# THE IRONY OF FREE SPEECH

OWEN M. FISS

# HE IRONY OF FREE SPEECH

-

OWEN M. FISS

Harvard University Press
Cambridge, Massachusetts
London, England
1996

Printed in the United States of America

Library of Congress Cataloging-in-Publication Data

Fiss, Owen M.
The irony of free speech / Owen M. Fiss.
p. cm.
Includes bibliographical references and index.
ISBN 0-674-46660-8
1. Freedom of speech—United States. 2. Hate speech—United States. 3. Pornography—United States. 4. Campaign funds—Law and legislation—United States. I. Title.
KF4772.F57 1996
342.73'0853—dc20
[347.302853]
96-8289

*To Brenda, Emily, and Gina Fiss*
*for their love, each in her own way*

# THE IRONY OF FREE SPEECH

# CONTENTS

# INTRODUCTION

Freedom of speech is among our most cherished rights, yet it has always been a contested domain. For most of this century it has been the subject of countless judicial battles and has sharply divided the Supreme Court. Indeed, the *Pentagon Papers* case of the early 1970s was one of the most fractious episodes in all Supreme Court history, involving a dispute between the Attorney General of the United States and two highly respected newspapers, the *New York Times* and *Washington Post,* and it left the Justices at odds with one another. Freedom of speech has also been fiercely debated within political circles, on the campuses of the nation, and even around the dinner table—in contexts ranging from the 1921 trial of Sacco and Vanzetti to the anti-Communist crusade of the 1950s.

To some observers, the current controversies over freedom of speech may not seem especially noteworthy; they may even be a bit tiresome. The issues may have changed—instead of subversion and the alleged Communist menace, we now are preoccupied with such topics as hate speech and campaign

finance—yet the divisions and passion they engender are all too familiar. I believe, however, that such a perspective on today's free speech controversies—seeing them as nothing more than a repetition of the past—is mistaken. Something much deeper and much more significant is occurring. We are being invited, indeed required, to re-examine the nature of the modern state and to see whether it has any role in preserving our most basic freedoms.

The debates of the past were premised on the view that the state was the natural enemy of freedom. It was the state that was trying to silence the individual speaker, and it was the state that had to be curbed. There is much wisdom to this view, but it represents only a half truth. Surely, the state may be an oppressor, but it may also be a source of freedom. By considering a wide variety of the free speech controversies now in the headlines—hate speech, pornography, campaign finance, public funding of the arts, and the effort to gain access to the mass media—I will try to explain why the traditional presumption against the state is misleading and how the state might become the friend, rather than the enemy, of freedom.

This view—disquieting to some—rests on a number of premises. One is the impact that private aggregations of power have upon our freedom; sometimes the state is needed simply to counteract these forces. Even more fundamentally, this view is predicated on a theory of the First Amendment and its guarantee of free speech that emphasizes social, rather than individualistic, values. The freedom the state may be called upon to foster is a public freedom. Although some view the First Amendment as a protection of the individual interest in self-expression, a far more plausible theory, first formulated by Alexander Meiklejohn[1] and now embraced all along the political spectrum, from Robert Bork[2] to William Brennan,[3] views the First Amendment as a protection of popular sovereignty.

The law's intention is to broaden the terms of public discussion as a way of enabling common citizens to become aware of the issues before them and of the arguments on all sides and thus to pursue their ends fully and freely. A distinction is thus drawn between a libertarian and a democratic theory of speech, and it is the latter that impels my inquiry into the ways the state may enhance our freedom.

The libertarian view—that the First Amendment is a protection of self-expression—makes its appeal to the individualistic ethos that so dominates our popular and political culture. Free speech is seen as analogous to religious liberty, which is also protected by the First Amendment. Yet this theory is unable to explain why the interests of speakers should take priority over the interests of those individuals who are discussed in the speech, or who must listen to the speech, when those two sets of interests conflict. Nor is it able to explain why the right of free speech should extend to the many institutions and organizations—CBS, NAACP, ACLU, First National Bank of Boston, Pacific Gas & Electric, Turner Broadcasting System, VFW—that are routinely protected under the First Amendment, despite the fact that they do not directly represent the individual interest in self-expression. Speech is valued so importantly in the Constitution, I maintain, not because it is a form of self-expression or self-actualization but rather because it is essential for collective self-determination. Democracy allows the people to choose the form of life they wish to live and presupposes that this choice is made against a background of public debate that is, to use the now famous formula of Justice Brennan, "uninhibited, robust, and wide-open."[4]

In some instances, instrumentalities of the state will try to stifle free and open debate, and the First Amendment is the tried-and-true mechanism that stops or prevents such abuses of state power. In other instances, however, the state

may have to act to further the robustness of public debate in circumstances where powers outside the state are stifling speech. It may have to allocate public resources—hand out megaphones—to those whose voices would not otherwise be heard in the public square. It may even have to silence the voices of some in order to hear the voices of the others. Sometimes there is simply no other way. The burden of this book is to explore when such exercises of the state's power to allocate and regulate are necessary, and how they might be reconciled with, indeed supported by, the First Amendment.

# THE SILENCING EFFECT OF SPEECH

# 1

The First Amendment—almost magisterial in its simplicity—is often taken as the apotheosis of the classical liberal demand that the powers of the state be limited. It provides that "Congress shall make no law . . . abridging the freedom of speech, or of the press." The Supreme Court has read this provision not as an absolute bar to state regulation of speech but more in the nature of a mandate to draw a narrow boundary around the state's authority.

The precise location of this boundary has varied from age to age and from Court to Court, and even from Justice to Justice, but its position has always reflected a balance of two conflicting interests—the value of free expression versus the interests advanced by the state to support regulation (the so-called countervalues). Sometimes the accommodation of conflicting interests has been achieved through the promulgation of a number of categories of speech that may be subject to regulation. For example, the state has been allowed to regulate "fighting words" but not the "general advocacy of ideas." In other cases, the Court engaged in a more open and explicit

balancing process in weighing the state's interest against that of free speech. The rule that allows the state to suppress speech that poses a "clear and present danger" to a vital state interest might be the best example of this approach. In either instance, the Court has tried, sometimes more successfully than others, to attend to both value and countervalue and to seek an accommodation of the two.

In trying to guide the Court in this process, Harry Kalven, Jr.—in my eyes the leading First Amendment scholar of the modern period—pleaded with the Court to remember that freedom of speech is not "a luxury civil liberty."[1] In a more jocular mood, he expressed the same sentiment in saying, "Honor the countervalues."[2] Kalven was an ardent defender of liberal values, always in favor of limiting the state, yet he felt that in its resolve to protect speech, the Court should not in any way trivialize the interests of the state. At the end of the day, speech might well win, indeed, speech *should* win. But not, Kalven insisted, before the Court gave a sympathetic hearing to what the state was trying to accomplish. The Court must begin by attending to the state's interests and treating them as fully worthy of respect.

The 1960s was an extraordinary period of American law, a glorious reminder of all that it might accomplish. The decade was best known for progress made in racial equality and the reform of the criminal process, but it was also marked by a number of notable free speech victories. When, in his book *A Worthy Tradition,* Kalven celebrated the evolution of First Amendment doctrine over the course of the twentieth century as an example of the law working itself pure, he was referring above all to the free speech decisions of the Warren Court in the 1960s. Although I am sympathetic to this reading of the sixties, I cannot help but wonder whether the free speech decisions of that era represented a fair test of Kalven's faith that

speech would win even if the Court honored the countervalues.

Take the Court's repeated willingness to protect the protest activities of the Southern civil rights movement.[3] In those cases, the Southern states defended their actions in curbing free speech on the ground that they were attempting to preserve order. The Supreme Court listened to that defense with some measure of seriousness, but the plea on behalf of maintaining order was impeached by the racial policies the states were pursuing in the name of that value. Order did not just mean order, but order that preserves segregation. Then, in the years following the Watts riots in Los Angeles in 1965 and the emergence of the black power movement, the claims of order became somewhat distinct from the program of preserving segregation. In that context the countervalue, order, could be engaged more sympathetically, but at the risk that free speech would not prevail. For example, in *Walker v. City of Birmingham,* a majority of the Justices upheld a criminal contempt citation against Dr. Martin Luther King Jr. and his followers for parading in defiance of a restraining order, even though the state court had not given him an adequate opportunity to attack that order on free speech grounds.[4] The case arose in 1963, but the Justices spoke in the different circumstances of 1967 and were guided by the events that they saw before them then.

In truth, most of the Warren Court's First Amendment docket involved cases in which the countervalue advanced by the state was neither particularly alluring nor compelling, and for that reason the Court's decisions in favor of free speech generated widespread support. Examples are such landmarks as *New York Times v. Sullivan* (1964), *Brandenburg v. Ohio* (1969), and even, if it can be included within the reaches of the Warren Court, the *Pentagon Papers* case (1971). Like the

early civil rights protest cases, these decisions are indeed important free speech victories, in that an opposite result would have been a profound setback for the cause of freedom. But at the same time we should recognize that these cases were not a true test of Kalven's faith that free speech would prevail.

In *New York Times v. Sullivan,* the Court curbed the state's capacity to protect reputation, but in fact the reputational interest in jeopardy was that of public officials, who, in the Court's view, necessarily assumed certain risks to their reputation when they entered the political fray.[5] In *Brandenburg v. Ohio,* the Court protected the advocacy of illegal conduct and tightened up the "clear and present danger" test, but it did so in a context devoid of any true danger;[6] the case involved a sparsely attended Klan rally in an isolated farm in Ohio. In the *Pentagon Papers* case the Court refused to give the Attorney General the injunction he sought against the publication of a Department of Defense document that was said to threaten national security.[7] Kalven marveled at the fact that this decision was handed down even when the nation was at war.[8] But there was less to the countervailing claim of national security advanced by the Attorney General than first met the eye. Although the document in question was based on classified documents and was itself classified as "Top Secret," in truth it consisted of nothing more than a historical study of our involvement in Vietnam up until 1968. Moreover, the war was unpopular in many quarters; most of the study was in the public domain by the time the Court spoke; and though the Court did in fact deny the government an injunction against further publication, a majority of the Justices made clear that the government could protect a legitimate interest in secrecy by use of the criminal law.

The situation is, however, entirely different with three of the free speech issues that dominate public discussion today—

hate speech, pornography, and campaign finance. They strain, indeed shatter, the liberal consensus because the countervalues offered by the state have an unusually compelling quality. These contemporary issues are a truer test of Kalven's faith in the ability of free speech to prevail over the countervalues.

IN A MOST decisive manner, the American constitutional order and its governing political philosophy were reshaped by *Brown v. Board of Education*[9] and the transformations that followed. Whereas the liberalism of the nineteenth century was defined by the claims of individual liberty and resulted in an unequivocal demand for limited government, the liberalism of today embraces the value of equality as well as liberty. Furthermore, contemporary liberalism acknowledges the role the state might play in securing equality and sometimes even liberty. Admittedly, *Roe v. Wade*[10] and its condemnation of the criminalization of abortion have given new vitality to the claims of individual liberty, but never, I would insist, to the exclusion of equality. Indeed, as most commentators and a number of the Justices now recognize, *Roe v. Wade* is not fully explicable as a matter of constitutional theory unless some account is taken of equality and the consequences that criminalizing abortion would have upon the social status of women.[11]

This transformation of the constitutional order and of liberalism itself was not the work of the Supreme Court alone. In the 1960s all branches of government coordinated their efforts and produced such singular measures as the Civil Rights Act of 1964, the Voting Rights Act of 1965, and the Civil Rights Act of 1968.[12] In the ensuing decades, as the Court and the presidency moved to the right, the leadership role fell to Congress.[13] The momentum toward equal treatment continued even during the Reagan and Bush years and resulted in the

Voting Rights Act of 1982, the Americans with Disabilities Act of 1990, and the Civil Rights Act of 1991.[14]

As a result of these developments, more and more spheres of human activity—voting, education, housing, employment, transportation—have come to be covered by antidiscrimination law, so that today there is virtually no public activity of any significance that is beyond its reach. Moreover, the protection of the law has been extended to a wide array of disadvantaged groups—racial, religious and ethnic minorities, women, the disabled. Soon it is likely to be extended to groups defined by their sexual orientation. Over the last forty or fifty years, civil rights laws have become essential to the American legal order.

The welfare policies of the modern state fall short of the lofty ambitions proclaimed by those who launched the War on Poverty in the 1960s. Today we are more tolerant of economic inequalities. But norms protecting the poor against discrimination still have their force in certain special domains, such as the criminal and electoral processes.[15] Moreover, despite repeated assaults over the last twenty-five years, contemporary liberalism remains committed to satisfying the minimum needs of the economically downtrodden, providing them, though sometimes inadequately, with access to food, housing, and medical care. Like the civil rights measures, these welfare policies are actively embraced by contemporary liberalism.

Against this background, it is no surprise that in confronting the regulation of hate speech, pornography, and campaign finance today, many liberals find it difficult to choose freedom of speech over the countervalues being threatened. The liberals' commitment to speech remains strong, as evidenced by their staunch support for the flag-burning decisions,[16] but in all three of these areas that commitment is being tested by exercises of state power on behalf of another of liberalism's defining goals—equality.

Hate speech is regulated by the state on the theory that such expression denigrates the value and worth of its victims and the groups to which they belong.[17] Equality can also be found at work in the new assault on pornography by some feminists, who object to pornography not for religious or moral reasons but on the ground that it reduces women to sexual objects and eroticizes their domination.[18] In their view pornography leads to violence against women, including rape and domestic abuse, and beyond that to a pervasive pattern of social disadvantage, both in matters most intimate and in the public sphere. As with hate speech and pornography, the regulation of expenditures in electoral campaigns is also impelled by egalitarian considerations.[19] Some defend such regulation as a device to prevent corruption, but it can be understood in more generous terms—as a way of enhancing the power of the poor, putting them on a more nearly equal political footing with the rich, thus giving them a fair chance to advance their interests and enact measures that will improve their economic position.

Each generation tends to emphasize its uniqueness, and so one must be careful not to overstate the significance of the present moment. Regulations like the ones that so concern us today have been considered by the courts in earlier times. Yet I believe an important difference can be found in the depth of the legal system's commitment to equality today. Even in the 1960s, equality was but an aspiration, capable of moving the nation but still fighting to establish itself in the constitutional arena. Today, equality has another place altogether—it is one of the center beams of the legal order. It is architectonic.

When obscenity regulations were debated during the 1960s, consideration was of course given to the alleged power of sexually explicit films and magazines to arouse sexual drives and lead to rape. Little attention was given, however, to the effect that their perceived risk of rape might have on the day-to-day behavior of women, and to the impact pornography