

How We Should—And Shouldn't— Ban Extremist Speech

July 2025

Eric Heinze¹

This report has been independently commissioned. The views and opinions expressed are those of the authors and do not necessarily reflect the official policy or position of the UK Government or the Commission for Countering Extremism. These essays were commissioned to present a diverse range of perspectives from authors with contrasting or conflicting opinions on this issue. They are provided to contribute to this vital discussion and do not imply agreement or endorsement by any associated parties.

¹ Professor of Law, Queen Mary University of London. All translations into English are the author's. All online sources are verified as of 1 May 2024.

Abstract. Most western democracies today penalise extreme speech in some form. These penalties spark little controversy when the speaker utters the provocative words in the course of perpetrating independently illegal harm to persons or property. But how should we treat extreme speech when it is voiced outside those contexts? We must first acknowledge that there can be no fixed definition of 'extremism', given how easily the term can be manipulated for political ends. Moreover, doubt persists about banning speech solely on grounds that certain abhorrent ideas are expressed in general terms and to general audiences, provoking moral outrage but without clear links to independently harmful conduct. This article draws two conclusions about the policies that longstanding, stable and prosperous democracies (LSPDs) should adopt. First, in contexts of live exchange, LSPDs should not ordinarily penalise speech addressed in general terms to general audiences *solely* on grounds of the repugnant ideas expressed; however (ii) the far greater risks of electronic platforms do warrant democratic controls.

Keywords: extremism, free speech, hate speech, militant democracy, terrorism

1. Introduction

In liberal democracies today, it is legal to openly praise forms of violence that are themselves legal. For example, it would be legal to praise someone who had used violence when that was the only way to rescue innocent life. Similarly, it would be legal – perhaps not always wise, but legal – for a speaker to urge that a military operation undertaken in national defence should proceed aggressively. It would be legal to praise the sport of licensed boxing. Since it is legal, then, to advocate legal violence, is it therefore illegal to advocate illegal violence?

Not necessarily – and this is no minor point, given that advocacy of illegal violence entails much of what is commonly defined as extreme speech. According to guidelines published by the UK government in 2024, extremism includes in part 'the promotion or advancement of an ideology based on violence, hatred or intolerance, that aims to . . . negate or destroy the fundamental rights and freedoms of others'.² But then consider advocacy of the death penalty. In most liberal democracies today, the death penalty has been abolished for common crimes because in those jurisdictions even the most vicious perpetrators retain a 'fundamental' right to life.³ If such a state were to violate its own law by putting them to death, it would commit an act of illegal violence. However, it is perfectly legal in today's liberal democracies for a speaker to 'promote' the 'ideology' that such criminals *should* be deprived of their 'fundamental' right to life. Whenever a brutal murder hits the headlines, outcries that the perpetrators 'don't deserve to live' are heard routinely, yet rarely if ever are the speakers prosecuted. In such a situation it remains entirely legal, then, to for someone to advocate a form of violence 'that aims to . . . negate or destroy' another's 'fundamental' right to life.

2 'Guidance: New definition of extremism', UK Government: Community and Society, 14 March 2024. <https://www.gov.uk/government/publications/new-definition-of-extremism-2024/new-definition-of-extremism-2024#fnref:3>

3 E.g., *Death Sentences and Executions in 2023*, London: Amnesty International, [Amnesty International Global Report: Death Sentences and Executions 2023 | Amnesty International USA](#)

Here's another example. As far back as 1697, the twenty-year-old Thomas Aikenhead became the last person in Britain to be executed for the crime of blasphemy after publicly mocking Christian faith and doctrine.⁴ Of course, today it would be illegal for any liberal democracy to execute blasphemers. But should it be illegal for someone to proclaim publicly that blasphemers *ought* to be put to death – indeed, in ways similar to religious executions still carried out in various societies today⁵? If so, then it would make perfect sense to punish *all* death penalty advocates as extremists, since, here too, they would all be advocating a form of violence 'that aims to . . . negate or destroy' others' 'fundamental' right to life; and if not, then these definitions adopted by the UK and other democracies make no sense at all, since they end up permitting a range of unexplained exceptions for speech that patently falls under their own adopted concepts of extremism.

You might want to challenge my claim here by arguing that the harms caused by violent crimes outweigh the harms caused by blasphemy. Yet if the state cannot lawfully execute perpetrators of either act, then this distinction becomes irrelevant because, once again, any speaker advocating the death penalty would be advocating violence in a way 'that aims to . . . negate or destroy' others' 'fundamental' right to life. And here's another example: many public personalities have been convicted for acts of rape or sexual assault, but it is not illegal for their fans to express public support for them. Should it be legal to express support for the convicted serial abusers Harvey Weinstein or Gérard Depardieu, but not for Hamas or Hizbollah? After all, throughout history and still today, violence against women has claimed exponentially more victims than those thus far targeted by Hamas and Hizbollah.

The concept of extremism is infinitely malleable because it is always embedded in political assumptions. After Vladimir Putin's 2022 invasion of Ukraine, even Russians peacefully opposing the war were convicted on charges of extremism, terrorism, or similar charges,⁶ placing the entire population on notice that acts of spontaneous dissent would be viewed as extremist, and would become subject to prohibitions, arrests, and imprisonments.⁷ Moscow has reminded the world how manipulable labels like 'extremist' and 'terrorist' can be. In the

4 E.g., Michael F. Graham, *The Blasphemies of Thomas Aikenhead*. Edinburgh University Press: Edinburgh, 2008. [The Blasphemies of Thomas Aikenhead: Boundaries of Belief on the Eve of the Enlightenment | Edinburgh Scholarship Online | Oxford Academic](#)

5 E.g., David Gritten, 'Iran executes two men convicted of blasphemy', *BBC*, 8 May 2023, <https://www.bbc.co.uk/news/world-middle-east-65523996>; Ehtisham Shami, 'Pakistan blasphemy: Student sentenced to death over Whatsapp messages', *BBC*, 8 March 2024, <https://www.bbc.co.uk/news/world-asia-68511557>.

6 E.g., Amnesty International, 'Russia: "I would love to hug her, but it is impossible"', Research Briefing EUR 46/8193/2024 (2024).

7 On the political nature of qualifications about extreme speech, cf. Eric Heinze, *Coming Clean: The Rise of the Critical Theory and the Future of the Left* (Boston: MIT Press, 2025), pp. 105-129; Eric Heinze, 'Identitarian Hatreds and Disloyalty Propaganda: Revisiting the Eurocentrism of Human Rights', *Human Rights Quarterly*, 46: 4, pp. 616-638. [Identitarian Hatreds and Disloyalty Propaganda: Revisiting the Eurocentrism of Human Rights by Eric Heinze : SSRN](#)

United States, echoes of Putinism have been heard from Donald Trump's camp, which has branded even moderate rivals as 'the enemy within'.⁸ The strategies in such contexts are not hard to decipher. The more a sense of threat is increased across a population, the greater will be the pressure on government to label actual or perceived support as extremist, and to respond by quelling the real or supposed evil at its source.⁹ To be sure, conceptual malleability is not unique here. It haunts many familiar terms in law (think about terms like 'harm', 'interest', 'wrongdoing', 'violation', 'consent', or 'equality').¹⁰ The question is whether and when the concept of illegally extremist speech can be useful at all.

In part because of these and other ambiguities, I will argue in this article (i) that a longstanding, stable, and prosperous democracy (LSPD) cannot legitimately prohibit supposedly extremist speech *solely* on grounds of the political viewpoint it advocates *when* such speech is delivered in general terms to live, general audiences; however, (ii) regulation can indeed be legitimate in online contexts. The criteria for a democracy to count as 'longstanding, stable, and prosperous' are far from obvious or settled, and the countries that best measure up to this description can shift over time, yet researchers have long identified workable threshold criteria.¹¹ I use the LSPD model not because it is dominant among democracies today, which it is not, but because the further away we drift from LSPDs, the more a concept like 'extremism' becomes politically abused, serving more to bolster existing power than to secure conditions of justice, as in Putin's Russia or Trump's America. In Section 2, I recall how easily concepts like 'extremism' and 'terrorism' can be manipulated by governments, yet in Section 3, I warn against treating all provocative speech as a unified whole. Distinctive contexts are essential for determining whether or to what degree such speech merits legal protections. Crucial to such contextual determinations are differences between live and online speech, therefore I conclude in Sections 4 and 5 that certain forms of speech may merit protection in live contexts while not necessarily requiring protection online.

2. The inherently manipulable concept of 'extremism'

Concepts like 'extremist' and 'terrorist' draw their meanings not from objective reality but from pre-adopted political standpoints. When we label some idea as 'extremist' we already presuppose a constitutional framework that renders it extreme.

8 E.g., Lisa Lerer and Michael Gold, 'Trump Escalates Threats to Political Opponents He Deems the "Enemy",' *The New York Times*, Oct. 15, 2024 (updated Nov. 8, 2024), [Trump Escalates Threats to Political Opponents He Deems the 'Enemy' - The New York Times](#)

9 E.g., Dominique Geissler, Dominik Bär, Nicolas Pröllochs, and Stefan Feuerriegel, 'Russian propaganda on social media during the 2022 invasion of Ukraine', *EPJ Data Science*, vol. 12, 35 (2023), [2211.04154](#)

10 E.g., Eric Heinze, *The Logic of Liberal Rights*. London: Routledge (2017 [2003]); Eric Heinze, *The Logic of Equality* London: Routledge (2017 [2003]).

11 E.g., Eric Heinze, *Hate Speech and Democratic Citizenship*. Oxford: Oxford University Press, 2016, 69-78.

Brief examples suffice to make this point. In ancient Rome, Spartacus's slave rebellion – with which many of us, today, would surely sympathise – counted as extremist in the eyes of the patricians, who responded ferociously.¹² In late eighteenth-century France, the more strident the democratic forces became, the more the ruling aristocracy viewed them as dangerous. Then when the power flipped, ushering in the Reign of Terror, it was the radical democrats who treated aristocrats and their real or perceived supporters as threats to the state.¹³ In the next century, still during Karl Marx's lifetime, the term 'Marxist' emerged to bear liberationist connotations on the left, while denoting extremism in the eyes of conservatives, and these conflicting usages still persist into our own time.¹⁴ In pre-1917 Russia, the aristocracy persecuted dissenters as extremists, who in their turn, after the Bolshevik Revolution, smeared supposed members of the aristocratic, bourgeois, or kulak classes, and their real or perceived supporters, as extremists.¹⁵ Today we find dissidents tarred as extremists not only in the Russia of Putin, but also in the China of Xi Jinping,¹⁶ the North Korea of the Kim dynasty¹⁷, and plenty of other nations. Of course today, a longstanding, stable, and prosperous liberal democracy – say, in Canada or Denmark – will distinguish legitimate from illegitimate violence pursuant to liberal-democratic norms, for example, by taking steps to curtail police brutality, or to ensure due process of law to persons criminally charged on grounds of direct or indirect participation in violent activity.¹⁸

Every political system organises violence by distinguishing between its own versions of legitimate and illegitimate recourse to violence, however fair or abusive those distinctions may appear to outsiders. The advocacy of any political philosophy therefore always implies the advocacy of some manner of organising violence, even if that advocacy is only tacit. For example, consider some vintage texts of Western liberalism, such as John Stuart Mill's *On Liberty*,¹⁹ Karl Popper's *The Open Society and Its Enemies*,²⁰ Isaiah Berlin's *Two Essays on*

12 E.g., Barry Baldwin, 'Two Aspects of the Spartacus Slave Revolt', *The Classical Journal*, vol. 62, No. 7 (1967) 289-294. [Two Aspects of the Spartacus Slave Revolt on JSTOR](#)

13 To be sure, boundaries between monarchical and revolutionary forces were never fixed, and on each side figures did emerge to recognise claims by the other. E.g., Pierre Rosanvallon, *Le modèle politique français : La société civile contre le jacobinisme de 1789 à nos jours*, Paris : Éditions du Seuil (2004).

14 E.g., Predrag Vranicki, *Geschichte des Marxismus*, Frankfurt a.M.: Suhrkamp (1983).

15 E.g., Sean McMeekin, *The Russian Revolution*, London: Profile (2018).

16 E.g., Shen Yang and Fengshi Wu, 'From Online Mass Incidents to Defiant Enclaves: Political Dissent on China's Internet', *The China Journal*, vol. 87 (2022), <https://doi.org/10.1086/717610>, [From Online Mass Incidents to Defiant Enclaves: Political Dissent on China's Internet: The China Journal: Vol 87](#)

17 E.g., UN Human Rights Council, Report of the detailed findings of the commission of inquiry on human rights in the Democratic People's Republic of Korea, 7 Feb. 2014, UN Doc. A/HRC/25/CRP.1, paras. 163-264, pp. 45-74.

18 See above, text accompanying note 11.

19 John Stuart Mill, *On Liberty and Other Essays*, edited by John Gray, Oxford: Oxford University Press, 1991 [1869].

20 Karl Popper, *The Open Society and Its Enemies*, vols. 1 & 2 (London: Routledge, 2002 ([1945])).

Liberty,²¹ John Rawls's *A Theory of Justice*,²² or Ronald Dworkin's *Taking Rights Seriously*²³. None of these works expressly praises violence, and liberals commonly flatter themselves as seeking non-violent forms of law and government. Yet the absence of such advocacy in these books in no way renders their authors pacifists. These books bypass any mention of violence not because they outline ways of avoiding it, but because they necessarily presuppose it in the very form of the state they envisage. Insofar as these writers adopt some version of liberal democracy, they tacitly endorse distinctions drawn between legitimate and illegitimate violence along liberal-democratic lines. In other words, such books tacitly endorse certain forms of violence defined by a liberal democracy as legitimate, including the repression – hence, where necessary, the violent repression – of what *that* state defines as sufficiently dangerous forms of extremism. So when someone in a liberal western society exclaims 'Fight for democracy!', such a statement sounds more prosaic than provocative, unlike statements such as 'Fight for Islam!' or 'Fight immigration!', which are more likely to be deemed to pose threats to individuals or social groups. *When we advocate any model of government, be it liberal-democratic or otherwise, we by definition advocate whatever violence is required to achieve and to maintain it.*

The point is not an ethically relativist one that all political opinions, and all their concomitant definitions of extremism, are of equal worth, thereby rendering us incapable of distinguishing between better and worse political values. What nevertheless follows is that we must confront some oft-neglected questions. Would it be legitimate for a liberal democracy to penalise only a subset of speakers on grounds that they endorse certain forms of violence, given that all of us, be it only tacitly, endorse certain forms of violence the moment we endorse any political model at all? Or is banning the glorification of some forms of violence merely a way to ban the ideas we dislike, which seems incompatible with liberal democracies' perpetually proclaimed devotion²⁴, in George Orwell's words, to upholding 'the right to tell people what they do not want to hear'²⁵? Indeed, digging deeper, does banning the advocacy of certain forms of political violence amount to nothing more than banning honesty and candour? Do such bans (a) grant freedom to those speakers who are merely ignorant or deluded about the violence implicit in their own worldviews, while (b) penalising speakers who openly and frankly acknowledge the violent implications of their belief systems? Do bans on the expression of extremist ideas betray a grievous hypocrisy within liberal society?

Before exploring these questions, two preliminary points are essential. First, lawmakers and courts around the world have treated certain forms of non-verbal expression as

21 Isaiah Berlin, *Four Essays on Liberty*. Oxford: Oxford University Press, 1969.

22 John Rawls, *A Theory of Justice*, 2nd ed. Oxford: Oxford University Press, 1999 [1971].

23 Ronald Dworkin, *Taking Rights Seriously*. Cambridge, MA: Harvard University Press, 1977.

24 E.g., *Handyside v. United Kingdom*, 1976 ECHR 5, [1976] 1 EHRR 737, para. 49.

25 George Orwell: 'The Freedom of the Press', *The Times Literary Supplement*, Sept. 15, 1972, p. 12.

communication subject to rules similar or identical to those governing speech. For example, in certain contexts, some liberal democracies ban public displays of the Nazi swastika²⁶ or public burning of sacred texts,²⁷ even if such expression is undertaken without any words being spoken at all. For present purposes, I will assume references to 'speech', 'communication', and 'expression' to be interchangeable. The latter two are more analytically precise, but 'speech' is the word commonly used and tends to capture more of the everyday occurrences that spark controversy about which ideas a liberal democracy should and should not tolerate. Second, I draw in this brief article upon laws and policies from various contemporary democracies, drawing at times on international and comparative sources, since my concern is not with any particular democracy as such, but with the question as to *whether there are any criteria that liberal democracies would by definition have to adopt in order to merit their status as liberal democracies*. I take this hybrid approach in part because questions about speech regulation are currently in flux in our era of globalised information technologies,²⁸ so focussing on a single country risks overlooking broader and more essential points.

3. Types of extreme speech

Despite the malleability of a term like 'extremist', it may seem absurd to some observers that a liberal democracy should have to allow speech that aggressively attacks democratic values. One way to defend rights to engage in such speech is to start with an uncontroversial inventory of the types of extremist expression that a liberal democracy *can* legitimately penalise, then to proceed to the more controversial proposal that some extremist expression should nevertheless merit legal protection.

To be sure, many experts argue that liberal democracies should place prevention above punishment through programs designed to dissuade individuals from developing terrorist sympathies in the first place, including measures such as early intervention in strained social, familial, and educational environments.²⁹ Nevertheless, for the foreseeable future, liberal democracies will be compelled to proceed on the assumption that controversies around extremist speech will most likely persist. To start with, then, most observers will agree that legal penalties can legitimately be imposed in cases where speech forms an integral part of

26 E.g., Strafgesetzbuch (StGB) § 86a (Germany).

27 Forslag til Lov om ændring af straffeloven, 7 Dec. 2023 (Folketinget) amending criminal code §110 (Denmark).

28 E.g., Jack M. Balkin, 'Free Speech in the Algorithmic Society: Big Data, Private Governance, and New School Speech Regulation', *University of California – Davis Law Review* vol. 51, pp. 1149-1210 (2018); Jack M. Balkin, 'Free Speech is a Triangle', *Columbia Law Review* vol 118, pp. 2011-2056 (2018).

29 E.g., Alex P. Schmid, ed., *Handbook of Terrorism Prevention*, The Hague: International Centre for Counter-Terrorism (2021).

the deliberate pursuit of some independently illegal act causing harm to persons or property, as when uttered, for example, among perpetrators of that act.³⁰ Where opinion divides is on questions about whether speech constituting a conspiracy to commit unlawful conduct should in itself constitute unlawful conduct even when the undertaking never progresses beyond exchanges of words.³¹ But this is mostly a line-drawing dispute: the further such speech acts proceed down the road of material completion of the unlawful act, the more the speech acts themselves can legitimately be deemed to be unlawful.³² For example, assume that a group of people cry out 'Glory to Hamas!' whilst attacking a synagogue or 'Down with Islam!' whilst attacking a mosque. Liberal democracies generally penalise such speech at least to the extent of its role in advancing unlawful conduct causing, or likely to cause, harm to persons or property.³³ Even in the writings of the leading academic defenders of free speech,³⁴ we find few if any challenges to the imposition of liability on speech that forms part of a materially advanced criminal conspiracy.

Rather, the real controversy arises around such words when they are spoken without proximally causing harm to persons or property. American law supplies a useful point of comparison. The 1969 case of *Brandenburg v. Ohio* set a high-water mark and is still frequently cited by American free speech activists. In that case, the US Supreme Court found that if government authorities are to penalise a speech act on grounds of the inherent malice of the idea being expressed, they must show that the idea is not merely dangerous as a general matter, but that it 'is directed to inciting or producing *imminent* lawless action and is *likely* to incite or produce such action',³⁵ in other words, by causing such harm immediately. Even if the execution of an unlawful enterprise turns out to be impeded so that no damage to persons or property occurs, prosecution for the attempted crime will still be deemed legitimate within most liberal democracies, which maintain interests in protecting members of the public not only from completed unlawful activity but also from materially attempted crimes. In addition, we can also note further circumstances under which liberal democracies legitimately penalise extremist speech. For example, absent the plotting of a full-blown act of violence, even avid defenders of free speech widely accept that cries such as 'Glory to Hamas!' or 'Down with Islam!' can appropriately be penalised if they are directed against identifiable

30 Even under the highly protective U.S. First Amendment, racist speech is not shielded when it can reasonably be linked, as evidence of motive, to a racist physical attack. *Wisconsin v. Mitchell*, 508 U.S. 476 (1993).

31 E.g., Markus D. Dubber, 'Criminal Law in Comparative Context', *Journal of Legal Education*, vol 56: 3 (2006) 433-443 at 440-441.

32 These differences are not new and have been observed for many years. E.g., Richard J. Hoskins, 'A Comparative Analysis of the Crime of Conspiracy in Germany, France and the United States', *N.Y.U. Journal of International Law and Politics*, vol 6, 245-265 (1973).

33 E.g., Cf. Criminal Law Act 1977 (2002), Part 1: Conspiracy (U.K.).

34 See, e.g., authors cited below in note 44.

35 *Brandenburg v. Ohio*, 395 US 444, 447 (1969) (emphasis added). But compare some potentially narrowing conditions in *Holder v. Humanitarian Law Project*, 561 U.S. 1 (2010).

individuals in ways that raise immediate safety concerns, for example, in situations of stalking or harassment, or overtly threatening conduct.³⁶

With those types of limits on speech broadly conceded, what remains are thornier disagreements, namely, about ideas taking the form of *general expression addressed to general audiences, communicated without any demonstrated link to independently unlawful conduct*. More-or-less all of today's liberal democracies have become parties to the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), which provides that states parties '[s]hall declare an offence punishable by law *all dissemination of ideas* based on racial superiority or hatred [or] incitement to racial discrimination'.³⁷ Additionally, these nations are parties to the International Covenant on Civil and Political Rights (ICCPR), which provides that '*[a]ny* advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law'³⁸, even when not spoken in connection with independently unlawful action. Upon agreeing to be bound to these instruments,³⁹ several liberal democracies deposited reservations or interpretive declarations confirming free speech rights,⁴⁰ yet most of these nations have always complied with these provisions to some meaningful degree.⁴¹ Some extreme speech acts can therefore be penalised without forming part of any conduct causing harm to persons or property. But do such penalties reflect the values of liberal democracy?

4. Individual freedom and democratic citizenship

Again, the thorny question before us is whether and when extremist speech, such as cries of 'Glory to Hamas!' or 'Down with Islam!', should be penalised solely on grounds of the worldviews they express. Those who support penalising such speech will argue that it constitutes incitement to fully-fledged acts of violence or discrimination. Yet with regard to

36 On the legality of such restrictions even under a regime highly protective of speech, such as that of the US Supreme Court, see, e.g., Nadine Strossen, *HATE: Why We Should Resist It With Free Speech, Not Censorship*. New York: Oxford University Press, 2018, pp. 53-68.

37 International Convention on the Elimination of All Forms of Racial Discrimination, 660 U.N.T.S. 195, *entered into force* Jan. 4, 1969, art. 4(a) (emphasis added).

38 International Covenant on Civil and Political Rights (ICCPR), Dec. 19, 1966, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976), art. 20(2) (emphasis added).

39 For regularly updated data on state adherence see UN Treaty Body Database, ratifications, - [OHCHR Dashboard](#)

40 See ICERD Declarations and Reservations, United Nations Treaty Series: Multilateral Treaties Deposited with the Secretary-General, ch. 4, doc. 2 (available at https://treaties.un.org/pages/Treaties.aspx?id=4&subid=A&clang=_en); ICCPR Declarations and Reservations, United Nations Treaty Series: Multilateral Treaties Deposited with the Secretary-General, ch. 4, doc. 4, (available at https://treaties.un.org/pages/Treaties.aspx?id=4&subid=A&clang=_en).

41 E.g., Eric Heinze, ed., *Criminalising Hate Speech*, The Hague: Asser / Springer (2025); Natalie Alkiviadou et al., *Global Handbook on Hate Speech Laws*, The Future of Free Speech (Nov. 20, 2020), [Global Handbook on Hate Speech Laws](#).

individuals speaking in situations of live communication (unlike online speech, to which I shall return below), questions about whether or to what degree harmful effects can be empirically demonstrated over a wide range of cases have remained doubtful.

For example, in 2016, the UK-based Islamists Anjem Choudary and Mizanur Rahman were convicted under section 12 of the Terrorism Act 2000 for soliciting support for the Islamic State (IS), a proscribed organisation under British law, although the charges recited no harms that the defendants had inflicted on persons or property.⁴² Some observers would certainly endorse these convictions on grounds that the state should not have to wait for such harms to occur before intervening, and therefore can and should exercise a reasonably and proportionately pre-emptive power. But then free speech activists respond by charging that democratic states abuse anti-extremism laws as pretexts to penalise ideas solely on grounds of the worldviews expressed, particularly insofar as speakers such as these are often doing nothing more than expounding their religious views or praising ideals associated with the Islamic State, regardless of how alien or odious many of us may consider those ideas to be. By comparison, under *Brandenburg*⁴³ criteria, these men could not even have been lawfully arrested, let alone tried and convicted.

Analogies are sometimes drawn to revolutionary Marxist gatherings, where speakers may call for violent resistance or revolution, but in terms too abstract to warrant prosecutions on grounds of any immediate risks to persons or property. The German Constitutional Court (Bundesverfassungsgericht) too has struggled with comparisons between right-wing, left-wing, and Islamist or other forms of extremism, and such comparisons cast doubt on the whole enterprise of banning ideas solely on grounds of the dangerous worldviews they actually or putatively express.⁴⁴ For my part, as author of the present study, I have long rejected such prosecutions brought within longstanding, stable, and prosperous liberal democracies, *to the extent* that speakers like Choudary and Rahman were engaged *solely* in live speech and *solely* expressing general ideas to general audiences.⁴⁵ My position arises not from some abstract ideal of free speech 'absolutism', nor from any assumption that individual freedom must rank higher than other human goods. As I have argued elsewhere, free speech 'absolutism' is a legal nonsense because it would inherently undermine the very possibility of any legal regime: even the most libertarian system would collapse in short order under any regime of free speech 'absolutism'.

42 Choudary & Anor v R. [2016] EWCA Crim 61; Choudary & Anor v R., [2017] 4 WLR 204.

43 Even after *Holder*, cf. above note 34.

44 See sources cited below in Section 5.

45 See Heinze, above note 11. Cf. Ronald Dworkin, Foreword, in Ivan Hare and James Weinstein, *Extreme Speech and Democracy*, Oxford: Oxford University Press (2009) pp. v – ix; Robert Post, *Constitutional Domains: Democracy, Community, Management*. Cambridge, MA: Harvard University Press (1995); James Weinstein, 'Participatory Democracy as the Central Value of American Free Speech Doctrine', *Virginia Law Review* vol. 97:3 (2011), pp. 491-514.

Nevertheless, the electronic age imposes a second qualification, given that far more intricate problems arise around online media, which Choudary and Rahman also used on some occasions to recruit support for the Islamic State. To distinguish between live and virtual contexts, let us assume for argument's sake that no harms to persons or property resulted from their online speech, and indeed no such harms were alleged at trial. Even then, for the foreseeable future, liberal democracies must confront cyberspace as a whole. Millions of messages are posted every day, often able to reach global audiences; yet this sheer volume of communications precludes full-blown judicial evaluations for each and every provocative message. More importantly, in contrast to live speech events, online radicalisation has already scored a track record of grievous material harms that even the most competent liberal democracies have lacked the means to avert.⁴⁶

For example, in 2011 Anders Behring Breivik bombed government buildings in Oslo, killing eight people, then killed 69 more, mostly teenagers, at a Labour Party youth camp, in addition to over 100 persons physically wounded. Experts have widely attributed Breivik's actions to far-right radicalisation through electronic media.⁴⁷ In 2019 Brenton Tarrant, having also accessed far-right propaganda online, killed or wounded almost 100 victims at the Al Noor Mosque in Christchurch, New Zealand, while actively streaming his rampage on Facebook.⁴⁸ Similar events are to be expected *a fortiori* in more volatile democracies, as the lethal riots of 6 January 2021 in Washington D.C. traced largely to online incitement.⁴⁹ Similar to Breivik and Tarrant, Payton Gendron too is a white man with a history of immersion in online racist and antisemitic materials, including conspiracy theories about a genocide plotted against the white race. In 2022 he entered a supermarket in a black neighbourhood in Buffalo, New York and randomly sprayed bullets into the crowd, killing ten black victims.⁵⁰ Admittedly, much of the extremist material that fuelled these aggressions was of only an abstractly conspiracist character, and staunch free speech defenders argue that even these levels of violence cannot justify censorship, which would swallow up all and sundry materials, given the difficulties of distinguishing between acceptable and unacceptable types of radicalised content, and would erase materials associated with important political trends, precisely of the type that citizens need to be aware of in order to understand the socio-political circumstances under which they live.

46 See Heinze, above note 11, pp. 40-43; Eric Heinze, Commentary on Frank Dietrich, 'AI-based removal of hate speech from digital social networks—chances and risks for freedom of expression', *AI and Ethics* (2024), <https://doi.org/10.1007/s43681-024-00646-9>.

47 District Court (Oslo tingrett) TOSLO-2011-188627-24E (11-188627MED-OTIR/05).

48 R v Tarrant [2020] NZHC 2192.

49 Final Report of the Select Committee to Investigate the January 6th Attack on the US Capitol, Washington, DC: US House of Representatives (2022).

50 Affidavit in support of criminal complaint, United States v. Payton Gendron, United States District Court, Western District of New York (trial pending as of this writing).

The problem is that today's capacities for electronic communications to cause sudden and mass harms follow from an immediacy and reach exponentially greater than any previously known in the live speech contexts familiar within liberal democracies. For any democratic society, this power of virtual platforms becomes further aggravated by corporate owners' recourse to opaque algorithms, hefty profit motives, inscrutable governance, undisclosed collection and use of personal data, and pervasively undemocratic structuring. In addition, artificially generated communications normalise a world in which massive volumes of 'speech' are synthetically manufactured directly originating from no discernible citizen at all.⁵¹ Certainly, for present purposes, we need not worry about prohibiting artificially generated speech overall, which no one has seriously proposed, since much of it can be helpful and countless millions of us now use it in constructive ways. Yet nor can we claim for communications that are unconnected to some citizen-speaker any higher-order legal protections simply by virtue of *being* speech.

Some free speech advocates might respond that citizens maintain a distinctly informational interest in accessing even speech that does not originate with individual speakers – a kind of 'listeners' right' independent of any speaker's right. However, there is no logically obvious sense in which such an interest would transform *proprio motu* into a fundamental legal or even moral right. The contours and limiting principles of a 'listener's right' would need to be established as a separate matter if indeed such a right were to operate independently of a free speech right. For the foreseeable future, then, I would propose that it must remain legitimate for liberal democracies to penalise certain extreme speech online expression even while some of that speech would rightly merit protection in live contexts. To appreciate this distinction, it will help to clarify four basic categories of extremism as indicated below in Table 1. Only the third category, which consists *solely* of generally extremist speech spoken to general audiences, unlinked to harms materially caused to persons or property, and *solely* in live contexts – as when radicals like Choudary and Rahman spoke in electronically un-transmitted encounters – raises serious doubts about both the legitimacy and the pragmatics of imposing legal penalties:

Extremist expression within longstanding, stable, and prosperous democracies		
	Live speech	Online speech
Link to independently unlawful conduct	(1) Legitimately sanctionable	(2) Legitimately sanctionable
No link to independently unlawful conduct ('generally' extremist speech aimed at general audiences)	(3) Not legitimately sanctionable?	(4) Legitimately sanctionable

Table 1

⁵¹ See above, text accompanying note 28.

Most western democracies currently designate some forms of speech as legitimately sanctionable in all four categories, but the view I am putting forth here is that the legitimacy of regulations on speech falling within the third category has always been and remains doubtful. Certainly, these four categories serve only to identify general tendencies and not hard-and-fast distinctions that would deliver clear-cut applications in all instances. For example, line-drawing problems will inevitably arise at the border between speech acts that can, and those that cannot, be proximally linked to material harms caused to persons or property, hence a blurring of lines between categories (1) and (3). Similarly, some speech will be hybrid: for example, starting with an act of live speech but which is then filmed and disseminated online, or starting with online speech but which is then broadcast at a live event, and these crossovers can in turn blur the lines between categories (3) and (4).

Yet for speech falling entirely within the third category, I oppose censorship imposed *solely* on grounds of the repugnant viewpoint that is articulated. Some types of *non*-viewpoint-based regulation of such live communications would still be widely accepted by most defenders of free speech, including so-called 'time, manner, and place regulations'.⁵² For example, a street protest can legitimately be subject to rules barring participants from causing excessive noise in residential areas at night, or from blocking ordinary citizens' access to necessary thoroughfares, as long as the same rules are applied even-handedly to all protests, regardless of the philosophy or worldview they advocate. Accordingly, it is legitimate to place such limits on persons shouting 'Glory to Hamas' as long as the same limits are imposed on those shouting 'Death to Islam', or 'Abortion rights now', or, for that matter, 'We want more apple crumble'. Moreover, experts widely agree that limits can legitimately be imposed on the category of 'generally' extremist speech in contexts outside fully-fledged public forums, for example, in employment or commercial contexts.⁵³ By extension, in situations of urgency such as foreign invasion or mass unrest, a liberal-democratic constitutional order might legitimately limit free speech rights where it is essential to avert mass risks to life, health, or safety.⁵⁴

5. Proposal: A Revised Model of Militant Democracy

Some contemporary democracies have long insisted that they are permitted and even required to ban speech of the third category – that is, to punish the live expression of an idea solely on grounds that it rejects the basic values of liberal democracy. This claim is sometimes traced to the French revolutionary Antoine de Saint-Just, reputed to have

⁵² Strossen, *HATE*, above note 35, at pp. 57-58.

⁵³ *Id.* at pp. 56-57, 62.

⁵⁴ E.g., UN Human Rights Committee, 'General Comment 29: States of Emergency (article 4)', UN Doc. CCPR/C/21/Rev.1/Add.11 (2001).

exclaimed: 'No liberty for the enemies of liberty' (*Pas de liberté pour les ennemis de la liberté* – never authenticated though arguably a paraphrase). The notion re-emerged more subtly in post-World War II German jurisprudence under the label of 'militant' (*wehrhafte* or *streitbare*) democracy, given how the overthrow of the Weimar Republic, fuelled by virulently antidemocratic incitements, had ushered in the Nazi regime.⁵⁵

Hence a series of challenges posed by this third category, again, of speech that is delivered *only* live and is *only* of a 'generally' extremist type: Should freedom extend to the enemies of freedom? Should tolerance extend to the enemies of tolerance? Should democracy protect the enemies of democracy?⁵⁶ According to the jurist Marcus Thiel, a 'combat against the liberal-democratic order' must be countered not only by criminalising material acts of terrorism, but must also through an 'intellectual combat'.⁵⁷ Accordingly, '[t]o assure that citizens enjoy their constitutional protections, the state can and must defy attempts to endanger or abolish the liberal democratic order'.⁵⁸ These attempts need not be solely material in nature, as Thiel includes the expression of certain ideas that run strongly contrary to democratic norms. Yet like experts elsewhere, German writers remain far from unanimous and continue to debate the legitimacy of a democratic state penalising live speech with extremist content when such speech is unlinked to independently unlawful conduct. The legal philosopher Ralf Dreier diverges from views such as Thiel's, arguing: 'By definition, democracy cannot be militant against [political] aims, but only against the means for their realisation, that is, against violent means'.⁵⁹

In addition to these debates about democratic principles, we find pragmatic disagreements about the everyday effects of extremist speech. Dieter Grimm, a former judge of the German Constitutional Court, has frequently praised the silencing effect of bans upon extremists under a regime more stringent than that of most contemporary democracies.⁶⁰ Nevertheless, the more Grimm has insisted on this view, the more extremism in Germany, as in many other democracies, has increased, raising suspicions that bans may in fact fuel the very problem they are meant to solve.⁶¹ Several authors have argued that bans serve only to

55 E.g., in Markus Thiel, ed., *Wehrhafte Demokratie: Beiträge über die Regelungen zum Schutze der freiheitlichen demokratischen Grundordnung*. Tübingen: Mohr Siebeck (2003).

56 Karl Popper observes these paradoxes of tolerance, freedom, and democracy in the expanded 1957 German edition of *The Open Society and Its Enemies*. See Karl Popper, *Die offene Gesellschaft und ihre Feinde - Band I: Der Zauber Platons*, Tübingen: Mohr Siebeck 2003 [1957], pp. 361-362.

57 Markus Thiel, 'Die Verwirkung von Grundrechten gemäß Art. 18GG', in Thiel, above note 54, pp. 137-38.

58 Markus Thiel, 'Zur Einführung: Die "wehrhafte Demokratie" als verfassungsrechtliche Grundentscheidung', in Thiel, above note 54, pp. 1-24, at p 23.

59 E.g., Ralf Dreier, 'Verfassung und "streitbare" Ideologie', in Claus Leggewie and Horst Meier, *Verbot der NPD oder mit Rechtsradikalen leben?* Frankfurt a.M.: Suhrkamp (2002), pp. 81-88. This collection edited by Leggewie and Meier contains a generally even split of essays supportive and sceptical of banning a far-right political party on both grounds of democratic legitimacy as well as practical implementation. Now more than two decades old, the core arguments nevertheless remain relevant to today's controversies.

60 E.g., Dieter Grimm, 'Über den Umgang mit Parteiverboten', *id.* pp. 138-44.

61 E.g., Heinze, above note 11, pp. 145-153.

tutor hate groups to become ever cleverer, to tread constantly at the edge of legality without overstepping it. Andrea Röpke and Andreas Speit reach back a decade earlier: 'After the wave of prohibitions against smaller neo-Nazi organisations in the years between 1992 and 1995 some neo-Nazis began to construct a new organisational model'.⁶² Another writer, Toralf Staud, shows how bans guide extremists through the methods of Orwellian newspeak. Hate groups adjust and re-adjust their speech to dodge arrests and trials:

*After the Skinhead-network Blood & Honour was banned, [followers] started printing 'B&H' on their T-shirts or, according to the place of those two letters in the alphabet, the numerical code "18". Once school teachers have had word that "88" means "Heil Hitler", pupils write "2 × 44" on their school packs or "87 + 1".*⁶³

As one lawyer has noted, another transparent substitution for 'Blood & Honour' became 'Glory and Honour'.⁶⁴ Meanwhile the swastika (*Hakenkreuz*) has sometimes simply been replaced by a Nazi-era triangular figure (*Gaudreieck*).⁶⁵ The Hitler greeting has sometimes been substituted by the 'Kühnen greeting', named after a post-war neo-Nazi leader, merely replacing the flat outstretched hand with three extended fingers.⁶⁶ Known in French as the *quenelle*, the gesture was made famous by the notoriously antisemitic entertainer Dieudonné Dieudonné M'bala M'bala.⁶⁷ Staud concludes, 'These cat-and-mouse games make a mockery of prohibitions'.⁶⁸

The post-World War II model of militant democracy has allowed the German government and judiciary to send symbolic messages⁶⁹ rejecting antidemocratic ideas. To be sure, further questions arise as to whether liberal democracies can legitimately abridge higher-order rights and liberties, such as free speech, solely for the purpose of sending out ethical messages. After all, any defender of liberal democracy would have to respond with outrage if rights protecting criminal suspects from, say, arbitrary arrest, or arbitrary invasions of privacy, were abridged solely for purposes of 'sending messages' about the evils of crime. Moreover, in practice, the efficacy of bans as means for combatting such ideas in the context

62 Andrea and Andreas Speit, eds., *Braune Kameradschaften: Die militanten Neonazis im Schatten der NPD*, Berlin: Links Verlag, p 8.

63 Toralf Staud, *Moderne Nazis: Die neuen Rechten und der Aufstieg der NPD*, 3rd ed., Cologne: Kiepenheuer & Witsch (2006) p. 174. The initials 'A[dolph]' and 'H[itler]' translate as '1' and '8'.

64 Carsten Schrank, *Rechts-Staat Deutschland?: Zum Kampf der Justiz gegen Rechtsextremisten*, Norderstedt: Books on Demand (2006) p. 28.

65 *Id.*, p. 20.

66 *Id.*, p. 21.

67 E.g., '« Quenelle », comment un geste antisémite est devenu un emblème', *Le Monde*, 11. Dec. 2013, updated 10 March 2014, https://www.lemonde.fr/politique/article/2013/12/11/quenelle-comment-un-geste-provocateur-est-devenu-un-embleme_3528089_823448.html

68 Staud, above note 63, at p. 174.

69 E.g., Grimm, above note 60, at p. 143.

of live communications has been doubtful at best and counterproductive at worst. It remains doubtful, then, that longstanding, stable, and prosperous democracies can legitimately prohibit speakers, *solely* within live contexts, from expressing even a general idea to a general audience *solely* on grounds of the hideous viewpoint it expresses.

Having said this, I have nevertheless argued here that the model of militant democracy becomes more persuasive for spheres of online networks, for which links between extremist speech and grievous harm have been more reliably established. My thesis, then, is that, for the foreseeable future, this narrower model, which we could describe as 'militant democracy online', strikes the most convincing balance between, on the one hand, rejecting penalties that are imposed solely for the expression of generally dangerous ideas, while, on the other hand, countering the powerful and unforeseeable risks posed by electronic platforms.

6. Conclusion

Most liberal democracies today can and do legitimately regulate online extremism, as well as live speech acts proximally linked to real or attempted harms to persons or property. Yet many of them also penalise some forms of extremist speech solely on grounds of the reprehensible ideas that are expressed, even when it is transmitted offline and spoken without any demonstrated links to acts causing material harms to persons or property. This latter type of ban raises questions about whether liberal democracies can legitimately penalise expression solely on grounds that it communicates a reprehensible worldview. Germany's post-World War II model of militant democracy has struggled to justify such bans, both in terms of democratic principle and in terms of any effective track record in combatting extremism. Longstanding, stable, and prosperous democracies should not penalise extremist insofar as it is uttered solely or primarily as general remarks to general audiences *and* within contexts of live communication. Nevertheless, a proven record of far greater risks means that the narrower model of 'militant democracy online' will be warranted for electronic communications, in view of their exceptional capacity to induce such harm in ways that even a robust democracy would lack means to prevent.

Eric Heinze (Maitrise, Paris; JD, Harvard; PhD, Leiden) is Professor of Law & Humanities at Queen Mary University of London. His books include *Coming Clean: The Rise of Critical Theory and the Future of the Left* (MIT 2025); *Criminalising Hate Speech* (Asser/Springer 2025); *The Most Human Right: Why Free Speech is Everything* (MIT 2025); *Hate Speech and Democratic Citizenship* (OUP, 2016), *Sexual Orientation: A Human Right* (Nijhoff, 1995), and *Of Innocence and Autonomy: Children, Sex and Human Rights* (Ashgate, 2000). He has published more than 100 articles in *Oxford Journal of Legal Studies*, *Harvard Human Rights Journal*, *Modern Law Review*, and other journals.