

DIGNITY, AUTONOMY, AND DEMOCRACY

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It is an honor to be asked to deliver the first annual Richard Daub lecture. Richard Daub is a great figure in the history of German journalism. He believed in and worked for the establishment of a profession of journalism. And of course since at least the time of the French Revolution, the press--and the journalists who make the press--have provided the structural foundation for communication within the public sphere. That communication is the basis of modern democracy.

Now I have been asked today to address the topic of "Dignity versus Democracy." That is an immense topic, with countless ramifications. But, in deference to the work of Richard Daub, I shall approach this topic from the particular perspective of public communication. About expression within the public sphere we can say both that it is generally recognized as essential to democracy, and also that various forms of public speech can imperil human dignity. The precise topic which I will address, therefore,

is how we can conceptualize and resolve this potentially disturbing contradiction.

I shall address this question by discussing, first, the meaning of democracy and its connection to the value of autonomy. I shall then analyze the meaning of dignity and, finally, offer a conceptual framework for understanding the fraught and complex relationship of dignity to democracy within public discourse. Unfortunately, there can be no simple resolution of the tensions implicated in this intricate relationship.

### **DEMOCRACY**

There is at present a great deal of confusion regarding the meaning of democracy. In the eyes of many theorists, some of whom are quite sophisticated, democracy means the rule of a majority. But majoritarianism is a method of preference aggregation and decisionmaking. It does not explain why we would use this rule of decisionmaking.

Democracy is a value that contains within it such an explanation, for we adhere to majoritarianism because we believe in democracy, and not the reverse. Democracy is not merely a Linnean classification used by descriptive political scientists to describe a particular form of

government. As Frank Michelman has observed: "Democracy is a demanding normative idea, an idea with content, however uncertain or disputable its content may be."<sup>1</sup>

What is this value of democracy? I believe it lies in the good of collective self-determination. To live in a democratic state is to live in a society in which "we the people" govern ourselves. We are not governed by a king, or by a colonial power, or by an external force. We are not heteronomous subjects, but to the contrary we exercise our own collective autonomy.

But there is a problem here. We have some idea what it means for a person to be autonomous, for a person to lay down the rules which shall govern his own conduct. But what does it mean for a collection of persons to do the same thing? Why isn't every majority decision simply a heteronomous imposition on a minority? If I lose a vote, why don't I feel constrained by the 51% of my fellow citizens who think differently and who are imposing their will on me?

This question illustrates why simple majoritarianism cannot be the same as democracy. If I were black and I lived in the American South in the 1950s, and if I were perpetually outvoted on every issue so that I experienced

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<sup>1</sup> Frank Michelman, "Brennan and Democracy," 86 Calif. L. Rev. 397, 419 (1998).

myself as perennially estranged and isolated, with no reason to feel that the decisions and actions of the state were in any way connected to me or my views, I would not have the experience of living in a democratic state, even if I were permitted to vote.

What then are the prerequisites for the experience of democratic legitimacy? Rousseau was the first political theorist to address this question and to sketch the outlines of a solution. Rousseau argued that authentic collective self determination only happens when there is a link between the individual self-determination of the citizen and the communal decisionmaking of the society. He identified this link as a correspondence between the particular wills of individual citizens and the general will of the state. Rousseau believed that the particular will of the citizen had, so to speak, to fuse into the general will of the society, so that when obeying the general will, each "obeys no one but himself, and remains as free as before."<sup>2</sup>

In the 20th century, however, most political theorists have regarded this postulated fusion between individual and collective will as far too strong, and indeed as a

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<sup>2</sup>Jean-Jacques Rousseau, The Social Contract 60 (Maurice Cranston trans. 1968).

invitation for tyranny. They have instead argued that democratic legitimacy requires (1) that the public should have a warranted belief that the decisions and actions of the state are responsive to public opinion and (2) that all citizens must have the opportunity freely to participate in the formation of public opinion.

Public opinion is thus conceived as mediating between the particular wills of individual citizens and the general will of the state. It performs this function by including all citizens in an open invitation to participate in an ongoing process of rational deliberation that will ultimately guide political decisionmaking.

Free access to the forms of communication necessary for the formation of public opinion, which I shall call "public discourse," is in this sense a necessary, although not sufficient, precondition of democratic legitimacy. To bar a citizen from public discourse is to deny him the potential for influencing the actions of the state, and, precisely to that extent, to make the state with respect to him heteronomous.

So democratic legitimacy depends in part (and I want to emphasize that it is only in part) upon freedom of public discourse. The identification with the state that

democracy requires does not happen at the point of decisionmaking, but prior to decisionmaking.

This explains why, in the United States, we say of the First Amendment, which protects freedom of public discourse, that it is the "guardian of democracy"<sup>3</sup> even though it sets aside majoritarian enactments. Although the First Amendment is antimajoritarian, it nevertheless safeguards the structural conditions that are necessary for democracy to function.

Notice that this is a very different account of democracy than one finds in the work of American scholars like Alexander Meiklejohn, Owen Fiss or Cass Sunstein. These scholars argue that democracy is about collective decisionmaking, so that the structural prerequisites of democracy are met when constitutional provisions assure free dissemination of information and opinion, so that a citizenry can make wise and informed decisions. Scholars holding this concept of democracy argue that freedom of speech is necessary in order to protect the integrity of the decisionmaking process.

While I would certainly agree that such integrity is a necessary attribute of democracy, the hypothesis I have

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<sup>3</sup> Brown v. Hartlage, 456 U.S. 45, 60 (1982).

advanced would imply that this integrity is not fundamental. Following Rousseau, I have suggested that the normative essence of democracy does not derive from decisions, but from the authorship of decisions. If we can come to embrace government decisions as our own, as representing us, the decisions bear the stamp of democracy, and not otherwise, however well-informed they are.

So my argument is that we protect the ability of speakers to engage in public discourse not merely to ensure informed decisions, but also to safeguard the forms of participation capable of sustaining the sense of authorship which is the source of all democratic legitimacy. On this account, freedom of speech is "speaker-centered," and not, as in the writings of Meiklejohn, Fiss and Sunstein, "audience-centered." The challenge of a democracy is to move from the "I" of the particular citizen, to the "we" of "we the people," who speak in the preamble of both the American and German constitutions.

This view of democracy entails a quite radical implication. Democracy requires us to sustain a social and institutional structure that empowers we, as a people, to choose our destiny, to decide our fate, to make ourselves into what we wish to be. That is what self-determination means. But this suggests that democracy *necessarily* points

toward an open ended future. Democracy requires a very special social and institutional structure that continuously preserves the potential for remaking collective identity.

### **AUTONOMY**

Another way of putting this point is that collective self-determination entails collective autonomy. In a democracy citizens, acting together, lay down the rule by which they are to be governed, and they thereby retain the power to create their own collective identity.

Because democracy requires the identification of individual citizens with the collective will, this point about collective autonomy must also apply to individual autonomy, at least within the realm of public discourse, where individual and collective autonomy are mediated. Citizens can within public discourse enact various laws that control behavior outside of public discourse in ways that exemplify their collective identity. But within public discourse they must always be free to decide what sort of laws they wish the state to enact, and they must be free to advocate for those norms within public discourse. Otherwise they could not view themselves as participating in the authorship of a potentially new collective identity.

This means that democracy requires law to respect the autonomy of citizens within public discourse. This is widely accepted with regard to freedom of opinion. It is generally understood that if the law prohibits certain opinions, it

cuts off the possibility of participating in the open ended future required by democracy. Precisely to that extent the law imposes a version of what the future can or cannot be; citizens prohibited from expressing their opinions in turn are reduced to heteronomous subjects, instead of autonomous citizens. That is why restrictions on the content of ideas in public discourse are inconsistent with the internal logic of democracy.

What is less commonly recognized, however, is that restrictions on the manner of expression within public discourse are equally inconsistent with the internal logic of democracy. Most legal systems outside of the United States permit such regulation. The jurisprudence of the German Federal Constitutional Court, for example, distinguishes between legal control of "*thought-content*," which is said to touch freedom of speech "in its central meaning,"<sup>4</sup> and legal control over the "form of expression," which is said to have less impact on freedom of speech because "formulations of thoughts may be changed without difficulty without harming the idea sought to be communicated."<sup>5</sup>

American constitutional law uniquely rejects this distinction. In America public discourse cannot be regulated

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<sup>4</sup> Echternach case, 42 BVerfGE 167, 169 (1976). Translated in Peter E. Quint, "Free Speech and Private Law in German Constitutional Theory," 48 Md. L. Rev. 247, 322 (1989).

<sup>5</sup> Deutschland-Magazine Case, 42 BverfGE 143, 149-50 (1976). Translated in Edxward J. Eberle, "Public Discourse in Contemporary Germany," 47 Case Western Law Review 797, 844 n.199 (1997).

simply because it is expressed in an indecent, abusive, insulting, or outrageous manner. One reason why we reject the form/content distinction is because we tend to believe that form and content cannot be separated. We have a fundamentally romantic view of language. For the same reason that Percy Bysshe Shelley believed in "the vanity of translation" because a poem could be never be rendered into another language, we tend to believe that every expression communicates a unique meaning.

But, putting this point aside, American constitutional law rejects this distinction for a second reason that is more directly pertinent to our analysis of democracy. This reason becomes visible if we focus on why, under German law -or indeed under any law - we seek to regulate the form of an expression. Typically we do so because we find that the form of an expression is harmful, because a speaker has said something in a disrespectful, insulting, outrageous, or abusive way that is injurious to the dignity of his addressee.

We must ask, however, how words can injure in this way. It is because we live in a society in which relationships between persons are governed by social norms whose violation by particular forms of speech is experienced as injurious. I would like to use the term "community" to stand for a social organization that is

characterized by such norms. The violation of community norms can be experienced as causing injury because such norms are somehow connected to the internal experience of persons. But how can that be?

The answer is that social norms are perpetuated through processes of socialization. Socialization, which is a key concept in sociology and anthropology, is the means by which persons who are raised in a particular culture come to assimilate and identify with the standards and expectations of that culture. These standards and expectations are internalized into the very identity of persons who have been well-socialized into a culture. The best description of this process of internalization is by the American sociologist George Herbert Mead, who wrote:

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

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<sup>6</sup>George Herbert Mead, Mind, Self, and Society 162 (Charles W. Morris, ed.) (University of Chicago Press, 1962).

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

I want to stress four aspects of these norms. First, norms are not merely subjective; they are instead "intersubjective," because they refer to attitudes and standards that persons have a right to expect from others. So, for example, when Charles Taylor refers to "dignity" as rooted in "our sense of ourselves as commanding (attitudinal) respect,"<sup>7</sup> he means, first, that dignity depends upon communal norms that define respect as between persons, and, second, that the right to dignity is not merely subjective, but involves claims that members of a community place upon other members of the community, by virtue of the shared norms of the community.

Second, norms are not merely instilled during processes of primary socialization in the family, but are also continuously reinforced through forms of social interaction that sociologists like Erving Goffman have demonstrated pervade every aspect of ordinary social life. When these forms of social interaction are disrupted, so is the identity of well-socialized members of a culture. If others act in ways that persistently violate the norms that define my dignity, I find myself threatened, demeaned, perhaps even

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<sup>7</sup>Charles Taylor, Sources of the Self: The Making of Modern Identity 15 (Harvard University Press 1989).

deranged. The health of our personality therefore depends in no small degree upon the observance of community norms. That is why the violation of these norms is experienced as injurious.

Third, the injury caused by the violation of these norms is not merely to individuals. The totality of a culture's norms define "its distinctive shape, its unique identity."<sup>8</sup> There is thus a reciprocity between individual identity and cultural identity. Violation of norms is for this reason experienced as an attack on the community itself. That is why, for example, German law seeks to preserve the integrity of both your national flag and your national anthem.<sup>9</sup>

Social norms that reciprocally define individual and community identity are both shared and evolving. They are like a language that conveys meaning only because of common expectations and yet that manages nevertheless to change over time. So my fourth and last point is that norms are for this reason intrinsically contestable. There are constant struggles over the meaning of shared standards and expectations. As a consequence cultures tend to establish institutions, like schools, that offer authoritative

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<sup>8</sup>Kai Erikson, Wayward Puritans: A Study in the Sociology of Deviance 11 (Wiley, 1966).

<sup>9</sup> "The national anthem, which, just as the federal flag, has the significance of establishing identity . . ." "The German National Anthem Case, 81 BverfGE 298, translated in Decisions of the Bundesverfassungsgericht, Vol 2, Part II, at 453. See "Flag Desecration Case," 81 BverfGE 278, translated in id. at 437-49.

interpretations of norms. One of the most prominent of these is the institution of the law. We use the law to stabilize and enforce the forms of respect that define individual and collective identity.

It follows from these four points that when the law seeks to regulate "the form" of public discourse, because that form is deemed harmful, the law is in effect upholding a particular vision of both individual and collective identity. That vision is instantiated in the norms themselves, whose violation is thus experienced as causing both social and individual injury.

For this reason, regulating the form of expression within public discourse to prevent harm exactly contradicts the requirements of democratic autonomy. By imposing one particular normative vision of identity on public discourse, on the very medium of collective self-determination where collective identity is to be constructed, the law shuts down the open space required by democracy to facilitate the creation of new identities.

We can thus understand the refusal of American constitutional law to permit legal restrictions on the manner of speech within of public discourse as following directly from the internal logic of democracy. We could put this point aphoristically, by noting that American constitutional law recognizes that democracy requires a marketplace of communities as well as a marketplace of ideas.

This marketplace of communities transpires within a public space. Within American constitutional law, therefore, the sphere of the public must be experienced as large enough to embrace all possible groups and communities, so that these groups and communities can compete for democratic endorsement. Historically and sociologically, the formation of the public in the United States evolved from "cultural differentiation"; it functioned, as our sociologists have told us, as a "universe of discourse" within which members of distinct communities could nevertheless come together to form a single democratic polity.<sup>10</sup> The paradigmatic image is a city like Chicago, with its myriad ethnic neighborhoods, ranging from Little Italy to Chinatown, which nevertheless must be democratically responsive to all the members of its distinct communities. To be a politician in Chicago requires inhabiting a neutral space between these local communities.

In our conception of democracy, therefore, public discourse appears as a site of difference, in which communication can occur between those who do not share the identity and assumptions that define distinctive communities. Public discourse requires the ability to interact in a "critical"<sup>11</sup> manner that establishes distance

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<sup>10</sup>Carroll D. Clark, "The Concept of the Public," 13 Southwestern Science Quarterly, 311-15 (1933). See Robert E. Park and Ernest W. Burgess, Introduction to the Science of Sociology 254 (1924); Kenneth Ewart Boulding, The Image 137-47 (1956).

<sup>11</sup>Alvin W. Gouldner, The Dialectic of Ideology and Technology: The Origins, Grammar, and Future of Ideology 98 (Seabury Press 1976).

from local certitudes and that thereby creates the possibility of spanning the boundaries between disparate normative groups.

Independent of this sociological history, however, the internal logic of democracy commits the law to the construction of a public discourse that is distinct from the normative sphere of particular communities. It does so because the law must protect the individual and collective autonomy to construct our collective identity in a forward looking way, that may well alter the nature of our present identity, our present community. The extent to which this autonomy extends outside public discourse is a complicated question, which I do not address here. I note only that one purpose of public discourse is precisely to decide which community norms ought to govern our behavior generally. My only point here is to stress that within public discourse, where we decide what our fate is to be, community norms that seek to foreclose this process of decision by imposing particular visions of community and individual identity, cannot be enforced.

#### **DIGNITY**

We are now in a position to address the question of dignity and of its relationship to autonomy.

There is a certain Kantian tradition in which dignity and autonomy are complementary concepts, because dignity

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inheres precisely in the ability of humans autonomously to lay down the rules of their own morality. As Kant puts it, "Autonomy is therefore the ground of the dignity of human nature and of every rational nature."<sup>12</sup> In this tradition dignity means the value of something that has no price, which cannot be used as a means for anything else, and which is therefore of "an unconditioned and incomparable worth—for the appreciation of which, . . . the word 'reverence' is the only becoming expression."<sup>13</sup>

Despite the overwhelming influence of this Kantian tradition, it is striking to note that in almost every modern legal system, dignity and autonomy are often set in opposition to each other. They are frequently seen actually to oppose each other. For example, in his comparative study of bioethics, the anthropologist Paul Rabinow writes:

In the name of dignity of the person, French law basically refuses the individual the right to dispose of his or her body and its parts; American law has allowed greater latitude for proprietary and commercial relations concerning the body and person, privileging autonomy and value over an inherent and inalienable dignity. Autonomy contra dignity, dignity contra autonomy, antinomies linked in an uneasy seesaw, with neither tradition totally eliminating what the other valorizing.<sup>14</sup>

The clash between dignity and autonomy is particularly pressing within the area of freedom of speech, where the

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<sup>12</sup> Immanuel Kant, Groundwork of the Metaphysic of Morals 103 (H.J. Paton Trans, Harper Torchbooks 1956).

<sup>13</sup> Id. at 103.

<sup>14</sup> Paul Rabinow, French DNA: Trouble in Purgatory 93 (University of Chicago Press: 1999).

autonomy of a speaker and the dignity of his audience are frequently seen as opposing each other. In the United States, for example, our Supreme Court has explicitly held that the protection of the dignity of an audience is an insufficient reason to repress the autonomy of speakers with public discourse.<sup>15</sup> By contrast, in German law the autonomy of a writer has been held to be limited by the “dignity” of others.<sup>16</sup>

How are we to understand this tension between dignity and autonomy? If we look carefully at the Kantian tradition, we find that the notion of dignity actually has two aspects. Dignity is, first, a way of describing the worth of a being that is autonomous. Dignity signifies the value that such a being bears. In this sense dignity truly is, as Article I, Clause 1 of the German Basic Law states, “inviolable.”<sup>17</sup> This dignity directly attaches to the capacity of autonomy, and so long as that autonomy remains, so does the dignity of the person. Even a human being who has been debased and tortured retains his dignity, if he retains his capacity for autonomy.

But dignity within the Kantian tradition bears a second aspect. Dignity also refers to the specific ways in which

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<sup>15</sup> Boos v. Barry, 485 U.S. 312 (1988).

<sup>16</sup> Mephisto Case, 30 BverfGE 173 (1971).

<sup>17</sup> “Human Dignity is inviolable. To respect and protect it is the duty of all state authority.” Art. I (1).

the value of dignity is acknowledged and made manifest. Kant himself uses the word "reverence" to describe these ways. The German Constitutional Court has referred to this aspect of dignity as "the social entitlement to value and regard" or as an "entitlement to respect . . . in the social sphere."<sup>18</sup> Such entitlements can, of course, be violated. They are precisely not inviolable. That is why the German Constitutional Court has sought to fashion a jurisprudence that will prevent these entitlements from being "lowered or disparaged."<sup>19</sup>

The tension between autonomy and dignity refers to this second aspect of dignity -the question of the forms of respect that are necessary to acknowledge and maintain the dignity of an autonomous individual. I hope it is obvious to you that this question is historically and culturally contingent. The forms of respect by which a person is to be valued will vary in time and from society to society. They may also be controversial within any given society at any given time, because the norms of respect that comprise dignity are exactly the kind of community norms that we have already discussed. To the extent that a state is culturally heterogeneous, the norms demanded by dignity will be contentious.

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<sup>18</sup> Id., translated in Decisions of the Bundesverfassungsgericht, Vol 2, Part I, at 157-58.

<sup>19</sup> Id. at 157.

It follows from this analysis that in enforcing the entitlements to respect that are the manifestations of dignity, the law is enforcing a particular vision of community and personal identity. And we have already concluded that when the law attempts to pursue such enforcement within public discourse, it stands in contradiction to democracy and to the autonomy required by democracy.

### **DEMOCRACY VERSUS DIGNITY**

We are now in a position to understand the tension between dignity and democracy. This tension has two dimensions. The first concerns the dignitary requirements entailed by the internal logic of democracy itself. The second concerns the dignity as a value that is distinct and independent from democracy.

#### **I.**

Turning to the first of these dimensions, we can see that there is within public discourse an apparent theoretical tension between democracy and dignity. This tension, however, is considerably more complex and nuanced, than anything that we have so far articulated.

To understand this, we must see that if we think about democracy as a norm of self-determination that finds expression in a social structure that sustains and realizes that norm, then democracy rests on a paradox. The legal structure presupposed by the norm of democracy must meet two

equally important and yet inconsistent obligations. On the one hand, the law must maintain the institutional arrangements prerequisite for achieving the normative value of autonomy by insuring the continuing existence of a free and open public discourse, so that citizens can be free to determine their own fate. But, on the other hand, the law must also structure society so as to sustain the norm of democracy itself, and this task can contradict the value of autonomy.

This becomes apparent once we see that at a minimum the open-ended future envisioned by democracy must always presuppose an ongoing commitment to at least one pre-existing value, which is that of democracy itself. Suppose, for example, that "we the people," in full and fair elections, should decide to create arrangements that are manifestly inconsistent with the norm of democracy, by choosing to install an hereditary monarchy.

In such a case the autonomy required by democracy would contradict the norm of democracy. I take the German doctrine of "militant democracy" to be responsive to precisely this tension, in the sense of committing German law to the maintenance of the norm of democracy in the event that it should contradict the autonomy that democracy itself requires to be accorded to collective self-determination.

This contradiction arises because the norm of democracy is itself a value, a social norm, that is institutionally established and maintained in just the same way that all

community norms are established and maintained. Liberals sometimes tell the story that we believe in the value of self-determination merely because we choose to, but that is simply a fairy tale.

In point of fact we care about the value of self-determination because we have been socialized through our families, our schools, and our peers into a culture where that value is continuously articulated and reinforced. Many scholars have written, for example, about the importance of democratic education to the maintenance of democracy.

This implies that democracy depends upon a social structure that sustains and nourishes the value of collective self-determination as constitutive of collective and individual identity. Democracy is in this sense incomplete. Democracy requires and depends upon a particular kind of community.

That a flourishing democracy presupposes a healthy community capable of creating and sustaining the norms and the forms of social solidarity necessary for democracy to function is paradoxical. This paradox makes itself felt in many ways in constitutional law, but the manifestation that is most pertinent for our discussion is this: public discourse can perform the function that it does for democracy, which is to forge a link between the individual wills of citizens and the general will of the nation, only if public discourse is perceived as a process of rational dialogue.

What constitutes communication as rational, however, are precisely the standards of civility that are forms of community norms. Thus John Dewey once remarked that the possibility of rational deliberation depends upon "the possibility of conducting disputes, controversies and conflicts as cooperative undertakings in which both parties learn by giving the other a chance to express itself," and that this cooperation is inconsistent with one party conquering another "by forceful suppression . . . a suppression which is not the less one of violence when it takes place by psychological means of ridicule, abuse, intimidation, instead of by overt imprisonment or in concentration camps."<sup>20</sup>

If I were to perceive public discourse as a scene of vicious abuse, as, in the words of one commentator, a "battleground," rather than a "marketplace of ideas,"<sup>21</sup> then participation in public discourse could hardly serve for me as vehicle for facilitating democratic legitimacy and identification. This means that democracy presupposes that dignity be maintained within public discourse. But notice that if the entailments of dignity were to be enforced by law, the autonomy required by democracy would be compromised.

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<sup>20</sup> John Dewey, "Creative Democracy--The Task Before Us," in Classic American Philosophers 389, 393 (Max Harold Fisch, ed., 1951).

<sup>21</sup> Lasson, "Group Libel Versus Free Speech: When Big Brother Should Butt In," 23 Duq. L. Rev. 77, 123 (1984).

We are thus faced with a paradox. The only resolution of this paradox is if norms of dignity and civility persist in public discourse spontaneously, without legal enforcement. That is perhaps why Justice Louis Brandeis was moved to observe that democracy "substitutes self-restraint for external restraint."<sup>22</sup>

But Brandeis was expressing a hope, not a sociological fact, and, human nature being what it is, it is unfortunately clear that sometimes self-restraint is not enough, and legal enforcement of dignitary entailments may be necessary to preserve the health of public discourse. The implications of this are enormous, because it follows that in every case we must ask whether the enforcement of a dignitary norm within public discourse is to be justified as necessary in order to sustain public discourse, so that constitutionally invalidating the enforcement would ultimately undermine democratic self-governance, or whether, to the contrary, the enforcement is to be condemned as violating the autonomy required by democratic self-determination, because it is unnecessary to preserve the health of public discourse.

For this reason, legal protection for the autonomy of speech within public discourse requires judgment: judgment about the sources, strength and spontaneous persistence of

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<sup>22</sup> Letter from Justice Louis Brandeis to Robert Walter Bruere (Feb. 25, 1922), Letters of Louis D. Brandeis (Melvin I. Urofsky & David W. Levy, eds) (Albany: State University of New York Press, 1978), p. 46.

community norms, judgment about the sources and strength of democratic legitimacy, judgment about the health of public discourse, judgment about the social consequences of enforcing or invalidating particular regulations. The relationship between collective autonomy and dignity is thus highly dependent upon contingent matters of history and culture. That is one reason why different democratic countries have displayed such different notions of freedom of speech.

To understand why the American jurisprudence of the First Amendment has taken the idiosyncratic turn that it has in the years since 1940, it is certainly relevant to note that in the United States there has been in the last half-century a truly functioning marketplace of communities. The flamboyant individualism characteristic of American culture and law is surely the most striking sign of this marketplace, as is the tendency to regard communities as voluntaristic and subject to competition for membership.

This sociological history has had two consequences. First, we have felt comfortable suspending the enforcement of community norms within public discourse because our history of cultural heterogeneity has made us accustomed to inhabiting public spaces subsisting in the interstices of the safe and familiar normative domains of our own communities. Think now of the politician in Chicago, trying to create agreements between the inhabitants of the Black neighborhood, the Jewish community, and the Polish sections

of the city. As a consequence of this history, we do not tend to become deeply threatened when our public discourse is liberated from community norms and assumes a character that is, to quote from our judicial opinions, "uninhibited, robust, and wide-open," encompassing "vehement, caustic, and sometimes unpleasantly sharp attacks."<sup>23</sup>

Second, this history has led us to conceive freedom of speech within public discourse in a manner that is analogous to prohibitions against the Establishment of religion. Because our different communities have quite different conceptions of dignity, respect, and appropriate manners of speech, we have come to use the First Amendment to ensure that the state will remain strikingly and exceptionally neutral as between competing communities, each seeking to use the force of law to impose its own particular norms and standards upon public discourse.

The situation is far different for nations, like Germany, that are essentially culturally homogeneous. Unlike the United States, Germany is not an immigrant country, and this sociological history is hugely important in understanding how your legal system has struck the balance between dignity and democracy.

My reading of German cases dealing with freedom of speech certainly would suggest that German law expresses a strongly hegemonic set of national cultural norms. These are

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<sup>23</sup> New York Times Co. v. Sullivan, 376 U.S. 254 (1964).

manifest, for example, in your long history of strict legal protections for honor and strict prohibitions against insult.<sup>24</sup> It is clear both that your citizens would feel more vulnerable were they to be deprived of legal protection for these dignitary forms of respect, and that you have less incentive to distinguish the public sphere from the sustaining framework of community norms. In Germany there is not a marketplace of communities; you do not have distinct cultures competing to restructure the normative space of public discourse in incompatible ways.

## II.

The internal logic of democracy thus has certain dignitary requirements built into it. But this does not exhaust the tension between dignity and democracy, for dignity can be conceived as a value which is distinct and independent from democracy, as it is, for example, in Kant. If our discussion so far has justified the imposition within public discourse of those dignitary requirements, and only those dignitary requirements, that are necessary in order to sustain the practice of democracy, we have not adequately considered the fact that it is possible to value dignity in its own right, and thus to seek to impose dignity entitlements other than those justified by democratic

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<sup>24</sup> For a wonderful study, see James Q. Whitman, "The Law of 'Civility': Three Societies," Yale Law Journal (2000, forthcoming).

necessity. How are we to understand the tension between democracy and dignity in such circumstances?

A preliminary point is that the norm of democracy and the norm of dignity stand on the same analytic footing. Both are community norms sustained by processes of socialization and built into personal and collective identity. The choice between these two norms is accordingly a matter of whether we wish to live in a community identified with dignity or a community identified with self-determination.

Posed this way, of course, the choice is grim, since in any desirable state of the world we ought to have both dignity and democracy. And in many ways of course we can have both. First, democracy itself presupposes certain dignity entitlements within public discourse. Second, nothing I have said would argue against the enforcement of dignity entitlements outside of the realm of public discourse. And, in fact, it is fairly common, even in the United States, to regulate speech that is not public discourse in order legally to establish the prerequisites of dignity.

Thus, even if we commit ourselves wholeheartedly to the norm of democracy, we will have some legal enforcement of dignitary entitlements. But if we narrowly focus on the arena of maximum conflict, what can we say about the enforcement of such dignitary entitlements within public discourse, if they cannot be justified as necessary to sustain the social structure of democracy?

Such enforcement unambiguously compromises democratic autonomy. But how can we understand the relationship between the two poles of this tension? The most illuminating framework of analysis is provided by the work of the American sociologist George Herbert Mead, whose writings I have already referenced. In his writings, Mead attempted to understand individual personality by distinguishing between what he called the "I" and what he called the "me." Mead identified the socialized structure of the individual personality with the "me." He was quite aware, however, that there could be no such thing as a completely "institutionalized individual."<sup>25</sup> Persons always retain the inherent and irreducible capacity to modify or transcend socially given aspects of themselves. Mead identified this capacity as the "I":

The "I" is the response of the organism to the attitudes of the others; the "me" is the organized set of attitudes of others which one himself assumes. The attitudes of the others constitute the organized "me," and then one reacts toward that as an "I."<sup>26</sup>

The "I" is spontaneous, unpredictable, and formless; the "me" is structured and relatively static. Mead viewed each as a fundamental and indispensable aspect of the self. He associated the "me" with "social control," and the "I"

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<sup>25</sup> George Herbert Mead, On Social Psychology 239 (Anselm Strauss, ed., Chicago: University of Chicago Press 1964).

<sup>26</sup> Id. at 230.

with "self-expression."<sup>27</sup> "Taken together, they constitute a personality as it appears in social experience. The self is essentially a social process going on with these two distinguishable phases."<sup>28</sup>

The distinction between dignity and democracy can be understood as flowing from the difference between these two phases of the self. Law in the service of dignity upholds the values associated with the "me," which is to say the community norms and attitudes that form the structure of personality. Law in the service of responsive democracy safeguards the values associated with the "I," which is to say the potential for individual modification and transcendence of that structure.

But just as the "me" and the "I" are necessarily complementary and interdependent, so also are the social forms of dignity and democracy. The tension between the two is irreducible and constant; the law merely provides the vehicle for its social embodiment. It throws the weight of the state behind one or another phase of the self.

Although this insight does not offer an analytic roadmap for resolving the conflict, as it arises in constitutional law, between dignity and democracy, it does illuminate the profound and irreducible values that are at stake in that conflict. In the face of fundamental

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<sup>27</sup> Id. at 238, 240.

<sup>28</sup> Id. at 238.

questions like this, we must throw ourselves on the mercy of our judgment.

That is why judicial opinions in every constitutional system reflect a deep ambivalence about the opposition of dignity and democracy. This ambivalence is expressed in the contingent and highly contextual nature of the relevant decisions, which typically invoke fact-specific methodologies like balancing. It is also expressed in the historically shifting balances between dignity and democracy that are evident in every legal system, as courts articulate changing visions of an appropriate balance at different times in history.

If I have accomplished nothing else, therefore, it is my hope that at least I have provided a vision by which the abstract generalities of constitutional decisionmaking can be translated into the most basic and essential political questions of national identity. I hope, thereby, to have removed constitutional law from the experts - judges, lawyers, legal academics - by exposing its deeply political and sociological foundations. These foundations raise questions to which all citizens contribute, including journalists, like Richard Daube. They form part of the common weave of our national life.