

## Chapter One

# Truth, Democracy, and Autonomy

### 1. Introduction: Common Ground

There are many arguments for protecting freedom of expression, but all seem to focus on one or a combination of three values: truth, democracy, and individual autonomy. Freedom of expression must be protected because it contributes to the public's recognition of truth or to the growth of public knowledge; or because it is necessary to the operation of a democratic form of government; or because it is important to individual self-realization, or because it is an important aspect of individual autonomy. Some arguments emphasize one value over the others. In these single-value accounts the other values are seen as either derived from the primary value or as independent but of marginal significance only.<sup>1</sup> However, most accounts assume that a commitment to freedom of expression, which extends protection to political, artistic, scientific, and intimate expression, must rest on the contribution that freedom of expression makes to all three values.<sup>2</sup> Freedom of expression, like other important rights, is supported by a number of overlapping justifications.

In this chapter, I will argue that the different accounts of the value of freedom of expression rest on common ground. While emphasizing different values or concerns, these accounts rest on a common recognition that human agency emerges in communicative interaction. We become individuals capable of thought and judgment, we flourish as rational and feeling persons, when we join in conversation with others and participate in the life of the community. The social emergence of human agency and individual identity can be expressed in the language of truth/knowledge, individual self-realization/autonomy, or democratic

self-government. Each account of freedom of expression represents a particular perspective on, or dimension of, the constitution of human agency in community life.

This recognition of the social character of freedom of expression does not represent a general or novel account of the freedom's value under which all other accounts can be located. The wide variety of accounts offered to justify the constitutional protection of freedom of expression suggests the rich and varied role that expression plays in the life of individual and community. Different relationships and different kinds of discourse are critical to the realization of human agency and the formation of individual identity. Any account of the value of freedom of expression must recognize the complexity of human agency and the diverse forms of human engagement in community.

While the social character of human agency is seldom mentioned in the different accounts of the freedom's value, it is the unstated premise of each. Each account is incomplete without some recognition that individual agency is realized in social interaction. This dimension of the freedom has simply been pushed below the surface by the weight of the dominant individualist understanding of rights and agency. As a consequence, most accounts of freedom of expression consist of little more than abstract statements that give little shape to our intuitions about the value of expression and provide very little guidance in the resolution of particular disputes concerning the scope and limits of the freedom.<sup>3</sup> My hope is that making explicit the social character of freedom of expression will enable better understanding of the value and potential harm of expression and better judgment about the scope and limits of the freedom.

### 2. Truth and Knowledge

The most familiar version of the truth-based argument for freedom of expression is that of J.S. Mill, who thought that the general public would be more likely to recognize truth if they were permitted to hear all available views, even those thought by many or most to be false.<sup>4</sup> In *On Liberty*, Mill (1982 [1859]) argued that censorship inhibits the progress of human knowledge because no censor is infallible. Even when it acts in good faith (which is certainly not always the case), the state will make mistakes and sometimes suppress truth rather than falsehood (Mill 1982, 77). The risk that censorship will inhibit the search for truth is significant, according to Mill, because public debate is not

simply a competition between true and false ideas. Even the apparently false idea often contains at least a grain of truth, which will be suppressed if the idea is censored (Mill 1982, 108). In Mill's view, the progress of public knowledge occurs through the synthesis of competing ideas.

Mill dismissed the argument that fallible state censors might still be in a better position than the general public to distinguish truth from falsehood. In his view, individual judgment isolated from the process of open debate is unreliable. We can only have confidence in our judgments about what is true when there is free and open expression of competing views, when determinations of truth and falsity are left to the general public.<sup>5</sup> Mill's fallibility argument rests on a faith in public reason.<sup>6</sup> It assumes that the public, when permitted to engage in free and open debate, is capable over the long run of distinguishing truth from falsehood.

For Mill, even if the state censor happens to judge correctly and suppresses only false views, something is still lost. The expression of false views has value because the 'collision' of truth with error gives us a 'clearer perception and livelier impression of truth' (Mill 1982, 76). We will gain a better understanding of the truth if we must address competing views and decide why we believe a particular view to be true or false. Our truthful opinions will be stronger and less vulnerable to superficial attack if they are based on reasoned judgment (Ten 1980, 126).

Mill is generally understood as having made an instrumental argument for freedom of expression.<sup>7</sup> Freedom of expression is valuable because it advances the goal of truth. Members of the community are more likely to recognize what is true and what is false, at least over the long run, if freedom of expression is protected. Yet, as many have suggested, this empirical claim is contestable. We have plenty of reasons to be sceptical about the reliability of public reason when exercised in particular social/economic contexts (Meiklejohn 1975, 19; Baker 1989, 6). In addition, even if, as a general rule, truth is more likely to emerge when there is debate rather than dogma, there is certainly a case to be made that some false or objectionable views could be excluded from public discussion (although perhaps not from expert debate) without any noticeable decrease in publicly recognized truth. This case has greater strength once we recall how often members of the public base their 'opinions' on the authority of experts rather than on an independent evaluation of the evidence or arguments. Instead of being subject to a general or presumptive ban, restrictions on expression could be considered on a case-by-case basis to determine whether

their benefits to public knowledge outweigh their costs (Smith 1987, 695). If dialogue leads to truth, as Mill argued, then eventually, on some questions at least, the truth may be realized, at which point opposing views may simply be mischievous or misleading.<sup>8</sup> Provided we are not in the grip of a profound scepticism, we might decide to hold on to the truth we have achieved by suppressing false ideas. The difficulty, admittedly, would be knowing when that moment of practical certainty had been reached.

Along these lines, Chief Justice Dickson for the majority of the Supreme Court of Canada in *Keegstra* (1990, 762) said:

Taken to its extreme, this argument [for truth] would require us to permit the communication of all expression, it being impossible to know with absolute certainty which factual statements are true, or which ideas obtain the greatest good. The problem with this extreme position, however, is that the greater the degree of certainty that a statement is erroneous or mendacious, the less its value in the quest for truth. Indeed, expression can be used to the detriment of our search for truth; the state should not be the sole arbiter of truth, but neither should we overplay the view that rationality will overcome all falsehoods in the unregulated marketplace of ideas.

Dickson C.J. suggested that the hateful views of James Keegstra could be denied constitutional protection because they were so 'obviously' false.<sup>9</sup> Yet obviously false views are unlikely to be seen as a concern and to attract censorship. If the views are obviously false, few will be persuaded by them. Indeed, if many people are convinced, the views cannot be so 'obviously' false and the risks of censorship may be significant. The problem with the views of James Keegstra and others is that they are not obviously false to some members of the community. The issue is whether and when the governing authorities should be permitted to suppress views that *they* recognize as obviously false. Perhaps the ground for censoring the false views of Keegstra and others is not the obviousness of their falsity but rather their appeal to the irrational (a matter of the form and social context of expression) or some combination of the irrationality of the appeal and the seriousness of the harm that might follow acceptance of these views by some members of the community.<sup>10</sup>

If Mill's concern was simply that true opinions gain general acceptance (so that society is in a better position to act in ways that increase the welfare of its members), then it would not matter how these ideas

were spread. As long as true opinions achieve general currency in the community it should not matter whether this occurs through persuasion or through indoctrination. The only argument against manipulation or indoctrination is that, in contrast to rational persuasion, they are inefficient tools in the spread of truth.

Mill, however, had other concerns. His argument is not simply that freedom of expression is valuable as an instrument to the realization of public knowledge or the public recognition of truth. It involves much more than an empirical claim that truth will emerge from free and open discussion. Beneath the instrumental and empirical form of Mill's argument, and its concern for the achievement of the social good of public knowledge, is a belief that participation in public discourse is necessary to the development of the individual as a rational agent and a commitment to a way of life that involves reasoned judgment and the effort to discover truth through discussion with others (Ten 1980, 124).

For Mill it mattered not only that we, as a community, hold true opinions but also that we, as individual community members, hold these opinions in a particular way. He was concerned that the individual think and act 'as a rational being,' one who understands the grounds for his or her opinions (Mill 1982, 97).<sup>11</sup> He wanted the individual to participate in the truth, in the sense of being able to distinguish truth from falsehood and knowing the grounds for her/his opinion. More generally, Mill valued the 'cultivation of intellect and judgement' and believed that this would occur through the individual's participation in public discussion and the collective effort to discover the truth (Mill 1982, 97).<sup>12</sup>

Seen in this way, Mill's argument cannot really be described as instrumental rather than intrinsic or as concerned with the collective rather than with the individual.<sup>13</sup> Truth is valued as something recognized or realized by human agents, by individual members of the community exercising their reasoned judgment. The life of truth (or knowledge) is in human reflection and judgment. But reflection and judgment are not simply private processes. Truth is achieved through collective deliberation, through the sharing of ideas and information among community members. Public discussion is valuable to the community, which comes to have greater knowledge, and to individuals, who come to know truth as community members, to develop as rational agents capable of recognizing true opinions, and to live in a community where the pursuit of truth/knowledge is valued.

In the United States, the metaphor of 'the marketplace of ideas' is sometimes used to express the kind of truth-based argument made by Mill: that truth will emerge from a free and open exchange of ideas.<sup>14</sup> Sometimes, however, this metaphor is meant to express an argument that is more sceptical about truth claims. Justice Holmes argued that 'the ultimate good desired is better reached by the free trade in ideas ... that the best test of truth is the power of the thought to get itself accepted in the competition of the market' (*Abrams* 1919, 630). In Holmes's account 'truth' may be simply that which emerges from the marketplace of ideas, the outcome of unrestricted discussion among members of the community.

This sceptical form of argument has been criticized on several grounds. If we are deeply sceptical about the possibility of truth or knowledge, why should we attach the label of truth, indeed why should we attach any value, to whatever conclusions may emerge from free and open discussion? If the product ('truth') has value, this value must be based on the process of its production. Freedom of expression is valuable not because it produces truth but because it is the right or fair way to decide social questions or to achieve public consensus. This is very different from the conventional truth-based argument, in which the value of free expression depends on its production of truth, independently or objectively determined. In its sceptical form the marketplace of ideas argument resembles the democratic account of freedom of expression, with its focus on the process of deliberation and consensus building.

For at least two reasons the idea of democratic deliberation has advantages over the marketplace of ideas metaphor. First, the 'marketplace' image (and its laissez-faire connotations) discourages consideration of the appropriate conditions for achieving social consensus. Most importantly, it does not address the question of the background distribution of wealth and communicative power. The distribution of communicative power should be a central issue in an account concerned with the process of community consensus building. We do not enter the public market as equals: greater voice is given to those with greater economic power. The marketplace metaphor, however, encourages us to think of the existing distribution of communicative power as a fixed background to the free exchange of information and ideas among citizens. It assumes that the public sphere should operate in the same way as the market for goods: controlled by those with resources.

The other difficulty with the metaphor is that the exchange of ideas and information is not analogous to the exchange of goods and services (Shiffrin 1990, 91). Public discourse is not simply about the provision of information and ideas that enable individuals to advance their desires and preferences. Participation in public discourse is vital to the formation of preferences and choices. Human desires, preferences, and purposes are not presocial, formed independently of debate and discussion, but are instead given form in public discourse.

### 3. Democracy

The argument that freedom of expression is necessary to the operation of democratic government is appealing for a number of reasons. First, it accounts for the central role that political expression seems to play in our understanding of the scope of freedom of expression. Second, it offers a way to justify the constitutional entrenchment of freedom of expression as a limitation on the actions of a democratically elected government. If we accept that freedom of expression is a basic condition of democracy, then the tension between judicial review and democracy seems to dissolve. According to this view, freedom of expression is a necessary constraint on the majority's will and is appropriately enforced by a judiciary insulated from political pressure.

The democratic argument is an American creation, intended to give content and legitimacy to the constitutionally entrenched right to free speech. Its most important proponent, Alexander Meiklejohn, argued that '[t]he principle of freedom of speech springs from the necessities of the program of self-government' (Meiklejohn 1965, 27).<sup>15</sup> This principle is not 'a Law of Nature or of Reason in the abstract'; it is instead 'a deduction from the basic American agreement that public issues shall be decided by universal suffrage' (Meiklejohn 1965, 27).<sup>16</sup> The adoption of a democratic form of government carries with it an obligation to protect freedom of expression. The exercise of self-government requires the free and open flow of ideas and information concerning public issues. If men and women are prevented from hearing 'information or opinion or doubt or disbelief or criticism' relevant to a public issue under consideration, their efforts to advance the common good will be ill-considered and ill-balanced: '[T]he thinking process of the community' will be distorted (Meiklejohn 1965, 27) and the government's democratic authority will be lost.

In Meiklejohn's account, the purpose of the First Amendment is to ensure the 'voting of wise decisions' and this means that voters must be made 'as wise as possible' (Meiklejohn 1965, 26). The responsibility for deciding public issues lies with the citizens, who must, therefore, be given the opportunity to consider these issues. The focus of Meiklejohn's account is thus on 'the minds of the hearers' rather than 'the words of the speaker.' What matters 'is not that everyone shall speak, but that everything worth saying shall be said' (Meiklejohn 1965, 26). As well, in this account, the First Amendment protects only speech that bears, 'directly or indirectly,' upon issues with which voters have to deal. Speech that does not contribute to the consideration of public issues is not protected. 'Private speech' (and 'private interest in speech') has no claim to First Amendment protection (Meiklejohn 1965, 79). However, the protection of 'public' or political speech 'admits of no exceptions' (Meiklejohn 1965, 20).<sup>17</sup> Within its proper scope the freedom is absolute.

For Meiklejohn, the principle of 'self-government' provides a generally accepted and constitutionally recognized premise from which the protection of 'political' discussion follows. Yet what self-government involves or requires is the subject of considerable debate. Certainly the category of speech necessary to the operation of representative government is anything but clear and uncontroversial.

While political expression lies at the core of our understanding of freedom of expression, other forms of expression – notably artistic, scientific, and even intimate expression – also figure in our intuitions about the freedom's scope. It may be that political expression occupies this central role not because it is somehow more valuable than other kinds of expression, but simply because it has been the most vulnerable to state censorship. Many accounts of the value and constitutional protection of freedom of expression focus on the partiality of the government's decision to censor political expression alleged to be untruthful or harmful.<sup>18</sup> These accounts recognize that governments may not judge well the value or harm of political expression and may sometimes be tempted to suppress criticism of their policies. Regardless of whether political expression is more valuable than other forms of expression, there are particular reasons for ensuring independent (judicial) scrutiny of legislative decisions to censor it.

Most advocates of the democratic account of freedom of expression accept that intimate and artistic expression deserve some protection and have sought to fit these other forms of expression into the demo-

cratic account. One approach has been simply to supplement the account with a recognition that freedom of expression contributes to other values, such as truth and self-realization. Cass Sunstein, for example, argues that while political speech lies at the core of freedom of expression, which is principally concerned with democratic deliberation, other forms of expression, such as works of art, lie at its margins, protected because they contribute to values such as individual autonomy (Sunstein 1993, 123). For Sunstein, the centrality of democratic values and the consequent focus on political expression is a matter of constitutional interpretation rather than moral or rights theory. It stems from the structure, history, and text of the First Amendment, which establishes the right to free speech as a constitutional limit on state action.

Meiklejohn adopts a different strategy for extending protection to speech that is not directly concerned with political issues. In his original statement of the democratic account, Meiklejohn had argued that the First Amendment only protected speech that related directly or indirectly to issues that voters had to decide, to matters of public interest. Many criticized his account for failing to protect works of literature, science, and philosophy. In his later writings, however, Meiklejohn argues that such criticism was unfair and that his democratic account of the First Amendment extended protection to these different forms of expression because they contributed to the wisdom and sensitivity of voters. According to Meiklejohn, '[s]elf-government can exist only insofar as the voters acquire the intelligence, integrity, sensitivity and generous devotion to the general welfare that, in theory, casting a ballot is assumed to express' (Meiklejohn 1975, 11). Voters derive this 'knowledge ... [and] sensitivity to human values' from many forms of expression, including philosophy and the sciences as well as literature and the arts (Meiklejohn 1975, 12).<sup>19</sup>

The most obvious problem with Meiklejohn's broad understanding of the category of political speech (speech that contributes to democratic deliberation) is that his already difficult claim that the freedom is absolute in its protection of political expression now seems stretched beyond breaking point. If freedom of speech is this broad, it must often come into conflict with other important interests and must sometimes give way to them. Meiklejohn avoids this conclusion and maintains the claim of absolute protection by denying the label of political speech to any communication that is deceptive, manipulative, or personally offensive, even though its content may be political.<sup>20</sup> While we may be prepared to accept Meiklejohn's claim that these forms of speech do not contribute to political deliberation, and in particular to the listener's

ability to make wise political judgments, there is no easily defined or clearly bounded category of manipulative, deceptive, disruptive, or offensive speech. The determination that speech is manipulative or disruptive and so falls outside the scope of the First Amendment involves a difficult contextual assessment of factors that contribute to, or detract from, the audience's ability to exercise independent judgment. Furthermore, while deliberative democracy may require some restriction of disruptive or offensive expression, the exclusion of these forms of expression may also be seen as limiting the individual's opportunity to contribute to political discourse and to hear strongly held views.<sup>21</sup> Meiklejohn's category of 'political speech' may be protected absolutely and not balanced against competing interests. However, something very like balancing may enter at the stage of defining the scope of the protected category.

Meiklejohn's broad view of the scope of political speech highlights the difficulty that democratic theorists have in keeping the focus of their account on the operation of democratic government. First, if the concern of democratic theorists is with self-government, and with the equal right of citizens to participate in the decisions that affect their lives and the life of their community, this concern could easily extend to other sites of social interaction and power, such as the workplace, the school, or the marketplace, which are of central importance in the life of the individual.<sup>22</sup> While the workplace, for example, may not be organized on the same principles as the governing process (i.e., on the basis of free and equal participation by members), it should, perhaps, be more open, with employees having the right to discuss working conditions, product quality, or management organization.<sup>23</sup> The workplace is an 'important site for the forging of personal bonds' between individuals from diverse backgrounds and 'it affords a space in which individuals cultivate some of the values, habits and traits that carry over to their role as citizens' (Estlund 1997, 727). The focus in the democratic account of freedom of expression on political speech and the workings of representative government stems not so much from the logic of self-government as from the constitutional status of the right and concerns about the legitimacy of judicial review. A constraint on the power of democratically elected institutions of government may seem tolerable only if it can be viewed as a limited but necessary condition of the exercise of legitimate authority by these institutions.

Second, the democratic account's focus sometimes seems to shift from the workings of representative government to the development of wise and public-spirited citizens. While formally concerned with the

governing process, the democratic account of freedom of expression sometimes appears to have a deeper concern with the realization of the individual as a 'rational and value-sensitive' agent. Meiklejohn argued that the wisdom and value sensitivity of citizens (and the protection of artistic, scientific, philosophical, and intimate expression) are necessary to democracy. Yet his argument could easily be turned around so that democracy is valued because it is necessary to the development and realization of the individual (Schauer 1982, 41). Do we care about individual wisdom simply because it contributes to democracy? Should we not regard the development of the individual as a more fundamental value that is simply dressed in the language of self-government? However, simply shifting the focus from political process to individual judgment misses something important about the relationship between individual and community.

If democracy involved nothing more than the registration and aggregation of the political preferences of individual members of the community, all that would be required for its operation would be regular elections, interim polling, and communication from competing candidates to the electorate concerning policy alternatives. However, the conception of democracy that underlies the democratic account involves much more than this. Democracy, understood as collective self-determination, requires that 'public action be founded upon a public opinion formed through open and interactive processes of rational deliberation' (Post 1995, 312).<sup>24</sup> Freedom of expression is not just an instrument for advancing the goal of democratic or representative government. In a democracy the responsibility of citizens for the governance of their community is actualized in public discussion and deliberation.<sup>25</sup> The members of a self-governing community seek common understandings and work towards shared goals through the exchange of views. Through participation in public discourse, the individual becomes a citizen capable of understanding, and identifying with, the concerns and opinions of others and oriented towards the public interest, in the sense that she is concerned with the common good and not simply with the satisfaction of personal preferences.<sup>26</sup>

If this is what the democratic argument is about then two of its advantages have disappeared: the definition of a narrow, but absolutely protected, category of protected activity and the justification of judicial review in a democracy. It is impossible to limit the scope of freedom of expression to the discussion of contemporary political issues, something that Meiklejohn came to recognize. It is also clear that the rich

and complicated understanding of democracy that underlies this account of the freedom cannot provide a simple or neutral justification for judicial review under the constitution.

#### 4. Autonomy and Self-Realization

There are a variety of arguments for freedom of expression that focus on the interests or well-being of the individual. The most familiar version of this type of argument is that it is a violation of the individual's autonomy, or a failure to show proper respect for the individual, to prevent her from hearing the ideas of others because she might make poor judgments (Scanlon 1977, 162).<sup>27</sup> Human beings are characterized by their ability to reason and judge and should be trusted to assess the messages of others fairly or accurately. A parallel to this 'listener'-focused argument is offered by Ronald Dworkin, who argues that the state fails to show equal concern and respect for the individual 'speaker' when it censors his or her ideas on the grounds that they are wrong or foolish (Dworkin 1985, 386).<sup>28</sup> Other arguments stress the importance of expression to individual self-realization (Weinrib 1990; Baker 1989).<sup>29</sup> The individual realizes his capacities for thought and judgment by expressing his ideas or by listening to and, reflecting upon, the ideas of others.

Sometimes it is argued that expression deserves special protection, beyond that accorded to other human acts, not because it is distinctly valuable but because it is ordinarily a harmless activity (Baker 1989, 56; Haiman 1993, 85).<sup>30</sup> According to this view, the protection of expression follows from our commitment to the harm principle. Individuals should have the liberty to do as they please subject only to the limitation that their actions must not cause harm to others (Mill 1982, 68).<sup>31</sup> While the manner of an individual's expression may sometimes cause harm, as with a loud noise or a disruptive demonstration, the message communicated has only a mental impact and is therefore harmless.

Yet this seems wrong. Individuals express themselves in order to affect attitudes and events in the world. The message, and not just the manner of expression, can sometimes cause harm to others. The message may be hurtful or offensive; it may involve the spread of false ideas; or it may encourage harmful activity by others. Expression 'causes' harm when someone is persuaded by a false idea or persuaded to act in a violent way towards another. It may be true that these harms occur only because the listener consciously accepts the message. But why should

this make a difference? If we think that a commitment to freedom of expression means that these harms must be endured or disregarded, we must explain why it is important that individuals be allowed to make judgments for themselves or why expression is so valuable that it should be protected despite the harm it 'causes.'

Generally speaking, those who advance autonomy-based arguments do not claim that freedom of expression is simply an aspect of a more general principle of liberty of action. They assume that the freedom protects a subset of voluntary action, which corresponds more or less with the activity of communication, and that there are distinctive reasons for protecting this type of action. Yet the language of individual respect or autonomy offers few clues as to why communication should have this special status. Why is it disrespectful to silence a speaker when we think that his or her views are wrong, but not disrespectful to criticize those views? Why is it wrong to prevent a listener from hearing certain views, even when we are afraid that he or she might judge unwisely, but not wrong, not a violation of individual autonomy, to prevent the listener from acting on those views? An account of the value of freedom of expression must involve more than a general claim that the restriction of expression is disrespectful to the individual or invades the individual's autonomy. It must provide some explanation of the positive value of the activity of expression (Moon 1985, 342).<sup>32</sup>

Kent Greenawalt suggests that the special connection between expression and autonomy rests on the fact that communication 'is so closely tied to our thoughts and feelings' (Greenawalt 1989, 28). Because of this tie, 'suppression of communication is a more serious impingement on our personalities than other restraints on liberty' (Greenawalt 1989, 38).<sup>33</sup> Yet are not all voluntary acts expressive of the individual and closely tied to his or her thoughts and feelings? The difference is that expression is closely or personally linked to the individual because it is through expression, through conversation with others, that an individual gives shape to his or her ideas and feelings. Expression is not simply an emotional outlet or a vehicle for relaying an individual's existing ideas to another person. An individual's thoughts and feelings, and more generally her identity, are constituted in her expressive activities.

Autonomy- (or self-realization-) based accounts have difficulty explaining the particular value of expression, because they assume that rights, such as freedom of expression, are aspects of the autonomy that the individual retains when he or she enters the social world and that

should be insulated from the demands of collective welfare. Within an individualist framework it is impossible to account for the particular value of expression – of communication *between* individuals. Self-expression accounts seem to assume that ideas or meanings originate with the individual, who may decide to relay his or her particular ideas to others. However, the value we attach to freedom of expression makes sense only if we recognize that the creation of meaning (the articulation of ideas and feelings) is a social process, something that takes place between individuals and within a community.

If we can lift the concepts of autonomy and self-realization out of the individualist frame, so that they are no longer simply about freedom from external interference or freedom from others, then they may provide some explanation of the value of freedom of expression (Moon 1985, 345–6). If by autonomy we mean a capacity to think, judge, and give direction to one's life and the ability to participate in collective governance, then freedom of expression may have an important role to play in the realization of autonomy. Similarly, if by self-realization we mean the emergence of the individual as a conscious and feeling person, freedom of expression may be important to self-realization. In both cases, however, the value of freedom of expression rests on the social character of human identity, reason, and judgment. Freedom of expression is central to self-realization and autonomy because individual identity, thought, and feeling emerge in the social realm.

### 5. Communication and Agency

Whether the emphasis is on democracy, autonomy, or self-expression, each of the established accounts of the value of freedom of expression rests on a recognition that human autonomy/agency is deeply social in its creation and expression. Each recognizes that human judgment, reason, feeling, and identity are realized in communicative interaction with friends, family, co-workers, and other members of the community (Moon 1991, 94).

Speech, or language use, is a social activity 'through which individuals establish and renew relations with one another' (Thompson 1995, 12). In expressing him/herself to others, a speaker employs a language that is created and shaped in discourse. In an important sense language pre-exists the individual user. It is produced intersubjectively and held by the community of speakers. Significantly, language is not a transparent medium, a simple instrument for conveying an individual's ideas

and feelings. Speaking involves more than the selection of words that correspond to the communicator's ideas. Using language an individual is able to articulate his ideas and feelings. His ideas and feelings are partly constituted by the language of their expression.<sup>34</sup>

We can never fully dominate the language with which we express ourselves, but nor are we fully dominated by language (Taylor 1985, 232).<sup>35</sup> Mikhail Bakhtin observes that while '[t]he words of language belong to nobody ... the use of words in live speech communication is always individual and contextual in nature' (Bakhtin 1986, 88). In expressing him/herself to others, an individual employs a socially created language that belongs to the larger community of language users. Nevertheless, 'we hear those words only in particular individual utterances, we read them in particular individual works' which must be seen as individual and expressive (Bakhtin 1986, 88).<sup>36</sup> Individuals adapt the symbolic forms of language to their needs in particular communicative contexts and in so doing recreate, extend, alter, and reshape the language (C. Taylor 1995, 97).<sup>37</sup> Recognition that language use is active and creative – that it is 'purposive action[] carried out in [a] structured social context[]' (Thompson 1995, 12) – underlies our view of the individual as a conscious agent, who is capable of reflection and judgment and is not simply the product of social structures.<sup>38</sup>

Language enables us to give form to our feelings and ideas and to 'bring them to fuller and clearer consciousness' (Taylor 1985, 257). An individual's ideas only take shape, only properly exist, when expressed in language, when given symbolic form. When we speak we bring to explicit awareness, to consciousness, that which before we had only an implicit sense (Taylor 1985, 256).<sup>39</sup> In this way our capacity for reflection and our knowledge of self and the world emerge in the public articulation/interpretation of experience. As Clifford Geertz observes, we become individuals, agents capable of particular and intentional action, 'under the guidance of cultural patterns, historically created systems of meaning in terms of which we give form, order, point and direction to our lives' (Geertz 1973, 76).<sup>40</sup>

In giving symbolic form to her ideas and feelings an individual manifests these not simply to him/herself but to others as well. To express something is to enter into dialogue – into a communicative relationship – with other members of the community. When an individual expresses something, not only does she formulate it and put it 'in articulate focus,' she also places it in a public space and joins with others in a common act of focusing on a particular matter (Taylor

1985, 260). The individual reflects upon her ideas and feelings by giving them symbolic form and putting them before herself and others as part of an ongoing discourse. She understands her articulated ideas and feelings in light of the reactions and responses of others.

When an individual speaks, he speaks to someone, whether to a specific person or to a general audience. What he says and how he says it will depend on whom he is addressing and why he is addressing them, on whether, for example, he is engaging in political debate or intimate expression. The speaker seeks from his audience what Bakhtin calls 'an active responsive understanding' which may include agreement, sympathy, elaboration, preparation for action, and disagreement (Bakhtin 1986, 94). Not only is the speaker's expression oriented to an audience and intended to elicit a response, his expression is itself a response, 'a link in the chain of communication' (Bakhtin 1986, 91). The speaker responds to prior acts of expression, drawing on conventional forms of expression and reacting to previously stated views. Every statement an individual makes 'is filled with echoes and reverberations' of the statements of others, which he or she reworks and re-accentuates (Bakhtin 1986, 89).

Effective communication can occur only because the speaker and listener 'share certain conventions for expressing different meanings' (Bruner 1990, 63). As George Steiner notes, 'If a substantial part of all utterances were not public or, more precisely, could not be treated as if they were, chaos and autism would follow' (Steiner 1975, 205). At the same time, however, a particular utterance will be interpreted in light of the listener's distinctive experience – in light of assumptions and expectations that are not necessarily shared by others and that stem from a particular life history.<sup>41</sup>

The creation of meaning is a shared process, something that takes place between speaker and listener.<sup>42</sup> A speaker does not simply convey a meaning that is passively received by an audience. Understanding is an active, creative process in which listeners take hold of, and work over, the symbolic material they receive (Thompson 1995, 39), locating and evaluating this material within their own knowledge or memory (Thompson 1995, 42).<sup>43</sup> Listeners use these symbolic forms 'as a vehicle for reflection and self-reflection, as a basis for thinking about themselves, about others and about the world to which they belong' (Thompson 1995, 42).<sup>44</sup> The views of the listener are reshaped in the process of understanding and reacting to the speaker's words. As Bakhtin observes, the individual's thought 'is born and shaped in the process of



articulation and the process of interaction and struggle with others' thought' (Bakhtin 1986, 92).

This intersubjective understanding of agency and identity underlies the claims that freedom of expression contributes to the recognition of truth, the advancement of democracy, and the realization of self. Freedom of expression is valuable because in communicating with others an individual gives shape to his or her ideas and aspirations, becomes capable of reflection and evaluation, and gains greater understanding of her/himself and the world. It is through communicative interaction that an individual develops and emerges as an autonomous agent in the positive sense of being able to consciously direct his or her life and to participate in the direction of his or her community. Through communication an individual creates different kinds of relationships with others and participates in different collective activities, such as self-government and the pursuit of knowledge.

#### 6. The Established Dichotomies: Intrinsic/Instrumental and Listener/Speaker

The established accounts of the value of freedom of expression are described as either instrumental or intrinsic<sup>45</sup> (or as result-oriented or process-oriented (Shiner 1995, 192), or as concerned with the realization of a social goal or with protection of an individual right).<sup>46</sup> Some accounts see freedom of expression as valuable in itself. The freedom is intrinsically valuable because it permits free and rational beings to express their ideas and feelings. Or it must be protected out of respect for the freedom and rationality of individuals. Other accounts see freedom of expression as important because it contributes to a valued state of affairs: freedom of expression is instrumental to the realization of social goods such as public knowledge or democratic government.

Intrinsic accounts assume that freedom of expression, like other rights, is an aspect of the individual's fundamental liberty or autonomy that should be insulated from the demands of collective welfare. Yet any account that regards freedom of expression as a liberty (as a right of the individual to be free from external interference) seems unable to explain the other-regarding or community-oriented character of the protected activity of expression – of individuals speaking and listening to others.

Instrumental accounts of freedom of expression recognize that the freedom protects an other-regarding or social activity and so must be

concerned with something more than respect for individual autonomy, something more than individual 'venting' or the exercise of individual reason. They assume that the freedom must be concerned with social goals that are in some way separate from, or beyond, the individual and his or her communicative actions, goals such as truth and democracy. Yet if freedom of expression is an instrumental right, its fundamental character seems less obvious. Its value is contingent on its contribution to the goals of truth and democracy. And there is no shortage of arguments that freedom of expression does not (always) advance these goals.<sup>47</sup>

The value (and potential harm) of expression will remain unclear as long as discussion about freedom of expression is locked into the intrinsic/instrumental dichotomy, in which the freedom is concerned with either the good of the community or the right of the individual. The value of freedom of expression rests on the social nature of individuals and the constitutive character of public discourse. This understanding of the freedom, however, has been inhibited by the individualism that dominates contemporary thinking about rights – its assumptions about the presocial individual and the instrumental value of community life. Once we recognize that individual agency and identity emerge in the social relationship of communication, the traditional split between intrinsic and instrumental accounts (or social and individual accounts) of the value of freedom of expression dissolves (Moon 1995, 470). Expression connects the individual (as speaker or listener) with others and in so doing contributes to her capacity for understanding and judgment, to her engagement in community life, and to her participation in a shared culture and collective governance.

The arguments described as instrumental focus on the contribution of speech to the collective goals of truth and democracy. However, we value truth not as an abstract social achievement but rather as something that is consciously realized by members of the community, individually and collectively, in the process of public discussion. Similarly, freedom of expression is not simply a tool or instrument that contributes to democratic government. We value freedom of expression not simply because it provides individuals with useful political information but more fundamentally because it is the way in which citizens participate in collective self-governance. There is no way to separate the goal from the process or the individual good from the public good.

Attaching the label 'intrinsic' to autonomy or self-realization accounts of the freedom of expression seems also to misdescribe the value at stake. Communication is a joint or public process, in which individual

participants realize their human capacities and their individual identities. The individual does not simply gain satisfaction from expressing his pre-existing views on things: an individual's views, and more broadly his judgment and identity, take shape in the communicative process.

Freedom of expression theories are also categorized as either 'listener' or 'speaker' centred (Schauer 1982, 104). Listener-centred theories emphasize the right of the listener to hear and judge expression for herself. The listener's right is protected as a matter of respect for her autonomy as a rational agent or for its contribution to social goals such as the development of truth or the advancement of democratic government. Speaker-centred theories emphasize the value of self-expression. The individual's freedom to express himself is a part of his basic human autonomy or is critical to his ability to direct the development of his own personality. Each of these accounts recognizes the connection between speaking and listening, yet each values one or the other of these activities or, if it values them both, it values them as distinct or independent interests. Freedom of expression is valuable because it advances an important individual interest of the listener (or a more general social interest) and/or an important individual interest of the speaker.

The focus of these accounts on the different interests of the speaker and the listener misses the central dynamic of the freedom, the communicative relationship, in which the interests of speaker and listener are tied (Moon 1985, 352; Moon 1995, 426).<sup>48</sup> The activities of speaking and listening are part of a process and a relationship. This relationship is valuable because individual agency emerges and flourishes in the joint activity of creating meaning.

### 7. The Scope of Freedom of Expression

In each of the established accounts of the value of freedom of expression, the freedom is seen as protecting acts of communication, in which an individual 'speaker' conveys a message to a 'listener' (Irwin Toy 1989, 968; Schauer 1982, 98). This is not a conclusion of theory, but rather an assumption that drives the theoretical arguments. The object of most freedom of expression theory is to explain the special protection of communication and to give a clearer or more precise definition to the scope of this protected activity.

Even though the established accounts define expression in similar terms, each tends to define the core and the margins of the freedom

differently. The emphasis on a particular value, such as truth or democracy, or on a particular dimension of the communicative process, will affect the definition of the scope of freedom of expression and the 'balancing' of expression interests against competing values or interests.

Truth-based (or knowledge-based) accounts of the freedom tend to focus on factual claims, which appeal to the audience's autonomous reason and can be described as either true or false. In an account that emphasizes the discovery of truth, the 'word,' and more particularly the printed word, is the paradigm of expression.<sup>49</sup> Words enable individuals to make statements, the truth of which can be debated and judged. They effectively convey ideas and information and support reflection and reasoned judgment on the part of both the 'speaker' and the 'listener.' The printed word, in particular, has the power to reach large audiences, to articulate complex ideas, and to present arguments in a clear, rational, and dispassionate way.<sup>50</sup> While truth-based accounts of freedom of expression sometimes extend protection to more emotive forms of expression, or to art forms such as music, dance, or painting, the inclusion of these forms requires an enlargement of the idea of truth beyond the factual knowledge that individuals and communities use to advance their goals.

The obvious focus of democracy-based accounts of freedom of expression is on communication about the political issues of the day, even if the democratic account is sometimes extended to include protection of scientific and philosophic works. Like truth-based accounts, democracy-based accounts tend to emphasize propositional speech. If the individual is to participate in collective self-government, she must be free to express her views on public issues and to hear the views of others. It is, however, sometimes argued that emotive expression that relates to political issues may be just as important to democratic decision making as calm and rational discussion of the issues. Emotive expression is important because it lets fellow citizens know the depth of the speaker's feelings about a particular issue. I suspect, however, that the increasing emphasis on emotive expression reflects a partial shift in our understanding of democratic participation from informed deliberation and active contribution to public discussion to the manifestation or registration of feelings in polls and elections.

Accounts of the value of freedom of speech that emphasize individual self-realization or autonomy attach significance to both rational and emotive forms (or more correctly dimensions) of expression.<sup>51</sup> Communication is not simply the conveyance of information and ideas, it is

also a way of expressing/articulating one's deeply held feelings. As the U.S. Supreme Court recognized in *Cohen* 1971, all acts of expression have both a propositional and an expressive dimension – both rational and emotive force:

[M]uch linguistic expression serves a dual communicative function: it conveys not only ideas capable of relatively precise, detached explication, but otherwise inexpressible emotions as well. In fact, words are often chosen as much for their emotive as their cognitive force. We cannot sanction the view that the Constitution while solicitous of the cognitive content of individual speech has little or no regard for that emotive function which, practically speaking, may often be the more important element of the overall message sought to be communicated. (*Cohen* 1971, 26)

When self-realization is the guiding value, the paradigm of expression is the spoken word or works of art or other symbolic acts either public or intimate.<sup>52</sup> While the printed word permits the careful articulation and consideration of ideas, oral speech *seems* to involve a more 'direct' and 'immediate' expression of the individual's ideas and feelings. The spoken word is performance-oriented, 'embedded in the human life world, connected with action and struggle' (Ong 1982, 101). Oral communication is more likely to be spontaneous, impulsive, and emotional because it is more closely connected with the immediate context.

In each of the established accounts of the value of freedom of expression, regardless of its particular emphasis, expression is assumed to involve the conveyance of a message to an audience – an engagement of speaker and listener.<sup>53</sup> An act of expression or communication is characterized by the agent's intention to articulate and convey to an audience an idea or feeling. When communicating, the speaker wants the audience to recognize that his or her act is meaningful – that the act is intended to convey to them a message (Moon 1985, 351; Green 1994, 138).<sup>54</sup> The communicative act will be successful only if the audience recognizes the speaker's intention and is able to understand the meaning of the act. As discussed earlier, this characterization of expression or communication as an intentional act does not mean that the act's meaning is simply a matter of the agent's intentions.<sup>55</sup>

An individual may communicate using established symbolic forms, such as spoken or written language, which the audience recognizes as meaningful and intended to convey a message. Or he may use other

symbolic forms that have a generally recognized meaning, such as flag burning or certain gestures.<sup>56</sup> The individual may also use less conventionalized forms of expression, such as parking a car, an example used by the Supreme Court of Canada in *Irwin Toy* (1989). While the communicative function of parking may not be very obvious to others, as long as the individual intends by his or her act to convey a message to an audience then that act should be regarded as expression. According to the Supreme Court of Canada, expression can take 'an infinite variety of forms,' including the written and spoken word, the arts and physical gestures (*Irwin Toy* 1989, 607).

There is a way in which everything we do can be seen as expressive of the self, and as telling others something about us. However, the question in every case is whether the actor intends to convey a message to others, and more specifically, whether she intends that others view her act as meaningful.<sup>57</sup> Nevertheless, there is no bright line separating acts intended by the actor to convey a message from other voluntary human acts.

On this view, the creation of a work of art is an act of expression, perhaps even the paradigm case of expression. Even if art is, as Frederick Schauer says, 'a mode of self-expression, or if there is taken to be a necessary gap between what is intended and what is perceived by the observer' (Schauer 1982, 110),<sup>58</sup> art involves the use of conventional forms and is intended by its creator to be viewed as meaningful. Art gives form to human feelings and concerns by making them visible (or audible) and brings them into the public realm for shared contemplation. According to Richard Wollheim, '[t]he value of art ... does not exist exclusively, or even primarily for the artist. It is shared equally between the artist and his [or her] audience' (Wollheim 1980, 86).<sup>59</sup> A work of art materializes 'a way of experiencing' and brings 'a particular cast of mind out into the world of objects, where men [and women] can look at it' (Geertz 1983, 99).<sup>60</sup> It is meant to be viewed as a human creation and as 'the object of an ever-increasing or deepening attention' (Wollheim 1980, 123).

While it is true that we experience art and do not simply interpret it, art is not just human feeling projected onto objects in the world; artistic expression works through signs and depends on a practice or institution. To view something as a work of art is to see it as human expression formulated in and shaped by a particular medium (Gombrich 1963, 11; Wollheim 1980, 124).<sup>61</sup> In calling something a work of art we underline its artificial character. Indeed, according to some contemporary views,

the significance of art is that it leads us to recognize the artificial character of communicative codes and the conventional nature of perception and understanding.

If freedom of expression protects communicative relationships, and the joint activity of creating/interpreting meaning, there must be both a 'speaker' and an audience to whom the speaker wishes to communicate a message. Even acts of 'speaking to oneself' bear some resemblance to conventional dialogue. (While such acts may or may not be seen as falling within the scope of freedom of expression they are unlikely to be the subject of state restriction.)<sup>62</sup> A speaker who speaks only to her/himself, when writing a diary for example, employs a language. Although the diarist may not intend to communicate with others, he uses a socially created language to give shape and clarity to his thoughts. The diarist may even be seen as speaking to a future self, recording his ideas and feelings so that they are available to be read and considered at a later time.

It also follows from this view of freedom of expression that the 'speaker' must intend to appeal to his or her audience in a conscious or non-manipulative way.<sup>63</sup> Expression may be confrontational, uncivil, and even insulting and still engage its audience.<sup>64</sup> However, the exclusion by the American courts of 'fighting words' from the protection of the First Amendment is a recognition that at a certain point expression is so uncivil or threatening that it cannot be seen as communicative engagement. More obviously, the relationship of expression is undermined by manipulative expression, in which a speaker seeks to affect audience thought and action while by-passing conscious recognition. Even those accounts of freedom of expression that downplay the relational character of expression find a way to exclude or marginalize manipulative or deceptive expression. They classify (without explanation) deceptive or manipulative expression either as 'action' or 'conduct,' which is denied constitutional recognition, or as 'low value' expression, which is given less weight when balanced against competing interests.<sup>65</sup>

### 8. Value and Harm

Individualist approaches to freedom of expression have difficulty accounting for both the value and harm of expression. If expression is simply a transparent process in which the individual conveys pre-existing (prelinguistic) ideas and feelings to an audience, then it is unclear why it is different from, and more important than, other human ac-

tions. Why should we view freedom of expression as a distinct right rather than simply an aspect of a more general liberty of action?

Expression is valuable because individual identity/agency emerge in communicative interaction; because our ideas and feelings and our understanding of self and the world develop through communication with others.

At the same time, this dependence on expression means that words can sometimes be hurtful or manipulative (Moon 1995, 445-6). While expression sometimes seems to increase knowledge and stimulate reflection, even about our most basic assumptions, at other times it seems to discourage critical thinking, to leave us in 'the deadening grip of disengaged reason' (Taylor 1989a, 377), to deceive and to manipulate. As described in the next chapter, the impact of a particular act of expression will depend not only on its design or form but also on its social and material circumstances.

# The Constitutional Protection of Freedom of Expression

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