Ape Speech Legislation:
Essays in First Amendment Law

by Florent Boucharel

All countries except the USA must be inhabited by apes, otherwise why would they need Ape Speech Laws?

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The "shield" for "extremist" views is the First Amendment

The Wikipedia page "Gab" (an internet platform) says: "Gab claims that it promotes free speech and individual liberty, though these statements have been criticized as being a shield for its alt-right and extremist ecosystem." Under American law an "alt-right ecosystem" has no need of a shield, its shield is the law (First Amendment), so the critics alluded to are irrelevant unless the problem is the very shield American law offers alt-right ideas, that is, the problem is free speech.

The construction "Gab claims... though" is objectionable; there can be no "though" here, free speech is indeed what it is all about. When one creates a business for money laundering, as money laundering is illegal, then the business is a "shield." Therefore, as alt-right views are shielded by the First Amendment, describing Gab as a "shield" is libelous.

It strikes one as odd, given First Amendment law, that some Americans, like the author(s) of this Wikipedia page, seem to have been raised in a European legal environment where freedom of speech exists only for what the powers that be allow and everything they label extremist is doomed to endless persecution.

ii

Finnish minister says sexist online comments about female politicians is a "threat to democracy."

The utterance is even more ominous when one thinks that under Finnish democratic law derogatory comments on public figures such as elected officials might be prosecutable and severely punished. I am not saying this is the case, as I don't know Finnish law, but that wouldn't surprise me given the state of the law in my and several other continental European countries that I know.

iii

Pro-liberty Skidmore students blocked from creating a club after "cancel mob" organized against them.

Before *cancel culture* there's the *heckler's veto*, a cancel mob is a heckling mob. I don't know how a "Student Government Association," which blocked the club's creation under pressure of a heckling mob, relates to government, if at all, in free speech law (any form of government support would suffice) but the doctrine about heckling is: "the core concern ... is that allowing the suppression of speech because of the discontent of the opponents provides the perverse incentive for opponents to threaten violence rather than to meet ideas with more speech." (mtsu.edu)

iv

Instagram deletes post of President Biden falling up the stairs under its "violence and incitement" policy.

MSNBC analyst says Biden falling meme could incite violence.

They expect him to fall a lot. Joe Biden has been would-be candidate for POTUS for 35 years. Here's what Robert H. Bork wrote for year 1987: "Senator Biden's presidential aspirations came to a sudden end, probably for all time. The campaign staff of Governor Michael Dukakis gave the press videotapes demonstrating that Biden had plagiarized speeches by other politicians such as Britain's Neal Kinnock. In addition, the press learned that Biden had misrepresented his law school record. As the damaging facts began to pile up, Biden at first tried to explain and finally had to hold a press conference at which he withdrew as a candidate for his party's nomination." (*The Tempting of America*, 1990)

v

"It started with words," so free speech is not okay?

vi

Biden appointee Timothy Wu once questioned whether the First Amendment was "obsolete," has questionable free speech views.

A fair statement would be that *all* elected officials and their appointees have questionable free speech views, because a political class will always want to mutate into a *political cartel*, which requires speech control and suppression, so the condition for free speech is a truly independent judicial power and irremovable judges, something that apparently does

not exist in this world except the USA. Do not make as if Republican majorities had unquestionable free speech views: the many anti-BDS laws, which will be struck down one after the other, and the sooner the better, are a recent example of the tendency.

vii

Force is the one thing we're not allowed to advocate.

The First Amendment does allow one to advocate force. "Advocacy of illegal conduct" is protected speech, what is not protected is "incitement to imminent lawless action" (*Brandenburg v. Ohio*), the word to emphasize here being "imminent." Case law explains that, for speech to be unprotected, the lawless action it advocates must not only be imminent but also likely to follow from speech. I argue that there is an intrinsic impossibility for online speech to be incitement to imminent action; the law is aimed at speech "brigaded with action," that is, speech to and from among a mob prone to act, or, in the classic example, shouting fire in a crowded theater.

I am surprised that a former shareowner of a platform, namely Parler, is raising funds for his legal counsel in view of a Congress hearing about the platform's responsibility for the Capitol storming. It looks like rogue intimidation. I question the legality of any step by the legislator that compels private citizens to legal counsel expenses. The judiciary, not the legislative, is the power that examines particular responsibilities.

The Political Cartel

A

I believe in Free Speech. Whatever I say, you can mull over, agree, disagree, argue with, and I'll do the same, respectfully. (P. Little)

"Respectfully" is Little's own version of free speech, but if we set a "respectful" criterion on speech before allowing it to be free, there's no free speech. A lot of speech is scornful, and this is the kind of speech that needs protection. If the government tells me to be respectful with them but their policies infuriate me, this is speech suppression by the government.

There is one distinction to make. It is less acceptable that you use scornful speech with your neighbor, because, although he may be a strong supporter of the policy that infuriates you, he isn't directly responsible for it and has not asked for your vote in an election, unless he's a public official, in which case your scornful speech will be more acceptable and protected. Thus, the scale of offensive speech acceptability is such in American law, from more to less: public officials, public figures (known personalities without public office but somewhat influential in the debate), and then the ordinary citizen ("your neighbor"). This is quite in agreement with the nature of the democratic debate. In state-terror states such as many European countries, the scale is the reverse: public officials get more protection *from* speech than the ordinary citizen. This is how a political cartel shields itself from criticism.

B
Libel Law and the Political Cartel

Justices Thomas and Gorsuch call for a revisiting of 1964 case that prevented public figures suing for defamation. (Reclaim the Net)

Public figures are not "prevented" from suing, only they must show *actual malice* when the statements are untrue, that is, the onus of the proof is on them. – Let these two Justices have their way and soon you'll have nothing to envy to Canada. Of course, public figures can sue, only claimants must demonstrate defendants' actual malice, and this is what Justices Gorsuch and Thomas disagree with. They want politicians to be censors through gag trials as politicians do in other countries like Canada.

ii

Reclaim the Net wrote a rather supportive paper on Justices Thomas and Gorsuch's opinion that libel law should be changed regarding public officials (read: politicians), that is, that *NYT v. Sullivan* should be reversed. Therefore, they endorsed a view contrary to free speech, they defend politicians' so-called *personality rights* against free speech, supporting the two Justices' view that the line should be drawn as it is in Canada, for instance, which is to pave the way to a political class forming a protected political cartel. This betrays Reclaim the Net's conservative militancy, that is, their alignment with party politics. As it is observed that the

media environment is biased towards the Democratic party and against the Republican party, the two Justices think that aligning libel law with all other western democracies' practice (with their political cartels) will allow Republican politicians to respond to smear campaigns (as if such campaigns were really detrimental to them, to begin with, rather than the opposite). To make a long story short: this will Canadize (Canada-ize) the USA. (But as I said already time and again hostility to free speech is universal among professional politicians: this statement is my contribution to political *science*.)[1]

iii

Trust in US mainstream media hits rock bottom. (Reclaim the Net)

This is why Justices Thomas and Gorsuch's view that *New York Times Co. v. Sullivan* should be reversed must not be heeded to. Libel law must remain favorable to the messenger when the message deals with public officials and public figures. Smear campaigns by disreputable media do little harm. On the other hand, giving public officials (read, mainly, politicians) a convenient weapon in libel law would Canadize USA. I go as far as saying that current US libel law is what has made US mainstream media fall into general disrepute, as the media felt unbound and that has been their fall because they lack integrity.

[1] When you will have Canadized USA through libel law, it will only be a matter a time before USA adopts hate speech laws Canada-wise and alternative social platforms will be no more.

"A Culture of Fear and Censorship"

A Christian Finnish politician has been charged with multiple hate crimes, after she tweeted a Bible verse and criticized homosexuality, and could face up to 6 years in prison as a result. (National File)

"Paul Coleman, the Executive Director of ADF International, who is representing Päivi Räsänen: The Finnish Prosecutor General's decision to bring these charges against Dr. Räsänen creates a culture of fear and censorship. It is sobering that such cases are becoming all too common throughout Europe. If committed civil servants like Päivi Räsänen are criminally charged for voicing their deeply held beliefs, it creates a chilling effect for everyone's right to speak freely."

When the laws are such, no one can be surprised that prosecuting authorities make use of them. What creates a "culture of fear and censorship" in Finland is not the charges but the very laws that trigger them. And make no mistake, grassroots movements for repealing hate speech laws do not exist in European countries where such laws exist.

First, you won't hear a lawyer ask for a change in the law where judicial review is as good as non-existent, which I believe is the case in most European countries. As a matter of fact, it is the case in France, where the judicial review of laws is the domain of a byzantine council where former members of the legislative and executive powers seat, that is, whose members are asked to review laws they passed in their former functions! Absent serious judicial review, trials do not give the opportunity to revise the legislation[2].

And there is and has been no support for repealing hate speech and other speech suppression laws among the public opinions of these countries, nor in the media nor from any group of which I know, probably because, among other things, people know they would go against a state-terror state that does not hesitate to deprive people of their freedom because of their speech. That is, where a state has hate speech and other such laws, asking to repeal these laws is a remarkably exigent demand on such a state, a demand for which one could easily be labeled an enemy of the state.

ii

The defense chosen by Räsänen's lawyer is doomed. On the one hand he refuses to criticize the Finnish law, probably for the following reason: To criticize the law would be an argument for judicial review of the law, which is not available to the defendant (this is a mere conjecture, but if judicial review is available, clearly the lawyer *ought to* make use of it). On the other hand he criticizes the step taken by prosecuting authorities – that is, the charges – as

[2] As I write both "Absent serious judicial review, trials do not offer the opportunity to revise the legislation," alluding to various countries including France, and, later, "the bill would be declared unconstitutional as a result of its discriminatory nature," stressing the reality, in France, of judicial review, I owe the reader a precision. In France judicial review of the law on the occasion of trials did not exist before 2008. In that country the traditional way of reviewing the constitutionality of laws is through parliament members of the opposition seizing the so-called *Conseil constitutionnel* when a law has just been passed. The French do not have a tradition of judicial review *through litigation* and even since 2008 French courts cannot review the constitutionality of laws: they must refer the question, when raised, to the above-named council (whose decisions are unappealable).

contrary to a "cornerstone of democracy," freedom of speech, but as the charges are based on Finnish law the argument aims at the wrong target: Judges (it should be juries if you ask me but we are dealing with a type of state devoid of refined conceptions of individual rights) will determine that the charges are conform to the law and condemn Räsänen. It is the law that is supposed to defend freedom of speech, so when the law requires to condemn someone for her speech, the judge, if not summoned to judicially review the law, will descry it as both defending speech and nonetheless instructing him or her to condemn someone for their speech because there are "necessary exceptions etc." Judges in their quality of ordinary judges are no judge of the law; they will examine the charges but they cannot, as ordinary judges, decide that the charges violate a fundamental guarantee when observing at the same time that the law commands the charges.

iii
Pastor Åke Green

As Finnish politician Päivi Räsänen is currently prosecuted for hate speech in Finland after having expressed her Christian views about homosexuality, let us remember a case in Finland's neighboring Sweden, where Pentecostal Pastor Åke Green was acquitted by the Swedish Supreme Court applying Articles 9 (freedom of conscience and religion) and 10 (freedom of speech) of the European Convention on Human Rights (ECHR) against the Swedish criminal code.

For having in a sermon "described 'sexual perversions' (referencing homosexuality) as 'abnormal, a horrible cancerous tumor in the body of society' [and] said that a person cannot be a Christian and a homosexual at the same time" (Wikipedia), Pastor Green was prosecuted for group libel (*hets mot folksgrupp*, "incitement against a group") and sentenced to one month in prison. The court of appeals overturned the sentence, leading the attorney general, unsatisfied that Pastor Green could get off scot-free for expressing his views, to bring the case before the Supreme Court.

In 2005 the Supreme Court, invoking the ECHR that applies to all party states (among them Finland too), upheld Pastor Green's right to express his views.

Then, "[r]esponding to the sentence, Sören Andersson, the president of the Swedish Federation for Lesbian, Gay, Bisexual and Transgender Rights (RFSL), said that religious freedom could never be used as a reason to persecute people" (Wikipedia). This is a testimony of this person's blatantly muddled notions since, even though there were no separation of Church and State in Sweden (there is a national Lutheran church), expressing one's negative views about homosexuality from outside the national church and state in no way can be construed (contrived) as persecution of homosexuals, and on the contrary it was Pastor Green's conviction for his speech that was persecution – state persecution (endorsed by RFSL), until the Supreme Court overturned the conviction.

I ask the Finnish courts regarding Päivi Räsänen to uphold Sweden's interpretation of the ECHR and not to make an empty nutshell of the Convention.

Mr. Blackface

Justin Trudeau dismisses critics of internet censorship bill as "tin foil hats."

The same guy explained that derogatory speech is the same as shouting fire in a crowded theater – the classic example in SCOTUS (Supreme Court of the United States) case law that would serve to send his bill to the garbage can.

ii

New open letter asks Trudeau to stop plans to harm the internet.

Trudeau is the person who claimed that derogatory speech is the same as shouting fire in a crowded theater, the classic SCOTUS example of what derogatory speech is not and can never be. How dare Canadians allow their politicians to talk such humbug when they have had the world's beacon of liberty as their sole neighbor for more than 250 years? Are they all eyes for Greenland? Yes, it must be that: for the last 250 years Canada has had eyes for Greenland only and now derogatory speech is like shouting fire in a crowded theater in Canada.

iii

Canada Justice Minister pushes for censorship bill and limited freedoms. David L. said freedoms are not "absolute."

250 years with the world's beacon of liberty for sole neighbor and Canadian politicians know no better than telling Canadians freedoms are not absolute – in order to pass censorship bills. How is it possible? How can American First Amendment law exist and spread not like fire over the world? – Because of politicians.

Since the US failed to export its unique free speech spirit abroad, now the country is at risk of losing it at home. The US failed to export it because it has not been a politician's job to begin with: American free speech law is entirely judge-made. It takes independent judges tenured for life to defend free speech and to prevent elected, corrupt politicians from making it an empty shell.

iv

Canada: Conservatives' attempts to protect platform users' speech online is blocked. A bad result for free speech in Canada.

Let's face it: Canada never was a free-speech country. US envoys never pressed it to become one and how would they when their bosses at home had rather have the same anti-free speech policy at home too? I told you already, for that it takes independent judges tenured for life. Among politicians it's always the opposition that defends free speech, but when it gets to government there's no more of that, it's censorship bills one after the other, all of them.

v

The faceless against hate

Justin Trudeau: Freedom of expression isn't "freedom to hate."

That's the true state of Canadian law, where faceless bureaucrats (of whom Trudeau is but the mouthpiece) decide what is hate and what is not, and what citizens, writers, intellectuals, journalists are allowed to say.

That a few states be added to the territory over which the Union is sovereign, is long overdue. If the US does not consider it seriously or keeps accepting such a sham, such a parody of democracy at its border, then the Union will not be able to maintain its freedoms for long because its sense of freedom will be eroded by the deceptive idea that a country can be mocking and trampling liberties as Canada does and still be a legitimate model of Western democracy.

Before the internet people had no idea, but I fear the internet is not going to make Canadians ask for the same freedoms as their neighbor but rather that American faceless bureaucrats will press Congress and courts to curtail American freedoms, legitimized by the Canadian example. I fear the internet is not going to make Canadians ask for the same freedoms as their neighbor, precisely because their system is locked up. People do not decide what subjects are open to debate, Canadians are not allowed to ask "freedom to hate," that would be, as the faceless bureaucrats construe it, to stand against the state, that would be *sedition*.

You might say Trudeau is the face of the "faceless," after all. As much as a conservative prime minister would. They are called faceless no matter who is "in charge" because, in a locked-up system, the people cannot look at bureaucracy as in a mirror. Their dictates are promises made to lobbies behind closed doors; and while they hardly ever show up on political platforms, yet repressive laws are piling up.

vi

Irrevocable laws

Canada marching towards tyranny as move to criminalize dissenting speech moves closer to reality. (Natural News)

Hate speech is already a crime in Canada and has been for decades. Therefore, Canada is not "moving to criminalize dissenting speech," as if it did not exist already in the country.

"The proposed legislation by the Justice Department of Canada would tamp down on hate speech by adding language to the Canadian Human Rights Act and Canadian criminal code to try to clarify the definition of hate speech."

We're talking of a mere "clarification" of the definition of hate speech. – Opponents to this "clarification" are not opposed to hate speech legislation, quite the contrary: "This bill will not target hate speech – just ensure bureaucrats in Ottawa are bogged down with frivolous complaints about tweets," Rob Moore, the Conservative Party's Shadow Minister for Justice and Attorney General of Canada, noted." Canadian conservative opposition feels the clarification of the definition of hate speech will not target hate speech and therefore it is bad. For them criminalization of hate speech is *good*. And they're the opposition!

Lying

"Free speech" lawyer argues "lying" should be an impeachable offense.

The levels of nincompoopery in academia ("law professor at George Washington University") are staggering. To think that these fellows are comfortable talking about truth and lies as they do... They really have got no clue. Let me take an example. Husband and wife want to divorce because it turns out they don't see things the same way. One issue to settle is who will keep the kids. Why is it an issue? Because husband and wife both want to raise the kids according to his or her own views and ideas, according to how he or she sees things. Will you ask a law professor at George Washington University to tell the judge whose ideas are truths and whose are untruths, calling the latter lies, before taking a decision? Nonsense. If an amicus curiae talked like that (within an acceptable margin in the frame of the society – as expressing some ideas, like belief in witchcraft or alien abductions, would probably be detrimental in the case to the party expressing these ideas) he would be dismissed at once, as trying to impose his or her own set of preconceived ideas.

ii

What I wrote may sound confusing, at least for two kinds of people in America. Some will remember that experts in American courts are *experts of the parties*, who try to sustain their party's position, whereas I seem to be talking of *experts of the courts*, which exist in civil law (as opposed to common law) countries, experts who had rather remain as neutral as possible in order not to fall into disrepute.

Others will remember that in America *jury trial* is the rule in civil trials and I seem to omit the fact completely. In fact, divorce trials by jury are rare even in the US: "Only a few states allow for any type of jury trial in a divorce case. Even then, those states limit the issues that can go before a jury. For example, Texas, which has the most liberal rules concerning jury trials in divorce cases, is the only state that allows juries to decide which parent gets custody of the children and where the children will live." (rightlawyers.com) Unless most divorces occur in Texas, the majority of divorced American parents must abide by a decision on who is to keep the children that was not taken by a jury.

Still, if an expert smugly told the judge, like some professor of George Washington University, that the kids cannot be in custody of the father, for instance, because the father voted for Trump and Trump is a liar so you cannot rely on such a one to take care of kids, she would be laughed at or I do not know my judge. Yet she writes books like that, which tells you what a tyrant she must be in her classroom, even if people shrug shoulders at her in most other circumstances.

Now, judges are probably more of an official's profile than the majority of people, so the fact that divorce trials are not decided by juries is also more likely to be detrimental to parents who hold certain ideas, even not so fringe as belief in alien abductions. I should think a

parent known to be a Gab user, for instance, is likely to lose his kids in a divorce court when a divorce is filed. Prove me wrong.

None of Your Business

The US will join the "Christchurch Call" to eliminate extremist content online. (May 2021)

"New Zealand man jailed for 21 months for sharing Christchurch shooting video" (BBC News, June 2019). Making it a crime to share this video amounts to claiming that the government must be the only source of truth. The only source of truth will be at the same time the agency that restricts access to evidence.

Under a constitutional regime the government can make no claim to be an exclusive authority as to what the truth is. Hence, by restricting access to evidence it overrides its constitutional function and mocks constitutional liberties.

Here is how the government proceeds. You learn what happened in Christchurch and then the government tells you that, given what happened in Christchurch, they are going to carry out a set of policies that will curtail your fundamental liberties for the sake of peace and order. Then, when a citizen says, "Let's see what happened in Christchurch" and makes the video of the shooting available online, he's punished with 21 months imprisonment for inciting violence (or whatever fallacy they used). Thus, what happened in Christchurch is *none of your business* even though based on this event you are going to lose big in terms of freedom, or more simply you are going to lose your freedom. – What happened in Christchurch is the government's business and you have no right to ask for evidence. "The only source of truth will be at the same time the agency that restricts access to evidence."

Lynching the available person

"French trial opens over anti-Asian Covid tweets." (RFI in English, March 25, 2021) "Protesters gathered in front of the Paris court, with one man carrying a placard which read 'In Atlanta or in Paris, no to anti-Asian racism,' in reference to last week's mass shooting in the US that killed six Asian women." "'My mother has been attacked, my aunt too. Because we are Asian, people think that we have money,' Darith, a 30-year-old of Chinese-Cambodian descent, told French news agency AFP at the protest in Paris."

Note the rhetoric. "Protesters" gather against defendants who are facing prison. It's a lynch mob. (That the defendants are "most likely facing damages if convicted rather than prison" is only because none of them has a criminal record, otherwise the likelihood would be the reverse.) The journalist then quotes one protester, an Asian woman, who talks of relatives having been physically attacked. Why is this woman not protesting in front of the court that judges the attackers instead of protesting in front of a court that judges people for speech? Because there is no trial for the attackers? Most likely because there is no trial and will never be one. It is easy to prosecute people for speech, child's play, but it makes no difference on people's safety and only allows governments to conceal facts. The rhetoric consists in slipping in the assumption that prosecuting speech is an efficient way to guarantee people's safety.

I wish the US exported more of its free speech spirit and less of its mass culture. In fact, as they have not exported the former at all, the risk is now quite serious that they lose this unique spirit.

Anti-BDS Laws

A

Georgia anti-BDS law is *unconstitutional*: "A federal court ruled in favor of journalist Abby Martin, who was barred from speaking at Georgia Southern University after she refused to pledge she would not boycott Israel." (*shadowproof*, May 24, 2021)

It's only the fifth or sixth anti-BDS law that is declared unconstitutional by a US federal court, there remain a dozen ones in other states. Apparently, none of the humiliated states dare appeal the evisceration of their shameful bills to the Supreme Court?

There is that politician, Rubio, I don't know what he's saying about all this but he wanted an anti-BDS federal bill. And how did he "sell" it? By exposing his total, complete and irremediable lack of constitutional knowledge. He said: What? (¿Cómo?) BDS supporters could boycott Israel but the government couldn't boycott BDS supporters? I believe he was convinced, while tweeting this, he had found the ultimate ironclad argument to his bill's opponents. He's got no clue, he doesn't know that a state boycott (by any government, federal, state, or local) is *state action* against which boycott is protected as free speech, whereas BDS is a grassroots boycott protected by the First Amendment. Even if both were called boycotts, one infringes on free speech and the other is free speech. This is basic constitutional law.

B

Meet the Reactionaries

Texas is First US State to Adopt IHRA Definition of Antisemitism. (i24news June 16, 2021)

This comes after *Amawi v. Pflugerville Independent School District* (April 2019), "a case in Texas where the plaintiffs had all faced potential or real loss of employment with the State of Texas for being unwilling to sign contracts promising not to participate in boycott activities against Israel."

The Texan District Court held that "content-based laws ... are presumptively unconstitutional" and that "viewpoint-based regulations impermissibly 'license one side of a debate' and 'create the possibility that the [government] is seeking to handicap the expression of particular ideas'. It further asserted that the law the State had relied on, HB 89, was unconstitutional under the First Amendment." (Wikipedia)

Governor Greg Abbott couldn't have his anti-BDS law stand the judicial test (it was eviscerated), so he adopts a new definition of antisemitism. So what? As far as legal value is concerned his adopted definition is nonexistent. He could have repainted the state capitol instead and that would have been exactly as relevant in terms of positive law (with the difference that it would be something useful, as buildings need new paint once in a while). Any attempt to give a positive legal value to the definition will be a major infringement on First Amendment rights, just like his anti-BDS law.

ii

As far as the American Jewish Congress's remarks on [a social platform beside Twitter and Facebook] in a *Newsweek* opinion called *We need to stop Marjorie Taylor Greene's online extremism before it gets violent* are concerned, the authors examine two solutions.

One – the second discussed by them – is transparency about online fundraising. Why not? Yet do the authors really believe that transparency would be of any use against what they claim is their concern, namely that online speech would incite violence? I fail to see how this would work (to be sure I only read the first two paragraphs, which were screenshot, of their paper).

Before looking at their second proposal, let us remember that under the American Constitution even speech that incites violence is protected if it is not "directed to inciting or producing imminent lawless action and likely to incite or produce such action" (*Brandenburg v. Ohio*, 1969). In my opinion that excludes all online speech to begin with, since then the people get the message through electronic devices, mostly sitting in a room with a computer, so the imminence criterion is lacking altogether (although with smartphones things could change in the future, if for instance we could see such a thing as a mob where individuals are both absorbed in their smartphones' content and committing violence at the same time, which would be peculiar all the same).

The authors' second proposal is to ban the platform. They write: "There are precedents in law where exceptions to the First Amendment regarding hate speech exist." I have no idea what precedents they have in mind (they do not name them here, if at all) but I know that the current state of the law is *Brandenburg v. Ohio*, which does not support the idea of a ban. *In fact, there are no currently valid precedents at all*. They would have to resort to the Espionage Act, as has been done with Julian Assange, but this is not even credible. What they call for, then, is reviving precedents long fallen into disuse, in the spirit of the Sedition Act. I can see no other alternative. This is the most reactionary stuff I have read in a long time.

iii

As to the Anti Defamation League's call to investigate [the same platform as above] "for possible criminal liability in Capitol attack," it is preposterous. A platform cannot be held responsible for the content its users publish: this is Section 230 (as if people had not been talking about it at length recently!). The section "provides immunity for website platforms from third-party content": "No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider." Even if some people had posted on the platform content that was "directed to inciting or producing imminent lawless action and likely to incite or produce such action" (the *Brandenburg v. Ohio* requirement for prosecuting speech), which must be what ADL has in mind, with the "lawless action" being the Capitol attack, Section 230 prevents the Justice Department from even considering investigating the platform. The slightest step in that direction would be a civil liberties case against the state.

iv

On new definitions as hot air

A new definition of antisemitism by a state governor or the US State Department or anyone is not a matter of law and cannot have judicial effects on American citizens since antisemitism is nonexistent as a legal object to begin with (there is no constitutional hate speech law in the US thanks to the First Amendment)[3]. As I see it, they intend the move as an international policy pressure tool: since anti-Zionism is now, by this new definition, antisemitism, they can object to anti-Zionist standpoints from other countries as antisemitic, and presumably they believe it will give the American administration more self-willfulness in their unconditional (and therefore, in my opinion, unconstitutional) alignment with Israel (aligned no matter what the latter's policies are).

Probably mainstream media will talk a good deal about it? Governor Greg Abbott led the way by having the definition adopted already in Texas. I don't know what it is in Texas, whether a statute, an executive act, or a sheet of paper signed by Abbott and flaunted to cameras. No idea, but neither this Texan nor the US State Department's definition is a *normative* act. They're using their constitutional powers for non-normative activity. Hot air. Symbolically you might resent it, and symbolically mainstream media might make a lot of fuss about it as if it were lawmaking, but legally speaking this hot air is showing us some people at the end of their tether if anything[4].

[3] To be sure, antisemitism might be considered a legal object through the dubious category of hate crime (a crime against an individual is thought more egregious when the alleged motivation is hate towards a group). I call the category dubious but so far it has not been declared unconstitutional, so I make the present qualification. However, this does not change one jot to what I wrote, as neither the State Department nor Abbott's definition binds courts, which will continue to use their own sovereign definitions.

[4] "At the end of their tether" means that if the hot air becomes too visibly pathetic, they are going to resort to illegality in broad daylight.

Given that the new administration's barefaced hostility to the First Amendment can only lead to their blowing hot air and never to legitimate lawmaking, the greatest threat of illegal violence at this juncture in the USA is poised against law-abiding dissenters. There is something pathetic about blowing hot air which cannot escape them (the administration, the government) long.

*

Political Police

I'm reading "the FBI just put X and Y (movements) on the same threat level as ISIS." Is this leaked information? Is it (1) a leak or (2) state intimidation against legally constituted associations? If (2), how, besides, is this not libelous? There can be no governmental immunity when a police bureau slanders and libels law-abiding citizens.

Where knowing the law is of no use

British man cleared after being arrested for "offensive" online video. A win for free expression.

A win for free expression? "The court cleared L. after learning he did not make the video, shared it as a joke, and the clip had been quote-tweeted 369 times, and retweeted 47 times, and had 107 likes." The police picked up the man randomly among 400 "criminals" and there was a trial and that wasn't the trial of the police but of the man, and you call this a win for free expression? No, it would have been a win if the police had been tried and convicted for harassing a law-abiding citizen.

Why do I say the man was subjected to police harassment? Normally, when police bring a man before a criminal court for trial, if the court, differing from the police, pronounces acquittal, it is based on a difference as to *facts*. The police thought, according to the evidence at their disposal, that the man was guilty, but the court found out the story was another one. They differ on the *facts* of the case. But when the court acquits the accused based *on the same facts* upon which the police and the prosecutor acted to prosecute the accused, how do you call this?

Here the court learnt that L. "did not make the video, shared it as a joke, and the clip had been quote-tweeted 369 times, and retweeted 47 times, and had 107 likes," but the police investigation, which obviously had reached the selfsame conclusion that L. "did not make the video, shared it as a joke, and the clip had been quote-tweeted 369 times, and retweeted 47 times, and had 107 likes" had sent L. before a court for these – and no other – facts! Clearly L. had *not* told the police he had made the video himself, in dead earnest, and was the only person to share it, because we will assume he is not suicidal – if he were he would have told the court the same story. Therefore, the police, having all the facts it needed to leave L. alone, ignored the law and subjected L. to a dire ordeal – out of sadism? one might ask.

With these perverted laws repressing speech, it is always the same and everybody knows it and no one dares speak their mind because a trial's always possible, it all depends on the subjective appreciation – or even whims – of this or that officer or magistrate. This, I believe, is a strong motive why the US Supreme Court wants none of such insanities, whereas in Britain they are still children living in the days of Blackstone who thought free speech is protected when there is no prior restraint.

In other words, they all agree on the facts of the case; yet, based on facts on which they all agree, one demands a conviction and the other acquits. This means no one can know what is permissible and what is not, as knowing the law is of no use. What is required of citizens is not so much knowing the law as being able to read people's minds.

Charged for
(Name a crime, not a freedom)

Former highschool student charged for putting Hitler quote in yearbook. (New York Post, July 13, 2021)

New York Post's headline is sheer disinformation, of which their own article gives ample evidence. The kid is charged for "computer crimes for accessing a database used by students to alter two classmates' entries."

The so-called "Hitler quote" are the words "It is a quite special secret pleasure how the people around us fail to realize what is really happening to them," which the kid "incorrectly attributed" to George Floyd. To detect that these were actually Hitler's words requires a level of specialization far beyond the average, and if, to boot, as the paper seems to say, the kid did not know they were Hitler's words (obviously, if the kid "incorrectly" attributed the words to George Floyd, it means he did not change the author's name on purpose, knowingly), you may not talk of a Hitler quote at all.

The second quote is thus described by NYP: "Tryon, 18, also reportedly inserted a quote in a second student's yearbook entry referencing drugs and Boston bomber Dzhokhar Tsarnaev, who was convicted in the April 2013 attack that killed three people and wounded more than 260 others." There's not a jot of information in this, it could mean anything, the quote could either be apology of terrorism, or indictment of terrorism, or something entirely different for all we know. Obviously, NYP doesn't care what the content of this quote is, they had their headline with the "Hitler quote" and that was good enough for these muckrakers.

But, again, the case is not at all about a Hitler quote. The headline should not read "charged for putting Hitler quote in yearbook" because under the rule of law people are charged for crimes and a Hitler quote, even in a yearbook, is not a crime.

Welcome on Board

Facebook oversight board member [Danish former prime minister Helle Thorning-Schmidt] *says free speech "is not an absolute human right." (Reclaim the Net)*

The irony of her statement (not "in" her statement as she seems completely devoid of a sense of irony) is that a private company such as Facebook does not under the First Amendment have to care about the status of speech as a right (of others). As its lawyers often stress, it is Facebook's very free speech right to refuse some kinds of speech on their platform, so if free speech is "not an absolute human right," then this is bad news for Facebook because it means they have been censoring thousands, perhaps millions of people based on what they think is an absolute human right (to do so) but is not.

In fact, this former prime minister of Denmark (who sits at the oversight board of a Delaware, United States, incorporated company without knowing much of American law, obviously) only parrots and repeats the mantra of the European Court of Human Rights, which balances rights such as free speech on the one hand and personality rights on the other hand.

But the same holds true in US, as in its libel law: not all speech is protected. The First Amendment does not allow you to defame someone, that is, you cannot, in the case of public figures for instance, publish false defamatory statements about public figures (but the latter must prove the statements are false, not you that the statements are true, and public figures must also demonstrate that you acted knowingly or in reckless disregard of the truth, this is the rather stringent "actual malice standard"). As Donald Trump's lawsuit against big-tech platforms is mentioned in Reclaim the Net's article, let me add that, although Trump is suing for civil liberties (breach of First Amendment, especially after recent admission by the Biden administration that it was "flagging problematic posts for Facebook that spread disinformation"), he may sue for libel as well. When Twitter flagged his tweets and then banned him to the effect that people should think he is a compulsive liar[5], that was an attack on his good name by statement of fact and therefore falls under the category of defamation. That he might win a libel suit is not granted though because 1/ he was one of the most prominent public figures at the time (actual malice standard) and 2/ the truth or falsity of the facts in question is still under scrutiny (forensic audits).

By parroting the European Court of Human Rights, the former prime minister of Denmark proves how silly she really is. When the European Court says free speech is "not an absolute human right," it means governments can limit free speech in consideration of other rights. But Facebook is not a government, it's a private business that is free to refuse some speech and accept other on its platform unless the law says otherwise or government entanglement in the business can be proven.

Parroting the European Court of Human Rights at and from the oversight board of a Delaware incorporated business is preposterous on so many grounds, I don't know if you can imagine.

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[5] Accusing someone of lying belongs among the eight "sensitive categories" that make statements defamatory on their face: "#3. Impugn another's honesty or integrity." (Neil J. Rosini, *The Practical Guide to Libel Law*, Praeger 1991, p. 9)

*

It’s true the European Court of Human Rights says free speech is not an absolute human right, but to be honest the ECHR is not an absolute court either.

Group defamation is nonexistent in law

> Defamatory statements made about a large class of people cannot be interpreted to refer necessarily to any individual. And only individuals, not classes of people, can sue for damage to personal reputation. This principle has been established in a number of cases, including one in which a class action was brought on behalf of 600,000,000 Muslims to recover damages for airing the film *Death of a princess*. The group found the film, which depicted the public execution of a Saudi Arabian princess for adultery, insulting and defamatory to the Islamic religion. The claim was dismissed because the aim of defamation law is to protect individuals, and if a group is sufficiently large that a statement cannot reasonably be interpreted to defame individual group members, First Amendment rights would be impaired by permitting individuals to sue.
>
> Neil J. Rosini, *The Practical Guide to Libel Law*, Praeger 1991, p. 32.

The case alluded to is *Khalid Abdullah Tariq Al Mansour Faissal Fahd Al Talal v. Fanning*, 506 F. Supp. 186, 187 (N.D. Cal. 1980). In this decision the court stresses that such actionable group libel (as provided for by hate speech laws around the world) "would render meaningless the rights guaranteed by the First Amendment": "If plaintiffs were allowed to proceed with this claim, it could invite any number of vexatious lawsuits and seriously interfere with public discussion of issues, or groups, which are in the public eye. Statements about a religious, ethnic, or political group could invite thousands of lawsuits from disgruntled members of these groups claiming that the portrayal was inaccurate and thus libelous. … If the court were to permit an action to lie for the defamation of such a multitudinous group we would render meaningless the rights guaranteed by the First Amendment to explore issues of public import." (https://law.justia.com/cases/federal/district-courts/FSupp/506/186/1653813/) The consequences here laid down in the hypothetico-deductive mode are an accurate depiction of "Western democracies" such as Canada and France. In these countries (at least France, which I know best) hate speech laws make hate speech both a crime and a tort, and the authorities have allowed anti-defamation organizations to pocket damages from hate speech trials (beside their being subsidized by government).[6]

[6] The only groups that are taken into consideration in US libel law are actual groups of few individuals, that is, not the group category as it is understood by hate speech laws around the world: "Calling a five-member task force 'rife with corruption' entitles each to sue. Asserting that a particular labor union is controlled by organized crime would certainly defame the officers of the union. Accusing all–or even most–of a 20 person night shift of using drugs on the job injures the reputation of each." (Rosini, p. 32)

Mister Chow goes to court,
or The limits of political correctness (and libel law)

Mr. Chow, owner of a Chinese restaurant in New York City, was humiliated by a culinary critique and he sued. In turn the court that dismissed his claim (in appeal) humiliated him by the terms of the judgment, and the author who deals with the case in a treatise on libel law adds one more layer of humiliation.

> Restaurant reviews (like aesthetic criticism) seem to generate hyperbole of particular piquancy. For example, a food critic declared that the "green peppers…remained still frozen on the plate," the rice was "soaking…in oil" and the pancakes were "the thickness of a finger" in a review of a Chinese restaurant. Though the restaurant owner had no tolerance for literary license and sued for defamation, the judge applauded the critic's "attempt to interject style into the review rather than…convey with technical precision literal facts about the restaurant." The judge refused to limit the author and others like him to pedestrian observations like "the peppers were too cold, the rice was too oily and the pancakes were too thick," and also observed that the statements were incapable of being proved false. "What is too oily for one person may be perfect for some other person. The same can be said for the temperature of the vegetables, [and] the thickness of pancakes." In another review, a sauce was described as "yellow death on duck" and the poached trout renamed "trout ala green plague." For essentially the same reasons, the statements were deemed too hyperbolic expressions of pure opinion and not statements of fact.
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> Neil J. Rosini, *The Practical Guide to Libel Law*, Praeger 1991, p. 146.

The case described is *Mr. Chow of New York v. Ste. Jour Azur S.A.* (2d Cir. 1985). The last two quotes are from *Mashburn v. Collin* (La. 1977) (cited in *Mr Chow of New York v. Ste.* [it should be Sté., for Société] *Jour Azur*). The culinary critique in *Mr. Chow* appeared in the *Gault & Millau Guide to New York*.

It was not enough that Mr. Chow had been humiliated by the hyperbolic acid of the critique, the judge had to applaud the critic's "attempt to interject style into the review" and in turn Rosini derides Mr. Chow for lacking "tolerance for literary license" and scorns him for attempting to limit culinary critique to "pedestrian observations." So much for political correctness. It seems that PC has not encroached on public discussions in the legal and judicial field. Although these facts are some forty years old, I believe this is still the case because, as in other more or less specialized fields (in no way less important as to public controversies), the discussions are somewhat beyond the grasp of the general public. However, I am not sure Gault & Millau has maintained its piquancy with respect to ethnic cuisine, no matter how piquant the dishes are.

In Rosini's book, the case illustrates the judicial difference between *statements of fact* and *expressions of opinion*. The distinction, however, is specious because opinions by Gault & Millau and other influential critics oftentimes are meant by those who claim participation in the set of connoisseurs as true statements of fact. When a master critic writes the rice is too oily, make no mistake, it *is* too oily. If you care about your social life, dare not say you like the rice at Mr. Chow's when Gault & Millau wrote it is "soaking in oil." In fact, you do not even go to Mr. Chow's after reading this from Gault & Millau. In other words, it is the critic's *opinion* that is harmful (when negative), one cannot distinguish the critic's opinion from statements of fact.

Only in the abstract "what is too oily for one person may be perfect for some other person," because, as soon as the critic, who by definition knows what is good, speaks, his opinion is law – a law of taste. Just like juries are judge of facts and magistrates judge of law (sometimes judge of law and fact together), critics are judge of taste.

Therefore, I am not surprised that the trial court had found the defendant, the critic, guilty, because the distinction between expression of opinion and statement of fact is a specious one; a critic's opinion is as likely as statements of fact to ruin one's reputation and business, and Mr. Chow probably could provide evidence of pecuniary loss (if he lost customers because of the critic's "literary license"). – But what's the point of critique if it either must be positive or face lawsuits? There is no critique, then, only réclame. Yet one needs critique, for instance when traveling to places where one has no acquaintances (the importance of culinary critique has increased with tourism).

My hate speech your problem

"In a Supreme Court case on the issue, *Matal v. Tam* (2017), the justices unanimously reaffirmed that there is effectively no 'hate speech' exception to the free speech rights protected by the First Amendment and that the U.S. government may not discriminate against speech on the basis of the speaker's viewpoint." (Wikipedia) (Emphasis ours)

Previous major Supreme Court decisions include *R.A.V. v. City of St. Paul* (1992) and *Snyder v. Phelps* (2011).

"*Societal Implementation*. In the 1980s and 1990s, more than 350 public universities adopted 'speech codes' regulating discriminatory speech by faculty and students. These codes have not fared well in the courts, where they are frequently overturned as violations of the First Amendment." "*Private regulation*. In 1992, Congress directed the National Telecommunications and Information Administration (NTIA) to examine the role of telecommunications, including broadcast radio and television, cable television, public access television, and computer bulletin boards, in advocating or encouraging violent acts and the commission of hate crimes against designated persons and groups. The NTIA study investigated speech that fostered a climate of hatred and prejudice in which hate crimes may occur. The study failed to link telecommunication to hate crimes, but did find that 'individuals have used telecommunications to disseminate messages of hate and bigotry to a wide audience'. Its recommendation was that the best way to fight hate speech was through additional speech promoting tolerance, as opposed to government regulation." (Wikipedia: Hate Speech in the United States)

It is since the advent of a big-tech cartel that the issue of hate speech has become a cause of concern, for this cartel has unprecedented means of censoring people and is censoring perhaps millions of people at this juncture, based on terms of service where hate speech allegedly has a prominent place among the things these TOS do not allow. (The figures of human beings subjected to the cartel's arbitrary censorship around the world are probably unknown even to the most invasive spy agencies, of which the cartel might be, by the way, only a scion, given the US military origins of the internet.)

Besides, it is the most amazing story in the world that a thing – hate speech – so consistently protected by the Constitution should be the principal yardstick by which people in America think their reputation is judged, *as if hate speech were worse than crime*. But something the Constitution protects cannot be worse than crime. (You would have to change the Constitution to allow government repression of hate speech, and then you could say, all right, hate speech is not desirable, but so long as the Constitution protects it, believe it or not, hate speech is desirable – at least it is preferable to its ban, which is to say that it is desirable to the extent that its ban, which is also in your power, would be harmful.)

ii

It's not enough to defend free speech, you must defend hate speech. In Canada, France, and other Western democracies politicians defend free speech too – yet they are always passing new hate speech laws as one man. It's in your power to ban hate speech in the United States. It's in your power to align the United States with Western democracies. It's in your power to

align the New World with the Old World. Therefore, it's not enough to defend free speech, you must defend hate speech.

iii

You can't be leader of the free world when you're the free world.

iv

It pains me how Americans are not thankful for, are not even appreciative of the relentless combat led by Justices of the US Supreme Court and other American courts to uphold freedom of *hate speech* – against the whole world – and of how they are thus opening the eyes of those who have eyes to the despicable hypocrisy of all politicians, all public officials, all public figures engaged in public controversies within so-called Western democracies. Here my heartfelt thanks to the Supreme Court of the United States who consistently defends the *freedom of hate speech* guaranteed by the Constitution whereas courts in Western democracies have agreed that governments can ban hate speech and those countries dare parade as free speech lands in front of their distorting mirrors with swag. When the US Supreme Court consistently defends hate speech as a constitutionally protected freedom (*Brandenburg v. Ohio* 1969; *R.A.V. v. City of St. Paul* 1992; *Snyder v. Phelps* 2011; *Matal v. Tam* 2017), the Justices are talking to the world. They are telling Western democracies: You are apes, aping political freedoms with nauseating swag.

v

Yes, hate speech is under attack.

The Biden administration as constitutional problem

A
A glimpse into the problem

Biden answers: "They're killing people," when asked about "misinformation" on platforms like Facebook. (Reclaim the Net – confirmed by multiple sources)

For killing people, the penalty may be death in 27 states and the federal government[7].

ii

"You have made a choice to allow them to continue to spread lethal lies." (U.S. senator Schatz to Facebook on covid)

The "free flow of ideas" is in fact the vehicle of "lethal lies," so it was a silly mistake to invent free speech and the First Amendment. To combat lethal lies you need consistent enforcement of speech repression. Lethal lies are lies that kill people (see Joe Biden: "They're killing people.") For killing people, the penalty may be death in 27 states and the federal government.

B

[White House press secretary] *No options are "off the table" regarding regulating online speech. (Reclaim the Net)*

All options unconstitutional. "The White House isn't toning down its rhetoric." At some point in a continual, legally unrealistic discourse, it becomes something else, something like the announcement of a coup in broad daylight. "Congress shall make no law ... abridging the freedom of speech" (First Amendment). This administration is always talking of solutions to regulate – read *abridge* – speech. They ought to understand once and for all that they must leave people and their freedom of speech alone because if this constitutionally unrealistic discourse goes on it will be clear they are not going to find solutions as they are a constitutional problem in its own right.

[7] To make my point clear, Joe Biden said his conviction was that those who opposed his policy during the covid pandemic deserved to be sentenced to death. He was saving lives, was responsible for Americans' survival, the very President of a country that has been engulfed in an opioid crisis that so far has already claimed more than half a million American lives because of the same persons on whose shoulders now rested everybody's survival. Of course, his being President of the United States precludes that "informed" people get on the conscious level the message as an expression of the willingness to apply capital punishment to opponents; one has no right to take it literally, just as one would be silly to take literally the rantings of a dotard unable to control his speech. When the President of the US talks literally like a dictator, one is under the compulsion to understand his speech metaphorically. – Or maybe he's a dotard in commentators' eyes and they are just polite: "Do not make a fuss about the dotard talking like a dictator."

ii

The only available solution is to amend or repeal Section 230, which Donald Trump already contemplated. They don't want to say they are walking on Trump's footprints. But this comes along the same kind of discourse on "online extremism." It is their obsession: to abridge freedom of speech. On the present issue they basically want to abridge the freedom of speech of opponents to the administration's public health policy. All solutions are off the table except tinkering with Section 230 and that would only allow for tort litigations ("to hold platforms accountable") where the subject is in fact the government's health policy.

To "hold platforms accountable" for spreading misinformation. (Reclaim the Net)

You've got to ask the question: "accountable for what?" (One needs to name a specific item, not the vague "spreading misinformation.") Does this administration want to explode Section 230 so that a couple of pharmaceutical companies, which the government commanded to develop covid vaccines, can sue for *product disparagement*? The government is trying to conflate opposition to its health policy with libelous attacks on private businesses. In that case all opposition to health policy choices would be stifled because "[p]harmaceutical companies can be seen as 'agents' who work for the government (or society), developing new drugs. ... They do not receive an amount of dollars for each successful drug discovery. Instead, they receive a patent." (Gerrit De Geest, *Rents*, 2018) (The words "or society" are irrelevant: pharmaceutical companies work for the society as represented by the government.)

iii

Surgeon General says "equity" is the reason COVID "misinformation" needs to be censored online. (Reclaim the Net)

"Misinformation is a threat to our health, and the speed, scale and sophistication with which it is spreading is unprecedented" (Surgeon General). Opposition by speech to the government's public health policies is an absolute constitutional right. Government's talking of "misinformation" is ominous enough, its ceaseless repetition a threat not only to political opponents but also to the Constitution. The government has no constitutional power, while enforcing its public policies, to enforce against freedom of speech the justificatory discourse underlying them.

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