Freedom of Speech

Second Edition

ERIC BARENDT

OXFORD
UNIVERSITY PRESS

ITALY

Constitutional Court

Corte di Cassazione, Penal Section

NEW ZEALAND

SOUTH AFRICA

I

Why Protect Free Speech?

1. Introduction

Written constitutions and bills of rights invariably protect freedom of speech as one of the fundamental liberties guaranteed against state suppression or regulation. It is guaranteed by the Universal Declaration of Human Rights and by international conventions, notably the European Convention on Human Rights and Fundamental Freedoms (ECHR). Long before the ECHR was incorporated into its law by the Human Rights Act 1998 (HRA 1998), freedom of speech was regarded in England as an important right; leaving aside established common law restrictions, governments have to produce strong arguments to justify restraints on its exercise. Political philosophers have argued for liberty of opinion and discussion, or for a free speech principle under which speech is entitled to a greater degree of immunity from regulation than other forms of conduct which cause similar harm or offence.[1] Yet philosophers and lawyers disagree about the justifications for a free speech principle or indeed whether there are any good reasons for treating free speech as special. As one leading philosopher has put it, '[f]reedom of expression is a liberal puzzle'. It is prized by liberals for reasons they may not understand.[2]

Public debate in Britain and other liberal democracies about free speech is usually more concerned with the scope of the freedom than with the issue whether the freedom should be protected at all. There are questions how far hard-core pornography or commercial advertising, say, for cigarettes, are covered by freedom of speech. Other subjects of controversy are how much weight should be given to freedom of speech and press freedom when a newspaper article discloses details of a celebrity's private life and whether it is right to limit media publicity before legal proceedings. These matters raise questions of constitutional law in jurisdictions like the United States, Canada, and Germany where courts are required to uphold freedom of expression. The First Amendment to the United States Constitution provides that 'Congress shall make no law . . . abridging the freedom of speech, or of the press . . .'. The text appears simple, but it is left to the courts to decide what

[1] See J. S. Mill's classic essay, 'Of the Liberty of Thought and Discussion', in Mill, discussed in s. 2(i) below, and Schauer, ch. 1.

[2] J. Raz, 'Free Expression and Personal Identification' (1991) 11 *OJLS* 303.

constitutes 'speech' and whether, say, a state statute providing for privacy rights can be enforced against the media without infringing its First Amendment freedoms.

A threshold question is the extent to which resolution of difficult free speech issues such as these should be influenced by arguments of political and moral philosophy. In particular, an examination of the theories underlying the free speech principle may suggest solutions to the problems which confront both legislatures and courts. Of course, governments may act largely in response to public pressure, but arguments of principle are often influential in the course of parliamentary debate and should be taken into account by legislators.[3] It may be less obvious, however, that judges should concern themselves with questions of political philosophy, even in jurisdictions where they do have the power to strike down legislation infringing basic rights. The courts' task, it might be said, is to interpret the text, albeit in the light of the constitution as a whole, rather than to engage in philosophical argument.

The function of courts in constitutional cases raises notoriously difficult questions. Free speech litigation is no exception. It is impossible to draw a sharp line between legal and philosophical argument in this context. The literal approach to textual interpretation, of some serviceable use in the construction of detailed statutes, is of little assistance in elucidating the meaning of freedom of speech (or freedom of expression) provisions which are invariably framed in broad, general terms. The courts are perhaps limited to the range of meanings which can be supported on a reading of the text, but the range of possibilities is so wide that this constraint is of little importance. Thus, Black J., a member of the United States Supreme Court who took a literal interpretation of the First Amendment, still had to decide the meaning of 'speech', a matter on which the Constitution provides no help whatever.[4] Naturally there may be a little less difficulty where the free speech clause contains more specific provisions, as Article 5 of the German Basic Law and Article 10 of the ECHR both do. But the courts' task when interpreting and applying any of these provisions remains quite different from that imposed on them when they consider detailed legislation.

An alternative approach is to consider what the framers of the constitution intended. Did the Founding Fathers of the United States Constitution, for example, have in mind that only previous restraints (or censorship) operating before publication were outlawed by the First Amendment, or did they intend it also to proscribe penal sanctions for the publication of, say, seditious speech?[5] For obvious reasons this technique cannot really be sustained. It is rarely clear what

[3] UK ministers are required to make a statement that a bill's provisions comply with the European Human Rights Convention or that, though he cannot make a statement of compatibility, the government wishes Parliament to proceed with it: HRA 1998, s. 19.

[4] For the meaning of speech, see ch. III, s. 2 below.

[5] For discussion of this point, see D. S. Brogen, 'The Origins of Freedoms of Speech and the Press' (1983) 42 *Maryland Law Rev.* 429, 439–44.

the drafters of a constitution intended. Preparatory documents frequentl evidence conflicting views and aspirations, difficulties which are even more acut in the case of international conventions such as the ECHR. Even when it i possible to infer a particular intent, it should hardly be decisive for litigatio arising some decades or centuries after the constitution was framed. Political an social circumstances will have changed so radically that it would be absurd to b limited to the particular conceptions of a freedom entertained by the members o a constitutional assembly. It is unlikely that the delegates to the 1787 Philadelphi Convention anticipated the development of mass commercial advertising or th advent of the broadcasting media, so it would be silly to enquire how they woul have applied freedom of speech to these phenomena.

Partly because of these difficulties, it has been urged by Ronald Dworkin tha constitutional texts should be viewed as embodying general moral and politica *concepts* rather than specific *conceptions*.[6] He pointed out that the US Constitutio proscribes 'cruel and unusual punishment', but does not lay down any particula conception of this general concept. Courts must decide whether it should b understood now to outlaw, say, capital punishment; that decision requires reflec tion on the moral reasons why cruel punishment is forbidden. On this approac a constitution may reflect commitment to a general concept of freedom o speech, but the particular understandings or conceptions of that freedom are bes elucidated by an examination of the moral and political reasons justifying it protection and an appreciation of its significance in the constitution as a whole. Moreover, underlying the specific freedoms set out in a bill of rights, there may be even broader concepts concerning immutable basic human rights, for example rights to equality of respect and concern or of human dignity. The scope of a particular freedom such as freedom of speech, and its meaning in a specific context, may be determined through argument more akin to philosophical reasoning than to conventional legal techniques such as the drawing of inferences from precedents. To some extent, then, the general ideas which justify freedom of speech are of considerable assistance to its interpretation. These ideas are likely to be of a loose, open-ended character, very different from the specific and detailed aims which characterize most modern legislation enacted to deal with a particular problem, say, poor housing or low education standards. Philosophical and political arguments about the justifications for a free speech principle are on this approach highly relevant to constitutional interpretation, insofar as they assist in elucidation of the concept incorporated in the text. If, say, the only sound argument for freedom of speech is that it is essential for citizens to make informed choices between parties at general elections, a court would be wrong to hold the freedom covered sexually explicit material or commercial advertising. Dworkin's approach, building on the distinction between the general concept of free speech and particular conceptions of it, is more likely to resolve hard cases concerning its

[6] R. M. Dworkin, *Taking Rights Seriously* (London: Duckworth, 1977), 132–7.

scope than are other techniques which emphasize the meaning of the constitutional text and the intentions of its framers.

This conclusion does not, however, mean that judges ought to resolve hard constitutional cases solely on the basis of *abstract* philosophical argument. For a start, the constitution may be designed to reflect one particular philosophical or moral perspective rather than another. For example, the protection of freedom of expression in most modern constitutions is probably more closely connected with allowing all citizens an equal right to engage in open public discourse than it is with Mill's argument from truth published in 1859. Such a conclusion might emerge more clearly from a look at the overall structure of the constitution than from surmises about the intentions of the framers or the general philosophical concepts which influenced them. Consider a hypothetical constitution, in which the right to freedom of speech is set out in a general chapter entitled 'Political Freedoms', in conjunction with the right to vote, the freedom to form political parties, and rights of access to government information. In that case, it would be hard to deny that freedom of expression concerns only political speech, and that consequently commercial speech and obscenity are not covered. The point may be illustrated by reference to the German Basic Law (*Grundgesetz*). The Constitutional Court has to some extent been influenced in its interpretation of the guarantee of freedom of expression in Article 5 by the specific protection of political parties in Article 21 of the *Grundgesetz*, and so has afforded political speech more protection from government regulation than that it has granted other types of communication.[7]

There is, therefore, a difference between the purely philosophical arguments for a free speech principle, and the specific arguments which courts must consider when they adjudicate constitutional claims to exercise the right. Judicial consideration of the former must be tempered by the constraints imposed by a proper interpretation of the text, and must further be substantially moulded by the concepts adopted by the framers of the constitution, its general structure, and earlier judicial precedents. Constitutional interpretation can be seen, therefore, as a subtle process in which abstract arguments of principle mingle with historical, institutional, and specifically legal factors. As Frederick Schauer, a leading free speech theorist in the United States, has said: '... the task of the courts, in attempting to interpret the open-ended and morally loaded constitutional provisions—freedom of speech ... and so on—is to develop a theory of these clauses, a theory that will be significantly philosophical, but will include a large dose of precedent.'[8] The respective weight of these considerations will naturally vary from one constitution to another. The more specific the legal text and the more detailed and complex the constitution is as a whole, the greater will be the role played by textual and structural arguments. The force of earlier judicial rulings will vary, depending on the doctrine of precedent adopted in the system, and the number and quality of those

[7] 61 BVerfGE 1, 9–11 (1982).

[8] 'Must Speech be Special?' (1983) 78 *North Western Univ Law Rev* 1284, 1305.

precedents. Courts should, and will, be more prepared to depart from a single decision which appears inconsistent with the arguments of moral principle underlying a right, than they would be to disregard a line of authority, which might equally be open to challenge on that basis.[9]

Moreover, courts need not wrestle with all the difficulties which beset abstract philosophical argument. While philosophers may remain unsure whether the case for a free speech principle is sound, judges are required to interpret and apply a freedom of speech or a free expression clause. (The terms 'freedom of speech' and 'freedom of expression' are used interchangeably throughout this book, unless the context indicates otherwise.) They must accept the special status of free speech provided in the constitution and must make the best sense of the concept that they can. When freedom of speech or freedom of expression provisions are contained in bills or charters of rights, it is clear that these are rights entitled to some protection from government interference; courts need not explore further the philosophical character of the right. Unlike philosophers, they do not have to worry whether the best arguments for free speech are utilitarian in character or are instead deontological, that is, that free speech is a natural moral right. Moreover, guidance on the scope of free speech may be provided by the constitutional text. Related clauses covering the freedom of assembly and association indicate that courts should protect demonstrations on the streets and other forms of public protest, even though they might consider that on principle such activity falls outside the scope of freedom of speech or of expression.[10] Privacy rights may strengthen controversial claims to free expression rights, for instance, to read pornography at home, which might be hard to justify on the basis of the abstract philosophical arguments for freedom of speech.

Subject to these points, arguments of political theory are often central to the disposition of free speech cases. They are particularly relevant when courts determine the meaning of speech and the scope of the freedom. Courts must decide, for instance, the extent to which freedom of expression covers commercial advertising, sexually explicit material, and expressive conduct such as the desecration of a national flag. They must also determine whether the protection of hate speech directed at racial or religious groups is required by freedom of expression in the light of the underlying moral arguments for guarantee of that freedom, or alternatively whether human dignity supports its proscription. They must rule whether freedom of speech is only a negative liberty, guaranteed against interference by government, or whether it also entails upholding some positive rights, for example, to use public property for speech or to acquire information from public authorities ('freedom of information'). Answers to these questions are rarely provided by the text of the constitution, so judges must decide them on the basis of

[9] In *West Virginia State Board of Education* v. *Barnette* 319 US 624 (1943), considered in ch. III, s. 4, the US Supreme Court overruled its decision of three years earlier, *Minersville School District* v. *Gobitis* 310 US 586 (1940).

[10] For the relationship of free speech and freedom of assembly, see ch. VIII, s. 2 below.

the moral and political arguments which underlie its commitment to freedom of speech. They cannot, in short, avoid, confronting difficult questions of political philosophy.

After a brief introduction on the nature of a *free speech principle*, section 2 of this chapter explores the coherence of four justifications for that principle. Each of these arguments assumes different forms, so some simplification is involved in their reduction to four; further, within the context of these justifications for free speech, particular arguments are considered which could be put under an alternative heading. As will be seen, the different arguments for free speech emphasize the interests of either the speaker or of the audience, or perhaps that of the public in an open tolerant society. So section 3 discusses the *free speech interests* of speakers, recipients (listeners, readers, and viewers), and of the general public in the unimpeded communication of information and ideas. These distinctions may have legal significance. Some texts confer rights on both speakers and recipients, while others provide only for freedom of speech or expression, without making it clear whether both groups enjoy rights. In some circumstances, for instance that of commercial advertising, the free speech claims of recipients appear stronger than those of speakers, so it is important how far the free speech or expression clause protects the formers' interests.

Many free speech arguments link the freedom to other rights and values which may be more fundamental in terms of political principle or of the constitution, or both: a right to dignity or the right to equal respect and concern. Equally, these values may circumscribe free speech rights, in particular limiting individual rights to freedom of expression to ensure greater, or more equal, enjoyment of the freedom. In particular, the value of pluralism may justify qualifying the exercise by individuals, notably the owners of media corporations, of their free speech rights. That conclusion would be rejected by many commentators, particularly in the United States, because it seems to entail upholding some government regulation of speech. They contend that it would run counter to the justifications for free speech which underlie its incorporation in the constitution. These arguments are considered in section 4 of this chapter.

2. Four Arguments for a Free Speech Principle

This section explores four arguments commonly put forward to justify a free speech principle, that is a principle under which speech is entitled to special protection from regulation or suppression.[11] The principle must be an independent political principle, distinguishable from general libertarian claims. An anarchist would not need to invoke a free speech principle, since he argues that all attempts by government to regulate his behaviour, including speech, violate his freedom.

[11] Schauer, 7–10.

Under the principle, speech is entitled to a degree of immunity from government regulation because of some special quality or value to be attributed to communication and expression. Although the case for free speech protection may be associated with, or rest on, more fundamental claims about human dignity or opportunities for self-fulfilment and development, the principle is only coherent to the extent that speech can be distinguished from other areas of human conduct and activity. Further, a right to free speech must be isolated from other fundamental liberties that may be incorporated in a written constitution, for instance, rights to privacy or to choose a sexual lifestyle, or property rights. This may create difficulties in some contexts. When rights to view hard-core pornographic films or live sex shows are asserted, it is unclear whether these are really claims to free speech, to privacy, or to a broad right to personal liberty in indulging sexual tastes.[12]

A free speech principle need not entail absolute protection for any exercise of freedom of expression. Most proponents of strong free speech guarantees concede that its exercise may properly be restricted in some circumstances, for example, when it is likely to lead to imminent violence. But the principle does mean that government must show strong grounds for interference. It would be inconsistent with any free speech principle, worthy of the name, if a publication could be stopped on the ground merely that it is offensive to some people, or could be penalized because it contributes to disorder or lowers the government's authority or reputation. In short, a free speech principle means that expression should often be tolerated, even when conduct which produces comparable offence or harmful effects might properly be proscribed. And that must be because speech is particularly valuable, or perhaps because we have special reason to mistrust its regulation.

(i) Arguments concerned with the importance of discovering truth

Historically the most durable argument for a free speech principle has been based on the importance of open discussion to the discovery of truth. If restrictions on speech are tolerated, society prevents the ascertainment and publication of accurate facts and valuable opinion. The case is particularly associated with John Stuart Mill, but it had also been made two centuries earlier by Milton, and it has played some part in the theorizing of American judges.[13] There are a number of versions of the argument. Truth may be regarded as an autonomous and fundamental good, or its value may be supported by utilitarian considerations concerning progress and the development of society. A theory resting the special status of speech on the value of truth should, one might think, assume that truth is a coherent concept, and that particular truths can be discovered and justified. That was

[12] See ch. III, s. 2(iii) and ch. X below for further discussion.

[13] J. Milton, *Areopagitica: A Speech for the Liberty of Unlicensed Printing* (1644) in *Prose Writings* (Everyman, 1958). For relevant US judgments, in addition to that of Holmes J. in *Abrams* v. *US* 250 US 616 (1919), see Brandeis J. in *Whitney* v. *California* 274 US 357, 375–8 (1927) and Frankfurter J. in *Kovacs* v. *Cooper* 336 US 77, 95–7 (1949).

Mill's position. Relativists contest this assumption. Their perspective raises philosophical questions outside the scope of this book.[14] But one version of the argument from truth—the marketplace of ideas—associated with Holmes J.'s famous judgment in *Abrams* v. *US* shares to some extent the relativist perspective: it is considered later in this section after discussion of the older, and intellectually more respectable, argument made by Mill.

Mill's truth argument put forward different contentions, dependent on whether the expression at issue is possibly true or is (almost certainly) false. Prohibition of the former category of speech is undesirable because it entails an unwarranted 'assumption of infallibility' on the part of the state. Government naturally acts on its view of what is right when it proscribes certain conduct, for example, unfair trading practices and anti-competitive agreements, but, Mill argued, it is only because opponents of such measures are free to challenge their wisdom that the government can ever be confident that its policies are right and that it is appropriate to legislate.[15] Alternatively, speech may be suppressed because it is objectively false. It is still wrong to take this step, for people holding true beliefs will no longer be challenged and forced to defend their views. They 'ought to be moved by the consideration that, however true it may be, if it is not fully, frequently, and fearlessly discussed, it will be held as a dead dogma, not a living truth'.[16]

Many criticisms can be made of Mill's argument. In the first place, it assumes that in all circumstances (short of an imminent emergency) the publication of a possibly true statement is the highest public good. But there are many situations where legal systems prefer to protect other values, and that choice seems defensible. For example, in many countries racist hate speech is banned, because racial harmony and the protection of the sensitivities of ethnic groups is considered a more important goal than the absolute tolerance in this context of freedom of speech.[17] Similar judgements may be made in other contexts; advertising of tobacco products and dangerous drugs may be prohibited, though some people, not only cranks, may claim it is healthy to use them. Mill's argument that the utility of an opinion cannot be divorced from its truth is unpersuasive. It is not inconsistent to defend a ban on the publication of propositions on the ground that their propagation would seriously damage society, while conceding that they might be true. The interests of truth are, to some extent, protected if the wisdom of the ban can be freely debated.[18]

The best rejoinder to this criticism is that the suppression of speech, however plausible the justification for this course, creates a suspicion of authority and

[14] For a defence of the concept of truth, see B. Williams, *Truth and Truthfulness* (Princeton, NJ: Princeton UP, 2002).

[15] Mill, 22–4.

[16] Ibid., 40.

[17] Hate speech is discussed in ch. V, s. 4 below.

[18] See C. L. Ten, *Mill on Liberty* (Oxford: OUP, 1980), 131–2, and see also H. J. McCloskey, 'Liberty of Expression: Its Grounds and Limits' (1970) 13 *Inquiry* 219, 226–7, cf. D. H. Munro, ibid., 238, 252–3.

destroys tolerance. It is better, it is said, to permit the dissemination, say, of hate speech than to curtail the freedom of extremists. The latter course might encourage people to believe the truth of the suppressed speech, which they would otherwise ignore or reject; moreover, it is sometimes dangerous to drive unpleasant ideas underground, for they may surface later in a more dangerous form. There is something in this counter-argument to criticism of Mill. But insofar as the rejoinder rests on a judgement that it is overall misguided to restrict speech, it departs from the argument from truth. That argument is that it is wrong to suppress truth, even though that course is considered useful. Once the utility of suppression is in issue, it is a matter for empirical judgement whether on balance it is right to restrict free expression, and on that matter the judgements of freely elected governments are usually trusted.

A related criticism is that Mill overvalued intellectual discussion and the need for all individuals to be able to debate public affairs vigorously. This feature emerges most clearly in his claim that it would be wrong to prohibit even false speech, because in the absence of opposition the ability to defend true and valuable beliefs will decline. This may be correct, but a government worried that inflammatory speech may provoke disorder is surely entitled to elevate immediate public order considerations over the long-term intellectual development of the man on the Clapham omnibus. At any rate the risk of immediate damage which may occur from the acceptance of falsehood should be balanced against the long-term benefits of constant, uninhibited debate.

However, the greatest difficulty with Mill's argument is its implicit assumption that freedom of discussion *necessarily* leads to the discovery of truth or, more concretely, to better individual or social decisions. That assumption is certainly warranted in environments where there is a shared commitment to the discovery of truth; it is clearly wrong to censor expression in universities and between members of a scientific community, on the ground that it challenges received wisdom. Indeed, a novel idea is much more likely to be accepted in these circles if it is true. Moreover, procedures are in place, for example, peer review of articles submitted for publication, to ensure that their claims to truth are plausible and worth discussion.[19] But it is difficult to make the same assumptions about the role of free speech in society. It is not clear that unregulated speech always leads to the reception of truth. Indeed, some historical experience suggests the contrary; the Nazis came to power in Germany in 1933, although there had been (relatively) free political discourse under the Weimar Republic during the 1920s. This is not to say that truths are more likely to be discovered in the absence of free speech. Freedom of speech may be necessary, if not sufficient, for this purpose, but equally some constraints may be required to ensure that false propositions do not drive out truths.

One question which has been relatively little explored in discussion of Mill's theory is whether his argument applies equally to all types of expression, and in

[19] Williams (n. 14 above), 217.

particular whether a distinction should be drawn between claims of *fact* and expression of *opinion*. Mill clearly considered the argument from truth, or at least that aspect of it concerned to justify the tolerance of false opinion, to be more relevant to discussion of political, moral, and social affairs than to mathematical or scientific propositions.[20] His treatment does not explicitly refer to other modes of expression, such as commercial advertising or sexually explicit material, which may consist of both information and ideology or fit into neither category. One interpretation of the truth argument is that it does cover these types of expression, since they form part of a general argument that, say, looking at such material is an aspect of a good lifestyle.

There is perhaps something paradoxical about Mill's thesis. The argument for a free speech principle from truth is said to be particularly applicable to types of expression, which can only rarely, if ever, establish truths with the same degree of assurance that obtains in mathematics or the natural sciences. Truth, of course, is not to be equated with certainty, and the fact that there are better and worse arguments in political and moral discourse is enough to substantiate Mill's conclusion that the prohibition of such discussion by the government is (at least generally) wrong on the truth argument. Less clear is the status of speech which does not assert any coherent proposition or make a claim which could ever be objectively tested. Personal abuse, some emotive political speech (perhaps the 'Fuck the Draft' slogan upheld as protected speech by the US Supreme Court in *Cohen* v. *California*[21]) and hard-core pornography all appear to fall outside the categories of expression which Mill had in mind when he formulated the argument from truth. Yet the legal systems considered in this book to some extent protect these types of expression. That might mean that courts accept justifications for freedom of speech other than the truth argument. In any event, Mill's theory is difficult to apply to types of expression where it seems absurd even to look for an element of truth, or to propositions which are quite obviously factually false, such as 'the moon is made of green cheese'.

A more important question is how relevant the argument from truth is to free speech coverage of the publication of government secrets, or the disclosure of confidential personal information. (Most legal systems impose restrictions on the disclosure of such information in the interests of national security or privacy.) In these circumstances, the speech is not restricted because the government fears the disclosure of information which is false. It is not acting on 'an assumption of infallibility'. The disclosure of information, say, by a civil servant or an employee of a commercial company to a newspaper is outlawed because it reveals true facts which the government or the company wishes to keep confidential. Individuals take privacy actions generally to stop (or secure compensation for) the disclosure of sensitive personal information which is probably accurate. Arguments from truth are not readily applicable in this context; it is better to justify the coverage of such disclosures by free speech clauses with other arguments.

[20] Mill, 51. [21] 403 US 15 (1971).

Mill's truth argument then applies most clearly to speech stating beliefs a theories about political, moral, aesthetic, and social matters. The position with his theory of factual propositions and scientific or mathematical formulae is l well established. However, this reservation does not seem to affect the judic interpretation of free speech provisions. Courts are influenced by the other justifi tions for a free speech principle, especially the argument from its importance i democracy, which does apply to much factual information.[22] Moreover, sor constitutions, such as the German Basic Law, and the ECHR clearly cover t right to impart and receive information, as well as ideas.[23]

As mentioned earlier, the principal weakness of Mill's argument is its questional assumption that free discussion necessarily leads in a democratic society to t acceptance of truth, or at least the adoption of better or more liberal social polici Another argument must be made to strengthen the case made by Mill: governme is not to be trusted in this context to determine the appropriate procedures for t discovery of truth. One may legitimately doubt whether free speech always leads truth, but better decisions are likely to emerge from uninhibited discussion th from a process regulated by the state. For government does not share the comm ment of a university or the scientific community to the truth, and cannot be reli on to adopt appropriate procedures for its discovery. This is surely a reasonable pc ition, though it needs refinement.[24] At this juncture, the point should be made th the argument runs counter to the majoritarian theory of democracy, under which elected majority is generally entitled to regulate speech whenever it considers its di semination is against the overall good or welfare of the community.[25]

Another form of the argument from truth is associated with a famous passage the dissenting judgment of Holmes J. in *Abrams* v. *US*:

> But when men have realized that time has upset many fighting faiths, they may come believe even more than they believe the very foundations of their own conduct that tl ultimate good desired is better reached by free trade in ideas—that the best test of truth the power of the thought to get itself accepted in the competition of the market, and th truth is the only ground upon which their wishes safely can be carried out.[26]

The 'marketplace of ideas' theory of free speech has been enormously influenti in the United States. It is the reason why courts mistrust government interver tion, even when it is intended to foster free speech. It provides one explanatio for their strict scrutiny of viewpoint or content-based regulation of speech, fc arguably such regulation distorts the working of a free market for the exchange (ideas.[27] Just as liberal economists consider it is wrong to interfere with the oper: tion of a free market in goods and services, so in Holmes J.'s view it was equall undesirable to manipulate the market in ideas. The truth would emerge from 'free trade in ideas' or intellectual competition.

[22] See s. 2(iii) below. [23] See ch. II, ss. 4 and 5 below. [24] See s. 5 of this chapter.
[25] See s. 2(iii) below. [26] 250 US 616, 630–1 (1919).
[27] See ch. II, s. 2 below for development of these points.

On one view, Holmes J. thought that unregulated competition in the *actual*, and not just an *ideal*, market is conducive to the discovery of truth.[28] Or he may have taken a relativist (or gloomy) view of truth: whatever emerges from the competitive market in ideas is the truth, and nothing more can be said. That view is far removed from Mill's perspective, which assumes instead a lively discussion of rival views, as if society were conducting a perpetual seminar. In any event, Holmes J.'s version of the truth argument rests on shaky grounds. If it can never be claimed on intellectually defensible grounds that one proposition is stronger than another, the notion of truth becomes more or less empty. In that event, it is hard to see why a democratically elected government should not interfere with the free speech market, just as it may regulate the working of an economic market to ensure, say, open competition and stamp out unfair trading practices. A preference for the marketplace, as opposed to governmental regulation, can be justified on many grounds, for example, suspicion of government or a concern for the free speech rights of individuals when their speech is suppressed, but such a choice seems wholly unrelated to Holmes J.'s eccentric views on the impossibility of discovering truth.[29]

Other criticisms can be made of the marketplace theory.[30] First, the marketplace is not in practice open to everyone who wants to communicate his ideas. Some views are widely disseminated by the media, others hardly figure in public discussion. Differences in the availability of ideas have little to do with their truth. The marketplace may not therefore provide a forum for the vigorous public debate that Mill and other proponents of free speech envisage. Secondly, insofar as the marketplace theory is an argument about the discovery of truth, it assumes that contributions to the marketplace represent the views of their proponents; ideas should not be put forward primarily because the speaker, say, a tabloid editor, considers they will be popular or that their inclusion will lead to increased sales of his newspaper. For any truth argument assumes attitudes on the part of speakers of sincerity and truthfulness. But we know that newspapers and other publications are often sold or issued to make money, and that, sadly, a concern for truth may be subordinate to other considerations. Finally, the argument assumes that readers and other recipients consider claims made in the marketplace rationally, determining whether their acceptance will lead to a better society or an improved lifestyle. That is surely too optimistic an assumption.

Some regulation of the free speech marketplace must surely be conceded, if expression is to be communicated effectively. At the very least, some government intervention is justified, if only to prevent the clash of speech, whether on the streets, on airwaves, or at public meetings. That is widely admitted.[31] Arguably,

[28] Williams (n. 14 above), 214–15. [29] See Schauer, ch. 2, esp. 19–21.

[30] S. Ingber, 'The Marketplace of Ideas: a Legitimizing Myth' [1984] *Duke Law Jo* 1.

[31] Even Alexander Meiklejohn, a prominent defender of free political speech, recognized that procedural rules are necessary to regulate the order and length of speech at public meetings: see *Free Speech and its Relation to Self-Government* (New York: Harper, 1948), expanded and retitled as *Political Freedom: The Constitutional Powers of the People* (New York: HarperCollins, 1960), 19–28.

regulation of the mass media is justifiable to ensure that a variety of views can be heard in the marketplace.[32] In some contexts, notably that of commercial advertising where it is difficult for the public to assess the veracity of the claims made to it, intervention is reasonable in order to curtail deception and fraud.[33] On its own the marketplace theory seems a poor argument for freedom of speech. The case has to be made that an unregulated marketplace better serves freedom of speech than other alternatives. And whatever Holmes J. said, it is not really an argument about truth.

(ii) Free speech as an aspect of self-fulfilment

A second major theory of free speech sees it as an integral aspect of each individual's right to self-development and fulfilment. Restrictions on what we are allowed to say and write, or (on some formulations of the theory) to hear and read, inhibit our personality and its growth. A right to express beliefs and political attitudes instantiates or reflects what it is to be human. The argument asserts that there is an individual right to freedom of speech, even though its exercise may be inimical to the welfare of society. Unlike the theories which relate free discussion to the discovery of truth or to the maintenance of a democracy, this rationale is not necessarily consequentialist, although it might be defended in utilitarian terms. The theory might regard freedom of speech as an intrinsic, independent good; alternatively, its exercise might be regarded as leading to the development of more reflective and mature individuals and so benefiting society as a whole.[34] Courts need not concern themselves with this point; however, as will be seen, other difficulties in applying the theory may concern them.

At the level of general philosophy it is reasonable to ask why freedom of speech is particularly important to a person's self-fulfilment. It is far from clear that unlimited free speech is necessarily conducive to personal happiness or that it satisfies more basic human needs and wants than, say, adequate housing and education. Yet unless some reasons can be given for treating expression as particularly significant, the case for a free speech principle made on this basis becomes hard to distinguish from general libertarian claims to do anything which an individual may consider integral to his personality. There is perhaps something uniquely valuable in intellectual self-development. The reflective mind, conscious of options and the possibilities for growth, distinguishes human beings from animals. Freedom of speech is also closely linked to other fundamental freedoms which reflect this aspect of what it is to be human: freedoms of religion, thought, and conscience. But, unlike those freedoms, the exercise of freedom of speech or expression may harm others by, for instance, damaging their reputation or infringing privacy or intellectual property rights; speech is not self-regarding.

[32] See ch. XII, s. 2 below for discussion of this topic.

[33] See ch. XI below for regulation of commercial speech.

[34] T. Campbell, 'Rationales for Freedom of Communication', in T. Campbell and W. Sadurski (eds.), *Freedom of Communication* (Aldershot: Dartmouth, 1994) 33–4.

Furthermore, if intellectual development is particularly valuable, rights to education, to cultural goods, and to travel should also be protected. Something more must be said to establish why speech is special.

Admittedly, there are practical reasons why freedom of speech might be singled out for constitutional protection and distinguished from other rights, for example, to an appropriate level of education, which are similarly related to intellectual and moral growth. Freedom of speech is usually regarded as a liberty against the state, or a 'negative freedom', and largely for this reason may be thought more capable of judicial interpretation and enforcement than positive rights to, say, an adequate education. The provision of good schools and universities involves the allocation of resources, and probably public expenditure; framers of constitutions, and courts, may reasonably consider that educational rights should not be legally enforceable, even though they are as closely linked to the self-development of individuals as freedom of speech.

The problems which confront the courts in this context reflect some of these difficulties. Assuming that self-fulfilment arguments do justify a constitutional guarantee of free speech, problems occur in distinguishing between genuine assertions of a right to free speech and claims to other freedoms, which might equally be supported by reference to the case from self-fulfilment and development. They are most acute in determining the meaning of 'speech', a topic considered in Chapter III. Is, for instance, an asserted right to incur unlimited election expenditure really a claim to free speech or a claim to the unregulated use of money?[35] At first glance, the right might be supported by arguments about self-fulfilment at least in a material sense, but on closer inspection it surely has little connection with the particular view of intellectual and moral development underlying a rights-based view of free speech. A similar question arises when deciding how far pornography qualifies as 'speech' for the purposes of the First Amendment or other free speech provision. A claim for constitutional protection which rests on the role such material plays in satisfying sexual needs can be treated as a free speech argument, but may be more soundly based on a general freedom to moral autonomy.[36] That general freedom is closely linked to self-fulfilment, as is freedom of speech, but that does not mean that the two freedoms are identical. The self-fulfilment rationale for free speech easily lends support to arguments which are hard to distinguish from general libertarian or moral autonomy claims.

These problems are not removed if, as argued by Ronald Dworkin, the case for free speech protection is grounded on fundamental background rights to human dignity and to equality of concern and respect.[37] Again, this argument does not provide any clear basis for determining the scope of a free speech principle or for

[35] See ch. III, s. 3 below, where it is argued that expenditure restrictions engage freedom of speech because they are intended to limit expression.

[36] See R. M. Dworkin's argument for a right to read pornography on the basis of a broad freedom to moral independence in 'Is there a Right to Pornography?' (1981) 1 *OJLS* 177.

[37] *Taking Rights Seriously* (n. 6 above), 266–78, 364–8.

distinguishing it from a general claim to personal liberty. Take a claim that individuals have a right to choose the manner of their dress or follow their sexual lifestyle free from any public constraint. Should those claims be regarded as aspects of a broad free speech right, of privacy rights, or of a general right to personal liberty? Dworkin's argument is of little help here. Respect for the rights of, say, homosexuals may be based on the same underlying arguments of dignity and equality which support free speech rights, but it would be wrong to conflate the rights. Further, the argument does not show why speech is special, or why it should be singled out from other claims which may be made by libertarians.

There is a further problem which should be noted here, but which will be discussed later in this chapter: it can be argued that the exercise of freedom of speech infringes human dignity or the rights of other persons affected by the speech to be treated with equal respect and concern.[38] This argument is most frequently made to justify the imposition of limits on hate speech and pornography demeaning women. It is not necessary at this stage to say whether it is persuasive. But it is appropriate to point out here that free speech justifications, using as their basis self-fulfilment, dignity, and equality rights are at least vulnerable to this argument.

Quite apart from these criticisms levelled at the intellectual coherence of the theory, it may not explain the terms of particular free speech clauses or the jurisprudence of constitutional courts. On the versions of the theory considered up to this point, it would be hard to justify the application of the free speech principle to the disclosure of *information*, in contradistinction to the dissemination of *ideas* and *opinions*. This point is even more apparent if emphasis is placed on the rights or interests of the speaker. While an unlimited, or at least very wide, freedom to communicate one's own views may be considered an integral aspect of self-development or human dignity, it is surely far-fetched to make the same claim for the disclosure of news and information, unless perhaps the communicator has assembled or is in some way responsible for it. But some free expression provisions, notably Article 10 of the ECHR, explicitly cover the disclosure of information, while in other jurisdictions court rulings have established that disclosure is covered by freedom of speech. Such coverage is better explained under a theory, like the argument from democracy, which emphasizes the interests of the recipients of communications. Similarly the extension of free speech rights to legal persons, such as corporations, makes little sense in terms of self-fulfilment theories, and the same can be said of the application of the free speech principle to the press and other media.[39]

These reservations do not, however, apply to the variant of the argument put forward by Thomas Scanlon.[40] His argument for freedom of expression proceeds

[38] See s. 4 below.

[39] For the speech of corporations, see ch. III, s. 3 below, and for free speech and the media, see ch. XII below.

[40] Also see the similar arguments of T. Nagel, 'Personal Rights and Public Space' (1995) 24 *Philosophy and Public Affairs* 83, and of D. A. Strauss, 'Persuasion, Autonomy, and Freedom of Expression' (1991) 91 *Columbia Law Rev.* 334.

from the premise 'that the powers of a state are limited to those that citizens could recognize while still regarding themselves as equal, autonomous, rational agents'.[41] A person is only autonomous if he is free to weigh for himself the arguments for various courses of action that others wish to put before him. The government, Scanlon asserts, is therefore not entitled to suppress speech on the grounds either that its audience will form harmful beliefs or that it may commit harmful acts as a result of these beliefs. The first limb of this conclusion is similar to that reached by John Stuart Mill; Scanlon indeed refers to his own thesis as 'the Millian Principle', though unlike Mill's argument it does not rest on any assumption that truth will emerge from open discussion. Scanlon's thesis is clearly rights-based rather than consequentialist. The individual has a right to hear views and to consider acting on them, even though this process will damage society—although it is conceded that some limits may be imposed during times of extreme emergency. On the other hand, unlike other versions of the self-fulfilment case, it focuses on the rights or interests of the recipients of speech. Another point is worth noting. Scanlon emphasizes that the Millian Principle does not exhaust the arguments for freedom of expression; other theories might, for example, justify a wide right of access to the means of expression. His case is simply that under the Principle the government is unable to use certain grounds for limiting speech.

Compared with some other free speech theories, this argument provides a relatively coherent explanation of much judicial interpretation of free expression provisions. It should be noted incidentally that it is not based on the history and structure of the United States Constitution, and so it may shed light on the interpretation of the free speech clause in any constitution. An important point is that the argument is not limited to political speech, but applies to all speech (or expressive conduct) which provides the audience with information and opinion relevant to the formation of its own beliefs. This is reflected in the case-law of all the jurisdictions considered in this book. Although political speech may be accorded a special degree of protection, artistic and moral discourse, sexually explicit material, and to some extent commercial speech, are also covered. Scanlon's concern with the legitimacy of the government reasons for restricting speech reflects many decisions of the US Supreme Court; measures aimed at the content of particular ideas or discriminating between varieties of political and social communication are subject to strict scrutiny.[42] The theory also distinguishes between the communication of information relevant to the development of political and moral beliefs which is to be protected against regulation, and the revelation of technical information which merely provides the audience with the means to accomplish harmful acts, for example, military and scientific secrets, and which may be prohibited.[43]

The theory has been criticized, to some extent because of the weaknesses of the notion of personal autonomy which lies at its root.[44] It seems that autonomy is

[41] Scanlon, 162. [42] See ch. II, s. 2 below. [43] Scanlon, 159–60.
[44] Schauer, 67–72, and S. J. Brison, 'The Autonomy Defense of Free Speech' (1998) 108 *Ethics* 312, 323–36.

ascribed to human beings as an element of their essential dignity, rather than a attribute that all people in fact enjoy or appreciate. So the theory might be able t resist the charge that many people are generally incapable of exercising real auton omy. They are unable, it may be said, rationally to consider views and argument put to them, so unfettered freedom of expression may lead to foolish and danger ous choices, for example, to vote for fascist political parties. Scanlon might be abl to dismiss that criticism, because he considers that persons must see themselves a autonomous unless they are prepared to surrender their independent judgemen to the state: '[a]n autonomous person cannot accept without independent consid eration the judgment of others as to what he should believe or what he shoulc do'.[45] But Scanlon could not so easily reject an argument that autonomous peopl might deliberately, after careful reflection, choose to allow the state to determin that certain types of speech are too dangerous to be tolerated. Almost everyon would agree, I think, that we should be protected from exposure to false claims b commercial advertisers; hardly anyone is able independently to evaluate suc claims before, say, making a disastrous purchase. So the proscription of deceptiv advertising is compatible with moral autonomy. But many people might make th same argument about, say, racist hate speech or hard-core pornography. Auton omous people might well agree that some of them find it difficult to evaluate thi material, so its availability should be regulated by the state. But they would no surrender their freedom to argue against maintenance of the regulation, and they would require that the scope of any restriction be determined by indepen dent courts.[46]

Scanlon himself reconsidered the soundness of his arguments. In a later articl he doubted whether the audience's interest in having a good environment fo the formation of its attitudes really justified the broad autonomy principle.[47] Some restrictions on free speech, for example, on saturation advertising by a candidate for office, could be justified in order to foster a climate for rational thought by the public. In some circumstances, he argued, speech may legitimately be restricted on paternalistic grounds, while his original theory had left no room for limitations on, say, cigarette advertising. Another objection to the autonomy thesis is that it does not really do justice to the interests of the *speaker*.[48] It seems odd, for example, to justify the protection of unpopular speech (for example, street demonstrations or underground literature) entirely by reference to the interests of the audience or readership (which may be negligible), but ignore the stronger claims in these circumstances of the demonstrator or publisher. Moreover, Dworkin pointed out that much conventional, political speech hardly offers fresh information or ideas for the public to reflect on and, therefore, would not appear to be covered by the Millian Principle. Despite these points, Scanlon's thesis is

[45] Scanlon, 163.
[46] For the significance of judicial review in the free speech context, see s. 5 of this chapter.
[47] 'Freedom of Expression and Categories of Expression' (1979) 40 *Univ of Pittsburgh Law Rev* 519.
[48] Introduction to R. M. Dworkin (ed.), *The Philosophy of Law* (Oxford: OUP, 1977), 14–16.

important. It draws attention to one reason why the suppression of speech is wrong: it prevents free people from enjoying access to ideas and information which they need to make up their own minds.

(iii) The argument from citizen participation in a democracy

This is probably the most easily understandable, and certainly the most fashionable, free speech theory in modern Western democracies. A representative judicial view is this extract from Brandeis J.'s judgment in *Whitney* v. *California*:

> Those who won our independence believed that the final end of the State was to make men free to develop their faculties; and that in its government the deliberative forces should prevail over the arbitrary... They believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth; ... that the greatest menace to freedom is an inert people; that public discussion is a political duty; and that this should be a fundamental principle of American government.[49]

In the United States the argument has been particularly associated with the writings of Alexander Meiklejohn.[50] He thought the primary purpose of the First Amendment is to protect the right of all citizens to understand political issues in order to participate effectively in the working of democracy. The Amendment represented the commitment of the people to representative self-government. In some of its leading judgments, particularly in the context of libel proceedings, the German Constitutional Court has similarly recognized the crucial role of freedom of expression in the formation of public opinion on political questions; as a result Article 5 has been particularly broadly construed in this area.[51]

The argument is attractive largely because it is relatively easy to understand. To some extent it rests on the rules, values, and commitments explicitly stated in the particular constitutional document, as well as on the more abstract philosophical theorizing which characterizes the arguments from truth and the right to self-fulfilment. For courts concerned with legal interpretation this feature is an asset; conceptual shortcomings of the argument are less troublesome for them. One or two aspects of the argument are worth noting. Insofar as the argument is couched in terms of the need to expose citizens to a wide variety of views and to provide it with enough information to hold government to account, a free speech clause would only cover political expression; there would be little justification for extending its protection to literary and artistic discourse, let alone sexually explicit material or commercial advertising. Nor would it cover speech which challenged

[49] 274 US 357, 375–8 (1927).

[50] See in particular *Free Speech and its Relation to Self-Government* (n. 31 above), and 'The First Amendment is an Absolute' [1961] *Supreme Court Rev* 245.

[51] See e.g. 12 BVerfGE 113 (1961) (article by a judge replying to criticism of his political attitudes held to be immune from libel proceedings); 61 BVerfGE 1 (1982) (exaggerated attack on a far-right political party held to be political speech immune from libel proceedings).

the existence of democratic government and institutions. The purpose of speech from this perspective is to serve democracy, so it would be wrong to tolerate the circulation of material advocating its overthrow.[52] Yet liberal legal systems do protect non-political speech, although criticism of government and its officials may enjoy a greater degree of protection than, say, commercial speech. That suggests that courts may consider other justifications underpin the free speech clause, in addition to the argument from democracy, or alternatively that argument should be recast to explain why courts do, and should, hold the clause to cover non-political discourse.

In its simplest form the argument from democracy is firmly utilitarian or consequentialist. This has some awkward repercussions, for a government might consider that sometimes the values of a democracy, including its long-term commitment to free speech, can best be preserved by the suppression of some speech. Unlike the case for free speech based on rights to self-fulfilment or moral autonomy, the argument from democracy does not appear necessarily to trump a counterclaim that the exercise of free speech might in some situations be contrary to the public welfare. It is, of course, possible to make further refinements to the basic utilitarian argument in rebuttal of this point: in the long run, it may be said, the maintenance of a confident democracy is best guaranteed by protecting freedom of speech in all (or almost all) circumstances, so temporary regulation might induce political unrest, undermine the acceptability of other laws, and so on.[53]

This difficulty is one aspect of the central weakness of the argument from democracy in the simple form put forward by Meiklejohn. If the maintenance of democracy is the foundation for free speech, how can one argue against the regulation or even suppression of speech by a democracy acting through its elected representatives? As Schauer puts it, 'the very notion of popular sovereignty supporting the argument from democracy argues against any limitation on that sovereignty, and thereby argues against recognition of an independent principle of freedom of speech.'[54] It is difficult to resist this conclusion if the *majoritarian* conception of democracy is accepted, for that allows majorities to determine the limits of the rights individuals are entitled to exercise.

But it is preferable to hold an alternative conception of democracy, under which freedom of speech should be more broadly understood. On what Dworkin terms the *constitutional* conception of democracy, political institutions must respect the right of all citizens to be treated with equal respect and concern.[55] Everyone, including, of course, members of minority groups and parties, is entitled to participate in public discourse and debate, as a result of which temporary political majorities are formed. This right is so fundamental that it cannot be surrendered to the powers of the elected majority. It would be wrong for the majority to

[52] This is the view of R. Bork, 'Neutral Principles and Some First Amendment Problems' (1971) 47 *Indiana Law Jo* 1.

[53] Munro (n. 18 above), 249–53.

[54] Schauer, 41.

[55] Dworkin, 15–26.

suppress the right of minorities to express their dissent. On this perspective, defamatory attacks on public officials, hate speech, and extremist speech challenging the legitimacy of existing institutions must all be tolerated, because the state is not free to determine the boundaries of public discourse.[56] Sexually explicit material is covered by freedom of expression, because it too could claim to be part of public discourse; at least it would be wrong to concede government the authority to exclude it. The relationship of free speech to democracy is quite different in this version of the argument. While under the simpler version associated with Alexander Meiklejohn the commitment to democracy justifies freedom of speech, under this more complex theory it is the equal rights of everyone to participate in society through the exercise of free speech rights and of the related freedoms of assembly and association, which underpin the commitment to democratic government.[57]

This version of the third argument for freedom of speech draws on elements of the other two already considered. The rights of minorities to contribute to political debate should be respected, partly because they may have better ideas than those of the elected majority. The right of all people to equal respect and concern, which underlies their right to engage in public discourse, has close links to the arguments for free speech from dignity and self-fulfilment. It also emphasizes that government should not be permitted to delimit the contours of public discourse; otherwise it could privilege the speech of some individuals by ruling the contributions of others, as it were, out of bounds. To an extent, therefore, it also draws on the fourth 'negative' argument for free speech protection, to be considered shortly.

Although it has to be significantly reformulated to meet theoretical objections, the argument from democracy has been much the most influential theory in the development of contemporary free speech law. The fact that to some extent obscenity and commercial speech, in addition to political discourse, are covered by the freedom of expression provision does not disprove this conclusion. The extension of constitutional protection to these types of expression has been controversial. But courts are understandably reluctant to countenance the regulation of (at least some) non-political speech, either because they distrust the ability of the legislature to distinguish it from genuine discussion of public affairs, or because they fear that the latter will be inhibited by the imposition of restrictions on freedom of expression. Other chapters of this book discuss whether categories of 'speech' can or should be distinguished.[58] Distinctions of this sort, or that between 'speech' and 'conduct', are best made by reflecting on the purposes of a free speech principle, and on this point the argument from democracy offers the most helpful tool for analysis. Admittedly, courts are sometimes influenced in their interpretation of free speech provisions by other rationales for their existence.

[56] D. A. J. Richards, *Free Speech and the Politics of Identity* (New York: OUP, 1999), 22–35; R. C. Post, 'The Constitutional Concept of Public Discourse' (1999) 103 *Harvard Law Rev.* 601.

[57] See M. H. Redish, 'The Value of Free Speech' (1982) 130 *Univ of Pennsylvania Law Rev* 591.

[58] In particular, see chs. X (pornography) and XI (commercial speech) below.

This may be understandable, for no argument has a monopoly of truth ai constitutional provisions may indeed be framed in the light of various philosop ical perspectives.[59] But case-law shows the central importance of political speec and this in its turn indicates, it is suggested, the pre-eminence of this thi argument for free speech.

(iv) Suspicion of government

So far we have examined positive theories for free speech protection. They clai that there is something special about the characteristics or consequences speech: it enables the discovery of truth, is crucial to the working of a democrat constitution, or is an aspect of human self-fulfilment or autonomy. A fourth th ory argues that there are particularly strong reasons to be suspicious of gover ment in this context; it is a negative argument in that it highlights the evils regulation, rather than the good of free speech.[60] Frederick Schauer places gre emphasis on the argument. He points to the history of attempts by governmen and other authorities such as the Catholic Church to suppress speech. They hav often outlawed speech which turns out to make accurate claims and which ever tually becomes widely accepted, even by political or ecclesiastical authority itsel Much misery is occasioned by these efforts. It is difficult to draw a line betwee speech which might appropriately be regulated and speech which in any liber society should be tolerated. This point is particularly evident in areas like hat speech or the publication of sexually explicit material, where a law proscribin extremist speech or hard-core pornography can too easily be applied to cover th expression of radical or subversive ideas. Governments, moreover, have strong rea sons to fear the impact of these ideas, so they are naturally tempted to repres them. A free speech principle is necessary to counteract this tendency. Schaue concludes his argument in this way:

> Freedom of speech is based on large part on a distrust of the ability of government to mak the necessary distinctions, a distrust of governmental determinations of truth and falsity an appreciation of the fallibility of political leaders, and a somewhat deeper distrust of gov ernment power in a more general sense.[61]

The argument is a powerful one, and it should be admitted that the positive argu ments often use it to bolster their own case. Mill's and Scanlon's arguments, fo instance, both contend it is wrong for government to decide whether citizens hav access to ideas, though the theories differ with regard to the reasons why tha is wrong.

But it is very doubtful whether the argument makes the case for free speech Two questions should be asked of it. The first is whether government is less to b

[59] Schauer, 85–6, and in 'Codifying the First Amendment: *New York* v. *Ferber*' [1982] *Suprem Court Review* 285, 308–17.

[60] Schauer, 80

[61] Ibid., 86.

trusted in this area than it is in others such as the regulation of sexual conduct or of economic activity. Arguably, popular pressure has meant that even in generally liberal societies, governments are as inclined to penalize minority sexual practices as they are radical speech. Moreover, we need a theory which enables the legislature, courts, and commentators, to distinguish speech which enjoys the coverage of a free speech principle or constitutional clause from conduct which falls outside it and which can therefore be regulated. A purely negative argument cannot do that, since we still need to know when and why government acts improperly, if it, say, outlaws hard-core pornography or the burning of a national flag. Schauer's argument does not provide any reasons why such material or activity should be covered by a free speech or expression clause.[62] The negative case for free speech is parasitic on positive arguments; it reinforces the latter, providing reasons why government should not be trusted to make distinctions in this area, but it does not itself show why speech is special.

The second question is not commonly asked in the United States, but is posed more frequently now in Europe: is there any reason to be particularly suspicious of *government* regulation of free speech, compared with censorship or interference by other bodies such as churches, commercial companies, or even media corporations? Historically, the greatest dangers to the expression of novel political and social ideas have been posed by authoritarian states, admittedly sometimes to protect church doctrine. The Inquisition was able to suppress Galileo's teachings, because Catholic states during the seventeenth century enforced church teaching.[63] Constitutional rights have generally been guaranteed only against state action, because constitutionalism in its intellectual and political origins has been concerned to limit government, not private authority. But there is no necessary reason why they should be so limited. It will be seen in the next chapter that, in Germany, free speech rights and values must be honoured in private law disputes; constitutional courts in Germany, France, and Italy require the law to guarantee the freedom, even if that entails the imposition of restrictions on the interests of private media corporations.[64]

The extension of free speech rights beyond cases of government interference is controversial. The imposition of limits on, say, the rights of broadcasting companies to draw up their own programme schedules certainly restricts the liberty of those companies. As these limits require the institution of public regulatory authorities by government, they may pose dangers to freedom of speech greater than those cured by their imposition. It is unnecessary to resolve this controversy now.[65] But its very existence shows the shakiness of an argument for freedom of speech based on a distrust of government. The claim that government has a duty

[62] See the complex arguments of L. Alexander and P. Horton, 'The Impossibility of a Free Speech Principle' (1983) 78 *North Western University Law Rev* 1319, 1329–46.

[63] The continued existence of blasphemy laws is a legacy of cooperation between secular authority and the church: see ch. V, s. 5(i) below.

[64] Ch. II, ss. 4 and 6(i)–(ii) below.

[65] For further discussion, see ch. III, s. 5 and ch. XII, s. 5 below.

to promote the free speech values of widespread uninhibited debate or tolerance is not a trivial one; it argues that free speech is too important to be left to the play of economic forces in an unregulated market. It cannot be met simply by making a rival claim that the reason that we protect free speech in the first place is because we are fearful of government in this context.

3. Free Speech Interests

Another approach to analysis of the justifications for free speech is to explore the interests of people involved in the expression of ideas and information: to what extent do the participants have a real interest in unrestrained communication, and how far do those interests strengthen the arguments for freedom of speech and identify concrete free speech rights? The discussion may afford insights into the arguments of principle considered in the previous section, but more emphasis is placed here on the relations between free speech interests and legal rules. Free speech may be looked at from the perspective of the speaker, the audience (or recipient), and finally, of the bystanders or general public. One general point should be made at the outset. When we refer to the interest of a speaker or audience, we could have (at least) one of three things in mind: the *actual* interest in the communication of a particular idea or piece of information, the *general* interest that a person or group has in the communication of ideas of the character transmitted, and the interest *ascribed* by the law or the courts to that person. The first two statements are descriptive; they assert that a speaker or a listener is really interested in putting across, or considering, a particular idea or type of idea. The third is normative. If it is claimed, for instance, that in the context of broadcasting, it is the interests or rights of listeners and viewers which are paramount,[66] that is probably another way of saying that the law should recognize their claims in priority to those of the broadcasters when they conflict, although the actual interest of a programme-maker in transmitting the broadcast item may be greater than that of viewers as a whole. The law ascribes, for one reason or other, a (greater) free speech interest to one person or group than to another.

(i) The speaker's interest in communicating ideas and information

Intuitively, the speaker's interest seems paramount. This appears most obvious, if rights to free speech are linked with fundamental rights to self-fulfilment and development. Equally, speakers as participators in the political process, say, politicians and political commentators, have important interests recognized by the argument from democracy. Moreover, speakers and other communicators

[66] See White J. in *Red Lion Broadcasting* v. *FCC* 395 US 367, 390 (1969).

generally have a close, perhaps an intense, involvement with the content of their message, whether it is political, literary, or artistic. What exactly is the interest? Scanlon has argued that it lies in the speaker's ability to bring ideas and propositions to the attention of a wide audience (though not necessarily the widest possible).[67] The formula, however, raises some questions. Should, for example, the interests of a publisher or distributor be equated with those of the speaker and author, as Scanlon appears to imply?

On one view, some investigation of the speaker's real motives and purposes may be necessary to determine whether his interest should be taken into account in deciding whether free speech protection is appropriate. When book and magazine publishers disseminate their material to make a commercial profit, or a politician makes claims (of doubtful accuracy) purely to enhance his own standing, a claim that freedom of speech should be protected to respect the speaker's interest in communicating his message appears, without more argument, relatively thin. It is certainly weaker than the case which can be made by a writer whose sole aim is to contribute to political or social discussion. Obviously, speech published with this object is the archetypal type of expression to merit coverage by a free speech provision. But there are in fact great difficulties in denying a publication protection, merely because the author was not entirely disinterested. A rigorous examination of motives to exclude speech made for profit would leave little immune from regulation. Moreover, the interests of the recipient should be considered as well. It is often of no concern to him that the author was influenced by the prospect of self-advancement, if the speech contains valuable ideas or information. This point is particularly relevant to political speech, where it should make no difference to the degree of legal protection whether it is disinterested or misleading. Governments are not to be trusted to make this sort of judgement. On the other hand, an economic motive on the part of a publisher might in other contexts lead to the refusal of free speech coverage. One argument for denying commercial speech and hard-core pornography the degree of legal protection afforded political discourse is that much of it is published purely for gain; further, there may be less reservation about the state's ability to draw lines in these contexts, for example, to determine that some types of advertising are inherently deceptive or that extreme hard-core pornography lacks any redeeming merit.[68]

These considerations are also relevant to another question: should a corporation be able to claim freedom of speech? Related questions also arise in the case of newspapers, political parties, and pressure groups, though often the issues there are clarified (and to some extent complicated) by a separate provision in the constitution for freedom of the press and of association. If the right to free speech is primarily viewed as the speaker's right, linked to ideas of human dignity and

[67] 'Freedom of Expression and Categories of Expression' (n. 47 above), 521.

[68] For further consideration of the arguments in the context of pornography and commercial speech, see chs. X and XI respectively below.

self-fulfilment, it is hard to see any justification for the protection of corporate speech. But legal systems do consider it covered by freedom of speech or expression provisions.[69] In a leading United States case, the majority of the Supreme Court, invalidating a Massachusetts law which had prohibited banks and business corporations from making contributions to influence referendum campaigns, found the recipients' interests decisive in its decision to hold corporate speech covered by the First Amendment: 'The inherent worth of the speech in terms of its capacity for informing the public does not depend upon the identity of its source, whether corporation, association, union or individual.'[70] The decision shows how important it is to examine interests, other than those of the speaker or publisher, in determining whether to apply a free speech provision.

Would it be right to recognize free speech rights when the claimant has no intention to communicate his ideas to another person? It is arguable that there must be some communication between a speaker and his audience for freedom of speech to be engaged. Free speech theories based on the discovery of truth and from the role speech plays in a democracy both assume communication. Freedom of expression would not be at issue on those theories if, say, a state were to confiscate personal diaries which were kept wholly for the delight of the diarist, though other rights, notably freedom of thought and of property would be. It might, however, be harder to deny a speech claim here, if the self-fulfilment rationale for that freedom were accepted; talking to oneself, as it were, might be as crucial on that argument as communication to others. However, as we have seen, on that rationale free speech claims easily collapse into broader libertarian arguments.

(ii) The audience interest in receiving ideas and information

The audience (or recipient) interest is particularly relevant in the case of information, in contradistinction to opinion and ideas. Restrictions on the free flow of political information are suspect because they invade the audience's interests in having enough material before it to make informed choices and to participate fully in the democratic process. A free speech challenge to official secrets laws based on a civil servant's interest in disclosing the contents of government files is much less attractive. The same point applies to commercial information: the interest of consumers in information about the prices, availability, and attributes of products and services is much stronger than that of the advertiser in their disclosure.[71] The arguments from truth and from democracy attach particular weight to the interests of recipients; ideas, as well as information, should be freely communicable in order to enable recipients to discover the truth and to participate fully in

[69] See further ch. III, s. 3(ii) below.

[70] Powell J. in *First National Bank of Boston* v. *Bellotti* 435 US 765, 777 (1978).

[71] In the leading US case, extending the coverage of the First Amendment to informational advertising, the challenge was brought by a consumers' association: *Virginia State Board of Pharmacy* v. *Virginia Citizens Consumer Council* 425 US 748 (1976): see ch. XI below.

public discourse. On the other hand, the speaker's interest may be more involved, if a legislature proscribes controversial political publications which few members of the public are actually interested in reading or viewing. Moreover, a speaker has an interest in putting his ideas across, even if the audience has heard them all before from other sources.

These considerations show how wise it is for free speech provisions, like Article 10 of the ECHR and Article 5 of the German Basic Law, to cover the interests of both speaker and recipient.[72] Each has rights which can be asserted in appropriate cases. In most situations they will equally be affected by restrictions on expression. But sometimes one is in a better position to assert a right, say to receive information, than the other is to claim a right to speak. For example, the speaker may be physically outside the jurisdiction, or unable (or unwilling for various reasons) to face the challenge of initiating litigation. These circumstances do not present any particular legal difficulties where the constitutional (or statutory) text recognizes that both speaker and audience have free speech rights.

The position is much less straightforward where there is an audience interest, but there is no speaker. Larry Alexander suggests that freedom of expression would be engaged if government banned the sale of toy guns, because it considered that children playing with them would acquire militaristic ideas.[73] Yet there is no speaker in this case, and no communication. Or the potential speaker may not want to speak. Is there a free speech right to compel the government, or anyone else for that matter, to disclose information it wishes to keep secret? Attention to the audience's interest alone might suggest that such a free speech right should be upheld. In fact, the jurisdictions considered in this book are unwilling generally to derive a constitutional right to know, or to acquire information, from the free speech clause, though many countries now have freedom of information statutes.[74] This reluctance can be defended. It is one thing to recognize a recipient right to receive speech when the speaker is unwilling to assert his rights or has forfeited his right because, say, he speaks from an environment, such as prison or a military base, where speech rights are restricted.[75] It would surely, however, be a distortion of a free speech principle to invoke it where there is no speaker at all, as in Alexander's toy guns case, or there is no willing speaker. Furthermore, in the latter situation a private individual or company may have an interest in not disclosing its information, which should be recognized in the formulation and interpretation of free speech provisions. In short, recipients do not have a free speech right to compel others to speak.

These points qualify Schauer's argument that recipients are the primary object of free speech concern, and that speakers have derivative rights, recognized only in

[72] See ch. II, ss. 4 and 5 below.

[73] 'Freedom of Expression as a Human Right', in T. Campbell, J. Goldsworthy, and A. Stone (eds.), *Protecting Human Rights* (New York: OUP, 2003), 39, 54.

[74] This topic is considered in ch. III, s. 7 below.

[75] For speech in these circumstances, see ch. XIV, ss. 3 and 5 below.

order to protect the formers' interests.[76] If that were the case, the law should uphold constitutional free speech rights of access to information, and recognize that free speech is engaged if government bans toy guns or soldiers to discourage militaristic attitudes. Further, the law would more readily uphold than it does, even in European jurisdictions, the free speech interests of readers and viewers when they conflict with those of the editor or owner of a newspaper or the controller of a television channel. Readers might claim, for example, that a newspaper should give some coverage to foreign affairs, or give more treatment to parliamentary debates than it does to football matches, because their free speech interest is as strongly engaged as that of the editor to determine the contents of his paper. No court would accept that argument. Freedom of speech in this context and press freedom are primarily, perhaps solely, rights of the editor or owner, not those of readers or of the general public.[77]

Schauer, I think, underestimates the extent to which the classic free speech theories rely on speaker interests. Take the argument from democracy. That does not rest primarily on the audience or recipient interest in hearing the ideas of others or acquiring information from them, as if the citizens are to be equated with consumers dependent on the offerings of a few producers and distributors. That demeans the role of citizens. The argument from democracy, as we have seen, is more plausibly framed in terms of active citizens who have an equal right to engage in public discourse and to exchange ideas and information.[78] Secondly, even if Schauer were right in terms of the relative importance of speaker and recipient interests at the theoretical level, courts may be hesitant to draw inferences from his conclusion when they determine concrete free speech cases. A court might properly decide that, although the general argument for free speech attaches as much, or conceivably a little more, weight to the recipient interest than it does to that of speakers, in practice the speaker's interest in a particular communication is stronger than that of the audience. It would be wrong for it to uphold a free speech claim on behalf of the recipient when that would show disrespect for the speaker's interest in, say, not communicating his ideas or sharing information with the recipient.

(iii) The bystanders' (or public) interest in speech

Finally, the public interest should be considered when framing and applying a free speech rule. This may sometimes be hard to distinguish from the audience interest, as is shown by the passage from Powell J.'s judgment in the United States corporate speech case.[79] Mass communications, whether delivered by the media or by corporations, are rarely aimed at a particular group of people separable from the general public. So the argument from democracy could be framed either in

[76] Schauer, 105–6, 158–60.

[77] See ch. XII below for further discussion.

[78] See s. 2(iii) above.

[79] N. 70 above.

terms of the rights of individuals to receive information and views pertinent to their political choices, or in terms of the general public interest in the disclosure of such information. The latter claim cannot really be distinguished from the argument that, whatever interest people may actually have in communicating and considering ideas and information, there is an important public good or value to freedom of speech. That argument is considered in the next section of this chapter.

More usually, however, the interest of bystanders or the public is seen as limiting the circumstances in which expression may legitimately be made. Scanlon distinguishes between the bystanders' interest in preventing the harmful side-effects of speech, such as congestion, noise, or litter on the streets, and the important public interests which may sometimes justify restrictions on speech to prevent harms occurring as a result of the audience reactions to speech—for example, engaging in disorder or leaving the armed forces.[80] That distinction is easy to state, but its application may be difficult in practice.

It is far from clear whether a neat distinction can be drawn between the harmful consequences of an audience's reaction to speech and harmful side-effects independent of such reaction. How, for example, should the consequences of speech invading privacy be characterized? Or take the case of a passer-by reacting angrily to a street demonstration, because it is holding up the progress of his car rather than because he dislikes the cause supported by the procession: is his violent response to be treated as an incidental side-effect or a harmful reaction to speech? These comments perhaps only matter if the legal system is more willing to countenance time, manner, and place restrictions on speech imposed to prevent deleterious side-effects than it is to tolerate regulation inspired by hostility to its contents. United States courts and commentators frequently advocate this distinction in discussing the constitutionality of limits on free speech, but it is much harder to apply than to state in abstract.[81] A second point is that limits may be placed on speech to protect either the general public interest or a private right. Public order and national security limitations clearly represent general third-party interests, but expression is also frequently restricted to secure other private rights which may be seen to have stronger weight either generally or in the particular circumstances. Rights to reputation, privacy, and a fair trial are instances of these competing rights. Their weight may depend, of course, on whether they are also constitutionally protected, or exist only under statute or at common law.

The existence of a public interest in the speech might, however, also be seen as a necessary condition for its legal protection. Meiklejohn doubted whether speech about an entirely private matter, that is, a publication of absolutely no concern to the people at large, is covered by the First Amendment.[82] A defamatory remark about a barmaid's chastity, for instance, would not on this perspective engage freedom of speech. It would be difficult to justify its coverage on the basis of the arguments from truth or democracy, but for some people the making of such remarks

[80] N. 47 above, 528. [81] See ch. II, s. 2 below. [82] N. 31 above, 79.

might be valuable to their self-fulfilment. And the argument from suspicion of government may suggest that it would be wrong to proscribe such comment. The courts might not be able easily to distinguish purely private (defamatory) speech which may be regulated from allegations of public interest which are protected by freedom of speech. As will be seen later in this book, these distinctions have been troublesome in determining the relationship of freedom of speech to the protection of reputation and privacy rights.[83]

Perhaps speech should be *public* in another sense to engage freedom of speech; arguably, it must be communicated to the community or to a section of it to be covered. In contrast, verbal speech or a written note communicated to one person or to a limited group should not be entitled to legal protection under the free speech principle. In favour of that conclusion, it can be said that Mill's thesis and the argument from democracy hardly apply to private speech, insofar as these arguments assume a communication to the general public which can then assess its truth or its relevance to democratic government. The self-fulfilment argument might well justify application of the free speech clause to purely private communications, but in some situations they are more appropriately covered by privacy rights rather than freedom of speech. The censorship by a prison governor of correspondence from a prisoner to his wife, a friend, or his lawyer, more clearly violates the detainee's privacy rights than his freedom of expression;[84] his complaint is that the confidentiality of his correspondence has been infringed, not that he lacks freedom to disseminate information to the public. A need for communication to the public would also explain why the revelation of official secrets to another member of a subversive organization, let alone an enemy agent, would not even engage freedom of speech. The publication is clearly 'speech' in the dictionary sense, but the absence of any public element to the communication weakens any free speech claim. That is not the case when official secrets are revealed to the public: freedom of speech is engaged, though there are powerful arguments for the imposition of restraints.[85]

On the other hand, in some circumstances purely private communications clearly engage freedom of speech. Employers' references are written in confidence to other (prospective) employers, but they enjoy a qualified privilege defence to defamation actions, because it is in the public interest that the writers of references speak freely; equally, the recipients of references have a strong interest in truthful and full disclosure. A spouse or other person involved in an intimate relationship surely has a free speech interest in disclosing details of that relationship to a close friend from whom he seeks advice. (In these circumstances we might indeed be more willing to uphold free speech arguments than we would be when similar

[83] See further ch. VI below.

[84] The European Court has usually treated cases of interference with prisoners' correspondence under ECHR, art. 8 (right to respect for private life and correspondence) rather than art. 10 (freedom of expression): see *Silver* v. *UK* (1983) 5 EHRR 347, and *McCallum* v. *UK* (1991) 13 EHRR 597.

[85] The topic is discussed in ch. V, s. 6 below.

details are disclosed to the community, perhaps by the media.) It would be wrong, therefore, to hold that only general or public communications engage freedom of speech. In some instances private speech merits protection, either because there is a clear public interest in unfettered communications between the individuals concerned, or perhaps because the speaker has a strong interest in expressing his feelings to another person. The case for free speech coverage of public discourse, communicated to the general public, is particularly strong. But it would be wrong to exclude private communications altogether from free expression guarantees.

4. Freedom of Speech and Other Values

Free speech arguments typically suggest, if they do not explicitly state, that the freedom entails *rights* to impart and receive ideas and information. The discussion of free speech interests in the previous section shows that the interests of speakers and audience are worthy of protection, and implies that in legal terms their rights should be recognized. This is important. For the claim that individuals have rights to free speech implies that government may not stop them communicating and considering ideas merely because a restraint would benefit, or meet the preferences of most members of, society.[86] Freedom of speech therefore limits the authority of government and its ability to promote what it, and perhaps the majority of citizens, consider to be the public good.

In this section we consider freedom of speech from a different perspective which supplements the arguments made up to this point. It suggests that freedom of speech should be protected because it is a public good, rather than because individuals value it or have a strong interest in its exercise. Joseph Raz argues persuasively that free political expression is integral to the public good of living in a democracy, irrespective of whether individual citizens wish to participate in political debate or to cast their vote.[87] More generally, he argues that freedom of expression is of value because it validates different forms of life—life in a religious community, as a gay person, or engaging in particular hobbies and leisure pursuits. Equally, censorship or suppression of a publication is an insult to the people engaged in the way of life portrayed in that material. Integral to Raz's argument is a belief in pluralism, that is, the value of diverse ways of life which may be incompatible and conflict, but which tolerate each other.[88] A somewhat similar argument has been made by Lee Bollinger, a leading commentator on the First Amendment, against the background of controversial court decisions in the United States protecting extremist speech.[89] He argues that freedom of speech

[86] Dworkin (n. 6 above), 190–1.
[87] 'Free Expression and Personal Identification' (n. 2 above). [88] Ibid., 321–3.
[89] L. C. Bollinger, *The Tolerant Society: Freedom of Speech and Extremist Speech in America* (New York: OUP, 1986).

should be explained and defended as helping to develop a practice of tolerance; hate speech cases provide a good setting for cultivating tolerance, since speech is less damaging than, say, discriminatory conduct, and therefore, these decisions pose relatively few dangers to social cohesion.

Raz points out that the public expression of a way of life is of crucial importance to the well-being of people who have adopted that course.[90] The self-esteem of homosexuals, for instance, is enhanced by the availability of gay literature and magazines, and conversely would be significantly lower in societies where it is suppressed. In this way, freedom of expression establishes and represents a public culture of acceptance and tolerance. This case appears to differ from the rights-based self-fulfilment and autonomy arguments of Dworkin and Scanlon considered earlier in the chapter.[91] They argue for a connection between underlying duties to treat all individuals with equal respect and concern (or to respect their autonomy) and respect for a fundamental liberty of expression. The liberty is derived from that equal concern for all citizens, the 'sovereign virtue of political community'.[92] What, however, all these arguments share is the perception that freedom of speech should be justified by reference to other fundamental values or moral principles, which may be termed equal respect and concern, the self-esteem of individuals, or human dignity. There are also close links between freedom of political expression and democratic values, though Dworkin and Raz would offer different philosophical explanations for those links. Freedom of speech, in short, is integrally connected with other values.

The discussion in the rest of this section explores two topics where the links between speech and other (constitutional) values create problems for philosophers and courts. The first concerns the relationship between free speech, on the one hand, and equality or human dignity, on the other, in the context of extremist speech—either racist speech or hard-core pornography demeaning to women. The second takes up some implications of Raz's views about the importance of pluralism and the suggestion that the law might be used to promote that value. This creates the possibility that freedom of expression might itself be limited in order to foster its underlying values.

(i) Hate speech, dignity, and equality

Defenders of restrictions on hate speech and misogynist pornography justify their imposition to some extent as necessary to protect the equality and dignity rights of members of the targeted groups.[93] In reply, it is said that these restrictions infringe

[90] N. 2 above, 312–13. [91] S. 2(ii) above.
[92] R. M. Dworkin, *The Sovereign Virtue* (Cambridge, Mass.: Harvard UP, 2000), 1. Also see *Taking Rights Seriously* (n. 6 above), 272–8.
[93] These are not the only arguments for the imposition of restrictions: see ch. V, s. 4(i) and ch. X, s. 4(v) below.

the rights of the publishers of hate speech to be treated with equal respect and concern; their contributions to public discourse are discounted, which shows them disrespect.[94] Indulging in hate speech may be part of the way of life of racists, so that their self-esteem is damaged if they cannot communicate their views.[95] Further, if government proscribes hate speech, or other speech of which it disapproves, it takes sides on issues of controversy, and so abandons the neutrality it must show if it is to honour equality of respect and concern to all members of the community.

Critics of hate speech laws also argue that a government might abuse its powers to proscribe extremist expression. Its legislation may be applied to curtail subversive or even unpopular speech. Alternatively, writers may be deterred from publishing material of that character, because they fear they would be prosecuted. This is the so-called 'chilling effect' of speech-restrictive laws, the abhorrence of which has substantially influenced the US courts' approach to resolving conflicts between free speech and the protection of reputation rights.[96] As Schauer argues,[97] these dangers certainly provide support for the free speech principle; otherwise it would be too easy for government, or the courts, to use vague laws to curtail speech which is offensive or unpopular. But the argument does not mean that hate speech or pornography laws are necessarily incompatible with freedom of speech; it means that courts should interpret and apply them with regard for the values of free speech, and not allow them to be abused. Hate speech laws only lead to the suppression of radical political speech if courts allow that to happen.

A state should certainly not proscribe hate speech or hard-core pornography merely because their dissemination causes offence or endangers race or gender relations; commitment to a free speech principle means that it is not entitled to legislate for the welfare of society when that involves the infringement of free speech rights. But the argument may be quite different if the hate speech law is defended by reference to a right to human dignity (or perhaps equality rights), particularly if the right has constitutional status. There would then be a conflict between two constitutional principles, the weight of which must be assessed by the court in the light of the particular circumstances. It is not clear that speech should necessarily enjoy priority if its dissemination infringes other rights. Nor should a state always be required to remain neutral about different lifestyles, as Raz himself admits.[98] Should groups who believe that the only valuable form of life is one devoted to committing spectacular murders or to the consumption of dangerous drugs be free to propagate their views of life, taking strength from the knowledge that it is shared by others? There would be no good reason in these circumstances to give freedom of speech an automatic priority over a right to life; if the spread of these beliefs does put life in danger, it would surely be right to curtail their propagation. The relationship of speech and dignity is more problematic, if

[94] Dworkin, 234–8; Richards (n. 56 above), 22–35. [95] Raz (n. 2 above), 320–1.
[96] See ch. VI, ss. 2 and 3(i) below. [97] Schauer, 83–5. [98] N. 2 above, 319.

only because human dignity is a such a broad, perhaps indeterminate, concept. But it should be conceded that speech may infringe it: the display of pictures of the recently dead or of acts of bestiality are two such cases. In these circumstances, there is a strong argument that the protection of human dignity should trump any free speech claim.

An assumption underlying arguments for free speech is that human beings are in general able to consider rationally the ideas put to them and determine appropriately their consequent behaviour. That assumption clearly underlies the arguments from democracy and Mill's truth argument; liberty did not apply to 'any state of things anterior to the time when mankind have become capable of being improved by free and equal discussion'.[99] Alternatively, as in Scanlon's autonomy argument, the capacity to make sensible judgements might be ascribed to human beings as an essential aspect of their dignity: liberal societies must accept that by and large people have a capacity for rational thought, although we know that is not always the case. If we did not make that commitment, it would be more difficult to sustain arguments against authoritarian government or the rule of enlightened despots. It is questionable, however, whether these assumptions hold in the context of hate (and perhaps other) speech, where there are strong grounds to doubt whether it will be considered rationally by its audience. Suppose, for example, that racist leaflets are distributed, or graffiti are scrawled, in a neighbourhood where tensions exist between the (white) majority and minority ethnic groups. Many of those who look at the leaflets or graffiti feel vulnerable and threatened as a result, while members of the majority group receive confirmation of their racist outlook. In these circumstances, respect for human dignity perhaps legitimizes the proscription of racist speech, rather than amounting to an argument for its tolerance.

That conclusion can, of course, be disputed. It assumes that racial identity is an essential, rather than a contested, element of individual human dignity. Another perspective can be taken: speech challenging conventional views concerning the meaning of race and of the importance of membership of racial groups should be allowed as an aspect of free public discourse.[100] The proscription of hate speech, it is argued, rests on a presumption that racial identity is an integral aspect of each individual's dignity or personality, which may not be the case. All aspects of individual human dignity are, at least to some extent, determined by social and cultural perceptions which can properly be contested. On this perspective, commitment to freedom of speech requires the tolerance of even personal abuse, however wounding it is to the individual victim.[101]

Equality and dignity are complex moral and political concepts. It is hard to determine their scope in general, or their appropriate weight when it is argued

[99] Mill, 15.
[100] R. C. Post, 'Racist Speech, Democracy, and the First Amendment' (1991) 32 *William and Mary Law Rev* 267, esp. 317–26.
[101] This perspective underlies the decision of the US Supreme Court in *Hustler Magazine* v. *Falwell* 485 US 46 (1988), discussed in ch. VI, s. 4 below.

they limit the exercise of freedom of expression. But clearly these values cannot be ignored when they are recognized by the constitution.[102] Neither the legislature nor a court could easily conclude that hate speech has no impact on the dignity of members of racial minorities it targets, irrespective of the particular circumstances. Nor could it comfortably decide that any impact it did have should be ignored, because of the strength of the argument referred to in the previous paragraph. The argument that equality limits the exercise of free speech in this context is much less persuasive; the claim that hate speech, unlike discrimination in the allocation, say, of housing or employment, infringes the equality rights of members of the target ethnic groups is weak and should be rejected. That is certainly true if equality rights are understood in terms of a right to equal treatment; racist speech, however demeaning to members of the victim group, does not infringe that right.

But the argument from human dignity is a strong one. Free speech itself, as we have seen, relies on background claims about the autonomy of human beings or their entitlement to equal respect. It is assumed, further, that they can assess arguments rationally. Extreme hate speech, perhaps some hard-core pornography, and personal abuse all express contempt for the targeted individuals or groups; some publications, for example, the circulation of close-up photographs of a dead or seriously wounded person, demean human dignity and humanity itself. It would appear odd to hold such speech is *always* protected under a principle which itself is grounded on respect for human dignity and rationality. Even if it is admitted, as it should be, that the proscription of, say, extreme hate literature may violate the freedom of speech of racists, based on their right to be treated with equal respect and concern, it is surely equally clear that the publication of such material may infringe the dignity rights of its victims. There is, then, no alternative to balancing freedom of speech and dignity in the context of the particular facts.

(ii) Pluralism and freedom of speech

Implicit in Raz's argument for freedom of expression is the value of pluralism, or variety in types of life and conceptions of welfare.[103] Certainly, a diversity of attitudes, moral beliefs, and ways of life exists in any developed or liberal society; government must respect this diversity, as any attempt on its part to impose uniform standards of behaviour may impose intolerable strains on social cohesion. Freedom of speech reflects and reinforces pluralism, ensuring that different types of life are validated and promoting the self-esteem of those who follow a particular lifestyle. But suppose that the principal media of expression are controlled by particular individuals or corporations and that they deny members of minority

[102] Constitutions invariably recognize equality rights, while the German Basic Law, art. 1, guarantees human dignity: see ch. II, s. 4 below.

[103] It is not clear whether Raz regards this variety as intrinsically desirable, as good because it leads to human flourishing, or he accepts that it inevitably exists in liberal societies.

groups the opportunity to express their views, to communicate with other peop who share their way of life, or to persuade others to adopt it. Should or may go ernment intervene to promote freedom of expression in the interests of pluralisn Raz appears to contemplate this possibility when he says his views show 'freedo of expression can be supported as part of a pluralist argument for using the la to promote pluralism in the society'.[104] The possibility has been realized i some European jurisdictions. Both the French Conseil constitutionnel and th Italian Constitutional Court have ruled that the free speech rights of med corporations may be limited to ensure that the constitutional value of pluralism safeguarded.[105]

In contrast, the US Supreme Court is unsympathetic to attempts to promo free speech values or equalize opportunities for speech, if they entail limits on th free speech rights of individuals.[106] However laudable its aims, government car not be trusted to take decisions in this context. This attitude is influenced by th general suspicion of government and the faith in the marketplace of ideas whic characterize the American approach to free speech issues. It may, however, also b shaped by a narrow perspective on free speech which reduces it to a set of ind vidual rights. Those who share this view would presumably consider that fre expression exists in a homogeneous society where all adopt the same attitudes an say the same thing, but are *legally free* to say what they think.

From an alternative perspective, free speech not only confers rights, but als reflects the pluralist values of diversity and variety. Freedom of speech does enta the absence of censorship, but also means an actual robust public debate.[107] Ther is a positive benefit in the expression of a range of views, which is not satisfie when the only people who speak say much the same thing. Free speech is a publi good or value in the same way that the arts and good education are. We would nc say that a society values the arts, merely because the government does not sto people attending exhibitions or concerts. Why should we conclude that fre speech is respected, because there are no legal restraints on publication? A sup porter of this alternative perspective might well be prepared to take the risk o government intervention to promote diversity, even when that step limits th 'rights' of some people to disseminate their views.

So it may make some difference whether we think of free speech exclusively i terms of individual rights and interests, or whether we also contemplate it as a publi good or value in a pluralist society. Of course, government can do much to promot pluralism and diversity without interfering with individual free speech rights; i can, for instance, subsidize writers and the arts, and establish public broadcastin (to allow the expression of views not given time on commercial media). Th advent of the Internet has perhaps weakened the case for media regulation t

[104] N. 2 above, 323. [105] See ch. II, s. 6 below. [106] Ibid., s. 2.

[107] See J. Lichtenberg, 'Foundations and Limits of Freedom of the Press', in J. Lichtenberg (ed.) *Democracy and the Mass Media* (Cambridge: CUP, 1990), 102, 107.

ensure that minorities and individuals can communicate effectively with each other.[108] And the market may work relatively well to provide for a variety of expression, rich enough to satisfy the needs of a pluralist society. It certainly seems to do that, at least in Britain, in some contexts, for example, the provision of magazines and periodicals to satisfy more or less any taste or lifestyle.

On balance, I prefer the view that free speech not only contains a set of rights, but reflects values which may on occasion require promotion through the law. Those occasions may be rare. Commitment to free speech means that courts must scrutinize carefully any attempt by government to regulate its exercise, however well intentioned that may appear. But an exclusive rights-based approach, and a blind faith in the market, also poses dangers, in particular that of a society in which only a few people can communicate their ideas effectively through the mass media. Moreover, the risks of government intervention may have been exaggerated by commentators, primarily in the United States, who would rule it out in all circumstances. I develop this point in the final section, which discusses the impact of *constitutional* protection on the abstract case for free speech guarantees considered in this chapter.

5. The Constitutional Protection of Free Speech

This chapter has largely been concerned with the coherence of some arguments for a free speech principle, under which expression is entitled to special immunity from regulation. These are abstract arguments developed by political philosophers and jurists, rather than by judges. But courts cannot, it has been argued, ignore them, although in some contexts the text of the constitution they are interpreting and judicial precedents will also shape their decisions, say, on the scope of free speech or how it is to be balanced against privacy, reputation, or other private interests. Each of these abstract arguments makes a good case for freedom of speech. But none of them is immune to criticism. Mill, for instance, assumed that truth, or better decisions, will always emerge from uninhibited discussion, but that seems too optimistic. The argument from self-fulfilment may collapse into a case for a general liberty right. Scanlon's argument from autonomy assumes that people are generally rational, and that autonomous people would never choose to surrender to government the authority to proscribe expression. Though generally acceptable, neither assumption is warranted in all circumstances. The most popular, and perhaps the most attractive, argument is that from citizen participation in a *constitutional* democracy. But that too relies on an argument that citizens have background rights to equal respect and concern, and it may, therefore, be vulnerable to some of the criticisms levelled at other theories, notably that of Scanlon.

As far as the courts are concerned, the constitution or bill of rights makes it plain that speech enjoys special protection. But they must determine why that is

[108] See ch. XIII below for discussion of this topic.

so in hard cases concerning, say, the coverage of commercial advertising c pornography by the particular free speech or expression clause.[109] This requir ment appears to impose an impossible burden on them. Constitutional cour cannot be expected to decide why free speech is special and what it means, whe political philosophers have been unable to agree on answers, and some have cor cluded that the search for explanation is doomed to failure.[110] Nevertheles judges cannot escape this task. Perhaps, however, the fact that freedom of speecl or expression, is *constitutionally* guaranteed has some impact on the coherence an strength of the general philosophical arguments for free speech; one of these argu ments may be entitled to special weight in hard cases, because the constitutiona provision, properly interpreted, reflects a commitment to that justification of fre speech. As mentioned earlier, the text of the particular provisions, the structure o the constitution as a whole, and precedents also offer guidance. As a result court might find it easier to resolve free speech disputes than they would, if they hac to rely on abstract philosophical arguments, divorced from any constitutiona context.

A few reflections are offered with regard to the significance of the *constitutiona* guarantee of free speech. Historically, constitutions, and more particularly thei fundamental rights provisions, are drafted to restrain power and to protect citizen against government. Constitutional judicial review limits the power of the major ity in the legislature and therefore appears, at first glance, anti-democratic. But the practice can be justified by recourse to one of two arguments. First, judicial review ensures that majorities are properly elected, and that citizens can debate issue intelligently before casting their vote. On this perspective courts protect the democratic process, rather than discrete substantive rights.[111] Alternatively, a second argument urges that it is the equal right of all to participate in the political process which itself justifies democracy, and that courts must protect that fundamental right against infringement by an elected temporary majority or executive government.[112] On both arguments, there is a powerful case for the protection of political speech. The justifications for judicial review support the arguments for freedom of speech from democracy canvassed earlier in this chapter. It is not surprising that these arguments have been the most influential in shaping free speech jurisprudence. Courts are understandably more prepared to strike down restraints on political expression than they are, say, limits on sexually explicit or commercial speech. The former course is justifiable in terms of the courts' constitutional responsibilities. In contrast, they have less, if any good, reason to interfere with a decision of the legislature to limit commercial advertising or other non-political speech.

[109] See Schauer (n. 8 above), 1305–6.

[110] For this view, see S. Fish, *There's No Such Thing as Free Speech, and It's a Good Thing, Too* (New York: OUP, 1994), and Alexander, 'Freedom of Expression as a Human Right' (n. 73 above), 72–3.

[111] For a classic exposition of this case, see J. H. Ely, *Democracy and Distrust* (Cambridge, Mass.: Harvard UP, 1980).

[112] Dworkin, 15–26.

The constitutional protection of free speech may also have implications for the strength of the fourth argument for free speech: suspicion of government.[113] That argument asserts that governments are naturally inclined to suppress speech they dislike; further, they are easily tempted to limit radical or dissenting speech when they act to preserve public order. In short, governments abuse their powers. The free speech principle is needed to counteract the dangers of these 'slippery slopes'.[114] This argument explains, for instance, the opposition in the United States to the framing and application of hate speech laws; an ordinance suppressing extremist speech aimed at vulnerable racial groups could easily, it is said, be used to prosecute the expression of other unpopular ideas. And radicals may prefer not to speak, because they fear prosecution under these laws. On one view, this argument strengthens the case for active judicial review to ensure that the legislature, executive government, and the police do not suppress the expression of unpopular ideas. But if the courts discharge their responsibility to check government and to protect free speech effectively, the 'slippery slope' argument loses some of its force. If judges, for example, interpret hate speech laws properly in the light of free speech principles, the laws should not be applied to less extreme radical expression. Dissidents may become more confident that they will not be prosecuted; if so, the 'chilling effect' argument would be less persuasive.

Moreover, the fear of government is less sustainable in other free speech contexts, if we place trust in the courts. As was mentioned at the end of the previous section, there is disagreement whether attempts by government to promote the values of freedom of expression should necessarily be regarded as incompatible with free speech. Courts, and many commentators, in the United States consider they should be, as government motives are always suspect in this context. Even if an independent authority is established, say, to regulate broadcasting, it is feared that its intervention—for example, to improve programme standards—will distort the terms of public debate. But these anxieties assume that the courts are unable to determine in particular cases when the intervention of government or a regulatory authority infringes, rather than promotes, free speech. The argument is, as it were, that all regulation is suspect, because we cannot rely on anyone, even the courts, to distinguish between censorship and measures which encourage speech and its values, for example, pluralism. This argument is incoherent. It is incompatible with the reasons why we rely on courts as the ultimate guarantor of free speech. If courts are trusted to guarantee free speech, to determine its scope and to decide when it may, exceptionally, be limited in furtherance of other interests such as privacy or the right to a fair trial, there is no reason why they cannot equally be trusted to distinguish a measure which promotes free speech from one which improperly suppresses it. The suspicion of government intervention cannot sensibly be extended to distrust of the courts. The guarantee of free speech in a constitution means we must place confidence in them.

[113] S. 2(iv) above.
[114] Schauer, 80–5, and in 'Slippery Slopes' (1985) 99 *Harvard Law Rev.* 361.

II

Free Speech in Liberal Legal Systems

This chapter reviews the treatment of free speech in a number of liberal democracies, where it enjoys significant protection. Special attention is paid to free speech principles in four national jurisdictions, England, the United States, Canada, and Germany, and those developed by the European Human Rights Court, interpreting the European Convention on Human Rights and Fundamental Freedoms (ECHR). Briefer reference is then made to the protection of free speech in a few other countries.

The purpose of this chapter is to provide some background to the more detailed discussion of particular free speech topics in later chapters. It sets out the relevant constitutional provisions and examines the approach of the courts in each jurisdiction to their interpretation and application. Inevitably, some general constitutional issues are discussed. Freedom of speech as a legal concept cannot be understood in isolation from other constitutional rights and principles, which may be peculiar to a particular system.

1. England

English free speech law, like other aspects of its civil liberties jurisprudence, has in principle been transformed by the incorporation of the ECHR into United Kingdom law by the Human Rights Act 1998 (HRA 1998). In fact it is doubtful whether the change has so far been much more than cosmetic. The appearance of the law is clearly different, in that courts examine rulings of the European Human Rights Court and sometimes explain their own decisions in terms of the Convention. But it is hard to point with confidence to free speech cases which have been decided differently as a result of the change in the legal landscape brought about by the HRA 1998; the courts could almost certainly have reached the same conclusion on the basis of the common law and the principles of statutory interpretation they had already fashioned. English judges had already begun in the 1990s to develop this law in the light of ECHR rights, even though at that time they were not enforceable in English law. It is important, therefore, to look at common law free speech principles, before discussing a few important cases subsequent to 2 October 2000 when the HRA 1998 became enforceable in English law.[1]

[1] The HRA 1998 came into force earlier in Scotland and Wales with regard to devolution issues.