

The Cost of Free Speech

The laws abridging freedom of expression

Freedom of opinion and expression are fundamental human rights set out in Article 19 of the Universal Declaration of Human Rights. The principle of free speech maintains that the right to publicly and peaceably seek, receive and impart information and ideas of all kinds, by any means possible, verbally or symbolically, should not be inhibited. Freedom of speech serves as the vanguard of a free society, in which commoners may partake in decision-making processes of the state by petitioning their elected officials. As sacrosanct a right free speech is, the consensus among representative democracies is that unfettered freedom of expression goes counter to protecting the public interest, as such practice comes not without constraints and caveats, duties and responsibilities. Democratic governments are duty bound to guard against hate speech and incitement, uphold law and order, maintain the peace and act in good faith for the preservation of national security, albeit under certain conditions. Those imposing the restrictions must be able to demonstrate the necessity and they must be proportionate and balanced; and safeguards must be in place to stop any abuse of power with a proper appeals process.

On the 21st of January, 2011, Congressman Thomas Rooney introduced a contentious bill [“H.R. 347”] to the House of Representatives, which was subsequently sponsored by Senator Richard Blumenthal for additional debate in the Senate. In February 2012, H.R. 347 passed both houses, and was signed into law by President Barack Obama as the Federal Restricted Buildings and Grounds Improvement Act, which can be found under the U.S. Code: Title 18 – CRIMES AND CRIMINAL PROCEDURE. H.R. 347 did not culminate into a new law, but, it updated an existing law, originally enacted in 1971, which restricted access to areas around the president, the vice-president, or any individuals protected by the Secret Service. The updated version added to the old law “the White House or its grounds, or Vice President’s official residence or its grounds” to a list of restricted areas and altered the federal jurisdiction as regards the mens rea. The old law made it an offence to “wilfully and knowingly” enter restricted buildings or grounds. The updated version only specifies that one must “knowingly” enter such a space to be in violation of the law. The subtle differences separating “wilfully” from “knowingly” were set out in the 1998 Supreme Court decision *Bryan v. United States*, which held that acting wilfully is to know that one’s conduct is unlawful, whereas the mental state of acting knowingly requires only that one is aware of the factual events which led to the crime. Opinions vary as to the impact of these changes to the old law. Those critical of the changes who will have studied, scrutinized and dissected the new format brought forth by H.R. 347 summarized that, with the government lowering the intent requirement in terms of proving a guilty state of mind as regards the actus reus, the effect of discarding the “wilfully” criterion has tipped the scales to the advantage of the prosecutor, and it gives law enforcement (i.e. the police) more discretion when enforcing the law; and it opens the statute to misuse or overuse by the Secret Service. The necessity of the law, too, is put into question when considering that a provision in the District of Columbia Code addressing minor misdemeanour infractions for anyone attempting to trespass, or otherwise succeeding in trespassing, upon the grounds of the White House, or the Vice President’s residence, already exists in parallel with the law. The controversial portions of the law are detailed under subsections (b) and (c), listing the penalties imposed under various conditions, and, the parameters of the restrictions.

Under subsection (b)(1), any individual found trespassing whilst carrying a dangerous weapon or firearms risks up to 10 years imprisonment. It is not unlawful for people to carry weapons, as that right is granted by the 2nd Amendment to the U.S. Constitution. Subsection (c)(1) defines the term “restricted buildings or grounds” as any building or grounds where the president or other person protected by the Secret Service is or will be temporarily visiting; or, a building or grounds so restricted in conjunction with an event designated as a special event of national significance...and the law concludes in defining the term “other person protected by the Secret Service” to mean any person whom the United States Secret Service is authorized to protect under section 3056 of Title 18 or by Presidential memorandum, subject to such person desiring the privilege. Proponents of the law seeking to allay accusations of curtailing freedom of expression outline that the intention of the law is that it applies to cordoned off areas, or where a restriction is posted and where the general public has been cleared from. Opponents of the law evoke objections on moral and constitutional grounds in their arguments that no society is truly free if it cannot peaceably assemble and petition its government for a redress of grievances, mandated as per the 1st Amendment to the U.S. Constitution. The Federal Restricted Buildings and Grounds Improvement Act is online [see link:]. <https://www.law.cornell.edu/uscode/text/18/1752>

Bills enacted by Congress from the District of Columbia have powers of enforcement throughout the United States, whereas those emanating from U.S. states are binding in their jurisdiction only. The state of South Dakota passed Senate Bill S.R. 176 in 2017, which enables officials to prohibit protests of more than 20 people on public lands in certain circumstances and expands the crime of trespass; empowers the Department of Transportation to prohibit protesters from stopping on the highways; and criminalizes protests by individuals who impede traffic by standing on the highways [see link:]. <http://sdlegislature.gov/docs/legsession/2017/Bills/SB176ENR.pdf>

The state of North Dakota passed House Bill H.B. 1293 in 2017, which criminalises a trespasser, de facto, from protesting on private property. In addition, this law creates a civil trespass offence, empowering law enforcement officers with the option to issue a citation and a fine of \$250 for each violation [see link:]. <https://www.legis.nd.gov/assembly/65-2017/documents/17-0650-04000.pdf>

The state of Oklahoma passed House Bills H.B. 1123 and H.B. 2128 in 2017, which criminalise protesters who wilfully trespass on “critical infrastructure”, with enhanced penalties for those whose actions harm the infrastructure’s operations, including fines amounting up to one million dollars imposed on any conspirator involved [see links:]. <https://legiscan.com/OK/text/HB1123/id/1603494/Oklahoma-2017-HB1123-Enrolled.pdf>
http://webserver1.lsb.state.ok.us/cf_pdf/2017-18%20ENR/hB/HB2128%20ENR.pdf

In the United Kingdom, under section 5 of the Public Order Act, a person is guilty of an offence for using threatening or abusive words or behaviour, or for displaying any writing, sign or other visible representation otherwise perceived as threatening within the hearing or sight of a person likely to be caused harassment, alarm or distress. The offence is valid whether or not a person is caused, at all, harassment, alarm or distress, since only a bystander must be present, within the scope of the misdemeanour, for this offence to have validity. The previous version of section 5, up until 2013, consisted of “abusive or insulting words or behaviour” with the words “or insulting” dropped from the updated statute following a high-profile campaign to reform the act [see link:]. <https://www.legislation.gov.uk/ukpga/1986/64/section/5>

The consequences of enacting laws, rules and regulations at odds with public opinion, to a point that no reasoning can placate those on the receiving end, are that the options left on the table are activism, nonconformity and civil disobedience. Mahatma Gandhi in India was one such activist, who rightfully campaigned for independence from the British Empire; just as Nelson Mandela was in South Africa, who fought against racist apartheid rule. The Suffragette movement in the United Kingdom, once perceived as a terrorist organisation for deploying such things as letter bombs, improvised explosive devices, and the like, fought for the right to vote under the banner "Votes for Women" and for the advancement of gender equality; and are regarded in our time as dissenting heroines setting an example of nonconformity in the face of institutionalised injustice. Martin Luther King Jr., who played a key role in the American civil rights movement until his assassination, regarded civil disobedience as a practice of reverence for law:

“...I submit that an individual who breaks a law that conscience tells him is unjust, and who willingly accepts the penalty of imprisonment in order to arouse the conscience of the community over its injustice, is in reality expressing the highest respect for law.”

~ Martin Luther King Jr.