Preface

The Idea of Global Norms of Freedom of Speech and Press

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From my vantage point, this volume of essays originated more than a decade ago, when I began to realize that the reality of what we, for good or bad, call “globalization” was fundamentally changing the problems of freedom of speech and press. The increasing interconnectedness of the world was having a profound impact on individual nations while creating issues and challenges that required collective action at a global level. The near-universal embrace of some version of capitalism and open markets, the easing of barriers to the movements of people, and the emergence of the first ever truly global communications system (led, of course, by the Internet, but preceded and supported by satellite broadcasting and other forms of communication) together augmented trends toward integration of the world that, in turn, would reshape how we communicate and need to communicate in order to cope with a new level of shared life.¹ Climate change, economic bubbles, recessions—and, yes, pandemics—would offer undeniable proof that global discussion of global issues was more and more the order of the day.²

But it was also increasingly apparent that this new world required a different level of political structure or framework. The international institutions established in the wake of World War II needed to be refreshed or replaced.³ Life

in whatever form it takes—economic, social, political, cultural—was racing ahead of our capacities to govern it. Such changes were emphatically not self-effectuating. For them to happen, we needed a public square—a place where all this and more could be debated and understood and decided. Some of this would happen, of course, within existing nations, though each system would be affected by the whole, and some would happen across nations in the broader public sphere. This, in turn, would necessitate expansive rules and norms about communication and media, and that’s what the principles of freedom of speech and press are all about.

For me, the problem was that my primary academic expertise, my scholarly knowledge, essentially ended at the borders of the United States. I was, and am, an expert on the First Amendment to the U.S. Constitution. My education occurred in the 1960s and 1970s, resulting in becoming a law professor in 1973, which corresponded with that particular period of American history—indeed, a seminal period—when the modern First Amendment was born and a new generation of scholars was created. This moment of enormous social and political ferment, following the Supreme Court’s 1954 decision in *Brown v. Board of Education* and centered around the civil rights movement and dissent over America’s involvement in the Vietnam War, laid bare the gap between the realities of American life and our ideals. It was also a period when virtually every major controversy and argument was refracted through the lens of the Constitution and brought to a receptive court. The constitutional jurisprudence of this era was so rich and important, spanning such a wide swath of American life, that the scholarly community responded, appropriately, by subdividing what had until then been regarded as one field of expertise—constitutional law—into dozens of distinct scholarly pursuits. Some law professors became experts on the Fourteenth Amendment, some on the Fourth Amendment, and some, like me, on the First Amendment. By the 1970s, the ranks of every law school faculty were dominated by constitutional law scholars. The First Amendment rights of freedom of speech and press became a “field” unto itself, and every law school had its First Amendment experts, with courses and textbooks, academic conferences, and journals to support this work.

A different world of expertise, however, centered on freedom of speech and press in other nations (often focusing on comparative law) and at the international level (typically grounded in international human rights law).⁴ The work of scholars in these fields, who came from different intellectual traditions and who expressed their thinking through separate journals, textbooks, and conferences, would occasionally overlap with the world inhabited by First Amendment scholars in the United States, but serious cross-pollination was rare. The

First Amendment had, of course, been part of the U.S. Constitution since the adoption of the Bill of Rights in 1789.⁵ But, for various reasons, the Supreme Court did not interpret those simple words “Congress shall make no law . . . abridging the freedom of speech, or of the press” until just after World War I, in 1919.⁶ Those early cases and the decisions in the decades that followed, leading up to that extraordinary period of the 1960s, were in effect trial runs in which different ways of thinking about freedom of speech and press were tested.⁷

Even though all of this jurisprudence evolved from a felt need to design principles and doctrines for the political system within the United States, in retrospect one can see that, certainly since this seminal period in the 1960s, the world was watching, and that it absorbed many of the ideas that emerged from the United States’ quest. And there were signal moments on the international stage that gave birth to the equivalent of the U.S. First Amendment. The most significant came in 1948 with the adoption of the Universal Declaration of Human Rights (UDHR).⁸ Article 19 of the declaration addressed freedom of expression in stirring language: “Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.”⁹

The UDHR was followed with the 1967 International Covenant on Civil and Political Rights, which, among other things, codified Article 19.¹⁰ For freedom of speech and press in the international arena, these are the critical foundational texts. Yet, as a symbol of the separation of the academic fields of First Amendment law and international law, it is worth noting that casebooks on American constitutional law typically will make no reference to these treaties. In contrast, as contributors to this volume of essays demonstrate (see part 2), beginning in the 1960s, divisions that had existed in international jurisdictions were being bridged by the establishment of courts and regional institutions, particularly in Africa, that encouraged regional political and legal integration and, eventually, enabled international legal integration.

This progression in the United States was largely foreseeable. During an extended period after World War II, the United States held the status of an international superpower experiencing both the Cold War threat presented by the Soviet Union and a profound internal societal reorganization. Locked in an ideological battle against totalitarian regimes, the nation assumed the responsibility of setting an example for the world and subscribed to the belief that getting it right would convey symbolic authority internationally.¹¹ The collapse of the Soviet Union and the rise of capitalism, with policies favorable to expanding free trade and the accompanying ubiquity of foreign investment, magnified a

process under way for decades and created a new degree of interdependence demanding an overlay of global oversight. This transition built upon the accumulation of global norms that took root after the end of dictatorships in the Americas, the dismantling of apartheid, and the erosion of the Soviet bloc, and can be traced back even further, to the proliferation of international treaties and regional institutions in the 1960s and 1970s.¹²

The pace of change in the 1990s was radically accelerated by the phenomenal development of the global communications system.¹³ And by the beginning of the twenty-first century, we were in a new world, where each nation would have to figure out how its citizenry would or would not participate in the global marketplace of ideas and how it would interact with citizens from other nations who did so, as well. These were very real and very practical questions, different from the foremost concerns of the prior era, when we were focused on the degree to which respective nations embraced “universal human rights” and how best to leverage the developing human rights system and the ethos it embodied to impede the belligerence of totalitarian governments and lessen the possibility of another world war, which were the well-founded objectives of the Universal Declaration of Human Rights and its progeny.¹⁴

Here are some examples of this highly complex new reality.

Every nation must decide to what extent its own public forum will be permeable to the peoples and governments around the world. Will its own citizens be protected domestically when they engage in free speech work around the world? In the United States, there is one set of doctrines for citizens who provide advice and assistance to radical domestic political organizations and another (less protective) set of doctrines for citizens who do this for foreign political groups.¹⁵ Will the domestic public forum be open to foreign citizens and governments wishing to communicate with its citizens? In the United States, there have been enormous concerns about foreign interests (governments) trying to disrupt and manipulate domestic deliberations.¹⁶ Yet, clearly, we all have a significant interest in hearing from peoples beyond our borders about issues we all face. Will a nation’s public forum be open to foreigners seeking to better understand and report on that nation? In the United States, the foreign press must receive special visas from the government before operating as journalists.¹⁷ Recent controversies surrounding the denial of visas to members of the Chinese media are illustrative of this issue.¹⁸

Here is another set of problems in the new world of an instantaneous and pervasive global communications system. One’s own citizens may be “censored” by foreign governments for exercising their free speech rights within their own national borders. We see civil (for instance, libel) and criminal actions

brought in foreign jurisdictions against American citizens for exercising their rights of expression in the United States.¹⁹ The most heinous example of this, of course, is the murder by Saudi Arabia of Jamal Khashoggi, in part for viewpoints he expressed as a columnist for the *Washington Post*.²⁰ I have written about the ways in which international and U.S. law might be deployed to punish this extreme form of “censorship.”²¹

And yet another set of problems: In this new world, with its urgent problems to be discussed and resolved, we now have a much stronger interest in how citizens in other countries are treated by their own governments. Since what they know and decide are crucial to things we all care about, in the most practical sense, we have a stake in how their governments treat discussion within that state. As I have said many times, in the modern world, censorship anywhere is censorship everywhere.²²

As I laid out in the Tanner Lectures at Clare Hall, University of Cambridge, in 2018,²³ in a profound sense what we are encountering now on the global level is a continuation of a process that began to unfold in the last century, starting with the movement within societies from the local to the national levels. I see this as having happened in the United States during that seminal period of the 1960s, to which I referred earlier. By the mid-twentieth century, America was well into the development of a national economy, with a strengthened and expanded federal government, facing issues national in scope, new technology of communication that emphasized national conversations (namely, broadcasting, with first radio and then television), and a rising sensibility that whatever happens anywhere is consequential for those elsewhere (leading examples being *de jure* segregation in the South, actions involving the environment, and local economic policies).

With regard to the First Amendment, this shift from local to national standards was represented by the Supreme Court’s decision in *New York Times Co. v. Sullivan* in 1964.²⁴ Protections for an individual’s reputation through the civil law of defamation had long been regarded as a matter for individual states and local jurisdictions to handle.²⁵ As a result, libel laws across the country varied significantly. But, in a case involving an attempt by the state of Alabama to impose its speech-restricting defamation law against the *New York Times* for publishing a (concededly factually incorrect) advertisement by a civil rights group seeking to raise funds to continue protesting racial discrimination by the Alabama state police, the court in *Sullivan* intervened and established national constitutional standards necessary for “uninhibited, robust, and wide-open” national debate.²⁶ (Many of those standards have been embraced by courts and intergovernmental watchdogs around the world, as Hawley Johnson and Peter Noorlander examine extensively in their contributions to this collection.)

Just as the course of history with respect to freedom of speech and press has been to move to national principles as issues have become more national in scope, so too must that happen on a global scale as the issues have become global in scope. The problem is, of course, that while this could happen in the United States through the institution of the Supreme Court, there is no comparable institution at the international level that could take the norms of the UDHR, for example, and make them into a global jurisprudence of free speech and press—although, as the contributions in this volume demonstrate, a number of others have played this role.

Nevertheless, the project we have embarked upon is no less clear: to evolve global norms about these rights and to determine which global freedom of expression norms are essential for this interconnected world. That is the fundamental issue for the essays in this book. My reference point for this inquiry is also the development of the common law in the twentieth century, particularly in fields like contract law. Great treatise writers such as Arthur Corbin and Samuel Williston scoured the decisions in states across the country and brought them together in major reference books.²⁷ By aggregating these cases and highlighting them over the decades, a consciousness and reality of a national body of law were created. It was, in one sense, basic assembling. But, in a much more profound sense, the process became meaningful in its own right and over time fulfilled what it assumed—namely, that there was a coherent whole emerging from discrete parts. The idea behind this volume is to help create that similar whole.

The search for global norms on freedom of expression and information is crucial in its own right. It is also, however, a matter of enormous importance to the state of the world generally. As global communication expands, many governments are responding to the sense of loss of control not only by increasing censorship but also by turning to techniques of authoritarianism, such as inciting extreme forms of nationalism, engaging in the politics of populism, and exhibiting animosity toward and demonization of marginalized groups, especially foreigners.²⁸ General norms of freedom of expression, therefore, are inherently important, but they also are critical to avoiding further descent into the new forms of authoritarianism and to finding effective solutions to shared global problems.

Let me take a moment to speak about the direction I believe we should take in the years ahead. As I have indicated, unfortunately but realistically there is no way to establish enforceable global principles and rules about freedom of speech and press under the current international institutional framework, nor does it seem likely that this state of affairs will change anytime soon. The absence of any institution within the UN framework that possesses the power

to enforce the texts of international law on freedom of expression in disputes between states and their citizens is a hard fact of life—well known, of course, and, at least in the free speech community, widely lamented.

This does not mean, however, that there is a complete absence of international bodies with institutional authority in these matters. They exist at the regional level. The emergence since World War II of regional human rights courts in Africa,²⁹ Latin America,³⁰ and Europe³¹ has been one of the signal areas of advancement in the development of enforceable legal doctrines concerning freedom of expression. Everything must be done to support this trend in the world. Important essays in this volume address this development.

Still, the bulk of what happens, and will continue to happen, in the realm of free speech and press on a day-to-day basis occurs at the level of individual nations and, increasingly, at the level of the private corporate actors powering the Internet. Any strategy to advance these rights must accommodate that reality. There are several points that follow from this.

First, for a variety of reasons, freedom of speech and the press seem to be best articulated and preserved by the judicial branch of government, provided it is independent of the political process and characterized by respect for the rule of law. This seems to me to be based in experience, not necessarily in any preordained theoretical truth. To be sure, other government institutions are important to the development of free speech rights, sometimes even more important, but it is the judiciary that seems again and again to be the primary source of respect for those rights. My personal sense is that this is due to a natural alignment between the way of thinking that characterizes the legal mind and the values inherent in the principle of freedom of expression (that is, receptivity to the give-and-take of argument and an attitude of skepticism). Whatever the underlying reason, if this is true, then we must do all we can to support independent judiciaries.

Second, we should not be thinking about freedom of speech and press as rooted only in the idea of democracy and Madisonian self-government. In the United States, linking the First Amendment and freedom of expression to democratic self-government has become the conventional theoretical basis for analyzing cases ever since the court's decision in *New York Times Co. v. Sullivan*. With the influence of the writings of Alexander Meiklejohn, the relationship between the "search for truth" and the First Amendment, which emerged at the very beginning of First Amendment jurisprudence in the first half of the twentieth century, has taken a secondary position.³² But, in my view, that has been a mistake, and it certainly does not work well, given the variety of systems of government around the world.

For the “search for truth” rationale to gain greater currency, it must be linked more persuasively to all the ways in which we benefit from it. In particular, the system of research universities, both in the United States and around the world, is entirely devoted to advancing knowledge and truth, and over the past century, in particular, has brought more benefits to humanity in every facet of life than any other institution. At its best, journalism and its institutions are similarly dedicated to finding and conveying to the broader public the truth of current events. Tying freedom of speech and press to this entire enterprise is more likely to be palatable and compelling in most nations, especially in those that do not begin with the premise that Western-style democracy is the way to organize their societies. It is a fact that economic progress, at least beyond the level of a mercantile, basic manufacturing economy, is dependent upon an underlying creativity in the society, one linked to a commitment to expanding knowledge.³³ This is a commonly shared interest across most of the world and, therefore, a solid basis on which to argue for strong protections for speech and press.

Third, we need to decide (informally, of course) the scope of protections for freedom of expression that should be considered foundational, or vital, and in what areas reasonable but different approaches might be taken. I am thinking here specifically about what to do with extremist speech, which is often but not always about so-called hate speech. This is a very complicated subject, about which I have written and spoken extensively over the course of my career.³⁴ While the U.S. Supreme Court has squarely come down on the side of extraordinary protections for this kind of speech,³⁵ and while I believe there is a very good rationale for this approach, I do not think it is a necessary condition of a strong commitment to free speech and press. This is one area where reasonable people and nations may come to different conclusions, and we should be prepared to have those debates and discussions without assuming that the entire edifice of rights is at stake.

Fourth, as we engage in this sometimes laborious process of going case by case, court by court, and nation by nation in trying to build up norms around freedom of expression, it is critically important that we realize that this is necessarily a project that will take decades rather than years. As one surveys the world at this moment, it is easy to become discouraged, as nation after nation drifts further and further into an authoritarian, autocratic mind-set and system. Free speech and press seem under assault from every direction, more so than at any time since the collapse of the Soviet Union.

I will conclude, just as I began, on a personal note. As president of one of the world’s great research universities, the operative question for me over the

past decade has been how Columbia University should respond to all of this. We took a number of related actions. To help faculty and students find ways to engage in teaching and research around the world, we established what are now nine Columbia Global Centers.³⁶ These are currently operating in Amman, Beijing, Istanbul, Mumbai, Nairobi, Paris, Rio de Janeiro, Santiago, and Tunis, and they have become essential aids for our community to expand our physical and intellectual presence beyond the boundaries of New York City. These are not branch campuses, with separate faculty and students, but rather are facilities led by distinguished and highly knowledgeable individuals who can help guide our faculty and students to do their teaching and research more effectively in this far more integrated and interdependent world. The Global Centers reflect our sense that we are too ignorant of the vast changes that are occurring across the planet and that we, as scholars and teachers, need to be out there, physically as well as imaginatively, in order to grasp and critique what is happening. It is intellectual modesty, not the arrogance of superior expertise, that drives this initiative.

We also have embarked on a major effort to add to the basic mission of the modern university the purpose of having a direct impact on the world by bringing research into action through partnerships with outside entities. I have called this the “fourth purpose” of the university. Traditionally, universities have been thought of as being about expanding and conveying knowledge, while also being a good neighbor and engaging in public service. The fourth purpose adds a mission of action, or impact. Although this is not by any means unheard of within universities (for instance, medical research is often connected to delivery of health care; commercialization of academic research has become a widely accepted function of universities; and individual faculty often act on their own initiative to bring their research insights into the world of action), no university has been deliberate and comprehensive about making this a key element of what it is about.

To realize this new mission, we have created several new entities within the university. Related to Columbia Global Freedom of Expression, about which I will speak in a moment, is the Knight First Amendment Institute, which we launched with a \$50 million endowment and the mission of advancing research, teaching, public education, and—more to the point—litigation on freedom of speech and press.³⁷ The institute is the result of a collaboration between the John S. and James L. Knight Foundation and Columbia to lodge within a secure and independent institution (namely, a university) an organization engaged in helping to foster as meaningful a place for the First Amendment in this century as it occupied in the last century.

The new media concerns at the helm of today's digital world, though possessing abundant wealth, have so far not embraced to the same degree the journalistic ethos of their traditional media predecessors, nor have they exhibited a willingness to shoulder the costly and sustained legal advocacy needed to repel government abuse of power. Our intention in establishing the Knight First Amendment Institute is that it will be there to fill the gap, and in its first years of existence it is admirably accomplishing this purpose.³⁸ Nongovernmental organizations and public-minded law firms have for decades provided invaluable support in setting and safeguarding norms for the protection of freedom of expression, frequently advancing novel or progressive interpretations of the law that have had a global reach. Lodged in a great university and, therefore, distinctive, the Knight Institute is now among their ranks.

Consistent with this intellectual framework and these related ideas and initiatives, I decided in 2014 to establish the Columbia Global Freedom of Expression project.³⁹ As the founding director, I hired Agnès Callamard, then the head of the nongovernmental organization Article 19. Agnès has been spectacular in this role. She knows what needs to be done and is clear-sighted about the forces in the world that have to be reckoned with, courageous in person, scrupulous in character, imaginative in how to move the world forward, and generous to a fault in supporting others and never making herself the center of attention, even when she deserves it. It has been a joy and a privilege to work with Agnès on this far-reaching and long-term goal of advancing the development of global norms of freedom of speech and press.

The most important of the many activities and initiatives taken on by Columbia Global Freedom of Expression—though it is in many ways the least likely to be heralded—is the simple idea of creating a database of decisions related to freedom of expression around the globe. Amazingly, before we developed this, there was no place one could go to get a comprehensive sense of the judicial (and legislative) decisions regarding freedom of speech and press, referencing international principles. To date, more than 1,300 decisions have been analyzed, and there are thirty thousand visitors each month, demonstrating the need for and interest in such a tool.⁴⁰

Ultimately, my hope and objective is to encourage an integrated approach and understanding of freedom of expression and press freedom, one that borrows from, and builds bridges across, multiple jurisdictions and disciplines. To protect freedom of expression globally and to establish the norms needed for creating and then safeguarding a robust global public square, we must see a willingness on the part of scholars, intellectual leaders, and policy makers around the world to reach across national, regional, and international—and

intellectual—borders. Scholars of the First Amendment must become central participants in this effort, committed to interacting with international human rights lawyers, and vice versa.

This, then, provides the background and framework for this particular book. We hope that assembling many of the greatest experts in the fields related to global norms of freedom of expression will yield yet another milestone in the advancement of free speech and press in the world. I am deeply grateful and indebted to Agnès and to the authors who have worked so diligently and creatively to make the idea of this book, and this large project, a reality.

NOTES

1. See Artur Borcuch, Magdalena Piłat-Borcuch, and Urszula Świerczyńska-Kaczor, “The Influence of the Internet on Globalization Process,” *Journal of Economics and Business Research* 18, no. 1 (2012): 118–129.
2. See Karen Pashby, “The Global, Citizenship, and Education as Discursive Fields: Towards Disrupting the Reproduction of Colonial Systems of Power,” in *Globalization and Global Citizenship: Interdisciplinary Approaches*, ed. Irene Langran and Tammy Birk (London: Routledge, 2016), 69, 71 (describing a “world [that] seems more global than ever before,” in which “global issues take on a particular urgency and schooling is required to attend to the global”).
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4. See, for example, Sarah H. Cleveland, “Hate Speech at Home and Abroad,” in *The Free Speech Century*, ed. Lee C. Bollinger and Geoffrey R. Stone (Oxford: Oxford University Press, 2018), 210–231; and Albie Sachs, “Reflections on the Firstness of the First Amendment in the United States,” in *The Free Speech Century*, ed. Lee C. Bollinger and Geoffrey R. Stone (Oxford: Oxford University Press, 2018), 179–192.
5. Daniel Baracskey, “Bill of Rights,” *The First Amendment Encyclopedia*, February 2018, <https://www.mtsu.edu/first-amendment/article/1448/bill-of-rights>.
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7. See *Brandenburg v. Ohio*, 395 U.S. 444 (1969); *Tinker v. Des Moines*, 393 U.S. 503 (1969); *United States v. O'Brien*, 391 U.S. 367 (1968).
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9. G.A. Res. 217 (III) A, Universal Declaration of Human Rights, art. 19 (Dec. 10, 1948).
10. International Covenant on Civil and Political Rights, art. 19, Dec. 19, 1966, 999 U.N.T.S. 171.
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12. See UN Department of Economic and Social Affairs, *World Economic and Social Survey 2017: Reflecting on Seventy Years of Development Policy Analysis* 24 (2017), https://www.un.org/development/desa/dpad/wp-content/uploads/sites/45/publication/WESS_2017-FullReport.pdf (discussing the rise of capitalism following the end of World War II and the impact on international institutions).
13. See Ivo H. Daalder and James M. Lindsay, “The Globalization of Politics: American Foreign Policy for a New Century,” Brookings, January 1, 2003, <https://www.brookings.edu/articles/the-globalization-of-politics-american-foreign-policy-for-a-new-century/>.
14. See “Universal Declaration of Human Rights,” Amnesty International, <https://www.amnesty.org/en/what-we-do/universal-declaration-of-human-rights>.
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30. "Inter-American Human Rights System," International Justice Resource Center, <https://ijrcenter.org/regional/inter-american-system>.
31. "European Human Rights Bodies," International Justice Resource Center, <https://ijrcenter.org/regional/europe>.
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34. See, for instance, Lee C. Bollinger, *The Tolerant Society* (Oxford: Oxford University Press, 1986).

35. See *Brandenburg v. Ohio*, 395 U.S. 444 (1969); *National Socialist Party of America v. Village of Skokie*, 432 U.S. 43 (1977).
36. Columbia Global Centers, Columbia University, <https://globalcenters.columbia.edu>.
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REGARDLESS OF FRONTIERS