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Introduction

Speech, Privacy, and Dignity in France and the United States

1.1 ENLIGHTENMENT VALUES IN THE BALANCE

What are the just limits of freedom of expression in relation to the protection of other values like privacy and human dignity? To what extent should offensive speech be protected? What is the proper equilibrium between speech and other rights when in conflict? Is it legitimate for the state to define the content and limits of freedom of expression to protect other values or should civil society accomplish this task by itself? Is it legitimate for the state to intervene to protect its citizens from the danger of forming the wrong opinions? Is it legitimate for the state to intervene to protect citizens from modes of self-expression that could be considered by a part of society as violating the dignity of the person expressing themselves? The answer to these questions would be different in France compared to the United States, despite the fact that both countries share the same philosophical background of the Enlightenment.

Freedom of expression is a liberty at the core of the preoccupations of the Enlightenment. Two legal systems founded upon this similar philosophical and political background use state coercion differently to regulate a liberty at the core of the Enlightenment. This book studies this variety in the protection of freedom of expression to offer a philosophical reflection on the just limits of freedom of speech. France is more willing to accept limitations while the United States has opted for a regime that is very protective of free speech.[1] In the United States, the legal protection of freedom of expression trumps the protection of other values, like privacy or human dignity, a sign of American exceptionalism.[2] Social restrictions from civil society and political correctness limit expression. By contrast, limitations

[1] Robert Post and Peter Molnar, "Interview with Robert Post," in Michael Herz and Peter Molnar, eds., *The Content and Context of Hate Speech: Rethinking Regulation and Responses* (Cambridge University Press, 2012), 11. Frederick Schauer notes the importance of freedom of the press as a check on the government in Frederick Schauer, *Free Speech: A Philosophical Inquiry* (Cambridge University Press, 1982), 43–44.

[2] Frederick Schauer, "The Exceptional First Amendment," in Michael Ignatieff ed., *American Exceptionalism and Human Rights* (Princeton University Press, 2005), 29–56.

to freedom of expression are legitimate in France, in order to protect other competing values. The role undertaken by civil society in the United States is undertaken by the state in France. Civility norms are enforced by the state in France, which is not the case in the United States, where limitations to self-expression, which could be seen as violating the "dignity" of the person expressing themselves, would not be accepted. Examples of this divergence abound, concerning all cases of possible conflict between freedom of expression and other values, such as hate speech, freedom of religion, and invasion of privacy, as well as various modes of expression.

Hate speech is not protected in France.[3] Defamation on the basis of a person's "race" is punished more heavily than "ordinary" defamation and constitutes a "special crime."[4] By contrast, in American law, freedom of speech is a "preferred" liberty even when it is in conflict with other values. The US Supreme Court does not accept content restrictions on speech. Only time, place, and manner restrictions are accepted. In the United States, campus speech codes have been struck down as unconstitutional.[5] According to the Supreme Court, when the government restricts speech because of its communicative impact, even when the speech falls within one of the exceptions to the protection of free speech, limiting hate speech is impermissible viewpoint discrimination.[6] Although the Supreme Court upheld a group libel law in 1952,[7] the decision is no longer treated as good law.[8] Since *Brandenburg* v. *Ohio*,[9] the Court accepts that speech can be limited only if there is an "imminent danger" of causing harm. This criterion requires incitement to an illegal act, which is very likely to be committed, according to John Stuart Mill's conception. This protective regime applies against any state attempt to limit hate speech. In private settings where there is no state action, hate speech can be regulated in the United States too.

The denial of "the existence of one or more crimes against humanity" and "apology for crimes against humanity" (defined in the case law as the publication or public evaluation inciting its recipients to make a favorable value judgment on one or more crimes against humanity and tending to justify these crimes)[10] is a criminal offense in France.[11] The French Constitutional Council held that the

[3] See generally Ioanna Tourkochoriti, "Should Hate Speech be Protected? Group Defamation, Party Bans, Holocaust Denial and the Divide between Europe and the US," *Columbia Human Rights Law Review* 45 (2014), 552–622.

[4] Code pénal [C. pén] [Penal Code], art. R625-7, modifying arts. 32 and 33 of Loi sur la liberté de la presse du 29 juillet 1881 [Law of July 19, 1881 on the Freedom of the Press].

[5] *Doe* v. *Univ. of Mich.*, 721 F. Supp. 852 (E.D. Mich. 1989); *Corry* v. *Stanford*, No. 74039 (Cal. Super. Ct. Santa Clara Co. Feb. 27, 1995).

[6] *R.A.V.* v. *City of St. Paul, Minnesota*, 112 US 2538 (1992).

[7] *Beauharnais* v. *Illinois*, 343 US 250, 266 (1952).

[8] *Nuxoll* v. *Indian Prairie School Dist.*, 523 F.3d 668, 672 (7th Cir. 1985).

[9] 395 US 444 (1969).

[10] Tribunal de grande instance [TGI] [ordinary court of original jurisdiction] Nanterre, Sept. 23, 1987, Gaz. Palais 1987, 2, 672.

[11] On the basis of the "Gayssot Law" – Loi 90-615 du 13 juillet 1990, tendant à réprimer tout acte raciste, antisémite ou xenophobe [Law 90-615 of July 13, 1990 against any racist, antisemitic or xenophobic acts], *Journal Officiel de la République française* [JO] [Official Gazette of France], July 4, 1990, 8333.

Gayssot Law, which outlaws denial of the Holocaust, is in conformity with the Constitution as it aims to limit an "abuse" of the exercise of freedom of expression.[12] French legislation criminalizing the denial of crimes against humanity, similar to that which exists in other European countries, has inspired Framework Decision 208/913/JHA[13] of the Council of the European Union, which encourages other member states to enact similar legislation. By contrast, Holocaust denial is protected in the United States.[14] As the US Supreme Court clarified, even demonstrably false statements are protected.[15]

The US Supreme Court has invalidated federal legislation imposing limits on independent expenditures – political campaign communications usually made by corporations independently from the candidate – as a violation of their speech rights.[16] The Supreme Court invalidated legislation prohibiting independent spending by corporations "for speech defined as an 'electioneering communication' or for speech expressly advocating the election or defeat of a candidate."[17] France regulates the funding of political campaigns strictly and imposes upper ceilings to campaign expenditure.[18] In the United States, the newspaper industry was granted an exception from antitrust laws, which has led them to pursue a business model of maximizing monopoly profits.[19] This model has led to a significant crisis with the evolution of new communication platforms on the internet. French legislation gives judges the option of suppressing allegations of facts during electoral campaigns that are "inexact or deceiving" and of a nature to alter the sincerity of the voting process via an urgent requests process.[20] The French Audiovisual Superior Council can unilaterally terminate a contract with a broadcasting corporation when it transmits

[12] Conseil Constitutionnel [CC] [Constitutional Council], decision no. 2015–512 QPC, Jan. 8, 2016, JO, Jan. 10, 2016, 20.

[13] 2008 OJ (L 328), 55.

[14] Robert Kahn, *Holocaust Denial and the Law: A Comparative Study* (New York, Palgrave, 2004).

[15] *United States* v. *Alvarez*, 132 S. Ct. 2537 at 2547 (2012).

[16] *Citizens United* v. *FEC*. 558 US 310 (2010).

[17] Bipartisan Campaign Reform Act of 2002, § 441b.

[18] Loi 88–226 du 11 mars 1988 relative à la transparence financière de la vie politique [Law 88–226 of March 11, 1988, relating to financial transparency in political life], JO, Mar. 12, 1988, 3288; Loi 88–227 du 11 mars 1988 relative à la transparence financière de la vie politique [Law 88–227 of March 11, 1988, relating to financial transparency in political life], JO, Mar., 12, 1988, 3290; Loi 90–55 du 15 janvier 1990 relative à la limitation des dépenses électorales et à la clarification du financement des activités politiques [Law 90–55 of January 15, 1990, relating to limits on election expenditures and the reporting of political funding activities], JO, Jan. 16, 1990, 639. On the ceilings to campaign expenditures, see the decision of the Commission nationale des comptes de campagne et des financements politiques [National Commission on Campaign Accounts and Political Financing] of November 26, 2007, regarding Nicolas Sarkozy, presidential candidate, JO, Jan. 10, 2008, 574. See the site maintained by the Library of Congress in the United States www.loc.gov/law/help/campaign-finance/france.php

[19] Adam Lebovic, *Free Speech* and *Unfree News: The Paradox of Press Freedom in America* (Cambridge, MA: Harvard University Press, 2016), 213.

[20] Loi 2018-1202 du 22 Décembre 2018 relative à la lutte contre la manipulation de l'information [Law 2018-1202 of December 22, 2018 on the fight against fake news], OJ, Dec. 23, 2018, art. 1, modifying Code électoral [Electoral Code], art. L. 163–2(1).

"false information."[21] The law applies to corporations broadcasting in France controlled by foreign states. Legislation also obliges online platforms to take measures against the transmission of "false information" that can disturb public order.[22]

The divergence is also obvious in the area of self-expression. Wearing conspicuous religious symbols has been forbidden in "public schools and high schools" in France since 2005.[23] In 2010, the French parliament banned the wearing of the burka.[24] Covering one's face in public places is forbidden in reference to a conception of human dignity that dictates showing one's face to others. The European Court of Human Rights did not find that, by banning the burka, France had violated the right to freedom of religion under Article 9 of the European Convention of Human Rights, considering that the state has the authority to define "the circumstances of living together."[25] Limitations on the wearing of headscarves by students in schools were not accepted in the United States.[26] The hybrid rights doctrine offers strong protection for these claims, as they are founded both on the freedom of expression and freedom of religion clauses of the First Amendment. Prohibitions on facial coverings in public places would be accepted only in narrowly defined circumstances and for limited purposes related to public security.[27]

French courts are more willing to adopt a philosophical conception of human dignity as transcending the individual and imposing obligations toward the self, which must be enforced by the state. The French Council of State upheld the decision of a mayor, taken within his police authority, banning the practice of "dwarf-throwing."[28] For the Court, the respect of human dignity is one of the components of public order. According to the conclusions of Patrick Frydman, solicitor general at the Council of

[21] Loi No 2018–1202 du 22 Décembre 2018 relative à la lutte contre la manipulation de l'information, OJ, Dec. 23, 2018, art. 8, modifying Loi 86-1067 du 30 septembre 1986 relative à la liberté de communication [Law 86-1067 of September 30, 1986 on freedom of communication], OJ, Oct. 1, 1986, art. 42–46.

[22] Loi 2018–1202 du 22 Décembre 2018 relative à la lutte contre la manipulation de l'information, OJ, Dec. 23, 2018, art. 11.

[23] Loi 2004-228 du 15 mars 2004 encadrant, en application du principe de laïcité, le port de signes ou de tenues manifestant une appartenance religieuse dans les écoles, collèges et lycées public [Law 2004-228 of March 15, 2004 concerning, in application of the principle of separation of church and state, the wearing of symbols or clothing demonstrating religious affiliation in public primary and secondary schools], JO, Mar. 17, 2994, 5190. For a presentation, see Jonathan Laurence and Justin Vaisse, *Integrating Islam: Political and Religious Challenges in Contemporary France* (Washington, DC: Brookings Institution Press, 2006), John R. Bowen, *Why the French Don't Like Headscarves* (Princeton University Press, 2006).

[24] Loi 2010-1192 du 11 octobre 2010 interdisant la dissimulation du visage dans l'espace public [Law 2010-1192 of October 11, 2010, prohibiting the concealment of the face in public spaces], JO, Oct. 11, 2010, 18344.

[25] ECtHR, S.A.S. v. *France*, App. no. 43835/11, Judgment of July 1, 2014.

[26] See for instance Consent Order, *Hearn* v. *Muskogee Pub. Sch. Dist.* 020, No: CIV 03–598-S (E.D. Okla. 2004), available at www.justice.gov/crt/spec_topics/religiousdiscrimination/hearn_consent_decree_final.pdf.

[27] See Ioanna Tourkochoriti, "The Burka Ban: Divergent Approaches to Freedom of Religion in France and in the U.S.A.," *William andMary Bill of Rights Journal* 20 (2012), 791–852, esp. 824–25.

[28] Conseil d'Etat [CE] [Council of State], Assemblé [Ass.] [Assembly], Oct. 27, 1995, 136727, www.legifrance.gouv.fr/affichJuriAdmin.do?idTexte=CETATEXT000007877723.

State, the activity violated not only the dignity of the person being thrown but also the dignity of the spectators and the dwarfism community.[29]

The divergence also concerns cases where expressive interests conflict with privacy rights. The privacy of public figures is strictly protected in France.[30] In French law, the public's right to knowledge about public officials covers only private facts relating to public office.[31] Legislation prohibits the publication of elements of identification of victims of sexual aggression and suspects of crimes.[32] The US Supreme Court has on occasion held that similar legislation is unconstitutional.[33] The European Court of Human Rights has held that the privacy protection standards imposed on the press in France apply to all the member states of the Council of Europe.[34] The US Supreme Court, on the contrary, is predisposed to finding any conceivable justification to refuse media responsibility.[35] The Court has held that the notion of "newsworthiness" has constitutional value.[36] The recent history of the protection of free speech under the First Amendment in the United States shows that it has served as a "powerful engine of constitutional deregulation" in many areas where government regulation is accepted in Europe, such as data privacy.[37] Overall, informational privacy is not considered to be a value significant enough to mobilize state coercion for its protection. The Supreme Court has for example invalidated legislation that barred pharmacies from disclosing information to data miners.[38]

[29] Patrick Frydman, Concl., CE Ass., Oct. 27, 1995 (two cases), *Commune de Morsang-sur-Orge* and *Ville d'Aix en Provence*, *RFDA* (1995), 1204–15.

[30] Richard Malka, "Le droit à l'information n'est pas le droit à l'humiliation," *Le Monde*, May 16, 2011; Richard Malka, "Affaire DSK: la presse anglo-saxonne s'attaque à la culture française du secret," *Le Monde*, May 17, 2011. See the Opinion of the Conseil supérieur de l'audiovisuel [French Superior Audiovisual Council], May 17, 2011, www.csa.fr/Espace-Presse/Communiques-de-presse/Le-Conseil-appelle-les-chaines-a-la-plus-grande-retenue-dans-la-diffusion-d-images-de-personnes-mises-en-cause-dans-une-procedure-penale; Richard Malka, "Affaire DSK: le CSA appelle les chaînes de télévision à 'la retenue,'" *Le Monde*, May 17, 2011.

[31] See Ioanna Tourkochoriti, "Speech, Privacy and Dignity in France and the USA," *Loyola Los Angeles International and Comparative Law Review* 40 (2016), 101–82.

[32] Loi 2000–516 du 15 juin 2000 renforçant la protection de la présomption d'innocence et les droits des victimes [Law 2000–516 of June 15, 2000 strengthening the protection of the presumption of innocence and victims' rights], JO, June 16, 2000, 9038.

[33] *Cox Broad. Corp.* v. *Cohn*, 420 US 469 (1975); *Florida Star* v. *B.F.J.*, 491 US 524 (1989); *Globe Newspaper* v. *Superior Court*, 457 US 596, 607–8 (1982); *Smith* v. *Daily Mail Publ'g Co.*, 443 US 97, 108–9 (1979).

[34] ECtHR, *Von Hannover* v. *Allemagne*, App. no. 59320/00, Judgment of June 24, 2004. This case concerned the publication of pictures of a member of a royal family in public places during activities, which according to the opinion of the court are "private." For the European Court of Human Rights the privacy of a member of the family of one of the European monarchies is protected if the person is in a public place shown in an activity not related to public life.

[35] Paul Gewirtz, "Privacy and Speech," *Supreme Court Review* 139 (2001), 140.

[36] See *Cox Broad. Corp.* v. *Cohn*, 420 US 469 (1975).

[37] Robert Post and Amanda Shanor, "Adam Smith's First Amendment," *Harvard Law Review Forum* 128 (2015), 165.

[38] *Sorrell* v. *IMS Health Inc.*, 131 S. Ct. 2653, 2672 (2011). For a comparison with EU legislation in the area, see Ioanna Tourkochoriti, "The Snowden Revelations, The Transatlantic Trade and Investment Partnership and the Divide Between US–EU in Data Privacy Protection," *University of Arkansas Law*

Some overdetermination of the content of freedom of expression by the state is legitimate in France while it is not in the United States. American law tolerates violations of other liberties by freedom of expression, which other legal systems do not tolerate. This book analyzes two different approaches, the American and the French, on the proper limits to freedom of expression. It focuses on the study of the social and political context in which these norms were elaborated. It argues that the difference in the balancing of the two rights can be understood by reference to the philosophical presuppositions underlying the two legal orders. These presuppositions are expressed in legal arguments. They reflect philosophical ideas formed due to different historical, and political contexts. They reflect a difference in the conception of the role of the government regarding the degree of its intervention in civil society. They also reflect a different role for the government in determining the content and limits of freedom of expression. This understanding of the role of the government was formed at the foundation of the two democracies in response to concrete political problems. Legislation limiting speech is frequently invalidated by the US Supreme Court. In France, similar legislation in many cases was not even referred to the Constitutional Council (under the previous system of deferral to the Council based on the initiative of members of the parliament or the president). This indicates that the difference relates to the interplay between law and liberty in the two legal systems. The debates around the French Revolution, the Declaration of Independence in the United States, and the construction of the federal government there are instructive in relation to this interplay between law and liberty. These debates to a great extent formed the understanding on the proper relation between law and liberty.

In comparing the French and American approaches to free speech in this book, I identify, relatively, more and less legitimate exercises of government power in regulating speech. It is possible to distinguish between these more and less legitimate cases and to reflect critically upon both traditions to propose a theory of free speech. In France, the dominant tradition of trust toward the state leads to an overdetermination of the content and limits of liberty, including free speech. In the United States, the tradition of distrust leads to an underdetermination of the same liberty. Understanding how the two traditions emerged can help us to engage in a critical reflection in order to retain the best elements of both traditions. Understanding the origins of legal rules does not mean accepting historical determinism.[39] Limits on free speech are justified in order to protect other values such as human dignity and privacy, and in order to ensure that everybody has access to public debate. When speech violates privacy, it is the dignity of the person whose

Review 36 (2014) 161, 167; Paul M. Schwartz and Daniel J. Solove, "Reconciling Personal Information in the United States and European Union," *California Law Review* 102 (2014), 877; Paul M. Schwartz, "The EU-US Privacy Collision: A Turn to Institutions and Procedures," *Harvard Law Review* 126 (2013), 1966.

[39] Cf. Eric Heinze, *Hate Speech and Democratic Citizenship* (Oxford University Press, 2016).

privacy is violated that should be protected over the dignity of the speaker. A presumption in favor of privacy, dominant in France, is preferable in this case, though this area involves difficult ad hoc considerations of public interest.

Limitations to hate speech are justified when it has an individualized target. In this case, the harm caused due to the performative effects of speech is very important. Speech has the potential to accentuate marginalization and oppression. Speech has this performative effect when it targets a person individually. It is less easy to specify its harmful effect when speech has the form of broad statements, even concerning social groups. This means that legal sanctions as understood in France for "group defamation" are not justified. The very existence of an offense of group defamation is a case where the government overdetermines speech. Similarly, there should be no legal responsibility for speech challenging historical facts, even denying the existence of crimes against humanity. In this case, the causal link between a statement that describes a fact and the offense/harm caused is very weak. As I argue, legislation criminalizing the denial of crimes against humanity is justified only in reference to the emotion of guilt.[40] If societies feel guilty for terrible atrocities that took place in their midst, this is a very weak basis to justify limitations to freedom of speech. Therefore, the American solution, which trusts the reason of the individual to decide in these cases, is preferable. In some others, such as the dwarf-throwing case or the wearing of headscarves, government intervention is not legitimate and the individual should decide for themselves how to treat themselves. In both those cases, the reason of the individual should be trusted. The limits on self-expression imposed by French law are not justified. Regarding the regulation of political campaigns, it is imperative to protect the public debate from distortions and corruption. Therefore, in this case, the French solution is preferable to the American one.

The difference in the regulation of freedom of expression can be understood, I argue, in reference to the difference in the understanding of republicanism in France and in the United States. American republicanism associates the need to protect the common good with respecting the "natural liberties" of the individual. Government exists in the United States to protect the natural negative liberties of the citizens. The common good itself is associated with the protection of the liberties of the citizens. This can help us understand why the neo-Roman understanding of republicanism that insists on a mixed system of government has been dominant in America since the Founding Era. A conception of balanced government corresponds to the distrust toward the government. French republicanism protects the rights of the individual only to the extent that they promote the common good. It is closer to the conception dominant in antiquity. Republicanism in France is permeated with trust toward the state, which has its origins in the political theories that

[40] See Ioanna Tourkochoriti, "Challenging Historical Facts and National Truths: An Analysis of Cases from France and Greece," in Uladzislau Belavusau and Aleksandra Glyszczynska Grabias, eds., *Law And Memory: Towards Legal Governance of History* (Cambridge University Press, 2017), 151.

were dominant before the French Revolution. According to the French conception, rights are rules that regulate social interaction. They exist only because they are recognized by the state. They do not make sense outside of society and the state. The quality of citizen is primary and serves as the foundation of the rights of man. These ideas, related to the two different conceptions of republicanism, can assist our understanding of the difference in the protection of freedom of expression in France and in the United States.

Freedom of expression is very important both for individuals and societies. Numerous thinkers have emphasized the importance of freedom of speech for the intellectual development of humanity. Locke and Spinoza note the link between freedom of expression and freedom of thought and conscience. Spinoza notes that attempts by the state to limit how a human being thinks, and by extension to limit the expression of their opinions, are pointless.[41] For Spinoza, the very purpose of the state is to allow persons to "use their reason freely."[42] An understanding of the importance of mental autonomy underlies his analysis. Were this freedom suppressed, human beings, while not expressing their opinions, would still retain them, which would lead to generalized corruption in the state and the "good arts." Limitations would bring about stubborn resistance endangering peace in the state. Locke expands on this idea noting that questions of faith and thus expression of this faith belong to the individual.[43] It is impossible for a person to ensure that their faith conforms to the dictates of another. The nature of human understanding is such that it cannot be compelled to the belief of anything by outward force. Penalties, he thinks, are not capable to change one's beliefs. "It is only Light and Evidence that can work a change in Mens Opinions" [sic].[44] Voltaire also notes the importance of protecting expression, which helps human beings elaborate their reason and reach maturity of thought.[45] Criticizing religious fanaticism, he makes a compelling argument in favor of the freedom of speech of minority religious groups.[46] This argument would mean for us today that human beings have an interest in expressing themselves through dress and other choices in ways that are considered eccentric and unusual, an argument relevant to the debate on the permissibility of wearing conspicuous signs of religious affiliation in France.

Milton articulates a powerful critique against prohibition of books and prior restraint for speech.[47] For Milton, freedom of speech is important for civil liberty

[41] Benedict Spinoza, *Tractatus Theologicophilosophicus*, trans. Jonathan Israel and Michael Silverthorne (Cambridge University Press, 2007 [1670]), chap. 20, 250–59.
[42] Ibid., chap. 20, 240.
[43] John Locke, *Letter concerning Toleration* (Indianapolis, IN: Liberty Fund, 2010 [1689]), 35–67.
[44] Ibid., 40.
[45] Voltaire, *Toleration and Other Essays*, trans. Joseph McCabe (New York and London: G.P. Putnam's Sons, 1912), 27.
[46] Ibid., 32, discussing that the Greeks allowed the Epicureans to deny providence and the existence of the soul.
[47] John Milton, *Areopagitica* (Cambridge University Press, 1918 [1875]).

but also for the development of the individual themselves; men attain "the utmost bound of civil liberty when complaints are freely heard, deeply considered and speedily reformed."[48] Limiting the circulation of books hinders and crops the discovery that might be made in religious and civil wisdom, he notes.[49] "He who destroys a good book, kills reason itself."[50] According to Milton, revolutions of ages do not recover the loss of a rejected truth, for the want of which whole nations fare the worse. Milton discusses cases where ancient Athens ordered the burning of books. The judges of Areopagus commanded the books of Protagoras to be burned and the man himself banished from the territory because he expressed doubts as to the existence of the divinity.[51] Milton notes that all opinions and even errors are of service and assistance toward attaining the truth.[52] Good and evil are interwoven, he notes: they grow up together almost inseparably.[53] The knowledge of the one presupposes the other. It is the knowledge of what is evil that defines wisdom. Milton's argument stresses the need to protect individual freedom of choice of opinions that are right or wrong.[54] Optimistic as to the possibility to discover truth, Milton notes that it will always prevail.[55] He also brings an interesting nuance in his conception of truth. For him truth is like Proteus: "she may have more shapes than one."[56] Expressing an insight later expressed by Hegel, he notes that truth may be on both sides of an issue "without being unlike herself."[57]

Deontological justifications focus on principled a priori reasons to protect freedom of speech. According to a deontological argument for freedom of speech, human beings have the right to express themselves and to receive information in order to develop their personality. This is a right that should be recognized for everyone out of unconditional respect for their dignity. Freedom of expression is important for intellectual freedom. Freedom of speech allows the public use of reason, which, for Kant, can bring enlightenment in men on its own.[58] As humanity is entitled to unconditional respect, this means that human beings must have the liberty to invent themselves. For Kant, this is a duty that human beings have toward themselves. Other scholars have expanded this insight, noting that human beings have an interest in forming their personality.[59] Freedom of expression allows human

[48] Ibid., 2.
[49] Ibid., 6.
[50] Ibid., 7.
[51] Ibid., 8.
[52] Ibid., 19.
[53] Ibid., 20.
[54] Ibid., 20.
[55] Ibid., 59.
[56] Ibid., 59.
[57] Ibid.
[58] Immanuel Kant, "An Answer to the Question: 'What is Enlightenment?'" in H. Reiss, ed., *Political Writings*, trans. H. B. Nisbet (Cambridge University Press, 1970 [1784]), 54–60, esp. 55.
[59] Seana Shiffrin, *Speech Matters, On Lying, Morality, and the Law* (Princeton University Press, 2014), David A. J. Richards, "Free Speech as Toleration," in W. J. Waluchow, ed., *Free Expression: Essays in*

beings to find meaning in their lives. According to Dworkin, when the government limits a person's speech it is an affront to their dignity as it treats that person as not worthy of equal respect by the government.[60]

In the same spirit, according to an argument inspired by Rawls, freedom of speech is a basic liberty necessary for the development of the moral faculties of every person. It facilitates the formation of moral agency. For Rawls, "freedom of thought and liberty of conscience and so on" are "the background institutional conditions" necessary for the development of the moral powers of a person.[61] Those moral faculties are the capacity to develop a conception of the good and a sense of justice. Freedom of expression allows a person to develop their autonomy.[62] Respect for the humanity of each person dictates that they are allowed to receive information that will help them form their opinions and express them. Freedom of expression can enhance the quality of human life through the experience of various intellectual stimuli including art and social satire.[63]

According to John Stuart Mill's classic consequentialist defense, freedom of expression benefits individuals and societies alike.[64] A society has a better chance of discovering truth in scientific, political, and moral questions if it tolerates the free expression of ideas.[65] Mill emphasizes that when the state suppresses an opinion it assumes infallibility. He is in favor of the intellectual challenge of ideas, to prevent them from becoming dead dogmas. He notes the paradox that truth is very often the result of conciliation and combination of extremes. Optimistic about the rational capacities of humanity, Mill considers that truth prevails against error. He is criticized in this respect by Isaiah Berlin, who stresses that the domain of the irrational is much more complex than Mill imagines.[66] Demagogues and liars are not always stopped in time.[67] In France, bans on hate speech reflect this criticism by Berlin. They are justified by reference to the belief that state rationality can guide the reason of the individual and protect vulnerable individuals from offense.

In philosophy of science the current of phenomenology has made the conception of "objective" scientific truth relative. Husserl and Heidegger have noted that we can

Law and Philosophy (Oxford: Clarendon Press, 1994), 21; Joshua Cohen, "Freedom of Expression," *Philosophy & Public Affairs* 22 (1993), 207.

60 Ronald Dworkin, *Taking Rights Seriously* (Cambridge, MA: Harvard University Press, 1977) 198–99.

61 John Rawls, *Political Liberalism* (New York: Columbia University Press, 1993), 308.

62 For an association of freedom of expression with autonomy see Thomas Scanlon, "A Theory of Freedom of Expression," *Philosophy & Public Affairs* 1, no. 2 (1972), 204.

63 On the importance of freedom of expression for pursuing one's goals and aspirations see also Joshua Cohen, "Freedom of Expression," 207.

64 John Stuart Mill, "On Liberty," in *On Liberty and Other Essays*, ed. John Gray (Oxford University Press, 1998).

65 Ibid., 21.

66 Isaiah Berlin, "John Stuart Mill and the Ends of Life," in *Four Essays on Liberty* (Oxford University Press, 2002), 233; Paul Ricoeur, "The Erosion of Tolerance and the Resistance of the Intolerable," in Paul Ricoeur, ed., *Tolerance between Intolerance and the Intolerable* (New York: Bergahn Books, 1996), 197.

67 Ibid.