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Terror and the War on Dissent

Freedom of Expression in the Age of Al-Qaeda

Springer

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Chapter 1
'The War on Terror'[1] Security and Expressive Freedom

1.1 Introduction

> History abundantly documents the tendency of Government – however benevolent and benign its motives – to view with suspicion those who most fervently dispute its policies. . . The danger to political dissent is acute where the Government attempts to act under so vague a concept as "domestic security." Given the difficulty of defining the domestic security interest, the danger of abuse in acting to protect that interest becomes apparent. *United States v United States District Court* 407 US 297 (1972) per Powell J at 314.

This is a book about freedom of expression and counter terrorism laws in the United Kingdom. It was sparked by what was seen at the time to be a largely incidental aspect of the Blair Government's wider response to the terrorist outrages of September 11, 2001 and the London Bus and Tube bombings of July 7, 2005 (and the unsuccessful subsequent attempts of July 21, 2005) – namely the set of restraints in Sections 1 & 2 of the Terrorism Act 2006 upon communications that indirectly encouraged terrorism. Other controversial measures in the 'war on terror' such as indefinite detention of suspected terrorists, control orders, extensions of period of detention prior to charge, limits on the right of persons subject to control orders to learn in judicial proceedings of the basis of the case against them, have

[1] I use the term in parentheses to refer to counter terrorism measures pursued since September 11, 2001 by a number of western liberal democracies, notably the US & UK. Like many others, I dispute the assertion that these states are now or have been living through a time of ever present terror in which the lives of their citizens are experienced as being under continuous physical threat in the way that the lives of citizens elsewhere in Sudan, Afghanistan or Iraq are threatened. As Kostakopolou has noted, while terrorists can kill innocent persons, frighten countless more individuals and destroy property, they do not threaten the very existence of the state, see D Kostakopolou, 'How to do things with security post 9/11' (2008) 28 *OJLS* 317. The phrase though contested has however acquired a resonance through its repeated use by politicians and the media to refer to counter terrorism measures adopted since September 11, 2001.

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justly attracted considerable critical attention.[2] By contrast, limits on freedom of expression (and linked freedoms such as association) promulgated in the name of the 'war on terror' have featured less prominently in public debate. Nonetheless, restraints on dissenting (including anti-democratic) speech do raise important questions about the polity's claims to be a well-functioning constitutional democracy. Thus, one of the overarching questions that is canvassed in Chaps. 3 and 4 of the book is whether the set of newly promulgated offences connected to party political membership, possession of terrorist materials and 'glorification' represent a strategic 'militant democracy' type response to the growth of Islamic fundamentalism whereby core democratic freedoms are denied to those deemed to be the enemies of democracy. Such a strategy is however problematic for a democracy committed to constitutionalism under which a popularly-elected, responsible government acts within the rule of law, respects the separation of powers (or at least the checks and balances that exist to limit executive power) and individual autonomy/human rights.

No account of the impact of counter terrorism laws on freedom of expression can afford to ignore the panoply of controls to which media organisations and professionals are subject in their newsgathering activities as well as the opportunities and limits presented to the media and others by freedom of information legislation. It is perfectly logical to link freedom to dissent to the capacity of news media to inform their audiences on terrorist- related matters. Rival accounts that challenge official governmental explanations or justifications need access to relevant factual material to be credible. Where media channels are closed down and information about security matters are unduly limited, informed democratic control by the electorate is likely to be diminished. Constraints on newsgathering activities are discussed in Chaps. 5 and 6 where a broad spectrum of powers and controls are considered. The latter include problematic demands that an investigative reporter disclose sources or hand over his/her notebooks and other journalistic materials to assist police inquiries. The use of Official Secrets legislation and 'D' notices to limit the flow of government information into the public domain also features in this section of materials.

A recurrent theme in the international community's response to recent terrorist outrages has been the complementarity of counter terrorism policy and human rights. In rhetorical terms at least, there appears to be a positive commitment in principle to maintaining core freedoms such as freedom of expression and to restraining disproportionate interferences by the state. Chapter 2 considers the norms in international law that might be relevant at the domestic level in the regulation of dissenting expression and minority association. The domestic status and provisions of treaty law, customary law and 'soft' law norms are all discussed. UN Security Council Resolutions also feature in this section of materials. The UK Government played a major role in the drafting of UN Security Council Resolution

[2]A good recent account that discusses developments within their historical context is provided by Professor David Bonner, *Executive Measures, Terrorism and National Security* (2007, Ashgate, Hants).

1624 on incitement to terrorist activity which was then prayed in aid by the Blair Government in the domestic political arena to secure the passage of the Terrorism Act 2006. The aim of this chapter is to analyse whether international law forms represents a significant check on national authorities minded to shut down dissenting speech (including speech that advocates anti-democratic values) and unpopular political associations (including those that advocate anti-democratic policies).

The opening chapter situates the free speech/free association concerns that lie at the centre of this monograph within the broader context of tensions between demands for greater security on the one hand and human rights. One month after the London bus and tube bombings of July 7, 2005, Prime Minister Blair was moved to declare: 'Let no one be in any doubt that the rules of the game are changing.'[3] A combination of new statutory offences and executive measures of a disruptive or preventative nature would now be deployed against those suspected of involvement in, or support for, terrorism. The unspoken premise behind the Prime Minister's declaration was that individual and groups associated with terrorism had for too long benefited from an excessive degree of personal freedom (or, to put it another way, from an inadequate level of public security).[4] It is to these fundamental arguments about the need to re-balance the 'security – rights' equilibrium in favour of enhanced security that attention now turns.

1.2 'The War on Terror' and Rights

In 2005, one edited collection of essays that was published in aftermath of the attacks of September 11, 2001 asked whether human rights had 'irretrievably lost their status in international affairs and national policy-making?'[5] A central focus of the contributing essays in *Human Rights in the 'War on Terror'* was the human rights repercussions for individuals of counter-terrorism measures enacted in the wake of recent terrorist attacks. Contributors discussed whether the apparent post-Cold War triumph of human rights discourse had in fact proved short-lived and been replaced by a security-conscious, individual rights-encroaching stance on the part of states and international organisations? If true, did this development reflect a deeper level, Hobbesian tendency on the part of liberal democratic states to 'creeping authoritarianism' in which the claims of liberty would ultimately lose out to countervailing security interests. Certainly, at the level of discrete legislative initiative post-September 11, 2001, governments and politicians have sought to justify downward adjustments of individual liberty by stressing the more 'urgent' claims of security. It was, the electorate was told, unreasonable to expect the same

[3] 'The rules of the game are changing' *The Guardian* (2005) August 5.

[4] For a critical assessment of this premise, see D Bonner, *Executive Measures, Terrorism and National Security* (2007, Ashgate, Hants.) ch. 1.

[5] R Ashby Wilson, 'Human Rights in the 'War on Terror'' in (ed. R Ashby Wilson) *Human Rights in the 'War on Terror'* (2005, CUP, Mass) at p. 1.

degree of personal freedom after the events of September 11 as had existed before that date. The case for some re-alignment of the 'balance' between liberty and security has also been made by academics, including, surprisingly, scholars that had hitherto been considered to be enthusiastic advocates of a human rights-centred analysis of executive conduct. For these scholars, rights are now required to yield to the demands of enhanced security. Under this essentially consequentialist approach to policy-making, departures from the fundamental norms that characterise democratic societies are justified where they are needed to combat a 'greater evil' and maintain order. Thus for example, suspensions of the rule of law and/or the principle of habeaus corpus are contemplated in order that the executive can wage war against terrorism more effectively. In making an ethical case for such departures, Ignatieff for example has argued in favour of coercive measures that violate due process standards when the violation is 'really necessary' – that is when less coercive measures have been tried and found wanting and the proposed violation constitutes the next least restrictive means of effectively preventing a greater evil. In *The Lesser Evil: Political Ethics in a Age of Terror*, Ignatieff's focus is on setting out a moral framework within which the analysis of antiterrorism measures might occur.[6] He stops short of spelling out in more detail what his moral tests mean and whether individual states' responses to terrorist activity meet the criteria.[7] More concretely, the Harvard lawyer Alan Dershowitz has proposed at the international level targeted assassination of major terrorist leaders actively engaged in plotting further atrocities. On the domestic front, Dershowitz contemplates removing the absolute bar on torture as well as advocating a clutch of reforms including tighter controls over the movement of persons and allowing the state greater powers to collect intelligence and data about individuals.[8] Less expansively perhaps, another scholar with previous 'rights' form – Bruce Ackerman – rejects the possibility that existing constitutional and criminal laws can respond adequately to the challenges posed by terrorism in the twenty first century.[9] Canvassing the prospect of a cataclysmic terrorist onslaught that decapitates the government by 'taking down the President and most of Congress and the Supreme Court',[10] Ackerman argues for wide discretionary powers to be vested in the executive

[6](2004, Princeton University Press, Princeton).

[7]For a critical evaluation of the 'lesser evil' argument see C Gearty, 'Terrorism and Human Rights' [2005] *EHRLR* 1. In cases where a departure from prevailing due process standard occurs in the name of counter terrorism, Ignatieff proposes that coercive measures be subject to adversarial justification in legislatures, courts and more widely in public debate. For discussion of the application of Ignatieff's principles to the United States' counter terrorist strategy, see M Minow, 'What is the greatest evil?' (2005) 118 *Harv L Rev* 2134. Ignatieff's paradigm shift into the resolutely anti-rights reasoning of utilitarianism prompted Jonathan Raban to comment that Ignatieff had become the 'in-house philosopher of the terror warriors', J Raban, 'The Truth About Terrorism' (2005) *New York Review of Books*, January 13.

[8]A Dershowitz, *Why Terrorism Works* (2002, Yale University Press, New Haven).

[9]B Ackerman, *Before the Next Attack, Preserving Civil Liberties in an Age of Terrorism* (2006, Yale University Press, New Haven).

[10]*Ibid*., at p. 9.

under an emergency constitution. These powers would authorize *inter alia* curfews, intensive surveillance and forced medical treatment. A revised definition of torture produced by a 'Decency Commission' would assure state security services which particular interrogation techniques were permissible.[11]

1.2.1 Locke, 'Balancing' and Liberal Anxieties About State Power

Unsurprisingly, the various proposals to re-calibrate the liberty/security scales in favour of enhanced security have in turn generated considerable controversy. A general anxiety underpinning a significant strand of the critical responses to Dershowitz, Ignatieff and others reflects a Lockean concern that governments may be tempted in the name of greater security to abuse their powers, thereby compromising their purported liberal democratic credentials.[12] The argument proceeds roughly thus: If we allow torture (or infringement of another core right) to take place in a carefully delineated, exceptional circumstance, we will in all likelihood be pressed into accepting further 'exceptional' circumstances that permit further rights curtailments. Locke himself foresaw that the very same powers that might be granted to government to safeguard the state from the enemies of the people might in turn be invoked against the government's enemies.[13] In the present security-conscious climate, what is at risk are the defining commitments and overarching constructs of the liberal democratic state. Cole and Dempsey put it thus:

> In responding to terrorism however, we must adhere to the principles of political freedom, due process and the protection of privacy that constitute the core of a free and democratic society.[14]

Similarly, Kofi Annan and others have contended that human rights values must remain an integral part of states' counter terrorism policies.[15] Academics endorsing

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[11]See further S Levinson (ed.) *Torture, A Collection* (2004, OUP, Oxford).

[12]Although Locke's account of prerogative powers appears to confer an unchecked discretion on the executive to act in exceptional circumstances, see J Locke, *Two Treatises of Government* (1970, CUP, Cambridge) at 146–168 and the essay by M Freeman, 'Order, Rights and Threats: Terrorism and Global Justice' in (ed. R Ashby Wilson) *Human Rights in the 'War on Terror'* (2005, CUP, Mass) at pp. 39–41.

[13]See in this vein the work of Judith Shklar, whose concept 'the liberalism of fear' draws on moral psychology and the prevalence of human vices and prejudices. Shklar stresses the dangers of cruelty which arise from concentrating ever greater powers in the state in the name of securing greater order and security as discussed in B Yack, (ed.) *Liberalism without Illusions: Essays on Liberal Theory and the Political Vision of Judith N Shklar* (1996, Univ. of Chicago Press, Chicago). I discuss this in more detail in the text below.

[14]D Cole & J X Dempsey, *Terrorism and the Constitution: Sacrificing Civil Liberties in the Name of National Security* (3rd edn.) (2006, The New Press, New York) at p. 1.

[15]See the UN Press Release of March 11, 2005 entitled 'Secretary-General Kofi Annan Launches Global Strategy against Terrorism in Madrid: Agreement on Terrorism Convention, Respect for Human Rights, Strengthening State Capacity to Prevent Terrorist Acts Key Elements of Strategy' at http://www.unis.unvienna.org/unis/pressrels/2005/sg2095.html

this line have drawn on Locke's *Two Treatises on Government* to reject the apparent antithetical nature of the relationship between security and individual liberty. Tesón for example has argued that measures intended to confer greater security are only justified to the extent that they promote the 'liberal' constitution and its values. Security can never be an end or value in itself.[16] Rather, security and order are needed in an instrumental sense to enable individuals to pursue autonomous life plans or to safeguard natural rights. The critical error made by those adopting a Hobbesian perspective is that security is elevated to the level of an intrinsic good that exists on an equal footing with individual liberty and which, when threats arise, must take precedence over rights claims. Tesón reminds us that absolute security could only ever be attained in a police state and that liberals accept the condition of non-absolute security because of a preference for a substantial degree of individual freedom.[17] On his account, there may be a need for Hobbesian control (and a concomitant reduction of personal freedom) in the wholly exceptional scenario where a 'total collapse of the social order' is imminent, but there is scant evidence to suggest that liberal democracies have faced any such severe peril on September 11 or on any date since.

For a number of liberal theorists, the critical role played by rights in constitutional design means that they enjoy a lexical priority over other conflicting interests and considerations such as community welfare.[18] Rights do not, as Dworkin has previously stated, yield ordinarily to calculations of maximum benefit (including greater public safety).[19] Nonetheless, Dworkin does not go so far as to argue that a rights claim can never be overridden by aggregate welfare considerations. The non-absolute nature of a number of rights (including free speech) makes clear that circumstances may arise in which a compelling case can be made for the abridgement of certain rights and freedoms. The threshold point at which a right will yield to the general good will plainly vary depending upon the importance that is attached to the right. It is difficult for example to see Dworkin endorsing the unencumbered exercise of the right to freedom of association when this puts the entire apparatus of the democratic liberal constitution at substantial risk of imminent collapse. Separately, John Rawls in *A Theory of Justice* defends a principle of justice he calls 'equal liberty' that cannot be overridden by appeals to the greatest good of the greatest number. At the same time, individual freedom is not absolute and can legitimately be restricted when the just constitution itself is threatened. Focusing on abridgment of the rights of intolerant persons to political association, Rawls argues that the tolerant are entitled to curtail the freedom of the intolerant in a limited range of circumstances only, namely when the tolerant groups 'sincerely and with reason

[16]F Tesón, 'Liberal Security' in (ed. R Ashby Wilson) *Human Rights in the 'War on Terror'* (2005, CUP, Mass).

[17]*Ibid*., at p. 62.

[18]For Waldron, rights are 'resolutely anti-consequentialist', see J Waldron, 'Security and Liberty: The Image of Balance' (2003) 11 *Jo. of Pol. Phil.* 191.

[19]R Dworkin, *Taking Rights Seriously* (1977, Duckworth, London).

believe that their own security and that of the institutions of liberty are in danger.'[20] It is where the forces of intolerance are already so strong or growing so rapidly that the serious nature of the threat posed to the stability of the just constitution entitles the state on Rawls' view to take liberty-reducing measures.

A dominant metaphor in discussions of rights and security in the period after September 11, 2001 is the idea of 'balance' between security and liberty. The suggestion implicit in the work of Ignatieff and others is that the US and other liberal states had misjudged this balance by according an excessive degree of personal freedom. There arose a need post September 11, 2001 to recalibrate the scales in favour of greater security, thereby diminishing the extent of individual freedom. The task of those seeking recalibration was made easier Waldron notes by the 'political defeatism' of the electorate in the aftermath of terrorist assaults on the United States.[21] Governments with their unique access to security intelligence could be entrusted to make the correct judgment about any necessary adjustments to civil liberties. Those who dared to challenge the case for, or extent of, recalibration risked being and indeed were accused of a lack of patriotism.

Waldron nonetheless subjects this 'recalibration' argument to a penetrating critique. At the outset, he adopts Dworkin's point about the non-susceptibility of rights claims (outside of wholly exceptional circumstances) to consequentialist reasoning based around the social costs of not curtailing the right in question.[22] He is critical of the notion that individual rights comprised in the broader notion of justice are to be traded off against incremental gains in greater security. Waldron's main concern however centres upon the distributional issues thrown up by rights-reducing measures.[23] US reforms were framed in terms that distinguished between the freedoms of US citizens on the one hand and non-US citizens on the other.[24] The PATRIOT Act for example directs additional federal powers against noncitizens only. Moreover, although new measures did not explicit target specific ethnic groups, most agree that in practice the laws have impacted most severely on members of ethnic minorities.[25] It is accepted that ethnic profiling has become widespread at airports. The FBI is known to have a programme of interviewing

[20]*The Theory of Justice – Revised Edition* (1999, OUP, Oxford) p. 193.

[21]'Security and Liberty: The Image of Balance' (2003) 11 *Jo. of Pol. Phil.* 191.

[22]Of course, this analysis would look quite different where the security claim could be convincingly recast as a competing individual right claim (such as the right to life or freedom from intentionally inflicted harm). There, the idea of a lexical priority for rights does not help resolve the conflict. This is not to say however that a reduction in a right is justified merely because the adjustment confers some benefit upon another rights bearer.

[23]See similarly D Luban, 'Eight Fallacies About Liberty and Security' in (ed. R Ashby Wilson) *Human Rights in the 'War on Terror'* (2005, CUP, Mass).

[24]This point is conceded by those concerned to defend the executive's wide discretionary powers, see E Posner & A Vermeule, *Terror in the Balance: Security, Liberty and the Courts* (2007, OUP, New York) p. 92.

[25]For a detailed account see D Cole & J X Dempsey, *Terrorism and the Constitution: Sacrificing Civil Liberties in the Name of National Security* (3rd edn.) (2006, The New Press, New York) Part IV.

ethnic Arabs lacking US citizen status. The losses in personal freedom are not experienced equally across all sections of the community. Most US citizens, especially those that lack physical resemblance to the targeted groups, have incurred little or no loss of personal liberty. There is thus, as Waldron claims, a 'few/most' dimension to the balance. It does not follow however that because 'the few' are suspected of involvement in terrorist activity that their entitlements to due process rights and other core freedoms can be swept away for the sake of a putative gain to the security of the majority. Whatever the actual security gains may amount to, it is tempting to conclude with Waldron that the rush to legislation serves a powerful symbolic (and electorally useful) purpose of seeming to have retaliated promptly against an already marginalized group. Such a distributively unequal adjustment of rights would moreover clearly fall foul of Rawls' conception of justice as fairness. In his 'Original Position' construct, it will be recalled that the citizens who are striving to reach an agreement about the rules of a just society do so under a 'veil of ignorance.' They are abstracted from reality and not allowed to know the details of their social positions in the just society. This ignorance extends to matters of race, ethnic group, sex and gender. It is therefore difficult to see how under such conditions it could be agreed to grant the state extended coercive powers over persons solely on account of their racial or ethnic identities.

Underpinning Waldron's critique is a pessimistic account of what happens when the state is accorded too much power over the lives of individuals. This chimes with Judith Shklar's earlier work on the 'liberalism of fear.' Shklar's distinctive contribution to liberal discourse and the role of rights within liberalism is the emphasis upon moral psychology, specifically the empirically demonstrable tendency of human beings to succumb to irrationality and cruelty to others.[26] Her analysis of the violence and irrationality of twentieth century European history led her to endorse rights as a device to minimize the perpetuation of public cruelty and the abuse of power. In Shklar's view the sense of continuous fear that absolute or oppressive forms of sovereign power produce in the governed conduces to an intellectual paralysis in which base and irrational fears can take hold. Those who are fearful of a central authority, she argues, are likely to be in cruel in turn to others. In her own words, we should 'fear a society of fearful people.'[27] A commitment to liberalism means erecting external, institutional safeguards against the abusers of power (as well as internal, psychological restraints against the individual's tendencies to be cruel to others). The emphasis upon the prevention of public (as well as private) cruelty leads Shklar to advocate the toleration of vices, even painful ones such as betrayal and disloyalty.

> Liberalism must restrict itself to politics and to proposals to restrain potential abusers of power in order to lift the burden of fear and favour from the shoulders of adult women and

[26] 'The Liberalism of Fear' in (ed. S Hoffman) *Judith N Shklar: Political Thought & Political Thinkers* (1998, Univ. of Chicago Press, Chicago).

[27] *Ibid.,* at p. 11.

> men, who can then conduct their lives in accordance with their own beliefs and preferences, as long as they do not prevent others from doing so as well.[28]

In the case of expression, although it is hard to live in a society where the public utterances of others offends, contradicts, or assaults our own sensibilities, Shklar's position is one that is committed to maintaining diversity of opinion. This 'primacy of toleration' within liberalism acts to preserve a very broad range of beliefs from the coercive powers of the state and allows for a plurality of politically empowered groups to check the assertions of power holders and other powerful elites.

1.2.2 Enhanced Executive Power During Emergencies – the Posner & Vermeule Defence

Discussion of executive authority, recalibrations and the shift towards enhanced security during emergencies (a concededly fuzzy notion though generally understood to refer to 'full-blown crisis when it might be reasonable to believe that serious harm threatens the nation')[29] also features in Posner and Vermeule's *Terror in the Balance: Security, Liberty, and the Courts*. The concern of these authors conversely however is to show why Waldron *et al*. are wrong to fear broadly fashioned governmental powers and why the courts (which are said to be lacking in the relevant competencies) ought to defer to executive assessments of the appropriate balance between liberty and security during emergencies. Remarkably for a tome whose subject matter is the US Constitution (perhaps the best example of a constitution firmly anchored in the doctrine of separation of powers and accompanying checks and balances),[30] the authors' starting premise is 'the presumptive validity of executive action during emergencies'[31] and the book's central argument is that the executive ought to be trusted during emergencies to make informed assessments about the need for enhanced powers. The avowed purpose of the authors is 'to restrain other lawyers and their philosophical allies from shackling the government's response to emergencies with intrusive judicial review and amorphous worries.'[32] It is clearly beyond the scope of the present monograph to evaluate in detail the authors' specific arguments about the US courts' lack of competence to police executive curtailments of individual liberty during

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[28] *Ibid*., at p. 13.

[29] To adopt the definition used by Posner & Vermeule in *Terror in the Balance: Security, Liberty and the Courts* (2007, OUP, New York) at p. 42.

[30] This design can of course be traced to the Founding Fathers' appreciation of Montesquieu. Madison for example referred to Montesquieu as 'the oracle who is always consulted and cited on this subject. . .' J Madison, A Hamilton & J Jay, *The Federalist Papers* (ed. I Kramnick) (1987, Penguin Books, London) – *Federalist Paper Number 47* – Publius (Madison).

[31] *Terror in the Balance: Security, Liberty and the Courts* (2007, OUP, New York) at p. 5.

[32] *Ibid*., at p. 275.

emergencies. In passing though it may be remarked that, if the Guantanamo Bay jurisprudence is anything to go by, the US Supreme Court does not share Posner and Vermeule's lowly estimation of the judicial sphere's ability to exert some degree of oversight.[33] Consider *Hamdan v Rumsfeld* for example where the Court ruled that the President lacked an 'inherent' power to create military tribunals.[34] Or take *Rasul v Bush* in which a majority of the Court declared that foreign nationals captured in combat outside the United States could test the legality of their detention in the US courts.[35] Or look at *Hamdi v Rumsfeld* where a US citizen and alleged enemy combatant detained at Guantanamo Bay was deemed by the plurality to be entitled under the due process clause of the Fifth Amendment to be given an opportunity to be told the factual basis for his detention and a 'meaningful opportunity to contest the factual basis for that detention before a neutral decision maker.'[36] Lest this be thought a recent emboldening after the truly deferential (and infamous) 1944 ruling in *Korematsu v US*,[37] it should be remembered that eight years on from *Korematsu*, President Truman's order seizing steel mills during the Korean War was struck down for want of Congressional authority by the Court in *Youngstown Sheet and Tube Co. v Sawyer*.[38]

Posner and Vermeule wish to show more broadly that the individual rights critique of enhanced executive power during times of crisis is unfounded. The general terms in which the authors state their arguments suggest a more widely applicable, cross-jurisdictional defence of executive action, one that should interest a UK audience where the dominant position of the executive in the legislature virtually guarantees the enactment into law of the executive's counter terrorism proposals. *Terror in the Balance* seeks to disentangle several arguments made by human rights critics. These may be briefly stated as follows: (i) Governments tend to panic in emergencies and act irrationally by overstating the case for greater security; (ii) Governments are prone to 'democratic failure' in emergencies, responding to pressures from majority groupings by imposing a disproportionate burden of costs (in terms of reduced liberty) upon minorities; (iii) Governments systematically ratchet up security measures during emergencies and then fail

[33]For discussion of early Supreme Court rulings arising out of Guantanamo Bay see P Berkowitz (ed.) *Terrorism, the Laws of War and the Constitution: Debating the Enemy Combatant Cases* (2005, Hoover Institution Press, Stanford). For an account of a rule of law-based approach to emergencies in which the judges play a relatively restrained role (alongside the executive and legislature) in responding to the emergency, see D Dyzenhaus, *The Constitution of Law: Legality in a Time of Emergency* (2006, CUP, Cambridge).

[34]548 US 557 (2006).

[35]542 US 466 (2004).

[36]542 US 507 (2004).

[37]323 US 214 (1944) Mass internment of Japanese-Americans during World War II. In 1988, President George Bush belatedly apologized for the internment and made an offer of reparation. For a British equivalent in terms of judicial feebleness, see *Liversidge v Anderson* [1942] AC 206.

[38]343 US 579 (1952) and see Black J, 'The Founders of this Nation entrusted the lawmaking power to the Congress alone in both good and bad times.' at 589.

subsequently to restore the pre-emergency equilibrium between liberty and security once the emergency is past. According to Posner and Vermeule, none of these arguments offers a convincing basis to fault governmental adjustments to the liberty/security scales. In a direct attack on Waldron, they query his credentials to advance institutional critiques or causal hypotheses about political psychology and the structure of political representation. Waldron's expertise lies in constitutional theory, not empirical claims about the actual conduct of government.[39] Lawyers too should refrain from criticising executive assessments since they too lack expertise in security matters.[40] Leaving to one side the substantial issues of executive accountability that are posed by this account, it is important to examine each of the attempted refutations of human rights arguments in greater detail. I will argue that Posner and Vermeule's empirical assertions, in as far as they seek to explain the UK experience are, in the main, contradicted by the record of government responses to crises and emergencies. Indeed, it is my argument that UK counter-terrorism policy exhibits features of all three strands of the human rights critique and that, contrary to Posner and Vermeule, the various strands are more connected than the authors would have us believe. In terms of its general themes, what will alarm constitutional law scholars most about *Terror in the Balance* is the excessive trust placed in executive power, a trust that allows settled constitutional norms to be trampled upon.

(i) Panic

In the aftermath of a terrorist outrage or other crisis widely perceived to threaten the state, governments will panic or bow to a sense of panic in the wider population by implementing security measures that strike in an irrational way at core freedoms in the pursuit of enhanced security. The authors describe this view as a 'staple' of academic and popular discussions of emergency powers but find fault with it on several grounds.[41] Posner and Vermeule's central objection to the panic thesis is that there is no reason to suppose the existence of an emergency will systematically lead government to undervalue human rights or overstate the need for enhanced security. Rather, we are assured that 'the government will attach the same weight to these goods as it does during normal times.'[42] The government on this view is no more likely to panic into enacting rights-curtailing legislation in the aftermath of a major terrorist incident, than in normal times.

[39]*Terror in the Balance* (2007, OUP, New York) at p. 38.

[40]*Ibid*., at p. 94.

[41]Posner and Vermeule claim that the state of fear that precedes a panicked official reaction is not an unambiguously bad phenomenon since it may motivate governments to address the threat. However it cannot be the case that the irrationality that is implied by 'panic' is to be preferred to a rational determination that considers whether existing laws are up to the task of meeting the threat in question.

[42]*Terror in the Balance* (2007, OUP, New York) at p. 60.

There is an embarrassing richness of counter-evidence across any number of jurisdictions and from different time periods with which to refute this odd claim.[43] Did it ever occur to Posner and Vermeule that the reason the 'panic' thesis has become a 'staple' of academic commentaries is that it might possibly carry some conviction? Admittedly one could quibble over the use of the word 'systematically' inserting 'prone to' in its place. However, the evidence to support the thesis is overwhelming. Here is a sample of some randomly selected instances of panicked official reactions from the United Kingdom. Consider for example the *Defence of the Realm Regulations* (1918) No. 40 D which made it an offence for a woman with venereal disease to have sexual intercourse with a soldier.[44] Further back in British history, the Incitement to Mutiny Act 1797 reached the statute book after naval mutinies at Nore and the Spithead. The new Act was premised upon the panicky and mistaken belief that French revolutionaries had urged sailors to overthrow the British ruling class.[45] Bringing the UK analysis up to the present time, Clive Walker a UK terrorism expert, pointed to the fact that UK by 2007 counter terrorist legislation has only 'partially learned … the importance of devising a rational legal code and not panic legislation.'[46] Walker is critical of the cycle of emergency laws prior to 2000 which were devised hurriedly after each fresh terrorist outrage. Nonetheless, as Walker contends, elements of a panic response remained after 2000. Part IV of the of the Anti-terrorism, Crime and Security Act 2001 allowed the Home Secretary to detain indefinitely without charge non-nationals that were reasonably (i) believed to a risk to national security and (ii) suspected of being an international terrorist.[47] The effect of the measures was to subject non-nationals to indefinite detention without charge, a draconian measure that was not available in respect of UK nationals suspected of involvement in international terrorism. A challenge was taken to the legality of the indefinite detentions provisions the 2001 Act before the House of Lords in *A and Others v Secretary of State for the Home Department*.[48] Observing that the UK Government had not entered a derogation in respect of the Convention prohibition on discrimination in Article 14, seven members of the nine-strong bench in the House of Lords faulted Part IV on the

[43]A good and brief summary of legislation enacted immediately after terrorist incidents in the UK and US is to be found in K Roach, 'Anti-Terrorism and Militant Democracy: Some Western and Eastern Responses' in A Sajó (ed.) *Militant Democracy* (2004, Eleven International Publishing, Netherlands) at pp. 184–188.

[44]S R & O 1918 No. 367 Regulation 4. Admittedly the regulation was revoked shortly afterwards by S R & O 1918 No. 1550 which may itself be an admission of its irrationality. See further K D Ewing & C Gearty, *The Struggle for Civil Liberties* (2000, OUP, Oxford) at p. 53.

[45]In truth, it is generally accepted that low pay and poor conditions lay behind the Nore mutiny, see further Ch. 4.

[46]'The United Kingdom's Anti-Terrorism Laws: Lessons for Australia' in A Lynch, E McDonald & G Williams (eds.), *Law & Liberty in the War on Terror* (2007, Federation Press, New South Wales) at p. 187.

[47]Anti-terrorism, Crime and Security Act 2001, Part IV, ss. 21–23.

[48][2005] 2 AC 68.

ground that the new powers of executive detention unjustifiably discriminated against non-nationals. The most relevant point for present purposes however was the irrational (and thus panicky) assumption of the UK Government after the events of September 11, 2001 that British citizens could not pose a qualitatively similar threat to national security compared to non-nationals, an assumption which of course was startlingly refuted by the London bus and tube bombings of July 7, 2005.

Of course, it is also plausible to suggest that governments 'panic' additionally outside of emergency situations when for example their political survival is at stake. Such occurrences do not falsify the argument of a pronounced tendency to panic when emergencies arise. In quantitative terms however, Posner and Vermeule offer no evidence that might begin to hint at the *equal* likelihood of such 'non-emergency' panics.

(ii) Governments are prone to 'democratic failure'

The essence of this claim is that once an emergency has arisen, an elected government consciously acts as the agent of what it perceives to be majority interests and will seek to readjust the security/liberty balance by providing greater levels of security for the majority by reducing selectively the liberties of minority groups. The downward adjustment might occur via a process of scapegoating of minority groups in which hostile sentiments in the rest of the population which are latent during non-emergency periods become overt during emergencies. The tendency towards scapegoating may be especially strong where the target group is linked in some way to perpetrators of the emergency. Conscious of the electoral benefits of giving legislative form to these sentiments, politicians move to meet majoritarian feeling by implementing targeted and discriminatory rights reduction policies. This is certainly one way of reading the criminalization of glorification/indirect encouragement of terrorism effected by s. 1 of the Terrorism Act 2006 (which is discussed in detail in Chap. 4) and the power to proscribe political associations (Chap. 3). Where selection does occur on the basis of political belief, this is especially problematic for liberal democracies where freedom of political expression is typically valued highly.

Of course, it is plausible to argue, as Posner and Vermeule do, that governments may play up to majoritarian opinions in similar discriminatory ways outside of emergency settings. After all, it is to be expected that the instinct to self-preservation among elected politicians would be strong particularly at certain stages of the electoral cycle. This much can be conceded without losing sight of the vulnerability of minority groups during times of emergency or crisis where the group(s) is (are) connected to the source of the emergency. Arguably one of the most egregious examples of democratic failure is the mass internment of 120,000 Japanese-Americans (two-thirds of whom were US citizens) after the attacks on Pearl Harbour. The incarceration was justified as a necessary act to safeguard US military and civilian interests against the actions of a potentially disloyal group. The internment was readily accepted by the vast majority of US citizens who held 'long-standing prejudices against Japanese immigrants.' One Los Angeles journalist wrote at the time

> If making 1,000,000 innocent Japanese uncomfortable would prevent one scheming Japanese from costing the life of an American boy, then let 1,000,000 innocents suffer.[49]

Nagata notes that the justification of military necessity went unchallenged for decades after the internment.[50] Whilst the Roosevelt Administration's decision might initially have been characterised as a 'panic' measure, the length of detention (3 years) and the absence of any evidence against any internee of espionage or other conduct harmful to US military interests makes this claim much less convincing.

(iii) Ratchetting

The third civil liberties argument that Posner and Vermeule wish us to discard is the contention that, during emergencies, governments systematically ratchet up security powers and fail to scale back these powers once the emergency is over. Once more the evidence in the UK supports rather than undermines the allegation. A number of commentators on the problem of terrorism connected with the affairs of Northern Ireland have remarked on the 'normalization' of emergency powers. Michael O'Boyle for example noted in the case of internment how

> Frequent use of emergency powers to cope with crises . . . acclimatises administrators to their use, and makes recourse to them in the future all the easier. The danger is that succeeding generations of administrators inherit these powers as being efficient and unobjectionable. . .[51]

Writing in the mid 1980's David Bonner reached a similar conclusion.

> The draconian Civil Authorities (Special Powers) Act 1922 in Northern Ireland was originally a measure subject to annual, and later quinquennial, renewal. In 1933, it was made permanent so that "in a sense Northern Ireland (was) being treated in a permanent state of emergency."[52] Concern has been expressed that the current state of anti-terrorist measures are in danger of becoming *de facto* permanent features. A common complaint about emergency powers is their retention for longer than necessary.[53]

Ewing and Gearty likewise commented in 1990 that

> (T)he lesson of the past two decades has been that temporary measures, designed to meet the particular emergencies, have a tendency to become permanent and to develop a life of their own, independent of the transitory panic that gave birth to them.[54]

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[49]Henry McLemore writing contemporaneously in the *Los Angeles Times* and cited by *US News & World Report* (2008) May 8 'Japanese-Americans Fight to Preserve Wartime Internment Camps' by Justin Ewers.

[50]D Nagata, 'Expanding the Internment Narrative: Multiple Layers of Japanese American Women's Experiences' in (eds. M Romero & A J Stewart) *Women's Untold Stories: Breaking Silence, Talking Back, Voicing Complexity* (1999, Routledge, London) at p. 72.

[51]M O'Boyle, 'Emergency Situations and the Protection of Human Rights: a Model Derogation Provision for a Northern Ireland Bill of Rights' (1977) 28 *NILQ*, 160, 164.

[52]W Twining, *Emergency Powers: a Fresh Start* Fabian Tract 416 (1972, Fabian Society, London) p. 4.

[53]D Bonner, *Emergency Powers in Peacetime* (1985, Sweet & Maxwell, London) at p. 17.

[54]K Ewing & C Gearty, *Freedom under Thatcher* (1990, Clarendon Press, Oxford) at p. 213. See further C Walker, *The Prevention of Terrorism in British Law* (2nd ed.) (1992, Manchester Univ. Press, Manchester) ch. 4.

As suggested above, some or all of these rationales for liberty reduction may at times overlap and combine. A panicked Government may seek to target minority groups in a selective rights-reduction exercise with one eye on the electoral gain to be had from such a strategy. In other instances, it may, as Ewing and Gearty suggest in the last quotation, fail to draw back emergency powers having previously introduced them in a hurried and ill-thought through manner.

The various adjustments of the security/liberty 'balance' touched on above will remain centre stage throughout this monograph as the details of specific domestic limits on freedom of expression and the media are explored. At the level of thematic overview, it can be asked whether a broader conceptual framework can be constructed within which critical analysis of these limits can occur. One concept that may prove valuable in this regard is the notion of 'militant democracy'.

1.3 Militant Democracy and Counter Terrorism Measures

The activities of terrorists and their supporters tend to be conceived as existing outside normal, democratic politics. The apparent preference for the bullet and armed struggle over the ballot box and peaceful, democratic reform is of course a simplification, at least in respect of a number of struggles where terrorists and/or their supporters are prepared to use core political rights found in liberal democracies such as freedom of expression and association to advance their agendas.[55] Where this occurs, it poses an acute dilemma for the state. To what extent, if any, is it legitimate for a liberal democracy to build into its counter terrorism strategy limits on the use of the rights to expression and association by terrorists, their supporters and sympathisers? As subsequent chapters of this monograph will attempt to demonstrate, the UK's counter-terrorism strategy incorporates aspects of 'militant democracy' in its reliance upon the techniques of proscription of political associations, as well as glorification and encouragement offences that constrain expression. Roach has observed that the inclusion of a reference to political, ideological or religious motives in the UK's expanded definition of terrorism means that the prosecution has to provide evidence of the anti-democratic beliefs that inspired the conduct of the accused.[56] Anti-terror laws, Roach contends, could however be constructed in accordance with traditional principles of the criminal law that focus on the accused's intention and deem irrelevant his/her

[55]The focus in the monograph being on expressive freedom, I am ignoring here the tendency of militant democracies to resort to preventative detention and the right to liberty issues also implicated in militant democracy-style responses.

[56]K Roach, 'Anti-Terrorism and Militant Democracy: Some Western and Eastern Responses' in A Sajó (ed.) *Militant Democracy* (2004, Eleven International Publishing, Netherlands). This of course has a downside for prosecutors in that failing to prove beyond reasonable doubt that the defendant was so motivated will be fatal to the prospects of conviction. Roach has been critical of Canada's inclusion of political, ideological or religious motive in its Anti-Terrorism Act 2001, see K Roach, *September 11 – Consequences for Canada* (2003, McGill – Queen's University Press, Montreal) at pp. 25–28 and see further Chap. 3 of this book.

motives. As occurs under the Patriot Act in the United States, the emphasis could simply be upon 'violent acts or acts dangerous to human life' where the intention of the perpetrator is to intimidate, coerce or influence the policy of the government. The unwillingness of the US legislators to ground counter terrorism laws upon matters such as the ideological beliefs of the accused reflects of course the constraining influence of the First Amendment.[57] Conversely, the UK position that makes a person's belief system relevant to liability for a terrorist offence can be seen to draw more closely upon a 'militant democracy' type approach that treats less favourably those whose views stand in opposition to democratic ideals. Some problems attendant on this approach are examined in more detail shortly. To begin however, it is necessary to elaborate the concept of 'militant democracy' more fully.

> If democracy believes in the superiority of its absolute values over the opportunistic platitudes of fascism, it must live up to the demands of the hour, and every possible effort must be made to rescue it, even at the risk and cost of violating fundamental principles[58]
>
> K Loewenstein (1937)

It is unsurprising that the concept of 'militant democracy' should have emerged in German political thought at a time when the Weimar Republic's failure to constrain the anti-democratic forces of national socialism became apparent. Loewenstein advocated pre-emptive action to curtail the political rights of the enemies of democracy such as free expression and association so as to hinder severely the latter's ability to gain the support of the electorate. Democracies which had been captured by fascists had made the fatal error of extending to such groupings the same political rights as were enjoyed by their democratic opponents. After the defeat of Nazism by the Allies, the 1949 Constitution of the Federal Republic of Germany was careful to provide express limitations on the use of core democratic freedoms where the existence of the Constitution is threatened. Article 21(1) of the Basic Law recognises that political parties are agents 'forming the political will of the people'[59] and guarantees parties freedom to organize and campaign. However by Article 21(2):

> Parties which by reason of their aims or the behaviour of their adherents seek to impair or abolish the free democratic order or endanger the existence of the Federal Republic of Germany shall be constitutional. The Federal Constitutional Court shall decide the question of unconstitutionality.

The first party to be banned under Article 21(2) was the neo-Nazi Socialist Reich Party (SRP) in 1952. The Court concluded that the SRP had been set up to preserve and propagate National Socialist ideas such as the racial superiority of Germans and the belief in an authoritarian *Fuhrer* state.[60] Four years later, the Communist Party (KPD) was also banned. According to the Court, the KDP's programme evinced a

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[57]See *inter alia RAV v St Paul* 505 US 377 (1992).

[58]'Militant Democracy and Fundamental Rights I' (1937) 31 *Am. Pol. Sci. Rev.* 417, 431–2.

[59]*Socialist Reich Party Case* (1952) 2 *BVerfGE* 1.

[60]*Ibid.*

'fixed purpose' to combat the free democratic order established by the 1949 Constitution.[61] More recently in the post-Communist era of transition towards democratic structures of government in Eastern Europe, the Hungarian academic András Sajó has remarked upon the 'risk-averse' nature of liberated East European regimes and defended the resort to preventative measures against groups and individuals who openly seek the overthrow of democratic institutions and threaten fundamental norms. He identifies three main risks to transitional democracies in Europe - return to power of communists, the threat to territorial integrity posed by nationalist/secessionist forces and finally that posed by right-wing extremists invoking an ethnic agenda. He cites the European Court of Human Rights in *Rekvenyi v Hungary* in support of the idea that states in transition from communism to democracy enjoy a latitude to curtail the political rights of individuals and groups that is denied to more established democracies.[62] Beyond the specific positions of emergent East European states however, Sajó mounts a more general and principled defence of militant democratic techniques that paradoxically begins to remind his audience why the concept is problematic in the first place. Constitutional democracies, he asserts, are

> inherently weak against forces that seek to seize power through emotional mobilization... The radical politics of emotion has a penchant for lying. It would follow that action against mobilizing lies is justified given the lack of value of such lies.[63]

No evidence empirical, psychological or otherwise is offered to sustain the suggestion that modern electorates in general (presumably in the period before capture and therefore with access to a range of information and competing viewpoints) are vulnerable to emotional manipulation and capture by anti-democrats.

Instead Sajó's account tends to gloss over several problematic aspects of the 'strong-arm' defence of democracy. These include the tendency to overstate what law and legal sanction may be capable of achieving, especially when underlying economic or social grievances are left unaddressed.[64] Even if law is successful in preventing the activity that threatens the polity, it does not, by that fact, take away the reasons individuals previously had for wanting to engage in the activity. Law in this sense serves to confer a superficial degree of reassurance that the 'enemies of democracy' are being held at bay when in fact it is merely the ostensible forms of

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[61](1956) 5 *BVerGE* 85. For commentary, see DP Kommers, *The Constitutional Jurisprudence of the Federal Republic of Germany* (2nd edn., 1997, Duke University Press, Durham) at 217–38; L Kestel & L Godmer, 'Inclusion and exclusion of extreme-right parties' in (eds. R Eatwell & C Mudde) *Western Democracies and the New Extreme Right Challenge* (2004, Routledge, London) at 135–6; R Youngs, 'Freedom of Speech and the Protection of Democracy' [1996] *Public Law* 225.

[62](2000) 30 EHRR 519 – restrictions upon the political activities of police officers in Hungary held not to violate Article 10.

[63]A Sajó, 'Militant Democracy and the Transition towards Democracy' in A Sajó (ed.) *Militant Democracy* (2004, Eleven International Publishing, Netherlands) at p. 212.

[64]K Roach, 'Anti-Terrorism and Militant Democracy: Some Western and Eastern Responses' in A Sajó (ed.) *Militant Democracy* (2004, Eleven International Publishing, Netherlands).

anti-democratic conduct that have been suppressed. More fundamentally, the central dilemma which militant democracy poses for the liberal democratic state is whether, in restraining its enemies, elements of what makes the state essentially liberal democratic are compromised in the process or even abandoned in their entirety.

1.3.1 Democratic Legitimacy: The Work of Robert Post

In the case of restraints on the expression of anti-democratic beliefs, one useful way of thinking through some of the ensuing issues is provided by the idea of 'democratic legitimacy' that has been developed in the work of the US scholar Robert Post and the tension he explores therein between individual autonomy and substantive equality.[65] Post's account starts from a definition of democracy as active and mediated self-rule by the citizens. That is to say for citizens to experience government as their own government, each person 'must have the warranted conviction that they are engaged in the process of governing themselves.'[66] A vital component of this conviction is the perception that the state is responsive to the values of each citizen and that each one of us has the potential to influence the outcome of public discourse through our ideas and arguments. Provided that the 'warranted conviction' condition holds true, then each of us will be able to identify and maintain our identification with the state and its decision-making processes even if the actual outcomes of public discourse are at odds (as they must be from time to time) with our own preferred positions. To enable this identification with the state, it is required that each person be treated equally with other citizens as an autonomous, self-determining citizen. In this way, the citizen is free to decide whether and how to contribute to public debate. If the state regulates too readily the expressive activity of citizens,[67] there will be a loss of autonomy on the part of the censored citizens and a consequent inability to influence the outcome of public discourse. Those so excluded will experience a loss of 'democratic legitimacy' and feel alienated from the process of self-government. On Post's view, domestic public order law could be said to outlaw excessive amounts of speech using a very low threshold test with consequent alienation of a number of speakers. Under

[65]I refer here to 'The Constitutional Concept of Public Discourse: Outrageous Opinion, Democratic Deliberation and Hustler Magazine v Falwell' (1990) 103 *Harv L Rev* 605; 'Racist Speech, Democracy and the First Amendment' (1990–91) 32 *Wm & Mary Law Rev* 267; 'Community and the First Amendment' (1997) 27 *Ariz St L J* 473; 'Democracy and Equality' (2006) *ANNALS of the American Academy* 24; 'Religion and Freedom of Speech: Portraits of Muhammed' (2007) 14 *Constellations* 72.

[66]'Democracy and Equality' (2006) *ANNALS of the American Academy* 24, 26.

[67]Aside from expression of anti-democratic values, an alternative basis for the restraint might be the offence caused thereby to others, see further I Cram, 'Satire, Cartoons and Offensive Expression' in (eds. I Hare & J Weinstein) Extreme Speech and Democracy (2009, OUP Oxford) ch. 16.

the incitement to racial hatred provisions in Part 3 of the Public Order Act 1986, an offence can be committed where a speaker uses 'insulting' words and hatred is 'likely' to be stirred up thereby. The prosecution does not have to show that the speaker intended to stir up racial hatred or that public disorder or an act of violence was likely to occur at some point in the future. Moreover, no one person hearing the speaker's words need actually be incited to hate another on the basis of race.[68] It is sufficient if a *feeling* of hatred towards the members of a racial group might have been (though actually was not) stirred up.

Exceptionally, on Post's account, the alienation of the censored could be justified where the consequence of allowing the censored expression is to 'alienate *all other citizens* from participating in public discourse.'[69] The silencing of the speaker in this scenario serves to preserve the very existence of public discourse. More commonly (and more problematically in Post's view) is regulation of the speech of Citizen A because, in its unregulated form, A's speech is considered to have the effect of 'silencing' citizens from group B (which could occur in the example of incitement to racial hatred discussed above).[70] Accordingly, the restriction on A is rationalised on the ground that it will promote the fuller participation of citizens from group B in public discourse. For example, where A is prohibited from speaking because citizens in group B find A's contributions to be offensive and/or intimidating, a trade-off is occurring in which the loss to democratic legitimacy that happens when A's autonomy is curtailed (and the autonomy of A's audience) and he is thereby alienated from public discourse is seen as less substantial and less pressing than the loss to democratic legitimacy that happens when A is allowed (along with like-minded others) to heap public insult upon members of group B. One obvious danger of allowing the feelings of group B members to determine when A might be free to speak is that, once the injured feelings of a host of groups C, D, E and so on are taken into account, there might be little space left for robust opinion on matters of public importance.

The decision to exclude from participation in public debate a speaker on account of the anti-democratic content of his/her views (rather than the need to preserve the conditions of public discourse) likewise not only alienates the speaker but interferes with the autonomy of both speaker and listeners. The idea that 'bad ideas' may be excluded from public debate is of course accepted within a European approach to speech regulation where an individual autonomy-based account of expression has historically proved less persuasive than in the United States. In much of European society, the state is not a neutral spectator between rival conceptions of the good

[68]For a suggestion that the UK Government accepts that this threshold for liability is set too low, see the parliamentary debates on the new offence of inciting hatred on the grounds of sexual orientation at HC Debs (2007–8) Vol 475 cc. 603–604. (Maria Eagle MP).

[69]'Democracy and Equality' (2006) *ANNALS of the American Academy* 24, at p. 31. The speech type that he suggests might fit this scenario is 'fighting words'.

[70]The literature on the 'silencing' effect of racist and other speech includes M J Matsuda, 'Public Response to Racist Speech: Considering the Victim's Story' (1989) 87 *Mich L Rev* 2320; R Delgado & J Stefancic, *Understanding Words That Wound* (2004, Westview Press, Oxford).

life, but seeks actively to promote a substantive version of the 'common good' and strives to create the public and private virtues needed for society to attain that end.[71] Rules of civility found in the common law (for example in the laws of defamation and privacy) or in statutes regulating public morals express dominant community norms and thus community identity. Restraints on racist speech, homophobic speech[72] and more broadly anti-democratic expression (and thus on autonomy) can thus be cast and defended as the product of majoritarian rule-making that reflects prevailing norms (such as tolerance, non-violence and the equal worth of individuals) and are for the good of the whole community. Here, the demands of autonomous speakers and audience within the terms of democratic legitimacy may simply be seen as overridden by the demands of maintaining/enforcing community identity. One major difficulty with this stance is the largely speculative nature of the claims made about resultant physical harm to ethnic minorities, homosexuals or, in the case of anti-democratic speech, to the values and institutions of the state. More fundamentally however, it is the interference with the autonomy of speakers and audience that is problematic for a polity that considers itself to be liberal democratic. The implications of an autonomy-based approach to dissenting expression (including anti-democratic speech) will be returned to in the final chapter of this monograph.

1.4 Conclusion

As Post himself concludes, the relationship between speech and community is 'highly dependent upon contingent matters of history and culture'.[73] Nonetheless, the silencing of anti-democratic speech in the UK and elsewhere in Europe comes with a series of costs. The alienation of anti-democratic speakers and their audience (not all of whom will share the anti-democratic values of the speaker) has already been noted. Silencing also allows the speaker to claim convincingly that one of the much vaunted core freedoms of democratic societies is denied to those who argue for a non-democratic, alternative polity. This in itself is useful for recruitment purposes. In normative terms, one of the recurrent arguments in this monograph is that, where democratic institutions are not in imminent danger of collapse from anti-democratic forces, the state should be slow to limit expressive and associational activities. After all, the state has means of promoting democratic

[71] On communitarian thinking in general see, M Sandel, *Liberalism and the Limits of* Justice (1982, CUP Cambridge), C Taylor, *Philosophy and the Human Sciences: Philosophical Papers,* Vol II (1985, CUP, Cambridge); M Walzer, *Spheres of Justice: A Defence of Pluralism and Equality* (1983, Blackwell, Oxford).

[72] See now Criminal Justice and Immigration Act 2008, s. 74 & Sch 16 which amends Part 3A of the Public Order Act 1986 by the insertion of a new offence of inciting hatred against persons on grounds of sexual orientation.

[73] 'Community and the First Amendment' (1997) 27 *Ariz St L J* 473, 483.

values other than by issuing fresh sets of prohibitions on expression and association. It can engage in its own communicative activities. It can provide financial and other forms of support to mainstream political and community organizations. Moreover, through citizenship classes in the state education sector, a particularly valuable means of inculcating such norms in future generations is available. None of the foregoing are likely to produce the same degree of alienation and disaffection that are linked to suppression and censorship of speech.