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Free Speech and Human Dignity

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*Free Speech and
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Introduction

The First Amendment right to freedom of expression is a defining feature of American society. Yet the scope and meaning of this right have always been controversial. In recent years, much of the debate has focused on issues like hate speech and pornography. Supporters of regulation argue that such speech causes serious injury to individuals and groups and that it assaults their dignity as human beings and citizens. Civil libertarians respond that our commitment to free expression is measured by our willingness to protect it even when it causes serious harm or offends our deepest values. When the issue is framed in this way, we seem to face a tragic choice, one in which we can protect human dignity only by sacrificing freedom of speech, and vice versa. But both of these values are essential to a liberal democratic society. In this way, hate speech and pornography seem to pose an intractable dilemma for the American constitutional order.

Moreover, the problem is not confined to those forms of speech but extends to First Amendment jurisprudence as a whole. Contemporary disputes often involve conflicts between free expression and other values. Yet we have no coherent framework that would allow us to determine when speech should receive constitutional protection and when it should be subject to regulation. As a result, controversies over freedom of speech often appear to be irresolvable.

To overcome these difficulties, we must transform our understanding of the

First Amendment by developing a theory that is capable of reconciling free speech with other values. That is the goal of this book. Freedom of expression, I shall argue, is founded on respect for the autonomy and dignity of human beings. At the same time, however, this principle also gives rise to other fundamental rights, ranging from personal security and privacy to citizenship and equality. As a general rule, speakers should be required to respect the fundamental rights of others. In this way, the same ideals that justify freedom of speech allow us to determine the limits of that freedom.

As I show in chapter 1, this understanding of the First Amendment has deep roots in American constitutional history. Eighteenth-century Americans held that freedom of speech was one of the natural rights of mankind and was essential to republican government. Like all rights, however, free speech was limited by the rights of others. In this way, the concept of rights provided a standard by which to assess regulations of speech. As chapter 2 explains, however, this traditional view no longer prevails. Instead, modern jurisprudence conceives of First Amendment issues not as conflicts of rights, but as conflicts between the individual right to free speech and “social interests” such as dignity and equality. But there is no clear way to resolve clashes between individual rights and social interests. When First Amendment problems are understood in this way, they seem to involve collisions between incommensurable values. That is one reason these disputes have become so bitter and divisive. The best way to escape this predicament is to return to a rights-based theory of the First Amendment.

Part 2 of the book develops such a theory, drawing both on the natural rights tradition and on modern understandings of rights. According to this theory, which is presented in chapters 3 and 4, rights are rooted in respect for human beings and their capacity for self-determination. Rights represent what it means for people to be free in various areas of life — not only in relation to the external world, but also in their inner lives, in the social and political realm, and in “the sphere of intellect and spirit.”¹ These four elements of liberty correspond to the major justifications that have been advanced for freedom of speech: that it is an aspect of external freedom; that it is essential for individual self-realization; that it is indispensable to democratic self-government; and that it promotes the search for truth. But the same principles that support free speech also support other fundamental rights, including external rights to person and property; personality rights such as privacy and reputation; and rights of citizenship and participation in the society. As I shall explain, the people also have some rights as a community, including the rights to engage in political deliberation and to govern themselves through the democratic process.

On this view, freedom of speech must be exercised with due regard for the rights of other individuals and the community as a whole. Speech that infringes these rights should generally be regarded as wrongful and subject to regulation through narrowly drawn laws. In some cases, however, the value of the speech is so great that it should be protected despite the injury it causes. In chapter 5, I develop a general approach to cases of this sort, using the constitutional law of defamation as an illustration.

Chapter 6 contrasts this rights-based theory with the Supreme Court's current jurisprudence, which is based on the doctrine of content neutrality. That doctrine holds that "above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content."² Although this principle captures our strong commitment to freedom of expression, it is fatally one-sided, for it fails to recognize that some kinds of speech (such as defamation and incitement) inflict serious injury precisely because of their content. For this reason, the Court has carved out a series of exceptions to the content-neutrality doctrine. Yet the Justices have never succeeded in explaining the rationale for these exceptions or in squaring them with the general rule. As a result, the Court's First Amendment opinions often seem arbitrary and unpersuasive.

By contrast, I shall argue that the rights-based theory offers a more coherent and principled account of the First Amendment freedom of speech. Of course, I do not mean to say that this theory is capable of generating easy answers to free speech problems. As I have stressed, these problems typically involve important values on both sides. Individuals and groups will often disagree about the relative importance of these values and about how conflicts between them should be resolved. It follows that there will always be ideological disagreement over the scope of free speech. The goal of First Amendment theory should be not to eradicate such disagreement, but to develop a common language or framework within which we can engage in reasoned debate about controversial issues.

For several reasons, I believe that the rights-based theory is best suited to provide such a framework. First, as I have noted, this theory can find strong support in American constitutional history. Second, a belief in rights is deeply embedded in our contemporary political culture. In many cases, the supporters and opponents of regulation are already inclined to state their positions in the language of rights. By the same token, I believe that the principle that freedom of speech is limited by the rights of others is capable of having strong intuitive appeal, not only to the advocates themselves but also to the public at large. Third, the notion of rights plays a pervasive role in American law. Thus, the theory does not require lawyers and judges to use new or unfamiliar

concepts, but instead invites them to determine the boundaries of free speech in part by reference to concepts that have been carefully developed in other areas, such as torts, criminal law, and constitutional law. Finally, the theory of rights that I shall develop is based on the idea of mutual recognition and respect: rights instantiate the respect that individuals owe one another as human beings and citizens. Understood in this manner, the idea of rights may offer a way to overcome the deep divisions and mistrust that mark current debates over freedom of expression.

The final part of the book applies the rights-based theory to a wide range of First Amendment controversies. In accord with the civil libertarian tradition, chapter 7 argues that the Constitution should afford strong protection to revolutionary speech, flag burning, and other forms of expression that criticize the government or the existing political order. By contrast, I believe that the state should have greater authority to regulate speech that is directed against individuals or groups. As I explain in chapter 8, some forms of expression — such as incitement, threats, and fighting words — should be denied constitutional protection because they infringe the fundamental right to personal security or freedom from violence. In chapter 9, I argue that the state should also be allowed to protect the right to privacy against unreasonable intrusion or exposure. I then apply this view to a variety of contemporary problems, including sidewalk counseling at abortion clinics, protests at military funerals, and news reports that reveal the identity of rape victims. Finally, in chapters 10 and 11, I contend that some forms of hate speech and pornography can be regulated on the ground that they violate the most basic right of all — the right to recognition as a human being and a member of the community.

In short, this book argues that freedom of expression should be understood within a broader conception of rights based on human dignity and autonomy. This view recognizes a strong, liberal right to freedom of expression, at the same time that it affords protection against the most serious forms of “assaultive speech.”³ In this way, it seeks to develop some common ground between civil libertarianism and its critics.

The view I present may also be called a liberal humanist theory of the First Amendment. It is liberal in its emphasis on the protection of individual rights; it is humanist in holding that those rights are founded on respect for the intrinsic worth of human beings and are meant to enable them to develop their nature to the fullest extent. I believe that a theory of this sort offers the best hope of reconciling our competing commitments to human dignity and freedom of speech.

Notes

Introduction

1. *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943).
2. *Police Dep't v. Mosley*, 408 U.S. 92, 95–96 (1972).
3. Mari J. Matsuda et al., *Words That Wound: Critical Race Theory, Assaultive Speech, and the First Amendment* (1993).

Chapter 1. Free Speech and the Natural Rights Tradition

1. For some leading works, see Michael Kent Curtis, *Free Speech*, “The People’s Darling Privilege” (2000) [hereinafter Curtis, *Free Speech*]; Mark A. Graber, *Transforming Free Speech* (1991); Harry Kalven, Jr., *A Worthy Tradition* (Jamie Kalven ed., 1988); Leonard W. Levy, *Emergence of a Free Press* (1985); David M. Rabban, *Free Speech in its Forgotten Years* (1997); Geoffrey R. Stone, *Perilous Times* (2004). For a superb collection of materials that explores many of the authors and ideas discussed in this book, see Vincent Blasi, *Ideas of the First Amendment* (2006).

2. I should emphasize that this history is merely a starting point: I do not subscribe to the originalist view that the Constitution must be interpreted in accord with the intentions or the understanding of those who adopted it. For a discussion of the role that history should play in constitutional interpretation, see p. 223 n.54.

3. John Locke, *Two Treatises of Government* bk. II, §§ 4, 6, 123–31 (Peter Laslett ed., Cambridge Univ. Press 1988) (1690) [hereinafter Locke, *Government*].

4. *See, e.g.*, John Locke, *A Letter Concerning Toleration* 47 (James Tully ed., Hackett 1983) (William Popple trans., 1689).