REVIEW ESSAY

Nazis, Skokie, and the First Amendment as Virtue

NAZIS IN SKOKIE; by Donald A. Downs.† Notre Dame, Indiana: University of Notre Dame Press, 1985. Pp. xii, 227. $20.00.

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When Frank Collin and his little band of Nazis held a rally in Chicago's Federal Plaza, surrounded by a dense cordon of police and a raging crowd of six thousand "counterdemonstrators" who drowned out every intelligible sound, one of the more dramatic debates of recent years about the meaning of free speech reached its conclusion. Collin had originally intended to demonstrate in Skokie, a suburb of Chicago whose heavily Jewish population includes a number of concentration camp survivors. Under pressure from a group of these survivors, Skokie's leaders decided to pursue a policy of active opposition to the demonstration. They obtained several injunctions against it, and passed three ordinances to prevent its future occurrence. The American Civil Liberties Union (ACLU) then came to the Nazis' aid. It won four court decisions that overturned all the ordinances and injunctions, and lost 30,000 members in the process.

The Nazis were thus legally authorized to proceed, but plans by Jewish groups to converge on Skokie for a huge counterdemonstration, and suggestions to Collin that the local police could not prevent the counterdemonstrators from slaughtering him, persuaded him to change his mind. After intense bargaining with the Justice Department's Community Relations Service, Collin agreed to trade the right to demonstrate in Skokie for a long-denied right to hold one rally in his home neighborhood of Marquette Park and another at Federal Plaza (pp. 19-37, 68-83).[1] Following these demonstrations, Collin tried to organize a similar

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1. *See generally* D. HAMLIN, THE NAZI/SKOKIE CONFLICT (1980) (ACLU perspective); A. NEIER, DEFENDING MY ENEMY: AMERICAN NAZIS, THE SKOKIE CASE, AND THE RISKS OF FREEDOM (1979) (same). For a discussion of the ACLU's membership loss by the organization's leaders, see D. HAMLIN, *supra* at 119-33; A. NEIER, *supra,* at 79. This effect has been questioned by an empirical study that concludes that the impact of the Skokie incident on ACLU membership was actually minimal. *See* J. GIBSON & R. BINGHAM, CIVIL LIBERTIES AND NAZIS: THE FREE SPEECH CONTROVERSY 74-86 (1985).

demonstration in a Cleveland suburb, was convicted of pederasty, and then vanished with his organization from the public arena (p. 26).[2]

The Skokie incident provides a test of our ideas about the first amendment, about as crisp a test as any that the real world could be expected to produce. Few groups in America are more universally detested than the Nazis, and few evoke our sympathy as fully as the survivors of the Nazi camps. As a result, most people would be anxious to find some way of prohibiting Collin's demonstration. But our social commitment to free speech is correspondingly strong. It could not be described as absolute, being an operative doctrine that must be applied to an enormous variety of situations, but we strive to come as close to that ideal as we can.[3] Skokie thus presents a direct conflict between free speech, as a general principle of our political regime, and the human appeal of a particular and extreme situation.

Conflicts between our principles and our instinctive reaction to a given situation are often solved by some sort of doctrinal strategem, a technique which probably explains why we insist that all our judges must be trained as lawyers. But such strategems were simply not available in the Skokie case. Despite the impression conveyed by media reports, Collin never planned to "march through" Skokie. After the city of Chicago denied him permission to demonstrate in Marquette Park, he wrote letters to a number of suburban towns, asking to use one of their parks for his demonstration. Most of these towns simply ignored him, but Skokie responded with a hastily contrived demand for a $350,000 insurance bond that the Nazis could not possibly obtain (p. 22).[4] Sensing an opportunity, Collin wrote back that he intended to hold a demonstration at the

2. *See* D. HAMLIN, *supra* note 1, at 179. Collin's organization, officially named the National Socialist Party of America (NSPA), is a splinter group of the main American Nazi organization, formerly led by George Lincoln Rockwell and named the American Nazi Party, later the National Socialist White People's Party. *See generally,* L. BELL, IN HITLER'S SHADOW: THE ANATOMY OF AMERICAN NAZISM (1973); A. NEIER, *supra* note 1, at 11-22. At its height, the NSPA is estimated to have had between 20 and 30 active members (p. 19). *See also* D. HAMLIN, *supra* note 1, at 2-3.

3. The position that the first amendment is an absolute right is most closely associated with Hugo Black. *See, e.g.,* Konigsberg v. State Bar, 366 U.S. 36, 56 (1961) (Black, J., dissenting); Beauharnais v. Illinois, 343 U.S. 250 (1952) (Black, J., dissenting); *see also* Meiklejohn, *The First Amendment is an Absolute,* 1961 SUP. CT. REV. 245. Black, however, decided against an asserted free speech interest in several cases, even a few in which other Justices had decided in its favor. *See* Street v. New York, 394 U.S. 576 (1969); Tinker v. Des Moines School Dist., 393 U.S. 503 (1969). Meiklejohn also accepts a number of restrictions on speech that fall short of current doctrine. *See* Meiklejohn, *supra,* at 257-62. Whether Black, or anyone else, favors a truly "absolute" right is a question that involves formidable problems of definition. For present purposes, it is sufficient to use the term quasi-absolute, which will refer to an expansive view of the first amendment that is consciously identified as such by its proponents.

4. The city of Chicago had used a similar requirement (for a $250,000 bond) to prevent Collin from demonstrating in Marquette Park. At the time Skokie responded to Collin's letter, an ACLU-initiated lawsuit against the Chicago requirement was pending in federal district court. *See* D. HAMLIN, *supra* note 1, at 29-30. The court ultimately enjoined the requirement on constitutional

Skokie Village Hall to protest the denial of a park permit. That was all he planned to do (pp. 19-22).[5] The problem is that such a demonstration is not simply protected speech; it is, together with the newspaper editorial, our quintessential image of protected speech. Consequently, it forces us to choose between the unpleasant prospect of permitting such a demonstration and the difficult task of rethinking the nature of our first amendment right.

As might be expected, a number of books and articles have been written about Skokie. Two of the books are by ACLU officials who were involved in the incident: Aryeh Neier, the national director of the organization at that time, and David Hamlin, the Illinois divisional director.[6] Not surprisingly, both Neier and Hamlin strongly support the ACLU position and agree with the court decisions that affirmed the Nazis' right to demonstrate. *Nazis in Skokie,* by Donald Alexander Downs, takes the opposite position. Downs, a political scientist, was not a participant, but he conducted in-depth interviews with the leaders of Skokie's survivor community, he presents the survivors' view of the situation in his book, and he ultimately endorses their position. To do so, he advances arguments that draw upon a number of the major themes in modern jurisprudence. His analysis of the Skokie incident, together with the opposing views of the ACLU leaders, provides an excellent opportunity to reevaluate our doctrine of free speech and the types of arguments we use to justify it.

It is interesting to look at these issues through the complex fact pattern of a specific incident. In discussing doctrines like free speech, legal scholarship often remains bounded by the issues that appear in judicial decisions. Skokie, and the various accounts of that incident, provide an alternative approach. The judicial decisions that emerged from the situation[7] were not particularly important ones, since they largely followed existing Supreme Court precedents (pp. 68-77).[8] But with the possible exception of the Pentagon Papers case,[9] the incident as a whole was the best known and most extensively debated free speech issue in recent his-

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grounds (pp. 79-81). Collin v. O'Malley, 452 F. Supp. 577 (N.D. Ill. 1978); *see also* D. HAMLIN, *supra* note 1, at 139-40; A. NEIER, *supra* note 1, at 66.

5. For an account of Collin's plans, see D. HAMLIN, *supra* note 1, at 27-32. For a discussion of the media's inaccuracies, see *id.* at 66-68.

6. *See* D. HAMLIN, *supra* note 1; A. NEIER, *supra* note 1.

7. Collin v. Smith, 447 F. Supp. 676 (N.D. Ill.) (declaring village ordinances unconstitutional), *aff'd,* 578 F.2d 1197 (7th Cir.), *cert. denied,* 439 U.S. 916 (1978); Village of Skokie v. Nat'l Socialist Party of Am., 51 Ill. App.3d 279, 366 N.E.2d 347 (1977), *aff'd in part, rev'd in part,* 69 Ill. 2d 605, 373 N.E.2d 21 (1978).

8. The dominant precedent was Cohen v. California, 403 U.S. 15 (1971) (jacket labeled "Fuck the Draft" is protected speech).

9. New York Times Co. v. United States, 403 U.S. 713 (1971). *See generally* M. SHAPIRO, THE PENTAGON PAPERS AND THE COURTS (1972).

tory. In addition, it raised basic questions about the meaning of free speech and the nature of our social commitment to it that are barely intimated in more typical cases.

A common criticism of judicial decisions, moreover, is that they succumb to legal formalism because they ignore the social context of the disputes that they adjudicate. Downs makes this argument regarding the Skokie decisions; their doctrine of content neutrality, he argues, ignored the real effects of a Nazi demonstration on the Skokie community (pp. 3-6, 36-37, 125-50). Whether one agrees or disagrees with Downs's claim, it cannot be analyzed unless one has a reasonably complete description of the context. Simply reading a judicial opinion in isolation concedes to the court the unexamined power to structure and assess the facts according to its own standard of relevance, which is even worse than evaluating the court's doctrinal reasoning by reading only the cases which it cites.

Finally, law-trained people played a wide variety of roles in the Skokie conflict, apart from the judicially related roles of litigating and deciding cases. The corporate counsel of the village gave legal advice to the mayor and to the citizens at large. He acted as part of the village's decisionmaking team, and drafted the three ordinances that attempted to prevent the demonstration (pp. 60-63).[10] The ACLU lawyers made the decision to represent the Nazis, a much more fateful one than any decision concerning litigation strategy.[11] After the courts held in favor of the Nazis, the ACLU lawyers, together with the Justice Department's Community Relations Service, worked out a compromise to avoid the Skokie demonstration and then negotiated with another lawyer from the Chicago Park District to preserve the terms of the compromise (pp. 78-91).[12] All these activities are legal behaviors, by any definition. They help to determine the nature of the coercive rules that our society imposes, they involve our norms of public interaction, and they are what practising lawyers regularly do. But the significance of these activities can be captured only if the scope of inquiry expands beyond the narrow ambit of judicial decisions.

The specific facts of Skokie also provide an alternative way of approaching jurisprudential theory. Most modern theories claim that they provide a method for solving concrete, real-world problems, but they are stated at a level of generality that makes the claim difficult to evaluate. Testing them against the particulars of Skokie can provide an evaluation. Skokie is not a typical case, of course, but it is a hard one,

10. *See also* D. HAMLIN, *supra* note 1, at 141; Barnum, *Decision Making in a Constitutional Democracy: Policy Formation in the Skokie Free Speech Controversy*, 44 J. POL. 480 (1982).

11. For a perspective on the ACLU's decisionmaking process in the case, see D. HAMLIN, *supra* note 1, at 46-52.

12. *See also id.* at 161-72.

and it is generally the difficulty rather than the frequency of a problem that lends it jurisprudential significance. There is, of course, a danger in generalizing on the basis of a single case, but there is probably an even greater danger in generalizing on the basis of no case at all.

I
THE RESPONSE TO SKOKIE

The basic reason why the Skokie incident provides a conundrum for first amendment theory is that the speech involved, while concededly political, is so distasteful and potentially so harmful. Downs correctly identifies the quality that makes it so: the Nazi demonstration was racial vilification, targeted at "an individual, home, neighborhood or community in such a way as to single out an individual or specified group" (pp. 163, 154-64).[13] His response is to suggest that this narrow category of speech not be protected. Those who would oppose this conclusion must find a justification for an expansive free speech right that is powerful enough to outweigh its unpleasant consequences in Skokie.

It is somewhat surprising, therefore, to find that the arguments offered by Hamlin and Neier in support of their position are predominantly consequential. Both writers justify free speech because it is the most effective means of achieving other goals, not because of its intrinsic value. Hamlin's position may be described as specific consequentialism; he maintains that the protection of speech will produce desirable results in every specific situation. For example, the last chapter of his book, which focuses almost exclusively on Skokie, is entitled "Only Collin Lost."[14] Neier's approach, in contrast, is general consequentialism; while acknowledging that hard decisions must be made, he is convinced that the overall effect of free speech doctrine will be to produce a more desirable society.[15] "I supported freedom of speech for Nazis when they wanted to march in Skokie," he writes, "in order to defeat Nazis. Defending my enemy is the only way to protect a free society against the enemies of freedom."[16]

Consequentialism is a form of empirical argument, of course, and the empirical evidence supporting Hamlin's and Neier's position is substantial. Societies that restrict or prohibit speech typically display a level of political repression that we find repugnant, while those that protect it do not seem to have suffered any consistent pattern of instability as a

13. Downs also requires that the harm must be intentional, but he acknowledges that this requirement would "normally be easy to establish, for the very targeting of vilifying or intimidating expression . . . establishes clear evidence of intent" (p. 159).

14. *See* D. HAMLIN, *supra* note 1, at 163-77; *see also id.* at 126-27.

15. *See* A. NEIER, *supra* note 1, at 5-7, 105-59.

16. *Id.* at 1-2.

result. Individual restrictions in an otherwise protective setting tend to be either discriminatory, like the Smith Act,[17] in that they afflict a small, unpopular minority, or they exhibit the antic quality of extremist paranoia, like the removal of literary classics from junior high libraries.[18] Of course, no consequentialist argument can establish a universal principle, so if one wants to advocate free speech for the entire range of conceivable situations, consequentialism will not suffice. Whether this is a serious difficulty depends on one's commitment to universality, and to theory. In any event, it is virtually impossible to ignore general consequentialist arguments, however theoretical one's inclinations.

Tested against the specifics of Skokie, however, these consequentialist arguments for free speech seem either unpersuasive or indeterminate. A specific consequentialist position, since it asserts that the effects of free speech are preferable in every situation, is subject to refutation by counterexample. Downs persuasively maintains that Skokie presents precisely such a counterexample. He begins by considering the direct harms and benefits that resulted from the Nazis' threat to demonstrate in Skokie (pp. 84-121). The most notable of these was the psychological trauma generated by the proposed demonstration and by the Nazis' antecedent distribution of leaflets entitled "Smash the Jewish System" (pp. 28-29, 84-91).[19] Against this harm, he weighs the sense of control or "mastery" that the survivors gained by opposing the Nazis, the political mobilization of Skokie's Jewish community, and the general stimulation of debate about free speech (pp. 94-121). After a carefully balanced assessment, he concludes that the harms exceeded the benefits (pp. 122-53). He also points out that cases where the harm exceeds the benefit by an even greater margin can be readily imagined. For example, during certain periods of Ku Klux Klan activity in the southern states, blacks possessed few of the social resources of Skokie's Jews, and their oppressors possessed few of the Nazis' social disabilities (pp. 124-25). Downs's argnment seems persuasive, if only because specific consequentialism claims uniform effects for such a vast array of factual situations. Any coherent theory of the first amendment must confront the fact that, in specific situations, the immediate effect of free speech may be one that we generally regard as harmful.

General consequentialism, given its wider scope, is not similarly vulnerable to counterexample. Indeed, part of its appeal is that its claims,

17. 54 Stat. 670 (1940) (codified as amended at 18 U.S.C. § 2385 (1982)); *see* Dennis v. United States, 341 U.S. 494 (upholding Smith Act). *See generally* M. SHAPIRO, FREEDOM OF SPEECH: THE SUPREME COURT AND JUDICIAL REVIEW 63-67, 79-82, 118-21 (1966) (critique of Smith Act decisions).

18. *See* Board of Educ. v. Pico, 457 U.S. 853 (1982) (invalidating removal of nine books, including *Slaughterhouse Five, Black Boy, Down These Mean Streets,* and *The Fixer*).

19. D. HAMLIN, *supra* note 1, at 37-38.

being general, can be endlessly debated. The problem with it is that same generality. General consequentialism simply does not resolve very many real world issues, the issue that was raised in Skokie's being a good illustration. Prohibition of the Nazi demonstration would not represent a repudiation of free speech, nor transform America into a totalitarian society. Whatever the conceptual difficulties involved, the practical consequences would be relatively limited, particularly if the prohibition were carefully tailored. Downs's proposal exemplifies such caution. Although he attacks our first amendment theory at the highest level, the doctrinal change that he endorses is a limited one. Few people would feel much compunction about discouraging targeted racial vilification, and a law which tracks such a widespread social norm would hardly spell the end of the republic.[20]

The consequentialist response to this observation relies on that famous feature of metaphorical geography known as the slippery slope. As soon as we set our metaphorical foot upon the slope in any given case—although exactly how we have avoided setting foot on it before is unexplained—we begin the inevitable slide toward total thought control. As a result, the argument runs, a restriction of free speech in any given situation would produce general social harm.[21] The ACLU attorney expressed this idea when he argued in court that if the village of Skokie won its case, it would be "dancing on the grave of the first amendment" (p. 30)—a grave that presumably lies at the bottom of the slope.

Downs's response to this argument is the straightforward one that every legal distinction can be misapplied (pp. 164-65). Indeed, since all distinctions have their uncertainties as well as their potential extensions by analogy, it would appear that we are in permanent and unavoidable residence on the dread incline. Common sense suggests, however, that certain cases provide rather obvious sticking points. The idea that prohibitions of Nazi demonstrations today will become prohibitions of Republican Party rallies tomorrow is simply a chimera.[22]

But there is an additional sort of argument against prohibiting the

20. A more sophisticated consequentialist argument is offered by Lee Bollinger, in his review of Neier's book. Bollinger, *The Skokie Legacy: Reflections on an "Easy Case" and Free Speech Theory* (Book Review), 80 MICH. L. REV. 617 (1982). Bollinger argues that prohibiting the Nazi march would have unleashed and legitimized a type of intolerance that our society, taking the long view, is anxious to avoid. *Id.* at 628-33. But this might be seen as an argument in Downs's favor. His proposal would establish a carefully crafted legal exception for a particularly objectionable form of speech, and thus defuse people's natural antipathy that might otherwise spill over into general intolerance. *Cf.* Schauer, *Codifying the First Amendment:* New York v. Ferber, 1982 SUP. CT. REV. 285, 312-17 (excluding carefully defined category of speech from protection avoids dilution of general right).

21. *See* D. HAMLIN, *supra* note 1, at 124-25; A. NEIER, *supra* note 1, at 149-59.

22. The converse is not true however. Cities like Chicago that restrict speech by Republicans can also be expected to restrict speech by Nazis. *See* D. HAMLIN, *supra* note 1, at 11-14.

Nazi demonstration, one which is intrinsic, or deontological, rather than consequentialist. It holds that free speech is simply an essential value, on its own terms, and should not be compromised unless a countervailing value proves more powerful. Since we regard the value as quasi-absolute in character, moreover, we recognize no other values that could defeat it under ordinary circumstances.[23] The reason why the Nazi demonstration should not be prohibited, therefore, is not because of the immediate or long-range effects of that prohibition, but because it would constitute a violation of our political values. Downs is fully aware of this argument, of course, and much of his book consists of a response to it. In making this response, he invokes two major themes of modern jurisprudence.

The first theme is that we really do not protect speech for its own sake, but to implement the process of self-government and to confer autonomy on individual citizens (pp. 131-50). Types of speech that do not serve these ends, such as intentional libel, pornography, and "fighting words," are not entitled to protection. To these exceptions, which represent current doctrine, Downs would add targeted racial vilification. Such vilification, he argues, adds nothing to the debate about public issues, and it treats its victims as objects, rather than as autonomous, intrinsically valued human beings (pp. 125-31).[24] In appealing to these master values of self-government and autonomy, Downs accepts the basic premises of liberal thought regarding the idea of rights, the self, and the nature of the moral argument. He makes this pedigree quite clear by drawing his theory of self-government from Meiklejohn (pp. 132-33) and by linking his principle of autonomy to Kant's categorical imperative (pp. 125-27, 133). Consequently, he asserts that a clarification of basic liberal values would lead us to recognize that the Nazi demonstration is not the sort of speech we mean to protect.

Downs's second argument is based on an opposing view that can be labeled antiliberal or critical. This argument is that protection of the Nazis' speech derives from a position of content-neutrality that reveals our moral aguosticism, our lack of a coherent theory by which we can distinguish the good from the bad. It is thus a form of procedural justice because it does not distinguish between different beliefs but only creates a structure in which those who possess a belief of any kind can express

23. It is important to recognize that the link between a deontological and a quasi-absolute position on free speech is not a necessary one. The deontological position merely declares that free speech is desirable for its own sake, and it therefore cannot be limited for consequentialist reasons. But this position does not necessarily imply that speech is the exclusive or predominant value. There may be some other deontological value that is more important and that would serve as a limitation on free speech. The quasi-absolute position makes the additional claim that there is no such value.

24. For related approaches, see Delgado, *Words that Wound: A Tort Action for Racial Insults, Epithets and Name-Calling,* 17 HARV. C.R.-C.L. L. REV. 133 (1982); Note, *Group Vilification Reconsidered,* 89 YALE L.J. 308 (1980).

themselves (pp. 3-6). By contrast, the alternative view, and the one which Downs advances, is a form of substantive justice, because it makes such distinctions on the basis of other values (pp. 3-5, 167-69). To justify his general preference for substantive justice, Downs invokes the concept of community, as developed by Roberto Unger (pp. 167-69).[25] When people function as part of a community, they generate collective moral judgments, and any given right is meaningful only as part of that larger framework.[26] Were courts to recognize that framework they would consider substantive values—our general ideas about what is good and what is bad—and balance these values against the free speech right. That would lead to Downs's racial vilification principle, and it would have led the courts to prohibit Collin and his Nazis from demonstrating at the Skokie village hall.

This mixture of liberal and antiliberal theories is not necessarily a defect in Downs's analysis; in legal theory, as in federal court, one is permitted to argue in the alternative. Downs is seeking a refutation of our conventional approach to free speech, and he is entitled to explore as many options as he can identify. The liberal and antiliberal approaches conceivably could have different institutional consequences, but the carefully defined rule that Downs proposes removes this ambiguity. He would leave the prohibition of targeted racial vilification to popularly elected legislatures and simply have courts cease to overturn such laws on first amendment grounds.[27] On the theoretical level, however, the two types of arguments Downs presents, despite their similar implications, are clearly separate, and they must be separately evaluated.[28]

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25. Downs relies on R. UNGER, KNOWLEDGE AND POLITICS (1975).

26. For representative attacks on liberalism based on this position, see A. MACINTYRE, AFTER VIRTUE: A STUDY IN MORAL THEORY (2d ed. 1984); M. SANDEL, LIBERALISM AND THE LIMITS OF JUSTICE (1982); R. UNGER, *supra* note 25.

27. This is implicit in Downs's articulation of a new judicial doctrine as his suggestion for reform (pp. 154-69). In general, this is the approach that the liberal arguments imply. The critical arguments, in contrast, may suggest that there is a social obligation, in the interest of certain community values, to prohibit certain forms of speech, with this obligation falling on the courts, the legislature, the two in conjunction, or some emergent social institution.

28. Downs also offers a doctrinal argument, based on the fighting words doctrine of Chaplinsky v. New Hampshire, 315 U.S. 568 (1942) (pp. 6-8, 150-53). The significance of a doctrinal argument for Downs is a bit unclear, since the remainder of the book focuses on underlying ethical and social policy issues. In any case, the use of *Chaplinsky* is not fully persuasive. It is true that the *Chaplinsky* opinion refers to words that "by their very utterance inflict injury," 315 U.S. at 572, which is close to Downs's notion, but the doctrine has not evolved in this direction. The notion of fighting words refers to threats that place the listener in direct fear of a physical assault. They are thus the verbal equivalent of a raised fist or a drawn knife. *See* Gooding v. Wilson, 405 U.S. 518 (1972); Cohen v. California, 403 U.S. 15 (1971). Racial epithets may figure prominently in such threats, but the distinguishing feature is the threat itself. The Nazis' "threat" to demonstrate in Skokie, however offensive it may have been to the residents, simply did not constitute a threat in any real sense, just as a speaker who uses the twelve-letter word at a school board meeting offends but does not threaten. Rosenfeld v. New Jersey, 408 U.S. 901 (1972). Downs acknowledges this trend, which he describes as the "evisceration" of *Chaplinsky* (pp. 9-13). But since *Chaplinsky* can have no

II
THE LIBERAL CRITIQUE

The heart of Downs's liberal critique of first amendment absolutism is his use of autonomy and self-government as master values. A Nazi demonstration may literally be a form of speech, he argues, but the speech we really want to protect is that which contributes to the development of individual autonomy or to the process of self-government (pp. 132-33). It has certainly become fashionable to justify the protection of free speech in terms of these larger, and presumably deeper, principles of liberalism.[29] But mere invocation of such values, while it may carry a refreshing air of novelty, is of little use unless those different values are better accepted or more readily justified than free speech itself.

The extent to which a particular value is socially accepted is a purely descriptive question, but it can be given normative significance through a number of different theories.[30] In order to advance any of these normative claims, however, or even to make an accurate descriptive observation, one must identify a real value, a belief which the society in question really does accept. Acceptance, in this context, can mean at least two different things. The first is that the value is consciously employed by members of the society, while the second is that the value, while not employed in this manner, represents an accurate characterization of a value complex that is not otherwise identified.

Autonomy has a wide variety of meanings, some of which capture elements of our existing value system, and some of which extend beyond it. One socially accepted value associated with the notion of autonomy is that personal and family life should be insulated from most forms of state control. But this value is more correctly labeled "privacy." It could be

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doctrinal preeminence over subsequent cases, this characterization simply acknowledges that the doctrine has developed otherwise, and that more basic arguments, such as those used in other portions of Downs's book, are required. Downs's doctrinal argument is not without support, however, and may well be more persuasive as a prediction of the future. For example, four Justices dissented from the Court's order vacating and remanding in *Rosenfeld,* and three argued that while a fight was unlikely at the school board meeting, the fighting words doctrine extended to "willful use of scurrilous language calculated to offend the sensibilities of an unwilling audience." 408 U.S. at 905 (Powell, J., dissenting).

29. *See generally* A. MEIKLEJOHN, POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE (1965); Scanlon, *A Theory of Freedom of Expression,* 1 PHIL. & PUB. AFF. 204 (1972).

30. The simplest of these is values-clarification, where one argues that a given result is necessarily implied by existing values. Constitutional arguments frequently follow this approach. *See, e.g.,* J. CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS (1980); J. ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW (1980). More complex approaches involve the idea that a society's commitment to a value has normative significance, usually because of the special position that values occupy in social or personal terms. *See, e.g.,* L. FULLER, THE MORALITY OF LAW (rev. ed. 1964) (social terms); A. MCINTYRE, *supra* note 26 (personal terms, for certain types of societies).

used to support the protection of private speech, but it is of little use in justifying the public debate that is so central to first amendment rights. Autonomy also can mean freedom of thought,[31] although this is probably something of a scholar's notion of autonomy; most people would be more likely to think in terms of an independent income. In any event, thought is hardly equivalent to public debate, being among the quietest of human activities. While the freedom-of-thought approach would support a right to receive information (itself a peripheral aspect of our free speech right), it also would support a prohibition of speech on behalf of those who wanted to avoid receiving information, and a prohibition of a particular speaker because the same information was available from other sources. These principles are not necessarily monstrous, or even incorrect, but they reflect a value system rather different from our own.

In order to support our existing free speech right, with its strong emphasis on public debate, autonomy must be defined as the right to act as one desires. The difficulty is that this definition is far too broad to be acceptable, since it extends as much to action as to speech. As Frederick Schauer points out, it provides no basis for our prevailing view that speech is a preferred activity.[32] A general right of autonomy, in this sense, does not appear in our constitutional text, nor is it a significant element of our political discourse. It would be difficult to claim that it constitutes a unifying theme of modern legislation, whose regulatory nature implies high levels of government control and social interdependence.

Self-government presents almost the opposite problem. It can certainly be found in the constitutional text, and it does appear in political discourse, but it is more of a high school civics bromide than an operative principle. The one-person-one-vote decisions, for example, speak in terms of equality, not in terms of self-government.[33] In any case, nothing in our notion of self-government suggests that it should function as a limit on independently established rights. Just because certain types of speech are crucial to the self-government process does not indicate that other types of speech do not deserve protection. Lee Bollinger goes further; he suggests that self-government implies a set of intellectual values characterized by tolerance, and he attributes this approach to

31. *See* Scanlon, *supra* note 29.

32. F. SCHAUER, FREE SPEECH: A PHILOSOPHICAL ENQUIRY 47-58 (1982). Schauer identifies the general notion of autonomy as the "good life" and suggests that the term autonomy may be limited to freedom of thought. *See id.* at 67-72.

33. *See, e.g.*, Reynolds v. Sims, 377 U.S. 533 (1964). The constitutional provision that comes closest to embodying a principle of self-government is the guarantee clause. Interestingly, this clause has been treated as too general to be a source of judicial power. *See* Pacific States Tel. Co. v. Oregon, 223 U.S. 118 (1912); L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 3-16, at 73-75 (1978).

Meiklejohn.[34] To be sure, our theory of self-government can be used for the institutional argument that the courts should not have the power to overrule majoritarian legislation in order to protect speech, but this is simply a general argument against judicial review. Aside from the fact that this argument has been decisively rejected,[35] it has no specific relevance to the free speech clause. In fact, it is at its weakest when confronting such an explicit, well-accepted constitutional provision.

If self-government is treated as a limiting principle, moreover, it becomes far too narrow to characterize our existing value system, since it limits first amendment protection to political activity. Some commentators would favor such a limitation,[36] but that position is more an argument than an accurate characterization. There is no socially perceived division between political and nonpolitical activity in our society. Because our pragmatic orientation directs so many of our intellectual energies to politics, and because two centuries of free speech has familiarized us with political debate, our entire culture is mildly politicized, and our politics are thoroughly domesticated. The point is not that a distinction between the political and nonpolitical is administratively impossible to draw—it is no more difficult than many other operative distinctions—but rather, that our value system suggests no normative basis on which such a distinction can be made.

In consequential terms, moreover, one might well wonder whether any real society, having established a general pattern of control, would then allow people to speak freely in the one area that is inevitably controversial and inevitably threatening to the established order. More likely, such a society would find rather creative ways to define what it meant by politics. This temptation to confound the definition of politics with a description of one's preferences is exemplified by an article by Robert Bork, a leading proponent of the self-government limitation.[37] After carefully demarcating political speech as the only speech that merits protection, Bork hastens to point out that this protection would not extend to speech in favor of communism.[38] And the self-government argument is of no use in the Skokie case unless one is willing to climb aboard

34. Bollinger, *Free Speech and Intellectual Values,* 92 YALE L.J. 438, 456-60 (1983). The difficulty with this, once again, is that self-government is a rather vague notion, and its link to intellectual debate hardly emerges from the common usage of the term.

35. Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).

36. *See, e.g.,* Bork, *Neutral Principles and Some First Amendment Problems,* 47 IND. L.J. 1 (1971).

37. *See id.*

38. *Id.* at 29-34. Bork's argument is that communism, to the extent that it advocates violations of law or overthrow of the government, should not count as a political position, since it thereby opposes the premises on which our political system depends. But the argument relies on a definition of the term "political" that diverges from both ordinary and technical discourse. This use of wordplay indicates that Bork is arguing backward from the result he wants, and his conscious efforts

Bork's result-oriented express. Support for Nazism, to say nothing of protests against the denial of a park permit, may be distasteful political activity, but they are political activity nonetheless.

The extent to which autonomy and self-government diverge from our existing value system can be further illustrated by comparing them with self-expression, another value that is often invoked in the free speech literature.[39] Self-expression is a considerably more accurate description of our existing views about the first amendment. Viewed as a description, it does not really justify free speech, but it does provide some clarity in the necessary process of determining the scope of the protection. For example, describing speech as expression, rather than the mere use of words, explains why it is not a violation of the first amendment to punish death threats or to enforce oral contracts. It is this power to illuminate the implications of our present beliefs that distinguishes a characterization, or redefinition, from an argument. Applying this characterization to the Skokie situation, the protected nature of the Nazi demonstration becomes more apparent. What the Nazis planned was an expressive act, a statement of their personal beliefs. The real objection to it was not that it verged into some nonexpressive category, but that we find their personal beliefs repugnant.

The appeal of autonomy and self-government, however, may not be that they are better accepted than free speech, but that they are more readily justified. Justifications for liberalism have long been sought, of course, and the effort does not appear to have abated. Typically, these justifications do not begin by asserting the absolute or contingent superiority of a particular social order. Their starting point, instead, has been to imagine a particular process by which a social order can be generated, the most popular choice being some sort of contractual process.[40] In this context, the roles of autonomy and self-government are apparent: they are necessary conditions for the contractual process to operate. The theory of human behavior that predicts how people would behave in these mythical conditions requires them to be autonomous individuals. The process itself requires that they govern themselves, at least until the contract is established. Moreover, the usual account of the process is that these prehistoric or precorporeal individuals become attached to their autonomy and self-government, perhaps because they have so little else to become attached to, and choose to carry these features over into the

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to derive the argument from "neutral principles" simply represents a specific form of result-oriented argument that is used popularly as a defense of liberalism. *See* text accompanying notes 41-42 *infra*.

39. *See, e.g.*, F. SCHAUER, *supra* note 32, at 50-56; Baker, *Scope of the First Amendment Freedom of Free Speech*, 25 UCLA L. REV. 964 (1978).

40. For contemporary versions, see J. BUCHANAN & G. TULLOCK, THE CALCULUS OF CONSENT (1962); R. NOZICK, ANARCHY, STATE AND UTOPIA (1971); J. RAWLS, A THEORY OF JUSTICE (1971). The classic, of course, is Locke's *Second Treatise of Government*.

society that they create.[41]

The need to assume the principles of autonomy and self-government in order to justify the liberal state does not make these principles persuasive, however; it simply makes them arbitrary. They are the assumptions that are necessary to reach the desired result. In fact, the process theories are so elaborate, and so at odds with our empirical understanding of human behavior and society, that they would probably lead nowhere without guidance from the end-state that they seek to justify. One's suspicions are certainly aroused by the specificity of the conclusions. It is truly wonderful, for example, that Rawls's disembodied decisionmakers, from behind their veil of ignorance, manage to reconstruct the domestic program of the Kennedy Administration.

But the end-state does more than give these theories substance; it also gives them their significance. Who would pay attention to a demonstration that by making unprovable assumptions, and following an imagined methodology, one could generate the ethical system of the Aztec empire? It may be argued that there is a virtue to minimizing one's assumptions. Given the need to posit autonomy and self-government, this argument would run, one should not posit any other values, like "free speech," that exist independently of the justificatory process. The difficulty is that free speech is not an additional assumption underlying liberalism, but a basic component of a liberal society.[42] It is, in other words, the thing itself, the result that process theories are attempting to justify. To exchange a real, living value for a justification that is derived from it, and that relies on that value for its intuitive appeal, seems like a bad philosophic deal. If we choose to limit free speech, we should do so for the more substantial reason that it conflicts with other values, not

41. *See generally* R. NOZICK, *supra* note 40; J. RAWLS, *supra* note 40. This is not an inevitable conclusion, of course. In *Leviathan,* Hobbes makes the opposite assumption.

42. *See, e.g.,* R. DAHL, POLYARCHY: PARTICIPATION AND OPPOSITION 1-3 (1971) (constitutional guarantees required for democracy). There is some question about the level of public commitment to free speech. Several studies have found acceptance levels to be quite low. *See, e.g.,* S. STOUFFER, COMMUNISM, CONFORMITY AND CIVIL LIBERTIES (1955); J. SULLIVAN, J. PIERSON & G. MARCUS, POLITICAL TOLERANCE AND AMERICAN DEMOCRACY (1982). Others report substantially greater support for free speech. *See, e.g.,* C. NUNN, H. CROCKETT & J. WILLIAMS, TOLERANCE FOR NONCONFORMITY 36-43 (1978). The leading study presents a mixed picture. H. MCCLOSKY & A. BRILL, DIMENSIONS OF TOLERANCE: WHAT AMERICANS BELIEVE ABOUT CIVIL LIBERTIES 32-92 (1983). It is significant, however, that while people apparently waver when presented with real situations, they are fairly firm in their commitment to the general principle. *See id.* at 49-50 (89% of sample "believe in free speech for all no matter what their views might be"); *see also* A. NEIER, *supra* note 1, at 78-79. More important, our values are expressed and implemented through our governing institutions, and there is no such institution as the general public on the national level. In fact, our theory of government is that the public's abstract commitment to free speech should be implemented in specific cases by institutions, rather than by reference back to the public (which is impractical in any case). The McCloskey-Brill study suggests that the institutional support for free speech is quite extensive, by finding relatively high levels of tolerance among political leaders and legal elites. H. MCCLOSKY & A. BRILL, *supra,* at 48-73.

simply to persuade ourselves that we can construct theoretical justifications for the values that we already believe.

In fact, Downs does suggest such a conflicting value, although he does not seem to place as much emphasis on it as he does on self-government or autonomy. It is the value of equality, specifically racial equality (pp. 151-53). We may champion free speech for its own sake and may want to apply it universally, but it nevertheless can be argued that racial insults are too direct a violation of an independent norm to be acceptable. In this one area, at least, a different right must be recognized, and the absolute extent of free speech must be sacrificed. This argument is a powerful one, since equality is among the best accepted of our values. It appears in the constitutional text, it is certainly a central element in our political discourse, and its contours have been as fully and as carefully explored as those of the first amendment. Moreover, the right to equality is directed to one of our dominant social problems, while the free speech right has generally been invoked in peripheral situations.

There are serious problems with the equality argument, however, despite its evident appeal. Obviously the government may not engage in racial vilification, but that presents no conflict, since the first amendment does not confer free speech rights upon the government. While our social vision of equality requires the government to take some positive efforts as well, banning certain types of political speech need not be one of those efforts. There are many other methods that the government can use, not all of which have been employed as assiduously as one might wish. In fact, Kenneth Karst suggests that an unwavering commitment to the first amendment may itself serve as a means of achieving equality, since the first amendment is one of our more powerful instruments for invalidating measures that are facially neutral but operationally discriminatory.[43] Moreover, the mere refusal to ban racist speech cannot be taken as evidence of government discrimination, since it can be explained by our adherence to the separate value of free speech.

Our social vision also imposes requirements on private behavior, even if our present constitutional right does not reach beyond the public sphere. But here too, equality can be achieved without violating an independent right. The concept of equality, as it is commonly understood, refers to an end-state in which members of the particular group in question are treated as well as other people.[44] It cannot possibly be understood to mean that all groups are spoken of in the same way by the

43. *See* Karst, *Equality as a Central Principle in the First Amendment,* 43 U. CHI. L. REV. 20 (1975); *see also* H. KALVEN, THE NEGRO AND THE FIRST AMENDMENT (1965).

44. Whether "equality" has a more generalized meaning is, of course, another question. For the argument that it does not, see Westen, *The Empty Idea of Equality,* 95 HARV. L. REV. 537 (1982).

entire range of private speakers. In consequentialist terms, moreover, racist speech by powerless groups is unlikely to have any effect on the social position of their targets. And racist speech by the powerful is more likely to be a reflection of inequality than a cause of it, since those who would openly violate our social norm against such speech are already likely to have taken the quiet and even unconscious actions that constitute discrimination.

However speculative this last observation seems, it is well illustrated in the Skokie case. Racial inequality may be our dominant social problem, but the problem does not involve the group whom the Nazis were vilifying. Despite a certain amount of residual prejudice, Jews have basically achieved equality in this society. Their social position is certainly no worse than other groups, such as Methodists or Danes, who have not become the particular subjects of racial hatred. Collin's Nazis, moreover, were in no position to have any effect upon this social situation. Their statements, however distasteful, affected no legal structures regarding Jews and foreclosed no opportunities for them. It might be argued that other groups need the protection of antivilification laws to achieve the same level of equality, but one would have to treat equality as a virtually exclusive value to allow such tenuous consequentialism to overcome the direct opposition of the first amendment.

III

THE ANTILIBERAL CRITIQUE: AGNOSTICISM

Downs's critical or antiliberal argument begins with the observation that our right to free speech, with its concept of content neutrality, betrays an agnosticism about basic values and a preference for procedure over substance. Roberto Unger calls this aguosticism the principle of subjective value or arbitrary desire,[45] and Alasdair MacIntyre calls it emotivism,[46] because it maintains that value choices are merely the preferences that individuals assert. The force of this argument, however, depends on taking philosophic justifications for the modern state very seriously, including the justifications based on autonomy and self-government. It is probably correct to describe these justifications as agnostic or emotivist, in the sense that they do not make assertions about the objective or contingent truth of any substantive notion of virtue. A philosophic argument against aguosticism or emotivism is thus a relevant

45. R. UNGER, *supra* note 25, at 42-46, 76-81.

46. A. MACINTYRE, *supra* note 26, at 11-22. Strictly speaking, Unger uses the term "subjective value" for the political position, and applies "arbitrary desire" to personal ethics. But he regards the two concepts as indissolubly linked and as aspects of a single value system. R. UNGER, *supra* note 25, at 119-21. MacIntyre's term includes all levels of normative argument. He defines it generally, but his discussion of it tends to focus on G.E. Moore's argument that normative terms are mere statements of preference.

critique, whether or not one views it as a telling one. But to transfer this critique to our social values is not quite appropriate. We have a vast and complex system of beliefs, of which political philosophy forms only a part. These beliefs do not always fit together logically, but they must nonetheless be considered in their totality before our belief system can be accurately characterized. Once criticism shifts its focus from the philosophic to the societal level, it must confront that totality.[47]

An example of a subject on which our society is truly agnostic or emotivist would be modern art. Individuals have their preferences, of course, but there is no social consensus, for example, on the relative merits of Helen Frankenthaler, Roy Lichtenstein and Jasper Johns. Not only do we have no view, but at the level of society at large, we genuinely believe that the choice among these artists is a matter of personal taste. This may be bad for art—indeed, a unified value system seems more likely to produce better art than to produce a better political system—but it is our belief. That is the reason why the differential quality of contemporary artists has not become a major social issue for us, as it has for other societies. No American legislature could obtain a majority to ban the work of Frankenthaler, Lichtenstein or Johns, and individual legislators who proposed such a law would subject themselves to general ridicule.

But we are not agnostic about basic questions of political morality. We have definite and intense views in this area, and a fair degree of social consensus. For example, we know exactly how we feel about the Nazis. We hate the Nazis. Our willingness to let them speak is not derived from an inability to make distinctions or a blindness to the implications of our principles. It springs instead from an intense commitment to free speech, despite the judgments and distinctions that we make every day. Logically, the principle of free speech is oblivious to the content of the speech which it protects. Socially, we are fully aware of that content, and we maintain our commitment to the free speech principle in spite of it. Indeed, it is precisely when we have strong social views that the principle becomes important.

The specific case of the Nazis and Skokie provides an interesting illustration. The group with which Collin chose to associate himself has no political power, was the enemy in our last all-out war, and remains the preferred choice for stock villains in our popnlar literature. What Collin chose, in other words, was not a serious political movement, but

47. Unger is certainly aware of this distinction, *see* R. UNGER, *supra* note 25, at 6-17, 118, 145-46, but he chooses to suspend it as "a principle of expository method," *id.* at 17, and he never quite recaptures it. When he turns his attention to the social world he finds empirical embodiments of liberal views and liberal quandaries, but he does not find in that world any additional values that would expand our belief system beyond the bounds of agnostic liberalism. *See id.* at 147-81.

the secular equivalent of the devil. It seems apparent, therefore, that anyone who would become a Nazi in our present society, even if he were not a pederast, is somewhat warped.[48] This becomes more clear in Collin's case once one adds the rather startling fact that Collin's father was a Jew and a survivor of Dachau concentration camp (p.25).[49] Without playing amateur psychiatrist, it seems fair to conclude, simply as an outside observer, that this is a man who was consciously making himself hideous, and either daring or begging society to abandon its principles and oppress him. There is a certain dignity and virtue in refusing to respond to provocation of this kind. It would be easy, after all, to crush Frank Collin, and few would mourn the fact of his demise. By not doing so, however, we reaffirm the principles by which we live.

Virtue has become a popular concept, particularly as a critique of liberal values like free speech. Used in this sense, virtue refers to a specific or substantive position on what constitutes "the good."[50] But it is unclear why free speech does not count as such a virtue.[51] The criterion that Downs proposes is that free speech is procedural, rather than substantive. These are difficult terms, however; they represent a workable distinction in the context of dispute resolution, where they originated, but they cannot necessarily be extended by analogy to broad questions of social policy. The criterion that Rawls suggests is that procedural justice focuses only on the method by which the result is reached, not on the result itself.[52] But this distinction simply defines the term in the same adjudicative context, where pre-existing rules tell us what counts as methodology and what counts as result. In the realm of values there are

48. One question that comes to mind is why Frank Collin did not join the Ku Klux Klan. His political base was Marquette Park, a white, working-class district of Chicago surrounded on two sides by an expanding black community. The residents of Marquette Park hardly were afraid that Jews would come flooding into the neighborhood and destroy their fragile property values. It was blacks they feared, and the Klan, already established in Marquette Park, spoke directly to those fears (pp. 19-20). *See also* D. HAMLIN, *supra* note 1, at 8-11; A. NEIER, *supra* note 1, at 18-19. By joining, Collin would have become a member of an organization that had at least some political power. Moreover, he need not have been concerned that any particular animus he had toward Jews would have been offensive to his fellow Klansmen.

49. According to Downs (p. 25, n.45), this fascinating fact was first reported by Mike Royko, *Ol' Daddy o'Mine Isn't a Nazi Favorite,* Chicago Daily News, June 23, 1977.

50. *See, e.g.*, W. BERNS, FREEDOM, VIRTUE AND THE FIRST AMENDMENT 228-57 (1957); A. MACINTYRE, *supra* note 26, at 181-203; R. UNGER, *supra* note 25, at 236-48.

51. Downs does address the relationship between free speech and virtue, but in his view the virtue involved is a "republican virtue"—the contribution of free speech to serious political debate, and to our willingness as a society to confront difficult issues (pp. 15-17, 111-21). *See also* Bollinger, *supra* note 34, at 456-60, 470-73. That contribution is undoubtedly significant, but the argument still defines the value of free speech in consequentialist terms—its ability to produce long-range results that we prefer for other reasons. As a result, Downs is able to fold his discussion of republican virtue into his overall assessment of harms and benefits. The point here, however, is that free speech can also be virtuous in the intrinsic sense, not because it contributes to some independent value, but because it is a value in itself, a basic component of our political and ethical system.

52. *See* J. RAWLS, *supra* note 40, at 83-90. Rawls uses the term "pure procedural justice."

no such guidelines. If any sense could be made of the distinction in this realm, one would be compelled to conclude that our social value of free speech is not "procedural" at all. It advances quite a definite idea of what is good, and it favors a result, not a methodology by which results are reached. To be sure, a quasi-absolute right of free speech demands an attitude of neutrality towards other values, but that makes it procedural only if those other values count as real values and free speech does not, which is precisely the issue.

Some writers would reject the notion of free speech as virtue on the ground that a particular social value counts as virtue only if it is linked to some coherent moral system, which they would define as a system that produces a unified vision of the self.[53] This argument can be understood as either normative or empirical. As a normative argument, it once again describes the process of justification, not the underlying social reality. It requires that our values, or virtues, fit together in some fashion that is either logically or aesthetically coherent, but it does not explain the reason for imposing this requirement. What precisely is the moral significance of coherence, and why should we regard it as a master value? The cynical observation would be that a preference for coherence simply asserts the occupational self-interest of philosophers. While it is certainly difficult to construct an overarching moral theory without requiring coherence, it is not so difficult to live and act at this less rarified altitude.

Suppose a group of people believes in a quasi-absolute right of free speech and also in racial equality, but it cannot devise a coherent account of the relationship between the two. The group is not necessarily obligated to abandon one of these beliefs, unless it has a separate belief that a coherent account has greater moral significance than either free speech or equality. Of course, it may need to deal with conflicts between its beliefs, and with situations that neither belief covers, something that would not be needed if it chose, and then could actually construct, a coherent, comprehensive system. But conflicts can be resolved by elaborating beliefs, and novel situations can be dealt with by extrapolating from existing beliefs or by developing new ones. Again, it simply is not a foregone conclusion that coherence is the only morally acceptable solution.

As an empirical argument, the demand for a coherent value system is unpersuasive. The most common empirical argument is that the lack of moral coherence produces personal alienation, a sense of separateness

53. *See* A. MACINTYRE, *supra* note 26, at 181-225; M. SANDEL, *supra* note 26, at 15-28, 179-83; R. UNGER, *supra* note 25, at 191-235.

that destroys the real self.[54] This assertion is so familiar by now that we hardly notice it is an incomplete comparative. Once we try to identify some particular society that we are supposed to prefer to our own for its integrated, unalienated world view, the escape from alienation begins to seem less appealing.[55] We do not really know, moreover, whether any alternative we might select represents a real improvement. Perhaps the term "alienation" has become so capacious that it simply designates an inevitable human quandary that takes on a different coloration in each different culture. Or perhaps it is a reality, but one that, as Paul Sniderman suggests, provides essential support for our democratic system.[56] Even if we concede that alienation is a real phenomenon, that our society is so much more alienated than others, and that this acts to our overall detriment, the causal mechanism remains unclear. Can we assume that our philosophy is the cause of our alienation, rather than a reflection of it, and that a change in our philosophy, particularly our political philosophy, would be a likely antidote? Such assumptions would seem to rest on a rather heavily conceptual model of society. If they are wrong, allowing speech to be suppressed would definitively alienate those who are suppressed, and those who sympathize with them, without creating values or reintegrating the self. The deeply rooted pluralism of modern society strongly suggests that this is in fact the result that would occur.

IV

THE ANTILIBERAL CRITIQUE: COMMUNITY

Most antiliberal critics, including Downs, do not rest upon a negative critique of liberal society as lacking values, but also invoke the positive vision of community as an alternative. There is, however, a certain ambiguity in this term. A group of people may be referred to as a community because its members share a common value system and thus can maintain a set of social institutions without the use of continual or overwhelming force. Alternatively, a group may be regarded as a community because it maintains the particular values of mutual support and trust, a commitment to affective relationships rather than abstract principles, and a collective idea of virtuous behavior that constitutes its predominant definition of the self. The former may be called a functional community, the latter an affective community.[57]

54. *See* A. MACINTYRE, *supra* note 26, at 23-25; M. SANDEL, *supra* note 26, at 175-83; R. UNGER, *supra* note 25, at 55-62.

55. MacIntyre's account places ethical systems in their historical setting, but it does not really evaluate the social structure of those settings. When judged under our present value system, the great periods of virtue were also periods of unutterable savagery and oppression.

56. P. SNIDERMAN, A QUESTION OF LOYALTY (1981).

57. *See* P. ROSENTHAL, WORDS AND VALUES 219-50 (1984). Sandel uses the term

The distinction is important because almost everyone agrees that it is desirable to have a functional community, but there is serious disagreement about the desirability of an affective one. By conflating the two concepts, one can confer more support on the affective standard than it would otherwise attract. Consider, for example, the United States. The United States is a community in the functional sense. It consists of a group of people—a rather large, diverse group to be sure—that perceives itself as a poltical and cultural unit, that accepts the legitimacy of its government, and that manages to run a rather large operation with relatively little physical force. But the United States is not an affective community. It is characterized as much by individualistic rivalry and conflict as by support and trust. Its value system is based heavily on abstract principles, and recognizes a relatively wide range of acceptable behavior.

To criticize our society on the basis of a communitarian ideal, therefore, one must favor the more specific notion of an affective community. Affective communities are prominent in the annals of anthropologists, but precisely what would one look like in our current society? Downs suggests that it would look like Skokie, the Skokie which banded together to oppose a moral outrage against one group of its citizens. The difficulty is that Marquette Park (the white, working-class section of Chicago where the Ku Klux Klan is active) is also a community in this sense. The citizens of Marquette Park have also banded together, in their case to protect themselves against the surrounding black community that they regard as foreign to their way of life, as dangerous, and as a threat to the economic value of their houses, the only real assets they possess.[58] One cannot distinguish between Skokie and Marquette Park, moreover, by invoking the idea that a community has equal respect or diguity for all its members. The denizens of Marquette Park were willing to give equal diguity to each other, their opposition being largely directed toward outsiders. And this distinction between members and outsiders simply cannot be defined (or wished) away, since it is central to the idea of a community and certainly central to the affective version of that notion.

Even if one is willing to acknowledge that an affective communitarian ideal would legitimize the values of Marquette Park as well as those of Skokie, there is another problem with linking Skokie to the communitarian ideal. For a community to operate on the affective level, it must first be functional, and Skokie is not a functional community. Although it calls itself a village, with a self-conscious effort to invoke affective

"constitutive community," rather than "affective community." M. SANDEL, *supra* note 26, at 149-53. He compares and contrasts this to an "instrumental community." *Id.* The idea of a functional community is more of a minimum condition than a separate category.

58. *See supra* note 48.

notions,[59] it is not really a village at all, but a 70,000 person slab of megalopolis[60] whose separate political identity gives it little more than the ability to zone blacks out of its housing and exclude them from its schools more effectively and more politely than the urban neighborhood of Marquette Park. Suburban villages like Skokie hardly ever address basic social issues except in bizarre situations like the Nazi demonstration case. Their physical boundaries merge imperceptibly into the larger mass; their psychological and attitudinal boundaries barely exist. The real community, in the sense of a value-creating, separately governed entity, is the United States. It is this community that says to the citizens of Marquette Park that they cannot maintain a local value in violation of our general social principle of equality. It also speaks to Skokie, however, and insists upon the principle of free speech.

This point may seem descriptive, but it contains a general response to a critique based on the affective communitarian ideal. For an ideal to constitute a serious program, it must be mediated through a set of real social institutions. We live in an enormously complex society, governed by a vast administrative apparatus. It is not readily apparent how affective community values can be implemented in that context. The notion of an affective community carries with it an inevitable air of pastoralism, a vague image of small villages whose inhabitants all know and trust each other, live in harmony with nature, and labor at dignified, rewarding tasks. Even when it is not explicitly invoked, this image often serves as the implicit standard of comparison by which our own society is judged to be chaotic, unnatural, and antihuman. Pastoralism, of course, is a deep and constant theme in Western philosophy, as well as Western art. It expresses both a mood and a critique, but it hardly provides much of a prescription.

In contrast, a quasi-absolute right of free speech functions rather well in the sort of state in which we live. The right's effect is to limit the discretion of the thousands of American jurisdictions that possess lawmaking or rulemaking authority, and whose sensitivity to pressure from some angry group of citizens within them increases as their size and resources decline. And the right also limits the discretion of the hundreds of thousands of bureaucrats who apply the law from the obscurity of small, partitioned cubicles equipped with metal desks. Instead of trusting the communitarian instincts of such entities and individuals, it places commanding power in the hands of the courts. As Martin Shapiro points out, the courts are an institution—a political institution—that is uniquely designed to resist such local pressures and affirm diffusely held

59. *See* A. NEIER, *supra* note 1, at 39 (Skokie claims to be the "World's Largest Village").

60. *See* J. GIBSON & R. BINGHAM, *supra* note 1, at 22-23; A. NEIER, *supra* note 1, at 40.

values.[61] At the same time, free speech leaves room for the vast divergence of values that our pluralistic culture generates, allowing important groups to persuade and less important ones to ventilate, and it demands consensus only on the single principle of tolerance.

Even if it could be implemented in a modern society, the affective communitarian ideal would create consequentialist problems that should not be ignored. Historical examples of communities with unified, strongly maintained value systems reveal a level of intolerance and closed-mindedness that few contemporary thinkers are prepared to accept.[62] Indeed, it is hard to imagine how the situation could be otherwise. If people are morally certain about a given view, and totally supported in that certainty by all their compatriots, on what grounds would they want to tolerate the opposite? A society is likely to treat those who express themselves by advancing the opposing view exactly the same way we treat those who express themselves by molesting young children, unless it has an independent commitment to free speech. Thus, just as liberal justifications of our value system can be questioned for arguing backward from their results, antiliberal alternatives can be questioned for stopping short of theirs.

The unpalatable results of a communitarian ideal can be avoided in several ways. One way is to treat community as a principle rather than a literal prescription, and as a general call to recognize our ethical interdependence.[63] Another is to champion a sort of metacommunity, unified around such second-order values as individual fulfillment and social change.[64] These approaches do not really amount to alternative visions, however, but to arguments for the progressive as opposed to the classical, or conservative, brand of liberalism. The progressive critique of classical, your-rights-end-at-my-nose liberalism is based precisely on the idea of social interdependence, and a vision of institutions that change continuously over time to provide individuals with increasingly greater rights and opportunities.

It is notable, in this context, that both Downs and Unger ultimately favor an expansive or quasi-absolute free speech right that is characteristic of progressive liberalism. Downs's suggested change in legal doctrine

61. *See* M. SHAPIRO, *supra* note 17, at 34-39.

62. Medieval France and ancient Sparta would be two of the best examples. Ancient Athens is a more complex case. It did permit free speech, at least for citizens, but its social system as a whole is hardly an attractive one by modern standards. Moreover, Athens was in enormous social turmoil during the fifth and fourth centuries, so that it is hard to know whether it qualifies as a "community." MacIntyre provides an extended discussion of "the Virtues at Athens," but his account focuses on the sophists, Plato, Aristotle, and the tragedians, not on the Athenian social structure. *See* A. MACINTYRE, *supra* note 26, at 135-45.

63. *See* M. SANDEL, *supra* note 26, at 147-74.

64. *See* R. UNGER, *supra* note 25, at 259-77.

is a modest one, which carefully carves out targeted racial vilification from the field of protection (pp. 154-64). Unger justifies freedom of expression on the traditional, liberal basis that discussion is the best route to the truth, and that we can never be certain that we have arrived.[65] In a recent work, moreover, he identifies free speech as one of the "immunity rights" that should "establish the nearly absolute claim of the individual to security against the state, other organizations, and other individuals."[66] That articulation reflects a fairly standard approach to free speech, as well as a fairly standard concept of rights, and its greater reach simply identifies some of the issues that are on the present progressive agenda.[67]

There is nothing wrong, of course, with employing a global critique as a persuasive device to produce incremental change. But such a critique does have the disadvantage of diverting us from the affirmation and extension of our existing value system. As the Skokie case illustrates, there always will be circumstances when an absolute right will produce unfortunate consequences. But the nature of a principle, particularly an absolute principle, is that it must be continually reaffirmed. It must be reaffirmed, moreover, in precisely those settings where it causes some discomfort, or the reaffirmation costs little and means even less. This is not the slippery slope argument that one lapse begins the slide toward total abolition. Rather, each lapse represents a lost opportunity, a failure of the process of reaffirmation that is crucial to a principle's continued vitality.[68] The courts held in favor of the Nazis not because they feared that the alternative was tyranny, just as they did so not because they could not find any way to distinguish between Nazis and Republicans. They held as they did because they are committed to free speech as a positive virtue and a central element of our political faith.

V

FREE SPEECH AND THE ADMINISTRATIVE STATE

In advancing such theoretical arguments as autonomy, self-government, virtue, and community to support a relatively limited recommen-

65. R. UNGER, *supra* note 25, at 280-81.

66. Unger, *The Critical Legal Studies Movement,* 96 HARV. L. REV. 561, 599 (1983).

67. That is, it recommends lowering or removing the state action barrier, a project that was underway when progressive forces were in ascendancy, *see, e.g.,* Amalgamated Food Employees v. Logan Valley Plaza, 391 U.S. 308 (1967), *overruled,* Hudgens v. NLRB, 424 U.S. 507 (1976); New York Times Co. v. Sullivan, 376 U.S. 254 (1964), and which has received wide support from more doctrinally oriented commentators, see L. TRIBE, *supra* note 33, at 1171-74; Henkin, Shelley v. Kraemer: *Notes for a Revised Opinion,* 110 U. PA. L. REV. 473 (1962). The other part of the progressive agenda is access and empowerment, so that those who do not have significant financial resources can be as vocal as those who do. *See* Barron, *Access to the Press—A New First Amendment Right,* 80 HARV. L. REV. 1641 (1967).

68. *See* M. SHAPIRO, *supra* note 17, at 103-04; Bollinger, *supra* note 20, at 632-33.

dation, Downs is both intellectually honest and philosophically challenging. But in the process, he overlooks several aspects of the situation he describes, aspects that relate directly to our existing value system and to the realities of the modern administrative state in which that value system operates. To begin with, the Nazis did not demonstrate in Skokie. They were persuaded to desist by the Justice Department's Community Relations Service, a federal administrative agency. Two employees of this agency managed to frighten Collin about the risks of a Skokie demonstration, and then to take advantage of his fear by producing a federal demonstration site in its stead, and by prevailing on the Chicago Parks District to offer another alternative site, the one Collin originally wanted.

So we did manage to stop the Skokie demonstration and its attendant emotional trauma. In order to condemn our society for its inability to protect people from such trauma, or its failure to distinguish between the Nazis and more respectable groups, one must assume that administrative actions do not count. To be sure, these actions are not fully recorded, they attract less public attention than a trial or appeal, and they do not serve as binding precdent. But they are the basic way by which we run our government, and their obscurity is thus counterbalanced by their ubiquity. By leaving the Community Relations Service out of his evaluative calculus, Downs equates our legal regime with its judicial decisions, precisely the result his wider perspective would seem intended to avoid. In addition, he follows his philosophic sources in equating the totality of our value system with its theoretical component.

Admittedly, Downs's argument may be treated as a critique of the judicial decisions alone, since the judges could not have known that the Community Relations Service would effectively defuse the situation. But even if unplanned, the combined actions of the courts and the Community Relations Service represent a rather reasonable allocation of roles. The courts were able to affirm an important social principle in their role as the primary symbolic speakers of our legal order. And the administrators were able to avoid the negative consequence that this reaffirmation threatened to produce, and to do so in a quiet, subtle way that did not undercut the judicial affirmation. A flexible response of this sort is precisely what a well-functioning system should produce. The system did not give the survivors what they wanted, but it effectively mediated between their individual needs and the needs of society in general.

While Downs does not emphasize the role of the Community Relations Service, he does focus on the counterdemonstration plans of the Skokie survivors and their allies (pp. 54-66, 81-83). And he at least implies that the administrative efforts might not have worked without the underlying threat of violence against the Nazis (pp. 79-80). But this

focus only brings still another administrative agency into the analysis—the Skokie Police Department, and the other law enforcement agencies that had been called or could have been called to their assistance. The department, Downs relates, "was distraught over the institutional incapacity to plan for the counterdemonstration" (p. 83). Even with assistance from Chicago and suburban police forces and the Illinois National Guard, there was doubt that the "50,000 aroused people" (p. 83) who were expected to gather in Skokie could be controlled. But if 50,000 people, even 50,000 aroused people, had planned to march on a nuclear weapons facility, a way of controlling them somehow would have been found. Thus, the crowd's uncontrollability, and the consequent threat to Collin, were very much the product of another administrative decision.

This administrative decision raises a serious problem in terms of our political morality. It was standard adminstrative practice for the Community Relations Service to use the possibility of violence as a method of persuasion.[69] Actually permitting violence to occur, however, which the law enforcement agencies were apparently prepared to do, is quite another matter. The Nazis were authorized to demonstrate in Skokie by the valid and definitive orders of two courts. Whatever one thinks of the counterdemonstrators' actions,[70] their affliction does not seem sufficiently serious, nor their response sufficiently justified, to provide government officials with the moral authority for disobedience.

Downs suggests that the Skokie survivors somehow were driven to desperation by the judiciary's failure to protect them from emotional trauma. The proposed demonstration, he quotes one survivor as saying, "brought back a terror . . . here we are again, in the same position" (p. 85). But this account fails to make the sort of distinction on which political morality depends. The threat that twenty people will demonstrate at a public building, no matter what the content of that demonstration, is not the same as the threat of being sent to a death camp. No one could have had the slightest doubt that all the forces of society stood ready to protect the citizens of Skokie against any illegal behavior by the Nazis. The only time during the entire incident when our society bore any resemblance to Nazi Germany is when the law enforcement authorities indicated that they would not protect a group of unpopular but law-abiding people.

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69. The Japanese call this approach "administrative guidance." *See* C. JOHNSON, MITI AND THE JAPANESE ECONOMIC MIRACLE, 242-74 (1982).

70. Downs seems to approve of the counterdemonstrators' actions. Although he recognizes the psychological and political disadvantages of militancy (pp. 104-09), and describes Meier Kahane as "irascible" (p. 56), his basic tone is one of admiration for the Skokie militants (pp. 54-66). He describes the process of organizing a counterdemonstration and threatening the Nazis with violence as furthering the survivors' acquisition of psychological and political mastery over Nazi oppression (pp. 94-104). But he fails to point out that it was also a plan to engage in criminal activity.

However one judges the counterdemonstrators, the crucial public-policy question is how one judges the behavior of our institutions. Downs is heavily critical of the courts for holding fast to the principle of free speech and thus failing to protect the residents of Skokie against emotional trauma. To some extent he is correct. Our society is a somewhat rough-and-tumble one, and it simply does not offer that sort of protection. To suggest, as Downs does, that the courts' actions represent a breakdown of community protection generally, however, goes too far (pp. 88-91). The decisions represent a reaffirmation of our civil order, an order under which the residents of Skokie have lived and prospered. Admittedly, it is hard to say to a group of concentration camp survivors that their fears about the Nazis are not genuine. But it is harder still to make the same statement to a group of blacks about the Ku Klux Klan, not because of the nasty things we have allowed the Klan to say, but because of the nasty things we have allowed the Klan to do. And those things—the lynchings, the physical intrusions, the economic pressure, the control of entire towns and counties—were carried out in violation of our value of equality, in violation in many cases of our positive laws, and in violation of our value which commands obedience to law under ordinary circumstances.

Judged by our own ethical system, we failed Southern blacks as a society, not the residents of Skokie. It was in the post-Civil War South that we allowed strong pressure groups to dictate public policy, and underlying prejudice to subvert public obligation. The same is true of the Wiemar Republic in which Hitler rose to power, as Neier suggests.[71] In both cases, what was called for was not the limitation of free speech, but the affirmation of the abstract, nonaffective value system of which free speech forms a part. This would suggest that our main concern should be not to suppress reminders of the Klan or Nazi traumas, but to make sure that our government does not allow their repetition through its cowardice or complicity.

It is reassuring that the local police were sympathetic towards the Skokie demonstrators. But their sympathy could have been expressed by refraining from the use of physical brutality, by releasing anyone they detained without making an arrest or by cordoning off the Nazis rather than clearing the crowd. Countenancing mob rule expresses contempt for our value system, not sympathy for the offended. It represents the same sort of failure to enforce our laws and affirm our values as did our toleration of the Klan's activities. Just as the actions of the Community Relations Service deserve to be counted as legal behavior and part of a

71. A. NEIER, *supra* note 1, at 160-68. Our society was not morally responsible for that failure, as it was for the Klan's domination of the South at certain periods, but the example is instructive.

valid social response to the Skokie case, the intended actions of the police deserve to be counted as a legal and a moral violation, a violation that would have been far worse than any judgment error purportedly made by the judiciary.

Downs's apparent equanimity about this legal error can be reasonably regarded as a product of the arguments that he deploys.[72] Although these arguments differ greatly in their attitude toward the liberal state, they share a certain theoretical methodology. The autonomy and self-government principles would modify our first amendment values in accordance with contractarian arguments that have been advanced to justify those values. The substantive virtue and communitarian principles reject our first amendment values on the basis of the defects in those contractarian arguments and offer to replace them with new values based on arguments of equal philosophic abstraction. Both arguments, moreover, invoke a fanciful and oversimplified image of society, whether it is the schematic contractarianism of the liberal theorists, or the unarticulated pastoralism of their opponents. To be sure, these simplifications are evocative, and their best formulations have a seriousness that renders it improper to dismiss them out of hand. But their relevance to a modern administrative state remains open to question. If we accept either theory, we lose the opportunity to reaffirm our existing values, and to extend them by organic extrapolation. Since we have managed to run a rather complex society with those values, and to generate a substantial amount of progress in the direction that both philosophic arguments want us to move, the loss of such an opportunity should not be taken lightly.

Ideas and theories are important, and there is at least the possibility that their ultimate effects on society are profound. But at the point where those ideas intersect social policy, we must decide whether we prefer their implications to a more descriptive ethic based on our existing values. We find ourselves, after all, in the midst of history, inhabiting an enormous nation whose citizens frequently despise each other, and ruled by a government with several million armed men under its command and the technological capacity to turn any segment of humanity into a thin gas within about the space of half an hour. In this setting, free speech is a right that actually works, that curbs the natural instinct of our citizens and our government to suppress the things that they do not want to hear. Downs correctly identifies the harms the right produces in a specific situation, and his modification of that right would be unlikely to have major ramifications. But in the final analysis, the choice is whether we prefer to modify our right of free speech when we have the opportunity to reaffirm it.

72. Downs's only comment about the police behavior is that the village of Skokie "felt its image to be tarnished" (p. 83).