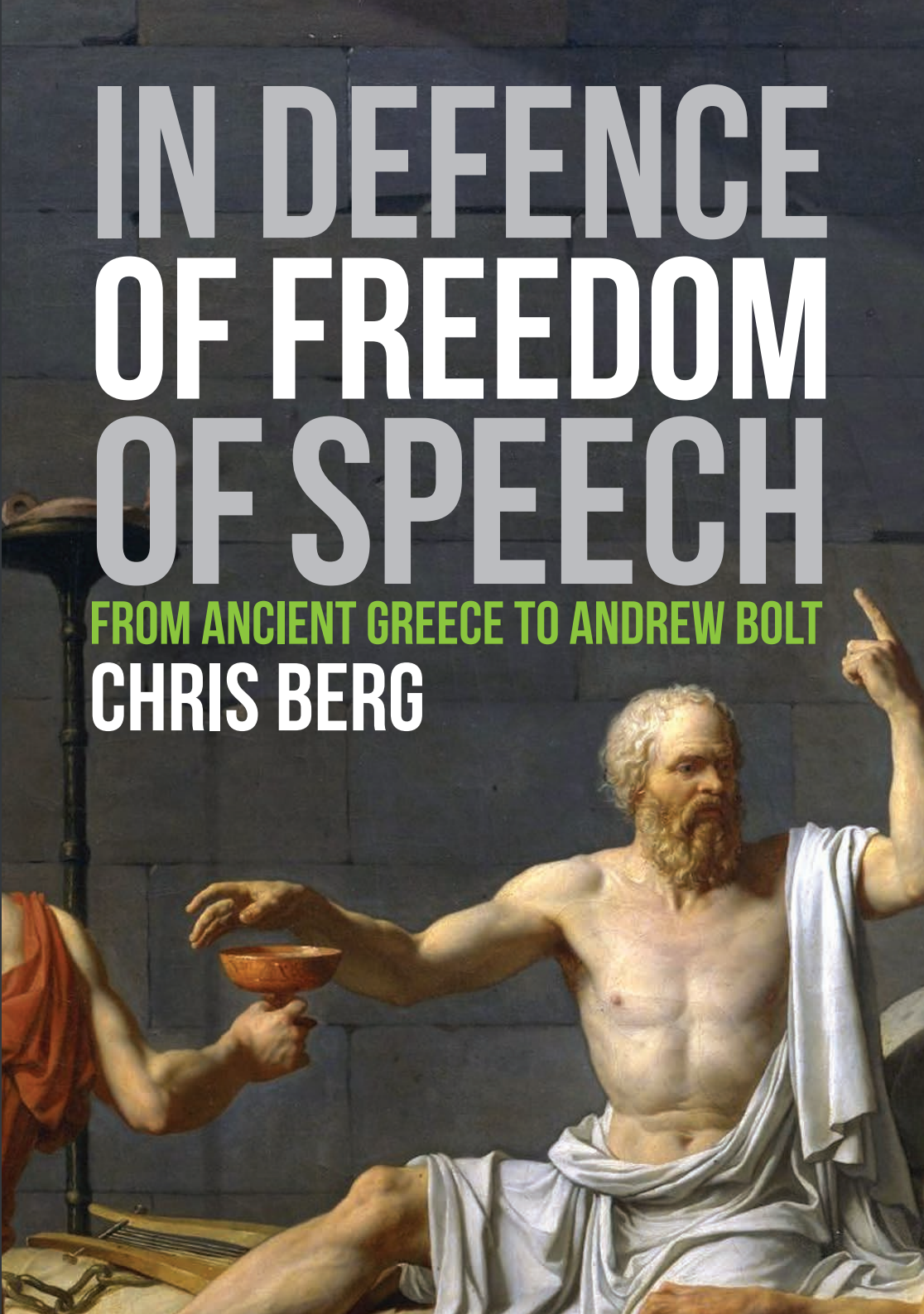
IN DEFENCE OF FREEDOM OF SPEECH

FROM ANCIENT GREECE TO ANDREW BOLT

CHRIS BERG



IN DEFENCE OF FREEDOM OF SPEECH

IN DEFENCE OF FREEDOM OF SPEECH

From Ancient Greece to Andrew Bolt

Chris Berg

Monographs on Western Civilisation
Special

Foundations of Western Civilisation Program

http://westerncivilisation.ipa.org.au/

Institute of Public Affairs
Mannkal Economic Education Foundation

First published 2012

Institute of Public Affairs

Level 2, 410 Collins St
Melbourne, Victoria 3000
Phone: 03 9600 4744
Email: ipa@ipa.org.au
Website: www.ipa.org.au

Mannkal Economic Education Foundation

Hayek on Hood
3/31 Hood Street
Subiaco, Western Australia 6008
Phone: (08) 9382 1288
Email: enquiries@mannkal.org
Website: www.mannkal.org

ISBN: 978-0-909536-74-9

Printed in Australia by Ligare

Today, to restrain the freedom of the press is to restrain the human race's intellectual freedom … Printing has been made the sole means of publicising things, the only mode of communication between nations as much as between individuals, by the nature and extent of our modern societies and by the abolition of all the popular and disorderly ways of doing this.

The question of press freedom is therefore the general one about the development of the human mind.

— Benjamin Constant, 1815

Contents

Foreword

Freedom of speech is one of our most fundamental rights. But, as Chris Berg's important new book explains, few of us really understand why.

Freedom of speech is also a great legacy of Western Civilisation. It took centuries to develop and evolve, and it should not be discarded lightly. Unfortunately like many of the endowments of Western Civilisation enjoyed by modern society, it is critically underappreciated. That's why the Institute of Public Affairs and the Mannkal Economic Education Foundation have come together to form the Foundations of Western Civilisation program. This book is the latest piece of research from the program, which seeks to fill the role sadly neglected by our schools and universities: transmitting to the next generation the fundamental features that make our civilisation special.

Recent events in Australia demonstrate how freedom of speech is under threat. *Herald Sun* columnist Andrew Bolt was hounded through the courts for the crime of writing an article that offended people. Broadcaster Alan Jones was investigated by a government agency because he said that public servants 'preyed on productive people'. Then he was investigated by that same agency for interviewing too many climate sceptics. The federal government announced a major inquiry headed up by former judge Ray Finkelstein into the media because they felt that the coverage they received

in some newspapers was too hostile. Finkelstein recommended a massive attack on press freedom and freedom of speech. He proposed a legislatively-empowered, taxpayer-funded super-media regulator that would have compulsory membership—even for newspapers. It's tantamount to a return to press licensing, which as this book explains, was abandoned in England in 1695.

That's why now is the right time to properly investigate the history of freedom of speech, and to understand where the arguments for and against it really come from.

As Chris Berg's book argues, freedom of speech defines the relationship between government and individual. Freedom of speech and freedom of thought are two sides of the same liberty. If a state thinks that it should control the very thoughts of its citizens it is, by definition, not a liberal state. Threats to freedom of speech—like the Finkelstein inquiry, the Bolt case, or the Alan Jones investigations—are not trivial. They go to the very heart of individual liberty.

Ranging across Greek, Roman, Dutch and English history, *In Defence of Freedom of Speech* is the first serious attempt at tracing the development of the philosophy of free speech. Censorship, defamation, hate speech and sedition are all covered in depth in this book, which explores the boundaries that have been commonly placed on speech.

This is the definitive history and defence of freedom of speech in Australia.

John Roskam
Executive Director
Institute of Public Affairs
April 2012

About the author

Chris Berg is a Research Fellow at the Institute of Public Affairs. He is a regular columnist with the *Sunday Age* and ABC's *The Drum*, covering cultural, political and economic issues. He is an award-winning former editor of the *IPA Review*.

His *Growth of Australia's Regulatory State: Ideology, Accountability and the Mega-Regulators* was published in 2008. He is also the editor of *100 Great Books of Liberty: The Essential Introduction to the Greatest Idea of Western Civilisation* (with John Roskam) published by Connor Court Publishing in 2010, and *The National Curriculum: A Critique* (2011).

I would like to thank Richard Allsop, Charles Richardson, Darren Ferrari, and John Roskam for their valuable feedback on the manuscript. Errors remain my own.

Introduction

On 29 December 1819, the young Earl of Ellenborough addressed the House of Lords in defence of the Tory government's Newspaper Stamp Duties Bill. The Bill substantially increased the taxes on cheap newspapers and pamphlets. It was a controversial measure, in no small part because it was transparently directed at the government's radical critics in the press. Ellenborough had taken his seat just a year earlier and he sought to calm his fellow peers.

The Bill was not directed against the 'respectable press', Ellenborough told the House. It was targeted at the 'pauper press'—cheap publications that were 'administering to the prejudices and passions of a mob'. These newspapers and pamphlets 'only sent forth a continual stream of falsehood and malignity'. So, he proclaimed, 'in the best interests of the country' his government must extinguish the 'gross and flagrant abuse of the press'.[1] Against Whig protest, the Bill passed.

Two hundred years later, the report of Australia's Independent Inquiry into Media and Media Regulation in 2012 struck remarkably similar notes. This report, commissioned by the Gillard government and written by the former judge Ray Finkelstein, claimed that freedom of the press—and freedom of speech in general—has resulted in 'inequality, abuse of power, intellectual squalor, avid interest in scandal, an insatia-

ble appetite for entertainment and other debasements and distortions'. Finkelstein's proposed solution was a regulatory agency that would enforce 'standards' on newspapers, magazines and virtually all Australian news or opinion websites.[2]

Ellenborough was frustrated by the disruptive, anti-authoritarian journalism of radicals like William Cobbett. The spark for Finkelstein's report was the hostile relationship between Rupert Murdoch's newspapers in Australia and Julia Gillard's Labor government. Both purported to be concerned with questions of taste and press ethics, yet these lofty ideas were scant cover for their true concerns: political antagonism between government and press. The same rivalry, two centuries apart.

Certainly, the similarity of Ellenborough and Finkelstein's complaints obscures the great changes that have occurred in the development of freedom of speech over those centuries. The mid-twentieth century saw a concerted legislative push to remove the limits on expression that had built up over the past few hundred years. Blasphemy laws were eliminated. Restrictions on obscenity, from racy novels to picture postcards to pornographic films, were substantially reduced. The scope of legitimate political opinion was widened; contrast, for instance, the repressive penalties for sedition during the First World War and much freer debate over the Vietnam War or the First Gulf War at the end of the century.

Yet that liberal tide is receding. In Australia, the laws against blasphemy that were eliminated in the twentieth century are back under a new guise of racial and religious vilification. 'Hate speech' has filled the void of the obscenity laws of the past: a steadily increasing set of statutory rules and case-law has created a 'right not to be offended' which directly competes with the right to freedom of speech. The voluntary press councils that were introduced in the middle of the last century to ward off newspaper regulation seem certain to become mandatory bodies in the wake of the British phone hacking scandal. With campaign finance laws and election restrictions, political speech is being

regulated—'managed'—in order to suppress voices that are considered too loud. Commercial expression is the subject of an increasing number of restrictions in the service of public policy—particularly in the field of public health. Outright bans on advertising certain products are increasingly common. The addition of privacy into human rights law has also thrown up new, and substantial, restrictions on speech, such as the United Kingdom's 'super-injunctions', where courts now routinely place gagging orders on the very existence of a gagging order. Even anti-sedition laws have experienced a resurgence as part of the War on Terror.

Virtually everybody says they support freedom of speech. But in every single debate over the new wave of speech restrictions there have been intellectuals, commentators and activists smugly claiming that freedom of speech is not 'absolute', or that their pet issues raise no free speech questions at all. Neither the nineteenth century's Ellenborough or the twenty-first century's Finkelstein believed they were damaging the liberties of their subjects when they proposed legislation to target 'intellectual squalor' or 'falsehood and malignity'. In liberal democracies, the importance of freedom of speech has been downgraded. It is a value which is no longer central to our self-image, and one which is apparently easy to discard if other goals present themselves. The news that the international watchdog Reporters Without Borders had dropped Australia's position on their Press Freedom Index from 18 in 2010 to 30 in 2011-12 went without much comment.[3]

But freedom of speech is not merely one value among many.

In the United States, the First Amendment of the Constitution demands that Congress shall make no law 'abridging the freedom of speech, or of the press'. This apparent stridency has generated a small genre of scholarship in that country trying to define the appropriate limits—if any—of free expression. In no other area of the law is the relationship between philosophy and practice so well-studied, or so highly theorised. This makes sense. As the American jurist Harry Kalven wrote in the

1960s, 'free speech is so close to the heart of democratic organization that if we do not have an appropriate theory for our law here, we feel we really do not understand the society in which we live.'[4]

This book argues that the liberty to express an opinion is at one with the liberty to hold an opinion. In a very real sense freedom of speech defines the relationship between the state and the individual. As Benedict Spinoza wrote in the seventeenth century, 'The most tyrannical governments are those which make crimes of opinions, for everyone has an inalienable right over his thoughts'.[5]

It is in the battle for liberty of conscience that we find the first buds of Western liberalism. In our secular age it is easy to forget that for much of our history, religious freedom was the first, and most important, liberty. The case for freedom of speech did not sprout fully formed in the mind of John Stuart Mill as he wrote the famous *On Liberty*. Nor was it an innovation of the American founders as they drafted the First Amendment. John Milton—whose 1644 tract *Areopagitica* is commonly cited as the first argument against censorship—was drawing upon two thousand years of thought.

We cannot understand the importance of free expression without knowing how this vital liberty was born; how thinkers and societies throughout history have developed the idea that individuals have the right to express themselves without fear of sanction by the state.

Freedom of speech is a liberty that has been defined and refined for more than two millennia. The greatest thinkers in Western Civilisation have explored its tenets and debated its foundations. In ancient Greece, the father of philosophy, Socrates, was executed for heresy. Yet his student, Plato believed the ideal state would be one that banned all poetry which did not either praise gods or famous men. Cicero and Tacitus saw freedom of speech as the keystone of Roman liberties. Augustine and Calvin punished their fellow Christians for mere doctrinal disagreements. Spinoza, Milton, Locke, Voltaire, and Mill have all defended, to

greater or lesser degrees, the right of individuals to believe and speak views of which governments disapprove. Even Karl Marx—no icon of individual liberties—was a passionate defender of press freedom. Yet the communist states that were his legacy have been among the most rigidly opposed to free expression. And it was the Soviet bloc that promoted the concept of hate speech—a concept which has spread throughout the liberal democratic world.

Our modern liberties are the result of a great dialogue within Western Civilisation. Intellectual and legal developments made on one continent or in one country ricochet across the Western world. Australian ideas about political and social freedom are drawn from the history of Greece, France, the United States, Rome, the Dutch Republic, and, of course, Britain.

And it is only by understanding that history that we can resolve the confusion about free speech in our time. Both ancient Rome and ancient Athens had a philosophy of free expression. But the two differed in an important way. The Athenians imagined freedom of speech as a foundation principle of their democracy. The Romans imagined freedom of speech as a foundation principle of their liberty. The difference is subtle but significant. If we believe that freedom of speech is an instrument, deployed for democratic purposes, we will find it sometimes necessary to restrain certain speakers—that is, to violate their free speech—in order to pursue a higher democratic goal. By contrast, if we believe, as the Romans did, that freedom of speech is a right held by individuals, then any attempt to restrain speech, for whatever reason, will be anathema.

These two competing ideas—free speech as a democratic instrument, and free speech as a right—have echoed through history and still define the contemporary debate.

This book argues that only the Roman tradition of individual rights provides a stable and coherent case for free expression. The reason for this lies in the intellectual origins of speech freedom—the relationship

between liberty of conscience and liberty of expression. The free, morally autonomous individual is one who can construct their own identity, form their own beliefs, and pursue their own desires while tolerating the identities, beliefs and desires of others. This idea is the core of liberalism. And its foundations were first articulated in the debate over religious toleration, and later freedom of speech. In this, Rome, with its tradition of scepticism and individualism, casts a longer shadow over Western Civilisation than Athens.

This book is not a legal history of freedom of speech, nor is it a history of the repression of speech. It aims not merely to recount the specific intellectual battles that have shaped the modern world, but demonstrate how that long history underpins the modern right to free speech, and what we will lose if this right is neglected. For, in the twenty-first century, it is the very idea of freedom of speech that is now being challenged. Benjamin Constant wrote in his *Principles of Politics* that:

> One habitual ruse of the enemies of freedom and enlightenment is to affirm that their ignoble doctrine is universally adopted, that principles on which rest the dignity of the human race are abandoned by unanimous agreement, and that it is unfashionable and almost in bad taste to profess them.[6]

We must show there is no such unanimous agreement.

It is easy to support freedom of speech when we agree with the content of that speech. So we need to ground our support for free expression in something more than platitudes—a resilient foundation that can cope with both the pleasing and the offensive. Freedom of speech has been, and still is, one of our most vital liberties. If we discard it, we critically undermine the moral foundations of liberal democracy, and lose our basic human individuality.

1 The Ancient World

The history of freedom of speech begins with a puzzle: the trial of Socrates for heresy by an Athenian jury in 399 BC. How could Athens—that icon of ancient liberty—do such a thing to its greatest thinker?

The answer to that question is not academic. Socrates is probably the most prominent and well-known philosopher in the Western intellectual canon. Nearly two and a half millennia after the fact, the philosopher's conviction and execution appear to be the classic example of state punishment of speech.

Socrates has entered political culture as the iconic martyr of freedom of speech; cited by John Stuart Mill, Martin Luther King, and Hannah Arendt alike as the first great crime against individual liberty and political opposition. In his retirement, I.F. Stone, the radical left-wing journalist, wrote a best-selling book on Socrates' trial, implicitly placing himself as an heir to Socrates' political dissent.

The confusion and bewilderment over his trial by supporters of freedom of speech is indicative of a larger confusion about freedom of speech in the modern era. Socrates' trial is entirely comprehensible in an ancient Greek context.

I.F. Stone thought that to understand twentieth century threats to free expression he had to return to the first great challenge to that lib-

erty in the first free city of Western Civilisation. He was half right. To understand why the modern world struggles with freedom of speech we need to understand why the modern world has struggled with the trial of Socrates.

The historical record reveals three separate Greek terms for free speech: *eleutherôs legein*, *isêgoria*, and *parrhêsia*.[1] The first and oldest, *eleutherôs legein* was comparative. A free Greek could speak freely. A slave could not. This free speech pivoted on the ancient definition described by Orlando Patterson in his seminal *Freedom in the Making of Western Culture* between a free individual and a slave: freedom, in the first, was the absence of slavery.[2] A slave could not speak his mind but a free person could. The earliest form of freedom is a double negative: 'not un-free'.[3]

The later term, *isêgoria*, described the rejection of tyranny by the aristocratic elite. Here the emphasis was on equality—the elimination of differences in the right to speak among a given community.

The final word is *parrhêsia*. This term has entered the modern world in a simplified translation as simply 'freedom of speech'. The trial of Socrates suggests this translation is somewhat more problematic. But in contrast to *eleutherôs legein* and *isêgoria*, *parrhêsia* gave a positive position on speech—*parrhêsia* was no longer the essence of equality, but of freedom. Greek philosophers and orators claimed that the practice of *parrhêsia* was an essential virtue of free Greek men. Aeschylus writes in his play *The Persians* of the results of the defeat of Persia in Greece:

> Now fear no more shall bridle speech;
> Uncurbed, the common tongue shall prate
> Of freedom; for the yoke of State
> Lies broken on the bloody beach.[4]

In despotic Persia, the speech of the 'common tongue' is limited by fear. In free Athens, speech is unrestrained. The Athenian statesman Demosthenes pointed out that one could not praise the laws of Athens

in Sparta, but one could freely praise the laws of Sparta in Athens.[5] (This is a timeless claim: Ronald Reagan famously joked that, just as an American citizen could stand outside the White House and abuse the president, a Russian was completely free to stand outside the Kremlin and abuse the American president too.) Comic plays could criticise the Athenian war effort against Sparta without sanction: the Athenians tolerated seditious views to a degree that would be alien to many twentieth century democracies.

Parrhêsia had great symbolic value. It was one clear and valued difference between Athens and its enemies; an indication of Greek liberty. To be granted *parrhêsia* was to be granted citizenship. (Slaves, foreigners, and women did not have the liberty to speak freely.)

Athenian speech was not free in any absolute sense. Much like freedom of speech today, it was limited by law. Athenians were prevented from making false accusations. Athenians could not insult a magistrate doing his duty. Nor could they insult the two 'Tyrannicides' who were considered the founding fathers of Athenian democracy.[6] This last limit stands out as a restraint on freedom of speech, but it is a relatively minor one. The first two—Athenian protection against libel and protection for officials conducting their business—are recognisably modern. More serious were restraints on the comic stage. While Greek comedy was the freest venue for uninhabited speech, it was also the target of specific laws which sought to protect the objects of its ridicule. The *aporrhêta* were words which could not be used at the theatre. There were also longstanding restrictions on mentioning specific individuals in comic plays.[7]

So *parrhêsia* was not absolute. But no democracy has been without some restraint on speech. And the restrictions do not explain Socrates' ordeal. The philosopher was a very old man when he was put on trial. As I.F. Stone asked, 'he had been teaching there all his life, unmolested. Why did they wait until he was seventy, and had only a few years to live, before executing him?'[8]

The Trial of Socrates

According to the public indictment by his accusers Anytus, Meletus, and Lycos, Socrates 'was guilty of not believing in the gods that the city believed in, and that he brought into the city other new divinities. Further, he is guilty of corrupting the young.'[9]

Most of what we know about the trial comes from the aristocratic Plato's dramatisations in *Euthyphro*, the *Apology of Socrates*, *Crito*, and the *Phaedo*. We also have an apology of Socrates written by the Athenian historian Xenophon, who was similarly a friend of the old philosopher. Xenophon portrays Socrates as an arrogant man who goads the jurors into ordering his execution. By contrast, Plato's Socrates is a model of an intellectual—humble, forthright and admirable. Yet these character differences in attitude are the least of our problems in understanding Socrates' demise. The historical puzzle of the trial of Socrates rests on a great inconvenience: we have only the case for the defence. We do not know, outside inference from our two sources and the indictment, the case against the philosopher. We do not know how the prosecutors reconciled their charges with Athenian free speech, or if they felt any need to do so.

Once the indictment had been published, Socrates was brought in front of magistrate for a preliminary hearing. The magistrate sent the case to trial. The trial itself lasted one day, and was conducted in front of approximately 500 jurors. The trial was public. There would have been many other spectators, and they were unruly enough to be referred to in Socrates' speech. The accuser and the defendant each laid out their case personally to the jury, and called others to speak in support. No lawyers or advocates were allowed—but it was not uncommon to have someone else write a speech for the defendant, which a third-century writer suggests was offered to Socrates by the greatest orator of the time, Lysias.[10] Socrates apparently refused.

For a long time, the accepted explanation for Socrates' prosecution and guilty verdict was that Socrates was swept up by both political cir-

cumstances of the time and was the victim of a personal vendetta.

According to this view the philosopher was a scapegoat for an Athens in crisis. Athens was democratic, but not stable. Just five years before the trial the city had been under control of the Thirty Tyrants, a dictatorship backed by Sparta which had taken the city in a coup. It had lost a series of devastating battles, and within living memory suffered a plague that killed up to one-third of its citizens.

In this uncertain political environment, Socrates was vulnerable. George Grote, the nineteenth century classicist, blamed Anytus for taking out personal grievances through the law. Anytus' son may have spent some time learning under Socrates. More recently, another scholar blames Meletus.[11]

These explanations act as an apologia for Athenian democracy, suggesting that the trial of Socrates was an aberration. Certainly, that was the view of Grote, who sought to absolve Athenian democracy of the illiberalism suggested by Socrates' trial. But more importantly these explanations assume that the ancient Greeks understood speech rights in the same way we do—that the translation of *parrhêsia* as 'freedom of speech' is close to literal.

In his 2009 book *Ancient Greek Political Thought in Practice*, Paul Cartledge makes the positive case for the five hundred Athenian jurors: Socrates was guilty. Cartledge focuses not on the charge of corrupting the young but on the religious charges. '[T]he Athenians' democracy and ours are very differently constructed and construed.'

Religion and politics were inseparable in ancient Greece. Athens was not just a city of men but a city of gods and men. And the 'gods' that Socrates brought into the city, as per the indictment, existed outside the democratic polity. There was nothing special about introducing gods into Athens, but Socrates' gods were personal gods, not collective gods. They were 'a power outside the regulatory control of the people'.[12]

This explanation suggests that there is something more complex go-

ing on than an abridgment on the right to speak freely. While *parrhêsia* superficially resembles our modern understanding of freedom of speech, it differs from that liberty is a number of critical aspects. *Parrhêsia* was a liberty to speak freely, but speaking freely meant speaking free of deception. *Parrhêsia* is openness. The French philosopher Michel Foucault described this as 'frank' rather than 'free' speech. We draw our modern saying to 'call a spade a spade' from a Greek proverb 'he calls a fig a fig and a trough a trough'. As Demosthenes describes the public space controlled by *parrhêsia*:

> There you have the truth spoken with all freedom, simply in goodwill and for the best—no speech packed through flattery with mischief and deceit, and intended to put money into the speaker's pocket and the control of the State into our enemies' hands.[13]

Parrhêsia may have been a liberal improvement on the earlier concept of *isêgoria*, but it was still intimately tied up with democratic ideology. For the Athenian state, the purpose of speech in Athens was to uncover truths. For democratic participation, Athens positively required its citizens to speak their own minds.

The scholar Arlene W. Saxonhouse describes *parrhêsia* as 'shameless' speaking, and contrasts Athenian *parrhêsia* with a story in the *Iliad* of a hapless soldier named Thersites. According to Homer, Thersites was the ugliest soldier at the siege of Troy, and a 'blathering fool'. But however hideous he was—Homer does not mince words—he had chutzpah. In the tale of Thersites, the great kings are deep in discussion about the next steps for their siege. The ugly soldier pushes his way into their circle. He raises his 'shrill voice' in what Homer describes as a 'torrent of abuse'.

Thersites' complaint is simple: King Agamemnon is being greedy and the army should return home. The circle of kings do not take the complaint as constructive criticism. Homer's hero Odysseus mercilessly beats the wretched soldier: 'You're nothing but trash'. Yet as Saxonhouse

points out, Homer had already endorsed Thersites' critique in a previous chapter. Thersites was insolent, but he wasn't wrong. The ugly soldier was beaten for speaking truth to power. Thersites was entirely correct about Agamemnon's selfishness, but had not displayed the required shame in front of his betters.

Every Athenian would have been familiar with the story of Thersites. *Parrhêsia* was the elimination of such shame. Rather than 'free' speech, *parrhêsia* is open, honest, and egalitarian speech. Saxonhouse writes that it 'captures both the egalitarianism of the regime that rejected the hierarchy implicit in the treatment of Thersites and the expectation that speech reveals the truth as one sees it, that speech opens and uncovers.'[14]

Parrhêsia stood opposed to deceptive speech. Athenians believed that the freedom to speak could be abused. And Socrates' use of irony and rhetorical skill would have been seen as contrary to the purpose of Athenian speech freedoms. In Plato's *Gorgias*, Socrates warns his interlocutor that while 'there's more freedom of speech than anywhere else in Greece,' he should be careful to curb his 'long style of speech'. Socrates' advice is both a sign that speech had limits, and that overblown and excessive rhetoric could been seen as deceptive.[15]

Deceit was an enduring obsession of the Athenians. The 'clever speaker' who deployed the art of rhetoric for ignoble ends was a threat to Athens' egalitarian democracy. Demosthenes again makes this plain: 'A man can do you no greater injustice than tell lies. For in a political system based on speeches, how can it be safely administered if the speeches are not true?'[16]

Socrates is open and honest in Plato's account of the trial. But openness and honesty is not style of the Socrates of the dialogues, where his argumentation seeks to manipulate and embarrass his interlocutors into questioning their beliefs.

In his lengthy preface to the *Apology* (as reported by Plato) Socrates extensively emphasises the truthfulness of what he is about to say—

claiming that it is his accusers that are masters of deception, not him. He characterises one of the accusations he faces as making 'the weaker argument appear to be the stronger'. But a virtuous speaker is an honest one, argues Socrates, and he is 'not a clever speaker'. These passages of the *Apology* are the centre of his defence. It is notable that Socrates makes no arguments about his freedom of speech—just that he is an honest, undeceitful man.

We understand freedom of speech as a 'negative' right—a right from restraint. This was not how the Athenians thought of *parrhêsia*. But that is not because they did not have any concept of rights. Fifth and fourth century Athenians could also have recalled, had they wished to do so, a rights-based tradition for free speech. (The earlier concept of *eleutherôs legein* was close to a rights-based understanding of speech freedoms, as limited and primitive as it was.[17])

But the Athenians of Socrates' time saw *parrhêsia* as a positive obligation rather than a negative right. *Parrhêsia* was about maintaining Athenian democracy, not expressing individual conscience. If it can be conceived in any way as a 'right', it was a right held by the community, not by individuals. The community therefore had the capacity to restrain it.

Socrates came up against limits of tolerance for speech precisely because he challenged, rather than reinforced the democratic system of Athens. By bringing in his own gods, Socrates was building a polity outside the Assembly. Athenian citizens may have been free and equal but they were not individualists. Citizens were granted *parrhêsia* by the city. Freedom of speech, so far as it existed, was not a right held contrary to state interests but a practice intended to further them. Moses Finley has written that, while Athens was democratic, there were 'no theoretical limits' to the power of the Athenian state—this is no clearer than its attitude to speech. In other words, the lesson of the trial of Socrates is not that rights need constant vigilance even under democracy, as Stone suggested, or, as liberals like John Stuart Mill suggested, democracies can

create a tyrannical majority under their liberal guise. It is that a liberty to speak conceived as a positive right to support a political system is an instable one.

While Athenians were free to criticise in the Assembly and satirise on the stage, they were not free to undermine. They loved verbal attacks on politicians, but were happy to restrain speech if it challenged democratic interests.[18] Socrates is a martyr to free expression and his reputation in the modern consciousness is deserved. But by Athenian law, he was probably guilty.

Socrates trial is more than just a historical puzzle. It emphasises a central confusion about the purpose and justification for freedom of speech in the modern world. How we defend freedom of speech is directly related to how we understand its purpose, its philosophical grounding, and its interaction with other values like democracy and toleration.

Freedom of Speech in the Roman Republic

Unlike Athens, the Roman Republic has no specific invocation of freedom of speech—no language which we can nominate as a parallel to our modern notions of free expression. But that does not mean it was an absent value, nor does it mean that free speech or free speaking had no cultural importance to Romans of this period. Here, however, our understanding of the philosophical justification for Roman speech rights pivots on an even more ambiguous and complex word: *libertas*. This was a general invocation of Roman liberty, rather than a specifically delineated right. *Libertas* was the guiding ideological construct around which Roman politics was built. We find the Roman understanding of freedom of speech within this larger concept.

No philosophical framework dominated Roman political debate more than *libertas*. Those who pushed Cicero into exile claimed to be acting to protect *libertas*, and built a shrine to the goddess Libertas where Cicero's house had been. Cicero described his subsequent return

from exile as a victory for *libertas*. Julius Caesar claimed to be defending *libertas* when he imposed his dictatorship, and his assassins claimed they were acting for *libertas* when they dispatched him.[19]

Libertas, clearly, was a flexible word. Or, perhaps more accurately, it had a variety of meanings, depending on the user and the context. In this sense it is not much different from 'freedom' as we understand and use it today—central to our self-image, but highly contested. And, like 'freedom', this ambiguity does not imply *libertas* was meaningless.

Neither does the absence of a specific, widely recognised Roman word or phrase for freedom of speech imply that no such concept existed. Despite its lack of formal recognition, free expression was in many ways more secure in the Roman Republic than it was in ancient Athens. And, despite the many documented instances of speech being abrogated in both Republic and Empire, the philosophical foundation of free speech was more lasting, and closer to our modern conception than that faced by Socrates. The romance of Greek *parrhêsia* has been an enduring interest for post-Enlightenment thinkers, but it is in Rome where we start to see a distinguishable right to free speech.

Some of our earliest Roman sources explicitly link free speech with *libertas*.

The second century BC dramatist Naevius boasted of the 'free tongue' of the Romans. His pride must have been tempered: Naevius was himself imprisoned under an old law which prohibited defamation through song. This was censorship. But that law was already hundreds of years old by the time Naevius fell afoul of it—it formed part of the Twelve Tables which founded Roman law—and stipulated a mandatory death penalty. Naevius was imprisoned, briefly, and released after he apologised. There is every reason to believe that by the late Republic, this law was a dead-letter law 'simply disregarded'.[20]

Individuals could privately sue each other for defamation, but only applied when that libel was spoken, not written.[21] Whatever precedent

the case of Naevius provided Roman jurisprudence it was not extended to writing and letters which, thanks to growing prosperity and literacy, came to dominate the public sphere in further centuries. The theatre appears to be the only area where directly naming political figures for criticism was restricted. (One legal historian suggests the role government funding played in theatre productions may account for this peculiarity.[22] If so, this would be an early illustration of a familiar phenomenon—that state funded speech is inevitably less free than privately funded speech.)

Considering the personal invective which has come down to us in Roman literature and poetry, it seems defamation action was rarely taken. Romans were practically free to attack and defend one another without the threat of legal retribution. Cicero was known for his rhetorical sprays against his fellow Romans, and said that to be prevented from speaking against anyone as you wished was the equivalent of servitude. We have our interpretation of the Twelve Tables from Cicero himself, so his belief in free expression was informed by deep knowledge of Rome's legal tradition in the area.[23] In his *Roman Revolution* Ronald Syme says that the absence of legal restitution for defamation made prominent Romans politicians 'hardy' to the abuse. 'It was a point of honour in a liberal society to take these things gracefully.'[24] Cicero's famously brutal character attack on the politician Vatinius, *In Vatinium*, was part of the rough and tumble of political life. The two men happily corresponded later in life, suggesting no hard feelings.

Freedom of speech in Rome was much wider than just limited libel action. Tacitus, writing during the Empire, wistfully recalled a lost freedom to write whatever he liked: 'an ancient historian has but few disparagers, and no one cares whether you praise more heartily the armies of Carthage or Rome'.[25]

The poetry of Catullus—particularly his (in)famous Carmen 16, *Pedicabo ego vos et irrumabo*—is both extremely obscene and illustrative of broad speech freedoms. Carmen 16 contains its own apologia:

'the poet can't be chaste enough / but verse is made of different stuff'. Catullus was recalled by later Roman poets to justify their own obscenities—first in the court of public opinion by Ovid, the Younger Pliny, and the bawdy Martial, and second by Apuleius in a legal court as he was being tried for magic.[26]

Libertas was part of the Roman worldview and an attribute of their status as free citizens. But unlike the Athenians, the Romans more closely viewed freedom of speech as a negative, rather than positive, freedom. In this sense it was more akin to a right than was *parrhêsia*. The political systems of Greece and Rome were very different. Athenian democracy was anti-hierarchical, almost communitarian. There was no fear of government because there was no government to be afraid of—democracy, to the Athenians, was the opposite of oppression. Roman Republicanism was more developed. Romans could, rightly, be concerned that magistrates could be oppressive. *Libertas* was as much a protection against the state as it was an attribute of citizenship. The confusion over the multiple uses of *libertas* stems from this recognisably modern fact that *libertas* could be threatened by tyranny. There was much to protect.

Libertas was regularly used in a negative context.[27] Cicero speaks of 'doing as you like'. Freedom of expression was, in Tacitus' words 'when you are allowed to think what you please and to say what you think.'[28] Appropriately, for a negative freedom, it was not limited to the upper classes or the Senate. The freedom to speak was widely held.

Just how pervasive Roman freedom of speech was can be seen in an unlikely institution: the Republican army. There were no restrictions or limitations on the speech of even the lowliest Roman soldier. Soldiers had to obey orders—this was in the oath they swore at induction—but were free to criticise, complain or dissent as they liked.

This extraordinary freedom meant that managing the expectations and allegiance of a legion was of critical importance for a commander. Caesar's *Gallic Wars* relates a number of instances where, having received

orders from their superiors, Roman soldiers would then debate those orders among themselves. One commander under Caesar was repeatedly taunted in speeches by his own forces.[29] It was not enough to give orders. To be an effective commander you had to convince your men they were good orders. Historians have reports of soldiers complaining that their commander was too hesitant to attack the enemy, and complaining that their commander was too belligerent.

This freedom of speech meant that soldiers were not absolutely bound by the chain of command either—they could approach the most senior commander directly with criticism or ideas. As long as such speech did not translate into full-blown mutiny, it was respected and legitimate.

One example of speech freedoms being restricted is the exception that proves the rule. In the Third Macedonian War, L. Aemilius Paullus told his men that during the campaign he would not permit subordinates to question or discuss his decisions—their only role was to fight when ordered. He was apparently successful at quashing his soldiers' speech. But doing so was illegal, and the episode caused him severe embarrassment when he returned to Rome after the campaign.[30]

The Roman freedom of speech was so ideologically powerful that it subverted the most hierarchical organisation in the Republic. Soldiers had this liberty because they were free Romans—above all other qualities they were Roman citizens and those citizens had *libertas*.

For the Romans of the Republic, freedom of speech was a right. Certainly, it was a right only held by citizens (so not a 'human right' in the modern sense in that it was recognised as an attribute of humanity). But it was a fundamental element of Roman citizenship, which was held in opposition to the state and protected by law.

Republican Rome is the first civilisation to conceive of a liberal model of citizenship rights which are not subordinate to democratic principles or the protection of a broader social group.

The Decline of Roman Liberties

This was not, however, to last. The dictatorship and Empire saw the steady elimination of speech rights.

It was not a sharp break. Even as dictator, Julius Caesar was comparatively accepting of dissent. Caesar would respond to verbal attacks rather than punish them, and he left some of his most vicious critics—like the poet Catullus—in peace. He did, however, exile a literary supporter of his rival Pompey.[31]

Caesar's successor, Augustus, was similarly hesitant to abandon the freedom of speech status quo. One historian argues that 'under Augustus the essential rights and liberties of Roman citizens remained untouched.'[32] Political writing boomed during Augustus' reign, and dissenting literature was distributed even under his eyes in the Senate. Augustus responded by making anonymous pamphleteering illegal, and extending (although largely not policing) the law against treason *lex maiestatis* to writing. We have references to three authors punished by Augustus for dissent—the worst of which, Titus Labienius, had his books burned and committed suicide.[33] Nevertheless, Augustus largely followed the path set by Caesar. Writing to his step-son and eventual successor Tiberius, Augustus wrote: 'Do not be swayed by youthful ardour, my dear Tiberius, into too great a rage over the fact that there are people who speak ill of me. For it is sufficient for us to have the power to prevent them from doing us any harm.'[34]

Tiberius did not take the advice. There is reason to suggest that the gradual increase in anti-dissent actions during Augustus' last years was directed by Tiberius. And once Augustus was dead, the liberty to speak declined rapidly. The *lex maiestatis* which Augustus had formalised and extended was, under Tiberius, a powerful weapon against the emperor's critics. Within a few years, 'actions for literary treason began to pour in'.[35] Tiberius had writers exiled and had books burned. Trials for other crimes began to be supplemented with accusations of literary treason. One such trial in AD 17 for adultery also charged a member of Tiberius' own family

that 'by foul gossip she had insulted the deified Augustus, Tiberius'.

Tacitus provides us with a lament for lost free expression in the speech of Cremutius Cordus, a historian who was tried in AD 25 under *lex maiestatis*. Cordus was accused of having praised Cassius and Brutus, assassins of Caesar and symbols of Republicanism. The historicity of his speech is doubtful. But whether speaking on behalf of himself or simply as a cipher for Tacitus' own views, the speech of Cordus is indicative of lost liberties under the emperors:

> The charge, Conscript Fathers, is for my words only; so irreproachable is my conduct. But not even against the sovereign or his parent are these words directed, though the *lex maiestatis* protects only these two.
>
> I am, however, accused of having praised Brutus and Cassius, whose deeds a great number of writers have treated, none without paying tribute to them …
>
> I will not cite the example of the Greeks, with whom not only liberty, but even licence remained unpunished, or if someone paid any attention, he avenged words with words. But one thing was absolutely free and never objected to: freedom to speak or write about those, whom death had removed from the hatred of foes and the praise of their partisans.[36]

This speech is interesting not merely as the lament Tacitus intended. The foundation of free speech has shifted. No longer is speaking freely a right in the way Cicero would conceive it—'doing what you like'. Now allowed speech was contingent on the emperor's will. Cordus says that Augustus and Caesar 'tolerated' dissent, 'displaying both moderation and wisdom.' The outcome of the trial was unequivocal—his books were burned, and owning any copy of Cordus' work was made a crime. Cordus starved himself to death.

As emperor, Caligula partially rescinded that law, and copies of Cordus' histories were available in a censored form. Yet the terrain had permanently shifted. The freedom to speak was no longer a fundamental attribute of

Roman citizenship. Tacitus himself wrote under the emperor Trajan at the end of the first century, and romantically recalled an earlier period where writing history was less politically sensitive and legally fraught.

Cordus' speech is Tacitus' way around the tight strictures he faces when writing. Tacitus knew he was limited in what he could say. Republican historians could take whatever sides they liked, Tacitus complained: they could praise Carthage and condemn Rome. Historians of the Empire could not. The latter historians' response was to take the advice of the first century rhetorician Quintillian: 'For we may speak against tyrants in question as openly as we please without loss of effect, provided that we say is open to a different interpretation, since it is only danger to ourselves, and not offence to them, that we have to avoid.'[37]

2 Christianity and Freedom of Conscience

'How would it be possible to rule over the conscience and the spirit of man through corporeal things?' asked the Huguenot theologian Francis Junius. His *Brief discourse sent to King Philip* was published in 1566, addressing the Spanish Catholic ruler of the Netherlands with a plea for religious toleration.

That year was a turning point in the history of the Low Countries. Like his father Charles V, Philip II believed it was his responsibility to restrain and repress the Protestant heresy that was spreading through underground reformist churches. But the heresy continued unabated, and the churches grew only more radical and more popular. In 1566, the religious tensions were dramatically exposed when large scale lay-preaching spread (up to 20,000 attended an outdoor religious service in Antwerp in June, defying the Spanish king) and Protestant mobs looted Catholic churches.

The train of events that began in 1566 led to the establishment of the Dutch Republic—the most politically liberal and religiously tolerant country of its time.

In the potent environment of mid-sixteenth century Netherlands, Junius was not the only writer talking about religious liberty and toleration. But Junius went further than most. Rather than limit his argu-

ments, as many of his contemporaries did, to how Protestants ought to be free to worship as they chose, Junius made a broader, more widely-applicable argument.

In Junius' view, those who held heretical views did so sincerely, believing that they were following the revealed wishes of God. Repression of those views would therefore be counterproductive. Repression would not stamp out Protestant heresy, but merely drive it underground where it could undermine the fabric of Dutch society. Otherwise law-abiding worshippers would, under repression, become 'vile atheists and libertines stirring up sedition and disturbing order and peace'.[1] Junius' solution was not merely a general toleration to all Protestant sects, but a guarantee of the right to express their beliefs. He understood that nothing a ruler could do would eliminate private religion, no matter how repressive or brutal that ruler was prepared to be. For Junius, this made freedom of speech a necessity. As a ruler could not police the inner thoughts of his subjects, on matters of faith, only argument was appropriate.

His support for freedom of speech was not absolute. But Junius' arguments are nevertheless important—and from a twenty-first century perspective, strikingly different to how our policymakers, commentators, public intellectuals, and academics perceive of speech rights and restrictions. In early modern Europe, freedom of speech and freedom of conscience were the same thing: two sides of toleration.

By the sixteenth century, when Junius was petitioning Philip II, the inseparability of belief and expression had a long intellectual history. It would dominate the philosophical approach to speech freedoms well into the nineteenth century, even though law and philosophy were seldom aligned.

Indeed, the history of freedom of speech after the fall of the Roman Empire in the West is deeply intertwined with the history of religious toleration. As John Stuart Mill wrote in *On Liberty,* it is on matters of religion that:

> the rights of the individual against society have been asserted on broad grounds of principle, and the claim of society to exercise authority over dissentients openly controverted. The great writers to whom the world owes what liberty it possesses, have most asserted freedom of conscience as an indefeasible right, and denied absolutely that a human being is accountable to another for his religious belief.[2]

Writers like Junius understood that the liberty to believe in your own God was, by necessity and by principle, one and the same with the liberty to express that belief.

After all, the dissemination of ideas is central to religious tradition. Many of the early modern clashes over freedom of speech occurred at the pulpit. Churches were a hub of communication. Church services were not limited to religious matters—they were used to disseminate community, regional and international news, and even discuss trivial issues like real estate.[3] Popular histories over-emphasise the role of the printed word during the Reformation and early modern period. The pulpit was the centre of political dissent and controversy well into the seventeenth century.[4] Long after the invention of the printing press, clerical authorities were trying, and failing, to ban their priests from making secular announcements in the sacred environment of the church.[5]

But more critically, in the pre-modern and early modern world, religious belief and political belief were virtually inseparable. Just as there was no separation between church and state, there was no clear separation between political philosophy and theology. Political dissent was broadcast from pulpits. And state command was transmitted through the state's religious doctrine.

Expression is the most concrete indicator of private belief. As Benjamin Constant wrote, 'Men have two ways of showing what their thinking is: speech and writing.'[6] This was particularly poignant before the birth of liberalism. Early modern autocracies viewed dissent in a different way to the non-tyrannical states of the twentieth and twenty-first century.

In the modern world, the argument that dissent or seditious speech needs to be suppressed is that such speech could act as a contagion, convincing those other than the speaker to share their views. One nineteenth century French legislator described censorship as a 'sanitary measure to protect society from the contagion of false doctrines, just like measures to prevent the spread of the plague.'[7] It is not the personal beliefs of radical Islamic preachers which Western democracies are concerned with, but the effect that expressing those beliefs may have on others. It is not private racist views that the Australian Racial Discrimination Act seeks to muffle, but how the expression of those views might hurt listeners.

For rulers of the early modern and pre-modern world however, speech revealed the existence of opposition. We can easily see in twentieth century history how totalitarian states have made the manipulation of private belief central to the maintenance of tyranny. Past monarchical states did so as well—at least as far as bureaucratic and technological development would allow. If power comes from God, then those who reject that God are a challenge to the political order as much as the theological order. The existence of heretical belief was the threat, not expression of heretical beliefs.

The religious origin of freedom of speech must shape our contemporary understanding of speech rights. Freedom of conscience, toleration, and religious pluralism provide the critical foundation for freedom of speech and freedom of the press. Not all intolerance is a manifestation of violated speech rights—persecutions in the medieval world were not limited to religious minorities. But in this period almost all violations of speech rights were manifestations of intolerance. The sixteenth century defender of religious toleration Sebastian Castellio wrote 'After a careful investigation into the meaning of the term heretic, I can discover no more than this, that we regard those as heretics with whom we disagree.'[8] The relationship between religious opinion and practice and freedom of

speech finds its full enunciation in the First Amendment to the United States Constitution.

It is therefore religious toleration where any historical investigation of free speech must turn. And to do so, we must return to Rome: the empire from which Christianity emerged.

Religious Toleration in Pagan Rome

Pagan Rome was a relatively tolerant society. It was multicultural and multiethnic. Roman polytheism easily accommodated new gods, a feature which virtually eliminated inter-religious tensions, but the monotheistic Jews were tolerated as well.

Private religious belief was only a problem for the Roman state if that belief threatened the security of Rome. The suppression of the cult of Bacchus—a rare example of religious restriction in Republican Rome—is illustrative. The religious beliefs of the cult of Bacchus didn't worry the Roman state, but the cult's practices did. The followers of Bacchus were accused of criminal activity and deviant sexual practices. So in 186 BC the Republican Senate laid down extensive and oppressive restrictions on the Bacchanals. There were to be no sanctuaries to Bacchus. No ceremonies could be held. No one could be appointed a priest of the cult. Mingling with Bacchants was prohibited. Bacchus worship could not be outlawed completely; Bacchus was an unchallenged member of the Roman pantheon. Private worship was allowed in groups of five people or less. These restrictions were accompanied by mass arrests: four thousand people were executed throughout Italy.[9] The cult of Bacchus was seen as a seditious threat to the moral and political foundations of Rome.

One scholar argues that, as religious cults in Rome were associated with certain industries, or certain festivals, prohibitions and restrictions on associations and events which developed in the late Republic and early Empire were themselves de facto limits on religious belief.[10] This

dovetailed with the Roman concern for conspiracy, which associations like the cult of Bacchus could perhaps ferment. One prominent imperial example was the banning of the religious practice of astrology in AD 294, a practice which Diocletian believed could stoke rebellion if an astrological prediction forecast defeat in war or his own death.

The practice of Roman religion was markedly different to Judaic religion and its descendants. It was heavily intertwined with the state, but the state's interest was in the performance of mandatory cultural practices, not of private belief. This manner of state religion allowed a degree of 'toleration' to a variety of cults across the empire, even cults of gods that were not in the Roman pantheon.

Rome was not, however, tolerant of religions whose adherents refused to participate in Roman religious practices.

This explains the Roman relationship to Christianity. In a letter to the Emperor Trajan around AD 110, Pliny the Younger argued that while Christianity was a pernicious folly, the young religion's most concerning consequences were how it affected Roman public life. The Apostle Paul was once brought before a Roman governor in Greece at the instigation of local Jewish leaders. The governor dismissed the complaint by saying 'If it were a matter of crime or serious villainy, I would be justified in accepting the complaint of you Jews; but since it is a matter of questions about words and names and your own law, see to it yourselves; I do not wish to be a judge of these matters.'[11]

Yet virtually from the moment it drew the attention of the Roman hierarchy to the conversion of Constantine in AD 312, Christianity was a prohibited religion. One of the earliest possible references we have to Jesus Christ is Suetonius' account of the expulsion of the Jews from Rome after 'disturbances at the instigation of Chrestus'. After the great fire of Rome in AD 64, Nero 'fastened the guilt and inflicted the most exquisite tortures on a class hated for their abominations called Christians.'[12] Nero's brutal purge of Christians in the capital set the tone

for the next two and half centuries. Jews were tolerated upon payment of an extra tax, but Christians were not.[13]

The integration of Roman religious cults and the cult of the emperor made rejection of Roman gods seditious. Yet Nero's brutal persecution of Christianity after the fire was seen by the Roman public as an opportunistic attempt to distract from his own failures. Sympathy—as far as we know—lay with the persecuted not the persecutor. The result was an uneasy peace between Christianity and the Roman state. Trajan's response to Pliny suggests that the philosophy of religious toleration remained a core principle, even while official imperial policy was hostile to Christianity:

> Christians are not to be sought out; if they are denounced and proved guilty, they are to be punished, with this reservation, that whoever denies that he is a Christian and really proves it—that is, by worshiping our gods—even though he was under suspicion in the past, shall obtain pardon through repentance. But anonymously posted accusations ought to have no place in any prosecution. For this is both a dangerous kind of precedent and out of keeping with the spirit of our age.[14]

But by the late second century, sporadic persecutions had solidified into general Roman hostility to Christianity, and the list of Christian martyrs grew over the next century, as the religion spread and climbed the Roman social hierarchy. Roman authorities targeted the church leadership directly, rather than just focusing on conversions.

The rule of Diocletian between AD 284 and 305 was a substantial jump in state control across the Roman economy and society. Diocletian's effort to unify the empire under Roman culture led to the Great Persecution of 302-305, an empire-wide attack on churches, the confiscation of scripture, imprisonment of clergy, and martyrdom. Diocletian's Great Persecution was the culmination of two centuries of antagonism between Rome and the early church. Ten years after the

Great Persecution, Constantine converted to Christianity, and Rome was a Christian empire.

But as one historian has written, the memory of the persecutions did not engender widespread support for toleration. Quite the opposite. 'Defence of the age-old established religion of guardian deities watching over the Roman empire and the peoples of the provinces gave way to the guardianship of a single God, whose demands were ever more exacting.'[15] Christian intolerance until the end of the Empire and well into the modern period inherited much from pagan intolerance. The philosophy of freedom of conscience—and, therefore, freedom of speech—is a direct result of that long history of persecution.

The Early Christian World

The Marxist historian GEM de Ste. Croix claimed that there were more persecutions of Christians in the Christian Roman empire than there had ever been before Constantine's conversion.[16] This claim is unlikely to be true. Ste. Croix's claim was driven by a hostility to the church (he was 'completely antichristian', to use his own words) but he was drawing on a long tradition of Enlightenment scholars from Hume to Montesquieu to Gibbon who contrasted 'tolerant polytheism' with 'intolerant monotheism'.[17] With a theology of multiple gods, pluralism is easy. Where there is only one God, alternative faiths are a threat.

This has become a standard story, even in academic work. The multi-ethnic, multi-faith, multicultural Rome was destroyed by Christianity well before it was sacked. The 'Dark Ages' were presaged by the decline of liberal Rome. Gibbon even managed to blame the Diocletian persecution on the 'inflexible obstinacy' of Christians.[18]

But if we view freedom of speech as a leading indicator of a liberal society, it reveals a different interpretation. 'Literary treason' was being prosecuted long before Diocletian's Great Persecution, let alone before the Christian persecutions of paganism after Constantine. Liberal Rome

died three centuries earlier, as the Republic died. The revolution was first structural, not philosophical. Under the empire, the maintenance of state power was given priority over Republican principles. Imperial authority and religious cult practice grew to be inseparable under the Caesars. The persecution of Christians was much more an assertion of authority against dissent than an assertion of religious superiority. Freedom of speech was simply the first liberty to go.

Nevertheless, Christian Rome under Constantine was not immediately intolerant. The experience of the Great Persecution—where many Christians were sheltered by pagan neighbours and friends—gave a legacy, albeit short-lived, that was favourable to toleration and hostile to religious coercion.[19] Constantine exiled Arius (founder of the Arian heresy, which believed that Christ was subservient to God, contrary to Catholic teaching) after the Council of Nicea in AD 325 and banned Arius' writings, but it is indicative that later advocates of persecution considered this act to have demonstrated weakness, not strength. After all, Arius was left alive.[20]

One important by-product of the official shift from paganism to Christianity was an intellectual strand of pagan thought defending tolerance. The failure of persecution to wipe out Christianity looms large in pagan arguments for religious pluralism. Even more interestingly, this strand of pagan thought, as it is addressed to a Christian audience, explicitly and deliberately makes its arguments according to Christian, rather than pagan, precepts and traditions.

One particular argument, an oration addressed to the emperor Jovian in 364, is worth dwelling upon. The speaker was Themistius, 'without a doubt the most important public official in Constantinople for almost forty years', and he mounts startlingly modern arguments for religious toleration.[21] His arguments anticipate those that have been used by advocates of free speech 1500 years later.

Themistius was a pagan, but a sufficiently trustworthy advisor to the Christian emperor to counsel him on one of the most sensitive issues

in Christian Rome. Jovian had a general policy of tolerance for which Themistius' speech provided support—Themistius was preaching to the choir, so to speak. The target audience of his arguments was not the emperor but other Christians.[22]

First, Themistius argues that freedom of conscience is a matter of practicality.

> No individual has exactly the same beliefs as his neighbour, but one man believes this and another that. Why then do we use force where it is ineffectual?[23]

Furthermore, Themistius argues, even the great Roman empire has limited power. Jovian cannot control the internal beliefs of his subjects:

> [A] king cannot compel his subjects in everything, but that there are some matters which have escaped compulsion and are superior to threat and injunction for example the whole question of virtue, and, above all, reverence for the divine, and that it is necessary for whoever intends that they should exist naturally to take the lead in these good things, having realised most wisely that the impulse of the soul is unconstrained, and is both autonomous and voluntary.[24]

A faith coerced is no faith at all, claims Themistius. It is 'impossible … to be pious and godloving out of fear of human laws'. An emperor who attempted to do so would undermine genuine faith, both Christian and pagan: his subjects would be reduced to 'worshipping the imperial purple rather than God, and altering our rituals with more ease than Euripus.' (Euripus, a famous channel of water in Greece, was supposed to change directions at least seven times a day: it was used by classical writers to describe inconstant opinion.)

For Themistius, Christianity is supported by freedom of conscience, rather than challenged by it. Indeed, when God granted individuals free will, He was offering instruction about the proper role of a ruler on matters of faith:

> He who applies compulsion removes the licence which God allowed. … [T]he law of God, which is our law, remains immovable for all time, that each man's soul is liberated for the path of piety that it wishes. Neither sequestration of property, nor scourges, nor burning has ever overturned this law by force. While you will persecute the body and kill it, as it may turn out, the soul however shall escape, carrying its resolve free within it, in accordance with the law, even though it may have suffered constraint as far as the tongue is concerned.[25]

A ruler may coerce individuals into silence (a negative coercion) or into participating in public rituals (a positive coercion) but the apparent religious unity would be entirely false.

Themistius believed that Christianity and paganism were variations of a deeper faith. Pagan theological belief was shifting towards a vague monotheism anyway: while he often cites specific pagan gods, repeatedly throughout his published *Orations* Themistius refers to God in an abstract sense.[26] Themistius therefore presented to Jovian a model of religious pluralism where pagans and Christians were travelling along different paths to the same goal—to find God and the divine.

Classical Greek philosophy told Themistius that God and the divine are unknowable—absolute religious truth is beyond the power of human comprehension. Therefore, Themistius argues, competition between faiths is necessary, because through that competition, all those with faith are brought closer to the truth about God.

> [I]t is in man's nature to complete with more eagerness those tasks in whose accomplishment he will meet a challenge, but to be casual in those which present no opposition. A complete absence of competition fills us with lethargy and boredom. For the spirit is always easily galvanised by opposition to take pleasure in toil. This is why you do not exclude beneficial contention from pious observance, and this is why you do not blunt the goad of zeal in religious affairs: mutual competi-

> tion and rivalry. It is as if all the competitors in a race are hastening towards the same Judge but not all on the same course, some going by this route others by that, while the man who is defeated does not go entirely unrewarded; thus you realise that, while there exists only one Judge, mighty and true, there is no one road leading to him, but one is more difficult to travel, another more direct, one steep and another level. All, however, tend alike towards that one goal and our competition and our zealousness arise from no other reason than that we do not all travel by the same route.[27]

The twin arguments that Themistius presented to Jovian—that a state cannot regulate the internal beliefs of individuals, and that the challenge of existence of contrary beliefs supports rather than threatens 'correct' beliefs—are significant. While it is limited to religious pluralism, rather than a neutral defence of individual conscience, Themistius' oration in AD 364 is nevertheless the earliest sustained defence of freedom of speech in the historical record.

Themistius was not the only pagan who argued for toleration. The rhetorician Libanius mounted a similar argument about the futility of forced conversion, arguing that while the apparently converted appear outwardly to perform Christian rites, they would inwardly continue to worship their own gods.[28] Symmachus, too, argued that all who had faith were travelling on the different path to the same truth, and that necessitated tolerance.[29] Yet it is surely indicative that pagans make arguments for toleration only after Constantine's conversion to Christianity, and when they do, they make those arguments on Christian, rather than pagan, grounds.[30]

The same argumentative convenience can be found across the religious divide, in Christian writings before Constantine's conversion. One of the most famous polemics in defence of toleration was written by Lactantius, a Christian professor of rhetoric in Nicomedia. During the Diocletian persecution, Lactantius argued that:

> There is no need for violence and brutality: worship cannot be forced; it is something to be achieved by talk rather than blows, so that there is free will in it. They must unsheathe the sharpness of their wits: if the reasoning is sound, let them argue it! We are ready to listen if they would tell; if they keep silent, we simply cannot believe them, just as we do not yield when they use violence.[31]

Lactantius also mounts an argument for the expression of religious values as a test for the strength of belief, writing 'If [the pagans] have any confidence in their truth, let them teach it to us: let them talk, let them just utter, let them have the nerve I say, to engage in debate of some such sort with us.'

The intolerance of early bishops in Christian Rome is well known. It was schisms within the Church that led to the Council of Nicea in 325. Typical of early Christian intolerance was that of the archbishop of Constantinople in the early fourth century, Nestorius, who pleaded with the emperors to 'Give me, my prince, the earth purged of heretics, and I will give you heaven as a recompense'.[32] But this intolerance from Christian bishops contrasted with the relative tolerance of fourth century emperors. The ferocity of the bishops should not be mistaken as imperial policy.

The Edict of Milan, signed jointly by Constantine and the Eastern emperor Licinius, signalled an official end of the Great Persecution. But it was more than a statement of support for Christians. The Edict proclaimed general religious toleration across the empire: all Roman citizens now had 'the right of open and free observance of their worship for the sake of the peace of our times, that each one may have the free opportunity to worship as he pleases.'[33]

Yet the toleration under Constantine was short-lived, in part because he left the office of emperor with the same religious duties as he inherited it. His less liberal successors were more than happy to use state apparatus to ensure Christian unity.[34] As the Roman empire transitioned into

the medieval era, Christian arguments against toleration prevailed—Constantine's attempt to replicate the toleration of pagan Rome in a Christian empire was abandoned. And no argument was more important to that change than that made by Saint Augustine at the end of the empire.

Augustinian Intolerance

The philosopher and theologian Augustine, who died in 430, has come down through history as the classic persecutor. He was both theorist and practitioner: he developed the original theory of Christian persecution and enacted it against the strict Donatist sect while he was Bishop of Hippo in North Africa.

But Augustine was originally a pragmatic supporter of toleration: 'no one should be coerced into the unity of Christ, that we must act only by words, fight only by arguments, and prevail by force of reason, lest we should have those whom we knew as avowed heretics feigning themselves to be Catholics.'[35] One of his earliest writings—now lost—was a thesis against coercion.[36] Heresy, the young Augustine believed, was to be challenged by argument not force. '[M]y desire is, not that anyone should against his will be coerced into the Catholic communion, but that to all who are in error the truth may be openly declared, and being by God's help clearly exhibited through my ministry, may so commend itself as to make them embrace and follow it.'[37]

Augustine's view changed. First he called for the state to restrain the violence of the Donatists who were persecuting Catholics. After 406, Augustine had however shifted towards a belief in active persecution of Donatists. His concern was the unity of the Catholic Church. Augustine faced the problem foreseen by those advocates of toleration who argued that a ruler could not coerce the internal beliefs of their subjects; the test for Augustine was whether the converted would defend 'the truths which are opposed to their former errors with the same

zeal as they used to show on the other side.' But this could be done: 'fear of severity', the bishop argued, 'assists the teacher of the truth.'[38]

Augustine argued that coercion had biblical justification. In one Biblical passage Augustine cited, Jesus tells a parable about a man who, having prepared a great banquet, finds that nobody will join his feast. He sends his servant out to bring in the poor and hungry, but there is still room for others. 'Then the master told his servant, "Go out to the roads and country lanes and compel them to come in, so that my house will be full."' Commenting on this passage, Augustine wrote to a sceptic:

> You are also of opinion that no coercion is to be used with any man in order to his deliverance from the fatal consequences of error; and yet you see that, in examples which cannot be disputed, this is done by God, who loves us with more real regard for our profit than any other can; and you hear Christ saying, 'No man can come to me except the Father draw him', which is done in the hearts of all those who, through fear of the wrath of God, betake themselves to Him.[39]

In the debate between advocates of toleration, and advocates of persecution, Augustine won. We now talk of some of the greatest church fathers as holding an Augustinian view of religious coercion, which saw persecution as a divine command to defend and enlarge the Christian flock.

The persecutory doctrine developed by the Bishop of Hippo is a touchstone in the history of toleration and freedom of conscience. His was the authority cited by eleventh century Church lawyers when devising the Papacy's position on heresy, and the persecution that followed. His interpretation of biblical passages like the parable of the banquet was adopted by humanists like Thomas Aquinas. His approach to the Donatists in North Africa was cited by Thomas More and Martin Luther. His shadow over Christendom was so great that advocates for toleration understood Augustine to be their interlocutor. Writing in the sixteenth century Sebastian Castellio said Christians must 'obey God rather than Saint Augustine'.

Full Augustinian religious persecution—if more brutal and violent than Augustine would have supported—was enacted by the Eastern emperor Justinian, virtually from the moment he took power in 527.

By Justinian's reign, the Western half of the empire had collapsed. Yet the doctrine of Christian persecution had been fixed. The liberties of Republican Rome—first among them *libertas*, the right to speak freely—were now a 500 year old memory, if they were remembered at all. It would take the classical revival of the Renaissance to fully imbibe the philosophical values of Athens and Rome, and post-Reformation liberalism to revive individualist arguments for freedom of speech.

Nevertheless, this was the loss of freedom of speech as a philosophical value, not as a practice. Roman and medieval authorities were a far cry from the totalitarian authorities of the twentieth century. The repression of speech requires a substantial administrative apparatus, to identify speech crimes, to try them, and to punish them. State power was used only when possible, and was necessarily arbitrary.

Medieval individuals would have had many opportunities to speak ill of emperor, bishop and king without anybody finding out. In an era before the Gutenberg press, the cost of publishing was prohibitive. Medieval lives were restricted by hard-to-traverse geography and low population; sharing seditious speech with more than a few dozen neighbours would have been challenging. Religion was central to pre-modern life—where there were political cleavages there were inevitably religious cleavages, and vice-versa. But the limited ability for individuals to broadcast their views also helps further explain why the battles for freedom of expression were centred around the pulpit. The audience of 20,000 that gathered in Antwerp in 1566 was enormous by early-modern standards, yet a tiny fraction of the audience that could be reached using even the earliest Gutenberg press. The disruptive power of speech is constrained by technology, and limits on speech are themselves constrained by legal and administrative infrastructure.

In his influential book, *The Formation of a Persecuting Society*, R.I. Moore describes the rise of persecution in Europe from the eleventh century onwards. As Moore points out, persecution had been well developed in prior centuries in theory—as we have seen, Augustine spelled out the arguments in full—but this heavy-handed intolerance was not implemented to any broad degree in practice. Moore describes a 'long silence' between the fall of the Roman Empire in the West and the turn of the millennium. A large part of this is due to the fact that the Western Church was, itself, insufficiently unitary to police heresy; it lacked the institutions to impose consistent worship and practice. Rome's dominance over regional dioceses would only come in the eleventh century.[40]

This is not to say Europe before 1000 was 'tolerant' in any usefully modern sense of the word. The Church's developing internal coherence gave it licence to enforce coherence in its flock, and to punish threats to that coherence.

The Case for Toleration in a Persecuting Society

Nevertheless, the medieval world did not lack arguments for toleration. 'Long before the Reformation', writes the historian Cary J. Nederman, religious toleration 'received defense from various quarters in Latin Christendom, orthodox as well as dissenting.' [41] Nederman details a number of writers between the eleventh and sixteenth centuries who made arguments, often indirectly, about toleration and freedom of conscience.

For example, the thirteenth century missionary William of Rubruck travelled throughout the Mongol empire and wrote, for the interest of Christians at home, about the multi-religious nature of that empire. By showing how toleration worked in foreign lands, William provided a practical demonstration of how toleration could be practised in Christendom.

Other writers provided more philosophical arguments for toleration, challenging theological knowledge, and, in highbrow works written only

for fellow intellectuals, introduced a sceptical foundation on which freedom of expression could be built.

The English Bishop and writer John of Salisbury provides the most comprehensive and recognisable defence of freedom of thought and speech in this period. Writing between 1157 and 1159, John argued for 'patience'—virtual indistinguishable, argues Nederman, from toleration—when faced with opinions or actions that his contemporaries disagreed with.[42]

John's 'patience' extended beyond religious toleration. John mounted an argument for freedom of expression: '[I]t is the part of the good and wise man to give a free rein to the liberty of others, and to accept with patience the words of free speaking, whatever they may be.'[43] Not only did John's views on expression extend outside the religious sphere to accept political speech, but he also argued that offensive and abusive views were to be tolerated: 'For even if criticism carries open or covert malice, to bear it is in the eyes of wise men a far finer thing than to seek to punish it.'[44] This, clearly, is a radical doctrine, and, in some aspects, an advance on the Roman tradition he was proud to inherit.

His argument for freedom of speech was grounded on scepticism about the ability of humans to understand God. No man could be virtuous if they were being forced into it. Virtue 'does not arise in its perfection without liberty'. John understood the crucial corollary of this. Toleration is not acceptance. To tolerate someone's wrong or immoral views is not to ignore them; on the contrary, it is to vigorously argue against them. 'Liberty … is not afraid to censure that which is opposed to sound moral character … Man is to be free, and it is always permitted to a free man to speak to persons about restraining their vices.' For John this is a principle that individuals should apply to each other, and to those who rule them.

John practised what he preached. He was an aggressive and consistent critic of the vices of the Papacy and the Church hierarchy. The

Pope 'is burdensome and almost intolerable to everyone', John wrote, saying that the Pope built palaces while churches were crumbling. This was a criticism that he made boldly in an audience with Pope Adrian IV himself. In his *Policraticus*, John describes how Adrian responded: 'The pontiff laughed and congratulated such candour, commanding that, whenever anything unfavourable about him made a sound in my ears, he was to be informed without delay.'[45]

John's arguments for toleration and freedom of expression stand out from his medieval peers in an important way. Nederman argues that John's affinity with classical Roman philosophy led him towards a rights-based understanding of free speech. According to John, the validity of any given proposition can only be judged by individuals, not society or the state. Individual judgment is the 'universal principle'.[46] John wrote that 'The Academy of the ancients bestows upon the human race the leave that each person by his right may defend whatever presents itself to him as most probable.'[47]

Rights-based arguments were however rare in an already small canon. More prominent were arguments for toleration grounded in communitarianism. Marsilius of Padua argued in the fourteenth century that the maintenance of the common good necessitates the toleration of different religious views, insofar as those views did not threaten the common good itself.[48] (This raises the obvious question of what should happen if the community decide that certain religious views *do* threaten the common good.) Nevertheless, what has since been described as 'communal functionalism'—where a community is conceived as a network of groups or parts arranged according to their contribution to the whole—was a prominent strand of medieval political thought, and Marsilius' hesitant approach was constructed firmly in that tradition.

John of Salisbury's account of tolerance is a tolerance that allows for (or even requires) moral judgment, and this was a particular feature throughout much writing on toleration in the period. Medieval writers,

even when they were advocating persecution and intolerance, made an important and useful distinction when they described what speech or thought should be punished and what should be left alone. Some belief which was, according to tradition and canon, objectively evil was to be tolerated nonetheless.

Persecution in Christendom targeted Christian heresy. How to deal with non-Christians was therefore an open question. While the medieval period saw some extraordinarily brutal persecutions of Jews, the Christian humanists developed an idea of toleration which, while extremely limited at the time, should be a necessary part of our understanding of toleration—and freedom of speech—today.

Medieval thinkers recognised that some evils were greater than others. Thomas Aquinas argued that Jewish rites—while, of course, evil—should be tolerated because the greater evil would be to suppress the religion that had bought Christianity into the world. Other non-Christian groups should be tolerated because persecution would bring Christendom into moral disrepute.

These medieval writers were clear that tolerance was the opposite of acceptance. One does not tolerate someone they admire; rather, one tolerates someone they actively dislike. Toleration 'was not an imperative of love but a restraint on one's hatred.'[49] Raymond of Pe contrasted this *tolerantia* with permission. Just because something was tolerated did not mean it was encouraged or morally right. Tolerance is simply 'when lesser evils are permitted so as to prevent greater ones.'[50]

The medieval writers who argued for the toleration of infidels were developing a philosophical justification for tolerance at its margins. Concepts of freedom of thought and expression are only meaningful for marginal cases. A freedom of speech that only allows freedom of inoffensive or popular speech is no freedom at all—it is how society deals with the speech that is offensive of unpopular that reflects its liberal values. The medieval approach—that one evil be tolerated to prevent a further

evil—is, despite its use by those who would fully persecute Christian heretics, insightful. And it contrasts favourably with later arguments for religious pluralism and toleration which treat all beliefs as morally neutral. Voltaire's idea of religious freedom was of separate and equal belief systems coexisting. Medieval philosophers would not have been able to share such a view—the Christian church held absolute truth. The purpose of *tolerantia* was dealing with the existence of non-Christians, given the overriding assumption that the non-Christians were wrong.[51]

Of course, *tolerantia* only applied to minor evils. Christian heresy was a major evil. And even within those philosophical constraints, *tolerantia* was not at all consistently adhered to. Even after tolerance for European Jews had been adopted into canon law in the twelfth and thirteenth centuries there were significant persecutions and pogroms.

Humanism, Reformation, and Censorship

The humanist revival of classical learning as a guide for the present (rather than an object of study in its own right) occurred concurrently with the bloodiest period of persecution and Inquisition. The split in Christendom between the Catholic Church and Protestantism from the 1520s onwards gave the long history of medieval persecution an added and more poignant dimension. And with persecution came a renewed emphasis on censorship. The Catholic Church banned the writings of Luther, Protestant cities banned Catholic philosophy, and both Catholic and Protestant authorities banned and burned Jewish works. Burning heretical books had been a regular occurrence in Europe since the end of the Roman Republic, but the sixteenth century made that censorship systematic.

Yet the increase in repressing ideas predates Luther's split by seventy years. Gutenberg unveiled his printing press in 1450. A decade later Europe had a full-blown printing industry. The sharp increase in book burning and censorship was not brought about by ideas, but technology.

The revolutionary nature of moveable type cannot be underestimat-

ed, even in its early period. The marginal cost of publication collapsed. Our best estimate of printing costs demonstrates the size of this change. An Italian printer in 1483 advertised that it cost three florins to set up five pages of type. It would have cost a scribe just one florin to transcribe five pages, but the printer would have been able to produce more than a thousand copies of those pages, while the scribe could only produce one.[52] A large print run in the sixteenth century was around 3,000 copies, a figure which may seem small by modern standards but such a quantity would quickly exhaust the demand in any given city.[53] (It was prohibitively expensive to transport large quantities of books.)

The historian of print culture, Elizabeth Eisenstein, argues that the simple existence of a printing industry brought about enormous cultural and political change in and of itself. The printing press did not merely accelerate existing trends, but was itself a coherent and independent revolution.[54]

Censorship quickly followed. Yet the first recorded call for censorship was not to police obscenity, heresy or sedition—it was to ensure quality. In 1470, an Italian printing firm published an edition of Pliny the Elder's *Natural History*. The editor of the book was Giovanni Andrea Bussi, a bishop who had been employed to be the firm's in-house manuscript editor and collator. It was not the only classical text Bussi was working on at the time. He was well-known for producing many first editions of classical works (although a highly defective version of *Natural History* had been produced a year earlier).

The rush, and competitive pressure of the printing industry, resulted in an edition of Pliny's work that was riddled with errors. In response another Italian bishop, Niccolò Perotti, wrote to the papal hierarchy to complain. Editors, Perotti complained, 'set themselves up as correctors and masters of antique books' yet 'pervert what is correctly written'. Bussi did not understand Pliny's work yet deigned to edit it nonetheless—in Perotti's view, he imposed his own opinions on the great Roman author.

Bussi editorialised. Arguing that he only speaks with a 'love of truth', Perotti said that widespread bad editing would corrupt the understanding of classical works.

His solution was twofold. Editors should introduce a common standard for editing, covering the use of reference manuscripts and guideline for when two manuscripts disagreed. But Perotti feared that not all editors would strictly comply with the standard. So he suggested the Pope set up a bureau to regulate publication of the classics. A papal authority would 'oversee the work [of printing classical texts], who would both prescribe to the printers regulations governing the printing of books and would appoint some moderately learned man to examine and emend individual formes before printing.' Furthermore, it would regulate 'reckless' editorialising, and limit the advertising of other works in the text. Perotti was optimistic that this would not affect the quantity of print production. 'If this is done, we will have not only many books, but also unmutilated ones.'[55]

The Pope did not take up Perotti's proposal. (When Perotti produced his own edition of *Natural History* in 1473, it was denounced by another scholar as even more error ridden than Bussi's version.)

Suppressing sedition and heresy was a more urgent task than maintaining the quality of editions of the classics. Twenty-five years after Gutenberg's first printing press, the Pope was asking the University of Cologne to censor books and regulate the printers. In 1486, the Archbishop of the German city of Mainz instituted a censorship bureau and a few years later forbade any books from being published that hadn't been examined and approved before publication.[56] A Papal Edict of 1512 established a formal prepublication censorship across the Catholic world, finding that 'some printers have the boldness to print and sell to the public, in different parts of the world, books … containing errors opposed to the faith as well as pernicious views contrary to the Christian religion and to the reputation of prominent persons of rank.'[57] Unapproved

books would be burned, and their printers could be excommunicated.

Such Papal censorship predates Martin Luther's Ninety-Five Theses, which were first distributed eight years after the edict. The institutions for Reformation-era censorship were being developed half a century before Luther's split. It was print as the medium, not Protestantism as the message, which was the origin of restrictions on freedom of the press.

Nevertheless, the rise of Protestantism—the ultimate Christian heresy—gave censorship a particular urgency. The infamous Index of Prohibited Books dates from the Reformation; inaugurated by Pope Paul IV in 1559, it was last published in 1948. The Index forbade the faithful from reading a variety of Protestant and heretical works, but also the works of humanists such as Erasmus of Rotterdam who sought to forge a compromise between Rome and the Protestant world. The Index became not merely a mechanism to exclude heresy but a positive tool for censorship; Lord Acton writes that it was 'directed, not against falsehood only, but particularly against certain departments of truth. Through it an effort had been made to keep the knowledge of ecclesiastical history from the faithful, and to give currency to a fabulous and fictitious picture of the progress and action of the Church.'[58]

Secular censorship quickly followed ecclesiastical censorship. In England, Henry VIII had a monopoly over the printing presses, but books were still smuggled in from abroad. Cardinal Wolsey condemned the works of Luther in 1521 for confiscation and burning. An English list of prohibited books was introduced eight years later. King Henry was heavy handed. Not only did he ban Luther's books, he also banned English translations of 'the chapters of Moses called Genesis.'

Henry was burning martyrs but he often burned books in their stead; John Foxe's book of Protestant martyrdom *Actes and Monuments* tells the story of a merchant found with Gospels written in the vernacular. He was paraded through the streets of London with books strung to his clothes—'behanged with bookes round about him' and forced to throw

them on a fire. The merchant died in the Tower.[59] After Henry's break with Rome, press censorship and prohibition did not let up—Mary suppressed Protestant books, Elizabeth suppressed Catholic books.

Censorship and press control was a Europe-wide phenomenon. Ferdinand and Isabella of Spain imposed a licence on book imports in 1502. In France, Charles IX introduced the licensing of books in 1563.

Despite its novelty, it would be misleading to try to depict the regulation of printing as a distinct restriction on liberty—it was part of a broader campaign of intolerance. Censorship and licensing had one overwhelming target: religious heresy. At the dawn of printing there was little difference between heresy and political sedition. Theories of royal absolutism, intended to undermine the Papacy's hold on political legitimacy, were religious—the divine right of kings said that the monarch was directly sanctioned by God. So we cannot separate the familiar contours of press censorship from the alien landscape of religious persecution. Long after the invention of printing, it is still in the debate over religious toleration that we find our strongest and most influential Reformation advocates for freedom of speech.

Our popular image of persecution and inquisition is derived from this period. The unity of the Christian Europe broke into two doctrinal camps. Both the traditional Catholic authorities and the new Protestant authorities saw themselves as holders of the divine truth. Persecution was used by both sides to enforce doctrine and convert adherents to the faith. Intolerance, with some notable but isolated exceptions, was mutual.

Yet even within the two camps, heresy grew. The greatest humanists of the age developed their philosophies of tolerance (and intolerance) facing both the Lutheran split and the growth of smaller Protestant sects like the Anabaptists. These fringe groups were persecuted by Protestant and Catholic authorities alike. And the fringe groups tried to police themselves.

One Anabaptist who argued for religious toleration and freedom of conscience was Balthasar Hubmaier, eventually executed for heresy

in 1528. A few years before his execution, he wrote a short tract called *Heretics and Those who Burn Them* arguing that heretics were to be dealt with through persuasion. If heretics could not be persuaded, then they should be ostracised by the community—not killed. Compulsion in religion was to be rejected; Anabaptism policed religious conformity through exclusion and shunning.[60] The Anabaptists lacked a coherent philosophy of toleration but for the most part they rejected persecution.

Radical reformers of this period were radicals in every sense of the word. Two of the earliest European totalitarian regimes date from the Reformation.[61] For a few months in 1534 an unusually intolerant Anabaptist sect took over the German city of Münster, forcibly baptised the inhabitants of the city, and imposed a political order based on New Testament law and proto-communism. And under John Calvin, the city of Geneva was a persecutory totalitarian state that enforced conformity—a theocracy that forbade political or religious dissent.

Sebastian Castellio

The first great advocate of religious toleration and freedom of expression in the Christian West was, at one time, a close friend of Calvin's. Sebastian Castellio was a French-born Protestant humanist who had been introduced to Calvin in the early 1540s. Castellio came under Calvin's theological tutelage when he arrived in Geneva. But the two men had fallen out by 1543. Castellio was a contrarian and freethinker—not attributes Calvin prized highly. Leaving Geneva hastily, Castellio moved to Basel, which was also a Protestant city and an intolerant one, but his new home was just outside Calvin's reach.[62]

In 1553 Michael Servetus, an unorthodox theologian and critic of Calvin's, was burned alive in Geneva. Servetus was tried and condemned under a Justinian law which insisted on the death penalty for those who denied the Trinity and infant baptism; both of which Servetus had publicly and controversially done. Calvin took a personal interest in

ridding Christendom of Servetus, and when the heretical theologian was arrested upon entering Geneva, Calvin was one of the main accusers at his trial. When he was burned, one of the heretical books he had written was symbolically tied to his body.

Servetus commanded no followers, offered no threat to the stability of Geneva, and had committed no political crime. Calvin's action was, in Lord Acton's words, 'the most perfect and characteristic example of the abstract intolerance of the reformers'.[63] Servetus was executed for nothing more than his opinion. His crime was to publish those opinions, obscure as they were, as his arguments were contrary to the theocratic doctrine of Calvin's Geneva.

The occasion of Servetus' execution launched Sebastian Castellio from antagonist of Calvin to supporter of freedom of conscience and expression. Castellio's book *Concerning Heretics and Whether They Should Be Persecuted, and How They Should Be Treated* appeared just five months after Servetus' execution. Published pseudonymously, *Concerning Heretics* was a collection of excerpts works of fathers of the early church and Protestant contemporaries, some of which were actually pseudonymous contributions by Castellio himself.

Concerning Heretics is a clever, even playful, volume. In the introduction, Castellio admits that not all authors he quotes were consistent advocates of religious freedom. So he enlists Augustine's earlier views opposing coercion, and cherry-picks material out of Augustine's later writings to make his case. He selectively quotes Luther, who early in his career had argued that the state should be strictly limited when dealing with individual consciences. (Luther, as everyone who read *Concerning Heretics* would have known, changed his mind on that question.) But Castellio's most dexterous quotes come from Calvin himself. In a passage in the 1536 edition of Calvin's *Institutes*—a passage which Calvin deleted from later editions—the Genevan argued for persuasion over coercion: 'exhortation and teaching, clemency and mildness, [and] prayers to God'.

Castellio makes two major arguments in his contributions to *Concerning Heretics*. The first is to undermine the concept of heresy itself. Heresy, Castellio writes, is nothing more than a difference of opinion. It is not an indication of a higher level of doctrinal difference and religious distinction, but only a personal viewpoint. Heresy is in the eye of the observer. This is more radical than it seems. 'One may wonder', writes the historian Perez Zagorin, 'whether Castellio really continued to believe in the existence of heresy as an objective fact.'[64]

His second argument is that, having established that heresy is nothing but that with which we disagree, the only sensible response is to allow intellectual freedom. According to Castellio, the destruction of books and heretics is counterproductive—it makes it impossible to understand and contest different opinions as to the nature of God. You cannot reason your way to true Christian belief if some paths are closed. Scripture is ambiguous and obscure, and different opinions are the inevitable result. This is not something to fear, wrote Castellio. The state should leave theological judgment to God.

Servertus' execution was highly controversial, even in Geneva. Calvin had felt it necessary to defend his actions in his *Defense of the Orthodox Faith*, asking 'why good magistrates shouldn't draw the sword given them by heaven to repress the apostates who openly mock God and profane and violate his sanctuary?' So Castellio's next book was a direct response to this argument—titled, simply, *Against Calvin's Book*. In this latter work, Castellio asked why he could not discuss heretical opinions with those who held them, 'equal to equal'. 'If you are right why do you not prove it? Why do you maintain your view by force?' Coercion could never eliminate unapproved or different opinions. 'To kill a man is not to defend a doctrine, it is to kill a man. When the Genevans killed Servetus, they did not defend a doctrine, they killed a man.' Persecution does not support or buttress a religion, but undermines it.

Castellio wrote two further tracts on religious toleration. One was

a reply to Theodore Beza, a colleague of Calvin's who had responded to *Against Calvin's Book*. The other was addressed to the French, who were engaged in a brutal sectarian war. In this latter tract he mounted similar arguments for toleration as his previous work, but also proposed a theory of political dissent: sedition, Castellio wrote, was the inevitable consequence of tyranny. The religious war had been caused by 'the forcing of consciences'.

Castellio was a pacifist and rationalist—he abhorred the violence of persecution. But his argument for toleration pivoted on scepticism and doubt. In Castellio's view, the finer points of religious truth were uncertain and obscure. To burn someone because they disagreed on the nature of the Trinity was to substitute the sword for reason. It is no coincidence that his final book was titled *The Art of Doubting*.

Castellio died of natural causes in 1563, but, as he died, there were proceedings being taken against him for religious orthodoxy by the Basel authorities. After his death, his works were suppressed. The Basel censor refused to publish many of his works; it was not until 1612 that *Against Calvin's Book* appeared outside the underground press.

Castellio was, however, enormously influential among advocates of toleration through the early modern period. While the name of Calvin is known far wider today, the execution of Servetus and Castellio's response shaped Calvinist attitudes to toleration for a century. It is thanks to Castellio that Calvin's theocratic Geneva was not the model by which all future Protestant communities were based.

3 The Birth of Liberalism

Pluralism and the Dutch Republic

One of the first states to enact general religious toleration was deeply Calvinist—the Dutch Republic. One historian writes that 'The central paradox of the Dutch Republic is this: the existence of a confessionally pluralistic society with an official intolerant Calvinist Church that discriminated against Catholics, but whose pragmatic religious toleration elicited admiration and bewilderment in ancien régime Europe.'[1]

The Dutch Republic was founded in religious strife. The revolt sparked by the Spanish king Philip II's repression of Protestantism waxed and waned until 1572, when Dutch rebels gained permanent control of the provinces of Holland and Zeeland.

The need to present united resistance to Spanish rule among the Dutch provinces—which had varying degrees of Catholic and Protestant dominance—necessitated some accommodation between faiths. To this end in June 1579 the city of Antwerp announced it was adopting a general religious toleration ('no religion may be maintained or impressed with violence or weaponry').

Religious peace was a political necessity first, and a principle second. In the Netherlands the 'advocacy of toleration was a highly self-conscious practical lesson drawn from the grim experience of sixteenth and seven-

teenth century wars of religion.'[2] Yet, in the heady politics of the Dutch revolt, arguments on principle for toleration were made. One tract called upon the golden rule to defend religious plurality—do not do 'unto others what you do not want to be done to yourself'—and replicated Castellio's arguments of a few decades earlier.[3]

Another argument for religious peace was given by Pieter de Zuttere, a Protestant minister in Ghent writing during the revolt, who argued that it was only Christ who could judge others, not men. De Zuttere drew on the long tradition of sceptical arguments for freedom of conscience. The temporal world could not know 'the spirit of truth', and governments and rulers, being of the temporal world, could not claim to know truth either. '[N]othing is so free as faith and the service to God which follows therefrom, to which no one may be forced, as it is a work of God through the Holy Spirit and can by no means be exacted by human violence.'[4]

These arguments were not unique. But how they were framed during the Dutch Revolt was significant. Protestants and Catholics opposed Spanish repression because they believed it trampled individual liberty. Rebels evoked a free Dutch past. Their mythology spoke of historic liberties and privileges that had been destroyed by Spanish rule. Some writers even imagined that past was characterised by religious toleration. One pamphlet recalled 'how careful our ancestors always were to preserve and to retain the enjoyment of [freedom of conscience] which until the arrival of the Inquisition we always enjoyed.'[5]

As Martin van Gelderen argues, 'some authors made the radical move of advocating freedom of conscience because it should be regarded as an individual natural right which was said to be the very essence of liberty. From this perspective the Dutch Revolt as a defence of liberty was principally a fight for individual freedom of conscience and worship.'[6]

The Dutch Republic was a remarkable advance in liberal tolerance. Within its borders, it mended the sectarian break that Luther's Ninety

Five Theses had started, centuries before any other major nation did so. The text of the 1579 Union of Utrecht, which bound the Low Countries together into the United Provinces, specifically guaranteed freedom of conscience, but as it was a federal system, left how that principle should be implemented to the provinces themselves.

Nevertheless, we should not imagine Dutch tolerance to be analogous to contemporary religious pluralism or religious neutrality. The Dutch Reformed Church was the only officially recognised Church. Public Catholic worship was banned in 1580. Yet private worship was left unmolested by the state. And what exceptions to toleration remained are beside the point. As one historian of the Dutch Republic has written, 'The distinctive feature of the Dutch solution was precisely a generalised practice of toleration that had nothing to do with legislation, and which limits were inevitably vague and changeable. It was based on a new and largely implicit relationship between the ecclesiastical and civil authorities, itself based on a new idea of the civic body.'[7]

Foreign visitors marvelled at Dutch diversity. One British expatriate remarked that 'in the street where I live there are nearly as many religions are there are homes'. A French correspondent wrote in 1673:

> The States give unlimited freedom to all sorts of religions, which are completely at liberty to celebrate their mysteries and to serve God as they wish. You will therefore know that besides the Protestants there are Roman Catholics, Lutherans, Brownists, Independents, Arminians, Anabaptists, Socinians, Arians, Enthusiasts, Quakers or Shakers, Borelists, Armenians, Moscovites, Libertines, and others whom we can call Seekers because they are seeking a Religion and they do not profess any of those established.[8]

The Dutch Republic was a model for a tolerant Europe; a touchstone on which religious pluralism and diversity was judged.

In such a liberal (philosophical, if not legal) environment, Dutch

advocates for toleration explicitly and deliberately made the connection between freedom of conscience and freedom of speech. The engraver and writer Dirck Volckertszoon Coornhert has a key place in the history of religious toleration, but he deserves a position in the development of press and speech freedom as well. In Coornhert's voluminous works we find not merely arguments for religious pluralism but arguments that the toleration of the Dutch Republic necessarily implied freedom of expression.

Some Dutch religious writers claimed that they fully supported religious toleration but drew the line at speech or expression. They argued that while people are free to believe what they liked privately, too much diversity of public opinion would make a cacophony of voices, which they did 'not regard as liberty but as pernicious licence'.[9]

But Coornhert argued that freedom of speech went to the heart of the Dutch project. Without it, the Netherlands could not consider itself free. 'Liberty has always consisted principally in this, that one could voice one's opinion freely. It has been the unique mark of tyranny that one could not voice one's thoughts freely'. Free speech was, for Coornhert, not merely a way to deal pragmatically with evils. It was a right. The development of the Dutch Republic into a republic of rights is reminiscent of the *libertas* of the Romans earlier and the 'inalienable' rights of the American founders later.

Coornhert wrote that freedom of speech had practical benefits as well. One advantage was that it brought civil disagreement out in the open rather than leaving it to languish in the dark where it could become more vicious and dangerous. The United Provinces, Coornhert wrote, 'has more reason to fear mutiny, subversion and rebellion from the clandestine exercise of religion than from its public exercise.' It is not faith that challenges the civil order but how that faith reacts to suppression. 'What will be the effect on people's hearts of the new interdiction concerning a freedom that has been pursued for so long and obtained at

such high costs?' Freedom of speech has a civilising effect.

Yet for all this lofty rhetoric, there was substantial censorship in the Republic. In 1581 William of Orange—the father of Dutch religious toleration—declared that all publications had to be first cleared by a committee of the States of Holland. Several provinces also instituted their own prepublication censorship. But this system was extremely ineffective. While official documents and edicts repeatedly affirmed the existence of prepublication censorship (almost every decade for the first half century of the Republic) there is good reason to believe that, functionally, there was no prior restraint on publication. So while press freedom did not exist in Dutch law, printers and writers 'operated in practice in relative freedom'.

The liberal philosophy underpinning that relative freedom of speech penetrated the ranks of the educated and political classes to the degree that it became a core aspect of Dutch self-image—even while the law declared otherwise. This is not to suggest that freedom of speech was an unchallenged principle—the Reformed Church sought for a long time, futilely, to get the States to institute systematic censorship.

Writers and dissenting philosophers moved to the United Provinces for its intellectual freedom. '[M]any an expelled Huguenot poured forth the bitterness of his heart in the columns of a Dutch gazette.'[10] Holland was where exiles went. When John Locke had to flee England after he was implicated in the Rye House Plot against the Stuart king, he went to Amsterdam. The English puritans stopped in Amsterdam before they travelled to the New World.

And as transport costs declined over time, Dutch presses published the dissident literature of other nations. Seditious French works were smuggled into France from Amsterdam.

The rest of Europe recognised in the Dutch Republic a haven of freedom of speech and religious toleration. It was the most liberal state in the continent.

Benedict Spinoza

The family of Benedict Spinoza (born Baruch Spinoza) was one of the many Jewish families that drifted around the continent looking for toleration. The Spinozas fled from Spain, to France, and eventually the Dutch Republic. Spinoza was born in 1632, right in the middle of the Dutch Golden Age—a period of relative peace and great prosperity for the United Provinces.

Spinoza had extremely radical religious views. There is debate about whether Spinoza should be described as a pantheist (that is, someone who believes that nature and God are one) or simply as an outright atheist. Nevertheless, he rejected the immortality of the soul, and the universality of Mosaic law. Unsurprisingly, at the age of 24 he was excommunicated from the Jewish community.

Spinoza's *Theologico-Political Treatise* was published in 1670.[11] It was released anonymously, with a false city of publication, and was quickly condemned by the Dutch religious authorities. The *Treatise* lays the groundwork for his *Ethics* (which was published after his 1677 death) and it is this latter work which has had the most influence in philosophy.

Yet Spinoza's *Treatise* is a ground-breaking statement of liberalism, freedom of conscience, and freedom of speech in its own right. In many ways it is superior to its English seventeenth century counterparts penned by John Milton and John Locke. The historian Jonathan Israel argues that the publication of Spinoza's *Treatise* sparked 'a continuous, unbroken dispute with the European Enlightenment as to whether the publication and general discussion of the fundamental philosophical, religious, moral, and political issues was in fact beneficial or actually harmful to the general good.'[12]

The first two-thirds of the *Treatise* explore Spinoza's religious views; the close relationship between religious belief and reason, the notion of a 'universal faith', and his claim that the laws of nature and divine laws are one and the same. There is no distinction between soul and body.

Spinoza also makes the radical argument that the Bible should be treated not as a supernatural text but as a human one—written by humans, in discrete historical circumstances, and shaped by the language it was written in.

From this, Spinoza looks at the origins of the state and the purpose of government. For Spinoza, individuals transfer some of their natural rights to a government in order to institute systems of justice. The purpose of a state is to 'free every man from fear'. Spinoza argues that religious bodies must not have any legal powers over citizens. The secular sovereign is superior to the religious authority—only the former can have power over religion.

Spinoza appears to grant the sovereign unbounded power. In this sense he has been commonly associated with the absolutist politics of Thomas Hobbes rather than the liberal politics of John Locke. Yet for Spinoza the sovereign's power is absolute insofar as it is supreme—the secular state is the only organisation that can rule on questions of religion, but this does not imply that it should do so. 'Inward worship of God and piety in itself are within the sphere of everyone's private rights, and cannot be alienated.' In a letter, Spinoza said

> the difference between Hobbes and myself … consists in this, that I always preserve the natural right in its entirety, and I hold that the sovereign power in a State has right over a subject only in proportion to the excess of its power over that of a subject.[13]

As Spinoza believes that individuals contract to make government, their rights remain intact even while they are governed under a state.

And Spinoza specifically draws important restraints on the exercise of sovereign power in the realm of freedom of conscience. 'However unlimited … the power of the sovereign may be,' Spinoza writes, 'it can never prevent men from forming judgments according to their intellect, or being influenced by any given emotion'. He continues:

> Since, therefore, no-one can abdicate his freedom of judgment and feeling; since every man is by indefeasible natural right the master of his own thoughts, it follows that men thinking in diverse and contradictory fashions cannot, without disastrous results, be compelled to speak only according to the dictates of the supreme power.

The natural right to freedom of thought made liberalism not only a moral requirement but a practical necessity, argues Spinoza.

> If men's minds were as easily controlled as their tongues, every king would sit safely on his throne, and government by compulsion would cease; for every subject would shape his life according to the intention of his rulers, and would esteem a thing true or false, good or evil, just or unjust, in obedience to their dictates.

In their 1962 work *The Calculus of Consent* James M. Buchanan and Gordon Tullock point out that Spinoza's model of political action and organisation is a remarkably modern one. He develops his arguments under an assumption that individuals will act on their own or perceived interest and the structure of government has to be shaped with that assumption foremost in mind.[14]

This principle Spinoza applies to toleration and freedom of speech. Spinoza recognises that a state which regulates to limit that freedom will find those regulations abused by interest groups seeking to benefit at the expense of others. In an era of sectarianism, doing so would be inevitably violent, as Spinoza illustrated through Biblical history:

> Pontius Pilate made concession to the passion of the Pharisees in consenting to the crucifixion of Christ, whom he knew to be innocent. Again, the Pharisees, in order to shake the position of men richer than themselves, began to set on foot questions of religion, and accused the Sadducees [a sect common among wealthy Jews] of impiety, and, following their example, the vilest hypocrites stirred, as they pretended, by the same holy wrath which they called zeal for the Lord, persecuted

> men whose unblemished character and distinguished virtue had excited the popular hatred, publically denounced their opinions, and inflamed the fierce passions of the people against them.

Neither did Spinoza shy away from a defence of bad—even 'harmful', as twenty-first century commentators would describe it—speech. Spinoza recognised there were doctrines which, whether espoused innocently or deceitfully, could have negative consequences for society. Nonetheless, these should be allowed. Spinoza argues that the presumption should regardless be on protecting freedom of expression rather than limiting it. 'I confess that from such freedom inconveniences may sometimes arise, but what question was ever settled so wisely that no abuses could possibly spring from them?'

> How many evils spring from luxury, envy, avarice, drunkenness, and the like, yet these are tolerated—vices as they are—because they cannot be prevented by legal enactments. How much more then should free thought be granted, seeing that it is in itself a virtue and that it cannot be crushed!

As we have seen, Spinoza's *Theologico-Political Treatise* was not without historical precedent. But Spinoza's genius is in the blending of two arguments for freedom of expression. The first—the natural rights argument that a state cannot control the thoughts of men—would be by itself insufficient to protect speech. After all, the state could give it a good try. The second—the pragmatic argument that to do so would create more problems than it would cause—would also be, by itself, a weak argument for speech and thought freedoms. But in the words of one early 20th century scholar, together they make 'a superstructure of popular liberties better secured than that of either Locke or Rousseau'.[15]

And Spinoza's argument for freedom of speech is as absolute as seen in the Western world until the late twentieth century. As the only purpose of the state is the maintenance of freedom, it is only in the defence

of those freedoms that speech could be restrained. This model would give a would-be speech suppressor very little room to act. Spinoza offered an exception for seditious speech, but that only constituted words 'which, when accepted, immediately destroy the covenant whereby everyone surrendered the right to act as he pleased'—in other words, only that sedition which breaks the social contract. It is hard to see many circumstances in which plain words would meet this criteria. After all, he wrote 'Man's loyalty to the state should be judged, like his loyalty to God, from his actions only.' Spinoza is very strict with the distinction between speech and acts. His position on sedition only allows the sovereign to restrain speech when words are equivalent to acts—just as incitement to violence is not protected speech in English common law. And the exception makes sense within Spinoza's philosophy of government: no state could exist at all if any individuals reserved the right to withdraw their cooperation at any time for any reason.[16]

Spinoza's advocacy of intellectual liberty and freedom of expression was a long way ahead of Dutch law. His subsequent work, *Ethics*, was not published in his lifetime because Spinoza felt the environment was too hostile. Spinoza's intellectual colleague Adriaan Koerbagh died in prison for writing two books questioning elements of the Christian faith, and Koerbagh's brother Johannes narrowly avoided prison for assisting. Spinoza's praise for Dutch liberalism in this light seems ironic. But as Jonathan Israel argues, when he writes that 'we have the rare good fortune to live in a commonwealth where freedom of judgement is fully granted to the individual citizen and he may worship God as he pleases, and where nothing is esteemed dearer and more precious than freedom', Spinoza is attempting to shift the Dutch self-image further towards toleration.[17]

And in his attempt to do so, Spinoza gave Western Civilisation one of the most coherent, rigorous and certain arguments for freedom of speech before the twentieth century. Perez Zagorin points out that the *Treatise* is remarkable because it extends freedom of thought from re-

ligious toleration to broader issues of secular political and intellectual discourse.[18] 'It is hard to imagine a more passionate and reasoned defense of freedom and toleration than that offered by Spinoza,' writes another commentator.[19]

Early Modern England

It is impossible to generalise the history of censorship in the Netherlands because of its multiple jurisdictions that took, at various times, different approaches to seditious, heretical or—in the case of the followers of Spinoza—atheistic works.

England in the sixteenth and seventeenth centuries was a unitary state. Yet censorship and religious intolerance in England, too, was ad hoc and contingent. Throughout the Tudor and early Stuart periods, censorship worked through a complex interaction of monopoly privilege, licensing, and arbitrary prosecution.

Elizabethan censorship was not systematic. Mercantile privileges for book printing were designed to stoke a native English printing industry but also to limit dissenting publications. Under Elizabeth, printing monopolies like the Stationers' Company were independent agents of the Crown. The integrity of these printing monopolies was repeatedly reaffirmed by the Star Chamber in response to Catholic works being sold from abroad.

From the mid-sixteenth century Elizabeth's High Commission, her chief ecclesiastic court, acted as primary enforcer of both conformity within the clergy and printed material. Attacks on the Queen's dignity were felonies; speculative writing about the royal succession brought a year in prison. Censorship remained predominantly a question of religious toleration. Elizabeth's court released eleven royal proclamations to censor printed works during her reign; six targeted Catholic books, four targeted radical Protestant books, and only one was explicitly political.[20]

James I was less content to delegate censorship. He took a much closer interest in both the production of print and its suppression. James, according to one historian, was 'probably the most literate and learned king to have occupied the English throne'.[21] He understood print and the possibilities of print better than his predecessors. This understanding translated into a greater emphasis on printed royal propaganda, on the institutionalisation of censorship, and on 'performative' aspects of censorship like public book-burnings. While Elizabethan censorship was focused on religion—in both the manner it was administrated through the ecclesiastical authorities and its focus on religious dissent—censorship under James was more concerned with moral, cultural, and political questions.

Yet still censorship remained ad hoc. During James' reign, 'the "state" rarely functioned as the kind of cohesive entity that prevailing understandings of press censorship imply.'[22] The institutions of censorship were diverse and contradictory; the works that were targeted and the motivation for their censorship were defined by political expediency. The only constant was James' belief in the royal power to censor. Under James, censorship was used to emphasise the strength of royal power, not to systematically eliminate critical voices.

Charles I took the throne in 1625. The next year the new king asserted his royal authority over censorship with a royal proclamation which announced it would censor 'Writing, Preaching, Printing [or] Conference' that 'raise any doubts, or publish, or maintaine any new conventions or opinions concerning Religion'.

Yet by the end of the 1630s Charles was facing a flood of dissenting literature criticising his religious policies, particularly from printers in the north. A proclamation in 1639 commanded his 'loving Subjects … receive no more … seditious Pamphlets sent from Scotland, or any other place'. Another proclamation 'against libelous and seditious Pamphlets, and Discourses sent from Scotland' made it a crime to be found in possession of seditious literature—before this time, simply possessing

banned works was not seen as sedition in and of itself.

It was Scottish dissent that bought about Charles' downfall. The expense of his attempt to subdue rebellious Scots caused him to recall parliament in 1640 for the first time in more than a decade. He found that once parliament had been recalled, the parliamentarians were less interested in authorising funds and more in pursuing pent-up grievances.

The Long Parliament sat from November 1640. It quickly dissolved the Star Chamber and the High Commission, two of the institutions which had developed since Elizabeth to censor print.

Yet this was not motivated by a desire of parliament to end censorship. A day before it eliminated the Star Chamber, it had already begun investigating a reformed system of press regulation—an investigation which culminated in the Licensing Order of 1643. No book could be printed without the authority of the Stationers' Company, and unlicenced printing presses were to be hunted down and seized. This order sought to prevent the unauthorised publication of parliamentary speeches and records, and 'false, forged, scandalous, seditious, libellous, and unlicensed' books and pamphlets which defamed state or church.[23]

John Milton's *Areopagitica*

Licensing by parliament was not substantially different from licensing by the Stuarts. The 1643 order was similar to a 1637 decree made by the Star Chamber. But the 1643 order is the pivot on which English understanding of the legitimacy or illegitimacy of censorship turned for centuries. The reason it looms so large in the English consciousness is entirely because of a work it inspired: John Milton's *Areopagitica*.[24]

John Milton was born in London in 1608. His first poem was published at the age of 24. In 1638 he travelled to Italy, and in *Areopagitica* claims to have met Galileo while the old philosopher was under house arrest 'for thinking in astronomy otherwise than the Franciscan and Dominican licensers thought'. After his return to England, he wrote a

pamphlet defending divorce which was published in 1643. It was the experience he had republishing that tract—it was first published in the relatively free environment that existed after the collapse of the royal censorship institutions, and republished under parliament's licensing order—that inspired Milton to write his most influential political work.

Areopagitica was published in 1644. It takes the form of a never-delivered speech to parliament. The title consciously recalls what Milton and other early modern contemporaries understood to be the golden age of Athenian liberties. (The Areopagus was a court in ancient Athens, and the 'Areopagiticus' a speech given by the fourth century orator Isocrates.)

The title sets the tone. Milton grounds his tract in classical learning and purports to identify the origin of intellectual freedom. His purpose is to present freedom of the press as an ancient liberty, and censorship as a recent child of the Inquisition. Milton argued that parliament must recognise it was 'the Popes in Rome' that had 'extended dominion over men's eyes'. The inference, for Milton, is that Protestants who rejected the Roman church should also reject its censorious ways.

In *Areopagitica*, Milton built the case against censorship on a sceptical foundation. For Milton, the fallout of the printing revolution had demonstrated in England a passion for intellectual debate and truth seeking. The ascendancy of parliament had boosted these natural merits, as the English people pursued 'the glorious waies of Truth and prosperous vertue.'

> [T]hough all the winds of doctrine were let loose to play upon the Earths, so Truth be in the field, we do injuriously by licensing and prohibiting to misdoubt her strength. Let her and Falsehood grapple; who ever know Truth put to the worse, in a free and open encounter?

Licensing, Milton writes, 'will be primely to the discouragement of all learning, and the stop of Truth'. The process of understanding of the world is necessarily messy. Those who would regulate or licence publish-

ers impede the 'dissever'd peeces' of understanding from being united into a coherent account of the world. A free press helps mankind discover truths, a censored press keeps those truths hidden.

Furthermore, Milton argues, free publication helps defend what we already know. A truth that is not continuously challenged becomes brittle. And belief that is imposed—either by force or by intellectual neglect—cannot be consider real belief at all. As Milton writes,

> Truth is compar'd in Scripture to a streaming fountain; if her waters flow not in a perpetuall progression, they sick'n into a muddy pool of conformity and tradition. A man may be a heretick in the truth; and if he beleeve things only because his Pastor sayes so, or the Assembly so determins, without knowing other reason, though his belief be true, yet the very truth he holds, becomes his heresie.

The free truth seeker discovers truth by 'triall, and triall is by what is contrary'. Milton writes, 'I cannot praise a fugitive and cloistered virtue unexercis'd and unbreath'd, that never sallies out and sees her adversary, but slinks out of the race where the immortal garland is to be won, not without dust and heat.'

Milton's *Areopagitica* is beautifully written and still widely quoted in the twenty-first century. Echoing Castellio, Milton wrote in a famous passage, 'who kills a Man kills a reasonable creature, Gods Image; but hee who destroyes a good Booke, kills reason it selfe, kills the Image of God.' Another well-worn passage reads 'Give me the liberty to know, to utter, and to argue freely according to conscience, above all liberties'.

But he is almost always misunderstood. Few who cite Milton as a defence of freedom of the press or freedom of speech appear to have read him. That an early modern liberal is more quoted than read is not surprising, but in the case of Milton it is conspicuous. It is Milton's eloquence that has given *Areopagitica* its staying power, not the coherence of his defence of freedom of speech.

Milton's argument against licensing is not the only argument in *Areopagitica*. He writes that the 1643 order 'avails nothing to the suppression of scandalous, seditious, and libellous Books, which were mainly intended to be supprest.' This is an important passage, early in the work, which suggests that Milton is not the icon of press and speech freedoms that his reputation indicates. Milton, one writer has pointed out, 'did not support freedom of religious debate for Catholics, Anglicans, Atheists or non-Christians'.[25] Milton's liberty of speech did not extend to 'Popery, or open superstition', but only 'neighbouring differences, or rather indifferences'. The press historian Leonard Levy wrote that it seems Milton's affinity for free expression was even further limited to high-brow intellectual and religious discussion. In one later work, *On True Religion*, Milton seemed more comfortable with allowing debate between Protestant and Catholic, but only on the proviso that such debate was conducted in Latin 'which the common people understand not; that what they hold may be discussed among the learned only'.

Milton was opposed to licensing—that is, prepublication censorship—but he had no problem with postpublication censorship. Church and state must keep a 'vigilant eye' on books. If they 'demeane themselves, as well as men', it was right to 'confine, imprison, and do sharpest justice' to their authors. If a certain book 'prov'd a Monster, who denies, but that it was justly burnt, or sunk into the Sea'. His argument is framed to condemn Catholic censorship but he appears to have little problem with book-burning in antiquity.

Even the allusion to the Athenian Areopagus is, itself, an indication of Milton's less-than-absolute belief in freedom of speech. Recalling the liberties of ancient Athens was a central element of seventeenth and eighteenth century Republican liberalism. Yet Isocrates was not a supporter of liberty. He believed Athens to have undergone moral decline. The editor of Isocrates in the early modern period—the edition which Milton would have read—blamed Athenian problems, in part, on how 'anyone

was able, not only to say, but also to do anything they wanted: and all men accounted unsuitable confidence to be popular liberty.' Some scholars have suggested that Milton pinned his appeal on Isocrates' out of a sense of irony, but, given the limitations *Areopagitica* places on freedom of speech, it is perfectly consistent.[26] Milton wrote poetically, but he also wrote clearly.

Milton's legacy is further confounded by the fact that just five years after publishing *Areopagitica*, he became a censor in Oliver Cromwell's government—suppressing partisan pamphlets and news sheets.

Yet *Areopagitica* has an enormous historical footprint. In his influential essay *There's No Such Thing as Free Speech … And It's a Good Thing, Too*, the postmodern literary theorist Stanley Fish used Milton as a basis on which to dismiss free speech 'pieties'. (Fish was a Milton scholar before he became famous as a postmodernist.) Milton, Fish points out, carved out such a wide range of exemptions to his model of freedom of the press that it was barely a model of freedom of the press at all. Fish therefore argues that freedom of speech is a fiction of more political and ideological significance than philosophical significance.

Furthermore, even putting Milton's gaping exceptions aside, there is little groundbreaking in *Areopagitica*. The pagan Themistius integrated classical beliefs about the unknowability of God with an argument for freedom of conscience. Castellio developed a richer model of disagreement and intellectual debate that embraced a wider range of faiths.

Yet the sceptical argument for free debate presented by Milton differs in an important way from the scepticism of these earlier writers. Themistius believed that God was unknowable. Castellio believed that the proper worship of God was simply a matter of opinion grounded in worldly, rather than divine, inspiration. For these earlier writers, the only appropriate response was therefore to permit free conscience and expression—not because a tolerant legal framework would resolve these questions but because the questions could not be adjudicated by man.

Milton's sceptical argument is more certain, more strident. In *Areopagitica*, the purpose of free discussion is to discover and support the truth. It is an instrument to achieve a goal, not a right. Milton claims to be concerned with maximising the pursuit of truth. The press should be free because it is the most effective way to achieve a goal. But, because for Milton the truth is inevitably a Protestant truth, there is no contradiction between that goal and the limits he puts on speech. Quite the opposite: these limits are derived from his theory of freedom of speech. They are not unfortunate exceptions, but logical—even, as Stanley Fish claimed, necessary—consequences. For all the strength of his argument against prepublication licensing, Milton condemns the free publication of books just as strongly.[27]

The *Areopagitica* pales when compared with Spinoza's *Theologico-Political Treatise*. Spinoza argues that freedom of speech is grounded in liberty of thought. It is neither possible nor just to limit either. The power to form opinions, and express them is an 'indefeasible natural right'. It is not conditional on being directed towards any particular goal. As individuals are free to think, they are free to express. The only grounds for restricting speech, according to Spinoza, is when that speech is both virtually indistinguishable from action and threatens to unravel the political order. By contrast, for all his high eloquence and poetry, the gap in Milton's protection of unwanted speech is so cavernous it undermines the philosophical foundations of his defence of speech.

Liberalism in the English Revolution

Milton's *Areopagitica* dominates the English historical memory, but it did not exist in a vacuum. Toleration and freedom of expression was a key focus of liberals and proto-liberals of the seventeenth century. The occasion of the 1643 Licensing Order bought forth a rich debate.

A year before Milton's *Areopagitica*, Thomas Hobbes wrote in his lesser known work *De Cive* that '[I]t is utterly essential to the common

peace that certain opinions or doctrines not be put before the citizens.' Hobbes goes on: 'the one man or council to whom sovereign power has been committed by the commonwealth also has the right both to decide which opinions and doctrines are inimical to peace and to forbid their being taught'.[28]

Hobbes' argument against sedition superficially resembles the limits Spinoza placed on incitement. Yet while Hobbes would consider that an individual's natural rights are granted to the sovereign, Spinoza argues that natural rights should be exercised mutually by sovereign and individual. So where Hobbes frets about the power of contrary opinion to undermine sovereign power, and limits speech accordingly, Spinoza assumes that contrary opinion will exist, suppression will have unintended consequences, and therefore the theorist's task is to distinguish between dangerous action and simple words. Spinoza was a close follower of Hobbes' thought on the social contract. His work should be seen as a continuous dialogue with the English author. So when Spinoza wrote that loyalty to the state should be judged by actions alone he would have been well aware that this was a direct contradiction of Hobbes' claims in *De Cive*.

There were at least seven major tracts published adjacent to Milton's which directly engaged with the question of free expression and religious toleration.[29]

Yet without exception these writers directed their focus to liberty of conscience, rather than liberty of the press. All other writers touched upon questions of speech and opinion but only Milton dedicated an entire tract to censorship alone. The debate was sparked by the appearance of *An Apologeticall Narration* in January 1644, by five ministers, which argued for a narrow toleration which would embrace 'some lesser [religious] differences with peaceableness'.

The most remarkable participant in that debate was Roger Williams, a friend of Milton's. Williams was a Puritan and joined the Puritan exile to the New World in 1630. Waves of Puritans left England because of a

lack of religious freedom in their home country during the seventeenth century. Yet they did not flee to build a religiously tolerant society across the Atlantic; by contrast, many Puritan settlements were more intolerant than the England they had left. As one historian has written, the Puritans 'fled not so much from persecution as error'—their vision of the ideal state was a theocratic one.[30]

Roger Williams was an exception. In the American colonies he quickly became a controversial figure for his radically liberal views about religious toleration. Just as controversially, Williams argued that the settlers had no right to grab land from Native Americans; land had to be purchased. Williams was banished from Massachusetts for heresy and sedition. In 1637, Williams founded the Rhode Island town of Providence, situated, he wrote, by a 'sweet spring'. This new settlement would guarantee its members liberty of conscience.

Six years later, Williams travelled back to England to petition parliament for a charter to set up the colony of Rhode Island with three other towns—Newport, Portsmith, and Warwick. The trip put Williams right in the centre of the pamphlet war over toleration and free speech. He first made his literary name in England with *A Key to the Language of America*, a study of Native American languages, but his ground-breaking contribution to the toleration debate was *The Bloudy Tenent of Persecution for Cause of Conscience*, released in England in 1644.[31] Addressed to contend with the arguments of Calvin and other advocates of persecution, Williams argued that a truly Christian government would be one that completely separated church and state. The government should only use its power for secular ends.

Williams emphasises the enormous costs of intolerance in lives: '[t]he blood of so many hundred thousand soules of Protestant and Papism spilt in the Wars of present and former Ages, for their respective Consciences, is not required nor accepted by Jesus Christ the Prince of Peace.' Williams argued that Christ commanded that consciences must be free, so crush-

ing those consciences through the power of the state was against His word. 'The unknowing zeale of Constantine and other Emperours, did more hurt to Christ his Crowne and Kingdome, than the raging fury of the most bloody Neroes'. Through a close scriptural analysis, and a study of the relationship between the New and Old Testaments, Williams concludes that the only possible political organisation that could call itself Christian would be one with a general religious toleration.

But Williams went further than any of his contemporaries. Not only was that toleration to be granted to those of 'neighbouring' or 'lesser' differences, but to all faiths alike. Jews, 'Turks' (Muslims), pagans, and 'Anti-Christians' (atheists) were all to be tolerated in William's tolerant society. Radically for the seventeenth century, even Catholics were permitted. The only requirement was that worshippers offer their 'civil obedience' to the secular state. As long as the 'common peace' was respected, any individual could hold, practice, and express any religious view.

Williams only implicitly mounted a freedom of speech argument. But his was the first English claim that all beliefs should be tolerated—no exceptions would be made for Catholics or atheists.

Other important and principled pamphlets pushing the cause of liberty of conscience were written by the English preacher John Goodwin and the merchant Henry Robinson. Robinson in particular mounted an influential argument for toleration based on the needs of trade and commerce: anticipating Voltaire's argument by a century, Robinson argued that a tolerant state would draw its economic success from trading with other nationalities and faiths.[32]

Domestic turmoil gave this debate added drama. The English Civil War had been sparked by the flight of Charles in 1642 out of London. And in the fast-moving politics of Civil War, many groups faced questions of toleration and freedom of the press.

The Levellers, a diverse group of radicals that comprised a proto-libertarian wing of English politics during the war, were just as

interested in freedom of speech and the press as they were on democracy and the design of government.

Their support for freedom of the press was not, however, absolute. In his *England's Birthright Justified*, John Lilburne argued that people should be able to 'print, divulge and disperse whatsoever Books, Pamphlets and Libells' they please, and protested that everything which spoke of the rights of free-borne people were being branded as 'Sedition, Conspiracie and Treason'. Yet he did not extend this desire for a free press to his political opponents: Royalist 'Malignant Books and Pamphlets tending to the ruine of the Kingdome … and freedome of People' should be restricted.[33]

Another Leveller, William Walwyn, argued for religious toleration and freedom of opinion on religious matters, but was careful to distinguish between matters of conscience and sedition—writings against the state, for Walwyn, should be suppressed. Walwyn was jailed in 1649 for exactly that: distributing seditious writings.

One major statement on freedom of expression was published in the Leveller newspaper *The Moderate* that year:

> As for any prejudice to Government thereby, if Government be just in its Constitution, and equal in its distributions, it will be good, if not absolutely necessary for them, to hear all voices and judgements, which they can never do but by giving freedom to the Press, and in case any abuse their authority by scandalous pamphlets, they will never want Advocates to vindicate their innocence. And therefore all things being duly weight, to refer all Books and Pamphlets to the judgment, discretion, or affection of Licensers, or to put the least restraint upon the Press, seems altogether inconsistent with the good of the Commonwealth, and expressly opposition and dangerous to the liberties of the people, and to be carefully avoiced, as any other exorbitancy or prejudice in Government.[34]

The writing of the Puritan clergyman John Saltmarsh gives a flavour of argument for freedom of expression from religious grounds during the English revolution. In his 1646 pamphlet *The Smoke in the Temple*, Saltmarsh wrote that the suppression only fostered civil dissent. 'Let there be free debates and open conferences and communication for all, where doors are not shut, there will be no breaking them open.' Saltmarsh claimed a Christian society was one of openness, honesty, and civic participation:

> Let there be liberty of the press for printing, to those that are not allowed pulpits for preaching. Let that light come in at the window which cannot come in at the door, that all may speak and write one way, that cannot another. Let the waters of the sanctuary have issue and spring up valleys as well as mountains.[35]

While Saltmarsh is obviously motivated by a model of what constitutes a Christian society, it is notable that he doesn't make his case on the terms which we are familiar. Saltmarsh is not arguing on the grounds set by Augustine twelve hundred years earlier; his is not an argument from scripture and parable, but an imagining of civil discourse and stability that, despite his belief that such a society would be grounded on Christian ethics, is almost wholly secular.

The Licensing Order of 1643 may have been the occasion for Milton and his interlocutors to draw their pens but its effect on England's printing industry is more ambiguous. There is a complex scholarly debate about the extent and effectiveness of censorship throughout the seventeenth century. We should not hold 'any ahistorical ideas of an Orwellian Big Brother' monitoring and suppressing all literature during this period.[36] The English republic deployed the same mechanisms and institutions of censorship that it had inherited from the Stuart monarchy—the practice of censorship in the revolutionary period was remarkably consistent with what came before. It was still improvised, ineffective, and

unable to handle the torrent of pamphlets and news books which the country's civil strife had unleashed.

This continued under the Restoration. Charles II's chief censor Roger L'Estange was called the 'bloodhound of the press' and claimed that in one week in 1664 alone he had confiscated over 130,000 books. Yet, in his view, 'Scarcely a regicide or a traitor has been brought to justice … It is noted for a very rare thing for any Presbyterian pamphlets to be seized and suppressed unless by order from above.'[37]

There was an enormous change in print and print culture during the Civil War. During this time, arguments for freedom of speech and the press expanded out of their traditional specific focus on religion and liberty of conscience. Earlier writers like Sebastian Castellio saw freedom of expression as simply a subsidiary of freedom of religion. In the wake of the civil war, these arguments were increasingly secular. For most Levellers, charges of political sedition were more threatening than charges of heresy.

The Restoration in 1660 was quickly followed by the Licensing of the Press Act of 1662, which aped, even more than the 1643 order of the Long Parliament, the Star Chamber's 1637 decree. The monopoly of the Stationers' Company over printing was reaffirmed. The 'general licentiousness of the late times' was condemned, and 'heretical, schismatical, blasphemous, seditious, and treasonable' were to be banned by L'Estange's censors. The system of prepublication censorship which Milton condemned stood. And, as the Stuart monarchy found, that system was no more successful in stamping out seditious works than its predecessors.

John Locke and the End of Licensing

Liberalism was born in England in the seventeenth century; a child of revolution, war, and the tyranny of Oliver Cromwell. The restoration of the Stuarts under Charles II was short-lived. Charles' brother James II lasted only 3 years on the throne before being deposed in the Glorious Revolution by the Dutch head of state William of Orange.

John Locke's *Two Treatises of Government,* written during the Restoration and published just after the Glorious Revolution, is the defining text of liberal thought. Like Spinoza, Locke developed a political theory where natural rights were protected by governments—the failure to protect those rights constituted a breach of the social contract and allowed for the dissolution of those governments. Locke's intellectual opponent in the First Treatise was Robert Filmer, a Royalist for whom the word 'staunch' does not quite do justice. Filmer defended the Divine Right of Kings doctrine which suggested monarchs were granted their powers directly from God, and as a consequence only had to answer to the divine, not human law.

Born in England in 1632, Locke was a philosopher, academic, tutor, scientist, and medical practitioner. He worked closely with the chemist and naturalist Robert Boyle, and the focus of his early research and career was not in political philosophy but science. Yet as early as 1660 Locke was thinking about the origins of government and toleration. An early unpublished work argued that matters of conscience should be treated 'tenderly' by the state, but the young Locke did not place any limits on the power of government to do so.

Locke's introduction to radical liberal politics was made when he met Lord Ashley, later the Earl of Shaftesbury, in 1666. Shaftesbury was a liberal Whig politician who had sat in parliament since 1640. First a Royalist during the revolution, and then a Parliamentarian from 1644 onwards, Shaftesbury was one of the most prominent liberal politicians of the latter half of the seventeenth century. Locke joined his house first

as personal physician, but forged a 'firm and lasting friendship'. It is likely that Locke's radical liberalism is directly the result of collaboration with Shaftesbury; what we consider liberalism today we owe to Restoration politics and the relationship between these two men. Locke was the ideological star of the American revolution. His political thought shaped English politics for nearly two centuries, at least until the advent of utilitarianism. His philosophical empiricism dominated scientific thought—Voltaire called him the 'Hercules of metaphysics'.

And his relationship with Shaftesbury put him dead in the centre of resistance to Charles II—through the older man, Locke was tangentially involved in the Rye House Plot in 1683 to assassinate the king and his Catholic brother to prevent the latter from acceding to the throne. Charles' parliamentary supporters had reduced religious freedom within England by extending the power of the Church of England. Non-Anglicans were unable to take government office. Yet at the same time the king was suspected as being highly sympathetic to Catholicism, and his heir had converted to Catholicism in the late 1660s.

Locke wrote his *Letter Concerning Toleration*, appropriately enough, in exile in Holland, having fled the country in the fallout of the plot.[38] In it he repudiated his earlier views, and mounted an argument for religious toleration.

'[T]here is absolutely no such thing as a Christian commonwealth', Locke argued. States in the past which claimed to have adopted Christianity retained the political system which they had inherited. A country cannot be 'Christian'—only individuals can. Locke was a committed Protestant and made his case on a close reading of scripture. But, Locke wrote, the New Testament offers no guide to political order; it is concerned with the faith of individuals, not the faith of a state. As a consequence,

> [T]he civil ruler has no more mandate than others have for the care of souls. He has no mandate from God, for it nowhere appears that God has granted men authority over other men, to compel them to adopt

> their own religion. And no such power can be given to a ruler by men; for no one may abdicate responsibility for his own eternal salvation, by adopting a form of faith or worship prescribed to him by another person, whether prince or subject.

Religious belief is not a civil matter. Locke drew on a long line of thinking about religious liberty when he argued that 'True and saving religion is an inward conviction of the mind … Such is the nature of the human understanding, that it cannot be compelled by any force'.

Locke emphasises that religious beliefs are a choice. He did not go so far as claiming that religious differences are simply a matter of opinion, as Castellio and Spinoza had, yet he wrote that to enter a church or a faith is a decision made by free men, and as such should not be restrained. 'Of his own accord he joins the association in which he believes he has found true religion and a form of worship pleasing to God … if he finds anything wrong with its doctrine or unseemly in its ritual, he must have the same liberty to leave as he had to enter'. There seems to be no role for the state interfering in religion in Locke's political order. And like Roger Williams' *Bloudy Tenent*, Locke made much of the link between the enforcement of conformity and violence. The brutal track record of persecution was itself an argument against intolerance.

Yet Locke's arguments for toleration are not absolute. On first reading, Locke appears to be carving almost as significant exceptions as Milton did half a century earlier. 'A ruler should not tolerate any doctrines which are detrimental to human society and prejudicial to the good morals which are essential for the preservation of civil society.' Locke is not so careful with language as Spinoza here—it is doctrines, not actions, that are not to be tolerated, although he suggests that genuinely dangerous doctrines are 'rare in any church'. Furthermore, he writes that 'A church can have no right to be tolerated by a ruler if those who join it transfer their loyalty and obedience to another prince simply by joining.' And finally, 'those who deny that there is a Deity are not to be tolerated at all.'

Locke explains: 'an atheist cannot claim the privilege of toleration in the name of religion, since his atheism does away with all religion.'

These exclusions may not be as clear cut as they appear. The philosopher Jeremy Waldron points out that Locke did propose toleration be extended to Catholicism.[39] If he wanted to deny toleration to Catholics he could have just said so clearly. There are many passages where Catholicism is often used as an example of a religion that ought to be tolerated. 'If a Catholic believes that what another man would call bread is truly the body of Christ, he does not hurt his neighbour,' Locke writes in one passage.

But Locke is very clear about atheists. Waldron argues that the exception for atheists reflected a key part of his model of human society which prioritised human equality; an equality which was founded on divine law. Atheists reject such law and therefore have no concept of equality. As Waldron writes, 'the atheist could not really be relied on to get hold of, or suffuse his actions and deliberations with, the principle of human equality—this principle that is so important in Locke's theories about consent, natural rights, slavery, property, the common good, and the basis of political representation.'[40]

Regardless of whether Catholics were excluded, or why Locke was so vehemently opposed to atheists on political, as well as religious grounds, these exceptions stand out as distinctly pre-modern.

Locke was not only interested in religious toleration—in his political career, he was deeply involved in the debates over freedom of the press. Locke had been forced to publish his major works anonymously, including the *Two Treatises of Government*. He had recommended Milton's *Areopagitica* to Shaftesbury in 1670.[41] And he wrote a minor essay, 'Liberty of the Press' in 1693, attacking Charles II's Licensing Act.

The occasion was the controversy over the Licensing Act's renewal between 1693 and 1695. After the Glorious Revolution, William of Orange and his coregent Mary maintained Stuart censorship. There is

no reason to believe that censorship was on its natural way out. Since 1688 there had been an outpouring out of pamphlets supporting the now-disposed James II, and the Privy Council sought to eliminate the seditious material.

Yet politics after the Glorious Revolution were highly divisive, and censorship officials were bound to come up against politically controversial works. In the 1693 session of parliament, Whigs furiously claimed the Tory censors were unjustly approving writings which undermined their claim that William and Mary ruled England by contract, rather than divine right. The regular renewal of the Licensing Act was no longer a sure thing. The Whigs suggested that there be two censor chairs, one occupied by a Whig, and one occupied by a Tory.[42]

Locke's essay was one of many urging reform of the Licensing Act. Locke parsed the provisions of the Act one at a time and raised objections to them all. One argument is particularly important for debate over freedom of speech and expression. Locke argued that the classes of literature prohibited by the act ('Heretical, seditious, schismatical or offensive') were too vague to be meaningful.

> Some of these terms are so general and comprehensive or at least so submitted to the sense and interpretation of the governors of church or state for the time being that it is impossible any book should pass but just what suits their humours.[43]

And, he implied, what is considered true or accurate depends on the time in which it is written. Views which are obnoxious or offensive in one time may not be seen that way in the future. 'And who knows,' Locke wrote 'but that the motion of the earth may be found to be heretical, etc., as asserting antipodes once was?' (By 'antipodes', Locke is referring to Galileo's defence of the Copernican system of astronomy.)

Locke goes on to condemn the Stationers' Company monopoly, and proposes a system of copyright where patents would be granted for 'sup-

pose 50 or 70 years' after first printing or the authors' death. For Locke, the Licensing Act is 'an invasion on the trade, liberty, and property of the subject'.

Locke's argument does not go so far as to contest the concept of sedition or treasonous writing. He only explicitly objects to prepublication censorship. Perhaps this is understandable—that was the controversy of the day.

Even so, that was further than the Whigs in the House of Commons intended to go: they did not want to eliminate licensing and prepublication censorship, just to reform it. Press licensing was merely a conduit for a larger battle between Whig and Tory in the House. Yet the Commons could not come to an agreement on how the Licensing Act should be reformed. In 1695, to everyone's surprise, parliament announced that it would not renew the Act. Prepublication censorship suddenly ended in England.

Press licensing in Britain was killed by political stalemate. Locke's narrow, pragmatic criticisms of the Act—repeated through his allies in parliament and replicated in the pamphlets of others—were those that won the day. Lord Macaulay argued that many of the practical arguments against the Act may have bordered on trivial, but such is politics:

> They complain that it is made penal in an officer of the Customs to open a box of books from abroad, except in the presences of one of the censors of the press. How, it is sensibly asked, is the officer to know that there are books in the box till he has opened it? Such were the arguments which did what Milton's *Areopagitica* had failed to do.[44]

That does not mean the end of licensing was unaffected by philosophical arguments for freedom of speech. It was not politics that kept prepublication censorship from being revived, but *Areopagitica*.

Milton's work became a touchstone of English thought on freedom of speech for at least a century. The political impact of Milton's argu-

ment cannot be overestimated. Early arguments against the revival of prepublication censorship relied on his famous pamphlet—some going so far as to mirror the structure and style of *Areopagitica*.[45]

Yet *Areopagitica's* dominance of the intellectual climate for freedom of expression had other unfortunate consequences. English legal thought came to conceive of freedom of speech and the press in the narrow grounds which Milton had devised. Well into the second half of the eighteenth century, freedom of expression was seen simply as the absence of prepublication censorship. The great jurist William Blackstone wrote in his *Commentaries on the Laws of England* in 1769 that

> The liberty of the press is indeed essential to the nature of a free state; but this consists in laying no previous restraints upon publications … but if [an individual] publishes what is improper, mischievous, or illegal, he must take the consequence of his own temerity.[46]

Nevertheless, the end of licensing was not universally welcomed. Alexander Pope believed the combination of the end of licensing and the growth of religious tolerance was undermining England's refined literary culture. In 1711, Pope complained that 'the Press groan'd with Licens'd *Blasphemies*.'[47] Pope was not alone regretting the newfound freedom of the press. Jonathan Swift ridiculed the book trade in his *A Tale of a Tub*, picking on the 'swarm' of writers that had filled the literary market since 'the liberty and encouragement of the press'.

Even Macaulay, looking back from the nineteenth century, wrote that when the House of Commons abandoned licensing on the grounds of 'petty grievances', they had no idea 'what they were doing, what a revolution they were making, what a power they were calling into existence'.[48]

4 The Radical Enlightenment

Jonathan Israel argues there was not one 'Enlightenment,' but two. Historians studying eighteenth and early nineteenth century attitudes to freedom of speech and of the press have remarked that Enlightenment attitudes towards free expression appear contradictory and confused. These historians usually conclude either that the intellectuals of the period were fully committed to free speech, or they were fully opposed to it. Israel, by contrast, offers an important distinction: that between the 'moderate' Enlightenment and the 'radical' Enlightenment.[1]

The radical Enlightenment posited that all individuals should be treated equally. Its advocates supported democracy, individual liberty, gender and racial equality, and, of course, free thought, expression, a free press and religious toleration. And they believed that the knowledge uncovered by the Enlightenment should be open to all; that all individuals could be trusted with religious, political, scientific or political debate.

For Israel, the radical Enlightenment is given human form by Benedict Spinoza, not least for his aggressive defence of freedom of expression. Spinoza's metaphysical and political thought was the foundation of radical Enlightenment politics, and, therefore, the revolutionary era.

If Spinoza was the archetypal radical, then Voltaire was the archetypal moderate. The moderate Enlightenment sought to strike a balance

between reason and tradition, to integrate Enlightenment ideas into the existing political and religious structures. The moderates rejected the notions of political and legal equality which were proposed by the radicals. Israel describes the moderates as 'court-sponsored'. Certainly it is true that many supported the 'enlightened' monarchs of the time such as Frederick the Great of Prussia and Catherine II of Russia.

Voltaire was one of those supporters. The French philosopher preferred orderly governments, shaped by reason, ruled by an intellectual monarch and sustained by a court of intellectuals. This political philosophy stemmed from a deeply ingrained elitism. For Voltaire, society consisted of two classes: the mob, and an enlightened core. The mob is a constant; their ignorance and bigotry for the most part unreformable. Voltaire wrote in 1771 that a 'great question' facing the enlightened was 'up to what degree the people, that is, nine-tenths of the human race, must be treated as monkeys.'[2] Voltaire believed that reason was on the march, but only among an enlightened few. Luckily for him those enlightened few were near the levers of power.

Nevertheless, Voltaire wrote repeatedly, eloquently, and stirringly against censorship. His own works had been censored in France. He criticised the capricious nature of censorship, arguing that whether a book was accepted or not depended on whether a censor was the 'friend of my friend or the friend of my enemy'.[3] He joked that authors whose works were banned should not resent their censors: 'Being censored by these gentlemen only makes people buy the book. The book sellers should pay them for burning everything which is printed.'[4] He argued that freedom of speech was at the foundation of all liberties: 'Without the freedom to explain what one thinks, there is no freedom'.[5] Censorship was no idle interest for Voltaire. His major work, the *Dictionnaire philosophique* published in 1764, features an essay 'Liberty of the Press', where the philosopher argues that the threat to state and society from books is greatly exaggerated:

> I know many books which fatigue, but I know of none which have done real evil. … [L]et us see, if you please, what state has been lost by a book. The most dangerous, the most pernicious of all, is that of Spinoza. Not only in the character of a Jew he attacks the New Testament, but in the character of a scholar he ruins the Old; his system of atheism is a thousand times better composed and reasoned than those of Straton and of Epicurus … Like yourself, I detest this book, which I perhaps understand better than you, and to which you have very badly replied; but have you discovered that this book has changed the face of the world? Has any preacher lost a florin of his income by the publication of the works of Spinoza? Is there a bishop whose rents have diminished?[6]

Voltaire concludes his essay: 'You fear books, as certain small cantons fear violins. Let us read, and let us dance—these two amusements will never do any harm to the world.'

Voltaire's intellectual elitism pervades his attacks on censorship. Discussing Locke in his *Letters Regarding the English Nation*, Voltaire writes 'Philosophers will never become a religious sect. Why? Because they do not write for the masses and are dispassionate.' At the very most books could only damage ideas that were insecure already. For instance, Voltaire was confident Spinoza's writing could be uncensored because his 'atheism' was not convincing.

> If a country's religion is sacred (for every country boasts that it is), a hundred volumes written against it will do it no more harm than [that done] to rock-solid walls by a hundred thousand snowballs. The gates of Hell shall not prevail against it, as you know! How can a few black letters traced on paper destroy it?[7]

Like many seventeenth and eighteenth century authors, Voltaire appears to have only objected to prepublication censorship. One may be free to write what they like, but they must accept the legal consequences when

they do so. If a book is foolish, the writer is booed, if a book is wide and noble, the writer is loved and rewarded, if a book is seditious, the writer is punished.[8]

Voltaire's two views—of freedom of speech and the irredeemably base nature of ninety per cent of people—did not mix well. Voltaire praised Frederick the Great's claims that the knowledge should be limited to only the educated upper echelons. The people were too filled with superstitions and too credulous to be trusted with radical thought.[9] Voltaire was troubled by the implications of this claim (it was a 'great question' whether to treat the mob like monkeys) but appears to have been more concerned with opposing the thought of the radical Enlightenment and its claims about human equality. For a long time Voltaire was seen by historians as an archetypal opponent of censorship and free expression; this is no longer the case.[10]

The result of Enlightenment ambivalence about how the masses would respond to a free press was a two-tiered censorship model. Enlightened courts and churches did not want to impede the growth of knowledge and the work of intellectuals. The educated elites could be trusted with complex and challenging books; the uneducated classes could not. Israel describes this as 'one rule for specialists and an entirely different rule for the general public'. This was a highly paternal approach to censorship. Even books which were not overtly political or religious were liable to censorship, as, in the words of one censor they could nevertheless be 'dangerous to the public'.[11] The monarchs of continental Europe may have been 'enlightened' but they were not liberal.

Yet it was nonetheless a significant change in the rationale for censorship. Pre-enlightenment limits on freedom of speech and publication did not discriminate between the educated and the non-educated classes. From the eighteenth century onwards, intellectual elites were granted a freedom to import controversial works. This shifted the purpose of censorship from limiting the development of new ideas—as medieval

and early modern governments attempted to do by naming heretical works—to limiting the social consequences of their dissemination. The uneducated could not handle the implications of radical ideas; it could trigger social or political unrest. Such challenging ideas could only be discussed and disseminated among an enlightened few.

The enlightened few formed the 'republic of letters'—an idealised community of intellectuals and intellectual monarchs and statesmen who exchanged and debated ideas across national borders. The French statesman Malesherbes emphasised the pan-European nature of this community when he said that 'What the orators of Rome and Athens were in the midst of a people assembled, men of letters are in the midst of a *dispersed* people.'[12] Pierre Bayle, who popularised the phrase 'republic of letters' with his late seventeenth century periodical *Nouvelles de la république des lettres* wrote that 'All learned men must regard one another as brothers.' The word that many appear to have emphasised in Bayle's command is 'learned'.

This elitist attitude manifested itself in another way as well. Avowed advocates of freedom of the press limited their sympathies and support to high-brow material. Pamphlets, satires, caricatures, and 'cheap' journalism went notably undefended by many Enlightenment supporters of press freedom. Voltaire's praise of the freedom of English authors was predicated on their readership being limited: 'The number of people who think is excessively small and these people never think about troubling the world'.

There was a further significant change as the eighteenth century began. The Enlightenment saw the rise of secular power against ecclesiastical power: the strong absolute monarchies which developed before the age of revolution did so in opposition to the church. This dynamic played out in the practice of censorship as well. Prohibited books and pamphlets were increasingly secular: it was not 'heretical' works that were targeted but 'dissident' works. As religious toleration slowly grew in Europe, the breadth of permitted discussion on religious matters ex-

panded, and more emphasis was placed on stemming the tide of political or philosophical controversy.

The state took over from the church in the administration of censorship as well. One highly symbolic episode occurred in France in 1704, when the conservative Bishop Bossuet, who had been approving and suppressing books since the 1670s, was forced to submit one of his own books to a secular censor.[13]

Freedom of expression and toleration is a liberty often attributed to the Enlightenment. Certainly, there was more stirring expression of free speech written during the eighteenth century than in any era previously. But as strong as the rhetoric in defence of speech was, it was, more often than not, limited. The exceptions they carved out were often too substantial to form a strong foundation for modern speech freedoms. And they were affected by elitist and paternalistic sentiments which undermined their philosophical coherence.

Elie Luzac

The peculiar weakness of Enlightenment arguments for freedom of expression is illustrated by one of the most uncompromising books of the time, Elie Luzac's *Essay on Freedom of Expression*.

Luzac was born in 1721 in the Dutch Republic to a family of Huguenot refugees. He made a career as a prominent lawyer and as a printer and bookseller. In 1747 he printed, to great controversy, *l'Homme Machine*, written by a follower of Spinoza, Julien Offray de la Mettrie. In his preface to that volume, Luzac distanced himself from la Mettrie's ideas, but wrote that he was publishing the book in order to encourage free debate. This strategy was unsuccessful. The Walloon Consistory of Leiden condemned *l'Homme Machine* as 'filled with the most appalling atheism and libertinism'.[14] They ordered him to hand over all copies to be burned. Luzac complied for the most part, but squirrelled away a few copies for future distribution.

It was this episode which led Luzac to write his *Essay on Freedom of Expression*, which was published anonymously two years later. The essay is a sophisticated and mature attempt to ground free speech—'the best part of human freedom'—as a natural right.

Luzac grants that freedom is limited insofar as it does not harm others. It follows, he argues, that ideas harmful to society might be legitimately prohibited. 'But how to determine what is harmful to society?' God gave all human beings intelligence. All humans are guided by that intelligence to seek what will be best for society. The only way to demonstrate that some ideas are harmful is if they are aired in public and refuted in public, by which time there is little point in suppressing them. If someone honestly held an opinion about the good of society, they had the right to express them. The circumstances may arise that someone was being dishonest, but it would be impossible for any human to tell, so their speech had to be free as well.

Luzac goes immediately from those general principles to the most challenging question of tolerance in his time—whether atheists should be granted freedom of expression. The answer is 'altogether simple', Luzac writes. Even though atheists deny the existence of God that does not mean a Christian ruler would be right to limit their speech. A God that grants all individuals freedom of thought grants it even to those who deny His existence. Atheists still want the best for society; they still believe they possess the truth. And, Luzac is quick to remind his readers, it is not as if some arguments for God have not been proven false. Bad arguments for a true religion ought to be challenged—even if those challenging it are wrong. 'A proposition cannot be said to be true or demonstrated as long as there are arguments that combat it, or solid arguments for its contrary.'

Yet Luzac's defence—powerful as it was—of freedom of speech only went so far. The very first lines in *Essay on Freedom of Expression* confirm its limits: 'I mean by expression men's actions by which they instruct oth-

ers with their ideas on certain propositions. Novels, lampoons, and other productions of that sort do not enter into the goal of this work.' These exceptions are not incidental to Luzac's model of speech freedom. Later in the essay he extends them to expression—even political expression—that is needlessly offensive: 'I hold no brief here for books full of indecent and insulting words, but for those where one merely reasons naturally about things.'

Indeed, Luzac believes that prohibiting offensive or trashy books actually helps boost the case against censorship. '[O]ne need only prohibit books that add to arguments insulting or indecent expressions, or which make a single web out of them, and leave in peace authors whose works contain no malice, etc.'

Luzac's argument is a hybrid one. On the one hand, he wants to ground his defence firmly within a natural rights tradition: reasoning from the supposition that God granted intelligence to all human beings. Yet on the other hand, he draws on the same sort of argument proffered by John Milton: that the purpose of free debate is to establish and support truths. This latter argument places limits on what should be considered 'legitimate' speech. For Luzac, there seems to be no truth-seeking benefit in allowing insult or indecency.

The history of his *Essay on Freedom of Expression* after its publication is replete with irony. Radical Dutch patriots in 1780—who Luzac, as a conservative, opposed—saw freedom of speech as an ancient Dutch liberty that was not fully recognised by the Republic. As one prominent patriot wrote 'Insist on freedom of the press, for it is the only support of your national liberty. If it is impossible to communicate freely with one's fellow citizens and warn them if necessary, the oppressors of the people will have an easy job.'[15] The patriots republished Luzac's essay in Dutch in 1782, not knowing who its author was.

But it was not Luzac's high-minded writings of the republic of letters that the Dutch patriots fought to free, but the very pamphlets and satires

which Luzac had specifically excluded. The now sixty year old Luzac wrote that 'Newspaper writers who turn their liberty to relate the news into the impertinence of publishing everything that surfaces in their raging and sick brains, are a disgrace to nature and the pests of society. They may with justice be regarded as the scum of the earth.'[16] Luzac died in 1796, two years before freedom of expression was officially codified in the Dutch constitution.

Freedom of Speech in the Republic of Letters

Luzac was just one writer among many. There are too many defences of freedom of speech or freedom of the press—not to mention religious toleration—in the Enlightenment to do justice here. There were powerful arguments from across the continent. The English deist Matthew Tindal wrote two influential essays on freedom of the press in 1698 and 1704: one in which he argued that the 'noble art of printing, that by divine providence was discovered to free men from the tyranny of the clergy they then groaned under … ought not to be made a means to reduce us again under sacerdotal slavery.'[17]

Alexander Radishchev—'the first Russian radical'—made a strong entry in the canon with his 1790 book *Journey from St. Petersburg to Moscow*. This book, purporting to be a travel account, was actually an attack on Russian serfdom and political corruption. It has been compared to other abolitionist tracts like *Uncle Tom's Cabin*. Published during the relatively tolerant reign of Catherine the Great (one of the 'enlightened' despots so admired by many Enlightenment intellectuals) the book was destroyed and the author condemned to death. Radishchev claimed temporary insanity and the sentence was commuted to exile.

Catherine's reign was, admittedly, more tolerant than those which had come before. She was proud to have published Diderot's *Encyclopédie* when it had been banned elsewhere, and she permitted the publication of tracts that opposed absolute monarchies. Yet her tolerance only went

so far. The chapter of Radishchev's book which most offended Catherine was one in which the book's narrator encounters a frustrated publisher.

> The censorship of what is printed belongs properly to society … Leave what is stupid to the judgment of public opinion; stupidity will find a thousand censors. The most vigilant police cannot check worthless ideas as well as a disgusted public can.[18]

Radishchev's *Journey* was one of the founding texts in the Russian radical tradition. One of the many tragedies of Russian history is that—even though his book was lauded by the Soviet authorities—the country has never been able to achieve his liberal ideal.

Another noteworthy work was written by Pierre Bayle. Bayle was of the previous generation to Luzac and Radishchev (he died in 1706), but deserves note here for extending a defence of freedom of expression further than most men of the republic of letters would. A French Huguenot who fled, like so many others, to the Dutch Republic, Bayle's major work was the *Dictionnaire historique et critique*. Initially published in 1697—first in two volumes and then expanded in 1704 into four—his *Dictionnarie* was a guide to intellectual history that acted as a vehicle for his own liberal ideas about politics, religion, and toleration. It immediately attracted the attention of the censors, and Bayle was charged with being offensive to religion. He was acquitted, but under the condition that he made changes. The resulting 1704 edition, as well as being longer, includes a clarification that was republished widely in its own right over the next century: 'On Obscenities'.

In this chapter, Bayle makes a number of critiques of anti-obscenity laws which would be repeated for centuries. It has been accepted, notes Bayle, by 'an abundance of people' in all ages that obscenities ought to be condemned. Yet, Bayle points out, this has not, obviously, been accepted by those targeted by the censors, who have not been moved to conform to good taste. Bayle believed that stubbornness was because

the speakers of obscenities felt that they would not be 'excluded from the status of moral person'. If there are community standards which are being breached by obscenities, they are not standards which the community appears to be itself interested in upholding through ostracisation or popular condemnation.

Further complicating this, Bayle argued that the administrative and judicial bodies that seek to maintain those standards are unable to define what the standards actually are. Those bodies are unrepresentative of the community whose standards they purport to defend, and censors make no effort to determine what the community's standards actually are. As Bayle wrote,

> Censors of obscenities seem to be far more capable of closing the question with an arbitrary sentence upon the whole of the republic of letters than of forming a broad senate of opinion encompassing many sorts of person. For within it one should see not only people venerated for the austerity of their lives or their sacred profession, but also swordsmen, professed gallants and, in a word, the sort of person whose hedonistic living was an occasion of scandal. This could be a factor of great weight; for the right to compose wanton verses would, undoubtedly, be a bad thing if it were denounced by the very persons who live in a worldly manner.[19]

Denmark, 1770-1772

The first formal declaration of freedom of speech and the press was not made in the Dutch Republic, England, or the United States, but in the Kingdom of Denmark-Norway in 1770. (Sweden pronounced freedom of the press four years earlier—a significant milestone, but one of limited influence as there was a gaping exception for religious matters.)

The protagonist in this short and violent tale was Johann Friedrich Struensee, the chief minister of Denmark-Norway, who convinced King

Christian VII to declare freedom of the press and was executed, brutally, two years later.

'Doctor Struensee' was born in 1737. He was a physician in the Danish-ruled province of Holsten in northern Germany. Struensee was a follower of Spinoza, and tried to publish writing inspired by his intellectual hero in the early 1760s, but the Holsten clergy censored his publications. In part this was because Struensee was not just a Spinozist, but a libertine as well; rebelling against the strict moral asceticism of his upbringing in Holsten, Struensee admired the irreverence of the ancient cynics.[20]

In 1769, Struensee was appointed personal physician to King Christian. His rise in Christian's favours was so rapid—James Mackintosh described it as 'instantaneous'—that a year later, he was appointed chief minister of the kingdom.[21] He acted fast to implement Spinoza's ideal. On 4 September 1770, Europe had its first general declaration of freedom of the press:

> We are entirely of the opinion that it is detrimental to the impartial investigation of truths, as it is obstructive to the disclosure of entrenched errors and prejudices, if upright patriots, concerned for the common good and the true best interest of their fellow citizens, are deterred and hindered by ordinances and preconceived opinions from freely writing in accordance with their insight, conscience and conviction, and from attacking abuse and unmasking prejudice. We have therefore decided, after careful consideration, to permit unlimited freedom of the press in Our realms and territories in such a way that, from now on, no one shall be obligated or required to submit books and writings that he wishes to send to press to the hitherto decreed censorship.[22]

The effect was immediate. Voltaire wrote immediately to King Christian—imagining the monarch to have been the driver behind the declaration—with words of praise for his enlightened rule. Within the

borders of Denmark-Norway, there was a sudden 'avalanche' of pamphlets, flyers and books taking advantage of this new freedom.

Struensee's interest in radical Enlightenment reform was not limited to freedom of the press. He had an extensive legislative program which liberalised the Danish economy, eliminated serfdom and challenged traditional religious power. So the newly liberated press turned their attentions on the chief minister. The vast majority condemned him.[23] Tracts complained of the nightmarish explosion in opinions. Struensee was viciously attacked: he was an atheist. He 'denied all forms of divinity'. He had no morals. His intellectual beliefs were denounced. Struensee was a follower of the 'Dutch Jew who was supposed to be learned but wanted to believe that the world had made himself' by the name 'Spinach or Spinos'.[24]

There were pamphlets supporting Struensee's initiative—David Hume and Voltaire appeared in Danish translation in 1771 in defence of free speech—but the result of freedom of the press in Denmark-Norway was seen by contemporaries as closer to anarchy than a republic of letters.

Struensee's fall was as instantaneous as his rise. He was arrested in January 1772 for plotting against the King (not true) and for sleeping with the Queen (true, but the open-minded Christian had given him permission). The sudden change in political dynamic meant that Christian could do little to save his chief minister. Struensee had neither political support within the court nor the support of the press he had freed.

He was executed with a barbarity that was rare in Denmark-Norway: hands cut off, beheaded, and then drawn and quartered. The press freedom he had brought in was hastily rescinded.

England's 'Extreme Liberty'

'Nothing is more apt to surprise a foreigner', wrote David Hume, 'than the extreme liberty, which we enjoy in this country, of communicating whatever we please to the public, and of openly censuring every measure, entered into by the king or his ministers.'[25]

In the eighteenth century, English liberties were those by which every other country measured itself, and no more so than with its free press. One French observer, Jean-Louis de Lolme, marvelled in his book *The Constitution of England* that 'every Man in England is permitted to give his opinion upon all subjects, and … to watch over the Administration, and to complain of grievances.'[26]

In an address in 1803, the Whig politician James Mackintosh said that the growth of the press under this 'extreme liberty' had been so momentous it had uprooted the form of English government itself: 'By increasing the number of those who exercise some sort of judgment on public affairs, it has created a substantial democracy, infinitely more important than those democratical forms which have been the subject of so much contest.'[27]

Press licensing in England ended almost by accident; it was not intended by either faction in the parliament in 1695. Neither (as a mid-century Whig newspaper bitterly pointed out) was press freedom one of the 'branch[es] of publick Liberty' that the Glorious Revolution sought to protect.[28] Yet no matter how accidental the liberty, it was a revolutionary one.

In 1712, there were twelve London newspapers; a century later there were 52.[29] The newspapers were the central focus of the coffee houses that were popping up all over London. Coffee houses also provided pamphlets and cheap political prints for their customers as they relaxed and socialised.[30] So no surprise that the coffee houses, fully stocked with newspapers and literature, were centres of political discussion and dissent.

A satirist claimed in 1674 that sedition was as much a focus of the coffee houses as food and drink, writing:

> Bak'd in a pan, Brew'd in a pot,
> The third device of him who first begot
> The Printing Libels, and the Powder-plot.[31]

Charles II tried to suppress the coffee houses in the 1670s in response to the 'great complaints … of the license that was taken in coffee-houses to utter the most indecent, scandalous and seditious discourses'. Charles removed their licences and threatened to prosecute any who remained open. The poet and Member of Parliament Andrew Marvell composed these lines in protest, threatening Charles II with the fate that befell his father, and arguing that it was not quiet discussion engendered by newspapers that the Crown should fear but tavern agitation:

> When they take from the people the freedom of words,
> They teach them the sooner to fall to their swords.
> Let the City drink coffee and quietly groan
> They that conquer'd the father won't be slaves to the son
> It is wine and strong drinks make tumults increase;
> Choc'late, tea, and coffee are liquors of peace:
> No quarrels nor oaths amongst those that drink 'em:
> 'Tis Bacchus and brewers swear, damn 'em, and sink 'em!
> The, Charles, thy edicts against coffee recall:
> There's ten times more treason in brandy and ale.[32]

The licences were quickly restored. The coffee-house came to dominate eighteenth century politics. One Russian visitor to London discovered in 1790 that this new civic engagement had its own peculiar customs. 'I have dropped into a number of coffeehouses only to find twenty or thirty men sitting around in deep silence, reading newspapers, and drinking port. You are lucky if, in the course of ten minutes, you hear three words. And what are they? "Your health, gentlemen!"'[33]

Mackintosh's observation that newspapers had changed the system of government was only part of the story. The explosion in printing changed the political culture as well, in ways that we in the twenty-first century would recognise. One contemporary complained that the newspaper press of the eighteenth century was like scary tales told to children:

> for as these terrify their fancies, and disturb their dreams with stories of ghosts, goblins, giants, and bloody-bones, so many a wise barber, grocer, and upholsterer, who go to drink their pot and smoke their pipe, return home with dreadful tales of foreign war, domestic discord, loss of trade, breach of public credit, bankruptcies, famine, ruin, misery, and desolation.[34]

A London lawyer wrote that 'newspapers and pamphlets tend to raise an uneasiness among the People'. Foreign visitors noticed this as well. The free press amplifies criticisms of the government: one observer noted that English 'speak and write as if they were continually exposed to grievances of every kind'.[35]

But while freedom of the press in England was unprecedented in European history and unparalleled in Europe, it was not absolute. The decline of licensing was not the end of censorship, merely the end of *prepublication* censorship. The response of the Crown and judiciary was to develop and evolve the concept of 'seditious libel' to restrain the press. Seditious libel drew on the longstanding law of defamation. Yet within a decade, the law of seditious libel had evolved so that it could be applied to any writing which bought into disrepute the monarch, the parliament, or the government.[36] The enormously broad strokes by which seditious libel was defined only increased the old Tudor and Stuart problem of arbitrariness in censorship.

That point was made early on by the journalist and novelist Daniel Defoe, who was convicted of seditious libel in 1703. His response to the conviction, *An Essay on Regulation of the Press*, published a year later,

demonstrates that a belief in freedom of speech was no longer limited to opposing prepublication censorship. Defoe argues that censorship is absolutely incompatible with British liberty.

In his essay, Defoe accepts that there should be some limits on the press. (Some have argued that there is reason to believe that acceptance was not genuine. Instead, it merely reflects a gratitude to those who had been lenient to him during his trial.) Just a few months after he published *An Essay*, he wrote these lines comparing a vote on press regulation with a seditious libel:

> Now you fall foul upon the Press,
> And talk of Regulation;
> When you our libelling suppress,
> Pray Drop your Votes among the rest,
> For they Lampoon the Nation.[37]

Eighteenth century British governments had two other mechanisms for managing the press. The first was enabled by the passage of the Stamp Act in 1712. The burden of this new tax fell mainly on the growing newspaper industry. The tax had three purposes: to raise money for the government, to restrain the press, and, through its compliance mechanisms, to keep an eye on press circulation. It was a clear political attack on the press by parliament.[38] One historian has written that the Act was intended to 'shatter' the newspapers.[39] While foreign visitors were impressed by England's press freedom, governments and politicians feared it. Rather than targeting specific writing, with its broad brush, the act tried to restrain an entire industry. The Stamp Act was initially ineffective—it was complicated to enforce and easy to sidestep—but the Act was strengthened over time and remained in force until the 1850s.

The Stamp Act was seen as the attack on freedom of speech that it was, and described by publishers in the most apocalyptic terms. Shortly before the implementation of the new law, Jonathan Swift wrote that

'Grub Street has but ten days to live; then an Act of Parliament takes place that ruins it, by taxing every half-sheet a halfpenny.'[40] Daniel Defoe and Joseph Addison both damned the new tax. The latter wrote in the *Spectator*, somewhat hysterically:

> This is the Day on which many eminent Authors will probably Publish their Last Words. I am afraid that few of our Weekly Historians, who are Men that above all others delight in War, will be able to subsist under the Weight of a Stamp, and an approaching Peace. A Sheet of Blank Paper that must have this new Imprimatur clapt upon it, before it is qualified to Communicate any thing to the Publick, will make its way in the World but very heavily. In short, the Necessity of carrying a Stamp, and the Improbability of notifying a Bloody Battel, will, I am afraid, both concur to the sinking of those thin Folios … A Facetious Friend of mine, who loves a Punn, calls this present Mortality among Authors, The Fall of the Leaf.[41]

The other major mechanism for influencing the press wasn't censorship but subsidy. Governments sponsored journalists and publishers for partisan purposes. The degree of control this gave governments over the press should not be underestimated. The Stamp Act had made publication expensive, government subsidy made newspapers viable again. Already both the Whigs and the Tories had their loyal newspapers. But those newspapers grew to depend on subsidies, rather than the loyalty of their readers. When a government left office, the papers it had sponsored often collapsed.[42]

John Wilkes

On 29 June 1762, one of these subsidised papers appeared in London. Written and edited by the Scottish poet and novelist Tobias Smollett, *The Briton* was sponsored by the Earl of Bute, then Prime Minister under George III and also, like Smollett, a Scotsman. Bute was a political oppo-

nent of William Pitt the Elder. *The Briton* was set up to attack 'Pensioner Pitt and Lady Cheat'em' and build support for Bute's policies.

London readers were offered a response just over a week later: the competing newspaper the *North Briton*. The title was satirical. It targeted Bute for, among other things, being the leader of a Scottish political invasion. 'The time is at length arrived, when the being born in Scotland shall be found to be the best and most effectual recommendation to preferment in England.' Readers of the *North Briton* were informed that Scots were 'odious' and only went into politics to help other Scots.[43]

The *North Briton* was edited and chiefly written by the libertine John Wilkes, who would, as a result of the events following its publication, become England's most notorious radical journalist. Wilkes was born in 1725 in London, and educated in Holland at the University of Leiden. He went into parliament in 1757 as a supporter of Pitt. James Boswell, the Scottish diarist who spent so much time with Samuel Johnson, was a friend of Wilkes, and suggested that the apparent hatred of Scots in the *North Briton* was affected: he 'likes the Scots as well as anybody; only he considers the abusing that nation as a political device, which he must make use of.'[44]

The first *North Briton* affirmed what Wilkes saw as his natural rights:

> The liberty of the Press is the birthright of a Briton, and is justly esteemed as the firmest bulwark of the liberties of this country. It has been the terror of all bad ministers; for their dark and dangerous designs, or their weakness, inability, and duplicity, have thus been detected, and shown to the public generally in too strong colours for them long to bear up against the odium of mankind.[45]

The *North Briton* criticised the Bute government for 'the infernal doctrine of arbitrary power and indefeasible right on the part of the sovereign', its proposed excise tax on cider, and the personal failings of the king's chosen ministers.

Wilkes' attacks on ministers sailed close to the wind. The law on seditious libel was broadly drawn. The *North Briton* was written anonymously, but anonymity was not much protection against a sedition charge. More than any other writer of the time, Wilkes was happy to identify the targets of his attack; Bute, the conservative Lord Chief Justice Mansfield (who believed that 'It is very necessary for all governments that the people should have a good opinion of it') the chief of the king's messengers (the police) Nathan Carrington, and the secretary of the Treasury Samuel Martin, who Wilkes described as 'the most treacherous, base, selfish, mean, abject, low-lived and dirty fellow that ever wriggled himself into a secretaryship.'

Bute resigned in April 1763. Wilkes only increased the vehemence of his attacks. A fortnight after Bute's resignation, Wilkes savaged the government with a legendary issue of *North Briton*: No. 45. In this issue, Wilkes directly blamed King George for the actions of the government's ministers, writing that the monarch gave 'the sanction of his sacred name to the most odious measures, and to the most unjustifiable, public declarations'. Wilkes wrote:

> The prerogative of the crown is to exert the constitutional powers entrusted to it in a way, not of blind favour and partiality, but of wisdom and judgment. This is the spirit of our constitution. The people too have their prerogative, and, I hope, the fine words of Dryden will be engraved on our hearts, 'Freedom is the English subject's prerogative.'[46]

Wilkes' challenge to the king's prerogative came close to advocating rebellion, or at least civil disobedience.

King George, understandably, saw this as an attack on himself. The Crown issued a 'general warrant' for the writers and publishers of this 'seditious and treasonable' paper. A general warrant only had to nominate the crime; it did not have to specify who the suspected perpetrators were. This allowed Carrington's messengers to arrest whoever they liked in the

process of finding the publisher of the *North Briton*. Forty-nine people were eventually arrested; but only three were taken to court. (As a result of public outrage over the Wilkes affair, the practice of issuing general, rather than named, warrants was banned two years later.)

Wilkes successfully claimed his writing was protected by parliamentary privilege and was let go. But Wilkes—now exposed as the author of the *North Briton*—had made powerful enemies. And his conduct after his release incited his political opponents further.

During the arrest, Wilkes' house had been ransacked for evidence. Given that he had not been named in any warrant, Wilkes publically claimed he had been 'robbed' and that the Crown was in possession of stolen goods. He also bought actions of trespass against the secretaries of state, the solicitor to the treasury, and the undersecretary of state.

One item which was taken from Wilkes' home was a manuscript of an obscene poem which Wilkes and a friend had written, *An Essay on Woman*. A parody of Alexander Pope's *Essay on Man*, it has since been described as one of the dirtiest poems in the English language. But as obscene as it was, *An Essay on Woman* was not illegal to possess—only to print.

So Wilkes made a big error when he printed a dozen copies of *An Essay on Woman* for the private use of his friends. His political enemies jumped on the opportunity. The poem was read aloud in parliament. Legislation was passed to limit the privilege given to parliamentarians to speak ill of the government to only what they said on the floor of the parliament. His time was up; Wilkes fled to France. He was found guilty of obscene and seditious libel in absentia.

Wilkes returned to England four years later, was elected as an MP again, and was jailed. He was expelled from parliament while in jail, re-elected, expelled, and re-elected again—all from jail. Parliament declared his opponent to be the winner, so he ran for and won the post of London alderman, in order to 'assert the conscience of every individual and the interest and freedom of the whole.'[47] He died in 1797.

Wilkes' was not the first trial for seditious libel—as we have seen, many journalistic luminaries like Daniel Defoe were caught in legal web that evolved after the end of licensing. Neither was his the first indictment for obscene libel in England. In 1708, a book called *The Fifteen Plagues of a Maidenhead* was bought before the court, but dismissed.[48] A conviction was recorded in 1727 against the infamous bookseller Edmund Curll—another foe of Pope's—for publishing a book on lesbian sexuality called *Venus in the Cloister*.

Yet it is hard to overestimate the iconic power of the Wilkes affair on the English legacy of freedom of speech. The obvious political source of the charge of obscenity against Wilkes was one factor; another was the killing of half a dozen protesters who had been shouting 'For Wilkes and Liberty' outside a courthouse where Wilkes was being tried.

Wilkes had a particularly iconic status in the American colonies. He was, according to the Boston Sons of Liberty, one of the most 'incorruptibly honest men reserved by heaven to bless, and perhaps save a tottering Empire'.[49] That was being far too generous. Wilkes was neither incorruptible nor particularly honest, as Benjamin Franklin, writing from London, hastened to tell his compatriots at home: the radical journalist was 'an outlaw … of bad personal character, not worth a farthing'.[50] Franklin's call for his compatriots to be calm was not heeded. One outlandish paean to Wilkes demonstrates his extraordinary status as a hero of liberty for the American colonies, published in Boston in 1769:

> I believe in Wilkes, the firm patriot, maker of number 45. Who was born for our good. Suffered under arbitrary power. Was banished and imprisoned. He ascended into purgatory, and returned some time after. He ascended here with honour and sitteth amidst the great assembly of the people, where he shall judge both the favourite and his creatures. I believe in the spirit of his abilities, that they will prove to the good of our country. In the resurrection of liberty, and the life of universal freedom forever. Amen.[51]

William Hone

The Wilkes trial was not, however, the only major English freedom of the press trial of this period. A generation of radical journalists followed Wilkes.

It was, indeed, admiration of John Wilkes which got William Hone in trouble. Hone was born in 1780 in Bath. At the age of 20 he began a career as a radical printer and bookseller. He made his name publishing sensationalised accounts of trials, crimes and executions. But he also published pamphlets against King George's wars, and anti-religion tracts. He reprinted influential radical works, such as Vicesimus Knox's critique of the use of foreign war for domestic politics, *The Spirit of Despotism*, and wrote many of his own attacks on the government.

In 1817, Hone wrote and published *The Late John Wilkes' Catechism*. Purporting to be written by Wilkes himself, it was a parody of a religious service designed to ridicule George and his ministers. Hone satirised the Ten Commandments ('Thou shalt not call starving to death murder … Thou shall not call Royal gallavanting adultery … Thou shalt not say, that to rob the Public is to steal.') and composed the 'Minsters' Memorial':

> Our Lord who art in Treasury, whatsoever be thy name, thy power be prolonged, thy will be done throughout the empire, as it is in each session. Give us our usual sops, and forgive us our occasional absences on divisions; as we promise not to forgive them that divide against thee. Turn us not out of our Places; but keep us in the House of Commons, the land of Pensions and Plenty; and deliver us from the People. Amen.[52]

Hone wrote these lines at an inopportune time. The French Revolution had encouraged radicalism in England, and that radicalism was met with a government crackdown on the press. There were twenty one seditious libel prosecutions in 1817 alone, the year Hone published *Wilkes' Catechism*.[53]

Hone was to be one of those defendants. He was arrested in May 1817, along with another journalist, Thomas Wooler. Hone was subjected to three separate jury trials—the first for the *Catechism*, and another two for other pamphlets which had ridiculed the monarchy and religion. Most defendants in seditious libel cases in 1817 cooperated with the courts. They entered pleas early in order to get in front of a jury as quickly as possible. But Hone did not want to cooperate—he wanted to frustrate. 'Nothing is gained', he wrote, 'by submission to base oppressors; they flatter, and fawn, and coax, like crocodiles, for no other purpose, than to allure their victims to a more certain destruction'.[54]

For Hone, his prosecution was an opportunity to undermine the foundations of the sedition laws entirely. The price of bail was set prohibitively high. As Hone refused to enter a plea, he was kept in prison for an unprecedented two months before his trial. The government placed an agent provocateur in his cell to try to entrap him into a treason charge. Hone brushed him away by saying that he was interested in reform 'by constitutional means only'.[55]

When a jury was finally selected for his case in June, Hone challenged the jury. It had been hand-picked to assure a conviction—so blatantly so that one of the jurors was a member of parliament hostile to Hone. This was a common strategy to assure convictions for seditious libel at the time, but only Hone had openly confronted it. The government was forced to admit that the jury had been selected 'improperly' and Hone was released on a now much-reduced bail.

Hone managed to postpone his trials until December. It seemed unlikely, before the court sat, that he would be successful: another bookseller had in interim been convicted merely for republishing his satires. But the delay and associated publicity had already given Hone's case an iconic status—the Tory press claimed that he would be found guilty and that the government would immediately enact legislation to strictly limit the press.

The government decided to try him not for sedition, but for blasphemy; as the parodies were clearly offensive to the Christian Bible, a conviction would be more likely. Yet the prosecution got off to a bad start. As it had been part of the indictment, the government had to read the full version of *Wilkes' Catechism* to the court. The crowd in the court erupted with laughter, to which the prosecutor soulfully retorted 'if there be any persons here who can raise a smile at the reading of the Defendant's publication, it is fullest proof of the baneful effect it has had'.

Hone's speech in his defence lasted six hours. He avoided tackling the legal merits of the government's case. Instead, he gave the crowd a literary history of parody. All parodies were, according to the government's overwrought claims, offensive to the texts which they parodied, argued Hone, but only he was in the dock. Hone claimed that the libel for which he was being prosecuted was nothing more than retaliation for his political journalism. Furthermore, libel was, by its very nature, ambiguous: 'There are … very few men who understand the law of libel. It is, in fact, a shadow—impossible to define.'

It took 15 minutes for the jury to return an acquittal. In the second trial the next day, the acquittal came after a deliberation of just over two hours. The third jury acquitted in 20 minutes.

With his impassioned attack on the law of libel, Hone completely undermined the 1817 campaign against sedition. Only seven of the twenty one sedition cases that year delivered guilty verdicts. One scholar suggests that Hone's advocacy was responsible for more than nine of the fourteen acquittals.[56] But the Hone cases had more than a temporary effect. Hone published his own accounts of the trials, and accounts of Hone's career both as a journalist and crusader for press freedom were popular throughout the nineteenth century. The Hone cases, like the Wilkes cases, became central to the idea of press freedom in England for the next few decades.

5 Two Revolutions

The year 1789 was a watershed moment in the history of freedom of speech. Revolutionary France and revolutionary America both presented free speech and freedom of the press as one of the principal foundations of their new political society. Both explicitly related freedom of speech to freedom of thought. Both conceived free expression as a 'right'. And neither initially lived up to their promise—in both France and the United States there were major restrictions placed on freedom of expression before the eighteenth century closed.

The French National Constituent Assembly adopted the Declaration of the Rights of Man and the Citizen on 26 August 1789. The Declaration has two articles which concern freedom of speech and expression. The first, Article 10, reads 'No one shall be disquieted on account of his opinions, even religious, provided their manifestation does not disturb the public order established by law.' Article 11 reads 'The free communication of ideas and opinions is one of the most precious of the rights of man. Consequently, every citizen may speak, write, and print freely, subject to responsibility for the abuse of such liberty in the cases determined by law.'

Each article has a prominent caveat which not only drains its rhetorical and philosophical power, but seems to open a nearly infinite opportunity to restrain the high-minded principles which preceded it.

The First Amendment of the Bill of Rights packs many more rights into just one sentence: 'Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.'

There are a few things to note when comparing the First Amendment with its French counterpart. The American Bill of Rights is limited to a certain jurisdiction. 'Congress shall make no law' places a limit only on the federal government. Given the importance of the states in the early United States, this offers little guide to the actual liberty of speech in early America; individual states could have a very different attitude to speech than the founders. This held true until the passage of the fourteenth amendment after the Civil War which eventually extended most of the rights held in the federal constitution to the states.

Yet limited as it might be by jurisdiction, the First Amendment is more assertive than the two French articles. It lacks caveats. It is a more insistent right, more dogmatic, uncompromising. Nor does the First Amendment offer any explicit justification for the rights it asserts.

Yet its formula is important. The Declaration clumsily splits its right of freedom of speech and opinion into two articles. Article 10 appears to defend freedom of thought, and Article 11 freedom of expression, although this distinction is fudged by the caveat in Article 10 which concerns the 'manifestation' of those thoughts. The First Amendment eloquently strings together a collection of rights. Its formula implies that the free exercise of religion, freedom of speech, freedom of the press, and freedom of assembly, as well as the non-establishment of an official religion and the petitioning of government, are aspects of the same right,

not distinct and separate ones. They should be considered together. The conflation of freedom of conscience with freedom of speech is vital. The First Amendment seems to recognise that believing and expressing are two sides of the same coin.

The French Revolution

Censorship in France under the ancien régime was, as in most other continental monarchies, heavy. It had prepublication censorship and licensing. Each book had to be approved individually by the state. Attacks on secular and religious authorities were prohibited. The Administration of the Book Trade banned between ten and thirty per cent of all submitted manuscripts during the eighteenth century.[1]

But during the eighteenth century, the nature of that censorship was changing. The advance of absolutism in France had taken censorship out of the hands of ecclesiastical authorities and put it into the hands of a centralised state. There were four censors in France in 1658. This figure grew to 178 by the Revolution.[2]

As a result of its censorship burden, French political culture relied heavily on foreign presses. Authors worried about the censors would send their works abroad to be printed and smuggled back into the country. The *Encyclopédie* was printed cheaply in Switzerland, and managed to sell 25,000 copies between 1776 and 1789.[3]

Book smuggling created a problem for the state in more ways than one. Absolutist France was driven by an ideology of mercantilism—its rulers and bureaucrats wanted to manipulate the market to grow domestic industries. So the idea that its own censorship policies were holding back its printing industry was a big issue. The solution, for the government, was a two-tiered censorship system that tacitly allowed most works, but withheld privileges like copyright protection for those without a licence.[4] One French censor put it this way: 'Provided that discussion is discreetly presented, with neither rant nor personal attack, I believe that it cannot

be given too wide a field.'[5] This system, necessarily arbitrary but at least partially liberal, lasted until the French Revolution.

Among the *philosophes*, support for freedom of speech in the lead up to the revolution was mixed. Voltaire was not alone in his combination of eloquence and vacillation on free speech. Writing in the 1770s, the liberal Marquis de Condorcet defended freedom of the press under the critical proviso that it not upset the general order.[6] Again, this would seem to open an enormous gap by which the state could censor whatever writing it defined as contrary to that order. (Like Voltaire, Condorcet had a typical Enlightenment disdain for the masses, defining public opinion as 'that of the stupidest and most miserable section of the population'.[7])

Political instability during 1788, the year before the revolution, brought forth a flood of printed literature—such a flood that the censors were powerless to hold it back. The announcement that the king would summon the Estates-General for the first time in nearly two hundred years raised the possibility of the expansion of press freedom. So when in the spring of 1789, the regions, cities and hamlets of France drew up their *cahiers de doléances*—letters of grievances—to inform the Estates-General of the liberties which the French people desired, freedom of the press was one of the major topics. The *cahiers* repeatedly affirmed the virtues of a free press.

Yet the *cahiers* were also eager to make exceptions to press freedom. One, from the northern city of Lille, demanded the 'indefinite freedom of the press' but also insisted that works which offended 'religion, the general order of things, public decency, and the honour of citizens' were suppressed. Another was similarly enthusiastic about free speech—unless it concerned religion, public values, or the government. One, by the clergy of Clermont-Ferrand in central France was concerned that liberty had gone far enough: press freedom 'already exists too much and is degenerating into licence.' Nearly ninety per cent of the *cahiers* which

mentioned freedom of the press also called for the regulation or restriction on the press.[8]

The Estates-General convened in May 1789 with the three estates—the clergy, the nobility, and everyone else. The third estate (everyone else) broke away in June, making itself the sovereign French power and assuming the task of writing a new constitution, and preparing a declaration of rights.

The Marquis de Lafayette—veteran of the American revolution—drafted one of the first proposed declarations for consideration. Drawing on bills of rights in the American state constitutions, Lafayette's proposal was unequivocal. Rights were 'inalienable', and freedom of conscience and the press were to be protected absolutely. There were no caveats in Lafayette's proposed declaration.

Yet Lafayette was in a minority. Most proposed declarations between June and August supported free speech, but insisted it must be compromised to maintain public order. One proposal, by the Chartres politician Jérôme Pétion de Villeneuve, said that 'Each individual may write and publicise his own thoughts; one should no more obstruct the development of intellectual faculties than the development of physical faculties', yet he also believed individual freedom should be limited and religious beliefs which disturbed 'public tranquillity' repressed.[9]

So it was no surprise that the resulting Declaration was deeply compromised. There was no significant constituency in the Assembly for an absolute statement on freedom of the press. And there was no consensus that free expression of ideas was a core ideal of the revolution. Even the harshest attacks on censorship under the monarchy were fearful of the consequences of a free press, and recommended it be restricted accordingly.[10]

This may, perhaps, seem incongruous. The French Revolution was presented as a revolution driven and inspired by natural rights. Article 11 speaks of 'free communication' as 'one of the most precious of the rights of man'. Yet as Alexis de Tocqueville argued, political freedom was

a late-comer to the ideals of the revolution. It was the last philosophy to be adopted, and the first to be abandoned. The *philosophes* had first in mind a program of government reform. The ideals of 'freedom', when they were adopted on the eve of the revolution, often clashed with that program, and it was freedom that lost out.[11]

The pre-revolutionary natural rights tradition in France was distinct from the natural rights tradition in England and the United States. Where the English had the liberal John Locke and the Levellers, the French had as their leading philosophical light the proto-totalitarian Jean-Jacques Rousseau.

Rousseau died ten years before the revolution but his ideas were the most admired and most praised by the revolutionaries. Rousseau's take on the theory of natural rights, and the views about censorship which followed from them, offer a link between the rhetorical emphasis on liberty in the National Assembly and the significant restrictions on that liberty which the assembly was eager to implement.

Rousseau's political thought was derived from his basic concept of the 'general will'—the aggregate preferences of the community, as opposed to the disaggregated preferences of individuals. It is up to the sovereign to determine what the general will demands. The sovereign is comprised of the people themselves. At its best, Rousseau's idea of the general will threatens to result in a tyranny of the majority. At its worst, the general will validates totalitarianism—it provides legitimacy for a ruler who claims to speak on behalf of the people and govern in their interests.

In the narrower field of freedom of speech, this manifested itself as a defence of censorship. Rousseau praised a number of historical censors. His first major work, *Discourse on the Arts and Sciences*, approved of the burning of the library of Alexandria by the Caliph Omar in the 640s. In his major work of political philosophy, *The Social Contract*, he wrote admiringly of Roman book burning.

Rousseau's attacks are not targeted at the lower forms of discourse, as Voltaire's are, but at intellectual works. He claims that philosophy undermines civic cohesion by either withdrawing philosophers from the social world or causing them to lose their sympathy with non-philosophers. Furthermore, Rousseau wrote, radical philosophy corrupts the minds of unsophisticated people. Intellectuals are irresponsible—they are not careful with the power they wield over less intellectual men. So when philosophers are not deliberately separating themselves from the community, they are corrupting it. This belief, combined with his belief in the power of the government to enforce what it considers to be the 'general will', opens up nearly unlimited opportunities for government to censor and repress seditious, heretical, or obscene views.

Yet Rousseau knew what censorship was like: he had faced it himself. *The Social Contract* had been suppressed. So too had his treatise on education, *Emile*. Rousseau was proud not to have published his works anonymously—he believed he was 'the only Author of my century and of many others who has written in good faith'. While his political theory allows for unlimited censorship, he argued that some radical works should be allowed as long as they did not challenge any particular government. Abstract theorising about philosophy might be tolerated, Rousseau argued. But political polemic or outright sedition could not be permitted by an enlightened state.[12]

Rousseau had an enormous influence on the revolution and the revolutionaries. Maximilien Robespierre, who led and defended the Reign of Terror between 1793 and 1794, said that Rousseau was 'the one man who, through the loftiness of his soul and the grandeur of his character, showed himself worthy of the role of teacher of mankind.'[13] The National Convention (a successor body to the National Assembly which ruled during the Reign of Terror) proclaimed 'It is to Rousseau that is due the health-giving improvement that has transformed our morals, customs, laws, feelings and habits'.[14] On another side of politics,

French liberals too recognised the danger of Rousseau's beliefs. Referring to Rousseau's debt to Plato, Germaine de Staël wrote that 'Rousseau said nothing new, but set everything on fire.'[15]

It did not take long for the revolution to come good on the implied threat in Articles 10 and 11 of the Declaration. Ancien régime censorship had collapsed with the political upheaval, but within a few years the revolutionaries adapted and extended the royal institutions for their purposes.

Abbé Sieyès, a Catholic clergyman who did more than anyone else to radicalise the third estate and break away from the Estates-General, proposed a general law on sedition and criminal libel to the National Committee in January 1790—just a few months after the Declaration had been adopted. By 1793, even calling for the dissolution of the revolutionary government was punishable by death.[16] The Terror demanded the elimination of seditious speech.

There had never been a consensus on freedom of speech, as a close reading of the clumsily worded Declaration reveals. But whatever promise the revolution did offer to liberals like Lafayette, it had well and truly disappeared by the Terror.

Benjamin Constant

Benjamin Constant was twenty-two when the revolution came in 1789. Born to a Huguenot family that left France for Switzerland in the seventeenth century, Constant became a politician in France in the waning years of the Revolution. But his political career took a setback when he was ejected from the Tribunate (another in the series of parliamentary bodies since the Estates-General) for his opposition to Napoleon Bonaparte in 1802.

Constant was for a long time known primarily for his *Adolphe*, a novel about a young man with who falls in love with an older woman. This was an only slightly veiled account of his own complicated love

life. The other major novel for which he is most famous, *Cécile*, was also about one of his love affairs.

But in recent decades, Constant's political writings have earned the prominence they deserve. Constant was above all a liberal. After he lost his seat in the Tribunate, he joined social and political circles around Germaine de Staël, with whom he would have a long relationship. (De Staël's 1818 book, *Considerations on the Principal Events of the French Revolution*, is one of the great liberal works on the revolution.)

Constant was a nuanced and principled thinker on liberalism, democracy and individual liberty. He was as concerned about the oppressive prospects of nominally democratic orders as he was monarchical ones. He had observed the promise of the early revolution, the brutality of the Terror, and the final rise of the dictator Napoleon. Near the end of his life, Constant wrote that

> For forty years I have defended the same principle: freedom in all things, in religion, philosophy, literature, industry and politics. And by freedom I mean the triumph of the individual both over an authority that would wish to govern by despotic means and over the masses who claim the right to make a minority subservient to a majority.[17]

The French Revolution had taught him that unlimited authority, whether it is democratic or totalitarian, was always liable for abuse. Liberals could not put their faith in any ruler, no matter how benevolent they seemed. 'It is not against the arm that one must rail, but against the weapon. Some weights are too heavy for the human hand.' Isaiah Berlin wrote that nobody understood the distinction between positive liberty and negative liberty better than Constant.[18]

Constant's 1814 work *The Spirit of Conquest and Usurpation and Their Relation to European Civilization* is an attack on Bonapartism. His *Principles of Politics*, published in its final form a year later, is a discussion of a free constitutional order. In this latter book, Constant draws on

Adam Smith and Jean-Baptiste Say to defend private property, the rule of law, and individual rights. He critiques excessive taxation and government debt, advocates for the privatisation of government monopolies, and condemns the tyrannical doctrines of Rousseau: 'When no limit to political authority is acknowledged, the people's leaders, in a popular government, are not defenders of freedom, but aspiring tyrants.'[19]

But central to the *Principles of Politics* is a defence of freedom of conscience and of speech. Constant's arguments for freedom of speech are firmly grounded in the nature of private belief. 'Nature has given man's thought an impregnable shelter. She has created for it a sanctuary no power can penetrate.' Yet governments have tried to penetrate and manipulate the thoughts of man. For hundreds of years, governments have tried to 'scrutinize consciences', 'mute public opinion', and 'persecute proud and honest men'. The 'absurdity' of this is obvious, argues Constant. Governments that try to enforce uniform belief only encourage hypocrisy and resistance. 'To prop up an opinion with threats invites the courageous to contest it.'

The *Principles of Politics* is a mature and eloquent rendition of the argument that freedom of speech is necessary because freedom of thought is inviolate. 'Men have two ways of showing what their thinking is: speech and writing,' he argues. But can speech harm? Constant draws the same distinction as Spinoza between thought and action. Writing or speech can only be criminal if it constitutes part of a criminal action. If not, it must 'enjoy complete freedom'.

The thread that ties Constant's liberalism together is the importance of the rule of law: a neutral, consistently applied framework within which individuals can pursue diverse ends. Suppression of speech, he suggests, will always inevitably breach these principles. If a law against certain opinions is drawn carefully and specifically, 'precisely defined' in a way that free individuals understand which views are permitted and which are not, then that law will be trivially easy to get around. 'Nothing

is easier than presenting an opinion in such variegated guises that a precisely defined law cannot touch it.' A government will then have to take the power to suppress written and spoken opinions out of the hands of the law, and make those judgments itself. But, writes Constant,

> by authorizing the government to deal ruthlessly with whatever opinions there may be, you are giving it the right to interpret thought, to make inductions, in a nutshell to reason and to put its reasoning in the place of the facts which ought to be the sole basis for government counteraction. This is to establish despotism with a free hand … The men to whom you entrust the right to judge opinions are quite as susceptible as others to being misled or corrupted, and the arbitrary power which you will have invested in them can be used against the most necessary truths as well as the most fatal errors.

Repression of certain views makes martyrs of those who hold them. Repression alienates the literary classes, almost certainly causing more hostile views to be published. And furthermore, to repress something makes it more interesting. The public love what is forbidden. Repression feeds 'the public greed for anecdotes, personal remarks, and seditious principles.' It unintentionally makes seditious writing more important than it would be if people were free to publish what they liked.

Constant argues that a society in which individuals can share their opinions freely is a stable one. 'Freedom spreads calm in the souls and reason in the minds of the men who enjoy this inestimable good, free from anxiety.' Allowing the publication of even the harshest sedition helps a government maintain its legitimacy:

> Governments do not know the harm they do themselves in reserving to themselves the exclusive privilege of speaking and writing on their own acts. People believe nothing affirmed by a government which does not permit one to reply to it and everything said against a government which does not tolerate scrutiny.

Constant argues that none of his liberal constitutional principles—due process, the rule of law, the defence of private property, and protection against persecution—would be possible without freedom of the press. After all, how would we know if those principles had been violated if exposure of their violation was not permitted? Freedom of speech helps keep a government honest, and by doing so, helps the stability of that government.

But, Constant is quick to point out, freedom of speech and of the press is not merely a mechanism for encouraging good government and defending other liberties. It is a vital liberty in its own right.

> [T]o restrain the freedom of the press is to restrain the human race's intellectual freedom. The press is an instrument such freedom can no longer do without. Printing has been made the sole means of publicizing things, the only mode of communication between nations as much as between individuals, by the nature and extent of our modern societies and by the abolition of all the popular and disorderly ways of doing this. The question of press freedom is therefore the general one about the development of the human mind. It is from this point of view that it must be envisaged.

Constant does not dismiss the possibility of 'bad' speech. 'I admit for an instant that certain books may corrupt manners or shake the principles of morality,' he writes. But moral beliefs cannot be learned by uncritical memorisation or the threat of coercion. They need to be understood and defended against immoral beliefs. A cocooned morality is a weak morality.

> Men should be taught to preserve themselves from these dangers by their own efforts and reason and through defending themselves. If all you do is force to one side corrupting ideas and dangerous sophisms, men will find themselves unprepared when they meet them and will let themselves be disarmed or perverted much more quickly. Children,

> whose head we have always wrapped for fear they might fall over and hurt it, fall one day when their head is not wrapped, and they crack it. If it is in the interests of one individual to spread bad maxims, it will be in the interests of a thousand others to refute them.

Like Benedict Spinoza's *Theologico-Political Treatise*, Constant's arguments for freedom of speech and the press were grounded in individual liberties and rights. Both claimed that thought was ungovernable, and that free expression was a necessary consequence of freedom of conscience. Both argued that it is only action which threatened the civil order. Spinoza and Constant lay a firm foundation for freedom of speech in the modern era.

The American Revolution

Where the Declaration of the Rights of Man and the Citizen is equivocal, the First Amendment of the Constitution of the United States is uncompromising. Yet it too was soon followed by a significant repression of speech. The Sedition Act of 1798 criminalised 'false, scandalous, and malicious writing … against the government … or either house of the Congress or the President' with the intent to bring them into 'contempt or disrepute'. And the same generation which wrote the radically libertarian First Amendment also wrote the Sedition Act. This creates a puzzle that has dominated debate over freedom of speech in the United States for nearly one hundred years. What did the First Amendment mean to the founders?

In 1960 the historian Leonard W. Levy published *Legacy of Suppression*, in which he claimed that the concept of freedom of speech held by the founders was more limited than historians and hagiographers have credited. Levy argues that, following Milton and Blackstone, the founders' concept of a free press only extended so far as eliminating prior restraint on publication. The First Amendment 'did not intend to give free rein to criticism of the government that might be deemed sedi-

tious libel.'[20] Saying that 'Congress shall make no law' did not suggest that there should be no law at all. Instead, it meant that the common law restrictions on press freedom should be maintained—at least by the federal Congress. State legislatures could do what they liked, and the federal judiciary could continue to evolve the laws governing the press as circumstances demanded. Only Congress was bound by the First Amendment.

So for Levy the Sedition Act offered no mystery; it was consistent with the beliefs of the founders and of the understanding of freedom of speech at the time. It is only our anachronistic understanding of speech and press liberties which create the confusion.

Yet this interpretation does not accurately reflect the philosophical debate over freedom of speech in the pre-revolutionary United States—a debate which the founders were deeply familiar. It had taken only a few years since the end of prepublication censorship in England for the rhetoric of freedom of speech to shift. The arguments no longer focused simply on licensing but took in critiques of the very idea of seditious libel.

After all, it was seditious libel that was the focus of the great battles over speech freedoms in eighteenth century England. The colonialists followed closely the trials of John Wilkes ('Who was born for our good. Suffered under arbitrary power') and they republished English arguments for freedom of speech in American papers. English and American radicals formed a single intellectual community, and like in the home country, colonial thought on free speech had progressed a long way since Milton. Blackstone's view was not the only view on freedom of expression.

After the publication of *Legacy of Suppression*, Levy's critics have dug up a substantial body of evidence showing that he had 'ignored the nearly epidemic degree of seditious libel that infected American newspapers after Independence'.[21] By the revolution, the law of seditious libel

in the United States was virtually a dead-letter law. The colonists were freely saying things about their governments that they might have been severely punished for back in England.

A more convincing explanation for the apparent clash between the absolute principles of the First Amendment and the apparent ease with which those principles could be abandoned is offered by the legal historian Philip I. Blumberg. In Blumberg's view, 'the jurisprudence of the Early American Republic was fundamentally incompatible with the political ideals of the Revolution incorporated into the new Constitution.'[22] The revolutionaries rejected English rule but they did not abandon English law. They inherited a heavy body of precedent and legal doctrine which was designed to protect the established institutions of England. When the colonies had been originally formed, they inherited the law of the home country. After the revolution, almost all converted their colonial law to state law, bringing the English legal legacy with it. The now independent colonies still followed English legal precedents.

For Blumberg, the Sedition Act was consistent with pre-revolutionary law. But it was not consistent with pre-revolutionary ideology—the values which eventually drove the split with England in the first place. In the colonies, political beliefs and the law sharply diverged. This divergence meant that what was a law on the books was not necessarily a law that was enforced.

There were sixteen attempted prosecutions for criminal libel in the American colonies during the eighteenth century. But only one of them came to a conviction. Colonial juries simply refused to convict. Blumberg argues that juries appeared to have gone beyond their instruction and acquitted according to their view of the justness of the law, rather than simply the facts of each case.

Indeed, the single recorded conviction was a case where the jury allowed the judge to determine whether a criminal libel had occurred. And that case was in 1724.[23] A case in 1735 was so demoralising for Crown

prosecutors that there were no more attempts at prosecuting criminal libel right up to the revolution. The story of libel in the colonies was a story of failure.

Prepublication licensing only seriously ended in the United States in the 1730s—the Crown ended its support for licensing when licensing lapsed at the end of the seventeenth century at home but colonial authorities were not as bound by the decisions of British parliament. There was a prosecution for blasphemous libel in New York as late as 1752, but on the whole the theocratic fervour that characterised the early colonies—the fervour that Roger Williams had resisted—died down in the fifty years before the Revolution.

One of the most influential political tracts in the colonies was *Cato's Letters*, a series of articles on government and political philosophy published in England between 1720 and 1723. Written by two Whig journalists, John Trenchard and Thomas Gordon, the articles adapted the ideas of John Locke and the radical Whigs to early eighteenth century political concerns. The articles popularised, in polemical and engaging language, the more technical writing of Locke and Locke's contemporary Algernon Sidney.

The appeal of *Cato's Letters* in the American colonies was unsurprising: they were uncompromisingly radical. Trenchard and Gordon emphasised the most radical elements of Lockean thought—including the right of resistance to a tyrannical government—in a way that may have seemed anachronistic to their eighteenth century peers in England, who did not wish to revisit the political upheaval of the past century. But the radicalism was eagerly consumed by the Americans. *Cato's Letters* was more widely read in America than England.

Central to *Cato's Letters* was a defence of freedom of speech and the press. In one letter, Gordon argues stirringly that

> Without freedom of thought, there can be no such thing as wisdom; and no such thing as publick liberty, without freedom of speech: Which

> is the right of every man, as far as by it he does not hurt and control the right of another; and this is the only check which it ought to suffer, the only bounds which it ought to know.
>
> This sacred privilege is so essential to free government, that the security of property; and the freedom of speech, always go together; and in those wretched countries where a man cannot call his tongue his own, he can scarce call any thing else his own. Whoever would overthrow the liberty of the nation, must begin by subduing the freedom of speech; a thing terrible to publick traitors.[24]

For Gordon freedom of speech and a free government are indistinguishable. 'Every one who loves Liberty ought to encourage Freedom of Speech.' Gordon cites the history of free speech in the Roman Republic and its decline under the Empire, and makes explicit the relationship between that ancient struggle and England's seventeenth century struggles. The 'wicked ministr[ies]' of Charles I, James, and Charles II were like the tyrants who silenced the Roman authors and punished Cremutius Cordus. In Rome, 'Tyranny … usurped the place of equality, which is the soul of liberty, and destroyed publick courage.' Gordon concludes, 'God be thanked, we Englishmen have neither lost our liberties, nor are in danger of losing them'.

It is important to observe what this argument about freedom of speech was, and what it was not; for the style and content of *Cato's Letters* were replicated in polemical tracts throughout the colonies in the lead up to the revolution. Theirs was not a legal or philosophical argument for free expression. They did not reason their way to freedom of speech in the manner that Constant or Spinoza or even Milton had. They did not make any claims about theological doctrine or natural rights.

Instead, Gordon simply asserts the centrality of freedom of speech. In *Cato's Letters* we see freedom of speech become an ideology. The free society and free speech are indistinguishable. A society without freedom of speech is by definition a tyranny. Gordon implicitly draws on a long line

of philosophical thought, but the message he imparted to the colonials was that freedom of speech was the essential attribute of individual liberty.

In their assertive, ideological claims for freedom of speech, Trenchard and Gordon were recalling an ancient tradition. Roman *libertas* and Athenian *parrhêsia* were constituent elements of free citizenship—they were the defining characteristic of the political order. Arguments for freedom of speech in the millennia after the fall of Rome had assumed that either theology or pragmatism were needed to justify that freedom. In eighteenth century America however, liberty was its own justification, and free expression an indivisible element of that.

The scholarly response to Leonard W. Levy's thesis has demonstrated the growth in this period of a deep ideology in support of press and speech freedoms.

'The press has always been an Enemy to Tyrants,' confidently claimed the first edition of the *Connecticut Gazette* in 1755, 'and just so far as Tyranny prevails in any Part of the World, so far the Liberty of the Press is suppressed.' Freedom of the press, wrote the editorialist, is the 'inviolate' right of the American colonialists 'who bravely fought the howling Wilderness with all its savage Terrors, rather than become the servile Slaves of bigoted Tyrants.'

The *Herald of Freedom*, a Boston newspaper, wrote that 'to think what they please, and to speak, write and publish their sentiments with decency and independency on every subject, constitutes the dignified character of Americans.'[25] Benjamin Franklin's 1757 poem 'On Freedom of the Press' gave free speech mythological power:

> The Press from her fecundous Womb
> Brought forth the Arts of Greece and Rome;
> Her offspring, skill'd in Logic War,
> Truth's Banner wav'd in open Air;
> The Monster Superstition fled,
> And hid in Shades in Gorgon Head;

> And awless Pow'r, the long kept Field,
> By Reason quell'd, was forc'd to yield.[26]

In his 'Apology for Printers' twenty years earlier, Franklin had been forced to defend the publication of controversial works against public opprobrium. 'The Business of Printing has chiefly to do with Mens' Opinions' and 'it is unreasonable to imagine Printers approve of every thing they print, and to censure them on any particular thing accordingly'.[27] It is notable that in this work the threat Franklin felt was not legal censure, but public condemnation.

The general statements of principle made by Gordon in *Cato's Letters* were qualified in an important way. In follow-up essays on that focused specifically on libel, the two journalists went into greater detail. Certainly, libels attacking the government 'undoubtedly keep great men in awe, and are some check upon their behaviour, by shewing them the deformity of their actions, as well as warning other people to be upon their guard against oppression'.[28] Trenchard suggests that policing bad speech would cause more harm than it prevented.

> If men be suffered to preach or reason publickly and freely upon certain subjects, as for instance, upon philosophy, religion, or government, they may reason wrongly, irreligiously, or seditiously, and sometimes will do so; and by such means may possibly now and then pervert and mislead an ignorant and unwary person; and if they be suffered to write their thoughts, the mischief may be still more diffusive; but if they be not permitted, by any or all these ways, to communicate their opinions or improvements to one another, the world must soon be over-run with barbarism, superstition, injustice, tyranny, and the most stupid ignorance.[29]

In another further essay, Gordon makes a distinction between public libel and private libel. 'Every crime against the publick is a great crime.'[30] And, like Trenchard, he argues the benefits of allowing public libels out-

weigh the costs: 'Slander is certainly a very base and mean thing: But surely it cannot be more pernicious to calumniate even good men, than not to be able to accuse ill ones … As long as there are such things as printing and writing, there will be libels: It is an evil arising out of a much greater good.' Private libels—verbally attacking men 'not for what they do, but for what they are'—are justly actionable: 'reputation should be defended by law', argues Gordon.

This position is complicated by the fact that according to longstanding English jurisprudence, truth was not defence against a libel. As Gordon puts it, 'A libel is not the less a libel for being true.' Originally the law of libel was only intended to prevent a breach of the peace caused by the publication of certain words; whether those words were, in fact, true, had no effect on whether the peace would be breached. *Cato's Letters* does not challenge this principle, but restricts it to private, rather than public libels.

When the First Amendment was proposed and ratified there appears to have been no elaboration of what the free press clause actually meant. From a legal perspective, we have every reason to believe it was simply intended to confirm the status quo.

But from a philosophical perspective, it was nonetheless groundbreaking. The founders may not have recognised the radical consequences of the First Amendment, but when they placed freedom of speech and the press so central to the understanding of individual rights and the role of government, they drafted a formula which was to have enormous consequences for free expression in the United States and around the world.

Perhaps surprisingly the Alien and Sedition Acts confirm the radicalism of that new doctrine. In 1797 and 1798 the Federalists and their president, John Adams, were convinced the country was on the verge of war with France. The XYZ affair (where French diplomats had insisted on bribes to continue diplomatic relations), the refusal of the French to

receive an American diplomatic mission, and the seizure of more than 300 American ships by France fed a general panic in America. Sceptics of the French Revolution anyway, the Federalists imagined war was imminent. Jeffersonians, more sympathetic to the French and their revolution, believed this fear was fanciful.

The Alien and Sedition Acts were part of a large Federalist program to put America on a war footing: the former president and revolutionary hero George Washington was once again given the leadership of an Army, commerce with France was banned, and assorted treaties with France were terminated. The Alien Act authorised the deportation of any individuals found to be a danger to the state.

The Sedition Act was enacted in July 1798. Yet the Sedition Act as drafted was, in many ways, more liberal than the state common law. Contrary to its modern reputation, the act was an advance for freedom of speech rather than a retreat. It made truth of a libel admissible as evidence, which state common law did not. It expanded dramatically the role of the jury. Where in common law the jury was restricted to deciding whether the allegation charged was accurate—that is, whether or not the defendant actually made the alleged statement—the jury was now allowed to decide on both the facts of the case and the applicability of the law. The requirement that the jury only give a 'guilty' or 'not guilty' verdict allowed the jury to acquit based on nothing other than their personal preferences, regardless of the strength of the prosecutor's case. And the Sedition Act required the prosecution demonstrate the accused had 'intent' to libel—another important progression from the common law.

The historical infamy of the Sedition Act comes not from its provisions but from its purpose and practice. The act was from the first, explicitly partisan. A private letter between Abigail Adams and her sister makes this plain, condemning the 'vile incendiaries … most wicked and base, voilent [sic] & calumniating abuse' in opposition newspapers

and concluding that 'nothing will have an Effect until Congress pass a Sedition Bill'. Thomas Jefferson wrote to James Madison pointing out the object of an inevitable sedition bill would be 'the suppression of the Whig presses.'

And the Federalists stacked the judiciary to use the Sedition Act against their political rivals. The judges were Federalists. The prosecutors were Federalists. The court clerks and marshals were Federalists, and there was a widespread belief that the jury had been handpicked by the court clerks—so the jurors were Federalists too. There were nearly two dozen prosecutions under the Federalists for seditious libel: more than had been in the half-century before the revolution. Only one ended in acquittal.[31]

As a result of the Sedition Act, papers were shut down. Politicians were indicted for urging the repeal of the Sedition Act. Even ridicule directed at the president was punishable—one widely cited incident involved three drunks who joked that a welcoming cannonade in honour of John Adams should have gone up his rear. The men were among the first convicted under the law.[32]

The Sedition Act was repudiated after the 1800 election. But its draconian extremes clarified libertarian thinking on freedom of the press.

One notable response was a tract published in 1800 by the New York lawyer Tunis Wortman, *A Treatise Concerning Political Enquiry and the Liberty of the Press*. In this radical work, Wortman writes that 'freedom of speech and opinion, is not only necessary to the happiness of Man, considered as a Moral and Intellectual Being, but indispensably requisite to the perpetuation of Civil Liberty'.[33]

For Wortman, society has a 'perfect right' to investigate political subjects, as government is subordinate to society: 'Governments are entrusted with the exercise of the original powers of sovereignty, but Society is, nevertheless, the real and substantial sovereign'. Even though some individuals are more informed than others—some are philosophers and others are

peasants—all people in a free commonwealth have a moral sense by which they will be able to make judgments on political issues. After all, governments are not instituted to 'monopolize the wisdom of society'. They draw their legitimacy from both philosopher and peasant alike. Governments lack the authority to restrain the opinions of citizens.

Wortman then makes a moral argument. Freedom of expression is a necessary element of natural liberty: 'When we cease to reflect and speak, it may emphatically be affirmed that we cease to live'. Wortman is happy to make an exception for defamation of private character as a 'separate and distinct' problem. The response of the law must be to allow civil cases to determine 'Reparation rather than punishment'. But no such remedy should be granted to government.

> How, then, shall erroneous opinions or wilful misrepresentations be combated by the wise and provident legislator? The proper answer to this enquiry is, That Government should by no means interfere, unless by affording such information to the public as may enable them to form a correct estimate of things.

If a government feels wronged by its critics, that government has more than enough resources to respond in kind.

Levy argues that Wortman's *Treatise* deserves the same iconic status as Milton's *Areopagitica* and John Stuart Mill's *On Liberty*—one of the founding radical texts of the free speech tradition. The comparison is not necessarily flattering. Wortman, like Milton, romanticises the capacity for free debate to come to the truth of any given proposition. 'The triumph of Falsehood can never be of permanent duration,' he asserts. 'There is no character which excites general obloquy and detestation more readily than that of the malignant Slanderer.'

These observations are more true than twenty-first century critics of free speech allow but far less true than Wortman believes.

6 The Utilitarian Turn

Tunis Wortman's 1800 *Treatise* demonstrates that, at the turn of the nineteenth century, there were two distinct arguments for freedom of speech. Both arguments shape our understanding of the relationship between expression and law today, but they have different implications.

The first conceives of free speech as a right. The second understands free speech as a mechanism to achieve a goal. Advocates of freedom of speech and expression have typically deployed a mixture of these arguments, but the emphasis they place on each is important; in many cases the weaknesses of their claims or the exceptions they carve out to speech liberty are drawn from the philosophical approach they take.

The distinction between a rights approach to speech and a utilitarian approach to speech characterises our contemporary debate—and it is a distinction that was clarified more than two hundred years ago.

One way of describing the difference is in their approach to truth. The sceptical advocates of religious toleration like Sebastian Castellio or Themistius claimed that the ways of God were essentially unknowable. Individuals should be free to hold whatever opinions they liked because there is no way for secular authorities to ascertain who is correct. Only God can do that. Man has 'an inalienable right over his own thoughts', wrote Benedict Spinoza. Freedom of conscience—and then

freedom of speech—was a right because of human fallibility. The truth can never be known. Those who conceived of speech as an inviolable right tended to reason their way from the belief that governments could not reasonably police thought, and—as Benjamin Constant so definitively proclaimed—there is no conscience where there is not expression of that conscience.

The utilitarian case was slightly different. Truth can be known. Freedom of speech is the only mechanism by which truth can be obtained. Falsehood would be eliminated by open discussion. Milton put it this way: 'who ever know Truth put to the worse, in a free and open encounter?' Wortman claimed 'The triumph of Falsehood can never be of permanent duration'. It is from these claims that we get one of the most influential ideas about freedom of speech: that free expression creates a 'marketplace of ideas'. And the weakness of these claims suggests how frail this widespread metaphor actually is.

John Stuart Mill

Few writers dominate the understanding of freedom of speech as John Stuart Mill, whose 1859 book *On Liberty* offers, in many ways, the definitive statement of the utilitarian tradition. Mill looms large in debates over freedom of speech. He shaped liberal thinking well into the twentieth century. One scholar describes Mill as having made the liberalism of Adam Smith and the founding fathers into a 'philosophically respectable' and 'systematic' doctrine.[1]

Mill's enormous reputation ballooned immediately after the publication of *On Liberty*: the philosopher Henry Sidgwick claimed that 'from about 1860-65 or thereabouts [Mill] ruled England in the region of thought as very few men ever did'.[2] And on freedom of speech, Mill was the new Milton. As *Areopagitica* made it impossible for the English government to reinstate prepublication censorship in the eighteenth century, *On Liberty's* dominance of the intellectual sphere shaped the next

century of free speech debate. That continues today. Mill is still regularly cited as the philosophical authority on questions of censorship.

There were few more pressing political issues than freedom of the press in the early nineteenth century. Whatever William Hone had done for press freedom had been temporary. The Peterloo Massacre in August 1819, where eleven people were killed and four hundred peaceful demonstrators injured in a cavalry charge, sparked crisis in a government already spooked by domestic radicalism. The repressive 'Six Acts' introduced shortly after included a number of significant restraints on the press. They allowed for the confiscation of all copies of any work determined to be libellous, and a repeated offender could be banished. The laws, which the young Earl of Ellenborough had spoken for in the House of Lords, also tried to strictly regulate publication frequency, subject matter, and impose a minimum price.[3] As we have seen, these laws were explicitly targeted at radical printers and journalists: what Ellenborough described as the 'pauper press'.[4]

Mill was born in London in 1806. His father was the historian and economist James Mill, himself a utilitarian and a liberal. James introduced his son to the philosophy of Jeremy Bentham, whose principle that policy should maximise 'happiness' dominated early nineteenth century utilitarian thought. Bentham completely rejected concepts like natural rights ('nonsense on stilts') in favour of rational accounting of the costs and consequences of policy. The Bentham and Mill families were close and John was subjected to a rigorous schooling in the classics and, of course, Benthamite philosophy.

Both Bentham and James Mill had been interested in questions of freedom of expression. When John was only one year old, James had already published on freedom of the press, describing it as 'the most inestimable security of that of a people, because it gives tone to the public feelings, on which all liberty must ultimately rest'.[5] Bentham wrote that 'whatsoever evil can result from this liberty, is everywhere, and at all times, greatly outweighed by the good'. The free press was necessary to

keep a check on government, to expose corruption and criticise public institutions. James Mill wrote the entry on freedom of the press in the fifth edition of the *Encyclopaedia Britannica*. That edition was published in 1817, and James' strong defence of this liberty could not have been more contrary to the legislative environment of the time.

John broke with Bentham's narrow calculus of pleasures and pains in the second half of the 1820s. For Mill, happiness had to take into account questions of individual liberty—which Bentham's philosophy steadfastly refused to do.

'I regard utility as the ultimate appeal on all ethical questions', wrote the younger man in *On Liberty*, 'but it must be utility in the largest sense, grounded on the permanent interests of a man as a progressive being.'[6] For Bentham, one could be deprived of all liberty but still be happy. Mill disagreed. In his view, happiness and the freedom to live an independent life were inseparable. But like Bentham, Mill rejected natural rights. Mill's project was to build a politics of liberty on utilitarian foundations.

And as the younger Mill moved away from Bentham, he developed a richer argument for freedom of the press than that presented by the two older men. By the time *On Liberty* was published, he had already written two works received with great acclaim, *A System of Logic*, and *Principles of Political Economy*. The latter work made highly influential arguments for free trade, yet granted (similarly influential) exceptions when protectionism might be justified. (The influence of *Principles of Political Economy* was particularly felt in the Australian colonies.)

Mill writes that *On Liberty* is based on one 'very simple principle': that 'the only purpose for which power can be rightfully exercised over any member of a civilised community, against his will, is to prevent harm to others.' This has been since described as the harm principle. Individuals are only responsible to society insofar as their conduct affects others. 'In the part which merely concerns himself, his independence

is, of right, absolute. Over himself, over his own body and mind, the individual is sovereign.'[7]

Central to Mill's understanding of liberty is not merely the absence of coercion but the way liberty helps individuals develop personally and socially—the 'man as a progressive being' which frames his belief in enlightened utilitarianism. 'Genius can only breathe freely in an atmosphere of Freedom,' he writes. 'The free development of individuality is one of the leading essentials of well-being'.

This shapes his argument for free speech which forms the centrepiece of *On Liberty.* It is not by accident that the chapter which explores this issue is titled 'On Liberty of Thought and Discussion'. Like Benjamin Constant, Mill is concerned as much with the threats to liberty that democracy can impose, as tyrannical governments. According to Mill, government is not the only threat to free expression: oppressive public opinion can be threatening too—the flourishing, progressive intellect needs to be freed from both state and social pressure. While the majority of his chapter focuses on state restrictions on censorship, the reasoning he applies to defend free speech is carefully written to apply to non-state 'censorship' as well.

Mill brought a systematic approach to the utilitarian argument for speech freedom. Censoring someone's opinion is an assertion, by the censor, of perfect knowledge. 'Those who desire to suppress [an opinion] of course deny its truth; but they are not infallible.' Mill admits this is not a particularly original idea. Nevertheless the argument against censorship, Mill writes, 'may be allowed to rest on this common argument, not the worse for being common.'[8] That censors can never be certain of their correctness should be a knockout blow against censorship, but Mill laments that it is not, for people recognise fallibility in others, but rarely in themselves.

Mill argues that freedom of speech is, in fact, freedom of discussion. From that, he makes familiar arguments. It follows that even false—

knowingly false—views should be allowed to be discussed. Some false views contain elements of truth in them that discussion will be able to incorporate into the truth. But even those views that are entirely false, that contain no elements of truth, should be allowed. For individuals who are not exposed to contrary views are no longer rational and autonomous intellects—truth becomes simple, unthinking dogma.

Certainly, the claim that free expression is a mechanism to determine truths against falsehoods was given full flowering in Milton's *Areopagitica*, and many of Mill's associated claims can be dated much earlier again. Themistius wrote that faith which was protected against challenge was a weak faith. Socrates was proud to be a 'gadfly' on the Athenian state, testing the citizens' pieties.

Yet Mill is more subtle and systematic than many of his predecessors. His study of free speech in *On Liberty* is intended to demonstrate the broader applicability of his philosophy. So, for Mill, the case for freedom of expression is part of a broader case against paternalism. As he writes:

> He who lets the world, or his own portion of it, choose his plan of life for him has no need of any other faculty than the ape-like one of imitation. He who chooses his plan for himself employs all his faculties. He must use observation to see, reasoning and judgment to foresee, activity to gather materials for decision, discrimination to decide, and when he has decided, firmness and self-control to hold his deliberate decision. And these qualities he requires and exercises exactly in proportion as the part of his conduct which he determines according to his own judgment and feelings is a large one. It is possible that he might be guided in some good path, and kept out of harm's way, without any of these things. But what will be his comparative worth as a human being?[9]

Censorship offends liberty because it suppresses intellectual growth and development. Mill's is a philosophy of progress. Hence the emphasis on

discussion—a mechanism which, if left unmolested by state or social pressure, helps the individual intellect refine an understanding of the world. Discussion is 'The steady habit of correcting and completing his own opinion by collating it with those of others'.

This focus on free discussion allows Mill to shift the debate in an important way. Censorship is not bad because of what it does to restrain the speaker, but because of what it does to the listener. Censors 'exclude every other person from the means of judging' matters of opinion.

> Were an opinion a personal possession of no value except to the owner; if to be obstructed in the enjoyment of it were simply a private injury, it would make some difference whether the injury was inflicted only on a few persons or on many. But the peculiar evil of silencing the expression of an opinion is, that it is robbing the human race; posterity as well as the existing generation; those who dissent from the opinion, still more than those who hold it.[10]

Certainly, many may be personally sure of their own opinions, but,

> it is not the feeling sure of a doctrine (be it what it may) which I call an assumption of infallibility. It is the undertaking to decide that question for others, without allowing them to hear what can be said on the contrary side.[11]

This discursive ideal of free expression was grounded in history. Mill was taught Greek from an extremely early age. When he was three years old, we are informed by his autobiography, he was already reading the classics: Homer, Xenophon, Herodotus, and, of course, Plato. The influence of Greek history and philosophy on Mill's image of the ideal society was substantial. His ideas of happiness were drawn from ancient writings; it is happiness as a moral virtue, rather than simple hedonism, which was the foundation of his differences with Bentham.

Socrates looms large in Mill's thought. The Greek philosopher appears as an intellectual ideal, in Mill's famous line from *Utilitarianism*:

'It is better to be a human being dissatisfied than a pig satisfied; better to be Socrates dissatisfied than a fool satisfied'.[12] The place of impiety in the social order was something which resonated with Mill. Socrates is no plain illustration of the elimination of censorship. He appears in Mill, as he would for I.F. Stone, as a virtuous exemplar of the fallen dissident; in Stone's case, Socrates was a political dissident, in Mill's case, he was a moral dissident. Socrates was 'probably of all then born had deserved best of mankind', yet he was put to death for impiety by the Athenians.

Mill admired the individuality and democracy of Athens. In his a review of the enormous history of Greece by his friend George Grote, he writes that

> The Athenian Constitution was so far a democracy, that it was government by a multitude, composed in majority of poor persons—small landed proprietors and artisans. It had the additional democratic characteristic, far more practically important than even the political franchise; it was a government of boundless publicity and freedom of speech. It had the liberty of the bema, of the dicastery, the portico, the palæstra, and the stage; altogether a full equivalent for the liberty of the press.[13]

To Mill, Athenian democracy was founded on open discussion—*parrhêsia* was the practice of a deliberative democratic community. Athenians were

> accustomed to hear every sort of question, public and private, discussed by the ablest men of the time, with the earnestness of purpose and fullness of preparation belonging to actual business, deliberative or judicial) formed a course of political education, the equivalent of which modern nations have not known how to give even to those whom they educate for statesmen.[14]

The reference to 'the ablest men of the time' is important. Mill was a supporter of freedom of expression but he was not an admirer of the press

of his contemporaries. He described the London newspaper industry as 'the vilest and most degrading of all trades, because more affectation and hypocrisy, and more subservience to the baser feelings of others, are necessary for carrying it on, than that for any other trade, from that of brothelkeeper upwards'.[15] He was an elitist. In *On Liberty* he denigrates public opinion as 'collective mediocrity' and decries the 'downright persecution' of Mormonism by the media. This distaste for the newspaper press and its readership does not, to his credit, alter his support for freedom of speech. Mill understood that one can have disdain for journalism without looking for ways to suppress it.

Mill's argument for freedom of expression is more robust than the simple truth-seeking mechanism relied on by Milton. It allows for false views—even mendaciously false views—to continue promulgation, because it is not the mendacious speaker whose rights will be abridged by censorship, but interested listeners, who would be deprived of the opportunity to test their own opinions against false ones. Mill does not rest his argument on falsehoods being inevitably exposed and destroyed, as Tunis Wortman so optimistically hoped. He explicitly rejects it. 'The dictum that truth always triumphs over persecution is one of those pleasant falsehoods which men repeat after one another till they pass into commonplaces, but which all experience refutes'.

Indeed, Mill goes even further. His concern that democracy would result in a tyranny of a majority informed his views about free speech as well. For Mill, the fact that an opinion was held only by a minority was, itself, a justification for allowing that opinion to be expressed. Minority views should not merely be 'tolerated', writes Mill in a rarely cited passage, but 'encouraged and countenanced'.

For those views represent 'the neglected interests, the side of human well-being which is in danger of obtaining less than its share.' Mill's utilitarian foundation for free speech, by prioritising the role of discussion in individual development, appears here to hint at a positive role

for government to actually encourage minority opinions.

Freedom of expression provides a strong demonstration of the applicability of Mill's harm principle. Mill did not argue that freedom of speech was absolute. Calls to violence—that is, speech which bridges the gap between words and action—were not justifiable by the harm principle.

An opinion that corn-dealers starve the poor, or that private property is robbery, ought to be unmolested when simply shared through print or conversation, but may justifiably incur punishment when delivered orally to an excited mob assembled before the house of a corn-dealer, or when handed about among the same mob in the form of a placard.

This seems clear-cut. However Mill's father had raised an objection to this argument a quarter of a century earlier. James recommended caution about assuming that what constitutes 'violent' speech is obvious: incitement is in the eye of the beholder. 'A word which may excite strains of emotion in one breast, will excite none in another.' And who decides what is incitement, and what is just discussion?

Oliver Wendell Holmes Jr.

In *On Liberty*, Mill wrote that people must 'be free to consult with one another about what is fit to be so done; to exchange opinions, and give and receive suggestions.' This is as close as Mill comes to the famous metaphor for which he is credited. The 'marketplace of ideas' features nowhere in *On Liberty*, and neither is the analogy of debate as trade explored in Mill's work.

Yet *On Liberty* so dominated the understanding of freedom of speech in the ensuing century that Mill's readers gave him credit. The true author is the US Supreme Court Justice Oliver Wendell Holmes, who, in a series of opinions made just after the First World War, gave not only the First Amendment, but the Western concept of freedom of speech its most enduring—and unfortunate—metaphor.

Moreover, not only did Holmes formulate the most influential argu-

ment for freedom of speech, he formulated one of the most highly cited arguments against absolutist models of free speech—that no doctrine of freedom of speech would permit a speaker to shout 'fire' in a crowded theatre.

American free speech jurisprudence had not changed significantly throughout the nineteenth century, despite the strong ideological claim on freedom of speech inherited from the revolution. The founders who drafted the Sedition Act in 1798 would have recognised their understanding of the law in an 1897 case which found that the First Amendment did not represent 'any novel principles of government'. Instead the First Amendment was no more than an acknowledgement of the 'certain guaranties and immunities which we had inherited from our English ancestors, and which from time immemorial had been subject to certain well-recognized exceptions'. As long as there were no prior restraints of the kind that Milton had fought, freedom of speech was not abridged by the suppression of indecent, blasphemous, libellous speech, or that which was 'injurious to public morals or private reputation.'[16]

Shortly after the American entry into the First World War in 1917, Congress passed a number of laws which criminalised seditious speech. The Espionage Act was purportedly focused on German spies and sabotage, but during the entire war, no spy or saboteur was convicted under the Act. Instead, it was used against the domestic press. A censorship board, comprised of senior military officials, monitored the press to punish the publication of any information that was deemed 'useful to an enemy'. As one paper wrote, 'The bureaucrat entrenched behind this law might conceal his errors until he had blundered away an army or a fleet.'[17] The Sedition Act, passed in the spring of 1918, widened the net even further. It punished 'disloyal, profane, scurrilous, or abusive language' which brought 'contempt, scorn, contumely or dispute' against the constitution, political system, flag or military uniform.

Fire in a Crowded Theatre

In 1919, the socialist Charles Schenck was convicted of violating the Espionage Act. He had distributed 15,000 copies of a flyer that condemned the draft. On one side of the flyer, Schenck printed the thirteenth amendment, which abolished slavery, and claimed the war was being run for the benefit of Wall Street. On the other side of the flyer, Schenck urged people to assert their rights and reject the capitalist press. There was no 'call to action' apart from this general claim and one which urged readers to 'join the Socialist Party in its campaign for repeal of the conscription act'.

The Schenck case made it to the Supreme Court. Holmes wrote the unanimous opinion. Holmes claimed that the degree to which speech is free depends on the circumstances under which it is spoken. Wartime requires a different standard of speech freedom. 'In many places and in ordinary times', Holmes admitted, 'the defendants in saying all that was said in the circular would have been within their constitutional rights.' But these were not ordinary times. 'When a nation is at war many things that might be said in time of peace are such a hindrance to its effort that their utterance will not be endured so long as men fight and that no Court could regard them as protected by any constitutional right.'[18]

Here Holmes made his first famous analogy: 'The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic.' It was an analogy devised by the prosecution, and a strikingly successful one. It is cited repeatedly in debates over freedom of expression around the world.

But there are many problems with Holmes' analogy. One can yell fire in a theatre if, for instance, there is a fire. (In popular discussion, the word 'falsely' is often removed from the formulation.) Perhaps there is no fire, but the speaker is convinced a fire exists. Perhaps there is no fire, and the speaker knows there is no fire, but there is no reason to believe that the ensuing actions of theatergoers would lead to harm. (Note that Holmes does not describe the theatre as 'crowded'.)

The problem with the conduct of the shouter in the fire analogy is not that they spoke, but that they were disorderly. It does not take a Sedition Act to criminalise disorderly conduct.

And neither does the analogy take into account the fact that the theatre is not a public space, but a private one. A theatre is owned by someone. It is property. The issue of yelling in the theatre is a question of contract between the owner and the visitor—not freedom of speech. Private property owners have the right to make whatever contract they like with those who enter their property.[19] And owners have more effective ways of protecting their guests against false panics—for instance, by providing more trustworthy mechanisms to determine when there is a fire such as a fire alarm or sprinkler system.

Regardless of the validity of the crowded theatre exception, the context in which it was made is too often forgotten. The analogy was, for the Harvard law professor Zechariah Chafee, writing shortly after the case, 'manifestly inappropriate'. A much closer parallel, Chafee argued, would be a man 'who gets up in a theatre between the acts and informs the audience honestly but perhaps mistakenly that the fire exits are too few or locked'.[20]

In Chafee's view, the fire analogy was mundanely true but deployed incorrectly. Holmes 'has told us that certain plainly unlawful utterances are, to be sure, unlawful.' It demonstrates nothing of relevance to the question of allowed political speech. Deliberate disorderly conduct and criticism of government are very different.

By using this example in an inappropriate context, Holmes opened up an unlimited range of speech restrictions. If we use the analogy as intended—criticising the government during wartime is the equivalent of maliciously causing a panic in a theatre—who decides what constitutes a) a fire and b) a false claim of fire? The analogy is trite and does nothing to further our understanding of the relationship between words and actions.

The test of what was permitted and prohibited speech Holmes offered in the Schenck case was whether there was a 'clear and present danger' that speech could 'bring about … substantive evils that Congress has a right to prevent.' The court believed Schenck's flyer was such a danger, and the verdict was upheld. This standard was applied in two more 1919 cases under the Espionage and Sedition Acts, the final one against Eugene V. Debs, the long-time socialist presidential candidate. In effect, Holmes and the court were reaffirming the English common law standard of seditious libel.

Holmes has been described as one of 'the most liberty-alert' justices in American history. He was no such thing, and saw the rights of the group as more important than the rights of the individual.[21] Holmes was only interested in social forces, not individual liberties.

Nevertheless, it appears he was stung by the reaction to the early Espionage Act cases.[22] After the Debs case in particular, Holmes' reasoning was widely questioned. Chafee argued that the American revolution was an explicit rejection of seditious libel, and the Debs case had been contrary to the spirit of the founders:

> The First Amendment was written by men for whom Wilkes was a household name, who intended to wipe out the common law of sedition, and make further prosecutions for criticism of the government, without any incitement to law-breaking, forever impossible in the United States of America.[23]

The Marketplace of Ideas

In late 1919 Holmes re-read Mill's *On Liberty*.[24] It seems to have had a major effect on his thinking. The next case to be decided concerned a Jewish immigrant from Russia, Jacob Abrams, who in the summer of 1918 had thrown out of a window two pamphlets, one in English and one in Yiddish. Each condemned the American intervention in

the Russian Civil War. The Yiddish one also called for a general strike of American workers in solidarity with the Russian Revolution. Lower courts all gave Abrams and four other socialists sentences of up to twenty years imprisonment.

The Supreme Court upheld the convictions, drawing on the same arguments which had informed the three previous Espionage Act cases—the call for a general strike posed a 'clear and present danger' to the war effort. The leaflets claimed 'there is only one enemy of the workers of the world and that is capitalism' and the majority reasoned 'This is clearly an appeal to the 'workers' of this country to arise and put down by force the government of the United States which they characterize as their 'hypocritical,' 'cowardly' and 'capitalistic' enemy.'[25]

But this time Holmes dissented from the majority. There was, apparently, a panic on the bench. The rest of the judges went so far as calling Holmes at his home begging him not to release the dissent publically, as they believed the court needed to present a united front during the crisis caused by the Russian Revolution. Their appeal did not work. Not only did Holmes publish his dissent, he was joined by the recently appointed Justice Louis Brandeis.

Holmes' dissent strikes an entirely different note to the previous opinions (opinions which he, himself, had been the author of). First he affirmed that his views on previous cases had not changed. There were, in his view, many circumstances under which the government could restrain speech:

> Persecution for the expression of opinions seems to me perfectly logical. If you have no doubt of your premises or your power and want a certain result with all your heart you naturally express your wishes in law and sweep away all opposition. To allow opposition by speech seems to indicate that you think the speech impotent, as when a man says that he has squared the circle, or that you do not care whole heartedly for the result, or that you doubt either your power or your premises.[26]

Yet Holmes now argued that 'Congress certainly cannot forbid all effort to change the mind of the country'. Abrams' 'silly leaflet' was no danger to the country. It was here Holmes introduced his most famous metaphor:

> [W]hen men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out.

The constitution, for Holmes, is 'an experiment, as all life is an experiment.'

> While that experiment is part of our system I think that we should be eternally vigilant against attempts to check the expression of opinions that we loathe and believe to be fraught with death, unless they so imminently threaten immediate interference with the lawful and pressing purposes of the law that an immediate check is required to save the country.

Holmes ended by adopting Chafee's argument about the views of the founders on freedom of speech: 'I wholly disagree with the argument of the Government that the First Amendment left the common law as to seditious libel in force.' This, as we have seen, is an ahistorical view. But it demonstrates the ideological shadow of the First Amendment—that the arguments of men like Trenchard and Gordon were, nearly two hundred years after they were written, still able to upset the legal status quo.

(There is an irony that it was Mill's *On Liberty* which brought Holmes to defend a supporter of the Russian Revolution. *On Liberty* was the most heavily censored of Mill's work in both Tsarist and Communist Russia. When it was published in Russia in 1864, it was heavily edited.

Its crime was to advocate 'an application of the Protestant principle of free choice … to all regions of knowledge and to every aspect of individual and social life.' The last edition to be published in Russia—still edited—was released in 1882. The Soviet authorities did not authorise a reprint, and *On Liberty* was scratched from the Mill bibliography. The entry on Mill in the Soviet *Philosophical Encyclopedia* makes no mention of what was in the Western world his most famous book.[27])

Holmes' use of the market metaphor was no accident. He was deeply fascinated by economics. His private letters are peppered with references to Thomas Malthus, Adam Smith, and David Ricardo. He had read Mill's *System of Logic* as a young man.[28]

Importantly, the phrase 'marketplace of ideas' features nowhere in the dissent; rather, Holmes uses 'competition of the market', a nuance which suggests that he was not drawing on Smithian principles of spontaneous order, but the Malthusian emphasis on scarcity. One commentator notes that 'the centrality of conflict and contest is a recurrent theme in [Holmes'] philosophical musings.[29] Holmes liked to say that 'every society rests on the death of men'.[30]

We have to do such tea-leaf reading analysis because it is not clear what Holmes actually meant by a 'free trade' in ideas. It was not the only metaphor used in the dissent and he did not elaborate on the concept. Historians have dug through Holmes' letters to try to discern his beliefs about scepticism, Darwinism and progress, hoping that those views might enlighten us to what he actually meant by 'competition' and 'free trade'.[31]

Despite the futility of doing so, the interest in what Holmes meant is understandable. The marketplace metaphor now dominates the Western understanding of freedom of speech—too often to the exclusion of other free speech justifications. It is cited in judgments to decide on valid limits of speech. It is cited in academic legal analysis. It is cited in political and public policy studies. The issues paper of the Australian Government's

2011 Independent Media Inquiry offered Holmes' dissent as its only justification for freedom of speech, ninety years after the fact.[32] A press release put out by the American Electronic Frontier Foundation used Holmes to frame a discussion about freedom of speech and the social networking site Twitter.[33] As it dominates the popular and academic understanding of speech, many critics imagine that to undermine the marketplace metaphor is to refute freedom of speech entirely. The philosophical literature on freedom of speech is littered with papers poking holes in the truth-seeking capacity of free discussion, and concluding that the right of free speech is therefore weakened.

The metaphor has taken on a life of its own. Holmes may not have explained it but he did suggest that it was 'the theory of our Constitution'—elementary to the entire American political system. It is deployed in ways that neither Mill nor Holmes would have recognised. One representative judicial opinion summarised the theory as a 'reverse Gresham's law' where 'good ideas … drive out bad ones'.[34] This argument would have been alien to Mill—whose primary interest was in the effect that free discussion had on individual intellectual growth—and most likely alien to Holmes, who, as far as we can tell, had a fairly radical aversion to notions of 'absolute truth'.[35] This is a continued problem with philosophical work on the validity or otherwise of the marketplace of ideas—it is doctrine derived from Mill's *On Liberty*, not defined in it.[36] Mill is regularly credited with views on the truth-seeking capacity of the market for ideas which he does not hold.

The problems with the metaphor abound. Holmes may have intended it as a sweeping defence of free expression, but the comparison between an ideas marketplace and a real marketplace suggests that the market for ideas should be highly restricted. After all, actually existing markets are rife with government interventions, restraints, regulations and taxes. There is redistribution in the marketplace. Many goods are prohibited from sale, such as guns or drugs. In Australia, tobacco prod-

ucts must be hidden under counters, covered with warnings, sold to only those above a minimum age, and packaged in plain packs. Big companies face different regulatory burdens than small companies; and rich individuals face different tax rates than poor individuals. Some industries are run entirely by government. We don't have to travel far to find regulatory incursion in the market for goods and services: the media industry itself does not operate in a 'free market' at all, but is subject to an array of ownership limits and licences to operate.

Ronald Coase pointed out that this has led to a striking cognitive dissonance among intellectuals. On the one hand, there is little support for a free market in goods and services in academic or media circles. But on the other hand, the free market in ideas is widely seen as inviolate. Consumers operating in a real market are assumed to be uninformed, irrational, and easy to manipulate. 'Consumers' in the market for ideas are assumed to be capable of choosing freely between different 'goods'—there are no transaction costs, for example, no externalities beyond Mill's harm principle, no concept of market failure, none of the over-theorised objections to the open market that appear in every first year economics textbook.[37] Justice Holmes admitted he was not much interested in the technical side of economics, just its sociological aspects.[38] (Coase argued that both the market for goods and the market for ideas should be regulated to the same extent, as 'buying harmful ideas is just as bad as buying harmful drugs'. For Coase this meant legalising drugs not criminalising speech.[39] The market metaphor's dissonance can work in both directions.)

If this is being tediously literal, it is not inappropriately so. The conflict between metaphor and reality has been used in free speech jurisprudence to justify speech restraints. In an American case in 1987, one judge suggested that the magazine *Hustler* 'is not a bona fide competitor in the "marketplace of ideas." It is largely pornographic, whether or not technically obscene.' This was, in the courts opinion, because 'the principal function of this magazine is to create sexual arousal,' just as

the principle purpose of alcohol or tobacco is for its physical effects. To argue that pornographic magazines deserves freedom of speech is to 'degrade the free market of ideas to a level with the black market for heroin.' Therefore, pornography should 'assume a lower value' on the 'scale' of free speech protection.[40] The marketplace metaphor implies far more exclusions from the domain of legitimate speech than perhaps even Holmes intended.

The 'marketplace of ideas' is credited with amazing powers. Milton asked 'who ever knew truth put to the worse, in a free and open encounter?' But it is trivially easy to think of instances when truth was put to the worse, despite the openness of an encounter. In Western Civilisation there are many ideas which have remained in circulation well after they have been demonstrated false. Most people are not truth seekers. They are irrational. They are affected by biases. And they do not necessarily want to find truth—participation in public debate is rarely about the open-minded pursuit of truth. Most people consume information according to their pre-existing preferences, rather than information which challenges them. It is the human condition that we prefer to buy books we agree with, watch news programs whose interests we share, and read commentators whose philosophical perspective is the same as ours. Despite what Milton claimed, there is no reason to believe that truth will out-compete falsehood in a free contest. Nor is there any reason to believe that truth will out-compete falsehood in the aggregate—that is, given a long enough period of time and a large enough body of people, it is not self-evident that the majority will accept truth over falsity.

At best, the truth-seeking capacity of free debate would seem only to support the Enlightenment conception of two-tiered speech, where disinterested, highly educated truth-seekers are able to pursue ideas freely but the irrational masses are restrained.

Furthermore, the truth of any given opinion is not objective. The fallibility of censors which is supposed to support the truth-seeking power

of debate proves too much. There is no way to tell whether the ideas market is discovering truth, as there is no way to determine whether a proposition is true—to do so would be to assert infallibility. Mill understood these objections. The free discussion he valorised was designed to allow those individuals who were looking to expand intellectually to hear all competing ideas.

And it is not clear that the pursuit of truth should be an overriding goal of public policy. Governments have to balance many goals, and many of those goals clash. Why should truth be the most important goal? A government might decide truth is less important than equality, or multiculturalism, or civil order. If the only justification for free expression is that it helps society obtain truths, society may decide that it does not want to prioritise truth discovery.

For example, one controversial issue which has, at various times, been faced with questions of free speech is that of the relative IQs of different ethnicities. Freedom of speech might suggest that this was a legitimate area of discussion, but what if society (or the dominate power in the legislature, or the censor) decided that it did not want to know the truth of the question? A society might decide that the more important value was racial equality, or the elimination of racism, or ethnic self-respect. The marketplace of ideas theory and its subordinate claims about truth-seeking already assume that freedom of speech should be protected—they are rationalisations after the fact. But they provide little guide for policymakers who have no particular desire to disinterestedly seek truth.

Imagining that freedom of speech is a mechanism to achieve a goal—in other words, it is narrowly instrumental, as its value is drawn from what it achieves, rather than what it is—is useless when the goal itself is challenged.

The Right to Freedom of Speech

The marketplace of ideas theory has a rigid grasp on jurisprudence and academic discussion of freedom of speech. It is demonstrably flawed. However, the most crucial counter to this utilitarian model of free speech is not that it has logical problems or provides an unstable foundation for liberty of expression, but that it does not describe the popular understanding of freedom of speech. This matters. Freedom of speech is one of the central philosophies of our liberal democracy. We cannot pretend that while the vast majority of voters view freedom of speech through one prism, its proper justification is the one held by judges and academics.

It is very rare that freedom of speech is described in instrumental terms in the press or in casual discussion. Rather, individuals in the Western world speak of free speech as a 'right'. Freedom of speech is a matter of individual agency, or personhood. It is a element of individual autonomy. The right to hold views that may be contrary to those of the majority, or of those in positions of power, is seen as quintessentially democratic. As we are all equal, we equally hold that right. This is a non-instrumental argument. Freedom of speech is a good in and of itself—it has intrinsic value. It is telling that rarely do public advocates for free speech feel they have to justify why it is important.

This inherent virtue of speech does not, however, exist in a vacuum. It is intrinsic but not instinctive. The history of freedom of expression demonstrates that. Knowingly or unknowingly, those advocates who describe free speech as a 'right' are drawing on more than two thousand years of political and theological thought. *Parrhêsia* and *libertas* were the basic attributes of ancient citizenship. With the freedom to speak, an individual was free. Without that freedom, an individual was not free. The great debate over toleration emphasised that conscience and expression were one. God did not give any person the power to police the thoughts of another person. So, reasoned the advocates of tolerance, He did not mean for

monarchs to force religious uniformity on their subjects. 'Everyone has an inalienable right over his thoughts,' wrote Spinoza. The step from freedom to hold an opinion to the freedom to express an opinion is not large. The liberty to think is curtailed if it is not grouped with a liberty to discuss, to express, the contents of our thoughts.

Although he was not a supporter of natural rights, Mill provides a crucial step here—the formation of opinion is richer when one can hear all argument freely, when discussion is not suppressed by censors. We have the remark of a cobbler during the Renaissance in the northern Italian town of Spilimbergo when the three books he owned were seized (one being a vernacular translation of the New Testament, another the *Decameron*) by inquisitors: 'I swear I will never read again'.[41] To censor is to stifle individual intellectual development.

We must base our doctrine of freedom of speech on questions of individual autonomy, not on its instrumental purposes. In his book *Human Liberty and Freedom of Speech*, C. Edwin Baker argues that 'the values supported or functions performed by protected speech result from that speech being a manifestation of individual freedom and choice.'[42] This is a free speech grounded in liberty. And it is a model of free speech that is cognizant of its origins as one of the most important philosophies of Western Civilisation. We ought to be talking not about Milton and Holmes, who loom larger than their utilitarian arguments deserve, but of Benedict Spinoza and Benjamin Constant, who applied natural rights to questions of expression and opinion.

To adopt this model is not to discard all possible restrictions on speech. Just as natural rights theory does not imply that all government is invalid or immoral, speech as a right does not suggest there must be no limitations. Instead, it defines the value we place on free speech protection, and the costs of restricting speech. If a limitation on freedom of speech is designed to ensure the market in ideas is efficient, we may believe that limitation to be benign. By contrast, if we understand that

limitation to be a limitation of our rights, of our freedom to be autonomous individuals, we will be much less likely to support it.

Certainly, one could believe that free speech is a right and at the same time believe it is a right that needs to be restrained. Yet it seems more probable that viewing speech as a right rather than a mechanism to achieve a goal will lead to the conclusion that there are too many restraints on this liberty.

7 Threats to Freedom of Speech

The twentieth century saw freedom of speech advance and retreat on different axes. In Western democratic states, the focus of restrictions on speech shifted. The first two-thirds of the century saw restrictions on obscenity increase and then decrease; in the last few decades of that century a new category of limits under the banner of 'hate speech' came to dominate. Philosophically, this was an enormous shift. Progressives who had fought to end conservative censorship of pornography in the name of free expression came to support censorship of offensive speech when it concerned racial or religious minorities.

Changes in technology too opened up new fields for speech restrictions. Courts decided that new technologies—such as radio and television broadcasters—deserved different levels of free speech protection than had been carved out for the printed word. The expansion of the regulatory state and the further codification of law has created a dense web of legal barriers to free expression.

At no other time in history has freedom of speech been professed in principle by so many. But at the same time, there have never been as many legal and regulatory restraints on speech, nor avenues by which the state can expand its control over the words of free people.

Obscenity

Censorship of printed obscenity in the late medieval world is hard to distinguish from political or religious censorship. The *Decameron* was placed on the Roman list of banned books, but the reputation it has gathered since then does not reflect its actual content—its obscenities are mild, but it was objectionable to the church because those obscenities involved the clergy. This was not unusual. Most pornographic imagery and writing before the Enlightenment was designed more to ridicule than arouse. Pornography was a motif through which dissidents made political or religious arguments. So it was sedition and blasphemy that authorities sought to police, not obscenity.

Indeed, one historian writes that 'it was only when the bawdy was combined with heresy or a satire or an attack upon the Church … that the work was ecclesiastically proscribed or at least not permitted to be read by the faithful until it had been "expurgated."'[1]

When non-political pornographic works were censored, it was because the author had written other works that offended politically. One of the most famous erotic works of the Renaissance is Pietro Aretino's *Sonetti Lussuriosi*, a collection of sixteen poems accompanying a series of sexual drawings. It was placed on the Index of Prohibited Books, but so was everything else Aretino had written, including a number of works that satirised Papal politics.[2]

Another famously pornographic book is the 1667 work *L'Ecole des filles*, the first erotic novel published in French. Samuel Pepys described it as 'the most bawdy, lewd book that I ever saw'. That did not stop Pepys obtaining a copy, of course: 'not amiss for a sober man once to read over to inform himself in the villainy of the world.' Like *Sonetti Lussuriosi*, *L'Ecole des filles* was banned by the authorities. And like the Italian censors, French censors seemed less interested in its pornographic content than its relationship to other prohibited political works. When its presumed authors were interrogated, they were only asked about their

possession of anti-government satires.[3]

Obscenity was a matter for God, not government. As one English judicial opinion stated in 1708: 'A crime that shakes religion, as profaness on the stage etc. is indictable; but writing an obscene book … is not indictable, but punishable only in the spiritual court.'[4] It is not until the mid-eighteenth century that we see obscenity being used as a justification for prosecution, yet even then it seems to disguise the political motives—the prosecution of Wilkes' *Essay on Woman* was clearly politically motivated, and the bookseller Edmund Curll was as much in trouble for blasphemy as pornography. In England, as around Europe, the systematic prosecution of 'purely' pornographic works is a phenomenon of the nineteenth and twentieth centuries only.

The rise of non-political ('pure') pornography only really dates until after the French Revolution. One exception is the pornography found in the Dutch Republic, where non-political erotica appears half a century before the fall of the Bastille. The explanation for this is the freedom given to political expression in the United Provinces. That relative toleration meant Dutch political and religious dissidents did not have to hide their political critiques in erotica. And, unlike in England, which also had a high degree of press freedom relative to the rest of Europe, there were no religious authorities with secular powers. So the typical pornographic satire we see throughout the continent—that is, depictions of religious authorities conducting degrading sexual acts in private—was much less biting in the Dutch context.[5]

The suppression of obscenity has always been deeply paternalistic. When they did turn their attention to obscenities, medieval and early modern moralists were more concerned about the impact of the obscene and blasphemous on the lower orders. The paternalism was made explicit in an 1868 case in England which applied a broad test for prohibited obscenity: 'whether the tendency of the matter charged as obscenity is to deprave and corrupt those whose minds are open to such immoral

influences and into whose hands a publication of this sort may fall.'[6] In other words, the test is how the literature in question would affect the most susceptible mind, not the mind of the average or ordinary member of the community.

An editorial writer for the *Hobart Mercury* claimed in 1910 that with the 'widening circle' of literate readers, 'there has been a falling-off in the quality of books'. And printing costs had reduced to such a great degree that 'half-educated people' were mass producing books to be read 'by those with even smaller instruction'.[7]

The paternalist nature of obscenity laws was used frequently by defendants in obscenity cases to embarrass the prosecution. In one 1901 case in Melbourne, the defence counsel questioned a witness who had testified to the 'bestial' nature of a shipment of French novels, by asking whether the novels would 'have a demoralising effect on, say, a Supreme Court judge'. The expert witness, a Melbourne University Professor of French and German, responded that 'the question is put in an insulting manner'.[8]

Across the Western world, the late nineteenth and early twentieth centuries saw a sharp turn towards the heavy regulation of obscenity. In the United States, the moral crusader Anthony Comstock successfully agitated for the passage of laws which made it illegal to send 'obscene, lewd or lascivious' material through the mail. Comstock bragged that he had confiscated more than 130,000 pounds of obscene literature, 194,000 obscene photos and prints, and drove fifteen people to suicide by his zealous prosecutions. Comstock was not just interested in dirty novels and pornography. The laws, known collectively as the Comstock Laws, also targeted literature on birth control, and 'articles made of rubber for immoral purposes, and used by both sexes.'[9]

In Australia, it was the importation of novels that formed the basis of obscenity censorship, an artefact of the size of the country and its small domestic printing industry. In 1889 customs officials in Victoria

seized a shipment of French novels destined for the Melbourne bookseller Edward William Cole. 'I have no wish to sell, and do not intend to sell, indecent literature,' wrote Cole in a letter to the customs commissioner. Yet, he wrote, 'the law is uncertain' and 'every large bookseller sells hundreds of books with indecent passages in them. Aristotle, Ovid, Virgil, Rabelais, Boccaccio, Chaucer, Shakespeare, Pope, Byron, Burns, Swinburne, Fielding, Smollet, Defoe, [and] Ouida all contain indecent passages'.[10]

The panic had begun. In 1897 a 'Doctor's Wife' wrote in the *Warragul Guardian* that 'it would be absurd and illogical to say that the reading of bad books, even by unsophisticated youth, will straight away morally ruin them. But the seed is sown. The mind is made familiar with evil.'[11] The *Hobart Mercury* writer complained that 'spicy … incidents' were depicted in modern novels 'with tongue-rolling relish [and] come as nearly as possible to photographic representations of absolute indecency.'[12]

The system of censorship which was instituted in Australia responded to Cole's complaint that it was unclear what books were prohibited. The Customs Department banned books individually. The bans were not systematic; customs officials could not hope to inspect all books that entered Australia, so they acted on letters of complaints and paid special attention to prominent works. Furthermore, there were ways around the system: one could always print the books in Australia instead, bypassing customs officials altogether. In 1933 the Lyons Government instituted an advisory board of literary experts to pass judgment on what should be permitted and what should be prohibited. The board was instituted to pass judgment on whether obscenities had any literary merit.

The *Hobart Mercury's* complaint in 1910 emphasised a major element in the repression of freedom of speech—the relationship between obscenity and technology. Cheaper printing made it possible for half-educated writers to titillate even less educated readers. There were enormous advances in lithography and paper technology from the late

eighteenth century onwards. Transport advances expanded the size of markets, allowing those technologies to capture an ever-larger number of consumers. The reproduction of photographs allowed the mass-printing of naughty postcards and slides; a London raid in 1874 netted the authorities 130,248 obscene postcards from one pornographer alone.[13]

The first movie was commercially aired in 1894, the first pornographic movie one year later. Each new technology in the twentieth century has been rapidly embraced by pornographers. The high costs of film projection restricted early distribution to a few professionals who would play the films for private bachelors' parties. Legal changes governing obscenity in the 1960s and 1970s throughout the West allowed for the rise of commercial pornographic cinema, yet the high cost involved in distribution and screening gave governments the power to control and regulate the industry.

The cost of distribution was drastically reduced by the introduction of cable television and home videotape. This, unsurprisingly, increased the demand for pornographic content. Indeed, the video industry was driven by pornography. Pornographic movies were available on video tape one year before general release films were, and for the technology's first decade pornography encompassed half the video market.[14]

The response of governments to obscenity in the age of mass media has been to wind back outright censorship, and replace it with regulation.

Film and television content is now subject to classification and time slot restrictions that act to fence content off from what legislators and regulators believe to be sensitive audiences. This is a more subtle form of censorship but is a restraint on freedom of speech and the press nonetheless. Classification can act as outright censorship. In Australia, films and videogames which are refused classification are illegal to distribute. They are, in most cases and in most states, nevertheless still legal to possess.

The history of freedom of speech provides important insights here.

Classification is a form of prepublication censorship, of the kind that was eliminated for printed materials at the end of the seventeenth century. It is a pre-1695 approach to freedom of speech. Publications 'which lack moral, artistic or other values to the extent that they offend against generally accepted standards of morality, decency and propriety' are refused classification. This category does not merely capture publications that are illegal to produce—such as child pornography—but material that is 'excessively' violent or provides 'detailed instruction in matters of crime or violence' or drug use.

The power to censor is not held by courts and the common law, but by boards and guidelines. Prepublication censorship is ad hoc and arbitrary, as Locke argued three centuries ago, dependent on the 'sense and interpretation of the governors of church and state' and the 'humours' of the censor.[15] That is particularly clear in some of the most prominent classification decisions made by Australian authorities. Decisions made by the Classification Board rely on highly subjective judgments. In a recent decision, the board had to decide how 'stylised' images of violence were—to which they responded that they sets were 'grimly' realistic. Furthermore, the music was 'low and menacing'.[16] The Classification Board reportedly tries to judge actors' age on their appearance, including breast size.[17]

The classification guidelines purport to represent community standards. Even if it was possible to determine what the 'community's' standards about excessive violence were, freedom of speech cannot be not dependent on group, rather than individual, standards. When Mill argued that free speech was essential to protect the interests and values of minorities, he was arguing specifically against the concept of common standards. Pierre Bayle argued that state censorship based on community standards was redundant: if the community was that outraged, they would do the censoring themselves.

The freedom of speech implications of these sorts of arbitrary and subjective criteria are clear when we consider how they are liable to be

captured by political activists. Anti-smoking campaigners around the world have sought to make depictions of smoking grounds for higher classifications. In early 2012, the Australian Advertising Standards Bureau banned an insurance advertisement that depicted a man using a laptop and hands free phone earpiece in a spa. The bureau ruled that it 'potentially unsafe behaviour'. Never mind that the scenario was obviously a comic fantasy: the bather was wearing a full suit and tie.[18]

Nevertheless, for all the philosophical objections to the prepublication censorship of the classification system, the system can only function if there are a limited number of publications, films, and video games. So while the upheaval in media consumption brought about by videotape and cable television was significant, the explosion of content brought about by the internet has been revolutionary. Potentially 'obscene' speech is now effectively free to distribute, and that distribution can happen across state jurisdictions—and continents—in milliseconds.

Prepublication censorship has always been limited: censors have struggled to scrutinise all material that has been produced or imported into a country. The early modern state's struggle with print resembles our contemporary governments' struggle with the internet. Seventeenth century England had few censors and they struggled to keep up with heavy workloads.[19] Twenty-first century Australia has many more censors, but prepublication censorship is made exponentially more difficult when there are not hundreds of books but trillions of websites.[20] To take just one prominent host, 48 hours of video are uploaded to YouTube every minute—the equivalent of 240,000 full-length films every week.[21] There are 500,000 video games available for download on iTunes. None of these have been passed through the Australian classification scheme. Anthony Comstock was proud of seizing 194,000 pornographic photos. That is nothing compared what's available on the internet. It is impossible to know how much pornography is online, but some home internet filters claim to block upwards of two and half million websites alone.

The challenge is further compounded by the migration of media from analog distribution—that is, videotape, television broadcast, bookstores—to the internet. Not only is the internet growing the media content pie, but much content which was previously sold in 'hard copy' is now being sold exclusively online. The classification system's inability to handle R-rated videogames has been a relatively minor problem considering most videogames are now distributed exclusively through the internet—the ban on distribution governs retail outlets effectively, but is unable to restrain websites. The Australian ban on the euthanasia guide *Peaceful Pill Handbook* is effectively meaningless considering access to a digital version of the book is only a short Google search away.

Prepublication censorship is impossible in an internet age. The one hundred and fifty year history of anti-obscenity censorship is functionally at an end. The challenge for freedom of speech is that governments have not yet fully recognised this is the case. The most substantial threats in the online sphere to freedom of expression arise from this basic cognitive dissonance—governments imbued with the paternalistic ethos of the twentieth century trying to maintain their approach long after technology has passed them by. The Rudd Government's proposed internet filter was an attempt to impose censorship onto the internet according to the principles which have governed classification for the past few decades.

The pragmatic argument against censorship for 'good taste' has never been more compelling. But is there a principled argument? Certainly not if we adopt a marketplace of ideas theory for free expression. Pornography or graphic depictions of violence can rarely be described in such terms: they contain no free exchange of ideas. There is little 'truth-seeking' in obscenity for obscenity's sake. Mill's harm principle provides a more plausible defence of obscene speech: there are no third parties injured in the voluntary production, distribution, and consumption of pornography or (fictional depictions of) violence.

The claims that obscenity causes psychic harm to the individual is

one objection to this argument. A further objection, made by many opponents of pornography, is that widespread access and consumption of pornography degrades the culture. As regards to the first objection, the conservative constitutional lawyer Alexander Bickel provides the definitive argument against regulating obscenity to stop harm:

> The question about obscenity is not whether books get girls pregnant, or sexy or violent movies turn men into crime. To view it in this way is to try to shoehorn the obscenity problem into the clear-and-present-danger analysis [the test introduced by Oliver Wendell Holmes Jr.], and the fit is a bad one. Books, let us assume, do not get girls pregnant; at any rate, there are plenty of other efficient causes of pregnancy, as of crime.[22]

As to the second objection, what is culture if not the aggregate cultural preferences of the individuals which comprise it? Were it even possible to demonstrate the effect that obscenity had on 'culture', it is not clear why that would be cause for government action. A greater danger to culture must surely be political interference, rather than the free choices of free individuals. The choice is not between a free 'degraded' culture and a free 'moral' culture, but between a free culture and one that is regulated by the state.

Nevertheless, the validity of these arguments need not concern us if we have a model of free speech based on rights. To have government deny individuals the ability to judge for themselves what is obscene and offensive is to deny them moral autonomy. Individuals may find self-fulfilment and self-expression in pornographic literature. A 1969 United States Supreme Court case found in that the attempt to regulate the ownership of obscene literature was 'an assertion that the State has the right to control the moral content of a person's thoughts.'[23] The advocates of natural rights who argued for religious toleration on precisely these grounds would, presumably, agree.

Offensiveness

Should Nazis have the right to free speech? Adolf Hitler's Germany, obviously, had no liberty of expression. Must freedom of speech allow for the toleration of an intolerant minority? The question has been answered in different ways in various countries. Germany places significant limits on neo-Nazi speech and assembly. The United States permits such speech.

But this was no more pressing a question than when international human rights treaties were being drafted at the end of the Second World War.

The geopolitical and ideological circumstances of half a century stamped themselves on those treaties—circumstances which are rarely understood when academics, lawyers or commentators try to impose the precepts of the treaties onto domestic politics. This is no more so than with freedom of speech. Concepts like hate speech, racial vilification, and group defamation were conceived in significantly different political environments to our own.

Yet rarely is the actual content or justification for the rights enumerated in those treaties challenged. In contemporary debate over human rights, it is remarkable how unexamined and unquestioned the treaties actually are.

The unquestioned dominance of human rights treaties on our understanding of individual rights has had a number of problematic effects. It has changed how we think about rights. The natural rights tradition explored in this volume has, at its heart, a central concept of moral autonomy by the individual. Natural rights can be secured through the state, but they exist prior to the state: states are only formed in order to maintain those rights. Natural rights are general. Rather than specifying what specific protections an individual is entitled to, natural rights suggest that anything that encroaches on their moral autonomy should be frowned upon.

International human rights law however is specific, enumerated, and comprehensive. These declarations, covenants, and treaties cover every-

thing from the right to marry, to the right for individuals with a disability to access vocational rehabilitation. Rather than positing general moral principles, international human rights laws simply list all the things that the drafters believe are worthy. There is no distinction between negative rights and positive rights—thus, human rights law confuses protection against state action with demands that states act. Allowing an individual to marry the person of their choice unmolested by the government is very different to the requirement that individuals with disability receive support for vocational rehabilitation, which, however worthy, requires governments to tax other citizens to provide.

This confusion is particularly apparent when human rights law tackles freedom of speech and expression.

Article 19 of the United Nations' 1948 Universal Declaration of Human Rights states unequivocally that 'Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.' Yet the Universal Declaration of Human Rights does not impose any obligations on states. It was not a treaty—simply a 'declaration'.

Dissatisfaction with the Universal Declaration's purpose led to the International Covenant on Civil and Political Rights. Adopted in 1966 by the United Nations, it, too, made a bold statement on behalf of freedom of speech in Article 19: 'Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.' The power of that statement was drained by the following: speech should be subject to restrictions to 'respect of the rights or reputations of others', or 'the protection of national security or of public order … or of public health or morals.' The final phrase 'for the protection of … public health or morals' carves out a potentially enormous scope for

limitations on freedom of expression.

Yet the caveats went further than that. Article 20 sets the stage of a major new class of prohibited speech in Western liberal democracies. 'Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.' With Article 20, freedom of expression is completely defanged. Incitement to violence has always been a standard limit on speech, but never contingent on being sourced from 'natural, racial or religious hatred'. Nor does incitement to 'discrimination' or 'hostility' have any foundation in the history or theory of freedom of speech.

These restraints were conceived entirely by the drafters of the covenant—the start of a new limit on freedom of speech which protected against discrimination, hatred or hostility. But we must not take them at face value. The concept of 'hate speech' (and the concepts which are drawn from it, such as group defamation) was deliberately and explicitly political. Article 20 has its origins in a clash between two worldviews—that held by Western capitalist countries which supported individual rights and liberties, and that held by the Communist bloc, which did not.

The Soviet origins of Hate Speech

For what it is worth, Karl Marx was supporter of press freedom. He was a journalist and editor in Prussia immediately after he finished his academic studies, and hated Prussia's purportedly 'liberal' censorship regime. In a series of articles between 1842 and 1843, Marx laid out a strident critique of censorship and a defence of press freedom.

For the young Marx, 'Censorship, like slavery, can never be rightful, even though it existed a thousand times in the form of laws'. His arguments are familiar. Censorship invests bureaucrats with arbitrary and excessive powers. A free press is the foundation of good government. Free expression allows for human flourishing: 'the essence of a free press is the

rational essence of freedom in its fullest character'. Marx even argued that free expression was justified by pluralism, when he wrote that 'You don't expect a rose to smell like a violet: why then should the human spirit, the richest thing we have, exist only in a single form?'[24] Censorship corrupts the press, as Marx argued:

> [T]he free press remains good even when its products are bad, because these products are deviations from the nature of a free press. On the other hand, the censored press remains bad, even when its products are good, because these products are only good insofar as they represent the free press within the censored press, and insofar as it is not in their character to be products of a censored press.[25]

Press freedom, and freedom of expression more generally, was central to Marx's professed ideas about human freedom.

But the political system he devised was deeply antithetical to freedom of speech. Communism's claim that the state could represent the masses was closely related to Rousseau's conception of the 'general will', and the ideological justifications for limiting censorship were obvious to communist leaders of the twentieth century. Proto-communist states were intolerant of dissent. The temporary Anabaptist takeover of Münster in the sixteenth century was characterised by forced religious conversion and expulsion.

So, true to prior form and theory, twentieth century communist states immediately cracked down on freedom of speech. No political system based on Marx's ideas could tolerate dissent.

In Russia, the liberal revolution of February 1917 declared a general freedom of the press, allowing any speech except that which dealt with military matters in the ongoing Great War.

The Bolshevik revolution in October quickly eliminated this liberty. On the day of the October revolution itself, the Petrograd Military Revolutionary Committee shut down a major liberal newspaper and

confiscated its equipment. Two days later, twenty conservative and liberal papers were suppressed. A decree signed by Lenin declared that 'the bourgeois press is one of the mightiest weapons of the bourgeoisie'.[26] His decree was described as temporary, but draconian restrictions on freedom of speech lasted until the collapse of the Soviet Union. 'Why should freedom of speech and freedom of the press be allowed?' asked Lenin. A government 'would not allow opposition by lethal weapons. Ideas are much more fatal than guns.'[27] A 1923 memo gave the scope of reasons that books and newspapers could be banned, which was to include:

> Those treating the Soviet power and communism in a decidedly hostile manner … putting over ideologies alien and hostile to the proletariat … books of idealistic persuasion … children's literature containing elements of bourgeois moral and lauding old conditions of life … writings by counterrevolutionary authors … writings by authors perished in the struggle against the Soviet power … Russian literature brought out by religious societies regardless to their content.[28]

The 1936 constitution of the Soviet Union guaranteed freedom of speech and freedom of the press, 'in order to strengthen the socialist system'.[29] This was, like so much else about the Soviet constitution, entirely fictional. Censorship was pervasive and freedom of speech nonexistent. As the novelist Vasily Aksyonov wrote: 'what in the West is called Soviet censorship is nothing less than the Soviet air that one breathes'.[30]

So when the Soviet bloc participated in the framing of the Universal Declaration on Human Rights in 1948, it was no surprise that it stridently opposed the blanket statement in support of freedom of speech. To the question of whether Nazis could have freedom of speech, their answer was resoundingly 'no'. Repeatedly during the drafting of the Declaration, the Soviet delegation proposed an amendment that 'freedom of speech and the press should not be used for the purposes of propagating fascism, aggression and for provoking hatred as between na-

tions'. Simultaneously, the Soviets proposed a restriction on freedom of assembly to any organisation of a 'fascist or anti-democratic nature'.[31]

The Soviet proposals were rejected, and the Declaration was adopted with the uncompromised Article 19. But it was abundantly clear what the Soviet delegation was seeking. The Soviet Union did not see fascism as a discrete political system, or as a socialist heresy, but as a variety of capitalism. In the view of Alexei Pavlov, the head of the delegation, 'Fascist elements [exist] in almost every European country except those with a people's democracy'—such as the Soviet Union. Pavlov wanted the Declaration to explicitly allow governments to suppress not only Nazi, but liberal capitalist speech as well. As one Canadian participant reflected, 'The term 'fascism' which had once had a definite meaning was now being blurred by the abuse of applying it to any person or idea which was not communist.'[32] The debate, Western nations discovered, was becoming less about limiting one extreme form of speech—Nazi speech—and more about blessing whatever restrictions dictatorships wished to place on expression. Eleanor Roosevelt warned that the proposed restrictions were 'likely to be exploited by totalitarian States for the purpose of rendering the other articles null and void.'[33]

One potential restraint on speech was, however, included within the Universal Declaration. Article 7, which says that all people are equal before the law, also states that people are entitled to protection 'against any incitement to … discrimination.' This was a wording found in compromise—the Soviet Union sought to prohibit incitement, but the final formulation more vaguely protects against incitement.

As one commentator has noted, 'the drafting history of the protection of the freedom of expression in the [declaration] does not leave any doubt that the dominant force behind the attempt to adopt an obligation to restrict [freedom of speech] under human rights law was the Soviet Union.'[34] The British delegate summed up the position of most Western powers:

> In the United Kingdom where human rights had certainly been respected as much as in any country, there had never been any need for legislation to compel the authorities to take action against incitement to discrimination. The force of public opinion had always proved sufficient to deal with any attempts at such incitement.[35]

When nearly two decades later it came time to draft the binding International Covenant on Civil and Political Rights, this was not the ascendant view. The Western countries proposed limiting restraints on speech to those that were an 'incitement to violence'. The Soviet Union proposed extending those restraints to 'incitement to hatred.' According to the Soviet-aligned Yugoslav delegation, it was necessary to 'suppress manifestations of hatred which, even without leading to violence, constituted a degradation of human dignity and a violation of human rights.'

Again, the Western powers objected. The Australian delegation argued 'people could not be legislated into morality.' This time, however, the West lost the UN vote, and an expansive version of Article 20 which banned 'incitement to discrimination, hostility or violence' was adopted.

The same occurred during the drafting of International Convention for the Elimination of all Racial Discrimination. Here the restriction on freedom of speech is even more strident. All signatories must 'declare an offence punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination.'[36]

Again, this clause was driven by the Communist Bloc against the protest of Western powers. As the Columbian delegate argued, the statement,

> is a throwback to the past . . . Punishing ideas, whatever they may be, is to aid and abet tyranny, and leads to the abuse of power . . . As far as we are concerned and as far as democracy is concerned, ideas should be fought with ideas and reasons; theories must be refuted by arguments and not by the scaffold, prison, exile, confiscation, or fines.[37]

Once more the Western delegations which supported freedom of speech

were outvoted. The adoption of international human rights law was an intellectual culture change from above. Suddenly, states were responsible for the elimination of intolerance and discrimination—an elimination which could not be accomplished without the coercive suppression of freedom of speech. The Soviet Union and other repressive nations—communist or otherwise—were perfectly used to doing so. For liberal democracies, particularly those coming from the English common law tradition, this was a major change in the way they were to understand the limits of free expression.

In 1948, as the Soviet Union was trying to place restrictions on speech in the Universal Declaration of Human Rights, the Gulag system held 2.2 million people.[38] The year the International Covenant on Civil and Political Rights was approved by the United Nations, 1966, was the same year that two satirists, Andrei Sinyavsky and Yuli Daniel, were put on trial, sparking the late Soviet dissident movement. 'It is a sad reflection on Europe', writes the Danish human rights advocate Jacob Mchangama, 'that the increasing emphasis on criminalizing words that wound, offend, or hurt is the brainchild of the very totalitarian states with which Western European states were locked in an ideological battle during the Cold War.'[39] The human rights movement to restrict hate speech and racial discrimination was an ideological power play by the Communist Bloc that was looking for human rights law to approve the suppression of political dissent. The adoption of hate speech restrictions was not intended to liberate minorities (as so many contemporary human rights advocates claim), but to restrain democrats.

In the decade following the two conventions, Western countries adopted their own forms of racial discrimination laws which prohibited, to varying degrees, 'hatred' or 'discrimination'. The United Kingdom, Canada, New Zealand, and Europe adopted prohibitions to protect racial or other groups. Of the major Western nations, only the United States now has no prohibition against hate speech.

Race and Offensiveness in Australia

The Australian drive to enact the principles of international racial discrimination law was given extra impetus by the legacy of the White Australia Policy. One major way the Whitlam government felt it could introduce 'multiculturalism' was by adopting the 1966 United Nations convention. The convention was embraced by immigration minister Al Grassby in his first major statement on multiculturalism.[40] When Gough Whitlam introduced the 1975 Racial Discrimination Act, which adopted the principles of the convention, he made explicit reference to its harmony with his government's multiculturalism policy.[41]

The effect this Act would have on restraining expression was noted, vehemently, at the time. The Liberal senator Ivor Greenwood described it as 'repugnant to the rule of law and to freedom of speech'.[42]

The Act, after its amendment in 1995, makes it unlawful to 'offend, insult, humiliate or intimidate another person or a group of people … because of the race, colour or national or ethnic origin of the other person or of some or all of the people in the group.'

The states soon followed by enacting their own anti-discrimination and anti-vilification acts. New South Wales introduced an Anti-Discrimination Act in 1977, which, after amendment in 1989, made it unlawful to 'incite hatred towards, serious contempt for, or severe ridicule of' on the grounds of race, gender, sexuality or HIV/AIDS status. All states now have legislation similar to the Racial Discrimination Act; that is, all states have sought to encode the principles of United Nations human rights covenants and conventions into statutory law.

The result is a complex mixture of civil and criminal sanctions that prohibit vilification and discrimination according to different standards. Some states outlaw racial vilification, other states outlaw racial and religious vilification. The cross-border nature of online communications makes this complexity important. Australian citizens can be liable for breaching racial discrimination laws in other countries, as Germany's

Federal Supreme Court found in 2000. The 2001 Victorian Racial and Religious Tolerance Act takes no account of whether the vilification is committed in that state; or, even, if anybody from that state has seen or heard the vilification.[43]

Just how vague and arbitrary these restrictions on speech are is demonstrated by a 2000 case under New South Wales anti-discrimination law. In December 1998, Tom Switzer, then a journalist for the *Australian Financial Review*, wrote an opinion piece on the Israel-Palestine conflict. Switzer contrasted the actions of US President Bill Clinton with the actions of the Palestinians, and concluded that 'the Palestinians cannot be trusted in the peace process.' The Palestinians, he wrote, 'have pursued over 300 terrorist attacks against innocent Israeli civilians … Mr Yasser Arafat uses Western aid not, as it is intended, for the poor of Gaza, but to build luxury flats for his military and bureaucratic elite, and it would appear that the Palestinians remain vicious thugs who show no serious willingness to comply with agreements.'[44] The *Australian Financial Review* published three responses to the Switzer article.

One of those was by Ali Kazak, head of the 'Palestinian Delegation' to Australia. Not content with arguing his case in the court of public opinion, Kazak lodged a complaint with the NSW Anti-Discrimination Board. The complaint was in March 2000—nearly a year and a half after the publication of the original article.[45]

The manner in which the Tribunal interpreted the NSW Act suggests just how far from classical notions of the limits of freedom of speech vilification laws have strayed. Take the word 'incite'. The distinction between words and actions has been central to the free speech debate since the Gutenberg press. But, in the Switzer case, the Tribunal found that for words to be considered incitement, there was no need to demonstrate that the speaker intended for those words to be an incitement, nor any need to demonstrate that anybody had actually been incited into action. Simply the expression of an opinion was sufficient to be incitement.

Incitement, according to the Tribunal, is not a 'call to action'.

Advocates of racial discrimination legislation have long argued that while legislation cannot dictate inner thoughts it can at least prevent those thoughts being translated into action. The Switzer case demonstrates this is not the way that the courts have interpreted such legislation. The Tribunal found that 'the article as a whole paints an extremely negative picture of the Palestinian people and an extremely positive picture of the Israeli people and their government.' The tribunal felt that by describing the Palestinian leadership as 'Palestinians' in a generic sense, Switzer had directed 'hatred' towards the Palestinians as a race. From that interpretation of journalistic shorthand, the Tribunal found that the Switzer article had, indeed, breached New South Wales law. (In 2001, the broadcaster Phillip Adams was investigated by the Commonwealth Human Rights and Equal Opportunity Commission for similar sentiments. In critiquing American foreign policy, Adams had written that America had 'always been among the most violent nations on earth', and Americans were 'mad'.)

The political origin of the Switzer case is plain. The question of whether the Palestinian authorities were acting in good faith during the peace process is a legitimate area of public debate. The individual who brought the complaint was a political representative of the government that Switzer was criticising.

The tribunal argued that an 'ordinary reasonable reader' would be 'incited to hatred or serious contempt of the Palestinians' after reading the article. The faith in the power of words that the tribunal seems to have is striking—just 'a few black letters traced on paper', as Voltaire described the atheistic books of his day. There is no reason to believe that anyone was convinced by the Switzer article, let alone was driven to 'hatred or serious contempt' as a result of his reasoning. Yet, for the tribunal at least, this was sufficient to be in breach of the Act. Kazak had been published, in the same paper, mounting the contrary case, but the

legislation did not allow for that to be included as a factor. The ruling was overturned on appeal in 2002, but that appeal pivoted on whether the publication was in the public interest—not on the validity of the court's strange conception of incitement, one that requires no intent, protagonist, or victim.[46]

The peculiar definition of incitement used by the Tribunal underlines the importance of the debate during the drafting of the original United Nations declarations and covenants about whether there should be an exception for 'incitement to violence' (as the United Kingdom argued) or 'incitement to hatred' (as the Soviet Union maintained). For while the former links the expression of thoughts to actions, the latter formulation links the expression of thoughts to just more thoughts. Racial discrimination laws are not concerned that violence will be incited by argument, but that people may be *convinced* by argument.

The Bolt Case

The Switzer case drew much public comment about freedom of speech and anti-vilification law. But that response paled in comparison to the debate sparked by the case involving the News Limited columnist Andrew Bolt in 2011.

In April 2009, Bolt published two columns in the *Herald Sun* that looked at what he described as the 'political Aborigine'. This described individuals who have both light skin and part-Aboriginal heritage, and are therefore able to identify as a range of ethnicities. The individuals chose, 'incidentally', to identify as Aboriginal, a choice which bought 'political and career clout'.[47]

In September the next year a group of nine individuals who Bolt had named in the columns announced they intended to sue the columnist for racial vilification. The lawyer running the case at the time described it as 'clarifying the issue of identity — who gets to say who is and who is not Aboriginal.'[48] No doubt it was not his intention to do so, but by

describing it this way he also illustrated the importance of the case for freedom of speech—whether questions of identity should be outside the realm of protected speech.

The group eventually settled on pursuing Bolt under the Commonwealth's Racial Discrimination Act, and the case was heard in March 2011 in the Federal Court by Justice Bromberg.

It was an aggressive trial. Bolt's articles were described as 'akin to eugenics'. 'This sort of thinking led to the Nuremberg race laws', argued the applicants' lawyer, Ron Merkel. After all, 'the Holocaust started with words and ended with violence'. Merkel had claimed that the case was 'not about free speech'. His repeated, gratuitous, emotive references to genocide suggest otherwise. Not only was Merkel implying that speech could cause harm—emotional, reputational or otherwise—but he was claiming that the simple expression of an opinion could set a nation down the road to murderous ethnic cleansing.

This is ahistorical. There were significant restrictions on press freedom during the Weimar Republic targeting Nazi speech.[49] But more essentially it is a radical attack on basic principles of free speech—implying that the simple airing of ideas should be suppressed in order to prevent future political change.

Furthermore, the comparison illustrates the limits of protection against 'offensiveness'. Many commentators, on all sides of politics, have written that Merkel's argument is arguably much more offensive to an 'ordinary reasonable' individual than were the original columns. Yet even if they were made outside of court, they would not fall within the purview of the Act. Merkel was free to compare Bolt's words to the Holocaust, while at the very same time arguing that what he wrote was too offensive for a liberal society to condone.

The Racial Discrimination Act does not protect against offensive speech. It protects against offensive speech that has as its theme race or ethnicity. Even if it could be consistently applied, that would already

make it arbitrary. There is no reason why, if society has decided that the harm principle should extend to the harm of offence, that it should only extend to offence taken by a certain segment of the population.

This is, nonetheless, a view held by some. One Australian academic paper published in 2003 argues that while anti-vilification is justifiable when that vilification is targeted at ethnic minorities or lesbian or gay individuals, that does not mean it should be available for Anglo-Australian or heterosexuals to use.[50] This is an extraordinary perversion of liberal principle that every individual should be treated equally under the law, but it is a perversion that is implicitly reflected in the narrow scope of our current anti-vilification laws.

Attempts to determine what values a reasonable member of the community might hold are always fraught and necessarily judgmental—especially when they are determined by a judge who, virtually by definition, is not representative of that community. In his finding, Bromberg hypothesised about what this reasonable member might believe. Quoting a previous case, Bromberg decided that a reasonable member believes that freedom of speech has boundaries: 'when something goes beyond that boundary an open and just multicultural society will perceive it to be intolerable … and so judge it to be unreasonable for the purpose for which it was said.'[51]

In other words, a reasonable member of the community is one who believes freedom of speech should be limited, and, by implication, supports the tone, intent, purpose, and provisions of the Racial Discrimination Act. This is, needless to say, unsupported by any evidence.

Yet Bromberg went further. He argued that the standard of offence was what a reasonable member of the group that had been vilified would believe. The 'reasonable member' was taken to be a reasonable member of the offended group, not the community at large. In effect, the offended group determines what is offensive, rather than the 'community'. Offence, according to this theory, is an amorphous concept differently

applied to different groups depending on their history and 'context'.

In that case, the group was light-skinned aborigines. The offence could easily be demonstrated: skin colour and its relationship to aboriginality is a complicated and challenging issue that is much debated by Aboriginal communities. Bromberg wrote that the reasonable member is 'likely to be sensitive about attempts by non-Aboriginal persons to define Aboriginal identity.'

There should be no question that Bolt's columns were a contribution to that debate. In many cases the individuals named held publicly-funded academic positions and received publically funded prizes. It is absolutely a public policy question how and where the lines concerning aboriginality are drawn. Nevertheless, Bromberg argued that the offence taken by a hypothetical light-skinned Aborigine reading the two Bolt columns was sufficient to be damaging to social cohesion. The columns were 'inflammatory and provocative … The tone was often cynical.' They were 'gratuitous' and 'derisive'. Bolt, therefore, was found to have breached the Racial Discrimination Act, a decision which was handed down in September 2011.

In the fallout of the trial, many commentators argued that the Bolt case did not have any major freedom of speech implications. The Racial Discrimination Act provides exemptions to its restriction on vilification. If the comment is made 'reasonably and in good faith' in making 'a fair comment on any event or matter of public interest', it would not breach the Act. Bromberg argued that Bolt had made a number of factual errors, that these errors suggested the columns were not written in good faith, and did not therefore qualify for exemptions under the Act.

It is not clear why this is supposed to comfort supporters of freedom of speech. It was the judge who decided what 'faith', good or bad, Bolt wrote his columns in. The exemptions simply offer more subjective determinations to be made by a judge to restrain speech.

How many factual errors or mistakes in research are allowed before

something becomes 'bad' faith? There is, certainly, a wealth of case law from which Bromberg pulled his determinations of what constitutions 'reasonable', 'fair', 'good faith', 'offence', a 'reasonable member', yet that does nothing to show that those determinations are just when imposed on freedom of speech. Even on the Racial Discrimination Act's own terms, the burden that the law places on the defendant to prove that they made their claims in good faith is fundamentally antagonistic towards freedom of speech.

Bromberg did not merely argue that Bolt made some errors. He combined those with a 'derisive tone'. It was the tone, not the errors, that created the offence. Nor did the applicants make a big deal out of apparent factual errors. It was Bolt's tone which was the inspiration for the case in the first place, as Geoff Clark, one of those named in the articles, and one of those who took action, claimed shortly after the decision. Clark made explicit the political origin of the case when he said 'it was based on the articles [but] there was certainly other ranges of views too numerous to comment.' Clark claimed that the court victory was a victory for others who had been criticised by Bolt during his career.[52]

If so, that would be no surprise. The debate over the Racial Discrimination Act in late 2011 was, effectively, a referendum on Australia's most prominent political commentator. The court victory was, for many, seen as a blow against Bolt himself, not as a defence of social cohesion. If it had been merely factual errors which motivated the case then the individuals named in his columns would have pursued action for defamation. But they sought instead the symbolic victory of branding Bolt as a 'racist'. This was little more than a political attack on a prominent conservative though the courts.

Offensiveness, Autonomy and Toleration

Any claims that opinions should be censored in a democracy are problematic. Modern democracy is predicated on egalitarianism—that all people have the moral standing to elect a government. That egalitarianism is based on a view about the capacity for those individuals to decide civic questions. Even the least educated, least intelligent member of the community helps build the foundations for the state's legitimacy. The vote of the least informed individual is worth as much as the vote of the most informed individual.

As one writer in the 1940s argued, this makes censorship of any speech profoundly anti-democratic:

> The democratic philosophy is based on a man's ability to reason, to decide for himself his own best interest, on man's educability, and his conscience. Censorship denies all these premises. Regardless of the issues of truth and falsehood, danger of obscenity, free expression is invaluable for progress. Censorship cannot be justified in a democracy.[53]

If we adopt a rights-based argument for freedom of speech we are claiming that free conscience and free expression must be as close to absolute as possible. But what does this mean for offensive (hate) speech?

There is no question that hate speech can be harmful. One could plausibly extend John Stuart Mill's harm principle to emotional harm, and use that as a justification for the restraint of hate speech. Nor is there any defence of hate speech to be found in the marketplace of ideas theory: 'hatred', 'humiliation', 'insult', or 'offensiveness', to sample the descriptions of this category of speech, serve no truth-seeking purpose, and the state has ample reason to suppress such speech.

Hate speech presents a particular challenge to the rights based argument for free expression. A belief in the autonomy of individuals is central to this rights argument. Yet hate speech is targeted directly at that autonomy—it is, at its most pure, an assault on the dignity of the

individual. Speech that offends on the grounds of race or religion—that is, unavoidable or deeply felt personal characteristics—could limit the offended individual's capacity to utilise their autonomy. Hate speech could prevent them from the intellectual growth valorised by Mill.

But to a large extent, the circumstances under which hate speech can limit another's moral autonomy are illusory. They describe only the most extreme theoretical cases—with speech so extreme and offence so great to pass a threshold where a group's capacity to act autonomously is undermined. There is a reason that Ron Merkel drew so heavily on Holocaust references in the Andrew Bolt case: he sought to convince the judge not just that his clients were offended by the columns, but that any reasonable person would believe they were hatefully, disastrously offensive.

The academic literature on hate speech is full of the most extreme examples of potentially harmful speech; for example, the speech made by neo-Nazis on obscure websites. Actual anti-vilification laws cast a much wider net. In the Bolt case, 'hatred' did not come into the question at all. The contest was over how humiliating or offensive the original columns were. The Switzer case did focus on hatred, but there was no need to demonstrate that Switzer or the *Australian Financial Review*, intended to or actually had stoked hatred. The most extreme examples of hatred are dredged up to support laws which set a low bar of offence. Bromberg made this clear—he saw the purpose of the Racial Discrimination Act as promoting social cohesion, not defending the moral autonomy of the individual.

The question is be not whether hate speech is bad, or whether people would rather not be offended, or humiliated, or ridiculed, or brought into contempt. Nor is the question whether such speech should be opposed. The issue is whether the state, through the legal system, should suppress that speech—whether the right to speech is less important than the right for some individuals not to be offended by the speech of others.

The legal theorist C. Edwin Baker distinguishes between two types of autonomy in the realm of freedom of speech. An individual is formally autonomous if the legal system recognises their liberty of conscience and expression. An individual is substantively autonomous if they have the capacity, intellectual or otherwise, to direct and control their own life.[54] At its hypothetical worst, hate speech could be a threat to the latter form of autonomy. But an attempt to promote substantive autonomy will intrude on formal autonomy. And a liberal democracy can justifiably favour the latter. After all, it is the ideal of formal autonomy—equal treatment by the law—that democratic legitimacy is founded upon. So is individual liberty. Without formal autonomy, substantive autonomy cannot exist. As Baker writes, 'Achievement of more substantive aims, such as helping people experience fulfillment and dignity, must occur with a legal structure that as a formal matter respects people's equality and autonomy.' An argument for freedom of speech based on equality of rights cannot prohibit hate speech, as offensive and undesirable that sort of speech may be.

This is not to approve of offensive or hateful speech. The right to freedom of speech does not preclude judgement. We tolerate bad speech—we do not condone it. Racist, sexist, homophobic speech in a free society may be protected from state sanction, but it is not protected from the speech of others. All speech is not the same; speech is not morally neutral. There is a widely held belief that the only way to demonstrate opposition to something which is seen as morally wrong is to have it prohibited by law. Yet society has many weapons to condemn morally wrong actions.

While offensive speech must be tolerated by the legal system, that imposes no obligation on free individuals to personally tolerate that speech. To the contrary—a robust and vibrant public sphere is needed to counter speech that the community finds abhorrent.

Yet, as the British philosopher Frank Furedi points out in his 2011 book *On Tolerance*, our contemporary understanding of 'toleration' has

changed in such a way that it threatens the robust public sphere needed to contest offensive speech.[55] Toleration, Furedi argues, is no longer about legal neutrality but about moral neutrality. In the twenty-first century, tolerance implies non-judgement, acceptance, and, especially, 'respect'. To be tolerant is to avoid all judgement. The contemporary reinterpretation of this crucial word is clearly spelled out in the United Nations Education, Scientific and Cultural Organization's Declaration on the Principles of Tolerance: 'tolerance is respect, acceptance and appreciation of the rich diversity of our world's cultures, our forms of expression and ways of being human'. The advocacy organisation Teaching Tolerance describes its mission as 'reducing prejudice'. In this view, difference should be valued as a virtue in and of itself.

This shift has taken tolerance away from a statement of fact—a description of a real political and legal framework that does not discriminate on the basis of conscience or opinion—to an ethical aspiration. Tolerance in the modern conception is about 'education'. A tolerant individual is one who suppresses or eliminates judgment about the views or values of another individual or culture. Any failure to suppress that judgement is assessed according to a new criteria—that of the offence felt by the person being judged.

The tolerance of the past was opposed to persecution. The tolerance of today is opposed to offence. Furedi sees this philosophical change as the origins of prohibitions on offensive speech—enforced in order to promote 'tolerance', but actually deeply intolerant of the diversity of opinions in a free society.

The classical advocates for freedom of speech did not expect that governments would try to restrict speech that simply offended others. But as we have seen, their predecessors in the medieval world did develop a doctrine that understood some views were deeply objectionable but must nevertheless be tolerated. The medieval thinkers on *tolerantia* engaged, with greater clarity and intellectual coherence, about what to

do with the marginal cases of freedom of conscience and opinion to a greater degree than our public intellectuals and human rights scholars do today. Something may go unpunished that is still nonetheless loathsome. A resilient model of tolerance does not mean respect, and it is not non-judgemental. It is a legal framework where levels of respect and judgement are uncontrolled and unmolested by state authorities. As Alexander Radishchev wrote in the eighteenth century, 'The most vigilant police cannot check worthless ideas as well as a disgusted public can'.[56]

By seeking to go the other way and regulating offence and humiliation through the state, opponents of freedom of speech have created a vast legal complex where political controversy and debate is mediated by the courts, not by society. And it is one which has been used not only in Australia but throughout the world to stifle free, legitimate, and often necessary free discussion.

We have focused on the Switzer and Bolt cases in part because they demonstrate how anti-vilification laws are used for political purposes—in the former, to punish critics of a political entity, in the latter, to punish a journalist for his controversial views.

Politicisation is not just an unfortunate consequence of anti-speech laws, but an essential part of them. The Soviets wanted international law to bless anti-hatred laws so that it could use those laws for political ends against its own citizens. When the Racial Discrimination Act was introduced in Australia, it was immediately used for political purposes. In 1977, the leader of the Country Party, Ian Sinclair, described a number of union officials as 'Pommie born-shop stewards', and that were bringing the 'British disease' of weak, unionised industries to Australia.[57] The response of the unions was to register complaints under the Racial Discrimination Act—an attempt not to rebut Sinclair's claims, but to attack him through the courts.

The journalist Mark Steyn fell into such a trap when he wrote articles criticising Islam in a Canadian magazine *Maclean's* in 2007—the

Canadian Islamic Congress filed a human rights complaint against the magazine in order to expose what a spokesman described as Steyn's 'falsehoods, and misrepresentation and stereotyping of Muslims'. The complaint was dismissed, but not after substantial cost to the magazine. One academic supporter of the legal action claimed that the case would show 'there are other aspects of Islam that need to be explored' in the Canadian media: a revealing statement that demonstrates the political purposes of the human rights complaints.[58]

Not all hate speech prosecutions are politically motivated. Yet even those that are not offer little credit to such laws. One notable example was the 16-year Aboriginal girl who was prosecuted in Western Australia for calling a Caucasian woman a 'white slut' in 2006. The Kalgoorlie Children's Court dismissed the racial vilification charges against her. But the police prosecutors maintained that a 'victim' of racial abuse does not even have to hear the offending speech, let alone be offended by it, for it to be considered hate speech.[59]

Quality and Fairness

In 1807, an eighteen year old Virginian named John Norvell wrote to President Thomas Jefferson for some advice about how to edit a newspaper. More than many others, during the American Revolution Jefferson had placed liberty of the press as central to his philosophy of government, going so far as saying: 'Were it left to me to decide whether we should have a government without newspapers, or newspapers without a government, I should not hesitate a moment to prefer the latter.'[60]

So when Norvell penned his letter asking Jefferson's 'opinion of the manner in which a newspaper, to be most extensively beneficial, should be conducted, as I expect to become the publisher of one for a few years', he was probably looking for something more optimistic than he received. 'I should answer, "by restraining it to true facts & sound principles only",' wrote the president. 'Yet I fear such a paper would find

few subscribers.' Jefferson was deeply unimpressed by the newspapers of his day. 'Nothing can now be believed which is seen in a newspaper. Truth itself becomes suspicious by being put into that polluted vehicle.' He informed Norvell that newspapers lie so often they have become worthless, continuing: 'I will add, that the man who never looks into a newspaper is better informed than he who reads them; inasmuch as he who knows nothing is nearer to truth than he whose mind is filled with falsehoods & errors.' An honest editor 'would have to set his face against the demoralising practice of feeding the public mind habitually on slander, & the depravity of taste which this nauseous aliment induces.' Jefferson wrote 'It is a melancholy truth, that a suppression of the press could not more compleatly deprive the nation of its benefits, than is done by its abandoned prostitution to falsehood'.[61]

Norvell was not dissuaded—he founded and edited a succession of newspapers until he entered the Senate in the 1830s.

But Jefferson's attitude has been widely held virtually since the dawn of printing. Politicians always feel that they get a hard time from the press, and that journalists are more interested in scandal than what they feel is important. Theodore Roosevelt coined the term 'muckraker' in a speech almost one century after Jefferson's letter. Roosevelt complained that while it was important for journalists to expose 'what is vile and debasing', they must also see the 'beautiful things above and roundabout them'. The journalist who 'never does anything else, who never thinks or speaks or writes, save of his feats with the muck-rake, speedily becomes, not a help to society, not an incitement to good, but one of the most potent forces for evil.'[62]

Politicians have long complained about the media's relentless criticism. They've complained about the power of newspaper editors and press owners. And perhaps understandably: Lord Beaverbrook, one of England's biggest press barons of the 20th century, claimed that he ran one of his papers, the *Daily Express*, 'merely for the purposes of making

propaganda and with no other motive'.[63] More often than not however, these complaints are driven by political considerations, rather than aesthetic critiques of the craft of journalism. The nakedly political attack on News Limited in Australia in 2011 was one such example of this: a government and minor party angry at the criticism they were receiving in the media took the opportunity of a foreign scandal to investigate media 'quality'.

Such a politically-inspired government inquiry is not new. The first Royal Commission into the Press in the United Kingdom was prompted by the fact that while Labour had won the 1945 election in a landslide, most of the county's newspapers had backed the Tories.[64] Yet while most canonical histories of journalism and the press earnestly record the results of that Royal Commission (which recommended the formation of a General Council of the Press and the professionalisation of journalism) they all but ignore the political impetus behind the commission—which was, essentially, an attack by a political party dissatisfied with the support it was receiving in the media.[65] (Similarly, while it is often mentioned that the Royal Commission was concerned with issues of ownership concentration, rarely is it pointed out that the newspaper owners were critics of the Labour government.)

Complaints about the quality of journalism itself are widespread, no more so than from within journalism. In 1958, Hunter S. Thompson thought it 'a damned shame that a field as potentially dynamic and vital as journalism should be overrun with dullards, bums, and hacks, hag-ridden with myopia, apathy, and complacence, and generally stuck in a bog of stagnant mediocrity.'[66] Half a century later, this view is also widely held.

Media criticism has never been more prominent than it is today. As it should be—journalism is a product sold to consumers. Robust discussion about the quality of that product helps the media supply what consumers demand. The problem for freedom of speech arises when

governments use that criticism to change the regulatory frameworks governing the media, as they did with the 1949 Commission into the Press in the United Kingdom, as they sought to do with the 2011 Independent Media Inquiry in Australia, and as they have done with regulations which purport to enforce 'balance' on broadcast journalism.

After centuries of battle for freedom of speech against autocratic and illiberal governments, one would have thought that there would be widespread hostility to the idea that the government should regulate the press. Yet that is exactly the circumstances that radio and television broadcasters find themselves today.

Broadcasting and Freedom of Speech

If, as many have believed since Milton, freedom of speech is a mechanism to seek truth through the free exchange of ideas, what happens if some ideas are more prominent than others? There could conceivably be a market failure in the market for ideas.

Accordingly, governments have taken the potential failure of free debate as reason for regulatory intervention in the media. The long battle of freedom of the press has kept newspapers relatively immune from such intervention. Governments have not been so shy regulating broadcasting. There are extensive limitations on what can be broadcast, and the time and circumstances in which certain things can be broadcast. In Australia, there are minimum requirements on the content that must be broadcast—for example, the Australian Content Standard requires that 55 per cent of programming shown between 6am and midnight must be Australian. There are also broadcasting-specific indecency rules.

Yet while the difference between freedom of the newspaper press and the lack of freedom in broadcasting is easy to explain, it is very hard to defend.

Certainly, governments have come up with reasons: Robert Menzies believed that television was 'the most intimate form of propaganda

known to modern science'. A committee into broadcasting in the United Kingdom in 1935 claimed that broadcasters 'could to some extent make or mar the reputations of politicians, and by a judicial selection of news items and the method of their presentation they could influence the whole political thought of the country.'[67] The US Supreme Court believes that broadcasting is more 'pervasive' than any other medium: 'Broadcasts extend into the privacy of the home and it is impossible completely to avoid those that are patently offensive. Broadcasting, moreover, is uniquely accessible to children.' Broadcast media is, according to the Supreme Court, an 'intruder' who 'confronts the citizen, not only in public, but also in the privacy of the home'.[68] As a consequence, the court decided that broadcast media was not as deserving of freedom of speech protection as print.

This view is highly questionable. Owning and switching on a television or radio is a choice. They can be easily protected from children by locked doors, hidden remotes, or (in the modern era) digital passwords. Offensive broadcasts can be turned off as easily as offensive magazines can be returned to the newsstand. The pervasiveness doctrine seems to assume that if a service is easy to access, consumers are rendered helpless. As one commentator has argued, 'At its root, the pervasiveness doctrine relies on a stunted view of individual responsibility.'[69] This philosophy of media regulation takes consumers to be passive and gullible—even sees them as unwitting victims of a manipulative broadcast media. One exponent of this view wrote in the late 1990s that 'the electronic media pervade our daily being … The millions of images that float through the public mind help determine the very nature of national allegiances, attitudes towards place, family, government, and state.'[70]

Ultimately, what underlies the pervasiveness doctrine is a highly patronising view about the suggestibility of the population.

It's a view with a long history. Many nineteenth century governments continued to censor caricatures long after they had dispensed with

prepublication censorship of the printed word; caricatures were assumed to speak to the masses more viscerally than writing. France abandoned press censorship in 1822, but continued censoring caricature for another sixty years. The French Minister for Justice in 1835 claimed that while words spoke to the 'mind', caricatures spoke to the 'eyes' and were therefore more likely to convert opinions into actions.[71] A Prussian minister in the nineteenth century claimed that caricatures and drawings were particularly dangerous because the 'uneducated class do not pay much attention to the printed words', a view shared by a French contemporary who told his subordinates that 'the worst page of a bad book requires time to read and a certain degree of intelligence to understand, while a drawing offers a sort of personification of thought, it puts it in relief, it communicates it with movement and life, in a translation which everyone can understand.'[72]

It was not only drawings that were seen as particularly dangerous, but the theatre as well. One Viennese actor said in the 1820s that 'the inspiration of the spoken word, heard by many thousands, strikes more deeply than any cold political writings read by a few.'[73] (We can date this attitude even earlier if we choose. In the sixteenth and seventeenth century, it was printing that was seen as dangerously seductive to the lower classes. 'Little books, widely disseminated, are like bait for the masses', wrote a French chronicler in 1608.[74])

Censorship has always had a paternalistic element, reflecting the Enlightenment belief that intellectuals have the strength of mind to engage with challenging ideas while the masses do not. And it is easy to see the echo of these sentiments in the Supreme Court's pervasiveness doctrine, and, for that matter, in any argument that broadcast speech is not as worthy of protection as printed speech.

One further justification for heavy-handed regulation is that the electromagnetic spectrum is 'public property'. Governments impose licences on broadcasters—and those licences come with conditions, in-

variably that they must broadcast in the 'public interest'. Regulators claim spectrum is limited; there can only be so many broadcast licences. It's impressively circular reasoning. It is true that the number of broadcast licences is limited. But in practice those limits are imposed, not by the laws of physics, but by governments who have sought to protect existing licencees from competition.

Furthermore, the idea that the government needs to regulate broadcasters because there are so few of them makes little sense when we consider that, in every major city, radio and television broadcasters are far more numerous than newspapers. If a monopoly over opinion was really the concern, then a public interest requirement would be imposed on newspapers, not broadcasters.

Nevertheless, even if the limited spectrum were sufficient justification for regulation, advances in broadcasting technology and the unlimited capacity of internet broadcasting make the spectrum argument anachronistic.

More centrally to the study of freedom of speech, there is no good reason that speech which is broadcast is any less deserving of protection than speech which is printed. The degree to which speech is protected must not dependent on the medium by which that speech is expressed.

The doctrine of pervasiveness and claims about limited spectrum have been used to justify substantial intrusions into broadcast speech—intrusions which would be recognised as extreme and paternalistic if they were imposed on the print media. A 1948 addition to the Broadcasting Act in Australia went so far as banning 'any dramatisation of any political matter which is then current or was current any time during the last five preceding years.'[75] As one former member of the US government's Federal Radio Commission observed in 1935:

> Broadcasting was born in an age greatly resembling that which saw the birth of the press—an age of great social and economic changes and a marked tendency to concentrate power in the executive. The com-

> parison may be carried a step further. If, instead of the phrase 'public interest, convenience or necessity'; we should insert in the Radio Act the meanings which the Commission has actually given the phrase, the resulting statute would bear a startling resemblance to the notorious decrees and ordinances of the Star Chamber in the days of the Tudors and the Stuarts, 'regulating the manner of printing, the number of presses throughout the kingdom, and prohibiting all printing against the force and meaning of any of the statutes and laws of the realm' and to the ill-fated Licensing Acts of Parliament. The reader would then realize better than from any effort of mine that, with the present governmental power to regulate speech by radio, the clock of liberty has been set back three hundred years.[76]

The restraint on freedom of expression represented by broadcasting regulations is significant, and rarely recognised. The public interest requirement gives government substantial power over broadcasters. Licences can be pulled or the fees for licences can be raised. Early American broadcast regulators used their licence powers to silence socialist critics of the Republican administration, and during the New Deal, applied the same pressure to conservative critics of the Roosevelt administration.[77]

In 1949, the United States Federal Communications Commission decided it was a 'paramount right of the public in a free society … to have presented to it … [the] different attitudes and viewpoints concerning these vital and often controversial issues which are held by various groups which make up the community'.[78]

Thus was borne the Fairness Doctrine, which required radio and television broadcasters 'to provide coverage of vitally important controversial issues of interest to the community [and] a reasonable opportunity for the presentation of contrasting viewpoints on such issues.' If one viewpoint was presented on, for example, the socialist form of government, then the competing viewpoint also had to be aired. Debate over government policy was subject to the requirement of balance. The FCC even ruled that ques-

tions of nutrition fell within the confines of the Fairness Doctrine.[79]

The Fairness Doctrine greatly enlarged the potential for political mischief over broadcasting. During the Kennedy Administration, the Democratic Party used the Fairness Doctrine against conservative broadcasters, as one strategist recalled:

> Our massive strategy was to use the Fairness Doctrine to challenge and harass right-wing broadcasters and hope that the challenges would be so costly to them that they would be inhibited and decide it was too expensive to continue.[80]

The Democrats sought to silence the 'ultra-right-wing preachers who were saying vicious things about Kennedy and Johnson.' The Nixon Administration did the same thing to its opponents. The Fairness Doctrine was repealed by the FCC in 1987. When Congress tried to reinstate the policy that year, Ronald Reagan vetoed it, arguing that it was 'antagonistic to the freedom of expression guaranteed by the First Amendment.'[81]

The Fairness Doctrine had a pernicious effect. It abridged the right of broadcasters to choose the content of their speech. Having the freedom to speak means nothing if that freedom is contingent on speech being balanced or 'fair'. Reagan was absolutely correct to say that the Fairness Doctrine breached free speech principles.

But the Fairness Doctrine had unwelcome practical consequences as well. The requirement to be balanced had a 'chilling effect' on what issues were raised and the content of broadcasting. It was easier to avoid discussing public policy questions than risk being pulled up by activists and the FCC for a lack of balance. Once the Fairness Doctrine was abolished in 1987, there was a sharp increase in the number of informational and political programming broadcast in the United States. There is good empirical evidence to suggest that balance requirements restrain speech and harm public debate.[82]

Broadcasting in Australia

In Australia, the power the Commonwealth held over licences was also repeatedly used to manipulate the broadcast press.

One pre-war episode illustrates just how naked this manipulation of the press could be. In 1938, the postmaster-general withdrew the broadcasting licence of a Sydney radio station in retaliation for its political commentary. The station in question, 2KY, was controlled by the New South Wales labour movement. 2KY's hosts had been viciously critical of the Lyons Government. Among other things, the postmaster-general was accused of wanting to 'thrust … all women back into the kitchen', and one broadcaster claimed that the minister for defence 'wanted to rule Australia will a spittoon in one hand and a smoking gun in the other'.[83]

The postmaster-general was particularly upset that he had been described as a 'fascist' by the station. So without warning on 21 December 1938 he pulled the plug on 2KY. Reasonably, one union official responded that shutting down a radio station 'was a characteristically fascist action'.[84]

There was an uproar. Unions threatened to strike. 2KY was restored four days later, but the government had insisted on an apology before they would allow the station to broadcast again. In a joint statement with the postmaster-general, the union agreed that:

> the Australian people are the sole owners of each broadcasting channel … that the radio should be used to promote peace, order, and good Government and international goodwill; that no station should be used to broadcast false statements in respect of persons, events, organisations, or people, and that a station should not be used to promote civil discord or international ill-will.[85]

This episode was shameless, but it is not an isolated example of the Commonwealth government using its broadcasting power to punish

criticism. In 1941, the government also pulled the licence of a number of radio stations operated by Jehovah's Witnesses for 'subversive' commentary. The postmaster-general instructed stations to avoid broadcasting opinions that could offend people whose beliefs 'may not be in harmony with those of the speaker'.[86]

Licensing was not taken out of ministers' hands until 1977, when it was delegated to an independent regulatory agency—a move that was supposed to take the politics out of licensing decisions.

The regulatory framework that governs broadcasting in the twenty-first century is the 1992 Broadcasting Services Act. Commercial broadcasters are required to comply with codes of practice which they develop in consultation with the broadcasting regulator—since 2005, the Australian Communications and Media Authority (ACMA).

The voluntariness of these codes is entirely fictional—they are a legislative requirement, their content is approved by the regulator, and they are legally enforceable. The Commercial Radio Code of Practice runs for 33 pages. The Commercial Television Code of Practice is twice that length. The codes impose substantial restrictions on what can be broadcast above and beyond what is legal to say in print. They place limits on what advertisements can be aired and at what time of the day. And they impose content obligations.

One of the more significant impositions of the commercial radio code of practice is similar to the American Fairness Doctrine. 'In the preparation and presentation of current affairs' broadcasters must ensure that 'reasonable efforts are made or reasonable opportunities are given to present significant viewpoints when dealing with controversial issues of public importance'.[87] The 'significant viewpoints' requirement offers political partisans and activists a weapon to attack their opponents through the regulatory system.

In a broadcast in February 2010, Sydney 2GB host Alan Jones editorialised on his breakfast radio program about the consequences of

native vegetation regulations. During this program he described the bureaucrats in charge of administering the regulations as 'scumbags that go around preying on productive people'. An anonymous individual reported him to the ACMA, arguing that Jones had not presented the alternative view. The ACMA ruled that Jones had, indeed, breached the Code of Practice, because his station had not made a 'reasonable effort' to 'present significant viewpoints' that Jones disagreed with.[88]

The relationship between native vegetation laws and property rights is a highly controversial area of public debate. But the Code of Practice did, in this case, little to help illuminate the issue. Instead, it gave some participants in that debate the opportunity to fight the issue not only in the public sphere but through the regulatory system; using the power of legal sanction to silence, or at least dissuade, a critic of native vegetation laws.

As important as native vegetation laws are, in 2011 there were few more significant public policy issues than climate change. Here, too, activists used the Code of Practice to challenging the right of broadcasters to speak freely. An episode of the ABC media criticism program *Media Watch* aired in March 2011 looked at what it described as 'a fascinating and rather disturbing phenomenon'—how radio broadcasters tackled climate change science.[89] The host, Jonathan Holmes, argued that stations such as 2GB, 2UE, Brisbane's 4BC and Perth's 6PR did not provide a 'modicum of balance' on climate change. In his view, these stations hired hosts who were climate sceptics, who went on to predominantly interview scientists who were climate sceptics.

As a media critic, Holmes is welcome to hold that viewpoint. But he went further, urging his viewers to complain to the ACMA, and have the regulator force radio stations to air the 'modicum of balance' which Holmes felt was absent. Two days later the left-wing activist group GetUp announced it was lodging a complaint with the ACMA, asking it to do exactly that. The GetUp spokesman stated that 'Alan Jones'

complete disregard for providing a balanced view of climate change on his show is unacceptable'.[90]

Like the Fairness Doctrine, the broadcasters' Codes of Practice, as administered by the ACMA, is being used as a weapon to attack political and ideological opponents. The codes are founded on the utilitarian belief that the government needs to 'manage' public debate—that government needs to ensure, by limiting the speech of broadcasters, that citizens are given all sides of any given issue.

Holmes has since protested that the radio broadcasting code is 'not-especially-exacting'.[91] This is beside the point. The 'significant viewpoints' requirement enables politically-driven attacks on the freedom of speech of participants in the public debate.

Print, Balance, and Bias

Western democracies impose far greater restrictions on broadcast speech than printed speech, even though there is no clear reason why different media should have different standards of freedom of expression. But the difference has had a perverse effect: inculcating a view among media academics and legislators that press freedom is predicated on the media being balanced, unbiased, and presenting alternative viewpoints in a non-judgemental manner. If, as they imply, the press is the 'Fourth Estate' of society whose purpose is to provide a check on government, then liberty of the press and the performance of that function are intertwined.

Certainly, classical thinkers linked good government with freedom of expression. And advocates of liberties of the press have deployed romantic, overblown language to deify newspapers and journalism. The *New York Times* publisher Arthur Hays Sulzberger claimed in 1947 that his newspaper's mission was 'sacred and special … the manner in which we perform our duties may well determine the destiny of the world.'[92] The romance of the newspaper press is deeply ingrained in journalistic culture. Many journalists and media theorists believe deeply that the

media is not primarily a commercial endeavour, but a 'public service'.

And in the last decade, many of those theorists have started to rest their support for freedom of the press on this 'public service' idea of journalism. This theory categorises high-brow, investigative journalism as virtuous, and the tabloid 'gutter press', obsessed with celebrities and scandal, as less virtuous. This is, in many ways, similar to the Enlightenment distinction between the writings of the *philosophes* and the writings of the masses (the 'monkey-like mob', in Voltaire's words). For the Enlightenment thinkers, only the former was worthy of free speech protection—recall that Elie Luzac explicitly excluded 'novels, lampoons, and other productions of that sort'. And for many modern media theorists, only high-brow journalism ought to be aggressively defended against the state.

This distinction between good journalism and bad journalism came clearly to the fore in the wake of the *News of the World* phone hacking scandal in England in 2011. Of course, there is nothing in the philosophy of freedom of speech that suggests phone hacking or police corruption should be protected against state sanction. The parliamentary inquiry that followed the scandal followed the same pattern as previous parliamentary inquiries into the press: a mogul, in this case Rupert Murdoch, was interrogated, and each side of politics used the media circus to further their political goals.

There is no evidence of any similar hacking or police corruption in Australia. Yet the Gillard Government and the Greens have a deeply antagonistic relationship with Murdoch's News Limited newspapers. So the Australian result of the *News of the World* scandal was the announcement of an Independent Media Inquiry by the Commonwealth government in late 2011.

The media inquiry was a lightning rod for a huge range of complaints about the media, its owners, its 'quality', and its purpose. Greens and Labor senators said the inquiry would investigate anti-Greens and

anti-government 'bias' in News Limited newspapers. One government backbencher openly admitted the purpose of the inquiry when he said that 'The Murdoch press are an absolute disgrace, they are a threat to democracy in this country and we should absolutely be having a look at them'.[93] (That was in response to claims made in the *Daily Telegraph* about leadership speculation—claims which were revealed to be entirely true, when Kevin Rudd challenged Julia Gillard for the Labor leadership in February 2012.) Another claimed the inquiry was needed because of the 'vendettas of hate' being waged against the government.[94] Greens leader Bob Brown suggested that the big problem with the news media in Australia is that it 'is owned by private corporations, outside of the ABC and SBS'.[95]

Drawing explicitly on Justice Holmes' market justification for freedom of the press, the inquiry focused on the 'effectiveness' of the internal codes of ethics managed by the newspapers themselves, and the role of the Australian Press Council—a voluntary organisation established in the 1970s by the industry to ward off the potentially draconian media restrictions being proposed by the Whitlam government.

The inquiry's report, released in March 2012 and written by the inquiry chair, former Federal Court Judge Ray Finkelstein, was radical. A new body, the News Media Council, would be given power to enforce 'standards' across all the 'news media'—that is, any publication, broadcaster or website that gathered, analysed, and disseminated news and opinions about the news.[96] Finkelstein proposed that every website that received more than 15,000 'hits' per year (that is, just 41 hits per day) and every printed publication and newsletter that distributed as few as 3,000 copies would fall under the council's purview.

The council would then be empowered to enforce a code of standards governing 'quality', 'fairness' and 'balance'. Finkelstein claimed in the report that his proposal could not be considered 'censorship', but that is hard to defend, given the power of his proposed News Media

Council to force the deletion of material from websites which breached the code. Likewise, he wrote that his proposal would not be 'licensing', but given the universal applicability of the scheme to all publishers, the mandatory adherence to a code of practice, and the legal penalties for not complying with that code, the News Media Council would be virtually indistinguishable from a licensing scheme.[97]

That such a measure could be proposed in Australia in the twenty-first century is remarkable. The end of licensing in England in 1690s was a definitive moment in the history of freedom of speech. We can date the origin of free debate in the English self-image to the failure of parliament to renew the Licensing Act under William and Mary. Unfortunately, Finkelstein's report fails to adequately grasp the importance of these events, and the distinctions which arose as a result. (One particularly egregious example is his citation of William Blackstone's definition of English speech liberties, apparently not recognising the significance of Blackstone's support for postpublication censorship.)

The media inquiry was doubly concerning because of the clearly political impetus behind its formation. It was the direct result of a hostile relationship between one newspaper organisation and the government. If the government adopts its findings in the future, the consequences would be substantial regulatory restrictions on the opinions of all Australians.

Australia has had many inquiries into media regulation in the past few decades; some focused on issues like classification and convergence, others on foreign ownership limits and competition. Any change to the regulatory framework governing the media has to be carefully weighed against the consequences that may have for freedom of expression. But intent matters. If regulatory change, or threat of regulatory change, is made in retaliation for hostile political coverage, it is absolutely a threat to freedom of speech and the press.

Money and Politics

There is no explicit right to freedom of speech in the Australian Constitution. Nevertheless, in a series of cases in the early 1990s, the High Court of Australia found within the document an implied right to political communication. The court reasoned that Australia's system of representative government necessarily implied a right to freedom of expression: 'freedom of discussion of matters of public importance is essential to the maintenance of a free and democratic society'.[98]

But the shape of that right is unclear—since the first freedom of speech case in 1992, the High Court has been reluctant to define its scope too closely. What the right to free speech actually means in Australian constitutional law is an ongoing question.[99]

So far, however, the constitutional right to free speech is narrow. It is specific to political communication. It is derived from an observation about the centrality of free expression to the structure of a democratic system—that is, it is founded on Australia's institutional structure. This justification has shaped the boundaries of freedom of expression. Australian courts have found that the freedom of political communication does not protect the publication of a critique of capitalism that advocates theft, a 'grossly offensive' song about a member of parliament, and a protest about a state political issue. In each of these cases the courts have gone out of their way to exclude these expressions from the category of political communication; for instance, 'The article does not relate to the exercise by the people of a free and informed choice as electors,' or this 'could not possibly be said to infringe against the need for free and general discussion of public matters'.[100]

More importantly, the court does not conceive freedom of expression as a 'personal' right. It found the implied right to freedom of speech in a view about the Australian system of government, not in a view about the moral autonomy of free individuals.

Yet the court could have plausibly grounded freedom of speech in

individual rights if it had wanted to. As one legal scholar, Adrienne Stone, has pointed out, democracy itself is founded on a principle of autonomous individuality.[101] Individual self-government is the foundation of representative government. The High Court could, if it chose, make an extra step to justify freedom of speech: our representative democracy implies moral autonomy, and it is that moral autonomy which implies freedom of speech. But by skipping across autonomy, the court has been able to limit the free speech right to political communication alone.

The absence of moral autonomy in the court's reasoning is conspicuous. Benjamin Constant wrote that a government that does not permit free discussion undermines its own legitimacy and weakens its popular support. Without a basic assumption of individual rights, democratic legitimacy is shallow as well. Democracy is founded on the belief that free citizens have sufficient moral agency to choose their political representatives. The step the High Court skipped is a crucial one.

And as Stone points out, this lapse in reasoning has practical implications. If the court sees freedom of expression as part of the functioning of government, it implicitly approves the many ways that governments try to 'manage' political discussion. If, however, autonomy is recognised as central to both democracy and freedom of speech, it would have significant policy consequences.

Stone notes that 'the High Court has yet squarely to face the question of whether government may 'manage' the public debate, silencing some voices in the interests of rich public debate.'[102] The court seems to favour such management. One High Court in 2012 case reasoned that the freedom of political communication is a 'limitation on legislative power. It is not a personal right. It exists to protect the institutions of representative and responsible government created by the Constitution.'[103] In this sense Australia's right to political communication has a lot in common with the limited *parrhêsia* of ancient Athens, which based freedom of speech on the functioning of democratic government, rather than individual liberty.

This is the central issue with campaign finance law. Advocates of freedom of speech have long pointed out that the restrictions electoral law place on funding and participation in elections are essentially restrictions on public debate—an attempt to supervise the public discussion of political issues. This, indeed, is openly admitted by advocates of campaign finance restrictions. The former New South Wales Premier Kristina Keneally argued that the purpose of campaign finance reforms were to prevent a political arms race where 'those with the most money have the loudest voice and can simply drown out the voices of all others'.[104]

Political donations are a form of expression—as much a symbolic gesture of support as any written statement could be. One commentator has written in the American context that '[i]f spending money were not a form of speech, the First Amendment would become hollow for all but newspapers and other press outlets, since any effort to spread one's message, through advertising or pamphleteering, could be stripped of First Amendment protections simply by attacking the expenditure of money.'[105] A government cannot create financial barriers to the expressive element of speech and pretend that freedom of speech is unharmed. In a society which valued freedom of expression highly, donations would be protected as a necessary part of free expression.

Campaign finance restrictions are particularly intrusive on third parties, many of whom have to raise money to lift their voices above the fray. In New South Wales, the O'Farrell Government's 2012 campaign finance reforms placed significant limits on third party campaigners, limiting both their ability to fundraise and placing restraints on the content of their speech. Any third party involved in 'promoting or opposing, directly or indirectly, a party or the election of a candidate or candidates, or for the purpose of influencing, directly or indirectly, the voting at an election' can now only accept donations from individuals to a maximum of $5,000 per year.[106] Limits on the ability of small organisations to fundraise are a very real restraint on their ability to speak.

Political speech has been subject to a range of controls throughout Australian history. For a short period in 1984, political advertising was subject to a 'truth in advertising' law. This was withdrawn quickly, after it became widely recognised that such a law would tie political debate up in legal procedure and have little beneficial impact on the public debate.

Many speech-restricting regulations still exist. Any political advertisement, video, pamphlet or poster has to carry the name and address of the individual who 'authorised' it. The Australian Electoral Commission justifies these regulations by saying they ensure 'anonymity does not become a protective shield for irresponsible or defamatory statements'.[107]

Of course, the concept of 'irresponsible' political speech is subjective and meaningless, and given that anonymity is no protection for defamation action, it is not obvious why political speech should be singled out by electoral law.[108] The authorisation requirement is a clear example of the government trying to manage political debate. But there are other restrictions as well, including the 'blackout' period where political advertising is banned three days before an election is held.

It is worrying that the Australian government feels democracy will not function if political parties are allowed to express their views when an election is imminent. But it is more worrying that legislators believe those who they represent do not have the capacity to vote responsibly—that is, that voters are unable to listen to and sceptically filter the messages of political parties and other organisations. This is a more significant challenge to democratic legitimacy than is recognised. On the one hand, a functioning democracy requires an autonomous free citizenry. On the other hand, restrictions on political expression and campaign finance assume that citizens are so lacking in autonomy that they can be effortlessly manipulated by the speech of others.

Commercial Speech

Freedom of speech is a right held by individuals. It is held by protestors and media moguls alike—whether they publish a blog or the *Wall Street Journal*. But is it held by corporations? One common claim is that commercial speech does not deserve the same protection as political or personal speech because it is not made by individuals, but a corporate entity. This is a particularly sensitive question when we debate the rights of those companies that produce 'sin' goods. For instance, do tobacco, alcohol, and junk food manufacturers have a right to free speech? Do they therefore have a right to advertise their products unimpeded?

In Australia, the answer to that question has been, so far, overwhelmingly no. Using the justification of public health (a justification which is blessed by no lesser authority than international law) the government imposes significant restrictions on the advertising of products it considers to be unhealthy.

The most extreme case is tobacco, where these restrictions are substantial. In many Australian states, retailers are limited by law about how they can display products and even how they can display the price lists for those products. In 2011 the Commonwealth government legislated to ban corporate logos on cigarette packages, going so far as prescribing the colour those packages must be. Once more, the assumptions underpinning these regulations about the power of speech and imagery to effect behaviour are significant, and completely disproportionate.

Other restrictions are placed on commercial advertising through the broadcasters' codes of practice, which limit when advertisements can be aired. Some states ban the advertising of personal injury legal services under a belief that allowing such speech could spark a 'litigious culture'. The advertising of films above a certain classification is also restricted.

In the United States, the legal landscape is significantly different. Since the 1970s commercial speech has been seen as protected speech. The courts have struck down bans on alcohol advertising, prescription

drug advertising, and tobacco advertising. In 2011 a US federal judge ruled that regulations requiring graphic warnings on cigarette packets would be unconstitutional. This makes sense: the protection of freedom of speech is not contingent on the worthiness of the speech being protected, something which American jurisprudence has grown to recognise during the last century.

Nevertheless, there is a good word we can put in for advertising. Not only does commercial speech deserve freedom of speech protection, but it has positive benefits. As the Nobel laureate George Stigler pointed out, advertising is 'an immensely powerful instrument for the elimination of ignorance'. Commercial speech has educational effects about the existence and advantages of new products or services. In 1976, the US Supreme Court found that:

> So long as we preserve a predominantly free enterprise economy, the allocation of our resources in large measure will be made through numerous private economic decisions. It is a matter of public interest that those decisions, in the aggregate, be intelligent and well informed. To this end, the free flow of commercial information is indispensable.[109]

Advertising keeps prices low and enhances competitive pressure within and between markets. It subsidises 'public interest' speech by providing the dominant financial support for newspapers and nearly the sole financial support for the broadcast media. Where the early press had to be sponsored by wealthy individuals, governments, or political parties, advertising promotes press independence by diversifying its funding base.

Advertising even has beneficial cultural effects. Culture, particularly popular culture, is deeply embedded in commerce and industry. Advertising reflects the cultural norms of the contemporary world. It can be a leading indicator of cultural changes—the arrival of interracial couples in advertising in the United States indicated a shift in social

attitudes, just as increasing numbers of same-sex couples in advertising and popular culture does today.

Commercial speech, furthermore, can be aesthetically pleasing. One of the unintended consequences of the debate over the plain packaging of tobacco products has been to demonstrate how much effort firms go to making their products attractive and appealing.

Nevertheless, even if advertising was deliberately ugly, had no informational content, was culturally regressive, and was mean-spirited, that would have no effect on whether it deserved freedom of speech protection or not. When Benjamin Franklin wrote his 'Apology for Printers' in 1731, it was in defence of a decision to print an advertisement for voyages to Barbados.[110] There are good reasons to grant corporate speech the same protections as that speech made by individuals.

First, the distinction between corporate and individual speech is not particularly clear. A corporation is simply a group of people working towards the same goal. Each individual in a corporate entity fully retains their rights to speech. Those rights are not abrogated by the fact they are working with others. Corporate speech is simply the speech of a group of people.

Nor is the distinction between commercial speech and non-commercial speech particularly sharp. All commercial advertising is an attempt to convince the audience of the value of a product or service. All political debate is an attempt to convince the audience of the value of an idea, or the desirability of an action. A successful politician will 'sell' an idea to an audience. Furthermore, he or she is likely to benefit financially from that sale. A successful candidate who ran on a platform of more funding for public schools will receive not only the remuneration of public office but the financial support of teachers' unions. As one analyst has written, 'all speech comes inextricably intertwined with commercial and non-commercial elements that belie any effort to distinguish economically motivated or related speech from all other speech. Almost all persuasive

speech contains informational components that are related to economic matters.'[111]

Whether the speaker is trying to persuade a listener to vote or purchase shouldn't matter to the government—the same freedom of speech protections must apply.

Defamation

The theory of freedom of speech advanced here—based on individual rights and moral autonomy—suggests that if this liberty is to have boundaries, they should be few and clearly drawn. It does not, however, preclude any boundaries whatsoever.

We could draw the boundaries in a number of ways. Spinoza limited speech only when it became action. Mill used the harm principle to draw a line between arguing against something and inciting an angry mob to violence. Modern theorists have drawn on Mill's notions of harm to expand the potential restrictions almost indefinitely—by asserting that some speech can harm 'human dignity', modern speech law now restricts offence, hatred, humiliation, or speech that inspires severe ridicule. This is a relatively recent development, but it has had the effect of completely undermining the crucial distinction between words and action that has defined thinking over freedom of speech for nearly half a millennium.

But if we were able to return freedom of speech to its roots, and rebuild the distinction between words and actions, would there still be prohibited speech? The most obvious question here is defamation—not seditious libels of the sort that John Wilkes was accused, but private libels.

Early laws against defamation were highly specific. In ancient Athens individuals could bring a private indictment for slander if someone used prohibited words against them—'shield thrower' or 'patricide' being the most well-known insults.[112] Germanic law in the early medieval period prohibited the insults of 'wolf, 'hare', 'thief' or 'manslayer'. The ninth century English king Alfred the Great offered slanderers a choice: they

could lose their tongue, or they could lose their head.[113]

Pre-modern courts took defamation seriously. Defamation was a sin, so the ecclesiastical authorities took great interest in adjudication. The first English statute that mentions defamation dates from the thirteenth century. That statute divided the spiritual and secular jurisdictions according to whether there was money demanded as restitution. It protected the 'great men of the realm' from the 'devisers of tales'.[114]

So, like so many other restrictions on freedom of speech, defamation has always been used as a political weapon. In the vicious politics of early nineteenth century America, partisans were openly advocating using defamation as a weapon to silence or bankrupt opponents. William Coleman of the *New-York Evening Post* recommended Federalists file private defamation action against Republicans when they were criticised. This attack was doubly powerful because a bankrupt could quickly find themselves in debtors' prison. The early American journalist, William Duane, was the defendant in 60 or 70 private libel suits.[115]

The threat of debtor's prison no longer hangs over the heads of speakers. But even in 2012, the cost of defending a defamation lawsuit can be enormous—enough to silence someone's speech even before a court has made a judgment. As a consequence, 'strategic' defamation action is an increasingly common weapon used to intimidate or harass critics.

There is a marked gap between the people who have the resources to bring a defamation action, and those who are most likely to be most harmed by defamatory speech.

While wealthy individuals have the money to sue their critics, they also have the money to defend their reputations in the court of public opinion. Less wealthy individuals can do neither and are unlikely to have the resources to defend a case through to the verdict, regardless of the merits of their defence.

There is a large body of research demonstrating that defamation law can restrict public debate on issues of importance.[116] A study published

in 2005 found that the ease in which defamation suits can be brought in Australia, compared to the United States, had a chilling effect on speech. Looking at potentially defamatory statements about political and corporate issues, the study found that defamation laws significantly shaped media coverage.

Some researchers have estimated that Australians start one third more defamation actions than the entire American population.[117] Greater free speech protection against actions for defamation in the United States leads to much more public commentary than occurs in Australia.[118]

The internet raises a further issue for defamation: the most defamatory statements are often those made anonymously. When William Duane faced his 60 or 70 libel actions in the early 19th century, it had an effect on the trustworthiness of his speech. As one contemporary put it, 'Duane's own reputation is so bad that his slanders no longer injure his targets'.[119] The online world is evolving norms where readers discount speech depending on whether they trust the website on which the speech is made, or whether they trust the alias of the speaker. While defamation action has been used against speech online, it is used rarely and inconsistently.

The internet provides a window into a largely defamation-free world, where savvy readers use the reputation of the writer to judge the value of what is written.

It's easy to imagine hypothetical cases where the application of defamation law could redress a moral wrong. But that hypothetical has to be weighed against the widespread use of defamation action—and the threat of defamation action—as a political weapon, as harassment, and as an opportunistic money-grab by those who can afford to litigate.

Nevertheless, that a law is abused, wrongly drawn, or no longer effective does not demonstrate it is *in principle* a bad law.

Defamation law is supposed to balance two values: that of freedom of speech, and that of individual honour, reputation and dignity. The

first value has been well studied, if not universally agreed upon. The second value has been woefully understudied. Reputation 'is a mysterious thing', as one commentator puts it.[120] Reputation refers to the attitude that people in general have about another. The propagation of knowingly or maliciously false information is thought to harm that reputation in the aggregate, and thus qualify as harm.

This is reputation as property: false information damages reputation as one might damage property, and the owner of that reputation is able to seek restitution for that damage through the courts.[121] Of course, as early modern jurists realised, the damage to reputation would be even greater if the defamatory allegations were true. The modern defences of truth or fair comment are simply workarounds to avoid the extremely repressive effect that this principle would have on the free flow of information if consistently applied.

Of course, reputation cannot be property. One cannot claim property in the thoughts of another, let alone the aggregated thoughts of an entire society. The analogy between property and reputation is widely used but deeply incoherent.

If defamation law is intended to protect the reputation of an individual within a community, then our focus has to be on the community itself. So how does the community respond to defamatory statements?

The Australian test for defamation is unpretentious—speech is defamatory if it will damage someone's reputation in the eyes of 'ordinary reasonable people'. This seems simple but is rife with ambiguities. As James Mill wrote, 'no two men have the same associations with the same words.' The ordinary reasonable person is a legal construct. One scholar has found that the understanding of 'reasonable' held by judges and lawyers and the understanding of 'reasonable' held by a representative sample of the population are very different.[122]

Surveys consistently show that people assume others are more intolerant than they are. Australians are more tolerant, less easily manipulated

and more sceptical than defamation law allows. 'The paradox is that, in our collective imagination, the 'ordinary reasonable person' emerges as a censorious bigot; quick to condemn, slow to question, open to insinuation, closed to reason.'[123]

Furthermore, the test of whether speech is considered to be defamatory does not adequately take into account the opportunities individuals have to protect their reputations. The best defence against a bad reputation is, of course, actions that garner a good reputation. An active public sphere offers many opportunities to correct falsehoods.

Defamation law is one of the oldest restraints on freedom of speech, but one of the least well understood. It favours wealthy litigants who have the capacity to defend themselves in the public sphere. It is used to silence 'legitimate' speech and intimidate speakers, and does little to restrain malicious speech. It rests on a range of assumptions that individuals are incapable of defending and promoting their own reputations against adversity. It imagines public discourse to be static, rather than dynamic. It imagines listeners as gullible, rather than sceptical. (As William Duane found, reputation works in two directions.)

All these preconceptions and negative consequences fly in the face of the autonomous foundations of both individual liberty and representative democracy.

Individual Liberty and Freedom of Speech

Freedom of speech is an essential liberty. But how does it relate to other liberties?

Some conservatives and classical liberals have argued that the prominence we place on freedom of speech is unjustifiable. In one of his earlier essays, the British conservative philosopher Michael Oakeshott argued freedom of speech was not as important as the right to free association and the right to private property. Our 'extraordinary emphasis on freedom of speech', Oakeshott wrote, 'is the work of [a] small vocal section of society' for whom the emphasis on free speech 'represents a legitimate self-interest'.[1] Not everybody makes their living speaking, said Oakeshott. For the vast majority of humanity, the man whose house is repossessed suffers more than the man who cannot explicate his opinions unimpeded.

Oakeshott was not saying that freedom of speech has no value, but that it is less important than other liberties. It's an argument that has been made by many.

But it is a peculiar argument coming from him. Oakeshott is well-known for having described all human activity as a form of conversation. He places at the very centre of his philosophy the importance of human autonomy as a self-defining and self-recommending virtue—

for Oakeshott, a flourishing society is one in which individuals pursue excellence through morally autonomous action. When individuals act, they are communicating with other individuals in mutual pursuit of the good life. In the words of one commentator, Oakeshott proposes 'an expansively adventurous rather than a self-satisfied, hidebound kind of individualism.'[2]

That is our concern here as well. Freedom of speech is not a self-contained value which can be isolated and separated from the suite of human values. It is a reflection of a deeper value—individual moral autonomy and human liberty—which underpins any free society. As one US Supreme Court Justice wrote, freedom of speech is the 'matrix, the indispensable condition, of nearly every other form of freedom.'[3]

When we understand the value of freedom of speech in this light, it unveils the deep paternalism of those who believe that speech and the press should be limited. How else to describe claims that broadcast radio and television are too powerful and influential to be fully deserving of speech freedoms? How else to describe the arguments that people need to be protected from the offensive thoughts of others, or that consumers do not know when they are being given a sales pitch?

Oakeshott's account of individualism is grounded in its historical development; an analysis of when individual autonomy became a 'virtue in its own right'. He finds this in fifteenth and sixteenth century Europe, when the feudal system was in decline—that same period where the nineteenth century Swiss historian Jacob Burckhardt discovered the origins of individualism.

The history of freedom of speech suggests an even earlier origin of modern individualism. For more than one thousand years—between the conversion of Constantine and the consolidation of liberalism in the age of revolutions—the field on which individual liberty was advanced was religious toleration.

Freedom of speech and freedom of conscience are inseparable. Any

defensible foundation for freedom of speech has to be derived from this observation.

This observation underlines how substantively different the Athenian idea of freedom of speech is from the modern idea. *Parrhêsia* was not a right held by individuals, but an obligation all citizens had to the community. Rather than being frank, as the principles of *parrhêsia* demanded, Socrates was obscure. The philosopher was executed because he was seen to be acting contrary to the interests of Athens. In our modern worldview, Socrates is virtually the definition of a philosopher pursuing excellence through autonomy—which the longevity of his reputation attests to—but that was not something which Athenians valued highly.

Freedom of speech as an individual attribute, rather than as an attribute of citizenry, is detectable, in many ways, during the Roman Republic. But true spark of what we now recognise as free expression occured in the intolerant medieval world. In coming to terms with the morality of persecution, theologians and early liberals had to refine their views about individual conscience, and how those consciences related to the beliefs of a community. It is in the exploration of freedom of conscience that we find the seeds of freedom of speech.

Later justifications for freedom of expression have sought to substitute other values for autonomy. The utilitarian rationale—that speech is needed for truth-seeking—began with John Milton and found its full flowering in the 'free market of ideas' construct of Oliver Wendell Holmes. It is superficially appealing rationale, but one which implies hidden limits on free expression. Appeals to 'human dignity' in the form of laws against offensive and hateful speech are similarly limiting: by attempting to promote an ephemeral notion of liberty, they restrain a more substantive one.

Freedom of speech is the absence of coercion or restriction on expression by the state. This is a narrow definition but one with a deep historical and philosophical basis. It is the only coherent definition that

protects both desirable speech and unpopular speech. It is also a definition with broad practical application. It exposes the unjustifiable differences between the protection of printed speech and broadcast speech. It clarifies the very real freedom of speech issues raised by campaign finance restrictions and advertising bans. And it offers a perspective on offensive speech that grounds freedom of expression in the very human dignity advocates of anti-discrimination law seek to protect.

If freedom of speech is to be defended into the twenty-first century, it needs to be more than just a motherhood statement. We need to understand where it came from—its centrality to the history of Western Civilisation. And we need to understand what freedom of speech actually means—why it matters, and why it is still our most important human liberty.

Bibliography

Introduction

1. Cited in Arthur Aspinall, *Politics and the Press, c1780-1850*, Morrison & Gibb, London (1949).
2. Ray Finkelstein, *Report of the Independent Inquiry into Media and Media Regulation*, 28 February 2012.
3. Reporters without Borders, Press Freedom Index 2011-12, 25 January 2012.
4. Cited in Lee C. Bollinger, 'Free Speech and Intellectual Values' *The Yale Law Journal*, v92 n3 (1983).
5. Benedict Spinoza, *Theological-Political Treatise* (trans. R H M Elwes) Dover, New York (1955).
6. Benjamin Constant, *Principles of Politics Applicable to All Governments,* Liberty Fund, Indianapolis (2003).

The Ancient World

1. The distinctions are described at length in Kurt A Rafflaub, 'Aristocracy and freedom of speech in the Greco-Roman World', in Ineke Sluiter & Ralph M Rosen (eds), *Free Speech in Classical Antiquity*, Brill, Leiden (2004).
2. Orlando Patterson, *Freedom in the Making of Western Culture,* Basic Books, New York (1992).

3. Kurt A Rafflaub, 'Aristocracy and freedom of speech in the Greco-Roman World', in Ineke Sluiter & Ralph M Rosen (eds), *Free Speech in Classical Antiquity*, Brill, Leiden (2004).
4. Arlene W. Saxonhouse, *Free Speech and Democracy in Ancient Athens*, Cambridge University Press, Cambridge (2006), p89.
5. Ryan K Balot, 'Free Speech, Courage, and Democratic Deliberation' in Ineke Sluiter & Ralph M Rosen (eds), *Free Speech in Classical Antiquity*, Brill, Leiden (2004).
6. D.M. Carter, 'Citizen Attribute, Negative Right: A Conceptual Difference between Ancient and Modern Ideas of Freedom of Speech' in Ineke Sluiter & Ralph M Rosen (eds), *Free Speech in Classical Antiquity*, Brill, Leiden (2004).
7. Arlene W. Saxonhouse, *Free Speech and Democracy in Ancient Athens,* Cambridge University Press, Cambridge (2006), p130.
8. 'I.F. Stone Breaks the Socrates Story', *The New York Times Magazine,* April 8, 1979.
9. Diogenes Laertius, cited in Arlene W. Saxonhouse, *Free Speech and Democracy in Ancient Athens*, Cambridge University Press, Cambridge (2006), p100.
10. Thomas C. Brickhouse and Nicholas D. Smith, *Plato and The Trial of Socrates*, Routledge, New York (2004), p74.
11. Arlene W. Saxonhouse, *Free Speech and Democracy in Ancient Athens*, Cambridge University Press, Cambridge (2006), p103.
12. Paul Cartledge, *Ancient Greek Political Thought in Practice*, Cambridge University Press, Cambridge (2009).
13. Cited in 'General Introduction', Ineke Sluiter & Ralph M Rosen (eds), *Free Speech in Classical Antiquity*, Brill, Leiden (2004).
14. Arlene W. Saxonhouse, *Free Speech and Democracy in Ancient Athens*, Cambridge University Press, Cambridge (2006), p87.
15. Marlein van Raalte, 'Socratic *Parrhêsia* and its afterlife in Plato's Laws,' in Ineke Sluiter & Ralph M Rosen (eds), *Free Speech in Classical Antiquity*, Brill, Leiden (2004).
16. For a review of the relationship between deceit, democracy and rhetoric, see Jon Hesk, *Deception and Democracy in Classical Athens*, Cambridge University Press, Cambridge (2001).

17. D.M. Carter, 'Citizen Attribute, Negative Right: A Conceptual Difference between Ancient and Modern Ideas of Freedom of Speech' in Ineke Sluiter & Ralph M Rosen (eds), *Free Speech in Classical Antiquity*, Brill, Leiden (2004).
18. Robert W. Wallace, 'The Athenian Laws against Slander', in G Thür (ed) *Symposium* 1993
19. Henrik Mouritsen, *Plebs and Politics in the Late Roman Republic*, Cambridge University Press, Cambridge (2001) p9.
20. R. E. Smith , 'The Law of Libel at Rome', *The Classical Quarterly*, n3/4 1951.
21. P.A. Blunt, *The Fall of the Roman Republic and Related Essays,* Oxford University Press, Oxford (1988,) p317.
22. José Manuel Díaz de Valdés, 'Freedom of Speech in Rome', *Revista de Estudios Histórico-Jurídicos*, 2009.
23. R. E. Smith , 'The Law of Libel at Rome', *The Classical Quarterly*, n3/4 1951.
24. Ronald Syme, *The Roman Revolution*, Clarendon Press, Oxford (1939).
25. Tacitus, *Annals*.
26. See Thomas Nelson Winter, 'Catullus Purified: A Brief History of Carmen 16,' *Arethusa*, 1973.
27. P.A. Blunt, *The Fall of the Roman Republic and Related Essays*, Oxford University Press, Oxford (1988) p313.
28. Tacitus, *The Histories*, 1:1.
29. Caesar, *Gallic Wars.*
30. Stefan G Chrissanthos, 'Freedom of Speech and the Roman Republic Army' in Ineke Sluiter & Ralph M Rosen (eds), *Free Speech in Classical Antiquity,* Brill, Leiden (2004).
31. Frederick H. Cramer, 'Bookburning and Censorship in Ancient Rome: A Chapter from the History of Freedom of Speech', *Journal of the History of Ideas*, 1945.
32. Chaim Wirszubski, Libertas *as a Political Idea at Rome during the Late Republic and Early Principate*, Cambridge University Press, Cambridge (1950).
33. Mary R McHugh, 'Historiography and Freedom of Speech: The Case of Cremutius Cordus' in Ineke Sluiter & Ralph M Rosen (eds), *Free Speech in Classical Antiquity*, Brill, Leiden (2004).

34. Cited in Frederick H. Cramer, 'Bookburning and Censorship in Ancient Rome: A Chapter from the History of Freedom of Speech', *Journal of the History of Ideas*, 1945.
35. Frederick H. Cramer, 'Bookburning and Censorship in Ancient Rome: A Chapter from the History of Freedom of Speech' *Journal of the History of Ideas*, 1945.
36. Tacitus, *Annals* 4:34.
37. Quintillian, *Institutio Oratoria*, 9:2.

Christianity and Freedom of Conscience

1. Franciscus Junius is profiled in Martin van Gelderen, *The Political Thought of the Dutch Revolt, 1555-1590*, Cambridge University Press, Cambridge (2002) p83-84.
2. John Stuart Mill, *On Liberty,* Penguin, London (1995).
3. Elizabeth Eisenstein, *The Printing Revolution in Early Modern Europe*, Cambridge University Press, Cambridge (2005), p104.
4. Alfred Soman, 'Press, Pulpit, and Censorship in France before Richelieu', Proceedings of the American Philosophical Society, v120 n6 (1976).
5. Henry Phillips, *Church and culture in seventeenth-century France*, Cambridge University Press, Cambridge (1997) p34.
6. Benjamin Constant, *Principles of Politics Applicable to All Governments*, Liberty Fund, Indianapolis (2003).
7. Cited in Robert Justin Goldstein, 'Introduction', in Robert Justin Goldstein (ed) *The War for the Public Mind: Political Censorship in Nineteenth Century Europe*, Praeger, London (2000).
8. Quoted in Perez Zagorin, *How the Idea of Religious Toleration Came to the West*, Princeton University Press, Princeton (2003).
9. Jorg Rupke (ed.), *A Companion to Roman Religion*, Blackwell, Oxford (2007) p64.
10. Dorothea Baudy (trans. Jutta Raithel), 'Prohibitions of Religion in Antiquity: Setting the Course of Europe's Religious History' in Clifford Ando & Jorg Riipke (eds.) *Religion and Law in Classical and Christian Rome*, Franz Steiner Verlag, Stuttgart (2006), p107.
11. Acts 18:14-15.

12. Tacitus, *Annals* 15.44.3.
13. WHC Frend, 'Persecutions: genesis and legacy' in Margaret M. Mitchell and Frances M. Young (eds.) *The Cambridge History of Christianity: Volume 1 Origins to Constantine,* Cambridge University Press, Cambridge (2006).
14. Pliny, *Letters,* 10.96-97.
15. WHC Frend, 'Persecutions: genesis and legacy' in Margaret M. Mitchell and Frances M. Young (eds.) *The Cambridge History of Christianity: Volume 1 Origins to Constantine*, Cambridge University Press, Cambridge (2006).
16. G. E. M. de Ste. Croix, *Christian Persecution, Martyrdom, and Orthodoxy*, Oxford University Press, Cambridge (2006).
17. Joseph Streeter, 'Introduction: de Ste. Croix on Persecution' in G. E. M. de Ste. Croix, *Christian Persecution, Martyrdom, and Orthodoxy*, Oxford University Press, Cambridge (2006).
18. H. A. Drake, 'Lambs into Lions: Explaining Early Christian Intolerance', *Past and Present*, November 1996.
19. H. A. Drake, *Constantine and the bishops: the politics of intolerance*, Johns Hopkins University Press, Baltimore (2000).
20. The Dutch tolerationist Dirck Coornhert dramatises this argument in his *Synod on the Freedom of Conscience*, Gerrit Voogt (trans.), Amsterdam University Press, Amsterdam (2008).
21. Clifford Ando, 'Pagan apologetics and Christian intolerance in the ages of Themistius and Augustine', *Journal of Early Christian Studies* v4n2, 1996.
22. Peter Heather and David Moncur (trans.) *Politics, Philosophy, and Empire in the Fourth Century: Select Orations of Themistius,* Liverpool University Press, Liverpool (2001).
23. Ibid., p170.
24. Ibid., p166.
25. Ibid., p167.
26. Ibid., p64.
27. Ibid., p168.
28. Libanius, *Oration* 30.
29. Symmachus, *Relation* III.
30. H.A. Drake, 'The church, society and political power', in Augustine Casiday & Frederick W. Norris (eds.) *The Cambridge History of*

Christianity: Volume 2, Constantine to c.600, Cambridge University Press, Cambridge (2007) p420.
31. Lacantius, *Divine Institutes,* 5:19.
32. Socrates, *The Ecclesiastical History*, VII 29.
33. The 'Edict of Milan' (313 AD), *The Internet Medieval Source Book.*
34. H.A. Drake, 'The church, society and political power', in Augustine Casiday & Frederick W. Norris (eds.) *The Cambridge History of Christianity: Volume 2, Constantine to c.600*, Cambridge University Press, Cambridge (2007) p421.
35. Augustine, Letter 93.
36. Perez Zagorin, *How the Idea of Religious Toleration Came to the West*, Princeton University Press, Princeton (2003), p27.
37. Augustine, Letter 34.
38. Augustine, Letter 191.
39. Augustine, Letter 93.
40. RI Moore, *The Formation of a Persecuting Society: Authority and Deviance in Western Europe, 950-1250*, Blackwell, Oxford (2007).
41. Cary J Nederman, *Worlds of Difference: European discourses of toleration, c.1100-c1550*, Penn State University Press, Pennsylvania (2000).
42. Ibid.
43. John of Salisbury, *Policraticus*, VII:25.
44. Ibid.
45. Ibid. VII:24.
46. Cary J Nederman, *Worlds of Difference: European discourses of toleration, c.1100-c1550*, Penn State University Press, Pennsylvania (2000)
47. John of Salisbury, Policraticus, II:22.
48. Cary J Nederman, *Worlds of Difference: European discourses of toleration, c.1100-c1550*, Penn State University Press, Pennsylvania (2000).
49. István Bejczy, '*Tolerantia*: A Medieval Concept', *Journal of the History of Ideas*, v58 n3, 1997.
50. Raymond of Pe, *Summa de iure canonico*.
51. István Bejczy, 'Tolerantia: A Medieval Concept', *Journal of the History of Ideas*, v58 n3, 1997.
52. Albinia De la Mare, 'Vespasiano da Bisticci Historian and Bookseller,' (Ph.D. diss., London University, 1965), 207. Cited in Elizabeth L. Eisenstein, *The Printing Revolution in Early Modern Europe*, Cambridge

University Press, Cambridge (2005).
53. Lucien Febvre & Henri-Jean Martin, *The Coming of the Book*, Verso, London (1976) p219.
54. Elizabeth L Eisenstein, *The Printing Press as an Agent of Change*, Cambridge University Press, Cambridge (1979).
55. The story is told at length in John Monfasani, 'The First Call for French Censorship: Niccolò Perotti, Giovanni Andrea Bussi, Antonio Moreto, and the Editing of Pliny's Natural History', *Renaissance Quarterly,* v41 n1 (1988) but also see Martin Davies, 'Making sense of Pliny in the Quattrocento' *Renaissance Studies* v9 n2 (1995).
56. Lucien Febvre & Henri-Jean Martin, *The Coming of the Book*, Verso, London (1976), p244.
57. Fifth Lateran Council, 1515.
58. Lord Acton, *The History of Freedom and Other Essays*, Macmillan, London (1907).
59. John Foxe, *Actes and Monuments*, 8:35.
60. Perez Zagorin, *How the Idea of Religious Toleration Came to the West*, Princeton University Press, Princeton (2003).
61. Peter Bernholz, 'Totalitarianism', in Charles K Rowley & Friedrich Schneider (eds.) *The Encyclopedia of Public Choice*, Kluwer Academic Publishers, New York (2004).
62. This account of the life and works of Sebastian Castellio is drawn primarily from Perez Zagorin, *How the Idea of Religious Toleration Came to the West*, Princeton University Press, Princeton (2003).
63. Lord Acton, *The History of Freedom*, The Echo Library, Fairford (2010), p146.
64. Perez Zagorin, *How the Idea of Religious Toleration Came to the West*, Princeton University Press, Princeton (2003).

The Birth of Liberalism

1. Ronnie Po-Chia Hsia, 'Introduction', in Ronnie Po-Chia Hsia & Henk van Nierop (eds.), *Calvinism and Religious Toleration in the Dutch Golden Age*, Cambridge University Press, Cambridge (2002), p2.
2. John Dunn, *The History of Political Theory and Other Essays*, Cambridge University Press, Cambridge (1996) p100.

3. Martin van Gelderen, *The Political Thought of the Dutch Revolt, 1555-1590*, Cambridge University Press, Cambridge (2002).
4. Ibid.
5. Benjamin J. Kaplan '"Dutch" religious tolerance: celebration and revision' in Ronnie Po-Chia Hsia and Henk van Nierop (eds.) *Calvinism and Religious Toleration in the Dutch Golden Age*, Cambridge University Press, Cambridge (2002), p11.
6. Martin van Gelderen, *The Political Thought of the Dutch Revolt, 1555-1590*, Cambridge University Press, Cambridge (2002), p228.
7. Willem Frijhoff, 'Religious toleration in the United Provinces: from 'case' to 'model" in Ronnie Po-Chia Hsia & Henk van Nierop (eds.) *Calvinism and Religious Toleration in the Dutch Golden Age*, Cambridge University Press, Cambridge (2002), p31.
8. Ibid.
9. Martin van Gelderen, T*he Political Thought of the Dutch Revolt, 1555-1590,* Cambridge University Press, Cambridge (2002) p250.
10. Robert Harrison, 'The French Clandestine Press in Holland', *Library*, 1893.
11. Benedict Spinoza, *Theological-Political Treatise* (trans. R.H.M. Elwes) Dover, New York (1955).
12. Jonathan I Israel, 'Libertas Philosophandi in the Eighteenth Century: Radical Enlightenment versus Moderate Enlightenment (1750-1776)' in Elizabeth Powers (ed) *Freedom of Speech: The History of an Idea*, Bucknell University Press, Lewisberg (2011).
13. Benedict Spinoza, Letter 50 in Michael L Morgan (ed) & Samuel Shirley (trans.) *Spinoza: Complete Works*, Hackett Publishing, Indianapolis (2002).
14. James M. Buchanan and Gordon Tullock, *The Calculus of Consent: Logical Foundations of Constitutional Democracy*, University of Michigan Press (1967).
15. Edward I. Pitts, 'Spinoza on Freedom of Expression' *Journal of the History of Ideas*, v47 n1, 1986.
16. Ibid.
17. Jonathan Israel 'Religious toleration and radical philosophy in the later Dutch Golden Age (1668–1710)' in Ronnie Po-Chia Hsia & Henk van Nierop (eds.) *Calvinism and Religious Toleration in the Dutch Golden Age,* Cambridge University Press, Cambridge (2002), p148.

18. Perez Zagorin, *How the Idea of Religious Toleration Came to the West*, Princeton University Press, Princeton (2003).
19. Steven Nadler, 'Baruch Spinoza', in Steven Nadler (ed) *A Companion to Early Modern Philosophy*, Blackwell, Massachusetts (2002) p245.
20. Cyndia Clegg, *Press Censorship in Jacobean England*, Cambridge University Press, Cambridge (2004).
21. Ibid., p68.
22. Ibid., p224.
23. An Ordinance for the Regulating of Printing, 14 June 1643.
24. John Milton, *Areopagitica and Other Political Writings of John Milton*, Liberty Fund, Indianapolis (1999).
25. W. R. Matthews, cited in Leonard W. Levy, 'Freedom of Speech in Seventeenth-Century Thought', *The Antioch Review*, v57 n2 1999.
26. Eric Nelson, '"True Liberty": Isocrates and Milton's *Areopagitica*', *Milton Studies*, 2001.
27. Stanley Fish, 'Driving from the letter: Truth and Indeterminacy in Milton's Areopagitica' in Margaret W. Ferguson (ed) *Re-membering Milton: essays on the texts and traditions*, Methuen, New York (1987) p238.
28. Thomas Hobbes, *De Cive*, VI:11.
29. James Egan, 'Areopagitica and the Tolerationist Rhetorics of the 1640s' *Milton Studies*, 2007.
30. Quoted in Murray Rothbard, *Conceived in Liberty, Vol 1*, Ludwig von Mises Institute, Auburn (1979).
31. Roger Williams, *The Bloudy Tenent of Persecution* (1644).
32. Henry Robinson, *Liberty of Conscience* (1644).
33. John Lilburne, *England's Birthright Justified* (1645).
34. Quoted in Martin Conboy, *Journalism: A Critical History*, Sage, London (2004) p36.
35. John Saltmarsh, *The smoke in the temple (*1646).
36. Jason McElligott, *Royalism, Print, and Censorship in Revolutionary England*, Boydell Press, Woolbridge (2007) p193.
37. Wilbur Cortez, 'The Restoration Press', *Proceedings of the Massachusetts Historical Society*, Vol. 67, 1941.
38. John Locke, *A Letter Concerning Toleration*, Rivington, London (1824).

39. Jeremy Waldron, *God, Locke, and Equality: Christian Foundations of John Locke's Political Thought*, Cambridge University Press, Cambridge (2002).
40. Ibid., p227.
41. Annabel Patterson, *Early Modern Liberalism*, Cambridge University Press, Cambridge (1997).
42. Raymond Astbury, 'The Renewal of the Licensing Act in 1693 and its Lapse in 1695', *Library*, 1978.
43. 'Liberty of the Press' in Mark Goldie (ed.) *John Locke: Political Essays*, Cambridge University Press, Cambridge (1997), p329-330.
44. Lord Macaulay, *History of England from the Accession of James II*
45. Ernest Sirluck, '*Areopagitica* and a Forgotten Licensing Controversy', *The Review of English Studies*, Vol. 11, No. 43, 1960.
46. William Blackstone, *Commentaries on the Laws of England*, Book 4
47. Alexander Pope, 'An Essay on Criticism' (1711).
48. Lord Macaulay, *History of England from the Accession of James II*.

The Enlightenment

1. Jonathan Israel, *A Revolution of the Mind: Radical Enlightenment and the Intellectual Origins of Modern Democracy*, Princeton University Press (2010).
2. Voltaire, 'Jusqu'à quel point on diot tromper le people,' 1771, quoted in Jonathan Israel, '*Libertas Philosophandi* in the Eighteenth Century: Radical Enlightenment versus Moderate Enlightenment (1750-1776)', in Elizabeth Powers (ed) F*reedom of Speech: The History of an Idea*, Bucknell University Press, Lewisberg (2011).
3. Christopher Kelly, 'Rousseau and the Case for (and against) Censorship' *The Journal of Politics*, Vol. 59, No. 4, 1997.
4. Mogens Lærke, 'Introduction' in Mogens Lærke (ed) *The Use of Censorship in the Enlightenment*, Brill, Leiden (2009).
5. Voltaire, 'The ABC Dialogues: Ninth Conversation', in *Voltaire: Political Writings*, Cambridge University Press, Cambridge (1994).
6. Voltaire, 'Liberty of the Press', *Dictionnaire philosophique* (1764).
7. Voltaire, 'The ABC Dialogues: Tenth Conversation', in *Voltaire: Political Writings*, Cambridge University Press, Cambridge (1994).
8. Voltaire, 'The ABC Dialogues: Ninth Conversation', in *Voltaire: Political Writings*, Cambridge University Press, Cambridge (1994).

9. Jonathan Israel, '*Libertas Philosophandi* in the Eighteenth Century: Radical Enlightenment versus Moderate Enlightenment (1750-1776)', in Elizabeth Powers (ed) *Freedom of Speech: The History of an Idea,* Bucknell University Press, Lewisberg (2011).
10. Helena Rosenblatt, 'Rousseau, Constant, and the Emergence of the Modern Notion of Freedom of Speech' in Elizabeth Powers (ed) *Freedom of Speech: The History of an Idea*, Bucknell University Press, Lewisberg (2011).
11. Jonathan Israel, '*Libertas Philosophandi* in the Eighteenth Century: Radical Enlightenment versus Moderate Enlightenment (1750-1776)', in Elizabeth Powers (ed) *Freedom of Speech: The History of an Idea*, Bucknell University Press, Lewisberg (2011).
12. Quoted in Elizabeth L Eisenstein, *The Printing Revolution in Early Modern Europe*, Cambridge University Press, Cambridge (2005) p105.
13. Henry Phillips, *Church and culture in seventeenth-century France*, Cambridge University Press, Cambridge (1997).
14. Wyger R. E. Velema, 'Introduction to Elie Luzac's *An Essay on Freedom of Expression* (1749)' in John Christian Laursen and Johan van der Zande, *Early French and German Defense of Freedom of the Press*, Brill, Leiden (2003).
15. Ibid.
16. Ibid.
17. John Tindal, *Reasons Against Restraining the Press*, 1704, citied in John Keane, *The Media and Democracy,* Blackwell, Cambridge (1991) p14.
18. Douglas Smith, 'Alexander Radishchev's Journey from St. Petersburg to Moscow and the Limits of Freedom of Speech in the Reign of Catherine the Great' in Elizabeth Powers (ed) *Freedom of Speech: The History of an Idea*, Bucknell University Press, Lewisberg (2011).
19. Bayle, Political Writings, Sally L. Jenkinson (ed.) Cambridge University Press, Cambridge (2000).
20. John Christian Laursen, 'Cynicism as an Ideology behind Freedom of Expression in Denmark-Norway', in Elizabeth Powers (ed) *Freedom of Speech: The History of an Idea*, Bucknell University Press, Lewisberg (2011).
21. James Mackintosh, 'Sketch of the Administration and the fall of Struensee', *The Miscellaneous Works* (1871).
22. Jonathan Israel, '*Libertas Philosophandi* in the Eighteenth Century:

Radical Enlightenment versus Moderate Enlightenment (1750-1776)', in Elizabeth Powers (ed) *Freedom of Speech: The History of an Idea*, Bucknell University Press, Lewisberg (2011).

23. Jonathan Israel, *Democratic Enlightenment: Philosophy, Revolution, and Human Rights, 1750-1790*, Oxford University Press, Oxford (2011).
24. Jonathan Israel, '*Libertas Philosophandi* in the Eighteenth Century: Radical Enlightenment versus Moderate Enlightenment (1750-1776)', in Elizabeth Powers (ed) *Freedom of Speech: The History of an Idea*, Bucknell University Press, Lewisberg (2011).
25. David Hume, 'Of the Liberty of the Press', in *Essays, Moral, Political, and Literary,* Liberty Fund, Indianapolis (1987).
26. Jean Louis De Lolme *The Constitution of England* (1771).
27. Sir James Mackintosh, 'A Speech in Defence of Jean Peltier', *The Miscellaneous Works* (1871).
28. Cited in Jeremy Black, *The English Press in the Eighteenth Century,* Croom Helm, Kent (1987).
29. Jeremy Black, *The English Press in the Eighteenth Century*, Croom Helm, Kent (1987).
30. Brian Cowan, *The Social Life of Coffee: The Emergence of the British Coffeehouse*, Yale University Press, New Haven (2005).
31. Markman Ellis, *The Coffee House: A Cultural History*, Weidenfeld & Nicolson, London (2004).
32. Ibid.
33. Brian Cowan, *The Social Life of Coffee: The Emergence of the British Coffeehouse*, Yale University Press, New Haven (2005) p86.
34. Cited in Jeremy Black, *The English Press in the Eighteenth Century*, Taylor & Francis, Kent (1987).
35. Jean Louis De Lolme, *The Constitution of England* (1771).
36. See, generally, Philip Hamburger, 'The Development of the Law of Seditious Libel and the Control of the Press', *Stanford Law Review*, v37 n1, 1985.
37. Ibid.
38. P. B. J. Hyland, 'Liberty and Libel: Government and the Press during the Succession Crisis in Britain, 1712-1716', *The English Historical Review*, v101 n401 (1986).
39. Michael Harris, 'The structure, ownership, and control of the press' in

George Boyce, James Curran, and Pauline Wingate (eds.) *Newspaper History: From the Seventeenth Century to the Present Day*, Constable, London (1978).

40. Joseph M. Thomas , 'Swift and the Stamp Act of 1712', Proceedings of the Modern Language Association, v31, n2 (1916).
41. Joseph Addison, *The Spectator,* No. 445, July 31, 1712.
42. P. B. J. Hyland, 'Liberty and Libel: Government and the Press during the Succession Crisis in Britain, 1712-1716', *The English Historical Review*, v101 n401 (1986).
43. Arthur H Cash, *John Wilkes: Scandalous Father of Civil Liberty*, Yale University Press (2006) p73.
44. Ibid.
45. Quoted in Martin Conboy, *Journalism: A Critical History*, Sage, London (2004) p82.
46. Arthur H Cash, *John Wilkes: Scandalous Father of Civil Liberty,* Yale University Press (2006), p100.
47. Ibid., p241.
48. Kevin W. Saunders, *Degradation: What the History of Obscenity Tells Us about Hate Speech*, New York University Press, New York (2011), p55.
49. Pauline Maier, 'John Wilkes and American Disillusionment with Britain' *The William and Mary Quarterly,* v20 n3 (1963).
50. Ibid.
51. Ibid.
52. William Hone, *The Late John Wilkes' Catechism of a Ministerial Member* (1817).
53. Donald Thomas, 'Press Prosecutions of the Eighteenth and Nineteenth Centuries: The Evidence of King's Bench Indictments' *The Library*, v32 n4 (1977).
54. Cited in Ben Wilson, *The Laughter of Triumph: William Hone and the Fight for the Free Press*, Faber and Faber (2005) p205.
55. The account of the trial comes from Ben Wilson, *The Laughter of Triumph: William Hone and the Fight for the Free Press*, Faber and Faber (2005).
56. Donald Thomas, 'Press Prosecutions of the Eighteenth and Nineteenth Centuries: The Evidence of King's Bench Indictments' *The Library*, v32 n4 (1977).

Two Revolutions

1. Charles Walton, *Policing Public Opinion in the French Revolution: The Culture of Calumny and the Problem of Free Speech*, Oxford University Press, Oxford (2009) p26.
2. Cited in Helena Rosenblatt, 'Rousseau, Constant and the Emergence of the Modern Notion of Freedom of Speech', in Elizabeth Powers (ed) *Freedom of Speech: The History of an Idea*, Bucknell University Press, Lewisberg (2011).
3. Peter McPhee, *A Social History of France 1789–1914*, Taylor & Francis, London (1992) p26.
4. Robert Darnton & Daniel Roche (eds), *Revolution in print: the press in France, 1775-1800*, University of California Press, Berkeley (1989) p57.
5. Cited in Raymond Birn, 'Book Censorship in Eighteenth-Century France and Rousseau's Response' Oxford-Princeton Partnership Conference: The History of Censorship, 2003.
6. Charles Walton, *Policing Public Opinion in the French Revolution: The Culture of Calumny and the Problem of Free Speech*, Oxford University Press, Oxford (2009) p58.
7. Cited in Helena Rosenblatt, 'Rousseau, Constant and the Emergence of the Modern Notion of Freedom of Speech', in Elizabeth Powers (ed) *Freedom of Speech: The History of an Idea*, Bucknell University Press, Lewisberg (2011).
8. Charles Walton, *Policing Public Opinion in the French Revolution: The Culture of Calumny and the Problem of Free Speech*, Oxford University Press, Oxford (2009) .
9. Ibid., p88.
10. Jeremy D. Popkin, *Revolutionary news: the press in France, 1789-1799,* Duke University Press (1990) p169.
11. Alexis de Tocqueville, *The Old Regime and the Revolution*, University Of Chicago Press, Chicago (1998) p209-217.
12. Christopher Kelly, 'Rousseau and the Case for (and against) Censorship', *The Journal of Politics,* v59 n4 (1997).
13. Paul Johnson, *Intellectuals: From Marx and Tolstoy to Sartre and Chomsky*, HarperCollins, New York (2007).

14. Ibid.
15. Isaiah Berlin, *Freedom and its betrayal: six enemies of human liberty,* Princeton University Press, Princeton (2003).
16. Helena Rosenblatt, 'Rousseau, Constant and the Emergence of the Modern Notion of Freedom of Speech', in Elizabeth Powers (ed) *Freedom of Speech: The History of an Idea*, Bucknell University Press, Lewisberg (2011).
17. Cited in Dennis Wood, *Benjamin Constant: A Biography*, Routledge, New York (1993) p4.
18. Isaiah Berlin, Henry Hardy (ed.), *Liberty, Incorporating Four Essays on Liberty,* Oxford University Press, Oxford (2002) p209.
19. Benjamin Constant, *Principles of Politics Applicable to All Governments*, Liberty Fund, Indianapolis (2003).
20. Leonard W. Levy, *Legacy of Suppression: Freedom of Speech and Press in Early American History,* The Belknap Press of Harvard University Press, Cambridge (1960).
21. Leonard W. Levy, *Emergence of a Free Press*, Oxford University Press, New York (1985).
22. Phillip I. Blumberg, *Repressive Jurisprudence in the Early American Republic: The First Amendment and the Legacy of English Law*, Cambridge University Press, Cambridge (2010).
23. Ibid., p56.
24. 'No 15: Of Freedom of Speech: That the same is inseparable from publick Liberty', February 4, 1721 in *Cato's Letters,* vol. 1, Liberty Fund, Indianapolis (1995).
25. Jeffery Alan Smith, *Printers and Press Freedom: The Ideology of Early American Journalism*, Oxford University Press, Oxford (1990) p18-19
26. Benjamin Franklin, 'On Freedom of the Press' (1757).
27. Benjamin Franklin, 'Apology for Printers', *Pennsylvania Gazette*, 10 June 1731.
28. 'No. 100: Discourse upon Libels', October 27, 1722 in *Cato's Letters*, vol. 3, Liberty Fund, Indianapolis (1995).
29. Ibid.
30. 'No. 32: Reflections upon Libelling', June 10, 1721 in *Cato's Letters*, vol. 1, Liberty Fund, Indianapolis (1995).

31. Phillip I. Blumberg, *Repressive Jurisprudence in the Early American Republic: The First Amendment and the Legacy of English Law*, Cambridge University Press, Cambridge (2010) p18.
32. Ibid., p19.
33. Tunis Wortman, *A Treatise Concerning Political Enquiry and the Liberty of the Press* (1800).

The Utilitarian Turn

1. Gertrude Himmelfarb, 'Introduction' in John Stuart Mill, *On Liberty*, Penguin, London (1995).
2. K.C. O'Rourke, *John Stuart Mill and Freedom of Expression: The genesis of a theory*, Routledge, London (2001).
3. Ibid., p12-13.
4. Dec. 29, 1819, *The parliamentary debates from the year 1803 to the present time*, Volume 41, p1591.
5. K.C. O'Rourke, *John Stuart Mill and Freedom of Expression: The genesis of a theory,* Routledge, London (2001).
6. John Stuart Mill, *On Liberty* (1859).
7. Ibid.
8. Ibid.
9. Ibid.
10. Ibid.
11. Ibid.
12. John Stuart Mill, *Utilitarianism* (1863).
13. John Stuart Mill, 'Grote's History of Greece [II]', *The Collected Works of John Stuart Mill, Volume XI: Essays on Philosophy and the Classics*, University of Toronto Press, Toronto (1978).
14. Ibid.
15. Cited in K.C. O'Rourke, *John Stuart Mill and Freedom of Expression: The genesis of a theory*, Routledge, London (2001) .
16. G Edward White, 'The First Amendment Comes of Age: The Emergence of Free Speech in Twentieth-Century America,' *Michigan Law Review*, v95, n2 (1996).
17. Ernest Freebery, *Democracy's Prisoner: Eugene V. Debs, the Great War, and the Right to Dissent*, Harvard University Press, Harvard (2008), p46.
18. *Schenck v. United States*, 249 U.S. 47 (1919).

19. The classic libertarian argument is provided (humorously) in Walter Block, *Defending the Undefendable*, Ludwig von Mises Institute, Alabama (2008) p69-72.
20. Zechariah Chafee Jr. 'Freedom of Speech in War Time', *Harvard Law Review,* v32 n8 (1919).
21. Louis Menand, *The Metaphysical Club: A Story of Ideas in America*, Farrar, Straus, and Giroux, New York (2001).
22. Fred D. Ragan, 'Justice Oliver Wendell Holmes, Jr., Zechariah Chafee, Jr., and the Clear and Present Danger Test for Free Speech: The First Year, 1919', *The Journal of American History,* v58 n1 (1971).
23. Zechariah Chafee Jr. 'Freedom of Speech in War Time', *Harvard Law Review,* v32 n8 (1919).
24. Vincent Blasi, 'Holmes and the Marketplace of Ideas' *The Supreme Court Review*, v2004 (2004).
25. *Abrams v. United States*, 250 U.S. 616 (1919).
26. Ibid.
27. James P. Scanlan, 'John Stuart Mill in Russia: A Bibliography', *The Mill News Letter,* v4 n1 (1968).
28. Vincent Blasi, 'Holmes and the Marketplace of Ideas' *The Supreme Court Review*, v2004 (2004).
29. Ibid.
30. Louis Menand, *The Metaphysical Club: A Story of Ideas in America*, Farrar, Straus, and Giroux, New York (2001).
31. Vincent Blasi, 'Holmes and the Marketplace of Ideas' *The Supreme Court Review*, v2004 (2004).
32. Independent Inquiry into Media and Media Regulation, Issues Paper, 2011.
33. Jillian C. York and Trevor Timm, 'U.S. Government Threatens Free Speech With Calls for Twitter Censorship' *eff.org*, 6 January 2012.
34. *Herceg v Hustler Magazine, Inc,* 814 F.2d 1017 (1987).
35. Vincent Blasi, 'Holmes and the Marketplace of Ideas' *The Supreme Court Review*, v2004 (2004).
36. See, for instance, Stanley Ingber, 'The Marketplace of Ideas: A Legitimizing Myth', *Duke Law Journal*, v1984n1 (1984).
37. Ronald Coase, 'The Market for Goods and the Market for Ideas' *The American Economic Review*, v64 vn2 (1974).

38. Vincent Blasi, 'Holmes and the Marketplace of Ideas', *The Supreme Court Review*, v2004 (2004).
39. R. H. Coase, 'Advertising and Free Speech', *The Journal of Legal Studies,* v6 n1 (1977).
40. *Herceg v Hustler Magazine, Inc*, 814 F.2d 1017 (1987).
41. Gigliola Fragnito, *Church, censorship, and culture in early modern Italy*, Cambridge University Press, Cambridge (2001) p10 .
42. C. Edwin Baker, *Human Liberty and Freedom of Speech,* Oxford University Press, Oxford (1992).

Threats to Freedom of Speech

1. H. Montgomery Hyde, *A History of Pornography*, Farrar, Straus and Giroux, New York (1964).
2. Kevin W. Saunders, *Degradation: What the History of Obscenity Tells Us about Hate Speech*, New York University Press, New York (2011), p46.
3. Joan DeJean, 'The Politics of Pornography: L'Ecole des filles' in Lynn Hunt (ed.) *The Invention of Pornography: Obscenity and the Origins of Modernity, 1500-1800*, Zone Books, New York (1993).
4. Leo M. Alpert, 'Judicial Censorship of Obscene Literature', *Harvard Law Review*, v52 n1 (1938).
5. Wijnand W Mijnhardt, 'Politics and Pornography in the Seventeeth- and Eighteenth-Century Dutch Republic' in Lynn Hunt (ed.) *The Invention of Pornography: Obscenity and the Origins of Modernity, 1500-1800*, Zone Books, New York (1993).
6. Cited in Kevin W. Saunders, *Degradation: What the History of Obscenity Tells Us about Hate Speech*, New York University Press, New York (2011), p57.
7. 'Poisonous Literature', *Hobart Mercury*, 15 January 1910.
8. Peter Coleman, *Obscenity, Blasphemy, Sedition: The rise and fall of literary censorship in Australia*, Peter Coleman Duffy & Snellgrove, Sydney (2000), p9.
9. Janice Ruth Wood, *The Struggle for Free Speech in the United States, 1872–1915 Edward Bliss Foote, Edward Bond Foote, and Anti-Comstock Operations*, Routledge, New York (2008).
10. Edward William Cole, 'Recent Seizure of Alleged Indecent Literature', *The Argus*, 15 August 1889.

11. 'Novels and morals', *Warragul Guardian*, 17 September 1897.
12. 'Poisonous Literature', *Hobart Mercury*, 15 January 1910.
13. H. Montgomery Hyde, *A History of Pornography* (1964).
14. Jonathan Coopersmith, 'Pornography, Technology and Progress', *Icon*, 4 (1998).
15. 'Liberty of the Press' in Mark Goldie (ed.) *John Locke: Political Essays*, Cambridge University Press, Cambridge (1997), p329-330.
16. Classification Review Board, 'Human Centipede II (full sequence)—Review Board decision reasons', 28 November 2011.
17. Michael Meloni, 'Australia bans small breasts', *Somebody Think of the Children*, 27 January 2010.
18. 'iSelect ad banned for showing a man using a laptop in a Jacuzzi', *Mumbrella*, 11 January 2012.
19. Anthony Milton, 'Licensing, Censorship, and Religious Orthodoxy in Early Stuart England', *The Historical Journal*, v41 n3 (1998).
20. In 2008, Google indexed 1 trillion websites, a figure which has certainly multiplied since then.
21. YouTube, Statistics, http://www.youtube.com/t/press_statistics.
22. Alexander M. Bickel, *The Morality of Consent*, Yale University Press, Yale (1975), p73.
23. *Stanley v. Georgia*, 394 U.S. 557 (1969).
24. Leszek Kolakowski, *Main Currents of Marxism*, W. W. Norton, New York (2008), p99-100.
25. Hanno Hardt, 'Communication is Freedom: Karl Marx on Press Freedom and Censorship' *The Public*, v7 n4 (2000).
26. Herman Ermolaev, Censorship in Soviet Literature, 1917-1991, Rowman & Littlefield, Maryland (1997).
27. Cited in Robert Justin Goldstein, 'Introduction', in Robert Justin Goldstein (ed) *The War for the Public Mind: Political Censorship in Nineteenth Century Europe*, Praeger, London (2000).
28. Nadezhda Ryzhak, 'Censorship in the USSR and the Russian State Library', paper presented to IFLA/FAIFE Satellite meeting, 11 August 2005.
29. Constitution of the Union of Soviet Socialist Republics (1936).
30. J. M. Coetzee, *Giving offense: essays on censorship*, University of Chicago Press, Chicago (1996), p124.

31. Johannes Morsink, *The Universal Declaration of Human Rights: Origins, Drafting and Intent*, University of Pennsylvania Press, Pennsylvania (1999), p67-68.
32. Ibid., p69.
33. Jacob Mchangama, 'The Sordid Origin of Hate-Speech Laws', *Policy Review,* n170 (2011).
34. Jacob Mchangama, 'The Sordid Origin of Hate-Speech Laws', *Policy Review,* n170 (2011).
35. Johannes Morsink, *The Universal Declaration of Human Rights: Origins, Drafting and Intent,* University of Pennsylvania Press, Pennsylvania (1999), p71.
36. International Convention on the Elimination of All Forms of Racial Discrimination (1965).
37. Jacob Mchangama, 'The Sordid Origin of Hate-Speech Laws', *Policy Review*, n170 (2011).
38. Anne Applebaum, *Gulag, Doubleday*, New York (2003), p516
39. Jacob Mchangama, 'The Sordid Origin of Hate-Speech Laws', *Policy Review*, n170 (2011).
40. Al Grassby, 'A Multi-cultural Society for the Future', Canberra, Australian Government Publishing Service (1973).
41. Department of Immigration and Citizenship, 'Fact Sheet 6: Australia's Multicultural Policy' (2007).
42. Senator Greenwood, Racial Discrimination Bill 1975 Second Reading, Senate Hansard, 15 May 1975.
43. GregTaylor, 'Casting the net too widely: racial hatred on the internet', *Criminal Law Journal*, v25 (2001).
44. Tom Switzer, 'With friends like the Palestinians, who needs enemies?', *Australian Financial Review*, 23 December 1998.
45. *Kazak v John Fairfax Publications Limited* NSWADT 77 (2000).
46. *John Fairfax Publications Pty Ltd v Kazak* (EOD) NSWADTAP 35 (2002).
47. Andrew Bolt, 'It's so hip to be black', *Herald Sun*, 15 April 2009.
48. Karl Quinn, 'Aborigines sue Bolt over racial writings', *The Age*, 18 September 2010.
49. See, generally, Bernhard Fulda, *Press and Politics in the Weimar Republic,* Oxford University Press, Oxford (2008).

50. Aleardo Zanghellini, 'Jurisprudential Foundations for Anti-Vilification Laws: The Relevance of Speech Act and Foucauldian Theory', *Melbourne University Law Review*, v17 (2003).
51. *Eatock v Bolt* FCA 1103 (2011), 255.
52. Stephen Drill, 'Geoff Clark reveals why he went after Andrew Bolt' *Herald Sun*, 30 September 2011.
53. Louis Edward Ingelhart, *Press and Speech Freedoms in America, 1619-1995*, Greenwood Publishing Group, Westport (1997) p139.
54. C. Edwin Baker, 'Hate Speech', University of Pennsylvania Law School Paper 207 (2008).
55. Frank Furedi, *On Tolerance: A Defence of Moral Independence*, Continuum, London (2011).
56. Cited in Douglas Smith, 'Alexander Radishchev's Journey from St. Petersburg to Moscow and the Limits of Freedom of Speech in the Reign of Catherine the Great' in Elizabeth Powers (ed) *Freedom of Speech: The History of an Idea*, Bucknell University Press, Lewisberg (2011).
57. 'Sinclair faces censure on UK "disease"', *The Age,* 9 August 1977.
58. Joseph Brean, 'Maclean's wins third round of hate fight' *National Post*, 11 October 2008.
59. 'WA court dismisses charges over racial insult', *AM*, ABC Radio National, 15 September 2006.
60. Thomas Jefferson to Edward Carrington, 16 January 1787, in *Thomas Jefferson, The Works,* v5.
61. Thomas Jefferson to John Norvell, 14 June 1807, in *Thomas Jefferson, The Works*, v10.
62. Theodore Roosevelt, 'The Man with the Muck-Rake', 15 April, 1906. Cited in Tom Goldstein (ed), *Killing the messenger: 100 years of media criticism*, Columbia University Press, Columbia (2007).
63. James Curran and Jean Seaton, *Power Without Responsibility: Press, broadcasting and the internet in Britain*, Routledge, London (1997).
64. Jean Seaton, 'Rows and consequences', *British Journalism Review,* v14 n4, 2003, pages 26-31.
65. See, for instance, Martin Conboy, *Journalism: A Critical History*, Sage, London (2004).
66. Hunter S Thompson to Jack Scott, in *The Proud Highway: Saga of a Desperate Southern Gentleman, 1955-1967*, Ballantine Books, New York (1998).

67. The Australian Royal Commission on Television, 'Control of political broadcasting in English-speaking countries', *Journal of Broadcasting*, v2 n2 (1958).
68. *Federal Communications Commission v. Pacifica Foundation*, 438 U.S. 726 (1978).
69. Jonathan D Wallace, 'The Spectre of Pervasiveness: Pacifica, New Media, and Freedom of Speech', Cato Institute Briefing Papers n35 (1998).
70. Monroe Edwin Price, *Television, the public sphere and national identity*, Oxford University Press, Oxford (1995) p3.
71. Robert Justin Goldstein, 'Introduction', in Robert Justin Goldstein (ed) *The War for the Public Mind: Political Censorship in Nineteenth Century Europe*, Praeger, London (2000), p6.
72. Ibid.
73. Ibid.
74. Alfred Soman, 'Press, Pulpit, and Censorship in France before Richelieu, *Proceedings of the American Philosophical Society*, v120 n6 (1976).
75. David J Brennan, 'Printing in England and Broadcasting in Australia: A Comparative Study of Regulatory Impulse' *Adelaide Law Review*, v22 (2000).
76. Louis G. Caldwell, 'Freedom of Speech and Radio Broadcasting', *The Annals of the American Academy of Political and Social Science* v177 n1 (1935).
77. John Samples, 'Broadcast Localism and the Lessons of the Fairness Doctrine', Cato Institute Policy Analysis, n639 (2009) .
78. Thomas W. Hazlett & David W. Sosa, 'Was the Fairness Doctrine a "Chilling Effect"? Evidence from the Postderegulation Radio Market', *The Journal of Legal Studies*, v26 n1 (1997).
79. Kathleen Ann Ruane, 'Fairness Doctrine: History and Constitutional Issues', Congressional Research Service, 7-5700 (2009).
80. John Samples, 'Broadcast Localism and the Lessons of the Fairness Doctrine', Cato Institute Policy Analysis, n639 (2009).
81. Ibid.
82. Thomas W. Hazlett & David W. Sosa, 'Was the Fairness Doctrine a "Chilling Effect"? Evidence from the Postderegulation Radio Market', *The Journal of Legal Studies*, v26 n1 (1997).
83. '2KY off the air', *The West Australian*, 22 December 1938.

84. 'Unions want licence of 2KY restored', *The Examiner,* 23 December 1938.
85. 'Station 2KY Agrees to Apologise', *The Advertiser,* 24 December 1938.
86. Bridget Griffen-Foley, *Changing Stations: The Story of Australian Commercial Radio*, UNSW Press, Sydney (2009) p178.
87. Commercial Radio Australia, Codes of Practice and Guidelines, September 2011.
88. Australian Communications and Media Authority, Investigation Report No. 2540 (2011).
89. 'Balancing a hot debate', *Media Watch*, 21 March 2011.
90. 'GetUp to take on shock jock Jones' *AAP*, 23 March 2011.
91. Jonathan Holmes, 'True enemies of free speech' *The Drum*, 31 March 2011.
92. Louis Edward Ingelhart, *Press and Speech Freedoms in America, 1619-1995*, Greenwood Publishing Group, Westport (1997) p138.
93. 'Senator labels leadership line 'reprehensible" *The World Today*, ABC Radio, 3 November 2011.
94. Katharine Murphy, 'Pressure mounts for broad media inquiry', *The Age*, 27 July 2011.
95. Bob Brown, Submission to the Independent Media Inquiry, October 2011.
96. Ray Finkelstein, Report of the Independent Inquiry into the Media and Media Regulation, 28 February 2012.
97. For an extended critique of the Finkelstein report, see Chris Berg, 'The Finkelstein Report into Media and Media Regulation: Licensing, censorship and accountability', Institute of Public Affairs Briefing Paper, March 2012.
98. Australian Capital Television v Commonwealth 177 CLR 106 (1992).
99. George Williams ,'The Australian Constitution and the Aid/Watch Case', *Cosmopolitan Civil Societies*, v3n3s (2011).
100. Adrienne Stone, 'Rights, Personal Rights and freedoms: The Nature of the Freedom of Political Communication' University of Melbourne Law School Research Series (2001).
101. Ibid.
102. Ibid.
103. *Wotton v Queensland* HCA 2 (2012).

104. Cited in Andrew Norton, 'Democracy and Money: The Dangers of Campaign Finance Reform' Centre for Independent Studies Policy Monograph n119 (2011).
105. Bradley A Smith, *Unfree Speech: The Folly of Campaign Finance Reform*, Princeton University Press, Princeton (2001) p113.
106. See Chris Berg, 'O'Farrell's Campaign Finance Reforms Are Abominable', ABC *The Drum*, 22 February 2012.
107. Australian Electoral Commission, Electoral Backgrounder No. 15, 'Electoral Advertising', August 2004, p2.
108. See John Quiggin, Submission to Parliamentary Electoral Matters Committee Inquiry into the Conduct of the 2004 Federal Election and Matters related Thereto, March 2005.
109. *Virginia State Pharmacy Board v. Virginia Citizens Consumer Council*, 425 U.S. 748 (1976).
110. Benjamin Franklin, 'Apology for Printers', *Pennsylvania Gazette*, 10 June 1731.
111. Jonathan W. Emord, 'Contrived Distinctions: The Doctrine of Commercial Speech in First Amendment Jurisprudence', Cato Policy Analysis, n161 (1991).
112. Jeremy F. Hultin, *The Ethics of Obscene Speech in Early Christianity and Its Environment*, Brill, Leiden (2008) p25.
113. Van Vechten Veeder 'The History and Theory of the Law of Defamation. I' *Columbia Law Review*, v3 n8 (1903).
114. Ibid.
115. Phillip I. Blumberg, *Repressive Jurisprudence in the Early American Republic: The First Amendment and the Legacy of English Law* (2010), p213.
116. Andrew T. Kenyon, 'What Conversation? Free Speech and Defamation Law', *The Modern Law Review*, v73 n5 (2010).
117. Roy Baker, 'The 'Ordinary Reasonable Person' in Defamation Law', *Communications Law Bulletin*, v22 n4 2003.
118. Chris Dent and Andrew T Kenyon 'Defamation Law's Chilling Effect: A Comparative Content Analysis of Australian and US Newspapers', Melbourne University Legal Studies Research Paper n94 (2004).
119. Phillip I. Blumberg, *Repressive Jurisprudence in the Early American Republic: The First Amendment and the Legacy of English Law*, Cambridge University Press, Cambridge (2010) p213.

120. Robert C. Post, 'The Social Foundations of Defamation Law: Reputation and the Constitution', *California Law Review*, n74 (1986).
121. See, for instance, James Paterson, *The liberty of the press, speech, and public worship: being commentaries on the liberty of the subject and the laws of England* (1880); Robert C. Post, 'The Social Foundations of Defamation Law: Reputation and the Constitution', *California Law Review*, n74 (1986).
122. Roy Baker, *Ordinary Unreasonable People: Social Attitudes and Defamation Law*, Thesis, University of New South Wales (2010).
123. Ibid.

Individual Liberty and Freedom of Speech

1. Michael Oakeshott, 'The Political Economy of Freedom' in *Rationalism in Politics and Other Essays,* Liberty Fund, Indianapolis (1991).
2. Horst Mewes, 'Modern Individualism: Reflections on Oakeshott, Arendt, and Strauss' *Political Science Reviewer*, 21 (1992).
3. *Palko v Connecticut*, 302 US 319, 327 (1937).