

Forbes

Free Speech Under Siege In America

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There used to be a strong consensus in America that people were entitled to speak their minds. That was not just because the First Amendment stated that government was not permitted to punish people for arguing their beliefs or to censor their writings if they disturbed those in power.

Most Americans thought that free speech was one of the “blessings of liberty” that made our nation exceptional. Sure, many people would say and write terribly mistaken or dangerous things, but it was vastly better to *argue* with them than to try *silencing* them.

Sadly, that *laissez-faire* approach to speech is rapidly eroding.

One reason is that the values of free speech and debate are not taught in our schools the way they once were. In fact, students in American high schools often hear the opposite from their teachers. As Greg Lukianoff, president of the Foundation of Individual Rights in Education (FIRE) writes in his recent book *Unlearning Liberty*, “A shameful level of civics knowledge, in combination with the miserable state of student rights in K-12, leaves students uninformed about the importance of free speech and distressingly comfortable with censorship.”

A second reason why free speech is under siege is that the forces of political authoritarianism have discovered that they can use power to silence their opponents – and get away with it. Even if they don’t succeed in preventing opponents from making their arguments, they see no reason not to try because so few Americans still hold the principles of free speech dear.

We have seen this anti-speech mindset at work on our college campuses, where student groups, sometimes aided and abetted by faculty members, have repeatedly worked to keep speakers off campus because their views are ones they disagree with. One example of many is the pressure that led to Brandeis officials “disinviting” Ayaan Hirsi Ali from speaking because her comments about Islam would probably hurt some students’ feelings. (See my article [here](#) for more details.)

Arguably the most blatant manifestation of the new hostility to free speech is seen in the demands by some politicians that individuals and groups that dissent from the orthodoxy that

climate change is a grave threat calling for immediate governmental action *should be charged with a crime*. In a Washington Post piece last summer, Rhode Island Senator Sheldon Whitehouse advocated that the U.S. Department of Justice institute a RICO (Racketeer Influenced Corrupt Organization) suit against the oil and gas industries.

Whether such litigation is ever brought or not, the threat of having to battle the endless resources of the federal government if an industry makes statements that politicians declare to be “misleading” is enough to exert a chilling effect on the discussion of public issues. And as legal analyst Walter Olson writes on his Overlawyered site, “It had been widely imagined that the First Amendment might deter image-conscious officials from pursuing such attacks on their adversaries’ speech. But it has not deterred Sen. Whitehouse.”

Criminalizing policy differences is what you expect in third-world dictatorships, not in the United States – but that is ominously changing.

Some recent attacks on free speech are particularly noteworthy because they come from the very officials who are supposed to work to uphold the Constitution.

Back in July, Mark Iannicelli was arrested in Denver, charged with seven counts of jury tampering. Jury tampering is indeed a serious felony – attempting to compel a juror to decide a case the way the tamperor wants it decided. Usually, that involves bribes or threats.

But what Iannicelli had done was merely to hand out pamphlets near the courthouse. His pamphlets contained information about “jury nullification,” which is a decision by the jury not to convict the defendant because they think the law itself is wrong. In other words, Iannicelli was using his freedom of speech to say to anyone who read his pamphlet (including people who might enter the jury pool) that jurors should be able to decide a case based on their own beliefs.

The Denver DA did not like what Iannicelli was saying and thus had him arrested and hit with criminal charges. Cato Institute legal expert Tim Lynch accurately calls this “just a thuggish attempt to intimidate people from exercising their right to talk about jury nullification.”

Naturally, prosecutors would rather that jurors just obey their instructions to decide the case based solely on the facts, but that desire cannot override the First Amendment’s protection against officials using their power to abridge the freedom of speech.

Incidentally, an elegant case for jury nullification (or perhaps a better term is “jury independence”) has been set forth by attorney Clay Conrad in his book Jury Nullification. Conrad’s book was praised by Georgetown University law professor Randy Barnett, who said, “Jury independence in criminal cases was long considered one of the palladiums of individual liberty against repressive and unjust legislation until 19th century judges usurped the right of juries to pass upon the justice of the law as well as upon the facts.”

Agree with that or not, Iannicelli should have as much right to hand out pamphlets about jury nullification as Conrad has to publish a book about it.

Another case like that one arose more recently in Big Rapids, Michigan. Keith Eric Wood has been hit with felony jury tampering charges, again merely for having handed out leaflets on the sidewalk near a courthouse. In this instance, it is the judge who instigated the legal proceedings against a citizen who was speaking his mind. First Amendment legal scholar Eugene Volokh, a professor of law at UCLA, notes that the law protects such speech, writing, “City sidewalks, including outside a courthouse, are a traditional public forum in which First Amendment rights are at their strongest.”

The freedom to speak and write is central to all other freedoms. Americans had better start pushing back against those among us who believe not in free speech, but controlled speech – controlled by them, of course.