

THE LAW OF DISSENT AND RIOTS

Compiled and Edited by

M. CHERIF BASSIOUNI

Professor of Law

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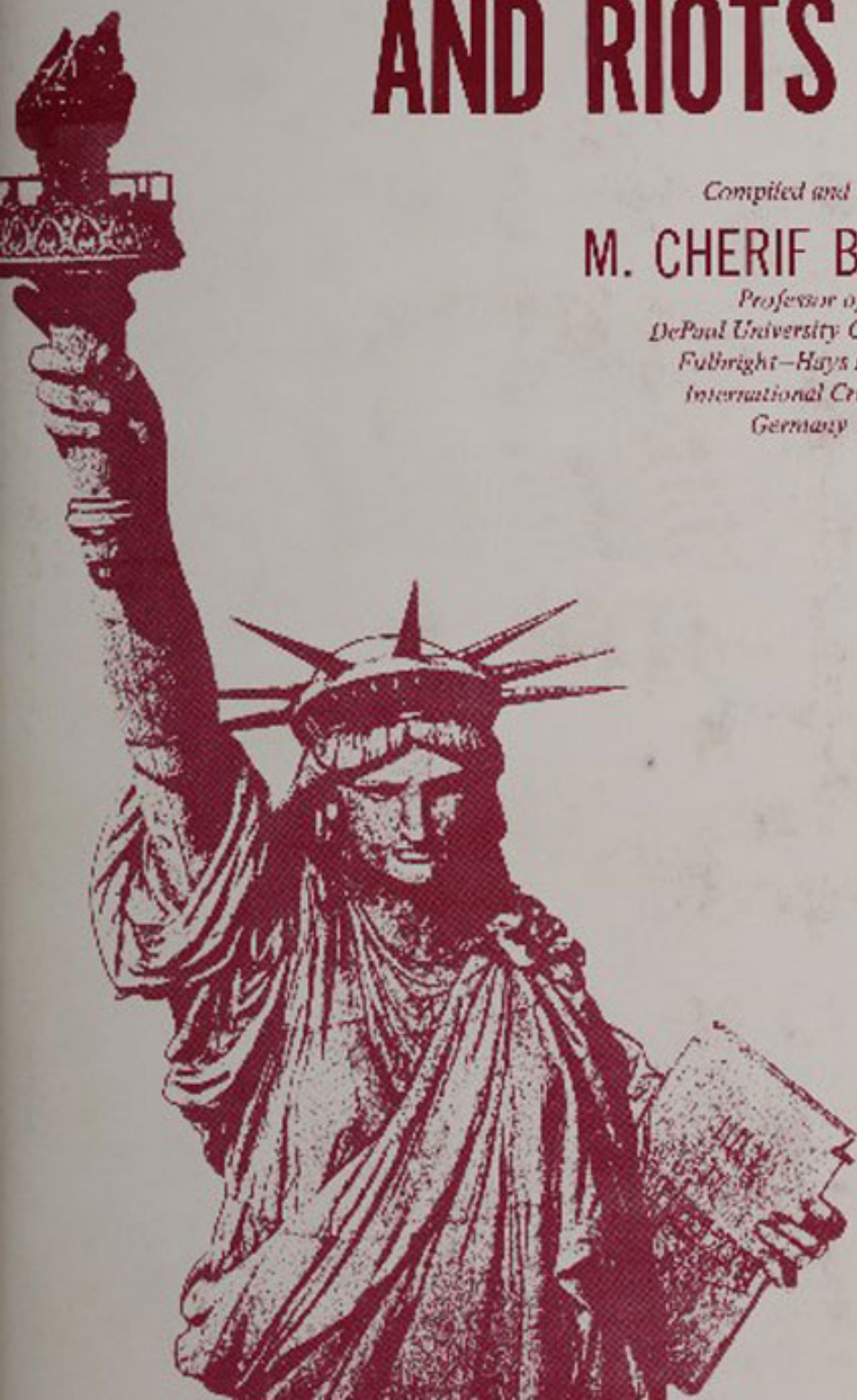
Fulbright-Hays Professor of

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Germany 1979

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Also by this author:

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(published by Thomas, 1969)

and

Many leading law review articles.

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To Rossana

Everything can grow out of the barrel of a gun.

MAO TSE TUNG

Revolutions have never lightened the burden of tyranny:
they have only shifted it to another shoulder.

G. B. SHAW

*Preface to
The Revolutionist's Handbook*

This country, with its institutions,
belongs to the people who inhabit it. Whenever they
shall grow weary of the existing government
they can exercise their constitutional right of amending it,
or their revolutionary right to dismember or overthrow it.

ABRAHAM LINCOLN

Inaugural Address (1861)

Those who make peaceful evolution impossible
make violent revolution inevitable.

JOHN FITZGERALD KENNEDY

PREFACE

The events of the last decade seem to have eroded the distinction between liberty and license; and from every corner of the nation, there is a rising level of discontent with discontentment. When rights are in conflict the minority must, at some point, find a way to accommodate itself with the majority if the gains obtained are to be secured. Intransigence will breed but the same. But as Jefferson said:

During the contest of opinion through which we have passed, the animation of discussion and of exertions has sometimes worn an aspect which might impose on strangers unused to think freely and to speak and to write what they think; but this being now decided by the voice of the nation, announced according to the rules of the constitution, all will, of course, arrange themselves under the will of the law, and unite in common efforts for the common good. All, too, will bear in mind this sacred principle, that though the will of the majority is in all cases to prevail, that will, to be rightful, must be reasonable; that the minority possess their equal rights, which equal laws must protect, and to violate which would be oppression.*

As lines are drawn and positions polarized, it may be wise to reexamine the nature of the right to dissent, to reevaluate its significance, and to reconsider its means of expression.

This book is intended to offer the reader an overall view of the social, political, and philosophical bases of the right to freedom of expression, its abuse and methods of control. It is not advocative of any theory or position, but seeks to bring into a clearer perspective the most significant aspect of our contemporary social conflicts. Dissent is the vehicle of change in a dynamic society and the means to preserve political freedom. It is too precious a right, too hard fought for, to permit its abuse with the knowledge that abuse may lead to the loss of the right proper.

The Rule of Law is the difference between tyranny and civilization, and everyone is the trustee of this legacy.

M. CHERIF BASSIOUNI

* "Jefferson, First Inaugural Address, March 4, 1801," *The Complete Jefferson* 384–385 (Padover ed. 1943).

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THE LAW OF DISSENT AND RIOTS

PART I

**FREEDOM OF EXPRESSION, DISSENT
AND SOCIAL UNREST**

CHAPTER 1

FREEDOM OF EXPRESSION: THE KEY TO AMERICAN SOCIOPOLITICAL TRANSFORMATION

M. CHERIF BASSIOUNI

Declaration of Independence

When in the Course of human events it becomes necessary for one people to dissolve the political bands which have connected them with another, and to assume among the powers of the earth, the separate and equal station to which the Laws of Nature and of Nature's God entitle them, a decent respect to the opinions of mankind requires that they should declare the causes which impel them to the separation.—We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness.—That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed,—That whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or to abolish it, and to institute new Government, laying its foundation on such principles and organizing its powers in such form, as to them shall seem most likely to effect their Safety and Happiness. Prudence, indeed, will dictate that Governments long established should not be changed for light and transient causes; and accordingly all experience hath shewn that mankind are more disposed to suffer, while evils are sufferable, than to right themselves by abolishing the forms to which they are accustomed. But when a long train of abuses and usurpations, pursuing invariably the same Object evinces a design to reduce them under absolute Despotism, it is their right, it is their duty, to throw off such Government, and to provide new Guards for their future security.—Such has been the patient sufferance of these Colonies; and such is now the necessity which constrains them to alter their former Systems of Government.

The currents of history run fitfully. At points, they become sluggish and seem to stagnate in the pools of time; at others, they appear to cut across channels, rushing on the unpredictable destinations. American history has broken into rapids, whose swirling and turbulent course has no precedent. The power and tragedy of onrushing human events created a flood of recent anxiety which raised the level of doubt about American society, its goals, government, and people, to tidal wave proportions. The established structure is shaken by those who are desirous of bringing it down. Values heretofore ascribed to are being cast away with such rapidity that no sub-

stitute or replacement is offered. The changes sought would, at best, bring down what is for what is yet but dimly conceived.

This is a time for everything. As Charles Dickens said a century ago in *A Tale of Two Cities*,

It was the best of times; it was the worst of times. It was the age of wisdom; it was the age of foolishness. It was the epoch of belief; it was the epoch of incredulity. It was the season of light; it was the season of darkness. It was the spring of hope; it was the winter of despair. We had everything before us; we had nothing before us.

“Justice” is what is sought, we are told; but *justice* is a term that thoughtful people have debated since time immemorial; and seldom has there been agreement on what it is, least of all on how to attain it.

Yet throughout the tribulations of mankind it became evident that such words as *justice* are only hollow promises if the processes of government and law are not “fair.” The wisdom of the framers of the American Constitution produced the concept of “due process of law”—the vehicle with which to attain the relativity of human justice.

Modern societies are seldom homogenous or cohesive, even though catalistic events may on occasion case them in that mold. The diverse forces which make it often pull in opposing directions. A system of government by law is designed to harness those energies and coordinate their drive through a rule of law process. Such is the nature of a process of government which seeks to broaden society’s base to accommodate as diverse segments as can exist within its framework. The continued expansion of the societal framework is the method by which absorption rather than rejection allows evolution and precludes the need for revolution. The converse of such a process would only lead to the rejection of some who when on the outside will have no interest to preserve the structure which refused them; and revolution, whenever possible, will be the inevitable consequence. As Judge Learned Hand once said before the Board of Regents of the University of the State of New York in 1952;

That community is already in the process of dissolution where each man begins to eye his neighbor as a possible enemy, where nonconformity with the accepted creed, political as well as religious, is a mark of disaffection; where denunciation, without specification or backing, takes the place of evidence; where orthodoxy chokes freedom of dissent; where faith in the eventual supremacy of reason has become so timid that we dare not enter our convictions in the open lists, to win or lose.

The First Amendment of the Constitution states:

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

The right to freedom of expression is the product of mankind's evolution. Its dynamic nature and limitations are best expressed by the following essays.

JOHN STUART MILL, ON LIBERTY

1859

15, 24–25, 30–31, 40–41, 47–48 (*McCallum ed.* 1946)

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. . . .

But, indeed, the dictum that truth always triumphs over persecution is one of those pleasant falsehoods which men repeat after one another till they pass into commonplaces, but which all experience refutes. History teems with instances of truth put down by persecution. If not suppressed for ever, it may be thrown back for centuries. To speak only of religious opinions: the Reformation broke out at least twenty times before Luther, and was put down. Arnold of Brescia was put down. Fra Dolcino was put down. Savonarola was put down. The Albigensis were put down. The Vaudois were put down. The Lollards were put down. The Hussites were put down. Even after the era of Luther, wherever persecution was persisted in, it was successful. In Spain, Italy, Flanders, the Austrian Empire, Protestantism was rooted out; and, most likely, would have been so in England, had Queen Mary lived, or Queen Elizabeth died. Persecution has always succeeded, save where the heretics were too strong a party to be effectually persecuted. No reasonable person can doubt that Christianity might have been extirpated in the Roman Empire. It spread, and became predominant, because the persecutions were only occasional, lasting but a short time, and separated by long intervals of almost undisturbed propagandism. It is a piece of idle sentimentality that truth, merely as truth, has any inherent power denied to error of prevailing against the dungeon and the stake. Men are not more zealous for truth than they often are for error, and a sufficient application of legal or even of social penalties will generally succeed in stopping the propagation of either. The real advantage which truth has consists in this, that when an opinion is true, it may be extinguished once, twice, or many times, but in the course of ages there will generally be found persons to rediscover it, until some one of its reappearances falls on a time when, from favourable circumstances it escapes persecution until it has made such head as to withstand all subsequent attempts to suppress it. . . .

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.

There is a class of persons (happily not quite so numerous as formerly) who think it enough if a person assents undoubtingly to what they think true, though he has not knowledge whatever of the grounds of the opinion, and could not make a tenable defence of it against the most superficial objections. Such persons, if they can once get their creed taught from authority, naturally think that no good, and some harm, comes of its being allowed to be questioned. Where their influence prevails, they make it nearly impossible for the received opinion to be rejected wisely and considerately, though it may still be rejected rashly and ignorantly; for to shut out discussion entirely is seldom possible, and when it once gets in, beliefs not grounded on conviction are apt to give way before the slightest semblance of an argument. Waiving, however, this possibility—assuming that the true opinion abides in the mind, but abides as a prejudice, a belief independent of, and proof against, argument—this is not the way in which truth ought to be held by a rational being. This is not knowing the truth. Truth, thus held, is but one superstition the more, accidentally clinging to the words which enunciate a truth. . . .

It still remains to speak of one of the principal causes which make diversity of opinion advantageous, and will continue to do so until mankind shall have entered a stage of intellectual advancement which at present seems at an incalculable distance. We have hitherto considered only two possibilities: that the received opinion may be false, and some other opinion, consequently, true; or that, the received opinion being true, a conflict with the opposite error is essential to a clear apprehension and deep feeling of its truth. But there is a commoner case than either of these; when the conflicting doctrines, instead of being one true and the other false, share the truth between them; and the nonconforming opinion is needed to supply the remainder of the truth, of which the received doctrine embodies only a part. Popular opinions, on subjects not palpable to sense, are often true, but seldom or never the whole truth. They are a part of the truth; sometimes a greater, sometimes a smaller part, but exaggerated, distorted, and disjointed from the truths by which they ought to be accompanied and limited. Heretical opinions, on the other hand, are generally some of these suppressed and neglected truths, bursting the bonds which kept them down, and either seeking reconciliation with the truth contained in the common opinion, or fronting it as enemies, and setting themselves up, with similar exclusiveness, as the whole truth. The latter case is hitherto the most frequent, as, in the human mind, one-sidedness has always been the rule, and many-sidedness the exception. Hence, even in revolutions of opinion, one part of the truth usually sets while another rises. Even progress, which ought to superadd, for the most part only substitutes, one partial and incomplete truth for another; improvement consisting chiefly in this, that the new fragment of

truth is more wanted, more adapted to the needs of the time, than that which it displaces. Such being the partial character of prevailing opinions, even when resting on a true foundation, every opinion which embodies somewhat of the portion of truth which the common opinion omits, ought to be considered precious, with whatever amount of error and confusion that truth may be blended. No sober judge of human affairs will feel bound to be indignant because those who force on our notice truths which we should otherwise have overlooked, overlook some of those which we see. Rather, he will think that so long as popular truth is one-sided, it is more desirable than otherwise that unpopular truth should have one-sided assertors too; such being usually the most energetic, and the most likely to compel reluctant attention to the fragment of wisdom which they proclaim as if it were the whole. . . .

Before quitting the subject of freedom of opinion, it is fit to take some notice of those who say, that the free expression of all opinions should be permitted, on condition that the manner be temperate, and do not pass the bounds of fair discussion. Much might be said on the impossibility of fixing where these supposed bounds are to be placed; for if the test be offence to those whose opinions are attacked, I think experience testifies that this offence is given whenever the attack is telling and powerful, and that every opponent who pushes them hard, and whom they find it difficult to answer, appears to them, if he shows any strong feeling on the subject, an intemperate opponent. But this, though an important consideration in a practical point of view, merges in a more fundamental objection. Undoubtedly the manner of asserting an opinion, even though it be a true one, may be very objectionable, and may justly incur severe censure. But the principal offences of the kind are such as it is mostly impossible, unless by accidental self-betrayal, to bring home to conviction. The gravest of them is, to argue sophistically, to suppress facts or arguments, to misstate the elements of the case, or misrepresent the opposite opinion. But all this, even to the most aggravated degree, is so continually done in perfect good faith, by persons who are not considered, and in many other respects may not deserve to be considered, ignorant or incompetent, that it is rarely possible, on adequate grounds, conscientiously to stamp the misrepresentation as morally culpable; and still less could law presume to interfere with this kind of controversial misconduct. With regard to what is commonly meant by intemperate discussion, namely invective, sarcasm, personality, and the like, the denunciation of these weapons would deserve more sympathy if it were ever proposed to interdict them equally to both sides; but it is only desired to restrain the employment of them against the prevailing opinion: against the unprevailing they may not only be used without general disapproval, but will be likely to obtain for him who uses them the praise of honest zeal and righteous indignation. Yet whatever mischief arises from their use, is greatest when they are employed against the comparatively defenceless; and whatever unfair advantage can be derived by any opinion from this mode of asserting it, accrues almost exclusively to received opinions. The worst offence of this kind which can be committed by a polemic, is to stigmatise those who hold the contrary opinion as bad and immoral men. To calumny of this sort, those who hold any unpopular opinion are peculiarly ex-

posed, because they are in general few and uninfluential, and nobody but themselves feels much interested in seeing justice done them; but this weapon is, from the nature of the case, denied to those who attack a prevailing opinion: they can neither use it with safety to themselves, nor, if they could, would it do anything but recoil on their own cause. In general, opinions contrary to those commonly received can only obtain a hearing by studied moderation of language, and the most cautious avoidance of unnecessary offence, from which they hardly ever deviate even in a slight degree without losing ground: while unmeasured vituperation employed on the side of the prevailing opinion really does deter people from professing contrary opinions, and from listening to those who profess them. For the interest, therefore, of truth and justice, it is far more important to restrain this employment to vituperative language than the other; and, for example, if it were necessary to choose, there would be much more need to discourage offensive attacks on infidelity than on religion. It is, however, obvious that law and authority have no business with restraining either, while opinion ought, in every instance, to determine its verdict by the circumstances of the individual case; condemning every one, on whichever side of the argument he places himself, in whose mode of advocacy either want of candour, or malignity, bigotry, or intolerance of feeling manifest themselves; but not inferring these vices from the side which a person takes, though it be the contrary side of the question to our own: and giving merited honour to every one, whatever opinion he may hold, who has calmness to see and honesty to state what his opponents and their opinions really are, exaggerating nothing to their discredit, keeping nothing back which tells, or can be supposed to tell, in their favour. This is the real morality of public discussion: and if often violated, I am happy to think that there are many controversialists who to a great extent observe it, and a still greater number who conscientiously strive towards it.

EMERSON, TOWARD A GENERAL THEORY
OF THE FIRST AMENDMENT
72 Yale L.J. 877–891 (1963)

In constructing and maintaining a system of freedom of expression, the principal problems and major controversies have arisen when the attempt is made to fit the affirmative theory—that is, the affirmative functions served by the system—into a more comprehensive scheme of social values and social goals. The crucial issues have revolved around the question of what limitations, if any, ought to be imposed upon freedom of expression in order to reconcile that interest with other individual and social interests sought by the good society. Most of our efforts in the past to formulate rules for limiting freedom of expression have been seriously defective through failure to take into consideration the realistic context in which such limitations are administered. The crux of the problem is that the limitations, whatever they may be, must be applied by one group of human beings to other human beings. In order to take adequate account

of this factor it is necessary to have some understanding of the forces in conflict, the practical difficulties in formulating limitations, the state apparatus necessary to enforce them, the possibility of distorting them to attain ulterior purposes, and the impact of the whole process upon achieving an effective system of free expression.

The starting point is a recognition of the powerful forces that impel men toward the elimination of unorthodox expression. Most men have a strong inclination to suppress opposition even where differences in viewpoint are comparatively slight. But a system of free expression must be framed to withstand far greater stress. The test of any such system is not whether it tolerates minor deviations but whether it permits criticism of the fundamental beliefs and practices of the society. And in this area the drives to repress, both irrational and rational, tend to become overwhelming.

. . . The strong innate drive to suppress deviant opinion has also been stressed in modern studies of the authoritarian personality. An attack upon cherished premises tends to create anxiety, especially in those who have a strong inner need for certainty. The deviant opinion is felt as a threat to personal security. And the response tends to be fear, hatred or a similar emotion, from which springs a compulsion to eliminate the source of the danger. In such circumstances it is natural to turn to the state for protection against the supposed evil. Such factors play a prominent part in the formulation of restrictions upon expression and, equally important, in this administration.¹⁰

It is necessary to take into account not only the psychology of the orthodox but also the psychology of the dissenter. Persons who stand up against society and challenge the traditional view often have strong feelings for the issues they raise. Others may be influenced by inner tensions which make it difficult for them to "adjust" to the prevailing order. In any event, the dissent is often not pitched in conventional terms; nor does it follow customary standards of polite expression. This tends to increase the anxiety and hostility of the orthodox and thus compounds the problem.¹¹

Apart from these inner compulsions at work in a system which undertakes to limit freedom of expression, difficulties arise at the more rational level. To many people their immediate and personal affairs are the most vivid and most compelling. Those who currently dominate a society naturally cling to their economic, political and social position of advantage. Vested interests in the status quo, or in the continuing ignorance of other people, tend to take precedence over the broader interests of society as a whole. Forces of this nature vigorously resist the expression of new ideas or the pressures of the underprivileged who would change existing conditions in the society.

Nor is the longer-run logic of the traditional theory immediately apparent to untutored participants in political conflict. . . .

Suppression of opinion thus may seem an entirely plausible course of action.

¹⁰ See, e.g., Adorno, Frenkel-Brunswick, Levinson and Sanford, *The Authoritarian Personality* 654-726 (1950).

¹¹ See, e.g., Mill, *On Liberty and Other Essays* 63-65 (Neff ed. 1926).

Toleration may appear inconsistent with maintaining order or achieving other ends desired by the majority or the group in power. The dialectics of freedom and order are not always perceived; the apparent paradox is not always readily resolved.

That full understanding and readiness to accept the theory of freedom of expression tends to be an acquired attitude is apparent from the entire history of free expression. It has been common for individuals and groups who demanded freedom of expression for themselves to insist that it be denied to others. Until the nineteenth century most of the theoretical supporters of freedom of expression took this position. And even those who urged a broader view have sought to impose restrictions upon their opponents when they achieved power. Thomas Jefferson himself, after being elected President wrote to Governor McKean of Pennsylvania objecting to the "licentiousness" and "lying" of the Federalist press and saying, "I have therefore long thought that a few prosecutions of the most prominent offenders would have a wholesome effect in restoring the integrity of the presses."¹³ It is not surprising then that few nations in the past have succeeded in maintaining any substantial degree of freedom of expression, and that even those have suffered serious relapses in times of pressure.

Similar attitudes prevail in our own times. Studies of public support for freedom of expression reveal an alarmingly high proportion of the population who are unwillingly to apply the basic principles of the theory in practice. . . .

Taking all these factors into account it is clear that the problem of maintaining a system of freedom of expression in a society is one of the most complex any society has to face. Self-restraint, self-discipline and maturity are required. The theory is essentially a highly sophisticated one. The members of the society must be willing to sacrifice individual and short-term advantage for social and long-range goals. And the process must operate in a context that is charged with emotion and subject to powerful conflicting forces of self-interest.

These considerations must be weighed in attempting to construct a theory of limitations. A system of free expression can be successful only when it rests upon the strongest possible commitment to the positive right and the narrowest possible basis for exceptions. And any such exceptions must be clear-cut, precise and readily controlled. Otherwise the forces that press toward restriction will break through the openings, and freedom of expression will become the exception and suppression the rule.

A second major element in the problem is the inherent difficulty of framing limitations on expression. Expression in itself is not normally harmful, and the objective of the limitation is not normally to suppress the communication as such. Those who seek to impose limitation on expression do so ordinarily in order to forestall some anticipated effect of expression in causing or influencing other conduct. It is difficult enough to trace the effect of the expression

¹³ Letter to Governor McKean, Feb. 19, 1803, in 8 *The Writings of Thomas Jefferson* 216, 218 (Ford ed. 1897).

after the event. But it is even more difficult to calculate in advance what its effect will be. The inevitable result is that the limitation is framed and administered to restrict a much broader area of expression than is necessary to protect against the harmful conduct feared. In other words, limitations of expression are by nature attempts to prevent the possibility of certain events occurring rather than a punishment of the undesired conduct after it has taken place. To accomplish this end, especially because the effect of the expression is so uncertain, the prohibition is bound to cut deeply into the right of expression.

Moreover, the infinite varieties and subtleties of language and other forms of communication make it impossible to construct a limitation upon expression in definite or precise terms. It is not easy to frame a prohibition against certain forms of conduct; but to formulate a prohibition which will embrace the multiplicity of words and meanings which might influence conduct can only be done through language exceedingly broad in scope. Men for generations have found ingenious ways to evade mechanical formulae of censorship. The allegory and the historical allusion are only two of the devices that have been used for such purposes. In order to accomplish what the framers of the limitation seek, the limitation must be couched in a sweeping generalization. This means, of course, that a wide area of expression is brought within the reach of the limitation and enormous discretionary power placed in the hands of those who administer it.

This brings us to a third factor in the dynamics of limitation—the apparatus required for administration and enforcement. Those who are assigned this task already have or soon develop a tendency to pursue it with zeal. At the very least they have a job to do, the continued existence of which depends upon their activeness in performing it. Often their efficiency and possibility of advancement are measured in terms of their success, which means success in restricting expression. Prosecution of unpopular opinion is frequently an important avenue of political advancement, and hence has a special appeal for the politically ambitious. While there has been little study of the psychology of the censor, security officer and investigator, experience demonstrates that many of those attracted to these positions are likely to be more than ordinarily influenced by the fears, prejudices or emotions which furnish the driving force for suppression. Much of the day-to-day work of administration is controlled by persons in the lower echelons of a bureaucracy, where narrow adherence to rigid rules, fear of superiors, and sensitivity to pressures carry the application of restrictions to their extreme limits. And the accompanying techniques of enforcement in the area of expression—the investigations, surveillance, searches and seizures, secret informers, voluminous files on the suspect—all tend to exercise a repressive influence on freedom of expression.

Other features of the administration of a limitation on expression press in the same direction. Thus the very bringing of a prosecution or other governmental proceeding, even where it is not successful, or the simple fact of investigating, can have the most serious impact. The essential point is that the forces inherent in any system of administration tend to drive to excess, and the mere existence of an enforcement apparatus is in itself restrictive.

A fourth element in the practical administration of limitations on freedom of expression is that the objectives of the limitation are readily subject to distortion and to use for ulterior purposes. Many persons do not easily separate the conduct or threatened conduct of those who express unwanted ideas from their expression of hated and feared opinions. Thus opposition to the conduct, or to the potential conduct, readily merges into suppression of opinion. The irresistible drive is not only to oppose the action sought by the minority group but to suppress their advocacy of it. Frequently prosecution of unpopular opinion is used as a screen for opposing necessary social change. And often the limitation becomes a weapon in a political struggle, employed primarily for partisan advantage.

Finally, in analyzing limitations on freedom of expression, there must be taken into account the whole impact of restriction on the healthy functioning of a free society. Limitations are seldom applied except in an atmosphere of public fear and hysteria. This may be deliberately aroused or may simply be the inevitable accompaniment of repression. Under such circumstances the doctrines and institutions for enforcing the limitations are subjected to intense pressures. Moreover, while some of the more hardy may be willing to defy the opposition and suffer the consequences, the more numerous are likely to be unwilling to run the risks. Similarly persons whose cooperation is needed to permit the full flow of open discussion—those who own the means of publication or the facilities for communication—are likely to be frightened into withholding their patronage and assistance.

LEARNED HAND, THE BILL OF RIGHTS*

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. . . The authority of courts to annul statutes (and a fortiori, acts of the Executive) may, and indeed must, be inferred, although it is nowhere expressed, for without it we should have to refer all disputes between the "Departments" and states to popular decision, patently an impractical means of relief, whatever Thomas Jefferson may have thought. However, this power should be confined to occasions when the statute or order was outside the grant of power to the grantee, and should not include a review of how the power has been exercised. This distinction in the case of legislation demands an analysis of its component factors. These are an estimate of the relevant existing facts and a forecast of the changes that the proposed measure will bring about. In addition it involves an appraisal of the values that the change will produce, as to which there are no postulates specific enough to serve as guides on concrete occasions. In the end all that can be asked on review by a court is that the appraisals and the choice shall be impartial. The statute may be far from the best solution of the conflicts with which it deals; but if it is the result of an honest effort to embody that compromise or adjustment that will secure the widest acceptance and most avoid resentment, it is "Due Process of Law" and

* Copyright, 1958, by Harvard University Press.

conforms to the First Amendment. In theory any statute is always open to challenge upon the ground that it was not in truth the result of an impartial effort, but from the outset it was seen that any such inquiry was almost always practically impossible, and moreover it would be to the last degree "political."

I am well aware that the decisions do not so narrowly circumscribe the power of courts to intervene under the authority of the First Amendment and the "Due Process Clause." I have not tried to say how far those decisions have in fact extended the scope of these clauses. Frankly, I should despair of succeeding. On the contrary I have been only trying to say what is the measure of judicial intervention that can be thought to be implicit, though unexpressed, in the Constitution. You may well ask, however, what difference it makes at long last if the courts do exceed those implicit limits. Even though until about a century ago it was the accepted role of courts to confine themselves to occasions when Congress or the states had stepped over their borders, why should we now retreat, if it has become the custom to go further and correct patent deviations from a court's notions of justice? It is a "constitution," you may go on to remind me, that we are "expounding," and constitutions have the habit of organic growth. Ours is no different from other constitutions, and it has by now been modified to protect the basic privileges of any free society by means of an agency made irresponsive to the pressure of public hysteria, public panic and public greed.

There may be much to be said for the existence of some such organ in a democratic state, especially if its power be confined to a suspensive veto, like that for example of the present British House of Lords. The recuperative powers of a government that has no such curb are indeed great, but in the interval between the damage and the restoration great permanent injury may be done, and in any event the suffering of individuals will never be repaired. Those who advocate such relief at times concede too scanty importance to the provisions very carefully devised at least in the federal Constitution to check hasty and ill-considered legislation. The veto and independent tenure of the President, unlike that of the ministry in most democracies, are obvious curbs upon sudden swings of popular obsession; so too is the Senate, whose control is in the hands of a small minority of the population, representing a facet of public opinion quite different from that of the urban sections. However, I am not going to discuss whether it might not be desirable to have a third chamber, but on the contrary I shall assume for argument that it would be. The question still remains whether the courts should be that chamber. Let me try to sum up the case on both sides: and first that of those who wish to give the courts power to review the merits.

I agree that they have the better argument so far as concerns Free Speech. The most important issues here arise when a majority of the voters are hostile, often bitterly hostile, to the dissidents against whom the statute is directed; and legislatures are more likely than courts to repress what ought to be free. It is true that the periods of passion or panic are ordinarily not very long, and that they are usually succeeded by a serener and more tolerant temper; but, as I have just said, serious damage may have been done that cannot be undone,