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2005

### The First Amendment's Original Sin

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#### Recommended Citation

Lee C. Bollinger, *The First Amendment's Original Sin*, 72 U. CHI. L. REV. 417 (2005).

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## REVIEWS

### **The First Amendment's Original Sin**

*Lee C. Bollinger*†

*Perilous Times: Free Speech in Wartime,  
From the Sedition Act of 1798 to the War on Terrorism,*  
Geoffrey R. Stone. Norton, 2004. Pp xix, 691.

Times of war place considerable stress on civil liberties, especially ones protected by the First Amendment. When the nation must gather itself to fight an enemy who is intent on killing us, it is perhaps only natural that our tolerance for the usual disorder of dissent will decline. When everyone has to sacrifice for the common good, when fellow citizens are dying in that cause, the costs of speech are visible and serious. Dissent may dissuade or discourage soldiers from fighting; sowing doubt may weaken resolve just when it's needed most; falsehoods and misinformation may lead to catastrophic shifts of policy; and the enemy's perceptions of a divided society may well strengthen its determination to fight on, with still more injury and loss of life on the battlefield. Wars, moreover, always bring a sense of heightened urgency that leads the ideals of rational and deliberative debate to acquire an air of naïveté. Action, not deliberation, becomes the imperative. In this way, the rationale for an "exception" to freedom of speech in times of war emerges.

Yet, it is widely thought (certainly by those who study and defend civil liberties) that the nation persistently loses a proper respect for civil liberties during these times of national crisis.<sup>1</sup> A panic sets in; a mob mentality takes hold, which exaggerates the danger from speech, looks for scapegoats for our fears and rage, and inflicts a trail of

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† President, Columbia University. It bears noting that Professor Stone and I coedited a book on the First Amendment. Lee C. Bollinger and Geoffrey R. Stone, eds, *Eternally Vigilant: Free Speech in the Modern Era* (Chicago 2002).

<sup>1</sup> See Natsu Taylor Saito, *Justice Held Hostage: U.S. Disregard for International Law in the World War II Internment of Japanese Peruvians—A Case Study*, 40 BC L Rev 275, 297 (1998) (calling "times of war or other perceived crisis" the "times that our civil liberties are most easily lost"); *Skinner v Railway Labor Executives Association*, 489 US 602, 635 (1989) (Marshall dissenting) ("History teaches that grave threats to liberty often come in times of urgency, when constitutional rights seem too extravagant to endure.").

shameful persecution. The victims of these excesses are usually the weakest and least influential members of the society,<sup>2</sup> although at times even some of the most powerful are not entirely immune.<sup>3</sup> The government may see political advantages, too, in stirring up intolerance, while such an agitated environment can also be useful in settling scores and shoring up one's political base. Most of all, however, excessive intolerance threatens to eviscerate serious public debate about critically important public issues.

Invariably these periods of excess are followed, once the danger passes, by a condemnation of what has occurred and a stated determination not to let such excesses happen again. The postwar period is filled with regrets, apologies, clemencies, pardons, all accompanied by promises that we'll do better next time. But the bad behavior has all the elements of an addiction. It is a story of chronic recidivism, of violations followed by pleas for forgiveness, followed by a new situation that is always thought to bear no resemblance to past periods of transgression. Every war seems different from the last. The enemy seems to be more clever and to possess new tactics and capacities. Our success seems more in doubt.

Dissent, therefore, always seems more dangerous and costly than it was the time before. Thus, while the maxim of war is that generals are forever making the mistake of thinking the new war is just like the last war, the maxim of free speech in wartime is just the reverse—society is forever making the mistake of thinking the new war is fundamentally different from all prior wars.

Geoffrey Stone's book, *Perilous Times: Free Speech in Wartime, From the Sedition Act of 1798 to the War on Terrorism*, shows how this has occurred at least six times in U.S. history. He analyzes each episode: the Alien and Sedition Acts of 1798, the Civil War, World War I, World War II, the Cold War, and the Vietnam War. And Stone concludes by asking whether we, in the war against terrorism, can do any better. The story of censorship, when told in this fashion, should instill in all of us a sense of alarm that First Amendment freedoms are still not safe against the tempestuous emotions of war. It is easier, Stone reminds us, "to look back on past crises and find our predecessors

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<sup>2</sup> Stone's book is replete with examples. The brunt of these excesses falls on persons like the copy editor of a German-language newspaper in Missouri (p 195), or a handful of anarchist emigrants from Russia (p 203). See *Frohwerk v United States*, 249 US 204 (1919) (unanimously affirming a copy editor's conviction under the Espionage Act for conspiring to cause disloyalty, mutiny, and refusal of duty in the United States military forces); *Abrams v United States*, 250 US 616 (1919) (affirming a group of anarchists' convictions under the Espionage Act).

<sup>3</sup> For example, Eugene Debs, the leader of the Socialist Party in the United States and a presidential candidate, was notoriously prosecuted and sent to jail for speaking approvingly of those who resisted the draft during World War I. See *Debs v United States*, 249 US 211 (1919).

wanting than to make wise judgments when we ourselves are in the eye of the storm" (p 557). And Stone is the perfect person to tell the tale.

As the Harry Kalven, Jr., Distinguished Service Professor at the University of Chicago Law School (where he was also dean and provost), Stone bears the mantle of one of the great, and eloquent, figures in the modern history of freedom of speech. All of us who are First Amendment scholars who came of age in the late 1960s wished to be Harry Kalven.<sup>4</sup> Stone comes closest, not just in title but in intellectual style, to the perspective of Harry Kalven.<sup>5</sup> This is a perspective that believes in developing a coherent doctrinal architecture that serves relatively simple but still profound fundamental values, such as that of self-government. It sees the virtues of legal institutions providing bulwarks against the natural bad impulses that both arise from democracy in action and simultaneously mar democracy if unchecked. It sees the benefits of vigorous public discussion. It is concerned that punishing and deterring intemperate speech might "chill" desirable speech, and this concern often takes precedence over laws that protect other goods from harmful speech (for example, reputation or national security). Geoffrey Stone speaks from this vantage point in *Perilous Times*.

Interspersed throughout the tales of intolerance, Stone develops significant themes that have not been illuminated before in the literature on freedom of speech. Experiences of the twentieth century have taught us that courts and juries do not serve as adequate bulwarks against the rising tides of suppression of speech in times of war.<sup>6</sup> Nearly everyone, including judges, seems swept up in the emotional need to separate the world into those who are for the cause and those who are against it. But Stone finds something intriguing about judges in these moments, something reminiscent of the remarkable theme Robert Cover explored in his book on how northern antislavery judges interpreted the Fugitive Slave Act.<sup>7</sup> The thesis is this: faced with deciding cases under legislation judges believe is immoral or wrong,

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<sup>4</sup> Harry Kalven, Jr., wrote numerous books and articles on the First Amendment, but perhaps the best known and influential was *The New York Times Case: A Note on "The Central Meaning of the First Amendment,"* 1964 Sup Ct Rev 191, 193-94 (arguing that the Supreme Court's decision in *New York Times v Sullivan* was its "best and most important . . . ever produced in the realm of freedom of speech").

<sup>5</sup> See, for a single example, Geoffrey R. Stone, et al, eds, *The First Amendment* (Aspen 2d ed 2003).

<sup>6</sup> See, for example, *Korematsu v United States*, 323 US 214 (1944); *Debs*, 249 US 211.

<sup>7</sup> Robert M. Cover, *Justice Accused: Antislavery and the Judicial Process* 6-7 (Yale 1975). Cover examines how several "antislavery" judges in the late-eighteenth and nineteenth centuries interpreted and enforced the Fugitive Slave Act strictly, despite their own moral and conscientious objections to slavery.

judges will rigidly invoke their official obligation to enforce the “law” and actually overlook or ignore reasonable interpretations of that law that would moderate its harmful impact. So too, Stone finds, judges in the national hysteria during World War I interpreted the Espionage Act of 1917<sup>8</sup> in less speech-protective ways than was reasonably required (pp 158, 170–73). One court, not at all uncommon in its interpretation, read the act to cover a speaker saying “government is for the profiteers” to the Women’s Dining Club of Kansas City—all because the statement had a tendency to “chill enthusiasm, extinguish confidence, and retard cooperation” among the women attending (p 171–72).<sup>9</sup>

Another notable theme in *Perilous Times* is the varieties of censorship utilized, which extend far beyond the classic approach of passing legislation prohibiting speech. John Stuart Mill observed long ago that nonlegal forms of censorship are at least as effective as direct legal means in suppressing speech.<sup>10</sup> Stone makes the point graphically, in each of the six narratives.<sup>11</sup> But of greater interest and importance is Stone’s illustration of how intolerance can be driven by the interaction of national leaders (such as the president and the attorney general) and the public. For example, Stone shows how effectively Lincoln’s restraint in using censorship during the Civil War “played a critical role in keeping repression in check” (p 133). On the other hand, President Wilson and his administration unfortunately chose a different path and made an atmosphere of intolerance significantly worse. The Wilson administration, Stone writes, “needed to create an ‘outraged public’ in order to arouse Americans to enlist, contribute money, and make the many other sacrifices war demands” (p 153). The administra-

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<sup>8</sup> 40 Stat 217.

<sup>9</sup> *United States v Stokes*, (unreported) (D Mo 1918), revd, 264 F 18 (8th Cir 1920), quoted in Zechariah Chafee, *Free Speech in the United States* 52–53 (Harvard 1941).

<sup>10</sup> John Stuart Mill, *On Liberty* 93 (Penguin 1985) (first published 1859). Mill describes these nonlegal forms of censorship:

For a long time past, the chief mischief of the legal penalties [restricting thought and discussion] is that they strengthen the social stigma. It is that social stigma which is really effective, and so effective is it that the profession of opinions which are under the ban of society is much less common in England than is, in many other countries, the avowal of those which incur risk of judicial punishment.

<sup>11</sup> For example, Stone cites strong pressure for political conformity in academia in the 1950s. Hundreds of professors were fired for “their actual or suspected, past or present, membership in the Communist Party” (p 422). Furthermore, the aura of conformity on campuses left students, as Stone explains, frightened to voice liberal views, or to become identified with peace or free speech because such views had become “associated with Communism” (p 422). To Stone, this form of nonlegal censorship “inhibits debate where it most needs to be uninhibited” (p 422), because an educated public and open dialogue about free speech allows the marketplace of ideas to function at its best (p 536–37).

tion's actions "led to one of the most fiercely repressive periods in American history" (p 153). Wilson himself spoke publicly, in a Flag Day address, of the "sinister intrigue" lurking throughout the country and of German "agents in the United States 'in places high and low'" (p 153). One of the more infamous and revealing official comments of the period came from Attorney General Thomas Gregory, who said of opponents of the war, "May God have mercy on them, for they need expect none from an outraged people and an avenging government" (p 153).

These observations on the interplay between government and the public in influencing the degree of respect for civil liberties raise one of the more interesting questions posed by Stone's analyses of the six episodes—just how far should the First Amendment go in protecting dissent from government suppression? For example, Stone explains how Wilson established the Committee on Public Information (CPI) to create public support for the government's war policies (p 153). Stone then observes that while "the government is free to tell its own side of the story and to attempt to promote a sense of national unity and commitment to the war effort," the "question raised by the activities of the CPI is how far the government should go in this effort" (p 153–54). He does not completely dismiss the idea that this might become, under extraordinary circumstances, a First Amendment question: "It would have to be a very extreme case to imagine a court holding that the government's own speech violates the First Amendment because it has, in effect, swamped the marketplace of ideas" (p 154). Nevertheless, "as a matter of sound governance," he argues, we should develop a national understanding of the limits of "government advocacy of its own policies" (p 154).

*Perilous Times* also makes us more sensitive to just how protean the censorship impulse is. Government officials "have proved insistently creative in pursuing their ends" of censorship, Stone states in conclusion (p 525). So,

when the government "loses" one means of controlling dissent, it quickly finds others to replace it. When direct criminal prosecution of dissidents became more difficult after World War II, the government promptly turned to loyalty tests and legislative investigations to deny dissenters employment and expose them to public harassment and humiliation. When those means of suppressing dissent came into question, the government expanded its use of surveillance and disruption to intimidate and silence its critics. When those techniques of managing dissent were challenged, the government moved more aggressively to control information and to deny citizens access to knowledge about the activities of their own government (p 525).

At the very least, this observation about the government's almost Darwinian ability to adapt means that over this century the very scope of the First Amendment—that is, what we take to be within its purview—is likely to change and to expand if we remain intent on protecting public debate to the extent we have in the latter part of this past century.

On the other hand, Stone is not pessimistic about the prospects for improvement. He disagrees with those who argue that “once constitutional rights are compromised, they are lost forever” (p 530). Rather, Stone demonstrates that for each period he chronicles, “the nation’s commitment to free speech rebounded, usually rather quickly, sometimes more robustly than before” (p 530).<sup>12</sup> An optimistic note is also struck in one of Stone’s more original insights: just how much Congress has kept in mind, even in wartime, “its constitutional responsibilities” (p 541).<sup>13</sup> At the time of the Sedition Act of 1798,<sup>14</sup> and on similar occasions, “Congress—proceeding without any Supreme Court guidance—took seriously” the constitutional interests at stake (p 541). For example, during the debate over the Espionage Act of 1917, Congress “took its constitutional responsibilities quite seriously and expressly rejected several key provisions proposed by the Wilson administration” (p 146). (The press censorship provision, for example, would have criminalized the publication of material that the president deemed “of such character that it is or might be useful to the enemy”; despite heavy pressure from the White House, Congress rejected this provision (pp 147–49).) Unfortunately, the “administration and the federal courts distorted the . . . Act in order to suppress a broad range of political dissent” (p 146). This sad story of censorship throughout

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<sup>12</sup> Compare Jack Goldsmith and Cass R. Sunstein, *Military Tribunals and Legal Culture: What a Difference Sixty Years Makes*, 19 Const Comm’n 261, 286–87 (2002):

[W]e add the more general point that restrictions of civil liberties that came to be regretted after the war were never again repeated. No President has ever repeated Lincoln’s suspension of the writ of habeas corpus, his military trials for civilians in the United States, or his brutal suppression of newspapers. We have never again seen loyalty prosecutions as in World War I, and we are unlikely to do so. The same is true of the World War II exclusion of Japanese-Americans.

<sup>13</sup> See also David P. Currie, *The Constitution in Congress: The Federalist Period, 1789–1801* 296 (Chicago 1997). Currie argues that during the Federalist Period, “Congress and the executive resolved a breathtaking variety of constitutional issues great and small, left us a legacy of penetrating and provocative constitutional arguments, and developed a sophisticated glossary of the meaning of a whole host of constitutional provisions.” *Id.* Although Congress did pass the Alien and Sedition Acts, the Republicans, in their opposition to the Acts, “gave us all that really matters in our modern theory of free expression—the indispensability of speech to the political process and the marketplace of ideas.” *Id.* at 297.

<sup>14</sup> 1 Stat 596.

our history naturally leads the reader to ask what might be done to improve on this record in the future.

I think we have to start with the possibility that we already have improved significantly and certain things that have been done are working beneficially and should continue to be emphasized. *Perilous Times* reminds us that not until 1919 was there any significant judicial interpretation and application of the First Amendment and that not until that year was there a single Supreme Court case involving the principle of free speech.<sup>15</sup> Since then, of course, we have had an enormous jurisprudential development of free speech doctrine and thought, culminating in the Court's extraordinarily speech-protective decisions, primarily in the 1960s, which remain the governing precedents to this day.<sup>16</sup>

The question to be asked, then, is whether this is a transformation of historic dimensions or another quixotic tilting at intolerance. It seems to me significant that someone of Stone's knowledge and judgment believes in a positive transformation. Of course, he says, there "is no 'end' to this story," but there is progress (p 525). Thus, the Court "has learned over time that it is impossible to excise from public debate only those views that are thought to be 'dangerous,' without undermining free speech more generally" (p 524). It now understands the roots and manifestations of intolerance, and *Brandenburg v Ohio*<sup>17</sup> "represents the (contemporary) culmination of this process" of steadily increasing awareness (p 524). Having constructed a "fortress" around core political speech, *Brandenburg* is, as "Harry Kalven has said . . . 'the perfect ending to a long story!'"<sup>18</sup> (p 524).

Of course, we are in wartime now, and so we have one more experience to add to the list that Stone explores in depth. In the last few pages of *Perilous Times*, Stone considers how well we as a society have

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<sup>15</sup> See, for example, Daniel Farber, *Lincoln's Constitution 171-72* (Chicago 2003) (noting that "the Supreme Court did not seriously confront First Amendment issues until . . . World War I and its aftermath"). The major cases that year were *Schenck v United States*, 249 US 47 (1919) (upholding the defendants' convictions under the Espionage Act for circulating a pamphlet criticizing the draft); *Frohwerk*, 249 US 204; and *Debs*, 249 US 211.

<sup>16</sup> See, for example, *New York Times v Sullivan*, 376 US 254, 280 (1964) (holding that the First Amendment does not permit criminal or civil sanctions for false statements made about public figures without a showing of "actual malice"); *Tinker v Des Moines Independent Community School District*, 393 US 503 (1969) (holding that schools may not prohibit students from wearing armbands to protest the Vietnam War); *Cohen v California*, 403 US 14, 26 (1971) (holding that, under the First Amendment, the "simple public display" of a certain "four-letter expletive" as a protest against the military draft may not be criminalized).

<sup>17</sup> 395 US 444, 447 (1969) (holding that even speech advocating the use of force or violations of the law is protected by the First Amendment unless such speech "is directed to inciting or producing imminent lawless action and is likely to incite or produce such action").

<sup>18</sup> Harry Kalven, Jr., *A Worthy Tradition: Freedom of Speech in America* 232 (Harper & Row 1988).



done during “the war on terrorism” (p 550). He begins with praise for President Bush for “his response to the risk of hostile public reactions against Muslims and Muslim Americans” (p 551). Bush has done better than Wilson (with respect to German Americans) or Roosevelt (with respect to Japanese Americans). Stone proceeds to note that “there have been no federal criminal prosecutions of any individuals for criticizing the administration’s policies against terrorism” (p 551). This, too, is a “far cry” from what has occurred in earlier wars. This is a genuine sign of progress, Stone asserts. Whereas Eugene Debs was prosecuted for praising draft resisters during WWI, it is “unthinkable” that Howard Dean might today be prosecuted for opposing the war in Iraq (p 551).

But Stone criticizes the Bush administration for associating dissent with disloyalty, for exploiting citizens’ fears for political advantage, and for some abridgements of civil liberties during this period. On the last charge, his list is chilling:

The more questionable restrictions included indefinite detention, with no access to judicial review, of more than a thousand *non-citizens* who were lawfully in the United States and had not been charged with any crime; blanket secrecy concerning the identity of these detainees; refusal to permit many of these detainees to communicate with an attorney; an unprecedented assertion of authority to eavesdrop on constitutionally protected attorney-client communications; secret deportation proceedings; the incarceration for more than two years of an American citizen, arrested on American soil, incommunicado, with no access to a lawyer, solely on the basis of an executive determination that he was an “enemy combatant”; significant new limitations on the scope of the Freedom of Information Act; expanded authority to conduct undercover infiltration and surveillance of political and religious groups; increased power to wiretap, engage in electronic eavesdropping, and covertly review Internet and e-mail communications; new power secretly to review banking, brokerage, and other financial records; and expanded authority to conduct clandestine physical searches (p 552) (internal citations omitted).

While Stone criticizes Congress and the public for the early, too-easy, acceptance of questionable restrictions on civil rights, he expresses approval of the resistance to later proposed incursions: “Thus, although the initial response of Congress and the public was to support the administration’s demands for additional powers, once fears had settled, the response was more clear-eyed and more resistant to further expansions of executive authority” (p 554). Stone closes his discussion (and the book) with a cautious appraisal: “And, so, we shall

see" (p 557). The reader may reasonably wonder whether we have indeed reached "the perfect ending."

I am more skeptical about progress, believing that we have not experienced the same level of fear since the end of World War II and further believing that human nature is more incorrigible in this area of intolerance.

Still, even if Stone is right, there may be more we can do. I would not say the answer lies in sharpening the test for the limits of free speech, as some might (not Stone, however). Such sharpening has been a primary focus of discussion over the last century as countless formulations have been put forward, placed into service, abandoned or modified, and then replaced by yet another linguistic turn. I do not mean to say that this has been a useless fiddling with words while speakers and free speech burned. Tests matter. But Stone is right: we now have a test (*Brandenburg*) that, although still somewhat ambiguous, is about as speech-protective as we're going to get in the real world.

Perhaps I should also say at this point that (for different reasons) little hope should be put in what we might call the rhetoric of free speech. A claim that free speech is an "absolute" is either self-evidently preposterous or a meaningless tautology (the First Amendment protects absolutely all that the First Amendment protects). Indeed, this is exactly opposite the direction in which we should be headed, for reasons I will offer in a moment.

What about the idea many have advanced over time of extending the boundaries of protected speech so far out (even if not "absolutely") that it will be harder in times of stress to sacrifice the principle excessively? It is a fact that the United States protects speech significantly more than any other society in the world.<sup>19</sup> To be sure, whether this effectively serves as a buffer in wartime is an intriguing question in its own right, but, as a concept for improving protection in the future, we are not going to expand protection from where it is now.

Interestingly, I take Stone's focus in *Perilous Times* to be less on First Amendment doctrine and more on understanding the psychology

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<sup>19</sup> See, for example, Daniel A. Farber, *The First Amendment* 1 (Foundation 1998) ("[N]owhere is the protection for free expression taken as far as in the United States."); Frederick Schauer, *The First Amendment as Ideology*, 33 *Wm & Mary L Rev* 853, 856 (1992) (arguing in part that "the degree of freedom of speech and press in the United States is substantially greater than that prevailing in any other country on the face of the earth"); Lee C. Bollinger, *The Tolerant Society* 3 (Oxford 1986) (noting that the United States protects speech ranging from advocacy of the violent overthrow of the government to the endorsement of racial and religious discrimination and that "[n]o other free society permits this kind of speech activity to nearly the same degree").

of censorship through historical investigation and on finding the extra-judicial means to moderate that bad impulse, inflamed as it is in times of war. In the closing discussions of the book, Stone calls primarily for education, for better-educated citizens and public officials (p 537). He has some novel notions about having a “cooling off” period for legislative restrictions on speech in wartime and about including sunset provisions in any legislation that emerges from this special process (p 539–40). He further calls for a free speech advocate within the corridors of the White House, having shown how extremely important presidential leadership is in determining how the whole society deals with dissent (p 542). But what Stone knows—and undoubtedly what compelled him to write this book after so many years of teaching and writing about the First Amendment—is that self-knowledge is the best, and perhaps even the only, antidote to the intolerant excesses he meticulously recounts.

*Perilous Times* itself serves that fundamental educational purpose. It makes more visible and accessible, by concrete examples, the evils of intolerance and the courage of resisting it. For a society better educated on these issues, one can only hope that *Perilous Times* makes Geoffrey Stone a rich man.

I would offer just a few final thoughts. Stone calls for more of a temperament of self-doubt throughout society as a path to a better balance of civil liberties in wartime. He asks for “a *culture* of civil liberties” (p 537):

Educational institutions, government agencies, political leaders, foundations, the media, the legal profession, and civil liberties organizations all can help cultivate an environment in which citizens are more informed, open-minded, skeptical, critical of their political leaders, tolerant of dissent, and protective of the freedoms of *all* individuals. Above all, as Judge Hand observed, the “spirit of liberty is the spirit which is not too sure that it is right”<sup>20</sup> (p 537).

The idea of a beneficial relationship between self-doubt and skepticism and tolerance of dissent has, of course, deep roots in our traditions. While the remedy is helpful, it should not be regarded by any means as a complete answer to the problem of the mentality of intolerance. It is a hard fact of life, especially in a democracy, that one of the most difficult and important capacities citizens must develop is how to deal with the countless conflicts over differing beliefs (includ-

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<sup>20</sup> Learned Hand, *The Spirit of Liberty*, in Irving Dillard, ed, *The Spirit of Liberty: Papers and Addresses of Learned Hand* 189, 190 (Knopf 1952).

ing threats to those beliefs) that make up daily life in the public sphere. Belief and doubt are not the only ingredients in our responses, and each is appropriate in its own time.

Indeed, one key reason why excessive intolerance arises is because of a fear that the opposite evil may occur. In a society undergoing stress, it can sometimes happen that people lack the courage of their moral convictions, through excessive doubt. They may become befuddled by doubt when the proper call is to be resolute; or they may try to free ride on others bearing the burdens of action. The tragedy of the commons applies just as much to defending your principles as it does to any shared physical space. And wars present collective action problems in the psychological arena, too. To summon the will to fight as a group, citizens naturally feel the need to demonstrate to each other (and to themselves, in order to overcome their own self-doubts) that they are in it together for the duration. This process of mutual reassurance about the will to act when there are many incentives for not acting can naturally lead people to use certitude as an expression of will, which involves, in turn, a recalculation of the costs of and responses to deviance. Indeed, it is the recognition of this natural pattern of thinking in human behavior that undoubtedly leads to the idea that freedom of speech must bend to some extent in times of war.

At the same time, it is simply not the case that embracing an attitude of skepticism or self-doubt ensures proper restraint in social conflict. One may recognize the possibility that one's beliefs are untrue and yet unreasonably insist on having one's way, especially since by this logic everyone's beliefs may be untrue. Crossing over from doubt into commitment to one's belief is also a reasonable way to live, as nearly everyone does, and behaving with appropriate self-restraint in that state of mind is critically important today.

The simple and important facts are, first, that the intolerant-mindedness that manifests itself in censorship of speech infects all kinds of other behavior as well. It distorts judgment, leads to other repressive laws, prevents reasonable compromise, and inflicts excessive punishments on those who violate social norms and are viewed as threats to society. The stories of intolerance in *Perilous Times* are notably not limited to persecution of speakers.

And, second, there are no easily reducible rules or remedies for regulating these excesses in all circumstances. The problem of the intolerant mind is a problem of self-government, not a plague that can be cured by law.

But this is part of the source of the enormous power of the principle of freedom of speech as it has been developed in the United States, over the past century especially. We now live in the most speech-protective society in the world. What is so unusual about this

country is not the security of the general right of free speech but rather the scope of the right, the fact that so much speech that every other democratic society regards as unacceptable and dangerous is here tolerated.

In the United States, the social activity of speech has essentially been removed from the normal area of democratic regulation. In the realm of human behavior, it is the equivalent of protected and unregulated areas of wilderness. And, as such, freedom of speech has two functions; it serves two democratic purposes. One is to provide extraordinary protection for the activity of speech itself as a means of advancing our societal interest in public discussion of public issues. The other is to create a part of the public arena where we can push our capacities for tolerance as a way of better coming to terms with the dangers of the mentality of intolerance that is so threatening to the entire social fabric in the public sphere.

*Perilous Times*, to my mind, is a book that speaks powerfully and factually to both of these dimensions of the modern idea of freedom of speech. By focusing on free speech in times of war, which is typically when attitudes of intolerance run at their highest and the needs of public debate for information and ideas are also greatest, Geoffrey Stone teaches all of us about how speech in this country serves both the practical interest in good discussions and the higher interest in becoming better people and a better society.