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Freedom of Speech as Therapy

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RECENT BOOKS

FREEDOM OF SPEECH AS THERAPY

Pierre Schlag*

LEE BOLLINGER,** *THE TOLERANT SOCIETY*, 295 pages, \$19.95 (Oxford University Press 1986).

Lee Bollinger's book presents a bold thesis: freedom of speech rests not so much on the intrinsic or instrumental value of speech as it does on a symbolic lesson to be learned from the judicial enforcement of freedom of speech.¹ More specifically, by depriving the community of the coercive legal machinery to respond to speech that is extreme or offensive, the courts teach a salutary lesson about the dark side of intolerance in social intercourse. This thesis, called the "Tolerance Theory," is grounded in the therapeutic model of law: for Bollinger, freedom of speech should be viewed as a type of social therapy.

The structure of Bollinger's book is straightforward. First, he reviews the traditional theories of free speech.² These are depicted as internally contradictory and as unable to answer some key questions for free speech theory. From the cracks in the old theories, a new approach emerges: the Tolerance Theory. Bollinger briefly tests this new theory against the case law. He then recommends the judicial actualization of theory by means of a "conscientiously ambiguo-

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1. L. BOLLINGER, *THE TOLERANT SOCIETY* (1986).

2. In contrast to other works of free speech theory, Bollinger does not premise his discussion on the explicit or implicit premise that, of course, free speech is wonderful—leaving us only to decide how and why.

ous" doctrine. The book closes with some uncommonly candid observations about the possible problems with Bollinger's own Tolerance Theory.

Bollinger's review of traditional free speech theory divides the prime candidates into two camps: the "classical model" and the "fortress model." The classical model includes those theories which suggest that speech is protected because of its instrumental or intrinsic value. Bollinger's discussion of this model is mostly devoted to the search-for-truth conception and the political self-governance theory, though he does touch upon the self-realization theory.³ While Bollinger finds some merit in these traditional theories, he nonetheless finds them wanting in some crucial respects.

Much of Bollinger's criticism of these theories is classic fare.⁴ Still, he does have some new insights. Bollinger convincingly argues that these theories overestimate the value of speech-acts which, if the hard truth be told, is often dispiritingly low.⁵ Moreover, the traditional theories also tend

3. The search-for-truth conception is based on the view that "the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon [which people's] wishes can safely be carried out." *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting). The political self-governance theory is based on the view that political speech (and maybe more) must be protected because it is essential to democratic self-governance. For different versions of this theory, compare A. MEIKLEJOHN, *FREE SPEECH AND ITS RELATION TO SELF GOVERNMENT* (1948) with BeVier, *The First Amendment and Political Speech: An Inquiry into the Substance and Limits of Principle*, 30 STAN. L. REV. 299 (1978); Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1 (1971); Meiklejohn, *The First Amendment Is an Absolute*, 1961 SUP. CT. REV. 245. Also included in the classical model, but barely discussed, is the "autonomy" or "self-realization" theory of freedom of speech. According to this theory, speech is protected because it is an aspect of self-realization. See Baker, *Scope of First Amendment Freedom of Speech*, 25 UCLA L. REV. 964 (1978).

4. See, e.g., Shiffrin, *Defamatory Non-Media Speech and First Amendment Methodology*, 25 UCLA L. REV. 915, 936-38 (1978); Shiffrin, *The First Amendment and Economic Regulation: Away From a General Theory of the First Amendment*, 78 NW. U.L. REV. 1212, 1232-39 (1983) [hereinafter Shiffrin, *Economic Regulation*]. Both pieces criticize the political self-governance theory advocated by Meiklejohn and Judge Bork, respectively; see also Baker, *supra* note 3, at 967-90 (criticizing the marketplace-of-ideas and search-for-truth theories).

5. The proponents of the search-for-truth and political self-governance models, of course, could always answer that it is not the value of individual speech-acts that matters, but rather the value at the margin of additional free speech protection. Meanwhile, the proponents of the self-realization theory could claim that what matters is not the social value of individual speech-acts, but the

to underestimate the costs of speech. Not only may speech persuade people to do socially undesirable acts or offend those within earshot, but it can also harm the self-identity of a community. Speech is "agenda-setting:" a speaker can often command others to respond merely by saying something.⁶ By way of example, Bollinger notes that the attempts of Nazis to march through Skokie, a suburb of Chicago populated in part by survivors of Hitler's concentration camps, imposed significant costs on the community.⁷ The mere proposal of the march required the community and its Jewish constituency to respond and to divert their attention from other matters.⁸

Bollinger labels the second type of free speech theory the "fortress model." According to this model, speech is protected by a consciously overprotective doctrinal fortress that serves to check the intrinsic tendencies of government officials and the people to suppress speech that they disfavor. This type of theory, of course, does not aim to answer why speech is protected, but rather seeks to justify the pro-

value to the individual of not having to constrain or conform her being to external norms.

6. As Bollinger states:

The trouble with speech behavior, therefore, is that it very often demands a response from those who know of it. It compels us to act in response, and in that sense it exerts a controlling power over other people's behavior. It is agenda-setting, for without any response, messages different from those we want to be communicated are communicated.

L. BOLLINGER, *supra* note 1, at 64.

7. Crudely summarized, the Skokie incidents centered on the attempts of a Nazi party to hold marches in Skokie, a suburb of Chicago with a large Jewish population that includes survivors of the German death camps. Skokie took various legal measures to prevent the marches—all of which were legally unsuccessful. The facts of the Skokie incidents present starkly the psychological and symbolic costs entailed by the rigorous protection of freedom of speech. For a basic summary of the Skokie incidents, see L. BOLLINGER, *supra* note 1, at 23–35. See also D. DOWNS, *NAZIS IN SKOKIE: FREEDOM, COMMUNITY AND THE FIRST AMENDMENT* (1985); A. NEIER, *DEFENDING MY ENEMY: AMERICAN NAZIS, THE SKOKIE CASE, AND THE RISKS OF FREEDOM* (1979).

8. The proponents of the classical model could probably question whether this agenda-setting feature of speech can truly be characterized as a cost. From their perspective, the opportunity of individuals to command the community's attention by speech might be counted as a benefit. The proponents of the classical model could also question Bollinger's causal supposition. Speech is agenda-setting only if the listeners take it seriously; therefore, listeners also have a role in determining whether speech is agenda-setting or not.

tection accorded speech of dubious social value, such as the Nazi speech in *Skokie*.

Bollinger begins his criticism of the fortress model by questioning the need for overprotection. He notes, for instance, that it would not be all that difficult to distinguish valueless speech, such as Nazi noise, from valuable speech.⁹ More significant is Bollinger's suggestion that the fortress model adopts an image of the human condition that is at odds with that advanced by the various versions of the classical model. The latter advances an essentially optimistic view of humanity and its capacity for rational and sensible decision making. By contrast, the fortress model's elaborate doctrinal safeguards are animated by a deeply pessimistic vi-

9. L. BOLLINGER, *supra* note 1, at 38. He states:

Given the premises or social reality offered in the *Skokie* opinions, it is difficult to believe that some workable rule could not have been arrived at for the speech at issue in that case. . . . Nor do I find it difficult to distinguish in *my own mind* between the type of "offense" caused by blacks marching in the South for their civil rights and that brought about by Nazis who would advocate the murder or enslavement of a segment of the community.

Id. (emphasis added). I also have no difficulty in my own mind making these distinctions. However, the problem is not my mind nor Bollinger's mind: neither of our minds needs to operate on the basis of doctrine. Rather the real problem is whether either one of us could craft a piece of doctrine that would allow some judge in some unknown part of the country to reach the right result in cases that are much closer than the ones Bollinger presents above. Consider the following list of speakers and the type of speech that they have produced:

The Nazis

The KKK

Louis Farrakhan

Jerry Falwell

MARX (*On the Jewish Question*, in K. MARX & F. ENGELS, COLLECTED WORKS 148 (1975))

Frantz Fanon (*WRETCHED OF THE EARTH* (1963))

Lenny Bruce

Jesse Helms

Given this list, I think that it is difficult to come up with a piece of principled doctrine that will lead some judge somewhere to reach "the right result" in deciding whose or which type of speech should be protected how much and when.

In support of this position, Bollinger cites Article 4 of the Convention on the Elimination of All Forms of Racial Discrimination, which contains extensive prohibitions against racist speech activities. L. BOLLINGER, *supra* note 1, at 253-54 n.66. This example only shows, however, that it is possible to craft doctrine. It does not establish that it is possible to craft doctrine that works, much less that it is possible to craft doctrine that would work in America.

sion of the human animal as a captive of passion and intolerance.

Bollinger presses hard on this pessimistic vision: he wonders what possible value speech can have if the fortress model is correct in its implicit assertion that we are not yet out of the dark ages. Moreover, if this grim vision is correct, it becomes difficult to maintain that the fortress of words will hold fast once intolerance is loose across the land. The short of it is: the classical and fortress models are at war with each other and neither (alone or together) can account for the questions that Bollinger believes free speech theory must answer.

The first question Bollinger wants answered is why there is such a disjunction in our attitudes towards personal and legal responses to offensive speech. "When we compare our reluctance to impose *legal* restraints against speech with our readiness to employ a host of informal, or *nonlegal*, forms of coercion against speech behavior, the paradox is striking."¹⁰ Bollinger also asks: "Why should we exercise such extraordinary self-restraint in the regulation of nonspeech behavior? Why, in particular, should we tolerate extremist speech? Why should we vest the interpretative and enforcement functions of the principle in the judicial branch?"¹¹ Together, these questions serve to reorient theoretical attention away from the reasons for protecting speech and toward the reasons for restraining the legal suppression and regulation of speech. Along with Bollinger's criticisms of the classical and fortress models, these questions drive the construction of his Tolerance Theory.

Less happily, the questions also signal a major tension in Bollinger's book. In large part, Bollinger's review of the intellectual history and theory of free speech follows a dialectical approach. Contradictions among the images, assumptions, implications, and effects of the various theories are traced and highlighted. Counter-arguments and counter-forces are acknowledged. Formalistic syntheses are shunned. But then, mysteriously, the dialectic stops as Bollinger strives to formalize his insights into a grand normative

10. L. BOLLINGER, *supra* note 1, at 12 (emphasis in original).

11. *Id.* at 107, 140.

free speech theory.¹² For reasons never quite made clear by Bollinger, an account that begins on the dynamic plane and which resists (at least in part) facile formalization nonetheless crystallizes into a static, normative theory offered for judicial adoption. Not only is this transformation mysterious, but it is also hard to pull off. Indeed, once a dialectical inquiry is begun, it is not easy to arrest its workings. And at the end of the book, after the Tolerance Theory has been elaborated, the dialectic (true to form) returns to impeach Bollinger's own theory (which accounts for those extraordinarily candid statements Bollinger makes in the last chapter about the problems with his own theory).¹³

It is exceedingly difficult to move from a descriptive dialectic to a grand normative theory, unless of course, the game is rigged in advance. And in some sense Bollinger has done just that. From the outset, his dialectics are constrained by two significant theoretical and imagistic commitments. The first is a tendency to view law, including the free speech clause, as symbolic discourse. Absent from Bollinger's account is a sense that the law is not mere theater—that free speech involves real jobs, real blood, and real persons. The second commitment is his tendency to subordinate speech to free speech theory. Bollinger attempts to resolve in theory problems that are best left to speech itself to resolve, if at all. These tendencies, which are objectionable in themselves, will return later to haunt Bollinger's Tolerance Theory. But both are already evident early in Bollinger's work.

The first sign of Bollinger's tendency to view law as symbolic discourse arises with his observation that *we*¹⁴ have

12. Bollinger's dialectical approach would have been much more conducive to an argument cautioning against the adoption of any grand normative theory in the free speech arena or an approach akin to the "eclectic" approach offered in Shiffrin, *Economic Regulation*, *supra* note 4, at 1232-39, or the approach offered in Chevigny, *Philosophy of Language and Free Expression*, 55 N.Y.U. L. REV. 157 (1980).

13. After advocating the idea that free speech should be designed to inculcate the capacity for tolerance, Bollinger acknowledges some troublesome questions. First, free speech protection might have the ironic effect of stimulating excess intolerance in other social contexts. Second, the promotion of tolerance might be too successful and lead to obedience. L. BOLLINGER, *supra* note 1, at 245-47.

14. Bollinger relies frequently on the first person plural. It is very difficult to determine who Bollinger thinks "we" are. *See infra* text accompanying notes 26-27. For the sake of fidelity to Bollinger's work, I use this first person plural too—but I have substantial doubts that this "we" exists in any meaningful sense.

disjunctive attitudes toward private and legal condemnation of speech that we do not like. Bollinger illustrates this disjunction by noting that if someone makes a racially derogatory remark, we will probably insist upon a sort of censure (such as ridicule, reproach, or humiliation), and we will feel guilty if no censure occurs.¹⁵ But as soon as someone proposes that there ought to be a law forbidding the offensive speech, the free speech principle will be invoked and the proposal abandoned. Bollinger finds a curious disjunction here.¹⁶

But the disjunction is only present (and only calls for explanation) if we find that the two situations are analogous. Arguably, they are not. Heaping ridicule or dispensing large doses of humiliation upon a racist is not entirely the same thing as putting him in jail. To be sure, there are communicative or symbolic aspects to putting someone in jail. And both humiliation and jail terms have a tendency to restrict the interpretive possibilities of the person submitted to the treatment. But quite frankly, jail restricts social possibilities in a way that humiliation and ridicule generally do not.¹⁷

15. L. BOLLINGER, *supra* note 1, at 12.

16. Of course, the disjunction disappears if Bollinger's factual premise is wrong. And indeed, it is doubtful that the general populace feels inhibited from using legal measures to contain offensive or extremist speech. It can also be doubted that the lay public feels inhibited by state action doctrine from making "free speech" arguments in "private" contexts, such as the workplace or other institutional settings.

The legal community is divided as well on this question, as is manifested by the depth of controversy surrounding the state action doctrine. For recent proposals to eliminate the state action doctrine, see Chemerinsky, *Rethinking State Action*, 80 Nw. U.L. REV. 503 (1986); Skover, *The Washington Constitutional "State Action" Doctrine: A Fundamental Right to State Action*, 8 U. PUGET SOUND L. REV. 221 (1985). More generally, the plausibility, usefulness, and legitimacy of the public/private distinction is under question as well. *A Symposium: The Public/Private Distinction*, 130 U. PA. L. REV. 1289 (1982).

17. This is not universally true. Humiliation and ridicule can be so concerted and so systematic that they have largely the same effect or implications as do legal penalties. The cultural practice of racism and sexism, for instance, are clear examples. To the extent that these practices are systematic, concrete, and inescapable, they can yield the same effects and implications as racism and sexism of the legal, official kind.

Yet there is a sense in which criminal or civil penalties generally have an effect in restricting social possibilities above and beyond the symbolic level. The same is not true of informal speech sanctions such as ridicule or humiliation. When the government puts people in jail or compels them to pay fines, it is arguably doing something more than merely speaking. Whether ridicule or humiliation is merely speaking or something more, by contrast, depends on the context and on whether

Why then does Bollinger see such an "extraordinary disjunction" in our attitudes regarding private and legal responses to offensive speech?¹⁸ The short answer is that Bollinger thinks that private expressions of reproach or humiliation are essentially similar to legal condemnation. But why would he think that? The answer can be found in his vision of law as symbolic discourse: "Law plays a special role in this country. It provides a process through which we create a social identity, by which we reflect and embody the aspirations and values of the community. Enforcement of the law bespeaks a commitment to those aspirations and values."¹⁹ As a descriptive matter, Bollinger is undoubtedly correct in claiming that law is a type of expression, a way for the community (or rather, particular constituencies) to speak. But it is also true that law speaks with an authority and a violence not common to other types of literature. Largely absent from Bollinger's account is the recognition that law is not merely discourse and symbol, but power and tool as well.

Perhaps more serious is Bollinger's genuine fondness for the idea that the community can express its sentiments and sense of identity through law:

We suffer a serious loss when we strip ourselves of the use of legal restraints against speech behavior we regard as socially destructive. It is easier to organize an official response through the lawmaking process But its primary value for us is as a *communicative* tool for satisfying the need of the community to express its position on the issues raised by the speaker and in doing so to define and create itself.²⁰

This vision of law can be dangerous: Bollinger appears to be glorifying the state's role in defining the meaning, identity, and values of the community.

the humiliation or ridicule is sufficiently systematic, concerted, and complete so that we can say that it operates in roughly the same manner as a law.

This points to another weakness in Bollinger's observation. Sometimes we are every bit as concerned with the private disruption of speech as we are with state repression of speech. The unreflective restriction of the realm of discourse produced by institutional or cultural convention or by powerful figures draws fierce claims that freedom of speech is being abridged. Indeed, it is common for lay people, who are not encumbered by state action doctrine, to appeal to the first amendment in "private" institutional settings.

18. L. BOLLINGER, *supra* note 1, at 35.

19. *Id.* at 72.

20. *Id.* (emphasis in original).

Ironically, while Bollinger accords significant status to law as a form of symbolic discourse, he tends to truncate the symbolic dimensions of speech itself. This brings us to the second problematic tendency in Bollinger's work. He often seems to resolve as a matter of theory problems that should probably be left to speech itself. As will be seen, this tendency is manifest in the Tolerance Theory, but it is already nascent in Bollinger's early introduction of a dichotomy between extreme and nonextreme speech and in his persistent questioning of the value of the former.²¹ Bollinger's establishment of this distinction in the formative stages of his theory leads to a devaluation of extremist speech. Indeed, he quite clearly thinks that extremist speech needs some special defense under the free speech clause. In part, however, that supposition stems from the rapid link he makes between extremist speech and the Nazi incidents in Skokie. The latter events serve as Bollinger's main image of extremist speech and are used throughout the book as a motif for testing theoretical insights.

The very dominance of the Skokie imagery in Bollinger's book invites a certain amount of chiding: one could say that Bollinger has developed a grand theory to resolve a single incident—one which is already history. But chiding aside, there is something to be said for this criticism. It is by no means clear that extremist speech is a particularly perplexing, significant, or microcosmic issue for free speech theory in general.²² Likewise, it hardly seems evident that the Nazis are a particularly representative or useful vehicle for discussing extremist speech.²³ Further, many things can

21. Bollinger's questioning of extremist speech begins in the introduction. *Id.* at 9.

22. Even from Bollinger's perspective that free speech should be seen as shaping the intellectual character of society, one would think that television and commercial advertising present much more significant terrain for inquiry than the infrequent and marginal displays of extremist groups such as the Nazis.

23. Nazi speech presents some unique considerations. Given the meaning of the Holocaust in our culture, the identity of a speaker as a Nazi has often had more bearing on the meaning of the speech than its actual content. In a sense, it almost does not matter what a Nazi says; as long as he is identified as a Nazi, his speech will almost always carry the same revolting meaning. Indeed, this point is illustrated in the Skokie incidents:

Was this a march to proclaim religious and racial hatred, or even genocide? No, said the Nazis quite explicitly from the beginning. It was to protest the denial of their "free speech rights." The placards they proposed to carry were to be inscribed with the words, White

be said about Nazi speech other than the fact that it is extreme. For instance, the Nazi speech in *Skokie* can be seen as posing the problem of: racial slurs or insults, psychotic noise, provocation to violence, vocal invocation of deep seated conventions of religious or ethnic prejudice, offensive speech, psychic harm, and so on. The point is that Bollinger's choice to describe the Nazi speech in *Skokie* as extreme decides too much—both with respect to the Nazis and with respect to extreme speech. There are other ways to describe Nazi speech and many other images of extremist speech besides the Nazis. The choice of description and imagery seems to be a deeply political question. Moreover, the very choice to divide speech into the camps of extreme and nonextreme seems transparently political.²⁴ And yet Bollinger has not given any political arguments for his choices.²⁵ What, then, is the basis for his positions?

The answer is that Bollinger has adopted a therapeutic model to resolve free speech problems. Once this is recognized, the general absence of explicit political argument in Bollinger's work becomes understandable (even if not justifiable). Indeed, there is no need to talk about politics once the problem is depicted as a society-wide sickness or malady. And argument is unnecessary, because the therapist can rely on the rhetoric of authority and expertise.²⁶ Following the therapeutic model, Bollinger examines society, assesses its ailment, and describes the role that speech and freedom

Free Speech and Free Speech for White America, a protest against the demands for an insurance policy as a prerequisite to obtaining a march permit.

L. BOLLINGER, *supra* note 1, at 27.

24. Particularly objectionable is Bollinger's failure to define extremist speech while relying heavily on the Nazi imagery to supply content for that term. What are we supposed to conclude from this besides the view that all extreme speech is awful because it is like Nazi speech? Or is Bollinger's vision of extremist speech truly limited to white-power hate groups? If it is, then it truly stretches the imagination to think that toleration of extremist speech is a central problem for free speech theory.

25. The absence of political argument is also evidenced in Bollinger's failure to justify his choice of intolerance as the dark impulse most in need of containment by free speech. See *infra* note 33 and accompanying text.

26. Indeed, therapeutic approaches often have, though not necessarily, a tendency to depoliticize. Simon, *Homo Psychologicus: Notes on a New Legal Formalism*, 32 STAN. L. REV 487 (1980). Missing from Bollinger's account is a sense that people disagree for reasons that have little to do with intolerance and that probably cannot and should not be cured by therapy.

of speech might play in the therapy. But who wants therapy, let alone national collective therapy under the tutelage of the U.S. Supreme Court?

Bollinger's answer is that we do. In fact, a significant portion of his book discusses what *we* feel, what *we* think, and what *we* believe. I do not want to make too much of Bollinger's frequent use of the first person plural: it is an accepted stylistic device. But in Bollinger's book, this stylistic device has a close connection with the substance of his message. I often wondered who this "we" might be? The American public? (Very doubtful.) The legal community? (Again, doubtful.) Legal intellectuals with a penchant for theory? (Yes, now this one is possible.) But does it matter what such a small idiosyncratic community believes? Besides, is this community really a "we" or more like a You/I/They/It? Even if this "we" exists, do (we) have the right to impose collective therapy on them—the American public?

Bollinger clearly thinks so: "Law (in this case, *constitutional law*) is being used . . . as a major project concerned with nothing less than helping to shape the intellectual character of the society."²⁷ This brings us to the Tolerance Theory:

Taking this approach, we can now see that the purposes of the free speech enterprise may reasonably include not only the "protection" of a category of especially worthy human activity but also the choice to exercise extraordinary self-restraint toward behavior acknowledged to be bad but that can evoke feelings that lead us to behave in ways we must learn to temper and control. What is important about speech is not that it is special but that the excessive intolerance we sometimes experience toward it is both problematic and typical, in the sense of reflecting a general tendency of mind that can potentially affect many forms of social intercourse.²⁸

This novel thesis reverses much of contemporary thought about free speech.

Bollinger argues that the current social function of free speech is to teach us something about our problematic inclinations to intolerance. We are to use the free speech principle as an opportunity to explore the irrational dark side of human beings that manifests itself as intolerance. By con-

27. L. BOLLINGER, *supra* note 1, at 107 (emphasis in original).

28. *Id.* at 120.

fronting this dark impulse, we are to learn how to master it. We are to learn how, when, and why we should exercise restraint, or, more pessimistically, self-repression. So the first reversal is that the free speech clause is supposed to lead us not toward more or greater expression, but rather to less.²⁹

The second reversal offered by Bollinger is that the normative justification for free speech rests not so much on the values supporting free speech as it does on what we might learn or become by restraining legal responses to speech that we do not like. But why this lesson? Of all the dark impulses thought to animate human beings, why is intolerance the one most in need of containment by the free speech principle?³⁰

If free speech is to be used as therapy to cure destructive impulses, the choice of possible applications is wide open. One could even argue that freedom of speech should be construed to teach us something about the dark side of tolerance—those irrational tendencies which we call passivity, resignation, and apathy.³¹ As long as we are using free speech to teach lessons, why not use the concept and its rhetorical baggage as a symbolic spur to involvement, creativity, or experimentation?³² Free speech could be conceived as a

29. Or at the very least, we must learn to stifle ourselves before intolerant words trip off the tongue.

30. And similarly, why limit the Tolerance Theory to the interpretation of free speech? Why not extend the theory to equal protection or substantive due process? Bollinger's answer to these questions seems to be that speech generally causes less injury than nonspeech behavior. L. BOLLINGER, *supra* note 1, at 124. The point seems to be that it is less harmful to teach the vices of intolerance by allowing offensive speech than by creating, for example, more costly entitlements under equal protection or substantive due process.

31. E. FROMM, *ESCAPE FROM FREEDOM* (1941); Marcuse, *Repressive Tolerance*, in R. WOLFF, B. MOORE & H. MARCUSE, *CRITIQUE OF PURE TOLERANCE* 81-123 (1969) (suggesting that the objective of tolerance calls for intolerance toward prevailing policies, attitudes, and opinions and that the actual practice of tolerance is a passive acceptance of an entrenched false consciousness). Bollinger attempts to distinguish tolerance from its dark side, which he calls "obedience," but the distinction is awfully thin—theoretically and practically. "[F]ree speech is concerned with the development of a mind that is itself comfortable with uncertainty and complexity. The obedient mind does not think for itself." L. BOLLINGER, *supra* note 1, at 246-47. The problem is exacerbated by the fact that Bollinger never gives us a terribly cogent account of what he means by tolerance. *See id.* at 10 (tolerance is a capacity to control feelings or to show understanding and leniency for conduct or ideas conflicting with one's own).

32. Certainly, this thesis would be more in keeping with the traditional rhetoric accompanying freedom of speech than the Tolerance Theory.

unique sphere where people are allowed to be intolerant/destabilizing, upsetting/creative, foolish/experimental.

The point is simply this: Bollinger may be right that we suffer from destructive impulses toward intolerance, but we also suffer from noxious irrational impulses toward tolerance and from many other submerged impulses that threaten social intercourse and cause pain. Why then is intolerance to be accorded primary status as the one dark impulse most deserving of therapy?³³

I suspect that the answer may have something to do with intolerance itself—specifically, the intolerance of a certain kind of intellectual project. Many intellectuals have a highly pronounced distaste for intolerance because it is the ugly and threatening reminder that social life is not all contemplation, reason, and dialogue.³⁴ Intolerance threatens both the significance and the possibility of many an intellectual project. Now, it is certainly to Bollinger's credit to champion the cause of tolerance (and the cause of intellectuals). But is there not a bit of intolerance in commandeering the whole of the free speech clause to domesticate this particular intellectual *bête noire*?³⁵ This strikes me as a rather parochial interpretation of freedom of speech. And a rather

33. Bollinger's arguments on this score are fairly weak. He suggests that tolerance is a necessary adjunct of democratic government in which compromise and defeat are inevitable, that a capitalist system requires a broad capacity for self-containment, and that pervasive bureaucratic and professional systems require the ability to submerge the self. L. BOLLINGER, *supra* note 1, at 117-18, 141, 238-39. The structure of Bollinger's argument goes something like this:

1. This is the way our community is constituted.
2. In order for our community to function as presently constituted, tolerance is necessary.
3. Therefore, we ought to promote tolerance through available means, including the free speech clause.

Missing from Bollinger's account is any critical examination of how our community is or should be constituted. Bollinger simply takes the community as given and resists any political inquiry into its nature. More troubling still, he does not even employ his own psychological or therapeutic approach to question the way the community is constituted.

34. For other intellectuals, of course, the problem is just the reverse: the intellectual project is threatened by the passive tolerance of routinized procedures and conventions that preclude inquiry and extinguish thought. See Schlag, *The Brilliant, the Curious and the Wrong*, 39 *STAN. L. REV.*— (1987) (forthcoming). So which is most threatening to the intellectual project: tolerance or intolerance? It is often difficult to decide which is worse and even sometimes to decide which is which.

35. Bollinger clearly means to use the free speech clause to convert others to his vision of the intellectual project. In a previous essay, he wrote:

strained one as well: given that intellectualism is such a marginal idiosyncratic project, it would seem difficult to impose it on the entire nation through the medium of law—especially if it has to be done in the name of tolerance.

It is deeply wrong, though common enough, for legal academics to assume that the law has to be tailored to fit some version of the intellectual project.³⁶ There is not only intolerance in such a vision, but a potential for a good deal of violence as well.³⁷ I certainly would not mind if Americans were more in the intellectual image, but the free speech clause hardly seems a legitimate or effective vehicle for accomplishing this end.³⁸

In part, Bollinger's cooptation of free speech to advance his version of the intellectual project stems from his view of law as symbolic discourse. Of course, to a large extent Bollinger is right: law is symbolic. And in the academic context of the law school, law rarely moves beyond the symbolic. In practice, however, those legal symbols have a tendency to crash through people's lives as husbands are put in jail, wives are fired from jobs, and sons are beaten over the head with nightsticks. Suppose then that a court following the Tolerance Theory announced to someone like Paul Cohen that his case simply does not provide the right setting to test

I will suggest that much of what we encounter in discourse about the First Amendment is really about fundamental intellectual values. Free speech is not just about getting more information and ideas needed to make good decisions, nor just about having freedom to express ourselves as we see fit, but more importantly, and more broadly, about *how to think*, about such matters as our beliefs and about the fears and angers we bear towards the contrary beliefs and behavior of others.

Bollinger, *Free Speech and Intellectual Values*, 92 YALE L.J. 438, 445 (1983) (emphasis in original).

36. The whole program can be summarized as making law safe and attractive for a certain kind of legal intellectual. As normative programs for the construction of law go, this one seems neither realistic nor attractive.

37. See E. CANNETTI, AUTO-DA-FE (1979); Cover, *Violence and the Word*, 95 YALE L.J. 1601, 1610-18 (1986).

38. See *infra* text accompanying notes 38-49. I think that the prospect of transforming America into an intellectual community ranks somewhere between zero and nonexistent. As for making it a more intellectual community, the chances rise to the level of dismal. As for using the free speech clause to inculcate intellectual values of tolerance, the chances return to zero.

A modicum of realism is warranted here. Below I have listed the circulation figures for a number of magazines along with my subjective assessment of the level of consciousness associated with each magazine.

the limits of tolerance.³⁹ I think there is a good chance the response would be mildly intolerant. And conversely, can you imagine telling Jewish survivors of the concentration camps that the major (the only?) reason the Nazis must be allowed to march is to enable the Jews and the rest of the community to learn the virtues of tolerance?⁴⁰ I cannot con-

MAGAZINE	CIRCULATION	CONSCIOUSNESS
New York Review of Books	120,000	modernist/postmodernist
The New Republic	90,000	modernist/post-Cartesian
Time Magazine	4,600,000	Cartesian
People	2,840,776	Pre-Cartesian
Reader's Digest	17,884,818	?
Star	3,757,065	?
National Enquirer	4,057,055	?

The circulation statistics are drawn from ULRICH'S INTERNATIONAL PERIODICALS DIRECTORY (25th ed. 1986-87). Obviously, I have compiled this data, rather unscientifically, to make a point. Still, if we suppose that this data on circulation is some indication of the prevailing levels of consciousness in America, then what chance is there in using the free speech clause to teach the virtues of tolerance? Who is likely to receive, let alone understand, Bollinger's message—especially given its complexity and the source from which it will issue? *See infra* text accompanying note 42.

39. *Cohen v. California*, 403 U.S. 15 (1971). The trial court convicted Mr. Cohen under a disturbing-the-peace statute for wearing a jacket that bore the inscription "Fuck the Draft" in a courthouse. The United States Supreme Court found the conviction unconstitutional. *Id.* at 26.

I do not mean to suggest that Bollinger's approach would counsel against finding a constitutional violation in this case. It could be argued either way under his "conscientiously ambiguous" doctrine. L. BOLLINGER, *supra* note 1, at 203-04 (discussing *Cohen v. California*); *see infra* text accompanying notes 44-48. The point is, however, that quite a few free speech claimants (and their audience) would probably react with no small amount of intolerance if they learned that their speech was left unprotected because protection would not serve to inculcate the virtues of tolerance.

40. Bollinger does adjudicate the Skokie incidents in his book. He concludes that, on balance, the Nazis should have been allowed to march. L. BOLLINGER, *supra* note 1, at 197-200. Interestingly, Bollinger reaches this conclusion not on the grounds that allowing the march would allow people to learn about the dark side of intolerance, but rather on the grounds that free speech analysis begins "with a strong presumption in favor of toleration." *Id.* at 197. This bit of proposed doctrine is quite different from the Tolerance Theory. Almost any free speech theorist would be capable of making this statement. There are many reasons to favor toleration other than the Tolerance Theory: the marketplace of ideas, political self-governance, and self-realization. Bollinger's presumption is not very different from saying, "when we deal with speech, there is a strong presumption that it is protected."

It is this presumption and not the Tolerance Theory that allows Bollinger to

ceive of a court having the moral authority to make such statements.⁴¹

I am not suggesting that it is wrong to focus on the symbolic aspects of free speech, but Bollinger overdoes it. Law is both symbol and instrument. To disregard the crude, causal, or instrumental aspects of law leads to two kinds of violence. The first type of violence is committed by courts when they manipulate symbols without the slightest consideration of the earthly effects those symbols will produce. The tendency to view law as merely or primarily symbolic discourse leads to the second kind of violence—the untutored response of the public to the first kind of violence.

It is easy for legal academics to fall for the first kind of violence because it can be shrouded in some very noble visions, for instance, the view of the court as the forum of principled argument, or the view of adjudication as dialogue. Bollinger does seem taken with this kind of vision when he states that “[l]itigation provides the framework, the occasion, for the community to think about the things free speech is intended to raise for thought.”⁴² This is an exceedingly romantic vision of litigation. Indeed, it is difficult to imagine a more challenging forum than litigation for teaching the virtues of tolerance. Not only is litigation starkly outcome-oriented, but it is fraught with displays of intransigence, hyperbole, and general pettiness. And before one can reach “the forum of principled argument,” there are sustained encounters with the stylized vagaries of evidence law, the uncertain recollections of witnesses, and the vicissitudes of civil procedure. As for the view of “adjudication as dialogue,” there may be more to be said for the view that the latter ends when the former begins. Additionally, if litiga-

conclude that the courts reached the correct conclusion in Skokie. The presumption is not theory-specific and yet it is crucial for Bollinger's conclusion. Bollinger's analysis of Skokie is simply not based on any characteristic that is unique or specific to his own theory. Had he deployed his own theory to decide Skokie—namely the therapeutic model—his treatment of the issues would have been implausible, as the next footnote suggests.

41. To explain in a judicial opinion why the Nazis must be allowed to march in Skokie is surely no easy task. But for a judge to explain to the Jewish and non-Jewish residents of Skokie that it is because they and the nation need to learn the virtues of tolerance would bespeak an incredible degree of arrogance. Confronted with such an opinion, I think that any number of people would be (and would be quite justified in being) furious—and that is a far cry from tolerance.

42. L. BOLLINGER, *supra* note 1, at 195.

tion is to serve as collective therapy, it seems appropriate to consider how well the lay public follows and understands litigation. How many Americans could tell you today what the Skokie cases were all about? How well would the present citizens of Skokie answer the question?

Moreover, if free speech is to provide therapeutic lessons on the vices of intolerance, it would be nice to know what we are supposed to learn. Bollinger never makes this sufficiently clear. One interpretation would suggest that we are supposed to learn how problematic the human condition is: we are to see ourselves as controlled by irrational impulses to intolerance, learn to control these impulses while remaining competent and whole enough to express intolerance when it is warranted.

As a prescription for the good life, this is nothing short of admirable. At the very least, it should strike a chord with academic intellectuals who traffic in this problem day in and day out. But it is the free speech clause at stake here. Is it conceivable that it should be reduced to experimental therapy aimed at curing or illuminating the human propensity toward intolerance? Are legislators, administrators, and the rest of officialdom merely to watch the therapy from the sidelines, leaving the rest of us to hope that the message rubs off on them too?⁴³

Are free speech entitlements, and the jobs, security, and bodily integrity that go along with them, really supposed to be subordinated to the claim of symbolic discourse that it has something to teach about the dark side of intolerance? And what about this little matter of fashioning legal rules and doctrine for deciding actual cases? Bollinger has an answer to these questions: the key is to develop a "conscien-

43. There is little doubt that Bollinger conceives the free speech clause on the therapeutic model. This raises the question of whether Bollinger has adopted the right sort of therapy given his diagnosis of the ailment. There are, after all, many conflicting types of therapy: Psychoanalytic Therapy (S. FREUD, *THE INTERPRETATION OF DREAMS* (1955); S. FREUD, *AN OUTLINE OF PSYCHOANALYSIS* (1949)); Existential Therapy (I. YALOM, *EXISTENTIAL PSYCHOTHERAPY* (1980); R. MAY, *FREEDOM AND DESTINY* (1981)); Behavioral Therapy (A. BANDURA, *PRINCIPLES OF BEHAVIOR MODIFICATION* (1969); B. SKINNER, *BEYOND FREEDOM AND DIGNITY* (1971)); Rational-Emotive Therapy (A. ELLIS & R. GRIEGER, *HANDBOOK OF RATIONAL-EMOTIVE THERAPY* (1977)); Reichian Therapy (W. REICH, *THE INVASION OF COMPULSORY SEX-MORALITY* (1971); W. REICH, *THE MASS PSYCHOLOGY OF FASCISM* (1970)). Which of these approaches can most easily or successfully be adapted to curing the problem of intolerance?

tiously ambiguous" doctrine that takes into account the tolerance function of free speech and the social costs that free speech imposes.⁴⁴ But the balancing Bollinger offers does not work.

First, he asks us to balance incommensurables: the effectiveness of a therapeutic free speech session (discounted by its lack of effectiveness) as against social cost (discounted by its improbability).⁴⁵ We simply do not have a scale that will accommodate the realm of symbolic discourse on one side and the world of social costs on the other.

Second, balancing does not help because the world depicted by Bollinger removes the possibility of making the means-to-ends judgments that would allow balancing in the first place. Indeed, Bollinger acknowledges some alarming Catch 22's in balancing our way to tolerance. First, "the actual operation of free speech might have the ironic effect result of stimulating excessive intolerance elsewhere in society."⁴⁶ Second, "[f]ree speech may be *too* successful and create a problem of excessive tolerance, which may have equally pernicious effects for the society as its opposing vice."⁴⁷ If the world of symbolic effects is this perverse (and I am tempted to agree with Bollinger that it is), then balancing and the Tolerance Theory are hardly up to the tasks they face.

Finally, Bollinger's balancing does not work because when the stakes are high and the courts have to choose between imposing some concrete societal costs or providing an opportunity for an abstract lesson about our dark side, the balance is likely to tip against speech. Ultimately, following Bollinger's approach may well lead the courts to conclude that it is best not to insist too much on freedom of speech—

44. L. BOLLINGER, *supra* note 1, at 192.

45. For instance, in dealing with the Skokie incidents, Bollinger states:

We begin, under the tolerance principle of free speech, with an understood commitment to extraordinary self-restraint; coupled, therefore, with a willingness to be sensitive to context is the idea the free speech principle requires us to begin with a strong presumption in favor of toleration, which can be overcome only after it is determined that the society has little or nothing to gain in the various ways that the tolerance principle proposes the society will benefit from self-restraint and by comparison, a great deal to lose.

L. BOLLINGER, *supra* note 1, at 197.

46. *Id.* at 244.

47. *Id.* at 245 (emphasis in original).

only as much as is necessary to teach the lesson that insistence is sometimes a vice.⁴⁸

CONCLUSION

Obviously, I think there are serious problems with the Tolerance Theory. Not the least among them is that beneath Bollinger's message of tolerance there lurks a fair degree of intolerance. Ironically, this observation might suggest that I do believe in the virtue of tolerance after all. But I do not: the tolerance/intolerance distinction is intellectually useless unless we know which is which. And we cannot know which is which unless we know what it is we are supposedly being tolerant or intolerant about.

48. As Bollinger states:

The simple truth about free speech is, therefore, that its proponents face the risk of exhibiting precisely the intolerant mind that the principle is intended to point up and condemn. An intolerant defense of tolerance is more than just an anomaly; it may cancel out, even reverse, the gains the society hopes to achieve through the institution of free speech. We must teach ourselves therefore, that the pursuit of tolerance is not necessarily an inoculation against the malady of an intolerant mind.

Id. at 215.

