

# Feminist Theory and Freedom of Speech

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The First Amendment to the United States Constitution says, among other things, that “Congress shall make no law . . . abridging the freedom of speech.”<sup>1</sup> This short and apparently simple phrase has generated an astonishingly complex collection of legal doctrines and a rich tradition of constitutional theory. In this Article, I would like to offer you a feminist perspective on the theoretical landscape of freedom of speech. While there has been much feminist writing about particular free speech issues, such as pornography, there has been relatively little scholarly attention given to the implications of a feminist perspective for the fundamental issues in First Amendment theory. I believe that the feminist critique provides important insights into free speech theory and offers hope of resolving some of the more intractable problems—both theoretical and doctrinal—concerning freedom of speech.<sup>2</sup>

## I. FIRST AMENDMENT THEORY

First Amendment theory begins by addressing the questions: Why protect free speech? Why regard it as a central and fundamental right? In the Anglo-American legal tradition, the answers to these questions have generally fallen into one of three categories: truth theories, autonomy theories, and democracy theories. There is a version of the feminist critique addressed to each one of these types of theories, but in this Article I have space only to provide you with one example. So, I will outline for you the traditional truth theory of speech, the feminist critique of that theory, one alternative model of truth developed from that critique, and a few of the more significant implications of that feminist alternative for free speech doctrine.

The truth theory asserts that we should protect freedom of speech because it is either a necessary or at least a very useful mechanism for discovering the truth. John Milton and John Stuart Mill both developed versions of the truth theory as justifications for freedom of speech.<sup>3</sup> And there is little doubt that the truth theory was embraced by the framers of the United States Constitution.<sup>4</sup> The Justices of the U.S.

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1. U.S. CONST. amend. I.

2. This Article is a summary of some of the arguments made in greater detail in my book, *SUSAN H. WILLIAMS, TRUTH, AUTONOMY, AND SPEECH: FEMINIST THEORY AND THE FIRST AMENDMENT* (2004).

3. See JOHN STUART MILL, *ON LIBERTY* 18 (David Spitz ed., 1973) (1869); JOHN MILTON, *Areopagitica*, in *JOHN MILTON: COMPLETE POEMS AND MAJOR PROSE* 716, 746–47 (Merritt Y. Hughes ed., 1957).

4. See, e.g., *An Act for Establishing Religious Freedom*, 1785 Va. Acts ch. 34, reprinted in *12 STATUTES AT LARGE; BEING A COLLECTION OF ALL THE LAWS OF VIRGINIA* 84, 85–86 (William W. Hening ed., George Cochran 1823); JAMES MADISON, *Memorial and*

Supreme Court have also relied upon the truth theory in some of their landmark First Amendment opinions, such as *Whitney v. California*<sup>5</sup> and *New York Times v. Sullivan*.<sup>6</sup> There is a large literature full of critiques and revisions of truth theory. This literature focuses on the extent to which people are actually capable of recognizing the truth when they see it, and on what conditions must be met in order for a free speech marketplace to generate truth. These criticisms and revisions generally accept, however, the model of truth implicit in this theory.<sup>7</sup>

This model of truth—or more accurately, this family of models—is so much a part of our social institutions and so widely accepted that it is almost invisible to us. And the Supreme Court, like the rest of us, takes it for granted and does not often pause to work out the details or implications of its assumptions. But feminist philosophers Alison Jagger and Susan Bordo have compiled a useful list of the aspects of this model, which is called Cartesianism,<sup>8</sup> and these aspects can be traced in both the free speech literature and the Court's opinions. In Cartesian epistemology, truth is a quality of beliefs: a true belief is one that accurately describes or reflects reality. Reality is, moreover, objective—it exists independent of our understanding or perception of it and independent of our moral or political values. There is, in other words, a fact of the matter about whether or not there is a wall over there and that fact is independent of whether I happen to believe in gender equality or find myself in a democratic society or not. People acquire knowledge about this objective reality through the use of their reason, sometimes supplemented by their sense perceptions. These faculties are understood as characteristics of individuals, independent of a person's social context: reason is the same for everyone, everywhere. As a result, the knowledge acquired is universally valid—there cannot be multiple, equally valid truths—there is only one truth.

The Cartesian assumptions are closely connected to a series of dichotomies that permeate not only the philosophical tradition but also popular culture. The dichotomies include mind/body, culture/nature, universal/particular, reason/emotion, and objective/subjective. While the connection is fairly obvious for most of these dichotomies, the culture/nature dichotomy is worth a slightly closer look because it often functions as a summation of all of the others. Nature represents all that is

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*Remonstrance*, in THE MIND OF THE FOUNDER: SOURCES OF THE POLITICAL THOUGHT OF JAMES MADISON 7, 14–15 (Marvin Meyers ed., 1975).

5. 274 U.S. 357, 375 (1927) (Brandeis, J., concurring).

6. 376 U.S. 254, 279 n.19 (1964). I do not include here the most famous reference to the truth theory: Justice Holmes metaphor of the marketplace of ideas. See *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting). Although this metaphor has become the classic reference, I believe that Justice Holmes actually had in mind a different approach. WILLIAMS, *supra* note 2, at 26–27.

7. For a general assessment of these arguments, see FREDERICK SCHAUER, *FREE SPEECH: A PHILOSOPHICAL ENQUIRY* 23–24 (1982). For specific examples of such criticisms, see Paul H. Brietzke, *How and Why the Marketplace of Ideas Fails*, 31 VAL. U. L. REV. 951, 961–68 (1997); Christopher T. Wonnell, *Truth and the Marketplace of Ideas*, 19 U.C. DAVIS L. REV. 669 (1986).

8. See Alison M. Jagger & Susan R. Bordo, *Introduction to GENDER/BODY/KNOWLEDGE: FEMINIST RECONSTRUCTIONS OF BEING AND KNOWING* 1, 3 (Alison M. Jagger & Susan R. Bordo eds., 1989). The description of Cartesianism and of the feminist critique both closely follow the analysis I offered in Susan H. Williams, *Feminist Legal Epistemology*, 8 BERKELEY WOMEN'S L.J. 63, 65–75 (1993).

physical, moved by emotion or instinct rather than reason, sunk in subjectivity and particularity. Culture is the triumph of mind and reason, imposing objective and universal constraints—perhaps most clearly, although not exclusively, in the form of law—over these forces of chaos, danger, and ignorance. Nature may be the non-human world—the resources and raw materials, the natural forces and disasters—against and over which man stands as the representative of culture. But nature may also be people: the “barbarian” hordes of another nation, the subset of our own population in need of control (women, the poor, minorities), or even that part of each individual that sometimes threatens to overwhelm his reason. In other words, the nature/culture distinction constructs the boundary between the orderly and productive realm in which reason and objectivity rule, and the confused, inarticulate, and possibly dangerous area beyond the wall, which has yet to be subdued. Human beings can and do live on both sides of that wall.

This Cartesian model of truth forms the foundation for the truth theory of free speech. It is because speech is useful to the discovery of this truth that it is valuable. References to the various characteristics of Cartesianism can be found in both the work of philosophers and the opinions of judges espousing the truth theory.<sup>9</sup> And this reliance on Cartesianism should be unsurprising given the fact that this model of truth is so deeply embedded in our social institutions and popular beliefs. When we say that speech will lead us to the truth, this is the kind of truth we have in mind.

## II. THE FEMINIST CRITIQUE

The recent challenges to the traditional conceptions of truth and autonomy have come from a number of different directions, including hermeneutics, pragmatism, postmodernism, communitarianism, and feminism. While these movements share many insights, the emphases and underlying concerns differ somewhat in each. I believe that one could reach many of the same results I will suggest here by traveling one of these other paths as well, but the path I will chart begins from the concerns and methods of feminism.

There are many forms of feminism and they differ in important ways, but feminist frameworks do share certain themes. One such theme is the belief that women are and have been systematically denied equality and respect or oppressed by men and that this situation is wrong and should be corrected.<sup>10</sup> A second theme shared by many, but not all, feminist positions is the recognition of social constructionism.<sup>11</sup> Finally, feminists also largely agree on the importance of listening to and taking seriously women’s own accounts of their experiences.<sup>12</sup> The criticisms of the traditional models of truth and autonomy that I will describe build on these widely accepted themes.

The feminist critique of Cartesianism begins by arguing that knowledge is socially constructed. The central claim is that knowledge-making is an activity that takes place

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9. See WILLIAMS, *supra* note 2, at 37–40 (discussing John Stuart Mill and Supreme Court opinions).

10. See DEBORAH L. RHODE, JUSTICE AND GENDER 5 (1989).

11. See Susan H. Williams & David C. Williams, *A Feminist Theory of Malebashing*, 4 MICH. J. GENDER & L. 35, 66–70 (1996).

12. John Christman, *Feminism and Autonomy*, in “NAGGING” QUESTIONS: FEMINIST ETHICS IN EVERYDAY LIFE 17, 18 (Dana E. Bushnell ed., 1995).

only within, and deeply shaped by, a cultural context. The critique then links this social constructionist insight to the commitment to end patriarchy, by showing how an epistemology that sees truth as objective, rationalist, universal, and representational works systematically to support gender hierarchy.

The critique starts by undermining the claim that truth is objective, in the sense of reflecting a reality independent of the human perception of it. Instead, the critique argues that truth is deeply, necessarily shaped by the social and personal context of the observer. There are at least three ways in which the process of acquiring knowledge is shaped by the knower's context. First, the very facts that are taken by Cartesianism to be the materials out of which reason constructs knowledge are shaped by culture.<sup>13</sup> Our experience does not come to us in prearranged bundles; rather, facts are made by a process of selection from experience. What we notice and the way we organize our experiences are both constrained by the conceptual categories that our culture makes available to us.<sup>14</sup> Moreover, the categories available to any given individual may be different from those available to other individuals in her culture. A society may give different conceptual tools to different groups. For example, women may be trained to identify subtle changes in emotional states while men generally are not.

The second sense in which knowledge is socially constructed is that, in order to analyze data, interpreters must make value choices. There are always multiple possible interpretations of our experience; to choose between them one must rely—explicitly or implicitly—on a value judgment. Some value judgments are explicitly acknowledged in traditional science—for example, the preference for simplicity and elegance in a theory. But less explicit and more problematic value judgments also shape the choice of interpretation, such as the perennial preference for biological explanations for any difference between the sexes, which tends to support the moral and political values of patriarchy.<sup>15</sup>

Finally, value judgments affect not only the construction and interpretation of facts, but also the choice of which issues or questions are worthy of investigation. There is no such thing as a problem in need of study without people who have the problem.<sup>16</sup> Which problems are studied will depend upon whose perspectives, concerns, and needs are considered most important by society. This phenomenon is well-illustrated by the long history of medical research that ignored the distinctive problems of women or studied shared human problems by looking only at men.

The argument about the cultural construction of knowledge can be summarized by saying that interpretation is a necessary element of knowledge creation at every stage in the process and interpretation is inescapably cultural and value-laden in nature. And the value judgments we make in creating knowledge have important moral and political consequences: they can affect the social status of groups and can influence the structure

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13. See Ruth Hubbard, *Some Thoughts About the Masculinity of the Natural Sciences*, in *FEMINIST THOUGHT AND THE STRUCTURE OF KNOWLEDGE 1* (Mary McCanney Gergen ed., 1988).

14. See Naomi Schemann, *Individualism and the Objects of Psychology*, in *DISCOVERING REALITY: FEMINIST PERSPECTIVES ON EPISTEMOLOGY, METAPHYSICS, METHODOLOGY, AND PHILOSOPHY OF SCIENCE 225, 229* (Sandra Harding & Merrill B. Hintikka eds., 1983).

15. See generally RUTH BLEIER, *SCIENCE AND GENDER: A CRITIQUE OF BIOLOGY AND ITS THEORIES ON WOMEN* (1984).

16. See Sandra Harding, *Introduction: Is There a Feminist Method?* to *FEMINISM AND METHODOLOGY 1, 6* (Sandra Harding ed., 1987).

of social institutions. As a result, the social constructionist argues that these value choices are subject to moral and political criticism and justification. The problems one chooses to study, the way one describes the data, and the theories one develops from it, can all be criticized on the grounds that they are shaped by value choices that are morally or politically objectionable. And it follows that the knower is personally responsible for the knowledge she creates. She must accept responsibility for the values she used in generating and defending her knowledge claims. She must recognize the process of making knowledge claims as itself a moral and political act for which she bears personal responsibility.

The social constructionist view of knowledge suggests that every aspect of the Cartesian model of truth is mistaken. Truth is contextual and relational rather than objective. It can and must be pursued by means which recognize emotion and value as well as reason and that generate responsibility on the part of the knower whose values are implicated. Truth may be plural or perspectival rather than universal. And truth may take many forms other than propositions purporting to represent an external reality.

As I have just described it, the social constructionist critique is not unique to feminism. The distinctively feminist version of this argument, however, focuses on the relationship between the Cartesian premises, on the one hand, and the meaning of gender and the oppression of women, on the other hand. Cartesian epistemology has been used as a foundation for defining the difference between the genders and justifying the oppression of women. The Cartesian knower is culturally male. The characteristics associated with the knower—objectivity, reason, intellect, universality—are traditionally associated with men. The thing known is defined as culturally female. The characteristics associated with the object of knowledge—particularity, emotion, physicality—are traditionally associated with women.<sup>17</sup>

The Cartesian premises and dichotomies do not merely define men and women as different; they also justify gender hierarchy. The side of each dichotomy associated with men is privileged, thus helping to justify the social privilege of those persons who are assumed to best exemplify those characteristics. Women are defined in terms of the opposite set of characteristics, making the acquisition of knowledge by them perhaps impossible, and certainly unfeminine. Since the role of the knower is to exercise power over the known, and since knowers are, almost by definition, male, it is men who are thereby authorized to exercise power. Since women are, almost by definition, part of the natural world to be known, they are among the fit objects of such control.

There is extensive argument among feminist theorists over whether this gender hierarchy is a necessary aspect of a Cartesian epistemology or whether it is only an historical accident that the two ideologies have become joined in this way. For the purposes of my argument, it does not matter which position one adopts on this issue. Even if the connection is a matter of historical happenstance, it is too strong and deep to be severed now. Whether or not it was inevitable, it is now the case that part of the meaning and function of Cartesian epistemology is to reinforce gender hierarchy.

The feminist critique, then, goes beyond the other versions of social constructionism by pointing out how the Cartesian epistemology constructs and justifies gender

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17. See Peggy Reeves Sanday, *The Reproduction of Patriarchy in Feminist Anthropology*, in *FEMINIST THOUGHT AND THE STRUCTURE OF KNOWLEDGE*, *supra* note 13, at 49, 53.

difference and hierarchy. Thus, the feminist critique does not merely argue that value judgments and social goals are generally implicit in epistemological choices; it demonstrates how a particular set of values and goals—those of gender distinction and domination—are implicit in a particular epistemology. In short, the Cartesian model of truth is not just epistemologically flawed, it is also morally objectionable.

### III. A FEMINIST RECONSTRUCTION OF TRUTH

For a feminist, however, giving up the Cartesian model of truth cannot mean giving up truth altogether. While certain forms of postmodernist theory may be able to cheerfully dispense with a need for truth, feminism cannot. Complete social determinism or complete cultural relativism is not acceptable from a feminist point of view. If we are truly and completely trapped within our cultural assumptions then feminism would never be possible in a sexist society. But feminists want to be able to assert both that feminism is possible and that our society is sexist. And if there are no standards beyond each person's own individual perspective, how can we argue that the oppression of women is wrong? Feminism cannot accept a moral relativism that would force us to be neutral as between different value systems, some of which oppress women and others of which do not. To be an acceptable basis for a feminist epistemology, social constructionism must be modified or supplemented to provide some standard for criticism, of both our culture generally and of the viewpoints of particular persons or groups within it.<sup>18</sup>

In other words, the critical project of feminism, while important and necessary, is not sufficient. We cannot do completely without truth and, therefore, if feminists are unhappy with the traditional, Cartesian version of truth, they must provide a workable alternative. I will suggest one such alternative to you now.<sup>19</sup>

#### *A. The Functions of Truth*

In order to reconstruct truth, I propose to begin by describing the functions that truth claims serve for us. What is it that we would feel ourselves unable to do, that we want and need to do, if we could no longer make such claims? I will suggest four functions for truth claims that are valid and important and that any feminist alternative version of truth needs to be able to fulfill. First, truth claims facilitate the creation of a shared reality. Second, truth claims function as an appeal to something that can be used to criticize social conventions or culturally sanctioned assumptions. Third, truth claims direct our attention to the practical impact of our decisions on subjects who matter. And fourth, truth claims form a basis for our connection to nonhuman reality.

Perhaps the most obvious social and political function of truth claims is to facilitate the creation of a shared reality that can ground joint action and decision making by groups. In the political realm, if anything like a democratic process is to be used for

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18. See Seyla Benhabib, *Epistemologies of Postmodernism: A Rejoinder to Jean-François Lyotard*, in *FEMINISM/POSTMODERNISM* 107, 122 (Linda J. Nicholson ed., 1990).

19. For a thorough discussion of the dangers of this extreme form of social constructionism, see DANIEL FARBER & SUZANNA SHERRY, *BEYOND ALL REASON: THE RADICAL ASSAULT ON TRUTH IN AMERICAN LAW* (2007). I agree with the authors that this extreme form is untenable, but I disagree that social constructionism inevitably slides to this extreme point.

decision making, the members of the group must be able to recognize at least some shared realities, such as the proposal under consideration and the voting procedures themselves. In social life more generally, the possibility of cooperative action for any group—a family, a business, a school—requires at least a minimally shared reality. There are at least two ways to see this connection between cooperative action and shared reality: one is in terms of the cognitive elements of cooperation—that is language and conceptual categories—and the other is in terms of trust.

Cooperative decision making requires a shared reality because it depends upon collective use of language and conceptual categories: if we cannot communicate then we cannot cooperate. Cooperation also requires trust. And one cannot trust someone who does not share, at least to some extent, the same reality. Even a completely benign person cannot be trusted if she is delusional; she does not share the same reality and, therefore, cannot be relied upon. Collective social action requires this reliance, and thus it requires some minimal shared reality.<sup>20</sup>

A truth claim can be understood as a claim about such shared reality. It makes a demand for recognition by the listener that is not present where no truth is claimed. To call something true is to imply that it (generally) can and should be accepted as a belief by the listener. In other words, the function of truth here is to make claims for the possibility of intersubjective knowledge and the existence and desirability of a shared reality.

Why do we care about the creation of a shared reality? I have suggested that we care because we need to be able to make joint decisions and engage in cooperative social action, but the issue is, of course, much deeper. The point in seeing shared reality as a goal is that we recognize our interdependence and the moral necessity for each of us to treat the others as joint participants in the process of building our collective life. The value of shared reality thus arises from a particular moral commitment closely connected to feminism's concerns for both relationality and justice: the commitment to go forward together on the basis of trust, respect, and understanding.

The second function of truth claims is as an appeal to norms that can form the basis for criticizing a culture. This function can be particularly important to oppressed people, who need to be able to argue that the current cultural arrangements are wrong or unjust.<sup>21</sup> Just as the first function of truth rejects total relativism, this second function rejects simple conventionalism. Conventionalism is inadequate because it stifles criticism by people who are suffering from injustice that is built into the conventions of their society. Any adequate model of truth must allow for this function as well.

Third, truth claims serve the function of calling to our attention the impact of our actions and decisions on subjects that should matter to us. I will call such claims "working" claims. Even if we are capable of reaching a joint decision, that decision loses much of its value if it does not work. We want our decision-making process to generate decisions that move us closer to our goals and that produce as few

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20. Cf. Naomi Scheman, *Who Wants to Know? The Epistemological Value of Values*, in (EN)GENDERING KNOWLEDGE: FEMINISTS IN ACADEME 179, 185 (Joan E. Hartman & Ellen Messer-Davidow eds., 1991).

21. See Martha C. Nussbaum, *Valuing Values: A Case for Reasoned Commitment*, 6 YALE J.L. & HUMAN. 197, 214 (1994).

unanticipated evils as possible. “Working” truth claims insist that we should care, not only about the symbolic import of our decisions, nor even just about the process through which they are reached, but also about their practical consequences.

This use of truth may be the one that is closest to the hearts of many Cartesians because they understand “working” to mean manipulating an external and objective reality in order to meet our needs or desires. But a concept of workability need not be Cartesian. Indeed, the philosophical tradition most concerned with this notion is the very non-Cartesian tradition of pragmatism. The pragmatic approach suggests that truth is what works and makes no claims for its relation to any reality independent of human understanding of it.<sup>22</sup> Truth works if it helps us to deal with our environment, including the internal tensions we may feel, as well as the social and political context in which we find ourselves.<sup>23</sup> Feminism can add to this account the stipulation that truth only works if it does not result in systematic, illegitimate hierarchy—such as patriarchy. Another way to put this is that the “us” for whom truths must work must centrally include those who are systematically oppressed by such hierarchies.<sup>24</sup>

The importance of the “working” function of truth claims lies in its ethical dimension. Such a claim demands that we take seriously the pain and happiness of others. It also insists that we recognize responsibility toward others when making decisions. In other words, it is because failure has consequences for other subjects who matter that we care whether or not a decision “works.”

In constructing a non-Cartesian explanation of the “working” function of truth claims, I do not intend to deny the existence of the world or to assert that whether or not something works is all in our heads. We experience the world as real and I am not suggesting that we should try to do otherwise. The world is just as real for us whether we imagine it in Cartesian terms or not. Indeed, what it means for the world to be real, in non-Cartesian terms, is simply that we experience it as real, rather than as a dream, or an illusion, or one of the other categories of our experience that we distinguish from reality. In other words, the opposite of “real” is not “socially constructed,” it is “imaginary.” Both real and imaginary experiences are socially constructed, but they are still different in important ways.

In addition to the functions of truth previously described, which are social or political in nature, truth claims seem to play an important role in the personal lives of many people. In this role, truth claims form the basis for an understanding of oneself as connected to reality in a stable way, an understanding of a larger whole—often including nature or God—of which one is only a part. Religious truth claims are one subset of this category, but they are by no means the only form. Some environmentalist or animal rights positions might also fall into this category. To the extent possible, a social constructionist model of truth should try to accommodate this function of truth as a stable connection to a larger, nonhuman reality.

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22. See, e.g., WILLIAM JAMES, PRAGMATISM 104 (1975); Robert Lipkin, *Indeterminacy, Justification, and Truth in Constitutional Theory*, 60 FORDHAM L. REV. 595, 627–28 (1992).

23. *Id.*

24. See Margaret Jane Radin, *The Pragmatist and the Feminist*, 63 S. CAL. L. REV. 1699, 1710, 1720 (1990).



*B. A Relational Model of Truth*

The relational model of truth is non-Cartesian because it rejects all of the central tenets of the Cartesian model: objectivity, rationalism, universalism, and the representational view of truth. This new model sees truth as fundamentally contextual and normative. That is, knowers can engage in the activity of knowledge-making only from a particular position or perspective, one that is radically shaped by their cultural context, including their normative concerns. Such contexts should not be seen as impediments to knowledge, but as preconditions of it. To ask what we could know if we could escape all such cultural perspectives is like asking what we could see if we could escape having any particular sorts of eyes. Interpretation, with its contextual and evaluative character, is as essential to the process of making truth as the biomechanics of eyes are to the process of seeing.

One result of this focus on interpretation is that truth is seen as made by human actors rather than discovered. There is no passive receptivity to an external reality; rather, there is an active process of interpretation. Another result of the focus on interpretation is that the traditional dichotomies—particularly the fact/value distinction—are made untenable. There are no facts that are not permeated by values because all result from a process of interpretation that is inherently normative. The relational model also rejects universalism: truth may often be plural rather than singular.

The rationalist bias also falls away. First, reason cannot be understood in the abstract and instrumental way that it traditionally has been, as focused on logic and means/end rationality. Reason, like truth, is highly contextual. Second, reason cannot be contrasted with emotion or politics simply because the latter are seen as normative in nature. The opposite of a reasoned judgment is not an emotional one, but an unreasonable one: emotions are often quite reasonable.<sup>25</sup>

None of this means, however, that reason should lose its place among—maybe even in the forefront of—those human capacities we use to make knowledge. Reason, like truth, is a category worth rehabilitating. Reason is the process through which we make sense of our experience. “Making sense” is, of course, a highly contextual matter: the sort of argument that can make sense of our experience in a physics laboratory (mass, velocity, vectors) is not the same as the sort of argument that can make sense of our experience at a baseball game (strikes, foul balls, and runs). The concept of reason captures this concern that some things—such as forms of argument and conceptual categories—in some contexts, help us to make sense of our experience better than others.<sup>26</sup>

Finally, the relational model of truth sees language in a way quite different from the traditional Cartesian propositional, representational view. Because cultural understandings so deeply shape our truths, and because language is one of the primary vehicles through which such understandings are created, maintained, and transmitted, language is seen as performative rather than as representational. To make a truth claim is to do something in the world, not merely to represent something that already exists.

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25. See Martha C. Nussbaum, “*Secret Sewers of Vice*”: *Disgust, Bodies, and the Law*, in *THE PASSIONS OF LAW* 19, 21 (Susan A. Bandes ed., 1999).

26. See PAUL CHEVIGNY, *MORE SPEECH: DIALOGUE RIGHTS AND MODERN LIBERTY* 66 (1988).

With this sketch of the model in place, we can now turn to consider how this model serves the purposes or functions of truth outlined in the previous Part. The first function of truth was to serve as the basis for claims of intersubjective knowledge, claims concerning a shared reality that makes cooperative social action possible. The second function of truth was to serve as the basis for a critique of existing social institutions and conventions, a critique that can be broad and deep rather than merely a matter of “tinkering.”

These two functions mark the acceptable range on a continuum: at one end is a cultural framework that is so totally open that it allows for too little shared reality (relativism) and at the other end is a cultural framework so totally closed that it allows for too little critique (conventionalism). If all knowledge is contextual, then one way to see this problem is as a dilemma about the size of the context. If we are looking for a context rich and powerful enough to generate a shared reality on a controversial issue, then we can find ourselves drawing the context ever smaller, in order to find enough common ground for a consensus. Such a shrinking context, however, can leave us with a radical relativism in which truth can be determined only from within a given viewpoint, and viewpoints are—at least potentially—no bigger than a single person. Shared reality would then become difficult or impossible. On the other hand, if we are looking for a context big enough to include deep and broad challenges to our assumptions, then we may find ourselves expanding the boundaries of the context beyond the usual cultural limits. Such an expanding context, however, can leave us with too little in common to draw on for any kind of claim at all. Deep critique would then become meaningless: it would be like criticizing people in a language they do not understand.

Thus, the two functions of speech push in opposite directions but each, if taken to an extreme, undermines its own goals. The need for a shared reality pushes us toward smaller contexts, but if they are too small they cannot sustain such a reality. The need for deep critique pushes us toward larger contexts, but if the context is too large it cannot sustain such a critique. When seen this way, the problem is finding the right context: one that is small enough to generate a strong sense of shared reality, but big enough to provide materials for deep criticism of its own assumptions.

What makes this problem seem so intractable is its construction as an epistemological issue rather than a pragmatic, social and political one. If contexts are seen as given in advance and static, then it may be very difficult to find one that has both sufficient grounds for shared reality and sufficient resources for deep critique. And, even if one could locate such an ideal context, it may be very difficult to explain how one could argue that other people need to adopt the same cultural context rather than a competing one that they may prefer. So, for example, on gender equality issues, it is hard to find a cultural framework that includes both widely shared commitments and the foundations for deep critique. And, assuming that I have found such a framework—perhaps the constitutional culture’s commitment to equality would serve—it is hard to know how I would convince someone who was committed to a religious framework on gender issues that he or she ought to adopt mine instead.

But contexts are not given and static; they are created and recreated through our act of calling upon them. This means that social and political action can generate a new framework that no one was aware of before, such as the frame of women’s experiences that was generated by the feminist practice of consciousness raising. It also means that existing frameworks can be and are transformed by how we use them. It is not that anything is possible in any framework, of course, but we determine what is possible

through the very process of calling upon a framework, rather than knowing its limits in advance. We are not at the mercy of some epistemological slippery slope down which we will slide into a context that is either too large or too small. Contexts do not just sit there waiting for us; they have to be built and rebuilt. And the process of building and rebuilding them is a social and political process that must be guided by our values.

So, if we find that there is not enough common ground for the social group that must make a joint decision, then we must build that common ground through social and political action. The construction of such common ground is a large part of the purpose and appeal of the narrative turn in legal scholarship. The use of stories allows us to expand our experience without changing the circumstances of our lives and that expanded experience can provide a foundation for a shared reality across significant lines of social division such as race, gender, or class.<sup>27</sup> Or if we find, on the other hand, that we share a great deal but there are not sufficient materials within our current context for deep criticism, then we must build a context that includes such materials. As I mentioned above, the recent history of consciousness raising provides a striking example of using the materials of a shared reality—the frustration and unhappiness of many women in a patriarchal society—to generate new grounds for critique.

Such efforts at cultural construction are not guaranteed to be successful and they can take a long time to bear fruit. Our efforts to build a context may fail rather than succeed in any given instance. But we will not find ourselves sliding inexorably toward one end or the other of the spectrum: contexts are not so given and we are not so passive as that picture would suggest. The challenge before us is not fundamentally a conceptual one, but a moral, political, and practical one: deciding what sort of context we need to address an issue and then taking the action necessary to build it. Knowledge-making is similar to, even continuous with, political action. Neither relativism nor conventionalism is ever simply inevitable. With the relational model of truth, both shared reality and deep critique are possible, meaningful, desirable, and a matter of human effort.

The third function of truth is to provide a basis for “working” claims. I hope it is clear how this function of truth is consistent with, even required by, the relational model I have offered. The responsibility that is central to this model requires that we consider and respond to the challenges, moral and political, that others might bring against our decisions or beliefs. The “working” truth claim is precisely this type of challenge. The relational model of truth does not merely allow for the “working” type of truth claim; importantly, it places such claims at the center of our attention because they raise precisely the issues of moral and political responsibility upon which epistemology rests.

Finally, the fourth function of truth is to provide a connection to a stable, nonhuman reality. This function poses the greatest challenge for a social constructionist model of truth. In the relational model, truth is a human creation, deeply shaped by culture and personal context. Social constructionism cannot take a position on what, if anything, is “really out there.” Indeed, from a social constructionist view, this is a meaningless question because all knowledge-making goes on only “in here,” meaning within human cultures. But this does not mean that social constructionism denies the existence of

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27. See Kathryn Abrams, *Hearing the Call of Stories*, 79 CAL. L. REV. 971, 1020–24 (1991).

anything beyond human beings and their experiences. In fact, such an assertion would simply be another form of forbidden claim about what is (or what is not) “really out there.”

The social constructionist view does require, however, that what we know of nonhuman nature (and, indeed, what we know of ourselves and other human beings as well) is always known through our relationship to it. We know only from within a perspective, never from outside it. This does not require agnosticism about whether or not nonhuman reality exists. Nonhuman reality certainly exists because all existence does or could mean is that we stand in a certain sort of relationship with it. It does not become impossible to speak about our role in some reality large enough to include nonhuman moral elements just because we have adopted a social constructionist view of truth. We can talk about this subject only from within a human perspective, of course, but that does not mean that we are silenced. The relational model of truth leaves room for this function of truth claims. Thus, the relational model of truth can provide a basis for all of the functions that we need truth claims to serve.

#### IV. RELATIONAL TRUTH AND SPEECH

If we adopt the relational model of truth, will it generate a theory of free speech? Indeed, speech is extremely important to the pursuit of truth, understood in a relational sense, but it is important in somewhat different ways than in the traditional truth theory. I will briefly outline why relational truth requires protection for free speech and point out a few of the ways current First Amendment doctrine might be altered by the adoption of a relational truth theory. The most fundamental shift would be to recognize speech as systems of relationships between people and not merely as the expressive acts of individuals. A legal right to free speech under a relational theory would need to include a right to the protection of such systems and relations.

I argued in the last Part that the key to unraveling the dilemma posed by the need for both shared reality and deep critique was to recognize that the construction of workable contexts for knowledge-making is not a conceptual problem, but a practical one that can only be solved by social and political activity by people. The central question then becomes: what are the means by which we build our cultural contexts? This question leads us directly to speech.

Speech is, of course, the primary practice by which we manipulate symbolic and conceptual frameworks, and such conceptual manipulation is crucial to the practices of building and reinterpreting contexts. Speech is central to the project of creating shared reality because in a speech relationship we adopt the moral stance of respect toward our dialogic partners that is the foundation for shared reality.<sup>28</sup> Speech is also central to the project of generating deep critique because it is an important—perhaps a unique—mechanism for the consideration of alternatives to our present point of view. As many writers have pointed out, such consideration of other perspectives is a precondition for the only type of objectivity available in a social constructionist approach.<sup>29</sup> Speech is

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28. See SEYLA BENHABIB, *SITUATING THE SELF: GENDER, COMMUNITY, AND POSTMODERNISM IN CONTEMPORARY ETHICS* 31 (1992).

29. See, e.g., SANDRA HARDING, *WHOSE SCIENCE? WHOSE KNOWLEDGE?* 155–56 (1991); IRIS MARION YOUNG, *INCLUSION AND DEMOCRACY* 114–15 (2000).

the primary way in which we are able to access other minds, allowing us to see and consider alternatives we would otherwise miss.

All of these arguments concern speech at the micro level: as a relationship between individual speakers and listeners. But we must also consider speech at the macro level: the systems of speech in which large numbers of people participate and through which they negotiate the conceptual and symbolic frameworks that guide their truth making. Such systems would include the mass media, political campaigning, public education, and public fora. In order for a relational model of truth to function well, these systems must be vibrant and healthy. They must facilitate both the creation of shared reality and the promotion of deep critique. A free speech theory based on a relational model of truth would, therefore, see the protection of these systems as a central goal of the First Amendment.

This understanding of speech sheds light on one of the current debates in the literature: whether the First Amendment prohibits the government from regulating speech systems in order to make them work better according to a normative vision of public dialogue. This issue comes up in the context of the regulation of hate speech<sup>30</sup> as well as in campaign finance reform.<sup>31</sup> The underlying issue in both situations is whether the government may restrict some people's speech in order to create a system that facilitates speech by others. The Supreme Court has consistently rejected this sort of justification.<sup>32</sup> One reason for the rejection is that this justification may appear to violate what many have seen as the bedrock principle of the First Amendment: that the government may not silence speech simply because it dislikes or disagrees with it.<sup>33</sup> A relational model of truth requires a more nuanced approach to this issue and suggests that some forms of government regulation of speech systems for normative purposes could be an important part of protecting freedom of speech.

If the government silences speech simply because it dislikes or disagrees with it, that would violate the relational truth theory of free speech by interfering with the deep critique function of truth. But the government rarely claims that this is the reason for silencing speech. Generally, the government points to some concrete harm the speech will or may do as its justification. Here too, a general suspicion of government motives has its place. There is an inherent bias in government when it comes to the goals of shared reality and deep critique: government can generally be trusted not to attempt to silence speech because it supports a shared reality, but it has a profound impulse to silence deep critique and the First Amendment should be seen as a response to this impulse.<sup>34</sup> But, in order for our speech systems to serve the purposes of relational truth, they must in fact facilitate both shared reality and deep critique. Where the government claims that it is ordering such a speech system in order to protect the capacity to generate shared reality, we may view such claims with suspicion, but we should not regard them as the equivalent of the dislike or disagreement that is at the heart of an unconstitutional purpose.

The difference here turns on the distinction between protecting a particular vision of a shared reality that the government presently supports, on the one hand, and protecting

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30. See *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992).

31. See *Buckley v. Valeo*, 424 U.S. 1 (1976).

32. *Id.* at 48–49.

33. See Jed Rubenfeld, *The First Amendment's Purpose*, 53 *STAN. L. REV.* 767, 778 (2001).

34. See LEE BOLLINGER, *THE TOLERANT SOCIETY* 104–44 (1986).

the mechanisms through which our shared reality is reinterpreted, on the other hand. The government has no legitimate interest in protecting a particular view of our shared reality because the content does and should change constantly. But the government does have a legitimate, indeed a compelling, interest in protecting the mechanisms through which that shared reality is constructed. Thus, a government purpose to regulate speech in order to preserve the process of building shared reality and deep critique—for example, by preventing monopolies in the communications industry, regulating campaign finances to reduce the impact of money on politics, or preventing some forms of hate speech—is not presumptively illegitimate. The courts will, of course, still need to examine carefully the means chosen, but the purpose itself is consistent with a relational truth theory of the First Amendment.

When we add consideration of “working” claims, we see additional connections between relational truth and speech. Relational truth requires that we make ourselves vulnerable to such claims by other people. Speech allows us to be vulnerable to such claims by people who would otherwise find us unreachable because of social and/or physical distance. Speech is, indeed, the only real opportunity for vulnerability for all of the members of a community who must build truth together. But, again, we must consider the systems and relationships in which such speech takes place. We must scrutinize our speech systems at the macro level for their openness to a broad range of people affected by public policy, particularly those who might not otherwise be heard.<sup>35</sup>

This concern about access leads us to another set of implications for First Amendment doctrine. Current free speech law restricts the right to use public spaces for speech purposes through an impoverished public forum doctrine. Traditional public fora are limited to those spaces that have historically been used for speech activities, such as parks and streets. More contemporary public property will be seen as a designated public forum only if the government explicitly chooses to open it for speech purposes, and even then, it will be a forum only for that class of persons who were the intended recipients. All other public spaces are either non-public fora, in which the government may exclude any speaker on a mere showing of reasonableness, or not fora at all, in which case the First Amendment simply does not apply.<sup>36</sup>

If we take the need for “working” claims seriously, however, then many public spaces and institutions would need to be far more open to speech. The power differentials in which working claims have their genesis require that power holders make themselves vulnerable to such challenges. In order for the challenge to be effective, it must sometimes be made within the institutions where the power is exercised. But the people who are in authority in such institutions have strong incentives to overestimate the need for their own control and underestimate the harms done to those subject to that control. For that reason, deference toward the people holding power in such institutions—as implied in a reasonableness standard—is generally less appropriate as the institutions are more hierarchical. In order to

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35. I read Steve Shiffrin’s *Dissent, Injustice, and the Meanings of America* to illustrate one view of what it would mean to take seriously the systemic issues concerning such “working” claims, which are closely related to Shiffrin’s category of dissent. See STEVEN H. SHIFFRIN, *DISSENT, INJUSTICE, AND THE MEANINGS OF AMERICA* (1999).

36. For the Court’s description of this current doctrine, see *Arkansas Educational Television Commission v. Forbes*, 523 U.S. 666, 677–78 (1998).

accommodate, indeed encourage, working claims, a publicly owned resource should be open to persons wishing to use it for speech unless the speech would conflict with the primary purpose to which the resource is committed. In other words, a functional incompatibility approach, like that used in the *Grayned* case,<sup>37</sup> should be the standard, rather than the historical, rigid, and deferential approach presently taken by the Court.

Finally, speech is also central to the last function of truth claims. People pursue a connection to a larger reality through many mechanisms, but they often involve speech. Worship services, theological debate, and evangelism are all forms of speech that serve this purpose. Obviously, this function of speech is closely related to the religion clauses of the First Amendment. The search for understanding is an important part of truth and the practices of both speech and religion serve as vehicles for such understanding.<sup>38</sup> As a result, religious speech should often receive protection under the Free Speech Clause as well as the Free Exercise of Religion Clause.

#### CONCLUSION

Feminism offers a critique of the traditional truth theory of free speech, but it can also offer a foundation for an alternative theory: one that sees truth as fundamentally relational, contextual, and normative. In our philosophical tradition, truth has too often been used to assuage a longing for certainty, and certainty has, in turn, been purchased at the price of hierarchy. But truth is and should be important to us. Truth is the symbol of our commitment to live together in a way that meets our moral standards, to create our destiny and our reality together. A feminist vision of truth offers hope that the First Amendment could become the repository of this commitment.

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37. See *Grayned v. City of Rockford*, 408 U.S. 104, 116 (1972).

38. For a related argument, see William P. Marshall, *In Defense of the Search for Truth as a First Amendment Justification*, 30 GA. L. REV. 1 (1995).

