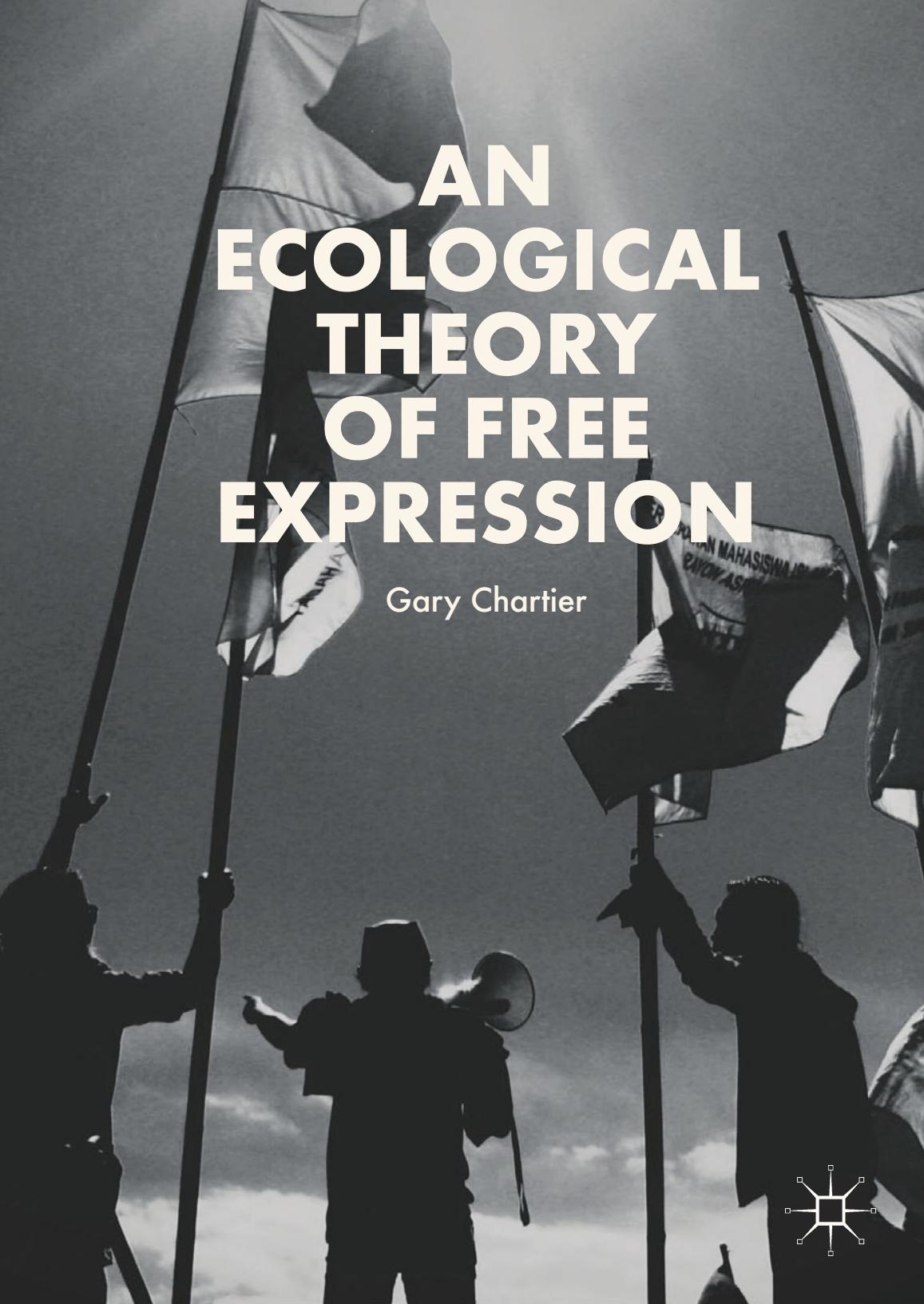

AN ECOLOGICAL THEORY OF FREE EXPRESSION

Gary Chartier

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In memory of
Elenor Louise Andromeda Persephone Levitias Babette Barbara Webb
and
in honor of
Lalé Welsh

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As usual, I will donate the author royalties I receive for this book to AntiWar.com. I am grateful to this exceptional source of news and inspirer of activism for its role in fostering peace and freedom. I encourage all of my readers to consider supporting it.

Contents

CHAPTER 1

Protecting Expression

An ecological theory of free expression—shaped by multiple complementary, mutually reinforcing rationales—focuses on institutional environments that respect and further expressive activity and realize the goods associated with it.

This book elaborates a theory of free expression. It is concerned with why we ought to value and protect expressive freedom and with the sorts of institutional environments likely to safeguard and encourage it. I seek to show why, both *ex ante* and *ex post*, expressive activity as such should not be burdened at all with legal sanctions.

I make my case in the idiom provided by a moral theory rooted in the Aristotelian tradition.[1] Some aspects of this approach are doubtless

[1] On this theoretical approach, the "New Classical Natural Law" (NCNL) theory, *see generally* John Finnis, Natural Law and Natural Rights (1980); John Finnis, Fundamentals of Ethics (1983); 1 Germain Grisez, The Way of the Lord Jesus: Christian Moral Principles (1983); Germain Grisez & Russell Shaw, Beyond the New Morality: The Responsibilities of Freedom (3d ed. 1988); John M. Finnis et al., Nuclear Deterrence, Morality, and Realism (1987); Germain Grisez & Joseph M. Boyle, Jr., Life and Death with Liberty and Justice: A Contribution to the Euthanasia Debate (1979); John Finnis, Moral Absolutes: Tradition, Revision, and Truth (1991); 2 Germain G. Grisez, The Way of the Lord Jesus: Living a Christian Life (1994); John Finnis, Aquinas: Moral, Political, and Legal Theory (1998); Robert P. George, In Defense of Natural Law (2001); 3 Germain Grisez, The Way of the Lord Jesus: Difficult Moral Questions (1997); Germain Grisez, Joseph M. Boyle, and John Finnis, *Practical Principles, Moral Truth, and Ultimate Ends*, 32 Am.

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controversial,[2] but in general it is quite similar to familiar Kantian and Humean approaches and to other Aristotelian positions. I don't seek to defend the theory here, and much of what I say could readily be recast in one or another theoretical vocabulary. But the theory does, in any case, provide a convenient way of thinking and talking about the moral and legal issues I address.

On this view, the basic aspects of well-being for creatures like ourselves—we might also talk about basic goods or basic dimensions of welfare or flourishing or fulfillment—include life and bodily well-being, knowledge, practical reasonableness, play, skillful performance, friendship and sociability, aesthetic experience, imaginative immersion, meaning and harmony with reality in the widest sense, sensory pleasure,[3] and self-integration.[4] These dimensions of welfare aren't reducible to any common, underlying element like happiness (understood subjectively) or desire-satisfaction, nor are they best understood as means to any independently specifiable goal. They are incommensurable, and individual instances of these aspects of well-being are non-fungible.[5]

J. Juris 99 (1987); John M. Finnis, Germain G. Grisez, and Joseph M. Boyle, *"'Direct' and 'Indirect'": A Reply to Critics of Our Action Theory*, 65 Thomist 1 (2001); Mark C. Murphy, Natural Law and Practical Rationality (1999); Mark C. Murphy, Natural Law in Jurisprudence and Politics (2006); Alfonso Gómez-Lobo, Morality and the Human Goods: An Introduction to Natural Law Ethics (2002); Timothy Chappell, Understanding Human Goods: A Theory of Ethics (1995). Like me, not everyone whose work is listed here would be viewed as a paid-up member of the NCNL fraternity; my preferred version of the theory is certainly in some ways idiosyncratic.

[2] *Cf.* Jason Brennan, *Controversial Ethics as a Foundation for Controversial Political Theory*, 7 Stud. Emergent Order 299 (2014) (objecting to the theory's commitment to the incommensurability of basic aspects of well-being).

[3] *See*, *e.g.*, Gary Chartier, Public Practice, Private Law: An Essay on Love, Marriage, and the State 115–19 (2016). Sophie-Grace (formerly Timothy) Chappell and I may be the only theorists who've worked in something like the NCNL tradition to acknowledge sensory pleasure as a basic aspect of well-being. *See* Chappell, *supra* note 1, at 38–43. Chappell's views now tend more toward a sort of particularism than they did a couple of decades ago, but, even if her own views rather than the merits of the position she elaborated in this book were in question, the refinement of her position wouldn't affect the merit of her *arguments* on this point.

[4] *See*, *e.g.*, Chappell, *supra* note 1, at 37–45 (1995); Murphy, Rationality, *supra* note 1, at 96–138; Gómez-Lobo, *supra* note 1, at 6–25; Grisez & Shaw, *supra* note 1, at 77–88; Grisez, Principles, *supra* note 1, at 121–25; Finnis, Law, *supra* note 1, at 59–99.

[5] *Cf.* Gary Chartier, The Logic of Commitment 34–41, 47–55 (2018).

One way of flourishing is choosing wisely with respect to one's own flourishing and the flourishing of others. Doing so means adhering to a set of basic requirements,[6] at least four of which are important here: (*i*) acknowledge the basic goods, and only the basic goods, as non-derivative, non-instrumental reasons for action (the Principle of Recognition); (*ii*) don't purposefully or instrumentally injure any aspect of well-being—one's own or another's (the Principle of Respect); (*iii*) don't arbitrarily distinguish among those affected by one's actions—do so only when doing so (*a*) is a means of effecting or promoting participation in an actual aspect of well-being (say, picking people for a team in an athletic contest on the basis of their ability rather than at random) and (*b*) is consistent with a general rule one would be willing to see applied to oneself and one's loved ones as well as others (the Principle of Fairness); and (*iv*) set priorities and make possible long-range planning by making some small- and large-scale commitments and adhere to these commitments under ordinary circumstances (the Principle of Commitment).[7]

In virtue of this cluster of principles, choosing in a vast number of ways, crafting any of a vast array of lives, will qualify as reasonable. By contrast, we will have good reason to use force or substantial social pressure to *interfere* with a smaller subset of choices—to prevent, end, or remedy unwarranted injuries to people's bodies or justly acquired possessions effected by those choices.[8] But while they allow for the use of force or social pressure in some cases, the principles of practical reasonableness make room for the legal and social toleration of a vast number of unreasonable ways of life. Choices integral to these ways of life are inconsistent with the requirements of practical rationality; but those

[6] *See*, *e.g.*, Grisez & Shaw, *supra* note 1, at 117–53; Grisez, Principles, *supra* note 1, at 205–28; Finnis, Law, *supra* note 1, at 100–33, 304; Finnis, Ethics, *supra* note 1, at 75–76; Murphy, Rationality, *supra* note 1, at 198–212; Gómez-Lobo, *supra* note 1, at 42–44. The particular delineations of these principles, and the labels I assign them, are mine.

[7] *See* Chartier, Commitment, *supra* note 4, at 8–55.

[8] For simplicity's sake, I refer throughout this book to preventing, ending, or remedying injuries. But I do not intend, by speaking of *preventing* injuries, to suggest that freewheeling interference with people's bodies or possessions to keep them from injuring others is appropriate. I do not believe preemptive violence is morally appropriate. I have in mind preventive activity undertaken in response to actual threats, signaled verbally or physically, that pose immediate risks of serious legally cognizable injury that cannot be averted without forcible intervention.

same requirements give us reason to avoid interfering with such choices forcibly or by means of intense social pressure.

Many discussions of free expression in the United States presuppose or seek to justify a particular understanding of First Amendment jurisprudence. It is certainly the case that American constitutional law has offered relatively robust protections for many varieties of expression. But this book is an exercise in moral, political, and legal theory; I do not seek to take positions regarding contested questions in constitutional exegesis, nor do I assume the authority of the US Constitution (or of the statutes, treaties, and court decisions invoked in connection with the issue of freedom of expression in Europe, Canada, and elsewhere).[9] In addition, I am concerned, as I have indicated, not only with reasons for people to avoid favoring or imposing legal and other forcible constraints on expressive acts but also with reasons for individuals and consensual institutions to avoid imposing non-forcible sanctions on such acts.[10]

"Expression" here is a catchall term. It is easy to point to instances of what the term is intended to cover: the words and pictures in newspapers, books, magazines, blogs, tattoos, and speeches; the moving images in films and television programs; the sounds experienced when listening to live and recorded musical performances and addresses.[11] What I have

[9] On disputes regarding freedom of expression in the United States, *see*, *e.g.*, Stephen M. Feldman, Free Expression and Democracy in America: A History (2008); Ronald K. L. Collins & Sam Chaltain, We Must Not Be Afraid to Be Free: Stories of Free Expression in America (2011); *Howl* on Trial: The Battle for Free Expression (Bill Morgan & Nancy J. Peters eds., 2006); Geoffrey R. Stone, Perilous Times: Free Speech in Wartime: From the Sedition Act of 1798 to the War on Terrorism (2005); First Amendment Stories (Richard W. Garnett & Andrew Koppelman eds., 2012). For a comparative review of the relevant legal issues, *see* Eric Barendt, Freedom of Speech (2d ed. 2005).

[10] I agree completely with Charles Fried that legal protections for freedom of expression should be seen as constraints on what the *legal system* can do, on what (in our current context) it's appropriate for the *state* to do; *see* Charles M. Fried, Saying What the Law Is: The Constitution in the Supreme Court 79–80 (2005). Legal protections for free expression should not be understood to offer a roving mandate for judges to police the expression-impacting behavior of nonviolent non-state actors. But the legal protection for freedom of expression finds intelligibility and justification in the context of a broad set of moral concerns. And these concerns are clearly relevant to the choices of non-state actors, even though these actors should not be compelled by force of law to respect the expressive freedoms they have strong moral reasons to recognize.

[11] On the protection of nonverbal expressive acts in American constitutional law, *see*, *e.g.*, Mark V. Tushnet, Alan K. Chen & Joseph Blocher, Free Speech Beyond Words: The Surprising Reach of the First Amendment (2017).

in mind is something like *the information-content* available by means of any of these media—that is, content that influences or seems likely to influence the thoughts, feelings, imagination, or behavior of one or more recipients *apart from* its role in announcing the intentions of the communicator.[12] The expressive content of an act ordinarily includes at least (*i*) the thoughts, attitudes, emotions, or the like it is intended to evoke and (*ii*) the further fact that the communicator intends to evoke these. An act may be expressive even when not deliberate. But an act is often meaningful just to the extent that it is seen as conveying particular contents which the communicator intends to convey *and* as conveying the further thought that the communicator wishes to convey just these contents.

Freedom of expression concerns this content, abstracted from the specific medium in which it is embodied. Whether one is free to convey this content by means of a given act is separate from the question whether the *purpose* of one's act is to convey this content or even whether one is *aware* that one is conveying this content. Freedom of expression is the freedom to avoid having one's conduct interfered with *in virtue of* the information content.

It is thus not the case that freedom of expression as I understand it is violated whenever a particular physical embodiment of some expressive content is precluded: I do not, say, violate your freedom of expression if I prevent you from performing on your drum set in my living room, or if I keep you from tattooing a political message on my back. But this is because I have an untrammeled right to prevent you from entering my living room or tattooing my back, whatever the message, and because I have what seem like excellent and essentially decisive reasons to regard exercising these rights in the envisioned ways as entirely reasonable. Freedom of expression as I understand it is violated when, *in virtue of the information-content of a given instance of expression*, someone (*i*) uses force against the body or justly acquired possessions of a communicator or recipient or (*ii*) employs or encourages the employment of social

[12]When someone's conduct is interfered with, perhaps forcibly, because she has engaged in expressive conduct that constitutes a threat, it is not the expressive conduct per se that is being interfered with or sanctioned. Rather, the purpose of the interference is to prevent or end the injurious activity threatened by means of the conduct. If I say, "Your money or your life!," and someone shoots me as a result, I'm not being harmed because of the *content* of my words but because those words signal *behavior* that may, and indeed likely should, be stopped.

pressure, except in appropriately limited cases, against a communicator or recipient.

I describe what I have offered here as an *ecological* theory of freedom of expression for three reasons.

(*i*) The various goods that freedom of expression rightly fosters are promoted or realized by a social ecosystem—that is, an interlocking, mutually supporting and reinforcing network of formal institutions and social practices and cultural patterns. Here, as in many other contexts, we further the relevant goods not by seeking to promote them directly but rather by advancing a set of social rules that permit these institutions and practices and patterns to operate.[13] These rules, the ecosystem of expression, both (*a*) make expression possible and (*b*) facilitate the transmission of what is expressed. The relevant goods are thus realized to a significant extent as a matter of "social emergence."[14]

(*ii*) In addition, one of the goods realized by freedom of expression is precisely the creation and self-correction of various large- and small-scale social ecosystems that are valuable *both* because of their contribution to realizing the various goods furthered by freedom of expression *and* in their own right.

(*iii*) A well-functioning ecosystem of any sort isn't uniform or monolithic: It features diverse elements. That's certainly true of the expressive ecosystem. This ecosystem's diversity is *inherently* valuable, insofar as the availability of multiple good options enriches people's lives. Its diversity is a *reflection* of the autonomy that undergirds the ecosystem's dynamism. And this diversity is, at the same time, a *driver* of the engagement that enables the ecosystem to produce multiple goods (as when alternative knowledge-claims confront each other).[15]

In short, the right sort of ecosystem (or set of ecosystems) fosters freedom of expression, and freedom of expression fosters the right sort of ecosystem (or sorts of ecosystems).

The ecological metaphor is intended to emphasize what I believe is a crucial point. The language of expression focuses, appropriately, on the communicator. And it brings to mind the degree to which many, perhaps

[13] *Cf.* Peter Railton, *Scientific Objectivity and the Aims of Belief, in* Believing and Accepting 179, 191–202 (Pascal Engel ed., 2000). A conversation with Annette Bryson led me to this essay.

[14] *Id.* at 195.

[15] Thanks to Kevin Hill for help on this point.

almost all, of us desire *self*-expression and see freedom of expression as protecting our opportunities to share ourselves in various ways with others. Of course, there can *be* no ecology of free speech without individual communicators (literalizing versions of poststructuralism to the contrary notwithstanding). But the ecological metaphor highlights the important fact that freedom of expression is valuable not just for the communicator but also, and at least as importantly, for the recipients of her communication. (Of course, the communicator needs the recipients in order to *be* a communicator, not just trivially and definitionally but also because the communicator's expression, even, perhaps especially, deep *self*-expression, loses its point without recipients.) A diverse expressive ecosystem fosters and transmits and embodies the goods realized in and through expression.

On the view I seek to defend here, freedom of expression directly and indirectly furthers our fulfillment, flourishing, well-being—our participation in the various dimensions of welfare.[16] An ecology of expression fosters our acquisition of every good in one way or another; in particular, its contribution to everyone's participation in the goods of knowledge and practical reasonableness also instrumentally facilitates our participation in all the other goods. Individual instances of expression realize particular aspects of well-being (this is different from, but obviously related to, the ways in which the ecosystem furthers these aspects). And the moral constraints that do and the legal constraints that should protect the ecosystem of expression I outline here flow from the requirements of practical reasonableness.

[16]While free action is, in the most general sense, genuinely individual action that occurs without restraint or necessitation, there are multiple dimensions of freedom. *Political freedom*, or *freedom from aggression*, is the most fundamental: It's the freedom to act without being restrained by actual or threatened aggression against one's body or justly acquired possessions. Most discussions of the freedom of expression are concerned with freedom from aggression. *Social freedom*, by contrast, is the freedom to act without being restrained by actual or threatened nonviolent social pressure. It is never possible to be free entirely from social pressure—there are obviously consequences for the choices one makes as one interacts with others. But some social interactions and social environments offer much more room for individuality to be developed and expressed than others. In this book, I am concerned with freedom of expression as a variety of social as well as political freedom. *See* Gary Chartier, Anarchy and Legal Order: Law and Politics for a Stateless Society 4 n.9 (2013). (I am not much concerned *here* with such other varieties of freedom as *physical* or *metaphysical* freedom, though I suspect it is easier to make one sort of case for freedom of expression if agents are metaphysically free.)

The basic elements of the expressive ecosystem, what makes it an eco*system* rather than simply a single object, are individual actors—who are, of course, agents as well as beneficiaries of the ecosystem. The space within which the particular actor can choose and pursue her own projects is defined both by her body and by her justly acquired possessions. In Chapter 2, I provide a brief, broadly Humean, justification for a set of rules related to possessions and explain how a just system of such rules provides the foundation for freedom of expression.

Interfering with someone's freedom of expression will frequently amount to interfering with her justly acquired possessions and will at least ordinarily be impermissible, at minimum, for this reason. Recognizing just rights with regard to possessions means recognizing a strong presumption against interference with expressive activity. However, while possessory rights must be robust in order to do their job, it doesn't follow that they are absolute. In particular, my rights with respect to my possessions might well be limited to prevent me from injuring someone else's body or justly acquired possessions or to require me to compensate someone if I've done so. But, I argue in Chapter 3, expressive activity does not and cannot cause or constitute injury to anyone's body or justly acquired possessions, and *offense* thus does not constitute the sort of injury that provides a satisfactory basis for restricting or punishing expression. And this means that the putative need to prevent, end, or remedy this kind of injury can't serve as a justification for *ex ante* or *ex post* interference with freedom of expression.

I argue in Chapter 4 that public choice and class-theoretic considerations count against giving political or institutional actors the discretion to suppress or sanction expressive activity. This is particularly troubling because the expressive preferences of entrenched interests and well-connected elites will be served by restraints on expression and because the voices of ethnic, cultural, and ideological minorities are especially likely to be silenced. This provides the most fundamental context for understanding the merits of the ecology of expression.

I argue in Chapter 5 that interfering with expression means interfering with personal autonomy in ways that most people could be expected to be unwilling to endorse were they prevented from expressing themselves. The autonomy that freedom of expression protects includes, of course, both the autonomy of those expressing themselves *and* the autonomy

of the recipients of their communications (who are also infantilized by restraints on communication). Given the status of expressive ability as a centrally important human capacity, attacking it will seem in the same way to be especially problematic; this capacity is particularly important because of its role in effecting individual self-authorship. And, while not all expression is, as I've noted, *self*-expression, nor is self-expression important only because of the value of self-revelation, it nonetheless remains the case that self-disclosure plays an important role in establishing and solidifying relationships and communities, so that interfering with expression runs the risk of undermining interpersonal awareness and connection. Doing so also impedes people's participation in the goods of friendship and sociability *and* in the goods of aesthetic and sensory pleasure that are integral to or are facilitated by the consumption of expressive goods.

The ecology of expression is instrumentally valuable in multiple ways. A crucial function of this ecology is its role in facilitating the search for truth and the conduct of experiments in living (which may sometimes be inhibited precisely because of their communicative function). Restraints on expression, I suggest in Chapter 6, make increased insight less likely (even when what is expressed doesn't take the explicitly intellectual form). Restrictions on expression are thus in this way problematic on instrumental grounds because they impede the achievement of greater understanding among those who listen, learn, and dialogue. They are also problematic instrumentally because they interfere with accountability for institutional and political actors. They are problematic on similar grounds because they hamstring the effective operation of markets, which yield evident society-wide economic benefits.

Freedom of expression is characteristically treated as a matter of freedom from legal constraint. But, as John Stuart Mill observed, social pressure may also restrain human creativity. Ironically, the possessory rights that provide robust safeguards against legal interference with free expression may sometimes facilitate the social suppression of disfavored expressive conduct. The considerations noted in the previous chapters don't justify *forcing* non-state institutions and groups to avoid using social pressure to exclude or suppress ideas they don't like. But a number of these considerations, I argue in Chapter 7, do provide *moral* reasons for corporations, religious communities, and other non-state entities to respect expressive freedom and so to create and maintain considerable

space for expressive activity they might prefer to exclude (though they do not justify *legal* mandates of civility). These considerations also provide reasons for state actors to create this kind of space where expressive conduct by government workers and by non-state actors on government land is concerned. By contrast, considerations related to coercion, equality, and inclusion preclude much expressive activity by the state itself.

In Chapter 8, I apply the position I've developed in the book by briskly considering some examples. These include restrictions on expression rooted in concerns related to "intellectual property," libel and slander, as well as speech restraints implied by corporate conduct codes. In the Conclusion, I seek to synthesize the ecological perspective on free expression and to note its general implications.

Expressive freedom makes sense as part of a network of beliefs and norms. It isn't best understood as free-standing. While other sorts of defenses are possible, the one I offer here involves appeals to conceptions of possessory rights, the optimal nature of legal liability, a theory of class, and a substantive vision of the human good. There is a sense in which advancing this kind of defense involves giving hostages to fortune: What if, for instance, some particular element of my defense proves entirely unpersuasive?[17] I offer this defense in the form I do because I believe all the elements matter and because, taken together, they provide the strongest possible basis for protecting freedom of expression. Many of the individual elements can help to ground protection for expressive

[17]While I cast my defense of expressive freedom in, roughly, the terms of the NCNL theory, some NCNL theorists favor moral paternalism of various sorts, or regard it as in principle defensible. Germain Grisez tends to oppose moral paternalism, *see* Grisez & Boyle, *supra* note 1, at 449–58, and Finnis implicitly acknowledges the general appropriateness of Mill's harm principle, *see* Finnis, Aquinas, *supra* note 1, at 228. Robert P. George is clear that various pragmatic considerations might rule out morals legislation in particular cases, *see* Robert P. George, Making Men Moral: Civil Liberties and Public Morality viii–x (1993), but believes that such legislation is in principle appropriate. My goal here is not to respond to arguments for moral paternalism framed in terms of the NCNL theory in detail as far as these arguments apply to expressive freedom. I simply note, briefly, that I differ from other theorists in the broad NCNL family at several key points, and our differences regarding these points help to explain why I don't join some NCNL theorists in accepting paternalistic morals legislation. (*i*) I deny that the state exercises legitimate authority. (*ii*) I deny that retributive punishment is morally permissible. (*iii*) I affirm possessory rights much more robust than the ones other NCNL theorists are inclined to endorse. (*iv*) I believe that only a narrow range of injuries should be legally cognizable.

freedom even if some of the others are absent. These elements are not so closely interlinked that the whole edifice I have constructed would tumble where one removed. At the same time, however, I hope the merits of the comprehensive set of ideas I have elaborated will be apparent in virtue of the defense I've offered—and that their role in this defense will serve both to make the case for freedom of expression as strong as possible and to underscore the appeal of the individual elements on their own.

I accept the view, increasingly common among political philosophers, that states lack legitimacy—that they are not entitled to generate content-independent reasons for action for those over whom they claim authority.[18] There is little reason to suspect that consent-based justifications for state power are successful. I also embrace the conviction, endorsed by a variety of social scientists, that a kind of social order worth having is possible without the state.[19] If states were necessary, we might reasonably regard ourselves as obligated to tolerate them. But, if they are not, we can acknowledge without hesitation that their present-day illegitimacy is matched by their origins in violence and plunder ("stationary banditry") and their ongoing rapacity.[20] We have every reason, therefore, to seek to limit their power, to render them irrelevant, and to ensure that, as long as they exist and act, they function inclusively, respect the rights and dignity of those over whom they assert authority, and avoid arbitrary, exclusionary, violent, and rapacious behavior. My arguments for freedom of expression do not in general presuppose the validity of anarchism. They do, however, assume that there are multiple reasons to seek to limit state power.

[18] *See*, *e.g.*, Leslie Green, The Authority of the State (1990); Joseph Raz, The Morality of Freedom 70–105 (1986); A. John Simmons, Political Philosophy 15–66 (2008); M. B. E. Smith, *Is There a* Prima Facie *Obligation to Obey the Law?*, 82 Yale L. J. 950 (1972); Stephen R. L. Clark, Civil Peace and Sacred Order 46–92 (1989). *Cf.* Gary Chartier, *In Defence of the Anarchist*, 29 Oxford J. Legal Stud. 115 (2009).

[19] *See*, *e.g.*, Anarchy, State, and Public Choice (Edward P. Stringham ed., 2005); Anthony de Jasay, The State 35–52 (1998); Anthony de Jasay, Against Politics: On Government, Anarchy, and Order (1997); Michael Taylor, Community, Anarchy, and Liberty (1982); Michael Taylor, The Possibility of Cooperation (1987); Peter T. Leeson, Anarchy Unbound: Why Self-Governance Works Better Than You Think (2014).

[20] *See*, *e.g.*, Franz Oppenheimer, The State (1997); Stephen R. L. Clark, The Political Animal: Biology, Ethics, and Politics 33–35 (1999); Jasay, Politics, *supra* note 9, at 16–21; Kevin A. Carson, The Iron Fist Behind the Invisible Hand: Corporate Capitalism As a State-Guaranteed System of Privilege (2002).

Perhaps surprisingly in virtue of the radicalism of its anti-statist starting point, this book is intended as very much a contribution to the liberal tradition—a tradition in which anarchism is best seen as a participant.[21] The version of liberalism I elaborate here presupposes and is defended in light of a substantive conception of fulfilled, flourishing life.[22] But its support for a substantive conception of the good is not intended in any way to legitimize the imposition of a substantive vision of the good life by the state. A commitment to freedom of expression has always been a central element of the liberal tradition. This book's liberalism is perhaps idiosyncratic both in incorporating anarchist ideas and in deliberately synthesizing two more mainstream strands of the liberal tradition that have often been at odds. Classical liberalism has emphasized the importance of robust rights regarding possessions, though not all classical liberals have seen those rights as foundational to the protection of free expression. It has also emphasized the importance of the kind of analysis of the behavior of official actors embodied in public choice theory. Modern liberalism has tended to stress the importance of the marketplace of ideas as a means of identifying truth. And, like John Stuart Mill, whose work arguably straddles the boundary between the two strands of liberalism, modern liberals have often noted the importance of acknowledging the ways in which private persons and associations can foster conformity and stifle diversity of expression. I believe both sets of emphases, along with the others that figure here, deserve careful and appreciative attention.

[21] Anarchism's radicalism might prompt resistance to the thought that describing it as linked with liberalism. Interestingly, anarcho-syndicalist Noam Chomsky characterizes it in just this way: *cf.* Anthony Arnove, *Forward*, *in* Noam Chomsky, The Essential Chomsky at vii (Anthony Arnove ed., 2008); Matthew Robare, *American Anarchist*, The American Conservative, Nov. 22, 2013, *available at* http://www.theamericanconservative.com/articles/american-anarchist. While Chomsky sees anarchism as a descendant of classical liberalism, he views classical liberalism as having been distorted into a rationalization for an unjust *status quo*; on his view, anarchism adds socialism to the classical liberal repertoire of views. Rudolf Rocker had earlier made the case that anarchism should be tied to the liberal tradition; *see* Rudolf Rocker, Pioneers of American Freedom: Origin of Liberal and Radical Thought in America (1949). *But cf.* Markets Not Capitalism: Individualist Anarchism against Bosses, Inequality, Corporate Power, and Structural Poverty (Gary Chartier & Charles W. Johnson eds., 2011).

[22] For other such accounts of liberalism, *see*, *e.g.*, Joseph Raz, The Morality of Freedom (1986); Douglas J. Den Uyl & Douglas B. Rasmussen, The Perfectionist Turn: From Metanorms to Metaethics (2016).

CHAPTER 2

Possession and Expression

Robust protections for just possessory rights ground and enable participation in the ecosystem of expression.

I. Introduction

Discussions of expressive freedom don't characteristically begin with analyses of justice in possession. But I believe that we have independent grounds for affirming robust possessory rights, grounds largely distinct from their role in the ecosystem of expression, that turn out, when taken seriously, to impose substantial limits on interference with expressive activity. Because possessory rights don't figure prominently in the typical defense of free expression, it is worth beginning this defense of the expressive ecosystem by explaining briefly why I believe we should affirm them.

"I went to a theatre last night with you," Hugo Black observes in an interview with Edmond Cahn. "I have an idea if you and I had gotten up and marched around that theater, whether we said anything or not, we would have been arrested." Black goes on to note his doubt that freedom of expression involves:

> a right to go anywhere in the world they want to go or say anything in the world they want to say. Buying the theater tickets did not buy the opportunity to make a speech there. We have a system of property in this country …, which means that a man does not have a right to do anything

Gary Chartier, *An Ecological Theory of Free Expression*,
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> he wants anywhere he wants to do it. For instance, I would feel a little badly if somebody were to try to come into my house and tell me that he had a constitutional right to come in there because he wanted to make a speech against the Supreme Court. I realize the freedom of people to make a speech against the Supreme Court, but I do not want him to make it in my house.[1]

A robust set of possessory rights, grounded in the Principle of Fairness, forms the foundation for the ecosystem that promotes and realizes the goods that give us reason to value free expression.[2] People's right to control their justly acquired possessions provides a powerful safeguard against interference with expressive activity. Possessory rights can take different forms. But the underlying rationales for such rights, in tandem with the Principle of Fairness, limit the forms they can reasonably assume and provide support for a set of baseline possessory rules. Legal standards shaped by these rules will offer little or no room for the use of force to constrain expressive conduct.

II. Grounding Possessory Rights

Rules "distinguishing what belongs … to the individual, or group, from what belongs to others," as well as providing for the interpersonal and intergenerational transmission of possessions, seem to be universal.[3] And it is hardly surprising that they would be. We have good reason to embrace a set of general rules governing possessions.[4]

[1] Hugo Black, *Justice Black and First Amendment "Absolutes": A Public Interview*, 37 N.Y.U. L. Rev. 549, 558 (1962) (interview with Edmond Cahn). I am citing the original interview, but I am grateful to Murray Rothbard for calling to my attention this portion; *see* Murray N. Rothbard, The Ethics of Liberty 114–15 (1982).

[2] *See* Rothbard, *supra* note 1, at 113–20. While Rothbard treats possessory rights as foundational for expressive freedom, the justification he offers for these rights differs from mine.

[3] Donald E. Brown, Human Universals 139–40 (1992); *cf.* A. Irving Hallowell, *The Nature and Function of Property as a Social Institution*, 1 J. Leg. & Pol. Soc. 115 (1943).

[4] *Cf.* 2 Armen Alchian, The Collected Works of Armen Alchian 3–144 (Daniel K. Benjamin ed., 2006); Anthony de Jasay, Choice, Contract, Consent: A Restatement of Liberalism 65–79 (1991); David Hume, A Treatise of Human Nature 3.2.2–5 (2d ed. 1749). When articulating or referring to these rules, I typically refer to *possession*, rather than *property*, for several reasons. (*i*) The alternative, talk about *property*, is too readily understood as implying endorsement of particular existing possessory claims. *See*, *e.g.*, Karl Hess, *Where Are the Specifics?*, *in* Markets Not Capitalism: Individualist

A. The Baseline Rules

We have good reason to endorse what I call the *baseline rules* regarding physical possessions. These rules can be seen as matters of *convention*. But the fact that they are conventional doesn't mean that they could take just any form imaginable or that they could be altered at will. They are *constrained* conventions: There are good reasons to embrace some conventions related to possession rather than others.[5] These rules are as follows:

1. *Initial acquisition through effective possession*. Someone who takes effective possession of something for the first time, or after it has been abandoned, is entitled to control it, as is someone who receives something from someone else who is entitled to control it.[6]
2. *Exclusive freedom to retain and transfer*. This control should extend to the *disposition* of any physical possession—to retain it,

Anarchism against Bosses, Inequality, Corporate Power, and Structural Poverty 289, 289 (Gary Chartier & Charles W. Johnson eds., 2011) (emphasizing that a defense of property should not involve the affirmation of, "willy nilly, all property which now is called private" and stressing that "[m]uch … [property currently labeled "private"] is stolen. Much is of dubious title. All of it is deeply intertwined with an immoral, coercive state system."). (*ii*) My concern is specifically with physical objects (including land), and not with abstract patterns, hoped-for profits, or any number of other non-physical things to which people sometimes claim property titles. (*iii*) Talk about possession emphasizes that, in accordance with the first baseline rule, entitlement to possession is rooted in actual control or occupancy, rather than in, say, a political process of resource allocation in which some authority simply announces that certain assets, previously unclaimed or held by the wrong people, now belong to particular, politically favored people.

[5] *See* Charles M. Fried, Modern Liberty and the Limits of Government 90–94 (2006).

[6] *Cf.* Robert Sugden, The Economics of Rights, Cooperation, and Welfare 93–107, 162–64 (2d ed. 2004); Jasay, Choice, *supra* note 4, at 69–79; Randy E. Barnett, The Structure of Liberty: Justice and the Rule of Law 68–71, 100–102, 112, 153–54 (1998); David Schmidtz, Elements of Justice 153–57 (2006); Carole Rose, *Possession As the Origin of Property*, 52 U Chi. L. R. 73 (1985). I don't suppose rooting legitimate control in actual possession means that subsequent possession has to be *continuous* (though a substantial enough gap in possession ought to constitute abandonment) or that *only* the putative possessor as an individual, rather than her partners or agents, must exercise control over an object to maintain a defensible claim to possess it (possession by her partners, agents, or other designees seems adequate).

give it away, exchange it for something else, or abandon it, and so to enable others to acquire justly what one has first acquired justly oneself.

3. *Exclusive control.* The control which someone who has justly acquired a possession is entitled to exercise over the possession is exclusive and exhaustive, so that she is free to do whatever she wants with her legitimately acquired possessions. A legitimate possessor's exclusive control is not absolute. (*i*) She may not use these possessions to interfere with others' bodies or legitimate possessions. (*ii*) Her exclusive control over her legitimate possessions may be interfered with on a *de minimis* basis, provided appropriate compensation is tendered. (*iii*) Her exclusive control over these possessions may also be interfered with to the degree minimally necessary to prevent a threatened injury or end an actual injury to someone's body or legitimate possessions. (*iv*) It may also be interfered with to obtain compensation for an injury by her to someone else's body or legitimate possessions, including the reasonable costs of recovery.

The baseline rules spell out what it means for an object to count as *justly acquired: either*, in accordance with the first rule, one has acquired it be establishing effective possession of it when it is in an unowned state *or*, in accordance with the second rule, one has received it voluntarily from someone else *or*, in accordance with the third rule, as a matter of compensation for injury.[7]

[7]There is good reason to prefer compensation or restitution as a remedy for injuries to bodies or justly acquired possessions. Retribution is morally objectionable, as is the rejection or expulsion of an offender viewed as a cancer on the body politic. Deterrence provides no good independent justification for interference with anyone's body or justly acquired possessions. Restraint or incapacitation does provide such a justification, but only in limited circumstances—in which an offender is effectively committed to an ongoing program of violence. Rehabilitation, reintegration, and reconciliation between offenders and victims are all in principle appealing goals, but it makes little sense to seek to achieve them by force. *See* Gary Chartier, Anarchy and Legal Order: Law and Politics for a Stateless Society 265–301 (2013). On the merits of restitution as a remedy for injury, *see*, *e.g.*, Barnett, Structure, *supra* note 6, at 158–60, 176–84; Randy E. Barnett, *The Justice of Restitution*, 25 Am. J. Juris. 117 (1980); Randy E. Barnett, *Restitution: A New Paradigm of Criminal Justice*, 87 Ethics 279 (1977).

People might endorse many potential rules with regard to physical objects (including parcels of land). I can't envision the entire space of logically possible rules and evaluate them all in order to show that the baseline rules I propose are preferable. But there are multiple considerations that tend to suggest that the baseline rules I've elaborated are particularly worth endorsing. Some of these considerations are mainly concerned with the *form* or *status* of sensible rules regarding possession, while others relate to their *content*—particularly important because they make people's participation in social cooperation in and through production and exchange, or significant in virtue of other contributions to welfare.[8]

B. Presumptive Respect for Actual Possession

The most basic attitude underlying the relevant conventions is just respect for possession as such. I would ordinarily be unwilling for you simply to grab something out of my hand, so it would be unreasonable for me to grab something out of your hand. And it's easy enough to extend this judgment to the possession of other things over which (directly, as an individual or with others, or indirectly, through agents responsible to me alone or to me in tandem with others) I have more diffuse control—a car even when I'm not driving it, a building even when I'm not occupying it, and so forth. The presumption in favor of actual possession is defeasible. We judge, for various reasons, that people aren't entitled to things they possess directly or indirectly. But protection of people's possessory rights begins with the fact that it's ordinarily unfair to ignore actual possession.

C. Other Basic Values

Apart from respect for actual possession, embracing the baseline rules is an appropriate expression of commitment to the Principle of Fairness for other reasons.

- They are *rules*—so that actors can plan based on the assumption that they will be enforced.

[8] In this chapter, I am simply gesturing at the kind of justification I believe the rules deserve. I offer a more detailed defense in CHARTIER, ANARCHY, *supra* note 7, at 49–89.

- They promote the *reliability* of people's claims to their possessions,[9] enabling people to pursue their various projects confidently.[10]
- They are characterized by *simplicity*. Simplicity makes it unlikely that anyone will be disadvantaged for failure to comprehend the rules. It thus facilitates planning. And it reduces the risk of confusion-generated conflict.[11]
- They exhibit game-theoretic *stability*: Resistance to interference with claimed territory and objects is a strategy that can readily persist in a population.[12]
- They are marked by *generality*: They apply across a wide range of cases without variation. This renders them easy to understand and apply and makes special pleading unlikely.
- They exhibit *impersonality*: They apply to potential *possessors* without qualification. Thus, they respect and promote everyone's interests, and they can be straightforwardly applied without difficult inquiries into status and desert.
- They are marked by *impartiality* as regards possessors' purposes, so they leave possessors free to consider and pursue alternative ends.
- They facilitate personal *autonomy* and *self-authorship*. Thus, they enable people to weigh reasons on their own and to craft lives that reflect their priorities and commitments.[13]
- They enable us to manage the complexities resulting from the *scarcity* of physical objects.

[9] On the significance of reliability, *see*, *e.g.*, Fried, *supra* note 5, at 156–60; Stephen R. Munzer, A Theory of Property 191–226 (1991).

[10] *Cf.* Loren Lomasky, Persons, Rights, and the Moral Community 37–151 (1987).

[11] *See*, *e.g.*, Richard A. Epstein, Simple Rules for a Complex World (2005); Harold Demsetz, *Toward a Theory of Property Rights*, 57 Am. Econ. Rev. 347, 354–55 (1967).

[12] *See* Skyrms, *supra* note 9, at 76–79. *Cf.* Anthony de Jasay, Against Politics: On Government, Anarchy, and Order 193–202 (1997); Anthony de Jasay, Political Philosophy, Clearly: Essays on Freedom and Fairness, Property and Equalities 320–33 (2010); Sugden, *supra* note 6, at 58–107.

[13] *See* Germain Grisez & Joseph M. Boyle, Jr., Life and Death with Liberty and Justice: A Contribution to the Euthanasia Debate 454–55 (1979); John Finnis, Natural Law and Natural Rights 168–69, 172, 192 (1980).

- They offer some protection for the *identity-constitutive relationships* people enjoy with some physical objects (from wedding rings to family farms).[14]
- They enable people to establish and reinforce *social norms* by rewarding those who uphold these norms and, if necessary, excluding those who don't.
- They make possible the *stewardship* of physical objects for contemporaries and future generations by assigning responsibility for care for these objects to identifiable actors and making it possible for them to be rewarded for their care.[15]
- They make possible the *coordination* of the actions of buyers and sellers throughout a price system.[16] They thus help to make possible *extended social cooperation* in and through the production and exchange of goods and services.
- They maximize the *accessibility* of goods and services by enabling people to be *incentivized* to produce and exchange,[17] as well as by giving them the *opportunity to produce* by ensuring their control over clearly defined resources.
- They make *specialization* possible,[18] thus fostering production and giving space for the expression of individual capacities and individual interests.
- They create space for *experimentation*,[19] and so for the development of new products and services—but also new patterns of living, new ways of being human, that can, if successful, be imitated.
- They effectively foster *social connection* by enabling people to engage exchange relationships across cultural and geographic

[14] *See*, *e.g.*, Margaret Radin, Reinterpreting Property 35–71 (1993); *cf.* Raziel Abelson, Persons: A Study in Philosophical Psychology 91 (1977).

[15] *Cf.* Finnis, Law, *supra* note 13, at 70; Demsetz, *supra* note 11, at 355–58.

[16] *See*, *e.g.*, Barnett, Structure, *supra* note 6; David D. Friedman, *A Positive Account of Property Rights*, 11 Soc. Phil. & Pol'y 1 (1994).

[17] *Cf.* Munzer, *supra* note 9, at 191–226; Richard A. Posner, The Economics of Justice 13–115 (1981); Finnis, Law, *supra* note 13, at 170–71; John Finnis, Aquinas: Moral, Political, and Legal Theory 190 (1998).

[18] *See*, *e.g.*, Alchian, *supra* note 4, at 38–43, 62–66, 96–98.

[19] *Cf.* Mark Pennington, Robust Political Economy: Classical Liberalism and the Future of Public Policy 5 (2011).

divides—promoting peace, creating opportunities for friendship, and breaking down barriers.[20]

- They make possible the acknowledgment of *contributions* by those who benefit from them, and the provision of compensation for those contributions, in light of the notion that "one good turn deserves another."[21]
- They equip people to participate in relationships of *reciprocity*, which foster mutual interdependence and encourage people to take responsibility for themselves.[22]
- By encouraging social cooperation, they facilitate *the development of virtues* operative outside the context of exchange, including *trustworthiness* and *honesty*.[23]
- They provide vital opportunities for people to develop and exhibit the virtue of *generosity*.[24]
- They foster *conflict-reduction* and *peacemaking*.[25] They reduce the risk of confusion and defeated expectations. And they promote peacemaking because people engaged in the commercial relationships they enable have good reason to connect with and understand each other.

[20] *Cf.* Neera Kapur Badhwar, *Friendship and Commercial Societies*, 7 Politics, Phil. & Econ. 301 (2008); Murray N. Rothbard, Man, Economy, and State with Power and Market 100–101 (2d scholar's ed. 2009).

[21] *See*, *e.g.*, Finnis, Aquinas, *supra* note 17, at 197; Munzer, *supra* note 9, at 254–91. The notion of desert in play here need only be Strawsonian; it need be no more metaphysically laden than saying "thank-you." *Cf.* Peter Strawson, *Freedom and Resentment*, *in* Freedom and Resentment and Other Essays 1, 24 (2008).

[22] *See*, *e.g.*, David Schmidtz, The Limits of Government: An Essay on the Public Goods Argument 138–56 (1991); Robert Nozick, Invariances: The Structure of the Objective World 240–84 (2001); David B. Wong, Natural Moralities: A Defense of Pluralistic Relativism (2006).

[23] *See*, *e.g.*, Joseph Henrich et al., *"Economic Man" in Cross-Cultural Perspective: Ethnography and Experiments from 15 Small-Scale Societies*, Beh. & Brain Sci. 795, 808, 813 (2005); Paul J. Zak & Stephen Knack, *Trust and Growth*, 111 Econ. J. 295 (2001). Because trustworthiness and honesty enhance economic productivity, they will tend to spread, with attendant benefits for those affected. *Cf.* David C. Rose, Moral Foundations of Economic Behavior (2011) (this isn't Rose's primary point, but I think can be seen to follow from it).

[24] *See*, *e.g.*, Finnis, Law, *supra* note 13, at 175; Aristotle, Politics II.5 (Benjamin Jowett trans., 1905).

[25] *See*, *e.g.*, John Hasnas, *Toward a Theory of Empirical Natural Rights*, 22 Soc. Phil. & Pol'y 111 (2005): Butler Shaffer, Boundaries of Order (2009); Friedman, *supra* note 16.

III. How Possessory Rights Safeguard Expressive Freedom

Possessory rights at their best clearly define spheres of influence and resolve conflicts.[26] Respecting people's justly acquired possessions provides a clear, simple, and robust basis for protecting their freedom of expression. Possessory rights determine who will have the right to speak where and using what media. We can resolve most of the pressing questions about freedom of expression by determining who has the relevant possessory rights.

Thus, for instance, (*i*) if we know to whom a given building belongs, for instance, we know who is entitled to hold or authorize a meeting there. (*ii*) If we know to whom some paper belongs, we know who can print a magazine on the paper and who can then sell the magazine to others; similarly, we know that the others, having bought or been given copies of the magazine, are entitled to control their copies, and so, if they wish, to read the magazine. Similarly, (*iii*) if we know who owns a given digital distribution infrastructure, and who is contractually entitled to access that infrastructure in order to transmit or receive information, we know who may provide and obtain content by means of that infrastructure. And (*iv*) if we know to whom some cloth belongs, we know who has the right to burn it, whether or not it's been colored in such a way that it counts as a flag.

For most practical purposes, on this view the content of a given communicative act or the purpose of the communicator never surfaces as salient considerations when the question whether the act is entitled to legal protection arises.

An approach by way of possessory rights is noteworthy for at least two reasons. (*i*) Such an approach makes it easy to provide a clear, content-independent way of answering the question whether someone can produce or receive communicative content in a given context. What we need to know is not *what* is being communicated but simply *who* is communicating and using what media. The inquiry into content never gets off the ground, since people have exclusive rights to transform and to give or trade their possessions. (*ii*) Given the limited bases for interference with possessory rights in accordance with the baseline rules, a possession-based approach to freedom of expression offers very robust

[26] *Cf.* Black, *supra* note 1, at 558–59.

safeguards for this freedom. To accept the account of possessory rights I have offered is, on its own, to accept that freedom of speech should in many cases—those involving the use of non-state possessions to transmit or receive communicative content—as essentially unqualified.

IV. Conclusion

While possessory rules are social conventions, multiple desiderata narrowly limit the forms they may reasonably assume. There are thus good reasons to endorse the baseline rules—providing for initial acquisition through effective possession, free transferability, and exclusive control of what is justly acquired. There is, as a result, good reason to reject violations, including official violations, of these rules—including violations committed or contemplated in the interest of preventing, ending, or punishing expressive activity.

Even if possessory rights were less robust than I have suggested they should be, any credible scheme of such rights would generally provide a reasonable basis for resolving conflicts about expression. Any rules regarding possessions, in order to play anything like the role they need to play in fostering or respecting or exhibiting, as appropriate, the values I identified earlier, will need to be relatively simple and reliable, and thus robust. Such rules will therefore serve frequently to provide content-neutral protection for expressive freedom.

Bodily and possessory rights determine what should and should not count as legally cognizable injuries. Because of the ways in which they limit the scope of such injuries, they provide secure foundations for expressive freedom. However, arguments for restricting expressive activity often begin from the worry that expressive activity does, in fact, injure in a way that ought to be legally relevant. I argue in Chapter 3 that this is not the case.

CHAPTER 3

Expression and Injury

Expressive acts do not ordinarily constitute, necessitate, or effect injuries for which legal remedies should be available.

I. Introduction

The issue of restraining or punishing expressive activity arises, ordinarily, because those who seek to inhibit expressive activity or punish those who engage in it regard the activity as injurious. Expressive activity can obviously *contribute* to injuries in various ways. But whether expressive activity bears the kind of relationship to injury that ought to trigger legal liability or social sanction is a different and more difficult question. In this chapter, I suggest reasons the law should be concerned specifically with injuries to bodies and justly acquired possessions and reasons we should not, in general, regard expressive activities as constituting, effecting, or necessitating such injuries.

II. Legally Cognizable Injury

There are multiple aspects of well-being, and in principle, one might be injured with respect to any of these. When I lie to you, for instance, I adversely affect at least two aspects of your well-being—*knowledge* and *practical reasonableness.* If I have an affair with your partner, I likely disrupt your *friendship* with her. When I interrupt your golf game with distracting catcalls from the sidelines, I'm undermining your participation

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in the good of *play*. If I talk and cough loudly during a chamber concert, I'm damaging the *aesthetic experience* of the concertgoers. If I mutilate myself by, say, cutting off a finger in order to show contempt for the human body, I unreasonably attack the good of *life and bodily well-being*. And so forth.

But not all injuries merit *legal* redress. That's because the law is not a universal problem-solver. It's not the function of the law to address all social ills; indeed, the law ought to be a last resort when it comes to dealing with the disputes and injuries we suffer.

The law's stock in trade is *physical force*. A legal intervention—for the purpose of preventing, ending, or remedying a putative wrong—takes a limited number of forms, all involving the use of force. In contemporary Western legal systems, the use of force in a given instance might be (*i*) imprisonment, (*ii*) execution, or (*iii*) the exaction of a monetary penalty.[1] Each of these interventions constitutes an actual or threatened use of force against someone's body or possessions. There are good reasons to limit the use of these interventions against someone else's body or justly acquired possessions in a way that tightly cabined the possibility of legal liability, and so to cases (prescinding from *de minimis* and emergency cases) in which that person has herself used or threatened injurious force. Legally cognizable injuries would thus be those that either caused or constituted injuries to bodies or justly acquired possessions.

(*i*) A focus on actual injuries rather than on morally wrong *choices* is important because giving the legal system the authority to deal with immorality *as such* confers great, and so dangerous, power on systemic actors. Doing so overestimates their ability to affect people's characters and effect moral improvement, especially since moral character is ultimately a product of choice rather than coercion. In addition, while it will be more readily apparent that a physical injury has occurred, it will be more difficult to agree on what counts as moral wrongdoing. Involving

[1] This isn't an exhaustive list of conceivable legal responses, of course. In other societies, and at other times in our own society, these might also include (*i*) forcible public humiliation, (*ii*) mutilation, (*iii*) torture, (*iv*) enslavement, (*v*) required work as a gladiator (a particular variety of enslavement), (*vi*) outlawry, and (*vii*) general forfeiture of assets. All of these involve the actual or threatened use of force against someone's body or possessions. And non-forcible remedies, like those effected by means of schemes for rehabilitation or restorative justice, seem to qualify as *legal* precisely because the state effectively uses force to compel people to participate in them (prisoners are available to participate in counseling and education programs precisely because they are *prisoners*).

the legal system in remedying wrongdoing as such rather than injury both commits the legal system to taking positions on controversial moral questions and invests it with potentially dangerous discretion. In addition, a concern with wrongdoing rather than injury is often associated with *retribution*. But retribution is pointless and cruel. It does not cause or constitute a benefit for anyone, while it does constitute and cause injuries. Justifications for retribution seem to trade on an inapt economic metaphor—as if a loss to one person could amount to a benefit to another.[2]

(*ii*) In particular, there is reason for the law to be concerned specifically and exclusively with injuries to people's bodies and possessions. A key reason to limit the use of physical force in this way is that the use of force is *qualitatively different* from other forms of interference with our fulfillment of our preferences. (*a*) Other inducements may affect us emotionally or intellectually. But the use of force against our bodies or possessions deprives us of the ability to act. We use our bodies and our possessions to achieve all of our other goals and to flourish in diverse ways; we can *act* because we can achieve purposes in the world, and we need bodies and possessions in order to do so. Thus, the use of force represents a direct attack on our capacity to act, and so our capacity to flourish. We would not want our own choices to be limited in this way, and so we have every reason to avoid limiting or seeking to limit others' choices in this way. So we have reason to limit the use of force as much as possible. (*b*) In addition, the use of force prevents people from using their own judgment: It substitutes the judgment of the person using force for the judgment of the person against whom force is used, and this runs the risk of being dehumanizing.

(*iii*) Purposeful or instrumental injury to someone's body is ruled out absolutely by the Principle of Respect. And incidental—foreseen but unintended—injury to someone's body is limited by the Principle of Fairness (since one may reasonably bring about this kind of injury only when doing so is consistent with a general rule, one would be willing to see applied to oneself and one's loved ones). There will thus be significant constraints on the use of force against anyone's body as a legal intervention. If, for instance, I would be unwilling to endorse a rule permitting the use of force against my daughter's body to stop her from

[2] *See* Gary Chartier, Anarchy and Legal Order: Law and Politics for a Stateless Society 289–95 (2013).

telling lies, I cannot consistently choose to use force against someone else's body to stop *him* from telling lies.

(*iv*) The Principle of Fairness grounds support for and implementation of the baseline possessory rules. These rules limit interference with someone's justly acquired possessions by providing for her exclusive control of those possessions except when she uses or threatens to use them to injure others' bodies or justly acquired possessions. Even if one thinks that the Principle of Fairness would allow for more extensive legal interference than this, there is still reason to cabin such interference as tightly as possible. For the more interference is permitted, the more the simplicity and reliability of possessory standards are diminished, the more autonomy is reduced, and so forth. Allowing legal remedies that involved collecting fines or otherwise interfering with people's possessions for actions other than injuries to people's bodies or possessions would be to interfere with people's possessions in a manner itself inconsistent with the baseline rules.

(*v*) Relatedly, the use of force by the legal system tends to legitimize and normalize the use of force in general. The use of force against nonviolent conduct by the legal system runs the risk of making *private* violence targeting nonviolent conduct seems more appropriate.

(*vi*) Mandating or permitting liability, and so the imposition of force, appears inconsistent with a requirement of *proportionality* that seems to flow from the Principle of Fairness.

(*vii*) Physical injuries, injuries to bodies, and possessions are much more readily identifiable. And it is easy not only to identify these but also to agree that they count as injuries. Injuries to other aspects of well-being are often more difficult both to spot and to characterize defensibly as injuries.

(*viii*) That force has been used also means that any social interaction in which the person against whom force is being used participates, while force is being used against her or in which she *would* have participated in the absence of force cannot benefit from the local knowledge she would or could bring to the interaction.

(*ix*) If it's undertaken to steer people in what are taken to be virtuous directions, then, even if it succeeds in shaping behavior in putatively desirable ways, it keeps people from making choices and forming characters marked by authentic virtue.

(*x*) When conduct *that would otherwise be permissible* is rendered subject to liability *because* of its intent, this seems to be a matter of seeking

to regulate and punish thoughts as such. And this kind of interference with thought seems to be a serious infringement on autonomy.

(*xi*) Limiting liability in this way provides a liability rule that is simple, clear, and easy to understand. A proportionality requirement, in particular, represents an easily operationalizable bright-line rule for legal systems and law-enforcement agencies.

(*xii*) Careful limits on liability seem likely to minimize discretion, and so abuse.

Thus, while we can suffer many kinds of injuries, we have good reason to limit the scope of *legally cognizable* injuries to those that involve harm to or serious interference with people's bodies or justly acquired possessions. There is thus good reason to avoid imposing liability on the basis the communicative contents of expressive acts. For imposing liability would mean depriving the communicator of her justly acquired possessions, limiting the communicator's use of her own justly acquired possessions, confining the communicator's body in some way, or injuring the communicator's body in some way. There are good reasons not to do these things. And, while some instances of interference with someone's body or justly acquired possessions might be defensible, there are, as I have suggested, good reasons to suppose that, apart from (compensation-triggering) *de minimis* violations, these instances should be limited exclusively to those involving the prevention, termination, or remediation of forcible interference.

III. Expression Doesn't Constitute Legally Cognizable Injury

An expressive act can't *constitute* an injury to the basic goods of life and bodily well-being, friendship and sociability, meaning and harmony with reality, or sensory pleasure. That's because ideas or other abstractions aren't integral to these aspects of well-being, so the communicative content of an expressive act couldn't affect them. It *could* in principle constitute an injury to any of several other aspects of well-being. An expressive act could perhaps constitute an injury to one's own self-integration (certain kinds of lies and symbolic acts might do so, for instance),[3] or

[3] *See* Christopher D. Tollefsen, Lying and Christian Ethics (2014); Seana Valentine Shiffrin, Speech Matters: On Lying, Morality, and the Law (2014).

to one's participation in the goods of play, skillful performance, aesthetic experience. However, legal sanctions aren't appropriate, on familiar anti-paternalist grounds (and also in virtue of the impermissibility of retributive and deterrent penalties), for an agent's injuries to herself. And an injury to someone's self-integration is not an injury to her body or possessions.

Suppose I display a film. Whatever the content of the film—whether it depicts the migration of salmon, the bloodiest battle of the Franco-Prussian war, a domestic dispute between the members of a first-century Roman family, or a reunion performance by a Brit-pop band—the display of the content just as such won't amount to an attack on anyone's body or justly acquired possessions. We can imagine scenarios in which the display does amount to this sort of attack, as when a private home is commandeered as a theater. But the injury here can be specified apart from the communicative content of the film and would obviously still obtain if no film at all, or a film featuring nothing but a solid black rectangle, were displayed. Here, it is the interference with the preexisting rights of the homeowner that is objectionable. By contrast, presuming no contextual rights violation occurs, the specific *content* of the film won't constitute any such violation. No one's body or possessions will be interfered with just in virtue of the images and sounds that make up the film. Displaying the film doesn't *change* anyone's justly acquired possessions, and doing so changes someone's body only in the sense that the information content is registered by the consumer's senses.

IV. Expression Doesn't Effect or Cause Legally Cognizable Injury

To maintain that expressive acts don't constitute injuries might seem like a trivial point. Might the information content of an act *effect* or *necessitate* injury to someone's bodily integrity or justly acquired possessions? Expressive acts can sometimes effect injuries, but not legally cognizable ones. They may influence behavior in ways that may increase the likelihood that injuries, including legally cognizable ones, will occur, but not in a way that removes responsibility from those who actively choose to bring about these injuries (though deceiving others or directing or coordinating others' activities might well merit different legal treatment). Evoking post-traumatic stress might be thought to represent a

special case, one in which significant bodily changes are attributable to expressive activity in a legally relevant way; however, if this turns out to be the case, the results should be tightly cabined. By contrast, ordinary cases of insult and offense should not be treated as legally injurious, as warranting restraint; and, indeed, it would be helpful if both categories were banished from our emotional and moral vocabularies.

A. When Expression Effects Injury, the Injury Isn't Legally Cognizable

While *uttering* words loudly might damage someone's eardrums (and so affect her bodily well-being) or disrupt a concert (and so injure someone's aesthetic experience), these injuries result from particular physical performances and not from the communicative *content* conveyed by those performances. But some injuries *are* linked with that content. Expressive acts can *effect* injuries to the goods of knowledge and practical reasonableness (lies pretty clearly do this), and perhaps also the goods of aesthetic experience, imaginative immersion, play, and skillful performance. But these are not, of course, injuries to anyone's body or justly acquired possessions. And they couldn't be: An injury *effected* by the meaning of an expressive act would have to be an injury to an aspect of well-being to which cognitive content was integral (otherwise the cognitive content could not as such impact the relevant aspect of well-being), and cognitive content is not, could not be, integral to life or bodily well-being or to any physical possession.

B. When Expression Influences Injurious Behavior, It Doesn't Cause That Behavior, and Thus Doesn't Cause the Injury

Expressive acts can *indirectly* influence the occurrence of injuries to most or all of the various aspects of well-being. For instance, I adversely affect the good of *friendship* by revealing a secret that disrupts a spousal relationship. I misdirect a musician and so spoil a concert—thus hampering participation by the musician in the good of *skillful performance* and participation by the members of the audience in the good of *aesthetic experience*. However, these injuries are not injuries to anyone's body or justly acquired possessions. And when an agent's expressive acts *do* contribute to injuries to others' bodies and justly acquired possessions, they do not

cause these injuries because the injuries occur in virtue of the injurious acts of others, for which those others are responsible. To cause in the relevant sense is to "make[ ] use of threats, lies, or authority to induce … [someone] to act in a particular way,"[4] so that "the act of the intermediary … [is] not … fully voluntary."[5]

Imagine that I exhibit a film which depicts identifiable people as engaging in some disapproved form of behavior. Those who view the film respond with indignation, form a mob, and attempt violently to attack those the film depicts as engaging in disapproved behavior.

Attempts to argue for liability in such cases might build on the assumption that someone's "reaction" to a provocation "could not be regarded as fully voluntary."[6] But it is unclear why a response to provocation or incitement should be treated as not "fully voluntary." In the kind of case I've envisioned, the members of the mob act on their own.[7] They act freely.[8] They *allow* themselves to be carried away by emotions they could instead resist. They are not *puppets*. As ordinary moral actors, they know that chaotic violence is not an acceptable response to others' bad behavior. And yet they act. To suggest that the film has necessitated their violent action is to deny that they themselves are responsible for

[4] H. L. A. Hart & Tony Honoré, Causation in the Law 367 (2d ed. 1985).

[5] *Id*. at 373.

[6] *Id*. at 375. Note that, while provocation may be held to occur when a given response, even if illegal, is a "natural" consequence of a given act, "the notion of what is 'natural' is strongly influenced by moral and legal standards of proper conduct, [even] though weight is also given to the fact that certain conduct is usual or ordinary for a human being." *Id*. at 183.

[7] *Cf*. C. Edwin Baker, *Harm, Liberty, and Free Speech*, 70 So. Cal. L. Rev. 979, 991–92 (1997) (*quoted in* Jeremy Waldron, The Harm in Hate Speech 168–69 (2012)).

[8] *See*, *e.g*., Joseph Boyle, Jr., Germain Grisez & Olaf Tollefsen, Free Choice: A Self-Referential Argument (1976); Carl Ginet, On Action (1989); David Ray Griffin, Unsnarling the World-Knot: Consciousness, Freedom, and the Mind-Body Problem (1998); Robert Kane, The Significance of Free Will (1998); John Thorp, Free Will: A Defense against Neurophysiological Determinism (1980); Austin Farrer, The Freedom of the Will (1957); John Searle, Rationality in Action 269–98 (2001); Carl Ginet, On Action (1989); Thomas Pink, Free Will: A Very Short Introduction (2004); Richard Swinburne, Mind, Brain, and Free Will (2013); Peter Ulric Tse, The Neural Basis of Free Will: Criterial Causation (2013); Mark Balaguer, Free Will as an Open Scientific Problem (2009).

their own choices.[9] And, while it may have influenced their behavior, the choice to engage in that behavior is theirs alone.

Suppose a member of the crowd was to say, in advance of the film's performance, *I will be so overwhelmed by seeing the film that I won't be able to avoid engaging in violence*. Would we take this claim seriously? Or would we suggest that it was very much her responsibility to *avoid* acting violently? The film may contribute to arousing someone's emotions, in such a way that she will engage in violence unless she restrains herself. Perhaps we'd want to say that the film *helped* to cause her emotional state—though it obviously can't be seen as exhaustively responsible for that state, since both her background and disposition and her choice of perspective as she views the film will also be relevant to determining what that state will be. But, even if the film helped to cause the emotional state, the emotional state itself does not *cause* her behavior; how she responds to her emotional state is still up to her.

If the legal authorities can restrain the exhibition of the film, it should also be possible to restrain the crowd. Intervention in anticipation of violence need not focus on expressive activity rather than on the brewing violence itself (if the violence *isn't* brewing, the intervention itself would seem to be inappropriately suppressive of autonomy). And, after some injury has in fact occurred, it will be possible to identify and subject to legal liability those who have actually engaged in violent conduct; there is no need to focus on the expressive activity rather than on the violence that actually injured the relevant victim or victims.

In a number of cultures, various acts, including some expressive ones, may be seen as impugning someone's honor. Others may believe that someone's honor has been irretrievably damaged in such a case unless he (this sort of honor is usually, even if not always, a male attribute) takes action to injure in return the person or people responsible for the harm to his honor. Regarding an expressive act as triggering, almost mechanically, a potentially violent response in such a case is to offer legal and,

[9]We can't know a priori that everyone in a given population is a responsible agent. It is in principle possible that some people in some groups are significantly impaired as regards the exercise of free will. It does not follow that those who are impaired in this way will be *caused* by the film to behave in certain ways, but we can't rule this possibility out entirely. My argument is simply that we cannot treat people presumptively as if they belonged to this—evidently tiny—group, and that there are good reasons to avoid crafting legal rules or imposing legal liability on the assumption that people belong to this group.

by extension, social endorsement of the responses of resentment and retaliation integral to an honor-based culture. But given the unreasonableness and destructiveness of these responses,[10] we have every reason to delegitimize and discourage them. We thus have every reason to seek to avoid doing so by reducing an agent's responsibility for acting in accordance with them by treating someone else's purely expressive conduct as even partly accounting for it.[11]

And this in turn is both an inaccurate characterization of the actions of the members of the mob in this particular case and a rule it would be undesirable to encourage others to follow. By treating the film as capable of overriding the capacities of the members of the mob to control their own choices, the legal system would encourage others in the future to resist destructive impulses less resolutely, to assess claims about others less critically, and to deny responsibility for destructive actions after the fact.

The point is not that someone might not act *wrongly* in producing or distributing a film intended to arouse intense negative attitudes. The point is simply that the film does not *make* people act on those attitudes in particular ways. *Their agency* intervenes between the display of the film and injury. Those who embrace and act on negative attitudes must

[10]The responses in question can be seen as objectionable for more than one reason. (*i*) They often assume that the absence of a retaliatory, vengeful response to a perceived wrong is itself shameful. But retaliation and revenge, whether or not violent, only add to the injury in the world and are never justifiable. (*ii*) The specific grounds on which people are judged to have been dishonored may be dubious. For instance, I may be injured by my partner's adultery. But the injury is constituted by her disengagement from me. In an honor-based culture, however, I may be seen as having been shamed as a result of her adultery either because I am "not man enough" to satisfy her sexually or because I am not able to control her. But of course I am not entitled to control her or anyone else. And if my partner behaves in a way that reveals and reflects my sexual inadequacy, while she may have acted wrongly by breaking promises to me and by putting our relationship at risk as well as by subjecting me to public embarrassment, these wrongs do not warrant violence.

[11]Consider the two cases noted in this connection by Hart and Honoré. *See* Hart & Honoré, *supra* note 4, at 56, 149, 183, 336, 375. In one, when Liverpudlian Catholics rioted in response to the bigoted remarks of a Protestant preacher, a court judged this a "natural" response and on this basis approved the detention of the preacher. Wise v. Dunning, 1 KB 167 (1902). In the other, the damages due a man's mistress in virtue of an assault by the man's wife were reduced in virtue of the provocation putatively offered by the mistress. Trib. Civ., Abbeville, Dec. 22, 1936, Gaz. Tri., Feb. 3, 1937, 62. In each instance, the court's ruling serves in some significant degree to legitimize violence and seems objectionable for that reason.

be seen as morally responsible agents accountable for their own choices. Thus, those who act wrongly in producing or distributing the film are not responsible for the injuries others inflict in the scenario I have envisioned. The producers and distributors *propose* these injuries, and intending injuries to others is morally objectionable. But the point of the law is not to punish immorality but to prevent, end, and rectify injuries inflicted on others by responsible agents.

C. Direction, Coordination, and Deception

The case might well appear different when the act of communicating the content serves to *direct* or *coordinate* the behavior of those with whom the communicator is participating in a cooperative venture. If Vincent Corleone uses a video recording to convey to his lieutenants instructions regarding a bank robbery ("Team 1: be on hand at the corner of Ninth and Main by 10:35 on Tuesday morning ...."), he has not *caused* them to perpetrate the robbery, so they are responsible for their own actions. But he is in part responsible for the robbery, not because he described how it might be performed, say, but because he *directed* the robbers on the scene, just as would be the case if he maintained real-time contact with them and, like a general, oversaw their movements during the robbery itself. He qualifies as a *participant* in the robbery and accordingly shares the liability of those wielding guns, collecting bills, and so forth. The communicative content of Vincent's DVD doesn't cause or constitute the bank robbery, and the robbers are responsible for their own actions, but the communicative content is an element of a communicative *act* on Vincent's part that is effective, not because he overrides the freedom of his lieutenants or the robbers (presuming he's not threatening them into executing the robbery) but because he's cooperating with them in making the robbery happen.[12] And so Vincent can certainly share in legal liability for the injuries brought about by the scheme.

Cases of deception immediately responsible for injury to people's bodies or possessions or for interference with their control over their bodies or possessions are also different. Take *fraud*, for instance. Here, I obtain your possessions under false pretenses, to one degree or another actively depriving you, because of my deception, of the capacity to

[12] *Cf.* Murray N. Rothbard, The Ethics of Liberty 80 (1982).

choose freely. Or consider a similar case: Perhaps an expressive act leads directly to injury to your body or possessions because you accept a false belief in virtue of the expressive act and behave accordingly. Suppose, for instance, that I instruct you to walk on a certain portion of a floor, a portion that turns out to be rotten, with the result that you fall through the floor and break a leg. Here, I may not have benefited, but my action has still deprived you of bodily well-being.[13] In these cases, my expressive activity has brought about a legally cognizable injury, and it is thus appropriate for me to be liable.[14]

It seems entirely consistent with the provision of robust protections for expressive activity that injuries to bodies and justly acquired possessions which are linked with the kinds of expressive activities considered in this section—direction and coordination on the one hand and deception on the other hand—should be subject to legal liability. But it is important not to treat these instances as justifying *ex ante* restraint of expressive activity in any case or *ex post* imposition of liability for such activity except in the narrowest range of cases. Such liability should be limited to those cases in which a particular act of direction or deception exhibits an immediate link with a specific injury. In addition, in the case of an act of direction, liability should be limited to a case in which the injury has

[13] *Cf.* Frank van Dun, *Natural Law and the Jurisprudence of Freedom*, J. Libertarian Stud., Spring 2004, at 33–34, *available at* https://mises.org/system/tdf/18_2_2.pdf?file=1&type=document. Thanks to Sheldon Richman for discussions of this topic.

[14] On the view I defend here, the regulation of lies not clearly involved in immediate aggression would be precluded for multiple reasons. (*i*) Such lies do not effect or otherwise bring about legally cognizable injuries. (*ii*) Regulating them would interfere with people's use of their own possessions and their autonomy. In addition, (*iii*) the kind of apparatus needed to regulate such lies could be expected to inhibit the operation of the instrumentally valuable aspects of the expressive ecosystem. (*a*) Legal regulations targeting purposeful deception would unavoidably involve the legal system in intrusive inquiries into murky issues related to personal virtue. Further, (*b*) such regulations could readily be employed to target controversial opinions or controversial speakers. It is an interesting question whether other theoretical accounts of the freedom of expression or reasonable developments of First Amendment might be understood to allow the legal regulation of lying. Seana Shiffrin argues that, while there are good reasons to rule out such regulation, her own preferred theory of free speech, which focuses especially on protecting thinkers' interests in making up their own minds, would not require legal protections for lying, and she suggests that Supreme Court may have been mistaken in extending First Amendment protection to lies. *See* Seana Valentine Shiffrin, Speech Matters: On Lying, Morality, and the Law 117–81 (2014).

been brought about by rights-violating conduct reasonably adhering to the central thrust of the directive expressive act.

These narrow limits ensure that the expression of general analyses or predictions or evaluations will not be subject to liability. The risk that a claim might turn out to be false and result in injury or that someone else might embrace a judgment an engage in harmful conduct in virtue of embracing the judgment could obviously inhibit good-faith expressive activity. It is difficult to inquire into agents' motives, and a legal system that eschews attempts to make people virtuous and that focuses on redressing injuries would not concern itself with motives in any case. So it won't make sense to exempt from liability only where good faith is demonstrable. However, narrowly limiting liability will have a practical effect similar to that of factoring good faith into the legal equation. And it will do little in general to inhibit expressive activity.

In general, when the legal system seeks to adjudicate questions regarding truth, an authority's judgment regarding truth is effectively substituted for someone else's by force. When a forcible substitution of judgment occurs, those affected are denied the freedom to use their own capacities to identify the truth. And the substitution of judgment by force is fundamentally problematic because, in foreclosing people's use of their own truth-seeking capacities, state actors give those affected the wrong *kind* of reason for belief acceptance, since the occurrence of force in support of a belief lacks any consistent positive relationship with the truth of that belief.

In the case of limiting liability for deception to *ex post* liability for specific misappropriation of justly acquired possessions or bodily injury, disputes regarding truth can be effectively constrained. Giving the legal system responsibility for adjudicating large-scale scientific, historical, or metaphysical claims is risky at best. It risks interfering with people's possessory rights and (to anticipate my arguments in subsequent chapters) empowering official mischief-makers, impeding people's autonomy and flourishing, and foreclosing the truth-seeking function of the expressive ecosystem. And the more large scale an issue becomes, and so more significant and high-profile, the more politicized, and so unreliable and potentially intrusive, the process of adjudicating truth-claims by means of the legal system is likely to prove. Long-term, large-scale disputes can be resolved through the operation of the expressive ecosystem without any need for the involvement of the law.

D. Emotional Upset, Insult, and Offense

Frank Murphy maintained that "the prevention and punishment of" expressive acts "which, by their very utterance, inflict injury" had "never been thought to raise a Constitutional problem."[15] Constitutional doctrine has changed since the announcement of Murphy's 1942 *Chaplinsky* opinion. But, even if it hadn't, the view Murphy treats as unproblematic is objectionable on normative grounds.

1. Emotion and Injury

To talk about emotional upset as a free-standing problem, much less as a free-standing injury, is to misunderstand the nature and function of emotions.[16]

Emotions constitute or embody judgments of meaning and value that are ordinarily, though perhaps not necessarily, paired with sensory signals.[17] These judgments are not necessarily the products of rational deliberation or of conscious reflection of any sort; one advantage offered by emotions is that immediate emotional judgments may be reached much more quickly than judgments reached deliberatively or reflectively. But emotions *matter* because they involve cognitively meaningful judgments. If they didn't involve such judgments, they would simply amount to bare sensations that we would have reason to treat no more seriously than, say, an increased heart rate or feeling of tension caused by a drink of coffee or coke. But if they *do* involve such judgments, then they cannot be treated as beyond question or criticism; if they involve cognitively meaningful judgments, then these judgments are truth-evaluable and we can assess the judgments' truth-aptness.

Thus, what's ultimately important when someone is emotionally upset is not the upset itself, but rather whatever it is that she is upset *about*. An emotion is necessarily *responsive* to some state of affairs in the world external to the consciousness of the person experiencing the emotion. That state of affairs might *merit* dismay or upset. But it's the state of affairs that matters, not my response to it. A form of the familiar open

[15] Chaplinsky v. New Hampshire, 315 U.S. 568, 571–72 (1942) (Murphy, J.).

[16] I refer to "upset," "disturbance," and so forth because I do not wish to use "emotional distress," which might be taken as a term of art with an existing legal meaning.

[17] *Cf.* Martha C. Nussbaum, Upheavals of Thought: The Intelligence of Emotions 64 (2001); Robert C. Solomon, About Love: Reinventing Romance for Our Time 76–82 (1988).

question argument is germane here. For any emotional reaction, we can reasonably ask, *But is this reaction appropriate to the circumstances to which it is a reaction?* By contrast, when we have fully specified an injury to an acknowledged aspect of well-being, it makes no sense—or, at minimum, much less sense—to ask whether it is, indeed, an injury.

Suppose you break my arm and I react in completely impassive fashion; you've still wronged me and you still owe me compensation for my medical bills and related expenses and the reasonable costs of recovering compensation from you. (Indeed, a particularly serious injury—probably not a broken arm—might leave me so numb that I experience no conscious, subjective upset.) By contrast, I might be deeply upset by the discovery that my child is dating someone from an ethnocultural background different from mine; but, despite my great disturbance, the relationship between the two does me no actual injury. Even if it appeared to do some sort of injury, if the strictures elaborated at the beginning of this chapter are correct it certainly does me no legally cognizable injury and thus can't be a predicate for legal liability. Not everything we dislike is an injury. The familiar aphorism remains apt: "Sticks and stones may break my bones, / but words can never hurt me."

If I accurately judge that a state of affairs is such that it merits dismay or upset, then the state of affairs itself ought to be my focus. On the other hand, if I incorrectly take a state affair to merit dismay or upset, then the fact that I experience these reactions is irrelevant. And of course some states of affairs brought about by the actions of others rightly merit upset or dismay without counting as legally cognizable injuries. To take an obvious example: breaking spousal (or other) promises of sexual exclusivity can sometimes prove, or risk proving, terribly disruptive to an identity-constitutive romantic relationship. It may in such cases rightly be an occasion for great dismay. It is thus not surprising that tort and criminal liability in once attached to adultery. But of course it doesn't carry legal consequences today. This obviously isn't because we now think that violating such promises is harmless. Rather, it's because we don't think legal liability is the right way to deal with the injuries effected by adultery.

This is doubtless in part because of the desire not to encourage angry spouses to use the courts to create unedifying public spectacles. But the best justification for the abandonment of rules permitting tort or criminal liability for adultery is that adultery isn't the *kind* of conduct to which such liability attaches. (Specifically, *contractual* liability is another matter. It seems perfectly reasonable for people to craft contracts in virtue

of which adultery might trigger monetary payments or the forfeiture or a bond or other asset, for instance.) Violating a spousal promise of sexual exclusivity is wrong for the general reasons promise-breaking is wrong and also in virtue of any specific injuries it may do in a particular case to a spousal relationship. But while it is wrong, and while it is frequently likely to prove very upsetting, it doesn't amount to a legally cognizable wrong because it does not cause or constitute an injury to anyone's body or justly acquired possessions. (Spouses do not have possessory interests in each other's bodies—they are not each other's slaves.)

Treating upset as a predicate for liability introduces a troubling element of uncertainty into the legal system. When liability is limited to cases of interference with people's emotionalbodies and justly acquired possessions, it will be clear what conduct can trigger liability. By contrast, (*i*) emotional reactions vary qualitatively from person to person. (*ii*) The same kind of emotional reaction may be much more intense for one person in a given case than for another. And (*iii*) subtle circumstantial differences may lead to significantly different emotional responses (on the part of the same person and on the part of different people). Emotional responses are thus unpredictable to a significant degree. This unpredictability limits moral culpability, and it is—given the grave seriousness of the law's use of force—especially significant as a limit on *legal* culpability. Introducing such unpredictability reduces people's ability to comply with legal requirements and unduly limits their social behavior. In particular, given that emotional upset is variable and unpredictable in this way, it would be easy to use a rule permitting liability for emotional upset to block or penalize expression legal authorities didn't like and, indeed, expression anyone didn't like—for any reason.

2. Offense and Insult

Emotional upset isn't an appropriate predicate for liability and isn't (at least ordinarily) itself an injury to any aspect of well-being. So it follows that the putatively *offensive* or *insulting* quality of an act—since offense and insult are species of emotional upset—can't serve as a reasonable predicate for legal liability, either, and can't be understood as an injury to any aspect of well-being, either.[18]

[18]While defending narrowly targeted legal penalties for what he characterizes as "hate speech," Jeremy Waldron is clear that offense as such is not an appropriate predicate for liability. *See* WALDRON, *supra* note 7, at 105–43.

(*i*) If offense or insult *were* an appropriate emotional reaction, what would matter would be the actual or predicted conduct evoking the reaction, not the fact that someone was offended or insulted in reaction to it. An emotional response is an *evaluation* of that to which it's a response, and the evaluation is either correct or incorrect. *If* the evaluation is correct, then it's the conduct evoking the response, conduct that is correctly evaluated as problematic, that ought to be in focus. But if the evaluation is incorrect, then there would seem to be no further reason to take the emotional response seriously. If the conduct is not otherwise an injury, it shouldn't become one simply because of someone's reaction to it. So focusing on offense or insult seems to put the focus in the wrong place.

But offense is in fact an entirely inappropriate response. This is so because, among other things, (*ii*) the state of being offended or insulted is *pointless*. It doesn't constitute any sort of benefit to the person who experiences it, nor does it prompt any sort of useful behavior. Being offended or insulted involves hostility, a largely valueless, and often destructive reaction that gives rise to retaliatory or retributive responses, responses involving actual or attempted injuries to aspects of others' well-being—sometimes including legally cognizable injuries to others' bodies or possessions. Like all retaliatory or retributive responses, these responses are unreasonable. While mounting or preparing to mount a proportionate defense to an evident threat is entirely reasonable, hostility—retributive or retaliatory—involves the desire to impose injuries, and so to add, if you will, to the injuries undergone the world, rather than eliminating existing injuries or contributing positively to creaturely flourishing.

(*iii*) Even if injuring or seeking to injure weren't (as I maintain it is) *always* unreasonable, it will *frequently* be so; and, when someone indulges and *acts* on it by engaging in retributive or retaliatory behavior, it will be destructive. This means, in turn, that there is a good reason to discourage it. By favoring the imposition of legal or social sanctions in response to perceived offenses, we treat hostility as appropriate, and we thus encourage people to nourish and express it. We make it more likely that entirely illegitimate hostile responses will be expressed without serious challenge. And we also make it more likely that mild negative responses will be replaced by more intense ones, as a cascade effect becomes evident.

It's especially worth emphasizing that (*iv*) the conduct to which being offended is a response frequently does not constitute or cause any sort

of actual injury at all. In general, offense at *B*'s conduct on the part of *A* seems to be a response to a perceived negative attitude—characteristically hostile or dismissive—evinced by *B* toward *A* as an individual or as a member of some group or toward some object or institution valued by *A*. But the challenge here would be to identify actual injury undergone by *A*, to specify the aspect of well-being injured just as such by *B*'s holding or expressing negative attitudes.[19] Does holding or expressing these attitudes constitute an injury to *A*'s life or bodily well-being? Her stock of or capacity to obtain knowledge?

It is unclear that holding or expressing negative attitudes ordinarily constitutes an injury to any of the basic aspects of anyone's welfare. (*a*) I am no worse off because a random person on the other side of the planet holds a negative view of me, even a highly negative view. (This person might act wrongly in cherishing that view for various reasons, of course, but it does not follow that in so doing she wrongs *me*.) Nor am I, in general, worse off just because someone more proximate embraces a negative view of me. So I am not ordinarily worse just because someone, near or distant, *expresses* such a view.

Suppose *A* feels insulted or offended by something *B* has said or evidently believes. *A*'s reaction might seem reasonable in light of *A*'s concern about behavior on *B*'s part that might seem to be threatened by *B*'s words; the role of *B*'s attitudes in distancing her from *A*; or problems created by the risk that *A* might embrace *B*'s beliefs or attitudes. These sorts of concerns serve to render *A*'s reaction intelligible in ways that reference to *B*'s holding or expressing certain beliefs or attitudes *simpliciter* does not.

Similarly, (*b*) I am no worse off because someone, near or far, holds or expresses a negative belief or attitude regarding some institution, practice, or belief I cherish. Suppose an artist produces a video depicting the gleefully malicious destruction of a symbol that's religiously important to me. (Assume the artist owns the object she destroys and that it's readily replaceable.) The artist's expression of hostility toward the symbol and so, presumably, toward that which it symbolizes doesn't affect *my* opportunities for life, knowledge, play, practical reasonableness, friendship, and so forth. (Perhaps being involuntarily subjected to the video hampers my participation in the good of aesthetic experience.) It doesn't affect my

[19] I presuppose here the judgment that an injury to someone is an injury to some specifiable aspect of her well-being.

ability to use the symbol in my own spiritual practice. And of course it doesn't injure any actual transcendent reality to which the symbol points. (If the transcendent reality is impassible, then no event in the creaturely world can affect it. If the transcendent reality is personal and passible, then it will have no more reason to find an attempted insult actually injurious than a finite person would, and presumably considerable reason to contextualize the attempted insult in ways that would make it much *less* disturbing.)

(*c*) I might be worse off if someone's embrace of a negative view of me amounted to a rupture in his relationship with me, distancing him from me. But it is the *acceptance* of the view, not its *expression*, that effects the rupture.

Of course, (*d*) I might reasonably fear that your expression of a negative belief or attitude about me *presaged* bad behavior on your part. It might signal that you were likely to engage in actually injurious conduct; it might even amount to an active *threat*. But threatened or actual bad behavior merits responses on its own. There's no need to focus on, or suppress or penalize, expressive conduct which *signals* that such behavior is forthcoming.[20]

And, indeed, this sort of expressive conduct might serve as a useful *warning* in virtue of which targets of bad behavior might be prepared for it, and this sort of expressive conduct might recontextualize some early-stage bad behavior in a way that rendered it worthy of vigorous, perhaps even forcible, defensive response. Perhaps, for instance, someone tells me, "People like you are disgusting, and our neighborhood should be

[20]A threat, whether conveyed by words or by conduct, can warrant a forcible response—when such a response is a necessary means of defense against imminent violence. But of course a threat that merits such a response must itself *be* a threat to effect a legally cognizable injury, as opposed to a threat to engage in legal conduct. The latter kind of threat, even if the threatened conduct is clearly *immoral*, can hardly merit a forcible response any more than the threatened conduct *itself* would merit such a response. My *threat* to avoid doing business with Sears, even if my purpose is immorally to pressure Sears to stop hiring LGBTQ employees, can no more warrant the use of force than would my *actually* not doing business with Sears. Thus, while Jeremy Waldron is correct that some vitriolic, deeply immoral public statements may amount to threats, *see*, *e.g.*, WALDRON, *supra* note 7, at 1–2, if they are not threats to engage in *violence* but rather threats to engage in odious but peaceful conduct, they will not merit legal interference because the threatened conduct itself would not merit legal interference. Non-forcible interference by individuals and non-governmental institutions (including government-funded universities) might well rightly seek to impede this conduct in various ways. A university, for instance, might in some cases

purified of them." In this case, I will be entitled to treat the person who said this as more likely than would otherwise be the case to be engaged in violent conduct, and so to interpret what would otherwise be ambiguous conduct on her part (say, reaching for what might or might not be a concealed weapon) as the first stage of an attack. And this means that I will be entitled to respond with force. No one has any right to engage in violence against me because she holds false-negative beliefs about me or finds me disgusting; but, given that someone does respond to me in this way and might act unreasonably on the basis of her reaction, it's beneficial to me that she has alerted her to this possibility.

(*e*) Another reason to think of the expression of negative beliefs or attitudes as potentially injurious is that I might, or might *fear* that I might, be tempted to *embrace* someone's negative belief or attitude *myself*, with debilitating consequences. *B*'s expression of a negative belief or attitude about *A* might raise questions on *A*'s part about whether *B*'s negative attitude was *warranted*. The resulting self-doubt might in some cases influence *A*'s capacity to act effectively.

But of course this doesn't mean that fostering it is an *injury*. That's because, even if the belief or attitude is expressed as a matter of hostility, it might in fact be appropriate. People may hold false views of themselves. And criticisms, whether or not voiced dispassionately and

suspend a student who had publicly threatened to engage in nonviolent mistreatment of one or more other students with disfavored political or religious beliefs. It might do so precisely in order to stop the intended mistreatment—*not* to punish the expressive activity. Stopping this *conduct* wouldn't be the same thing as impeding the expressive activity announcing or seeking to encourage it.

Waldron, *see id.*, suggests that expressive attacks on what he calls "assurance" to effect injuries that ought to be legally cognizable. Some expressive acts, he suggests, can undermine confidence on the part of particular people (he has identifiable groups in mind) that they will be fully included in, treated as equal members of, their society. The kinds of expressive acts Waldron has in mind are, indeed, frequently wrong, sometimes horribly so. Some of them will amount to threats to commit legally cognizable wrongs, and they should certainly be treated as such. In other cases, however, there will be several problems. (*i*) In these cases, the threat to engage in conduct that undermines assurance in Waldron's sense will not be a threat to commit a legally cognizable injury—though it may involve a threat to engage in serious moral wrongdoing. (*ii*) It may not amount to a threat to commit an injury at all. (*iii*) It may involve *encouragement* to engage in wrongdoing or to commit an injury—but not a *threat* to do so. In these other cases, then legal liability will not be appropriate.

rationally, may correctly reflect difficulties with their behaviors or attitudes. Being confronted with negative perceptions may thus be positively *helpful.* (To be sure, if the attitude is rooted in a correct assessment, this does not mean that *A* must denigrate herself rather than simply acknowledging the truth of the assessment and, as appropriate, addressing those aspects of her behavior, beliefs, etc., that are relevant.)

Insult and offense may be triggered by the sense that someone's superior status has been called into question. Someone can of course be troubled by being viewed as lacking moral equality with others—she is treated, say, in a way that people in general wouldn't be. And while *viewing* her in this way is not itself injurious, it may be problematic for multiple reasons—it may signal likely bad behavior and it may encourage someone to view herself inaccurately. And we certainly have reason to regard this as troubling. However, in other cases, someone might feel insulted or offended because she is viewed as not being *superior* to others. She might regard herself as entitled to cut a line; to sit while those speaking to her stand deferentially; to claim the largest portion of a dish at the table because of age or gender; and so on. And she might well respond angrily, with the sense that she has been slighted or treated rudely, when she is not permitted to act on the basis of her sense of entitlement. This attitude, a denial of basic moral equality, is one a liberal society's legal rules and social norms should not legitimize or otherwise encourage.

Sometimes, of course, the negative reaction conveyed in and through *B*'s putatively offensive or insulting behavior toward *A* simply involves, not a general thesis regarding *A*, but simply the purely subjective reaction to *A* experienced by *B*: "*I* find you unpleasant"; "*I* find you disgusting"; "*I* find you trivial." Here, there's no false proposition, but only an individual response. It is one sign of intellectual and emotional immaturity, of course, to assume that others should share one's subjective responses and to seek to validate those responses by encouraging others to embrace them or even demanding that they do so. So when *B* seeks to insult *A*, *B* (who, as a person insulting someone else, is likely to exhibit the relevant sort of intellectual and emotional immaturity) both wants others to join her in reacting negatively to *A* and indeed—both as a means of validation and as a means of injury to *A*—wants *A* himself to share her negative reaction.

But of course the reaction isn't objective. There's nothing inherently *correct* or *fitting* or *appropriate* about it, *ex hypothesi. B*'s telling *A*,

"I find you disgusting," is no more inherently worthy of shared embrace than *B*'s telling *A*, "I find eggplant disgusting." It is entitled to no rational claim on *A*.

It could certainly be debilitating for *A* to adopt *B*'s negative subjective reaction to her. Recognizing that the reaction is arbitrary, that it is not the sort of thing that *merits* or *could merit* external, objective endorsement, should help to protect her from the temptation to embrace it. And, again, as with actual falsehoods, the legal system should not presume that people are passive receptors of others' attitudes, with little choice but to accept them. It should not treat the expression of these attitudes as necessitating their acceptance. Nonetheless, someone might not be able to resist the temptation to offer endorsement in such a case. And the recognition that an injury is not legally cognizable because it does not necessitate a reaction should not minimize the immorality of assailing someone's self-understanding with these sorts of reactions.[21]

Suppose *B*'s expressive act is rooted in falsehood. (The falsehood might be descriptive—"Having certain phenotypic characteristics, as you do, means that a person is more likely to be lazy or stupid or dishonest!"—or normative—"People like you objectively deserve to be subordinate to people like me, excluded from the society of people like me.")[22] In this case, *A* certainly need not accept it. While communicating any falsehood with the intent that it be accepted is as such an attempt to effect an injury, falsehoods about *A* communicated by *B* to *A* are special. That's because *A* will generally have a basis for *recognizing* them as falsehoods and so rejecting them. Nothing compels their acceptance. And by not using legal pressure to eliminate even the potentially injurious

[21] *Cf.* Staci Zaretsky, *Did Law School Bullying Contribute to a Recent Graduate's Suicide?*, Above the Law, Sep. 20, 2017, https://abovethelaw.com/2017/09/law-school-bullying-leads-to-recent-graduates-suicide/. Thanks to Jessica Brown for calling this article to my attention.

[22] Nourishing a false belief or a negative attitude or focusing on a true but negative belief or a negative attitude about someone is unreasonable for at least three reasons. (*1*) It may amount to a distancing of myself from a friend to whom I am committed. (*2*) It may increase the possibility that I will treat the person in question unfairly or otherwise injure her. And (*3*) choosing to nurture such a belief may involve an attack on one or more basic goods—potentially including the goods of friendship, knowledge, and practical reasonableness—while also, when the belief is false, encouraging the adoption of a habit of disregard for the truth.

offense done by falsehood to people's self-conceptions, we encourage people to take responsibility for how they view themselves, to view calumnies *critically*, and to seek on their own to determine how best to view themselves. (We can, of course, assist them by challenging falsehood with truth.)

In addition, (*v*) a communicator's mental state matters. As Oliver Wendell Holmes quipped, "[e]ven a dog distinguishes between being stumbled over and being kicked."[23] Offense will be inappropriate, in particular, in those cases in which I have misunderstood someone's beliefs, attitudes, or intentions.

(*a*) The communicator's mental state matters because I will reasonably experience particular expressive content as troubling to the extent that I take it to be (*1*) predictive of bad behavior on the part of the communicator in relation to me or someone I care about, (*2*) indicative of a relational rupture between me and the communicator, or (*3*) corrosive of my own self-understanding or the self-understanding of someone else receiving the communication. Conduct in categories (*1*) or (*2*) will be troubling in virtue of how I understand the belief or attitude underlying it. If I am fearful, distraught, or angry but have misunderstood the communicator's intent, then, once I am apprised of the communicator's intent and it is clear that her words don't portend ill, it no longer makes sense for me to remain fearful, distraught, or angry.[24] The point is not that independently specifiable injury that happens to be unintentional should get a free pass. The point, rather, is that occurrence of the putative injury in this case *depends* on the conduct's being intentional. Expressive conduct will be troubling in ways (*1*) or (*2*) just insofar as it embodies attitudes or intentions of particular sorts; if it

[23] O. W. Holmes, Jr., The Common Law 3 (1882).

[24] I am, of course, entitled in some cases to assume that my conversation partner's intent is obvious given what she says. If she says, "You're an idiot!," I am entitled to assume that she believes I am an idiot. And I might find her believing this might be troubling for sorts of reasons I note above. But I might, for all that, be mistaken. Perhaps, for instance, she is just learning English and has been told by a not-so-well-meaning friend that "idiot" is the English word for "excellent chef." Or perhaps her tone of voice and the conversational setting of her words make clear to me that she intends "You're an idiot!" in an affectionately jocular way. In neither case am I likely to respond, nor will it be reasonable for me to respond, as if she had intended to utter a vituperative characterization of me. Thanks to David Gordon for encouragement to think more about this point.

doesn't, therefore, apart from exceptional cases, it *can't* be troubling in these ways.[25]

(*b*) A communicator's mental state can figure in another way, too. Suppose you say something critical about me. I *regard* your comment as inaccurate and as an unfair generalization about some group of which I am a member. The criticism stings. In addition, because of what I suppose about your mental state, I *believe* both that I am being treated unfairly, since members of various groups will differ in many respects, and that others with whom I in one way or another identify are being viewed unfairly. But it is relevant to the merits of this negative reaction that in fact you took no position on the characteristics of the relevant group and intended your criticism to apply only to me.

In a case in which unfair group-based criticisms of the relevant sort are common, of course, the risk of misunderstanding may be high, and it may in these cases be reasonable to expect the person offering the criticism to make it in a way that reduces the risk of misunderstanding.

There may also be the worry that the critic intends to criticize me in particular but has been *influenced* by inaccurate generalizations about a group or groups to which I belong, generalizations that she has embraced unconsciously and unreflectively. In this case, however, it will not, *ex hypothesi*, be the case that the criticism is intended to focus on the group. The *intent* is still to criticize me in particular, and this is certainly relevant to assessing its moral quality. However, if the critic is aware that she is prone to accept and judge in light of inaccurate generalizations, it will be her responsibility to take this into account when communicating with others.

Emotions matter because of the underlying realties they signal. If an emotion does not signal the occurrence of an actual injury, then under ordinary circumstances it will be morally irrelevant. If it does signal the occurrence of such an injury, what will matter will be the injury rather than the emotion signaling the injury. *Being offended* and *being insulted* are emotional reactions that are appropriate, if at all, in light of the putative injuries they signal. But they are, in any case, hostile, unproductive, and dangerous, and so generally or always inappropriate. This is

[25]To be sure, there might be cases in which I have misunderstood the communicator's intent but in which her *actual* intent portends ill for me, *or* in which the communicator intends no ill-will toward me despite the fact that her non-malicious verbal performance portends ill without her realizing that it does.

especially so because offense and insult are not infrequently occasioned by non-injurious conduct. It is also the case to the extent that these reactions are framed with inadequate attention to the mental state lying behind putatively offensive or insulting behavior.

Whether I feel immediately offended or insulted in response to something someone says is not ordinarily, of course, a matter of cool deliberation or of voluntary action. Emotional reactions are frequently relatively automatic. But what I *do*, how I *choose*, when an instinctive reaction has occurred *can* be a product of deliberation to a greater extent; I can restrain myself and decide what to do. More than that, I can prepare myself in advance by coming to a clearer understanding of what sorts of responses are appropriate. I cannot, in the moment, simply turn off a particular reaction. But I can opt not to treat my being offended as a reason to act, and I can seek to extirpate offended reactions entirely over time.

3. Expression and Bodily Alteration

We normally think of expressive activity as bringing about injuries to bodies and possessions, if at all, through its influence on others' behavior (apart from the sorts of cases I just canvassed). But we might also consider the possibility that expressive activity itself could injure someone's body.

Any sensorily mediated communication from *A* to *B* necessarily alters *B*'s body. There might be tangible reactions at the *time* of the communication (ear-drum vibrations or an increased heart rate, say, along, of course, with the movements of signals along neural pathways). There will be tangible changes in the wake of the communication (those involved in the storage of new memories and the creation of new patterns of behavior and emotional response). And a sensation, a perceptible physical change, is always or ordinarily an element of an emotion. Evoking the emotion thus amounts to the effectuation of a physical change in someone's body. So there is no way to avoid communicating without interfering with the recipient's body.

Normally, this kind of interference will be *de minimis*. Bodily integrity is undisturbed, and bodily functions continue as before. As a result, there could not reasonably be a demand for compensation for bodily interference effected by a communicative act because there would be no injury for which to compensate. And this includes instances in which injuries are, as they frequently are, *registered* emotionally. The occurrence of the

emotion that signals a given injury is not itself,[26] and does not cause, the injury. The injury *evokes* the emotion, and it's the independently specifiable injury that merits compensation. As I've already noted, whether I experience emotional upset is irrelevant.

A trickier case occurs, however, when the content of a communication activates emotional responses sedimented in and through past trauma. The communication does not, of course, cause the body to malfunction directly: The emotional response is evoked precisely because the body is working the way it's supposed to work. But when the emotional response occurs, the apprehension of reality and the capacity for judgment are impaired.

If liability were possible in such a case, the responsible party could avoid liability simply by noting communicative content with the potential to activate post-traumatic responses of the relevant sort. Even so, the possibility that an expressive act might interfere with the operation of someone's body in a way that impaired her capacity for judgment need not be seen as justifying interference with expressive activity. (*i*) The risk of this kind of activation is low and can't reasonably serve as the basis for any general policy of prior restraint. It will be difficult to make awareness of the risk a basis for rational planning where the concern is simply that some unidentified person might be adversely affected. (*ii*) The activation of these responses might be a foreseen but unintended by-product of some communicative act, a by-product which it might be reasonable to bring about in a particular case event without a warning. (*iii*) Even when a given communicative act that might activate a post-traumatic bodily response is *un*reasonable, it might also be unreasonable to interfere *ex ante* with the *class* of acts of which this one is a part or to impose liability *ex post* on this particular act because of the other reasons, noted in the remainder of this book, to avoid interfering with communicative acts. (*iv*) In particular, allowing for interference with expressive activity in this kind of case would be problematic because the uncertainty involved in predicting with any confidence that debilitating post-traumatic stress could result from a given communicative act could make it easy for unwise or self-dealing legal authorities to use the risk that this kind of stress might be evoked as an excuse for interference with expressive

[26] Perhaps in a rare case, the sensory signals one experiences are so overwhelming as to be debilitating. In this case, the occurrence of the emotion might itself be injurious.

activity. Thus, even if the fact that a communicative act might serve as an indirect interference with another's body in what could in principle be a legally cognizable way, then there will be good general reasons to avoid predicating prior restraint or after-the-fact liability on the possibility that it might do so.

There might, however, be grounds for *ex ante* or *ex post* interference in the case in which someone engages in a communicative act *with the purpose* of significantly interfering with another's cognitive functioning by activating a substantial post-traumatic bodily response and in which the desired response or a comparable response actually occurs, with debilitating results. This standard is very high, and it would obviously rule out interference and liability in some cases in which genuine interference with another's body has taken place. But the requirement of purpose carefully cabins interference with communication in ways reflective of the concern both with the communicator's and other recipients' possessory rights and with the other rationales for freedom of expression advanced here.[27]

Seemingly similar cases might be viewed differently, however. Suppose, for instance, I communicate with someone I believe to be responsible for ordering a murder. I communicate, let us imagine, in a way designed to elicit a confession from her, perhaps in part by providing her with tangible evidence—visual, aural, etc.—of just what was done to the murdered person. My goal is certainly to unsettle or disturb her. Perhaps she has not previously seen just what was done on her orders, and perhaps she suffers a stroke as the full horror of what she has done sinks in on her. Here the communicative content is responsible for her emotional upset, as it is intended to be.

V. Conclusion

Injuries should be legally cognizable when they harm or seriously interfere with people's bodies or justly acquired possessions. Expressive activity does not in general injure in legally cognizable ways. Expression doesn't *amount* to injury. And it also doesn't necessitate injury, since those who act to injure others must take responsibility for their choices, and since it is their acts, rather than any expressive conduct that might

[27] *Cf. New York Times* Co. v. Sullivan, 376 U.S. 254 (1964).

have affected their thinking, that effect the injuries.[28] Reactions like *being insulted* and *being offended* are of dubious merit and should not receive legal endorsement; in fact, we should seek to banish them from our moral and emotional vocabularies. And, while some expressive acts *can* affect bodies indirectly, they do not do so in ways that should (apart from instances of coordination, direction, and deception) trigger liability. This is evident because (*i*) there are good reasons to offer legal remedies only for injuries to people's bodies and justly acquired possessions and (*ii*) expressive activities neither constitute nor necessitate injuries to people's bodies and justly acquired possessions and they fail to bring legally cognizable injuries about except in a narrow range of cases.

Suppose, however, that expressive acts clearly constituted, necessitated, or effected injuries to people's bodies or justly acquired possessions. Or suppose that injuries other than those to bodies or justly acquired possessions could rightly trigger legal liability or social sanction. Nonetheless, weighty additional reasons serve to rule out the use of legal liability or, in many cases, social pressure to impede or punish expressive activity. I examine these reasons in the next three chapters. Taken together, they count strongly against treating even significant expression-linked injuries, if there are any, as predicates for legal liability or, frequently, social pressure. The first of these reasons is that the relevant sorts of liability and pressure wouldn't be imposed by perfectly wise, objective, and benevolent decision makers. A central reason to oppose the practice of using legal and social sanctions against expressive activity is that decision makers can be expected to use the capacity to impose such sanctions to further their own agendas and interests. I elaborate this worry in Chapter 4.

[28] It is very much to Jeremy Waldron's credit that he clearly emphasizes this distinction in arguing that *indignity*, which he believes can be specified objectively and which need not involve (thought it might be thought predictably to occasion) subjective upset, rather than *offense*, which is necessarily subjective, that ought to be the basis for the "hate speech" prohibitions he favors. *See*, *e.g.*, Waldron, *supra* note 7, at 111–14.

CHAPTER 4

Public Choice, Class, and the Ecology of Free Expression

State actors should not be trusted to police-expressive activity not least because they can be expected to do so as a way of advancing their personal and class interests.

When we frame rules regarding freedom of expression, it's important to remember that these rules will be applied and enforced in the real world. That matters in light of what we know about those who will make, interpret, and apply the rules. It also matters as regards the content of the rules.

Legislators and regulators frame rules regarding expressive activity. Judges and members of regulatory commissions render putatively authoritative rulings regarding the meaning of these rules. And executives and bureaucrats and police officers and innumerable other government functionaries enforce the rules. We know several things about all of these state actors.

Perhaps of greatest importance is the fact that none of them is a transparent medium frictionlessly translating the will of the people into laws, judicial decisions, or administrative actions. And none of them is a passionless expert finding and employing the most efficient means to achieve whatever end the public wants or needs.

Gary Chartier, *An Ecological Theory of Free Expression*,
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To understand the behavior of state actors, it's important to begin by abandoning the romance of politics.[1] At minimum, state actors bring their own impulses, preferences, biases, and so forth to their governmental roles. The principal–agent problem bedevils business relationships of all sorts: How can a board of directors keep a president from self-dealing? How can a client keep a lawyer from ignoring a client's interests and acting on his own behalf?[2] A principal lacks the ability to monitor an agent consistently, and an agent frequently enjoys multiple, often undetectable, opportunities to pursue her own interests at her client's expense.

Conventional democratic theory treats the members of the public in democratic states as principals and state actors as their agents. But the problems that plague conventional principal–agent relationships are magnified dramatically in this case.[3] There are many, many principals, even in the case of a local governmental entity. The practical effect is that no one principal will usually find it efficient to seek information about state actors' actual behavior (as opposed to their public pronouncements) and about the actual (rather than announced) features and effects of the policies state actors favor and implement.[4] The size of the public also means that state actors can often count on significant support from some putative principals even if others are hostile. Individual principals dissatisfied with agents' performance can't fire and replace them if they're state actors. Much of what putative agents do is relatively hidden, so that monitoring is particularly difficult. State actors can use their official powers to reduce the risk of monitoring by or accountability to their supposed principals. They can also use their public platforms for the purpose

[1] *Cf.* James M. Buchanan, *Politics Without Romance: A Sketch of Positive Public Choice Theory and Its Normative Implications*, 3 Zeitschrift des Instituts für Höhere Studien B1 (1979); James M. Buchanan, Public Choice: The Origins and Development of a Research Program (Center for the Study of Public Choice, 2003), *available at* https://www.gmu.edu/centers/publicchoice/pdf%20links/Booklet.pdf. *But cf.* Robert Higgs, *Politics without Romance? Yes and No*, The Beacon, Mar. 9, 2017, http://blog.independent.org/2017/03/09/politics-without-the-romance/.

[2] Or, indeed, murdering the client; *cf. Murdered Man's Estate Founds Great University*, New York Times, Feb. 25, 1912, at 1.

[3] *See* Robert Higgs, *Principal-Agent Theory and Representative Government*, The Beacon, Aug. 24, 2017, *available at* http://blog.independent.org/2017/08/24/principal-agent-theory-and-representative-government/ (last viewed Aug. 31, 2017).

[4] *Cf.* Ilya Somin, Democracy and Political Ignorance (2d ed. 2016).

of garnering support that will allow them to ignore criticisms. And they can shape the outcomes of elections by disempowering some classes of people.[5]

Campaign advertising is often deceptive and manipulative. And politicians often frame their positions in ways likely to mislead the unwary. (Compare candidate Barack Obama's appeals to the peace vote, and his seeming opposition to the growth of the national security state with President Barack Obama's actions after occupying the White House.) Politicians say what they think voters want to hear; once in office, they can be counted on to do whatever they think will boost their chances of reelection and benefit their cronies. And of course there's the fact that votes often don't count because elections can too easily be stolen.[6]

The principal–agent problem would be a serious problem in the political context because of the structures within which politicians operate even if state actors were largely indistinguishable from members of the population more generally. But this almost certainly isn't the case. Those who come to exercise state power seem likely, unsurprisingly, to be on average the sorts of people who want power and are good at acquiring and retaining it: They are likely, that is, to be unprincipled and ambitious. Since connections matter at multiple stages of the process of gaining power, being linked with existing elites will make it easier for people to achieve power. And, once in office, even if she arrives with clean hands, a politician becomes the target of enthusiastically privilege-seeking elites and their cronies, who will be adept at influencing her or his actions to their benefit. In short, it is very likely that state actors will be particularly prone to seek and maintain power and to use state power to benefit themselves and their cronies. It's not a matter of coincidence if state actors are members or supporters of the ruling class; the ruling class is *constituted* by its relationship with the state.[7]

[5] Thus, the victims of the drug war and other campaigns against victimless actions will be poorly positioned to influence electoral outcomes; the deck starts out stacked against anyone who wants to roll back state policies responsible for unjust imprisonment. Similarly, death penalty opponents are frequently prevented from serving on juries tasked with deciding whether or not people should be executed.

[6] Just ask Coke Stevenson; *cf.* Robert Caro, 2 The Years of Lyndon Johnson: Means of Ascent 145–412 (1990). Thanks to Elenor Webb for purchasing a copy of this book for me.

[7] *See* Social Class and State Power: Exploring an Alternative Radical Tradition (David M. Hart et al. eds., 2018).

State actors likely to be particularly ambitious and unprincipled. They are also likely to represent particular social strata. As sociologists like C. Wright Mills and G. William Domhoff have shown,[8] elite groups, defined not just by their relationship with state power but also by their wealth and social standing, and the interconnections of their members with each other persistently exert influence over state policies. They may sometimes themselves be state actors. But they will in any case be socially connected with state actors in various ways and will be able to engage in back-channel communication with them and to affect their choices. While there will of course be exceptions to this as to other generalizations, these actors can be expected to behave both in the *interests* of their social *confreres* and in light of the *perspectives* characteristic of members of their social group, no matter how limited and narrow these may sometimes prove to be.

There are thus at least two *incentive* problems for any state-based political system: (*i*) accountability mechanisms are limited and (*ii*) state actors' internal controls are likely to be especially permissive.

There are also serious *knowledge* problems confronting such a system. (*i*) Much relevant knowledge is dispersed, and not shared, in a way that makes it impossible to aggregate. (*ii*) Many relevant truths simply aren't known to anyone. (*iii*) Even in particular cases in which state actors do know relevant truths, they and others will have good reason to wonder self-critically whether this is the case in any particular instance. (*iv*) Related to the incentival difficulties already noted: Members of the public will have good reason to wonder in any particular case whether state actors are being honest and forthcoming about the knowledge they possess. (*v*) Similarly, members of the public will have good reason to wonder whether state actors can be trusted to act impartially when charged with adjudicating various knowledge claims. (*vi*) And this means in turn that, even if state actors were (as I would deny is possible) reasonable in interfering with freedom of expression, there would be reasonable concerns about the *legitimacy* of their doing so.

Incentive and knowledge problems alike bedevil state attempts to regulate speech. Knowledge problems mean that even honest mistakes on the part of state actors can have substantial negative consequences. And incentive problems mean that there is good reason to worry that the

[8] *See* C. Wright Mills, The Power Elite (1956); G. William Domhoff, Who Rules America? The Triumph of the Corporate Rich (7th ed., 2015).

mistakes won't be honest. Suppose that interference by state actors with expressive activity was sometimes capable *in particular* cases of preventing or remedying particular wrongs in a narrowly targeted way. I have already offered multiple reasons to oppose even this sort of potentially effective interference. But the incentive and knowledge problems create very reasonable expectations that interference with expressive activity will *not* be narrowly targeted to deal with any injury someone imagines might be effected by expressive conduct. Legal rules that are framed in putatively general terms will be *applied* by state actors in support of their personal agendas. Thus, for instance, "the prosecution of hate speech in a court runs the risk of giving that court the opportunity to impose a further violence of its own. And if the court begins to decide what is and is not violating speech, that decision runs the risk of constituting the most binding of violations."[9] It seems particularly likely that putatively general rules will be used by state actors to suppress expressive activity by marginalized, excluded, and subordinated groups.[10]

Minimizing state actors' discretion to interfere with expressive conduct can reduce or eliminate these risks. The more clear and unequivocal the relevant standard, the less likely it will be that state actors can apply it in ways reflective of their limitations in knowledge or designed to promote their personal interests, benefit their cronies, or yield to popular prejudice and bigotry. Thus, the risk that, if they are permitted some discretion to engage in content-based interference with expressive activity, state actors will engage in mischief reflective of their personal limitations and interests and those of their cronies provides a further reason—in addition to those noted in Chapters 2, 3, 5, and 6—for denying them this sort of discretion entirely. A rule completely precluding content-based interference would be easy to understand and apply, and actions inconsistent it with would be easy to identify, resist, and sanction.

[9] Judith Butler, Excitable Speech: A Politics of the Performative 65 (1997). As will be apparent from Chapter 3, I am doubtful about the use of "violence" in this context.

[10] Such groups thus have particular stakes in the maintenance of robust protections for expressive activity; *see*, *e.g.*, Stephen M. Feldman, Free Speech and Democracy in America: A History (2008) (highlighting struggles by excluded groups to speak without suppression). *Cf.* Butler, *supra* note 9. There is the risk that "racially marked depictions of sexuality will be most susceptible to prosecution, and those representations that threaten the pieties and purities of race and sexuality will become most vulnerable." *Id.* at 64.

Quite apart from the potential for mischief on the part of legal and other decision makers empowered to interfere with expressive activity, there are substantial reasons to oppose rules and norms allowing them to do so. Some of these reasons, on which I focus in Chapter 5, concern the importance of the autonomy of those who engage in expressive activity and of those who are the recipients of their communications, and of the kinds of fulfillment which autonomous expressive and receptive activity can further.

CHAPTER 5

Autonomy, Fulfillment, and Expression

Respecting expressive activity is a way of respecting the personal autonomy of those who engage in this kind of activity and those who receive their communications, and so of facilitating the flourishing of both.

I. Introduction

Respect for personal autonomy,[1] for the capacity to choose for oneself the shape one's life will take,[2] and regard for the aspects of well-being in which the ecosystem of expression enables people to participate, provide important reasons for respecting and protecting freedom of expression. Protecting free expression *safeguards* a variety of goods produced or facilitated by expressive acts. But those acts themselves, and the consumption of their products, *directly involve* various basic goods. While the rationale concerned with possessory rights focuses on the importance of maintaining a framework that happens to permit free expression and

[1] My concern here is both with autonomy in a fairly broad sense, understood as self-direction, and with autonomy in the narrow sense of personal decision making in accordance with reason.

[2] *Cf.* Germain Grisez & Joseph M. Boyle, Jr., Life and Death with Liberty and Justice: A Contribution to the Euthanasia Debate 452–57 (1979). Grisez and Boyle argue for an understanding of liberty that is in many respects quite similar to the view of personal autonomy I defend here, and I have drawn on their account where appropriate. They tend to run together what I'm calling "autonomy" and what I'd refer to as "freedom

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the instrumental rationale focuses on widely shared benefits of permitting or even encouraging expression, another set of rationales focuses on specific benefits to the communicators and consumers of expressive content. Autonomy is important in its own right, and it also enables various other kinds of flourishing. Regard for autonomy and for the kinds of flourishing it makes possible provides important reasons for us to respect expressive freedom.

II. The Importance of Personal Autonomy

Personal autonomy is related in multiple ways to the basic aspects of well-being and is deeply valued by most people. While autonomy is not itself a basic aspect of well-being,[3] there are multiple reasons for me to respect someone else's autonomy without reference to any particular benefit it might yield instrumentally.

(*i*) I have a range of preferences regarding the ways in which I want to live my life. That I have these preferences at all means that, at least ordinarily, I do not want my efforts to fulfill them to be interfered with. But if *I* don't want the fulfillment *my* preferences interfered with in general, it would be arbitrary, inconsistent with the Principle of Fairness, to

from aggression"; *cf.* Gary Chartier, Anarchy and Legal Order: Law and Politics for a Stateless Society 4 n.9 (2013). I suspect that their view could be modified to offer clear and distinct protection for the latter kind of freedom, which in my view delimits the sphere of the political, were they to abandon their (limited) commitments to the authority of the state and to retributive punishment and were they to embrace the conception of possessory rights I defend here, one that is considerably more robust than theirs. As regards the authority of the state, they maintain: "[I]f people accept a social order for the sake of goods to which they are committed, and the society then uses its methods of control—especially the coercive methods of political society—to compel people to act for other goods which they are not in fact committed, then the process of government does infringe liberty." *Id.* at 454. I think there is little reason to suppose that people actually accept, or should accept, a *political* order, a state apparatus (which is what Grisez and Boyle seem primarily to mean by "a social order"), for the sake of any goods to which they are committed. If commitments to goods to be achieved in and through a political order limit what that political order can do, then most or all political orders will, in my view, be clearly illegitimate. But to argue this point here would take us to far afield.

[3] For the view that autonomy is, while valuable, not a basic aspect of well-being, *see* Robert P. George, Making Men Moral: Civil Liberties and Public Morality 179–82 (1993).

accept interference with others' fulfillment of *their* preferences in general. Fairness grounds a presumption against interference with autonomy.

(*ii*) Not achieving goals one has set for oneself is potentially a deeply troubling variety of failure. To interfere with people's autonomous pursuit of their goals is thus to risk making this sort of failure an aspect of their lives.[4] Again, since one would not want to be saddled with this kind of failure oneself, one has good reason to avoid imposing it on others.

(*iii*) Interference with others' actions designed to fulfill their preferences is sometimes motivated by the desire to encourage putatively virtuous behavior. But genuine virtue is embraced by free choice, not as a result of external pressure. It seems, then, as if the goal of promoting virtue using force or extreme social pressure is ruled out from the start.[5] In addition, we need not be skeptics about morality to recognize the difficulties we confront in discerning what moral requirements might be in particular cases. And this should make us particularly hesitant about using force to implement our moral convictions by interfering with others' autonomy.

(*iv*) More generally, flourishing is a matter of reasonable choice. Fulfillment doesn't happen to as we sit passively and wait for it; fulfillment happens in and through our choices. Indeed, the *point* of morality "is to constitute oneself" through one's choices.[6] Since limits on autonomy compromise people's abilities to make reasonable choices, such limits unavoidably interfere with their capacity to flourish—certainly with their capacity to nurture and exhibit practical reasonableness, and likely also, as I emphasize in Part III, to participate in a variety of other aspects of well-being. Such limits in general will often be difficult to square with the Principle of Fairness. And any *forcible* attack on practical reasonableness will be ruled out completely by the Principle of Respect.

(*v*) In addition, because restraints on their autonomy mean that "[t]heir lives are of necessity constituted otherwise than they wish," then, to the extent that these restraints obtain, "they are alienated from their very selves." Autonomy ensures that "the selves which … [people] constitute in action are the selves in whom they find their own fulfillment."[7]

[4] *See* Joseph Raz, The Morality of Freedom 353–55, 385–89 (1986).

[5] *Cf.* Grisez & Boyle, *supra* note 2, at 456.

[6] *Id.* at 455.

[7] *Id.* at 455.

Of course, the imposition of limits on autonomous action may in particular cases be unavoidable, but their deleterious effect on flourishing provides a crucial reason to minimize them.[8]

(*vi*) A further reason to respect others' autonomy is that they characteristically know themselves and their circumstances much better than do the authority figures who might presume to interfere with the fulfillment of their preferences. This lack of on-the-ground knowledge makes inept meddling and the occurrence of destructive consequences troublingly likely. It also means that not only people's unique opportunities and circumstances but also their unique opportunities to give to others will be ignored or undervalued.

(*vii*) Empowering authorities or others to interfere with people's autonomy might also not go well because of the temptation of those who interfere to pursue their own interests or agendas rather than the well-being of those with whose autonomy they're interfering, or to seek to impose their own limited conceptions of flourishing on others.

(*viii*) Particular people matter *not* because they are the *building blocks* of society, understood as distinct from all those who participate in it, but because they *are* society, which has no consciousness or capacity for agency apart from them. To be concerned with value is to be concerned with actual, acting agents: Value is realized and experienced precisely by actually existing persons. It is their welfare as the particular persons they are that is morally significant. Thus, "the common good *is* the good of individuals, living together and depending upon one another in ways that favour the well being of each."[9]

(*ix*) Respecting autonomy acknowledges people as creative, with the capacity to flourish and to contribute to social interactions in distinctive ways. It treats others as genuinely existing *others*, as others not simply assimilable to one's own plans and expectations, as having lives that are actually *their own*. It gives them the space to relish and define their individuality. And of course this has implications for expressive freedom.

(*x*) Because autonomy is not a basic aspect of well-being, even deliberate interference with someone's autonomy does not violate the Principle of Respect. But the Principle of Respect prohibits purposeful or instrumental injury to people's bodies. In turn, the Principle of Fairness limits

[8] *See id.* at 455.

[9] John Finnis, Natural Law and Natural Rights 305 (1980).

unintentional injury to people's bodies and purposeful, instrumental, or unintentional interference with their justly acquired possessions. Thus, these principles seriously constrain attacks on others' autonomy.

Thus, the Principle of Respect and the Principle of Fairness provide multiple, mutually reinforcing reasons to avoid using force or social pressure to interfere with people's autonomy. And this means, in turn, that there will be multiple reasons to avoid interfering with their participation in the ecosystem of expression. This will certainly be true when autonomous choice serves simply to select one kind of flourishing over another. But it will also obtain even when it appears that someone's participation in the expressive ecosystem might be harmful to her or to someone else.

(*i*) Generally, of course, an expressive act won't constitute, cause, or effect a legally cognizable injury and therefore won't merit a forcible response. (*ii*) Respect for the freedom to make up one's own mind, recognition of the potential ignorance of putative decision makers, and awareness of the potentially bad motives of such decision makers should encourage doubts about decision makers' judgments regarding the harmfulness of any given expressive act. And this should, in turn, occasion hesitation and doubt regarding the permissibility possible interference with someone's autonomous participation in the expressive ecosystem. (*iii*) Even apart from this sort of hesitation and doubt, regard for autonomy might make, or help to make, it inappropriate to exert social pressure in response to or in anticipation of an expressive act that might constitute, cause, or effect an injury that is not legally cognizable. It seems especially likely that this will be the case when the supposed injuries are, or are likely to be, undergone primarily or exclusively by those willingly affected by the expressive act. Someone might reasonably prefer a generally applicable rule that precluded interference with autonomous choice, despite the injury, in such a case to one that permitted prevention or minimization of the injury while also licensing interference with autonomous choice.

III. Free Expression and Flourishing

We would have good reason to respect autonomy in the sphere of expression just because we have good reason to respect autonomy generally. But autonomy in this sphere is *also* important because it allows people to participate in multiple aspects of well-being by creating, sharing,

consuming, and evaluating instances of expression.[10] We thus have both further reasons to safeguard the ecosystem—respect for autonomy and regard for the goods in which we can participate because of its operation—and a further reason to value autonomy: It allows each person to contribute to maintaining the ecosystem, which benefits us in multiple ways.

Autonomous persons *create* expressive content. In so doing, they exercise their own creative powers and enjoy both the process of creating and the content—as a matter of knowledge or aesthetic experience or imaginative immersion—they have created. They deepen their capacities for practical reasonableness as they decide what to create. They can acquire speculative knowledge in and through the creation of the contents to which their work gives expression (as when they write journalistic books or articles). Generating expressive content can be a kind of play or skillful performance. Cooperating with others in creating expressive content can build friendship. Interfering with their autonomous creation of expressive content is thus an attack on their precious capacity for independent decision making and on the various goods the creative process yields. It denies them opportunities to hone their creative skills and to exercise judgment, and so to acquire *good* judgment, regarding the creation of expressive content.

Autonomous agents *share* expressive content. In so doing, they provide content for others to consume while also inspiring the creation of further content. They build friendships and other social connections rooted in shared appreciation for this content. And they build particularly rich connections when what they share is content that they themselves have created: In this case, in an important sense, they share *themselves*. They can acquire speculative knowledge in virtue of the responses elicited by their expressive acts. Sharing themselves with others through the activity of sharing expressive content can build friendship and other kinds of social connection. They can enjoy the knowledge or participate in the aesthetic experiences or opportunity for imaginative immersion their acts of sharing make possible. They can, as in prayer, seek harmony with reality through expressive activity. And when, say, *not* expressing oneself might seem to be an act of self-denial or self-rejection, expressive activity can effect self-integration and inner peace. Interfering

[10] *Cf.* George, *supra* note 3, at 192–208 (linking freedom of expression with flourishing).

with their sharing of expressive content means, therefore, undermining their autonomy as well as their opportunities to develop autonomous judgment and to engage in self-disclosure and connection. In addition, the *process* of formulating and sharing content, whatever it is, with others matters quite apart from the specific features of the shared content, insofar as it enables people to develop cognitively and emotionally.[11]

It is crucial to acknowledge freedom of "conscience and belief," the freedom to make up one's own mind.[12] But if we acknowledge *this*, then it makes particular sense to acknowledge that freedom "of communication about matters of conscience and belief is equally vital."[13] This is true both because shared communication about these matters plays an essential role in maintaining communities of belief and because beliefs are transmitted and assessed in this way.[14] But autonomy with respect to this kind of communication must involve autonomy with respect to a wide range of other sorts of communication. (*i*) Not only *explicit* communication regarding matters of belief but also many other kinds of communication are relevant to shaping worldviews and uniting people into communities of shared belief. (*ii*) Discretion vested in politicians to treat other kinds of communication differently from communication regarding matters of conscience and belief is likely to be used to suppress communications related to matters of conscience and belief of which they don't approve.

Autonomous persons *consume* expressive content. In so doing, they enjoy the intellectual or aesthetic or immersive aspects of what is communicated. Speculative knowledge, aesthetic experience, and imaginative immersion are of course worth pursuing for the intrinsic contribution each makes to flourishing, and they can also be occasions for participation in other goods, such as sensory pleasure. Being the consumer of a particular kind of expressive content identifies one as a person with a particular way of being, a person telling a particular kind of story with her own life. Sharing consumption with others can help to define identities; it is also one of the most crucial acts uniting friends. Consumers of

[11] *See* Seana Valentine Shiffrin, Speech Matters: On Lying, Morality, and the Law 90–91 (2014).

[12] The freedom to make up one's mind plays a crucial role in Seana Shiffrin's powerful defense of (many kinds of) free expression; *see id.* at 79–115.

[13] Grisez & Boyle, *supra* note 2, at 456.

[14] *Id.* Grisez and Boyle focus on the first reason.

expressive content can use it to help them hone their capacities for practical reasoning through dramatic rehearsal. Receiving a communication can serve as a move in an instance of play. It can enhance one's capacity for skillful performance. The insight that comes from encountering an expressive act can lead the recipient toward harmony with reality and can provide guidance toward self-integration and inner peace.

Interfering with consumers' autonomous consumption of expressive content deprives them of the goods offered by the content as well as of the goods involved in consuming it in tandem with others and identifying themselves as its consumers. In addition, it treats them as if they lack the capacity to evaluate the content of what they consume—and substitutes the judgment of others for their own. But that capacity is crucial to responsible personhood, and it does not disappear simply because it is suppressed or ignored. As Liesl Schillinger observes, "You can shun obscene books if you like, but you can't scrub erotic fantasies from the mind's hard drive." Rather, Schillinger emphasizes, "[t]he choice of dreaming about them, acting upon them, repressing them, or reading them is yours, to be made at your own risk, and at your own pleasure."[15]

Indeed, interfering with people's consumption of expressive content actually *undermines* their capacity for autonomous judgment. It deprives them of opportunities to sharpen their skills as assessors of expressive contents. And it encourages them to rely on others to do this for them. In so doing, of course, it also encourages them to trust others, typically authority figures, to make decisions for them more generally and so to cede responsibility for their own lives.

Creating, producing, distributing, and consuming in the market can serve as perhaps surprising instances of expression.[16] An act can be expressive even if it is also commercial. The commercial dissemination of expressive content is still expressive. Expressing the desire to engage in a commercial transaction is still expressive. The choice to consume expressive content provided commercially—a television program offered on a subscription-based cable network, a painting or a print—realizes the benefits of expression even if money changes hands.

[15] Liesl Schillinger, *Bookends: Why Read Books Considered Obscene?*, New York Times, Sep. 22, 2015, *available at* https://www.nytimes.com/2015/09/27/books/review/why-read-books-considered-obscene.html (last viewed Sep. 13, 2017).

[16] *Cf.* John Tomasi, Free Market Fairness 88, 93–95, 98, 246 (2012). I gratefully acknowledge Tomasi's inspiration for what I say at multiple points in this chapter.

IV. Conclusion

Expressive activity *involves* direct participation in various aspects of well-being and also *facilitates* such participation, for both communicators and recipients. Interfering with autonomy by impeding expressive activity is objectionable *both* because there is good independent reason to avoid interfering with people's autonomy *and* because interfering with it *in this case* will impede participation in these dimensions of welfare. The Principle of Fairness provides us with general reasons to respect autonomy and particular reasons to respect the autonomous generation, sharing, and consumption of expressive content, through which people flourish in multiple ways. This principle also provides reasons to value expressive freedom because of the multiple instrumental benefits it confers. I explore these reasons in Chapter 6.

CHAPTER 6

The Instrumental Value of Expression

Respecting expressive activity enables the expressive ecosystem to generate a range of benefits related to knowledge, practical reasoning, aesthetic experience, and other aspects of flourishing, as well as to institutional accountability, the discovery of valuable forms of life, and the effective functioning of markets.

I. Introduction

The fact that interfering with expressive activity often means interfering with others' justly acquired possessions means that, if we have reason to respect robust possessory rights, we have reason to avoid interfering with expressive activity. The activity of expression directly yields a variety of goods for both the communicator and the recipient. But these aren't the only reasons to favor, promote, and protect the ecology of expression. The ecology of free expression yields a number of extrinsic benefits.[1] (*i*) It facilitates the acquisition of knowledge that is valuable for its own sake. (*ii*) It enables us to sharpen our capacity for practical reasoning.

[1] Broadly instrumental arguments have provided the most familiar justifications for freedom of expression. The two most familiar and influential are John Milton, Areopagitica (1644) and John Stuart Mill, On Liberty (1859). I gratefully acknowledge their ongoing significance. *Cf.* Robert P. George, Making Men Moral: Civil Liberties and Public Morality 192–208 (1993) (exploring links between freedom of expression and flourishing).

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(*iii*) It facilitates our direct participation in the other basic aspects of well-being. (*iv*) It fosters accountability for political and other institutional actors and so facilitates our participation in the other aspects of well-being by maintaining a framework within which we can do so. (*v*) It facilitates discovery of appealing art forms. (*vi*) It fosters the effective functioning of markets in general and so, again, facilitates our participation in the other aspects of well-being, while also facilitating the transmission of information relevant to *specific* markets. (*vii*) It facilitates choices among alternate ways of life.

II. How Expression Yields Instrumental Benefits

It yields these distinct benefits because it is an effective means of both, on the one hand, disseminating and, on the other, sifting and winnowing what at the most general level we might label *proposals*.

A. Sifting and Winnowing

The instrumental value of expressive freedom is hardly limited to the extension of speculative knowledge. But begin there, with a simple example: I make a factual claim in a public medium; others instinctively disagree, and some challenge me; there's an ongoing exchange, with the various contributors advancing arguments for their respective views. In this case, it may be that neither I nor my most vociferous interlocutors have changed their minds; it's possible that we're too emotionally invested in our positions for the nonce. But our exchanges haven't been conducted primarily for our own benefit. Rather, these exchanges have served to provide those who have been, as it were, listening in on our conversation with access to the best available cases for our positions. By conducting our argument in public, showcasing our own arguments, we enable the members of the public at large to make up their own minds.

While this example concerns rational discussion, the process of winnowing and sifting need not occur by means of rational deliberation; it will sometimes, and sometimes reasonably, take place by means of intuition or emotional reaction. What matters is that proposals are on offer

and that we are able to assess them. And of course the proposals themselves may be intellectual, but they need not be.[2]

Whatever the nature of the proposals and the sifting mechanism, what is, in effect, a Darwinian process serves to filter good proposals from bad ones (with "good" and "bad" understood, of course, contextually—moral and aesthetic goodness aren't the same thing). Over time, some ideas survive because they meet the challenges with which they are confronted. There is no official body of judges reviewing competing positions. But members of the relevant population can assess varying alternatives. And, over time, the positions that prove the most persuasive and plausible survive and thrive, as information consumers benefit from the public scrutiny to which alternatives are subjected. In a classic articulation of this view, with a particular focus on truth, Oliver Wendell Holmes underscored the importance of "free trade in ideas," emphasizing "that the best test of truth is the power of the thought to get itself accepted in the competition of the market."[3]

The sifting and evaluating of proposals can take place by means of the kind of institutionalized review that happens within the context of various academic disciplines—as books and articles and proposals for conference presentations are peer-reviewed and publications and presentations are critiqued in other publications and presentations. (In this context, as in others, the relevant set of practices can yield knowledge even if, as is often the case, truth is not necessarily the exclusive or primary focus of the individual participants in these practices.[4]) But it can also happen informally, as all those who read or listen to particular proposals attend to them, note criticisms, and choose to adopt, modify, or reject the

[2] *Cf.* Alan Haworth, Free Speech 3–32 (1998) (suggesting that Mill's understanding of free speech focuses on the kind of freedom needed in "the seminar room," in which *ideas* are sifted in the course of *intellectual exchange*).

[3] Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting). For an extended discussion of the background to and aftermath of Holmes's opinion, see Thomas Healy, The Great Dissent: How Oliver Wendell Holmes Changed His Mind—And Changed the History of Free Speech in America (2013). Thanks to Alexander Lian for focusing my attention on this book.

[4] *Cf.* Peter Railton, *Scientific Objectivity and the Aims of Belief, in* Believing and Accepting 179, 191–202 (Pascal Engel ed., 2000).

proposals. Thus, the instrumental justification for freedom of expression does not depend on the assumption that just any instance of expressive activity contributes to, for instance, the discovery of *truth*, but that the untrammeled operation of expressive ecosystem as a whole does so consistently and reliably on an ongoing basis.[5]

B. Authority and Rationality

This sort of intellectual ecosystem doesn't depend on any one person's being an unchallenged authority. Indeed, it's premised on the assumption that no merits status as this kind of authority. The instrumental justification for maintaining this ecosystem isn't *skeptical*: It doesn't rely on the assumption that no idea is better than any other or that no one can know the truth. Rather, it is precisely because truth is achievable, because truth *matters*, that it makes no sense to give some group of would-be authorities the right to assess truth-claims on everyone's behalf. Giving everyone the chance to make up her own mind is, of course, a matter of respect for her rationality and autonomy, as I argued in Chapter 5. But that's not the focus of the instrumental argument for freedom of expression. That argument holds, instead, that harnessing "the wisdom of crowds" is the best way to ensure that everyone has the best chance of learning the truth.

It hardly needs to be noted that the instrumental argument doesn't assume that everyone is perfectly rational, that everyone is immune to the temptation to engage in motivated cognition, and that no one wants to deceive others. Individual actors and groups of actors can and, indeed, surely do communicate and assess the communicative activities of others, in ways unlikely to lead to truth. But that's precisely the *point* of the instrumental argument. Knowing the truth is an important aspect of everyone's well-being, and most people recognize it as such. Even though in some instances—in search, say, of peace of mind or of one sort of validation or another—people may want to believe propositions that are, in fact, false, they don't (at least ordinarily) want to believe them *under*

[5] This claim is similar to, but arguably different from, the notion that Mill's defense of the freedom of expression is an accurate "tendency claim" which might be summarized as: "An increase in the rate of participation in seminar group type activities causes an increase in the supply of truth." HAWORTH, *supra* note 2, at 67, 66.

that description. What even those who surrender to the urge to engage in motivated cognition want is for it to be the case that the propositions they want to be true *really are true*. Truth matters.

People are thus inclined in most cases to sift the claims made by others. And those who seek to hide in various ways from the truth will frequently be challenged by those with opposing views. Over time, observers will have better access than they otherwise would have had to accurate information. They're better equipped to make up their own minds.

III. Knowledge for the Sake of Knowledge

This sifting and winnowing process matters for multiple reasons. It matters, first and foremost, because knowledge, knowledge for its own sake, is a basic aspect of human well-being. If we want to learn about the Chinese textile industry in the seventeenth century or the mating habits of the lemur or the meaning and importance of Iris Murdoch's *The Book and the Brotherhood* or the merits and demerits of panpsychism as an account of the relationship between mind and body, we are most likely to gain more accurate understanding because alternative answers to questions about these topics have been floated and vetted. And this would be a substantial reason on its own to encourage the free flow of ideas. We have reason to value speculative knowledge. The free exchange of ideas will make it more likely that we will gain such knowledge. Each of us has reason to embrace a scheme of rules and norms that would make this possible for herself and so, to be fair, to embrace such a scheme that would yield the same benefits for others.

Recognizing the value of this aspect of the expressive ecosystem does not depend on any judgment regarding the likelihood of that ecosystem to help us apprehend *especially significant* truths. Knowledge as such is worth pursuing, but the various *instances* of knowledge are incommensurable in value. They matter for those who seek them, and it is perfectly reasonable for all of us, prizing the different truths we seek, to welcome the operation of the social ecosystem that helps to make them available to us.[6]

[6]Thanks to Seana Shiffrin for highlighting the need to address this point; *see* Seana Valentine Shiffrin, Speech Matters: On Lying, Morality, and the Law 84 (2014).

A. Fairness and Knowledge

Some people, of course, don't want some knowledge to be available. They believe that others aren't ready to know the truth about various matters. And so they may not want the ecology of expression to operate. But notice that, in the vast majority of cases, those who take this position don't want *others* to gain knowledge about one thing or another. They deny others the opportunity to access and evaluate truth-claims. But if they themselves want access to those truth-claims, they act arbitrarily by denying others access to them. They treat themselves as entitled to opportunities they seek to keep others from having. If they already know about the truth-claims to which they want to deny others access, they evidently believe it is safe to be aware of these claims. If they do not, they are evidently willing to take the unreasonable risk of suppressing information with which they aren't directly acquainted and about which they thus aren't entitled to form settled judgments. They might, of course, maintain that it was safe for *them* to know things it wasn't safe for others to know. But such a view seems both objectionably paternalistic and unreasonable, since adopting it means ruling out opportunities for contestable claims to be evaluated by the expressive ecosystem. By limiting public access to these claims, those who seek to suppress discussion make it less likely that good judgments will be formed regarding these claims in the more limited contexts in which people do become aware of them. By arbitrarily preferring themselves to others—*they* likely know, or believe they know, the truth and judge themselves capable of handling it—they act unreasonably. And by seeking, in effect, to manipulate others by denying them access to the truth or by distorting the truth, or to facilitate their manipulation, the would-be guardians again act unfairly, treating others as rightly subordinate to themselves.

B. Fairness and Protection Against Untruth

The same kinds of fairness considerations will at least ordinarily rule out a related sort of justification for opposition to freedom of expression. Here the thought will be, not that people are unready for the truth, but rather that the ecology of expression will make it possible for some people either (*i*) to raise serious doubts in the minds of others about important true beliefs *or* (*ii*) to actively propagate falsehoods.

It is important that we be able to trust, to rely on, each other. And social norms conduce to flourishing when they encourage us to communicate truthfully, and so in a manner that makes trust possible. We should certainly favor social norms fostering truthful communication. But what lies behind these worries *understood as objections to free expression* is the thought that we should trust the would-be guardians to protect us from this sort of deception. And there are at least two difficulties with this assumption.

The first is that there is no reason to suppose that those likely to be tasked with (purportedly) protecting us against deception are themselves in possession of the truth. One general reason to favor the ecology of free expression is that we doubt that there is likely to be any high positive correlation between being in a position of power and having access to the truth. If we thought those with power were especially likely to have access to the truth, we would have little reason to want them to protect us from lies rather than from *all* falsehoods. If we don't think this, as I think we shouldn't, and so don't view them as especially adept at acquiring and sharing true beliefs, then we have little reason to do so where protecting the rest of us from deception, in particular, is concerned.

Even if we imagined that the would-be guardians of truth were especially well equipped for the task of securing us against lies, there is little reason to expect that, as a general matter, they might *want* primarily to do so. This is particularly likely to be the case where the most controversial claims are concerned. Here, there will often be substantial public pressure to suppress unpopular views, and politicians are not unlikely to respond to public pressure. And politicians' personal interests not just in popularity, influence, and reelection but in all sorts of other things as well may be affected by contested claims. If they are treated as having the authority to suppress expressive activity "in the interests of truth," they can be expected not infrequently to suppress views they happen not to like for reasons relatively unrelated to truth. Notably, they might suppress views that seemed to them likely to prove destabilizing. But of course destabilization might well be intensely important. Indeed, destabilizing the positions of politicians might prove quite valuable to ordinary people.

One might imagine a tighter limitation here: Perhaps there might be legal limits, not on the expression of ideas judged to be false, but only on the expression of ideas *believed* to be false by those expressing them: Purposeful deception might be ruled out. This sort of arrangement

would pose fewer risks than ones that allowed state actors to interfere with expressive activity simply because they believed it involves falsehood or might prove dangerous. But it's still likely to be attended with serious risks. (*i*) Some purposefully deceptive expressive conduct would not likely be injurious to anyone's body or justly acquired possessions. If there are good reasons to cabin legal liability so that it does not attach to conduct that is not injurious in this way, there will be reasons not to support liability for expressive conduct, in particular, that is not. (*ii*) Bad-faith allegations of purposeful deception can be used to harass those expressing disfavored content, and the risk of dealing with the legal consequences of good-faith and bad-faith allegations alike will tend to inhibit the expression of this sort of content. (*iii*) The accuracy of allegations regarding purposeful deception will be difficult to demonstrate, so that it's not clear how effective legal liability would be in actually inhibiting genuine deception, even though it obviously *would* be effective in reducing controversial expression. (*iv*) While purposeful deception is always or almost always morally wrong, and while purposeful deception may inflict special injuries on personal relationships, the primary injury effected by deception, whether purposeful or entirely innocent, is the propagation of falsehoods. And falsehoods can be sifted by the expressive ecosystem whether they are purposeful or not. There is no need for special deception-preventive powers to be exercised by state actors.

Politicians are obviously not the only people inclined to want to suppress information for various reasons, nor are they the only people lacking omniscience. But they are especially likely to abuse power to suppress or limit access to particular expressive acts. And while nonforcible attempts by non-state actors to do this may have troubling consequences, the reach of state power makes it more likely that suppressive efforts by politicians will be effective at stifling or reshaping the exchange of thoughts, images, attitudes, and so forth within the expressive ecosystem.

IV. Knowledge and Flourishing

While knowledge is important for its own sake, it also matters for other reasons. And so, therefore, does the maintenance of an ecosystem capable of facilitating our grasp of knowledge.

We flourish along multiple dimensions. And knowledge furthers our fulfillment in each. We benefit from knowledge directly about the

contours of each aspect of well-being: knowledge about the sorts of aesthetic responses that might be appropriate to various sort of phenomena; knowledge about what adept play *looks* like in a given context—the techniques most effective for achieving victory under given conditions in a game of chess or lacrosse; knowledge about the sorts of treatments likely to lead to healing from this or that illness; and so forth. In every instance, we can come to understand a given aspect of well-being more fully, to plumb its depths more extensively. And we also benefit from knowledge about the context within which we pursue each aspect of well-being: knowledge about the chemical substances that might inhibit our ability to engage in practical reasoning; knowledge about the customs by which people in a new friend's culture recognize and celebrate close relationships; and knowledge of physiological processes underlying erotic pleasure. Knowledge of each of these things will be *inherently* valuable as a matter of speculative knowledge. But, *in addition*, knowledge of each will make it easier for us to participate in other aspects of well-being more effectively. We all have reason to value opportunities to participate in the various aspects of well-being, for ourselves and others, and so to support the existence and operation of the ecosystem of free expression.

The ecosystem of expression filters controversial claims. But it also simply enhances access to uncontroversial information. Refusing to impede expressive freedom means *both* that contested claims can be tested *and* that ordinarily useful information can be made more readily available. Given that people would like to make such information available and that making it available would be relatively easy absent legal impediments, eliminating legal barriers means that such information will be more likely to be accessible. Its accessibility also means that it can more effectively be assessed by the expressive ecosystem.

Systems of prior restraint would obviously impede the transmission even of ordinary, uncontroversial information—since of course no censoring authority could know in advance that some sorts of information *were* uncontroversial, and would therefore need to review even putatively harmless expressive acts and might be expected to inhibit some access to the information conveyed by such acts. And schemes imposing liability for the content of expressive acts could have chilling effects even on the transmission of this sort of information, since one could not be sure in advance whether a seemingly harmless expressive act would fall foul of some regulation related to its content. The simplest way to avoid

these risks would be the embrace of a simple rule precluding the imposition of *ex ante* or *ex post* content-based restraints on expressive activity. Of course, more targeted rules might have the desired effect; I do not mean to suggest that considerations related to the most mundane kinds of expressive activity can on their own support protections for the most controversial varieties. But the value of mundane expression and the risks even to this kind of expression posed by content-based legal limits on expression provide at least limited further support for the untrammeled operation of the ecology of expression.

V. Expression and Practical Reasoning

The expressive ecosystem can sift knowledge-claims. It can also help people develop the capacity for practical reasoning by providing opportunities for them to engage in imaginative rehearsal. By confronting them with particular, potentially challenging situations, instances of both artistic and journalistic expression can make it easier for them to think through and prepare for various kinds of choices, including potentially difficult ones, before they actually need to make such choices. The knowledge and capacity for practical reasoning promoted by the expressive ecosystem in turn have positive consequences for our participation in the other aspects of welfare. These do so by:

- increasing understanding of scientific principles and health-building techniques and—by both promoting research and improving the operations of markets—enhancing access to medicines, dietary supplements, and nutritional data that can enable us to achieve bodily well-being and enrich and prolong life, and offering preparation for tough choices related to life and health;
- broadening awareness of techniques of and opportunities for play and of potential fellow players and, for varieties of play that benefit from audiences, making potential audience members aware of instances of play; helping relevant decision makers become aware of those particularly adept at various sorts of play; facilitating the operation of markets that create and attract appropriate attention to instances of play and opportunities for the development of capacities for play; sharing instances of play with interested spectators through electronic media; offering opportunities for dramatic

rehearsal that equips people to make reasonable choices with respect to play before they're actually required to make these choices;

- recording and acknowledging key instances of skillful performance and connecting practitioners with both clients and spectators; aggregating and evaluating various performance techniques; imaginatively preparing people in advance to exercise practical wisdom as they seek to engage in skillful performance; creating institutions that foster the development of performance skills;
- making potential friends aware of each other and of relevant topics for shared conversation and of occasions for shared activity; helping people learn more effective ways of engaging in various sorts of friendship; fostering market transactions that create environments conducive to the development, expression, and enhancement of friendship; giving people opportunities to prepare imaginatively for potentially challenging choices related to friendship;
- sifting ideas related to the character of reality and to the quest for meaning, as well as to practices relevant to intentional engagement with reality in the widest sense; enabling the operation of institutions and communities devoted to understanding and fostering apt engagement with reality in the widest sense; providing opportunities for dramatic rehearsal capable of aiding people in making these choices when they actually confront the relevant possibilities; fostering the operation of markets that disseminate insights related to meaning and harmony with reality;
- identifying techniques for effecting gustatory, erotic, and other varieties of sensory pleasure and people who might join with one in bringing about these varieties of pleasure or appreciate one's efforts in one way or another; supporting market and non-market institutions and practices likely to help promote experiences of these sorts of pleasure; providing advance preparation for people to exercise practical rationality with respect to these goods;
- disseminating and assessing ideas related to practices intended to foster self-integration and inner peace (including the development of the skills required to achieve inner peace by choosing well—embracing the good of practical reasonableness—in potentially challenging situations) and enabling the development of market and non-market institutions assisting in the realization of these goods; equipping people to make practical choices related these goods; *and*

- critiquing various claims relevant to the promotion of aesthetic experience and imaginative immersion, including ones in art and media criticism and art and media history, and enabling people to develop the skills needed to make practical choices with respect to aesthetic experience and imaginative immersion; promoting the effective operation of markets disseminating these goods.

In addition, simple respect for people's capacity to engage in practical reasoning with respect to various expressive contents *itself* promotes the development of this capacity. (*i*) When people are treated as capable of making decisions, they will be more likely trust themselves and so to be willing to make decisions, to take risks, to experiment. (*ii*) When they do this, when they practice, they will learn more effectively to exercise their capacity for rational decision making.

VI. Expression and Accountability

The dissemination and cooperative evaluation of truth-claims help us to understand and participate more successfully in various dimensions of welfare. These activities also further the maintenance of *frameworks* within which we can do so. For instance, it helps to ensure that civic institutions and, in the context of a state, politicians are subjected to extensive scrutiny. Sunlight makes for better behavior. This is true because politicians and other actors in civic institutions may simply lack relevant information. Confronting them with this information may thus enable them to act more effectively on the basis of good intentions. But it is also true that these actors may well *not* have good intentions (indeed, there is every reason to expect that they frequently do not).[7] The threat of exposure and resulting embarrassment and perhaps removal from office can help to prevent bad behavior, and actual exposure can lead to corrections in behavior and the replacement of poorly performing functionaries.

It should be clear why widespread public discussion of and debate regarding the affairs of politicians and other state actors would tend to render those actors more accountable, and so better behaved, and why, in turn, members of the public would have good reason to want this

[7] *See* Chapter 4, *supra*.

sort of accountability to obtain. Of course, there will be individuals who benefit from special, state-secured privileges who might not want their unique opportunities given public attention, but most people won't be the recipients of such privileges and will have every reason to want to know what those who claim to serve them are up to. And even those with special privileges will recognize that, while *their* cozy deals with political cronies risk exposure under a regime of free expression, a change in regimes might make them outsiders, and so very much interested in the accountability of politicians and other putative public servants.

The value of rendering politicians accountable might seem to be served primarily by protecting expression related specifically to the evaluation of politicians. But the difficulty is that there's no straightforward way of delimiting expression fostering accountability by putative public servants from other sorts of expression. A narrow delimitation of such expression seems likely to miss some sorts of expression actually relevant to ensuring politicians' accountability, and, given the importance of keeping politicians in check, an over- rather than an under-inclusive understanding of this sort of expression seems quite helpful. In addition, standards defining the sort of expression to be protected as a means of holding politicians accountable would not be *formulated* by detached rational calculators seeking the public interest. These standards would be formulated by politicians themselves, who could be counted on to try to reduce the risk of their being held accountable. In addition, these standards, once in place, would be *applied* by state actors—perhaps politicians, perhaps functionaries ultimately accountable to politicians. And they could be expected to apply the standards, therefore, in a way designed to protect at least their political allies and perhaps the class of politicians more generally. The need for the ecosystem of expression to do its job by fostering politicians' accountability, therefore, is a reason to extend the legal protection of expressive freedom quite broadly.

Free expression also fosters accountability for various actors outside the legal system. For instance, it can intentionally or unintentionally highlight instances of morally dubious conduct on the part of businesses. This sort of conduct might include theft, fraud, collusion with abusive political authorities, and deceptive contract violations. In addition, of course, conduct that ought to be legally permissible may nonetheless frequently be thoroughly objectionable, and expressive activity can highlight this sort of conduct, too. Calling attention to these sorts of private misconduct can lead to lawsuits, decisions by shareholders to replace

managers, and public boycotts. Again, each of us will likely benefit in particular cases from accountability for this kind of bad behavior, so we all have reason to favor general rules protecting expressive activity that fosters this kind of accountability.

VII. Expression and Aesthetic Experience

As I noted in the previous chapter, the expressive ecosystem can directly serve the good of aesthetic experience because expressive activity valuable for its aesthetic content is one instance of the kind of expressive activity that forms the core of the ecosystem. But the ecosystem can also make possible the *vetting* of works and schools of art, the determination of their merits, and the identification of their appeal. Where the ecosystem of expression may tend to marginalize or even eliminate false beliefs and poor reasoning, however, it need to in anyway eliminate minority movements and tendencies in art: People can continue to use freedom of expression to call others' attention to artistic products without current wide appeal, and these products can find support in niche markets.

VIII. Expression and Markets

Expressive activity can also make markets function more effectively. Public expression can both signal and report on consumer preferences. It can highlight new production techniques and approaches to organizational design and operation. It can call attention to scientific discoveries with commercial value and to political or social changes that present investment opportunities. In the nature of the case, targeted research won't always reveal these sorts of developments. The planned dissemination of information won't, couldn't, provide what's needed for entrepreneurial creativity to go to work, since a key aspect of entrepreneurship is a kind of creativity for which it's unavoidably difficult to plan. The only kind of plan that's likely to be effective in fostering such creativity is the plan to ensure that all available information is shared as widely as possible, with a variety of curation strategies among which entrepreneurs and others can select. Unconstrained expression will yield a variety of unexpectedly beneficial results. The direct and indirect results will thus not infrequently include the enhancement of consumer welfare through the provision of a broader range of goods and services, the provision of

goods and services more responsive to consumer preferences, and reductions in cost to consumers.

And of course the various instrumental functions of the ecosystem of free expression are interconnected. While sifting truth-claims and facilitating markets are distinct processes, among the goods markets produce are informational goods. Markets facilitate the creation and distribution of the informational goods which can then be vetted by ecosystem of expression. Similarly, they facilitate the creation and distribution of the aesthetic goods the ecosystem of expression can nourish.

To the extent that the wide availability, in unplanned form not filtered by forcible constraints, of information about an immense array of topics will generate unanticipated benefits to consumers, each of us is likely to welcome the effects of this kind of availability in particular cases. Each of us thus has reason to favor general rules facilitating the free, unplanned exchange of information.

Of course, free expression will also be useful in contexts in which the demand for information is more predictable and targeted. While general rules protecting expression facilitate market discovery, they also can contribute to the operation of particular markets in which information of particular sorts can be readily identified. There may be less concern about the need for open-ended rules that permit the wide-ranging dissemination of information of unpredictable value in these contexts. But efforts to impede the flow of information in such contexts (as, for instance, by denying consumers access to information by restricting advertising) can clearly reduce consumers' opportunities to realize their preferences. To the extent that any of us might benefit from the improved operation of particular existing markets effected by the availability of information specific to those markets, we will have reason to favor general rules making it more likely that this information will be disseminated freely.

IX. Experiments in Living as Instances of Expression

As Mill famously observed, "experiments in living" foster the growth of flourishing societies.[8] Such experiments may fail, and fail miserably, in specific cases. But the fact that they *can* take place yields obvious benefits

[8] *See* John Stuart Mill, On Liberty 103–39 (1859).

for social life. They put particular options on display and give both the participants and those who observe or become aware of the opportunities to determine whether they should, in one way or another, emulate the experimenters. Experimentation obviously matters as a means by which particular people can determine how they themselves want to live over time, what options work well for *them*. But the expressive function of the experiments themselves *and* expressive acts separate from the experiments that let others know about the experiments enable them to contribute effectively to social change more broadly. Top-down mandates for social change (like Peter the Great's attempted modernization of seventeenth-century Russia) can be disruptive, wildly unpopular, and unresponsive to the actual facts on the ground. Bottom-up change, driven by the examples offered by individual arrays of (whether or not coordinated) experimenters, can spread throughout a society as others observe and reflect on what the experimenters have done.

A striking example: Koinonia Farm, established by the renegade Baptist preacher, farmer, and theologian Clarence Jordan. Koinonia Farm modeled racial inclusiveness in segregated Georgia, welcoming participants from different ethnic, cultural, and social backgrounds without distinction. The simple fact that this kind of community existed proved threatening to segregationists precisely because it demonstrated the clear possibility that the social boundaries that constituted segregated society were *contingent*, that people could live flourishing lives in their absence. As a result, Jordan's community was the target of violent attacks. Jordan and his associates had not been marching. They had not been demanding legislative changes. They had not been engaging in sit-ins or other sorts of protest. *The sheer fact that they enabled others to see what a community that did not live by segregationist rules was enough to make them profoundly threatening.* Segregationists clearly knew that *this* experiment in living, a practical demonstration of an alternative to the *status quo* they favored, had the potential radically to disrupt their way of life.[9]

Experiments in living need not be planned and coordinated. They need not be deliberately chosen *projects*. When the Jazz Babies of the early twentieth century or the hippies of the 1960s rejected Victorian

[9]Thanks to Charles Teel, Jr., for alerting me to key details regarding Koinonia Farm. On Jordan's life and impact, *see*, *e.g.*, Tracy E. K'Meyer, Interracialism and Christian Community in the Postwar South: The Story of Koinonia Farm (1997); Frederick L. Downing, Clarence Jordan: A Radical Pilgrim in Scorn of the Consequences (2017).

sexual mores,[10] they didn't do so having created intentional communities designed to revolutionize society. They were simply interested exploring alternatives to what seemed to them to be irrational and repressive standards. But as so many of them chose confidently to adhere to new patterns of social life, others, less experimental, not at all identified with the *avant-garde*, came to wonder about the merits of the lifestyles they were observing—and chose to emulate them.[11]

An experiment in living, like Koinonia Farm, may be intended as a laboratory demonstration of the viability of a particular lifestyle. But the expressive function of an experiment in living need not be deliberate. It need be no part of the purpose of someone who engages in such an experiment to share insights with observers. And yet such experiments can be threatening, and legal force may be used in attempts to suppress them, precisely because of their expressive function. They may be persuasive even if they are not intended to be.

There may, of course, be reasons in virtue of which the conduct involved in an experiment in living might be genuinely expressive (whether or not it is intended to be) but *also*, separately, rightly triggering legal liability. The conduct itself might constitute or generate a legally cognizable wrong separate from its expressive content. (Perhaps someone wants to show others why human sacrifice is appealing by killing someone on an altar on her YouTube channel. Here, the conduct embodying the message is *murder*, which rightly triggers legal liability whatever its expressive content.) Or perhaps there is some incidental wrongdoing associated with the conduct. (Perhaps those forming an intentional community, seeking to display to others the merits of a patriarchal way of life,

[10] For an evocative depiction of one representative life in the Jazz Age that captures the liberating and liberated experimental temper of the times, *see* Nancy Milford, Savage Beauty: The Life of Edna St. Vincent Millay (2001). Millay outlived the Jazz Age, of course, but her work captured the spirit of that era and her own life reflected the tumultuous energies in play in an American culture breaking free of older strictures. The experimentation in which the flappers engaged bore fruit in a variety of ways, doubtless playing some role in birthing an increased willingness to push the limits of acceptable speech in the immediately subsequent decades; *see*, *e.g.*, *H*owl on Trial: The Battle for Free Expression (Bill Morgan & Nancy J. Peters eds., 2006).

[11] Rick Moody's *The Ice Storm* and the Ang Lee film based on the book nicely depict the migration, not without cost, of ideals of sexual freedom from the counterculture in the 1960s to the urban upper-middle class in the 1970s; *see* Rick Moody, The Ice Storm (1994); The Ice Storm (Good Machine, 1997).

opt—not as a statement of some sort but simply as a matter of convenience—to squat on land or in a house or apartment justly acquired by someone else who hasn't abandoned it. The members of the community might, not unreasonably, be resented for their promotion of patriarchy, but they can rightly be excluded from the land or house or apartment *not* because of the expressive content of their actions but because they are trespassing.) So recognizing the value of experiments in living does not mean regarding any and all means of experimentation as protected. But insofar as genuinely peaceful conduct serves, deliberately or not, to share proposals regarding or insights into alternative ways of being, experiments in living can perform vital expressive roles.

Experiments in living are powerful. They are among the most effective drivers of social change—frequently more effective than education, electoral politics, or public protest. We all benefit from the operation of such experiments, which can serve either to validate existing practices or to point the way toward new ones. And because we do, we have good reason to embrace rules that preclude their being impeded in virtue of their expressive significance.

X. Conclusion

Safeguards on expressive activity make sense because of the importance of respecting people's possessory rights, their autonomous action, and the flourishing that is effected through such action. But protections for freedom of expression also matter because of a broad range of positive consequences that occur when expressive activity occurs without interference. Expression makes possible the *cooperative* evaluation of proposals of all sorts (a kind of evaluation that does not depend on everyone's being equally rational or committed to truth, and that is clearly superior to the resolution of intellectual disputes by social authorities). It thus enables us to acquire inherently valuable knowledge and to sharpen our capacities for practical reasoning, as well as to gain knowledge that, alone or in tandem with practical reasonableness, facilitates our participation in other aspects of well-being. Particularly significant is the way in which the expressive ecosystem fosters accountability for political and institutional actors and the effective functioning of markets—with widespread benefits to most or all members of the population. Expression also enables us to sift proposals for aesthetic experiences of multiple varieties. The expressive activity that fills these valuable roles need not be verbal or

symbolic. Experiments in living can also serve to expand understanding and, intentionally or unintentionally, both to *count as* and to make it easier for us to *evaluate* proposals regarding ways of being.

Any attack on the capacity of the expressive ecosystem to evaluate truth-claims will amount, in effect, to an indirect attack on the participation in the good of knowledge by those who benefit from the ecosystem's operation. When an attack is purposeful, it will be ruled out entirely by the Principle of Respect. And the same will be true of direct attacks on the various other goods fostered by the expressive ecosystem. But even when their effects are indirect, actions that undermine people's participation in knowledge, practical reasoning undertaking in light of knowledge, and other aspects of well-being will be, at minimum, questionable from the standpoint of the Principle of Fairness. The more the issue is viewed from an appropriately high level of generality, the more considerations related to fairness will rule out any interference with the expressive ecosystem—particularly given the limits of human knowledge, the need for the perpetual enhancement of understanding through interchange, the absence of any privileged institutional position for the evaluation of truth-claims, and the risk of bad behavior on the part of institutional actors empowered to interfere with the expressive ecosystem.

The considerations noted in this chapter and its predecessors serve especially to show why imposing legal liability for expressive activity is unreasonable. However, they also count more or less strongly as a matter of ethics against other kinds of restraints on expression, whether imposed by states or by non-state actors, and they provide reason to think that these sorts of restraints should be legally impermissible when imposed by state actors. I examine such restraints in Chapter 7.

CHAPTER 7

Expression on Government Land, by Government Workers, and in Non-Governmental Associations

The use of publicly accessible government land, expressive activity by government workers, and expressive acts within and on behalf of non-governmental associations all raise distinctive problems, but the principles already elaborated show how these problems can be satisfactorily addressed.

I. Introduction

The state safeguards the expressive ecosystem primarily by avoiding interference with expressive activity. Freedom of expression is safeguarded when the state declines to impede people's expressive uses of their own bodies and possessions. But the issues related to expressive freedom arise in other contexts, too. There are questions about the extent to which the state may rightly limit expressive activity on land which it claims and which is in principle made available to everyone. There are questions about the state's sponsorship of particular ideas, attitudes, or values. There are questions about the expressive activities in which government workers, in particular, might engage. And there are questions regarding the extent to which expressive freedom should be respected within non-state institutions—business firms, convictional communities, and universities.[1]

[1]Some universities are, of course, state-operated. For the sake of convenience, I treat both private and state-operated universities at the same time. This makes sense because the issues both kinds of institutions confront are similar and because, while being

Gary Chartier, *An Ecological Theory of Free Expression*,
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II. Government Land

There are good reasons to doubt that states are entitled to claim possessions. States are illegitimate and dangerous. They seem to be criminal gangs, and so not to be entitled to respect. They predictably make problematic use of the land and objects they claim. And they acquire the land and objects they claim through direct or indirect theft or by unjustly engrossing unowned land that should be available for homesteading by ordinary people.[2]

But suppose I'm wrong about this. Suppose states serve useful purposes and make legitimate possessory claims. If we operate within the terms of state-friendly political theory, we will assume that states exist to protect and otherwise serve those who live in their territory. States hold land or physical objects for all sorts of reasons. (*i*) Some of the land states claim is used primarily for the performance of states' putative functions. Government offices function like private offices as sites for the transaction of government business of various sorts and will thus appropriately be accessible to members of the public when they are participants in the relevant kinds of business. (*ii*) Some state land is intended for the members of the public to use freely, but only for specific purposes. Government roads are intended for movement from one place to another, and not for, say, picnics. However, people may on occasion want to use land of this kind in non-standard ways. (*iii*) Some government land is intended for general public access. Members of the public can ordinarily use this sort of land for any peaceful function they choose.

It is often possible for government land in category (*iii*) to be used in multiple ways at the same time. People can hold a birthday party in one corner of a public park, while others conduct a memorial service in another corner of the park. But sometimes different proposed uses of public-access government land will conflict. So, for instance, a public park may be a very appealing venue for a public demonstration, since the signs demonstrators hold will be visible and the things they say will be audible, to those walking or driving past the park. But it will not

state-operated imposes certain constraints on an institution, a state-operated university typically functions at some remove from state authorities. It does not ordinarily function as an immediate agency of government.

[2] *See* Gary Chartier, Anarchy and Legal Order: Law and Politics for a Stateless Society 157–241 (2013).

be practical for two different groups of people to hold demonstrations at the same time in the park—certainly not in the same place, and frequently not in separate places, except in a very large park.

The state entity that is the putative owner of the park is not entitled to treat it as a private owner would. A private owner is free to use her private park for any peaceful purpose and, in particular, to use it as a site for any sort of expressive conduct she likes. By contrast, the state entity that is the putative owner of the park will have good reason to allow access for a necessarily exclusionary purpose like this in an evenhanded manner. That is, it will have reason to limit exclusionary uses so that they don't preclude ordinary recreational use of the park. And it will have reason to make the park available for exclusionary uses in ways that don't discriminate based directly or indirectly on the likely content of contemplated expressive activity.[3]

Within the terms of the statist constitutional game, the state is understood as an agent of the public. But whether this is the case or not, the state establishes and preserves its title to the park, controls the use of the park, and maintains the quality of the amenities on offer in the park using funds gained through taxation and employing the force exerted by police personnel. The potential for the abuse of force is substantial. In particular, there is a substantial risk that the state will attempt to skew debate regarding particular, controversial topics. If there is to be a state, it needs to function as an effective umpire rather than as a participant in the game. Its use of force and of the tax funding at its disposal will tend to distort the marketplace of ideas and interfere with self-disclosure and connection. And the state acts unfairly when it uses its coercive power and coercively gained funding to take sides regarding controversial issues.

III. Government Workers

Government workers (from judges and politicians to clerks and members of police forces) play two sorts of roles in relation to the expressive ecosystem. In making decisions about whether to seek to impose

[3] Similar constraints on the use of genuinely public land would apply in the absence of the state, too. There is no reason to think that there wouldn't or couldn't be such land without the state; *see* Roderick T. Long, *A Plea for Public Property*, *in* Markets Not Capitalism: Individualist Anarchism against Bosses, Inequality, Corporate Power, and Structural Poverty 157 (Gary Chartier & Charles W. Johnson eds., 2011).

legal liability for expressive contents or to sort out disputes about who is entitled to conduct a public meeting in a government-owned park, state actors preserve and nourish the ecosystem by remaining uninvolved when they can—and by being evenhanded when they cannot.

But government workers are not always acting in their official capacities. And, when they are not, they can be conventional *contributors* to the ecosystem of expression. Issues of expressive freedom arise in this connection in at least two ways.

(*i*) Sometimes, the question is whether it is appropriate for government workers to give public expression convictions about controversial matters. It seems as if they should avoid doing so in their official capacities. A judge should not use the platform provided by her position to deliver a political monologue. Police personnel should not plaster their official vehicles with bumper stickers attacking the Black Lives Matter movement. Their official positions are tax-supported and vested directly or indirectly with coercive power. It is unfair to those who are asked to fund their activities to expect them to support views that they do not share. And it is contrary to the principle of official neutrality—which helps to maintain the expressive ecosystem—to use or threaten to use coercive state power on one side of a public controversy.

Senior, high-profile government workers, both elected officials and top-level appointed officials, are arguably always acting in their official capacities when they are in public. There is no particular space or activity that qualifies uniquely as a context for official activity where they are concerned. In their cases, the principle of official neutrality arguably dictates public silence regarding matters of controversy apart from those regarding which they are required to make official decisions. Expecting public neutrality on their part does deny the expressive ecosystem access to their perspectives. But their coercive authority and the fact that those who might hold opposing views are forced to fund their activities make such neutrality in this narrow case *protective* of the expressive ecosystem. While it would be difficult to prevent biased activity on their part, at least there is no public threat that their coercive power will be used to tilt the balance in favor of one side of a controversy. And those who do not share their views are not forced to provide funding supportive of the expression of those views.

Expressive activity by other government workers *in their personal capacities* is a different matter. Certainly, the same protections rightly available to everyone else should protect government workers from

legal liability—in crime or tort—for the expressive content of their conduct. But the question that is sometimes raised is whether political neutrality should matter in *contract*—whether it should be a condition of employment.

In general, people should be free to make whatever sorts of contracts they like. But of course the state is in a special position as a contracting party because it exercises a monopoly over the putatively legitimate use of force and because it is funded, at its own discretion, through taxation. And this means *both* that it does not make contracts with workers on anything like an equal playing field, since it can begin from a position and draw on resources unavailable to any private party, *and* that it has a special obligation to be evenhanded as regards its treatment of expressive activity.

To be sure, a partial or complete ban on public statements regarding controversial matters—say, of a political nature—by government workers (apart from those who, in order to be elected, *must* pronounce on such matters) would not be *content*-based. Rather, it would be specific to particular *persons* while they occupied given *roles*. And there is a case to be made for the view that government workers—who are involved in different ways in approving the level and nature of taxation and other forms of compulsory funding for state activities, who actively participate in collecting tax funds, who spend these funds in their official capacities, and who are paid with these funds and consume them in their private capacities—should be entirely uninvolved in the political process.

At the same time, however, the various rationales rooted in the value of personal autonomy, flourishing, and the instrumental value of the expressive ecosystem all count against banning them from speaking. It would be a severe burden on their autonomy where they denied the opportunity to express themselves in public. They would be denied the opportunities to flourish that come with expressive activity, and they would deny the individual *recipients* of their communication the related opportunities to flourish effected by that activity. And they would be unable to contribute in significant ways to the functioning of the expressive ecosystem by making their own contributions to it in the form of new instances of expressive content. In addition, it would seem as if they were being treated *in their private capacities* as unequal to other members of the polity, given that these others were, indeed, free to express themselves. And it is also significant that some, like researchers and educators, are responsible for taking positions and expressing them—it

would be difficult for them to perform their duties well in many instances where they unable to express themselves, and their positions create opportunities for them to share their expertise with others in ways that it would be inconsistent with regard to their positions to prohibit.

One understandable fear is that government workers will, through their expressive conduct, exert a chilling effect on the expressive activity of others or send the message that certain instances or kinds of expressive content are officially favored over others. That is, the worry is that, even when they act in their private capacities, their putatively *private* conduct may appear effectively indistinguishable from *official* conduct.

But of course the fact that someone does not express an attitude or belief makes it no more likely that she does not in fact *have* the attitude or belief. Government workers may be biased in particular cases whether or not they express themselves regarding controversial matters. And allowing them to express themselves regarding these topics may thus make it more likely that they will reveal their biases in ways that make it easier to restrain or discount biased official actions. What is needed, in any case, to preclude the chilling effect problem, is to reduce as much as possible the extent to which state power can be used and the range of discretion with which it can be employed. What's needed is not to silence government workers but to limit their abilities to embody unreasonable attitudes in their official acts.

Of course, this does not mean that a government worker's expressive conduct can or should have *no* problematic consequences. Suppose a government worker threatens, while off the clock, to use government power to injure disfavored people. In this case, she may reasonably be reassigned, suspended, or fired. But this is not because of the expressive content of what she said. Rather, it is because her conduct amounted to *a threat*. And removing her from her current position may be the right way to keep her from carrying out the threat. Similarly, if a judge has spoken out about a matter of political import, she can of course be expected to recuse herself from a trial in which this matter is meaningfully related to the outcome—and attorneys may rightly insist that she be reassigned if she fails to do so.

(*ii*) The freedom of expression of government workers may also become legally and politically significant when they act as *whistle-blowers*. In the course of her work, a government worker may become aware of wrongdoing either by other government workers acting outside the official scope of their duties or by government workers acting with a

significant degree of official endorsement. There is good reason for relevant legal standards and institutions to protect the public revelation by government workers of this kind of wrongdoing.

Possession-based protections for freedom of expression provide a fundamental reason to avoid interference with whistle-blowing. Suppose the objects and networks used for the storage and transmission of information related to government wrongdoing and the technologies used by consumers to receive this information do not belong to the government (presuming, *arguendo*, that states are entitled to acquire and hold land and movable objects). In this case, robust possessory rights will preclude government interference with them.[4]

Suppressing the release of information by whistle-blowers would obviously interfere with their autonomy. This will be particularly significant if a whistle-blower's actions are motivated by a sense of moral responsibility: It is especially weighty to interfere with someone's performance of what she takes to be a positive moral duty. Slightly less weighty, but still significant and troubling, would be interference with conduct someone took to be supererogatorily virtuous—praiseworthy, exemplary. Of course, people can act wrongly when they believe they are fulfilling moral duties or performing supererogatory acts. But the assault on the autonomy of someone who takes herself to be acting in this way seems especially serious. In any case, however, whether or not a whistle-blower understands herself to be acting in either of these ways, suppressing her speech would infringe on her autonomy, and there are significant reasons for declining to do this.

But of course the ecology of expression does not exist primarily or exclusively to benefit those who communicate—though their autonomy and their possessory rights certainly deserve independent consideration. A key reason for the maintenance of the ecology of expression is the benefit yielded to those *other* than the communicator—in principle, to *everyone*. (*a*) Knowledge of the truth is itself good. (*b*) Knowledge that makes people more aware of the penchant of government actors to engage in

[4] I bracket here a rejoinder to the obvious reply that what the government might claim to own in these cases is precisely *the information* being disseminated that the government rightly claims. I think we should reject the notion that the state rightly owns anything. But, even if it may assert ownership over physical objects, there are reasons to believe that no one may rightly claim to own information—and that therefore, by implication, the state cannot; *see* Chapter 8.2.1, *infra*.

wrongdoing, and so more suspicious of state power generally, is also valuable; knowledge of individual acts of wrongdoing can help people to discern a *pattern* of wrongdoing that might otherwise be invisible. (*c*) Knowledge can serve as a basis for holding wrongdoers accountable in at least two ways—(*1*) by ensuring that they compensate victims and (*2*) by providing the basis for their removal or reassignment or the redefinition of their responsibilities in ways that make it less likely that they will injure others or put them at risk. (*d*) This kind of accountability can also serve as a deterrent to other government wrongdoers. And (*e*) exposure can also make it more likely that victims receive appropriate compensation. There are thus multiple benefits yielded by protection for the practice of whistle-blowing that give us all reason to endorse rules offering such protection.

Whistle-blowers may, of course, sometimes reveal conduct that may not rise to the level of wrongdoing but that members of the public still have reason to want to know about, simply because it is in one way or another controversial. While the reasons for protecting whistle-blowing in this kind of case are less weighty than those for protecting revelations of actual wrongdoing, transparency fosters greater accountability, and members of the public have little reason to favor rules that seek to shelter a government policy or procedure from their own scrutiny.

On occasion, of course, conduct may not be wrong and there may be some generally beneficial reason for it to be concealed at a particular time from public view. Despite this reason, the public might nonetheless benefit from the subjection of government decision makers, both in this particular case and in general, to a regime of transparency. Even if the ability of government decision makers to accomplish actual goods in a morally appropriate manner would be hamstrung by public scrutiny, the benefits of scrutiny in general and knowledge in this particular case must still be acknowledged. Just because some benefits are yielded by secrecy doesn't mean that other, equally real, benefits aren't also yielded by public knowledge. The autonomy- and possession-based rationales would provide further reason for protecting whistle-blowers' expressive freedom even in this sort of case.

In addition, given the already-noted value of a general regime of transparency, it's important to recognize the evident temptation for state actors to abuse any opportunity to suppress information. Misbehavior by government agencies and personnel is to be expected, if the kind of analysis offered in Chapter 4 is credible. Also to be expected, on that

analysis, are efforts to suppress the truth about such misbehavior. When government agencies are given discretion to suppress information related either to their own activities or to the activities of other government agencies, the temptation to suppress revelations that might be damaging to the decision makers themselves or to their cronies will be substantial. Reducing official discretion to suppress the release of information makes this sort of abuse less likely.

This means, of course, not only the discretion to punish whistle-blowers themselves but also the discretion to interfere with third parties' dissemination of the information provided by whistle-blowers—without which, of course, the benefits of whistle-blowing would likely not be made available to the public. Hugo Black rightly observed that expressive freedom enables news organizations to "bare the secrets of government and inform the people."[5] The freedom of news organizations to do this contributes vitally to the expressive ecosystem: It is a matter of the autonomy and flourishing of participants in these organizations and enables them to make a vital contribution to truth-seeking and other aspects of the flourishing of members of the public.

Protections for expressive freedom should thus be applicable to whistle-blowers as a matter of respect for their possessory rights and autonomy and as a means of offering a variety of benefits to the public. While some instances of whistle-blowing may be unreasonable, there is good reason to restrain official discretion to interfere with expressive activity.

IV. Direct and Indirect Expression by the State

While government workers should be able to express themselves, expression by the state itself is another matter. As Robert Jackson famously emphasized, "[i]f there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein."[6] The conviction Jackson expresses in these stirring words is entirely consonant with the approach I have sought to defend here.

[5] *New York Times* Co. v. United States, 403 U.S. 713, 717 (1971) (Black, J., concurring).

[6] West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943).

The state is a coercive agency—funded by coercion and implementing its dictates by coercion. If, as I believe, we should be deeply troubled by coercion, we have every reason to limit the state's coercive activity itself and the reach into the social sphere of the influence it acquires in virtue of its past and ongoing coercive power. And this means, in turn, that we should recognize that the state can exert this influence in multiple ways. The expressive activity in which it engages and which it sponsors provides obvious examples.

When the state speaks, it does so against a backdrop of past and threatened future coercive activity. The modern democratic state also claims, with limited justification, to speak for all its citizens, and, whether it does so, considerations of fairness prompt us to urge on the state the adoption of policies which will acknowledge the equal status and moral dignity of all those over whom it claims authority. So there is reason to object when the state seeks, as Jackson puts it, to "prescribe what shall be orthodox."

Consider a common example. Context is everything. But it will frequently be difficult to avoid reading a government entity's conspicuous placement of a religious symbol on its land *either* as a deliberate affirmation that the tradition with which the symbol is associated enjoys a privileged place in public life and perhaps in the shaping of public policy *or* as an unthinking acknowledgment of its privileged status. There is thus a double injury here. Those who do not embrace the tradition are compelled to pay for its public acknowledgment. And they are repeatedly reminded that deeply important views that are not theirs may be expected to affect a range of official actions to which they will be subjected.

The overt placement of religious symbols on government land is one way in which the government in effect prescribes an orthodoxy. It is the understandable fear that the same is true of other symbols, similarly situated, that understandably births call for the removal of these symbols. A related concern understandably attaches to government funding of specific instances of expressive activity.

If the government is to fund the creation of paintings, films, symphonies, or books, it cannot opt to allocate funding in light of their *content.*[7]

[7]The difficulty here would be most pronounced if funding were allocated directly by politicians. But it would persist even if funding were the responsibility of expert panels. (*i*) Assigning responsibility to these panels would be to send the message that the pools from

To do so is, again, to prescribe an orthodoxy—in virtue of the decision to fund specific projects and also because this decision places the weight of state power behind the class of projects with relevantly similar contents. And it is to dragoon individuals into support for this orthodoxy by compelling them to fund the projects whether they share the state's view of their contents or not.[8] The problem can be partly resolved if funding available for expressive activities is allocated as evenhandedly as access to a park intended for a demonstration. But of course the coercive demand that people fund instances of expression whose content they did not endorse would still be made. In effect, the state would still be speaking on their behalf without their consent.

V. Non-State Actors

A regime of robust possessory rights creates the space within which people can flourish and in particular flourish in and through expressive activity. And this means that people must be able to determine how they will use their possessions, and how others will use these possessions, for (among other things) expressive purposes.

There may, however, be conflict and disagreement regarding how particular possessions are to be used. Just possessors should have final legal

which the panels are selected are endorsed by the state as experts—that the state endorses the professional *class* to which they belong. (*ii*) Given the ideological conformism that obtains within particular professional subcultures, the state would be *in effect* endorsing the dominant views within the relevant subcultures and would undoubtedly be known to be doing so.

[8] Requiring people to pay for a public symbol which conveys a message of which they do not approve is arguably not *as* intrusive as making someone who does not endorse the Pledge of Allegiance recite it. The latter kind of interference involves conscripting a person's body and seems designed to exert some indirect influence on her thinking as well. Still, (*i*) the state—certainly the democratic state, but not only the democratic state—claims to speak for its subjects. (*ii*) The use of resources extracted from them by force to fund the display of particular symbols does seem to involve people involuntarily in support for particular expressive acts, as does the use of state funds to maintain and protect these symbols. (*iii*) The state's maintenance of symbols and its deployment of force to protect them do seem designed to influence the thoughts and feelings of its subjects. (*iv*) State action in support of particular symbols compromises the state's putative neutrality as among the beliefs of its citizens. Thus, the same kind of objections apply here as in the case of the mandatory recitation of the Pledge of Allegiance. On state-compelled speech, *cf.* Seana Valentine Shiffrin, Speech Matters: On Lying, Morality, and the Law 94 (2014).

authority in this regard: That's what it means for them to have genuine possessory rights. However, from the fact that I should be legally entitled to determine how my possessions will be used, it does not follow that every choice I might make with respect to these possessions is morally appropriate. I can use my home as a site for adulterous liaisons. I can use my computer to spread lies. And while I should be legally free to do these things, that doesn't change the fact that I act wrongly when I do them.

Just possessory rights set the primary boundaries within which legal constraints may be imposed on expressive activity. And the considerations I've noted regarding the value of autonomy and the various contributions expressive activity can make to flourishing further solidify these boundaries. But these considerations are also relevant to the moral choices of actors with respect to their own possessions. They are germane in different ways to the behavior of several classes of such actors. I note some factors relevant to three kinds, in particular: business firms, religious organizations, and institutions of higher education.

A variety of general considerations apply to these sorts of institutions. In brief: in light of the general considerations I have adduced, institutional actors certainly have reason, within limits, to respect the autonomy and foster the flourishing of those who participate in the institutions and to foster open expression—for the benefit of the institutions and in the interest of the wider society. While *forcible* interference with the fulfillment of one's preferences is particularly troubling, we certainly don't want out autonomy interfered with even in non-forcible ways. This doesn't mean, obviously, that interference with someone's autonomy is always wrong, but there is, at minimum, a presumption against it. Institutional decision makers wouldn't want their autonomy interfered with, so they have reason to avoid interfering with the autonomy of other institutional participants. And they will recognize the distinctive value of creative individuality.

In addition, decision makers will want institutional participants to flourish by making their own choices. Decision makers will have reason to want to avoid saddling other institutional participants with the problems associated with the failure to achieve their own goals. They will recognize that using pressure to foster virtue is often unproductive or counterproductive. They will also be aware that others will have better information about their own circumstances than the decision makers themselves ordinarily will. And those who shape institutional rules and

cultures will recognize, and seek to avoid, the risk that decision makers will use the capacity to interfere with others' autonomy to pursue their own interests and agendas.

Decision makers will also be aware that open dialogue and the exchange of information ensure that institutions function more effectively. They will also see that institutions can contribute to broader societal understanding in various ways as individual participants and institutions contribute to societal dialogue on matters of public concern. These non-state institutions are not agencies of the state, and they are not responsible for the shape of public dialogue. But when they can contribute to knowledge, insight, aesthetic experience, cultural change, and so forth while fulfilling their own distinctive goals, they have reason to do so when costs are not excessive.

To talk about the purpose of an institution is not to pretend that there is some platonic ideal to which any organization or community with certain features must conform, or that the goals of some particular set of founders must be seen as decisive. The point, rather, is that twofold: (*i*) Institutions with certain features have opportunities and capacities that might be thought to yield particular responsibilities; (*ii*) those who participate in these institutions have in some cases made commitments of various sorts that rightly shape their institutional behavior.

A. Business Firms

Business firms have limited moral obligations to maintain the ecosystem of expression—to protect and encourage expressive activity by their workers both for the firms' own benefit and for the benefit of the wider society. Firms also enjoy the same expressive freedoms as others.

1. Firms Should Help to Maintain the Expressive Ecosystem

A firm exists to provide goods and services to consumers on the market. It cannot thrive, at least not without private or governmental subsidies, if it does not do this at a satisfactory quality level and with satisfactory pricing. Investors select firms to support based on their profitability—which serves as a signal indicating how effectively firms are delivering what consumers prefer. But firms also find that they must maintain customer loyalty in less tangible ways—not infrequently through the values they appear to endorse. At the same time, of course, firms are not unitary actors; they are associations of people engaged in common tasks, with

different capacities and with access to different information-sets. They are, to one degree or another, communities: people bring their personalities and non-work concerns into their workplaces and their interactions with co-workers, suppliers, customers, and others. And communication within a firm can spill over into the wider society. All of these factors are relevant to the significance of expressive activity within a firm.

We don't always think of firms as such as parts of the wider ecology of expression. But firms' collective contributions to the general expressive ecosystem are not insignificant. These contributions include their official reports, their news releases, their advertisements, and the expressive activities they support philanthropically (art projects, say) or on a for-profit basis (films or television programs, for instance). All of these help to shape beliefs, attitudes, and habits. Firm decision makers may not necessarily think of themselves as contributing to the ecology of expression. But many of their day-to-day activities do so nonetheless.

In addition, however, *individuals* within a firm engage in formal and informal expressive activities of all kinds. Firm decision makers should generally avoid impeding or retaliating against such activity.

Avoiding interference or retaliation is a matter of appropriate regard for workers' autonomy. They don't shed their humanity when they enter their workplaces, and engaging in reprisals when people express themselves in disfavored ways is unreasonable for the general reasons that non-forcible interference with autonomy is unreasonable.[9]

In addition, expressive activity designed to enhance firm operations can be exceptionally beneficial to firms themselves. Large, hierarchically organized firms confront the same sorts of informational and incentival difficulties that beset centrally planned economies. People in one sector of a firm often lack access to information about firm activities possessed by those elsewhere. Free-flowing communication within a firm helps to ensure that information is made more generally available. Individual workers often possess information and perspectives more generally that are germane to operational decision making—knowledge of political developments in a country in which the firm does business, say, or of particular natural- or social-scientific theories or findings. An internal ecosystem that encourages the free-flowing exchange of firm-specific and general information can enhance firm performance.

[9] *Cf.* Seana Valentine Shiffrin, Speech Matters: On Lying, Morality, and the Law 109 (2014).

Individuals' expressive activities within firms can also spill out into the wider world and contribute to broader public understanding and insight. A speech or report intended first of all to affect behavior within a firm can reshape public understanding in various ways, for instance. Firms should avoid interfering with individual expression out of regard for workers' autonomy and of the recognition that their expressive acts can benefit firms directly and because of their public significance.

Obviously, all of these considerations take place within the terms set by the purpose of the firm. Firms do not exist, per se, to educate the members of the public; they exist, to provide goods and services to the public. And this purpose serves as a source of limitation on the degree to which it is unreasonable for firm decision makers to interfere with expressive activities by firm workers. Communications among workers may drive some people to leave a firm and take valuable skills elsewhere. Constant criticism may interfere with someone's productivity. A worker's expressive activity may lead to a consumer backlash against the firm with the potential to diminish profitability.

There is no hard-and-fast rule to be applied here. Rather, firm decision makers will need to employ the Principle of Fairness, asking what rules they would and wouldn't be willing to endorse if *they* or their loved ones were the affected workers or members of the public. But it is important for these decision makers to think about issues beyond those raised by any particular case, and to take into account factors they might be inclined to overlook. While it will be tempting to focus on the immediate uproar related to a particular expressive act, decision makers need to remember both the independent value of workers' autonomy and the contribution to their firm and to the wider society of a reliable internal ecology of expression in which people feel free through their words and actions to express ideas and attitudes.

It will also be important for decision makers to recognize the contribution that taking a clear stand for fairness to particular workers and regard for their autonomy in the face of public pressure can make to wider public understanding and moral improvement. Again, the purpose of a firm is not societal moral uplift. But in some cases it will be clear that, in the absence of public pressure, it would clearly be right to treat a worker in a particular way.

The public pressure may be motivated by factual misunderstanding or by false moral beliefs (say, in the inherent disgustingness or inferiority of particular ethnocultural groups, in guilt by association, or in the merits

of retribution). Consumers certainly have obligations not to act unfairly in general, and, more specifically, to avoid unfairly interfering with the ecology of expression. But the fact that the public pressure is, *ex hypothesi*, unreasonable does not change the fact that it *may* contribute to a decline in the firm's profits and, indeed, perhaps, to the firm's closure. And this fact has to be taken into account. A firm cannot reasonably murder to assuage consumers. Whether or not an instance of purposeful or instrumental killing might be consistent with the Principle of Fairness in a given case, purposeful or instrumental killing is *always* inconsistent with the Principle of Respect, so the possibility of murder isn't even on the table for the reasonable person. But the Principle of Fairness is different, since *all* relevant circumstances may contribute to determining what *counts* as fair in a given case.

Nonetheless, it is possible that acting in relation to a worker in what would, in the absence of public pressure, clearly qualify as a fair manner might contribute to moral insight on the part of members of the outraged public. And that it might do so would be a reason, whether or not a decisive one, for a firm's decision makers to act in this manner. Loyalty to the worker as a member of the community that is the firm would also be a reason to act in this way. These considerations are unlikely to be reasons for the firm to court bankruptcy, but they may certainly be reasons for the firm to be willing to risk alienating some consumers.

It is important, in any case, to distinguish cases in which workers' expressive activity might drive away other workers or might alienate consumers from cases in which the desire to suppress workers' expressive conduct emerges from managerial insecurity. Workers in managerial positions may resent being challenged by other workers who may believe they possess superior understanding of relevant issues. They may expect to be treated with deference irrespective of their knowledge or competence. Managerial workers may dislike free-wheeling intra-firm expressive activity because it highlights problems they do not wish to acknowledge that they have failed to solve or because it might bring to light product or service inadequacies or firm-caused threats to public health. They may fear an intra-firm expressive ecosystem because it empowers other workers and threatens managerial workers' control over others. And it is important to stress that firms do not exist to serve the interests of managerial or other workers. Respect for all workers' dignity and autonomy and capacity to contribute to firm performance and wider social insight are all important constraints on the ways in which firms can rightly treat

workers. But firm policies should not be designed to protect managers' fragile egos or positional prerogatives. Managers are persons equal in moral worth to other firm participants. Their insecurities provide no good reason to limit workers' abilities to maintain their autonomy, to flourish in and through expressive activity, to assist firms in performing better, or to foster wider public understanding.

2. Firms' Own Expressive Activities Merit Legal Protection

Firms engage in expressive activity. As I have already noted, firms advertise. They issue reports. Their official representatives issue public statements. These acts are contributions to the expressive ecosystem that merit just the same kind of protection as the expressive acts of other associations and of particular persons.

The grounds of firms' expressive freedom are simple and familiar. When firms' expressive activities are undertaken by means of their justly acquired possessions, interfering with these activities means violating the firms' possessory rights. A firm's expressive activity is frequently a matter of autonomous action on the part of the relevant agents and a way in which these agents flourish. This activity contributes instrumentally in multiple ways to the realization of various aspects of well-being. It does not constitute or cause any legally cognizable injury. And mischief of various sorts could come about where the legal system entitled to restrain expressive activity, including the activity of firms.

Firms are, of course, engaged in the pursuit of profit, and the discipline of the marketplace can channel their energies and narrow their options. They are not ordinarily engaged in the disinterested pursuit of truth. Firms' expressive activities nonetheless contribute to flourishing in multiple ways, and firm actors flourish in and through these activities.

Firms are not themselves actual agents, obviously: The actions of firms just are the actions of the various people who make up the firms, and these agents' goals and goods are not exhausted by those of the firms. It is the autonomy of these agents that is valuable and deserves to be respected.

Markets play quite different roles in different firm actors' lives. Not all business speech is corporate speech, and not all businesses organized as corporations are large and impersonal. Sole proprietors do very much intend, quite frequently, to express their deeper moral convictions in and through their business decisions, and closely held corporations may function in the same way—and I am not thinking here just of social-purpose businesses, since businesspersons of all sorts may integrate their

convictions with the activities of quite conventional businesses. And even firms that *do* focus narrowly on those bottom lines need not do so at the expense of truth. Firm actors do not abandon their moral integrity simply because they are firm actors.

In addition, market forces simply aren't always going to amount to instances of social pressure of the kind that inhibits autonomy: either because they're simply not strong enough to inhibit someone's autonomous choice or because, even if they were, the choice happens to be aligned with them so that there's no conflict. Since some firm actors will be speaking autonomously, even if the autonomy of some others is compromised in some way, a general policy allowing for interference with firm actors' expressive acts on behalf of their firms would result in significant interference with autonomous speech.

In addition, the autonomy of *consumers* of information is inhibited when firms' expressive activity is limited. And these consumers benefit from the availability of information. The expressive ecosystem can sift and winnow that information, even if it is generated and disseminated with pecuniary motives in mind. Restricting firms' expressive acts is thus a way of interfering deliberately with consumers' opportunities to think clearly, acquire true beliefs, and otherwise benefit from the operation of the expressive ecosystem.[10]

B. Convictional Communities

Religious communities are the most obvious example of what we might call *convictional* communities, communities organized around the embrace and propagation of particular beliefs or lifestyles. Religious denominations are convictional communities. But so are ideologically driven political parties—Greens, Libertarians, and Socialist Workers (the Republicans and the Democrats are loose electoral coalitions, not ideologically cohesive communities)—and ideological affinity groups (organized associations of vegetarians and vegans, say).[11]

[10] *But cf. id.* at 98–102 (defending differential treatment of corporate and commercial speech).

[11] Other kinds of subcultures and formal associations share many characteristics with convictional communities. But issues of internal dissent within these groups are less important, because they are not concerned, per se, with seeking converts or discovering truth in the same way. (Of course, the differences are relative. Some fan subcultures may be more

Members of convictional communities frequently value legal freedom of expression for themselves, since this freedom allows them to engage actively in sharing their convictions with others. But such communities have additional reasons to encourage *internal* freedom of expression.

When a convictional community forms part of the large-scale ecology of expression, participants in that community are able to articulate ideas, model patterns of life, and so forth in ways that will enrich understanding and foster growth in the wider society. A convictional community serves the wider society as its designated representatives proclaim its official doctrines. But it also does so as individual members, concerned with the issues that form the community's focus, express themselves regarding these issues in various ways.

Convictional communities make genuine contributions to the wider society when they promote their own distinctive viewpoints, and of course, the autonomy of members who wish to promote those viewpoints would be inappropriately limited if they were precluded from doing so. There is something distinctively valuable about not simply echoing the perspectives on offer in other communities, in the news media, and so forth. Convictional communities may see internal dissent as undercutting their ability to communicate transformatively with the wider society.

It is important to distinguish between the messages conveyed in the official organs of a community and the beliefs and attitudes expressed in the words and actions of particular members. People both autonomously express their own preferences and contribute to understanding in their own community and in the wider society when they give voice to a community's distinctive vision. Communications that express distinctive viewpoints not available elsewhere make important contributions to well-being, not least by contributing to and fostering reflection, dialogue, and debate. So a given community can reasonably limit the messages that its official organs convey, precisely so that these organs can make these contributions.

Limiting the messages in these organs to those consonant with a particular vision can also be an expression of the autonomy of community members, funders, and community executives. This is less clearly a reason to favor coherent messaging, however, given that there may well be significant disagreements among the members for whom the organs

aggressive about proselytizing than some quietistic religious communities.) Considerations related to autonomy and, sometimes, potential contributions to understanding (internally or societally) will still, of course, rule out suppression of dissent within these groups.

purport to speak, among funders, or among community leaders. There may, on occasion, be real consensus about certain positions, of course. But it's important to distinguish cases in which this is so from ones in which certain funders or other institutional leaders confuse insisting on their own interpretation of a community's position with speaking for the community's members. The call to respect a given community's integrity too frequently becomes a cover for ignoring difference and treating particular authorities as if their view just was the entire community's rather than, in fact, merely their own.

In any case, while official community organs can certainly embrace and promote a narrow range of particular views, the specific reasons for limiting the range of expressive contents on offer via these organs don't apply to expressive activity by individual members and subgroups within a convictional community.

Expression *within* a given community also benefits the community insofar as it enables the community to achieve greater understanding regarding the community's own concerns. And a community that cares deeply about truth will have every reason to maintain an internal ecology of expression that will facilitate the acquisition of increased knowledge and deepened understanding. Community authorities who value truth act arbitrarily and unfairly if they inhibit the operation of ecology of expression that will enable community members to apprehend truth more clearly. They also, of course, infringe on the autonomy of community members—both those who communicate and the recipients of their communication—when they do so.

On occasion, some members of a convictional community may occupy official roles that they, and some other members, may treat as entitling them speak on behalf of the community with authority. But the community will still benefit from the free exchange of ideas—including, perhaps especially, ideas that present alternatives to those announced by putative authority figures. The quest for understanding inside the community will be fostered most effectively by free-flowing dialogue that allows for the winnowing and sifting of official pronouncements. And the community's contribution to understanding in the wider world will be furthered if as many voices as possible from inside the community are encouraged to participate in the expressive ecosystem.[12]

[12]Thanks to David Gordon for encouragement to reflect further on this point.

C. Universities

Some universities are operated by states, of course, while some are private. Some considerations apply in both cases.

1. Universities in General

The various instrumental rationales for freedom of expression, plus those concerned with the autonomy of their members and of others, provide strong reasons for universities to respect freedom of expression. So do the purposes of these institutions. Universities are defined by two purposes: (*i*) to educate students and (*ii*) to contribute to the general stock of knowledge, insight, and understanding available (*a*) to particular sponsoring communities and (*b*) to the wider society. The general considerations related to autonomy and flourishing and to the instrumental significance of expressive activity provide reasons for convictional communities and firms to avoid interfering with participants' expressive freedom. But the specific purposes of such institutions can provide reasons to impede expressive activity. By contrast, universities have far less reason to interfere with this kind of activity. Rather, their distinctive purposes give them additional reasons to respect expressive freedom.

Universities contribute to broader societal understanding through interventions by their members in relevant conversations. These may include exchanges conducted in scholarly publications and at scholarly conferences. They may also include contributions to wider public debate, as when legal academics discuss constitutional law in op-eds or economists address questions of regulatory policy in discussions on news programs. Academics need the freedom to take potentially controversial positions if they are to contribute usefully to these conversations.

Academics also contribute to student learning by confronting students with diverse views. This may mean simply exposing students to particular positions, including quite controversial ones. An important part of the learning experience is acknowledging the variety of stances on offer in any given context and developing the skills to deal with alternate stances, including thoroughly disagreeable ones, with equanimity. This habit is worth learning both because it enables people to show regard for each other's autonomy and because it prepares those who exhibit it to learn effectively in what might otherwise prove unsettling situations.

For the reasons I've already noted, offense is not a predicate for reasonable action. Neither instructors nor universities have any reason

to limit classroom or public expressive activity on the basis that it is or might be offensive. Reasonable people will seek to let go of the desire to retaliate or engage in retribution, along with the false belief that basic aspects of their well-being are injured just because they, or institutions, symbols, or groups they value, are viewed in hostile, critical, uncomprehending, or dismissive ways by others. They will thus seek to eliminate most or all instances of *being offended* from their emotional repertoires. (They may, of course, quite reasonably understand negative attitudes as effecting relational ruptures, and they may reasonably understand the expression of such attitudes as portending attacks on their well-being of various kinds.)

While instructors and institutions need not, and likely should not, actively seek to prompt offense, they should help to send the message that people should avoid experiencing offense and that, when they do so, they cannot reasonably treat feeling offended as a basis for attempting to silence anyone else. At the same time, of course, institutional actors need to be alive to actual *threats*—not only of physical violence but also of other kinds of mistreatment, as, for instance, expressive acts which threaten that students of a given religious or ethnocultural background won't be welcome in particular student organizations. While these sorts of threatened injuries shouldn't be *legally* cognizable, universities can certainly treat them as cognizable within the terms of their own disciplinary codes. Universities have particular responsibilities to foster the free exchange of ideas and to help people learn how to manage the task of dealing with ideas they find difficult. But they may still act to protect the legitimate interests of students and members of the faculty and staff in being fully included in university life. Institutions may also reasonably recognize the debilitating effects of genuine trauma. They have no obligation to avoid exposing students to potentially disturbing or controversial material, per se. But making students aware that otherwise required experiences might evoke post-traumatic stress and excusing them from these experiences seems entirely reasonable—an appropriate expression of sensitivity to genuine biomedical concerns. What's important, however, is to tightly cabin the circumstances occasioning this kind of notification and excuse so that it does not provide an opportunity for students to avoid the merely difficult, uncomfortable, challenging, offensive, or insulting.[13]

[13]Thanks to Kevin Hill for useful observations related to this issue.

By allowing particular departments or schools or particular student organizations to host particular events, university decision makers are not in any way endorsing the messages conveyed at those events. They need not intend that those messages be conveyed, but only, say, that those conveying them or arranging for them to be conveyed are not interfered with or that the scope of campus dialogue is enlarged. A university decision maker may be aware that both good and bad consequences can be expected to flow from a policy that permits the scheduling of this or that speaker, but they need not intend the bad consequences. Rather, she acts fairly just insofar as her permission for the scheduling of the speaker is consistent with a general rule she would accept even were she or her loved ones adversely affected in particular cases by its operation.

Instructors may also contribute to student learning by explicitly acknowledging their own, potentially controversial, views. There may be worries in such cases that students will not feel free to voice their own views if those views differ significantly from their instructors'. But what are needed in such cases are clear institutional safeguards designed to make certain that students aren't penalized for expressing their convictions. Such safeguards ensure that students can participate in robust debates, debates that are far more stimulating that sanitized classroom conversations from which provocative views are largely banished.

Students, of course, contribute to their own learning by engaging in vigorous debates in classrooms and in institutional fora of various kinds and by coming to grips with perspectives, attitudes, and behaviors they may find alien. Universities do not impede.

They also contribute to the learning of other students, and of community members, in such contexts. And the potential for media coverage (include coverage by low-cost grassroots media) means that students and faculty members who organize high-profile campus events are likely through those events to help educate a much wider, potentially global, public. Again, these sorts of events must be able to occur without institutional interference if they are to play their vital educational roles.[14]

To be sure, institutions need to shepherd scarce resources: There is no time and space for every event students and faculty members would

[14] *Cf.* Erwin Chemerinsky & Howard Gillman, *First Amendment Lessons for Liberals*, New York Daily News, Oct. 1, 2017, *available at* http://www.nydailynews.com/opinion/amendment-lessons-liberals-article-1.3531094.

like to organize, not even, frequently enough, for every event for which particular campus groups would be open to covering the costs. Decisions in such cases ought to be shaped by the Principle of Fairness in light of institutions' specific commitments. But institutions would in general do well to assign access to facilities and so forth on bases unrelated to the contents of particular sorts of expression planned for various events. Institutions are, of course, free to organize institutionally sponsored public events as well, and while the mission of education for students and various relevant communities must be kept in mind, institutions are obviously quite free to select programming for these events to counter messages being conveyed by events organized by students or faculty members.

The use of force is appropriate, if at all, as a means of preventing, ending, or remedying violence initiated by others; it is never an acceptable response to disfavored expressive acts. Neither are standard kinds of disruption—shouting down speakers, for instance, or interfering with access to facilities where controversial expressive acts are planned. Counterprogramming is entirely apropos, as are demonstrations that do not impede access to controversial events or interfere with people's opportunities to apprehend expressive content. On the other hand, controversial content should not be forced on the unwilling (as by sound trucks blaring messages while they drive through common areas on campus).

While institutions contribute most effectively to the ecology of expression by declining to make decisions about whether to permit public on the basis of the contents of the expressive acts to be expected at these events, they must also be aware of risks of violence and other sorts of disruptive conduct. They should take reasonable steps to prevent such conduct. But they may reasonably ask that campus groups sponsoring events shoulder the cost of security for those events. What is important, however, is to avoid conferring a heckler's veto on those who wish to engage in disruptive conduct. Thus, while organizers of events might be asked to pay for security for those events, students who attempt to disrupt these events through violence or other conduct that interferes with expressive activity may reasonably be disciplined.

Protection of free expression in classrooms, in publications, and in relation to public events is part and parcel of the specific mission of universities and makes particular sense in light of the instrumental value of freedom of expression. But of course regard for the autonomy of faculty members and students, and the goods they can realize as individuals in

and through expressive activity, provides a further reason for institutions to respect expressive freedom.

2. State-Operated Universities

Universities in general have multiple reasons related to their specific purposes to encourage wide-ranging expression. Universities operated by states have further reason to do so.

States inhibit autonomy and the quest for understanding when they use their ability to extract funding coercively to favor particular beliefs. The funding itself tilts discussion in one direction or another, of course. In addition, the public *awareness* that the state has funded one option in preference to another can stifle alternative views as people anticipate continued state support for particular options and decide that it's unprofitable to support others. It can also serve to underwrite social norms supportive of some options in preference to others.

Thus, if the state is to avoid distorting the ecology of expression, it cannot reasonably seek to shape the content of the teaching or scholarship conducted at the universities it funds. In general, the state needs to treat state-funded universities in the same general way it treats public spaces it purports to own: While it may certainly seek to ensure order and safety, and to make certain that facilities are used for their intended purposes, it cannot reasonably take sides regarding the *content* of the non-violent, non-disruptive expression in which people engage.

Individual departments and schools may, of course, tend to seek faculty members with particular skills, interests, and dispositions. But interest in a particular research program is different from the endorsement of particular *conclusions* with respect to the subject matter of that research program. A department might seek to recruit highly qualified scholars of evolutionary psychology, for instance, without opting to hire only those candidates who enthusiastically promote or intensely criticize evolutionary psychology. Because of its funding and the communicative import of its societal position, a state institution has good reason to avoid ideological specialization.

3. Privately Operated Universities

Privately operated universities in general will have every reason to permit wide-ranging expression, out of regard for participants' autonomy and flourishing and the contribution of expressive activity to on-campus

learning, the improvement of on-campus operations, and the enhancement of public understanding and public life.

Private universities operated by convictional communities—religious, political, moral, or otherwise—present some special challenges. Such universities may contribute to the fulfillment of their sponsoring communities' distinctive missions and offer distinctive varieties of enrichment to the ecology of expression, by deliberately promoting particular perspectives in their classrooms and in their institutional programming and pronouncements.

This need not be inconsistent with the fundamental commitment to seeking and disseminating truth that is constitutive of the university as we understand it. The university oriented in this way may proceed from the understanding that truth is best discerned and understood from within a particular tradition or perspective. So its commitment to a given tradition will be an *expression* of its commitment to truth.[15]

While universities committed to distinctive perspectives can enrich the wider cultural conversation and foster deepened understanding outside their own walls, such institutions cannot reasonably operate as if they or their sponsoring communities can rest in the serene confidence that they possess the truth. They must, that is, remain engaged in the ongoing quest for enhanced knowledge and insight. To think otherwise would be to deny the finitude and situatedness which religious communities characteristically acknowledge—and which any sane observer of the human scene must treat as a foundational premise for reflection on human knowledge and action. They may, to be sure (though they need not), be premised on the assumption that proceeding from within a given perspective or tradition is a, perhaps the most or the only, way to gain greater awareness of reality. But confrontation with alternative traditions and perspectives is a crucial means by which one's own preferred tradition or perspective is refined. Similarly, traditions are not unified and undifferentiated: Within a broad tradition, there will be a variety of disagreements, some of them quite sharp, even among those who embrace many or all of the tradition's defining assumptions. Private universities

[15] *See*, *e.g.*, Nicholas Wolterstorff, Reason within the Bounds of Religion (2d ed. 1984); Alasdair MacIntyre, Three Rival Versions of Moral Enquiry (1990); William C. Placher, Unapologetic Theology: A Christian Voice in a Pluralistic Conversation (1989); Charles Scriven, *Higher Education and Theological Ethics*, *in* The Future of Adventism: Theology, Society, Experience 267 (Gary Chartier ed., 2015).

operated by convictional communities will thus have good reasons related to the quest for truth to welcome both dissenting voices from within the traditions or perspectives embraced by their sponsoring communities and the presence in their midst of colleagues who help them understand their own views better by embracing and defending alternative perspectives or traditions. Thus, while they may seek to populate their faculties with scholars who are participants in the traditions or perspectival communities that inform their operations, they have reason to welcome proponents of alternative interpretations of the relevant traditions or perspectives and those from outside their communities entirely.[16]

Apart from the contribution of dissent and difference to the quest for truth, convictional universities will, of course, have reasons related to autonomy and flourishing to respect participants' expressive activity. Such reasons may not, given institutional purposes, justify high-profile intellectual or behavioral challenges by faculty members to institutions' official stances as regards beliefs or lifestyles. Convictional universities may, indeed, limit the views that can be expressed in their own official publications. They may reasonably ask that certain topics be addressed outside rather than inside the classroom. And they may ask that members of their faculties and other workers avoid taking certain positions in the classroom or when officially representing them. But, in view of considerations related to truth, autonomy, and flourishing, convictional universities should avoid pressuring faculty members and other workers to avoid expressing particular beliefs or attitudes in their scholarly writing and speaking or in their behavior outside institutional contexts.

Convictional universities may reasonably expect that faculty members and other workers support the universities' missions and avoid disruptive activities, especially in the classroom, but should not seek to silence their contributions to increased understanding on the part of students, colleagues, and the communities in which institutions are embedded. Institutions may reasonably hire with convictional consonance in mind. But they should not foreclose the quest for truth or compromise autonomy or flourishing by asking faculty members to agree to particular beliefs or behavioral stances. Doing so prevents faculty members from contributing through their words or behavior to increased understanding within their universities and in the wider world.

[16] *See* Scriven, *supra* note 15, at 277–78.

VI. Conclusion

While the general preclusion of state interference with expressive activity serves to answer most questions about expressive freedom, a number of special cases pose particular problems. States are coercively funded and routinely deploy force to achieve their ends. To limit the effects of these features of state activity, and to ensure that states, as long as they obtain, will serve rather than undermining the ecology of expression, states should make public-access spaces available for expressive activity without regard to the expressive *content* of that activity. To avoid speaking on anyone's behalf, much less endorsing any sort of orthodoxy, the state should avoid sponsoring expressive activity. Out of regard for their autonomy and their capacity for flourishing, and in order to enable others to benefit from their potential contributions to the expressive ecosystem, government workers should be legally entitled to express themselves freely. This should be true when they are addressing politically controversial topics in unofficial capacities and when they engage in whistle-blowing—an activity which enhances public awareness of government mischief and helps to ensure accountability.

The value of autonomy, flourishing, and ongoing contributions to understanding all give business firms, convictional communities, and universities reasons to avoid interfering with the expressive freedom of participants. Firms are not responsible for maintaining the expressive ecosystem, but they can facilitate its flourishing by declining to interfere with their workers' expressive activity. Free expression on the part of workers can also help to improve firms' performance. Convictional communities help to achieve the goal of truth-seeking by showing themselves hospitable to expressive activity. And, especially in light of their distinctive purposes of teaching and scholarship, universities have particular reasons to avoid stifling free expression in their classrooms and elsewhere on their campuses.

In the first six chapters of this book, I have attempted to lay out a general framework for thinking about freedom of expression and to note at a fairly high level of abstraction why this kind of freedom might apply even in cases in which legal liability was not at issue. In Chapter 8, I use the framework to consider some more specific cases, including broad issues I haven't so far addressed and some current topics that have attracted recent media attention.

CHAPTER 8

Respecting and Promoting Free Expression: Case Studies

Case studies, both real and fictional, help to clarify the significance and implications of the ecological theory of free expression for both state and non-state actors.

I. Introduction

The principles I have elaborated provide multiple grounds for respecting and protecting expressive freedom. In this chapter, to illustrate the relevance of these principles, I offer brisk treatments of a number of cases. I begin with several concerned directly with state action. Then, I turn to the ones involving non-governmental actors.

II. Cases Involving State-Imposed Legal Liability

State action has the potential to affect the expressive ecosystem in multiple ways. In this part, I note two kinds of state-created putative rights that interfere with expressive freedom on multiple levels—"intellectual property" rights and rights against defamation. I also examine the appropriateness of the state's own expressive activity with a focus on state maintenance of controversial monuments and of attempted suppression by the legal system of the cinematic documentation of rights-violating conduct.

Gary Chartier, *An Ecological Theory of Free Expression*,
https://doi.org/10.1007/978-3-319-75271-6_8

A. Intellectual "Property"

Intellectual "property" (IP) rights are difficult to square with freedom of expression. IP protections tell people what they can and cannot do with their own possessions, imposing legal liability on those who embody abstract patterns in unapproved ways. To accept robust possessory rights of the sort I have defended here is thus to reject conventional IP protection. Put another way: IP involves a grant of monopoly privilege; monopoly privileges of all kinds are inconsistent with robust possessory rights. It seems clear that they are also inconsistent with personal autonomy and would undercut the opportunities for flourishing autonomous choice with respect to the use of those possessions to embody various patterns might make possible.

Defenders of these monopoly privileges have argued since their initial institution that granting them benefits everyone because it leads to a profusion of valuable goods and services that would not be created in their absence. Without these privileges, say IP's proponents, people could not afford to create and embody new patterns or would not be willing to take the risk involved in doing so, or would not, in any case, do so with anything like the frequency they do now. On this view, we would have reason to modify the baseline possessory rules to allow for at least some monopolistic privileges-related abstract patterns because we would all, or almost all, be better off in virtue of the availability of goods ad services made possible by these privileges.

It is unclear, however, whether this claim is correct. People can monetize the creation and embodiment of new patterns in ways that don't depend on IP.[1] And there is good evidence that they have done so repeatedly. Innovation happens without monopoly privileges, and not only at the margins. Almost three decades ago, Friedrich Hayek voiced

[1] *See*, *e.g.*, Kevin A. Carson, "Intellectual Property": A Libertarian Critique 28–29 (2009), *available at* http://c4ss.org/wp-content/uploads/2009/05/intellectual-property-a-libertarian-critique.pdf; [Mike Masnick] *The Future of Music Business Models (and Those Who Are Already There)*, TechDirt, Jan. 25, 2010, http://www.techdirt.com/articles/20091119/1634117011.shtml; Stephan Kinsella, *Examples of Ways Content Creators Can Profit Without Intellectual Property*, StephanKinsella.com, July 28, 2010, http://www.stephankinsella.com/2010/07/examples-of-ways-content-creators-can-profit-without-intellectual-property/; Michele Boldrin & David K. Levine, Against Intellectual Monopoly 123–48 (2008). *But cf.* Bobbie Johnson, *Unbound's Struggle to Crowdfund Books*, Bloomberg BusinessWeek, July 26, 2011, *available at* http://www.businessweek.com/technology/unbounds-struggle-to-crowdfund-books-07262011.html.

skepticism about "whether there exists a single great work of literature which we would not possess had the author been unable to obtain an exclusive copyright for it. …"[2] He emphasized that

> recurrent re-examinations of the problem have not demonstrated that the obtainability of patents of invention actually enhances the flow of new technical knowledge rather than leading to wasteful concentration of research on problems whose solution in the near future can be foreseen and where, in consequence of the law, anyone who hits upon a solution a moment before the next gains the right to its exclusive use for a prolonged period.[3]

Recent historical and contemporary evidence supports this view.[4] More than that, it underscores the point that IP can actively *hinder* innovation.[5]

Enforcing IP claims would mean vesting considerable power in legal authorities to exercise potentially arbitrary discretion. And IP protection flies in the face of the instrumental rationale for expressive freedom. It could be expected to limit access and the use of commercially valuable information *and* to be used on occasion actively to *suppress* information to which members of the public might want access. Respect for people's rights to their actual physical possessions, for their autonomy and flourishing, and for the multiple broad, public benefits effected by the broad dispersion of information provides good reason to oppose monopolistic IP privileges.[6]

[2] F. A. Hayek, The Fatal Conceit 36 (W. W. Bartley III ed. 1988). Hayek also notes that "it seems … that the case for copyright must rest almost entirely on the circumstance that such exceedingly useful works as encyclopaedias, dictionaries, textbooks, and other works of reference could not be produced if, once they existed, they could freely be reproduced." *Id*. at 36–37. More recent experience suggests that Hayek was unduly pessimistic here.

[3] *Id*. at 37.

[4] *See*, *e.g.*, Boldrin & Levine, *supra* note 1; Carson, *supra* note 1; N. Stephan Kinsella, Against Intellectual Property (2008); Roderick T. Long, *The Libertarian Case Against Intellectual Property Rights*, *in* Markets Not Capitalism: Individualist Anarchism against Bosses, Inequality, Corporate Power, and Structural Poverty 187 (Gary Chartier & Charles W. Johnson eds., 2011); Brink Lindsey & Steven Teles, The Captured Economy: How the Powerful Become Richer, Slow Down Growth, and Increase Inequality 64–96 (2017).

[5] *See* Boldrin & Levine, *supra* note 1, at 68–96, 184–211.

[6] *But cf*. Nigel Warburton, Free Speech: A Very Short Introduction 88–94 (2009).

B. Defamation

Hugo Black famously doubted that the US Constitution's protection of freedom of expression left any room for legal liability for libel, slander, or defamation. "It wouldn't bother me," he observed, "if there were no libel or slander laws." He concluded bluntly: "They infringe on free speech."[7]

Black's argument for this view was on its face a textualist constitutional one: "I have no doubt myself that the provision, as written and adopted, intended that there should be no libel or defamation law in the United States under the United States Government, just absolutely none so far as I am concerned."[8] And, in accordance with the Fourteenth Amendment, because the Constitutional provision "was not intended to authorize damage suits for mere words," it follows that "the same rule should apply to the state."[9] As I have emphasized, this book is an argument in normative political philosophy, not an exploration of the constitutional law of the USA or any other polity. But Black's conclusion seems to me to be correct as a matter of political morality.[10]

The most straightforward argument for denying legal relief in these cases is that *A* should be able to obtain legal relief from *B* only when *A*'s conduct caused or constituted an injury to *A*'s body or *A*'s justly acquired possessions. Defamation does not constitute or cause any such injury.

[7] *Quoted in* Roger Newman, Hugo Black: A Biography 513 (1994). Jeremy Waldron suggests that Black was mistaken in opposing group defamation laws. *See* Jeremy Waldron, The Harm in Hate Speech (2012). But Waldron reads Black as treating laws prohibiting the defamation of individuals as acceptable, *see id.* at 51–53. Black may have regarded such laws as appropriate at the time of the *Beauharnais* decision, *see* Beauharnais v. Illinois, 343 U.S. 250, 267–76 (1952) (Black, J., dissenting), on which Waldron focuses, or he may simply have accepted them *arguendo* in his dissent. But by the time of the interview Newman quotes he seems clearly to have become unequivocally skeptical regarding them.

[8] Hugo Black, *Justice Black and First Amendment "Absolutes": A Public Interview*, 37 N.Y.U. L. Rev. 549, 557 (1962) (interview with Edmond Cahn).

[9] *Id.* at 558.

[10] Defamation claims are, I suggest, state-enabled infringements on people's rightful claims to their own bodies and justly acquired possessions. And they are enforced by states by means of their own legal institutions. Alan Haworth argues that non-state organizations are often the key contemporary sources of threats to freedom of expression. I certainly believe that such organizations can impede the operation of the expressive ecosystem. But I also believe, for reasons I have already noted, that *force* is qualitatively different

More than that, the viability of defamation actions presupposes rights that it would seem odd in other contexts to assume obtained—rights with respect to other people's beliefs and attitudes and rights with respect to communications among third parties. Suppose I have a right to my reputation. This putative right would just be a right that *someone else* not interfere with how *other people* view me by communicating *with them* in relevant ways. And libel, slander, and defamation actions seem to presuppose precisely that I *do* have such rights. I have no right that other people view me in a certain way. But if I have no right that other people view me in a given way, there's no right for someone who *affects* the way others view me to violate. Similarly, I don't have any general right that another person communicate with particular third parties in any particular way. But, if I don't, whence the putative right that another person communicate with third parties *about me* in any particular way? The point is *not* I have no *interest* in these things or that someone who engages in the kind of conduct capable of occasioning libel, defamation, or slander actions behaves in a morally acceptable way. It is simply that *I* have no cause of action.[11]

The intuitive implausibility of the idea that there should be actions for defamation is apparent when the individual elements of a putative defamation claim are spelled out. Such a claim presupposes that there are rights which we wouldn't otherwise acknowledge and which we would have little or no *reason* to acknowledge in other contexts. Clearly, for instance, a right against defamation means a right to control what other people do with their bodies and justly acquired possessions. And it means a right to interfere with others' autonomy more generally and to undermine their flourishing in various ways.[12]

from other kinds of interference with freedom of expression (and other sorts of freedom). When Haworth offers examples of the kind of attempted suppression of expressive activity in which non-state actors engage, he begins by instancing the courtroom attack by McDonalds on putatively libelous characterizations of its products and operations. *See* Alan Haworth, Free Speech 137–38 (1998). But such an attack would be possible only given the operation of a state legal system enforcing state-created rights against defamation.

[11] *See* Murray N. Rothbard, The Ethics of Liberty 121–23, 124–27 (1982).

[12] No one flourishes by lying. Lying may enable the liar to realize extrinsic benefits, but it is not inherently beneficial to the liar, and of course it is harmful to the person or persons deceived, and to the relationship between the liar and anyone she deceives. But an act may be an act of deception and simultaneously an act of another type, one that *does* benefit the

In addition, a purportedly defamatory expressive act can contribute instrumentally to growth in understanding. (*i*) A putatively defamatory proposition conveyed such an act may, in fact, be true. (*ii*) The proposition may be in significant part true. (*iii*) A supposedly defamatory expressive act can prompt a vigorous response that can help to clarify.

By contrast, the availability of defamation actions runs the risk of inhibiting the operation of the expressive ecosystem. Private parties can use defamation actions to suppress truths they do not wish to circulate. Those with substantial resources can tie up truth-tellers in the courts and exhaust their resources in or to prevent the dissemination of claims they regard as undesirable.[13] State actors and corporate mischief-makers, in particular, can use defamation actions to protect themselves and their cronies against public scrutiny. Would-be truth-tellers may be inhibited from engaging in expressive activity by the potential for defamation liability. And the availability of actions for defamation can lead to an uncritical attitude regarding public claims that in fact ought to be scrutinized carefully.[14]

Defamatory acts are *deceptive*, and that those who have been deceived have been injured in multiple ways (at minimum, with respect to multiple basic aspects of their well-being, including speculative knowledge and practical reasonableness). However, it is *they*, rather than the person about whom deceptive claims are made, who have been lied to. If there were a cause of action, then, it would rightly be these injured parties in whom it would vest. In addition, the relevant injuries, while morally serious, are not necessarily legally cognizable. A deceived party would have suffered a legally cognizable injury only if (*i*) she was deceived regarding a third party in a way that amounted to defrauding her—depriving her of her justly acquired possessions by means of deception or (*ii*) someone's deceiving her triggered a contractual provision necessitating a penalty of some kind.[15]

liar, the deceived person or persons, or both. And of course there is no guarantee that an expressive act that occasions a defamation action, even a good-faith one, is (*i*) intended to effect or maintain a false belief, (*ii*) known or believed by the communicator to convey a false proposition, or, indeed, (*iii*) actually false.

[13] *See* Rothbard, *supra* note 11, at 127.

[14] *See id.*

[15] Thanks to Kevin Hill for useful observations regarding this issue.

The fact that tort actions for defamation weren't available wouldn't mean that there would be no remedies for the intentional propagation by one person of falsehoods about another. Those to whom the falsehoods are told could secure themselves against deception by contract. And someone about whom lies are told can use a variety of public fora, including the press and various social media platforms, to present (more publicly) the information she could have offered in support of a defamation action.

The availability of defamation actions is, at minimum, difficult to square with a commitment to free expression. Such actions infringe on people's rights to do as they like with their justly acquired possessions. They presuppose rights that we would otherwise have little reason to acknowledge. They interfere with people's autonomy. And they undermine the operation of the expressive ecosystem. A just legal system should make no room for them.

C. State-Maintained Monuments

Symbols are not *inherently* valuable. Rather, they are valuable insofar as they contribute to or constitute various aspects of the flourishing, the fulfillment, and the well-being of particular agents. They may do so by fostering knowledge or practical reasonableness, prompting moral behavior, contributing to play, evoking religious or aesthetic or imaginatively immersive experiences, or in other ways. (Specific *physical realizations* of symbols may also be valuable because of their identity-constitutive significance for particular agents.) They can thus frequently be expected to be controversial.

Monuments maintained by governments represent, as I have observed, significant instances of expressive activity by those governments. Such monuments have attracted increasing attention in American politics, as controversies have raged regarding the locations of statues memorializing Confederate political and military leaders.[16]

[16] *See* Ilya Somin, *The Case for Taking Down Confederate Monuments*, Washington Post, May 17, 2017, *available at* https://www.washingtonpost.com/news/volokh-conspiracy/wp/2017/05/17/the-case-for-taking-down-confederate-monuments/?utm_term=.2670297e6db4.

These statues rightly prompt concern. The Confederate States of America did a variety of evil things—most dreadfully, maintaining the institution of slavery, but also making war, practicing conscription, confiscating its subjects' resources, and suppressing dissent in multiple ways. But this would not, on its own, be a reason not to maintain a statue representing one of the CSA's political or military leaders. After all, the purpose for which the statue was maintained might be unrelated to evil actions performed by the person on behalf of the CSA. The statue might be maintained without any *intent* to honor those evil actions. And it might in fact send a variety of messages.

While the statues might send multiple messages, and might not be consciously intended to send problematic ones, it might be difficult or impossible to avoid sending some messages in some settings. What makes it unreasonable for governments to maintain CSA statues is not the fact that those represented by the statues have engaged in wrongdoing—this is, of course, true of all of us. What makes it unreasonable for governments to maintain these statues is rather that the statues unavoidably send a particularly disturbing message *in the context in which they are maintained*. While legally mandated segregation has ended, racial animus persists in some quarters, and actions by governmental authorities to subordinate and exclude black Southerners occurred within living memory. Those memories understandably evoke fears that abuses will occur again.

A government that places a religious symbol on land it claims signals its endorsement of that symbol and effectively coerces support for the tradition represented by the symbol. Consider, then, what happens when a government is known to have supported racialized subordination in the past and places on its land a piece of artwork that evokes the CSA. In this case, given the identification of the CSA with the institution of slavery, there is the serious risk that, by maintaining the monument, the government will send the message that it continues to support racialized subordination and that it can be expected to act in an unjust manner. If a government maintains a monument that symbolically expresses a positive attitude toward past figures who acted with hostility toward some people, and if the government has a history of acting with hostility toward similar people over time, it is understandable that such people today might reasonably see the maintenance of the monument as cause for concern.[17]

[17] Thanks to David Gordon for pushing me to clarify my position on this point.

The significance of the monuments in this case is not a matter of the actual intentions of the relevant civic leaders. The point is that, in the context in which Confederate monuments currently appear, governments that maintain them are as likely to seem to take sides as those that place religious symbols on the land they claim. Signaling—in effect, threatening—that they might side against people they are expected to serve is just the sort of expressive activity in which it's especially undesirable for governments to engage. Given the communicative impact of the symbols, governments have good reason to remove them. That people who object to their presence are forced to fund their maintenance and their protection is a further reason to do so.

While Confederate monuments have attracted particularly focused attention of late, monuments of all sorts both commit governments to taking sides on controversial issues and are maintained by coercing some people whose convictions they do not convey. Some critics of the campaign against Confederate monuments have regarded it as a *reductio ad absurdum* to ask whether other monuments, to revered political leaders, should also be removed from government land. It is important that the state not taking sides against particular groups of people and that it not commandeer people through taxation into, in effect, saying things they don't in fact wish to say. That it suggests that many, many other monuments should follow the Confederate monuments in the South, and the statutes of Lenin, Stalin, and other thugs in the former Eastern-bloc countries in ceasing to be publicly displayed on government land.[18] Non-state actors should be entitled to acquire and display these monuments, but states should get out of the monument business.

D. The Jewel Heist Documentary

Suppose a filmmaker encourages a criminal gang to commit a jewel heist—and bring her along to record the robbery in real time in order to create a commercial documentary. Theft of others' justly acquired

[18] *See* Radley Balko, *We Should Treat Confederate Monuments the Way Moscow and Budapest Have Treated Communist Statues*, Washington Post, June 26, 2017, *available at* https://www.washingtonpost.com/news/the-watch/wp/2017/06/26/we-should-treat-confederate-monuments-the-way-moscow-and-budapest-have-treated-communist-statutes/?utm_term=.05e815be0b00.

possessions is both morally wrong and rightly a predicate for legal liability. Actually, committing a robbery in a film is thus both morally wrong and rightly a predicate for legal liability. There is no right to make a film to which actual, real-world theft is integral. Anyone contributing to the making of such a film by actually committing the robbery would be creating evidence of her own wrongdoing. The cooperative role of the filmmaker might well render her contributorily liable for the robbery as well.

Similarly, anyone attempting to distribute such a film *on behalf of* the documentarian and the thieves would presumably be in a position to help arrange for their identification. If her arrangement with them predated or was simultaneous with the making of their film, she might reasonably be regarded as sharing liability with them.

By contrast, however, someone distributing such a film *without* any kind of chosen responsibility for the murder or murders it depicted would not reasonably be subjected to ex ante restrictions or to ex post liability, presuming the media she used to distribute it were her justly acquired possessions. In this case, attempting to interfere with her distribution of the film would count as interference with her just possessory rights and also with her autonomy and that of the consumers of the film. And certainly ordinary consumers would be entirely within their rights to attend public exhibitions of the film, to own DVD copies, and to play the film on their own video equipment using their own DVDS or taking advantage of streaming services.

Moral objections to the creation of such a film seem entirely appropriate. Some moral objections to the consumption of the film may be as well. But there is little justification for translating such objections into any attempt to impose legal liability for the non-violent distribution or consumption of the film—activities rightly protected under the same standards applicable to other peaceful uses of justly acquired possessions and peaceful uses of autonomy.

III. Cases Involving the Non-Governmental Workplace

While people's rights to control how their justly acquired possessions will be used are foundational to the expressive ecosystem, questions of ethics don't disappear once questions about rights have been resolved. Absent

contractual protections, employers should be legally entitled to limit uses of their property for expressive activity and to terminate workers for engaging in expressive activity of which they disapprove. They should be legally *entitled* to do so, just as married people should be legally entitled to violate promises of sexual exclusivity made to their partners; but, as in the latter case, legal entitlement doesn't track moral acceptability. The considerations related to autonomy, flourishing, and the functioning of the expressive ecosystem, together with the ones related to the specific purposes of particular workplaces, can serve as weighty reasons for employers to respect workers' freedom to engage in expressive activity in their workplaces. I consider three examples here: a journalist's tweets critical of the President; a fictional sports agent's distribution to his coworkers of a memo critical of their firm and their industry; and professional athletes' decisions to publicly, if silently, protest during the playing of "The Star-Spangled Banner."

A. Tweeting at Trump

On September 11, 2017, ESPN *SportsCenter* host Jemele Hill tweeted that US President Donald Trump was a "white supremacist who has largely surrounded himself with other white supremacists." A firestorm erupted. Presidential Press Secretary Sarah Huckabee Sanders fulminated from the White House podium that Hill had committed "a fireable offense."[19]

It is relatively unprecedented, in my experience, for a government official to call for the termination of a journalist for criticizing a politician. This almost-direct interference in the expressive ecosystem by an agent of the state is troubling on its own. Sanders was clearly speaking in her official capacity, as a representative of the US government, and it will have been natural to interpret her words as interpreting a call issued in some sense on behalf of the President himself. While no threat attended Sanders's declaration, she was using official pressure to attack a member of the media. When government officials employ their privileged platforms and tax-funded microphones to attack the economic well-being of

[19] *White House Calls Jemele Hill's "White Supremacist" Tweets a "Fireable Offense,"* Sports Illustrated, Sep. 13, 2017, *available at* https://www.si.com/tech-media/2017/09/13/sarah-huckabee-sanders-tells-press-jemele-hill-should-lose-job-over.

critical journalists, they arguably step outside the bounds of acceptability. They have not directly used force against their critics, but they have exerted considerable pressure against those who are tasked in part precisely with holding them accountable.

Absent contractual constraints, ESPN should be legally free to fire Hill. However, whatever one believes about the accuracy of her characterization of Trump, relevant considerations weigh heavily against the moral appropriateness of firing her for tweeting that he was a white supremacist.[20] No sensible person would want to encourage employers to make employment decisions based on people's out-of-work comments. Encouraging ESPN to fire Hill because of her comments means contributing to the establishment of precedents that would be bad for workers generally.

The instinct behind calls for Hill's firing, however, seems to be that journalism is *special* in a way that makes it particularly dangerous to give someone like Hill a public platform representing a news organization. But her status as a journalist does not make it appropriate for her employer to fire her in virtue of her tweets.

It is easy to imagine a news organization taking the official position that, in accordance with a commonly accepted definition of the term, Trump did, indeed, qualify as a white supremacist. To be clear, I am not expressing any opinion regarding the question of whether this characterization was accurate. I mean simply that a news organization should be free legally to decide that it was accurate and to express this position publicly, and that taking this position publicly could perfectly well—given that careful thought had gone into review of the definition, the relevant evidence, and the implications of announcing the position—be morally appropriate and consistent with the news organization's journalistic mission. Public understanding is not well served when news organizations editorialize while pretending to be objective, nor when they abandon careful investigation and factual reporting in favor of an exclusive focus on analyzing, interpreting, and evaluating events in the news. But they do news consumers a service by acknowledging their stances on controversial issues rather than pretending not to have them, by noting explicitly when officials act wrongly or speak falsely, and by seeking

[20]To be clear, I believe the considerations I note here would also apply in the case of journalists harassed, disciplined, or fired for criticizing any politician, and not merely Donald Trump.

to provide moral leadership at crucial times. Some organizations might imagine that their key commitments precluded this kind of honesty or directness; I would submit that such commitments were unreasonable, given the distinctive opportunities news organizations have to impact public understanding.

A news organization committed to avoiding editorial comment entirely would have reason to object when a journalist *speaking in its name* chose to editorialize. But this is not what Hill did. She expressed her belief regarding Trump and those around him using her personal Twitter feed. She was not claiming to represent ESPN, and a reasonable consumer of her comments would not have taken her to do so. It is no doubt true that Hill's visibility on Twitter is significantly dependent on ESPN's decision to employ her in a highly visible position.[21] But that does not mean that she therefore speaks, or could reasonably be imagined to be speaking, on behalf of ESPN whenever she tweets. ESPN is not responsible for her tweets despite arguably having made her Twitter following possible any more than a news organization that paid a journalist a salary high enough to enable him to buy a spiffy Manhattan apartment would be responsible if he chose to conduct an adulterous liaison there. And given that it is not, it should not be concerned with the contents of her tweets—much less fire her for them.

The general reasons that prompt us to value expressive autonomy should certainly prompt ESPN to think twice about interfering with Hill's choice to voice her views of Trump on Twitter, as should the recognition of the aspects of well-being in which she and her followers were able to participate in virtue of her tweets. And the threat of further reprisals would run the risk of inhibiting her future autonomous choices and impeding her flourishing—while also burdening other journalists' exercise of their autonomy and fulfillment (for them and others) effected through that autonomy.

Inhibiting the expression of conclusory judgments like Hill's also limits her ability and those of other journalists to contribute to public understanding and debate. Here, the focus is not so much on the injury to Hill herself (viewed in this case as an example of similarly situated journalists) as on the loss to the public if she is rendered unable to contribute in the same way to the expressive ecosystem.

[21] As Adam Scales has observed to me in connection with this case.

These considerations suggest that news organizations should avoid punishing journalists for what they way when not representing their employers (they should obviously be free to release statements emphasizing that they do not agree with the journalists on particular topics). But they are perhaps particularly relevant when journalists seek to hold government officials and other high-profile people accountable for wrongdoing or to prevent wrongdoing from occurring in the future. For these are central to the journalistic mission. Even when journalistic activity occurs outside of work, news organizations should value journalists' engagement with and contribution to public debate.

It would be unreasonable to fire a journalist for expressing political beliefs when colleagues had not been fired for doing so, both because she could not reasonably expect, given past behavior, that she would be fired for expressing her political beliefs and because a news organization that fired her after not firing others for expressing their political beliefs would evidently be acting in an arbitrary manner. But perhaps, a critic might suggest, the reason Hill should be fired for passionately expressing a belief regarding a matter of political concern is that her view is in some way "extremist." But this could hardly be a legitimate standard. It would be difficult for journalists (or others) to know when they were falling foul of a prohibition on expressing extreme political views. Extreme views are no less likely to be true for being extreme. And the expression of extreme views can contribute to public understanding just as the expression of other views can (and perhaps in an additional, special way, since such views provoke pointed reactions that themselves contribute to the expressive ecosystem).

A further reason for firing a journalist for expressing beliefs like Hill's might be that she did so in a highly provocative manner. But it is not clear how views like the ones Hill voiced on Twitter could have failed to be provocative; there is probably not an especially nice way to voice the conviction that someone is behaving very, very badly. If expression matters, we might well regard incendiary communication as something we simply need to tolerate. This might be especially true precisely in cases in which someone seeks to call attention to deeply problematic behavior.

In addition, there is no reason in principle to objection to incendiary communication. The expressive ecosystem does not function best when conducted like the fantasy version of an academic seminar. Dispassionate intellectual engagement matters. However, our multiple reasons for safeguarding expressive freedom even when possessory rights aren't decisive

(autonomy, flourishing, the various instrumental values of this kind of freedom) don't only give us reasons to prize and protect sober intellectual discourse. They apply to emotion-engaging music or film—and also to passionate tweets. Finally, of course, to speak of expressive activity as provocative is not to treat the communicator as responsible for bad behavior in which others might opt to engage in response to what she has communicated.

Here as elsewhere, of course, the issue of public reaction is relevant. While ESPN decision makers obviously wouldn't be willing to be fired *just* because members of the public disliked things they'd tweeted, they obviously have to maintain their network's profitability. And some members of the public might shun a news organization because of their disapproval of something a journalist has said.

To be clear: It would be completely unreasonable for members of the public to hold a news organization responsible for a journalist's expressive (or other) activity outside work hours and away from her work-site. The journalist does not, in such cases, speak for her employer and is not under the control of her employer (nor would we want her to be). Employing her does not imply endorsement by the news organization of her outside-work comments. Mere association with her does not render the news organization complicit in her actions. And employers are not responsible for punishing workers for bad outside-work behavior (to be clear, I deny that Hill's behavior was bad), both because retributive punishment is morally objectionable and because employers are not charged with the moral superintendence of their workers.[22] Similarly, it would be unreasonable for members of the consuming public to act in a way that will in fact undermine the expressive ecosystem (though of course members of the public must also discriminate among better and worse views for the ecosystem to function effectively).

Nonetheless, however unreasonable members of the consuming public might be in this case, news-organization managers still need to take into account the possibility that consumer disaffection related to a journalist's outside-work comments might lead to a significant revenue loss. It seems to me that an executive would be unlikely to treat as acceptable a rule as applied to the executive or her loved ones that

[22] On retribution, *see* Gary Chartier, Anarchy and Legal Order: Law and Politics for a Stateless Society 289–95 (2013).

gave *no* weight to a journalist's autonomy and the journalist's and her audience's flourishing and the public benefits of free expression both by the journalist and in general (given the precedential value of the news organization's action here), as well as the public's unreasonableness, as compared with the impact of declining profits. But perhaps, if roles were reversed, the executive *would* be willing at least in some cases to accept a rule in accordance with which she or a loved one could be fired because of comments prompting a decline in profits, even allowing for all other relevant considerations. In these cases, the executive would not act unreasonably if she fired the journalist. Except, however, in those cases in which her responsibility to maintain profitability (along with all the other relevant factors) rendered it unfair for her *not* to fire the journalist—and these would, I suspect, be rare—we might reasonably hope that, even when firing the journalist was permissible, an executive would take a stand against public unreasonableness and for freedom of expression.

B. Corporate Conversation

In Cameron Crowe's 1996 film *Jerry Maguire*, a sports agent concludes that the sports-management business faces a crisis of integrity. He envisions a reconception of his role, and his agency's, and, to that end, prepares and distributes a thoughtful memorandum arguing his case and urging his colleagues to embrace a new mission. His agency fires him.

Presuming the firing was consistent with his contract, the firm surely was and should have been *legally entitled* to terminate Jerry Maguire. But there are surely reasons to question the moral appropriateness of dismissing him for writing and circulating the memo. Doing so obviously hampered his expressive autonomy, while sending the message to other agents that publicly sharing potential critical views with each other would not be tolerated. And by discouraging the sharing of insights and perspectives, it effectively deprived the firm and of the benefit of the information those situated like Maguire might otherwise have shared, and its clients of the opportunity to think about alternatives and potentially press the firm for them. Given that Maguire's memo would surely have impacted other agencies as well, discouraging the preparation of such memos by firing him would effectively deprive those agencies and their clients of the relevant benefits as well.

Obviously, the fact that Maguire proposed a change in his company's mission should not have required his colleagues to adopt the change. And it might well have been reasonable over time to fire him if it became apparent that, while the company had not embraced his proposal, he had declined to fulfill his duties in accordance with the company's existing mission. But the negative reaction to his expressive activity did not seem to have been motivated by actual evidence that Maguire had fallen down on the job. Instead, it seems more likely to have been prompted by the insecurity of managerial egos and by resistance to change. Neither is a useful predicate for good organizational decision making. But, whatever their merits in other contexts, it seems especially unreasonable to act on the basis of either to deprive a firm, its clients, and others of the benefit of thoughtful reflections. Autonomy, flourishing, and multiple instrumental values associated with free expression all suggest that Sports Management International should have retained Jerry Maguire.

C. Athletic Patriotism

It has become *de rigueur* for American athletic events to be, at least, preceded by patriotic displays of various sorts, notably performances of "The Star-Spangled Banner." Sports organizations should of course be free to organize such displays. But such displays raise multiple concerns related to freedom of expression.

These displays run the risk of conscripting fans and athletes into expressing themselves in particular ways. When "The Star-Spangled Banner" is performed, fans and athletes experience considerable social pressure to stand, perhaps even to hold their hands over their hearts. That is, they are pushed to engage in behavior that conveys a particular sort of communicative content. This does not, of course, amount to legal coercion; people remain free to decline to participate. But they do experience social pressure to do so. The result is something very similar to the demand for orthodoxy—calling for personal recitation of the Pledge of Allegiance—that Justice Jackson rejected in *Barnette*.

Fans experience pressure to stand, perhaps to salute, on the part of those seated near to them. Athletes experience pressure from employers, coaches, and fellow team members. Their behavior is also under scrutiny from the members of the public viewing them on television and the Internet. By arranging for performances of "The Start-Spangled Banner" to which public deference are constantly treated as expected

responses, sports organizations conscript both into communicating patriotic messages. These organizations might reasonably show regard for the autonomy of fans and athletes by not scheduling such performances.

Fans, of course, may well want to participate in such shared celebratory events. Not everyone's preferences can be satisfied, and perhaps it remains reasonable to organize them because of fan demand. Teams could, by contrast, decline to pressure athletes to engage unwillingly in patriotic expression by asking them to arrive on the field only after the performances have concluded.

To schedule these sorts of patriotic performances is to run the risk of pushing fans and athletes engage in expressive activity when they might not wish to do so. It can also be the occasion for potentially controversial counter-expression. San Francisco 49ers quarterback Colin Kaepernick attracted sustained media attention when he announced and enacted a decision to kneel, rather than standing, during pre-game performances of "The Star-Spangled Banner." Kaepernick's decision, he said, was motivated by concerns related to the mistreatment of people of color in the USA. Other athletes followed Kaepernick's lead. He became a free agent at the end of the 2017 season. However, he failed to secure a contract for the new season. While different explanations were offered, it was widely suspected, given the quality of his athletic performance,[23] that controversy over his highly visible public gesture was responsible.

Kaepernick's visible protest against abuses including police violence powerfully called attention to topics that arguably merited increased public attention in the USA. He made a significant (and on my view valuable) contribution to public debate—doing one of the key things someone participating in the expressive ecosystem is supposed to do. At the same time, he shared his own passion with others, connecting in new ways with fans and fellow athletes. Sidelining him because of his decision to protest counters his autonomy, undercuts his flourishing, and deprives the expressive ecosystem of his contributions. These are at least significant reasons for supporting his decision. They are also reasons for a team not to deny him a contract *because of* his expressive activity.

They are obviously not the only factors in play. It is certainly reasonable for a team to worry about a significant revenue drain if it hires

[23] *See* Kyle Wagner, *Colin Kaepernick Is Not Supposed to Be Unemployed*, FiveThirtyEight, Aug. 4, 2017, *available at* https://fivethirtyeight.com/features/colin-kaepernick-is-not-supposed-to-be-unemployed/.

Kaepernick and fans who dislike his behavior vote in various ways with their feet and their dollars. On the other hand, the increased popularity with some fans Kaepernick has enjoyed because of his principled stance could drive revenue *toward* a team that opted to employ him. Team decision makers who would not be willing to be treated this way themselves should not, in any case, decline to employ him *because of* the content of his expressive activity.[24] They may, of course, reasonably take the effects of that expressive activity into account when deciding whether to do so—they are, after all, running for-profit businesses. But they should also be prepared to take into account his own autonomy and flourishing, his contribution to public debate, and his influence on other athletes and members of the public as regards the issues he has chosen to highlight, as well as the role of the valuable precedent he has set in encouraging athletes to use their socially prominent positions to challenge societal abuses.

When players protest, fans who've paid simply to watch a football game might worry that they are being pressured to watch athletes engage in controversial symbolic acts. In such cases, fans are not, of course, being pressured (as they are by the performance of "The Star-Spangled Banner") to *participate* actively in patriotic rituals—their autonomy is not being interfered with, per se; but they might prefer to avoid witnessing protests entirely. Presumably, if the patriotic displays occasioning player protests were eliminated, the protests themselves might well not occur, either, and perhaps there's a case for ending both. It cannot be demonstrated that teams *must* allow the protests despite fan discomfort. But, at any rate, there are good reasons for them to welcome the protests—related, as I've noted, to the players' autonomy and their capacity to contribute to public debate.[25]

Donald Trump's intervention into the debates over the protests doesn't change that. Trump added to the furor during a campaign

[24]There has been some dispute over the question whether expressive activity like the anthem protests engaged in by professional football players is protected by the National Football League's collective bargaining agreement with its players. It appears that it is not; *see* Michael McCann, *Can an NFL Owner Legally "Fire" a Player for Protesting?*, Sports Illustrated, Sep. 23, 2017, *available at* https://www.si.com/nfl/2017/09/23/donald-trump-fired-roger-goodell-player-protest. Thanks to Sheldon Richman for indirectly bringing this article to my attention.

[25]Thanks to David Gordon for useful input on this point.

speech on September 23, 2017, when he assailed anthem protestors: "Wouldn't you love to see one of these NFL owners, when somebody disrespects our flag, to say, 'Get that son of a bitch off the field right now. Out! He's fired. He's fired!'"[26] Trump's involvement in the row is reminiscent of Sanders's call for an administration critic to be terminated. But in this case, the call came from the President himself rather than a lower-ranking government official. Using the platform provided by his immensely powerful and high-profile position to help create a climate in which retaliation against disfavored expressive activity is encouraged is, at minimum, to place state power on the side of opposition to free expression. The very athletes Trump wishes to see fired are forced to pay his salary, support his security detail, and submit to the authority his possession of which accounts for the invitations to deliver the public addresses in the course of which he can mount his attacks against them. The use of a tax-funded position with coercive power at its disposal not only to take sides in a matter of public controversy that does not require any sort of presidential resolution but also to take sides *against* expressive activity seems reasonably regarded as an abuse of the presidential office.

IV. Conclusion

The operation of the expressive ecosystem is threatened in multiple ways. State actors threaten it by purporting to secure rights to "intellectual property" and to freedom from defamation—putative rights that should not be entitled to legal recognition. And they interfere with it by using coercive power and coercively acquired resources as they claim, in effect, to speak on behalf of others by erecting and maintaining controversial public displays. This kind of expressive activity on the part of the state should be consistently disallowed.

Private employers should not be forced to treat workers well or to contribute actively to maintaining the expressive ecosystem. But they have good reasons for doing so. They should thus, in particular, protect workers from termination or discipline occasioned by criticisms

[26] Bryan Armen Graham, *Donald Trump Blasts NFL Anthem Protesters: "Get That Son of a Bitch Off the Field,"* The Guardian, Sep. 23, 2017, *available at* https://www.theguardian.com/sport/2017/sep/22/donald-trump-nfl-national-anthem-protests.

of politicians. They should respect workers' freedom to participate in intra-firm dialogue by sharing perspectives regarding firm and industry practices and cultural characteristics. And they should avoid organizing patriotic displays in ways that place undue pressure on athletes and fans to engage unwillingly in expressive activity, while allowing athletes to protest non-disruptively during patriotic displays without fear of reprisal.

CHAPTER 9

Ecology and Expression

People should be free to contribute to the expressive ecosystem, and that ecosystem should be expected to flourish, because of possessory rights, the value of autonomy, the link between expression and flourishing, the instrumental worth of expressive acts, the nature of legally cognizable injury, and reasons to be suspicious of state actors.

Expressive freedom occurs within the context of a societal ecosystem that serves to extend and protect it and foster the direct and indirect realization of the whole panoply of human goods. The elements of this ecosystem are both individual expressive agents and those who receive their communications and a range of institutions that enable them to interact directly and indirectly. The expressive ecosystem is made possible, and its outlines are shaped, by robust protections for expressive freedom rooted in the affirmation of possessory rights, autonomy, the flourishing realized in expressive activity and its reception, and the immense instrumental value of this kind of activity. These protections also reflect appropriately modest understandings of state power and legally cognizable injury.

The baseline possessory rules make sense because they shape the contours of a regime of possessory rights that contributes effectively to flourishing. A prohibition on instrumentally or purposefully injuring anyone's body, or causing inadvertent injury to anyone's body, makes sense because of the value of bodily life. Acknowledgment of others' rights to control their bodies and their justly acquired possessions means acknowledgment of their rights to use their bodies and possessions for expressive

Gary Chartier, *An Ecological Theory of Free Expression*,
https://doi.org/10.1007/978-3-319-75271-6_9

purposes and to receive and store others' communications. And imposing liability for conduct that does *not* interfere with people's bodies and possessions is unreasonable because doing this is itself a *way* of interfering with their bodies and justly acquired possessions.

A narrow range of injuries—injuries to bodies and justly acquired possessions—should be legally cognizable. Understanding reasonable limits on what should count as a legally cognizable injury rightly grounds the denial that expressive activity should be restrained or that those engaging in it should be punished because it is legally injurious. And even if a broader range of injuries is in principle treated as meriting legal remedy, a broad range of systemic concerns in virtue of which the protection and promotion of expressive freedom makes sense justifies considerable hesitation about offering legal redress for these injuries by restraining or punishing expressive activity.

In particular, it is important to remember *who* would be responsible for offering any such redress. People who acquire and maintain power are particularly likely to be people who value power—ambitious and potentially unscrupulous. And state structures make it possible for entrenched elites to replicate themselves intergenerationally. Concern about the likely behavior of power-hungry state officials and members of the "power elite" inside or outside the official structures of state power rightly justifies limiting the power of state officials—acting in their own interests or in those of their cronies—to limit expressive activity. Awareness of the potential for suppression of truth and violation of just possessory rights and autonomy when state actors are empowered to interfere with or impede expressive activity means reducing their discretion to do so as much as possible.

But it's not just worries about the actual and potential abuses perpetrated by the powerful that justifies resisting the imposition of legal restraint on or legal liability for expressive activity. Taking others' autonomy seriously is a fitting response to the recognition of the diversity of persons and an expression of fairness. Respect for others' autonomy means, at least presumptively, respect for their freedom to engage in expressive activity. In addition, respecting freedom of expression shows regard for people's capacities as practical reasoners and gives them space to develop this capacity. Autonomy matters on its own, but it also makes possible innumerable varieties of flourishing. For instance, expressive activity directly delivers the goods of play, aesthetic experience, and imaginative immersion. Regard for others' flourishing means regard for

the ways in which expressive activity can benefit those who communicate and those who receive their communications.

Freedom of expression also contributes *instrumentally* to flourishing in multiple ways—particularly by allowing various intellectual, emotional, behavioral, and aesthetic proposals to be disseminated and sifted. The expressive ecosystem encourages the discernment of truth and the exploration of alternative ways of being. In this way, it directly fosters knowledge and practical reasonableness; and, given the role of these basic aspects of well-being in making others possible, every other dimension of welfare, too. By contributing the accountability of political institutions, businesses, nonprofits, and individual people, it serves to reduce the risk of abuses of all sorts. Its facilitation of the operation of the market order and the dissemination of market-relevant information ensures that markets can be more productive and thus that they can deliver the various goods people have actually prioritized. Recognition of the multiple contributions made by expressive activity to well-being, contributions made in virtue of the capacity of expressive activity to filter these proposals, rightly leads to non-interference with, and active protection of, such activity.

States have every reason to proceed openhandedly in allowing access to government-owned spaces for non-disruptive expressive activity. However, the coercive nature of state activity and the coercive basis of state funding mean that state agencies and state actors in their official capacities should avoid public expressive acts regarding ideologically laden issues. They should avoid doing so because they are in a position to distort the expressive ecosystem and because, when they engage in expressive acts funded by others, the others are effectively dragooned into speaking against their will. Non-governmental organizations and social groups have no exceptionless *moral* duty to avoid using social pressure to prevent or end certain kinds of expressive activity, much less (absent specific contractual provisions) any enforceable *legal* duty. But they *do* have good reason to take autonomy, flourishing, and the instrumental value of expressive activity—both for the wider society and for their own internal ecosystems—very seriously. Thus, it makes sense for them to give as much scope for expressive activity as realistically possible.

In practical terms, this cluster of principles means that legal protection should be accorded to "intellectual property," that legal remedies should not be available for defamation, and that states shouldn't maintain controversial monuments. It also means that, while they should not

be legally required to do so, employers should encourage and protect expressive activity on the part of workers even in the face of public disapproval—especially, but not only, when their expressive activity addresses matters of public concern.

In brief, we should judge either that expressive activity does not injure or that, if it does, the kinds of injuries it can effect should not be legally cognizable. State actors are poorly situated to make good discretionary decisions regarding legal restraints on or the imposition of legal liability for expressive activity. And mutually reinforcing considerations provide positive support for the view that imposing legal liability for expressive activity is wrong and that the use of nonviolent social pressure to discourage or punish such activity should be limited.

The best approach to framing laws and social norms related to expressive activity, I have tried to suggest, is one that is as general as possible, one that generally or entirely avoids inquiries into the specific contents of expressive acts and focuses instead on the entitlement of particular persons to engage in these acts in particular settings. Keeping the relevant laws and norms highly general has more than one advantage. It reduces the risk that actors empowered to restrain or punish expressive activity will use their authority to do so to advance their personal interests, the interest of their cronies, or their ideological agendas. In addition, it avoids entangling legal and political institutions in the messy and controversial business of answering contested questions about truth, aesthetic merit, and similar qualities of expressive acts—questions which public dispute is perfectly capable of resolving. Thus, it safeguards people's freedom to use their justly acquired possessions at their discretion and to exercise their autonomy with considerable latitude, while reducing the risk that injuries that aren't rightly regarded as legally cognizable, and putative injuries that aren't injuries at all, will serve as bases for liability.

I have chosen here to develop the strand of the liberal tradition that is deeply suspicious of state power. I haven't attempted—as it would make little sense to do in a book on the freedom of expression—to argue for anarchism. But I have emphasized what I take to be serious doubts regarding the efficacy and legitimacy of states. I have stressed the importance of doubts about state action rooted in class analysis and public choice theory as well as reasons to affirm robust possessory rights. I believe the case for expressive freedom can be made most persuasively when doubts about state power are in full view. At the same time, however, I believe that, even for readers who are unpersuaded by the case

I've offered for these doubts, it should be clear that safeguarding expressive freedom is immensely worthwhile and permitting the state to interfere with quite unwise.

A liberal society is marked by commitments to individual and subcultural diversity, experimentation, intellectual humility, flexibility, and ongoing discovery. Liberalism welcomes difference and dialogue. And so expressive freedom is essential to, constitutive of, a liberal social order. Such a society just *is* a thriving expressive ecosystem, one in which legal rights and social norms support the occurrence of expressive activity and the unburdened dissemination of its contents. In a liberal society, freedom of expression fosters accountability for state officials, corporate executives, and religious leaders. It both supports and is supported by religious freedom, market freedom, and the freedom to discover and explore alternative ways of being human. People can exercise expressive freedom in unwise or immoral ways. But laws and norms in a liberal society protect it nonetheless—in full view of the risks, but also in recognition of its immense capacity to contribute to flourishing and fulfillment.

About the Author

Gary Chartier is Distinguished Professor of Law and Business Ethics and Associate Dean of the Tom and Vi Zapara School of Business at La Sierra University in Riverside, California. He is the author, editor, or co-editor of thirteen other books, including *Public Practice, Private Law* (Cambridge, 2016), *Anarchy and Legal Order* (Cambridge, 2013), *Economic Justice and Natural Law* (Cambridge, 2009), and (with Chad Van Schoelandt) *The Routledge Handbook of Anarchy and Anarchist Thought* (Routledge, 2019). His byline has appeared over forty times in journals including the *Oxford Journal of Legal Studies, Legal Theory*, and *Law and Philosophy*. He is a member of the American Philosophical Association and the Alliance of the Libertarian Left and a senior fellow of the Center for a Stateless Society.

After qualifying for a BA in history and political science from La Sierra (1987, *magna cum laude*), he explored ethics, the philosophy of religion, theology, Christian origins, and political philosophy at the University of Cambridge, earning a PhD (1991) with a dissertation on the idea of friendship. He graduated with a JD (2001, Order of the Coif) from UCLA, where he studied legal philosophy and public law and received the Judge Jerry Pacht Memorial Award in Constitutional Law. The University of Cambridge presented him with an earned LLD in 2015 for his work in legal philosophy. A proud southern California native who wishes he had attended UC Sunnydale, he shares a slowly

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