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Allan C. Hutchinson

Osgoode Hall Law School of York University, ahutchinson@osgoode.yorku.ca

Melinda Jones

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Wheeler-Dealing:
An Essay on Law, Politics, and Speech

ALLAN HUTCHINSON* and MELINDA JONES**

Few matters seem to arouse greater feeling than local politics and sport. Each reflects and reinforces common qualities of robust partisanship and vigorous exercise. When the two combine, tempers are guaranteed to run very high. This unpropitious state of affairs occurred in Leicester in the spring of 1984. The city of Leicester has a significant and established black community; about twenty-five per cent of the population are of Asian or Afro-Caribbean origins. Leicester City Council was firmly committed to racial equality. In particular, it supported the Gleneagles Agreement made in 1977 between Commonwealth countries which encouraged "taking every practical step to discourage contact with sporting organisations from South Africa". When the English rugby team organised a tour to South Africa and selected three Leicester players, the council considered the gauntlet to be thrown firmly at its feet. The council allowed the Leicester Rugby Football Club to use a recreation ground for Second XV matches and general training; the First XV played elsewhere.

After much debate, Leicester City Council determined that, unless the club officials were prepared to condemn the tour and urge its players not to play, it would suspend the club's use of its recreation ground. The council fully appreciated the club had no power to instruct its amateur players not to tour. Although the club joined with the council in condemning apartheid, it felt that a total prohibition of all sporting links with South Africa would enhance rather than diminish apartheid. Consequently, the club refused to comply with the council's request. After the tour had taken place the council banned the club from using the recreation ground for twelve months. The club sought an order of *certiorari* quashing this decision, a declaration that the council's decision was *ultra vires*, and an injunction restraining the implementation of the decision.

*Associate Professor, Osgoode Hall Law School, York University, Toronto, Canada.

**Lecturer in Law, La Trobe University, Melbourne, Australia.

This project began while Allan Hutchinson was a visitor at Monash University, Melbourne. The authors appreciate the comments by friends at Osgoode Hall and Monash on an earlier draft.

As a matter of administrative law, the dispute was framed as one concerning the legitimate exercise of power by a local authority. Was the ban *ultra vires* or was the council within its statutorily-defined powers? The council contended that, in exercising its discretionary power over its land, it had a duty under the Race Relations Act 1976 “to make appropriate arrangements . . . to promote . . . good relations between persons of different racial groups”; thus, the ban was merely part of this statutorily-obligated policy. The club accepted that the council did possess such authority, but argued that as the club’s actions were neither illegal nor unreasonable, the council was in breach of its accompanying common law responsibility to exercise its statutory powers in a reasonable manner.¹ The council was attempting to punish the club for its refusal to endorse the official view of Leicester City Council.

Anxious to emphasise that judicial review did not raise questions of political judgement, the courts were at pains not to trespass:

. . . across that line which divides a proper exercise of a statutory discretion based on a political judgment, in relation to which the courts must not and will not interfere, from an improper exercise of such a discretion in relation to which the courts will interfere.²

At first instance, Forbes J. held that, although Leicester City Council did not have unfettered discretion in allocating its lands to competing public uses, it was entitled to give weight to the need to promote good race relations. The Court of Appeal upheld this decision and a majority of the judges went even further. Ackner L.J. and Sir George Waller concluded that the council’s decision to ban the club was not so unreasonable that no reasonable council could ever have made it.³ The House of Lords allowed the club’s appeal and reversed the decision of the lower court.⁴ The law lords held that, while the council was entitled to give weight to considerations of good race relations, the council’s ban was unreasonable in the *Associated Provincial Picture Houses Ltd. v Wednesbury Corporation* sense of being unfair and procedurally improper.

Although the “reasonableness” doctrine was originally confined to situations where the decision-maker acted arbitrarily or capriciously, it has more recently been used to overrule decisions which the courts consider politically wrong.⁵ *Wheeler and Others v Leicester City Council* is such a case. It is stretching things too far to claim that the council’s decision is “so absurd that no sensible person could ever dream that it lay within the powers of the authority”.⁶ As presently conceived, the doctrine of “reasonableness” is an empty barrel into which any political brew can be poured. Whereas Ackner L.J. and Sir George Waller thought the council acted reasonably, Roskill and Templeman L.JJ. thought it had not. Almost no indication was given as to why and by what lights they reached these conclusions. The most egregious culprit is Roskill L.J. who simply announced that while “I . . . greatly hesitate to differ from four learned judges, . . . I . . . say that the actions of the council were unreasonable”.⁷ Such conclusory statements do not pass argumentative muster; they fail to satisfy even minimal standards for reasoned argument and decision-making.

Accordingly, it is the burden of this short essay to uncover and criticise the arguments and assumptions on which the judgments rest. In so doing, our aim

is two-fold. First, the inevitable and inescapable political nature of the judicial enterprise will be thoroughly revealed; there is no way to judge without entering the ideological debate and struggle over how we should and should not organise social life. Secondly, the controversial and contingent nature of that debate and struggle will be demonstrated; there are no settled or final resolutions. By examining the facts and judgments in *Wheeler and Others v Leicester City Council*, the limits and affiliations of conventional legal thinking will be laid bare for critical scrutiny.

I

For all its doctrinal imperfections, *Wheeler and Others v Leicester City Council* does appear to be a victory for liberals and all those who place a high value on freedom of speech. As Templeman L.J. reminds us, “the laws of this country are not like the laws of Nazi Germany”.⁸ Public authorities cannot insist that people openly and enthusiastically commit themselves to views which they do not hold. Nor can the state punish people for adhering to political opinions of which the state does not approve. However, such a positive assessment of the judgments misrepresents their major thrust. At best, the law lords’ handling of the free speech issue should be described as Orwellian. The rhetoric is certainly in place, but the substantive message does more to undermine than to promote confidence in the courts as the protector of civil liberties.

Despite his indignant and complacent tone, Templeman L.J. manages to contradict and imperil a commitment to free speech. While freedom of speech is enshrined as a fundamental and fragile value to be protected vigorously by the courts, he asserts that “*of course* this does not mean that the council is bound to allow its property to be used by a racist organisation”.⁹ As the club and players had “a perfectly proper attitude, caught as they were in a political controversy which was not of their making”,¹⁰ the council was not entitled to reprimand them. Such a conditional and constrained protection of free speech offers cold comfort. The real objection to the council’s action was not that account was taken of the political views of the applicants nor that they improperly requested the applicants to publicly endorse their views. It was that the views of the players were “politically sound”. It was the antipathy between racist sentiments and views about the links between politics and sport which invalidated the council’s decision. The fact that the individuals held lawful views about apartheid and were “right thinking people” suggested to the judges that they should be entitled to their own opinions. On this reasoning, civil liberties are co-extensive with – but no broader than – the extant attitudes and beliefs of the judicial establishment. This offers a frightening prospect; social justice is still very much dependent on the size of the Lord Chancellor’s conservative foot.

The only exception to this lamentable state of affairs was the dissenting judgment of Browne-Wilkinson L.J. which was expressly rejected by the House of Lords. For him, the case raised fundamental difficulties about reconciling two conflicting principles of a democratic society:

... on the one hand, the right of a democratically elected body to conduct its affairs in accordance with its own views and, on the other, the right to freedom of speech and conscience enjoyed by each individual in a democratic society.¹¹

Although he acknowledged the council's duty under the 1976 legislation to establish good race relations, he maintained that it had to be read against fundamental constitutional rights of individual freedom which impliedly constrained the exercise of statutory powers unless expressly abrogated by Parliament.¹² Freedom of speech entails a liberty to refrain from and not be punished for expressing views that run contrary to those held by public authorities:

The right to freedom of speech depends on the fact that no one has the right to stop the individual expressing his own views, save to the extent that those views are libellous or seditious. These fundamental freedoms therefore are not positive rights but an immunity from interference by others. Accordingly, I do not consider that general words in an Act of Parliament can be taken as authorising interference with these basic immunities which are the foundation of our freedom. . . . [W]hen Parliament confers general discretionary powers on public authorities it cannot in general be taken to have contemplated that such discretions can be exercised by taking into account lawful views of those affected by the exercise of the discretions or their willingness to express certain views.¹³

Browne-Wilkinson gives voice to the concerns of civil libertarians and demonstrates a willingness and courage to face squarely the competing freedoms that energise the dispute and its political tension. However, he might have jumped out of the legal frying pan and into the political fire. Academic comment that hails Browne-Wilkinson's judgment as "enlightening and enlightened"¹⁴ is premature. This is truly a hard case. The difficulty is not Dworkin's esoteric problem of establishing that a matter of principle is involved, but one which goes to the very heart of democratic theory and practice. It highlights the contradictions and confusions of much traditional thinking and its impoverished premises. When stripped of its rhetorical appeal to constitutionalism, the rule of law, and free speech, Browne-Wilkinson's judgment has ambiguous merit. As a component of a larger scheme of legal doctrine, his judicial musings reflect and reinforce a particular and limited vision of social relations and thinking. The issues raised in *Wheeler and Others v Leicester City Council* are extremely complex and deserve a more thorough-going treatment than that provided by the courts. This is not a case that can be resolved simply by paying lip-service to general principles and vague commitments. Even if statutory provisions are to be construed in terms of free speech, it is not at all clear that the rugby ban was in breach of that principle. The judgments and the political/legal theory that they tacitly invoke are shot through with false analogies, hidden assumptions, and leaps of ideological faith. They collapse a number of issues into one and, as such, distort the overall picture. While the response to each issue might independently amount to a plausible or acceptable position, their combination fails: the principle of free speech is no Ockham's Razor.

“Free speech” is an evocative and potent term. As an ideal, like due process and natural justice, it exercises a tenacious grip on the political imagination and consciousness. Yet its ideological attraction and resilience are largely attributable to its historical adaptability and political plasticity. Free speech only takes on meaning and substance in particular contexts. Its content is fixed by those values it is chosen or seen to protect and promote at any particular time. The two major justifications – liberal and democratic – for freedom of speech can be distinguished by the different limitations they suggest on the authority and power of the state to intervene in speech matters.¹⁵ Liberals want individuals left alone to cultivate their own personalities through diverse acts of self-expression. Government must be scrupulous not to interfere with this inherent right to self-fulfillment even if its exercise is inimical to the public interest. The state is only obliged to intervene when there is a real and not imagined clear and present danger of quantitative and qualitative harm to another; merely upsetting, insulting, or disgusting another is insufficient as this is an inevitable corollary of speech. On the other hand, democrats protect political speech so that people can engage in informed public debate and effect a substantial degree of self-governance. Government must facilitate the expression and hearing of a full spectrum of values and ideas at large in society. However, the democrat is less concerned with the protection of so-called obscene, blasphemous, or other undesirable speech. If the touchstone of the liberal justification is self-realisation and distrust of the state, the touchstone of the democratic justification is political knowledge and the ennobling value of speech.

Before exploring their likely response to *Wheeler and Others v Leicester City Council*, the limitations and weaknesses of these justifications ought to be mentioned. First, there is the problem of the primacy of the value of speech within each ethical structure. The problem for the liberal is to explain why speech is special. She or he must explain why speech is of greater significance and in need of greater protection than prior needs such as food and shelter – rights which liberals have been slow to champion.¹⁶ The parallel problem for the democrat is to explain how majoritarian principles ought to be set aside in the interest of the minority. If the majority holds a legitimate and informed view, the democratic perspective suggests that dissenting individual voices can have no claim to be heard. In addition, there is the indeterminacy of these justifications. Although they each have a different substantive tilt, with the liberals favouring freedom over equality and the democrats equality over freedom, they can both be used to justify conflicting solutions. Indeed, each relies on the implicit values of the other to avoid the injustice that accrues from an unmitigated reliance on one to the complete exclusion of the other.¹⁷

Although these justifications push in different directions and place different weights on the scales of justice, both liberals and democrats accept that which is fundamentally objectionable and to be prohibited is the prevention of speech. However, in *Wheeler and Others v Leicester City Council*, no-one was

prevented from speaking. Instead, the rugby players were asked to speak. This raises the issue of whether freedom of speech incorporates the corresponding right not to speak. Despite the tendency to treat silence as a unidimensional circumstance, it is a subtle and complex mode of human action. As Thomas Carlyle stated, "Silence is Deep as Eternity; speech is as shallow as Time."¹⁸ The response of the courts to the constitutional status of silence is characteristically mixed. Despite the soaring rhetoric, the law and legal theorists have combined to weave a patchwork quilt of doctrine and defences.

The democrat may well answer differently to the liberal on a right to silence. The democrat would have no principled objection to state-enforced requirements that people and institutions provide information to those who request it. Indeed, the need to facilitate effective government by citizens might actually place an affirmative duty on the state to ensure that adequate knowledge and information is made publicly available. Such thinking has supported legislation to allow access to government information, census taking, the disclosure of corporate dealings, compellability of trial witnesses, regulation of advertising, disclosure of private affairs by elected officials, and much more. In a similar vein, the courts have refused to grant to the media a testimonial privilege to withhold its confidential sources of information.¹⁹ Being more concerned with the sanctity of the individual, the liberal will clearly object to the state requiring any sort of declaration of individuals. If there is no possibility that remaining silent will harm another, it will be treated as a self-regarding action beyond the legitimate sphere of government action. However, if silence could result in harm to others, it is other-regarding and speech can be demanded. Although there is much dissension in their ranks, modern information-seeking legislation is capable of liberal justification on such grounds.²⁰ Liberals and democrats would also raise the important distinction between obliging people to divulge information and requiring them to endorse opinions that they do not hold.

In *Wheeler and Others v Leicester City Council* it was not that the rugby players were required to speak, but that the council's threat was intended to force the players to express a political opinion that they did not hold or else be punished. As such, it offends a "fixed star in [the] constitutional constellation" which insists that "no official . . . can prescribe what shall be orthodox in politics . . . or force citizens to confess by word or act their faith therein."²¹ Although this unimpeachable sentiment seems to dispense with the council's action and justify the court's finding in *Wheeler and Others v Leicester City Council*, it hides much of complexity and difficulty under its sweeping injunction. For instance, liberals and democrats alike must be able to distinguish between facts and information which people can be legitimately obliged to speak, and ideas and opinions which cannot be legitimately forced into people's mouths. Not only have attempts to make meaningful distinctions between different kinds of speech been less than encouraging in the United States of America,²² but the law has struggled generally to separate truth from falsity and belief from knowledge. The

development of defamation law as applied to the media is a good illustration of the problems.

In *Wheeler and Others v Leicester City Council* the problem of the right to remain silent arose because of the rugby club's refusal to endorse the council's anti-apartheid policy. Can a public body require that users of its property display the warning that racism is anti-social? Is this any different from requiring cigarette producers to print the warning that "smoking is a health hazard"? Is it relevant, in either case, that the speaker neither believes in the truth of the warning nor cares about the message? In either case, the speakers are mainly concerned with the business of making money and playing ball. The council's strategy for hastening the demise of apartheid could be seen to be reminiscent of the loyalty oaths which were used to great political effect in the United States of America in the 1950s and 1960s. In these instances liberals and democrats alike insisted that free speech must protect the right to remain silent. Public employment and the enjoyment of public benefits (including the benefits of the National Labour Relations Act) were predicated upon the swearing of an oath; speakers had to declare that they were not communists and did not believe in the overthrow of the government by force or by other illegal means. This was a clear and virulent attempt to deny all civil liberties to communists and other "subversives". Judicial declarations of unconstitutionality did little to deter public authorities who simply changed their tack.²³ Individuals were obliged to swear simple oaths of affirmation, stating that they would uphold the federal and state constitutions. If it could be shown that speakers belonged to an organisation committed to communism or the transformation of the state, they were punished for perjury. In time, the court and most commentators considered that such methods were intimidatory and inimical to free speech.

But these cases are very different from *Wheeler and Others v Leicester City Council*. While it is difficult to imagine any justification for the state's action in the loyalty oath cases that would satisfy a self-respecting liberal or democrat, the circumstances in *Wheeler and Others v Leicester City Council* were very different. It is true that, as in the loyalty oath cases, the opinion of the club members was being stigmatised. But the attempt to eliminate the "undesirable" idea was qualitatively different from that aimed at in the loyalty oath cases. In *Wheeler and Others v Leicester City Council* the council was attempting to suppress a popular idea that itself undermined the sanctity of the individual. Moreover, whereas people's livelihoods were threatened in the United States of America, *Wheeler and Others v Leicester City Council* involved the use of public open space for playing rugby on some ten occasions during the year; there were plenty of other grounds available. It was more of an inconvenience than a serious deprivation and – relative to the effect on the black community of Leicester – was quite trivial. Further, in *Wheeler and Others v Leicester City Council* there was no attempt to intimidate the individuals concerned, although there certainly was a desire to punish them; disagreement was over strategy and not purpose. What is perhaps most important in distinguishing *Wheeler and Others v Leicester City Council* from

the loyalty oath cases is the fact that the decision was not intended to have a chilling effect on ideas or speech. It was, instead, intended to allow the council to make a statement through a body which was seen as an ambassador for the community. In such a case it is extremely uncertain that the free speech principle must or should be extended to protect the rugby players' desire to remain silent.

III

The court in *Wheeler and Others v Leicester City Council* avoided the question as to whether anyone's speech rights had actually been transgressed. It simply assumed that the right to free speech endorsed and protected the desire of an individual to remain silent. In fact, the court decided the case by reference to those principles governing access to public property. Although there is no right in the law of England and Wales to hold a public meeting,²⁴ it is accepted that, in determining whether public facilities can be used for speech purposes, the authorities are not entitled to grant or withhold permission on the basis of the views likely to be expressed. For instance, in *Verral v Great Yarmouth Borough Council*²⁵ a council sought to revoke a contract made by the previous administration with the National Front (a fascist organisation) and prevent it from using a public hall for their meetings. The Court of Appeal held that the contract was enforceable as "the right to speak should not be denied, even to those who speak . . . obnoxiously and offensively".²⁶ Clearly, *Wheeler and Others v Leicester City Council* is very different. The council did not prevent the club from speaking. Indeed, the council could have quite consistently allowed the club full and uninhibited access to council facilities to argue and communicate the club's opinion.

Nevertheless, it might be thought that the club could bring its claim within the *Verral v Great Yarmouth Borough Council* principle by arguing that the playing of rugby – at least in the particular circumstances of the case – amounts to an act of speech. Although its scope is a matter of dispute, it is uncontroversial that the guarantee of free speech can stretch beyond conventional kinds of speech to include symbolic forms of communication. However, while it is entirely appropriate to treat draft-card burning, flag saluting, arm-band wearing, and picketing in certain contexts as speech,²⁷ it is difficult to understand how the playing of rugby could be reasonably said to amount to any particular statement about racism. The fact that it might be interpreted by some as a vague act of defiance is insufficient on its own to warrant protection. Mindful of the fact that "all behaviour is capable of being understood as communication",²⁸ the acceptance of such arguments would mean that any criminal act of caprice would be portrayed as a committed and principled challenge to the regime of private property. Moreover, even with regard to the fundamental nature of free speech, *Wheeler and Others v Leicester City Council* should be distinguished from *Verral v Great Yarmouth Borough Council*. The fact that rugby players wished to express a popular view

which, through the auspices of the Rugby Football Union, had widespread communal acceptance, clearly separates *Wheeler and Others v Leicester City Council* from the majority of cases dealing with freedom of speech.

A commitment to freedom of speech, whether from the moral imperative of liberalism or from the functional perspective of the democrat, is intended to ensure that minority positions are given an airing in the face of a powerful majority. But in *Wheeler and Others v Leicester City Council* it was the council which was attempting to assert the position of the racial minorities whom it represented, against the view of a powerful non-state body. It is a naive view of democracy which translates the position of a minority into the mainstream simply by virtue of that minority finding an official voice. This situation is troubling and revealing for liberals and democrats. While it is unproblematic to translate the position of the rugby club into the rights of players, it is extremely difficult to accommodate similarly the position of the community. Yet, it would seem that local government bodies, like individuals or companies, often wish to make political statements which do not align them with the mainstream of the society. A pluralist notion of society would be able to recognise that in a complex constitutional system governments are as often participants as they are umpires in political struggle. It seems that the council should have a recognised speech-interest, such that it be accorded the right to have its view about racism or nuclear war heard. If this were possible, and if it were necessary to balance the competing speech-interests of the council and the players; a different set of questions would be required. Who is wishing to express the unpopular view? Is either body failing to accommodate any rights of the other? Is the council using its position of power to discriminate or unfairly disadvantage the other? By posing different questions, different answers might be forthcoming.

Leicester City Council clearly made a mistake in their attempt to disassociate themselves from supporters of apartheid. Had the council simply decided to let another team use the rugby ground or to close the ground at the relevant time, its decision would have been unassailable in the courts. The rugby players had no right to use the ground or to have their licence renewed. Further, imagine that instead of one club desiring to use the rugby field there had been three or four clubs vying for its use. The council policy with regard to racism, authorised by the Race Relations Act 1976, would certainly have allowed the council to take account of the views of the rugby club – racist or otherwise – in their decision about the allocation of public facilities. The real objection to the council's action was not that account was taken of the political views of the applicants or even that they improperly requested the applicants to endorse publicly their views. In the court's assessment, the views of the players were "politically sound".²⁹ Under the free speech principle, *all* views are supposed to be legitimate and deserving of legal protection. Accordingly, *Wheeler and Others v Leicester City Council* is not the landmark for free speech that it pretends to be.

Rather than thinking in terms of free speech, the council was more concerned to enhance racial equality; it considered equality more important

than liberty in the struggle for improved social justice. Of course, there is no neutral or objective way to fix the relative ordering of equality and liberty. However, a different cluster of considerations arise if *Wheeler and Others v Leicester City Council* is treated as primarily a case about equality and race relations rather than about liberty and freedom of speech. Importantly, there is no longer any need to construe the council's action as an exercise of power which undermines the rule of law. The whole incident ceases to be an instance when the state's action has exposed or failed to protect innocent minoritarian individuals from the unbridled force of majoritarian rule. In fact, *Wheeler and Others v Leicester City Council* is exactly the opposite case. The difficulties arose because of a firm commitment to the protection of minorities. A practical consequence of this policy was to confront and vanquish a disaffected member of the majority. In essence, *Wheeler and Others v Leicester City Council* brought into sharp focus a deep and enduring disagreement between two competing conceptions of social justice. It pitted the council's espousal of an egalitarian justification against the courts' adherence to a libertarian ethic.

The council's preference for equality is, of course, far from radical or novel. Concomitant with a commitment to freedom of speech, many countries have enacted proscriptions against incitement to racial hatred. In the United Kingdom the Labour Party first moved to ban incitement to racial hatred with the Race Relations Act 1965. While it is clear that legislative desire to prevent racism is no panacea, it is at least a public declaration of the political value of equality and its priority over liberty. Moreover, in the celebrated case of *Jordan v Burgoyne*,³⁰ the courts did not consider that an individual had the liberty to tell a crowd that Hitler had the right idea about the Jewish people or to provoke and belittle individuals on the basis of race or belief. That was much more clearly a free speech case than *Wheeler and Others v Leicester City Council* and the court did not feel it appropriate to give priority to liberty. In this sense, therefore, the courts in *Wheeler and Others v Leicester City Council* were not obliged by judicial precedent or legislative wisdom to reach the decision they did.

By countenancing incitement to racial hatred, the courts do not abandon people to majoritarian tyranny. What they do is opt for an egalitarian vision of social justice over a libertarian one. By allowing for policies which encourage racial harmony, the courts do not forsake the rule of law. What they do is support a more progressive rendering of the judicial role than a traditional one. In either case, the courts must take a political stand. It is not that they enter the debate over equality and liberty; there is no way not to be part of that debate. The only choices available are those of candour or subterfuge. In *Wheeler and Others v Leicester City Council* the courts chose liberty over equality and subterfuge over candour; the council chose equality over liberty and candour over subterfuge.

IV

Although the courts' commitment to free speech will hearten those who support efforts to read a Bill of Rights into the common law, such constitutional

guarantees are a two-edged sword. The history of the use of freedom of speech does not bear out the idea that when courts rely on that doctrine they are acting in the cause of social justice.³¹ A decision in favour of free speech is not unequivocal support for individual freedom or democratic values. It favours some interests at the expense of others; there is no escape from the burden of substantive choice. Moreover, the courts engage so thoroughly in the process of making, refining, reworking, collapsing, and rejecting doctrinal categories that judges tend to lose sight of the very values that they are dealing with. And when, as in this case, the judges make simplistic decisions resounding with principle, they fail to recognise the working complexities of the values they claim to acknowledge; sceptical caution is preferable to principled smugness.

For all their apparent dissimilarity, the liberal and democratic justifications of free speech share and form part of a common political philosophy of individualism – a thing or state of affairs is only estimable if it is valuable to a particular individual. The liberal's commitment is open and obvious. While the democrats manage to obscure their dependency, they are equally wedded to an individualistic ethic. Their concentration on the opportunities for engaged deliberation is premised on the democratic process as a favoured means for enhancing the more basic end of self-realisation through political participation. The value of entering civil society is found in the medium of law and its capacity to impose constraints on the power of Leviathan. In the picture provided by John Stuart Mill and accepted by modern liberals, the state must not interfere in matters of a private nature and ought to protect the negative liberties of its citizens.³² It is this understanding that drives and undergirds the approach of Browne-Wilkinson L.J. in *Wheeler and Others v Leicester City Council*: “fundamental freedoms [like the right to freedom of speech] . . . are not positive rights but an immunity from interference by others.”³³

As soon as liberals move beyond a libertarian free-market image of society and recognise a legitimate role for the state, they become trapped by the need to mediate between the state as a threat to freedom and the state as its guarantor.³⁴ In the realm of freedom of speech, this is particularly problematic. For speech and language are not neutral activities, but are intrinsically tied to social contexts. By focusing on individuals, liberal-democratic theory is unable to deal with the complexities of the modern marketplace and the impact of media control, corporate activity, and collective modes of individual enterprise. The dominant theories fail to recognise that not all speakers are equal but that some are more equal than others. The mask of neutrality hides the unsightly face of sectarian politics.

At the heart of the problem is the crucial distinction between the public and private spheres of social life. The courts imagine a Blackstonian set of natural rights that must be protected and preserved. An abuse of power occurs when the state, or someone acting through or on behalf of the state, interferes with or fails to protect such entitlements. However, not only is such a vital distinction between public and private acting impossible to make in any

meaningful, consistent, or predictable way, but also its arbitrary definition and use have worked to benefit some interests at the expense of others. Inaction or a decision not to intervene is as much governmental responsibility as an active decision to do so. Efforts to preserve the status quo involve the state as much as attempts to change it. Acquiescence and action are merely flip-sides of the governmental coin. The protection of private property and the enforcement of private contracts by the state ensures that a governmental presence is strong and essential in private transactions.³⁵ It is never a matter of whether the state should act, but exactly when and how it should regulate social life.

Constitutional law in the United States of America is riven by a confusion borne of an ill-fated reliance on the public/private distinction.³⁶ In the law of England and Wales a similar process of reasoning and state of confusion are apparent, although less pronounced; overt occasions for constitutional adjudication are much fewer. A pertinent illustration is the courts' interpretation of the Race Relations Act 1968 in *Race Relations Board v Charter*. A fundamental issue was the precise meaning of the Act's limitation to "the public or sector of the public". The House of Lords engaged in a highly formalistic analysis of the statutory words and resolved that a social club was private and could discriminate at will; the judgments are remarkable for their lack of any functional consideration of the issue.³⁷ However, in *Race Relations Board v Applin* the law lords held that efforts to dissuade couples from fostering black children were unlawful as they were fostering children in the care of the local authority and, therefore, were "a sector of the public". Although the 1968 legislation outlawed public acts of discrimination it left intact a private person's common law rights which allow them to discriminate "to their heart's content".³⁸ Throughout the judgments emphasis is placed on the extent to which the foster parents are *in loco publicae*. In so far as families – often and traditionally thought of as archotypically private – can be classified as public institutions, it seems both functionally and analytically unsound to find that clubs cannot also possess the necessary attributes of public identity; the impact of clubs on political morality and activity is no less than that of families. In substantive terms, it is unclear why ordinary parents should not be subject to the higher norms of public policy laid upon foster parents. Furthermore, the legislation was amended in a somewhat ironic manner; Parliament declared that clubs with over twenty-five members were to be within the scope of the 1976 legislation and that foster parents were to be outside it.³⁹

Although the citing of the distinction between the public and private spheres of social life can only be made in an arbitrary and ideological manner, the distinction has served to insulate vast sectors of power from social reach and censure. In the context of speech, the major beneficiaries of that state of affairs have been media corporations. As the fourth estate of the realm, they are not only considered to be beyond the scope of legitimate governmental regulation, but are often accorded special privileges, as under the constitutions of Canada and the United States of America.⁴⁰ The media is dominated by

huge corporations. The primary *raison d'être* of the media is neither disseminating news nor providing entertainment, but is the making of money and the accumulation of capital. In the modern high-tech world in which control over the channels of mass communication is a basis for broader control and in which politics has become a visual spectacle more than anything else, the abdication of such power to private interest is folly. If information is the lifeblood of contemporary society, large corporations have the power to regulate the pulse of the body politic in accordance with the dictates of economic logic. As Liebling put it, the only person with freedom of the press is someone who can afford to own one.

The judgments depend on and, at the same time, are undermined by the public/private distinction. The courts' imagery is of a powerful public body flexing its official muscles on a small group of private citizens – a minority view being smothered by an intolerant majority. Yet, in *Wheeler and Others v Leicester City Council* the substantive reality belies the formal rhetoric. Leicester City Council sought to represent the black minority in its debate with the white majority over racial issues. To translate the minority into the mainstream, simply by virtue of that minority finding an official voice, is to allow form to eclipse substance entirely. By obstructing attempts by those promoting the disadvantaged people of Leicester to make an effective contribution to public debate and influence in the city stymied the consolidation and further development of any sense of practice of civic virtue.

To emphasise these arguments imagine that a large corporation like I.B.M. was the landowner instead of Leicester City Council. Although the Race Relations Act 1976 might prevent it from discriminating in the leasing of its land on strictly racial grounds, I.B.M. is free to grant licenses to use its property based on viewpoint discrimination. As Lord Simon put it, it can discriminate to its heart's content.⁴¹ This state of affairs puts paid to any serious idea that free speech is a "much-prized and indispensable freedom".⁴² Like most freedoms, it slips into the background when property owners enter the picture. However, it might be argued, people are still free to speak; they simply cannot expect property owners to share their views or to be indifferent about them when it comes to bestowing favours, like using their property. This argument is revealing. If this situation does not give rise to free speech issues, it would not do so in the council context. This means that the issue will be one of the state's property rights rather than the individual's freedom of speech. If that is not the case and it is a free speech issue, then the outcome is that private property rights always trump speech rights. Remembering that public property is the only property that many Leicester citizens have or indirectly control. Such reasoning reinforces further the privileges of the propertied. Accordingly, the rhetoric of free speech is exaggerated and transparent. While property owners are free to espouse their views, unpropertied citizens are effectively left without a voice. The only effective outlet is further constrained by electoral preferences, including those of the rich, and by the judicial enforcement of "reasonableness".⁴³

Finally, the identification of the club and its members as “private” is open to doubt. It is surely more appropriate to recognise that it possesses no intrinsic public or private identity, but that its status will vary depending on the substantive context. Even within the limited discourse of the public/private distinction, it is plausible to define a club as public; it is licensed through the state, it uses public property and, therefore, possesses as much analytical connection to the state as do foster parents. However, had the club itself wanted to discriminate against persons wishing to use its facilities on the basis of political opinion rather than race, the courts would not intervene. The solution to this challenge is not to hide behind formal screens, but to address the substantive issues of justice directly; there will be no easy and general answers but only difficult and particular choices.

V

Contrary to conventional thinking, freedom of speech is not a principled standard that can resolve recalcitrant issues of political and moral practice. As so often in matters of speech, “the language of rights is at most a convenient proxy for a heterogeneous collection of familiar moral reasons”;⁴⁴ it hides more than it illuminates. Like any “contested concept”, freedom of speech is an intellectual terrain on which ideological forces battle for victory and control. It is not a technical matter of legal principle, but an engaged struggle over the kind of society we want to build and live in. An appreciation of this leads to a demand for a new theory and practice of “free speech”. It must go beyond the liberal and democratic underpinnings of traditional writings and lay a whole new foundation of understandings about language, personal identity, group claims, and state action. This is a demanding but essential task.

Accordingly, the limited aim of this essay has been to discredit the moral coherence and political integrity of the present practice and theory of free speech and to expose its ideological foundations. Legal discourse is neither determinate, dispositive, nor objective; it is a privileged and constitutive way of society-making and, as such, is a formidable factor in attempts at social change. By concentrating on *Wheeler and Others v Leicester City Council*, we hope to have highlighted the particular values that legal thinking tends to internalise and to have suggested alternative ways of framing and responding to questions of free speech. While courts might feel obliged to trade in certainties and feign an answer for everything, academics must resist such expedient hubris and cultivate a tolerant humility which forever struggles “to comprehend the world as a question”.⁴⁵

NOTES AND REFERENCES

- 1 See *Associated Provincial Picture Houses Ltd. v Wednesbury Corporation* [1948] 1 K.B. 223 (C.A.).
- 2 *Wheeler and Others v Leicester City Council* [1985] 2 All E.R. 1106 (H.L.) at pp. 1110-1 *per* Lord Roskill.

- 3 id., pp. 155 and 160 respectively.
- 4 op. cit., n. 2.
- 5 See, for example, *Bromley London Borough Council v Greater London Council* [1985] 1 A.C. 768. For an extended critique, see A. Hutchinson, "The Rise and Ruse of Administrative Law and Scholarship" (1985) 48 *Modern Law Rev.* p. 198.
- 6 op. cit., n. 1, p. 229.
- 7 op. cit., n. 2, p. 1111.
- 8 id., n. 2, p. 1112.
- 9 id., n. 2, p. 1113 (emphasis added).
- 10 op. cit., n. 2.
- 11 op. cit., n. 3, p. 157.
- 12 id., n. 3, p. 157.
- 13 id., n. 3, p. 158.
- 14 D. Allen, "Racial Harmony, Public Policy, and Freedom of Speech" (1986) 49 *Modern Law Rev.* p. 121 at p. 124.
- 15 For a survey of the different rationales, see E. Barendt, *Freedom of Speech* (1985) pp. 8-23, and F. Schauer, *Free Speech: A Philosophical Enquiry* (1982). Mill's "marketplace of ideas" and its economic imagery seems to be sufficiently discredited as not to warrant serious treatment. For a devastating critique, see P. Ingber, "The Marketplace of Ideas: A Legitimate Myth" (1984) *Duke Law J.* p. 1. Nevertheless, the connection between speech and property remains a strong subtext in the free speech debate (see pp. 11-12).
- 16 As John Hart Ely so tellingly put it in *Democracy and Distrust* (1982) p. 127, "watch most fundamentalist-rights theorists start edging toward the door when someone mentions jobs, food, or housing: those are important, sure, but they aren't *fundamental*".
- 17 See K. Karst, "Equality as a Central Principle in the First Amendment" (1975) 43 *University of Chicago Law Rev.* p. 20 at p. 43 for an expanded treatment.
- 18 T. Carlyle, *Critical and Miscellaneous Essays* (1878) Vol. 4, p. 613. See also B. Dauenhauer, *Silence: The Phenomenon and its Ontological Significance* (1980).
- 19 See *British Steel v Granada* [1981] A.C. 1096. Although legislation has reversed this decision, a refusal to divulge such information is punishable if its revelation is not demanded in the interests of justice, national security, or prevention of crime. See Contempt of Court Act 1981 s.10.
- 20 Dworkin takes the position that the question whether freedom of speech includes the right to remain silent is one of policy and not principle; see R. Dworkin, *Taking Rights Seriously* (1978) pp. 22-8. He concludes that, while an individual has an interest in whether there should be legal protection granted to those who want to remain silent, it does not give rise to an individual right and "must yield to [an accused's] genuine rights to a fair trial, even at some cost to the general welfare" (*A Matter of Principle* (1985) p. 377). If Dworkin's view represents the true liberal faith, freedom of speech will not necessarily entail a total protection for those who do not wish to speak.
- 21 *West Virginia State Board of Education v Barnette* (1943) 319 U.S. 624 at p. 642 *per* Jackson J.
- 22 See L. Tribe, *American Constitutional Law* (2nd ed. 1988).
- 23 id., p. 804.
- 24 See *Hunt v Broome* [1974] A.C. 587.
- 25 *Verral v Great Yarmouth Borough Council* [1981] 1 Q.B. 202.
- 26 id., p. 210. This is not to suggest that there are not strong arguments against this sort of speech being protected. For example, rejecting liberal arguments, Downs contends that a community-based theory of substantive justice can be developed to justify the restriction of speech that is intended to vilify other races. See D. Downs, *Nazis in Skokie* (1985).
- 27 See *United States v O'Brien* (1968) 391 U.S. 367; *West Virginia Board of Education v Barnette* (1943) 319 U.S. 624; *Tinker v Des Moines School District* (1969) 393 U.S. 503; and *Hubbard v Pitt* [1976] 1 Q.B. 142.
- 28 F. Haiman, *Speech and Law in a Free Society* (1981) p. 31.
- 29 See above, n. 9 and n. 10.

- 30 *Jordan v Burgoyne* [1963] 2 Q.B. 744.
- 31 See, for example, *R. v Nicholls* (1911) 12 C.L.R. 280, and *Irwin Toy Ltd. v A.G. of Quebec* (1987) 32 D.L.R. (4th) 641. For the American experience, see D. Kairys, "Freedom of Speech" in *The Politics of Law* (1982; ed. D. Kairys) ch. 7.
- 32 For a fuller account and critique of this theory, see A. Hutchinson and A. Petter, "Private Rights/Public Wrongs: The Liberal Lie of the Canadian Charter" (1987) 31 *University of Toronto Law J.*
- 33 See above, n. 3, p. 158.
- 34 See D. Kennedy, "The Structure of Blackstone's Commentaries" (1979) 28 *Buffalo Law Rev.* p. 205.
- 35 See R. Hale, "Coercion and Distribution in a Supposedly Non-Coercive State" (1923) *Pol. Sci. Q.* p. 470, and F. Cohen, "Property and Sovereignty" (1927) 13 *Cornell Law Q.* p. 8.
- 36 See "Symposium on Public-Private Distinction" (1982) 130 *University of Pennsylvania Law Rev.* p. 1289.
- 37 *Race Relations Board v Charter* [1973] A.C. 868. The dissenting judgment of Lord Reid is something of an exception to this.
- 38 *Race Relations Board v Applin* [1975] A.C. 259 at p. 286 *per* Lord Simon. See also *Blathwayt v Lord Cawley* [1976] A.C. 397 at p. 426 *per* Lord Wilberforce ("private selection [has not] yet become a matter of public policy"). See also *Re. Tuck* [1978] Ch. 49.
- 39 See Race Relations Act 1976 ss.25 and 23(2).
- 40 See A. Hutchinson, *Dwelling on the Threshold: Critical Essays on Modern Legal Thought* (1987) pp.175-8.
- 41 See *Race Relations Board v Applin*, above, p. 38.
- 42 See *Verral v Great Yarmouth Borough Council* above, n. 25 at p. 205 *per* Watkin J., as quoted and approved by Browne-Wilkinson L.J., above, n. 3, p. 157.
- 43 See above, n. 1. This is not to suggest that elections are somehow illegitimate or improper. It is merely intended to emphasise that public property is open to a larger range of controls than private property.
- 44 W. Galston, *Justice and the Human Good* (1980) p. 127.
- 45 M. Kundera, *The Book of Laughter and Forgetting* (1980) p. 237.