

## WHY NOT BASE FREE SPEECH ON AUTONOMY OR DEMOCRACY?

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### I. FRAMEWORK FOR DISCUSSING RIGHTS

**M***MORAL rights claims.* A moral claim about a right involves several elements: first, a claim that certain interests are of great importance;<sup>1</sup> second, a claim that because of the importance of these interests and their vulnerability, the powers and duties of various agents, in order to be justifiable, must be defined in certain ways; third, a claim that these constraints on the justifiable powers and duties of agents are feasible—that is, that their cost in other terms is one we have reason to bear. In the case of some claims about rights, the powers and duties in question are primarily those of individual private agents. For example, to claim that there is a right of self-defense is to claim that in light of the great importance, for each person, of preserving his or her life, a justifiable assignment of powers and duties entitles each person to act in certain ways that are necessary to preserve his or her life, even at some cost to others. In the case of the rights claims in which we are most interested, the powers and duties in question are those of governmental agents. What is asserted under the name of freedom of expression, for example, is mainly that the powers of governmental agents need to be limited (and their duties defined) in certain ways if important interests are to be adequately served. The rights of individuals to act in certain ways, by speaking and publishing, for example, thus emerge as the negative space defined by these limits on governmental powers.

There are some claims about rights (for example, claims about human rights to sufficient food or to other forms of welfare) in

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<sup>1</sup> The term “interest” has a certain ambiguity. Understood in a more objective sense, an interest is something a person has reason to care about. Understood more subjectively, an interest is something a person has taken an interest in or actually cares about. I use the term in the objective sense.

which the emphasis is almost entirely on the importance and vulnerability of certain interests and on the consequent need to assign powers and duties in *some* way that protects these interests. No specific claim is made about how this is to be done. In other cases, claims about a right refer to a fairly clear understanding of the way in which the powers and duties of agents are to be constrained if the relevant interests are to be adequately protected. In these cases, which include freedom of expression, the right is in large part understood in terms of these constraints. But this understanding is never complete. To apply the right in new cases, we frequently need to look back to the interests that guide it and reconsider what is needed to adequately protect them (this is so even of the right to self-defense). And this may involve rethinking how those interests themselves are best understood, especially in a case like freedom of expression, where the interests at stake are multiple and complex.

The dialectical interplay between the guiding interests of a right and strategies for protecting these interests is what allows rights to grow and change. It also can lead to some frustration with rights, or even cynicism, since it is unlikely that the guiding interests of a right can be fully promoted *simply* through the mechanisms that rights involve.

*Constitutional rights.* The constitutions of different countries can give legal embodiment to the same moral rights. The First Amendment to the U.S. Constitution<sup>2</sup> and Article V of the German Constitution,<sup>3</sup> for example, both establish freedom of expression as a constitutional right. But the legal rights established by constitutional provisions of the same moral right can diverge in two important ways. First, the guiding interests of a right may be specified in slightly different ways in the constitutional language itself and especially in the developing jurisprudence based on it, giving more explicit support to some interests than others. Second, the constitutional jurisprudence of different countries may select different means for protecting these interests. Different strategies may be adopted for ensuring access to a public forum, for example, or for

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<sup>2</sup> U.S. Const. amend. I.

<sup>3</sup> Grundgesetz für die Bundesrepublik Deutschland [GG] [Constitution] art. 5 (F.R.G.).

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providing opportunity to criticize public officials while protecting personal privacy.

Divergences of these kinds in the constitutional specifications of the same moral rights means that insofar as we are attempting to determine what is or is not constitutionally protected in our legal system we need, as Professor Robert Post says, to refer to “our actual history”—that is, to the choices “we” have made to emphasize certain interests and adopt certain means for protecting them.<sup>4</sup> But I do not think that this means *reducing critical argument* to mere sociological description, as Professor C. Edwin Baker fears.<sup>5</sup> This is so for two reasons. First, there is always room for argument about whether the means we have chosen for protecting the interests that our constitutional jurisprudence has explicitly recognized as guiding a certain right are in fact adequate to that task. Second, insofar as our constitution is best understood as giving legal recognition to a right, such as freedom of expression, that can be understood morally apart from this legal embodiment, there is always room for argument about whether the way in which our jurisprudence has interpreted the interests guiding this right is defensible, or whether this interpretation is, in fact, too narrow or cramped (as Professor Susan Williams notes in the third paragraph of her contribution).<sup>6</sup>

## II. CHARACTERIZING THE GUIDING INTERESTS

*How much unity should we seek?* I agree with Post that understanding what is covered by our constitutional protection of freedom of expression requires understanding the interests that guide this right (and justify the strategies of protection that the right involves).<sup>7</sup> But I doubt whether these guiding interests, even the ones that figure centrally in our actual First Amendment jurisprudence, can be helpfully subsumed under any single label.

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<sup>4</sup> Robert Post, *Participatory Democracy and Free Speech*, 97 Va. L. Rev. 477, 477 (2011).

<sup>5</sup> C. Edwin Baker, *Is Democracy a Sound Basis for a Free Speech Principle?*, 97 Va. L. Rev. 515, 518 (2011).

<sup>6</sup> Susan H. Williams, *Democracy, Freedom of Speech, and Feminist Theory: A Response to Post and Weinstein*, 97 Va. L. Rev. 603, 604 (2011).

<sup>7</sup> Post, *supra* note 4, at 479–482.

There are at least three such interests.<sup>8</sup> There are our interests as participants in expression in having access to means of expression for a variety of purposes. These include political purposes: to criticize public officials, influence public policy and legislation, participate in electoral politics, and communicate with others who share our political values. But we also have reason to communicate with like-minded others regarding nonpolitical values having to do with art, religion, science, philosophy, sex, and other important aspects of personal life. We also have reason to express these values to others, who may not share them, in hopes of influencing them and thereby shaping the mores of our society, or just to bear witness to these values by giving them public expression. As potential audiences to expression by others, we have interests in having access to information and opinion on all the subjects I have listed, and as third parties we have an interest in having the benefits of a society in which our fellow citizens' participant and audience interests are fulfilled, a society with a healthy politics and a vibrant cultural life.

Perhaps the phrase "democratic self-governance" might be stretched sufficiently to encompass all of these interests—that is, to include our interests in participation in democratic politics (both as speakers and as voters), our interests as participants in the informal politics of shaping the mores of our society, and (taking "*self-governance*" in a slightly different sense) our interest in being in a good position to form our own values and decide how to live our own lives. I think that an understanding of the interests that guide the right to freedom of expression that left any of these things out would be inadequate. In particular, our interest in "participating in the formation of public opinion"<sup>9</sup> is broader than our proper concern to be authors of the laws to which we are subject,<sup>10</sup> since it includes an interest in participating in the shaping of our shared culture.

The definitional stretching required to bring all of these interests under the heading of "democratic self-governance" seems to me to indicate not only that this particular phrase is of limited adequacy, but more generally, that it is a mistake to look for any one phrase

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<sup>8</sup> This catalog of interests follows that given in T.M. Scanlon, Jr., *Freedom of Expression and Categories of Expression*, 40 U. Pitt. L. Rev. 519, 520–21 (1979).

<sup>9</sup> Post, *supra* note 4, at 483.

<sup>10</sup> Id.

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to sum up all of these interests. In order to decide whether, for example, regulation of commercial speech violates the First Amendment, we need to identify the interests (particularly the speaker and audience interests) that are at stake and consider whether the proposed form of regulatory power threatens those interests. This is a messier business than simply finding some category, such as “democratic self-governance,” that singles out the interests that merit First Amendment concern. It involves both judgments of value about the importance of the various interests at stake and empirical judgments about whether the proposed regulation threatens these interests or protects them. I agree with Post when he says, “No First Amendment jurisprudence can proceed in the absence of such value judgments . . . .”<sup>11</sup> I disagree only with his idea that these judgments are all about “the forms of speech that are and are not necessary for the maintenance of democracy”<sup>12</sup> (at least unless “democracy” is understood very, very widely).

One particular point that concerns me about the idea that the First Amendment is concerned only with democratic self-government, or what Professor James Weinstein calls “the speech by which we govern ourselves,”<sup>13</sup> is uncertainty about the range of this “governance.” On one natural interpretation (suggested by the frequent references to democracy), the governance in question is through democratic political institutions. This interpretation seems to me too narrow (as Baker also observes<sup>14</sup>). A state law that banned the film *Brokeback Mountain* because it presented homosexuality in a favorable light would violate the First Amendment, but this is not only because gay rights and marriage are possible matters of legislation or constitutional change. The important interests that freedom of expression, and hence the First Amendment, seeks to protect include our interest in participating in the process of determining how our informal social mores will evolve and our interest in deciding for ourselves how to conduct our private lives.

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<sup>11</sup> Id. at 488.

<sup>12</sup> Id.

<sup>13</sup> James Weinstein, Participatory Democracy as the Central Value of American Free Speech Doctrine, 97 Va. L. Rev. 491, 491 (2011).

<sup>14</sup> Baker, supra note 5, at 516–517.

*A rant: Can we please stop talking about autonomy?* If we were to look for a single idea that captures the interests at stake in expression that merits First Amendment protection, the idea of autonomy would be a bad choice for this role. (As someone who once made a mistaken appeal to autonomy as the centerpiece of a theory of freedom of expression,<sup>15</sup> my position in the Dantean Inferno of free speech debates seems to be repeatedly assailed with misuses of this notion, no matter how I criticize them.) The chief problem with “autonomy” is that it is commonly understood in too many different ways. Sometimes it is a valuable capacity which free expression enhances by putting people in a better position to make decisions. Sometimes it is a kind of liberty, which ought not to be interfered with, as when Post refers to the claim (which he does not endorse) that “all ideas [are] equal because all ideas equally reflect the autonomy of their speakers, and because this autonomy deserves equal respect.”<sup>16</sup> As he goes on to say, when it is understood in this way “the value of autonomy extends not merely to the speech of persons but also to the actions of persons.”<sup>17</sup> Williams suggests yet a different idea that she calls “narrative autonomy.”<sup>18</sup>

Autonomy can also be understood as an idea of responsibility. To regard agents as autonomous in this sense is to regard them as responsible for what they do. My own early appeals to autonomy were of this kind.<sup>19</sup> What I had in mind was not the autonomy of speakers but that of audiences. Harms such as that of being led to form false beliefs could not be appealed to in justifying restrictions on expression, because justifications had to view audience members as autonomous and therefore responsible for their own beliefs. Even focusing on this idea of autonomy alone (leaving aside the problem of ambiguity just noted), this appeal seems to me a mistake because it is implausibly broad. Governments cannot justify restricting political speech on the grounds that it will lead citizens to form false beliefs about important political questions, be-

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<sup>15</sup> See generally Thomas Scanlon, A Theory of Freedom of Expression, 1 Phil. & Pub. Aff. 151, 204 (1972). I criticize the view presented in that article in T.M. Scanlon, Content Regulation Reconsidered, *in* T.M. Scanlon, The Difficulty of Tolerance 151, 161–64 (2003) [hereinafter Scanlon, Tolerance].

<sup>16</sup> Post, *supra* note 4, at 479.

<sup>17</sup> *Id.*

<sup>18</sup> Williams, *supra* note 6, at 608.

<sup>19</sup> Scanlon, Tolerance, *supra* note 15, at 15–16.

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cause (a) we have an important interest in being able to make up our own minds about such matters and (b) giving *governments* the power to regulate speech on these grounds is a clear threat to this interest.<sup>20</sup> If, in contrast, governments may enforce laws against false commercial advertising, they may do so not because the interests at stake are unimportant or lie, by definition, outside the sphere of the First Amendment, but rather because (if this is indeed the case) this form of regulation does not threaten the interests at stake and may even promote them.

I agree with Weinstein's observation that my principle (that restrictions on speech cannot be justified by the fact that the speech is likely to lead hearers to form false beliefs) "is not too strong if limited to the domain of public discourse."<sup>21</sup> Assuming, as seems clear, that he means discourse about how we are to govern ourselves, I agree. The element in my earlier view that I reject is the idea that this principle follows from a *general* requirement that any justification of restrictions on expression must be consistent with the premise of speaker autonomy (that is, responsibility for his or her own beliefs).<sup>22</sup>

Many of the different uses of "autonomy" that I have listed identify important values. My intent here is not to reject them but rather to point out the importance of recognizing the ways in which they are different. It is one thing to say that citizens have an important interest in being able to hear what others have to say in order to make up their minds about topics which are important to them (not just about how to vote). It is another to say that they are responsible for the opinions that they form in a sense that if exposure to expression would lead to their having opinions that put them in a worse position to decide what to think, this could not be taken as a ground for restricting that expression. This also may be correct, in at least some cases, but it is a different idea and one that arises at a different point in the argument. It is a conclusion about the legal framework that best protects our interests as speakers and

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<sup>20</sup> This is my way of putting what I take Post to have in mind when he says that "[t]he presumption of autonomy within public discourse follows from the primacy of the value of democratic self-governance," Post, *supra* note 4, at 484, except I would say *audience* autonomy.

<sup>21</sup> Weinstein, *supra* note 13, at 509.

<sup>22</sup> Scanlon, *Tolerance*, *supra* note 15, at 17.

hearers rather than, like the positive value of being in a better position to make up one's mind, an input into an argument for this conclusion.

The importance of distinguishing between the different values that may be referred to as "autonomy" is particularly important in cases where, as Post says, "[T]he autonomy of speakers and the autonomy of audiences are in tension."<sup>23</sup> I suspect that what is in tension in the situations he has in mind may vary from case to case. But in at least some cases the tension may be between, on the one hand, the interest that speakers have in access to a public forum in which to advocate their ideas and the freedom to speak (autonomy?) that this requires, and on the other hand, the interests of audiences in being "autonomous" (in a good position to decide what to think) and the freedom from "noise" and cacophony in the system of expression that would enhance this. Our understanding of this conflict is not enhanced by calling both of these "autonomy."

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<sup>23</sup> Post, *supra* note 4, at 488.