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## Law, Liberalism and Free Speech

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LAW, LIBERALISM AND FREE SPEECH. By *D.F.B. Tucker*. Totowa, New Jersey: Rowman & Allanheld. 1985. Pp. ix, 212. Cloth \$32.50; paper \$13.50.

D.F.B. Tucker's<sup>1</sup> *Law, Liberalism and Free Speech* articulates a Rawlsian alternative to "functionalist" justifications of the right to free speech. Tucker's goal is to suggest better theoretical underpinnings for established legal doctrines; he does not urge major substantive changes in free speech law.<sup>2</sup> Building on the works of Ronald Dworkin and Thomas Scanlon, he endeavors to construct a deontological<sup>3</sup> framework for analyzing free speech issues that avoids both the inflexibility of "absolutist" deontological theories and the "indeterminacy" of functionalist balancing approaches. Although the analytical superiority of Tucker's theory over functionalism proves questionable when he applies it to hypothetical "hard cases," his book provides a useful explication of topical free speech issues, including public access, fairness standards, defamation, and regulation of advertising.

Tucker begins his analysis by juxtaposing "functionalist" and "deontological" theories of free speech. Functionalists argue that free speech ought to be protected because it facilitates the attainment of a social good, such as truth-seeking<sup>4</sup> or self-governance.<sup>5</sup> The deontological approach, on the other hand, identifies free speech as a moral right which the state must respect regardless of the social cost. Tucker perceives weaknesses in both frameworks. He summarily dismisses strict deontological theories as "implausible," because they lack the requisite flexibility to accommodate important countervailing interests.<sup>6</sup> For example, absolute protection of the news media's autonomy would bar government officials from using the airwaves to deliver messages of great national importance without the networks' consent (p. 60). Functionalist theories, however, fail to explain our "intuitive" devotion to strong individual rights, since they provide a basis for pro-

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1. D.F.B. Tucker is a senior lecturer in Political Science at the University of Melbourne and the author of *MARXISM AND INDIVIDUALISM* (1980).

2. Indeed, Tucker feels compelled to apologize for the appearance that his book "seek[s] to legitimate the status quo in the United States." P. 6.

3. "Deontological" theories define rights "by reference to extremely abstract basic political principles such as the commitment to treat individuals with equal concern and to respect their dignity as persons." P. 184. By contrast, functionalist or consequentialist theories posit social goals and evaluate rights in terms of their tendency to maximize those goals. See also Schauer, *The Role of the People in First Amendment Theory*, 74 CALIF. L. REV. 761, 769-70 (1986).

4. See, e.g., J.S. MILL, *ON LIBERTY* 13-48 (R. McCallum ed. 1946).

5. See, e.g., A. MEIKLEJOHN, *POLITICAL FREEDOM* 27 (1960) ("The principle of the freedom of speech springs from the necessities of the program of self-government.").

6. Tucker argues that strict Lockean theories "place so much emphasis on . . . liberty that little regulation of the media to accommodate the public interest . . . can be legitimized." P. 60.

protecting only speech which maximizes utility. This focus on the social function served by speech diverts attention away from the individual's right to speak toward the public's right to be informed.<sup>7</sup> Moreover, functionalist balancing tests lead to "inconclusive" results, because determining the relative weights of speech and nonspeech interests entails extremely complex factual judgments (pp. 23, 188). Finally, the use of utilitarian calculus impairs judicial credibility, since the courts appear to be performing a legislative function (p. 179).

As an alternative to functionalism, Tucker advocates a Rawlsian deontological framework. Rawls' theory identifies moral rights by imagining the negotiations of equal actors who possess a basic understanding of human nature, but lack knowledge of their positions in society or individual conceptions of good.<sup>8</sup> Since any of the negotiators may belong to a social minority, they will accede to a right or obligation only if it distributes burdens and benefits universally.<sup>9</sup> For example, since Rawlsian negotiators would not know their own religious preferences, but only that spiritual beliefs are important to many people, they would recognize a right to religious freedom (p. 42). Tucker concludes that respect for individual dignity and autonomy constitutes the essence of a Rawlsian ethical system.<sup>10</sup> Applying this principle to speech, Tucker deduces that although Rawlsian negotiators would "favor freedom of speech and . . . regard the possibility of censorship as highly threatening," they would not recognize an absolute right to speak (p. 51). Since Rawlsian negotiators seek to maximize autonomy, they would permit restrictions to protect vulnerable listeners from manipulation.<sup>11</sup> Moreover, Tucker asserts that Rawlsian negotiators would view free expression as "no more than a residual right . . . left to us after we have done our part in ensuring that everyone else is treated fairly" (p. 52). In general, free speech prevails over other interests regardless of the social cost; but where it clashes with a specific "moral right," such as the right to a fair trial, speech loses. This shifts the inquiry in "hard cases" from the relative

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7. This focus on collective, rather than individual, rights is reflected in Meiklejohn's maxim: "What is essential is not that everyone shall speak, but that everything worth saying shall be said." MEIKLEJOHN, *supra* note 5, at 26.

8. See J. RAWLS, A THEORY OF JUSTICE 17-22 (1971). Tucker lifts Rawls' "veil of ignorance" slightly and endows his negotiators with general knowledge of modern industrial societies and a pessimistic view of human nature. Pp. 47-48. For a concise summary of Rawls' theory, see THE STATE, JUSTICE, AND THE COMMON GOOD 167-69, 219-40 (B. Diggs ed. 1974).

9. Rawlsian "justice as fairness" does not require absolute equality, however, since the negotiators will accept inequality if it produces a net gain at all levels of society. See J. RAWLS, *supra* note 8, at 75-83.

10. Pp. 44-45, 50-51. Tucker "drew on the Kantian ethical ideal of personal autonomy" to establish "equality in concern and respect for others . . . as the coordinating value." P. 185.

11. Thus, Tucker advocates regulation of advertising (because of its nonrational "subliminal" impact), and establishment of a right of access where monopolization of forum results in one-sided editorializing. Pp. 37-38, 81-82.

weight of the speech and nonspeech interests to the moral status of the nonspeech interest.

Tucker argues that his theory offers significant advantages over functionalism. First, it better explains our "intuitive" devotion to individual rights even where the social cost is high. Second, unlike functionalist tests, the Rawlsian approach avoids criteria based on the content of the speech or the status of the parties.<sup>12</sup> This accords with the ideal of equal respect for individuals, since it treats all ideas and persons as moral equals. Third, it avoids indeterminate balancing, since establishing the existence of a "moral right" ends the inquiry (pp. 60-61, 184-89). Tucker acknowledges that deontological theories suffer from rigidity, but he argues that this apparent weakness "is actually a strength" (p. 61). A degree of inflexibility comports with our "intuitive" reluctance to balance away free speech rights. Moreover, Tucker's system retains substantial flexibility. While moral rights may not be balanced, their exercise may be regulated. "[E]ven significant burdens on speakers" would not violate the free speech principle if "they are not so severe as to vitiate the enjoyment of the right" (p. 61). Furthermore, Rawlsian negotiators retain substantial latitude in defining the scope of moral rights which may override the "residual right" to free speech. In this manner, "Rawlsian liberalism . . . allows for a significant amount of balancing."<sup>13</sup>

The need to retain flexibility, however, detracts from the analytical force of Tucker's framework. Since balancing re-enters when Rawlsian negotiators determine the "precise profile" of a right, Tucker must explain how his theory avoids the "indeterminacy" of functionalist theories.<sup>14</sup> Tucker claims that Rawlsian liberalism meets this burden by providing "clear criteria delineating . . . the protected category 'speech'" (p. 188). But in practice his vague coordinating principle — "equality in concern and respect for others" — appears elusive.<sup>15</sup>

12. Professor Schauer's argument that defamation law should show greater solicitude for political speech than nonpolitical speech provides a good example of a content-based functionalist approach. Schauer maintains that "under a strong Free Speech Principle reputations must at times be sacrificed to the goals of freedom of speech." F. SCHAUER, *FREE SPEECH: A PHILOSOPHICAL ENQUIRY* 173 (1982).

13. P. 187. For example, Tucker maintains that Rawlsian negotiators would find a moral right to privacy where a person has a reasonable expectation of privacy, but the right's scope "varies depending on the circumstances." In the context of private files, we have a "right to expect" nondisclosure, but "we would accept many reasons as sufficient to justify an intrusion." Pp. 108-09.

14. See, e.g., Tucker's criticism of Professor Schauer's balancing approach. Pp. 22-24.

15. P. 185. Just as Tucker argues that functionalist theories too easily permit the common good to outweigh individual rights to free speech, Schauer asserts that theories based on respect for equal dignity provide "no argument against the vast number of putative restrictions on speech based on some specific other-regarding feature of the intended expression." F. SCHAUER, *supra* note 12, at 65. See also Scanlon, *A Theory of Freedom of Expression*, in *THE PHILOSOPHY OF LAW* 153, 168 (R. Dworkin ed. 1977):

[The principle of respect for individual autonomy] is obviously incapable of accounting for all of the cases that strike us as infringements of freedom of expression. On the basis of this

Tucker's analysis of "hard cases" reveals that his Rawlsian negotiators resort to the same sort of inconclusive balancing arguments functionalists apply. The weighing of interests simply appears at an earlier stage of the analysis; rather than balancing already defined rights, Rawlsian negotiators balance interests in the course of defining the rights themselves.

Tucker's discussion of the conflict between speech and privacy rights, comprising two full chapters, illustrates the degree of balancing his own theory requires. He argues that functionalist theories provide a poor guide where interests in privacy and speech collide. Utilitarian grounds would justify a rule protecting private information only if it "is unlikely to serve any useful social purpose" (pp. 104-05). Since the social value of disclosure varies with context, attempts to delineate and protect a category of "worthless information" result in "inconclusive balancing."<sup>16</sup> To avoid this morass, Tucker proposes a "thought experiment"<sup>17</sup> to determine what privacy rights Rawlsian negotiators would deem fundamental. Once a right is defined, "there would be no question of balancing" (p. 105).

Unfortunately, identifying the fundamental aspects of privacy requires Tucker's Rawlsian negotiators to delve into utilitarian arguments about the social value of protecting various classes of information. Tucker concludes that Rawlsian negotiators would reject a general right to privacy because "governments and the public . . . often have a legitimate interest in intruding" (p. 106). A moral right to privacy does exist where a person has a reasonable expectation of privacy, but the scope of this right varies with context (pp. 108-09). For example, while this right applies to private papers, "many reasons [would be] sufficient to justify an intrusion, especially if the . . . material concerned related to matters of legitimate public interest" (p. 109). Tucker also identifies a "moral right" to "that minimum freedom from . . . intrusion which is necessary if citizens are to perform their democratic responsibilities adequately."<sup>18</sup> Determining what interests "justify intrusion," constitute "legitimate" public concerns, or promote "democratic responsibilities" clearly calls for a complex weighing of indeterminate factors. Unless one is convinced that the

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principle alone we could raise no objection against a government that banned all parades or demonstrations (they interfere with traffic), outlawed posters and handbills (too messy), banned public meetings of more than ten people (likely to be unruly), and restricted newspaper publication to one page per week (to save trees).

16. P. 105. For example, a person's health might generally be regarded as private, but where the individual is also an important government official, a countervailing public interest in disclosure arises.

17. The "thought experiment" is described at notes 8-11 *supra* and accompanying text.

18. Pp. 110-11. Note that Tucker's deontological analysis uses a functionalist argument to identify this privacy right: it exists because it is "functional to the realization" of democratic participation. Compare this to Tucker's definitions of functionalist and deontological theories at p. 1.

principle of equal dignity makes the scope of these privacy rights self-evident, the application of Tucker's theory calls into question his claim that it avoids inconclusive balancing.<sup>19</sup>

The problem of inherent balancing undermines the benefits Tucker claims for his theory. For example, Tucker contends that his rights-based theory better legitimates judicial review because "legal authority is not concerned with . . . competing claims of contending forces in society but with matters of entitlement" (p. 179). However, ascertaining what entitlements exist ultimately requires the judge to determine how Rawlsian negotiators would resolve competing claims.

Despite the dubious success of Tucker's quest to discover a more coherent guide to analysis, *Law, Liberalism and Free Speech* remains valuable for its cogent exposition of the competing interests in hard cases. Tucker concisely restates the leading arguments for and against public access to media, compensation for damage to reputation, reporters' rights to know, disparate treatment of print and broadcast media, and regulation of mixed "speech" and "action." His work is well researched, with useful endnotes and bibliography. The book should be of interest to academics and students who are seeking "a better understanding of why we require governments to respect freedom of speech" (p. 189).

— M. Sean Laane

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19. A reliance on balancing recurs throughout Tucker's analysis. For example, he concludes that under his Rawlsian theory the scope of public access rights depends on a weighing of the editor's interest in autonomy, the burden of carrying the message, the importance of conveying the message, and the availability of alternate fora. Pp. 72-77. In defamation cases, Tucker argues that the balance between the burden on the press and the individual's capacity for self-help should define the extent of the libelant's right to respond. Pp. 97-98.