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Free Speech and the Culturally Contingent Nature of Human Rights

Some Concluding Observations

At the outset of this book, I suggested that a comparative law analysis of free speech rights in Western industrial democracies might shed some important insights into the relationship between the freedom of speech and democratic self-government. At an even more theoretical level, I posited that a comparative law analysis might yield useful perspectives from which to evaluate universalist claims about the fundamental nature of the freedom of speech. The foregoing materials *do* yield such insights but, for the most part, in the direction of rights pluralism rather than a single working definition of "the freedom of speech."

I. "Free Speech" Lacks a Common, or Universal, Definition

Free speech rights are highly culturally contingent, and universalist claims about the proper outcomes in free speech cases simply do not bear up upon closer inspection. This holds true with respect to societies that are overtly committed to maintaining the freedom of speech as an essential component of the project of democratic self-government. Accordingly, defenders of the free speech orthodoxy currently observed in the United States should be prepared to concede that free speech absolutism is not the only model for a society committed to safeguarding the freedom of speech.

The routine exclusion of certain disfavored kinds of speech, such as child pornography and hard-core forms of erotica (in all five nations, to

some degree or another), as well as the protection of low-value speech like commercial speech (the United States and Canada, but not Germany, Japan, or the United Kingdom) inevitably reflect highly subjective normative value judgments. There is nothing intrinsically good or bad about this, but such a state of affairs effectively belies any claim to some Platonic idea or Natural Law definition of free speech that judges, regardless of cultural influences, will reflexively identify and intuitively apply to reach largely identical results in cases presenting more-or-less similar facts. To the extent that international law makes safeguarding the freedom of speech an objective of the international human rights regime,[1] a great deal of leeway with regard to a nation-state's definition of "free speech" appears to be entirely unavoidable.

With those caveats, certain themes, elements, and leitmotifs about the purpose or role of free speech in a democratic polity *do* seem to exist. The *ideology* of free speech seems to have serious transnational salience. All five legal cultures—and the judges who serve as the apex of the legal pyramid—find it tremendously important to proclaim their commitment to the freedom of speech as an important component of the project of democratic self-government. Indeed, democratic self-governance, personal autonomy, self-actualization, and facilitating dissent all receive serious and regular consideration in the free speech case law of all five legal systems, even if the concrete results in particular cases vary wildly.

II. Constitutional Text Matters

Another potentially relevant conclusion that one might draw is that text matters. The most protective free speech regimes exist in the two nations with the most textually unqualified protections of the freedom of speech. Neither the First Amendment nor Article 21 of the Japanese Constitution directly invites rights balancing. The First Amendment simply states that "Congress shall make no law . . . abridging the freedom of speech."[2] Article 21 guarantees to all citizens "[f]reedom of assembly and association as well as speech, press, and all other forms of expression" and provides that "[n]o censorship shall be maintained, nor shall the secrecy of any means of communication be violated."[3] Unlike the German and Canadian Constitutions, or the British Human Rights Act, neither the United States Constitution nor the Japanese Constitution invites judges overtly to balance free speech against other interests (whether of a constitutional magnitude or not).

To be sure, the absence of constitutional text protecting the freedom of speech might not preclude courts from considering such claims on the merits—the United Kingdom prior to the enactment of the Human Rights Act provides an instructive example. Nevertheless, the presence of such text plainly facilitates judicial protection of free expression. Moreover, the nature of the constitutional text makes a difference too. The unqualified protection of a right seems to embolden courts to interpret the right more broadly than does more qualified language. Indeed, this comparative exercise shows a descending order of protection that certainly appears to track constitutional text very nicely. Again, one should not discount other important factors, such as a general culture that values the right in question and the presence of an independent judiciary vested with the power of judicial review. But, holding these conditions more or less constant, the precise articulation of a right seems to have an important effect on its implementation; in a word, text matters and drafters of constitutional instruments should be careful to bear this in mind.

Text does not happen by magic, of course. In particular, the drafters of the Japanese Constitution and the Basic Law provided, quite intentionally, very different levels of relative protection for the freedom of speech. The Japanese free speech guarantee is unqualified and, with respect to political speech, the Supreme Court of Japan has interpreted and enforced Article 21 in this way. The German Basic Law's protection of free speech, by way of contrast, is itself highly qualified and, moreover, totally subordinated to other constitutional interests (notably including human dignity (Article 1) and free development of the personality (Article 2)).

Although the First Amendment has remained textually unchanged since 1791, the amendment's jurisprudential meaning has evolved significantly over time. It was not until the twentieth century—and arguably the 1960s, with the Warren Court's expansive free speech decisions—that it came to provide political advocacy virtually unlimited protection. Thus, constitutional text probably mirrors culture as much as it shapes it. Canada, Germany, and the United Kingdom feature highly conditional protections of free speech precisely because the citizens of those polities value free speech somewhat less highly than the citizens (and judges) of the United States and Japan.

Of course, some degree of rights balancing is probably inevitable, even in the United States and Japan. But it does seem significant that the absence of conditional language appears to track a more robust construction of the freedom of speech. Other factors, such as an independent judiciary

with the power of judicial review are obviously important too. But Canada, Germany, and the United Kingdom feature independent judiciaries, and both the Canadian Supreme Court and the German Constitutional Court possess and use the power of judicial review to invalidate legislation and executive actions deemed inconsistent with constitutional rights.

Thus, constitutional text tracks social values even as it helps to shape them. For example, both the Canadian and German free speech guarantees are limited on their face. Section 1 of the Canadian Charter of Rights and Freedoms conditions the rights and freedoms that the Charter guarantees by expressly permitting "reasonable limits prescribed by law" that "can be demonstrably justified in a free and democratic society."[4] Article 2 rights are thus subject to generic limitations, provided that the limits are both "reasonable" and "demonstrably justified in a free and democratic society."

The German Basic Law establishes a hierarchy of rights, with dignity, protected in Article 1, residing, quite literally, at the top of the list.[5] Moreover, Article 5, which protects the freedom of speech, contains numerous provisos and limitations, including an express limitation protecting personal honor and reputation. In light of the highly conditional nature of the free speech rights in Canada and Germany, one should not be surprised to see the Supreme Court of Canada and the Federal Constitutional Court overtly balancing away the freedom of speech in order to advance other important interests—interests that themselves enjoy express constitutional protection too.

The United Kingdom provides an important cautionary note regarding the limits of text as a means of safeguarding human rights. But the status of free speech in the United Kingdom seems consistent with the overall picture sketched above. British courts certainly take free speech claims seriously but always measure this interest carefully against the traditional rule of parliamentary supremacy. This structural feature of the British Constitution has a higher priority than any specific human right, be it free speech or privacy rights.[6] This was true before enactment of the Human Rights Act of 1998 and it remains equally true today.

III. Freedom of Speech as an Essential Condition for Democratic Self-Government and the Countervailing Problem of Rights Pluralism

The transcultural salience of the freedom of speech as an essential element of a just government constitutes another potential lesson one may draw from this comparative law exercise. In all five nations, when citizens bring free speech claims, courts generally recognize that these claims implicate, to some degree at least, important social values related to the project of democratic self-government. This does not mean, of course, that advancing these values ultimately will take precedence over competing values, such as the protection of personal dignity (Germany) or the maintenance of a viable pluralist, multicultural society (Canada). But it does show that the conceptualization of free speech as a human right reflects some transculturally valid common ground.

Disagreement seems to arise not so much about the values that free speech advances but, rather, over the relative importance of these values when measured against other competing social goals and objectives. Thus, the particular implementation of shared concerns about the value of free speech does not allow for predictable results across legal cultures; different nations implement their commitment to "free speech" in unique and severable ways. For international human rights law, this would suggest the need for a very wide "margin of appreciation" when determining whether a particular country's laws and practices adequately discharge the obligation to respect "the freedom of speech."[7] Some concrete examples will demonstrate the point.

Campaign finance limits might or might not exist in a given nation (although the trend is fairly clear that most constitutional democracies maintain such measures and view them as entirely consistent with "the freedom of speech"). A regime that permits or disallows campaign finance laws should, accordingly, be deemed consistent with a commitment to free speech. A meaningful commitment to respecting "the freedom of speech" simply does not prefigure any specific approach to this problem.

Similarly, a constitutional court might—or might not—construe the freedom of speech to reach certain forms of erotica. Again, the diverse approaches that constitutional democracies committed to the freedom of speech have adopted regarding erotica suggests that a meaningful commitment to the freedom of speech says absolutely nothing about the protection of erotica. Both systems protecting and withholding protection from

these materials may legitimately claim to respect the freedom of speech. As with the presence or absence of campaign spending limits, either choice on this question should be seen as consistent with adherence to the principle of free speech.

Perhaps most significantly, the spectrum of protected *political* speech also might be less than unlimited. Canada, Germany, and the United Kingdom *all* restrict core political speech, generally in efforts to protect either personal dignity or the dignity and well-being of racial, religious, and ethnic minorities within their polities. The reasons for these practices vary from country to country.

Canada features an ideology of pluralism and multiculturalism that makes Canada different from the United States. Restrictions on free speech that advance the multiculturalist program seem entirely reasonable to the Canadian Supreme Court. In Canada, efforts to promote equality outweigh, at least in some circumstances, an individual or group's interest in free expression.

Germany's commitment to dignity values certainly reflects the historical fact of the Holocaust. But the German legal system's concern for individual dignity, honor, and reputation significantly predates the Holocaust and World War II. To be sure, the National Socialist period represents a complete cultural meltdown. That neither the German government nor the German citizenry wishes to take chances going forward should not really come as a surprise. If the United States had undergone a similar recent experience, it would not be surprising if the Supreme Court limited free speech principles in order to promote human dignity, both for the individual and for minority groups.

On the other hand, it would be mistaken to view the Federal Constitutional Court's commitment to protecting dignity values as solely a product of postwar reforms. In fact, German society has taken good manners seriously for a very long time indeed.[8] Therefore, one should not be surprised that the freedom of speech, even with respect to core political speech, must give way when a free speech claim conflicts with the protection of personal honor and dignity. This does not mean that Germany lacks an appreciation for the freedom of speech; it simply reflects a different relative priority regarding the importance of speech vis-à-vis the importance of human dignity.

In the United Kingdom, historical accidents largely associated with the doctrine of parliamentary supremacy work to limit the ability of courts to vindicate free speech claims. This was true prior to the adoption of the

Human Rights Act of 1998, and it will remain true for some time to come. The protection of human rights in the United Kingdom largely rests with Parliament, and not the courts. To the extent that Parliament wishes to displace free speech in favor of national security, the protection of the deity against blasphemous utterances, or to make the community a more welcoming place for racial and ethnic minorities, Parliament is free to do so and the British domestic courts will not stand in the way.

Great Britain's principal constitutional value is an unlimited commitment to the idea of majority rule, and this, by definition, implies bad things for minorities. Existing legal rules privilege the cultural and political majority at the expense of cultural and political minorities—but this might change as the Human Rights Act takes greater hold over time.

One should, however, bear in mind that the doctrine of parliamentary supremacy does not stop the courts from reading free speech values into ambiguous statutory or regulatory language. And the British courts have not shirked from doing just this. The social commitment to free speech—the shared social expectation that citizens will enjoy free speech to some degree—informs and influences the British judiciary's work.

Perhaps surprisingly, Japan's formal free speech doctrine looks the most like the free speech law of the United States. The Supreme Court of Japan has more or less adopted the Warren Court's free speech orthodoxy. To be sure, it has accepted greater limits on free speech to protect personal reputation than has the United States Supreme Court. The Supreme Court of Japan also has conceptualized the free speech project in terms of supporting the project of democratic self-government, rather than personal autonomy or freedom.

The marketplace of ideas metaphor receives occasional lip service from the Supreme Court of Japan, but the results in concrete cases reflect a commitment to protecting speech associated with democratic self-government. Hence, erotica, commercial speech, and political speech that involves strong personal insult do not receive protection. But speech critical of the government or its officers enjoys very broad protection.

In sum, these myriad restrictions on the freedom of speech coexist cheek by jowl with generalized expectations of freedom of speech in Western-style industrial democracies. The portrait that emerges reflects tremendous diversity as to means, if not ends. At bottom, a commitment to free speech implies merely a willingness to balance the burden of a particular law on an individual's right to self-expression against the social objectives the law in question advances; it does not imply (much less guarantee) any particular outcomes.

IV. Freedom of Speech Probably Cannot Be Cabined by Any Single Operative Definition or Set of Conditions

Professor Michael Perry has observed that differences in the conceptualizations of human rights do not, by themselves, negate the possibility of a meaningful international discourse regarding the existence and scope of universal human rights. "To say that human beings *are* all alike in at least some respects such that some things are good and some things are bad for *every* human being is not to deny that human beings are *not* all alike in many other respects; it is not to deny that some things are good and some things are bad for *some* human beings *but not for others.*"[9] Thus, "a concrete way of life good for one or more human beings might not be good for every human being, and a way of life bad for one or more human beings might not be bad for every human being."[10] These facts about human nature mandate some degree of difference among nations and cultures in conceptualizing human rights: "Undeniably, then, any plausible conception of human good must be pluralist."[11] But, one should take care to note that pluralism does not necessarily imply utter moral relativism. A conception of human good "can acknowledge sameness as well as difference, commonality as well as variety."[12]

Some practices, such as slavery and torture, present easy cases. "Practices transculturally agreed to be moral abominations—slavery and genocide, for example—are, typically, explicitly proscribed."[13] For other rights, such as freedom of speech, great differences of opinion exist as to whether particular laws and practices transgress the right. This sort of value pluralism is unavoidable and the product of cultural difference. In such cases, "[i]t makes good sense that some human rights are, as established by international law, not only conditional, because some human rights—like the right to freedom of expression—are, as a moral matter, nonabsolute."[14]

The natural and inescapable consequence of varying conceptualizations of specific rights is a degree of indeterminism in setting the metes and bounds of the right in question. As Perry observes, "some provisions of the international law of human rights [are] at least somewhat indeterminate in some contexts in which the provisions are implicated" precisely because it is necessary to "leav[e] room for a reasonable difference of judgment about whether, given all the relevant particularities, the necessary conditions exist."[15]

Once again, the observation seems inescapable that a strong "margin of appreciation"[16] must needs apply when analyzing whether a given national

legal system adequately protects "the freedom of speech." Broad discretion to define and shape the meaning of free speech seems essential. Unlike some rights, free speech simply is not the subject of broad transnational consensus as to either its shape or scope.

We would probably all agree that a government's use of thumb screws or electric shock to a prisoner's genitals constitutes "torture." Similarly, proscriptions against slavery and murder seem relatively easy to define and enforce. Cultural deviation as to these practices is far more circumscribed. Consensus generally exists across a wide swath of jurisprudential territory.[17] By way of contrast, whether commercial speech advances important social values or whether money equals speech are *not* propositions on which broad transnational agreement exists. Accordingly, it should be easier to achieve international consensus on the substance of a prohibition against torture or slavery than on the substance of an affirmative right to the freedom of speech.

There is an important domestic tension here too: the meaning of free speech is hardly fixed or immutable. The proper scope of free speech is both contestable and contested. Recourse to a comparative law survey conclusively shows that, unlike the law of physics, the laws governing free speech exhibit tremendous variability both across and within legal cultures. This should give both defenders and opponents of free speech orthodoxy pause—neither camp can lay claim to any more ground than persuasive argumentation can win for it.

Workplace harassment laws, campus speech codes, and campaign finance reform are *all* arguably consistent with a meaningful commitment to the freedom of speech. Similarly, one can plausibly claim that measures such as these go too far and, accordingly, cannot be squared with the First Amendment. The scope of the freedom of speech is and will always remain a work in progress, a kind of permanent legal construction zone.

This conclusion, moreover, should not be a cause for alarm. It seems entirely fitting that the free speech project itself should serve as an object of national—and international—debate. A commitment to free speech without a commitment to discourse and debate on the substance of the right would be more than a little bit ironic. Indeed, it would be a betrayal of the free speech principle itself.

Notes

NOTES TO CHAPTER 1

1. U.S. Const. amend. 1.

2. *See, e.g., Wisconsin v. Mitchell,* 508 U.S. 476 (1993) (upholding, against free speech challenge, a state law enhancing sentences for crimes in which the defendant selects victim because of the victim's race); *R.A.V. v. St. Paul,* 505 U.S. 377 (1992) (invalidating on free speech grounds a St. Paul, Minnesota, city ordinance that prohibited speech or expressive conduct causing fear or alarm on the part of another person based on race, gender, or religion); *Meritor Savings Bank v. Vinson,* 477 U.S. 57 (1986) (recognizing a claim of action under Title VII for the creation and maintenance of a hostile work environment); *American Booksellers Association, Inc. v. Hudnut,* 771 F.2d 323 (7th Cir. 1985) (invalidating on free speech grounds an Indianapolis, Indiana, ordinance that prohibited pornography that degraded or subordinated the models on the basis of gender), *summarily aff'd,* 475 U.S. 1001 (1986).

3. By "equality of citizenship," I mean the ability to participate fully in the political, economic, and social life of the community without regard to one's race, gender, religion, sexual orientation, or similar characteristics.

4. *Printz v. United States,* 521 U.S. 898, 977 (1997) (Breyer, J., dissenting).

5. *Atkins v. Virginia,* 536 U.S. 304, 347 n.21 (2002); *see also Thompson v. Oklahoma,* 487 U.S. 815, 830 & 831 n.31 (1988) (taking into consideration legal views of "other nations that share our Anglo-American heritage" and "the leading members of the Western European community" in analyzing Eighth Amendment question).

6. *Atkins,* 536 U.S. at 352 (Rehnquist, C.J., dissenting).

7. *Id.* at 353.

8. 539 U.S. 558 (2003).

9. *See id.* at 576–77 (noting that "[o]ther nations, too, have taken action consistent with an affirmation of the protected right of homosexual adults to engage in intimate, consensual conduct" and that "the right petitioners seek in this case has been accepted as an integral part of human freedom in other countries").

10. *Id.* at 576.

11. *Id.* at 577.

12. *See id.* at 604 (Scalia, J., dissenting) (referencing recognition of same-sex marriage under the Canadian Charter of Rights and Freedoms equal protection doctrine).

13. *See, e.g.,* Symposium, "New Directions in Comparative Law," 46 *Am. J. Comp. L.* 597 (1998); Symposium, "New Approaches to Comparative Law," 1997 *Utah L. Rev.* 255.

14. Catherine A. Rodgers, "Gulliver's Troubled Travels, or The Conundrum of Comparative Law," 67 *Geo. Wash. L. Rev.* 149, 150 (1998).

15. *See infra* Chapter 3.

16. *See* Mari J. Matsuda et al., *Words That Wound: Critical Race Theory, Assaultive Speech, and the First Amendment* (1993); Mari J. Matsuda, "Public Response to Racist Speech: Considering the Victim's Story," 87 *Mich. L. Rev.* 2320 (1989).

17. *See* Richard Delgado & Jean Stefancic, *Must We Defend Nazis? Hate Speech, Pornography, and the New First Amendment* (1997); Richard Delgado, "Words That Wound: A