

Readings for Tools 1: Justifications for Free Expression

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Justification 1. Discovering Truth (The "Marketplace of Ideas")

John Stuart Mill, *On Liberty* (1895)

[T]he peculiar evil of silencing the expression of an opinion is, that it is robbing the human race; posterity as well as the existing generation; those who dissent from the opinion, still more than those who hold it. If 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.

It is necessary to consider separately these two hypotheses, each of which has a distinct branch of the argument corresponding to it. We can never be sure that the opinion we are endeavouring to stifle is a false opinion; and if we were sure, stifling it would be an evil still.

First: the opinion which it is attempted to suppress by authority may possibly be true. Those who desire to suppress it, of course deny its truth; but they are not infallible. They have no authority to decide the question for all mankind, and exclude every other person from the means of judging. To refuse a hearing to an opinion, because they are sure that it is false, is to assume that their certainty is the same thing as absolute certainty. All silencing of discussion is an assumption of infallibility. Its condemnation may be allowed to rest on this common argument, not the worse for being common...

Let us now pass to the second division of the argument, and dismissing the supposition that any of the received opinions may be false, let us assume them to be true, and examine into the worth of the manner in which they are likely to be held, when their truth is not freely and openly canvassed. However unwillingly a person who has a strong opinion may admit the possibility that his opinion may be false, he ought to be moved by the consideration that, however true it may be, if it is not fully, frequently, and fearlessly discussed, it will be held as a dead dogma, not a living truth....

He who knows only his own side of the case, knows little of that....

Even if the received opinion be not only true, but the whole truth; unless it is suffered to be,

and actually is, vigorously and earnestly contested, it will, by most of those who receive it, be held in the manner of a prejudice, with little comprehension or feeling of its rational grounds. And not only this, but... the meaning of the doctrine itself will be in danger of being lost, or enfeebled, and deprived of its vital effect on the character and conduct...

Oliver Wendell Holmes, dissent in *Abrams v. United States* (1919)

Note: This case concerned the plight of five well-educated Russian immigrants, all of whom possessed anarchist, revolutionary, or socialist philosophies. In October 1918, they had published and distributed leaflets, written in English and Yiddish, criticizing President Woodrow Wilson's decision to send U.S. troops into Russia and calling for a general strike to protest that policy. The leaflets were written in language characteristic of the rhetoric of the Russian Revolution: "Workers of the World! Awake! Rise! Put down your enemy and mine!" and "Yes friends, there is only one enemy of the workers of the world and that is Capitalism." They described the government of the United States as a "hypocritical," "cowardly," and "capitalistic" enemy. The protesters branded President Wilson a "kaiser."

The government charged Abrams and the others with intent to "cripple or hinder the United States in the prosecution of the war" in violation of the Espionage Act of 1917. The trial court found them guilty and sentenced them to prison terms of fifteen to twenty years.

In the Supreme Court, Justice Clarke wrote for a seven-justice majority upholding the convictions. In his opinion, Clarke articulated a standard that became known as the bad tendency test. This approach, derived from English common law, asks: "Do the words have a tendency to bring about evil consequences?" The Court concluded that, in this case, they did.

The dissent starts here:

Holmes, joined by Justice Louis D. Brandeis, dissented.

I do not doubt for a moment that...the United States constitutionally may punish speech that produces or is intended to produce a clear and imminent danger that it will bring about forthwith certain substantive evils that the United States constitutionally may seek to prevent. The power undoubtedly is greater in time of war than in time of peace because war opens dangers that do not exist at other times.

But as against dangers peculiar to war, as against others, the principle of the right to free speech is always the same. It is only the present danger of immediate evil or an intent to bring it about that warrants Congress in setting a limit to the expression of opinion where private rights are not concerned. Congress certainly cannot forbid all effort to change the mind of the country. Now nobody can suppose that the surreptitious publishing of a silly leaflet by an unknown man, without more, would present any immediate danger that its opinions would hinder the success of the government arms or have any appreciable tendency to do so...

In this case sentences of twenty years imprisonment have been imposed for the publishing of two leaflets that I believe the defendants had as much right to publish as the Government has to

publish the Constitution of the United States now vainly invoked by them. Even if I am technically wrong and enough can be squeezed from these poor and puny anonymities to turn the color of legal litmus paper; I will add, even if what I think the necessary intent were shown; the most nominal punishment seems to me all that possibly could be inflicted, unless the defendants are to be made to suffer not for what the indictment alleges but for the creed that they avow—a creed that I believe to be the creed of ignorance and immaturity when honestly held, as I see no reason to doubt that it was held here, but which, although made the subject of examination at the trial, no one has a right even to consider in dealing with the charges before the Court....

Persecution for the expression of opinions seems to me perfectly logical. If you have no doubt of your premises or your power and want a certain result with all your heart you naturally express your wishes in law and sweep away all opposition. To allow opposition by speech seems to indicate that you think the speech impotent, as when a man says that he has squared the circle, or that you do not care whole-heartedly for the result, or that you doubt either your power or your premises. 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. That at any rate is the theory of our Constitution. It is an experiment, as all life is an experiment. Every year if not every day we have to wager our salvation upon some prophecy based upon imperfect knowledge. While that experiment is part of our system I think that we should be eternally vigilant against attempts to check the expression of opinions that we loathe and believe to be fraught with death, unless they so imminently threaten immediate interference with the lawful and pressing purposes of the law that an immediate check is required to save the country.

Justification 2. Facilitating Participation by Citizens in Political Decision Making

Alexander Meiklejohn, *Free Speech and Its Relation to Self-Government* (1948)

[The Constitution] ordain[s] that all authority to exercise control, to determine common action, belongs to “We, the People.” We, and we alone, are the rulers... [Under this system] Free men are not non-governed. They are governed—by themselves.

What, then, does the First Amendment forbid? Here...the town meeting suggests an answer. That meeting is called to discuss and, on the basis of such discussion, to decide matters of public policy. For example, shall there be a school? Where shall it be located? Who shall teach? What shall be taught? The community has agreed that such questions as these shall be freely discussed and that, when the discussion is ended, decision upon them will be made by vote of the citizens. Now, in that method of political self-government, the point of ultimate interest is not the words of the speakers, but the minds of the hearers. The final aim of the

meeting is the voting of wise decisions. The voters, therefore, must be made as wise as possible. The welfare of the community requires that those who decide issues shall understand them. They must know what they are voting about. And this, in turn, requires that so far as time allows, all facts and interests relevant to the problem shall be fully and fairly presented to the meeting. Both facts and interests must be given in such a way that all the alternative lines of action can be wisely measured in relation to one another. As the self-governing community seeks, by the method of voting, to gain wisdom in action, it can find it only in the minds of its individual citizens. If they fail, it fails. That is why freedom of discussion for those minds may not be abridged.

The First Amendment, then, is not the guardian of unregulated talkativeness. It does not require that, on every occasion, every citizen shall take part in public debate. Nor can it even give assurance that everyone shall have opportunity to do so. If, for example, at a town meeting, twenty like-minded citizens have become a “party,” and if one of them has read to the meeting an argument which they have all approved, it would be ludicrously out of order for each of the others to insist on reading it again. No competent moderator would tolerate that wasting of the time available for free discussion. What is essential is not that everyone shall speak, but that everything worth saying shall be said. To this end, for example, it may be arranged that each of the known conflicting points of view shall have, and shall be limited to, an assigned share of the time available.

But however it be arranged, the vital point, as stated negatively, is that no suggestion of policy shall be denied a hearing because it is on one side of the issue rather than another. And this means that though citizens may, on other grounds, be barred from speaking, they may not be barred because their views are thought to be false or dangerous. No plan of action shall be outlawed because someone in control thinks it unwise, unfair, un-American. No speaker may be declared “out of order” because we disagree with what he intends to say. And the reason for this equality of status in the field of ideas lies deep in the very foundations of the self-governing process.

When men govern themselves, it is they—and no one else—who must pass judgment upon unwisdom and unfairness and danger. And that means that unwise ideas must have a hearing as well as wise ones, unfair as well as fair, dangerous as well as safe, un-American as well as American. Just so far as, at any point, the citizens who are to decide an issue are denied acquaintance with information or opinion or doubt or disbelief or criticism which is relevant to that issue, just so far the result must be ill-considered, ill-balanced planning for the general good. It is that mutilation of the thinking process of the community against which the First Amendment to the Constitution is directed. The principle of the freedom of speech springs from the necessities of the program of self-government. It is not a Law of Nature or of Reason in the abstract. It is a deduction from the basic American agreement that public issues shall be decided by universal suffrage.

Justification 3. Assuring Individual Self-Fulfillment/Autonomy (no readings)

Justification 4. Creating a More Adaptable and Stable Community (The “Safety Valve”)

Note: Robert H. Jackson went on to serve as U.S. Solicitor General, U.S. Attorney General, U.S. Supreme Court Justice, and Chief U.S. Prosecutor of the International Military Tribunal in Nuremberg.

Free Speech as Safety Valve (1919)

*John Q. Barrett**

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On a Saturday evening in March 1919, attorney Robert H. Jackson, age 27, attended a lecture at Jamestown (New York) City Hall. The lecturer, a lawyer named Winter Russell, was a somewhat prominent American Socialist.¹ The lecture occurred in a period of global turmoil, devastation caused by the just-concluded Great War and, in the United States, ideological clashes, violence, law enforcement excesses and widespread unease.

Jackson, who had just completed a short term as Jamestown’s corporation counsel and was building a private law practice, attended Russell’s lecture by assignment. Jamestown’s mayor had appointed Jackson and other lawyers to serve on a committee that evening to “censor” the lecture. It was anticipated, at least by some Jamestown leaders, that Russell’s speech might cause disruption and need to be shut down.

Russell delivered a scathing speech. He attacked the U.S. government for its recent prosecutions of Socialist Party leaders Eugene V. Debs and Victor L. Berger for claimed crimes that really were, as Russell saw things, right principles and human ideals. Russell criticized the federal judges who had sentenced Debs and Berger to prison. But no censorship occurred—Jackson and his colleagues watched, listened and, at the end of the evening, returned to their homes.

Jackson stewed, then wrote. On Monday, he delivered this letter to the mayor, who was his mentor and friend, and to the Jamestown newspapers:

Dear mayor:

According to the duty which you thrust upon me, I attended the Socialist meeting last Saturday night addressed by Winter Russell, and desire to report to you that so far as I observed, there was no infraction of the letter or the spirit of our laws, and I desire to take this opportunity

to decline any further service upon committees of this character and to respectfully suggest that they be discontinued.

The speech at this meeting consisted of a bitter attack upon the government for prosecuting, and upon the courts for convicting Eugene V. Debs for his attacks upon President Wilson and his policy. He [Mr. Russell] denounced it as an attack upon free speech and complained that Debs was serving a long term in jail, while Theodore Roosevelt had not been prosecuted tho he called the president's policy "treasonable," and other attacks by richer and more influential men had passed unnoticed. He [Russell] concluded with the usual dreamy nonsense about the time when four hours shall constitute a working day. He predicted that if the government continued its policy of imprisoning men like Debs and Berger, it would bring on a revolution.

I see nothing illegal in any of this. That we have a right to criticize a conviction was pretty thoroly established when the whole North arose in indignation at the conviction of John Brown, and when Abraham Lincoln made bitter attacks upon the Supreme Court of the United States because of the Dred Scott decision. I suppose there is nothing treasonable in dreaming about a four-hour day, that is merely moonshine.

I must admit that I never understood why men like Roosevelt and [Senator Henry Cabot] Lodge are immune from laws which condemned Debs and Berger. Not that I believe Roosevelt and Lodge should be prosecuted, but I believe that a Socialist has as good a right to criticize a Democratic president as a Republican has. In fact, Mr. Mayor, the whole speech was very moderate compared with those attacks upon the government which I have been reading at the hands of eminent senators and gentlemen.

It is useless for us to have a cold chill every time the Socialists have a meeting. We have embarked upon a policy as a government of imprisoning people who oppose the government. Many of our eminent and well meaning citizens are rubbing their hands and saying, "Now that we have Debs in jail and Berger convicted, Socialism will die out." So said the Czar when he saw his political enemies exiled to Siberia; so said Louis the Fourteenth before the French Revolution; so said the Sanhedrin when they thought to kill out Christianity by crucifying Christ; so said the priesthood when they thought to kill out the Reformation by inquisitions.

Indignation meetings are the natural result of conviction of men like Debs and Berger, one several times a candidate for president of the United States who polled 897,000 votes in 1912, the last time he ran, and the other elected by the people of his district to represent them in Congress. I have read somewhat of history, and I just now fail to recall any government which has set about the suppression of unrest by putting popular citizens or class leaders in jail which has not stirred up a revolution, and I do not expect the United States to be any exception to a rule so universal. The prosecution of Debs and Berger is a tragic blunder. Sound law perhaps, but bad state policy, provoking class hatred and social unrest.

Mr. Mayor, I am opposed to Socialism and its insidious and vicious policy but I am equally opposed to those short-sighted people who expect to stamp it out by persecution. I am opposed to spying upon and persecuting and prosecuting and searching the Socialists, for they

thrive on it. No doctrine of military necessity now requires suppressing opposition to the draft. All that is past. Appointing smelling committees to go to these meetings merely advertises the meeting. I think half the joy that the Socialists found in the Winter Russell meeting was in the knowledge that they were being watched, which proved to them that they had finally got under somebody's sensitive skin and after I had heard the speech, I confess I felt a little ridiculous and I looked at the other members and they looked as ridiculous as I felt. Mr. Mayor, it is quite time that we quit letting these Socialists make fools of us.

Our forefathers were a canny crowd. They knew that free speech and a free press constitute the greatest safety valve that can be devised. They provided for it in this country, that is they thought they did, so that people who have grievances can meet and discuss them and solicit votes and carry on their opposition peaceably. The inevitable result of suppressing public gatherings and free speech is private gatherings and covert acts of violence and then the mob and then revolution. In every country which is now suffering from Bolshevism the government has for years tried stamping it out by suppressing free speech, exiling, and imprisoning labor leaders and radicals, preventing public gatherings, and in general adopting the very measures which seem to be getting some standing in respectable circles in the United States. We cannot adopt one half so drastic a measure against the Socialists as Russia did nor one half so effective, yet Russia failed, as we shall fail if we attempt similar methods. Bolshevism has gained the least ground in the countries allowing the greatest freedom of discussion and the most ground where most oppressed and penalized.

When Civilization is in convulsions, it seems to me not only petty but rather dangerous to be sitting on the safety valve. I think that our assumption of the right to censor what shall be said in these workingmen's meetings is like our conviction of their leaders in that it seems to add to the hatred and bitterness already existing between capital and labor, and that if we desire these two great forces to co-operate we should cease to do these things which provoke antagonism and arouse slumbering hatred.

Very respectfully yours, Robert Jackson

Justification 5. Promoting Tolerance

Lee C. Bollinger, "The Tolerant Society": A Response to Critics," *Columbia Law Review* 90: 979-1003 (1990).

In writing *The Tolerant Society* I was, and yet remain, interested in the treatment of speech behavior in this country, a treatment notably more liberal than in other Western democracies. Liberality, however, is not its only surprising or distinguishing hallmark; so too is how the world is characterized under the free speech concept.

For some time, even after I began teaching in the first amendment area, the scope and nature of protection afforded speech seemed to me obviously right. But the more I thought about it, the more it seemed to me quite extraordinary. Existing free speech theory provided less and less adequate an account for what our society actually permits under the free speech banner. Yet I also felt a strong intuition that free speech has powerful meaning for society, that somehow it

seems to strengthen society even by protecting the most appalling speech acts. I began to think about free speech as having a social significance that extends far beyond the mere removal of legal restrictions against speech. As I studied the major theorists, such as Holmes and Meiklejohn, I discovered that they also had, in the process of thinking about cases involving censorship of speech, become preoccupied with larger questions of the human personality-what I have called the intellectual character-with matters of belief and truth, and with challenges to both of those. These issues obviously transcended any hornbook understanding of the first amendment; setting the boundary of legal restraints on speech now involved thinking about its effects on the broader social culture. My research and writing in this field have been a search for that broader meaning, and what I have seen I describe under the general rubric of "tolerance."

In this Commentary I seek to respond to some of the criticism of the theory I set forth in *The Tolerant Society*. Part I states my view that the harms caused by speech are more like harms caused by nonspeech acts than is commonly perceived. Part II contains a summary of my thesis in *The Tolerant Society*. ...

I. HARM AND THE MIND BEHIND SPEECH

Our society's wide toleration of speech acts permits much more speech than what is customarily assumed to be beneficial under traditional first amendment theories. The conventional justifications for free speech are well known: Freedom of speech preserves a sphere of individual autonomy, provides a check against government abuse and, most prominently, secures our interest in advancing knowledge and truth. No doubt, much speech that is protected can be brought within the shelter of these justifications, but a lot of speech cannot reasonably find shelter here. Some speech has nothing whatever to do with truth seeking: it may be intended only for the momentary pleasure or enjoyment of both speaker and audience. Yet it is protected. Or, as with many demonstrations, the object is not to express a point of view but to disrupt other interests, such as peace and quiet, or to challenge and provoke an audience to a violent confrontation. Yet, though this speech is really just a legitimated form of social fighting, we protect it. Even racist speech and advocacy of genocide are protected, despite the fact that anyone seriously interested in seeking truth would spend no time listening to such ideas. We have good reason to think many ideas invalid and bad, and some come with a very high price. Some speech, in fact, has a great capacity for harm.

My view of this matter is quite simple: Speech can harm in ways we quite properly should take into account, a position supported by what we take into account in regulating nonspeech behavior. It is reasonable to care how people think, and speech is one way to induce others to think in ways dangerous or bad. We care about thoughts because we care about actions, and thoughts often induce actions. If law were perfect and could reach all harmful behavior, things might be otherwise. But it cannot, as a practical matter, and even when law does intervene, it often arrives after the harm has been done. Therefore, in the same way that the potential for gain has economic value, apprehension of future injury is reasonably within the purview of legitimate harms.

Consider the ordinary racist act. What is the injury inflicted by a policy of school segregation, or by any act of racial discrimination? Is it simply the inferior education or the denial of a room or a meal? Of course not. What is the injury of being forced to sit at the back of the bus? In all of these cases it is largely the thought and message of inferiority, of hatred and contempt, that is communicated by the discriminatory act and that afflicts the human spirit of the victim. This injury, in turn, impels us to intervene and to put a stop to the cruelty. Racist speech

does not differ in kind, nor does it necessarily differ in magnitude of injury, from other racist acts that we prohibit. Still, and this is the paradox, one is prohibited and the other is protected as free speech....

II. THE TOLERANCE THESIS

With this vision of speech as a species of action with a capacity to bring some benefits (though not uniquely and not as consequential as we might think) and a capacity to inflict injury (though not uniquely and not as inconsequential as we might think), I set out to think about why protection-or, as I ended up preferring to express it, toleration-of speech acts made sense, when the traditional benefits were small and the harms great. I thought a fundamental shift in perspective was needed. That shift involved two major components. The first was to see free speech as potentially concerned not just with trying to insure that we receive the benefits that speech has to offer, but also with correcting or stopping something bad or problematic in the reactions to-ward speech acts. The second component of the shift in perspective was to see that the social value we can derive from free speech need not depend upon speech being unique or significantly different from other areas of human interaction. In other words, rather than feeling that some special attributes of speech justify what we do there, one might instead see free speech as a discrete area of social interaction in which we seek particularly desirable values or qualities, perhaps to an extreme degree. I wanted to think about free speech in relation to our dealings with social behavior in general and to see whether that could account for our readiness to calculate bans and benefits in a way that, viewed in strictly comparative terms, seems so odd.

Taking this view opened up many possibilities for thinking about the social meaning of free speech. The task became one of thinking about or identifying the improper ways in which we react to certain behavior, given the values we profess to hold. Traditional values of free speech, like truth seeking, might themselves benefit from this perspective. One could agree with the observation just made that non- speech behavior can serve to advance the truth as well as speech-an observation that might otherwise be taken to challenge the legitimacy of free speech theory's removal of speech from social regulation, especially when the truth interest seems minimal-and argue that, because people have a general bias against receiving or acknowledging new ideas, it makes sense to set aside one area of social interaction such as speech and to commit ourselves to extreme pursuit of knowledge in that area. The position is not without further issues to be resolved, but the issues are importantly different. The problem of justification is no longer one of showing how the truth interest advanced by speech differs from that advanced by nonspeech acts, but rather one of showing how that interest is similar in both speech and nonspeech contexts, how there exists a general disinclination to pursue truth and how setting aside a special zone in which we will pursue truth to an extreme degree can provide a useful corrective for that social disability.

But this perspective also supports an enlarged conception of the social benefits potentially inhering in extreme toleration of speech acts, one that emerges from a focus on the problematic character of the reaction to speech acts. At least two kinds of social meaning seem to underlie the extraordinary restraint freedom of speech mandates toward speech acts.

The first has to do with the process of social punishment. There is no reason why what we derive from free speech cannot go beyond the truth-seeking interest and also be linked to the problems we have in fixing the appropriate punishment for bad behavior. There can be little doubt that human nature is afflicted with an impulse to punish excessively, to take vengeance for injury. Our system of criminal law is filled with precautions against this impulse. Once we realize that speech can not only constitute bad behavior but can also cause palpable injury, we

understand that speech can provide the context for exercising self-restraint toward bad behavior as a means of demonstrating and developing a capacity to exercise appropriate self-control when punishment is inflicted elsewhere. We let the injury pass, as it were, without exercising our power to prohibit and punish, because we recognize in ourselves the tendency to punish excessively when we do punish and use this as a means of moderating that tendency. We might call this aspect of free speech the virtue of magnanimity.

A second new function for free speech I call the development of the capacity for tolerance. Just as we might think of speech acts as bad acts, deserving of punishment and therefore creating an appropriate context in which to be extremely self-restrained in the exercise of punishment, so we might think of speech acts as just plain acts, verbal acts, in which people behave as they wish, despite risks of further behavior we properly dislike. This is a large and complex society, with people of varied beliefs and interests. Providing some accommodation of these varied beliefs is a critical and basic task of the society. Simply coexisting and overcoming the wish to establish an overly homogenized society are important goals. In this sense, free speech may simply function as a zone of extreme toleration, not because the behavior tolerated is important to human self-realization or to truth, but because as a practical matter living with divergent behavior is necessary.

I claim that the practice of toleration of verbal acts under free speech may help inculcate what I call the tolerance ethic. What I have in mind is the development of a general disposition, which I think is seen repeatedly in social interaction, to restrain our wants and beliefs in the exercise of social power. Some have pointed out how our constitutional law helps make raw self-interest an illegitimate basis for political power; the courts insist that arguments for laws at least be put in terms of advancing the public good. I would go farther and say that through the first amendment our judges have sought to constrain our desire to impose our own notions of the public good on others who have a different conception of it. Free speech seeks to modulate belief; not to destroy it, but to curb it. It is most striking that some of our greatest free speech theorists, such as Hand, Holmes and Harlan, saw in censorship an overweening belief, for which they prescribed the anti-dote of self-doubt. To Hand and Holmes, "Tolerance is the Twin of Incredulity." It is interesting that, for them, belief and doubt were matters that go to the whole person, to the matter of intellectual character. A person who feels healthy self-doubt toward her beliefs is a person who is not just prone to let more speech go uncensored, but a person who is going to behave differently, to insist on less and to compromise more, in the give-and-take of the political process.

This begins to get at what I have in mind when I talk about free speech as a special social context concerned with creating a culture or ethic of tolerance.