COMMUNITY AND THE FIRST AMENDMENT*

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In this brief discussion, I attempt to clarify the relationship between two ideas that are fundamental to this conference: the concept of community and the concept of the First Amendment. Unfortunately each of these concepts is infamously murky and confused.

The notion of “community,” as one sociologist has noted, is notoriously “difficult to define.”1 Community can mean anything from a small and defined geographic area to a group of persons who interact in a face-to-face manner. Generally, however, community evokes sensations of mutuality, respect, and support. The concept is unusual because, as Raymond Williams has noted, “[U]nlike all other terms of social organization . . . it seems never to be used unfavourably, and never to be given any positive opposing or distinguishing term.”2 This is fundamentally because the concept is filled with nostalgia. We always seem to be losing community; it is constantly slipping through our fingers. We experience ourselves as continuously declining from a childhood state of grace into a more impersonal, uncaring, standardless world. It is hard to know what sense to make of such an emotionally charged and slippery term.

Certainly, the First Amendment is no clearer as a concept. Of course, there is such a thing as the First Amendment, to whose simple text we can point. The Constitution states, in its relevant part: “Congress shall make no law . . . abridging the freedom of speech, or of the press . . . .”3 But since Congress (and every other branch of government) make laws

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abridging communication all the time, the meaning of these words is anything but lucid. Indeed, as I have elsewhere observed, "First Amendment doctrine is neither clear nor logical. It is a vast Sargasso Sea of drifting and entangled values, theories, rules, exceptions, predilections."\(^4\) The absence of a coherent structure, however, has not prevented the First Amendment from becoming the object of veneration. Who can possibly be opposed to it? Like community, therefore, the First Amendment carries a high and positive emotional valence.

The difficulty is how to relate one vague and ambiguous concept to another. Considerations of time and of capacity preclude me from offering systematic and comprehensive accounts of either concept. What I can proffer, however, is a way of understanding community and First Amendment that may prove useful in illuminating the relationship between them. I will thus propose certain definitions that are justified primarily because they can actually assist in sorting out some of the dilemmas that we will face in this Symposium.

So my plan is to offer in the first section of my discussion a definition of community. In the second section, I shall discuss how the law relates to that notion of community. In the third section I shall examine some ways of looking at the meaning of the First Amendment. And in the fourth and last section I shall look at how these concepts of the First Amendment and community relate to each other.

This is quite too much for the limits placed on this presentation, and so I shall be forced to discuss these issues at a very high level of abstraction. I shall have to leap over morasses of contradictory details with such complacency that I will no doubt leave lawyers and sociologists gasping with incredulity. And for this I can only apologize in advance and offer you citations to my work where, I promise, these issues are worked out with some care.\(^5\)

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I.

At the outset I wish to propose a definition of community that requires you to empty your minds of any notion of "community" that occupies a specific time or place. In fact I proffer a definition of community that has no content at all.

Instead, the definition I offer focuses on how people relate to each other. The aspect of social ordering that I wish to emphasize is captured in an idea that lies at the foundation of disciplines like sociology and anthropology. The idea is that of "socialization." Socialization signifies the process whereby persons who are raised in a particular culture come to assimilate and identify with the standards and expectations of that culture. These become, so to speak, internalized into the very identity of persons who have been well-socialized into the culture. The best description of this process of internalization is by the American theoretician George Herbert Mead, who wrote:

What goes to make up the organized self is the organization of the attitudes which are common to the group. A person is a personality because he belongs to a community, because he takes over the institutions of that community into his own conduct. He takes its language as a medium by which he gets his personality, and then through a process of taking the different roles that all the others furnish he comes to get the attitude of the members of the community. Such, in a certain sense, is the structure of a man's personality . . . . The structure, then, on which the self is built is this response which is common to all, for one has to be a member of a community to be a self.\(^6\)

For the sake of terminological simplicity, I shall use the term "norms" to refer to the group attitudes that we all carry around in us all the time and that form the foundation and possibility of our very selves.

I want to stress five aspects of these norms. First, norms are not merely subjective; they are instead "intersubjective," because they refer to attitudes and standards that persons have a right to expect from others. So, for example, when Charles Taylor refers to "dignity" as rooted in "our sense of ourselves as commanding (attitudinal) respect,"\(^7\) he means, first, that dignity depends upon communal norms that define respect as between persons, and, second, that the right to dignity is not merely subjective, but

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involves claims that members of a community place upon other members of the community by virtue of the shared norms of the community.

Second, norms are not merely instilled during processes of primary socialization in the family, but are also continuously reinforced through forms of social interaction that sociologists like Erving Goffman have demonstrated pervade every aspect of ordinary social life. When these forms of social interaction are disrupted, so is the identity of well-socialized members of a culture. If others act in ways that persistently violate the norms that define my dignity, I find myself threatened, demeaned, perhaps even deranged. The health of our personality, therefore, depends in no small degree upon the observance of community norms.

Third, the totality of a culture's norms define "its distinctive shape, its unique identity." There is thus a reciprocity between individual identity and cultural identity. Fourth, norms are both shared and evolving. Norms are like a language that conveys meaning only because of common expectations and yet that changes over time. Fifth, norms are therefore intrinsically contestable. There are constant struggles over the meaning of shared standards and expectations. As a consequence, cultures tend to establish institutions, like schools, that offer authoritative interpretations of norms. One of the most prominent of these, as we shall see, is the institution of the law.

So, to sum up, we can think of community as a particular way in which social organization is created, which is by internalizing norms into the identities of persons. Because some such internalization must occur for a person to have a "self," community is a primary form of social organization; it is always with us. We value it as we value ourselves. But because the particular norms that we have internalized are always in a historical process of evolution, the particular norms that we happen to identify with community are always threatened, always slipping away.

II.

One important method of stabilizing community norms is the institution of the law. In the twentieth century we have become accustomed to a particular view of law as a tool of instrumental reason, as a means of social engineering for the achievement of given objectives. So, for example, we might use parking regulations to make the traffic flow efficiently in

certain downtown streets, or we might use the tax code to encourage efficient allocation of capital resources.

But the law has traditionally performed (and continues to perform) a distinct and equally important function, which is the articulation and enforcement of community norms. One can see American law doing this, for example, whenever it references the "reasonable person" as a ground of judgment. When the law of negligence asks how a "reasonable person" would act in particular circumstances, it essentially asks a jury to determine and enforce the norms of the ambient community. The standard of the reasonable person, it should be emphasized, does not ask a jury empirically to predict these norms in a statistical, descriptive sense, as would a detached social scientist. It rather charges a jury to engage in the fully normative enterprise of deciding how persons "ought" to be expected to behave as members of a shared community. The law imposes on each of us the obligation to act reasonably on the assumption that socialized persons are already aware of this obligation by virtue of their common membership in community life.

Legal regulation of speech, ranging from the proscription of libel to the protection of privacy, has typically been an attempt to subordinate expression to community norms. Liability for the tort of public disclosure, for example, depends upon a plaintiff's demonstration that a defendant's speech "would be highly offensive to a reasonable person." When imposing liability for the intentional infliction of emotional distress, the law requires a jury to ask whether a particular communication was "outrageous and intolerable in that it offends against the generally accepted standards of decency and morality." The law's definition of "outrageousness" is quite explicit: "Generally, the case is one in which the recitation of the facts to an average member of the community would arouse his resentment against the actor, and lead him to exclaim, 'Outrageous!'"

We may stress four aspects of the legal subordination of speech to community norms. First, the law will not enforce all community norms that involve speech, but only the most important of them. I shall call the norms that receive legal enforcement "civility rules." Second, the law will often presume that the identity of persons is dependent upon the observance of civility rules. Thus, in actions for libel and invasion of privacy, the law will assume that the violation of civility rules will damage persons. Third, legal intervention to uphold community norms performs a dual function. It both

upholds the shared vision of community identity implicit in civility rules, and it protects the selves of individual members of a community who are subject to violations of those rules. There is therefore no necessary tension between individual rights and community values, as some have claimed. Fourth, to the extent that civility rules are, like all community norms, contestable, or to the extent that the geographical jurisdiction of the law encompasses more than one community, legal enforcement of civility rules will necessarily be hegemonic. It will either impose the civility rules of one community upon another, or it will impose one interpretation of those rules upon members of a community who do not share that interpretation. The law cannot escape this hegemonic task so long as it seeks to enforce and stabilize community norms. Yet such enforcement and stabilization may be essential for the maintenance of our social and individual identity.

III.

As promised, I must now temporarily shift the focus of my discussion to the second concept we are here to explore, that of the First Amendment.

The First Amendment is a very special kind of law, because it is addressed not to the general public, but to other lawmakers. The First Amendment essentially determines what kinds of laws and regulations the state may enforce. At first blush, it seems as if the First Amendment prohibits all laws and regulations that restrict speech. But this cannot be true.

If by “speech” we mean communication, then almost all of social life consists of communication, and to forbid laws that restrict communication would therefore be to forbid almost all laws. But this is plainly not the case. So, for example, the law regulates the making and enforcement of contracts, which are surely a form of communication, with virtually no interference from the First Amendment. And the law similarly regulates directions and warnings on consumer products, with virtually no guidance from the First Amendment, although these are surely communications.

The First Amendment, therefore, does not proscribe government restrictions on speech; it proscribes those restrictions on communication that are inconsistent with the purposes of the First Amendment. Thus, to understand the First Amendment, we must inquire into the nature of these purposes.

One purpose that is sometimes proposed is that the First Amendment expresses a generic distrust of government when it comes to the regulation of speech. But this theory is too evidently weak to explain the pattern of First Amendment law, for we surely trust the Federal Trade Commission to regulate trade, including the making of contracts, and we surely trust the Consumer Products Safety Commission to regulate products, including their warnings and instructions.

A second purpose that is often proposed refers to a general autonomy interest in speech. It is said that speech is fundamental to human autonomy and that it therefore merits special constitutional protection. But this purpose also has difficulties explaining the pattern of First Amendment jurisprudence. Let me suggest two reasons why this is so. First, in First Amendment contexts, autonomy typically figures on both sides of an equation. Thus, if you intentionally subject me to emotional distress, my autonomy interest in not being distressed must be weighed against your autonomy interest in saying what you wish, and for this reason autonomy tends to drop out of the equation altogether. Second, the claim of autonomy, although it is dressed in the language of speech, is ultimately merely a variant of the generic claim to human freedom. Precisely because such a claim can be invoked always and everywhere, it is very dilute. It is outweighed every time the state must regulate behavior. For this reason autonomy interests in speech are easily overridden by competing interests. Thus, when a doctor claims an autonomy interest in giving whatever bad advice she chooses to her patient, the First Amendment does not shield the doctor. Nor does it protect the lawyer who claims an autonomy interest to say whatever comes into his mind in a courtroom. Autonomy is thus too abstract and pervasive an interest to explain where and when First Amendment protections actually obtain.

A third First Amendment purpose that is often invoked is that of the “marketplace of ideas.” This refers to the public and social search for truth. I believe that this purpose does constitute a significant presence in First Amendment jurisprudence. But this purpose cannot explain certain First Amendment decisions that are central to our inquiry. These decisions protect not merely what is said, but the manner of expression, and hence they safeguard from government restrictions speech that is deeply uncivil or outrageous or malicious. Examples of these decisions, which are often seen as paradigmatic First Amendment cases, are those that strike down legal

proscriptions of flag burning, or of intentional infliction of emotional distress, or of indecent or abusive or malicious speech.

The reason why these decisions cannot be explained by the marketplace of ideas is that the search for truth presupposes rational deliberation, and rational deliberation is itself a form of social co-ordination that, like all such forms, depends upon civility rules. Thus, John Dewey once remarked that the possibility of rational deliberation depends upon "the possibility of conducting disputes, controversies and conflicts as cooperative undertakings in which both parties learn by giving the other a chance to express itself," and that this cooperation is inconsistent with one party conquering another "by forceful suppression . . . a suppression which is nonetheless one of violence when it takes place by psychological means of ridicule, abuse, intimidation, instead of by overt imprisonment or in concentration camps."\(^{15}\) Dewey's point is that there can be no search for truth when persons merely shout at each other. His point should be immediately obvious to anyone who has ever attempted to teach a class; except in highly unusual circumstances no responsible teacher would allow her classroom to degenerate into merely abusive exchanges. The marketplace of ideas, therefore, does not justify protecting expression that is intended merely to injure and not to contribute to truth, nor does it justify protecting uncivil expression that is not perceived as a contribution to rational dialogue but rather as "aggression and personal assault."\(^{16}\)

Such protection can be explained only by a more general and I think more powerful explanation of First Amendment doctrine. In my own view, this explanation lies in the purpose of promoting democratic self-governance. In American constitutional law, democratic self-governance means that the people govern themselves. But what it means for a group of citizens to govern themselves is actually a very complex and difficult subject to understand.

At a minimum, it means that citizens must have some sense that the decisions and actions of their nation are responsive to their will. The master theorist of this connection was of course Rousseau, who postulated a correspondence between the particular wills of individual citizens and the general will of the state.\(^{17}\) But in the twentieth century most theorists have regarded this postulate as far too strong. They have instead argued that democratic legitimacy requires (1) that the public should have a warranted

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belief that the decisions and actions of the state are responsive to public opinion and (2) that all citizens must have the opportunity freely to participate in the formation of public opinion. Public opinion is thus conceived as mediating between the particular wills of individual citizens and the general will of the state. It performs this function by including all citizens in an open invitation to participate in an ongoing process of rational deliberation.

If the speech necessary for the formation of public opinion is called "public discourse," we can say that collective self-determination occurs when through participation or potential participation in public discourse, the citizens of a state come to identify with the actions and decisions of their government. The First Amendment protects public discourse to safeguard the legitimacy and possibility of democratic self-governance. If the state censors the speech of a citizen within public discourse, it cuts that citizen off from the possibility of participating in collective self-determination.

This account of the First Amendment has quite powerful consequences, and in fact these consequences correspond rather well with the actual shape of First Amendment jurisprudence. It explains, for example, why the First Amendment permits the regulation of communication outside of public discourse to proceed along quite different lines than the regulation of communication within public discourse. And, most importantly for our topic today, it explains why the First Amendment suspends the enforcement of civility rules within public discourse, but not elsewhere.

If persons in community are conceived as embedded within pre-existing norms that define and sustain their identity, citizens in public discourse are by contrast conceived as autonomous, as committed to the process of deciding the nature and future of their collective fate. This autonomy would be fatally compromised if the state were to impose civility rules upon public discourse, for citizens would then be cast as already constrained and captured by one form of community rather than another. For public discourse to provide a site for autonomous decision-making, it must itself remain perennally open-ended, perpetually subject to revision and experimentation. It cannot be constrained to represent the norms of one community rather than another. Within the realm of public discourse, one might say, there is not merely a marketplace of ideas; there is also a marketplace of communities.
IV.

In sum, then, I propose for your consideration a conception of community that inheres in norms that reciprocally establish individual and collective identity, and a conception of the First Amendment that primarily protects speech in order to promote democratic self-determination, which is conceived as an open-ended process of creating individual and collective identity. What can we then say about the relationship between these two concepts?

In analyzing this question we must begin with the premise that democracy presupposes community. There are many reasons why this must be true. Here are three: First, democracy presupposes autonomous citizens, but persons can exercise autonomous choice only if they have already, through socialization, been brought into the possession of a personality and a self. Second, the very value of self-governance, upon which democracy depends, is itself the product of a particular kind of community, one which through processes of socialization instills and maintains the value of collective autonomy. Third, public discourse can link the individual wills of citizens to the general will of the nation only if public discourse is perceived as a process of rational dialogue, and community rules of civility are what define and constitute dialogue as rational. The failure to comply with civility rules almost invariably makes speech seem, in Dewey’s words, intimidating or abusive.

If a healthy democracy requires and presupposes the existence of a healthy community, if a major purpose of the First Amendment is to provide the basis of democratic legitimacy, and if democratic legitimacy itself requires the First Amendment to suspend the enforcement of community norms within public discourse, the First Amendment can accurately be said to be founded on paradox.

One important consequence of this paradox is that the First Amendment will not define public discourse in such a way as to obstruct the reproduction of the healthy community that makes democracy possible. Mechanisms of primary socialization, like public schools or the family, will not be subject to the constitutional restraints of public discourse. So, for example, the First Amendment has been interpreted to permit a high school to censor "lewd speech" on the grounds that it was "a highly appropriate function of public school education to prohibit the use of vulgar and offensive terms in public discourse" so as to "inculcate the habits and manners of civility."\(^{18}\) And the First Amendment has also been interpreted

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to authorize the FCC to enforce “contemporary community standards” to prohibit the broadcasting of “patently offensive” speech at “‘times of day when there is a reasonable risk that children may be in the audience,” at least in part on the grounds that “broadcasting is uniquely accessible to children” and hence could frustrate “the government’s interest in the ‘well-being of its youth’ and in supporting ‘parents’ claim to authority in their own household.”

A second consequence of this paradox is that within public discourse the First Amendment will not be interpreted to suspend the enforcement of civility rules when the very ability of public discourse to continue to function as a form of public deliberation is seriously undermined by the loss of civility rules. While the First Amendment has been interpreted to give a heavy presumption to tolerance within public discourse, there are nevertheless limits, as the doctrine of fighting words demonstrates.

The upshot of this analysis is that the First Amendment bears a highly unstable relationship to community. With respect to any particular government regulation enforcing a civility rule within public discourse, as for example the recent prohibition on flag burning, it can be argued either that enforcement of the prohibition is necessary to sustain community life, so that striking down the prohibition would ultimately undermine democratic self-governance, or that, to the contrary, the enforcement of the prohibition violates the tolerance required by democratic self-determination, so that allowing the prohibition would needlessly displace and therefore damage democratic self-governance.

One may conclude from this that the application of the First Amendment requires judgment: judgment about the sources and strength of community norms, judgment about the strength and sources of democratic legitimacy, judgment about the social consequences of enforcing or invalidating particular regulations. The relationship between freedom of speech and community is thus highly dependent upon contingent matters of history and culture. That is one reason why different democratic countries have displayed such different notions of freedom of speech. A hallmark of American exceptionalism, after all, is our extreme separation of public discourse and community. No other country allows such a breadth of defamatory, indecent, abusive, and outrageous utterances.

20. Id. at 749.
21. Id. (quoting Ginsberg v. New York, 390 U.S. 629, 639 (1968)).
To comprehend why our First Amendment has taken the idiosyncratic turn that it has in the years since 1940, one must understand that, in contrast to other countries like Canada, England, France, and Germany where there has been a strongly hegemonic set of community norms that national legal systems have unproblematically enforced within public discourse, the United States has witnessed in the last half-century a truly functioning marketplace of communities. Our flamboyant individualism is surely the most striking sign of this marketplace, as is our tendency to regard particular communities as voluntaristic and hence incapable of sustaining group rights.

In fact we can say, and I will conclude on this note, that because of this history, our conception of freedom of speech has in fact functioned analogously to our Establishment Clause: It has ensured that the state will remain strikingly and exceptionally neutral as between competing communities, each seeking to use the force of law to impose its own particular norms and standards upon public discourse.