Rights Talk/Free Speech and Equality

John A. Powell

Berkeley Law

Follow this and additional works at: https://scholarship.law.berkeley.edu/facpubs

Part of the Law Commons

Recommended Citation

I recently read an article by Elizabeth Schneider on how we should approach a conversation about legal rights and handling legal rights issues. In her article, she noted that rights grow from our experiences. The discussion of rights, then, should not happen until the middle of our conversation. Instead, we should begin our discussion of rights by talking about the real-life experiences of people and, to the extent that we can, by grounding this discussion with experiences from our own lives.

The Beginning of Rights Talk.—I will admit that this approach is an unusual way to discuss and determine legal rights and it is certainly unusual for lawyers. Lawyers, and those who have learned to think like lawyers, often begin a discussion of rights by simply asserting that they have a right to do something or not to do something. They assert this with a great deal of force but seldom with any effort to ground their assertions in experience.

---

2. Id. at 590. Schneider develops a dialectical approach to the relationship between rights and politics shaped by an understanding of praxis, wherein the theoretical and practical are constantly transforming, recreating, and reformulating each other. Id. at 649. This method reveals a:

...[C]onception of both a process through which rights are formulated as well as the content of the rights themselves. The process has been ‘regenerative’ as rights were developed in the ‘middle,’ not at the ‘end,’ of political dialogue. Rights [in the women’s movement] were the product of consciousness-raising and were often articulated by political activists and lawyers translating and explaining their own experience.

3. Id. at 649-50.
4. Id. at 650. Schneider emphasizes the success of the women’s movement in using practice and experience to shape theory and delineate legal rights.
5. We are taught as lawyers to argue within the parameters set for us by rules, precedent, and text. In this sense, we too often allow form to limit and even define the bounds of substance, instead of allowing the substance to inform and shape the form.
6. Grounding assertions of rights in experience raises, for some, the specter of the slippery slope and the danger of line-drawing.
If Schneider is correct, though, in contending that rights emanate from experience, why is it that lawyers so seldom make reference to experience when discussing legal rights? I believe the answer is that rights often conjure up a set of shared experiences and understandings, making it seem unnecessary to be explicit about what is at issue. When we assert our claim of right we assume that we are drawing on a collective background. But when this collective consensus is called into question, either because there is not the common experience or meaning of the experience, or because there is a real or potential conflict of rights, one must make these background experiences and understandings explicit. Indeed, it is only through such a process that one can begin to assert with authority which of the sets of rights in question should be asserted in the instant case.7

There is also a need to refer to experience to resolve disputes which arise among the multiple values that a given right may embrace. For instance, there are several values embraced by free speech and at times these values conflict.8 This is also true of conflicts arising under the rubric of equality and certainly in debates regarding the justification for punishment. To make the point more clear, one of the gross failures of the United States Supreme Court in Plessy v. Ferguson9 was its inability to grasp the experience that blacks suffered under the doctrine of "separate but equal." The Court was only able to understand equality in the abstract10 and from the perspective of their experience as white members of a segregated and racist society.11

Although we are here to discuss legal rights, free speech, and equality, there is clearly a lack of consensus as to the rights implicated and there exists the potential for a conflict of rights. There-

10. The abstract is not neutral. Abstractions only hide the choices made under the guise of a false necessity. See Roberto Unger, Knowledge and Politics (1975).
fore, I will heed Schneider's advice and begin my discussion of these rights by starting in the middle, as she suggests, with my own life experiences, recognizing that others may have different experiences to tell.12

Until recently, I lived and worked in New York City and I often went out for long runs. In charting my running course, I was careful to avoid certain neighborhoods. I was not primarily concerned with avoiding neighborhoods where drugs were being sold, or even neighborhoods where crimes were often committed. My primary concern was to avoid areas such as Howard Beach and Bensonhurst where, by all indications, there was very little violent crime on the streets and almost no drug trafficking. I avoided these areas because, correctly or incorrectly, I believed that African Americans were selected in these areas as targets of violent crime, harassment, and even murder.

During the time I lived in New York, I came to work every day in the most crime-ridden area in the country. You know it as Times Square. Neither the police nor the criminals are said to be safe in Times Square. The rest of the public travels in Times Square at their own peril. Literally thousands of crimes are committed in this tiny area each year. While I harbored no illusions that one could be "safe" in Times Square, I travelled there six days a week, every week, for over six years with a only a modest degree of anxiety. Occasionally, after taking some precautions, I would even have my son, Fon, or my daughter, Saneta, meet me at work in Times Square. However, in the six-plus years I lived in New York City, I never went to Bensonhurst and never went to Howard Beach.13 Even when an event that I wanted to attend

12. I am not suggesting that my experiences will resolve the dispute between free speech and equality or that my experiences are neutral. Nor do I believe, that by injecting experience into the debate, the ability to judge conflict and determine legal rights devolves simply into a matter of individual experience or subjective taste. Instead, I believe that if we can share our experiences and actually listen to each other, we may be able to move toward creating an understanding that might give rise to a consensus. See Michael Rosenfeld, Affirmative Action and Justice (1991); Juergen Habermas, Knowledge and Human Interests (J. Shapiro, trans. 1971).

13. In December, 1986, a gang of white teenagers in Howard Beach attacked three African-American men, chasing one of them, Michael Griffith, to a nearby highway where he was hit and killed by a car. The victims of this racially motivated attack had stopped in a pizza parlor in the overwhelmingly white suburb in Queens after their car had broken down in the vicinity. The attack was unprovoked.

Two years later, Yusef Hawkins, a sixteen-year old African-American boy, went with three friends to Bensonhurst, a largely white and Italian neighbor-
take place at Howard Beach, I would either wait until the event went elsewhere or just skip the event altogether. I was careful not to end up in these places even by accident; I would not even drive through these areas.

I knew, and I still know, that the menace and the murders occurring on a regular basis in Times Square are not the same type of crime, and do not constitute the same type of injury or danger, as those exacted upon Yusef Hawkins or Michael Griffith in Bensonhurst and Howard Beach. This distinction seems so obvious to me that I have difficulty understanding people who suggest that these crimes constitute the same injury as random acts of violence.

Let me take a moment to try to drive this distinction home. Anytime innocent people anywhere are killed, the killing constitutes a horrendous act. However, this does not mean all killing is qualitatively the same. It is clear to me that the killing now going on in Bosnia, and particularly the murder of victims selected because of their ethnicity or race, is of a different order than the random and senseless violence occurring everyday on the streets of America. As great a tragedy as the deaths of tens of millions during World War II were, the death of soldiers and random innocent civilians was of a different order than the genocidal annihilation directed against the Jews by the Germans. The difference was not just of magnitude. These situations were entirely different in nature. When world leaders come together to acknowledge the opening of the Holocaust Museum in Washington, D.C., we can understand and appreciate that what happened to the Jews in World War II differed from the tragedy that befell the many families and individuals who suffered death and senseless crime during that period.

But, if as I have argued, the random and senseless murder that happens regularly in Times Square is so obviously distinct from the murder of victims selected because of their race or their religion, we must acknowledge the question of why we are even here today at this gathering? This brings me to the middle of my conversation.

The Middle of Rights Talk.—The case that has brought us here today is, of course, Wisconsin v. Mitchell. The case that has brought us here today is, of course, Wisconsin v. Mitchell.14 In Mitchell, the

Supreme Court was asked to decide whether someone who selects a victim for assault or other violent crime because of the victim's race may be punished differently than someone who selects a victim at random. In the first part of my discussion, I argued that intentional selection of a victim based on characteristics such as race differs qualitatively from random violent acts. As I said, the distinction seems obvious.

To his credit, or maybe because of the strength of the assertion by the State that racially selective crimes injure differently than racially random crimes, the attorney for Todd Mitchell did not challenge this claim. Instead, the attorney for Mitchell argued that the Wisconsin statute, which enhanced the penalty for certain crimes wherein the victim is selected because of the victim's race, religion, color, disability, sexual orientation or other categories, violated the defendant's First Amendment right to free speech. He argued that Mitchell was being punished, not for the crime he had committed, but for the bigoted beliefs that he held.

But, if I am right in thinking that a crime in which victims are selected because of race is different than a crime in which race does not determine selection of the victim, punishing these crimes differently cannot be wrong and cannot violate the First Amendment. Certainly, the First Amendment does not maintain that we have a right to select our victims or injure someone because of the person's race. What the First Amendment does clearly stand for is the proposition that you cannot punish someone simply because of the person's belief. The First Amendment, however, does not bar the government from punishing someone, either civilly or criminally, for selectively discriminating on the basis of the person's race or religion. Our Constitution is not neutral about discrimination based on race and other spe-

15. Id. at 2196.
16. Id. at 2201.
17. Id. at 2197.
18. Id.
19. Id. at 2199.
21. The Civil Rights laws clearly prohibit discrimination based on race or gender. See Brown v. Board of Education, 347 U.S. 483 (1954). Speech elements, though, can be both part of the discrimination as well as proof of discrimination. Because speech is part of the act of discrimination, it is not immunized by the First Amendment.
specific categories. Nor does our Constitution suggest that all discrimination is qualitatively the same. You could have decided not to invite me here because you heard that I often do not wear ties. Or you could have decided not to invite me here because I do not capitalize my name. That would have been a very bad decision in either case. And you would have been wrong to exclude me for either of those reasons. But it would be quite different than your deciding not to invite me here because I am an African American.

So why the concern about the First Amendment in *Mitchell*? Why the claim that punishing the discriminatory selection of the victim of a crime violates a defendant's right to free speech? I believe that there are two answers to this, both of which I have already suggested. The first is that there is a tendency to approach this issue abstractly. An abstract approach would seem to indicate that the First Amendment is implicated by the Wisconsin penalty enhancement statute. The reasoning is that there was speech involved in the sentencing determination so this must be a First Amendment issue.

The second reason is that there are other experiences and other stories to be told. Some of these stories tell of people being punished not for violent acts but for unpopular thoughts. These stories tell of someone being punished because they said something in the middle of a violent fight, while angry and confused, that is later used to prove their state of mind prior to starting the fight. These stories also tell of persons being punished because of their association with bigots, social pariahs, or unpopular members of the community.

All of these stories raise serious First Amendment concerns. However, none of these experiences speaks directly to *Mitchell* or to the Wisconsin statute it addresses. Nor do any of these experiences help us to address or understand the equality issue in situations such as Howard Beach and Bensonhurst. Some people's experiences make them more concerned about free speech violations, some people's experiences make them more concerned about race or gender discrimination. Our society and, impor-

---


23. The Supreme Court's creation and continued use of a three-tier approach to evaluating constitutional claims arising under the Fourteenth Amendment provides the most basic and obvious example of the Court's treatment of different types of discrimination.

tantly, our Constitution must address both and not one at the expense or exclusion of the other.

There is a point at which punishing an activity violates a person's First Amendment protections but there is also a point at which speech, as part of an act or proof of an act, violates the Fourteenth Amendment. To the extent that the law punishes discriminatory selection of a victim or a crime based on a victim's race or other characteristic, First Amendment values are not infringed upon. To the extent that the government punishes someone for a belief they hold, the law violates First Amendment protections. Although this is not an adequate framework to produce guidelines in speech cases, it is nonetheless correct.

Now, consider the following examples. What if the law's purpose is to focus on and punish the discriminatory selection of victims, but the law requires using "speech" as proof of discriminatory selection? As long as this is done properly, it seems to me that this is okay. Indeed, this use of speech to prove discriminatory conduct did not begin with the Mitchell case. The entire body of Title VII and Title VIII law allows the use of speech to prove discrimination. For instance, most recently, the Court decided a sexual harassment case called Harris v. Forklift Systems, Inc. The proof used to demonstrate sexual harassment was the speech conduct of the employer. The fact that this "speech" was used to prove that the employer engaged in sexual harassment and that this "speech" was even regulated did not present a serious problem.

The primary goal in Harris, then, was to eliminate sexual harassment and discrimination in the workplace. It is fairly clear and well-settled that we can use speech to show that someone has been discriminated against in the workplace or in trying to obtain a house or an apartment. What is said and done is always used as proof. For example, what is wrong with a "whites-only" sign in a restaurant? Clearly this is "speech," but also, clearly, it is discrimination, and it is not shielded simply because the discrimina-

27. 114 S. Ct. 367 (1993)
28. Id. at 369.
29. Id.
tion comes in the form of speech. The primary focus of eliminating "whites-only" signs is not to curb speech, but to eliminate discrimination. What if a white person attacks a black person, and it can be shown that the white person is part of the KKK? Being part of the KKK does not show that the person selected the black victim because of the victim's race. Therefore, using this fact as part of the proof clearly violates the First Amendment.

What if we pass a law that says that members of the KKK who burn churches or engage in terrorist activities should receive stiffer sentences than other people who engage in similar activities? This last example is not a selection case and presents much greater speech concerns. The government regulation in this case seems to focus more on the political views of the actor than on discriminatory acts. One last example. What if, while beating a Christian, a man yells anti-Christian epithets? Again, this does not show discriminatory selection and will have much greater free speech implications. The reason for protecting this type of speech seems obvious. What one says or does while in the middle or an altercation or fight is quite different than what caused one to enter into the fight in the first place. We've all been in situations where, in the heat of an argument, we will say things designed to hurt the other person. It does not mean that what we said in the middle generated the argument in the first place.

The Wisconsin statute in the Mitchell case is fairly clear and relatively easy to apply and interpret, at least on its face. The statute focuses on the act of selecting the victim. Mitchell's words and acts made it clear that he was selecting the victim because he was white. The more attenuated the speech and the more removed from the time of the action, the less likely it will be that one can show that the selection fits within the criteria of the statute and the more concern we should have about the possibility that First Amendment protections are violated. The major First Amendment issue, then, in these types of cases, is not how penalty enhancement statutes punish people because of their protected beliefs. The primary questions we must ask are what proof is allowed and when do truth and evidence problems implicate the First Amendment?

The End of Rights Talk. — I am now coming to the end of the discussion. There are a number of important issues raised by the Mitchell case. I have only touched on a few. In addressing these

problems, we should remember that there are a number of values and concerns that arise in situations implicating speech and discrimination. The First Amendment protects speech not discrimination. The Fourteenth Amendment prohibits discrimination not speech. When speech and discrimination exist together, which they often do, we must not disregard either our commitment to free speech or equality. An abstract discussion of rights will not answer many important questions and concerns. It is important to pay attention to what is going on. Looking at the experiences will clarify some questions that an abstract inquiry will not. But even this approach will not answer all of the hard questions.

We have a body of law prohibiting discrimination, both criminally and civilly. Notwithstanding this, I would suggest there are too few laws and too much discrimination. Looking at speech to help us understand what his happening and the nature of the crime is not new. We are willing to probe and weigh motive when adjudging crimes such as murder. Thus, it is strange to me that only when the issue of race is raised do we seem unable or unwilling to draw a line between speech and discrimination. Part of the confusion in Mitchell, I believe, is the patent belief that the Constitution is neutral. It is not. It is not neutral regarding the First Amendment, and it is not neutral about race discrimination. Another part of the confusion in Mitchell stems from the Court itself and its language and logic.

Certainly, a statute can be drawn in a way that chills speech. However, many of the actions of individuals, including racially-motivated selection of victims, can undermine equality and promote racial discrimination by preventing the targeted individuals from exercising their constitutional right to travel and be free of racial violence. I care about my right to speak and I care about discrimination. My experience tells me it is not the lack of free speech that prevents me from going to Howard Beach and Bensonhurst, it is the lack of equality. My experience also tells me that Mitchell is not a "speech case" but a racial discrimination case like Howard Beach and Bensonhurst. That is my experience and my determination of legal rights in this context. I am prepared to listen to other experiences.