New York: Basic Books, 2008), 12–3. By its own terms, the Act expired in March, 1801, coinciding with the end of Adams’ first (and only) term in office.

Republican party, was convicted for accusing President Adams of ‘an unbounded thirst for ridiculous pomp, foolish adulation, and selfish avarice’.⁵

Although the Supreme Court never ruled on the validity of the Sedition Act, history has condemned the law as a violation of the basic right of free speech inherent in democracy.⁶ But perhaps this verdict is unfair. As Jeremy Waldron reminds us in a recent article:

To many people, federal authority seemed weak and precarious in 1798. Public agitation by Colonel Lyon’s supporters led to a brief uprising in Vermont, and there was a threat of considerable political violence elsewhere. George Washington was denounced as a thief and a traitor; John Jay was burned in effigy; Alexander Hamilton was stoned in the streets of New York; our hero, Matthew Lyon, attacked a Connecticut Federalist with fire tongs in the House of Representatives; and Republican militias armed and drilled openly, ready to stand against Federalist armies. Over everything, like a specter, hung fears of the Jacobin terror in France.

It was by no means obvious in those years—thought it seems obvious to us—that the authorities could afford to ignore venomous attacks on the structures and officers of government... That government could survive the published vituperations of the governed seemed more like a reckless act of faith than basic common sense.⁷

And so it has gone ever since. Though generally committed to free speech (both in theory and usually in practice as well), democratic societies have repeatedly repressed extreme speech that seems to present a ‘clear and present danger’ to some other basic societal value or goal.⁸ In Britain, without the bulwark of the First Amendment and the practice of judicial review of primary legislation, free speech was more fragile than in the US.⁹ The coercive power of the state was applied against Chartists and suffragettes campaigning for the extension of the franchise and against the nascent trade union movement.¹⁰ During World War I

⁵ R. N. Rosenfeld, *American Aurora: A Democratic-Republican Returns* (New York: St. Martin’s Press, 1997), 526–7. See also *Lyon’s case* 15 F. Cas. 1183 (C.C. Vt. 1798).

⁶ ‘Although the Sedition Act was never tested in this Court, the attack upon its validity has carried the day in the court of history.’ *New York Times v. Sullivan* 376 US 254, 276 (1964).

⁷ ‘Free Speech & the Menace of Hysteria’, 55 *New York Review of Books*, 28 May 2008 (reviewing Lewis n. 4 above).

⁸ See *Schenck v. US* 249 US 47, 52 (1919).

⁹ The only constitutional protection for free speech in Britain until the enactment of the Human Rights Act 1998 was the provision of the Bill of Rights 1689 that ‘the Freedome of speech and debates or proceedings in Parlyament ought not to be impeached or questioned in any court or place out of Parlyament’. Before the democratic era, the full barbarity of the medieval criminal law was deployed against religious dissenters on the ground that their challenges undermined the sacred authority of the King and State. See I. Hare, ch. 15 in this volume.

¹⁰ See B. Hilton, *A Mad, Bad, and Dangerous People? England 1783–1846* (Oxford: Clarendon Press, 2006), 612–21; K. W. Wedderburn, *The Worker and the Law*, 3rd edn. (London: Sweet & Maxwell, 1986) 512–8.

protestors in Australia,¹¹ New Zealand,¹² and Canada,¹³ as well as the United States¹⁴ and in Britain,¹⁵ were imprisoned for too vehemently—or perhaps too effectively—protesting against their country's involvement in the War to Make the World Safe for Democracy.¹⁶ The following decades witnessed the suppression of the advocacy of extreme political ideas such as anarchism, fascism, and communism in various democracies throughout the world.¹⁷ Though the content

¹¹ For instance, in 1916 in Perth members of the Industrial Workers of the World, including 83 year-old labour leader Montague Miller, were convicted of sedition for opposing conscription and the war. See J. Toscano, 'Australian anarchist history: Monty Miller', *Anarchist Age Weekly Review*, No. 215, 2 September 1996.

¹² For instance, in 1916 future Prime Minister of New Zealand, Peter Fraser, was imprisoned for sedition for opposing conscription during World War I. See 'Peter Fraser', *Encyclopaedia Britannica* online, <<http://www.britannica.com/EBchecked/topic/217506/Peter-Fraser>> (last accessed 21 August 2008).

¹³ For instance, Michael Chartinoff, editor of the Ukrainian Social Democratic Party's newspaper *Robotchyi Narod*, was given a three-year jail sentence and fined \$1000 under the War Measures Act for opposing militarism, accusing France of murdering pacifist Jean Jaures and quoting German socialist Karl Liebknecht. See J. Keshen, *Propaganda and Censorship during Canada's Great War* (Edmonton, U Alberta P, 1996), 88, 91. Canada also banned books portraying England in a poor light with respect to the amount of alcohol consumed there for fear that such descriptions would cause Canadians to question if the home country was worth saving. Temperance leader Rev. Benjamin Spence was arrested for possession of several copies of *The Fiddlers*, one of the banned works, though this prosecution was eventually dropped. Other banned books included those portraying Germany in a positive light and those portraying warfare realistically. *Ibid.*, 97–8.

¹⁴ See eg. *Debs v. US* 249 US 211 (1919), upholding the conviction of Socialist presidential candidate Eugene Debs for obstructing the draft by giving a speech in which he praised draft resisters.

¹⁵ For instance, in 1916 William Gallacher, president of the Clyde Workers' Committee in Scotland was convicted under the Defence of the Realm Act and sentenced to six months in prison for writing an article condemning British involvement in World War I. John Muir, the publisher of *The Worker*, the Clyde Worker's Committee journal in which the article was published, received a one-year sentence. See W. Gallacher, *In Revolt on the Clyde*, 4th edn. (London: Lawrence and Wishart, 1936). For speaking out against Britain's involvement in the war, philosopher Bertrand Russell was convicted under the Defence of the Realm Act on the charge of interfering with British foreign policy and spent six months in Brixton Prison. Russell had criticized the American Army for strikebreaking and suggested that his fellow citizens be wary of these soldiers. See J. Vellacott, *Bertrand Russell and the Pacifists in the First World War* (Brighton: Harvester Press, 1980).

¹⁶ See Woodrow Wilson, War Messages, 65th Cong., 1st Sess. Senate Doc. No. 5, Serial No. 7264, Washington, D.C., 1917, declaring that 'The world must be made safe for democracy'.

¹⁷ In Australia, a communist leader was convicted of sedition and sentenced to prison for telling a Sydney journalist that 'if Soviet Forces in pursuit of aggressors entered Australia, Australian workers would welcome them'. *R v. Sharkey* (1949) 79 CLR 121. In Canada during World War II, Camillien Houde, a former mayor of Montreal, was fined and imprisoned for sedition for publicly urging the men of Quebec to ignore the National Registration Act. See 'Innocents abroad', *Time Magazine*, 5 August 1946. In November 1940, the Swiss government dissolved the Swiss Nazi Party, noting that the party's activities endangered public order and created conflict. See P. N. Stearns, *The Encyclopedia of World History*, 6th edn. (New York: Houghton Mifflin, 2001). The Public Order Act 1936 was enacted in England during the rise of the British Union of Fascists in an effort to curb its activities as a political group. See K. D. Ewing and C. Gerty, *The Struggle for Civil Liberties: Political Freedom and the Rule of Law in Britain, 1914–1945* (Oxford: OUP, 2000), ch. 6. In the United States, a member of Left Wing Section of the Socialist Party was convicted under a law proscribing advocacy of criminal anarchy. See *Gitlow v. New York* 268 US 652 (1925). Later, leaders of the American Communist party were convicted under the Smith Act's prohibition against conspiracy to advocate the violent overthrow of the United States government for teaching Marxist doctrine. See *Dennis v. United States* 341 US 494 (1951).

of the banned speech may have differed, the basic problem remained the same: at what point, if any, does political and social criticism become so extreme and offensive to basic societal norms or so disruptive of critical social goals that it can legitimately be suppressed in a democratic society?

In this volume, a host of distinguished scholars drawn from a range of disciplines and different countries examine current attempts to suppress various types of extreme speech that many believe pose an unacceptable threat to essential values in modern multicultural democracies, or in some cases, to democracy itself. Extreme speech regulation breaks down into a number of categories and operates in different contexts. A particularly controversial category of extreme speech and one that has often been subject to legislation in contemporary democracies is hate speech. In its purest form, hate speech is simply expression which articulates hatred for another individual or group, usually based on a characteristic (such as race) which is perceived to be shared by members of the target group. Legal systems do not attempt to prohibit the expression of hate *simpliciter*. Rather hate speech regulation prohibits the speaker from using hate speech to achieve some further purpose: usually inciting others to hatred of the target group or seeking to encourage the audience to discriminate against them. Most of the recent developments in this field involve the extension of racial hate speech laws to speech based on other characteristics of the target group such as their religion or sexual orientation. The regulation of hate speech and the limits of such regulation in a democratic society are explored in Parts II and III of this collection, with the first of these sections focusing on hate speech in general and the second on incitement to religious hatred.

Religion is central to the topic of extreme speech regulation in another way: not only can speech (whether secular or itself religious) offend religious sensibilities, religious expression has the capacity to offend secular, liberal values. For example, religious disapproval of homosexual relationships or religiously mandated dress codes (such as veiling for women) may easily come into conflict with the liberal commitment to equality. This topic is addressed in Part IV. At some point, extreme speech may cross the line into general criminal prohibitions on the inchoate offences of incitement to violence. A recent development has been to expand the traditional categories of incitement to lawless action by creating specific offences to deal with incitement to, or glorification of, terrorism. These issues are explored in Part V of this volume.

Prohibitions on the denial of crimes against humanity such as the Holocaust overlap with incitement to hatred against ethnic or religious groups, but raise distinct questions as well. These questions are explored in Part VI. Different considerations may apply to extreme speech across distinct media: the growth in far-right propaganda on the internet is a prime example. Part VII considers the appropriate limits of governmental and self-imposed regulation of the media.

These controversies are not unique to the United States and the United Kingdom, but arise at various times and to a greater or lesser extent in every liberal

democracy. Therefore, we have included contributions which address extreme speech in a number of other jurisdictions, including Germany, France, Hungary, Israel, Australia, and Canada. We have also attempted to widen the scope of the discussions beyond the academic legal community in order to reflect the interdisciplinary nature of debates about extreme speech. In addition to law's usual companion, philosophy, we have incorporated contributions from the fields of history, psychology, and literature.

2. Is there a Lesson in this History?

The long history of suppression of extreme criticism of political or social conditions suggests that democracies tend to overreact to what at the time seemed to be imminent threats to core societal values or to projects such as the successful prosecution of a war upon which the fate of the nation is thought to depend.¹⁸ Looking back from the perspective of the late 1960s at 50 years of judicially approved suppression of extreme speech, United States Supreme Court Justice William O. Douglas observed that though 'the threats were often loud' they were 'always puny and made serious only by judges so wedded to the status quo that critical analysis made them nervous'.¹⁹ Is the same true of the 'extreme speech' that democratic governments attempt to suppress today and on which this book focuses? Will the threats that now seem clear and present also in retrospect be seen as greatly exaggerated? An argument can certainly be made that such is the case. There are, however, respectable arguments that the situation is different at least with respect to some types of extreme speech that plague contemporary multicultural societies. Almost all of the speech suppression of which we now repent involved extreme speech directed against government, laws, or public policy. Most of the controversial regulations with which this book deals involve, in contrast, bans on extreme speech directed towards other individuals, such as attacks on people's race, ethnicity, religion, or sexual orientation.²⁰

There are several reasons why this difference might be significant. The first goes to the perceived necessity of the law. Thus Waldron argues in the article quoted

¹⁸ Shortly after World War I, Judge Learned Hand wrote of the need to develop free speech doctrine adequate to 'serve just a little to withstand the torrents of passion to which I suspect democracies will be found more subject than for example the whig autocracy of the 18th century'. Letter from Hand to Zechariah Chafee, 2 January 1921, as quoted in G. Gunther, 'Learned Hand and the Origins of Modern First Amendment Doctrine: Some Fragments of History' (1975) 27 *Stan. L. Rev.* 719, 770.

¹⁹ *Brandenburg v. Ohio* 395 US 444, 454 (1969).

²⁰ Some regulations considered in this volume, eg, laws against glorification of terrorism, do target speech not usually aimed at groups of individuals, but like the extreme speech traditionally suppressed by government, usually involve attacks upon the state. Conversely, the expression targeted by bans on speech that insult or demean individuals on the basis of race, ethnicity, religion, or sexual orientation is rarely a mere rant against members of these groups but is almost always bound up with criticism of some government policy, eg, immigration laws or race-based minority preferences.

from above that prosecution of speech that threatened the public order, arguably needed to protect the fledgling American republic, was no longer justified when government soon thereafter became strong. 'But', he asks 'is that true of the system of mutual respect among the members of racial groups' which in many multicultural democracies including the United States is 'a recent and fragile achievement? Can we complacently assume that it too is immune from serious disturbance, so that we need not worry about the cumulative effect of racist attacks?'²¹

Waldron's point has merit, so far as it goes. But such an analysis is deficient in its assumption that the test of the legitimacy of a speech restriction is exclusively, or even primarily, the need for such laws. While gratuitous restrictions on speech, particularly political speech, are obviously illegitimate, the converse is not true. Thus a speech restriction is not legitimate just because it is actually needed to promote some important societal interest. For instance, few would argue that suppression of anti-war protests is legitimate in a democratic society just because government can show, as it likely could in many cases, that these protests imperil the war effort by encouraging the enemy and dispiriting the country's troops. What Waldron's analysis omits is the crucial question of whether the restriction on speech is justified despite speakers' interests in expressing their views as well as the audience interest in hearing these perspectives. Such fuller analysis, in turn, raises the question of precisely why free speech, particularly 'speech concerning the organisation and culture of society', is valued in a democracy.²² If, as Waldron seems to assume, speech is valued primarily for reasons instrumental to democracy, such as to 'help reveal, and remedy, abuses of power',²³ then it may well be appropriate to suppress speech in order to advance other social goals such as assuring 'the system of mutual respect among the members of racial groups'. But if free speech is valued not for such instrumental reasons, but rather as a right of each individual to participate in the discussion by which public opinion is formed, then excluding anyone from this discussion would compromise 'the sense of participation, identification, and legitimacy' on which democracy depends.²⁴ On this view of free speech, even a goal as important as promoting racial harmony would not seem to justify the suppression of racist ideas.

A related argument for distinguishing many of the contemporary restrictions on extreme speech from the discredited speech restrictions of the past is this: historically, laws suppressed the individual right of free speech in the name of some state interest such as maintenance of public order or the successful prosecution of a war; in contrast, contemporary regulations, with which this book is primarily concerned, narrowly limit the rights of the speaker in order to protect

²¹ Waldron, n. 7 above.

²² E. Barendt, *Freedom of Speech*, 2nd edn. (Oxford: OUP, 2005), 189.

²³ Waldron, n. 7 above.

²⁴ R.C. Post, *Constitutional Domains: Democracy, Community and Management* (Cambridge, MA: Harvard UP, 1995), 286.

the rights of other individuals not to suffer an affront to their dignity on the basis of a characteristic central to their personality such as their race, ethnicity, religion, or sexual orientation. This rationale in turn raises several crucial questions, including whether in a democratic society one truly has a right (as opposed to an inchoate interest) not to be demeaned by public discourse on bases such as these;²⁵ and if so, why vindication of this right justifies the infringement of the right of the speaker to participate in the political process.²⁶

It is not, however, the purpose of this general introduction to reach a conclusion about these matters, nor it is the purpose of this book to persuade others to adopt any particular view on the legitimacy of the various restrictions discussed in these pages. Rather, this introduction is meant to sketch some of the key questions raised by the new generation of laws suppressing extreme speech in a prelude to what we believe is a stimulating collection of essays that consider these questions in detail and from many different perspectives.

²⁵ Most commentators do not regard human dignity as a free-standing human right: ‘The notion that dignity can itself be a fundamental right is superficially appealing but ultimately unconvincing’ (D. Feldman, ‘Human Dignity as a Legal Value, Part I’ [1999] *Pub. L.* 682 and ‘Part II’ [2000] *Pub. L.* 61). See further, E. Grant, ‘Dignity and Equality’ [2007] *Hum. Rts. L. Rev.* 299; and J. Jones, ‘“Common Constitutional Traditions”: Can the Meaning of Human Dignity under German Law Guide the European Court of Justice?’ [2004] *Pub. L.* 167. But see the South African Bill of Rights which provides in s. 10 that ‘Everyone has inherent dignity and the right to have their dignity respected and protected’.

²⁶ Hate speech restrictions are typically under-theorized and rely on a shifting collection of justifications relating to public peace and order, non-discrimination, offensiveness, and human dignity often without any principled attempt to separate them out or address the free speech concerns they raise.