

PERILOUS TIMES: FREE SPEECH IN WARTIME FROM THE SEDITION ACT OF 1798 TO THE WAR ON TERRORISM, by Geoffrey R. Stone. New York: W. W. Norton & Company, 2004. 800 pp. Cloth \$35.00. ISBN: 0-393-05880-8.

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PERILOUS TIMES greets us in perilous times. In a nation wherein 48% of the people formally expressed their disapproval with the current administration, where the mission of one war has been “accomplished,” though the victory parades have yet to be scheduled, and where the “war on terror” has really just begun, Geoffrey Stone’s important new book examines the history and significance of freedom of speech during wartime. While 80% of our history (by his count, p.xxiii) has been relatively tranquil, war unsettles our general balance of security and liberty interests because it “generates a mass psychology.” “Emotions run high,” he continues,

[because] [s]pies, saboteurs, and terrorists lurk around every corner. *Our* way of life is imperiled. Anything that increases the danger to our troops—*our* sons and daughters—is feared and despised. . . . Time and again, Americans have suppressed dissent, imprisoned and deported dissenters, and then—later—regretted their actions. This book is first and foremost about why this happens and how we can break this pattern in the future (p.xxiii).

And thus the book’s specific project is to reveal tendencies that recur—national mistakes that continue to be made—but in a broader sense, Stone asks us to reflect on the “daunting responsibilities of self-governance in the most perilous of times” and the obligations ordinary citizens (not simply judges, politicians,

or figureheads) have to “preserve the spirit of liberty in times of crisis” (pp.xxxi-xxxii). In this sense, the book has both descriptive inclinations and normative ambitions: we see where we have been and are invited not to return.

Stone, the Harry Kalven, Jr. Distinguished Service Professor of Law at the University of Chicago, has long been one of America’s foremost thinkers on First Amendment issues. An editor of the SUPREME COURT REVIEW since 1991, Stone is also the co-author of one of the more widely used Constitutional Law texts (with Louis Seidman, Cass Sunstein, and Mark Tushnet). But it is his involvement defending the Nazis in the Skokie controversy and in representing Fred Korematsu in an amicus brief for the recent Guantanamo Bay case that perhaps lends the most interesting experiential color to this work—allowing him to contemplate the special nexus of radical political speech and the ugly consequences of wartime fear-mongering.

The book is divided into six substantive sections, beginning with the battles between Federalists and Republicans over the Sedition Act of 1798, and then moving through the Civil War, World War I, World War II, the Cold War, and the Vietnam War in succession. In each chapter Stone does several important

things: he provides the historical context for the various speech controversies that emerged; he lucidly describes the relevant legislation and legal precedents implicated; and he offers wonderfully informative vignettes on particular individuals and cases, a quality which helps to make the issues “real” for the reader—to put the problem in human terms. How else would one find out about the likes of Dudley Pelley, founder of the Silver Legion of America, a group sympathetic to the Nazi cause, and his outspoken attacks on President Roosevelt and the decision to enter World War II (pp.250-64)? Or the fact that Clement Vallandigham, a Copperhead Democrat of Ohio arrested for his “express advocacy” of desertion and refusal of duty during the Civil War—a kind of “bad tendency” before its time—“accidentally shot himself to death in his hotel room while preparing to demonstrate in court how his client’s alleged victim could accidentally have shot himself to death” (p.108)?

What Stone finds in his review of these various periods and events is that that dissent has consistently been suppressed during wartime—though in different ways and to varying degrees. In his conclusion he divides the six episodes into two groups, according to the intensity of the suppression of dissent. He asserts that the events of 1798, World War I, and the Cold War led to the most severe restrictions, while the Civil War, World War II, and the Vietnam War were more restrained periods. His distinction here pertains to the degree to which national political leaders “intentionally inflamed public fear” (p.529) and sought to arouse hysteria and intolerance. In the more severe instances, state actors aggressively

attempted to stamp out dissent by exacerbating anger against those who challenged the state’s official policies or motives; while in the more restrained periods the government behaved itself for a range of reasons. For example, Lincoln could not risk losing support in border states; there was broad public support for World War II, and thus dissent was never thought to be a genuine threat to the war effort; and by the time of the Vietnam War, American courts had articulated a more robust vision of freedom of expression in a democracy.

Overall, Stone finds that our political institutions have generally acknowledged their mistakes, and he contends that “the Court has learned over time that it is impossible to excise from public debate only those views that are thought to be ‘dangerous,’ without undermining free speech more generally” (p.520). His argument here boils down to a kind of “two steps forward, one step back” logic: as a people, and as reflected in the responses of our elected officials in the face of crises, we have consistently “overreacted” in the “heat of war fever” (p.62) and in the face of “ill-informed fears” (p.527), though we do seem to come to our collective senses and learn from our mistakes once the conflict has ended or the situation has been settled. And yet, while such phenomena might have an eventual educative effect on the citizenry (you do not appreciate what you have until it is gone), Stone argues that this is hardly consolation for the repeated revisiting of restrictions on civil liberties during wartime. Speech and effective self-rule are inextricably linked, he contends, and it is both essential and dangerous to acknowledge

this coupling; *essential* because we realize that “we the people” *can* effect change through our considered debate, scrutiny, expression, and outrage, and *dangerous* because the government knows this as well. You can stop the annoying drip by simply turning off the faucet.

There are a few drawbacks to this book. For one thing, it is long—too long, in fact, to be used in most undergraduate courses (with the exception of seminars on the First Amendment). It is very clearly written—and scholars and lay audiences will find it engaging—but it is heavily footnoted and reads like the compendium of law review articles that it is. While this does not detract from the quality of the argument, the length and depth might, unfortunately, be prohibitive for some readers, teachers, and scholars. It may have a home on some graduate syllabi (surely in American History, but also in Political Science and law and society courses), however, and is a must-read for legal scholars.

Substantively, the book could have been even better if it had further elaborated on two issues. First, Stone’s emphasis is almost entirely on the implications of *state* suppression of speech rights during wartime—that is, formal governmental efforts to narrow the scope of our liberties and punish us for disruptive, disloyal, or dissentient speech. What he does not address so much, though his argument logically leads the reader to wonder about, are the implications of *self* suppression of criticism and dissent during wartime. Here, Stone could have drawn upon studies in the social sciences that evaluate (through interviews and survey research) the degree to which

individual citizens censor *themselves* during times of crisis because they fear the reaction or retribution of their fellow citizens or because they instinctively believe—*contra* Stone’s message—that dissent or disapproval are somehow inappropriate during wartime. A reasonable parallel to this point might be the large percentage of Americans who, despite seeing problems in the administration of the efforts in Iraq, nevertheless feel that the Commander in Chief should not be replaced in the middle of the conflict because it might be perceived as a sign of weakness or failure. Do such individuals also believe that it is impossible to distinguish between speaking out against the *war* and speaking out against those running the war? When surveys ask “Do you support the war?” how many of the respondents actually believe that it is, by definition, treasonous—at that time—to answer in the negative? And thus, even if Stone is right—that our practices and responses are marginally better with each subsequent crisis—if, in their hearts and minds, the people still *believe* that they should not be dissenting (for whatever reason) then, short of government efforts to *promote* dissent, in effect we have the same problem that confronts us in the form of formal state prohibitions, sanctions, and suppression.

A second feature that would have improved this work is more discussion of the extension of his argument into the War on Terror. He does address potential implications and remedies in the Conclusion, but throughout the course of the book his arguments about “wartime” involve formal, declared—or “virtual states of undeclared” (p.9)—wars, waged between discrete states or parties and fought by conventional

means. But the War on Terror is not really a “war” in the traditional sense—most notably in that it does not have an obvious endpoint. Have we “won” this “war” when there are no longer individuals in this world, with access to dangerous weapons, a hatred of the United States, and the wherewithal to carry out violent acts? The reader needs to see more reflection on the effects of this apparent perpetuity for Stone’s periodization and categorization of American wartime history. We are reminded to be eternally vigilant, to refuse to accept governmental secrecy, and to proceed cautiously in the face of legislation like the USA PATRIOT Act, but especially when combined with the above point about individuals’ reticence and reluctance to criticize the government (even if they are completely “free” to do so in a legal sense), this *new* sort of war suggests a new sort of speech suppression—which suggests a new sort of “perilous times.” Sounds like a second edition in the making.

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