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The First Amendment and Article Ten: Sisters Under The Skin?

Lord Walker of Gestingthorpe
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The First Amendment and Article Ten: Sisters Under The Skin?

Lord Walker of Gestingthorpe

*'The Colonel's Lady an' Judy O'Grady
Are sisters under their skins'.*

Rudyard Kipling, *The Ladies*

Thank you for doing me the great honour of inviting me to speak to you as President of the Holdsworth Club. It is a particular honour to be doing so in this 80th anniversary year of the Club's foundation. The names of my presidential predecessors are set out in the printed text, and they are a formidable array. But I should add that the annual presidential address is only the most conspicuous of the Club's diverse activities – moots, social events, sporting competitions, and so on – which make it central to the life of the University's School of Law.

In my address I want to begin to explore a large subject: attitudes to free speech under the United States Constitution, on the one hand, and on the other hand under the European Convention on Human Rights and some other human rights instruments akin to the European Convention.

Under the European Convention almost all human rights adjudication requires a balancing exercise¹. Most human rights are not absolute, but qualified. That is for the simple reason that they are to be enjoyed, not in some ideal Garden of Eden, but in the real, overcrowded, quarrelsome world in which we live. It is a world populated by other individuals insistent on their own human rights, and regulated by constraints imposed in the general interests of society as a whole.

More than twenty-five years ago the European Court of Human Rights observed²:

'The Court must determine whether a fair balance was struck between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights. The search for this balance is inherent in the whole of the Convention.'

The position is much the same (though the provisions are mostly expressed in wider and more general terms) in Canada, India, New Zealand, South Africa, and (since 1 January 2008) the State of Victoria³.

¹ There are exceptions, because some rights are absolute. In particular, the prohibition on torture is unqualified. The deliberate infliction of severe pain cannot be justified or excused by arguments based on the number of lives that might be saved as a result of intelligence obtained by such means: *A v Secretary of State for Home Department (No.2)* [2006] 2 AC 221

² *Sporrong & Lonnroth v Sweden* (1982) 5 EHRR 35, para 69

Nowhere in human rights jurisprudence is this more obvious than in the field of freedom of expression. One individual's freedom of speech may be, to the mind of the government (or the minds of many of his fellow citizens) sedition, betrayal of state secrets, blasphemy, obscenity, racial abuse, defamation, invasion of privacy, breach of confidence or contempt of court. There is plenty of room for balancing exercises here.

The need is of course recognised in Article 10(2) of the European Convention on Human Rights:

'The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, and for maintaining the authority and impartiality of the judiciary.'

This is a comprehensive set of qualifications, expressed in terms which reflect the caution of those (including several British government lawyers) who drafted it in the years just after the Second World War.

It is therefore something of a culture shock to encounter the stark, unqualified, self-confident language of the First Amendment to the Constitution of the United States of America. It was approved in 1791 and so (like all the amendments down to the Twelfth) it was the work of the founding fathers themselves:

'Congress shall make no law respecting an establishment of religion, or prohibiting the full exercise thereof; or abridging the freedom of speech, or of the press; or of the right of the people peaceably to assemble, and to petition the government for a redress of grievances.'

This is a complex text, and it is not expressed with lawyerly caution. There is no definition of freedom of speech or freedom of the press⁴, and there is an unqualified prohibition on their being abridged. Throughout the history of the United States Supreme Court there have been some famous judges (sometimes called 'originalists') who have seen it as their duty to apply the founding fathers' plain words as they themselves would have understood them. Other judges have regarded the First Amendment as a living text which requires development and re-interpretation so as to meet the changing needs of American society.

³ Canadian Charter of Rights and Freedoms, s 1; Constitution of India, Articles 19, 25 and 26; New Zealand Bill of Rights Act 1990s

⁵ Constitution of the Republic of South Africa, s 36; Victorian Charter of Human Rights and Responsibilities Act 2006 s 7(2)

⁴ It is debatable whether the reference to freedom of the press was intended to refer to newspapers, or simply to reflect the difference between the spoken and the printed word.

United States Supreme Court there have been some famous judges (sometimes called 'originalists') who have seen it as their duty to apply the founding fathers' plain words as they themselves would have understood them. Other judges have regarded the First Amendment as a living text which requires development and re-interpretation so as to meet the changing needs of American society.

But it is not necessary to be an originalist to see that in the text of the First Amendment freedom of expression is linked with non-establishment of religion, freedom of religion, and freedom to assemble and petition about grievances. The context is that of the citizen's freedom (indeed, his duty) to take a full part in democratic *self-government*: government of the people, by the people, for the people – women and slaves excepted. Many commentators⁵ have pointed to the parallel with Athenian democracy in the 5th century BC, in the idealised picture painted by the funeral oration which Thucydides puts in the mouth of Pericles. This theme has been eloquently developed by an American political philosopher, Dr Alexander Meiklejohn⁶, in an article published in 1961:

'In my view, 'the people need free speech' because they have decided, in adopting, maintaining and interpreting their Constitution, to govern themselves rather than to be governed by others. And, in order to make that self-government a reality rather than an illusion, in order that it may become as wise and efficient as its responsibilities require, the judgment-making of the people must be self-educated in the ways of freedom. That is, I think, the positive purpose to which the negative words of the First Amendment give a constitutional expression.'

Nor is it necessary to be an originalist to see the freight of history carried by the First Amendment. Many of the founding fathers were the descendants of men and women who had come to North America as refugees from religious or political persecution, or both. They prized freedom of speech and freedom of religion at a time when both those freedoms were severely restricted in Britain and other parts of Europe. The firmly-held belief that free speech was an essential part of self-government was accompanied, I suggest, by an equally firmly held belief that government should interfere as little as possible in the private lives of its citizens (I pass over the extraordinary episode of prohibition, introduced by the Eighteenth Amendment in 1919 and abolished by the Twenty-first Amendment in 1933). The First Amendment's prohibition on the establishment of religion reflected, not that the founding fathers had no interest in religion, but that they saw it as no concern of government. Thus the Supreme Court affirmed in *Watson v Jones*⁷:

⁵ For instance Sir John Laws in ed Ian Loveland, *Importing the First Amendment* (Loveland), Chapter 7 and Justice Stephen Breyer, *Active Liberty* p.134. I acknowledge my debt to Loveland as a very useful secondary source.

⁶ *The First Amendment is an Absolute* 1961 Supreme Court Review 245, 262.

⁷ (1872) 20 L Ed 666, 676; similarly *Fortas J in Epperson v Arkansas* (1968) 393 US 97, 103: 'The First Amendment mandates neutrality between religion and religion, and between religion and non-religion.'

'The law knows no heresy, and is committed to the support of no dogma, the establishment of no sect.'

This neutral attitude was accompanied by a tendency to set a higher value on the individual citizen's right to self-expression than on the hurt that might be caused to the religious and racial sensitivities of his fellow-citizens. The American instinct for self-reliance and free enterprise seized on the metaphor of the market-place of ideas of which Justice Oliver Wendell Holmes spoke in 1919, in a famous passage which has since been quoted or echoed on countless occasions. Men may come to believe, he said,

*'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.'*⁸

Similarly, Justice Learned Hand said in 1943⁹:

'The First Amendment presupposes that right conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative selection. To many, this is, and always will be, folly; but we have staked upon it our all.'

These are stirring pronouncements, against which the measured collegiate prose of most Strasbourg judgments appears rather grey. But the market-place metaphor may be thought to be based on an over-optimistic view of human nature. Taken to its logical conclusion, it leads to the doctrine of content-neutrality: that government may restrict the time, place or manner of self-expression, but not its content. Indeed, taken to its logical conclusion¹⁰ it sets no limits to the values that may be questioned and criticised, except perhaps (as Professor Schauer has noted¹¹) the value of free speech itself.

But over the years there has not, on the whole, been a majority in the Supreme Court for taking it to its logical conclusion. I want to look at a few of the Supreme Court's leading decisions in the field of free speech, and to contrast them with the way in which other common law jurisdictions (and the European Court of Human Rights at Strasbourg) have dealt with similar issues. I am conscious that in the United States Supreme Court the citation of foreign authorities is regarded by some (notably Justice Scalia) as improper and unconstitutional, if not actually treasonable.

⁸ *Abrams v US* (1919) 250 US 616, 630

⁹ *US v Associated Press* (1943) 52 F Suppl 362, 372

¹⁰ Discussed and criticised by Professor David Feldman in Loveland, ch 8, *Content Neutrality*

¹¹ *The First Amendment as Ideology* (1992) 33 William and Mary LR 853

The English courts have not returned the compliment so comprehensively, but in this field they are disinclined to encourage the citation of United States authorities. They take the view that the First Amendment is so different in its origins, its text, and its jurisprudential development by the Supreme Court, that it can afford little assistance to English courts. That view is no doubt correct in relation to the detailed development of our case law. But I think that there is much of interest in the American experience. I shall consider in turn sedition; libel; blasphemous and racially offensive speech; and obscenity.

American independence was in some ways both the result of oppressive government in Britain, and (coupled with the French revolution) the cause of further oppression, since William Pitt saw the British constitution as threatened by an axis of revolution linking France and America. In Britain Tom Paine, the author of *The Rights of Man*, was convicted of high treason (in his absence, since he had fled the country¹²). Paine was regarded as a hero in America. It is therefore something of a surprise to find that Congress passed a Sedition Act in 1798, against the advice of Madison and Jefferson. Its constitutionality was never directly challenged, and it disappeared under its own 'sunset clause' in 1801, but not before there had been some successful prosecutions under it. A Republican member of Congress was fined and imprisoned for accusing the second President, John Adams, of

'a continual grasp for power, in an unfounded thirst for ridiculous pomp, foolish adulation and selfish avarice.'

It was over a century before Congress made another law about sedition. In 1917 the sinking of the *Lusitania* brought the United States into the First World War. There were violent anti-German feelings in some quarters, and Congress enacted first the Espionage Act 1917 and then the Sedition Act 1918. But there was also a strong anti-war movement. A minister of religion was prosecuted, convicted and sentenced to a long term of imprisonment for telling his bible class that a Christian could take no part in the war. In the *Schenk* case¹³ the authors of a pamphlet describing military conscription as 'slavery' were prosecuted and convicted, and their convictions were upheld by the Supreme Court. Immediately after the war the Russian revolution produced a violent reaction in the United States, based on largely imaginary fears of 'criminal syndicalism', and the Sedition Act 1918 found new targets.

The *Schenk* case is particularly important as the origin of the concept of 'clear and present danger'. In his judgment Justice Holmes discussed the notion (going back to Blackstone) that freedom of speech was concerned solely

¹² *R v Paine* (1792) 22 ST 358; see also *R v Hardy* (1794) 24 ST 241; *R v Horne Tooke* (1794) 25 ST 1

¹³ *Schenk v US* (1919) 249 US 47

with prior restraint, and that punishment of sedition was in no way inconsistent with it¹⁴. He rejected that notion, but held that in some circumstances seditious speech could be punished:

'The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent.'

Holmes seems to have had something of a road-to-Damascus experience¹⁵ because within a year he dissented (with Justice Louis D Brandeis) in *Abrams*¹⁶. The defendants, all Russian refugees, distributed leaflets urging a general strike against the President's decision to send troops to Russia. Holmes ridiculed the idea that 'a silly leaflet by an unknown man' could present any 'immediate danger' to government. He continued with the famous market-place metaphor which I have already quoted.

Throughout the 1920s Holmes and Brandeis continued to dissent (or occasionally to concur in speeches which read like dissents), most notably in *Whitney*¹⁷ and *Schwimmer*¹⁸. They were oddly matched comrades in arms: Holmes a Boston patrician, a thrice-wounded veteran of the Civil War who sat in the Supreme Court until he was ninety; and Brandeis fifteen years his junior, the first Jewish Justice of the Supreme Court, appointed by Woodrow Wilson in 1916 only after a fierce confirmation battle.¹⁹

In 20th century Britain there was a good deal of emergency wartime legislation, comparable to that passed by Congress during the First World War.

Bertrand Russell was sent to prison for an offence similar to those committed by Schenk and Abrams and their associates. The United Kingdom was a founder member of the European Convention on Human Rights in 1950, but for many years there were no significant cases testing restrictions on political agitation against the qualifications in Article 10. In 1980 Pat Arrowsmith, a peace campaigner, failed in her complaint to the European Commission of Human Rights²⁰ against her conviction for trying to dissuade British soldiers from serving in Northern Ireland. She put her case on Article 9 (manifestation of belief, that is pacifism) rather than Article 10. The Commission was satisfied that the restrictive legislation was necessary in the interests of national security – the European equivalent of the Supreme Court's 'clear and present danger'.

¹⁴ See *Patterson v Colorado* (1907) 205 US 454

¹⁵ Discussed in Anthony Lewis, *Freedom for the Thought that we Hate* pp 29–34

¹⁶ *Abrams v US* (1919) 250 US 616

¹⁷ *Whitney v California* (1927) 274 US 357

¹⁸ *US v Schwimmer* (1929) 279 US 344

¹⁹ In which Brandeis was denounced as 'a radical, a theorist, impractical, with strong socialist tendencies... given to extravagance in utterance.'

²⁰ *Arrowsmith v United Kingdom* (1980) 19 DR 5

The events of 9/11 have of course brought a host of human rights issues. Most of these concern personal liberty, rather than freedom of expression, although I shall have something to say later about legislation against speech provoking religious or racial hatred.

I now turn to libel. In the United States the focus on freedom of speech as essential to democratic self-government has meant that elected representatives have to accept that they are constantly exposed to criticism, often expressed in immoderate and offensive terms. 'Muck-raking' is recognised as an essential part of the function of a free press. In the days of Al Capone and prohibition there was a newspaper attack – the culmination of a series of attacks – on William Thompson, who had just failed to secure re-election as Mayor of Chicago. It included the following:

'Thompson has meant filth, corruption, obscenity, idiocy and bankruptcy. He has given the city an international reputation for moronic buffoonery, barbaric crime, triumphant hoodlumism, unchecked graft and dejected citizenship. He made Chicago a byword for the collapse of American civilisation. In his attempt to continue this he excelled himself as a liar and defamer of character.'

Thompson himself started proceedings for libel, but abandoned them. He also managed (despite his loss of office) to get the City of Chicago to sue but it failed in its claim²¹. The decision was based on Article 2 of the Constitution of Illinois, rather than on the First Amendment (which was not then understood as applying to the legislation of individual states) but the underlying reason was the same.

In 1964 came the very important decision of the United States Supreme Court in *New York Times v Sullivan*²². Sullivan was a police commissioner in Montgomery, Alabama. In 1960, at the height of the civil rights struggle in the southern states, the New York Times published an advertisement protesting against civil rights violations by officials in southern states – including the seven occasions on which Dr Martin Luther King was said to have been arrested on spurious charges. The text referred to 'southern violators of the Constitution'. It did not name any individuals, but Sullivan sued for libel on the basis that he could be identified. The case was heard in Montgomery by a white judge and jury applying the libel law of the state of Alabama, which approximated to English libel law. Some factual errors in the advertisement were established (for instance King had been arrested four times, not seven). The jury found for Sullivan and awarded damages of \$500,000.

²¹ *City of Chicago v Tribune Co* (1923) 139 NE 87

²² (1964) 376 US 254

The verdict was overturned by the Supreme Court. The decision is important in American constitutional law, since it was part of the rather belated recognition that the Fourteenth Amendment (passed in 1868 and requiring states to afford due process and equal protection of the laws) means that the First Amendment applies to state laws as fully as to federal laws. The decision is also important as the start of a line of authority extending the protection of political speech against the 'chilling effect' of libel laws.

The majority, led by Justice Brennan, held that when there is a complaint about the public conduct of public officials, state law may not require complete factual accuracy as a basis for any defence of fair comment. Factual errors (even if negligent) do not make political comment actionable in the absence of actual malice. Justices Black and Douglas (two hard-line 'originalists') took a more extreme view in favour of protecting press freedom in comment on public affairs.

The *Sullivan* doctrine has been progressively extended in the United States. It has been held to apply to any public official, whether or not elected, who is in a position of some responsibility²³. More controversially, in *Gertz*²⁴ it was extended to comment on any 'public person', that is *'those who by reason of the notoriety of their achievements or the vigor or success with which they seek the public's attention are properly classed as public figures.'*

I will leave it to my audience to consider who, in 21st century Britain, might count as a public person by this test. The Supreme Court has itself questioned whether the extension of the principle has not gone too far, introducing uncertainty into the law and enabling people's reputations to be damaged with impunity.²⁵

The first judgment of the European Court of Human Rights which closely addressed freedom of political speech was *Lingens*²⁶, and its collegiate judgment fell far short of the eloquence of Holmes and Brandeis. Lingens was a journalist and magazine editor who in 1975 published two articles criticising Bruno Kreisky, the retiring Austrian Chancellor, for his attitude to those in Austrian public life who had a Nazi past. Kreisky brought a private prosecution for criminal libel. Lingens was convicted and fined after two trials and two appeals. The European Court of Human Rights upheld his complaint, and adopted (at least in part) the need for special protection for political speech:²⁷

²³ *Rosenblatt v Baer* (1966) 383 US 75

²⁴ *Gertz v Welch* (1974) 418 US 323

²⁵ *Dun & Bradstreet Inc v Greenmoss Builders Inc.* (1985) 472 US 749

²⁶ *Lingens v Austria* (1986) 8 EHHR 407

²⁷ Para 42

'Freedom of the press furthermore affords the public one of the best means of discovering and forming an opinion of the ideas and attitudes of political leaders. More generally, freedom of political debate is at the very core of the concept of a democratic society which prevails throughout the Convention. The limits of acceptable criticism are accordingly wider as regards a politician as such than as regards a private individual. Unlike the latter, the former inevitably and knowingly lays himself open to close scrutiny of his every word and deed by both journalists and the public at large, and he must consequently display a greater degree of tolerance.'

It was necessary, the Court observed later²⁸ in its judgment, to distinguish carefully between facts and value judgments. The Court held unanimously that Austria was in breach of Article 10.

In 1989 the Sunday Times published articles questioning deals made for the investment of superannuation funds of the Derbyshire County Council. The headlines spoke of 'bizarre deals of a council leader and the media tycoon'. The Council sued for libel, and the House of Lords considered for the first time whether a local authority can bring such an action²⁹. Lord Keith of Kinkel (with whom the others agreed) cited *City of Chicago v Tribune Company* and *New York Times v Sullivan* in concluding that a local authority could not sue for libel. It may be the first case in which the English court has adopted the phrase 'chilling effect' to describe how the threat of heavy libel damages can inhibit free speech.

Lingens, Derbyshire and the American authorities (together with others from Canada, Australia and New Zealand) were cited and considered in *Reynolds*³⁰, a libel action by a former Taoiseach (that is prime minister of the Republic of Ireland). Mr Reynolds was accused of deceiving the Dail and his cabinet colleagues during a political crisis in 1994. Defences of qualified privilege and fair comment were pleaded and met with a plea of express malice. Mr Reynolds was awarded 1p damages and appealed to the Court of Appeal, which ordered a new trial. The House of Lords upheld this decision by a three-two majority but on rather different grounds. The main issue was whether the common law defence of qualified privilege should be developed so as to extend a special degree of protection to political comment.

Lord Nicholls of Birkenhead, giving the leading speech for the majority, declined to follow the American approach. He summarised his view as follows³¹:

²⁸ Para 46

²⁹ *Derbyshire County Council v Times Newspapers Ltd* [1993] AC 534

³⁰ *Reynolds v Times Newspaper Ltd* [2001] 2 AC 127

³¹ At p.204

'My conclusion is that the established common law approach to misstatements of fact remains essentially sound. The common law should not develop 'political information' as a new 'subject matter' of qualified privilege, whereby the publication of all such information would attract qualified privilege, whatever the circumstances. That would not provide adequate protection for reputation. Moreover, it would be unsound in principle to distinguish political discussion from discussion of other matters of serious public concern.'

Lord Nicholls then set out ten matters as a non-exhaustive list of relevant factors, starting with the seriousness of the allegation and ending with the circumstances (including timing) of the publication.

Reynolds was seen by some as a useful though modest advance against libel law's 'chilling effect' on the press. But others were disappointed, especially as to the way in which the decision was being applied by first-instance judges. In *Jameel v Wall Street Journal Europe Spr*³² the House of Lords was concerned to clarify its decision in *Reynolds*. Lord Bingham³³ said that it *'carried the law forward in a way which gave much greater weight than the earlier law had done to the value of informed public debate of significant public issues.'*

He added³⁴ that Lord Nicholls' list should be seen as pointers, and not 'a series of hurdles to be negotiated by a publisher before he could successfully rely on qualified privilege'. Lord Hoffmann said, approving *Loutchansky v Times Newspapers Limited*³⁵, that *Reynolds* privilege is a different jurisprudential creature from the traditional form of privilege from which it sprang.

Lady Hale agreed³⁶, adding

'In truth, it is a defence of publication in the public interest.'

So *Sullivan*, although not without considerable influence on the English law of libel, has certainly not been adopted in its entirety, especially as regards a 'public figure' defence. The same is true of Canada; the decision of its Supreme Court in 1995 in *Hill v Church of Scientology of Toronto*³⁷ contains a very full discussion both of *Sullivan* and of the impact of the Canadian Charter on the development of the common law. New Zealand also has declined to follow *Sullivan*³⁸.

³² [2007] 1 AC 359

³³ para 28

³⁴ para 33

³⁵ [2002] QB 783, 806

³⁶ para 146

³⁷ (1995) 126 DLR (4th) 129, paras 122–124; paras 83–98

³⁸ *Lange v Atkinson* [1997] 2 NZLR 22 (Elias J); [1998] 3 NZLR 424 (CA)

Among Commonwealth countries Australia has gone the furthest towards recognising a special category of political speech, subject to the requirement (derived from New South Wales statute law) of reasonableness. In *Lange v Australian Broadcasting Corporation*³⁹ the High Court of Australia stated in a single unanimous judgment (which is something of a rarity in the High Court):

'Accordingly, this Court should now declare that each member of the Australian community has an interest in disseminating and receiving information, opinions and arguments concerning government and political matters which affect the people of Australia. The duty to disseminate such information is simply the correlative of the interest in receiving it. The common convenience and welfare of Australian society are advanced by discussion – the giving and receiving of information about government and political matters. The interest that each member of the Australian community has in such a discussion extends the categories of qualified privilege.'

Thus this new principle was expressed in traditional terms of qualified privilege, but it is in substance a new departure.

It is of particular interest that this development has taken place in Australia, because although that country has a written constitution, it contains almost no express entrenchment of civil or human rights. Instead the High Court of Australia, in an important line of cases, has deduced and developed the notion that freedom of speech is so essential to the functioning of democracy that it must implicitly be part of the constitution. The line of authority begins with two cases holding that statutory restrictions on broadcasting were invalid⁴⁰ and was developed in *Theophanous*⁴¹ and *Lange*.

Mr Theophanous, a member of the House of Representatives, sued a newspaper for publishing a letter accusing him of 'standing for most things Australians are against', of having 'a bias towards Greeks as migrants' and as indulging in 'idiotic antics'. These might seem, in the robust world of Australian politics, fairly mild expressions, but sue he did, and the matter came before the High Court on an application to strike out part of the defence. The High Court considered *Sullivan* and decided not to adopt it, but held that the Australian constitution confers an 'implied freedom' to publish views on political matters, so long as there is no deliberate or reckless falsity, and publication is reasonable in all the circumstances. This was further developed in *Lange* three years later.

³⁹ (1997) 189 CLR 520, 571

⁴⁰ *National News Pty Ltd v Wills* (1992) 177 CLR 1 and *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106

⁴¹ *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104

I want to devote the rest of this address to the overlapping topics of blasphemy, speech intended to provoke religious or racial conflict, and obscenity. In these areas the development of First Amendment jurisprudence has been, and perhaps still is, rather uncertain and unpredictable. There are, I suggest, three main reasons for this. First there is the potent legacy of history, to which I have already referred. The founding fathers were not indifferent to religion, but they thought that government should be indifferent to it: 'neutral between religion and religion, and between religion and non-religion.'⁴² This neutrality has strongly influenced the Supreme Court's attitude to racially offensive speech, since race and religion often go together.

The second important factor is also one I have already mentioned: the strong American conviction that free speech is an essential part of democratic self-government, and that freedom of speech means freedom of political speech. Thus Burger CJ said in *Miller v California*⁴³, the leading case on sanctions against obscenity:

'To equate the free and robust exchange of ideas and political debate with commercial exploitation of obscene material demeans the grand conception of the First Amendment and its high purposes in the historic struggle for freedom.'

But there was some ambivalence about this simple distinction: obscene material ought to be banned, he said, only if it was 'utterly without redeeming social value'.

The third reason for the uncertain development of American jurisprudence in this area has been the delay in recognising the significance of the Fourteenth Amendment in extending constitutional control to state, as well as federal laws. This has been reinforced by a recognition that the United States contains many different communities with different standards:

'It is neither realistic nor constitutionally sound to read the First Amendment as requiring that the people of Maine or Mississippi accept public depiction of conduct found tolerable in Las Vegas or New York City. People in different states vary in their tastes and attitudes, and this diversity is not to be strangled by the absolutism of imposed uniformity.'

That is more of Burger CJ in *Miller*⁴⁴, a majority decision in which the Supreme Court enunciated the current American test of obscenity. The test has three limbs: (a) whether the average person applying contemporary community

⁴² fn 7 above

⁴³ (1973) 413 US 15, 34; the line of authority starts with *Roth v US* (1957) 354 US 476

⁴⁴ at p. 32

standards would find that the work, taken as a whole, appeals to prurient interests; (b) whether it describes in a patently offensive way sexual conduct defined by the relevant state law; and (c) whether, taken as a whole, it lacks serious literary, artistic, political or scientific value. But some (including Justice Scalia⁴⁵) have said that *Miller* needs reconsideration, mainly on the ground that literary or artistic value cannot be objectively assessed.

The United States Supreme Court has been slow (surprisingly slow, some would think) to withhold First Amendment protection from speech and conduct that is provocative or offensive to religious or racial sensitivities (what is sometimes called 'fighting words' or 'hate speech'). In *Smith v Collin*⁴⁶ the Court upheld a decision to permit neo-Nazis to march through a Jewish area in Skokie, Illinois. Marching is conduct which goes beyond words; and so, more obviously, is cross-burning, Ku Klux Klan-style, in the garden of a black family's home. But in the *City of St Paul* case⁴⁷ the Supreme Court struck down a conviction for cross-burning under that city's Bias-Motivated Crime Ordinance. The majority did so because the law lacked content-neutrality: fighting words infringed the law only if they would offend on the basis of race, colour, creed, religion or gender. The minority held the law over-broad because it referred to 'anger, alarm or resentment', rather than meeting the narrow 'fighting words' test in *Chaplinsky*⁴⁸.

In Britain the law has traditionally set greater value on keeping the peace than on protecting provocative speech in public places. This attitude has been considerably (and controversially) extended in recent years by a torrent of legislation.

It would take a long time to mention all the statutes, but they include the Public Order Act 1986, the Criminal Justice and Public Order Act 1994, the Police Act 1996, the Crime and Disorder Act 1998, and the Anti-Terrorism, Crime and Security Act 2001. The coming into force of the Human Rights Act will, I hope, provide some sort of brake on the exercise of the draconian powers conferred by these statutes. I would draw attention to the decision of the *Divisional Court in Redmond-Bate v DPP*⁴⁹ quashing the conviction of three women fundamentalists who refused to obey a police officer's order to stop preaching on the steps of Wakefield Cathedral. They were attracting noisy heckling and protests but there was no reason for the police to anticipate actual violence.

⁴⁵ *Pope v Illinois* (1987) 481 US 497, 504

⁴⁶ (1978) 439 US 916

⁴⁷ *RAV v City of St Paul, Minnesota* (1992) 120 L Ed 2d 305

⁴⁸ *Chaplinsky v New Hampshire* (1942) 315 US 568

⁴⁹ (1999) 7 BHRC 375

They were therefore wrongly convicted of obstructing a police officer. The judgment of Sedley LJ contains a valuable discussion of the whole area and suggests that the position in Britain ought not to be very different from the 'fighting words' test.

In England blasphemy was until this year a common law offence, but only if directed at the Christian religion as by law established. It had survived many previous attempts either to abolish it or to extend it to other religions⁵⁰. New statutory offences against speech and conduct offensive to religious groups are the subject of acute political controversy, but have not so far been considered by the Strasbourg Court. Prosecutions for blasphemous libel (the full, old-fashioned title of the offence) had become rare and in the second half of the 20th century seem to have been concentrated on material with sexual as well as religious content, such as the poem '*The Love that Dares to Speak its Name*' published in *Gay News*⁵¹. A complaint to the European Commission of Human Rights failed⁵². Similarly, with the film '*Visions of Ecstasy*' about St Teresa of Avila which was not prosecuted but was refused a licence. The Strasbourg Court, by a majority, dismissed the complaint⁵³. It relied on the generous margin of appreciation allowed to member states in this area – an approach which mirrors the United States Supreme Court's recognition, in *Miller* of the diverse standards of different communities.

We are approaching the fiftieth anniversary of the Obscene Publications Act 1959. For the younger members of the audience it may be hard to imagine what an important event that was in the cultural life of the country (followed after a few years, as it was, by the abolition of theatrical censorship). The Act adopted the English common law definition⁵⁴: an article is obscene if its effect is

'taken as a whole such as to tend to deprave or corrupt persons who are likely ...to see read or hear ... it'

but it introduced a defence of public good

*'on the ground that it is in the interests of science, literature, art or learning, or of other objects of general concern'*⁵⁵.

⁵⁰ See *R v Chief Metropolitan Magistrate ex parte Choudhury* [1991] QB 429 (attempt to obtain prosecution of Salman Rushdie)

⁵¹ *R v Lemon* [1979] AC 617 It has however considered material offensive to Austrian Roman Catholics in *Otto-Preminger-Institut v Austria* (1995) 19 EHRR 34; the complaint was rejected 6–3

⁵² *Gay News v United Kingdom* (1982) 5 EHRR 123

⁵³ *Wingrove v United Kingdom* (1996) 24 EHRR 1

⁵⁴ *R v Hicklin* (1868) LR 3 QB 360

⁵⁵ s 1(1); s 4

This defence was, as is well-known, successfully relied on in the trial of Lady Chatterley⁶⁶, celebrated by Philip Larkin in *Annus Mirabilis*:

*'Sexual intercourse began
In nineteen sixty-three
Between the end of the Chatterley ban
And the Beatles' first LP.'*

The defence was relied on unsuccessfully in the case of the *Little Red School Book*, which is in many ways a more interesting case since the competing values were more evenly balanced. Mr Richard Handyside published this book in 1971. He was convicted by magistrates and fined and his appeal was dismissed. In 1976 his Article 10 complaint was rejected by the Strasbourg Court. There was a real competition of values since the book was aimed at teenage children, and sold at a price they could afford. It did appear to encourage, or at least condone, some criminal activities (soft drugs and under-age sex). On the other hand these were isolated passages in a book which gave young people a lot of good advice about growing up in general, and sex in particular, at a time when there was much less reliable information available to teenagers than there is now. The Strasbourg Court, relying heavily on the margin of appreciation, upheld the United Kingdom government's reliance on the necessity to protect the morals of the young, a legitimate purpose under Article 10(2).

So the prevention of moral corruption is the explicit aim of the Obscene Publications Act, with its emphasis on the persons who are likely to see or read the material. In *Whyte v DPP*⁶⁷ (another case from the 1970s) the House of Lords held that magistrates had, in acquitting the respondents of selling what Lord Wilberforce called 'pornography of the hardest quality', been over-enthusiastic in applying the relative test, and in doing so had acted not on evidence but on inference.

Lord Wilberforce described the magistrates' thought process: (a) most readers were going to be the hard core of regular customers; (b) regular customers were 'inadequate, pathetic, dirty-minded men... whose minds were already in a state of depravity and corruption'; (c) therefore they would not be affected by the material. This reasoning, Lord Wilberforce said, contained its own refutation: the material's *tendency* to corrupt was established.

The debate about pornography sets liberals against feminists (two groups to whom I regard myself as equally sympathetic) and each side has acquired some strange allies. It goes to the fundamental issue of why society should put

⁶⁶ *R v Penguin Books Ltd* [1967] Crim LR 176

⁶⁷ [1972] AC 849

restraints on the publication of indecent or obscene material. It is a large and complex subject, not assisted by the multiplication of abstract nouns such as depravity, lewdness, and prurience. Nor is it assisted by Justice Stewart's well-known saying about hard-core pornography⁵⁸:

'I cannot define it, but I know it when I see it.'

Many scholars identify two different objectives: the protection (from moral corruption) of those who voluntarily resort to obscene material, and the protection (from annoyance and disgust) of those who are involuntarily exposed to it. There is a great deal of room for argument as to how to reconcile these objectives with the principle of John Stuart Mill's *On Liberty*, that harm to others is the only justification for restrictions on individual liberty. Harm to children is of course the clear justification for criminal sanctions against child pornography.

Is a general coarsening and vulgarisation of society enough to amount to harm? Robert H Bork (a professor at Yale Law School who was nominated but not confirmed as a Justice of the Supreme Court in the Reagan era) spoke of pornography as causing

'pollution of the moral and aesthetic atmosphere precisely analogous to smoke pollution'.

The same thought, but focussed on the effect on women, and often much more strongly expressed, underlies much of the feminist case against pornography. Baroness Hale put it with a light touch in *Belfast City Council v Miss Behavin' Limited* :

The same thought, but focussed on the effect on women, and often much more strongly expressed, underlies much of the feminist case against pornography⁵⁹. Baroness Hale put it with a light touch in *Belfast City Council v Miss Behavin' Limited*⁶⁰:

'My Lords, this case must take the prize for the most entertaining name of any that have come before us in recent years...There are far more important human rights in this world than the right to sell pornographic literature and images in the back streets of Belfast. Pornography comes well below celebrity gossip in the hierarchy of speech which deserves the protection of the law. Far too often it entails the sexual exploitation and degradation of women for the titillation of men. But there is always room for debate about what constitutes pornography.'

⁵⁸ *Jacobellis v Ohio* (1964) 378 US 184

⁵⁹ See for instance Hilaire Barnett, *Introduction to Feminist Jurisprudence*

It may be that (apart from pornography that exploits and damages children) there is room here for some measure of content neutrality: that is for avoiding outright bans but having restrictive licensing of sex shops, lap-dancing clubs⁶¹, and similar businesses (which is what *Miss Behavin'* was about).

So I reach the end of what has been, inevitably, a very superficial look at a very large subject. I hope it may encourage some of you to embark on more profound research into topics which I have touched on. What I tried to show overall is that whether the United States jurisprudence is to be cast as the Colonel's Lady and Europe's as Judy O'Grady – or vice versa – there is, despite their diverse backgrounds and careers, an essential core of the same or similar values; and we can learn both from the similarities and from the differences.



⁶⁰ [2007] 1 WLR 1420 paras 30 and 38

⁶¹ If lap-dancing can be regarded as a form of speech: see *Barnes v Glen Theatre* (1991) 111 SC 2456 and Richard Galvin, *Legal Moralism and the US Supreme Court* (2008) 14 *Legal Theory* 91.

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