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THE MEANING OF DISSENT

*Lee C. Bollinger**

THE FIRST AMENDMENT, DEMOCRACY, AND ROMANCE. By *Steven H. Shiffrin.* Cambridge: Harvard University Press. 1990. Pp. viii, 285. $29.95.

There is, and has always been, an abiding tension in first amendment theory. At times, freedom of speech is conceived as having a very practical purpose — as implementing a system designed for yielding truth, or good public policy. Thus, Zechariah Chafee wrote that the first amendment protects the "social interest in the attainment of truth, so that the country may not only adopt the wisest course of action but carry it out in the wisest way,"[1] and Alexander Meiklejohn spoke frequently of the first amendment as a practical plan for a self-governing society, engendering "wise decisions."[2] This vision of freedom of speech, however, does not lead to the conclusion that only speech that can be shown to make a contribution to the search for truth, or wise policy, receives protection. The speech we dislike and believe harmful may still be offered shelter within the first amendment; but, if it is, it will generally be regarded as a necessary evil, protected because we recognize that we are fallible — we cannot eradicate speech we perceive as harmful and debasing without diminishing that which is beneficial.

Another way of envisioning the functions and roles of the first amendment sees a protected realm of speech not as serving a quest for immediate practical benefits, but rather as a special context in which general qualities of mind and character are addressed and created. Freedom of speech is more than a plan for developing good ideas through uninhibited discussion. The enterprise has a far larger focus.

A close and sensitive examination of the canon of the first amendment reveals, I believe, both of these meanings. Often they occur in the very same judicial opinion or scholarly writing. Both Justice

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1. Z. CHAFEE, FREE SPEECH IN THE UNITED STATES 33 (1941).

2. A. MEIKLEJOHN, *Free Speech and Its Relation to Self-Government,* in POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE 26 (1965):

> Now, in that method of political self-government, the point of ultimate interest is not the words of the speakers, but the minds of the hearers. The final aim of the meeting is the voting of wise decisions. The welfare of the community requires that those who decide issues shall understand them. They must know what they are voting about. And this, in turn, requires that so far as time allows, all facts and interests relevant to the problem shall be fully and fairly presented to the meeting.

Holmes and Judge Hand, for example, extolled the practical benefits achieved through freedom of speech, but they also pointed out how the patterns of thinking underlying the censorship of their time revealed a troublesome cast of mind that required correction through the conceptualizing of free speech. Behind the movement for censorship they saw an overweening certainty of belief, to which they responded with an antidote of heavy relativism in their conceptions of free speech. They were concerned, as I have argued elsewhere,[3] with the intellectual character manifested in the specific context of free speech disputes, and their response was to propose a competing intellectual attitude. And one would have to be insensible in reading Meiklejohn's major writing on freedom of speech not to see him rebelling against the relativism of Holmes and Hand and proposing instead a posture of confidence in one's beliefs and a use of free speech as a means of testing one's commitments to those beliefs.[4]

It is not, of course, inconsistent to think of freedom of speech as serving both the narrow and practical needs of the society and as providing a special context for the development of more general qualities. One can cross a mountain range to reach the other side or to test one's capacity for hardship or both. What is important is to understand when and how these various functions are being served.

In my own efforts to explore the broader social significance of freedom of speech, I have tried to unpack the underlying attraction and potential meaning of the extraordinary protection afforded to quite harmful speech acts. It is possible, as noted above, to protect extremist speech because of the inability to draw safe lines. But it is also possible to protect such behavior out of a recognition of the need to master, or to moderate, a sensed impulse to disallow and crush acts with which we disagree or which we view as harmful. Under this latter conception of freedom of speech, protection (or toleration) constitutes a kind of extreme sharing of social space, or of self-restraint in the exercise of social legislation and punishment, all designed to influence the nature of social interaction more widely.

I

Professor Steven Shiffrin's book,[5] *The First Amendment, Democracy, and Romance,* makes an important contribution to our efforts to understand the broader cultural significance of the first amendment in American society. Shiffrin conceives of freedom of speech as springing from an important but overlooked strand of philosophy that he refers to as the Romantic tradition. The Romantic tradition, like many

3. L. Bollinger, The Tolerant Society 145-74 (1986).

4. For indications of this position, see A. Meiklejohn, *supra* note 2, at 27-28, 66-77.

5. Steven Shiffrin is Professor of Law at Cornell University.

other philosophic traditions, is concerned with developing a way of life, and so the first amendment, insofar as it embraces and emerges from that tradition, is a means for doing things that express and symbolize a commitment to that way of life. To Shiffrin, what the first amendment does best that is meaningfully related to the Romantic tradition is to "celebrate[] dissent" (p. 141). The celebration of dissent, according to Shiffrin, is a central idea of the Romantic vision.

Shiffrin's account of the Romantic vision of life, however, is somewhat unclear. Romantics, Shiffrin says, take life in the following terms:

> Without purporting to capture the beliefs of any and all who have been described as romantic (indeed, recognizing that some romantics do not fit parts of this picture at all), let us understand romantics as those who have sought to emphasize the passions against abstract reason; the subjective against the objective; the concrete and the particular against the general and the universal; activity, dynamism, and movement against the frozen, static, and eternal; creativity, originality, imagination, and spontaneity against mechanical calculation, rote analysis, or artificial, bloodless routine; invention over discovery; and struggle over victory. As Isaiah Berlin puts it, the romantics stand for the "celebration of all forms of defiance directed against the 'given' — the impersonal, the 'brute fact' in morals or in politics or against the static and the accepted and [for] the value placed on minorities . . . as such, no matter what the ideal for which they suffer."[6]

To Shiffrin, Ralph Waldo Emerson and Walt Whitman are the most relevant Romantics for thinking about the relationship between Romanticism and the first amendment. They, he contends, "understood more about the relationship of freedom of speech to American democracy than did Oliver Wendell Holmes or Alexander Meiklejohn . . . ." (p. 74). If so, one wonders whether Shiffrin's perspective springs from his reading of first amendment jurisprudence or whether he is recommending a new way of thinking about the first amendment derived from a neglected Romantic meaning. On this, Shiffrin is somewhat ambiguous. Shiffrin sometimes asserts that "as a cultural symbol . . . the first amendment has enlivened, encouraged, and sponsored the rebellious instincts within us all."[7] And he points to a case like *West Virginia v. Barnette*,[8] the flag salute case, as most embodying the Emersonian and Whitmanesque vision of freedom of speech.[9] Against

6. P. 141 (footnotes omitted) (quoting Berlin, *Preface*, in G. SCHENCK, THE MIND OF THE EUROPEAN ROMANTICS xvi (1966)).

7. But, as a cultural symbol . . . the first amendment has enlivened, encouraged, and sponsored the rebellious instincts within us all. It affords a positive boost to the dissenters and the rebels. It has helped to shape the kind of people we are, and it influences hopes about the kind of people we would like to be.

P. 87.

8. West Virginia Bd. of Educ. v. Barnette, 319 U.S. 624 (1943).

9. Pp. 159-61.

The very notion of citizenship, suggests *Barnette*, must leave space for an autonomous deci-

the levelling power of conformity challenged in that case, which demanded the expression of allegiance from every child, the first amendment intervened and taught respect for the value of dissent. But for Shiffrin, it would seem, these instances are rare. To him the judicial experience with freedom of speech is "depressing." Dissent has been sadly unrespected — especially in periods when dissent's need for respect was highest:

> *Schenck* introduces a long line of cases dealing with the advocacy of illegal action. If *Schenck* is a sobering introduction, the whole line is simply depressing. No one can read these cases without becoming increasingly cynical about the binding force of legal doctrine and about the willingness or capacity of the judiciary to protect dissent. The cases reveal a judiciary that mirrored the moods of the people. Judges, too, were caught up in the hysteria of World War I; they too responded to the anticommunist scare of the McCarthy era. In cooler times, they protected dissent. In the best of times and the worst of times, doctrine was manipulated, shaped, and changed to serve the perceived needs of the moment. Only rarely did judges transcend the censoring passions of the day. [p. 73; footnote omitted]

Shiffrin also criticizes a number of important judicial decisions and doctrines for failing to "celebrate dissent." George Carlin's ridiculing on radio of society's attitudes toward four-letter words should have been protected.[10] Public employees should have received more protection for speech in the workplace than the Supreme Court has permitted under *Connick v. Myers.*[11] There should be a first amendment right to speak on private property, such as shopping malls, and a right of access to the mass media (p. 100). And, in general, the first amendment's agenda should be seen both as broader than the protection of "political" expression — because "dissent" is broader than politics — and as narrower than the protection of "commercial" speech — because speech about trade has little to do with true "dissent" (p. 82). Moreover, Shiffrin argues for a flexible first amendment, not bound in by rigid rules, and he professes to be prepared to accept the risks of chilling and judicial abuse so commonly associated with flexibility (pp. 150-51).

A commitment to the value of "celebrating dissent" then, according to Shiffrin, has serious implications. The world of the first amendment would look somewhat different than it does. Sometimes strains

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> sion about how closely to bond with one of our most important national symbols. Thus, if there is to be any central constitutional understanding, it proceeds from a profound national commitment to preserving dissent, encouraging free minds, and basking in the rich cultural diversity that follows from such preservation and encouragement. . . . In short, the national picture drawn by *Barnette* is Whitmanesque and Emersonian: it resonates strongly with the romantic tradition.

P. 161 (footnotes omitted).

10. P. 80; FCC v. Pacifica Foundation, 438 U.S. 726 (1978).

11. Pp. 74-78; Connick v. Myers, 461 U.S. 138 (1983).

of the Romantic perspective can be heard in the cases. But not frequently enough.

II

I have no doubt that Shiffrin has separated and called attention to an important strand among the various threads of meaning that make up the appeal of the first amendment, a value insufficiently appreciated or developed in the cases or literature. At times, however, Shiffrin seems not to recognize the independent significance of the "celebration of dissent" theme he develops. Sometimes it seems as if he thinks he is simply using this term as an umbrella label to incorporate, or to give emphasis to, the purposes others have already identified with the first amendment. At one point, for example, he says that the idea of dissent "serves to consolidate the values contained in the other stories" of the first amendment (p. 167). At another point he asks himself whether "dissent" is just a "proxy for other values" (p. 100). His answer is not entirely clear. But the answer should be that it isn't. And he deserves credit for helping bring into focus a dimension to freedom of speech unfortunately diminished by the modern mechanical, or formulaic, emphasis on the practical and pragmatic side of free speech that I referred to at the outset.

But Shiffrin's project needs to be brought into sharper focus yet. Two intertwined critical aspects of his interpretation require greater development. The first is the way of life represented in the Romantic tradition: Shiffrin needs to say more about the kind of life being proposed. He speaks of free speech protection of dissent as stimulating "the rebellious instincts within us all" (p. 87), but it is not very clear what those instincts translate into within the modern American social and political system. The discussion is too often at too abstract a level. It pits "passion" against "abstract reason," the "subjective" against the "objective," the "concrete" against the "particular," and so on. At some points the reader resists agreeing only because the issue (between the Romantic and other visions) has been posed at such a high level of generality and with such loaded terms that agreement seems coerced.

Shiffrin does present a picture of American society as filled with nearly overwhelming pressures for conformity. He cites the educational system and television as primary forces (pp. 92-93). Against the pressures, he argues, there is a deep wish for a more vital independence of mind, symbolized in the extraordinary protection under the constitution for the radical and the nonconformist. Perhaps it is enough to say just that. It is certainly interesting. But it also would seem important to give more content to the image of what an "independent mind" or "rebellious instincts" would yield in the way of a different life. Besides, the Romantic tradition, as Shiffrin articulates it,

embraces far more than independent-mindedness. And, as to those qualities of character and how they would look, there is too little as of yet.

The second critical aspect in the argument needing some embellishment concerns the linkage between what is done in the context of freedom of speech and the development of qualities of character. This is, as I have acknowledged before, an unexplored area. How the deeper cultural significances, or meanings, of free speech are transmitted from the specific practices of the first amendment to the broader social arena is something of a mystery. It is not, it should be said, a mysterious fact that how one behaves in one area of life will have an effect on one's behavior in other areas. That is a commonplace understanding of human behavior. Jefferson's small farmer may make a better democrat; and English society may be different, and better off, because it tolerates its eccentrics. But the precise link between what one does in one setting and the development of general qualities is frequently a mystery. And it certainly is a mystery when it comes to thinking about the relationship between freedom of speech and the American character. Shiffrin could help us out enormously if he could explore that relationship more fully.[12]

Perhaps I should make the point more generally: If the problem of first amendment scholarship a few decades ago was that it seemed excessively concerned with the development of doctrine and too shallow in its premises about the social purposes and functions of free speech, the major problem for those today who wish to see the broader cultural significance of the first amendment is the failure to understand this linkage between free speech and general cultural norms. The burden to make the cause and effect relationship come to life is properly on those of us who believe that free speech is a way of life, or an important element in a way of life.

III

Now I want to offer some general comments on one of the central doctrinal ideas of the modern first amendment, namely the rule that says that the level and method of analysis for regulations of speech, or expression, will vary depending upon the state's motive, that is, whether the regulation is directed at the "communicative impact" (or the content) of the message communicated or at something else. As is

12. Even if we admit, then, that education inevitably produces some close-mindedness, that it may irretrievably foreclose certain ways of looking at the world, that it identifies certain values as malevolent, and that it channels, structures, and encourages other values, it remains the case that American culture promotes, albeit in a culturally relative and constrained way, an open-mindedness, a willingness to challenge habits and traditions. Moreover, this promotion is nurtured by general conceptions of American democracy and by the force of the first amendment as a cultural symbol.

P. 90.

now widely understood, if a law is directed at controlling or prohibiting the content of speech, then the first amendment imposes a very high burden of justification on the state. The law will be struck down as unconstitutional unless the speech at issue falls into one of the recognized exceptions, such as obscenity, libel, clear and present danger, and so on. If, on the other hand, the law is directed at regulating something other than the message (for example, at controlling litter), then, even though the law has an adverse impact on speech, the courts will balance the interest of free expression against the state's interest underlying the law. This approach does double duty: it answers the question whether nonverbal expressive acts can be protected by the first amendment (to which it says yes) and it provides a basic method of analysis for dealing with regulations that have an impact on expression. There is no doubt that under this analysis the first amendment is most concerned about regulations falling in the first level of analysis, that is, those concerned with regulating the content of speech.

Shiffrin has a fairly lengthy and critical discussion of this analytical approach (pp. 9-45). There are many cases, he points out, that are part of the standing jurisprudence and yet don't fit the analysis. The regulation of speech in the broadcast media and the speech of public employees are two examples to which he points. He also notes how the Court has invented certain categories of "low value" expression that receive less protection even from regulations directed at content. In general, he argues, whether the courts are considering regulations directed at content or regulations directed at something else, they are balancing — and that, he further says, is not necessarily bad.

I think Shiffrin's criticisms are, generally speaking, entirely proper. The so-called two-track method of analysis, which distinguishes between regulation of the content of expression (the first track) and regulation of other matters (the second track), is often taken to be a more powerful device than it is. It certainly does not provide a theory for why regulations directed at content are more troublesome, from a first amendment standpoint, than those that are not. (It is not at all clear, for example, that regulations of content will cause greater "distortion" of the "marketplace of ideas" than other regulations.) It begs the question of what areas of speech can be directly regulated for their content, for some concededly can (obscenity, libel, etc.); and it gives little hint of how to go about "balancing" on the second track the free speech interests against other state interests. As doctrine, the two-track distinction is at best, it would seem, just a line to work with, and it is a line with only partial explanatory power and no theoretical backing.

But even as a line it is less helpful than it seems. By dividing up the world of laws between those "directed" at the "content" or the "communicative impact," of expression and those directed at other

matters (such as preserving the appearance of public property), this analytical approach not only fails to explain why the line it draws should be significant for purposes of first amendment analysis but also fails to see that the *implementation* of message-neutral laws may not be content-neutral with respect to the "messages" emanating from the behavior. Deterrence is, after all, an objective concerned with "communication." Furthermore, the process of deciding what punishment is appropriate for a given violation often focuses on the state of mind of the offender, both for assessing the harmfulness of the offense and the likelihood of future violations, by this and other potential offenders. Beyond that, some laws — most notably civil rights laws — seek to prevent behavior precisely because of the attitudes *communicated* through the act of discrimination. In short, the more one looks at the distinction assumed by the two-track system of analysis (between laws concerned with the communicative impact of behavior and those that are not) the less helpful it becomes in explaining our intuitions about what laws are properly regarded as posing serious first amendment problems and those that are not.

But there is an even more fundamental difficulty that needs to be identified. The focus of the two-track analysis is on the *motive* behind the regulation or the official action claimed to be a first amendment violation. One of the things that has never been made clear is why official motive should be such a powerful factor. It is true that the first amendment analysis on the second track does not necessarily mean a less rigorous application of first amendment interests, but that is the way it is usually presented. The main problem, therefore, with the two-track method of analysis as a way of ordering the first amendment universe is that it tends to direct our attention away from thinking about what *experience* freedom of speech is supposed to provide within the society. That is a more important inquiry, and a quite separate inquiry, from figuring out when official motives are most troublesome.

IV

The First Amendment, Democracy, and Romance is a valuable addition to the first amendment literature. It directs our attention towards the deeper meanings of the free speech experience. In doing so, it offers support for what I would assume is a widespread intuition that the dissident, the iconoclast, represents something powerfully appealing to the American personality. Focusing upon the intellectual tradition of Emerson and Whitman provides a very useful means to begin to understand that appeal.