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The Quest for the Tolerant Mind

Each of the two models we have thus far considered possesses only a limited power to explain the modern application of the free speech principle. The classical model rests on premises and assumptions that are either inappropriate to many of the problems actually encountered in contemporary free speech disputes or greatly oversimplified in light of the modern understanding of human nature. Focusing as it does on the matter of identifying the primary beneficial uses of speech activity, the classical model has necessarily little to say about protecting speech in the extreme cases, where those values exist only in a most attenuated form. Moreover, its appreciation of the social harm sustained as a result of seriously constricting society’s ability to regulate speech activity seems naive at best, and in any event unfairly understated.

The fortress model, on the other hand, offers a strategy that, while making the extreme cases more explicable, can rest on a highly troublesome conception of social reality. In order to erect a legal barrier against legal restraints on speech, it tends to postulate a social universe in which the citizenry is alienated from the government, as well as internally from each other, and to induce a posture that can be unfortunately disingenuous and manipulative. It is also questionable whether it offers an effective strategy for the limited ends sought under it, or whether the social reality it presumes is in fact true.

In their pristine forms, therefore, both perspectives seem seriously incomplete; they fail in substantial measure both to account for what is actually done in the name of free speech and to offer a satisfying conception of what should be done in its name.

At the same time, both approaches contain much that is good and of legitimate appeal. As a statement of aspiration and positive encouragement, as a holding up of an ideal toward which human society should strive—whether it be truth seeking and rationality or personal self-realization—the classical model strikes successfully at deeper cords. In redefining what our ancestors fought for, we remind ourselves of how far we have failed to claim what they have won. On the other hand, the primary strength of the fortress model is that it does not shrink from critical examination of the human character. Rather than extolling our virtues, under its influence we are ready to criticize and to locate defects.

It would seem preferable to blend the best of both approaches, the idealism of the classical model and the realism of the fortress model, while shedding their limitations. Is that possible? If one examines the American experience with its free speech principle in this century, can one identify an emerging conception of free speech that is capable of answering the challenges leveled at the classical and fortress models? Is free speech performing another function besides those thus far considered? I believe it does and has, though for many reasons that function has failed as yet to reach the surface of our free speech discourse.

I

Let us begin by placing the discussion of this chapter more solidly in context with the development of the argument in preceding chapters. It will be recalled that in chapter 2 we considered, in
response to the claims of the classical model, how important the needs were behind the act of intolerance toward speech activity. Seeing these needs as stemming from powerful elements in the human personality, relating to the sense we have of our own identities, we warned against trivializing them. By chapter 3, when we considered the perspective of the fortress model, we found that free speech thinking was, actually, highly cognizant of the needs of intolerance, so much so, in fact, that it tended to view these needs as constituting an impulse that threatened the very foundations of liberty of speech and as therefore requiring a legal check. Instead of minimizing the needs of intolerance, free speech thinking was now seeing them as potentially overpowering, at least for a significant segment of the population. At this point, however, we began to wonder whether this vision had erred too far in the other direction by overstating the danger of excessive intolerance for the liberty of speech and, in any event, to wonder whether a legal barrier was the most effective means of dealing with the problem, given that the impulse to intolerance would seemingly manifest itself in many ways other than through excessive legal restrictions on speech activity. These difficult questions raise complex empirical issues about social reality and strategy, but now I would like to suggest that it is possible to accept, at least partially, the line of argument or premises that have been developed up to this point and yet find a crucial social role for the free speech principle in the context of the assumed reality of an impulse to intolerance.

To do that, we must begin by readjusting our vision of the social role of free speech, partly by altering our vision of what functions law can and does play in the society (in fact, by borrowing from the conception of the functions of law used earlier in developing the case for permitting regulation of speech activity). We might accept (to a substantial degree, if not entirely) the fortress model's characterization of a tendency in the society to react with excessive intolerance toward speech and the answering claim that that tendency will inevitably manifest itself well beyond the free speech context—and yet find the free speech principle a worthwhile enterprise precisely because it is one very important means by which the society attempts to deal with that larger problem. In this conception free speech derives its appeal by providing a method of addressing a ubiquitous social incapacity, not just a means of securing protection from that bad tendency for the special activity of speech, perhaps with the added hope that the insulated speech activity will somehow itself solve the larger problem.

At this stage, however, it would be better if we described the purpose behind the principle not as that of protecting speech but rather as that of dealing with the phenomenon of what we have called the "impulse to excessive intolerance" generally, though we do that by insisting on an extraordinary degree of toleration only in the limited context of speech activity. The role of free speech is directed at developing a capacity of far greater moment than that of just regulating the appropriate level of legal restraints on speech activity in the society. The legal principle operates in a small sphere, and in a special way, in order to address a larger issue. Law (in this case, constitutional law) is being used not simply as a barrier against entry but as a major project concerned with nothing less than helping to shape the intellectual character of the society.

In the remainder of this chapter we shall examine how such a vision of the social principle of free speech would work and, in particular, how it might assist us in understanding the three fundamental issues that have so bedeviled the development of a viable free speech theory for modern times: Why should we exercise such extraordinary self-restraint in the regulation of speech when we do not with respect to nonspeech behavior? Why, in particular, should we tolerate extremist speech? Why should we vest the interpretative and enforcement functions of the principle in the judicial branch? More immediately, however, we must return momentarily to a point developed in chapter 3—that excessive intolerance of speech is only a particular manifestation of a more widespread bias in social behavior—in order to lodge more firmly in place what is actually a cornerstone
premise of this new perspective. With this argument, as with so
many others we have now considered, we will actually be con-
structing a new theory of free speech out of many of the same
toils we have so far used in uncovering the limits of the
classical and fortress models.

We understand that we can be “intolerant” in many ways and
in many areas of social interaction. But we do not always see the
common roots of much of what we classify as intolerant behavior.
In part this is because of the way in which we approach thinking
about the free speech rationale. We look at speech for the good
it can bring, not for the harm it may cause or the responses it
may generate. As we observed in chapter 2, traditional efforts
to justify the special protection afforded speech under the free
speech principle have tried to identify those prized goals thought
to be especially realizable through the activity of speech—goals
like the exchange of information and ideas and personal self-
fulfillment. Speech is defended as integral to such pursuits, and
the regulation of speech as a threat to their realization. While,
of course, accurate to a degree, this general perspective has the
unfortunate consequence of limiting our understanding of the
possible social roles for the idea of free speech.

At the extremes it makes free speech proponents appear to
give excessive weight to these human pursuits, to the neglect of
other important human ends (as Wigmore observed). More im-
portant, by focusing on those activities that can be pursued
through speech in order to define the social justification for free
speech, we tend to pay little attention to the thinking that lies
behind the general human response to speech acts. We see it
only as an enemy to be fought off, while we seek other ends like
the acquisition of information. By neglecting it, we tend in turn
to isolate its social presence, both in the sense of seeing how
broadly it cuts through social interaction (both for desirable and
undesirable ends) and in the sense of seeing how it involves
feelings that are problematic for everyone (though the context
in which they arise may be different for different people). We
ought to begin, therefore, by exploring some basic propositions
about the dimensions of the bias sometimes exhibited in the act
of censorship.

If it is a tendency of human nature to overreact in the use of
legal restraints against speech activity, we must expect that ten-
dency to manifest itself in the form of nonlegal coercion as well.
That there is a wide network of social controls for speech activity
is indisputable. All the time we face the problem of deciding
whether and how to respond to people who say things we believe
are wrong or who communicate messages in contexts we think
are inappropriate and hurtful. Should we refuse to associate with
the speaker, shunning him or her in the way that some religious
communities do with enormous effect? Should we ridicule the
speaker, casting contempt on him or her—thereby using, and
in the process proving, the potency of speech to inflict injury (just
as we discussed in chapter 2)? The possibilities are only as limited
as our ways of expressing disapproval. The power to affect our
opportunities for employment, social life, and status in the commu-
nity is all within the hands of the established majority.

In fact, free speech law itself recognizes this reality, though
in a somewhat backward fashion, for both the common law torts
of libel and invasion of privacy, which free speech jurisprudence
has thus far tolerated (albeit with some modifications), permit
civil actions by individuals against those who have accused them
of holding or advocating certain beliefs. Free speech cases have
also held that a state may not eliminate the opportunity for
anonymity in public debate and association, recognizing that a
requirement of public disclosure of one’s identity will inhibit
many people from expressing their views because of the power
of social stigma. In these ways, First Amendment law acknowled-
ges the personally devastating consequences that can some-
times befall individuals when the community comes to believe
or know they have held and advocated certain beliefs. To have
it said that you were once a communist sympathizer, a fascist,
an atheist, or a liar can make you, at least in most quarters within
the society, socially and economically a pariah, as destitute as if you had been thrown in prison and fined. In fact, a good case could be made for the proposition that the power of social intolerance exceeds that of legal intolerance, as Mill argued:

[It is the opinions men entertain, and the feelings they cherish, respecting those who disown the beliefs they deem important which makes this country not a place of mental freedom. For a long time past, the chief mischief of the legal penalties is that they strengthen the social stigma. It is that stigma which is really effective, and so effective is it that the profession of opinions which are under the ban of society is much less common in England than is, in many other countries, the avowal of those which incur risk of judicial punishment.]

Regardless of the relative power of nonlegal and legal sanctions, we may reasonably assume the same tendency to employ them excessively, which we acknowledge with respect to legal coercion, must exist for nonlegal coercion as well. There would seem to be little reason to think that people's attitudes toward legal restraints and punishments are peculiarly prone to be unrestrained.

What of our reactions to behavior other than speech? Is a similar tendency to overreact or to react intolerantly experienced there as well? The answer, of course, is yes. All the time we face, both in our individual and in our social encounters with people, the problem of deciding just what beliefs or values we will demand that others conform to. As to these choices, we ought to expect that if the manifestation of thoughts through speech acts produces in us feelings that can generate improper reactions, then the manifestation of mind through other, nonspeech conduct will do the same. And if we look at speech acts from the traditional libertarian perspective—that speech is simply a prelude to action—we should expect to find that the responses evoked by speech will undoubtedly also be evoked by the action itself. In fact, this logic is widely accepted, if only tacitly, by traditional libertarian defenses on behalf of the free speech idea. Mill's classic argument for tolerance, for example, was general:

It envisioned a basic impulse to establish orthodoxy with respect to all kinds of behavior and then attempted to provide a universal principle by which it could be said that a certain category of behavior (Mill's idea of self-regarding behavior) would be entitled to near total toleration. Speech was simply one subspecies within that category. That type of inquiry into the possibility of finally deriving a general principle by which we can define the appropriate boundary for social control of behavior continues to this day, still focused largely—as it has been for so long—on the matter of sexual conduct.

There are indications even within the jurisprudence of the First Amendment itself that point up the need to guard against the impulse to intolerance in areas beyond speech activity. In religion, for example, the protections afforded by the First Amendment cover not just the advocacy of religious viewpoints and beliefs but the practice of religion as well. The impulse we are considering does not discriminate between speech and other acts; on the contrary, it concerns itself with any manifestation of the underlying attitudes and beliefs and, so, must be guarded against in all contexts. Moreover, an entire area of nonspeech conduct, referred to as 'symbolic speech' (basically nonspeech behavior that communicates ideas—a part of the First Amendment we will take up in more detail in chapter 6), has been grafted onto the First Amendment to protect it against the same impulses that seek to control speech activity. Dress, for example, is a form of nonspeech behavior that, as Bagehot remarked, may stimulate the desire to persecute.

The problem we face, therefore, is not simply one of controlling an impulse to insist too strongly on our beliefs and values with respect to speech; the impulse threatens all behavior. Everyone who is perceived as being different, as having different values or beliefs or an interest in a different way of life, is a potential victim of an excess of this impulse. Besides members of religious groups, the most common victims of such intolerance are those of different races or nationalities. We commonly refer to this form of intolerance as "prejudice" rather than "censor-
ship," but it is usually stimulated by the same underlying psychology. What leads us to react with intolerance is, typically, a concern with the mind perceived to be at work—with the way of thinking of the person or persons, whether that be political beliefs or general attitudes or values or whatever one might call it; and, equally important, with the fact that this thinking is essentially being communicated by the actions of those who hold, or appear to hold, these different beliefs, attitudes, or values.

Although it requires that we reconceive somewhat our notion of the term ideology, it may be useful to think of intolerance in all of these areas—tooward speech and nonspeech behavior; political, religious and racial groups; aliens and foreigners—as motivated in large part by a concern with the ideology, or way of thinking, manifested by the victims’ behavior (which, unfortunately, for some victims means simply being). We tend not to see this reality with respect to something like racial prejudice because the line commonly used as the basis for triggering the intolerance (skin color) is less precise than that used for other intolerance (for example, against "communists") and because the ideology perceived to exist, and thought of as troublesome, is so much broader and less specific than the usual political or religious ideology that commonly prompts intolerance. (Again, communism may serve as an example of a more concrete political ideology and Catholicism of a system of religious belief.) Perhaps another source of our failure to make these connections is the structure of the Constitution itself, which treats the problems of excessive intolerance in these various areas as discrete, primarily by enunciating different principles and by putting them in numerically separate categories. Nonetheless, the fact remains that the intolerant responses dealt with in these various areas of social intercourse bear an important unity of underlying thought or motivation. It is instructive, in this regard, to recall that Neier, when he was trying to defend the ACLU positions in \textit{Skokie} on fortress-model grounds, cast the specter of potential intolerance against Jews as involving not just invasion of speech rights but all forms of anti-Semitic prejudice. The history of deep intolerance against speech is usually linked to excessive intolerance against groups of people, especially aliens (the most infamous of censorial statutes is the Alien and Sedition Act).\textsuperscript{6}

Up to this point, in considering if the feelings that lead us to want to censor (improperly) speech acts also lead us to want to prohibit or sanction (again improperly) nonspeech acts, we have really been focusing on a particular kind of problem—namely, deciding whether behavior we dislike or disapprove of should be sanctioned or prohibited \textit{at all}. As we have seen, if we are moved to intolerance by the verbal manifestations of certain thinking, we are almost certainly going to be moved similarly by nonverbal actions that reflect or implement the same thinking. As we have noted, many people, following in Mill’s footsteps, have struggled with this problem of trying to identify the line at which social control of behavior is appropriate. While some areas of human activity (such as religion) are now widely regarded as beyond the legitimate control (at least legal control) of the community, there is a range of activities (sexual practices, for example) about which there is wide disagreement concerning the proper degree of social regulation. The issue of demarcating the line between the legitimate social regulation of morals and the sphere of private liberty is, therefore, still very much with us and undoubtedly will continue to be so for the foreseeable future.

But it would be a grave mistake to think that the problem of dealing with what we have been calling the impulse to excessive intolerance is restricted to deciding what we should choose to prohibit. Of greater importance—certainly of greater importance to the meaning of free speech we are developing here—is the problem of deciding \textit{how much} to punish behavior that is legitimately within the realm of community control. The problem we face with the impulse to excessive intolerance, in other words, is not just with resolving the issue of what merits sanction but also with answering the question of how to punish that which is properly punishable.

From the time that Paris seduced Helen and ignited the Trojan
War (and Agamemnon insulted Achilles by taking his concubine), people have written and wondered about how concededly bad acts can threaten and challenge the identity of individuals and communities and pose the deepest issues for them about the proper course of action to take in response. Today we can see the problem vividly and repeatedly presented to societies as they struggle with the problem of how to deal with political crimes, particularly acts of terrorists. A striking example for this country was the attack on the American embassy in Iran a few years ago, which resulted in the extended holding of American hostages. Like all guerrilla and terrorist attacks, this one had an explicit and conscious communicative purpose, a violent act of propaganda. A wave of anger swept across this country, posing a serious danger to visiting Iranians, who were sometimes violently attacked in retaliation for the actions of their distant countrymen. Though the anger in this country at the Iranian government was clearly justified, and equally clearly justified some intolerant response, it also ran the risk of becoming seriously excessive and of leading to the injury of innocent individuals.

Of paramount significance for our purpose is that this anger stemmed from precisely the same concerns that Holmes identified as constituting the foundation of intolerance (or, as he put it, of “persecution”) toward speech activity and that we discussed in chapter 2 when we considered the range of potential harm from speech acts. The Iranian act posed a challenge to the identity of the United States. It raised a question of what in fact the values of this country were and, more pointedly, a question of whether the United States had the courage and the power to act on those values. It was an insult, a threat, a challenge; just like any of the verbal variety, it expressed a way of thinking to others and “set an example” for others to follow. The situation, in short, involved the same dynamics as that posed for the Jews and for American society generally by the Nazi march in Skokie, Illinois, or, indeed—to carry through another thread from chapters 2 and 3 that we shall develop more fully in chapter 7—as that posed for free speech proponents by the attempt to forbid the Nazi march. That one was a “speech act” (though, it should be noted, the “speech” was manifested in a variety of forms of conduct: placards, dress, walking and gait) and the other an “act of violence” involving direct physical harm may be relevant for some purposes, but it does not alter the reality that the fundamental issues of gauging the right response, and of addressing and controlling the same important inner feelings that arise because of the act, were present in both instances. The need to do something in the face of the attitude—or the ideology—revealed, and the problem of deciding just what that something should appropriately be, were present in both instances. The same was true, to provide additional examples, of the Russian invasion of Afghanistan, which, of course, prompted the subsequent Olympic Games boycott, and of the asserted Cuban activity on the tiny island of Grenada, which prompted an armed invasion (though, interestingly, these may also be seen as sequels to the Iranian crimes).

At this point it is perhaps useful to pause and recall that, in chapter 2, we in fact have already made this observation about the similar difficulties presented for observers and the community by speech and nonspeech acts. There, however, the point was part of a plea that we become more sensitive to the harm-producing capacity of speech acts. Now, building on that recognition, we are able to see in the similarity of the dilemmas posed by such acts the comparable difficulty of resolving those dilemmas successfully. Out of this observation we will in due course see how it provides the basis for a justification of free speech as we have come to know it.

The dramatic international events we have so far mentioned only highlight an important common element in confrontations with behavior deemed improper—namely, that every bad act contains an implied threat to repeat the act, as well as other, more serious acts, and is, in a sense, an example for everyone to follow. In this way, then, all behavior (verbal and nonverbal) is “communicative,” or, what is really more to the point, all behavior reveals the thinking of the actor, which in turn poses the
same issues for the community. This is because, ultimately, we are always concerned with the mind behind the act itself, whether it involves speech or nonspeech behavior. "An evil act need not be repeated and can be repent of," Tolstoy wrote, "but evil thoughts engender evil acts." While such a concern with the mind of others is reasonable to a degree, the problem is that it poses a constant and serious risk of getting out of control and of generating undesirable responses.

So the point really reduces to a simple one: Just as the problem of setting and enforcing the appropriate limits of speech activity within the society is rendered difficult by feelings basic to human nature (involving belief and identity), so are our responses to nonspeech behavior rendered difficult by the same feelings. That there may be more social justification, or greater social need, behind the regulation of nonspeech conduct (perhaps, ironically, because of the greater effectiveness of nonspeech forms of communication—a point we will return to in chapter 6) than of speech conduct is not the relevant issue at the moment. What is true and important for the present discussion is that the system for dealing with nonspeech conduct must take into account, and develop checks and protections against, the very same tendency to excessive intolerance that manifests itself in the speech context. Aristotle made the point long ago: "It is not everybody," he said, "who can find the centre of a circle—that calls for a geometer." So, too, it may be said, it is "easy to fly into a passion." Anyone "can do that." But "to be angry with the right person and to the right extent and at the right time and with the right object and in the right way—that is not easy, and it is not everyone who can do it."9

And so, for example, we should find, as we do, in the system of criminal justice various protections against the impulse (in Holmes's words) to "sweep away all opposition." The decorum of the courtroom, the presumption of innocence, the rules of evidence restricting the submission of evidence likely to be emotionally inflammatory (discussed in chapter 2), and the cautions surrounding the meting out of punishment are all intended to function, at least in part, to check the impulse of the various decision makers to give vent to their desire to punish excessively someone who has potentially put into action a way of thinking deemed wrong by the society." For, inherent in the act is a mind at work that the community must necessarily feel to some degree is a challenge to its beliefs, its identity. The mind behind the act puts those who come to know of it in the same psychological dilemma as does the racial epithet or the advocacy of wrongful behavior. The acts of conviction and punishment are the society's communicative response, which is now labeled "deterrence" instead of "censorship."

For all its vast social significance, the system of civil and criminal norms is actually only one of the many arenas of social interaction where the feelings behind the impulse to excessive intolerance emerge as an important element to be dealt with. Since the impulse involves nothing less than an internal conflict, within the individual and the community, over how to respond in settings in which people advocate and act on different attitudes, values, or beliefs, we readily see how pervasive to social interaction are the feelings we are talking about.

The feelings must arise and must be controlled in the basic operation of a self-governing political society, where a willingness to compromise and a willingness even to accept total defeat are essential components of the democratic personality. Democracy, like literature, it may be said, requires a kind of suspension of disbelief. At the norm-setting level, as well as at the enforement level, a capacity to contain one's beliefs in the interest of maintaining a continuing community is critical. The problem of deciding on the nature of the commitment to one's belief is one of exquisite complexity. Those who possess the power to see their choices put into effect must decide whether and how far to press ahead in the face of opposition. Those in the minority must decide whether to accede to the will and power of the majority or in what ways to continue the fight, perhaps by selecting a course of action from the various modes of resistance or, in extreme cases, by resorting to outright rebellion. No bright
markers serve to guide these subtle choices. In this sense, therefore, the capacity sought through free speech bears a special relevance to the actual functioning of a democratic system of government.

The same capacity cuts even more widely through the social structure and can be observed at various levels of social interaction. Consider the basic requirements of a functioning bureaucracy and of various social professions.

A central injunction to those who make up the bureaucratic organizations of government is that they must implement the orders and directives of others despite their own contrary personal beliefs and feelings. Obviously, we draw limits on this; a bureaucrat or an employee should not act contrary to law, and a considerable gray area exists where personal integrity is both respected and encouraged, or even morally demanded. But, on the whole, a basic ethic of the employee's position is to set aside his or her personal beliefs and to implement those of others. The same is true, perhaps to an even greater extent, with certain professions, most notably that of law itself. Again, keeping in mind the complexity of the interaction between the lawyer's sense of right and wrong and his or her obligation to defend the client, there remains at the core of the lawyer's role an obligation to represent the positions of others even though the lawyer's own beliefs and values may differ from those being defended. Law students are taught to "think like a lawyer," which primarily means learning to see that on every issue there is "another side" to the one the student is so inclined initially to believe is right. Legal institutions in this country could not function unless these skills were developed; but developing them is no easy task and the impulse to violate the ethic remains powerful. (It is not, incidentally, without interest that the principal argument advanced in favor of the lawyer's ethic of submerging personal beliefs and values is that advanced in the free speech sector—that one's faith should be placed in the system, and not in oneself, to arrive at the proper accommodation of competing interests.)

The foregoing observations, though perhaps elemental, are nonetheless pivotal in arriving at an understanding of the relationship between tolerance of speech activity under the free speech principle and of behavior in other areas of social interaction. As noted earlier, if we believe that the sort of excessive intolerance we encounter and fear toward speech acts stems from conflicts we have over the beliefs and values we hold and profess allegiance to, it would seem that something so basic to human nature should certainly be expected to arise in a host of other areas in our lives, since beliefs and values are put at risk in so many social settings. If all this is so, if the issues evoked by confrontations with speech acts are characteristic of a host of social encounters, we might find it helpful to think about the principle of free speech and about the functions it serves in the light of that common feature—perhaps as one means by which self-control of those feelings is sought. Rather than isolating the activity of speech to understand the social role of "free speech," we might find it more helpful to see free speech as intended to help us gain control of feelings relevant to the whole tapestry of social intercourse. To that inquiry we now turn.

Perhaps it would be best to begin with a statement of the general theory of free speech that emerges from the preceding discussion. The theory proceeds from the premise that the way of thinking behind intolerance of speech activity (in the form of legal coercion) is something we encounter throughout social intercourse. It is not peculiar to legal coercion against speech activity, or even to coercion against speech. It is universal, both in the sense that it is something everyone must learn to control, though in varying degrees, and in the sense that it is pervasive in any society organized along the lines of twentieth-century United States. We might say that when we deal with speech acts, we are dealing with the mind behind the act, or revealed through the act, but to say that is to begin to recognize that we are virtually always concerned with the mind as manifested through behavior,
whether it be speech or nonspeech behavior. The universality of the issues confronted in the speech context means that tempering this way of thinking can be a principal focus, a primary source of value and justification, of the free speech principle. Stated another way, it need not be the exclusive function of free speech to protect an activity (speech) that is especially prized, but rather to work toward the correction of a perceived general defect in our intellectual makeup, one that happens to manifest itself sometimes in our reactions toward speech acts.

A central function of free speech, therefore, is to provide a social context in which we collectively speak, in a public and official setting, to an important aspect of what we might think of as the intellectual character of the society. Taking this approach, we can now see that the purposes of the free speech enterprise may reasonably include not only the “protection” of a category of especially worthy human activity but also the choice to exercise extraordinary self-restraint toward behavior acknowledged to be bad but that can evoke feelings that lead us to behave in ways we must learn to temper and control. What is important about speech is not that it is special but that the excessive intolerance we sometimes experience toward it is both problematic and typical, in the sense of reflecting a general tendency of mind that can potentially affect many forms of social intercourse.

At the beginning of this chapter, as well as before, it was said that any sound theory of free speech must answer three central questions. The first is to explain why the society has chosen to abide by what amounts to a presumption against regulation of this one area of behavior, that is, the behavior of speech. Apart from a few isolated regions in the area of nonspeech behavior, nowhere else in life do we insist in this way on such a level of self-restraint. We now have a thesis on that issue. From the critical insight into the generality, the universality, of the feelings that generate an excessive response to speech acts, we can see free speech as a limited, or partial, area in which an extraordinary position of self-restraint is adopted by the society as one means of developing a more general capacity with respect to that impulse. Free speech provides a discrete and limited context in which a general problem manifests itself and in which that problem can usefully be singled out for attention. Does it make sense to structure social life in this way?

Envisioning free speech from this perspective leads us to think about how society gains by structuring itself in nonlinear ways. Given the hold that the notion of “equality” has on our minds, and especially on the legal mind, this may not at first seem a comfortable prospect from which to examine the functions of a legal doctrine. Yet it is critical that we do so. For when we examine social life, rather than finding perfect consistency between all its various parts—a uniformity of treatment smoothed out through the careful evaluation of relevant differences—we often encounter a functional world composed of discrete inconsistencies, or anomalies, which together, however, can form a coherent whole. Such a method of behaving, therefore, is not so anomalous as it may at first appear.

In both our private and public lives we often act in certain ways in one area in order to influence our behavior in other areas—in ways that, considered alone and independently from other parts of our lives, would appear strange. We understand, if sometimes only instinctively, that qualities we acquire by stretching ourselves in one area of activity spill over into other areas where those qualities are also needed. We may even separate certain areas of life where we will behave in extraordinary ways in order to develop particular qualities needed elsewhere. The near total restraint in the use of race as a consideration in public decision making, which functions in part as a symbolic counterbalance to the use of race in private decision making, is a good example of this.

This bending over backward, pushing ourselves to an extreme, often in a limited context, is common in life. We parcel out our world in this way perhaps more than we recognize, certainly more than we acknowledge in the area of legal principles. We do so because it offers advantages over a homogenized existence: It can provide a more manageable place in which to begin, where
success is more likely and, if achieved, will in turn strengthen future resolve. It also has the great merit of allowing us to limit the costs of our mistakes, which can have a liberating effect, permitting us to experiment more freely and to take risks that would otherwise be inhibiting. It also allows us to focus attention with greater clarity on the problem being addressed, whereas if it were treated generally, it might get lost amid a sea of other problems.

The attractiveness of a limited and an extraordinary effort is even greater when the capacity we are trying to achieve is beyond the reach of the usual methods of social control—when what is ultimately involved is a matter of attitude and capacity for searching introspection.18 When that is true, the selection of a single area, in which there will occur a public and perhaps rather rigid and indiscriminate rejection of the type of thinking deemed improper, can offer an important means of symbolizing the "proper" way of thinking, which, it is hoped, will then be employed throughout all areas of behavior.

Furthermore, to select a discrete area in which to develop a particular quality desired can have the advantages of concrete experience, offering the kind of practical knowledge that comes from actual experimentation. If, for example, we are concerned about being unduly risk-averse, we may benefit by exposing ourselves to significant risks in a limited context where the consequences of those risks are relatively contained. In this way we may begin to learn how we overestimate risks and how to make adjustments to modulate that tendency in other settings.

Finally, in chapter 2 we saw how actually taking the step of passing a law prohibiting certain undesirable behavior is usually a much more powerful demonstration of a community's commitment to the values threatened by that behavior than is a simple verbal declaration of such a commitment. So, too, may an official act of extraordinary self-restraint toward that behavior similarly provide a more forceful demonstration. The injury voluntarily sustained helps to establish, both to oneself and to others, the depth of one's feelings and the purity of one's mo-

tives. The punishment willingly accepted by the person who engages in civil disobedience, or the injury passively suffered by those choosing a course of nonviolence in response to injustice, and the real and significant consequences thereby accepted help to prove, as well as inspire, commitment and to establish that good motives underlie the behavior.

All this speaks importantly to the functions served by free speech. Speech activity under the operation of the principle becomes a discrete area of behavior that is treated in such a way as to give it broader social meaning. The general problem addressed is one that cannot be solved by adopting a position of total abstinence, as we are sometimes able to do with troublesome impulses. The feelings that generate excessive intolerance cannot be obliterated from social interaction, nor would we want them to be. Like the desire for personal gain, the impulse of intolerance must be controlled and channeled toward good social ends, not uprooted. Moreover, the problems we face are not susceptible to ordering by some general rule or test. We are dealing with a matter of attitude, of balance and control. Under these circumstances, then, because of the feeling that the process of decision making is infected with a potential bias in the direction of intolerance, we can see the plausibility of stretching the capacity of tolerance in a single area where the bias can be expected to make an appearance. To structure our social life in this way helps achieve the desired end. The deprivation suffered has its necessary and unavoidable costs, but it also means—because of the distorting power of the bias over our judgment—that there will often be significantly smaller costs than our estimates would lead us to predict, thus providing a useful practical lesson in the importance of employing a corrective factor when we are called on to react to similar feelings in other contexts. The self-restraint in the face of the injury sustained demonstrates powerfully, more powerfully than a general injunction to be appropriately tolerant in all circumstances ever would, to ourselves and others, a commitment to exercise moderation throughout social intercourse. In this respect, the operation of
free speech may be seen as reflecting a determination to create a general intellectual character through the creation of a kind of tolerance ethic.

We may now, finally, also see why the category of speech behavior seems instinctively such a sensible place in which to undertake this enterprise. That speech generally causes less individual and social injury than does nonspeech behavior, while not in itself a sufficient justification for a free speech principle such as we now have, is nonetheless an important characteristic for explaining why speech is an appropriate setting in which to pursue a greater capacity for tolerance. Speech offers a fairly sharp line for limiting the extraordinary experiment with tolerance and an upper limit of potential for harm that makes unrestrained activity there generally tolerable for these purposes. There is in this sense, then, rational support for the widespread feeling that the reduced harm-producing capacity of speech behavior is somehow relevant to understanding why the culture has developed different rules for the regulation of speech and nonspeech acts.

But what of the extremes of speech? Why pursue the principle to this extent, to the very outer perimeter of speech activities, to speech nearly all of us believe immoral and vicious? This is a more complicated question, requiring a more lengthy response, though it is a response that emerges clearly from the vision of free speech we are now considering.

Let us take a quick survey of the possible functions of extreme cases and then consider them more fully in the specific context of Shoklo. First, if one has decided to construct a partial response to a general problem as a means of dealing with the general problem (and not just with the problem in the limited sphere selected), an insistence on an extreme degree of self-restraint is helpful as a means of emphasizing that generalized meaning. Extreme cases may be useful in realizing the desired symbolic significance. The extremes tend to attract attention, and that, as any educator

or radical knows, can be pedagogically and symbolically advantageous. They provide, in other words, a useful context in which to impress on people the lesson sought to be communicated, a frame for the message. But there is more to the extreme cases than this.

Given that the very nature of the problem we are dealing with is, as a practical matter, beyond the capacity of law to solve, involving as it does what is essentially a matter of attitude or judgment, it seems reasonable to approach the problem in the limited area selected for symbolic action through a principle of nearly general self-restraint. It is simply too difficult to make a case-by-case examination of legal restraints on speech to ascertain whether the underlying motivations are of an improper variety. The problem of the impulse to excessive intolerance is simply too elusive for that type of scrutiny.

Even apart from the complexity of the inquiry in the free speech area itself, there is the additional point that the problem of the impulse—because it cuts through a variety of social interactions and involves a capacity for toleration in the broadest sense—must really be confronted by creating something of an ethic against regulation, which will exert force in the opposite direction, very much like the presumption of innocence does in the context of the criminal jury trial. One way to accomplish this is to hold the society to a position of near complete and total tolerance in a limited area of social intercourse. Therefore, not only does the context of the extreme case provide a desirable educational setting for conveying the general message; it also means that the society has committed itself to a course of action in which the sacrifice demanded will create a psychological environment in which the message will find its most receptive audience. By pursuing the "principle" to its logical end, well beyond what the particulars of individual cases call for under it, the society impresses on itself the importance of the lesson, creating out of it an ethic, or identity, of self-restraint. "To straighten a bent stick you bend it back the other way."

Through this process, moreover, the society may learn more
about its capacity for self-restraint. The difficulty of untangling the mental processes behind restrictions on speech behavior (or, for that matter, wherever the problem arises) also means that actual self-restraint may offer the benefits of real-world experience. If we think we are too inclined to be risk-averse, too prone to overstate the risks involved in social interaction, or too cautious about permitting differences to exist, a benefit of going to extremes is that it provides a good basis for testing our grasp of reality.

This observation leads to another. Thus far, one may have thought the discussion has assumed that the extreme cases are largely free of the problem of improper intolerance but provide a useful context in which to create an effective counterbalance to the problem as it might arise in other contexts. This assumption is untrue, or at least needs to be seriously qualified. If one looks at the speech involved in extreme cases, the usual conclusion is that the speech itself is without serious social value and, considered independently, may properly be forbidden or restricted. But if one looks not at the speech but at the motivation behind the restrictions, one may properly conclude that the restrictions were imposed for bad reasons. In the typical extreme case, the wrong motivation tends to be treating the speakers as scapegoats.

Finally, it is also the case that we often benefit from the extreme cases by holding up to ourselves, through the act of protecting the speech and permitting it to occur, the very example of the mental process that it is the fundamental purpose of free speech to alter. Extremist speech is very often the product or the reflection of the intolerant mind at its worst and, as such, an illustration to us of what lies within ourselves and of what we are committed, through the institution of free speech, to overcome: Perhaps ironically, but nonetheless powerfully, the principle of “free speech” serves to “protect,” and so to hold up before us, that which we aspire to avoid.

Again, Shokie is helpful in the role of general illustrator. Clearly, the speech activity involved in that case pressed the principle of free speech to an extreme degree. Attention was focused on the case as a result, and a dialogue on the controversy over the proper limits of toleration spread throughout the country, not all of it, of course, of high quality but a surprising amount was (including a television drama about the case). The case provided in effect a forum in which attention was drawn not only to the limits of free speech but more broadly to the problems and issues of the prejudice of anti-Semitism, in all its various forms. What gave the case its dramatic power was not that it involved making a pact with the devil to better secure one’s own freedom, but rather that it involved a confrontation with the more complex, and less comfortable, processes at work behind the desire to punish these speakers, whether by legal or nonlegal means.

The wish to prove to oneself and to others that one has “no doubt either about one’s power or one’s premises” is, as Holmes said in his peculiar way, “perfectly logical.” It can be extremely unsettling to see our own bad qualities reflected in the behavior of others; it draws our attention to what we regularly close off, or censor, from our minds. But such unsettling feelings can turn into abhorrence when we see those bad qualities under intense magnification, when we thus have put before us the potential course of those bad tendencies we sense within ourselves. Then the desire to dissociate ourselves from the behavior is proportionally intensified. As much as we may wish it were otherwise, and as painful as the acknowledgment is, each of us bears some aspect of the character of mind reflected by the Nazis. And it is the intolerance we feel toward our own intolerance that contributes to our wanting to censor the external, exaggerated reflection of that part of ourselves. In its extreme form the desire manifests itself in a violent response, such as we regularly witness—usually with shame and embarrassment—in the confrontations and threats of confrontations of those who challenge the speakers. Some, like the Jewish Defense League (JDL), attempt to turn this type of behavior into a virtue by making it appear as if only they have the courage to stand up to evil. But the
desire may also take less primitive and more official forms as well.

The extremist groups are, of course, well aware of this potential for uncontrolled responses and shape their behavior so as to be as provocative as possible. Sometimes this is accomplished with considerable subtlety, which, of course, only adds to the provocation. When we began examining the Skokie dispute, and at subsequent times, I observed that the case involved a hall-of-mirrors effect. We always felt uncertain about precisely what was going on. Here again we can see how that feeling can arise. One element of the confusion was over the messages the Nazis would be conveying. The original petition described the purpose of the demonstration as a protest against the restriction that had been placed on their ability to hold a rally. It therefore became a demonstration against the denial of free speech rights—on the surface, then, many steps removed from a demonstration to advocate genocide, racial hatred, or the institution of a fascist dictatorship. Yet, the location selected for the march, the clothing and insignia they intended to wear, the movements of their bodies during the march, as well as the ideological position they ultimately wished to advance once they secured their free speech position, all bespoke another set of messages. In essence the desired effect was to “clothe” their position in innocence—in this case, ironically, in the drapery of the First Amendment—and in doing so to make the behavior provoked appear all the more indefensible.

It should be noted that one of the courts in the Skokie litigation actually gave some hint of recognition of a correspondence between speaker and audience in the Skokie context. At the very end of the federal court of appeals’ opinion, when the judges returned to making a personal statement about the difficulty of drafting such an opinion, they expressed their “extreme regret” that “after several thousand years of attempting to strengthen the often thin coating of civilization with which humankind has attempted to hide brutal animal-like instincts, there would still be those who would resort to hatred and vilification of fellow human beings…” What is particularly interesting about this statement is its unusual willingness to recognize something of the commonality between the Nazis and the rest of us. The internal instincts referred to are not simply those of an unrefined and uncivilized group but part of the condition of everyone, for which civilization offers only a “thin coating.” However much one may disagree with the assessment of the human condition in the words chosen, the judges should be praised for not having censored an unpleasant truth at stake in the case. It was unfortunate, however, that the truth was offered only by way of denunciation of the plaintiffs and not taken as the potential basis on which to build a rationale for the decision itself.

If one tries to trace the sources of the intolerance impulse still further, we find it becoming even more potentially complex. Beneath the surface rhetoric in the dispute about the risks of persuasion and offense, there rests the possibility of a quite tragic undercurrent of emotional energy at work in the confrontation. The Jews are victims, whether they were survivors of concentration camps or not. The horrifying treatment they received at the hands of the German regime must be regarded by all as one of unspeakable inhumanity. But the injuries of that event are far from simple. They consist not only of the loss of parents and relatives and friends or the pains of persecution and the fear of its revival. They also include a way of thinking about the event, of which guilt no doubt potentially plays a significant part. We cannot here explore this proposition at length, and in any case, the observation has been so frequently made and discussed by others that for me to do so would be redundant. But in its essential outlines it involves a feeling of not having resisted sufficiently, of having survived when others did not, and of having in some obscure ways, perhaps through weakness or some affirmative behavior, contributed to the event one abhors. That such feelings have no basis in reality is beside the point, for they are real feelings and as such can serve as springs of behavior.

For purposes of thinking about free speech, that behavior may be the desire for an excessively intolerant response to a group
like Collin's Nazis. Such a group both provokes the issue of guilt and provides the opportunity for its denial—in effect, for its censorship. Their very vulnerability, moreover, adds to the invitation.

In Skokie a distinct line of thought was sometimes heard, though it did not surface explicitly in the judicial opinions, that bears on all this. It was usually expressed as the argument that if we permit ourselves to prohibit this march by the Nazis in Skokie, then we will be forced into the position of having to permit whites in the South to forbid civil rights marches by blacks, for they too find such speech “offensive.” This was, of course, an argument for the free speech position in Skokie, and it was an argument of considerable power. But its real power lay not in pointing up the problem of effectively drawing lines (for, as I argued before, it is unconvincing to claim that we could not distinguish between a Nazi protest and a civil rights protest), or even in the acknowledgment of the difficulty of rationally explaining differences between cases, but in a strange and elusive identification between the claims for suppression that might be made in both cases. What made the cases appear comparable, I think, was the similarity of an improper or undesirable motive potentially involved in the controversy. Just as Jews might like to censor internally the guilt of the victim, and we all might like to censor the guilt of the piece of Nazi within us, so, too, many whites in the South have their own guilt of appease. It would, therefore, not be a simple matter to face Southern whites and explain that one's own intolerance was grounded in proper considerations while theirs was not. The point is not that intolerance in Skokie could not have been implemented for the right reasons, only that it might not have been, and it is that potential for improper intolerance that makes an explanation very difficult.

One must be careful here not to be misunderstood. As said before, the point is not that the guilts many Jews may feel as victims are justified in reality, nor that Jews necessarily feel this way or were motivated by it in the Skokie case. And it is certainly not being said that the Jews in Skokie were in any way other than in a certain psychological sense potentially similar to the imaginary white bigots who played such a powerful image in the thinking about Skokie. Rather, the idea is to see that there are bad as well as good reasons for being intolerant toward groups like the Nazis in Skokie. The point, therefore, is that in the extreme cases there is the potential for a type of internal censorship to be present, which makes them important contexts for confronting the problems the free speech principle is concerned with addressing.

There are, then, at least three primary advantages that can arise in the context of social confrontation with extremist speech. An initial consideration that is important, though perhaps not significant enough in itself to warrant tolerance of extremist speech, is that it is useful for gaining the notice needed for the concept to play its larger, symbolic role. Like a monument designed to inspire the virtue of courage, an extreme and greatly enlarged version of toleration can better enlist our attention.

Two deeper considerations are at work in the typical extremist speech case, one leading into the other. The first is that extremists often represent the paradigm of the intolerant mind at work and thus illustrate the very qualities of mind that it is the purpose of the free speech principle to counteract. In this, I do not mean to refer, as many people do, to the fact that many extremists hold or advocate anti-free speech views. Rather, I am talking about the more general qualities of mind revealed: their attitudes toward their own beliefs and those of others, their incapacity to cope with uncertainty in human affairs, and their quest for simple and clear answers—of which their attitude on liberty of speech is but a piece. For these people, speech is a weapon of intolerance, and through their behavior they represent what through the principle of free speech the society is committed to avoid.

Just as conferring awards for good actions is a means by which a community creates its own identity and defines its values, so, too, it is possible to accomplish the same ends by the opposite means of holding up before itself that behavior the community
most seeks to avoid. The energy to achieve a desired state of
mind or behavior can come from either direction; and with free
speech we follow the direction of Montaigne:

There may be some people of my temperament, who learn better
by contrast than by example, and by flight than by pursuit. This was
the sort of teaching that Cato the Elder had in view when he said
that the wise have more to learn from the fools than the fools from
the wise; and also that ancient lyre player who, Pausanias tells us,
was accustomed to force his pupils to go hear a bad musician who
lived across the way, where they might learn to hate his discord
and false measures.

The horror I feel for cruelty throws me back more deeply into
clemency than any model of clemency could attract me to it. A
good horseman does not correct my seat as does an attorney or a
Venetian on horseback; and a bad way of speaking reforms mine
better than a good one. Every day the stupid bearing of another
warns and admonishes me. What stings, touches and arouses us
better than what pleases. These times are fit for improving us only
backward, by disagreement more than by agreement, by difference
more than by similarity. Being little taught by good examples, I
make use of the bad ones, whose lessons are common. I have tried
to make myself as agreeable as I saw others violent."

Often in extremist speech cases there is a similar phenomenon
at work. Though it is ironic in conventional First Amendment
terms, it is nevertheless true that extremist speech may some-
times produce a chilling effect on less explicit varieties of the
attitudes communicated. The extremist speech makes us perhaps
more conscious of the full potential that lurks behind seemingly
more innocent versions of the same ideas." With some ideas,
this may be highly desirable.

It would be a serious mistake, however, to think that all that
occurs in the protection of extremist speech is a healthy recoiling
at the magnification of the intolerant mind. Confrontations with
extremist speech are usually beset with more complications than
that. The mistake would be to think that these sorts of cases do
not really involve the potential for the type of excessive intol-
erance or overreaction that it is the function of the free speech
principle to confront. The truth is the contrary, for it is very
often the case in these types of controversies that the most ex-
cessive responses are entertained and acted on. The very "pu-
niness" of these people makes them a convenient and an
attractive group on which to demonstrate those wishes that
Holmes talked about as constituting the roots of "persecution,
and their extremeness provides a rationalizing pretext for vent-
ing underlying anger." The magnification phenomenon only
accentuates the felt need to dissociate oneself through the act of
intolerance, and the speakers thus provide the ready makings
of a scapegoat.

Finally, to gain emphasis through repetition, it should be said
again that I am not suggesting that intolerance of extremist
speech is always infected with improper considerations or mo-
tives. Rather, the contention is that intolerance in these cases
may be done for bad as well as good motives, even when the
restrictions or punishments imposed are not, viewed independ-
ently, excessive. As with everything, good things may be done
for the wrong reasons, and with free speech the reasons are what
matter most. We ought to be concerned, for example, if Nazis
were banned as a kind of denial that anti-Semitism is a latent
force within the society.

In the end, all this comes down to a simple but nonetheless
critical point: extremes are not to be understood as the periph-
eral cost of an inevitably imperfect world, in which no one can
be trusted to draw the proper lines properly, but rather as in-
tegral to the central functions of the principle of free speech.

The third and last major theoretical issue to be considered is
whether it makes sense in a democracy to entrust the interpre-
tation of constitutional norms to the judicial branch. This is a
matter frequently discussed in the legal literature. Typically,
proponents of judicial review point to the desirability of having
some bulwark against an overarching majority—a bulwark fa-
vored with the power of a government institution, yet inde-
pendent of the usual pressures of popular government. I do not wish here to rehearse those arguments or to try to resolve that general debate, but I would like to identify some generally unnoticed advantages of a judicial enforcement system for a principle of free speech such as we have so far outlined in this chapter. It should be borne in mind that the tolerance principle, as I have thus far described it, is intended and designed to perform a self-reformation function for the general community and not, as is so often assumed as the starting point for discussions about the functions of judicial review, to offer a shield of protection either for the majority against the government or for minorities against unfair treatment at the hands of the majority. In the light of that deeper social function, what can be said about the benefits of having the free speech idea enforced by a judicial branch?

The free speech principle depends for its success on being able to provide an organizing principle for, or an account of, the act of toleration. Without such a coherent and articulated explanation, the confusion and uncertainty about motives that make intolerance the preferable alternative to tolerance will continue to create pressures for legal restraints on speech activity. Keeping this need in mind, we can identify several advantages of a judicial system of enforcement for the free speech principle.

First, the limited number of voices who pronounce the reasons for toleration (in written statements) makes a coherent explanation more feasible. Furthermore, it may be regarded as important that judges are members of a professional group whose central intellectual ethic is identical with the aspirations of the free speech principle. To a degree more than with any other group, judges are expected to have mastered the tolerant mind, to have the capacity to set aside their personal beliefs and predilections, and to control the impulses that accompany them as they set about interpreting and administering the society's laws—as the judges in Stohler observed repeatedly, it may be recalled. A good part of Holmes's great reputation as a judge, for example, was due to his capacity to separate his own personal beliefs from his judicial obligations. Though, here as before, important complications surround this central judicial ethos, both as to the full desirability of the model and as to its actual achievement in practice, it is important that we do not let these complications obscure its fundamental role in defining the nature of the institution. The ideal judge, in short, is in important respects a paradigmatic illustration of the qualities of mind pursued through the free speech principle, and it is therefore appropriate that we should assign to judges the task of safeguarding and administering that principle.

There are two final attributes of the judicial system that, while difficult to identify or even articulate, are nevertheless of potentially great significance to the actual functioning of free speech. The first involves the fact that the judiciary, having no forces at its disposal for enforcing its judgments, is the one government institution most dependent on its own capacity to secure the "toleration" of others necessary for its acts to become effective. This dependence on others may well induce a greater institutional understanding and appreciation of the process of toleration in general.

The second attribute arises from an ambiguity, an uncertainty, under the free speech principle over the responsibility for the choice for tolerance. We observed in the analysis of the impulse to intolerance how it arises, at least in part, from the feeling that the choice of tolerance would indicate weakness of belief or will. Such a feeling may be especially strong in the extreme cases, which we now can see are integral to the new free speech principle. The sense, therefore, of having no choice in the decision for tolerance, and thus no part of the responsibility, can help to alleviate the need to act intolerantly. The ambiguity about this ultimate decision maker is very much at the center of the constitutional and judicial system of enforcement of the free speech principle. The "judge," a figure not subject to election or recall, appears to be the final decision maker, and the text interpreted (the Constitution) is itself encased in a set of social attitudes that makes its revision virtually unthinkable. The practical conse-
quence of such a system is that in particular cases, when the needs of intolerance run extremely high, there is in the structure of free speech a means for making tolerance more palatable, which thus helps to preserve the identity of the general principle. Simultaneously, the litigation setting offers a convenient context for those for whom tolerance is troublesome both to articulate their “plea” for intolerance and to dissociate themselves from the result, and thereby from at least part of the “responsibility.” (They must, of course, still decide whether to obey the judicial order, and to what extent tolerate the speech, but what is typically regarded as an important new ingredient—respect for the system of law generally—has now been introduced into the overall calculus.)

On this last point, it may be noted that we have already observed, especially in the Skokie cases, an identical process reflected in the behavior of judges themselves. When the strain of tolerance gets too great, when the beliefs and values underlying the law conflict with the deeply held beliefs and values of the judge, we often find the judge turning to a posture of choicelessness, typically by disclaiming any power to alter the “predetermined” legal result—a phenomenon Professor Robert Cover has so powerfully documented for us with respect to the behavior of Northern pre-Civil War judges in their enforcement of the fugitive slave laws.46

It is significant, therefore, that the First Amendment has an ambiguous status in terms of social consent. In a sense, it is “ours” and reflects what we claim to want; but in another sense, it is “beyond” our control and even “imposed” on us. This ambiguity about consent and the First Amendment creates a beneficial environment for the discussion and implementation of it. The process is well designed for the problem intended to be addressed. The process of judicial enforcement gives those opposed to the speech an institutionalized method of objecting to the speech, and thus at least partially the opportunity of exercising their position with respect to it, and a result (if the judicial decision is in favor of toleration) that is—partially or ambiguously—“be-

yond their control.” Judges, therefore, serve the function of taking over the decision to permit the speech to go forward or not, and in so doing relieve those who object of a share of the responsibility. (This is similar, perhaps, to the way in which official and judicial enforcement of the criminal law provides a beneficial psychological distance for the public, which is able to give expression to feelings of outrage and indignation while a more deliberative process handles the prosecution and punishment of the offender.) The upshot is that free speech, in the way it operates in fact, can serve to make tolerance more possible than if it were left to be just a general injunction in the usual legislative process.

I would close this section with two comments. First, I am not claiming here that the posture of choicelessness is either entirely good or entirely satisfying to the intolerance impulse. I am saying that in a system that calls for extreme tests of the capacity of toleration, the system is aided by being somewhat ambiguous on the score of who exactly is making the choice for tolerance. On the other hand, the context must also permit some embrace of the result, for otherwise no gain in a general identity could be had, at least not one with any integrity to it. “Our” Constitution, with its method of judicial enforcement, permits both results.

The essence of successful institutions is often to be found in their having room for subtle and ambiguous solutions to difficult problems, and this would seem to be so under the institution of free speech. We need to look further than we have into the structural meaning of the First Amendment. In chapter 7 we will return to the problem of defining the judicial role in free speech cases.

II

It is accurate to say, as the fortress model does, that there is present in human society a grave and difficult problem of obtaining toleration between the minds within it. But it is also accurate and vitally important to see two other fundamental
aspects to this impulse: First, the human feelings involved are socially problematic not only with respect to legal restraints against holding or advocating certain beliefs—matters with which the principle of free speech is immediately concerned. Second, the problem of controlling those feelings is universal; that is to say, we all must address this problem more or less in our various social roles. It is not an affliction of only a few, or even of a majority. Provided we add to these acknowledged features of the impulse the assumption that we are still educable on the basic problem, we have the basis for a new theoretical perspective on free speech.

In chapter 3 the idea was introduced that the impulse behind intolerance toward belief and speech is really but a particular manifestation of a larger phenomenon and social problem. It was raised there as a basis for criticism of the fortress perspective, a basis for the suggestions that the general incapacity thus revealed in the discussion suddenly cast into doubt the processes of democracy and truth seeking, which had long been the mainstays of free speech theory; that it accentuated the risks of extremist speech, which had to be counterbalanced against the gains we could expect to derive from protection of that speech; and that it threatened to overwhelm and render useless the primary gain itself, namely, the legally secured right of speaking. But it was also doubted whether the risk assumed by the fortress model is really as significant or substantial as the model supposed it to be, and we wondered, in any event, whether there would be a role for free speech if the risk were in fact not so great.

Now, in the fortress model’s insight into human behavior we have seen another basis for defending free speech: Free speech may be an institutionalized method of grappling with the larger problem that involves our attitudes toward our own beliefs and identity. Through the social process organized under the principle, the society highlights the larger social problem; by confronting the problem in that discrete context, the society acts not just to protect one area of behavior against the force of the impulse but rather to address the whole problem. When liber-

tarian theory bemoans the reality of a tremendous, historically verified tendency toward excessive intolerance, it is reasonable to ask why we haven’t established some institutions that would be concerned with dealing with the bad tendency, in a sophisticated, educative way, and not simply by checking its impact in a minor area. In American society, free speech may have come to be one such institution.

Part of the reason for this development may be due to a phenomenon that the fortress model implicitly recognizes and uses to its advantage, namely, that free speech is more than simply a result; it is also a social event. People assemble in courts, they present arguments for and against the relevance of the principle, officials listen to the arguments and then arrive at a decision they must defend and justify according to standards developed over many years. The process we have created for implementing free speech involves a means of discussing and defining the bases on which we protect speech, and therefore the social meaning we derive from it. It is, in a very real and practical sense, a forum within the social life in which we have the opportunity to shape and affect our intellectual attitudes and, through that, our behavior.

For free speech to assume this function, however, it is critical that the feelings we seek to control, that constitute what we have referred to as the impulse to intolerance, be seen not only as cutting through a broad range of human behavior but also as being universal to all members of the society. For without that acknowledgment there is both a disinclination to address the problem openly, as well as sympathetically, and an inclination to slip into the posture of superiority toward those perceived to be afflicted by the defect. Human nature being what it is, shared experience usually provides the basis for empathic and therefore meaningful discussion. When Neier set out to justify to Jews and others why the Nazi march should have been protected in Skokie, he prefaced his argument with the statement that he too was a Jew and a near victim of the concentration camps. Holmes often spoke confidently about the necessities of a country at war while
noting that he himself had been a veteran of war and, better yet, a casualty. Such examples could be repeated endlessly. The acknowledgment of shared experience, or commonality, makes it easier to address troublesome issues and concerns. It lessens the sense in the listeners' minds that the speakers do not understand or have minimized their feelings and that the speakers regard themselves as superior, using the occasion to criticize as an opportunity to deny that they personally share the defect criticized. It therefore facilitates, instead of defeats, communication.

With the recognition of the wide dimensions of the impulse to intolerance, it becomes possible to see the enlarged social relevance of the free speech principle. To arrive at this point, we must reconstruct the meaning of the principle by amalgamating and expanding some of the basic premises of the classical and fortress models, in part through exploring the defect that the latter model identifies and through retaining the sense of hope for improvement that the former offers. Together, the two models reflect an appropriate degree of ambivalence on a vital social issue.

III

And so we see the elements of a new and different perspective on the meaning of free speech, one we may refer to as the general tolerance theory. In this view the social function of free speech is to provide a focus on the mind behind the act of intolerance rather than to protect the activity of speech itself as something that possesses independent value.

To see free speech as concerned not just with protecting the activity of speech but with the reaction to that activity, and to the personal values reflected in those reactions, changes considerably our idea of the ends served by the principle. We have already seen the range of importance to the community of learning to exercise self-restraint toward behavior found offensive or threatening. It seeks to induce a way of thinking that is relevant to a variety of social interactions, from the political to the professional. Significantly, this perspective sees the social benefits of free speech as involving not simply the acquisition of the truth but the development of intellectual attitudes, which are important to the operation of a variety of social institutions—the spirit of compromise basic to our politics and the capacity to distance ourselves from our beliefs, which is so important to various disciplines and professional roles.

It also promises a benefit we all can feel, individually as well as collectively, of avoiding the burdens that the impulse to intolerance can impose on us, or that through it we impose on ourselves. To escape its demands or, more accurately, to reduce the power of its grip, to become the master of the fears and doubts that drive us to slay the specter of bad thoughts, is an achievement of the first magnitude. This is what those I quoted earlier, like Meiklejohn and Holmes, who associated fear with intolerance and fearlessness with tolerance, may be read as saying. The idea was captured more explicitly by Brandeis in his opinion in Whitney v. California, among a litany of phrases about the purposes of the First Amendment: “Men feared witches and burned women,” he wrote, and it “is the function of [free] speech to free men from the bondage of irrational fears.” Brandeis recognized the importance of self-control and that it brings benefits not just to those who have been spared as victims but also to those who have been spared the costs of acting badly toward them. In the case of those who were burned, the gain would have been far more than the trivial saving of their not having to gather wood; it would have involved their being freed from the agony of fear and guilt that must have initiated and accompanied their acts of brutality.

It is now possible to answer the charges by Wigmore, and others who have wondered as he did, that free speech in the extreme cases is just the product of an excessive infatuation with liberty and freedom, a loss of balanced judgment on the needs of society for order and decency, or a perverse misuse of the social commitment to truth seeking and democratic government.
For under the general tolerance function, free speech is not concerned exclusively with the preservation of a freedom to do whatever we wish, or with the advancement of truth or of democracy as those terms are generally used, but with the development of a capacity of mind, with a way of thinking; it is concerned with facing up to a perceived bias of mind, one that interferes with all of those objectives, as well as others, and is also encountered in the decisions over the regulation of speech. Wigmore was right about the tendency to overstate the risks to freedom and to understate the needs of society for intolerance, but he—like many others—failed to see the importance of free speech in helping control the impulse that may lead us to “smite on the mouth” those who go among us advocating and acting on views we dislike, even legitimately so.\(^8\)

Free speech in this sense, then, is not inconsistent with what we do toward speech in other areas, like juries. There we seek means of controlling the impulse just as we do with the principle of free speech, though in each case in a different way—one by limiting speech and the other by tolerating it. Concern over a troublesome (but natural) way of thinking is what unifies our behavior in each area.

In many respects the principle of free speech is a typically American response to a perceived problem. Whereas theorists like Mill have attempted to fashion a single marker by which to gauge the justice of all social reaction to every form of behavior (speech or other), this society has evolved an approach with no single, overarching rule to follow but with a mixture of granting and withholding power, a kind of check and balance, which seeks in an untidy way to arrive at a workable compromise on a matter deemed—correctly, I think—beyond the reach of “rules” to order for us.

It is this that most fully accounts for the strength of the free speech principle’s appeal for this society. It would seem to be what we have in our minds when we say in defense of free speech in a difficult case, it is “the principle that matters.” The “principle” is the choice to exercise extraordinary self-restraint toward injurious behavior as a means of symbolically demonstrating a capacity for self-control toward feelings that necessarily must play a role throughout social interaction, but which also have a tendency to get out of hand. In this secular context we derive something of the same personal meaning and satisfaction of the religious fast, a self-initiated and extraordinary exposure to temptation that reaffirms the possibility of self-control over generally troublesome impulses. This concern with feelings that cut broadly through social life leads us to think about free speech as our premier constitutional principle, of wider compass and significance than all the others.

In Chapter 5 we shall explore how this notion of the meaning of free speech can be found in the classical literature on the subject, though you must look carefully for it and even then you will often see the evidence only as shards sticking through the surface of the discussion. The reasons why it should have remained so submerged are not difficult to identify. First, the language of the First Amendment speaks of prohibiting the “abridgement” of “freedom of speech,” and it is only natural that our attention should therefore focus on figuring out why that activity possesses sufficient value to deserve that sheltered status. Second, it is common in legal thinking generally to treat what seem to be extreme cases as of marginal importance, understandable only by reference to their relation to a core of most valued examples of the activity. Third, the legal mind is primed by training and practice to see explanations in differences, not similarities. Fourth, we have inherited a rhetoric about free speech that speaks in terms of earlier functions, in terms of the “liberty” of each individual and of the community of citizens against the sovereign state.

Perhaps the major intellectual obstacle to appreciating the shift in social meanings of the free speech idea is an implicit reluctance to see that ideas can change their social meaning over time and, further, that an activity taken to an extreme can also change its meaning from that it possessed when pursued in moderation. One might usefully think of the meaning of free speech as an
evolutionary process with three basic stages. In the first stage the people are attempting to secure basic political power and rights for themselves, as at the time of the American Revolution. In such a period people genuinely need protection against governmental misbehavior. In the next stage this battle has largely been won with respect to the government, but not as against the people. Society itself retains a perceptible tendency to sacrifice the essential elements of a democratic system of government.

In the final stage the basic elements of the governmental process are secure—including, most importantly, the element of valued speech activity. The society has achieved a certain stability, in which its core values are reasonably clear and widely accepted. Yet there remains a broad range of social functions in which a way of thinking is both necessary and desirable and yet in some doubt. Here the focus shifts importantly away from the form of behavior (speech) and toward the mental process behind the reaction to that behavior. The greater the security of the behavior, the more internal and introspective the self-examination can become. But the mental process that gives cause for concern is present both in the activity of speech and in the activity of intolerance toward that speech. A choice is available for proscribing it in one or both, but the choice is made to select one.

Here it becomes a matter of importance that the mental process is present not only in the interaction with speech but elsewhere, too. The toleration of speech then assumes its larger, symbolic function. The meaning of extremes is, in part, to serve that function. At precisely that point, the meaning of what is done in the name of free speech changes.

By examining closely the thinking of two major First Amendment figures—Alexander Meiklejohn and Oliver Wendell Holmes—we can illustrate and extend the general perspective on free speech arrived at in chapter 4. In the First Amendment writings of these two men, we see powerfully represented how, beneath the epiphenomenon of traditional justifications for free speech, modern theorists have been led to focus less on the worthiness of speech activity as a basis for protection and more on something potentially problematic in the public response to speech acts.

Instead of seeing the purpose of free speech as simply that of facilitating decision making by the removal of impediments to the flow of information and ideas, or that of maintaining the area of speech behavior as a special preserve for individual self-realization and fulfillment, both Meiklejohn and Holmes found that free speech provided the occasion for thinking about the general character of mind as it was reflected in the public efforts to suppress speech. The potential of the way of thinking that motivated the censorship troubled them and guided their responses, just as the potential of the way of thinking reflected in the speech act contributed to the desire to punish the speaker. But the remedies each offered were themselves in deep conflict,