Freedom to Offend

Bruce Boyden
Book Notes

Freedom to Offend


I

In 1881, the citizens of Tombstone, Arizona, faced a discomfiting problem. Cowboys from the outlying areas of the city roamed the streets, cursing and yelling, shooting out lamps, and generally annoying the respectable businessmen of the community, who were not accustomed to tolerating the boisterous antics of social outcasts. The businessmen discovered a simple solution: They prevailed upon Virgil Earp and his brothers to kill three of the cowboys in a gunfight, popularly known as the “Gunfight at the O.K. Corral.”

Excesses like those that occurred in Tombstone have largely been brought to an end. No longer can local elites wield untrammeled power in order to suppress behavior they deem “offensive.” The Bill of Rights now applies to the lives of everyday people in a way that was unthinkable in 1881. Yet with this advance has come a cost. As a result of the expansion of the protections afforded by the First Amendment, a particular sort of offensive behavior, offensive speech, now lies almost completely beyond the bounds of permissible regulation.

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* University Professor and Professor of Law, Columbia University.

1. This is a simplified version of the story. For more information, see _Paula Mitchell Marks, and Die in the West: The Story of the O.K. Corral Gunfight_ (Touchstone 1990) (1989). For evidence that civility in the nineteenth century was enforced elsewhere as it was in Tombstone, see generally _Richard Maxwell Brown, Strain of Violence: Historical Studies of American Violence and Vigilantism_ (1975); David J. Bodenhamer, _Law and Disorder on the Early Frontier: Marion County, Indiana, 1823–1850_, 10 W. Hist. Q. 323 (1979).


3. Chief Justice Warren Burger believed that the expansion of the First Amendment to protect offensive speech would lead to violence. See _Rosenfeld v. New Jersey_, 408 U.S. 901, 902-03 (1972) (Burger, C.J., dissenting) (“It is barely a century since men in parts of this country carried guns constantly
In an ironic twist of fate, some of the intellectual descendants of those who argued most strenuously for the expansion of civil liberties now believe that public discourse is in a state of devastating anarchy. In essence, these critics wish to reclaim for the state a little of the authority Tombstone's elites used against the marginal members of their society. Whereas Tombstone's elites attempted to regulate offensiveness on behalf of their own interests, however, left-liberal critics wish to regulate offensive speech that harms "outsider" groups such as women and minorities. Are such regulations justifiable in a liberal democracy? If so, can the particular liberal democracy we inhabit, the United States, restrict offensive speech without ultimately causing more harm than good?

In his new book, Fighting Words, Kent Greenawalt explores the first of these issues, but unfortunately leaves the second question unanswered. Still, Fighting Words has much to recommend it: Greenawalt has provided a useful, well-written, and concise synthesis of the current law and scholarship in the United States and Canada on the question of the proper limits of protected speech in a democratic society. Perhaps because of its origin as four separate lectures, however, the book lacks a clear and sustained argument that thoroughly addresses the concerns of the skeptical reader. This flaw lessens the value experts might derive from Greenawalt's book.

II

The outer bounds of protected speech are defined, Greenawalt notes, by "the kinds of speech mainly engaged in by extreme dissenters and outsiders" (p. 11)—that is, the kinds of speech most likely to offend others. Focusing on four types of offensive expression—flag burning, hate speech, workplace
harassment, and obscenity—Greenawalt asks whether democracy requires that such expression be placed inside or outside the bounds of protected speech (p. 47). Put another way, should the Earps be called in to protect the community from such speech? Or should the cowboys of free expression be allowed to roam the community, disrupting the social order?

The answers to these questions depend on how much one privileges the protection of individual liberties over the protection of community sensibilities. In the United States, Greenawalt argues, courts have unjustifiably undervalued the harm to communities that deeply offensive speech can cause (pp. 53, 58) and thus have been overprotective of individual freedoms. In cases striking down laws punishing flag burning, hate speech, and pornography, the Supreme Court has developed broad conceptual categories that ignore the question of whether particular acts or remarks, in certain social contexts, cause great harm to particular groups (pp. 123, 137–49). The Court has thus interpreted the First Amendment in such a way as to leave itself unable to perform more nuanced evaluations (p. 123).

The Supreme Court’s tests instead emphasize only the right of individuals to engage in expression free from governmental interference. The Court first asks whether a restriction on speech primarily targets expression. If not, then all the government must show to justify its restriction is an important or “substantial” interest, a requirement it has never failed to meet (p. 32). Conversely, a regulation targeted directly at speech must undergo strict scrutiny, a process that is almost always fatal to the regulation. An exception to this rule exists for restrictions on low-value speech, which are subject to less scrutiny. The Court has held, however, that a statute

11. One exception to this trend is Title VII, 42 U.S.C. § 2000e-2 (1988 & Supp. 1993), which the Court has indicated constitutionally prevents racist or sexist speech in the workplace. See R.A.V., 505 U.S. at 389. But see id. at 409 (White, J., concurring) (claiming that logic of majority opinion would invalidate Title VII).
14. The strength of the scrutiny depends on the class of low-value speech at issue. Obscenity, for example, is presumed to be completely outside the protection of the First Amendment, see Miller v. California, 413 U.S. 15, 23–24 (1973), while restrictions on commercial speech must constitute a
restricting even low-value speech must undergo strict scrutiny if it makes distinctions based on content.\textsuperscript{15} Nevertheless, the Court has failed to carve out intermediate categories for restrictions targeted at speech that causes harm to members of particular communities (p. 39). Thus, the Supreme Court does very little in the way of balancing group harms against the benefits of unrestricted speech.

In contrast to the U.S. Supreme Court's categorical imperatives against direct regulation of speech and content discrimination, Canada's governmental institutions have paid less attention to conceptual categories and more attention to weighing, on a case-by-case basis, the harms to individual freedoms against the benefits to communities. Like the First Amendment, Section 2 of the Canadian Charter of Rights and Freedoms protects freedom of expression,\textsuperscript{16} with expression defined broadly as any "activity [that] conveys or attempts to convey a meaning."\textsuperscript{17} Section 1 of the Charter, however, subjects freedom of expression "to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."\textsuperscript{18} The Canadian Supreme Court has used this escape hatch to uphold statutes forbidding hate speech in public\textsuperscript{19} and punishing the sale of obscene materials.\textsuperscript{20} In these cases, the Supreme Court held that such speech can cause "emotional damage of grave psychological and social consequence to members of the target group" (p. 66) and undermine the target group's equality.\textsuperscript{21} Although the U.S. Supreme Court would probably strike down such statutes as unconstitutional abridgements of free speech (pp. 123, 150), the Canadian example demonstrates that such restrictions can exist in a thriving liberal democracy (p. 11).

\textsuperscript{15} "reasonable fit" to the government's interest, see City of Cincinnati v. Discovery Network, Inc., 113 S. Ct. 1505, 1510 (1993).
\textsuperscript{16} CAN. CONST. (Constitution Act, 1982) pt. I (Canadian Charter of Rights and Freedoms), § 2 [hereinafter Canadian Charter].
\textsuperscript{17} Regina v. Keegstra, [1990] 3 S.C.R. 697, 729 (Can.) (4-3 decision) (quoting Irwin Toy Ltd. v. Quebec (Attorney General), [1989] 1 S.C.R. 927, 969 (Can.)). Greenawalt discusses these free speech provisions of the Canadian Charter (p. 17).
\textsuperscript{18} Canadian Charter, supra note 16, § 1. Furthermore, section 27 of the Charter provides: "This Charter shall be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians." Id. § 27.
\textsuperscript{20} See, e.g., Regina v. Butler, [1992] 1 S.C.R. 452, 509-10 (Can.) (unanimous decision). While Canada has not experienced a flag-burning controversy, it has endured a dispute over a cherished cultural symbol: the traditional hat worn by the Mounties. See John F. Burns, Will They Always Get Their Man, Hats or No?, N.Y. TIMES, Oct. 14, 1989, at A4 (discussing controversy over decision to allow Sikh Mounties to wear turbans); Canada: Court Wraps Up Turban Case for Sikh Mounties, Reuters News Service, July 8, 1994, available in LEXIS, Canada Library, Cannws File (discussing decision in suit brought by retired Mounties against Sikh Mounties allowing Sikh Mounties to wear turbans on duty).
\textsuperscript{21} See Keegstra, [1990] 3 S.C.R. at 745-49, 755-56. Greenawalt discusses this issue in his analysis of the Butler decision (p. 114), but he shies away from the claim that the difference in language between the Charter and the First Amendment has compelled the different results (p. 13 n.6).
Greenawalt concludes that Canada has come much closer to achieving the appropriate balance between communal and individual rights than has the United States (pp. 151–52). It is difficult, however, to determine exactly how Greenawalt would have the U.S. Supreme Court conduct a Canadian-style weighing analysis. He is somewhat vague when it comes to describing the appropriate balance to be struck in free speech cases: “[A]n understanding,” he writes, “that human character is social and that communities are vitally significant should definitely not lead to the abandonment of distinctions between public and private in determining rights” (p. 126). But, Greenawalt maintains, neither should the values important to particular communities—the preservation of a national symbol, the ability to work without being harassed, the freedom to partake equally in public discourse without fear of noxious insults, the ability to live in an environment free of literature that degrades one’s class of human beings—be downplayed in order to safeguard individual rights (pp. 143–49).

This argument, however, is unconvincing precisely because of its vagueness. Greenawalt never thoroughly examines the question of whether the United States could adopt the Canadian-style approach, even if it wanted to. Investing judges with the authority to make contextual, case-by-case decisions on the legitimacy of restrictions on speech may be much more compatible with Canadian political culture than with America’s. Greenawalt himself (p. 123) and others have noted that, once the Court begins to weigh the benefits of speech against other possible competing goods, a host of values that are anathema to left-liberal critics may enter into the weighing process. Greenawalt’s recommendation, if adopted in the United States, might lead to active judicial bias against disfavored groups in place of mere blindness to their hurts.

To some extent, these difficulties are inherent in the entire project of regulating speech. Generalized psychological harms to a community, national or particular, are extremely difficult to evaluate objectively. Regulation of offensive speech depends on a consensus that certain utterances or acts are “expressions that are [not] used in civil discourse” (p. 47). This consensus has largely disappeared as the old local elites have faded and political communities have become less homogeneous. Perhaps a national consensus on the norms

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23. Kenneth Karst has argued that the enforcement of norms of “civic debate” tends to silence the speech of subordinated groups. See Karst, supra note 4, at 126–27. Karst notes that such norms work only
of civility will reemerge. If not, however, then the entire project at issue in Greenawalt's book, the regulation of certain types of uncivil speech that cause great psychological harm, may be predicated on a hierarchical view of society that is now obsolete.

Among the few sustained arguments that Greenawalt does offer in Fighting Words is his definition of proscribable speech. Even this argument has difficulties, however. Throughout the book, Greenawalt attempts to distinguish insults and harassment from protected speech by characterizing the former as “situation-altering” expressions to which the reasons for having free speech, whatever they are, “hardly apply” (p. 6). Situation-altering expressions, according to Greenawalt, are those that commit the listener or the speaker, or both, to action, rather than “assert[]... facts or values or express[]... feeling” (p. 6). Thus, a threat or a bribe, or indeed any communication intended primarily to induce action rather than express ideas, is a “situation-altering expression” according to Greenawalt’s scheme. Unfortunately, this scheme seems to be the functional equivalent of the old, discredited distinction between speech and action. Many protected expressions (for example, “Let’s go have lunch today”) are attempts to induce action, or, as Greenawalt puts it, to change our social environments (p. 6). Although the line must be drawn, Greenawalt has not succeeded in doing so.

While providing a helpful overview of the problem of offensive speech, Greenawalt does not ultimately resolve the questions he sets out to answer. It is still not clear at the end of Fighting Words that the benefits of regulation of offensive speech would outweigh the harms in the United States. What is clear is that the cowboys of free expression are running amok. But in America today, as in Tombstone in 1881, the regulators may do more damage than good, destabilizing instead of stabilizing the community. It is not yet evident that regulation of offensive speech under our present system is something we, as a nation, really want.

—Bruce Boyden

in “politis] in which virtually all major values are shared and disagreements mainly concern ways and means.” Id. at 97.

24. See ALEXANDER M. BICKEL, THE MORALITY OF CONSENT 74 (1975) (calling idea of separation of speech and action “absurd” and concluding that “[t]here is no bright line between communication and conduct”).

25. Or else there would be no crime of conspiracy, for example.

26. See, e.g., Charles R. Lawrence III, If He Hollers Let Him Go: Regulating Racist Speech on Campus, 1990 DUKE L.J. 431, 458–59 (“There can be no meaningful discussion about how to reconcile our commitment... to free speech until we acknowledge that racist speech inflicts real harm and that this harm is far from trivial.”); Matsuda, supra note 7, at 2336–40.