1998

Free Speech and Good Character

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Early proponents of the freedom of speech such as John Milton, John Stuart Mill, and Louis Brandeis emphasized the role expressive liberty plays in strengthening the character of persons entrusted with such freedom. These theorists argued that character traits such as civic courage, independence of mind, and the capacity to learn from experience and adapt are nurtured by trusting citizens with dangerous ideas. Today there is much talk about good character in relation to free speech disputes—but all on the side of those who would regulate speakers. It is time to remember that a concern about character cuts both ways in these matters. Exactly how that is so is the subject of Professor Vincent Blasi's Melville B. Nimmer Memorial Lecture.

INTRODUCTION

During the last two decades, the most original writing on the First Amendment has focused on the subtle and sometimes severe harms that speech can cause.[1] This work gives the lie to what we were taught on the playground: Who among us still believes that "sticks and stones will break my bones but words will never hurt me"?

I do not intend here to challenge or revise or embellish the thesis that speech hurts. Instead, I will address an old question that takes on greater urgency the more we recognize the harms that words can accomplish: Just how valuable is free speech after all? Hardly anyone fails to pay lip service

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1. *See, e.g.*, LEE C. BOLLINGER, THE TOLERANT SOCIETY 61–73 (1986); CATHERINE A. MACKINNON, ONLY WORDS (1993); Charles R. Lawrence III, *If He Hollers Let Him Go: Regulating Racist Speech on Campus*, 1990 DUKE L.J. 431; Frederick Schauer, *Uncoupling Free Speech*, 92 COLUM. L. REV. 1321 (1992).

to the special significance of the liberty of thought and expression. However, as the price tag, computed in terms of perceived social costs, goes up, many persons are beginning to wonder whether the benefits of free speech have not been oversold. Why, as a general matter, should the freedom of speech be treated as possibly our single most important political principle? What accounts for its status as the virtual linchpin of our constitutional culture? Unless we can answer that question convincingly for our own age, we cannot justify the level of First Amendment protection that currently obtains.

When pressed to defend the extraordinary emphasis accorded the freedom of speech in the United States—an emphasis not really replicated in other liberal democracies—First Amendment devotees typically invoke one or more of three basic rationales. First, the liberty to express one's thoughts and to form them by unrestricted reading and listening is an essential attribute, it is said, of human autonomy—of what it means to be a self-directed person possessed of human dignity. Second, free speech is the foundational mechanism of the search for truth, at both the individual and the societal levels. In this regard, a free marketplace of ideas produces a better, more nuanced and richly textured understanding of life than can any prescribed orthodoxy. Third, for a society committed to the project of self-government, in which ultimate political responsibility rests with the mass of ordinary citizens, free speech is invaluable as a means of civic education and participation.[2]

This trilogy of rationales is venerable, and there is much to be said for each of them. But there are problems. Yes, we all like to think of ourselves as autonomous, but how many of us possess even a rudimentary understanding of this profound, elusive Kantian notion? And if we did, would we necessarily embrace its strong assumptions regarding human agency and also conclude that speech is special among the liberties that sustain the self? Yes, truth is important, but truth seeking is such a different activity for the true believer, the pragmatist, and the sceptic as to confound any effort to generalize regarding the priority to be accorded truth seeking, the role free speech plays in facilitating it, and the significance of the many "market failures" that distort the flow of ideas and information. Yes, self-government is a noble ideal and one with a textual mooring in the Constitution, but what it means for citizens to give meaningful consent or to engage in meaningful participation are the very questions that fuel the clash of modern political

2. For excellent critical summaries of the traditional rationales for the freedom of speech, see FREDERICK SCHAUER, FREE SPEECH: A PHILOSOPHICAL ENQUIRY 15–72 (1982), and Kent Greenawalt, *Free Speech Justifications*, 89 COLUM. L. REV. 119 (1989).

philosophies. This phenomenon of radical disagreement emerging from the shared commitment to self-government appears also at the level of First Amendment doctrine: Consider the issue of campaign spending limits. Moreover, the justification for free speech from self-government fails to provide a reason to protect literature or scientific inquiry, an unsettling prospect even for minimalists who can live with the exclusion of commercial advertising, workplace harassment, and hard-core pornography from the ambit of First Amendment concern. In brief, the tired trilogy of conventional free speech justifications is at best incomplete, and at worst so abstract and protean as to be of very limited intellectual or practical utility.

In light of these difficulties, it is odd that a somewhat different, and to my mind less problematic, rationale for the freedom of speech has not received more attention in recent times, particularly since it figured prominently during the first three hundred years of systematic writing in defense of toleration. This is a special kind of argument from character that builds from the claim that a culture that prizes and protects expressive liberty nurtures in its members certain character traits such as inquisitiveness, independence of judgment, distrust of authority, willingness to take initiative, perseverance, and the courage to confront evil. Such character traits are valuable, so the argument goes, not for their intrinsic virtue but for their instrumental contribution to collective well-being, social as well as political. This claim plausibly can be said to form the spine of each of the renowned defenses of free speech produced by John Milton,[3] John Stuart Mill,[4] Oliver Wendell Holmes,[5] and Louis Brandeis.[6] Yet today we pick up on other features of those classic writings, usually by finding some way to enlist their observations in the service of the familiar arguments for free speech from autonomy, truth seeking, and self-government.

The marginalization of the argument from character is unfortunate for several reasons. First, there is today much talk about the need for good character—but not among the proponents of free speech. If character is to figure more in contemporary political thought, as I think it will and should, proponents of free expression must not concede the issue of character to the authoritarians. Second, the objective of strengthening character provides a good reason to protect nonpolitical as well as political speech, even when the impact of such protection on the functioning of social institutions

3. *See* JOHN MILTON, *Areopagitica*, *in* COMPLETE POEMS AND MAJOR PROSE 716–49 (Merritt Y. Hughes ed., Odyssey Press 1957) (1644).

4. *See* JOHN STUART MILL, ON LIBERTY AND OTHER WRITINGS 19–55 (Stefan Collini ed., Cambridge University Press 1989) (1859).

5. *See* Abrams v. United States, 250 U.S. 616, 624–31 (1919) (Holmes, J., dissenting).

6. *See* Whitney v. California, 274 U.S. 357, 372–80 (1927) (Brandeis, J., concurring).

remains the principal concern; in contrast, most rationales that derive from the political role of speech are unsatisfying on account of their weak or nonexistent implications for the freedom of nonpolitical expression. Third, the soaring rhetoric of autonomy, truth seeking, and self-government has permitted critics to charge that the free speech tradition is founded upon ideals that are hopelessly out of reach, and upon assumptions regarding human nature that are far too optimistic. Whether fairly or not, the conventional arguments for free speech can be made to appear ungrounded and naive. The argument from the instrumental value of character assumes that we are to a large degree products of our environment and that human proclivities for sloth, conformity, and corruption are a constant threat to collective well-being. In this regard, a focus on character would help to liberate the idea of free speech from the Panglossian taint under which it now labors. Finally, to add value the argument from character need not provide a self-sufficient, comprehensive rationale for the freedom of speech; it can work in combination with other instrumentalist justifications of comparably discrete significance, such as the argument that free speech is beneficial because it facilitates the acquisition of information by those who would check abuses of authority. The autonomy, truth-seeking, and self-government rationales tend to be more holistic and self-contained, and in that respect less capable of making incremental contributions to the case for free expression.

To defend the idea of free speech by reference to its impact on character, we must establish both that a regime of expressive liberty actually nurtures certain character traits and that collective well-being is indeed served thereby. Some would contend that First Amendment protection weakens character by discrediting the very notion of limits. In this view, the predominant characterological effect of the freedom of speech is to encourage stridency, impatience, ideological exhibitionism, cynicism, the manipulation of audiences, and verbal cruelty, among other excesses and pathologies. I take this objection seriously but think it is best confronted later, after the lineaments of the argument from character are sketched. I will return to the subject of limits at the end of this lecture.

I should make clear at this point, however, that the argument I am about to describe is meant to address only the question of why as a general matter the freedom of speech deserves extraordinary emphasis in a liberal society such as the United States. What a character-based rationale, which in any event is not meant to stand alone, implies about the exact scope, strength, and contours of the right of free speech is beyond my ken on this occasion. I wish to emphasize this reservation. Lawyers are prone to want theories to function as algorithms: good theory in, good doctrinal formula-

tion or case resolution out. That kind of reductionism seldom advances understanding. Many variables in addition to theoretical justifications should figure in the construction of wise judicial doctrines and the just resolution of cases. Thus, in the domain of First Amendment law, institutional concerns pertaining to the limitations of legal categorization and the censorial predispositions of factfinders and enforcement officials properly loom large. One cannot say what a greater emphasis on character implies about obscenity law or the protection of symbolic speech, for example, without undertaking an institutionally and contextually sensitive inquiry that examines many considerations specific to those problems. First Amendment theory is interesting and relevant, but its resolving power for particular legal controversies should not be exaggerated or schematized. The welcome consequence of this lack of linear determinacy is that the argument from character must be evaluated in its own terms, not as a means to generate antecedently preferred outcomes.

I. FREE SPEECH AND INDIVIDUAL CHARACTER

So what exactly are the character traits that are promoted by according the protection of free speech an extremely high priority? The traits I have in mind include those mentioned earlier: inquisitiveness, independence of judgment, distrust of authority, willingness to take initiative, perseverance, and the courage to confront evil. Here we can add others: aversion to simplistic accounts and solutions, capacity to act on one's convictions even in the face of doubt and criticism, self-awareness, imagination, intellectual and cultural empathy, resilience, temperamental receptivity to change, tendency to view problems and events in a broad perspective, respect for evidence. This is a character profile that is anything but vacuous. In the matter of character, the First Amendment is not a big tent.

But how is character affected by a constitutional commitment? Is the key what such a commitment says, or what it does? The passions that constitutional controversies evoke often have a lot to do with what the disputants take to be the symbolic stakes. To understand the impact of the First Amendment, however, we do better to focus on material considerations. A legal system influences character not so much by preaching or teaching tolerance as by exerting coercive authority to protect dissenters.[7] The

7. In this respect, among others, the argument advanced here differs from the most important recent effort to integrate a concern about character into First Amendment analysis, that developed by University of Michigan President Lee Bollinger in his fascinating book, *The Tolerant Society*. *See* BOLLINGER, *supra* note 1. Bollinger's argument is limited to one crucial character trait, the capacity to control the intolerance one necessarily must feel toward persons whose

resulting environment, in which dissent is both an option and an inescapable reality, is the principal source of the characterological effect, or so I maintain. It would be wrong to discount entirely the prospect of hortatory influence, but the environmental impact of free speech deserves the greater emphasis.

The most important environmental consequence of protecting free speech is the intellectual and moral pluralism, and thus disorder in a sense, thereby engendered. In matters of belief, conventional structures of authority are weakened, rebellion is facilitated, closure is impaired. Persons who live in a free speech regime are forced to cope with persistent, and frequently intractable, differences of understanding. For most of us that is a painful challenge, at least in the realms that matter to us most. Being made to take account of such differences shapes our character.

For example, a person who cannot ignore the existence of understandings antithetical to her own must find some way to come to terms with her views. Such a coming to terms can take a variety of forms: blindly digging in, angry denigration of persons with different notions, self-doubt, a deepening of conviction and enhanced awareness of the grounds for one's beliefs, curiosity about the sources of disagreement, confusion, a redoubling of proselytizing zeal, or a grudging and gradual weakening of certitude that may lead eventually to a change of mind. Faced with perdurable difference, many persons will run a gamut of responses over time. What is less likely to ensue the more difference is salient is complacency about one's beliefs and the stasis that complacency engenders. Simply by energizing the experience of belief formation, a free speech regime's legitimation of difference can nurture many of the positive character traits outlined above.

In addition to forcing persons to confront their differences of understanding, free speech influences the complex process by which authority is constituted. Few if any of us can do without authority. By requiring us to do without *inherited* authority, *unquestioned* authority, *unaccountable* authority, *unitary* authority, a free speech regime creates a salutary void. We fill that void by creating other authoritative structures in our lives, ranging from institutions founded on collective (and revocable) consent, to social norms enforced by

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speech or conduct manifests beliefs that threaten individual or community identity. Bollinger views the protection of free speech as a commitment that can teach us how to understand and manage this pervasive, natural, morally worthy (in proportion) but often overflowing and self-destructive impulse. The character traits that I believe are nurtured by a free speech culture are numerous and various, extending far beyond the capacity to control the impulse to intolerance. Those traits are nurtured, moreover, primarily by the experience of living in a vibrant, dynamic, contentious society rather than by the pedagogic contribution of a legal norm of toleration. Despite these differences, the debt my treatment of the subject owes to Bollinger's pathbreaking resurrection of the concern about character is considerable.

social sanctions, to precommitments and other sources of self-discipline. Perhaps one could label this process the exercise of autonomy, but it matters, in terms of the role of character, that the emphasis is on the creation of authority rather than the experience of choice or self-determination as an essential attribute of personhood.

A third way that a free speech regime helps to mold character is by emboldening persons for whom orthodox understandings do not ring true. In most societies, even those that celebrate free speech, despair is the common lot of the dissenter. No doubt it can be intoxicating to act out differences: Rebellion has intelligible psychological roots and a whiff of romance as well. That should not obscure the point that for most of us, most of the time, it is a discomforting and often threatening experience to be out on a limb. Despite the real satisfactions of forbidden inquiry and unvarnished self-expression, the path of pleasure more frequently lies in the direction of going along. Despite the widespread perception that in modern society too many people flaunt and exaggerate their differences, the more common response still is to bury them. In many circumstances that is surely the socially desirable outcome; it is hard to imagine a functional society that was not replete with reticence and trimming. Precisely because the burying of differences is such a pervasive and necessary practice, however, the capacity to pursue differences when occasion demands serves a most important social function.

A culture that protects and celebrates free speech can help to nurture that capacity in several ways. The legitimation of dissent can reduce the degree to which persons with unorthodox ideas are viewed as deserving of ostracism or retaliation. Also, rallies, meetings, and publications can inform dissenters that they are not so isolated, not so far on the margin, as they might have assumed. Facilitating various experiences of solidarity is one of the most consequential, because most energizing, functions of a free speech regime. In addition, the spectacle of some persons standing up to authority or convention or corruption or evil or mediocrity can enhance in others the sense of duty to take enough responsibility for their convictions to act on them.

Finally, a regime of free speech can help to develop character by requiring those who would beat back bad ideas and contain evil demagogues to pursue those worthy objectives in the most arduous way: engagement rather than prohibition. The claim here is not that truth and justice will always prevail in a fair marketplace of ideas. We will never have such a marketplace, and truth and justice would not always prevail even if we did. Rather, the notion is that the *experience* of confronting falsehood and evil profoundly shapes the character of a person or a society, and that such an

experience is short-circuited by censorship. In this view, the most dangerous ideas can be defeated only by strong persons, not by repressive laws. The two are not, of course, mutually exclusive, but the disturbing tendency, illustrated by our recent efforts to control racism on college campuses, is to think the day's work is done when the self-congratulatory code is enacted. The passage of laws too often has the quality of a moral shortcut, and too often diverts what could be honest, if stressful, exchanges that might actually impact beliefs into shallow forensic contests over legal coverage. In denying the moral shortcut, a free speech regime strengthens the character of its citizens.

These are some of the ways that the protection of free speech can promote certain character traits. We must next inquire why the flourishing of those character traits might be thought to serve collective well-being.

II. INDIVIDUAL CHARACTER AND COLLECTIVE WELL-BEING

One benefit of free speech is its contribution to a system of checks and balances. Broadly conceived, such a system includes not only the efforts of different branches of the same government to keep each other in line, but also intergovernmental checks on the abuse of authority in a federal system (states checking the federal government and vice versa) and checking by private citizens via elections and less formal manifestations of public sentiment. To do their work, all the various checking agents depend on information concerning what the potential abusers of authority are doing. Often such checking agents rely heavily on the power of communication to mobilize resistance to any discovered abuses. In this regard, the freedom of speech is a mechanism that facilitates the system of checks and balances.

That is not my concern here. Particularly for a process that entails opposition to abuses by powerful actors, mechanisms and procedures cannot be efficacious if the persons who must employ them lack certain demanding personal qualities. Independence of mind is one of those qualities because abuses usually can be rationalized, excused, or ignored by observers who are temperamentally inclined not to question their inertia-driven perceptions of regularity and good faith. For the same reason, general distrust of authority is a functional attitude in this sphere. Another character trait of particular significance for the checking process is perseverance. Miscreant officials seldom go quietly once their transgressions are brought to light. Checking is work for persons who can endure counterattacks and speak truth to power not once or twice but like a broken record. By the same token, a populace accustomed to judging more on grounds of evidence than preconception or loyalty, a populace not paralyzed by complexity or delay,

is more likely to heed the whistleblower. To the extent that the experience of living in a robust, unruly free speech culture nurtures these various aspects of character, the First Amendment has instrumental value for the checking process quite apart from the mechanisms of communication it provides.

Character serves collective well-being in many ways other than by helping to control abuses of power. One is by facilitating compromise. Institutions ranging from democratic governments to marriages flourish or fail depending on how skillful participants are at the difficult art of compromise. To a large degree, the capacity to compromise depends on character. A free speech culture can help to foster some of the attitudes, skills, and even norms that successful compromise requires. This is important because when persons negotiate their differences poorly, becoming in the event manipulative or resentful or disengaged, collective well-being is not advanced. In addition to the costly side effects of such attitudes, compromises struck in their shadow are likely to be unstable.

Persons who live in a society suffused with conflicting opinions ought on that account to be more skillful at compromise. No doubt overheated rhetoric can fuel resentments and foster political aggression, but not so much, I would argue, as censorship can with the fantasies of purification and domination it encourages. Frustration with the blind, stubborn resistance of those who refuse to see matters our way will always be a major source of human unhappiness. The more that frustration is chronic, endemic to the very texture of social life, the better chance we have of learning to function in the face of it.

Free speech engenders fears but also hopes, and compromise is built on hopes. It is easier to stay engaged, to find value in that half a loaf, if tomorrow may bring change for the better. Similarly, the capacity to compromise frequently depends on the self-confidence and sense of perspective of those who are asked to settle for less. Persons whose identities have been forged by experiences of doubt, challenge, and choice are more likely to possess the self-awareness and perspective that compromise demands.

Probably the single most important way that free speech serves collective well-being is by helping persons and institutions adapt to a changing world. As with checking, adaptation depends on mechanisms of communication but even more on the character of the populace. And as various forces such as technological advances and demographic developments cause the pace of change to accelerate, this process of adaptation looms larger and larger as an ingredient of well-being.

Adaptation begins with awareness. When prevailing ideas and arrangements cease to work well in an altered environment, the common tendency is

to ignore or minimize the phenomenon. A society that encourages questioning, auditing, experimenting, and revising is more likely to notice problems generated by changing conditions.

At least as crucial to the process of adaptation is a temperamental receptivity to change. A free speech culture weakens attachments to existing patterns by ventilating alternatives and increasing public awareness of changes that are already afoot. The sheer proliferation of perspectives in play all but forces individuals caught in the maelstrom to adopt a dynamic frame of reference.

Awareness of change, even receptivity to it, does not necessarily engender productive adaptation, however. Good judgment is required for a person or institution to determine how to thrive in uncharted terrain. Heavy reliance on tradition or authority is maladaptive in a rapidly changing environment. What is needed is perceptiveness, boldness, independence of mind, willingness to experiment, flexibility—in short the capacity to make choices. Passivity and avoidance are the vices to be feared.

Whatever else the freedom of speech does or does not do, it asks its practitioners, speakers and listeners alike, continuously to choose: what to say, how to say it, whom to address, which speakers and messages to hear, what to believe. The more experienced persons are at making choices of this sort, the better their choices ought to be.

Unless, of course, too much choosing leads to decisional anomie. Successful adaptation requires not just the willingness to choose but the discipline to care about the wisdom of one's choices. Critics of what they take to be the ascendent consumerist culture of ideas worry that the celebration of free speech ends up being a celebration of destructively casual attitudes toward knowledge and belief. Surely there is something to this critique. Persons who feel overwhelmed by the choices with which they are confronted cannot be expected to stay engaged and retain perspective. Under such conditions, impulses will reign and adaptation will suffer.

The crucial question is whether a strong constitutional commitment to free speech fosters or forestalls this dangerous phenomenon of disorientation in the face of choice. Were it possible effectively to shield persons from the riot of choices thrown up by the conditions of modern life, were it possible to legislate simplicity and stability, we might well conclude that censorship is the cure for disorientation. But such shielding is *not* possible, at least not in a political community as large, demographically diverse and mobile, and economically dynamic as the United States. The complexity of the choices we face transcends any particular policy regarding free speech. And if we cannot help but choose, far better that we be shielded from susceptibility to simplistic perceptions and expectations. Although dema-

gogues enabled by toleration can and do peddle simple-minded nostrums, the net effect of a robust free speech tradition, I submit, is to make audiences more familiar and comfortable with complexity and thereby more sceptical of such nostrums. To the extent that is true, the supremely important objective of productive adaptation is served.

In addition to receptivity to change and good judgment regarding how to cope with it, an adaptive society needs creative ideas. Admittedly, the wellsprings of creativity are elusive; geniuses certainly have emerged in repressive regimes. Nevertheless, by tolerating unorthodox opinions and inquiries a community encourages creativity both by valuing it and by enabling creative persons to achieve visibility and interact. A free speech tradition appears to matter especially at what might be termed the second level of original thought, not that of rare geniuses with gifts and wills so profound as to overwhelm their environments, but among the foot soldiers of creative adaptation, the persons who diagnose and tinker and test and guess and implement. Such persons shape a culture and are in turn shaped by it. A vibrant culture of ideas can nurture the talents of such persons.

Checking, compromise, and adaptation are collective endeavors that contribute to well-being across a wide spectrum of political arrangements. When sovereignty resides in the people, however, as in a representative democracy, additional capacities that can be developed and sustained by free speech assume special importance. Among the most significant are the willingness of ordinary citizens to participate in collective projects, to assume some measure of responsibility for social outcomes, and more generally to maintain collective energy, resilience, and aspiration.

One way that a free speech tradition fosters such capacities is by instituting an ethic of distrust and critique of all institutions, not least of government. Critique presupposes responsibility and concern. An effective critic participates in civic life and provokes others to do so. A high level of accountability can energize both the sources and the targets of critical scrutiny.

As with adaptation, however, the social psychology of civic participation is complicated, contestable, and resistant to meaningful empirical verification. Promiscuous distrust and critique could lead to cynical disengagement from collective endeavors, the postmodern equivalent of medieval quietism. Why should we believe that pervasive and telling criticism of established institutions engenders more engagement than withdrawal? It is those very institutions, after all, that serve for most persons as the predominant forums for civic participation. Loyalty to and trust in civic institutions may provide a necessary foundation for personal commitment.

Given our current point in the cycles of the public mood, we naturally tend to associate free speech with rampant negativism, if not nihilism. And

surely in any age disenchantment is one of the consequences of the unremitting scrutiny of institutions. But systematic critique carries also an implicit message of hope—hope that standards of performance continue to obtain, hope that reform is possible. Otherwise, why bother? Institutions, like persons, are respected more when much is demanded of them than when they are indulged or ignored, and that holds true even when the demands are in some sense unreasonable. Moreover, the very act of participating in the practice of institutional critique, if only as a listener, connects the ordinary citizen with the collective endeavors that constitute public life. That connection is both contingent and crucial to individual and collective well-being. Loyalty and trust, the preconditions for civic engagement, flow more from connectedness than from innocence.

Connectedness, responsibility, hope—these are vital ingredients of civic participation that a commitment to free speech can help to sustain. At least as important to the maintenance of political energy are two virtues that typically do not receive the emphasis they deserve: perseverance and resilience. To bring about reforms, it is almost always necessary to keep knocking on the door, over and over again, refusing to take no for an answer. To preserve hard-won gains, it is almost always necessary to ride out storms of defeated expectations and consequent disillusionment. Staying power is the linchpin of efficacious civic participation. This is all the more true in a culture buffeted by multifarious forces that serve to shorten the individual and institutional attention span.

The relationship between free speech and the civic virtues of perseverance and resilience is as difficult to pin down as it is significant. On the one hand, we might fear that too much free thinking and toleration contributes to the erosion of shared standards of judgment. If so, the capacity to stay committed may be adversely affected. Citizens fighting only for their "preferences" may not be as fiercely determined and thereby as capable of enduring the slings and arrows of outrageous resistance as persons whose civic participation is motivated by notions of honor, fundamental justice, or divinely ordained (or natural) entitlement. In this view, free speech complicates perceptions, complexity sows the seeds of doubt, and doubt weakens the will, all to the detriment of staying power.

On the other hand, one might believe, as I do, that naiveté is the most important characteristic of quitters. Persons who have scant experience negotiating ideological and cultural differences, who manage to insulate themselves from all but kindred spirits, are the civic actors most likely to harbor unrealistic expectations and to wilt when those expectations are defeated. In this view, perseverance flows from experience and perspective. Whatever its relationship to autonomy, truth seeking, or fair representa-

tion, a free speech tradition cannot help but broaden horizons and reduce naiveté. If perseverance and resilience are as integral to civic well-being as I think they are, that effect should count heavily in any assessment of the benefits of free expression.

III. THE QUESTION OF LIMITS

So far I have concentrated on the affirmative side of the equation. I have examined the various ways that the protection of free speech can serve collective well-being via characterological effects. A sceptic could grant the claims I have put forward in this regard and still conclude that, on balance, a robust free speech principle disserves collective well-being precisely because of its impact on character. For a culture of free speech may be thought to foster self-indulgence and excess. The capacity to define and enforce limits is a major element of well-being, at the societal level no less than the personal. Even when free speech promotes checking, compromise, adaptation, and engagement in the ways specified above, the individual traits that help to generate those social benefits may simultaneously undercut the project of setting limits. In nurturing such traits as exuberance, independence, and savvy, free speech sharpens a double-edged sword.

Must freedom cause its practitioners to devalue and defy bounds? The assertedly natural progression from liberty to license has always figured prominently in the rhetoric of opposition to free speech. Thoughtful proponents of toleration concede the point. "Some degree of abuse is inseparable from the proper use of every thing," said Madison in what is the foundational essay on the meaning of the First Amendment, "and in no instance is this more true than in that of the press."[8] Madison thought such abuses were a price worth paying, but his observations regarding the wisdom of enduring inevitable excesses were not directed specifically to effects on character. Licentiousness might be considered especially subversive when character is the concern.

Consider, for example, the Supreme Court's much heralded decision in *New York Times Co. v. Sullivan*.[9] To encourage vigorous criticism of government and thwart efforts by the targets of such criticism to use libel law to achieve political objectives, the Court construed the First Amendment to permit recovery by a public official only upon proof that his critic published the offending statement with knowledge of its falsity or reckless

8. James Madison, Report on the Virginia Resolutions Concerning the Alien and Sedition Laws, *in* THE MIND OF THE FOUNDER 229, 259 (Marvin Meyers ed., rev. ed., Brandeis University Press 1981) (1973).

9. 376 U.S. 254 (1964).

disregard for the truth.[10] Perhaps, although there is much dispute about this, the balance struck by the Court can be justified by a utilitarian calculation regarding which stories critical of officials ought to reach the public and which injuries caused thereby warrant legal redress. But the *Sullivan* doctrine does more than strike a balance in these terms: It nurtures a journalistic ethic. Factual inaccuracy is excused and thereby destigmatized; holding a story for further sourcing is discouraged. What is glorified by the Court is "uninhibited, robust, and wide-open" reporting.[11] Over time, we might fear, the immunity from liability established by *Sullivan* will adversely affect the character of journalists, weakening resolve to get the details of a story right. In this environment, even the consumers of critical stories about public officials might come to care less whether an exposé is strictly accurate in its particulars.

The dilemma is apparent. We do need energetic, irreverent, adroit reporters who are not seduced by the trappings of office or cowed by the threat of a lawsuit. But we also need reporters who cherish the truth and appreciate their own fallibility in finding it—reporters, that is, who understand limits. In fostering journalistic aggressiveness and independence, does *Sullivan* extract too high a price in the currency of limits? The same question could be asked about a host of other icons in the First Amendment pantheon, including Mel Nimmer's triumph in *Cohen v. California*[12] establishing the right to employ four-letter words in public settings.

As occurs at other junctures in the case for toleration, judgment on this point depends heavily on one's faith or lack thereof in corrective dynamics. In my experience, excesses beget reactions. The spectacle of a person or cause or profession losing all sense of balance and decency tends to bring home to others the need to reinvigorate the moral and social order, not least by attending to the character demands of that order. There are ways to deal with overzealous reporting and breaches of public decorum other than by invoking the heavy, slow-moving, clumsy artillery of the law. Informal, nonofficial sanctions and judgments, Milton recognized, will always provide the most important "bonds and ligaments" that hold a society together.[13] Reporters who take liberties with the truth will be corrected far more by demanding editors and readers than by libel judgments. Protesters who assault the sensibilities of the public will be reigned in when their tactics cause audiences to recoil and their opponents to succeed in discrediting them. Such informal limits are a function of social vitality.

10. *See id.* at 265–92.
11. *Id.* at 270.
12. 403 U.S. 15, 26 (1971).
13. *See* MILTON, *supra* note 3, at 733.

They depend on dimensions of character that are blunted in repressive regimes.

It might be argued that the forces of nonofficial correction gain vitality from regulatory backup. Newspaper editors, for example, could be inspired to develop rigorous internal standards for fact checking if losing a libel suit were a more common experience. In theory, there is no reason why the legal and the informal limits on speech cannot be synergetic. In operation, however, that phenomenon is more likely to be the exception than the rule. The content of laws regulating speech cannot help but be affected, in the direction of weakening the scope and strength of the limits imposed, by some severe institutional constraints: the risk of ideological bias by judges, juries, and law enforcement officials; the peculiar difficulty of describing instances of communication in the categories of legal language; the contingencies that thwart the effort to predict or measure the consequences of particular acts of expression. Because of those constraints, legal sanctions can do only a small fraction of the work of setting limits. The informal sanctions on speech need to be much more substantial, pervasive, finely calibrated, and subtle than their formal counterparts could ever be. In this regard, the watered-down limits imposed by the institutionally constrained legal regime can actually impair the development of robust informal limits by establishing either a low benchmark or a false perception that meaningful limits are already in place. As a rule, the most effective limits on speech originate and derive their sustenance from sources other than formal laws.

In part this is so because the limits must themselves be dynamic and adaptive. The forces of excess do not follow set patterns. The transgressions of investigative reporters assume new forms as technological capacities expand, competitive pressures intensify, and audiences change. The advent of cyberspace necessitates the construction of a wholly new type of public decorum. The accelerating commercialization of American life, not excluding the life of the mind, raises issues of limits we have barely begun to address. Limits are not fixed essences to be found and enforced. They are ongoing judgments, made in response to the novel mix of threats, needs, and aspirations of a particular time and place. If a free speech tradition does indeed help citizens to confront problems, retain perspective, and exercise judgment in a changing environment, in no project are those skills more valuable than that of enforcing the tacit, uncodified standards of behavior that make for a resilient social order.

In the last analysis, behind this concern about limits lies the primordial fear of anarchy. It would be foolish to underestimate the role this fear has played—and continues to play—in disputes over free speech. No one with even a passing acquaintance with Hobbes can dismiss the

threat of anarchy out of hand, or cabin it in the seventeenth century.[14] The veneer of civilization may be just that.

Anarchy can flow from self-indulgence or zeal but so too can it flow from the failure to check, or compromise, or adapt, or take responsibility for social outcomes, or confront evil. What provoked countless persons over the centuries to fight and sometimes die for the principle of freedom of speech was, more often than not, a particular form of disorder, something we might with Locke call anarchy: the unrestrained use of the coercive apparatus of the state to stamp out difference and hold on to power.[15] The limits that keep in check the anarchic impulse to wreak vengeance on persons who challenge the reigning orthodoxy are among the essential "bonds and ligaments" of a civilized society. Those limits depend on constitutional structures but even more on strength of character.

"[T]he greatest menace to freedom," said Justice Brandeis, "is an inert people."[16] He might have added that in a liberal society such a people is also the greatest menace to order. That is why, for all its costs and excesses, free speech, the arch-enemy of inertia, is so important.

14. *See* THOMAS HOBBES, LEVIATHAN (Edwin Curley ed., Hackett Classics 1994) (1651).

15. *See* JOHN LOCKE, SECOND TREATISE OF GOVERNMENT ch. XIX (C.B. Macpherson ed., 1980).

16. Whitney v. California, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring).