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An Essay on Freedom of Speech: The United States versus the Rest of the World

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During the past few years, in addition to the numerous presentations on the constitutional protection of freedom of speech that I have made in American venues, I have made some presentations to foreign audiences, including a presentation at a colloquium at the University of Utrecht in the Netherlands and lectures to the Faculty of Law at Mari State University in Yoshkar-Ola, Russia. In the presentations before foreign audiences, I have compared the very strong constitutional protection of freedom of speech in the United States with the somewhat lesser protection of freedom of speech provided under the constitutions of other democratic nations and under international human rights norms. My foreign audiences have reacted with astonishment at hearing how far the United States goes in protecting highly offensive forms of speech that the rest of the democratic world prohibits, such as "hate speech." In these presentations I have tried to explain *why* it is that the American Constitution does provide so much protection to freedom of speech, including the kind of speech that most of the rest of the democratic world prohibits. My foreign audiences remained skeptical, and their skepticism is shared by those American constitutional law commentators who have long contended that the Supreme Court has gone "too far" in protecting freedom of speech against the government's efforts to prevent and sanction "harmful" speech.[1]

In one of my recent presentations,[2] I asked the participants to explore the difference between constitutional protection of freedom of speech in the United States and "the rest of the world" in light of humanistic values. I

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1. For criticism of the Court's decisions on "hate speech" and pornography, see, for example, MARI MATSUDA, CHARLES LAWRENCE, RICHARD DELGADO & KIMBERLE CRENSHAW, WORDS THAT WOUND (1993); THE PRICE WE PAY: THE CASE AGAINST RACIST SPEECH, HATE PROPAGANDA AND PORNOGRAPHY (Laura Lederer & Richard Delgado eds., 1995); Catherine MacKinnon, *Pornography, Civil Rights and Speech*, 20 HARV. C.R.-C.L. L. REV. 1 (1985).

2. Robert A. Sedler, Wayne State University Humanities Center Brown Bag Colloquium Series, *Freedom of Speech: United States vs. the Rest of the World* (Oct. 18, 2005).

asked them to consider questions such as whether humanistic values provide guidance as to how strongly we should protect freedom of speech when it takes the form of "hate speech" and what most of us would consider "bad ideas." Conversely, I asked them to consider whether humanistic values could be relied on to justify the strong constitutional protection that we give to freedom of speech in the United States.

Somewhat to my surprise, a consensus seemed to emerge. The consensus was that the strong constitutional protection for freedom of speech in the United States was itself an *American* humanistic value, a value that was the product of our own history and experience, and a value that is reflected in American *culture*. Thus, in the United States, a concern for humanistic values would justify protecting "bad ideas" and "harmful speech" rather than restricting them. This conclusion was in accord with my long-held position that the strong constitutional protection of freedom of speech in the United States is an integral part of American culture, resulting from our own history and experience. It is an American phenomenon. By the same token, I have also maintained that other nations, with a different history and experience, could understandably be less protective of freedom of speech than we are, and that freedom of speech would play a less important role in the culture of that nation than it plays in American culture.

The classic example of such a nation in my opinion is Germany, a nation trying to combat the horrific legacy of Nazism and the Holocaust, so that surely Germany could not be expected to tolerate any form of "hate speech" or any display of Nazi symbols or any advocacy of genocide. The same might be true of the European nations that endured terrible suffering under the Nazi aggression of World War II and the Holocaust, and of the State of Israel. In any event, I maintain that the strong constitutional protection of freedom of speech in the United States is embedded in the American culture of the twenty-first century and that the Supreme Court's expansive interpretation of the First Amendment's guarantee of freedom of speech serves to implement the values of American society today.

I begin my presentations on the strong protection of freedom of speech under the American Constitution by pointing out that many of the guarantees of the Bill of Rights, such as the First Amendment, have been drafted in broad and sweeping terms, so that their meaning depends on the interpretation of those provisions by the Supreme Court over a long period of time.[3] I also point out that since the United States Constitution was promulgated in 1787, when international law was in its infancy, it should not be surprising

3. I have referred to these provisions as "broadly phrased and open ended," and best described as "majestic generalities." Robert A. Sedler, *The Legitimacy Debate in Constitutional Adjudication: An Assessment and a Different Perspective*, 44 OHIO ST. L.J. 93, 122 (1983). They thus require massive definition to operate effectively as limitations on governmental power, as the Framers intended. *See id.*

that, unlike the situation in some nations with modern constitutions, international law is not a part of American constitutional law.[4] This means that international human rights norms relating to limitations on freedom of speech are not by their own force a part of American constitutional law.

The Supreme Court has interpreted the First Amendment's guarantee of freedom of speech very expansively, and the constitutional protection afforded to freedom of speech is perhaps the strongest protection afforded to any individual right under the Constitution. In the United States, as a constitutional matter, the value of freedom of speech generally prevails over other democratic values, such as equality, human dignity, and privacy. In the United States, other democratic values must be advanced by means that do not abridge freedom of speech. It is for this reason that the constitutional protection afforded to freedom of speech in the United States is seemingly unparalleled anywhere else in the world, and why the American view of freedom of speech is not always consistent with international human rights norms and the protection of freedom of speech in other democratic countries. International human rights norms and the constitutional law of other democratic countries treat freedom of speech as an important right, but one that must be balanced against other democratic rights. This being so, international human rights norms and the constitutional law of other democratic countries recognize certain restrictions on freedom of speech that would be prohibited under the First Amendment.

The best example of such a restriction is that on "propaganda for war" and "hate speech" imposed under the International Covenant on Civil and Political Rights. While Article 19 of the Covenant generally protects freedom of speech, Article 20 requires that any propaganda for war and any advocacy of national, racial, or religious hatred that constitutes incitement to discrimination, hostility, or violence, be prohibited by law.[5] "War propaganda" and "hate speech" are in most circumstances protected by the First Amendment.[6] This being so, when the United States Senate ratified the Covenant, the resolution of ratification contained a reservation to the effect that "Article 20 does not authorize or require legislation or other action by the United States that would restrict the right of free speech and association protected by the Constitution and laws of the United States."[7]

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4. Indeed, under the Supremacy Clause, Article VI, Section 2, a treaty stands only on the same footing as a federal law, so that if a treaty is in irreconcilable conflict with a later enacted federal law, the federal law controls, even though this effective repeal of a treaty may put the United States in violation of its obligations under international law. *See* Chae Chan Ping v. United States, 130 U.S. 581 (1889).

5. International Covenant on Civil and Political Rights arts. 19–20, Mar. 23, 1976, 999 U.N.T.S. 171 [hereinafter International Covenant].

6. *See, e.g.*, R.A.V. v. City of St. Paul, 505 U.S. 377 (1992); Dawson v. Delaware, 503 U.S. 159 (1992).

7. S. Exec. Res. 95-2, 102d Cong., Cong. Rec. 4783 (1992) (enacted).

In my presentations I then give my explanation of how it has happened that the United States Supreme Court has interpreted the First Amendment's guarantee of freedom of speech so broadly, with the result that the constitutional protection afforded to freedom of speech in the United States is seemingly unparalleled anywhere else in the world. In my view, this is the result of the fact that, in our constitutional system, constitutional law develops on a case-by-case basis through the process of constitutional litigation.[8] As the Supreme Court has decided First Amendment cases over the years, it has promulgated concepts, principles, and doctrines and has established precedents. These concepts, principles, doctrines, and precedents comprise what I call the "law of the First Amendment," and as constitutional protection has been extended to freedom of speech in one situation, that protection has been carried over to other situations implicating First Amendment rights. The sum total of the components of the law of the First Amendment provides a great deal of protection to freedom of speech, and, for this reason, in First Amendment litigation there is an increased likelihood that the First Amendment claim will prevail.[9]

The operation of the law of the First Amendment may be best understood from the perspective of the litigating lawyer and judge presented with a First Amendment issue. To the litigating lawyer and judge, it is as if the different components of the law of the First Amendment are flashed as a menu on a computer screen, and the task of the lawyer or judge, so to speak, is to press the right key. This calls up the substance of the applicable component of the law of the First Amendment and the relevant precedents. The task of the lawyer and judge then is to apply the applicable component and precedents to the resolution of the First Amendment issue presented in the particular case. The parameters for the resolution of that issue are now established, and in many cases, that resolution will be fairly clear.

The way that constitutional protection of freedom of speech has developed in the United States may be contrasted with the way that individual rights are protected under international human rights documents such as the International Covenant on Civil and Political Rights, mentioned above. Here the process is a legislative one, and the drafters were in a position to balance and accommodate different individual rights, and to make value judgments as to appropriate limitations on particular individual rights. Thus, the drafters of the International Covenant on Civil and Political

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8. As discussed previously, the First Amendment has been drafted in broad and sweeping terms, and for this reason, the text of the First Amendment does not contain any standard for determining permissible restrictions on freedom of speech. The restrictions that are permissible are those that have been developed by the Supreme Court in its interpretation of the First Amendment.

9. *See generally* Robert A. Sedler, *The First Amendment in Litigation: The "Law of the First Amendment,"* 48 WASH. & LEE L. REV. 457 (1991).

Rights made the value judgment in Article 19 that freedom of speech is an important individual right that should be protected.[10] But in Article 20, they qualified the protection given to freedom of speech by denying protection to what they considered to be particularly harmful ideas, such as the "advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence."[11]

When the United States Supreme Court was faced with constitutional challenges to laws that prohibited "hate speech" or "incitement to discrimination, hostility or violence,"[12] the Court resolved those challenges by applying two principles that had emerged from its cases over the years: the principle of content neutrality and the principle of the protection of offensive speech. The application of these principles leaves no room for the kind of value judgments embodied in Article 20 of the International Covenant on Civil and Political Rights. Rather, the application of these principles requires the protection of all ideas, no matter how harmful the Court may consider them to be and no matter how disagreeable or offensive they may be to the larger society.

I will now discuss these principles and relate them to the constitutional protection of "hate speech" under the First Amendment—a result that many Americans and most of the rest of the democratic world strongly deplores.

As to the protection of offensive speech, the Supreme Court has stated that "[i]f there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable."[13] The Court made this statement when it was invalidating a law prohibiting the desecration of the American flag, noting that "[w]e have not recognized an exception to this principle even where our flag has been involved."[14] Nor may the government prohibit the expression of an idea in a particular manner that is highly offensive to many people, such as a person's expressing opposition to the military draft during the Vietnam War by wearing a jacket emblazoned with the "unseemly expletive,"[15] "Fuck the Draft."[16] This principle even extends to the protection of offensive advertising.[17] Under this principle then, whenever the government tries to justify a ban on expression on

10. *See* International Covenant, *supra* note 5, art. 19.
11. *Id.* at art. 20.
12. *Id.*
13. Texas v. Johnson, 491 U.S. 397, 414 (1989).
14. *Id.*
15. Cohen v. California, 403 U.S. 15, 23 (1971).
16. *Id.* at 16.
17. *See* Bolger v. Young Drug Prods. Corp., 463 U.S. 60 (1983) (holding violative of the First Amendment a federal law prohibiting the advertising of contraceptive products on the ground that such advertising would be offensive to many persons).

the ground that the idea itself, or the manner in which it is expressed, is highly offensive to many people, that justification is necessarily improper.

The most important First Amendment principle in practice is that of content neutrality. Under this principle, the government may not proscribe any expression because of its content, particularly because of the viewpoint it expresses. The underlying premise of this principle is that the First Amendment establishes a marketplace of ideas, that all ideas, good and bad, must be able to compete in this marketplace, and that the remedy for bad speech is more speech, not enforced silence.[18] The principle of content neutrality invalidates a law prohibiting the display of any sign in front of a foreign embassy that "tends to bring that foreign government into 'public odium' or 'public disrepute,'" since it only prohibits displays that are critical of the foreign government and not displays that are favorable to it.[19] It also invalidates a federal law allowing the wearing of American military uniforms in performances and portrayals only if the performance or portrayal did not "tend to discredit the military."[20] The content neutrality principle was the basis for the Supreme Court's striking down state and federal laws that prohibited the burning of the American flag. Since the laws authorized burning as a proper means of disposing of a torn or soiled flag, the

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18. It is this underlying premise that is subject to relentless attack by critics of the Court's current First Amendment jurisprudence. They reject the notion of a marketplace of ideas, since they say there cannot be equal competition in that marketplace. The media and the wealth interests, they correctly point out, have a much bigger "stall in the marketplace" than dissident groups. This is true, of course, but the history of the First Amendment in the United States has been one of dissident groups seeking access to the marketplace, so that they can express their ideas with whatever resources they may have. But above all, say the critics, there are bad ideas, like genocide, racism, sexism, and homophobia, that find their way into the marketplace, and the government should be able to prohibit the expression of bad ideas because of the harm that they can cause to society and to "victim groups." My rejoinder here is that, at different times in our nation's history, the government has tried to repress what many people at the time considered to be a bad idea. During the Cold War era, the government tried to repress the idea of communism, which carried over to any opposition to the capitalistic economic system and to American foreign policy. During the civil rights movement, governments in the Southern states tried to repress the idea of integration as being "harmful to the Southern way of life." During the Vietnam era, the government tried to repress opposition to the war as being "unpatriotic" and "helping the enemy." Today, it is argued that the government should suppress what many of us consider to be bad ideas, like genocide, racism, sexism, and homophobia. The list of potential bad ideas is endless, and if the government could suppress what this group or that group considers to be a bad idea at this time or at that time, a great many ideas would have disappeared from the public discourse, and the government would be a perpetual censor of "bad ideas." Under the principle of content neutrality, however, the government cannot suppress any ideas. All ideas, good and bad, must be free to compete in the marketplace of ideas, and it is up to the people, not the government, to decide what is a "bad idea."

19. Boos v. Barry, 485 U.S. 312, 315 (1988).

20. Schacht v. United States, 398 U.S. 58, 62 (1970).

impact of the prohibition was directed toward the "content of the message" conveyed by the burning, and, as such, was unconstitutional.[21]

The principles of protection of offensive speech and content neutrality explain why it is that in the United States "hate speech" receives constitutional protection. The government cannot prohibit "hate speech" on the ground that it may be offensive to many people and to "victim groups." The offensive nature of the speech, far from justifying its prohibition, is precisely the reason why it is entitled to constitutional protection. And, as explained above, the government cannot prohibit "hate speech" on the ground that it expresses a "bad idea" and is inconsistent with democratic values. Under the principle of content neutrality, the idea of inequality is entitled to compete in the marketplace of ideas with the idea of equality. Similarly, the idea of genocide, the idea of holocaust denial, and any idea, no matter how extreme or repugnant, is entitled to be expressed. Thus, the First Amendment protects a march by self-styled "Nazis" with Nazi uniforms and swastikas in a city with a large Jewish population, including many holocaust survivors.[22] Such a march, of course, would be prohibited under international human rights norms.[23]

We see then that in the United States freedom of speech receives a very high degree of constitutional protection. The constitutional protection afforded to freedom of speech is perhaps the strongest protection afforded to any individual right under the American Constitution, and the value of freedom of speech generally prevails over other democratic values such as equality, human dignity, and privacy.[24]

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21. Texas v. Johnson, 491 U.S. 397, 412 (1989); *see also* United States v. Eichman, 496 U.S. 310, 317–18 (1990).

22. *See* Collin v. Smith, 578 F.2d 1197, 1198–99 (7th Cir. 1978).

23. A number of judicial decisions have upheld "hate speech" laws against freedom-of-speech claims. *See* The Queen v. Keegstra, [1990] 3 S.C.R. 697, 698 (holding that a Canadian law prohibiting "wilfully promot[ing] hatred against an identifiable group" does not violate the freedom-of-speech guarantee of the Canadian Charter of Rights and Freedoms); *Robert Faurisson v. France*, U.N. Human Rights Comm'n, U.N. Doc. CCPR/C/58/D/550/1993 (1996) (French law making it an offense to contest the existence of the category of crimes against humanity as defined in the London Charter of August 8, 1945, which includes genocide, does not violate the freedom-of-speech guarantees of Article 10 of the European Convention on Human Rights or Article 19 of the International Covenant on Civil and Political Rights); Holocaust Denial Case, Bundesverfassungsgericht [BVerfGE] [Federal Constitutional Court], Apr. 13, 1994, 90 Entscheidungen des Bundesverfassungsgerichts [BverfGE] 241 (F.R.G.) (application of law prohibiting a meeting of a group to promote Holocaust denial did not violate the freedom-of-speech guarantee of the German Constitution). *Cf.* Ceylan v. Turkey, 30 Eur. Ct. H.R. 73 (2000) (where the court found that a conviction of a labor leader for writing a news article denouncing the "terrorist" anti-Kurd policies of the Turkish government violated Article 10 of the European Convention on Human Rights).

24. I think that Justice John Marshall Harlan, Jr. has given what is perhaps the most cogent explanation of the First Amendment value of freedom of speech and its role as an integral part of the American culture:

The consequence of this very high degree of constitutional protection to freedom of speech in the United States is that ideas most Americans consider very repugnant, and that may be hurtful to some people, such as racial hatred, can be expressed freely. At the same time, the expansive protection to freedom of speech under the First Amendment ensures robust debate on all public issues and the widest dissemination of all ideas. As stated above, under the First Amendment, there is no such thing as a "bad idea," and the remedy for bad speech is said to be "more speech, and not enforced silence."[25] It is part of our culture that people are "free to speak their mind" and need not fear that they will be sanctioned for saying something that is offensive or unpopular. The government is not required to and, more importantly, is not permitted to make decisions about what ideas may be expressed and what ideas may not be expressed. The constitutional guarantee of freedom of expression under the First Amendment then means freedom of expression in the fullest sense. For better or worse, this is the American way.

> The constitutional right of free expression is powerful medicine in a society as diverse and populous as ours. It is designed and intended to remove governmental restraints from the arena of public discussion, putting the decision as to what views shall be voiced largely into the hands of each of us, in the hope that use of such freedom will ultimately produce a more capable citizenry and more perfect polity and in the belief that no other approach would comport with the premise of individual dignity and choice upon which our political system rests.
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> To many, the immediate consequence of this freedom may often appear to be only verbal tumult, discord, and even offensive utterance. These are, however, within established limits, in truth necessary side effects of the broader enduring values which the process of open debate permits us to achieve. That the air may at times seem filled with verbal cacophony is, in this sense not a sign of weakness but of strength. We cannot lose sight of the fact that, in what otherwise might seem a trifling and annoying instance of individual distasteful abuse of a privilege, these fundamental societal values are truly implicated.

Cohen v. California, 403 U.S. 15, 24–25 (1971) (internal citation omitted).

25. I recently participated in the U.S. Department of State International Visitor Program, making presentations on American constitutional law to small groups of mostly Moslem visitors from European countries. At the same time, controversy was raging worldwide over the publication of a cartoon of the Prophet Mohammed in a Danish newspaper. Likewise, France had recently enacted a law directed against the wearing of the head scarf by Moslem schoolgirls, and Turkey, an overwhelmingly Moslem but officially secular nation, has long prohibited the wearing of the Moslem head scarf in any public buildings. I pointed out to my audiences that in the United States, the First Amendment would protect the right of a newspaper to publish a cartoon of the Prophet Mohammed, and would also protect the right of Moslem schoolgirls and Moslem women to wear the head scarf as a form of religious expression.