

# 24.150 Liberalism, Toleration, and Freedom of Speech, Fall 2023

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## chapter 7

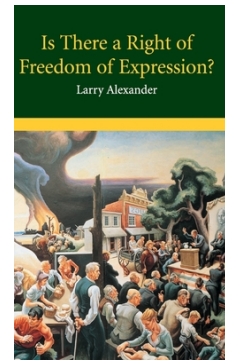
### I. Consequentialist Theories of Freedom of Expression

One family of theories attempts to justify a right of freedom of expression by pointing to various good consequences that such a right will bring about. The most often invoked good consequences of this sort that freedom of expression is supposed to produce are truth, autonomy, and virtue. I take up these three consequentialist goods in turn.

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today



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## Democratic Paradox?

The democratic argument for freedom of expression leads to a paradox. ... freedom of expression is thought to oppose and trump democratic decisionmaking, at least when that decisionmaking produces laws that infringe on freedom of expression. Therefore, the value of democratic decisionmaking will appear on both sides of the issue whenever a democratically enacted law is claimed to infringe the right of freedom of expression. On the one hand, that value is on the side of striking down the law because freedom of expression is the corollary of democracy. On the other hand, that value is also on the side of upholding the law, which presumably represents the democratic will. In a democracy, striking down democratically enacted laws in the name of democracy – which is how the democratic argument portrays the right of freedom of expression – is surely paradoxical.

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## Public Discourse Theory

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According to this theory, the democratic will is legitimate only if it reflects 'public opinion.' And the latter is a legitimate basis for the democratic will only if it is formed under conditions of freedom. This does not mean, however, that all expression must remain unregulated. Rather, what is necessary is that expression that is part of public discourse – the exchange of ideas that forms public opinion – be left free of Track One censorship and be regulated on Track Two only if adequate alternative channels of communication are available.

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Track One: regulation because the message is false, defamatory, incitement, hate speech, etc.  
Track Two: regulation that is indifferent to the message, e.g. time/place/manner restrictions

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The final theory of freedom of expression that I shall take up can be dealt with in short order. That theory derives the right of freedom of expression from the premise that government cannot be trusted to regulate expression, either because it is unduly error-prone in assessing expression's harms and benefits, or because it has motives for regulating – notably, self-protection – that render it untrustworthy in doing so.

The premise that government is unduly error-prone in regulating expression appears to be an empirical rather than a conceptual one. One might imagine then that governments vary, perhaps considerably, with respect to their capacities to regulate expression well. If so, then the premise seems inadequate to support a general human right of freedom of expression.

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2. Public Discourse Theory argues: 'The democratic will is legitimate only if it reflects public opinion. And the latter is a legitimate basis for the democratic will only if it is formed under conditions of freedom.' Alexander objects to the 'arbitrariness in specifying what lies within and without public discourse.' Do you agree? Can you think of a non-arbitrary place to draw the line?

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3. The final theory discussed 'derives the right of freedom of expression from the premise that government cannot be trusted to regulate expression.' Alexander asserts that the government is no more untrustworthy when regulating speech than when regulating anything else. Do you agree? Why or why not?

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## 'Reprehensible' anti-Israel protestors chant 'gas the Jews' outside Sydney Opera House: video

By Olivia Land  
Published Oct. 10, 2023, 10:08 a.m. ET



Land, Olivia. From "'Reprehensible' anti-Israel protestors chant 'Gas the Jews' outside Sydney Opera House: video," *New York Post*, October 10, 2023. © NYP Holdings, Inc. All rights reserved. This content is excluded from our Creative Commons license. For more information, see <https://ocw.mit.edu/help/faq-fair-use/>.

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**Lawrence H. Summers**  
@LHSummers  
Charles W. Eliot University Professor and President Emeritus at Harvard.  
Secretary of the Treasury for President Clinton and Director of NEC for President Obama  
Cambridge, MA [larrysummers.com](http://larrysummers.com) Joined January 2011  
693 Following 301.5K Followers

**Lawrence H. Summers** @LHSummers  
In nearly 50 years of @Harvard affiliation, I have never been as disillusioned and alienated as I am today.  
12:40 PM · 10/9/23  
6,596 Retweets 1,294 Quote Tweets 51.5K Likes

**Lawrence H. Summers** @LHSummers · 22h  
Instead, Harvard is being defined by the morally unconscionable statement apparently coming from two dozen student groups blaming all the violence on Israel. I am sickened. I cannot fathom the Administration's failure to disassociate the University and condemn this statement.  
242 1,125 10.4K

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what do you think?

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## Video transcript: Our community and the violence in Israel and Gaza

October 10, 2023

MIT must continue to be a place where "we cherish free expression, debate and dialogue in pursuit of truth." But antisemitism and anti-Arab and anti-Muslim hatred are corrosive, and they're poisonous to our community. We all fear that the violence in Israel and Gaza will intensify; together, we must ensure that the rhetoric on our own campus does not escalate to the point of personal attacks, harassment or violence.

From "Video transcript: Our community and the violence in Israel and Gaza." MIT Office of the President. October 10, 2023. © Massachusetts Institute of Technology. All rights reserved. This content is excluded from our Creative Commons license. For more information, see <https://ocw.mit.edu/help/faq-fair-use/>.

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## At Harvard, a Battle Over What Should Be Said About the Hamas Attacks

After a student group blamed Israel for the violence, Lawrence Summers, a former university president, condemned the leadership for not speaking up.

By Anemona Hartocollis, Stephanie Saul and Vimal Patel  
Published Oct. 10, 2023 Updated Oct. 11, 2023, 4:49 a.m. ET

Within a few days of the George Floyd killing and Russia's war against Ukraine, Harvard and other universities issued statements, claiming solidarity with the victims. Immediately after the Hamas attacks in Israel — in which assailants killed women and children — Harvard was quiet even as criticism mounted over an open letter from a student coalition.

The letter, from Harvard Palestine Solidarity Groups, said it held “the Israeli regime entirely responsible for all unfolding violence.”

The backlash to that letter turned Harvard's silence into a roar.

On Monday night, and again with more force on Tuesday, Harvard spoke. Its president, Claudine Gay, issued two statements, ultimately condemning “the terrorist atrocities perpetrated by Hamas” as “abhorrent.” A spokesman said Dr. Gay was not available for comment.

But Dr. Summers's pointed criticism raised questions about the obligation of universities to weigh in on difficult political matters.

A famous 1967 declaration by the University of Chicago called for institutions to remain neutral on political and social matters, saying a university “is the home and sponsor of critics; it is not itself the critic.” But students over the years have frequently and successfully pressed their administrations to take positions on matters like police brutality, global warming and war.

Hartocollis, Anemona, Stephanie Saul, and Vimal Patel. From “At Harvard, a Battle Over What Should Be Said About the Hamas Attacks,” *New York Times*, October 10, 2023. © The New York Times Company. All rights reserved. This content is excluded from our Creative Commons license. For more information, see <https://ocw.mit.edu/help/faq-fair-use/>.

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[Link to the letter: <https://bit.ly/harvard-against-terrorism> ]

We are faculty at Harvard who are deeply concerned about the events in the Middle East, as well as the safety of our students here on campus. On October 7th, Hamas launched a premeditated attack on the Israeli population. Hundreds of terrorists infiltrated Israeli towns and houses. Children were killed in front of their parents; entire families were executed. Grandmothers, mothers, and their babies were kidnapped. All in all, more than 900 Israelis were killed in a single day and the death toll is continuing to grow. There have also been deaths on the Palestinian side, including hundreds of terrorists and, tragically, civilians as well.

are simply wrong. However, the statement by Harvard's administration fell short of this goal. While justly denouncing Hamas, it still contributed to the false equivalency between attacks on noncombatants and self-defense against those atrocities. Furthermore, the statement failed to condemn the justifications for violence that come from our own campus, nor to make it clear to the world that the statement endorsed by these organizations does not represent the values of the Harvard community. How can Jewish and Israeli students feel safe on a campus in which it is considered acceptable to justify and even celebrate the deaths of Jewish children and families?

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## War in the Middle East

A Statement from President Claudine Gay  
October 10, 2023

As the events of recent days continue to reverberate, let there be no doubt that I condemn the terrorist atrocities perpetrated by Hamas. Such inhumanity is abhorrent, whatever one's individual views of the origins of longstanding conflicts in the region.

Let me also state, on this matter as on others, that while our students have the right to speak for themselves, no student group — not even 30 student groups — speaks for Harvard University or its leadership.

We will all be well served in such a difficult moment by rhetoric that aims to illuminate and not inflame. And I appeal to all of us in this community of learning to keep this in mind as our conversations continue.

Claudine Gay  
President, Harvard University

Gay, Claudine. From "War in the Middle East." October 12, 2023. © The President and Fellows of Harvard College. All rights reserved. This content is excluded from our Creative Commons license. For more information, see <https://ocw.mit.edu/help/faq-fair-use/>.

## President Pollack issues follow-up to Israel message

October 10, 2023

President Martha E. Pollack issued the following statement October 10:

Dear Cornell Community,

Earlier today, I wrote to you with the goal of providing information about the efforts that we have made over the last few days to reach out to and support our faculty, students and staff who have been impacted by the devastation in Israel, and to acknowledge the impact that this and other recent tragedies have had on members of our campus community.

In the hours since, I have heard from a number of you who expressed dismay that I failed to say that the atrocities committed by Hamas this past weekend were acts of terrorism, which I condemn in the strongest possible terms.

I offer my heartfelt apologies for the omission from my previous message.

Sincerely,

Martha E. Pollack  
President

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## What do laws against hate speech look like?

By 'hate speech regulation,' I mean regulation of the sort that can be found in Canada, Denmark, Germany, New Zealand, and the United Kingdom, prohibiting public statements that incite 'hatred against any identifiable group where such incitement is likely to lead to a breach of the peace' (Canada)...\*

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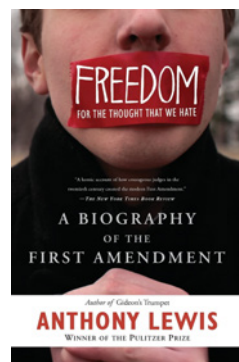
\*All text from Waldron unless otherwise indicated

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...or statements 'by which a group of people are threatened, derided or degraded because of their race, colour of skin, national or ethnic background' (Denmark); or attacks on 'the human dignity of others by insulting, maliciously maligning or defaming segments of the population' (Germany); or 'threatening, abusive, or insulting . . . words likely to excite hostility against or bring into contempt any group of persons . . . on the ground of the colour, race, or ethnic or national or ethnic origins of that group of persons' (New Zealand); or the use of 'threatening, abusive or insulting words or behaviour,' when these are intended 'to stir up racial hatred,' or when 'having regard to all the circumstances racial hatred is likely to be stirred up thereby' (United Kingdom)

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Lewis, Anthony. *Freedom for the Thought That We Hate: A Biography of the First Amendment*. Basic Books, 2010. © Basic Books. All rights reserved. This content is excluded from our Creative Commons license. For more information, see <https://ocw.mit.edu/help/faq-fair-use/>.

In *Freedom for the Thought That We Hate*, Lewis said that '[o]ne of the arguments for allowing hateful speech is that it makes the rest of us aware of terrible beliefs'—the depth and intensity of racist beliefs, for example—and strengthens our resolve to combat them.' He continued: 'This argument was rudely countered by Jeremy Waldron, an Englishman who emigrated to teach law in the United States.'

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With this provocation, I thought it appropriate to write a mildly critical review of Lewis's book in the *New York Review of Books*. I focused my critical comments on this issue of racist speech, expressing some misgivings about the arguments commonly used by Mr. Lewis and others in America to condemn what we call hate speech regulation....

...it wasn't clear to me that the Europeans and the New Zealanders were mistaken in their conviction that a liberal democracy must take affirmative responsibility for protecting the atmosphere of mutual respect against certain forms of vicious attack.

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My purpose in putting all this in front of you is not to persuade you of the wisdom and legitimacy of hate speech laws. ... Still less is it my aim to make a case for the constitutional acceptability of these laws in the United States. ... The point is not to condemn or reinterpret the U.S. constitutional provisions, but to consider whether American free-speech jurisprudence has really come to terms with the best that can be said for hate speech regulations. Often, in the American debate, the philosophical arguments about hate speech are knee-jerk, impulsive, and thoughtless. ... they address the case for hate speech legislation as though it consisted of certain do-gooders' disliking speech of a certain kind (speech that expresses 'thought that we hate') and trying to write their likes and dislikes into law.

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One obvious point is that many countries see these laws not as violations of rights but as something which may be permitted or even required in a human-rights context. For one thing, their constitutions acknowledge that basic rights, including freedom of expression, are legitimately subject to restriction. The Canadian Charter and the South African Constitution say this of all the rights and freedoms set out in the Charter: they may be subject 'to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.' Prohibitions on hate speech are seen as satisfying that provision.

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not directed at citizens

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In keeping with my emphasis on group libel, the approach I take will focus on the visual aspect of a society contaminated by posters or publications that deprecate the dignity and basic citizenship of a certain class of people in society.

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### What is a well-ordered society?

Q1: On Waldron's view, what is it that people in a well-ordered society need assurance of, and from whom do they need it?

But first...

The idea of a well-ordered society is the idea of a society being fully and effectively governed by a conception of justice....discussion of a society with sufficient rancor and division to generate hate speech cannot be discussion of a well-ordered society ..., since both the hatred this speech expresses and the hatred it is calculated to drum up are incompatible with the attitudes whose prevalence among the citizenry—indeed, whose universal adoption—is supposedly definitive of a well-ordered society. We don't call a society 'well-ordered' unless these attitudes have died out and been replaced by sentiments of justice.

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We should not think of a well-ordered society as a utopian fantasy, in which laws are unnecessary because everyone's attitudes are now utterly just. No one supposes that law can be eliminated from the basic structure of a well-ordered society, or that we can drop the laws about murder or burglary because, by definition, no one in a just society would ever be motivated to engage in those crimes. Rawls's society is not utopian in that fantasy sense; it is steadfastly located in the circumstances of justice, which include subjective circumstances of anxiety and limited strength of will among the citizens.

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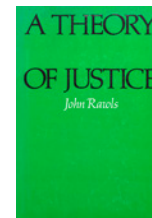


## John Rawls

*First published Tue Mar 25, 2008; substantive revision Mon Apr 12, 2021*

John Rawls (b. 1921, d. 2002) was an American political philosopher in the liberal tradition. His theory of *justice as fairness* describes a society of free citizens holding equal basic rights and cooperating within an egalitarian economic system. His theory of *political liberalism* explores the legitimate use of political power in a democracy, and envisions how civic unity might endure despite the diversity of worldviews that free institutions allow. His writings on *the law of peoples* set out a liberal foreign policy that aims to create a permanently peaceful and tolerant international order.

From "John Rawls" in *Stanford Encyclopedia of Philosophy*, April 12, 2021. © The Metaphysics Research Lab, Department of Philosophy, Stanford University. All rights reserved. This content is excluded from our Creative Commons license. For more information, see <https://ocw.mit.edu/help/faq-fair-use/>.



1971

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What is it that people in a well-ordered society need assurance of?

Q1: On Waldron's view, what is it that people in a well-ordered society need assurance of, and from whom do they need it?

...how they are likely to be treated, for example, by the hundreds or thousands of strangers they encounter or are exposed to in everyday life...[later:] that they can count on being treated justly.

the fundamentals of justice: that all are equally human, and have the dignity of humanity, that all have an elementary entitlement to justice, and that all deserve protection from the most egregious forms of violence, exclusion, indignity, and subordination.

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Q2. Waldron thinks hate speech has two points or aims. What are they?

[i] to undermine the public good of implicit assurance...

[ii] to establish a *rival public good*...a focal point for the proliferation and coordination of the attitudes that these actions (eg publication of hate speech) express, a public manifestation of hatred...to indicate to others that they are not alone in their racism of bigotry.

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### A challenge

Maybe the lesson for us, in our much-less-than-well-ordered society, is that we must hope that hate speech dies out, just withers away, not because of coercive laws limiting free speech, but because of changes of heart brought about perhaps by public education and (not least) by effective answers to hate speech in the free marketplace of ideas.

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### Waldron's response

Societies do not become well-ordered by magic. The expressive and disciplinary work of law may be necessary as an ingredient in the change of heart within its racist citizens that a well-ordered society presupposes. And anyway, as with all issues of justice, the necessity of such laws is a matter of the goods to be secured and the likelihood that they can be secured in the absence of legal intervention. If, as I am going to argue, the good to be secured is a public good, a general and diffuse assurance to all the inhabitants of a society concerning the most basic elements of justice, then it is natural to think that the law would be involved.

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next time

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Ch. 7



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