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How National Security Limits Speech in Four Anglophone States

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Following the attack on the United States, a specific minority was held to be responsible. Guilty by association, all people within this minority, American citizens or not, were a target of contempt and scrutiny. The government responded by taking action of a drastic and constitutionally questionable nature. The fundamental freedoms enshrined in the United States Constitution were quietly ignored in favor of rooting out the perceived threat.

This is not the story of Communists in the late Nineteenth and early Twentieth Centuries, nor is it the story of the Japanese following the assault on Pearl Harbor, though making that mistake is forgivable. This is the story of Ali al-Timimi, an American-born citizen.¹ He grew up in a generally secular, American household as the son of Iraqi immigrants.² In the late 1970s when al-Timimi was a teenager, he and his parents moved to Saudi Arabia, where al-Timimi remained until he returned to the United States for college in 1981.³ He ambitiously pursued multiple degrees in the sciences even as he deepened and broadened his understanding of Islamic teachings.⁴ Though he flirted with the idea of moving to the Middle East throughout the 1990s, he and his wife decided against it, enjoying being Americans.⁵ A student of Salafiya, a fundamentalist school of Islamic thought, al-Timimi at once considered himself rational and at the same time a propagator of a very conservative, traditional theology.⁶ To that end, he founded a mosque in northern Virginia to teach Salafiya to a diverse audience.⁷

¹ Milton Viorst, "The Education of Ali al-Timimi," *Atlantic Monthly*, June 2006, <http://www.theatlantic.com/magazine/archive/2006/06/the-education-of-ali-al-timimi/304884/>

² *Id.*

³ *Id.*

⁴ Viorst, *supra*, <http://www.theatlantic.com/magazine/archive/2006/06/the-education-of-ali-al-timimi/304884/2/>

⁵ *Id.*

⁶ Viorst, *supra*, <http://www.theatlantic.com/magazine/archive/2006/06/the-education-of-ali-al-timimi/304884/3/>

⁷ *Id.*

Until this time, al-Timimi had envisioned the Muslim world having a greater potential than the Western world, with only the shackles of outdated dogma being a restraint on the Muslim world.⁸ Some of his students were of a more fanatical strain, however, playing paintball in the woods in their free time to pretend that they were defending their fellow Muslims in Eastern Europe.⁹ Some went so far as to make plans to join the Lashkar-e-Taiba, an organization founded in the 1980s to expel the Russians from Afghanistan and support Pakistan's efforts in Kashmir against India.¹⁰ On the night of September 11, 2001, al-Timimi was invited to lecture to a group of concerned Muslims about what to expect in the coming days and weeks.¹¹ Among others things he said, al-Timimi recommended that the convened guests might best serve the faith as mujahideen in Eastern Europe and Afghanistan.¹² Thereafter, some of the paintballers with aspirations of joining the Lashkar-e-Taiba traveled to Pakistan, went to a Lashkar-e-Taiba camp, trained in the use of various weapons, but ultimately left Pakistan without having ever engaging in combat.¹³

A year and a half later, al-Timimi and the paintballers were charged with "conspiracy 'in furtherance of violent jihad.'"¹⁴ He was convicted on the ten counts brought against him in 2005.¹⁵ However, the Supreme Court of the United States had stated only thirty-six years earlier that the government could not "forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

¹¹ Viorst, *supra*, <http://www.theatlantic.com/magazine/archive/2006/06/the-education-of-ali-al-timimi/304884/4/>

¹² *Id.*

¹³ *Id.*

¹⁴ Viorst, *supra*, <http://www.theatlantic.com/magazine/archive/2006/06/the-education-of-ali-al-timimi/304884/5/>

¹⁵ *Id.*

action and is likely to incite or produce such action.”¹⁶ In terms of imminence, al-Timimi lectured to the paintballers on the night of September 11 and the paintballers traveled to Pakistan on September 19 and 20.¹⁷ At no time did he indicate when any of the paintballers ought to have joined the mujahideen in Afghanistan, and at the time, the United States had not even taken a position on the possibility of military operations in that nation.¹⁸ Indeed, his defense attorney at trial asserted that if imminent lawless action were al-Timimi’s intent, he could have advocated a brief trip to attack the Pentagon, fifteen minutes away from where he and his audience were.¹⁹ Imminence as a factor is meaningful; in a later case where a student protestor yelled at police that he and the hundred or so protestors with him would “take the fucking street later,” the Supreme Court overturned his conviction for disorderly conduct because it was advocacy of illegality but at an indefinite point in the future.²⁰

If that case indicates the Court’s commitment to *Brandenburg*, the conviction of al-Timimi becomes quizzical at best and illegal at worst. What it could not be classified as, though, is surprising; taken in the context of national security, al-Timimi’s conviction is highly typical of a severe overreaction on the part of government to a threatening force, whether perceived or real. Courts often retreat from the protections they are meant to guarantee in times of war, sedition, or terrorism to such a point as to undermine the constitutions by which they are bound. This phenomenon is readily apparent in the sphere of freedom of speech. That freedom is part of an old tradition, most clearly articulated by English philosophers who understood well the danger that came with abridging speech.

¹⁶ *Brandenburg v. Ohio*, 295 U.S. 444, 447 (1969).

¹⁷ Viorst, *supra*, <http://www.theatlantic.com/magazine/archive/2006/06/the-education-of-ali-al-timimi/304884/4/>

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Hess v. Indiana*, 414 U.S. 105, 107-08 (1973).

To understand the issue of free speech in nations influenced by the English free speech tradition in the post-9/11 era, it is first necessary to understand the origin of that English free speech tradition. Then, that tradition must be understood within the constitutional context of those nations: specifically the United Kingdom, the United States, Canada, and Australia. The manner in which these four nations have protected speech must then be reconsidered in times of war and terrorism. Only through such a comprehensive study of speech can an assessment of these nations' legal guarantees be matched and evaluated against actual judicial rulings.

Finally, the question must be asked: is it right for national governments to limit citizens' speech? Do we or should we agree with the reasons offered for curtailing speech? Are those reasons legitimately furthered by the way in which governments actually do suppress speech? Can a society embrace absolute freedom of speech or does a limitation on speech promote a greater good?

The Development of the English Free Speech Tradition

Freedom of speech is an old concept, recognized by the ancient Greeks and Romans. Its importance to the English-speaking world developed, fittingly, in England. Why England developed more liberally than its continental cousins throughout the Middle Ages in this regard is difficult to explain with certainty and is beyond the scope of this paper. Arguably, England's liberalism dates back to the Thirteenth Century, when King John's policies resulted in tremendous setbacks for the nation.²¹ English barons who were annoyed with John's failures openly rebelled against him.²² History is unclear on how exactly it was written, but by 1215 John had affixed his seal to a document written largely by the barons in defense of certain liberties.²³ This was the first time a charter in English history would be termed *Magna Carta*.²⁴ The importance of *Magna Carta* was that a king had been forced to concede to his vassals that he was not entirely absolute. The liberties of *Magna Carta* were granted rather broadly, with many negative rights given to all people, such as, "To no one will we sell, to no one will we refuse or delay, right or justice."²⁵ Of course, *Magna Carta* was only as meaningful as the willingness and weakness of any English monarch for many centuries, but certainly its importance in denying royal absolutism made it symbolic of liberty for all Englishmen. Tracing *Magna Carta*'s precise influence on later English thinkers, too, is a chore that exceeds the scope of this paper, but English history makes clear the resistance to excessive royal infringement on certain liberties. The culmination of this resistance was the English Civil War in the Seventeenth Century, when parliamentarians overthrew King Charles I and established a Commonwealth in which

²¹ Austin Lane Poole, The Oxford History of England: Domesday Book to Magna Carta, 1087-1216 430 (2nd ed. 1955)

²² *Id.* at 469-72.

²³ *Id.* at 473-74.

²⁴ *Id.* at 474.

²⁵ *Magna Carta*, cl. 40, 1215, <http://www.constitution.org/eng/magnacar.htm>.

Parliament was supreme.²⁶ It was at this time that the first, clear indicators of an English tradition of free speech appear in print.

Areopagitica was published by John Milton in 1644 in response to the particular English practice of licensing books.²⁷ Parliament had established a state censorship apparatus with the Licensing Order of 1643, which ordered that all books and their authors had to be registered in order to receive a license for publication. Any author who wrote books offensive to the government could be arrested and imprisoned and the offensive books themselves were to be burned. Parliament empowered one corporation, the Stationers' Company, to hold a complete monopoly on book publishing in England, making the Company *de facto* censors for the state. Milton, who suffered the indignity of having some of his books be denied for publication by the Company, wrote *Areopagitica* to challenge the conventional wisdom underlying the Licensing Order.²⁸

The content of Milton's work at once is a product of its time and also transcends time in the form of the ideals it espouses. After directing an opening statement of purpose of the polemic to Parliament, Milton beseeched Parliament to reconsider the Licensing Order.²⁹ He first assured Parliament that "when complaints are freely heard, deeply considered and speedily reformed, then is the utmost bound of civil liberty attained that wise men look for."³⁰ He then offered three reasons specifically to question the Licensing Order's methodology. Of the three reasons Milton gives, two are relevant for this inquiry: namely, that the restriction did not achieve the ends of suppressing "scandalous, seditious, and libellous [*sic*] books" and that such an order was

²⁶ Godfrey Davis, *The Oxford History of England: The Early Stuarts, 1603-1660* 158-60 (2nd ed. 1959)

²⁷ John Milton, *Areopagitica* in JOHN MILTON: THE MAJOR WORKS xvii (Stephen Orgel and Jonathan Goldberg, eds., 1991)

²⁸ *Id.* at xvii.

²⁹ *Id.*

³⁰ *Id.*

inimical to learning for the benefit of “religious and civil wisdom.”³¹ Both of these arguments, the contribution that free speech makes to a more effective political state and the proper tailoring of a means to its ends, would be echoed by jurists in the United States, Canada, Australia, and the United Kingdom many years after *Areopagitica* was first published. As a consequence, *Areopagitica* marks a natural beginning for the inquiry into the English free speech tradition and its effect on the free speech jurisprudence of countries that followed in this tradition.

Milton’s argument built first upon the fact that the classical Greeks and Romans, whom he regarded as men of the noblest intellect, had never adopted a policy of prior restraint with respect to the publication of books. The ancient Athenians had only condemned books that were blasphemous or defamatory.³² Not once did the Athenians ban the books that equated virtue with indulgence in pleasure or held all people as equally contemptible creatures.³³ Though the Athenians did curtail the performance of plays by Aristophanes, whose works were notoriously scurrilous, they did not prevent the dissemination of the scripts to the public.³⁴ The ancient Spartans, Milton noted, were never interested in literature anyway and so rarely took exception to any publications.³⁵ The ancient Romans punished authors who wrote libelous books.³⁶ Other than these and possibly books that were blasphemous, the Romans were liberal in permitting what could be published; thus, Milton pointed out the highly condescending satires of Lucilius and the explicit, obscene poems of Catullus were never threatened with censorship.³⁷ Indeed, Augustus never expressed discontent with a section in Livy’s history of Rome that praised

³¹

Id.

³²

Id. at 240.

³³

Id.

³⁴

Id. at 241.

³⁵

Id.

³⁶

Id.

³⁷

Id. at 242.

Pompey, a rival for supremacy with Augustus's grand-uncle, Julius Caesar.³⁸ Even when the Romans became Christian, their emperors only banned blasphemous books after councils had examined the books post-publication.³⁹ It was only when the Papacy became absorbed in political matters that it turned its attention to prohibiting books even if these books did not touch upon theological matters at all.⁴⁰ This was most overtly manifested in the *Index Librorum Prohibitorum*, a list of banned books promulgated by the Spanish Inquisition and approved by the Pope. From there, Milton complained "their last invention was to ordain that no book, pamphlet or paper should be printed...unless it were approved and licensed under the hands of two or three glutton friars."⁴¹ Milton admonished the source of the practice: "the most anti-Christian council and the most tyrannous inquisition that ever inquired."⁴² He then concluded these thoughts by saying that an unexamined idea ought not to receive value judgments because the idea's merits had not yet come to light; in other words, it was improper to judge a book by its cover.

Milton's next argument attacked not the historical source of licensing but the rationality behind its continued practice. He emphasized that while one may rightly suspect the fruit of a tree to be dangerous, one cannot be certain until the fruit has been carefully scrutinized.⁴³ To this point, he cited several religious figures as prime examples of learned men who could not have become so educated but for their expansive knowledge of all kinds of books, including Moses, Daniel, and Paul.⁴⁴ Additionally, he relates the tale of Bishop Dionysius Alexandrinus, who reportedly had a vision in which God told him, "Read any books whatever come to thy hands, for

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.* at 242-43.

⁴¹ *Id.* at 243.

⁴² *Id.* at 244.

⁴³ *Id.* at 245.

⁴⁴ *Id.*

thou art sufficient both to judge aright and to examine each matter.”⁴⁵ Building upon this premise, Milton added that after the fall of Adam and Eve, both good and evil came into the world like inseparable twins, and the only way to know the face of one would be to know the face of the other.⁴⁶ Therefore, although the fall of Adam and Eve resulted in the release of impurity into the world, “that which purifies us is trial, and trial is by what is contrary.”⁴⁷ In this way, Milton formulated the precursor to the “marketplace of ideas” theory famously put forth by Justice Oliver Wendell Holmes. Not content to stop there, Milton targeted the argument that prior restraint licensing would prevent corruption through unworthy ideas. He warned that the Bible must be included among controversial books because of the great amount of scholastic literature written about it by theologians through the centuries.⁴⁸ If these wise men could not come to a uniform conclusion about heresy and other aspects of Christianity, argued Milton, why would people place faith in the moral conviction of the Stationers’ Company?⁴⁹ Fighting corruption in this way was irrational because the logical extreme of this method was to “regulate all recreations and pastimes, all that is delightful to man. No music must be heard, no song be set or sung, but what is grave and Doric. ... It will ask more than the work of twenty licensers to examine all the lutes, the violins and the guitars in every house; they must not be suffered to prattle as they do, but must be licensed what they may say.”⁵⁰ The regulation must also extend to bawdyhouses, clothing, and socializing between the sexes, but Milton could not imagine who was fit to be the arbiter of propriety in this regard.⁵¹

⁴⁵ *Id.* at 246.

⁴⁶ *Id.* at 247.

⁴⁷ *Id.* at 248.

⁴⁸ *Id.*

⁴⁹ *Id.* at 249-50.

⁵⁰ *Id.* at 251.

⁵¹ *Id.* at 251-52.

Milton then addressed why the Licensing Order's system did not achieve its goal. First, it placed an undue burden on both the state and the individual. The state would be deeply involved in the business of regulating all published material and, by way of a slippery slope, soon all communication to the point that its normal affairs could be neglected.⁵² The individual would never be able to learn anything, for the state would publish all textbooks, and a teacher whose experience informed him of one thing but had to teach what was approved in the textbook would be of no use to men.⁵³ It also struck Milton as horrific to think that books written by intellects of the past could, at the stroke of some dull-witted licenser's pen, be lost to posterity forever or that the same fate could befall books that were otherwise of great value and had but one overzealous sentence that rubbed the Stationers' Company the wrong way.⁵⁴ The related chilling effect on speech could not be understated, for Milton noted how nothing of any literary worth had come out of Italy since the advent of the *Index*.⁵⁵ He had visited Galileo, a prisoner for challenging the Church's understanding of astronomy, serving as a visible example of the terrible consequences that were to flow from prepublication licensing.⁵⁶ As a direct consequence, ignorance would be encouraged: "What need [people] torture their heads with that which others have taken so strictly and so unalterably into their own purveying?"⁵⁷ An inert people will not search for truth, and there is always more to be learned.⁵⁸ From these mentally lazy people must come governmental officers, who will make bad laws that only exacerbate the degeneration of the society. Milton

⁵² *Id.* at 253.

⁵³ *Id.* at 256.

⁵⁴ *Id.* at 257.

⁵⁵ *Id.* at 258.

⁵⁶ *Id.* at 259.

⁵⁷ *Id.* at 261.

⁵⁸ *Id.* at 263-64.

concludes by asking the question, "...what magistrate may not be misinformed, and much the sooner, if liberty of printing be reduced into the power of a few?"⁵⁹

The English political philosopher John Locke contributed more indirectly to the English tradition of freedom of speech. These contributions appeared primarily in his *A Letter Concerning Toleration*, published in 1689. "Toleration," as defined by the title and the subject of the letter, referred particularly to religious tolerance. Locke's position is framed within a case for separation of church and state, though curiously, the intellectual arguments Locke presented for religious tolerance were sound defenses for freedom of speech. He began with three reasons to define the spheres of church and state as separate and distinct. His first was that "the care of souls is not committed to the civil magistrate, any more than to other men."⁶⁰ He insisted that one's salvation could not be entrusted to another. True beliefs were formed in one's own mind, and attempts by the state to constraint people's thoughts would not result in harmony but rather dissonance.⁶¹ His second argument expanded upon this point by emphasizing that the state could only impose corporal punishments. Compulsion of belief in such a way would never cause "men [to] change the inward judgement [*sic*] that they have framed of things."⁶² Locke's point was that an idea cannot be overwhelmed by attempting to stamp it out through force; the only thing capable of fighting a belief is another belief. Thus, he concluded that "[i]t is only light and evidence that can work a change in men's opinions; which light can in no manner proceed from corporal sufferings, or any other outward penalties."⁶³ Thirdly, Locke postulated a pursuit-of-

⁵⁹ *Id.* at 273.

⁶⁰ Locke, John, *A Letter Concerning Toleration*, 1689, <http://www.constitution.org/jl/tolerati.htm>.

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.*

truth theory as a basis for tolerance. The question that he posed, though it is in regard to religion, was germane to the importance of freedom of speech:

For there being but one truth, ...what hope is there that more men would be led into it if they had no rule but...were put under the necessity to quit the light of their own reason, and oppose the dictates of their own consciences, and blindly to resign themselves up to the will of their governors...? In the variety of opinions..., wherein the princes of the world are as much divided as in their secular interests, the narrow way would be much straitened; one country alone would be in the right, and all the rest of the world put under an obligation of following their princes in the ways that lead to destruction...⁶⁴

In other words, the idea that anyone had a monopoly on truth was, in Locke's view, absurd, and it would work a great disadvantage if governments stifled the pursuit of truth.⁶⁵ The only way to discover what was truth was to allow ideas to meet, challenge, incorporate, and develop.⁶⁶ Otherwise, the world would be full of people who had all developed their own "truth" that could be entirely wrong, and the people would not even know this because their beliefs had never been challenged by other beliefs. While Locke is known to the West for his proto-capitalist justification of private property, and especially to Americans for his positions on the separation of church and state as well as the right to life, liberty, and the pursuit of happiness, his advocacy of toleration of belief plays no less significant a role in Western nations' understanding of personal freedoms.

Perhaps the most robust argument for freedom of speech is to be found in John Stuart Mill's essay *On Liberty*, published in 1859. Mill set out to define "the appropriate region of human liberty," and the most important measure of human liberty was "the inward domain of consciousness; demanding liberty of conscience, in the most comprehensive sense; liberty of thought and feeling; absolute freedom of opinion and sentiment on all subjects, practical or

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.*

speculative, scientific, moral, or theological.”⁶⁷ Perhaps as a reaction or reference to Locke’s notion of private property, Mill avowed that ideas and opinions could not be valued so narrowly. Rather, ideas and opinions were universal, and efforts to silence them were detrimental to people in all places and at all times henceforth, for “[i]f the opinion is right, they are deprived of the opportunity of exchanging error for truth; if wrong, they lose, what is almost as great a benefit, the clearer perception and livelier impression of truth, produced by its collision with error.”⁶⁸ Though the sentiment echoes Milton and Locke, Mill expanded the pursuit-of-truth theory from its previous iterations by proposing two distinct branches of questioning to investigate under this theory.

First, it is impossible to know the truth value of any opinion; therefore it is fallacious to quash an opinion.⁶⁹ Mankind has proven its fallibility and it would be illogical for people to assume that they know how much truth or falseness is to be found in ideas.⁷⁰ Mill remarked, somewhat cynically, that “there are ninety-nine persons totally incapable of judging...for [every] one who is capable...”⁷¹ Furthermore, those who are capable of judging are only to be regarded as such relative to the other ninety-nine percent because, as Mill noted, many learned scholars of prior eras had approved of conduct and ideas that had long since been discarded.⁷² Thankfully, reason was man’s saving grace: “He is capable of rectifying his mistakes by discussion and experience....There must be discussion, to show how experience is to be interpreted. Wrong opinions and practices gradually yield to fact and argument: but facts and arguments, to produce

⁶⁷ John Stuart Mill, *On Liberty*, in GREAT BOOKS OF THE WESTERN WORLD 272 (Robert Maynard Hutchins, ed., 1952)

⁶⁸ *Id.* at 275.

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Id.* at 276.

⁷² *Id.*

any effect on the mind, must be brought before it.”⁷³ The magic of reason, argued Mill, was that it allowed people to set their minds in the right direction if it had previously been set in the wrong direction. Only through having an open mind does one acquire true wisdom, for wisdom is predicated on synthesizing and condensing various viewpoints.⁷⁴ In addition, if learned men of times bygone had done things that were considered wrong by later generations’ standards, then the opposite problem would naturally arise: namely, “when the arm of the law has been employed to root out the best men and the noblest doctrines...”⁷⁵ To illustrate his point, Mill cited the fate of Socrates and Jesus Christ, both of whom were condemned and executed by the state for perceived impiety although their teachings long survived them and are widely accepted today.⁷⁶ Particularly with the teachings of Christianity, Mill drew a distinction between the room for disagreement of opinions and the persecution of opinions. The idea that “persecution is an ordeal through which truth ought to pass, and always passes successfully, legal penalties being, in the end, powerless against truth” struck him as completely wrong.⁷⁷ Looking back on history, persecution had successfully crushed divergent opinions, and Mill listed a number of separatist Christian sects in history that the Inquisition had extinguished.⁷⁸ Such persecution stifled intellectual advancement and encouraged intellectual dishonesty among people who knew better but dared not to say so from fear, working to the retardation of progress for all people.⁷⁹

The second branch of the pursuit-of-truth theory Mill investigated was an educational consideration. He denounced the idea of learning as a matter of a person “assent[ing] undoubtingly to what [other people] think true, though he has no knowledge whatever of the

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Id.

⁷⁴

Id.

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Id. at 278.

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Id. at 278-79.

⁷⁷

Id. at 279.

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Id. at 280.

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Id. at 280-83.

grounds of the opinion, and could not make a tenable defence of it against the most superficial objections.”⁸⁰ Such exchange of thought “is not the way in which truth ought to be held by a rational being. This is not knowing truth. Truth, thus held, is but one superstition the more, accidentally clinging to the words which enunciate a truth.”⁸¹ Mill’s argument followed Milton’s on the nature of education. Mill contended that the process of learning required an individual to know both sides of an argument.⁸² The person who could only advocate for his position, without knowing a contrary position, had not truly learned; he had merely become a parrot under the illusion that he understood more than he actually did.⁸³ As an example of how this could be problematic in reality, Mill pointed to how modern Christians did not sincerely understand the teachings of the New Testament.⁸⁴ While they may have been able to regurgitate some maxims from the Bible, their everyday conduct was far more indicative of their actual character.⁸⁵ With these people paying lip service to Christian morality but pledging their allegiance to their mundane interests, it could easily be said that a number of modern, self-professed Christians had little understanding of Christianity at all.⁸⁶ To that end, Mill admonished the modern education system for doing nothing to challenge the mind in the way Socratic dialogues or medieval scholasticism had done; most of the education system was built around lecture from teachers and the reading of books that presented only one worldview, which students were to accept on blind faith.⁸⁷ Mill found this unrealistic as a matter of education but also on a much broader level. He stated that it was uncommon to have a doctrine that was entirely true or entirely false, but it was

⁸⁰ *Id.* at 283.

⁸¹ *Id.*

⁸² *Id.* at 284.

⁸³ *Id.*

⁸⁴ *Id.* at 286-87.

⁸⁵ *Id.* at 286.

⁸⁶ *Id.* at 287.

⁸⁷ *Id.* at 288.

more likely to find that truth lay somewhere between two conflicting doctrines.⁸⁸ He applied this postulation compellingly to politics:

In politics, again, it is almost a commonplace, that a party of order or stability, and a party of progress or reform, are both necessary elements of a healthy state of political life.... Each of these modes of thinking derives its utility from the deficiencies of the other.... Unless opinions favorable to democracy and to aristocracy, to property and to equality, to co-operation and to competition, to luxury and to abstinence, to sociality and individuality, to liberty and discipline, and all the other standing antagonisms of practical life, are expressed with equal freedom, and enforced and defended with equal talent and energy, there is no chance of both elements obtaining their due.... Truth, in the great practical concerns of life, is so much a question of the reconciling and combining of opposites, that very few have minds sufficiently capacious and impartial to make the adjustment with an approach to correctness, and it has to be made by the rough process of a struggle between combatants fighting under hostile banners.⁸⁹

Thus we see the genesis of the argument, used by jurists, that freedom of speech plays an integral role in a properly functioning democratic society. Having presented his full case, Mill summarized his advocacy of free speech as four distinct reasons: that it is illogical to deny an opinion because it could very well be true, that the clash of opinions usually reveals truth as being somewhere between two extremes, that uncontested opinions produce an intellectually inert populace that hold beliefs as prejudices with no understanding of what they claim to know, and that understanding turns into dead dogma when it is not understood and is used to limit further people's education.⁹⁰

Mill delivered one final message before concluding this chapter of *On Liberty*, cautioning against restricting the manner rather than the content of opinions.⁹¹ His concern was that people would, in the face of a zealous opposing advocate, try to subvert that opposing advocate's argument by decrying his delivery as intemperate and not suited for civil society. This was

⁸⁸ *Id.*

⁸⁹ *Id.* at 289.

⁹⁰ *Id.* at 292.

⁹¹ *Id.*

ensorship by other means, for Mill could not envision what were the appropriate bounds for temperate argument.⁹² Besides this, lesser offenses of intemperate argument (like sarcasm or invective) were used commonly by both sides of any argument while greater offenses of intemperate argument (such as misrepresentation of the opposite position) were, to Mill, usually not made in bad faith and so culpability should not follow.⁹³ Rational people in debate had to be capable of distinguishing vice in the mode of their opponents' advocacy from vice in their opponents' advocacy merely from taking a contrary position.⁹⁴ Mill concluded by stating, "It is, however, obvious that law and authority have no business restraining [speech based on manner]" and urged that people of reason recognize that the virtue of public debate rested in candid, forthright advocacy of a position.⁹⁵

Freedom of speech, as espoused by Milton, Locke, and Mill, dates back almost to time immemorial. Despite that, this liberty has only become deeply important in Anglophone nations' jurisprudence in the past century. Although speech jurisprudence is a relatively new concept, the philosophical underpinnings are important to understand, for they form and remain the present basis of the right of freedom of speech. Having considered the history and the philosophical foundation of freedom of speech, it is time now to consider the way in which it has actually been guaranteed by modern states in their constitutional frameworks.

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Id.

⁹³

Id.

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Id.

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Id. at 293.

The National Constitutions' Peacetime Protections

As a general proposition, constitutions are not written to be more protective of civil liberties at some times and less protective at other times. The text of constitutions is meant to be applicable to all people under its purview at all times. The manner in which judicial interpretation of constitutions shifts during times of security crises can only be properly understood if the “default” status of constitutional civil liberties is first understood; in other words, peacetime protections are to be considered the traditional resting point for civil rights.

Although the four nations under examination were all influenced by varying degrees by the freedom of speech notions developed by English philosophers, the range of protection accorded to freedom of speech differs widely among the four nations. Here, the structural distinctions in the nations' constitutions regarding freedom of speech will be studied.

A. *The United States*

The most natural starting point for an investigation of the protection of freedom of speech for nations with written constitutions such as America is the text of the national constitution itself. The First Amendment to the United States Constitution is a single sentence long:

*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 (emphasis added).*⁹⁶

Questions about the interpretation of the Free Speech Clause were not raised until the Twentieth Century, when the United States entered World War One. The propriety of America's involvement in the war became a subject of frequent and heated debate. Congress and state legislatures passed repressive measures limiting free speech, and consequently the first suits

⁹⁶ U.S. Const. amend. I.

testing the strength of the Free Speech Clause arrived before the Supreme Court of the United States.

Initial Supreme Court jurisprudence in the area of free speech took a narrow view of the Free Speech Clause's protections; concededly, the Court decided these cases during World War One and the First Red Scare, a time in which civil liberties were less protected. These cases, although reflecting a primitive understanding of speech's role in American society, served as gradual stepping stones to the modern interpretation of free speech. When the general secretary of the Socialist Party, Charles Schenck, printed and disseminated a leaflet protesting the draft, he was convicted of seditious espionage.⁹⁷ Justice Oliver Wendell Holmes, writing for the unanimous Court, upheld the conviction and promulgated the "clear and present danger" test for judging the merit of speech: "The question in every case is whether the words are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree."⁹⁸ Perhaps because he assumed the terms of the phrase "clear and present danger" were self-evident, Holmes did not define them further.⁹⁹ In this, the shortcomings of the test were to be found, for judges now had wide discretion to interpret those terms. The problem would become increasingly apparent over the 1920s as the Supreme Court upheld many convictions stemming from restrictive speech laws. The Court's position was that legislatures, rather than judges, were best suited to determine which types of speech were unwelcome in society, and the notion that the Court should judge the merits of a legislature's findings against the protections enshrined in the American Constitution had not taken hold.

⁹⁷ *Schenck v. United States*, 249 U.S. 47, 48-49 (1919).

⁹⁸ *Id.* at 52.

⁹⁹ Melvin I. Urofsky, *Louis D. Brandeis: A Life* 550 (2009)

The shift away from the clear and present danger test began with *Whitney v. California*. Justice Brandeis's concurrence nominally acknowledged the clear and present danger test but demonstrably moved beyond its contours: "[N]o danger flowing from speech can be deemed clear and present, unless the incidence of the evil apprehended is so imminent that it may befall before there is opportunity for full discussion. If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence."¹⁰⁰ Brandeis's position would carry the day forty-two years later in *Brandenburg v. Ohio*. Clarence Brandenburg, a member of the Ku Klux Klan, was recorded on television warning that "if our President, our Congress, our Supreme Court, continues to suppress the white, Caucasian race, it's possible that there might have to be some revengeance [sic] taken."¹⁰¹ Brandenburg further stated, "Personally, I believe the nigger should be returned to Africa, the Jew returned to Israel."¹⁰² He was convicted under the Ohio criminal syndicalism statute, which criminalized the advocacy of crime or violence or associating with a group that had a violent purpose. The Supreme Court noted that Ohio's criminal syndicalism statute bore a striking resemblance to the California criminal syndicalism statute under which Charlotte Anita Whitney had been convicted decades earlier.¹⁰³ The Court, however, considered the majority holding in *Whitney* to be "thoroughly discredited" as a matter of law and advanced a position comparable to Brandeis's concurrence in that case, declaring "that the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or

¹⁰⁰ *Whitney v. California*, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring).

¹⁰¹ *Brandenburg*, 395 U.S. at 446.

¹⁰² *Id.* at 447.

¹⁰³ *Id.*

producing imminent lawless action and is likely to incite or produce such action.”¹⁰⁴ Statutes that were not so narrowly tailored in this respect “impermissibly intrude[] upon the freedoms guaranteed by the First and Fourteenth Amendments” and “sweep[] within its condemnation speech which our Constitution has immunized from governmental control.”¹⁰⁵ As a matter of law, *Brandenburg* built upon the clear and present danger idea by adding the requirement that the government had to prove that the speech was directed to produce imminent lawless conduct.¹⁰⁶ The imminent lawless action test officially abrogated the clear and present danger test and *Brandenburg* explicitly overruled the majority holding in *Whitney*.¹⁰⁷

It must be noted that the Court’s understanding of the Free Speech Clause is little more than a series of evolving imperatives, each with a very skeletal framework of legal analysis. The Court has not had to elaborate on *Brandenburg* because free speech issues had receded from the fore of national politics; political stability in the past few decades made the government less prone to infringe the right of free speech. Although the threat of terrorism, most manifestly embodied in the attacks on September 11, 2001, has caused minor ripples in the federal courts’ interpretation of freedom of speech, *Brandenburg* is still the touchstone for constitutionally protected speech in the United States.

B. Canada

A study of free speech in Canada is necessarily different from a study of the same topic in the United States for various reasons. The political and judicial history of Canadian free speech is not as orderly as American free speech, for Americans have subjected interpretation of

¹⁰⁴

Id.

¹⁰⁵

Id. at 448.

¹⁰⁶

Id. at 447.

¹⁰⁷

Id. at 449.

that liberty to the First Amendment. By contrast, one of Canada's landmark decisions on free speech was decided when there was only an Implied Bill of Rights. Furthermore, while the source of free speech in the United States has been exclusively and expressly derived from the American Constitution, there have been multiple sources of free speech in Canada: rights implied in its constitution by its Supreme Court, a quasi-constitutional statute, and a written bill of rights incorporated into the Canadian Constitution. Although the narrative of the evolution of free speech in Canada is less direct than in the United States, Canadian jurisprudence on the subject is not significantly more difficult to follow than American jurisprudence. Indeed, Canadian jurisprudence is more consistent than its American counterpart, necessitating scrutiny into the various Canadian founts of this liberty.

The starting point of Canadian free speech, unlike American free speech, is case law: *Switzman v. Elbing*. The Province of Quebec passed a statute called "An Act to Protect the Province against Communistic Propaganda" in 1937, criminalizing the use of buildings as places to propagate Communist doctrine.¹⁰⁸ The statute was known more popularly as the Padlock Law because it authorized the provincial government to close the building for up to one year if a violation was found.¹⁰⁹ When a landlady discovered that a lessee had evidently contravened the Padlock Law, she sued to cancel the lease for fear of having the government lock up the building.¹¹⁰ The intervention of the Canadian Attorney-General raised a question of the statute's constitutionality, which the Canadian Supreme Court investigated.¹¹¹ In the seriatim opinion, the defense of free speech was most eloquently articulated by Justice Rand:

¹⁰⁸ *Switzman v. Elbing*, [1957] S.C.R. 285, 286.

¹⁰⁹ *Id.* at 287.

¹¹⁰ *Id.* at 286.

¹¹¹ *Id.* at 302.

Whatever the deficiencies of its workings, Canadian government is in substance the will of the majority expressed directly or indirectly through popular assemblies. This means ultimately government by the free public opinion of an open society, the effectiveness of which, as events have not infrequently demonstrated, is undoubted.

But public opinion, in order to meet such a responsibility, demands the condition of a virtually unobstructed access to and diffusion of ideas. Parliamentary government postulates a capacity in men, acting freely and under self-restraints, to govern themselves; and that advance is best served in the degree achieved of individual liberation from subjective as well as objective shackles.¹¹²

As a matter of law, the majority rested its decision on the fact that the Padlock Law was a law *ultra vires* under Canadian federalism.¹¹³ However, *Switzman* offered the first clear defense of free speech in modern Canadian jurisprudence. The case was decided in 1957, and its dicta on free speech signaled the direction in which the nation was moving. It was only three years later that Prime Minister John Diefenbaker introduced into the Parliament the Canadian Bill of Rights. Section One of the Canadian Bill of Rights reads thus:

It is hereby recognized and declared that in Canada there have existed and shall continue to exist without discrimination by reason of race, national origin, colour, religion or sex, the following human rights and fundamental freedoms, namely, ... (d) freedom of speech...¹¹⁴

Of its own accord, the Canadian Bill of Rights was merely an ordinary, parliamentary statute. To some extent, the potential conflict of laws was sidestepped by the unusual Notwithstanding Clause of Section Two:

Every law of Canada shall, unless it is expressly declared by an Act of the Parliament of Canada that it shall operate notwithstanding the Canadian Bill of Rights, be so construed and applied as not to abrogate, abridge or infringe or to

¹¹² *Id.* at 306.

¹¹³ *Id.* at 328.

¹¹⁴ Canadian Bill of Rights, R.S.C. 1960, c. 44.

authorize the abrogation, abridgment or infringement of any of the rights or freedoms herein recognized and declared...¹¹⁵

In that manner, the Canadian Bill of Rights conferred quasi-constitutional liberties upon the citizens of the nation. Although it was never repealed, the Canadian Bill of Rights has largely since been marginalized because of the advent of the Canadian Charter of Rights and Freedoms in 1982. As a formal addition to the Canadian Constitution, the Charter is a litany of rights expressly granted to the Canadian people. The relevant right granted in Section 2(b) is the “freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication.”¹¹⁶

In 1989, the scope of 2(b) was tested before the Canadian Supreme Court in *Irwin Toy Ltd v. Quebec*. The Province of Quebec had passed the Consumer Protection Act, a statute that forbade anyone from targeting children under thirteen with commercial advertising.¹¹⁷ The plaintiff challenged the law’s constitutionality and the case rose to the Canadian Supreme Court. The Court recognized the importance of freedom of expression, as stated in *Switzman* and by Justice Benjamin Cardozo in *Palko v. Connecticut*, where freedom of speech was described as “the matrix, the indispensable condition of nearly every other form of freedom.”¹¹⁸ The Court then applied a two-part test in applying 2(b) to the Act. First, 2(b) does not protect activity that does not have some expressive meaning or that “conveys a meaning but through a violent form of expression.”¹¹⁹ Next, the nature of the restriction had to be explored: if the government was merely engaging in a time, place, or manner restriction, then the government was not infringing upon the freedom. If, however, the government’s restriction was aimed at the content of the

¹¹⁵ *Id.*

¹¹⁶ Canadian Charter of Rights and Freedoms, I.2(b), Part I of the Constitution Act, 1982, *being* Schedule B to the Canada Act, 1982, c. 11 (U.K.).

¹¹⁷ *Irwin Toy Ltd. v. Quebec (Attorney general)*, [1987] 1 S.C.R. 927, 939.

¹¹⁸ *Palko v. Connecticut*, 302 U.S. 319, 327 (1937).

¹¹⁹ *Irwin*, supra, at 931.

speech, then the government had overstepped its constitutional authority. In scrutinizing the Act's content, the Court easily concluded that regulations contained within the statute such as a prohibition on encouraging children to buy goods or seek information about goods was a restriction that targeted the message of the speech and was therefore a violation of 2(b).¹²⁰ Nonetheless, the majority upheld the Act on other grounds in the Charter.¹²¹ Justice McIntyre's dissent contained the kind of powerful rhetoric reminiscent of Justice Brandeis's concurrence in *Whitney*:

In conclusion, I would say that freedom of expression is too important to be lightly cast aside or limited. It is ironic that most attempts to limit freedom of expression and hence freedom of knowledge and information are justified on the basis that the limitation is for the benefit of those whose rights will be limited. It was this proposition that motivated the early church in restricting access to information, even to prohibiting the promulgation and reading of the scriptures in a language understood by the people. The argument that freedom of expression was dangerous was used to oppose and restrict public education in earlier times. The education of women was greatly retarded on the basis that wider knowledge would only make them dissatisfied with their role in society. I do not suggest that the limitations imposed by [the Act] are so earth shaking or that if sustained they will cause irremediable damage. I do say, however, that these limitations represent a small abandonment of a principle of vital importance in a free and democratic society and, therefore, even if it could be shown that some child or children have been adversely affected by advertising of the kind prohibited, I would still be of the opinion that the restriction should not be sustained. Our concern should be to recognize that in this century we have seen whole societies utterly corrupted by the suppression of free expression. We should not lightly take a step in that direction, even a small one.¹²²

Despite a liberalizing trend in free speech starting with *Switzman*, free speech is not absolute in Canada. The right of free expression is constrained by the Limitations Clause of Section One of the Charter: "The Canadian Charter of Rights and Freedoms guarantees the rights

¹²⁰ *Id.* at 932.

¹²¹ *Id.* at 933-34.

¹²² *Id.* at 1008.

and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.”¹²³ The Court expressed this standard in *R. v. Oakes* when it warned that there would be certain times when it would be appropriate to limit Charter rights; namely, when “their exercise would be inimical to the realization of collective goals of fundamental importance.”¹²⁴ From this case was born the *Oakes* test, a two-prong test to balance the competing interests of the parties. The first prong is that the restrictive law “must be ‘of sufficient importance to warrant overriding a constitutionally protected right or freedom.’”¹²⁵ The second prong is a proportionality test that weighs three factors: the rational connection of the restrictive law to the objective, the law being as minimally invasive upon the right as possible, and balance between the effects of the law and the desired objective.¹²⁶

Though Canada has not adopted a particular framework of jurisprudence aimed at criminal advocacy, it may be inferred that it is less likely to be protective of such expression. The *Oakes* test was applied when a high school teacher promoted anti-Semitism in the classroom. The teacher told his students that Jews were deeply sinister individuals who had fabricated the Holocaust to win sympathy.¹²⁷ The teacher was convicted of a law restricting hate speech.¹²⁸ In applying the *Oakes* test, the Court in *R. v. Keegstra* determined in very Brandeis-like terms that, while free expression aided in the search for truth and served to facilitate the political process, the logical extreme of this position required clearly false statements to be protected.¹²⁹ An unregulated marketplace of ideas, according to the Court, was no better than a wholly state-controlled system of expression if the objective was the search for truth. In short, the majority of

¹²³ Canadian Charter of Rights and Freedoms, *supra*, l.

¹²⁴ *R. v. Oakes*, [1986] 1 S.C.R. 103, 136.

¹²⁵ *Id.* at 138 (quoting *R. v. Big Drug Mart Ltd.*, [1985] 1 S.C.R. 295, 352).

¹²⁶ *Id.* at 139.

¹²⁷ *R. v. Keegstra*, [1990] 3 S.C.R. 697, 698.

¹²⁸ *Id.*

¹²⁹ *Id.* at 698-701.

the Court made a value judgment with respect to the speech in question and upheld the teacher's conviction.¹³⁰ Though the majority expressly refused to equate the teacher's speech with violence, it did conclude that the First Amendment might have extended its protection to the teacher's speech. The Court found that First Amendment analysis helped to inform its decision, but chose not to apply that analysis to the case because of perceived differences between the standard set by the First Amendment and the standard set by the Charter.¹³¹ That the Court came to this conclusion suggests that if Canada is more oriented on the benefit of society as a whole, it is less likely to protect speech that is regarded as less valuable, including criminal advocacy.

Canadian jurisprudence in free speech bears many strong resemblances to American jurisprudence on the same subject. At first glance, the freedom afforded by the Charter seems to rival even the First Amendment. Comparing the extent of protection that the Supreme Courts of the two nations give to free speech, however, reveals that there is greater weight given in Canada to societal interests while the emphasis in the United States is on the individual. In that sense, Canadian law is more restrictive than American law with respect to speech. This is not to say that the difference is a stark one, but because the difference is slight, it is crucial to comprehend that difference in order to gain a complete understanding of the subject.

C. Australia

Like the United States, Australia has a written constitution. Unlike the United States, Australia does not have a bill of rights incorporated into its constitution. At the 1898 Constitutional Convention, the Australian Framers rejected the need for a bill of rights under the belief that the traditional liberties of British subjects would be guaranteed by a parliamentary system and an independent judiciary. Consequently, only a handful of rights are explicitly granted to the citizens in the Australian Constitution. Absent from these expressly enumerated

¹³⁰ *Id.* at 795.

¹³¹ *Id.* at 738-44.

rights is the right to free speech; indeed, the idea of free speech is almost entirely alien to Australian constitutional jurisprudence for it has never been a basis of any suit that has appeared before the High Court of Australia.

Freedom of speech does nevertheless exist in Australia, albeit in the highly circumscribed form of freedom of political communication. In 1992, the High Court of Australia heard two cases that addressed this question. The first, *Australian Capital Television Pty Ltd v Commonwealth*, dealt with a Parliamentary law that regulated political broadcasting on radio and television during electoral campaign seasons.¹³² The regulation required radio and television broadcasters to offer air time to political parties for free in election periods.¹³³ However, this statutory obligation applied only to those political parties whose candidates had served in the previous session of Parliament.¹³⁴ The broadcaster plaintiffs contended that the law created an unconstitutional acquisition of property by violating “an implied guarantee of freedom of access to, participation in and criticism of federal and State institutions amounting to a freedom of communication in relation to the political and electoral processes.”¹³⁵ The Court’s analysis in the first part relied on a studied history of the framing of the Australian Constitution and the reason why a bill of rights was omitted therefrom.¹³⁶ The Court concluded that certain rights were necessarily implied in the Australian Constitution as necessary for the exercise of other rights. “...In the exercise of [legislative and executive] powers the representatives of necessity are accountable to the people for what they do and have a responsibility to take account of the views of the people on whose behalf they act. Freedom of communication is an indispensable element

¹³² *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106, <http://www.austlii.edu.au/au/cases/cth/HCA/1992/45.html>

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ *Id.*

of government.”¹³⁷ The Court went on to identify that freedom of communication, “at least in relation to public affairs and political discussion,” was vital to the sustainment of a representative democracy, which formed the underpinnings of the Australian Constitution.¹³⁸ “Absent such a freedom of communication, representative government would fail to achieve its purpose...and, in that sense, would cease to be truly representative.”¹³⁹ The Court extended this freedom to the political communication between citizens and other bodies and groups, finding that protection political communication only between constituents and representatives would be inadequate to fulfill the mandate of the Australian Constitution.¹⁴⁰ The Court then criticized the parliamentary law at issue, suggesting its effect was imposing impermissible “restrictions on communication which target ideas or information,” comparable to the United States Supreme Court’s position that “government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.”¹⁴¹ Although the law appeared to be regulating the nature of how the speech was disseminated, it was creating a bias favoring incumbents and pre-established parties, while emerging political parties and persons or groups that were not affiliated with a political party were completely silenced on the airwaves. The High Court struck down the law as unconstitutional.¹⁴²

The twin case to *Australian Capital Television* was *Nationwide News Pty Ltd v Wills*, decided the same day. The law at issue in *Nationwide News* was the Industrial Relations Act 1988, which governed various aspects of an executive agency of the Commonwealth, the

¹³⁷ *Id.*
¹³⁸ *Id.*
¹³⁹ *Id.*
¹⁴⁰ *Id.*
¹⁴¹ *Id.*
¹⁴² *Id.*

Australian Industrial Relations Commission.¹⁴³ Among other things, the Act contained the provision that it was illegal to insult members of Commission when they were acting in their official capacities or to use speech intended “to bring a member of the Commission or the Commission into disrepute.”¹⁴⁴ Nationwide News was the parent company of a national newspaper called *The Australian*, in which an article was written impugning the integrity of the Commission by calling its members fascists.¹⁴⁵ The High Court noted that the Act’s language was broad enough to criminalize any speech that could bring the Commissioners dishonor, whether that speech was related to their official actions or not.¹⁴⁶ This raised the immediate concern that “[f]acts or criticisms bringing the Commission or a member into disrepute are all suppressed, though the facts be true and the criticisms be fair and reasonable.”¹⁴⁷ The Court then noted several comparable instances in which the broadness of the Act’s rejection of disreputable speech would not be sustained.¹⁴⁸ The law criminalizing scandalizing the court (articulating speech that attacked the integrity of judicial officers) more narrowly invaded freedom of speech because the speech was only criminal if it was unjust or unreasonable.¹⁴⁹ The law against sedition targeted speech that was “an excitement to disaffection against the Sovereign, the Constitution or the institutions of government.”¹⁵⁰ However, “[c]riticism of a merely political kind directed at the holders of public office for the time being, even if it brings those holders of office into disrepute, does not amount to sedition.”¹⁵¹ The High Court again emphasized that there were “legal incidents which are essential to the effective maintenance of [a representative,

¹⁴³ *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1, <http://www.austlii.edu.au/au/cases/cth/HCA/1992/46.html>

¹⁴⁴ *Id.*
¹⁴⁵ *Id.*
¹⁴⁶ *Id.*
¹⁴⁷ *Id.*
¹⁴⁸ *Id.*
¹⁴⁹ *Id.*
¹⁵⁰ *Id.*
¹⁵¹ *Id.*

democratic] form of government” as prescribed in the Australian Constitution, indicating that the constitutional right of the people to choose their representatives without a constitutional right to discuss their representatives’ actions “would be a parody of democracy.”¹⁵² After setting forth a proportionality test, the Court concluded that the Act failed this test:

But [the Act] goes much further than is needed to achieve a proper protection of repute. By prohibiting justifiable revelations of any corruption or other vice affecting the workings of the Commission and by prohibiting criticisms made fairly and reasonably, [the Act] purports impermissibly to prevent public discussion about an important agency of social regulation. It purports to stifle that free discussion which is essential to expose defects in, and to maintain the integrity of, any institution vested with power to affect the lives of the people living in a representative democracy. Had the Act prohibited speech and writing that is calculated to bring the Commission or its members into disrepute only when the speech or writing fails to state the critical facts truly or when the criticism is unreasonable or unfair, the provision would have been clearly valid, even though the freedom of discussion was curtailed to some extent. The balance between curtailment of the freedom and the protection of the Commission and its members against unwarranted attacks would have been appropriately struck. But [the Act] does not attempt to strike a balance.¹⁵³

As with *Australian Capital Television*, the statute in *Nationwide News* was struck down as unconstitutional because of its impermissible infringement of the freedom of political communication.¹⁵⁴

To be clear, the expressive freedom that the High Court drew from the Australian Constitution is not as broad in scope as its American counterpart. The Court made that clear in *Theophanous v Herald & Weekly Times Ltd* when it noted that, although there was an implied freedom of political communication, “[t]hat implication does not extend to freedom of

¹⁵² *Id.*

¹⁵³ *Id.*

¹⁵⁴ *Id.*

expression generally (cf. the First Amendment to the Constitution of the United States...).”¹⁵⁵ *Theophanous*, decided in 1994, revolved around a letter to the editor in the newspaper *The Sunday Herald Sun*, of which Herald and Weekly Times Ltd was the parent company.¹⁵⁶ The letter suggested that the immigration policies supported by the plaintiff, a member of the Parliament of Australia, were diluting the British foundations of the nation and the plaintiff therefore ought to be removed from office in the next election.¹⁵⁷ The plaintiff sued for defamation. The High Court briefly reviewed its decisions in *Australian Capital Television* and *Nationwide News* before confronting a practical problem of interpretation: if the Australian Constitution protected political communication, what was the dividing line between “political” and “apolitical?” The Court drew upon the standard set by the English-American philosopher Alexander Meiklejohn, who declared freedom of speech applies to “speech which bears, directly or indirectly, upon issues with which voters have to deal – only, therefore, to the consideration of matters of public interest.”¹⁵⁸ As applied to the specific case issue of whether the constitutional protection of political communication could serve as an affirmative defense to a defamation suit, the Court engaged in a careful analysis of other nations’ protection of speech, including *Switzman* and especially *Sullivan v. New York Times Co.*¹⁵⁹ Though the High Court found the *Sullivan* test generally a very rational approach, it was careful to distinguish Australian constitutional law from American constitutional law.¹⁶⁰ Thus, the Court modified the *Sullivan* test to require defendants to establish that they acted reasonably in publishing the defamatory material “either by taking some steps to check the accuracy of the impugned material or by

¹⁵⁵ *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104, <http://www.austlii.edu.au/au/cases/cth/HCA/1994/46.html>

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

establishing that [they were] otherwise justified in publishing without taking such steps or steps which were adequate.”¹⁶¹ The Court opined that a higher burden than that on defendants would be too onerous and would create an unconstitutional burden on the right to political communication.¹⁶² The legal significance of *Theophanous* is that political communication could extend to protect even what might be considered defamatory material, provided it was published in a manner that was neither reckless nor unreasonable and the publisher was unaware of its falsehood.¹⁶³

Though these three cases clearly highlight a difference between America’s freedom of speech and Australia’s freedom of political communication, the distinction can hardly be said to be especially clear. Like America’s Supreme Court, Australia’s High Court leaves unanswered questions in its jurisprudence. For example, *Theophanous* touches upon but does not fully examine the meaningful distinction between political and apolitical speech. The *Theophanous* decision acknowledged the possibility of speech moving from apolitical to political, raising a new question: at which point can communication be adequately considered political enough to invoke the protections of the Australian Constitution? Should Australians feel comfortable with leaving the distinction between political and apolitical speech to the courts or should legislation give more definite standards? As with the *Brandenburg* framework, the High Court has said very little elaborating on the sparse standard it established. Consequently, pragmatic concerns exist regarding where the line is drawn on the Australian Constitution’s protections of political communication.

¹⁶¹ *Id.*
¹⁶² *Id.*
¹⁶³ *Id.*

D. The United Kingdom

What distinguishes the constitution of the United Kingdom with respect to any of the other nations at issue here is that it is largely considered unwritten. This perception should not be overstated; many of the fundamental liberties enshrined in the American, Canadian, and Australian Constitutions are also provided for in writing in the United Kingdom. As with Canada, these writings are various. A great deal of what informs British free speech law has been discussed earlier in this paper in *The Development of the English Free Speech Tradition*. This section of the paper turns to the codification of those philosophical ideals in black-letter law. British free speech is less defined by textual interpretation perhaps because of the mostly unwritten nature of the British constitution, and so very little is available to read for statutory interpretation. Furthermore, the doctrine of parliamentary sovereignty, which ordains that Parliament is the supreme arbiter of the law, has checked the amount of judicial opinions that may be relied upon to elaborate on the state of the law. Consequently, the field of law from which to draw on this subject in British law is narrow. For the purposes of this paper, the analysis focuses on two distinct texts: the English Bill of Rights 1689 and the Human Rights Act 1998.

The English Bill of Rights must be understood within the context of English history. King James II was mistrusted by Parliament by his heavy-handed manner of attempting to secure personal and religious supremacy.¹⁶⁴ Parliamentary leaders, broadly speaking, practiced the Anglican faith whereas James was Catholic.¹⁶⁵ Political clashes between Crown and Parliament escalated up to 1688, when James fathered a son.¹⁶⁶ The birth of a new heir apparent who was presumed to be a future Catholic king filled the Anglican Parliament with a sense of urgency and

¹⁶⁴ Sir George Clark, *The Oxford History of England: The Later Stuarts, 1660-1714* 116 (2nd ed. 1956)

¹⁶⁵ *Id.* at 121.

¹⁶⁶ *Id.* at 126-27.

Parliamentary leaders invited William of Orange, the stadtholder of the Netherlands, to take up control in London.¹⁶⁷ William invaded with a naval force and entered London with very little actual combat at the same time that James fled the country.¹⁶⁸ William and his wife, James's daughter Mary, assumed control of the throne with the consent of Parliament.¹⁶⁹ With the ascension of William and Mary, Parliament set upon the task of preventing another problem of this magnitude from reoccurring and drafted an Act that was, in essence, an after-the-fact moral justification for the Glorious Revolution.¹⁷⁰ The Act opened with findings of the Parliament that James had infringed upon "the laws and liberties of this kingdom."¹⁷¹ Parliament then set forth certain those laws and liberties that could not be violated with its consent. Among these declarations was "[t]hat the freedom of speech and debates or proceedings in Parliament ought not to be impeached or questioned in any court or place out of Parliament."¹⁷² By its own words, this was a liberty guaranteed to Parliament, but ostensibly because it was guaranteed to the people's representatives in the House of Commons, it was also guaranteed to the people themselves.

The second source of freedom of speech in the United Kingdom is far more recent. The Human Rights Act 1998 is a legislative incorporation of the European Convention on Human Rights. This Convention was among a number of convention documents put forth immediately after World War Two. In relevant part, Article 10 of the Convention guarantees freedom of expression:

¹⁶⁷ *Id.* at 133.

¹⁶⁸ *Id.* at 142.

¹⁶⁹ *Id.* at 145.

¹⁷⁰ *Id.*

¹⁷¹ Bill of Rights, c. 2 (Regnal. 1 Will. and Mar. Sess. 2),

<http://www.legislation.gov.uk/aep/WillandMarSess2/1/2/introduction>

¹⁷² *Id.*

1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without reference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.¹⁷³

There are necessarily practical limitations on how the European Court of Human Rights may guarantee this freedom to people in the signatory states to the Convention. In *Handyside v United Kingdom*, the Court expressed this concern in terms of the “margin of appreciation” theory. Handyside was a bookseller who was deemed to have violated British obscenity law for selling a controversial book to children that covered such topics as sex and drugs.¹⁷⁴ He challenged the law in the European Court of Human Rights. The Court recognized the impossibility of finding a standardized system of morality applicable to all states under its jurisdiction: “In particular, it is not possible to find in the domestic law of the various Contracting States a uniform European conception of morals.”¹⁷⁵ The Court therefore gave great deference to the states in their own determinations of what was appropriate for themselves and found that the United Kingdom had drafted its obscenity laws for the protection of its citizens’ morals in concordance with Article 10. The test for the judges was to determine if there was an adequate balance between the restrictions and the legitimate aims of the government, evaluated

¹⁷³ European Convention on Human Rights, Sept. 3, 1953,
<http://conventions.coe.int/treaty/en/Treaties/Html/005.htm>

¹⁷⁴ *Handyside v. United Kingdom*, App. No. 5493/72, 6,
<http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57499>, (1976).

¹⁷⁵ *Id.* at 17.

on the necessity of the manner in which the legitimate aims were furthered by the imposed restrictions.¹⁷⁶ The defendant challenged this proportionality balancing, claiming that less restrictive alternatives existed but were not pursued, such as expurgating offensive parts of the book or limiting its sales.¹⁷⁷ Since the defendant had fought the British government's classification of the book as obscene, the Court rejected the notion that expurgation was a viable option even to the defendant, much less to the British government.¹⁷⁸ As the book was intended for a teenaged audience, the Court dismissed the second proposal as illogical and held that Article 10 was in no way violated.¹⁷⁹

A more recent example of the European Court's interest in British freedom of expression is in the so-called *McLibel* case. In this case, two people were part of a small group of environmental activists. The two activists distributed a leaflet protesting the fast food titan McDonald's, objecting to the corporation's practices of distributing unhealthy foods, mistreating union workers, animal cruelty, resource exploitation, and economic imperialism, among other things.¹⁸⁰ As the environmental activists were not incorporated, McDonald's could not pursue legal action against them as a collective body, so it sent private investigators to infiltrate the group and determine who was principally responsible for the group's anti-McDonald's campaign literature.¹⁸¹ After about a year of this investigation, McDonald's brought the two individuals at the heart of the lawsuit to court on claims of libel.¹⁸² The defendants, both on income assistance, asserted that their publication was substantially true as an affirmative defense, but lacked the

¹⁷⁶ *Id.* at 21.

¹⁷⁷ *Id.* at 23.

¹⁷⁸ *Id.*

¹⁷⁹ *Id.*

¹⁸⁰ Case of Steel and Morris v. United Kingdom, App. No. 68416/01, 2-8, <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-68224>, (2005).

¹⁸¹ *Id.* at 8.

¹⁸² *Id.*

funds to seek an attorney and had to represent themselves at trial.¹⁸³ After a two year trial, the trial judge found in favor of McDonald's and ordered the defendants to pay the corporation £60,000.¹⁸⁴ The defendants brought suit in the Court of Appeal, making a claim that their Article 10 right of freedom of expression had been violated from the outset.¹⁸⁵ The Court of Appeal rejected all of the issues presented.¹⁸⁶ With respect to the Article 10 claim, the Court of Appeal stated that acceptance of the defendants' position "would open the way for 'partisan publication of unrestrained and highly damaging untruths,' and there was a pressing social need 'to protect particular corporate business reputations...from such publications.'"¹⁸⁷ The defendants appealed to the Law Lords, at the time the British court of last resort. The Law Lords refused to hear their appeal.¹⁸⁸

After many years of litigation, the defendants brought their case to the European Court of Human Rights. The Court quickly assessed that the British courts' rulings amounted to state interference with the defendants' freedom of expression and that this state interference was prescribed by British law regarding defamatory publications.¹⁸⁹ The sole issue before the Court was determining the necessity of that interference in a democratic society.¹⁹⁰ In making its proportionality assessment, the Court took note of the fact that the leaflet raised very serious issues of a political nature, and "expression on matters of public interest and concern[] requires a high level of protection under Article 10..."¹⁹¹ The Court admonished the British government, reminding the United Kingdom that even the opinions of groups outside the mainstream were

¹⁸³ *Id.* at 8-9.

¹⁸⁴ *Id.* at 13.

¹⁸⁵ *Id.*

¹⁸⁶ *Id.* at 14.

¹⁸⁷ *Id.* at 15.

¹⁸⁸ *Id.* at 16.

¹⁸⁹ *Id.* at 29.

¹⁹⁰ *Id.*

¹⁹¹ *Id.* at 30.

entitled to the protection of Article 10.¹⁹² Moreover, the Court was concerned that the British courts were neglecting

[t]he more general interest promoting the free circulation of information and ideas about the activities of powerful commercial entities, and the possible “chilling” effect on others [as other] important factors to be considered in this context, bearing in mind the legitimate and important role that campaign groups can play in stimulating public discussion...¹⁹³

In its conclusion, the Court declared that the rule of proportionality had been violated in this case and held that the United Kingdom had violated the defendants’ Article 10 freedom of expression.¹⁹⁴

Over the past two decades, British speech law has changed substantially, in no small part because of the United Kingdom’s integration into a number of pan-European agreements. Case law in the area represents a moving target as a result, seemingly pointed in favor of a mild liberalization. Since the law is in a transformative state, it is unclear how many precedents may reasonably be relied upon as valid. Nonetheless, the English Bill of Rights and Article 10 set a baseline for British freedom of expression that has been interpreted through such cases as *Handyside* and *McLibel*. The current British freedom of expression is therefore not nearly as vast as its American or Canadian counterparts, but has the benefit of setting a much clearer standard than its Australian counterpart because it enumerates what in particular is to be protected.

Having examined the protections of speech in the United States, Canada, Australia, and the United Kingdom as they are normally guaranteed by their national constitutions, it remains to be seen how those protections may be changed. While the constitutions are guarantees for the

¹⁹² *Id.*

¹⁹³ *Id.* at 32.

¹⁹⁴ *Id.* at 33.

citizen against the government, the enforcer of those guarantees is also the government. Consequently, reliance on the courts to be neutral and dispassionate arbiters in times of strife and crisis results in denial of the civil liberties that the constitutions promised.

Restrictive Wartime, Anti-Sedition, and Anti-Terrorism Legislation

Now that the four nations' protections of speech have been seen in their natural state, investigating their protections in times of war, sedition, and terrorism may be understood in proper context. Interestingly, though the four nations protect speech in some ways that are fundamentally different, the way in which they restrict speech in times of security crises are almost identical.

A. *United States*

Restricting speech under the Constitution is nearly as old as the Constitution itself. In 1798, diplomatic relations between the United States and revolutionary France broke down entirely for a number of reasons, leading to French ships seizing American trading vessels. In response, President John Adams signed into law four bills that summer that are colloquially referred to as the Alien and Sedition Acts. The first, the Naturalization Act, merely established the rules for naturalization and provided for the recognition of legal aliens.¹⁹⁵ The second, the Alien Friends Act, authorized the president to order the expulsion of “all such aliens as he shall judge dangerous to the peace and safety of the United States, or shall have reasonable grounds to suspect are concerned in any treasonable or secret machinations against the government thereof...”¹⁹⁶ The Act included a proviso for aliens to demonstrate their good character to the federal government and obtain a special license to remain in the United States, but that license was revocable by the president “whenever he [should] think proper.”¹⁹⁷ The third statute, the Alien Enemies Act, ordained that when the president declared a state of war, “all natives,

¹⁹⁵ Naturalization Act, <http://memory.loc.gov/cgi-bin/ampage?collId=llsl&fileName=001/llsl001.db&recNum=689>

¹⁹⁶ Alien Friends Act, <http://memory.loc.gov/cgi-bin/ampage?collId=llsl&fileName=001/llsl001.db&recNum=694>

¹⁹⁷ *Id.*

citizens, denizens, or subjects of the hostile nation or government, being males of the age of fourteen years and upwards, who shall be in the United States, and not actually naturalized, shall be liable to be apprehended, restrained, secured and removed, as alien enemies.”¹⁹⁸ The Act also gave the president free reign to state America’s official course of conduct toward those legal aliens “and to establish any other regulations which shall be found necessary in the premises and for the public safety.”¹⁹⁹ This included setting a time frame in which legal aliens could leave the country voluntarily, “as may be consistent with the public safety, and according to the dictates of humanity and national hospitality.”²⁰⁰ Lastly, the Sedition Act proscribed conspiracy against the United States government, broadly defined as instances in which people attempted to undermine the federal government by “counsel[ing], advis[ing] or attempt[ing] to procure any insurrection, riot, unlawful assembly, or combination [thereof]...”²⁰¹ More specifically, “any person [who would] write, print, utter or publish...any false, scandalous and malicious writing or writings against the government of the United States” with the intent to “stir up sedition within the United States” was subject to criminal prosecution.²⁰²

Fortunately, the Alien and Sedition Acts contained sunset clauses. In the time during which they were in effect, however, there were multiple arrests, trials, and convictions for violation of the laws. Here, the federal courts may at least be partially absolved of ignoring the First Amendment; the principle of judicial review established in *Marbury v. Madison* was not yet in effect. That notwithstanding, the fact that the Alien and Sedition Acts were used successfully to prosecute people indicated the marginal importance of the First Amendment in the face of

¹⁹⁸ Alien Enemies Act, <http://memory.loc.gov/cgi-bin/ampage?collId=llsl&fileName=001/llsl001.db&recNum=700>

¹⁹⁹ *Id.*

²⁰⁰ *Id.*

²⁰¹ Sedition Act, <http://memory.loc.gov/cgi-bin/ampage?collId=llsl&fileName=001/llsl001.db&recNum=719>

²⁰² *Id.*

perceived sedition. Given this response, it is not entirely surprising that the Free Speech Clause would not be used as a serious touchstone of liberty until the Twentieth Century.

The Twentieth Century was initially no more receptive to honoring the spirit of the Free Speech Clause than the Eighteenth Century. As the United States prepared to enter World War One, President Woodrow Wilson signed the Espionage Act of 1917. The statute criminalized making or distributing any kind of interference with American armed forces in a time of war. This meant provoking “insubordination, disloyalty, mutiny, or refusal of duty...or...obstruct[ing] the recruiting or enlistment service of the United States” including by means of making “false reports or false statements...”²⁰³ This law was supplemented by the Sedition Act of 1918, which subjected to prosecution anyone who would “willfully utter, print, write, or publish any disloyal, profane, scurrilous, or abusive language”²⁰⁴ about the United States.

Almost immediately, the Espionage and Sedition Acts became instruments of suppression. In 1918, a number of Jehovah’s Witnesses were convicted and sentenced for preaching the teachings of their faith’s book, which rejected participation in the war, pursuant to the Acts.²⁰⁵ Only at the order of Justice Brandeis were they released on bail and their convictions were overturned.²⁰⁶ Charles Schenck was found to have violated the Acts when he published his pamphlet promoting pacifism.²⁰⁷ When Jacob Abrams and four others wrote and distributed a pamphlet denouncing the American government as a false, hypocritical, belligerent, capitalist machine, they were all convicted of violating the Acts.²⁰⁸ The Supreme Court of the United States upheld their convictions, stating that “the plain purpose of their propaganda was to excite,

²⁰³ Pub.L. 65-24, 40 Stat. 217, 219.

²⁰⁴ Pub.L. 65-150, 40 Stat. 553.

²⁰⁵ Alan Rogerson, Millions Now Living Will Never Die 42 (1969)

²⁰⁶ M.J. Penton, Apocalypse Delayed 56 (1997)

²⁰⁷ *Schenck*, 249 U.S. at 48-49.

²⁰⁸ *Abrams v. United States*, 250 U.S. 616, 616-20 (1919).

at the supreme crisis of the war, disaffection, sedition, riots, and, as they hoped, revolution, in this country...”²⁰⁹ Utilizing a test of tendency for provocation, the Court found that there was ample evidence for a jury to find that “the language of these circulars was obviously intended to provoke and to encourage resistance to the United States in the war...”²¹⁰ Justice Holmes, joined by Justice Brandeis, dissented; Holmes broadly agreed that the defendants had violated the Acts but the Acts were unconstitutional when balanced against the Free Speech Clause.²¹¹ As a legal argument, Justice Holmes contended that the majority failed to apply his clear and present danger test from *Schenck*.²¹² As a matter of philosophical discourse, he proposed the “marketplace of ideas” analogy for which the dissent is most famous:

To allow opposition by speech seems to indicate that you think the speech impotent.... But when 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.²¹³

This was a declaration in defense of speech essentially no different from Milton, Locke, or Mill. Justice Holmes concluded his dissent by remarking that seditious libel was a horrible archaism: “I had conceived that the United States through many years had shown its repentance for the Sedition Act of 1798, by repaying fines that it imposed.”²¹⁴ Whatever the ideals of the Constitution were supposed to be, they were not honored in World War One.

This condition persisted in World War Two. Following the Japanese assault on Pearl Harbor, President Franklin Roosevelt signed Executive Order 9066. The language of the order

²⁰⁹ *Id.* at 623.

²¹⁰ *Id.* at 624.

²¹¹ *Id.* at 626, 631 (Holmes, J., dissenting).

²¹² *Id.* at 627 (Holmes, J., dissenting).

²¹³ *Id.* at 630 (Holmes, J., dissenting).

²¹⁴ *Id.* at 631 (Holmes, J., dissenting).

was relatively neutral; invoking his power as commander in chief, the president authorized the Secretary of War and the commanders of the armed forces “to prescribe military areas in such places and of such extent as [they] may determine, from which any or all persons may be excluded, and with respect to which, the right of any person to enter, remain in, or leave shall be subject to whatever restriction [they] may impose in [their] discretion.”²¹⁵ In practice, this order was enforced primarily against people of Japanese or Korean descent. The order and its effects had very little to do with speech and is mentioned here solely to exemplify further the willingness of the courts to abandon their role as the custodians of constitutional liberties. When an American-born man of Japanese ancestry challenged the constitutionality of Executive Order 9066, the Supreme Court of the United States upheld the order.²¹⁶ Justice Hugo Black’s majority opinion²¹⁷ and Justice Felix Frankfurter’s concurrence²¹⁸ acknowledged with some worrisome obsequiousness the power of the president to make immediate judgments in response to war. Unsurprisingly, when justices pander to the power of the president in a time of warfare, civil liberties are deeply jeopardized.

September 11, 2001 brought these issues into the modern day. The USA PATRIOT Act of 2001 provided the federal government with a variety of tools to combat terrorism. The statute is immense, amending and modernizing a wide range of older laws in the United States Code. The law relaxed standards for search warrants and gave the government greater access to a variety of records held by third parties. The concern going forward for a number of groups was that the Act impermissibly infringed upon the people’s constitutional rights. Although most of the focus in this regard is on the Fourth and Fifth Amendments, the American Civil Liberties

²¹⁵ 7 FR 1407.

²¹⁶ *Korematsu v. United States*, 323 U.S. 214, 224 (1944).

²¹⁷ *Id.* at 217-18.

²¹⁸ *Id.* at 224-25 (Frankfurter, J., concurring).

Union has stated that the law also threatens the Free Speech Clause, with government surveillance made permissible “based in part on a person’s First Amendment activities, such as the books they read, the Web sites they visit, or a letter to the editor they have written.”²¹⁹ The section in question, Section 215, authorizes subordinates of the Director of the Federal Bureau of Investigations to seek an order compelling

the production of any tangible things (including books, records, papers, documents, and other items) for an investigation to protect against international terrorism or clandestine intelligence activities, provided that such investigation of a United States person is not conducted solely upon the basis of activities protected by the first amendment to the Constitution.²²⁰

The American Library Association targeted Section 215 as a mechanism that permitted “the government to secretly request and obtain library records for large numbers of individuals without any reason to believe they are involved in illegal activity...” and opposed its use to invade the privacy of library patrons.²²¹ Whatever may be thought of the ACLU and the ALA, their concerns are not entirely unfounded: notwithstanding the Act’s apparent conformity to the First Amendment, the law authorizes the government to seek the name, address, telephone number, local and long distance telephone call records, service type, and means of payment for such service of any person merely by certifying to a court that the person “is relevant to an ongoing investigation to protect against international terrorism or clandestine intelligence activities...” The substantially lowered standard to obtain a search warrant here, *ex parte* certification to the court of an individual’s relation to an open investigation with no judicial discretion, is an affront to the Fourth Amendment and opens up the possibility of a serious

²¹⁹ *Surveillance Under the USA PATRIOT Act* (Dec. 10, 2010), <http://www.aclu.org/national-security/surveillance-under-usa-patriot-act>.

²²⁰ Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act, Pub. L. No. 107-56, 2001 U.S.C.C.A.N. § 215 (2001).

²²¹ *Resolution on the USA PATRIOT Act and Libraries* (June 29, 2005), <http://www.ala.org/Template.cfm?Section=ifresolutions&Template=/ContentManagement/ContentDisplay.cfm&ContentID=101514>

incursion into the activities of people traditionally protected by the First Amendment. When Ali al-Timimi was indicted on federal charges, he had been under surveillance for months, based in large part on the lecture he gave the night of September 11, which, as has already been noted, was not conspiracy and would ordinarily fall under the protections of the First Amendment.

The United States suffered tragically on September 11, 2001. Its reaction thereto, however, has not been adequately focused. The result has been law that targets the wrong individuals in the wrong manner. Perhaps more troublingly, it has also served as a paradigm for other nations.

B. Canada

Fortunately for Canada, there has not been very much in the way of war or sedition on Canadian soil. Up through the Twentieth Century, then, there is little to say about Canadian legislation that was potentially restrictive on Canadians' freedoms in this area. When September 11 occurred, it took place in a much different context. A globalized world such as that of the Twenty-First Century presented a need for nations to address the growing threat of terrorism, and Canada was quick to react with anti-terrorism legislation that was passed that same year.

The potentially abusive effects of the USA PATRIOT Act were not limited to the United States. In Canada, the Canadian Anti-Terrorism Act substantially emulated the USA PATRIOT Act. Like the USA PATRIOT Act, the Canadian Anti-Terrorism Act is an omnibus bill that amends multiple extant statutes to bring them into the Twenty-First Century. Also like its American counterpart, the Canadian law makes special provisions on how the government may conduct its investigations.

Section 83.28 of the Act empowers law enforcement to apply to a judge for an order to conduct information gathering on a person suspected of participation in terrorist activity. The

judge can issue the warrant if he finds that there are reasonable grounds to believe the person has been or will be involved in terrorist activity and that the order's execution will be helpful in advancing the anti-terrorism cause. It is readily apparent that the Canadian law copies the American law's form and was intended to do so.²²² Where the two laws differ seems to be in respect of the level of suspicion: whereas in America, there is no specific level of suspicion needed to procure a warrant, save for the agent's certification, a Canadian agent must convince a judge that there are reasonable grounds to issue an order. Divining an exact match between the American and Canadian models is not feasible, but it would sound like "reasonable grounds" are analogous to "reasonable suspicion" in the United States. As a level of suspicion, reasonable suspicion is lower than probable cause, the traditional standard required for a search warrant. While the presence of a safety guard in any form appears to be an improvement over no safety guard, this does raise the question of whether or not the appropriate balance is being struck between protection and liberty.

The potential abuses from the USA PATRIOT Act described above are applicable to the Canadian Anti-Terrorism Act. If there have been such abuses, they have not been extensively documented to report. The Canadian law has also been used to impose a life sentence on one terrorist who intended to attack metropolitan Toronto, the harshest penalty available.²²³ This story reflects the law's use as a form of statutory sentencing, not necessarily as a form of updating national security for the Twenty-First Century. From what is described about the plot, it is not clear what role the augmented powers of law enforcement and security officials under the Canadian law played in foiling the attack. Those concerns about the misapplication or misuse of the law remain pertinent concerns for opponents of the law and civil rights activists.

²²² <http://www.thestar.com/news/gta/crime/article/752507--life-term-for-terror-ringleader>

²²³ *Id.*

C. Australia

Australia, like Canada, has not been affected by terrorism in the same way that the United States has. Following September 11, 2001, Australia was relatively slow in responding with anti-terrorism legislation. Most of the nation's legislation regarding terrorism came only in 2004, following the terrorist train bombing in Madrid. Australian anti-terrorism laws have been shaped around the USA PATRIOT Act too, and this is of special concern to the laws' opponents as a matter of Australian constitutional jurisprudence.

A substantial portion of the Australian anti-terrorism legislation in the middle of the last decade was generally modeled on the USA PATRIOT Act, and civil liberties organizations like the New South Wales Council for Civil Liberties expressed strong reservations about following the American system, especially in the case of executive orders that were not law, either by congressional decree or judicial decision.²²⁴ Three anti-terrorism bills were introduced into the Australian Parliament in 2004. The second of these, often referred to simply as Anti-Terrorism Bill No. 2, amended parts of the federal criminal code to create a new classification of offenses: treason and sedition.²²⁵ Although activities effecting treason or sedition had been criminalized under previous law, the new law redefined the offenses. Sedition previously was broken down into categories: expressing seditious intention (contempt for the Sovereign, the Commonwealth government, or the Constitution), carrying out seditious enterprise (undertakings to effect seditious intention), and expressing seditious words (communicating seditious intention). The new law untethered the act of sedition to seditious intention.²²⁶ Overthrowing, encouraging the overthrow, or assisting in the overthrow of the government or the Constitution became the new

²²⁴ <http://www.nswccl.org.au/docs/pdf/inquiry%20into%20provisions%20of%20anti-terrorism%20bill%202004.pdf>

²²⁵ <http://www.nswccl.org.au/docs/pdf/ATB22005submission.pdf>

²²⁶ <http://www.austlii.edu.au/au/other/alrc/publications/issues/30/2.html#Heading4>

statutory definition of sedition.²²⁷ However, the most striking change was not the definition of the act itself, but the required *mens rea*: whereas sedition previously required purposeful conduct based on seditious intention, amendments in the current law lowered that mental culpability threshold to recklessness.²²⁸

It is a matter of course that sedition laws necessarily curb speech. The concern about Anti-Terrorism Bill No. 2 is that it curbs speech to an unconstitutional degree. The English free speech philosophers explained the importance of the liberty and their sentiment was echoed by the Justices of the Australian High Court in the 1990s free speech cases. When the views of the High Court in those cases are contrasted with the provisions of Anti-Terrorism Bill No. 2, there is obvious incompatibility and inconsistency. In such a case, the High Court should be the definitive authority. Freedom of communication allows the representative democracy guaranteed by the Australian Constitution to flourish, in the opinion of the Justices. That is not to say that the freedom is absolute; it is subject to a proportionality test. Even so, when the culpability is lowered to mere recklessness, the law is undermining the high degree of protection that the High Court would afford freedom of communication. What would have been expressing a sentiment of dissatisfaction with the federal government in the 1990s could be sedition in 2005. As suggested before, a constitution should not offer different ranges of protection based on if there is a matter of national security.

In addition to the 2004 anti-terrorism legislation, another anti-terrorism law passed the Australian Parliament in 2005. The 2005 law features a number of provisions that encroach upon constitutional freedoms. For example, control orders are prescribed for terrorist suspects. The scope of control orders range widely: a suspect can be restricted in his travel, forbidden from

²²⁷ *Anti-Terrorism Act (No. 2) 2005* (Cth) s 80.2(1).

²²⁸ *Id.* at s 80.2(4).

doing certain activities even if those activities are necessary to his occupation, forbidden from using certain types of communication, or required to wear a tracking device.²²⁹ A suspect's attorney is permitted to request a copy of the control order, which is a judicial order, but neither law enforcement nor courts are obligated to provide the attorney with a copy of the order.²³⁰ A suspect can apply to have the order revoked but the law does not state under what circumstances an order would normally be revoked.²³¹ This gives judges wide latitude in determining what sort of limitations on liberty may be imposed on a person. Considering that judges need only be "satisfied on the probabilities," a phrase that sounds alarmingly close to reasonable suspicion under American jurisprudential standards, that the suspect either was involved or will be involved in terrorist activity in order to issue a control order, judges have a great deal of discretion on control orders at the front end as well.²³²

Another example of the 2005 law's expansive grant of power to the government is in the form of detention orders. Detention orders may be issued if the Australian Federal Police believes that "there are reasonable grounds" to think the suspect was, is, or will be engaged in terrorist activity.²³³ Such orders are meant either to prevent imminent terrorist attacks or to gather evidence in the wake of a terrorist attack. The authority that issues the detention order also determines the length of the order's effect.²³⁴ In theory, this gives law enforcement practically unlimited time to detain a suspect without being required to bring formal charges. As in the United States, Australia limits the amount of time that may pass before a suspect must be charged before a judge, yet detention orders entirely negate that protection. The relevant

²²⁹ *Anti-Terrorism Act 2005* (Cth) s 104.4(3).

²³⁰ *Id.* at s 104.10.

²³¹ *Id.* at s 104.11.

²³² *Id.* at s 104.3(b).

²³³ *Id.* at s 105.4(2).

²³⁴ *Id.* at s 105.9.

consideration here is that sedition is associated with terrorism under the new Australian anti-terrorism statutes, and for that reason, control orders and detention orders are available to law enforcement for expressing sentiments that are regarded as seditious. Reckless criticism of the Australian government could mean long-term to indefinite detention, and for all that the Australian High Court said of the importance of the citizen's ability to criticize the Australian government in the interest of public debate, that there should be a penalty at all is wrong. The fact that this penalty is so massive only adds to the self-evident unjustness in the light of the importance of free speech.

D. United Kingdom

Unlike any of the other three nations, the United Kingdom has been exposed to terrorism for a long time. This is reflected in the fact that some of the oldest British anti-terrorism laws date back to 1939. Conflict between the English and the Irish had escalated since World War One, culminating in a series of bombings in England. Irish terrorism rose again in the 1970s and resulted in a new round of legislation to combat the problem. Since then, the British government has periodically updated its anti-terrorism laws to adapt to the changing face and methodology of terrorism.

The Prevention of Terrorism Act 1974 was the first in a long string of laws designed to counter the attacks of the Irish Republican Army. Revisited annually because of the special emergency powers it granted, the 1974 act was breathtakingly clear in what it proscribed. The statute criminalized membership in, association with, or financial support of a specified terrorist

organization.²³⁵ More broadly, the law imposed a restriction on freedom of expression related to terrorist organizations:

Any person who in a public place (a) wears any item of dress, or (b) wears, carries or displays any article in such a way or in such circumstances as to arouse reasonable apprehension that he is a member or supporter of a proscribed organisation, shall be liable on summary conviction to imprisonment for a term not exceeding three months or to a fine not exceeding £200, or both.²³⁶

At least from the perspective of American jurisprudence, this is a highly invasive assault on free speech. When three children wore black armbands to school to protest the Vietnam War in violation of school policy, the district and appellate courts initially upheld the constitutionality of the schools' decision.²³⁷ The United States Supreme Court reversed, pointing out that the children's conduct was the type of conduct categorically protected by the Free Speech Clause.²³⁸ "The problem posed...does not concern aggressive, disruptive action or even group demonstrations. Our problem involves direct, primary First Amendment rights akin to 'pure speech.'"²³⁹ The children had caused no disruption apart from merely wearing the offending article, as presumably could a person who, in 1970s Britain, could have worn a shirt expressing his approval of the Irish Republican Army. To take another example, Paul Cohen "was observed in the Los Angeles County Courthouse...wearing a jacket bearing the words 'Fuck the Draft' which were plainly visible."²⁴⁰ He was convicted for "maliciously and willfully disturb[ing] the peace or quiet of any neighborhood or person...by...offensive conduct... [and] was given 30 days' imprisonment."²⁴¹ At no time did he or anyone else react in a loud or drastic way as a

²³⁵ Prevention of Terrorism Act, 1974, c. 56.

²³⁶ *Id.* at Part I, § 2(1).

²³⁷ *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503, 504-05 (1968).

²³⁸ *Id.* at 505-06.

²³⁹ *Id.* at 507-08.

²⁴⁰ *Cohen v. California*, 403 U.S. 15, 16 (1971).

²⁴¹ *Id.* (internal quotation marks omitted)

result of the inscription on his jacket.²⁴² The Supreme Court reversed his conviction, rejecting the argument that the State could legitimately regulate the content or form of the speech.²⁴³ The Court cautioned against “censorship of particular words as a convenient guise for banning the expression of unpopular views.”²⁴⁴ A person who advocated the cause of the Irish Republican Army in 1970s Britain by wearing clothes to that effect would assuredly have been expressing an unpopular view. Of course, this is an American perspective on the issue, but if a fundamental underpinning of free speech is the ability to air grievances so that they may be speedily redressed, the Prevention of Terrorism Act 1974 is markedly antithetical to that view.

The Prevention of Terrorism Act 1974 was replaced with the Terrorism Act 2000. One of the most significant changes is the redefinition of terrorism. In a 1989 amendment of the Prevention of Terrorism Act, terrorism was defined as “the use of violence for political ends, and includes any use of violence for the purpose of putting the public or any section of the public in fear.”²⁴⁵ The definition of terrorism in the 2000 act was expanded to be more comprehensive, including severe harm to person or property, endangerment of life, jeopardizing the health or safety of the public, or interfering with or disrupting electronic systems.²⁴⁶ With an expanded scope of terrorism came an expanded scope of police powers. For example, the Act permitted police to stop and search an individual or automobile if the police considered it “expedient for the prevention of acts of terrorism.”²⁴⁷ Unlike the USA PATRIOT Act, the Canadian Anti-Terrorism Act, or the anti-terrorism bills of Australia, the Terrorism Act required absolutely no

²⁴² *Id.* at 16-17.

²⁴³ *Id.* at 24.

²⁴⁴ *Id.* at 26.

²⁴⁵ Prevention of Terrorism Act, 1989, c. 4, § 20.

²⁴⁶ Terrorism Act, 2000, c. 11, § 1.

²⁴⁷ *Id.* at § 44.

showing of suspicion for cause. The vast authority given to police as a result of Section 44 eventually became the subject of debate in the courts.

In 2003, an arms fair in East London generated protests. Two people were stopped at the arms fair under Section 44, one of whom was a reporter, even though she had showed her press cards to the police when they asked her to stop filming the event.²⁴⁸ The High Court, the Court of Appeals, and the House of Lords all found in favor of the police.²⁴⁹ The plaintiffs took their case to the European Court of Human Rights, alleging violations of Articles 5, 8, 10, and 11.²⁵⁰ The plaintiffs' challenge under Article 10 was that "the legislation itself, with its inadequate safeguards, might well have an intimidatory and chilling effect on the exercise of those rights [protected by Article 10]..."²⁵¹ The European Court of Human Rights declined to examine the merits of the Article 10 challenge, instead finding adequate violation of human rights under Article 8, the right to privacy.²⁵² Looking at the Court's assessment of the Article 8 challenge gives insight into what it might have concluded if it had decided the merits of the Article 10 challenge. The Court first determined that Section 44 constituted an interference with a liberty interest. Its reasoning was that "the use of the coercive powers conferred by the legislation," with no recourse for the suspect but to subject himself to the search or face arrest, amounted to a significant invasion of one's privacy interest.²⁵³ The second part of the Court's proportionality test was that the statute must be in accordance with the law; even if the statute was considered invasive of a liberty interest, it could still be sustained by being properly tailored to meet its

²⁴⁸ Case of Gillan and Quinton, App. No. 4158/05, 2-3, <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-96585>, (2010).

²⁴⁹ *Id.* at 3-14.

²⁵⁰ *Id.* at 29.

²⁵¹ *Id.* at 44.

²⁵² *Id.*

²⁵³ *Id.* at 36.

desired ends.²⁵⁴ Here, the Court took exception to the idea that the coercive power given to the police did not have to “be considered ‘necessary’ and therefore [there was] no requirement of any assessment of the proportionality of the measure.”²⁵⁵ Worse, the absence of effective standard operating procedures afforded great discretion to individual police officers.²⁵⁶ This generated a real potential for arbitrariness in the eyes of the Court, a fear substantiated by the statistics indicating a disproportionate effect on African and Asian minorities.²⁵⁷ Therefore, the Court declared that the coercive powers of Section 44 were “neither sufficiently circumscribed nor subject to adequate legal safeguards against abuse. They are not, therefore, ‘in accordance with the law’ and it follows that there has been a violation of Article 8 of the Convention.”²⁵⁸ Consequently, Section 44 was removed from the Terrorism Act 2000. However, relying on the Court’s interpretation of Article 10 as broad and important in the *McLibel* case, it is reasonable to presume that the Court would have found Section 44 to be in violation of the Convention. The Court’s analysis of the disproportionality is essentially universal with respect to Section 44, irrespective of the particular legal challenge brought against that section. Thus, if the Court had decided this case on the merits of the Article 10 challenge, it would have likely found a violation of Article 10.

Following September 11, 2001, more anti-terrorist legislation came out of the British Parliament. The Anti-terrorism, Crime and Security Act 2001 generally followed in the model of the USA PATRIOT Act, with a startling resolution that foreign-born terrorist suspects could be detained indefinitely without trial and that the law was not subject to review by the European

²⁵⁴ *Id.* at 35-36.

²⁵⁵ *Id.* at 42.

²⁵⁶ *Id.*

²⁵⁷ *Id.* at 43.

²⁵⁸ *Id.* at 43-44.

Court on Human Rights.²⁵⁹ This particular part of the 2001 act was declared unconstitutional by the House of Lords in 2004.²⁶⁰ In response, Parliament passed the Prevention of Terrorism Act 2005, which substituted the unconstitutional section of the 2001 statute with control orders like those found in the Australian anti-terrorism laws. Just like the Australian anti-terrorism laws, the 2005 British law also imposed limitations on a terror suspect's communication, potentially placing "a restriction on his association or communications with specified persons or with other persons generally."²⁶¹ The Home Secretary, a ministerial position comparable to the Secretary of Homeland Security in the United States, was authorized by the 2005 law to impose a control order against anyone suspected of terrorist activity if the secretary had "reasonable grounds for suspecting that the individual is or has been involved in terrorism-related activity."²⁶² Again, the burden on the government was minimal in comparison to the measures it could take. The suspect potentially faced severe constraints on his ability to express his political opinions based on a law enforcement officer's reasonable suspicion. In 2006, this section of the law was also declared unconstitutional.²⁶³ The consequence of this judicial defeat for the British government was the passage of the Terrorism Act 2006.

The Terrorism Act 2006 marked the United Kingdom's strongest incursion into civil liberties in the name of national security. The law created a number of new terroristic offenses, the first of which was the encouragement of terrorism. The statute prohibited making any statement that encouraged, induced, instigated, or glorified terrorist activity.²⁶⁴ A defense against prosecution for encouragement of terrorism was demonstrating that the statement was not an

²⁵⁹ Anti-terrorism, Crime and Security Act, 2001, c. 24.

²⁶⁰ http://news.bbc.co.uk/2/hi/uk_news/4100481.stm

²⁶¹ Prevention of Terrorism Act, 2005, c. 2.

²⁶² *Id.*

²⁶³ <http://www.guardian.co.uk/politics/2006/apr/13/humanrights.terrorism>

²⁶⁴ Terrorism Act, 2006, c. 11.

expression of the defendant's views.²⁶⁵ Put simply, the law criminalized expressing a sympathetic opinion toward terrorism. Once again, this is a different way of treating free speech altogether than in the United States. *Brandenburg* would not countenance a statute that forbade advocacy of violent crime, much less one that punished unpopular speech. Although the elements of the Act are still in effect, British courts have intervened in interpreting the law. In 2007, a British woman of Middle Eastern ancestry was convicted under the Act for possessing records useful to terrorist activity, like terrorist manuals. However, the prosecution had submitted evidence of poetry advocating terrorism that she had written and posted online.²⁶⁶ In 2008, the Court of Appeal overturned the conviction, citing the conviction as "unsafe," ostensibly because the poetry evidence was highly prejudicial and the rest of the evidence was inadequate to support conviction.²⁶⁷ The Crown Prosecution Service asserted that the prosecution was not based on the poetry and did not seek retrial, even though it was convinced its prosecution was proper.²⁶⁸ Regardless of one's personal opinion on the outcome of that case, the Terrorism Act 2006 does represent a real invasion of the freedom of speech in the United Kingdom, as the case's conviction plainly illustrates.

The United Kingdom responded to September 11, 2001 in the same way as the United States, Canada, and Australia: by passing anti-terrorism legislation that strongly dug into citizens' civil liberties. The United Kingdom's especially high rate of legislative activity is probably due to judicial intervention and the London train bombings of July 7, 2005. While there are important and reasonable aspects to the various anti-terrorism laws, all of them curb the

²⁶⁵

Id.

²⁶⁶ http://news.bbc.co.uk/2/hi/uk_news/7084801.stm

²⁶⁷ <http://www.telegraph.co.uk/news/uknews/2145506/Lyrical-Terrorist-Samina-Malik-cleared-on-appeal.html>

²⁶⁸ http://www.cps.gov.uk/news/press_releases/143_08/

freedom of speech for the citizenry. Is this fascination with silencing speech sympathetic to terrorism appropriate or effective? I submit that it is neither, and the courts have been generally derelict in their duty to be the protectors of the public's freedoms.

The Case for Broadening Free Speech

The last question to be considered is the question of the propriety of curtailing speech. All of the nations examined in this paper have placed limits on speech in some form, generally in the name of public order. Is it right that governments so limit speech or is it best that governments have adopted their current restrictions? I assert that all of the nations examined in this paper have not gone far enough in protecting speech but I do not present a case for absolute free speech. Specifically, I contend that the various national constitutions are construed too conservatively in peace, thus making the retreat from the protections of those constitutions significantly easier in the absence of peace.

There is a certain seductiveness to the notion of absolute free speech, at least in abstract judicial thinking. The most obvious benefit it bestows on jurisprudence is its ostensible clarity; there is no need for balancing tests or analyzing the rationality of the measure taken with respect to the objective sought when the freedom is absolute. This understanding would not be limited to legal practitioners and scholars; the average layperson would have no difficulty comprehending the rule that there are no rules on speech. Working from the basic premise that all laypersons are supposed to know all laws, it would at least be advantageous to the common citizenry to have the totality of the law in this field completely and unequivocally understood. A corollary benefit is that any attempts by government to encroach upon this liberty will be plain. Any law that hinders speech in even the slightest manner would be obviously unconstitutional. As far as bright-line tests would be concerned, this would probably be one of the brightest lines drawn.

On the other hand, absolute free speech carries certain drawbacks. One such drawback is to be found in various criminal codes. Actions like fraud and perjury are generally regarded as reprehensible forms of conduct. Fraudulent deception offends most people's basic sense of

fairness. Courts have a vested interest in the truthfulness of testimony taken under oath for the benefit of the finder of fact. Certainly, these are actions, yet the fundamental *actus reus* of fraud or perjury is done with words. If absolute free speech prevailed, people could defraud others or perjure themselves with impunity. Unjust business practices would quickly flow from the consequent decriminalization of fraud. These practices could not be remedied justly in court because plaintiffs and defendants alike could lie to the court about what transpired and go unpunished. Undermining the justice system in the name of liberty sounds less like freedom and more like anarchy when viewed in this context.

Another consequence of free speech is that “speech” suddenly becomes a very broad term. Although Australia attempted to circumvent the problem by protecting “communication” and Canada and the United Kingdom did the same by protecting “expression,” the central question is: what *is* speech? Absolute free speech suddenly runs into a variety of obstacles, especially when some conduct runs afoul of society’s approbation. For instance, Paul Cohen, the defendant in *Cohen v. California*, wore a jacket bearing the words “Fuck the Draft” on the back.²⁶⁹ The majority classified this as a form of speech protected by the First Amendment.²⁷⁰ However, writing for three justices, Justice Blackmun rejected this classification. In a very brief dissent, Justice Blackmun stated, “Cohen’s absurd and immature antic, in my view, was mainly conduct and little speech.”²⁷¹ Proceeding from Blackmun’s conclusion, the wearing of clothing is “conduct,” but that does not sound like a compelling or even sensible interpretation. This would require the Court to make fairly arbitrary decisions on what is styled conduct and what is styled speech. Blackmun’s tortured and disingenuous attempt to exclude Cohen’s self-expression from the sphere of speech exemplifies how subjective these decisions would be. The logical extreme

²⁶⁹ *Cohen*, 403 U.S. at 16.

²⁷⁰ *Id.* at 26.

²⁷¹ *Id.* at 27 (Blackmun, J., dissenting).

would be that an act as mundane as tying one's shoes could be construed not only as action but as speech; acts without meaning and that do not undertake to fulfill any of the roles Justice Brandeis described in his *Whitney* concurrence would have the full benefit of the protection of freedom of speech. These actions would not need those protections, being devoid of any deeper meaning, and yet constitutional safeguards would be in place for them. I hesitate to believe that citizens of the nations examined here would find such a state of affairs necessary or desirable.

If the answer is not absolute free speech, then, what is the answer? Courts must broaden the guarantees of freedom of speech to the greatest extent possible short of absolute freedom. This does not set a very clear set of parameters in the abstract, but an illustration on the topic of criminal advocacy may better explain my meaning. Under America's *Brandenburg* test, it is only when speech is likely to cause imminent harm that it is not protected. This harkens back to Justice Brandeis's point that only when there is no opportunity for counter-speech is there the potential for harm of an imminent nature. That would be a sensible standard, if a scenario in which speech is adequately tied to the problem could be found. If we think of a hate group meeting to target a family of potential victims, whatever criminal activity is committed need not be tied to the speech among the members of the hate group. If someone in the hate group breaks a window of the victims' house, he is guilty of vandalism, but it is a more tenuous position to say that the criminal advocacy is what incited him to act. From a legal standpoint, it is almost irrelevant to inquire why one has broken the law. All that is required is an *actus reus* and a *mens rea*, both of which may be found without delving into the criminal actor's motivations. Motive informs a jury's understanding of the actor's *mens rea* but it is not necessary for a conviction.

Related to this matter is protecting speech advocating unfulfilled crime. Conspiracy punishes actors who have taken a substantial step in executing their plot. In the hands of results-

oriented judges, that is a sufficiently vague standard to make most actions criminal in nature. One need only look at al-Timimi to see how conspiracy may be wielded as a means of punishment by association. By advocating against the United States and recommending places to go to prepare to defend Afghanistan from American invasion, al-Timimi was found guilty of conspiracy, but it is not clear that this is a substantial step taken in furtherance of criminal activity. Why is speech a substantial step? The argument might be raised that, but for the speech, the actor would not have committed the crime. This rationale is a prosecutor's self-fulfilling prophecy. All it offers is a conclusory link between two events without attempting to establish a causal link between those events beyond a reasonable doubt. Indeed, applying *Brandenburg* to al-Timimi's case suggests a different outcome: the Ohio syndicalism statute at issue in *Brandenburg* outlawed advocating or teaching violence "as a means of accomplishing industrial or political reform." Al-Timimi taught the conspirators to use violence to resist America's military might with the intent of communicating a political message. It is odd to think that *Brandenburg*'s threat against the life of the president and other federal officials can be legally distinguished from al-Timimi's teaching of violent resistance to the United States armed forces. If conspiratorial speech were protected, it would prevent the results-oriented abuse that the al-Timimi case seems to represent.

Further to the point of protecting speech, al-Timimi serves as an example of the historical overreaction to unpopular speech in the absence of peace. There is a difficulty in believing that the pacifist position of Charles Schenck posed a dire threat to the United States. Schenck advocated resisting the draft, which, while problematic to the United States only in the sense of its ability to fight World War One, was not likely to cause imminent harm to anyone. Evidence of a threat to the United States from Japanese-Americans following the attack on Pearl Harbor

has been scanty at best, yet thousands of Japanese-Americans were herded into internment camps. Pro-Communist speech was extinguished during the Cold War for fear of a Communist takeover, a fear that was entirely unfounded even during the Cold War. The antiwar sentiment emblazoned on the back of Paul Cohen's jacket did not present some substantive threat to other people. These examples demonstrate a consistent pattern of disproportionate reactions on the part of the state in a time of war. Countering this point is that although history has demonstrated overreactions, there might come a time when the government underreacts because of its insistence on protecting civil liberties. This leads to the fundamental question of constitutional philosophy and what one thinks is the lesser of two evils. On the one hand, there is the belief that the judiciary retreating from the resting point of constitutional freedoms in times of war and terror, followed by liberal criticism of that retreat, is the better course. On the other hand, there is the belief that the judiciary protecting constitutional freedoms even at the risk of endangering the nation is the better course. I do not suggest that the latter position, which I favor, has exclusive claim over what is right; that would be contrary to Mill's reasonable point that truth usually lies somewhere between two extremes. Nonetheless, if it is true that the high courts have the duty of passing final judgment on the competing interests in civil society, the preferable balancing test should favor the individual, all other things being equal. The reason for this is that the constitutions have specially sanctified the liberty interest of the individual and then permitted the constraint of that interest rather than the other way around; put another way, "free speech is the rule, not the exception."²⁷² The risk of society proving to be extremely malleable to the speech-restrictive interests of judges, politicians, and the loudest pundits is a threat that is certainly more subtle than an overt physical threat to the well-being of a nation and its citizens, yet is no less

²⁷² *Dennis v. United States*, 341 U.S. 494, 585 (1951) (Douglas, J., dissenting).

dangerous. It is a degeneration of society from within, in the very form of mental inertness that Milton warned of in *Areopagitica*. Justice William Douglas summarized this concern best:

Accordingly a function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger. Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea. That is why freedom of speech, though not absolute, ...is nevertheless protected against censorship or punishment, unless shown likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest. There is no room under our Constitution for a more restrictive view. For the alternative would lead to standardization of ideas either by legislatures, courts, or dominant political or community groups.²⁷³

At a time when war is a term that is expanding in its definition, it is a serious risk of a more indirect, and perhaps therefore more hazardous, kind to have civil liberties rolled back. The “war on terror” has no foreseeable end. It should seem an unsettling consequence of so vaguely defined a conflict to pose so tangible a challenge to our civil liberties as their near-total abrogation at the whim of the government. Though assuredly done in the name of safety, there is no reason to believe that this cloaked undoing of a fundamental freedom makes people safer. The philosophy underlying the freedom of speech is that only reasoned judgment, not cringing fear, may serve as a foundation for democracy and “that violence is rarely, if ever, stopped by denying civil liberties to those advocating resort to force.”²⁷⁴

Even if the philosophical argument is unconvincing, there is nothing empirical to suggest the restrictive speech laws are effective counter-terrorism measures. One need only look at the British experience to see this. The United Kingdom has combatted terrorism for about a century. No matter the set of radicals trying to subvert the government, the United Kingdom has usually had some laws in place to counteract those inimical forces. The Prevention of Terrorism Act

²⁷³ *Terminiello v. Chicago*, 337 U.S. 1, 4-5 (1949).

²⁷⁴ *Dennis*, 341 U.S. at 590 (Douglas, J., dissenting).

2005 was in place when the terrorist attacks of July 7, 2005 occurred; certain parts of the Act were not declared unconstitutional until the following year. If trying to restrict people's communications was ineffective before, there is little reason to believe it will become more effective later. The Terrorism Act 2006 is arguably more restrictive and so one might make the argument that, because there have been no further terrorist attacks in the United Kingdom, more repression creates more security. The foundation for this argument must be that the only variable that has changed since 2005 is the repression of opinion. An inclination toward greater vigilance, better crime-fighting techniques, and a broader intelligence network are all natural consequences following terrorist attacks, as the non-peacetime legislation has indicated, but an argument that the repression of opinion has helped prevent further terrorist attacks must assume that all of these consequences were arrested. Plainly, the argument rests on several unsupported assumptions. The argument also presents an unreasonable proposal: if threats to national security continue to arise despite increasingly severe limitations on the freedom of speech, then the ultimate resolution will be to eliminate freedom of speech altogether in the name of safety. It follows that the integrity of any and all rights remaining are questionable.

Freedom of speech is one of the most important rights granted to the people by their governments. Its power lies in liberating people from mistaken beliefs and giving them a healthy means of expressing their dissatisfaction. However, it is in a state of persistent endangerment from fear. The plight of Ali al-Timimi is testament to that, especially in a world where warfare is no longer a conventional alignment of nation-states against nation-states. Terrorism continues to be an impediment to the evolutionary process of freer speech. Assuredly, a balance must be struck between security and liberty, and where that balance lies will be subject to interminable

debate. As long as that debate is permitted to continue, the objectives of free speech may continue to be pursued.