Individuals, Communities, and Liberties of Speech

# FIGHTING WORDS

Kent Greenawalt

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## INDIVIDUALS, COMMUNITIES, AND LIBERTIES OF SPEECH

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To

*Bill and Peggy*
*Ann and Bill*
*Kim and Bonnie*

—A Community of Family

# CONTENTS

# *PREFACE*

THIS BOOK builds on four lectures about freedom of speech: "Insults and Epithets: Are They Protected Speech?" an Edward J. Bloustein Lecture at Rutgers School of Law, published in 42 Rutgers Law Review 287 (1990); "O'er the Land of the Free: Flag Burning as Speech," a Melville B. Nimmer Memorial Lecture at the University of California, Los Angeles, Law School, published in 37 University of California at Los Angeles Law Review 925 (1990); "Free Speech in the United States and Canada," presented at a conference at Duke University on constitutional law in Canada and the United States, published in 55 Law and Contemporary Problems 5 (1992); and "First Amendment Liberties: Individuals and Communities," a University Lecture at Columbia University and then a Frank B. Strong Lecture at Ohio State University Law School, previously unpublished.

Each lecture was self-contained. "Insults and Epithets"dealt with the perplexing problem of abusive speech. "O'er the Land of the Free" concentrated heavily on a single controversial decision of the United States Supremed Court upholding a constitutional right to burn the American flag. The discussion of free speech in the United States and Canada in the third lecture was heavily descriptive, providing an overview of how the two countries deal with similar problems. The final talk, "First Amendment Liberties," considered how the broader debate in political philosophy between communitarians and liberals might bear on sound adjudication under the First Amendment, including the major problem of free exercise of religion.

Although the lectures diverged substantially in focus, their content overlapped. "Hate speech" figured significantly in three of them. The theme of individuals and communities figured in the background of the first three lectures, receiving only occasional explicit mention, but was emphasized in the final lecture. Certain crucial subjects, including obscenity and sexual harassment, were not covered in depth in any of the lectures.

When Malcolm DeBevoise and Princeton University Press invited me to turn the lectures into this book, we agreed that something more than a simple reprinting would be desirable. Aided by the penetrating and perceptive comments of Frederick Schauer and Steven H. Shiffrin, two distinguished free speech scholars, we decided that I should eliminate unnecessary overlap, expand the content of some lectures, add material on obscenity, workplace harassment, and campus speech codes, and draw connections between the lectures.

In the book that has emerged, approximately half the material is now being published for the first time. With the conclusion, there are eight chapters. The first chapter is introductory, explaining the major themes of the book and sketching some fundamental ideas of free speech theory. The second chapter presents the basic approaches to free speech in the United States and Canada. I have added some ideas about how differences between the countries and their constitutional systems help to explain variations in judicial approaches and results. Material from my original lecture on Canada and the United States that directly concerns the specific topics of the following five chapters has been reserved for those chapters. This material provides a comparative dimension for some, though not all, of the subjects of the book. Chapter 3 discusses flag burning. Chapter 4 addresses abusive speech, particularly hate speech directed along lines of race, gender, religion, and ethnicity. Chapter 5 treats two narrower issues about abusive speech: campus speech codes and harassment in the workplace. Chapter 6 considers the legal status of obscenity. Chapter 7 tackles fundamental questions about how far courts resolving issues of free speech (and the free exercise of religion) should consider individuals or communities.

Differences in texture from the original lectures remain. Some chapters pay close attention to details of legal doctrine and argument, others address wider themes, portraying principles of constitutional law and suggesting how they might develop, but not providing extensive analysis of particular judicial opinions. The variations among chapters show that the book remains partly a collection of closely related lectures, not the unified manuscript I would write from scratch. Nevertheless, these variations have a positive virtue; they remind the reader how various stages and levels of analysis are important. Broad theory is not a substitute for careful understanding of particular legal problems and doctrines; and narrow doctrinal approaches risk sterility if they are not informed by broader understandings.

Many people have helped with the ideas in this book. The faculty and students of Rutgers, the University of California, Los Angeles, and Ohio State raised interesting and challenging questions after the lectures there. The highpoint of the Columbia lecture, before a general university audience, was my failure to grasp a question put by my son Sasha; but conversations at home with him, Robert, and Andrei aided in clarifying my thoughts. The lecture at Duke was part of a conference of Canadian and American judges and lawyers, including most members of the Canadian Supreme Court. That occasion did much to spark my interest in free speech jurisprudence "north of the border." I presented the lecture on individuals and communities to faculty groups at Fordham and the University of Virginia, and the flag burning lecture to a similar group at New York University (where I was visiting). I discussed a number of the lec-

tures at faculty lunches at Columbia. In early 1994, I gave two chapters for a workshop at McGill University. On each occasion, I received highly insightful criticism. I also benefitted greatly from conversations in a Seminar on Free Expression and Communitarian Values I taught at Columbia this past spring. Mark Barenberg, Vincent Blasi, Stephen Macedo, Elaine Pagels, and Peter Strauss read parts of the manuscript and offered detailed and very valuable comments.

I have already mentioned the readers' reports of Frederick Schauer and Steven Shriffin. They were indispensable to my conception of how the pieces of analysis might fit together, and have helped greatly to shape this book.

For two of the lectures, Michael Dowdle provided excellent research assistance and criticism (during the year I spent at New York University Law School). Shauna Van Praagh, then an Associate-in-Law at Columbia, made me aware of recent Canadian decisions, educated me about important features of Canadian law and practice, and provided perceptive criticisms of a draft of that lecture. Diane Virzera and Kenneth Ward, through their research efforts, helped me to understand feminist thought and civic republicanism for the lecture on individuals and communities. Laura Brill read part of the manuscript, making clarifying editorial suggestions and correcting many of the notes. Galina Krasilovsky very carefully reviewed the text, quotations, and citation form; she caught numerous errors and proposed alterations that made the text clearer and more readable. She also drafted the index.

Alessandra Bocco of Princeton University Press made considerable improvements in the manuscript with her copyediting, which was done quickly and in a way that was fully respectful of my aims with the manuscript. In many places she came up with a more felicitous phrasing or raised questions that compelled me to be clearer. I also have her to thank for my title. Without Malcolm DeBevoise's strong initial encouragement, I would not have undertaken this book.

Sally Wrigley, my secretary, has, as always, managed a succession of drafts with humor and spirit; she has been aided, at times, by members of the Columbia Law School Faculty Secretariat under Rasma Mednis.

My summers have been largely free for work, thanks to the generosity of Columbia Law School alumni (1989–1994); The Mildred and George Drapkin Faculty Research Fund (1990); The Stephen Friedman Fund (1991); and the Class of 1932 Law Research/Writing Fund (1993). I am grateful to The University Center for Human Values at Princeton for providing a very congenial setting for my final review of the book.

Citation form in this book is an amalgam of legal and academic styles. Full citations are given the first time any source appears in a chapter. When an article is cited for the full article, citation is generally to the first page alone.

# Fighting Words

*Chapter One*

# INTRODUCTION: FREE SPEECH THEMES

The central subject of this book is freedom of speech, including freedom of the press. I address this subject in light of related themes: (1) the underlying reasons for having free speech; (2) the kinds of communication to which these reasons apply; (3) the significance of constitutional texts for the determination of free speech cases and the development of judicial doctrines; (4) the importance of a country's legal traditions and broader culture; (5) the degree of deference courts do (and should) give legislatures and executives when they face free speech problems; and (6) the extent to which legislatures and courts should focus on justice toward individuals or the health of communities.

No one doubts that freedom of speech and of the press is a cornerstone of liberal democracy. No one doubts that Canada and the United States are liberal democracies. Observing how these countries treat freedom of speech tells us much about relationships between citizens and government, relationships among citizens, and relationships between branches of government.

## Reasons for Free Speech

Freedom of speech and of the press rests on the belief that special reasons exist for liberty of expression.[1] Justifications strong enough for the government to restrict other activities may not be sufficient to restrict speech. The special reasons for free speech connect powerfully to underlying premises of liberal democracy. Some reasons are consequential, looking to positive effects of liberty; others are nonconsequential, claiming that independent of consequences restriction denies a right or constitutes an injustice.

The most familiar consequentialist justification for free speech, found in John Milton's *Areopagitica*, John Stuart Mill's *On Liberty*, and the eloquent Supreme Court opinions of Oliver Wendell Holmes and Louis Brandeis, is that liberty of expression contributes to the discovery of truth. In essence, the claim is that if people are exposed over a period of time to various assertions, they are likely to sort out which are more nearly true. Accompanying this cautious optimism about the human ca-

pacity to discern what is true is a strong skepticism that governments deciding which assertions to suppress will do a good job of protecting truth.

The truth discovery justification has attracted its share of challenges in recent decades, but none of the attacks undermines its basic premises. Even if many of the presently fashionable doubts about the "objectivity of truth" are well grounded, it does not follow that every claim is as good as every other. Within some compass, factual statements about depletion of the ozone layer and soldiers raping women in Bosnia are more and less accurate. What about assertions of value? Even if extreme relativism about values were warranted, discourse could nevertheless assess the coherence of claims about value and help clarify what cultures and individuals do value.

The worry that pervasive inequality in a "free" marketplace of ideas impairs the emergence of truth is more troubling than skepticism about truth itself. This worry is central for proposals to equalize opportunities for communication, but it hardly supports outright suppression of speech by the government.

The most serious concern about the truth discovery justification for speech is that people believe whatever views are already dominant or fit their irrational needs. Here two comments are in order. First, the question is not whether free individuals are paradigms of rationality while sifting claims of truth; the question is whether truth will prosper better in freedom than under government dictation. Individuals may be untrustworthy in their evaluations; but governments deciding what people may hear and see may be even more suspect. Second, any serious consideration of how individual propensities for delusion compare with government tendencies to abuse a power to suppress speech must address different domains: people may evaluate propositions of mathematics with more detachment than proposals for health care. Any claim that the government is more to be trusted than a regime of free discussion must explain why that is likely for the domain in question. All in all, the truth discovery reason remains an important justification for freedom of speech, although we need to recognize that many factors besides government suppression may deflect people's understanding.

One kind of truth that speech can reveal is abuse of authority, especially government authority. This particular justification for free expression had special significance for the founding generation. When the wrongs of those in power are publicly exposed by the press, as in the Watergate scandal, others can respond accordingly. Officials who are aware that their behavior may be exposed to public scrutiny will be less inclined to yield to the temptations of corruption.

Freedom of speech can contribute to the accommodation of interests. The resolution of many social problems requires not the discovery of "true principles" but the adjustment of competing interests and desires. Free communication allows people to indicate their wishes, and thus makes appropriate decisions more likely; it also teaches a tolerance of differences. Since failures of accommodation and tolerance often generate conflict, liberty of speech (despite its divisive side) can help achieve social stability.

Freedom of thought and expression promote individual autonomy, involving considered freedom of choice. At least in liberal democracies, autonomy is regarded as intrinsically valuable as well as the basis for people developing a lifestyle that is more fulfilling than they could achieve by simply conforming to standards set by others. Communication is a prerequisite for autonomy. It is also a crucial way for people to relate to each other, an indispensable outlet for emotional feelings, and a vital aspect of the growth of one's character and ideas.

Arguments from liberal democracy figure importantly in modern defenses of free speech. These arguments largely involve the reasons I have already discussed as they apply to political discourse and decisions, and to the participation of people in the political process. Liberal democracy rests finally on the choices of citizens; they and their representatives can grasp significant truths and understand how interests may be accommodated if speech is free. The government's own view of truth is especially to be distrusted in the political domain, because officials want to stay in office and promote their own political agendas.

Certain nonconsequentialist reasons that relate to liberal democratic conceptions of government also support free speech. One important idea is that the government should have limited powers and that most speech lies within a private domain. Much speech is within a private domain because it concerns matters, such as aesthetics and religion, that are, to oversimplify, not the government's business. Other speech, say about racial inequality, relates to dangers that are a proper concern of the government; but, even here, the speech may seem "private" because it is too remote from harms that might justify government interference. A second idea is that, regardless of whether free speech actually *promotes* autonomy and rational decision, granting liberty of speech may itself *constitute* a recognition of people, both speakers and listeners, as autonomous and rational. A third idea is that free speech for all may constitute public recognition that people have dignity and are equal.

Neither the nonconsequentialist nor consequentialist justifications yield clear principles by which one can easily decide when suppression of speech is unacceptable. These perspectives provide a set of considera-

tions regarding the government's relations to citizens that indicate which kinds of interferences with speech are most troubling. The perspectives also provide reasons that count, sometimes forcefully, in favor of freedom.

## Kinds of Communications Reached by Reasons for Free Speech

What communications do the reasons for free speech cover?[2] Liberal democracies have a great need for free discourse about public affairs, but the reasons for liberty of speech are much broader, extending to all subjects of human concern. They clearly cover general statements of fact, such as "rapid inflation causes social instability," and particular statements of fact, such as "Serbians shelled Sarajevo yesterday." They also cover general and particular assertions of value: "love is the greatest good" and "you should not lie to your friend about your grades."[3] The reasons for free speech also cover stories, works of art, and outbursts of feeling whose aim is to express and illuminate by means other than explicit statements of fact or value.

The reasons for free speech hardly apply to some sorts of communication. Consider two people agreeing to commit a crime. Their words of agreement dominantly represent commitments to action, not assertions of facts or values or expressions of feeling. Their words *change* the normative environment the two people inhabit, creating new obligations and claims. The communications are what I call *situation-altering*; they are much more "action" than "expression." It should come as little surprise that the punishment of ordinary criminal conspiracies has rarely been thought to raise problems of free speech. Orders or commands, offers of agreement, and invitations, such as "just try to hit me," are similar to agreements in their situation-altering character. These also change the normative environment. So do what I call *manipulative threats* and *offers*. Suppose Gertrude tells Claude, "I will give you two thousand dollars if you hire my sister"; or, "I will tell everyone about your time in prison if you do not hire her." Gertrude's comment in either instance sets in play consequences that would not otherwise occur; they are situation-altering.

Hovering between situation-altering utterances and ordinary assertions of fact and value are what I call *weak imperatives*. These weak imperatives are requests and encouragements that do not sharply alter the listener's normative environment, as does a command. If Gertrude says to her distant acquaintance, "Please hire Joseph," or "Beat him up," her immediate aim is to produce action, but she has not created new rights or

new obligations, or new consequences of Claude's behavior. Weak imperatives often indicate feelings and reflect beliefs about values and facts, and they cannot always be disentangled from expressions about these matters. Weak imperatives are covered by the reasons for free speech to a greater degree than situation-altering utterances, but they may be prohibited more often than assertions of fact and value.

The chapters that follow raise substantial questions about how particular communications fit into this rough categorization. I discuss how courts have responded to problems and offer some arguments for variant approaches.

## Constitutional Texts

In the United States and Canada, as well as within most other liberal democracies and under some international treaties, constitutional documents provide protection of free speech and free press. A constitution binds all branches of the government, and courts typically review compliance by the legislative and executive branches. Since courts must construe constitutional language to decide if a provision has been violated, the language itself can matter. The constitutional text may affect both the subsidiary doctrines with which courts approach specific cases and the results of those cases, a significant point when one looks at decisions of the Supreme Courts of the United States and Canada.

## Legal Traditions and Broader Cultures

The ways in which courts, and legislatures, approach free speech problems are influenced by legal traditions and broader cultures. Does a country have a tradition of an independent and active judiciary? Are constitutional rights long established or relatively novel? How have subjects like libel, now understood to raise free speech concerns, been treated in the past? These aspects of legal tradition may influence present approaches as much as the specific language of constitutions.

Wider cultural characteristics are also important. Is the country one in which cultural history is accorded great significance? Is the practicing philosophy of the country highly individualistic or does it emphasize the place of persons within communities? Variations along these lines may help to explain why the Canadian constitutional language differs as it does from that of the United States Constitution, and why the Canadian Supreme Court has reached different conclusions about some vital issues.

## Judicial Deference to Political Branches and Subdivisions

A crucial aspect of most constitutional cases is how much deference a court should give to the legislative or executive branches. The constitution limits what those branches are supposed to do, but when a case arises that challenges legislative or executive action, judges must decide how much weight to accord the judgment of members of that branch that they have behaved within constitutional boundaries. In favor of judicial deference is the notion that the will of the majority, best represented by legislative or executive decision, should be fulfilled unless it clearly violates the constitution. An argument against deference is that a constitution limiting governmental powers establishes that principles of public government are not simply democratic in the sense of allowing final determinations by the majority. Limits on what legislatures and executives may do should be given full effect. That argument is bolstered by the claim that courts are much better able to assess constitutionality than the political branches. In actuality, the degree to which an action of another branch reflects a judgment about constitutionality varies greatly. A legislature may deliberate carefully about that issue, or be cavalier. As often happens in search and seizure cases, if what is challenged is the behavior of an individual police officer that is not supported by legislative or executive regulation, the officer's judgment about constitutionality hardly represents the public. Two subissues about deference, thus, are how much attention a court should give to the actual degree of deliberation of another branch and how far the representative quality of the institution or person whose action is challenged should matter.

In federal systems, including both the United States and Canada, questions of deference are complicated by the relationship between central and provincial (or state) governments. Courts must ask themselves how far limits in a federal constitution should be interpreted to restrict the latitude of regional governments.

Within any country practices of deference are, of course, only one aspect of legal tradition, but they are crucial enough to warrant this separate mention. Insofar as my analysis of cases leads to recommendations about what courts should do, I am implicitly making judgments about the appropriate degree of deference.

## Individuals and Communities

One major theme of the book, the primary subject of chapter 7, is how free speech principles concern individuals and communities. Any country's dominant culture will place more or less emphasis on individuals or