Sedition and the Advocacy of Violence

Free Speech and Counter-Terrorism

Sarah Sorial

ROUTLEDGE

Sedition and the Advocacy of Violence

This book employs the theoretical framework of 'speech act theory' to analyse current legislative frameworks and cases pertaining to sedition or the advocacy of violence and the issue of freedom of speech. An analysis of the relation between speech and action offers a promising way of clarifying confusion over the contested status of speech, which advocates violence as a political strategy. This account reflects an understanding of philosophical issues about both the nature of freedom and speech and how these issues can be applied to concrete legal problems.

This approach will shed new light on the problems of sedition laws and how they might be remedied by providing a conceptual account of the nature of speech and its relation to action. On the basis of J. L. Austin's account of verdictive and exercitive speech acts, it is argued that while all speech acts are 'conduct' in a narrow sense, not all of them have the power to produce effects. This philosophical account will have legal consequences as to how we classify speech acts deemed to be dangerous, or to cause harm. It also suggests that because speech can evoke or constitute action or conduct in certain circumstances, modern versions of sedition laws might in principle be defensible, although not in their current form. On the basis of this account, it is argued that the harms caused or constituted by speech can be located in the authority of the speaker.

Sedition and the Advocacy of Violence: Free Speech and Counter-Terrorism will be of interest to students and scholars of philosophy of law and legal theory.

Sarah Sorial is an ARC Post Doctoral Research Fellow at The University of Wollongong, Australia.

Sedition and the Advocacy of Violence

Free Speech and Counter-Terrorism

Sarah Sorial

Routledge
Taylor & Francis Group
LONDON AND NEW YORK

First published 2012
by Routledge
2 Park Square, Milton Park, Abingdon, Oxon OX14 4RN

Simultaneously published in the USA and Canada
by Routledge
711 Third Avenue, New York, NY 10017

Routledge is an imprint of the Taylor & Francis Group, an informa business

First issued in paperback 2013

© 2012 Sarah Sorial

The right of Sarah Sorial to be identified as author of this work has been asserted by her in accordance with sections 77 and 78 of the Copyright, Designs and Patents Act 1988.

All rights reserved. No part of this book may be reprinted or reproduced or utilised in any form or by any electronic, mechanical, or other means, now known or hereafter invented, including photocopying and recording, or in any information storage or retrieval system, without permission in writing from the publishers.

Trademark notice: Product or corporate names may be trademarks or registered trademarks, and are used only for identification and explanation without intent to infringe.

British Library Cataloguing in Publication Data
A catalogue record for this book is available from the British Library

Library of Congress Cataloging in Publication Data
Sorial, Sarah.
Sedition and the advocacy of violence : free speech and counter-terrorism / Sarah Sorial.
p. cm.
Includes bibliographical references and index.
1. Sedition. 2. Freedom of speech. 3. Terrorism–Prevention–Law and legislation. I. Title.
K5253.S67 2012
342.08′53–dc22 2011009767

ISBN 978-0-415-85976-9 (pbk)
ISBN 978-0415-56515-8 (hbk)
ISBN 978-0-203-80432-2 (ebk)

Typeset in Garamond
by Cenveo Publisher Services

Contents

Table of cases

Table of legislation

Acknowledgements

This research project has been supported by the Australian Research Council under the Discovery Projects Scheme (Discovery Grant DP 0879258). There are many colleagues and friends who have helped me to develop the ideas presented in this book and I am especially indebted to Jacqui Poltera, Julia Quilter, David Neil, Patrick McGivern and Luke McNamara for reading and commenting on various drafts, as well as for their engaging and insightful discussions about many of the views presented here. Thanks also are owed to Debra Dudek, Catharine Abell and Lydia Sorial for their personal support.

Some parts of the book were presented at the philosophy staff seminar series at the University of Sydney University (July 2009), the *Philosophia* conference, Fordham University, New York (May 2009), the Legal Intersections Research Center Seminar Series at the University of Wollongong (March 2009), the Law and Society Conference, at the University of Sydney (December 2008) and at the philosophy staff seminar series at Macquarie University, Sydney (2006). I thank all who participated at these events for their helpful comments and criticism.

I also received many helpful suggestions at a workshop on the topic of political violence, funded by the Legal Intersections Research Centre at Wollongong University, and the Faculty of Arts. Thanks especially are owed to Catriona Mackenzie, with whom I collaborated, and to Katharine Gelber. Also, a special thank you to Robert Kirby for his meticulous research assistance.

Some of this material has been published elsewhere: the material in Chapter 3 has been published in *Law and Philosophy* (Vol 29, 2010); some material from Chapters 5 and 6 has been published in *The Journal of Value Inquiry* (Vol 44, 2010); and a version of the argument is forthcoming in *Critical Horizons* (2011).

Finally, thank you to my parents – Venice and Sobhi Sorial – and to my siblings, Lydia and Anthony for their humour and support over the years.

Introduction

1. Introduction

In March 2010, former Alaska Governor Sarah Palin posted on her website a series of maps of congressional districts that the Tea Party hoped to win in the November election. Each target district was marked with the crosshairs of a rifle. Palin also sent the following message to her Twitter followers: 'Commonsense conservatives and lovers of America. Don't Retreat. Instead – Reload'. Gabrielle Giffords was one of 17 democratic members of Congress targeted by Palin on her website. On 9 January 2011, Jared Loughner attended an outdoor 'meet-and-greet' held by Giffords for her constituents. He shot Giffords in the head, then fired at the crowd, killing six people, including a federal judge and a nine year old girl, and wounded 13 others.

The shooting by a lone gunman generated intense debate about the causal role played by political rhetoric. In an interview with CNN, Democrat Senator Dick Durbin claimed: 'The phrase "Don't retreat; reload", putting crosshairs on congressional districts as targets, these sorts of things, I think, invite the kind of toxic rhetoric that can lead unstable people to believe this is an acceptable response'.[1] While Republican Senator Lamar Alexander denied that Palin's speech was responsible, he called for greater civility in political debate: 'We ought to cool it, tone it down, treat each other with great respect, respect each other's ideas, and even on difficult issues like immigration or taxes or health care law, do our best not to inflame passions'.[2] Palin rejected claims that her speech played any causal role in the shooting, claiming: 'Acts of monstrous criminality stand on their own. They begin and end with the criminals who commit them, not collectively with all the citizens of a state, not with those who listen to talk radio, not with maps of swing districts used by both sides of the aisle, not with law-abiding citizens who respectfully exercise their First Amendment rights at campaign rallies, not with those who proudly voted in the last election'.[3]

This case and the ensuing debate raise a number of complex problems about the nature of speech: what is the role of inflammatory political rhetoric

in causing violence or enacting norms that permit violence? Did Palin's rhetoric play a causal role in the shooting? If it did, as many commentators and politicians claimed, why was her speech successful in enacting violence? Did the success of the words have anything to do with her popularity or her role as a public, political figure? Did it have anything to do with the charged political circumstances generated by disagreements in health care reform? Many politicians, including President Obama, called for restraint in public debate and for people to respect the norms of civility. What role, if any, do the norms of civility and tolerance play in preventing our political differences from turning violent?

This book attempts to address some of these questions by exploring the limits to free speech.[4] Specifically, it is concerned with the limits of speech acts that advocate violence against the state or its institutions in order to achieve political objectives.[5] These speech acts are commonly referred to in free speech literature as 'extreme speech' and have traditionally been refereed to as seditious speech in law. This type of extreme speech has recently become the subject of legal and philosophical debate because of its perceived prevalence and state responses to it. The account developed in this book is partially motivated by dissatisfaction with the polarised nature of debate about speech rights with respect to this issue. On the one hand, governments in Australia and the United Kingdom have implemented a range of legal measures to curb the dissemination of ideas advocating violence. These laws have been criticised for being too broad in scope and for imposing unjustifiable limits on speech rights. On the other hand, liberal defenders of speech refer to traditional free speech defences, including the arguments from democracy, truth and autonomy, to argue for the protection of such speech.

My claim is that both these approaches leave significant explanatory gaps. Each approach relies on a relation of sorts between speech and action, but each fails to give an adequate account of the ways in which speech and actions are connected. Each account also fails to give an adequate account of the status of the speaker in determining what a speech act will or will not do, including whether it will or will not cause various harms. My aims are to redress these gaps in debates about the limits of free speech with reference to speech act theory as developed by J. L. Austin. I defend two central claims: first, not all instances of extreme speech will cause harm as state defences of regulation seem to suggest. Some will be relatively innocuous, even though they contribute little of value to public debate. Legal regulation may, however, be relevant in a limited number of cases. The criterion for assessment proposed here is based on the authority of the speaker and the circumstances in which the speech is uttered. Specifically, I argue that only speech that satisfies the criteria of verdictive and exercitive speech acts in J. L. Austin's sense (that is, the speaker has the relevant authority) should not be protected in cases where the speech acts take the form of extreme speech and advocate violence.

Speakers with the relevant authority are able to do more things with their words precisely because of their identity: their saying so can make it so. The speech acts of authoritative speakers can enact norms and impose significant obligations on others to do what they say. Speakers whose speech acts enact norms that allow or permit violence, or that impose on others obligations to participate in violence, even if only in tacit ways, can cause or constitute more harm than other speakers. For this reason, they should be held to different standards of accountability and may not enjoy free speech protection for their extreme speech acts. It is useful to distinguish here between forms of extreme speech that overtly advocate violence and forms of extreme speech that enact discriminatory norms. In the case of the former, legal sanctions may be appropriate in some cases. In the case of the latter, the argument presented here does not advocate censorship of those speakers. Censorship, in the strongest sense of the term, means that the speaker is not allowed to speak at all. On this account, speakers can still speak, but they may not talk for 'free'. There are costs to the speech, in the form of various social penalties. These social penalties function to restrain authoritative speakers in the appropriate way.

Secondly, I suggest that many of the arguments commonly used to allow for the protection of these 'extreme' types of speech – the argument from democracy, the harm argument, the argument from truth and the argument from autonomy – cannot do the work required of them. That is, they cannot be used to defend a broad free speech principle, one that protects the extreme speech at issue. If it is the case that free speech is to be valued for the collective and individual goods it is able to achieve – democratic self-governance, individual flourishing and the discovery of truth – then it follows that only speech that contributes to achieving these goods ought to be protected.

2. Sedition and the limits of free speech

Sedition is a type of hate speech. In fact, as Robert Post points out, it is the 'oldest and most venerable legal prohibition of hate …' (Post 2009: 124). Sedition is hate speech directed at the state or sovereign. It refers to the uttering or writing of words intended to bring the sovereign state into hatred or contempt, to urge disaffection against the Constitution or democratically elected government, or the attempt to procure change in government by unlawful means. Sedition has traditionally been justified on the grounds that a sovereign government has the right to resist both external and internal aggression, and to protect the citizens of the state from harm. More recently, the law of sedition has been 'modernised' for the counter-terrorism context. Modern sedition laws, such as those enacted in Australia and the United Kingdom, the United States and Israel, target types of speech advocating violence against the state, in the form of religious sermons preaching violent *jihad* or glorifying acts of terrorism, although they have the potential to cover much more than this.

The proliferation of 'extreme' speech advocating terrorism and violence and governmental responses to it renewed debate about the status of free speech and religious expression in a time of so-called terror. Should speech of this nature be 'contained' or is such speech a legitimate form of expression in democratic societies committed to protecting free speech?[6] Extreme speech has been defined as speech that passes beyond the limits of legitimate protest.[7] It includes speech that advocates violence as a way of achieving political objectives and hate speech against persons or groups.[8] Its legitimacy in a democratic society has been defended on several grounds.

First, extreme speech has been defended on the grounds of democracy. Speech is essential to the effective functioning of democracy because free communication enables citizens to criticise government decisions and policy. This ensures citizen participation in democratic deliberative processes and ensures that government officials are held to account; because it is often difficult to distinguish between extreme speech and criticism of government, 'containing' extreme speech may also have consequences for speakers who legitimately criticise government (Saul 2005; Barendt 2005). Moreover, given our commitment to deliberative processes, there may be an obligation to engage with speakers of extreme speech, particularly in cases where the speech has political content (Malik 2009). The argument from democracy thus defends the legitimacy of extreme speech in liberal, democratic societies on the grounds that some extreme speech is political in nature. Because it is often difficult, if not impossible, to draw the appropriate lines between political and non-political speech or between speech critical of government and incitement, it is better, all things considered, to not draw any lines at all.

Secondly, extreme speech has been defended on the basis of a distinction between speech and action and on a relation between speech and harm. This defence is in some respects derived from John Stuart Mill's *On Liberty*. While extreme speech can be offensive or express violent sentiments, it is often causally remote from the actual occurrence of violence and does not, therefore, cause harm. Speech of this nature is merely expressive of people's opinions or is generally theoretical and abstract in nature. It does not cause or constitute harm in the relevant way. In cases where a direct causal link between speech and violence can be established, in the forms of physical damage to persons or their property, the speech can be limited and the speaker responsible for the speech acts punished. Where no causal relation can be shown, the speech ought to be protected. Given the difficulties in establishing a causal relation between speech and the occurrence of violence, the harm argument is also usually used to defend a principle of maximum protection for all speech, including extreme speech.[9] The harm argument, similar to the argument from democracy, also requires minimal state or other forms of interference with speech.

The third argument, also derived from Mill, is the argument from truth. The argument from truth justifies the protection of speech on the grounds

that permitting the free rein of ideas will produce good social consequences in the long run, even though it may protect speech that produces bad consequences in the short term. Good social consequences include the discovery of truth, the promotion of rational decision-making and greater understanding of one another's worldviews. On this argument, there may be good reasons for tolerating the existence of extreme speech: it may enable us to change the minds of those speakers who hold extreme views, it may foster understanding between political adversaries or it may lead us to change our own practices in light of criticism.

Finally, the argument from autonomy has been used to defend a policy of permissiveness with respect to extreme speech. Autonomy in this context refers to an individual's ability to exercise independent rational judgment, to form beliefs and to weigh up various reasons for action. A free speech principle is thought to protect this deliberative process, and thus enable the autonomy of both the speaker and the intended audience.

Collectively, these four arguments have been referred to in one form or another in the literature on extreme speech and are commonly used to defend a principle of maximum protection for all speech. Critics of modern versions of sedition laws have commonly appealed to one or more of these arguments to demonstrate why extreme speech against the state ought to be tolerated.

There are two general and interrelated arguments used by states to justify sedition laws and the constraints they impose on freedom of speech. There is significant equivocation between these positions, which makes it unclear whether the problem with seditious libel is that it is dangerous in itself, or that it can lead to dangerous acts, or both. On one argument, words that advocate violence are dangerous in themselves, irrespective of whether any actual violence occurs. This argument is based on the idea that all speech is a type of action and that the expression of an opinion is the same as an intention to affect that opinion.[10] The second justification is that seditious words are likely to incite or provoke acts of violence and are thus necessary to protect the public interest. On this account, there is a causal connection between speech and action.

Laws regulating the advocacy or glorification of violence and terrorism were hastily enacted subsequent to the terror attacks in Madrid (2004) and London (2005). Western governments expressed alarm that those responsible for terrorist violence were born or raised in Europe and had recently been 'radicalised' and that this process of radicalisation was allegedly attributable to 'words'. Vulnerable and alienated young men were especially susceptible to terrorist groups and to environments where fundamentalism flourished.[11] By claiming that there was a causal relation between the speech acts and violent acts in question, governments were able to justify the legal regulation of speech with reference to the harm argument. The causal model relied on by governments was, however, simplistic. The nature of the causal relation between speech and acts remained unclear, as did the question of why certain

words could cause the harm they allegedly did. Part of the problem with the enacted legislation is that it treats all speech acts as somehow equivalent, irrespective of the identity of the speaker and the social, religious or political position he or she occupies. One of the consequences is that the legislation assumes – whether intentionally or not – that every terrorist tract or piece of propaganda, or every act of 'glorifying' violence, has the potential to cause various harms.

There may be some truth to this intuition and there is some empirical evidence to support such a claim; however, it is not just the content of the speech act that is doing the causal work here, although this is of course relevant.[12] Of greater relevance to establishing either a causal or constitutive relation between speech and the enactment of harm is the authority of the speaker and the context in which the words are uttered. Words that instruct, recommend or order the commission of violence, even in the abstract, can enact what Mary Kate McGowan (2005; 2009) has referred to as the 'permissibility conditions' for acts of violence, and can thus have tangible effects in the real world. This, however, is subject to the qualification that the words are spoken by the appropriate person in the right set of circumstances.

Both liberal defences of free speech rights and state defences of modern sedition laws thus leave three significant explanatory gaps. First, each approach fails to offer an explanation of how speech and action are connected. It is not obvious why certain words do or do not constitute certain acts, what these acts are and why they may or may not be harmful, such that the words should be prohibited. Secondly, neither approach takes seriously the causal circumstances or specific situational contexts that are essential for words to constitute certain acts. Thirdly, both approaches assume that all speech acts have the same status irrespective of who is speaking. Governments defending sedition laws seem to assume that all terrorist material will cause terrorism, while liberals tend to assume that all ideas compete equally in the so-called marketplace of ideas. Both approaches thus fail to give an adequate account of the relevance of the speaker and his or her institutional context in their assessments of what a speech act is capable of achieving. As such, liberal defences of free speech rights take too narrow an approach to the nature of seditious harm, thereby failing to capture speech acts that may directly or indirectly cause harm. Conversely, state defences of sedition laws are too broad in scope, thereby capturing too much, including the legitimate criticism of government.

I attempt to redress these analytical deficits in debates about sedition by providing an explanatory account of the relation between speech and action. In so doing, I employ speech act theory as developed by J. L. Austin and apply this to the task of developing a defence of freedom of speech as a qualified right. The specific focus will be on speech acts advocating violence against the state or advocating violence in order to achieve political objectives. This includes religious sermons preaching violent *jihad* or

glorifying acts of terrorism, given that modern sedition offences are targeted at this type of speech. This account also has implications for other forms of 'extreme' speech, including hate speech and pornography, where this is understood as speech.

On the basis of Austin's account of verdictive and exercitive speech acts, I argue that while all speech acts are 'conduct' in a narrow sense, not all of them have the power to produce effects. For a speech act to have an effect in the relevant way, two conditions need to be met: the speaker has to occupy a certain position of authority and the words uttered by that speaker have to occur in a particular context (which I will refer to as the 'enabling' context). This philosophical account will have legal consequences on how we classify speech acts deemed to be dangerous, or to cause harm. It also suggests that because speech can evoke or constitute action or conduct in certain circumstances, modern versions of sedition laws might in principle be defensible, although not in their current form.

On the basis of this account, I suggest that the harms caused or constituted by speech can be located in the authority of the speaker. My intuition is that it is one thing for a racist bigot to shout hate speech on a street corner, and another for a respected university academic to publish papers on the inferiority of some races. It is one thing for a talkback radio caller to say that some women who are raped 'ask for it' because of how they were dressed, and another thing for a religious cleric to express the same sentiment in the context of a sermon.[13] There is a difference between a group of people discussing the merits of engaging in violent *jihad* and a religious cleric extolling the virtues of such behaviour and either implicitly or explicitly condoning it.[14] While the words are morally problematic in both cases, they are more damaging in the case of authoritative speakers because of the social position they occupy and the kind of influence they have. In the case of an authoritative person, the words acquire a legitimacy they otherwise would not have had had they been uttered by someone else. Those in positions of authority are thus able to do more with their words, including causing or constituting various harms. It is these extremes between speakers' social position and the effects of the words that are often bypassed in debates about free speech. It is this point that I seek to explore in this book.

This argument does not discount the importance of free speech. Free speech is a fundamental individual and collective good. Freedom to express ourselves is integral to the formation of our individual autonomy, our capacity to form beliefs and to weigh up reasons for acting. It is also crucial to the development of individual critical and reasoning skills. Free speech is a collective good insofar as it enables us to participate in articulating the norms that are to govern us and insofar as it facilitates the discovery of the truth. It is primarily for these reasons that free speech is valued. However, it follows from this that only speech which contributes to achieving these individual and collective goods it to be protected. To this end, I defend the claim

that the arguments commonly used by defenders of free speech to justify a principle of maximum protection cannot do the work that is required of them; that is, they cannot be used to defend a principle of maximum protection, one that includes the protection of extreme speech. Moreover, I suggest that it is an error to suppose that free speech is always enhanced by maximum protection. The status of free speech in a society should not be measured by the degree to which the society tolerates or accepts extreme speech but by the degree to which the discourse contributes to achieving the collective and individual goods that free speech protection is supposed to achieve.[15] Devising a criterion for assessment on the grounds of whether the speech contributes to achieving certain goods is exceedingly difficult and there will always be hard or unanswerable cases. This book proposes a criterion based on whether the speech act creates a space for dialogue and the nature of the speaker's authority.

3. Structure and outline

In Chapter 1, I give a legislative and historical overview of sedition laws and the circumstances under which they have been invoked and enforced in order to highlight three conceptual problems that such laws can cause. The first is the conceptual problem of distinguishing between incitement to violence and criticism of government, also commonly referred to as the problem of 'line-drawing'. My analysis of the legislation and case law is intended to demonstrate some of the analytical deficits in legal reasoning with respect to this issue. The second and related conceptual problem concerns the relation between speech and action and the conditions under which a speech act will cause or constitute various acts of violence. I address both of these issues in some detail in the second, third and fourth chapters, so the discussion in this chapter is merely intended to highlight the way the in which this problem is addressed in law. The third conceptual problem is whether citizens can use the freedoms afforded by democracy – in this case, the freedom of speech – to undermine or overthrow democracy. Legislators, judges and commentators have grappled with these complex issues in ways that I hope to show have been unsatisfactory.

In Chapter 2, I examine the relation between free speech and democracy, as well as the contested question of whether this relation necessarily permits or excludes extreme speech. This question is commonly addressed in the literature with reference to 'line-drawing': determining whether an extreme speech act is included or excluded by a free speech principle grounded in an argument from democracy requires us to 'draw' lines between political and non-political speech, and to assess whether a speech act permitted under normal circumstances 'crossed the line' because the social or political circumstances had changed. I defend two claims in this chapter: first, that the argument from democracy cannot be used to defend a broad free speech principle, one that includes or permits extreme speech; secondly, I suggest

that line-drawing strategies may be based on a conceptual error: the error is to suppose that extreme speech and other forms of intense disagreement are similar in kind and only differ with respect to degree or intensity. I propose that one way out of this conceptual dilemma is to conceive of extreme speech and intense disagreement as fundamentally different kinds of speech acts that differ in their aims and method. I give an account of the ways in which they differ and apply this to some hard cases. The argument here is intended to offer a principled way of distinguishing between extreme speech and intense disagreement. I do not suggest that forms of extreme speech in general should be regulated or prohibited, even though they may not, in principle, be defended using the argument from democracy. I argue that legal regulation may be relevant in a limited number of cases; namely, where the extreme speech takes the form of an exercitive or verdictive speech act in Austin's sense.

Having made the distinction between extreme speech and disagreement, in Chapter 3 I focus on extreme speech that takes the form of a verdictive or exercitive speech act. Utilising J. L. Austin and John Searle's work in the philosophy of language, together with Rae Langton's account of authority, I suggest that extreme speech that is classified as verdictive and exercitive should be subject to some form of legal regulation. The account developed here focuses on what persons are able to achieve with their words because of the authoritative positions they occupy. Specifically, it focuses on the way some people are able to enact norms and impose obligations on others because of who they are: that is, their saying so makes it so. The argument here has a number of implications. First, it suggests that some speech acts can cause or constitute various harms by enacting the 'permissibility conditions' to violence. Secondly, it means that not all instances of extreme speech should be regulated. Thirdly, it suggests that because speech can evoke or constitute action or conduct in certain circumstances because it is spoken by the appropriate person, the legal regulation of extreme speech might be justifiable, although certainly not in its current form.

In Chapter 4, I draw together the account of authority examined in the previous chapter with an account of harm in order to develop a normative criterion with which to assess contested speech acts. I locate the harm caused or constituted by speech in the authority of the speaker. I apply these criteria to a number of difficult cases in order to demonstrate how it yields the right result.

In Chapters 5 and 6, I focus on the second aspect of my argument: that traditional free speech defences cannot do the work required of them or that they cannot be used to defend a broad free speech principle. In Chapter 5, I examine the marketplace metaphor and the concept of autonomy on which it depends, as it appears in defences of free speech more generally, and as it is used to argue against laws regulating extreme speech more specifically. A closer examination of the way in which this concept functions in free speech debates suggests that the concept of autonomy can only protect a narrow free speech principle, one that does not necessarily include the

seditious libel in question. Autonomy in this context refers to an individual's ability to exercise independent rational judgment, to form beliefs and to weigh up various reasons for action. A free speech principle is thought to protect this deliberative process and thus enable the autonomy of both the speaker and the audience. I argue, however, that the concept of autonomy as appealed to in these debates is only able to protect speech that communicates its message in such a way that the speech can be rationally evaluated by its hearers, and that the hearers employ their rational capacity to judge that the beliefs advocated are correct. A free speech principle so defined will exclude types of speech that fall short of rational persuasion, including political speech that relies on emotive language and rhetoric, such as the seditious libel in question. Once again, to qualify, I am not suggesting that speech acts that fall short of this standard for rational persuasion should be regulated. My argument is concerned with the question of whether these types of speech can be defended on autonomy-based grounds.

I also suggest that much of the legal argument against the regulation of this type of speech has not been adequately informed by recent research in political philosophy, cognitive science and social psychology. I suggest that the legal debate about these issues has a mistaken view of belief formation and its associated psychology. In Chapter 6, I draw on recent work in the cognitive sciences on imitation and mental contamination to argue for the claim that our deliberative capacities may not provide us with immunity from the harmful effects of speech, irrespective of how the speech is communicated (ie, rationally or non-rationally). The empirical evidence indicates that we are especially prone to accepting as true the things we see and hear, and that we do not always rationally engage with what we hear. This means that it is not necessarily true that being exposed to more or 'better' arguments will enable us to come to the right decision or will lead us to change our erroneous views. If this is the case, then maybe our arguments in defence of free speech ought to be different from what they are now.

In the final chapter, I explore some policy implications for this argument. I suggest that while law may be relevant in a limited number of cases, there may be other non-legal avenues for regulating extreme speech. There may be an important role for various institutions, including educational institutions, religious institutions, political and media institutions to play in the regulation of extreme speech, particularly when an authoritative person who represents a particular institution is the author of extreme speech. This chapter examines the various responsibilities and obligations of such institutions.

Notes

1 Herszenhorn, D. M. (2011) 'After attack, focus in Washington on civility and security', *New York Times* (9 January 2011).

2 Mannion, J. (2011) 'Arizona shooting spotlights "toxic" political climate', ABS/CBN News.com posted on 1 October 2011.

3 Palin, S. (2011) 'America's Enduring Strength' posted on Wednesday 12 January 2011 at 3:52 am available at http://www.facebook.com/note.php?note_id=487510653434 (last accessed 21 February 2011).
4 Speech here is understood broadly to include any medium used to convey or communicate a message, political or otherwise. It includes the spoken or written word, artistic expression, lyrics, signs, banners, political propaganda, protest marches and demonstrations.
5 The discussion here only refers to reasonably functioning liberal democratic jurisdictions. My argument does not apply to dictatorships or states that purport to be democratic in name, but which are not in function. In these cases, it may be justifiable to advocate violence as a way of achieving political objectives as no other channels are available.
6 The term 'containment' is taken from John Rawls. See Rawls, J. (1996) *Political Liberalism*, New York: Columbia University Press at 64 n 19.
7 Weinstein, J., Hare, I. (2009) 'General introduction: Free speech, democracy, and the suppression of extreme speech past and present', in J. Weinstein and I. Hare (eds) *Extreme Speech and Democracy*, Oxford: Oxford University Press at 1.
8 Hate speech has been defined in various ways. Susan Brison, for example, defines it as: 'Speech that vilifies individuals or groups on the basis of such characteristics as race, sex, ethnicity, religion, and sexual orientation and that (1) directly assaults its target(s), (2) creates a hostile environment, or (3) is a kind of group libel' (Brison 2000: 281).
9 Ronald Dworkin is representative of this view. See Dworkin, R. (1977) *Taking Rights Seriously*, Duckworthsat 198.
10 This argument was used by Latham CJ in the case of *R v Sharkey* (1949) 79 CLR 121. See also Holmes and Brandeis JJ's comments in *Gitlow v New York*, 268 U.S. 652 (1925) that 'Every idea is an incitement. It offers itself for belief, and if believed, it is acted on unless some other belief outweighs it … the only difference between the expression of an opinion and incitement in the narrower sense is the speaker's enthusiasm for the result' (at 673). For an analysis of this position, see Maher, L. W. 'Every Idea is an Incitement', *Dissent*, Autumn/Winter 2006.
11 See for example the debate in the UK Parliament, Hansard HC Vol. 438 Col. 325 (26 October 2005).
12 This empirical evidence will be examined in Chapter 6.
13 See Kerbaj, R. (2006) 'Muslim leader blames women for sex attacks', *The Australian* (26 October 2006).
14 See Ross, N. (2008) 'Leader Benbrika no terrorist, Melbourne court told', *Herald Sun* (27 February 2008).
15 See Sorial, S., Mackenzie, C. (forthcoming) 'The limits to free speech: The advocacy of violence', *Critical Horizons.*

1 Modern 'sedition' law and the 'glorification' of terrorism

A legislative overview

Sedition traditionally refers to the uttering or writing of words intended to bring the sovereign state into hatred or contempt, to urge disaffection against the Constitution or democratically elected government, or the attempt to procure change in government by unlawful means. Sedition has traditionally been justified on the grounds that a sovereign government has the right to resist both external and internal aggression, and to protect the citizens of the state from harm. This classic definition of sedition is based on a traditional view of the relationship between the state and its citizens. According to Eric Barendt, on this view, governments and public institutions are not considered to be answerable or responsible to the people, but are entitled to the respect of their subjects in the same way monarchs were entitled to respect by virtue of the Divine Right of Kings (Barendt 2007: 163). The state could tolerate suggestions about how it could be improved, but it could not tolerate open or vehement attack (Barendt 2007: 163). Sedition laws were frequently used to suppress unpopular political views in England during the 18th and early 19th centuries and in Australia in the 19th century and well into the 20th century.[1] In the United States, prosecutions for seditious libel were frequent, particularly during times of war and in spite of first amendment free speech protection.[2] While sedition laws were liberalised during the 20th century across all jurisdictions, and a common law distinction was made between incitement to violence and the expression of criticism, sedition laws continued to be used to prosecute people for expressing unpopular political opinions.

Sedition has thus always been an essentially political crime and, according to Roger Douglas, has been used throughout history to 'punish people for what they think (or what they are thought to think) rather than on the basis of the degree to which their activities actually pose a threat to the social order (however defined)' (Douglas 2005: 247–8). During the 20th century, sedition laws were mostly used to curb the spread of international communism.[3] The rationale for these prosecutions was based on the belief that any advocacy of communist ideas and opinions was inherently dangerous and constituted incitement to overthrow the existing social order. With the exception of the indictment and conviction of Sheikh Omar Abdel Rahman in the

United States for violation of the seditious conspiracy statute in 1994 and the conviction in 1995 of Rabbi Ido Elba in Israel for the publication of a pamphlet advocating violence (among other things), the offence of seditious libel has for some time been considered to be incompatible with liberal free speech principles and has rarely been used since the Cold War years.

This led various law reform bodies to recommend that 'there is no need for an offence of sedition in the criminal code because the conduct it seeks to capture would be caught under the ordinary offences of "incitement or conspiracy to commit" the relevant offence'. The UK Law Commission found that: 'it is better in principle to rely on these ordinary statutory and common law offences than to have resort to an offence which has the implication that the conduct in question is "political"'.[4] Similarly, in its review of current sedition laws in Australia, the Australian Law Reform Commission (ALRC) recommended discarding the offence of sedition from the federal statute book because of its historical taint. It recommended retaining federal security and public order offences and the urging of inter-group violence in its place. Reviews of criminal law in Canada and New Zealand omitted sedition offences altogether (Gibbs, Watson and Menzies 1991).

Despite these recommendations by law reform bodies, interest in sedition as a category of offence was renewed in light of the so-called 'war on terror', and various laws were enacted to prohibit seditious libel across common law jurisdictions. Sedition laws in their modern form appear to be aimed at those who incite or encourage the commission of terrorist acts, or those who 'glorify' the perpetrators of these acts, or who condone acts of martyrdom in the form of suicide bombings or violent *jihad*. They also target the provocative and inflammatory propaganda used by terrorist and religious groups to disseminate their ideas and beliefs.[5] Take for example the then Liberal Government in Australia's claim that in the counter-terrorism context, 'sedition was just as relevant as it ever was', in particular, to 'address problems with those who communicate inciting messages directed against other groups within our community, including against Australia's forces overseas and in support of Australia's enemies'.[6] Similarly, the UK Government argued that new offences relating to the encouragement of terrorism were necessary 'to deal with those who … contribute to the creation of a climate in which impressionable people might believe that terrorism was acceptable'.[7] Although these laws were not categorised as sedition offences, they have similar aims and objectives to traditional sedition laws. Many of the speech acts condoning or glorifying acts of violence could be classed as seditious in nature, even though they are not referred to as such in jurisdictions such as the United Kingdom, because they incite violence or hostility against the state, its institutions and the rule of law and because they often advocate the overthrow of democratically elected government. In any case, the regulation represents an attempt to regulate forms of 'extreme speech' directed at the state.

The first section of this chapter demonstrates the controversial nature of sedition laws. Sedition laws are inherently controversial because they have always been enacted and enforced during periods of national crises and, more often than not, have been used in an opportunistic way to stifle political dissent. I draw on a number of cases from the US, Israel and Australia to support this claim. The examination of the case law in this section is by no means comprehensive or exhaustive. The cases selected are intended to demonstrate the political and, thus, the controversial aspect of these laws and to highlight the conceptual points at issue. They also give some insight into why criticism of modern sedition laws was so intense: given the way governments have enforced such laws in the past, there are good reasons to be wary of attempts to revive or modernise this particular offence. In the second section, I examine the legislative changes to sedition laws in Australia and the 'glorification' of terrorism laws enacted in the United Kingdom with a view to highlighting the way such laws have been tailored to the 'counter-terrorism' context.

In the final section, I examine the three conceptual issues that these laws raise. The first is the conceptual problem of distinguishing between incitement to violence and criticism of government, also commonly referred to as the problem of 'line-drawing'. The second problem concerns the relation between speech and action, and the conditions under which a speech act will cause or constitute various acts of violence. The third problem is whether citizens can use the freedoms afforded by democracy – in this case, the freedom of speech – to undermine or overthrow democracy.

1.1 Sedition and 'pathological' times: war, communism and political assassination

My analysis in this section takes its cue from Vincent Blasi's account of national 'pathologies'. Blasi's arguments are framed in terms of First Amendment jurisprudence, but the analysis is instructive for any democratic state that purports to value free expression. Blasi argues that the US Supreme Court should adopt what he calls the 'pathological perspective' when adjudicating First Amendment disputes and reformulating First Amendment doctrines. By this, he means that the fundamental objective of the court should be to interpret the First Amendment in such a way that does maximum service to speech protections during those historical periods when intolerance of unorthodox ideas is most prevalent and when governments are able and likely to stifle dissent and unpopular opinions by playing on people's fears. Free speech jurisprudence should thus be designed and targeted with the worst of times in mind. The underlying rationale of this thesis is that certain periods of time are of special significance for the preservation of the basic liberties of expression and inquiry because the most serious threats to those liberties tend to occur in abnormal periods or during 'pathological' times.