Lawlessness Revealed: The Supreme Court's Man of Liberty Transcends Tort Law

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With what Supreme Court Chief Justice William Rehnquist would later label his “customary clarity,” Justice Potter Stewart in a concurrence in the 1966 defamation case *Rosenblatt v. Baer* put the basis for tort law right where it has always been: The right of a man to the protection of his own reputation from unjustified invasion and wrongful hurt reflects no more than our basic concept of the essential dignity and worth of every human being—a concept at the root of any decent system of ordered liberty.1

As Justice Stewart put it, the “concept” which is both “basic” to and “the root of” tort law’s ordered liberty is none other than “the essential” “worth” of being. Tort laws are rooted in the intrinsic value of universal and individual being. Tort law is above all the great law of care—not care for efficiency, not care for liberty, not care for self-expression (though those attributes are certainly of value to the extent that they promote that which tort law also promotes)—but care for human life itself.

Tort law’s duty of care is fully justified by the extent to which it promotes good to being because being has an essential worth beyond the measure of anything else of value. How must the law constrain us to think of one another’s value? What is your measure of worth, and how must the law regard it? History judges the laws of nations on how they value life. The laws of Stalin’s Soviet Union or Amin’s Uganda seem not to have valued life at all, whereas the laws of Hitler’s Germany regarded the lives of some as supremely valuable but the lives of others without any value—the laws of those nations properly being judged by history as abhorrent. The value of being is as undeniable to law as it is to medicine, art, literature, philosophy, and all other legitimate pursuits and professions. Good to being is at the root of tort law as surely as it is in any other field. As Justice Stewart’s words above suggested, the charity, the benevolence, or, more prosaically the valuing of the good of being which define care, is the ends on which tort law depends for its justification.

Unfortunately, Justice Stewart has not had the Supreme Court’s last word on tort law. The Supreme Court has, in two more recent tort cases since *Rosenblatt v. Baer*, rejected care for one another as the foundation of tort law and the intrinsic good. In care’s place, the Supreme Court has made liberty the intrinsic good. The first such case, *Bose Corp. v. Consumers Union* in 1984, protected false commercial expression with the Court saying that “the freedom to speak one’s mind is . . . a good unto itself. . . .”2 The second such case, *Hustler Magazine v. Falwell* in 1988, protected intentionally severely distressing pornographic depiction, quoting *Bose Corp.* and repeating that “the freedom to speak one’s mind is . . . a good unto itself. . . .”3

The Supreme Court thus conceives of expression—not merely the false commercial expression in *Bose Corp. v. Consumer Union* but also the intentionally severely distressing pornographic expression in *Hustler Magazine v. Falwell*—as the ultimate (intrinsic rather than instrumental or conditional) good. This exaltation of the self over duties to one another echoed again even more recently in *Lawrence v. Texas*’s “transcendent” “autonomy.”4 Increasingly to the Court, self-expression is the intrinsic good and personal liberty the fundamental value, displacing the care tort law would ordinarily require of us for one another. The ghostly presence of the expressive self, as one writer has called it, more and more haunts the corridors of justice.

Of course such claims of an unconstrained and self-defining man, governed by “do for your self” rather than by “do unto others as for yourself,” are hardly new. After all, destructive self-definition (“I will be like God”) in violation of a simple command given by the supremely beneficent authority was man’s first independent act. We are forever challenged by and enamored of liberty. Even within the law, liberty is at once both the caged and singing bird—caged because without restraint liberty might pluck the eyes from any one of us, but singing because of the role self-

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determination plays in our ends and purposes. An unfettered liberty would be just as much the justifier of the grotesquely arch villain Jeffrey Dahmer as of the saint Mother Teresa. But the will to choose one path or the other seems a necessary ingredient in determining the obvious value (one good, one bad) of either.

Indeed, in few cases did the liberty animal show both its sides so clearly than in the Supreme Court’s *Hustler Magazine v. Falwell* case. Though not the cannibal murderer Dahmer, the defendant Hustler pornographic magazine publisher Flynt fabricated as purposeful, disgusting, and injuring an attack on reputation as human imagination could muster. Though not Mother Teresa, the plaintiff school founder Falwell was yet remarkably accomplished. He was certainly without the passing reproach of figures like Bakker and Swaggart with whom some might have mistakenly associated him. We had in other words a remarkably light and an equally remarkably dark knight, both of whom had chosen to exercise their quite different liberties in the manner their wills (or perhaps in Flynt’s case a part of the anatomy somewhat lower) compelled them.

Among the many law commentators who have treated the *Hustler Magazine v. Falwell* case, it is not surprising to find opposing camps, one generally approving of the Supreme Court’s decision and one generally disapproving. There are arguments to be made for either. What is more interesting for our purposes,

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6. *See, e.g.*, Dworkin v. Hustler Magazine Inc., 867 F.2d 1188, 1190 (9th Cir. 1989) (“Hustler Magazine is a pornographic periodical. Much of its content consists of what we have recently described as ‘disgusting and distasteful abuse.’” (citing Ault v. Hustler Magazine, Inc., 860 F.2d 877, 884 (9th Cir. 1988))).


though, is how the case reveals the underlying values and suppositions. The purpose of this writing is not to add another voice to either side along the traditional lines of the legal and cultural debates, so much as it is to examine a key assumption made by the Supreme Court and see how that assumption might have affected or yet affect other tort cases. To be more frank, the purpose here is to point out a fundamental fallacy in the Court’s opinion which (together with its corollary) tends to plague law generally and tort law more particularly—a fallacy which the Court just recently amplified and extended in Lawrence.

The fallacy which the Court accepted in Bose Corp. and Falwell and extended in Lawrence is that liberty is a “good unto itself.” Part I of this article explores what the Court and commentators have likely meant when describing liberty as an intrinsic good. In truth though, liberty is not a good unto itself but rather an instrumental or conditional good. Liberty is as much an attribute of murder, mayhem, and other vices as it is of the virtues of care and their corollaries. Thus Part II of this article argues that the law must clearly regard liberty as an instrumental or conditional good. In this view this writer is not alone. Indeed commentator Robert Post attributes the current disarray in the Court’s First Amendment jurisprudence to precisely that error. This article is however not primarily regarding First Amendment issues. It is instead written by a tort law commentator, professor, and practitioner. Thus Part III describes a corollary error that liberties are (and ought to be) balanced against and overriding of the care required of us by tort law. It is not merely that the Court’s First Amendment jurisprudence is in disarray because of the Court’s having mistakenly granted liberty an intrinsic value. Tort law, too, is much affected by the same misconception. Finally, Part IV suggests that the law should regard liberty not as opposed to and having to be balanced with care but rather as found in care as liberty’s author and definer. This latter premise—still not original in the broader field but yet surprisingly absent from or suppressed within the law—is the contribution offered by this writer.

I. LIBERTY AN INTRINSIC GOOD

The above introduction is not an exaggeration or misreading of Bose Corp. and Falwell—nor could it be insofar as it relies solely

on Bose Corp.’s and Falwell’s single quote that “the freedom to speak one’s mind” is a “good unto itself.”\(^\text{10}\) The Supreme Court quite plainly declared speaking one’s mind to be an intrinsic good. It takes no parsing of the Court’s opinion to reach that conclusion, for the Court said it itself. One might think the Court’s choice of words “speaking one’s mind” (rather than “speech” or “self expression”) to be a bit curious. This writer is not a lexicographer, but “speaking one’s mind” does carry with it a schoolmarm-like flavor as if one is about to receive a “good tongue-lashing.” And perhaps such a lexicographic limitation would make more palatable the Court’s equating the liberty to speak one’s mind with an intrinsic good. Rebuke from a sound authority figure is indeed much to be cherished.

But the Falwell case itself permits no such limitation. Flynt at least is no schoolmarm. Apparently when the Court equated speaking one’s mind with an intrinsic good, it meant to include speaking a filthy and vindictive mind as much as any other, for that was clearly Falwell’s context. Flynt had testified on deposition that his purpose in publishing that Falwell had several times had sexual intercourse with his mother in an outhouse was to “assassinate” Falwell—to destroy and silence him.\(^\text{11}\) It would be unfair to infer that any members of the Supreme Court personally approved of Flynt’s sophomoric linguistic style and incredibly base proclivities—which only makes the Court’s equating of speaking such a mind with intrinsic goodness all the more pronounced and surprising.

The extent to which the Court’s statement that speaking one’s mind is an intrinsic good actually affected the outcome of the Falwell case is probably a good question. The statement may not have been necessary at all. Some have argued that Falwell’s outcome was perfectly in line with developing Court free speech doctrine\(^\text{12}\)—which again only makes the Court’s equating of a vindictive liberty (a liberty intentionally exercised to destroy another) with intrinsic goodness all the more pronounced and surprising. Nor does it change the analysis that the Court was quoting another of its defamation cases Bose Corp. v. Consumers Union when it wrote in Falwell that speaking one’s mind was good

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in itself. Although starkly different factually, both *Falwell* and *Bose Corp.* were yet both tort cases including defamation counts in which the plaintiffs were claiming injuries to reputation.

One might think that too much has now been made of the Court's perhaps offhand statement in *Falwell*—that the quote has been taken out of context or to the extreme (though the facts of *Falwell* would seem to have placed the case at the extreme already). Yet such is not the case. We have already seen in the last chapter that the Supreme Court extended its liberty-as-intrinsic-good language to its "transcendent dimension" more recently in *Lawrence*. And self-realization as a transcendent value certainly did not start in the Court's jurisprudence with *Falwell* nor even with *Bose Corp.* It has an interesting history with the Court. As commentator Nicole Casarez wrote recently, "This 'freedom to speak one's mind' has always been a cherished aspect of American liberty, as reflected in the established First Amendment value of individual self-actualization."  

Liberty as its own end had a footing with the Court already in 1927 when Justice Brandeis in *Whitney v. California* labeled liberty to be "both . . . an end and . . . a means."  

That is what Justice Brandeis said: liberty as an end, though when he later added that liberty's end was "to make men free to develop their faculties" in particular for the "discovery and spread of political truth" it sounded much more like liberty as a means. 

The self-realization value later got a boost from an unusual source. As a lawyer, Thurgood Marshall used evidence of segregation's devastating effect on black children to convince the Supreme Court in the 1954 case *Brown v. Board of Education* to end legal segregation of the races. The Court accepted attorney Marshall's argument that there is an independent value to self-identification. Twenty years later, then-Justice Marshall amplified


15. *Id.* 

that same self-realization theme in the 1974 case *Procunier v. Martinez*, in which he raised self-expression first to a "need" and then to a "demand" and "basic yearning[]" of the "human spirit." 17 *Procunier* involved prisoner’s First Amendment claims to receive mail and have contact with law students and legal assistants. One might rather readily have seen from *Procunier*’s context that self-expression and self-fulfillment are not so fragile but rather extraordinarily resilient, for they clearly go on even after an extraordinarily confining jailing. As Justice Marshall put it (citing O. Henry and others writing from the jail cell), “When the prison gates slam behind an inmate,” that inmate’s “quest for self-realization” has not “concluded.” 18 But the frankly inescapable nature of self-expression was certainly not the intended point of *Procunier*. It was instead a decision intended to advance and protect self-expression.

That same year, 1974, the Court decided *Spence v. Washington*, in which it held that the First Amendment would be considered whenever “an intent to convey a particularized message was present[]” and in the surrounding circumstances the likelihood was great that the message would be understood by those who viewed it. 19 *Spence v. Washington* in essence placed the value of speech in the speech itself rather than its context. 20 The *Spence* test was so broad that commentator Robert Post would marvel at how “transparently and manifestly false” it was, in light of other Supreme Court cases rejecting that nearly anything communicative can be labeled protected speech. 21 But the *Spence* test survived and prospered. Self-realization got yet another boost in 1996 when the Court wrote in *Hurley v. Irish-American Gay, Lesbian, and*


18. Id.


20. Post, supra note 9, at 1273-74.

Bisexual Group that "the fundamental rule of protection under the First Amendment" is "that a speaker has the autonomy to choose the content of his own message."22 The shift from democratic truth-seeking toward autonomous self-definition was on.

It is by now readily apparent from the Supreme Court's First Amendment jurisprudence that the Court accepts not only the traditional political self-governance, but also the marketplace of ideas justification for expression.23 To the Court, speech is not just to promote democracy. Members of the Court clearly also accept an inherent value in liberty as a second and separate justification for expression. Indeed when Justice Marshall in Procunier accepted the "demand" and "basic yearning[]" of the "human spirit"24 as a justification for self-expression, he rather neatly fulfilled the ancient prophecy that man in his lawless liberty (lawlessness revealed) would soon set himself in the temple of God. One does not have to be a priest or a shaman to see and write of spirits in the law. Supreme Court justices exercise the same prerogative. Justice Marshall made the human spirit's demands the arbiter of what is appropriate in terms of expression, notwithstanding what the supreme Spirit might have to say about it, that we ought, even in our speaking, to be giving due regard for the welfare of others.

Many law commentators such as Bradley Wendel have followed the Court's lead (or have been leading the Court) by calling "expressive freedom . . . valuable as an end in itself."25 To Wendel, "Speech as speech is so inextricably bound up with individual autonomy and dignity that its suppression, especially by the government, represents a rejection of the humanity of the

Wendel notes *Bose Corp. v. Consumers Union* as having "hinted at this rationale" and the 1980 Supreme Court case *Consolidated Edison v. Public Service Commission* as having made an "ironic appeal" to it. But Wendel does not believe that the Court has ever "accepted it as the primary basis for the guarantee of free expression." He makes no mention of *Hustler Magazine v. Falwell* nor (because he wrote before the decision) of *Lawrence*, both of which (in different contexts) appear to have done just that: relied on expression's purported "transcendence" and intrinsic goodness as a principal basis for overturning state laws.

Law commentators who promote self-fulfillment have behind them a substantial and growing literature on the self, outside of the law, much of it purporting to be psychoanalytic, philosophical, post-modern, or Nietzschean. This writer does not pretend to understand the meaning or significance of all or even much of this writing concerning the self. For this writer, meaning evaporates when a law commentator such as Brian Murchison writes that "[l]aw's interest appears to be the individual's process of self-forgetting in the undertaking of action" and similar statements. Some of the legal literature of the self is less complex. One law commentator, Thomas Emerson, held forth, in keeping with this literature of the self, that the end of law was to aid man in realizing his own character and potentialities. Some two decades later, law commentator Martin Redish hit upon "individual self-realization" as "the one true value" of the First Amendment. To Redish, self-realization is not the pursuit of truth for self-governance in a democracy, but rather, is made up of the underlying values of

27. Id. at 422 & n.590 (citing Bose Corp. v. Consumers Union of United States, 466 U.S. 485, 503–04, 104 S. Ct. 1949, 1961 (1984), and Consolidated Edison Co. v. Public Service Commn., 447 U.S. 530, 534 n.2, 100 S.Ct. 2326, 2331 n.2 (1980)).
29. Murchison, supra note 5, at 461.
30. Emerson, supra note 5, at 879.
31. Redish, supra note 25, at 593 ("Free speech ultimately serves only one true value, which I have labeled 'individual self-realization.'").
individual self-determination and self-development.\textsuperscript{32} Of course self-determination implies a right of (or interest in) not being guided or constrained by others. There indeed is the rub. Some such as Frederick Schauer were thus not coy in admitting that the self-realization value supporting free speech means a speech unfettered by others.\textsuperscript{33} The view that autonomy is the fundamental organizing principle is of course at the root of liberalism—that from which liberalism draws its very name. The transcendent value of autonomy is indeed the agnostic viewpoint used to justify liberty, including ironically not only the freedom of speech but even the freedom of religion. As we shall now see, though, the autonomy argument—man as God in the temple—argues too much, indeed so much as to be logically meaningless.

II. LAWLESSNESS REVEALED

To anyone with a passing recollection of philosophy (no more than that which this author can claim), the Supreme Court’s reference in 	extit{Hustler Magazine v. Falwell} to an intrinsic good might recall to mind Plato for whom justice was (as it indeed remains) an intrinsic good. Justice requires no conditions or results for its justification.\textsuperscript{34} Justice was the justifier, just as the Court attempts to make liberty the justifier of our generation. But to appreciate the conceptual (not to mention real and personal—ask Reverend Falwell) difficulties the Court’s declaration presents, it ought to be remembered what is meant by something "good unto itself": something which is good without qualification or limitation. Attributes which are good only when qualified or in certain circumstances are not intrinsic goods. It is only that which is good without condition or as an instrument to another end, that is properly regarded as being good unto itself.

\begin{itemize}
\item[33.] Frederick Schauer, Free Speech: A Philosophical Enquiry 6, 55, 56 (1982).
\item[34.] See Eileen A. Scallen, \textit{Evidence Law as Pragmatic Legal Rhetoric: Reconnecting Legal Scholarship, Teaching and Ethics}, 21 Quinnipiac L. Rev. 813, 834 (2003). Professor Scallen reminds us that though a wealthy aristocrat by birth, Plato, in the Apology, the Gorgias, the Phaedrus, and the Republic, painted a dim view of the manipulative legal system which preserved his family’s noble status, and instead drew his inspiration from the “good unto itself” justice which had “no need of reference to particular results or consequences.” \textit{Id.}
\end{itemize}
Indeed as has been shown above, virtue and vice share many common attributes, liberty being only one of them. Both virtue and vice include liberty, intelligence, and efficiency—liberty in the ability to choose this or that conduct, intelligence in the sense of the knowledge of the character of the choice, and efficiency in the sense of the bringing about of the chosen end. Were not most of our famously depraved just so because they possessed the liberty to act (without which their notoriety would never have accrued), the intelligence to understand the depravity of their act (without which they would not have been properly regarded as depraved), and the efficiency of having accomplished that which they sought? It is not necessary to invoke demons to understand the point. Even so favored an attribute, in our process-oriented law, as that of deliberation is not a good unto itself but merely an occasional ally (and an occasional foe) to virtue. It all depends on the purpose of the deliberation. The instrumental or conditional goodness of liberty seems so apparent.

The instrumental nature of liberty is no less true when the liberty exercised is that of speaking—of self-expression. Commentator Post for instance calls "doomed from the start" the Court’s attempt to protect speech as such because "‘speech as such’ has no constitutional value . . . ." Post concludes that "value inheres instead in specific forms of social order" just as, indeed, "speech has tended to receive the constitutional protection necessary for it to facilitate the maintenance and success of specific forms of social order." Similarly, Robert George has argued that the value of expression is solely instrumental: "Speech that fails to advance any human good is valueless, for the value of speech is instrumental, not intrinsic . . . . "

George’s claim that speech’s value is solely instrumental is perhaps too broad. There may indeed be a sliver of expression that has inherent value without regard to its content—perhaps a baby’s or deaf-mute’s first struggling word in which some end of life is in itself accomplished, though by constraining the context we are probably proving the instrumental nature of even these forms of expression. What about a never-before heard aria of excruciating poignancy? Well again, it depends on the context. If it were sung by the leader of the world’s most powerful nation in sole response to a genocidal regime’s murder of hundreds of thousands of innocents, that aria could as well be called an abomination. It

35. Post, supra note 9, at 1279.
36. Id.
37. Robert P. George, Making Men Moral 195 (1993); see also Stanley Fish, There’s No Such Thing as Free Speech (1994).
would be military commands, not arias, the situation would require. There is clearly an "art" or aesthetic implied in the judgment that self-expression has value, which again makes such expression instrumental rather than inherently valuable. When one encounters a man dying of starvation, the appropriate response is to feed him, not to paint a picture of his hunger. Painting a picture of hunger may by its consciousness-raising and publicity also help the hungry man and others similarly situated, but that helpfulness very much depends upon the skill and contacts of the painter—which again, makes the painting instrumental rather than intrinsic. Try as one might, it is awfully difficult to prove intrinsic the goodness of self-expression.

Not that the Supreme Court entirely disagrees. The Court itself has long understood and repeatedly held that speech's content is in the right circumstances an appropriate subject for regulation. In *Chaplinsky v. New Hampshire*, the Court held that states could regulate fighting words that by their utterance inflict injury or incite immediate breaches of the peace.\(^{38}\) In *FCC v. Pacifica Foundation*, the Court recognized that vulgar, offensive, and shocking speech is not entitled to absolute constitutional protection.\(^{39}\) In *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, the Court held that speech defamatory of private individuals on private matters was not worthy of constitutional protection.\(^{40}\) Indeed Justice Holmes himself, whose famous dissent in *Abrams v. United States* had much to do with getting the First Amendment free speech ball rolling, expressly grounded his reasoning not in any inherent value to speech but in its instrumental capacity (that which he characterized as "free trade of ideas") to achieve "the ultimate good desired . . ."\(^{41}\) Now there seems a good pointing in the right direction.

Re-labeling freedom and liberty as "self-realization"\(^{42}\) or "self-fulfillment"\(^{43}\) does not make a justification which is otherwise lacking. Post considers, but rejects, that those differently-styled self functions might be First Amendment "universals."\(^{44}\) As Post argues, realization and fulfillment are essentially social practices which, like any other social practices, have their "appropriate time


\(^{41}\) 250 U.S. 616, 630, 40 S. Ct. 17, 22 (1919) (Holmes, J., dissenting).

\(^{42}\) See Redish, supra note 25, at 593.


\(^{44}\) Post, supra note 9, at 1272–73.
and place." The doctor who for self-realization diverts from accepted medical practice injuring the patient is certainly not deserving of legal protection. Nor is the lawyer who uses the courtroom for self-development or the employee who uses the workplace for self-fulfillment. Indeed, have an employer tape Flynt's pornographic parody of Reverend Falwell to an employee's locker, and the law may recognize a good case of sexual harassment. Self-fulfillment and self-realization are much the same as freedom and liberty. It is sophism to glorify self-expression as if it were an attribute or principle apart from, and deeper than, freedom or liberty. Anything can be called self-expressive. It may be little more than arrogance or convention to call "art" expression but skilled labor in the home kitchen something less than expression. Both are highly personal statements of value—choices, as it were, of what the actor believes to be of value. In a very real sense, self-expression is not a gift to the bourgeoisie but a necessity for all of us at every moment.

The question of the nature of liberty turns one to asking, "What are freedoms for?" That very phrase is the title of James Garvey's 1996 book exploring the subject. Garvey likewise concludes that the value of liberty inevitably depends on whether it is exercised for reasonably good and valuable ends. "There is no general right to freedom; there are only particular freedoms," he writes in reference to speech, press, religion, and assembly, and the Supreme Court-granted freedoms of association and reproduction. Even within those freedoms, such as the freedom of speech, the law exempts from protection whole categories such as malicious defamation, bribes, obscenity, and so forth. Garvey in essence inverted the first principle of liberalism "that the right is prior to the good" so as to "begin with an idea about what is good

45. Id. at 1273.
46. Id.
48. Post, supra note 9, at 1273 (citing Connick v. Myers, 461 U.S. 138, 147, 103 S. Ct. 1684, 1690 (1983)).
50. Garvey, supra note 49, at 19 ("[F]reedoms allow us to engage in certain kinds of actions that are particularly valuable.").
51. Id. at 12–13, 17 ("[T]here is no universal right to freedom.").
to do, and then assign rights so as to allow people to do what is
good.\textsuperscript{53} In so concluding, Garvey properly writes that the
autonomy argument which liberalism uses to justify freedoms
(including ironically the freedom of religion) argues too much.\textsuperscript{54}

Perhaps though, Garvey did not get it all right. Garvey did not
take \textit{Hustler Magazine v. Falwell} as the source of his inquiry,
though like \textit{Falwell} Garvey conceived of speech as intrinsically
good—so long at least as it promotes knowledge.\textsuperscript{55} To Garvey,
"the pursuit of knowledge" "is intrinsically good." Garvey holds
that the activity of pursuing knowledge "is worth doing for its own
sake."\textsuperscript{56} Immediately, though, one must ask, knowledge of what?
Knowledge of evil—how to hire a hit man, how to destroy a
marriage or abuse a child—is hardly something to be desired. The
very baseness of these activities proves it problematic at best to
distinguish the pursuit of such knowledge from the possession
of the knowledge itself, or from acting upon that knowledge. The
concern grows exponentially when one considers that rational
minds possessed of knowledge are not necessarily attracted to
good and truth. Garvey himself gives the frightening example of
the extraordinary success of Nazi propaganda among an educated
and assumedly highly rational people.\textsuperscript{57} To justify liberty
generally or the freedom of speech in particular on the basis of the
pursuit of knowledge (itself proof that liberty is not an intrinsic
good if it requires a conditional justifier) only compounds the
problems.

There are probably few better examples, though, of the
instrumental good that self-expression represents than the \textit{Hustler
Magazine v. Falwell} case itself. After all, the liberty depicted in
\textit{Falwell} was drunken incest in a latrine. As the jury found, the
liberty exercised in \textit{Falwell} was the intentional infliction of severe
distress. The Supreme Court’s labeling such expression exercised
for such a purpose a "good unto itself" is absurd and
incongruous—an error by the Court of the first order. It is an
impossible stretch for the Court to have used the conventional
"marketplace of ideas" justification to protect Flynt’s speech,

\textsuperscript{53} \textit{Id.} at 19.

\textsuperscript{54} \textit{Id.} at 43–45.

\textsuperscript{55} \textit{See} Foster, \textit{supra} note 49, at 86 ("Speech enjoys special protection in
our Constitution, Garvey asserts, for the same reason that the other basic
freedoms do—it is intrinsically good because it promotes the pursuit of
knowledge."); \textit{see also} Garvey, \textit{supra} note 49, at 58 ("[W]e protect freedom of
speech ... [because] freedom of speech lets us pursue knowledge.").

\textsuperscript{56} Garvey, \textit{supra} note 49, at 67.

\textsuperscript{57} \textit{Id.} at 66.
because what Falwell proved Flynt had done was to purposely (and to some extent, given Falwell’s proof of severe distress, successfully) attempt to remove Falwell from the market. Flynt had made it no longer a marketplace of ideas but a figurative bludgeoning of a competing ware-seller. Every market needs some regulation to ensure sellers of the ability to at least offer their wares. What Falwell proved was Flynt’s purposeful effort to remove another seller rather than to out-compete the sold product.

That is not to say necessarily that *Falwell* was wrongly decided. The good news of *Falwell* is that the Court recognized that there is such a thing as an intrinsic good, even if it placed that intrinsic goodness in a most problematic of places—liberty. The philosophical divide that law and society face more acutely now than ever is well known: that to some everything is material and relative and there is no such thing as an ideal or absolute standard, whereas to others, such standards are more real than imagined and their rejection the cause of an alarmingly dysfunctional society. What the Supreme Court seemed to have tried in its liberty-as-the-intrinsic good quip was to attempt to marry that relativistic, self-actualizing worldlier to the Judeo-Christian/Platonic objective truth—an uneasy union at best. The Court could have chosen truth, justice, love, care, or a number of other plainly intrinsic goods when it instead chose the often injuring and troublesome thing—liberty—which the Court assumed promotes the modern god of self actualization.

Odd though it seems, even to those who understand and perhaps champion the claims of self-realization, it all comes back to something clearly instrumental—even by their own admission something “moral” and “better.” Self-realization’s legal chronicler Murchison for one concluded that self-realizing speech “spurs a greater awareness of the world” which “may spur action” possibly “in the direction of justice,” especially if each person’s “moral strength” “flourish[es]” for the “betterment of society.”

Murchison cites the extensive writings of Charles Taylor on the self, hoping that those writings may give new direction to legal models of the self. Taylor claims self-fulfillment as a moral ideal supplying content to the goal of justice. And indeed there seems a hint of sense and substance in what Taylor writes: that it is inward articulations and outward expressions through which the

59. *Id.* at 462–63.
60. *Id.* at 462–63 (citing Charles Taylor, *The Ethics of Authenticity* (1992); Charles Taylor, *Human Agency and Language*, Philosophical Papers I (1986); Charles Taylor, *Sources of the Self, the Making of Modern Identity* (1989)).
individual discovers meaning independent of the self and thus transcends the self.  

This conclusion is much like what was ventured above, that the fact of cognitive expression (a baby's first word) seems to have something of inherent value, but that further expression is fundamentally instrumental toward the end of transcending that very self. It is certainly not what the thorough-going self-seekers conclude, that ultimate meaning remains in the expression of the self absent and self-transcending. To put it another way, the Lawrence Supreme Court conceptualized the self as transcending authority in order for the self to reach its own autonomous dimension. The Supreme Court’s grand statements about speaking being the ultimate good may or may not be an example of rootless, new age philosophizing, in which the Court grants citizens the liberty to decide for themselves what is right and wrong in exchange for citizens accepting its ultimate authority—a sort of “We will be your Court, and you will be our people” as one of its critics Gerard Bradley has pointed out.  In contrast to the Court’s approach, Taylor sees the self transcending its natural constraints in order to recognize independent moral authority—reflecting what Murchison calls “a background of external goods.” Taylor in that way tries to cure what he acknowledges to be our all-too-prevalent, debased, and superficial experiments in self-fulfillment—our “non-moral desire to do what one wants without interference.” When he writes of transcending the self, Taylor may indeed be on to something because it was the one, Jesus, who explicitly insisted on an annihilation of the self who had far and away the most actuated, moral, and realized life. The greatest victory one can have, the old saints would say, is victory over one’s self.  

So far these musings are not unique. Post for one calls the Court’s definitional attempts in this First Amendment area “failures of judicial craftsmanship of truly stunning proportions.” The results of those attempts are to some equally difficult to stomach: sodomy (that activity which the Lawrence Court’s decision ultimately defended), fraudulent commercial speech (Bose Corp.), and parodies of drunken incest intended to destroy reputation (Falwell). An unconstrained liberty is lawlessness
revealed—without convention, without reference, without judgment—and the picture of it is not pretty. Some justices of the Supreme Court have come to the point of recognizing that characterizing tortious expression as an intrinsic good will lead, and in fact has led, the Court to the miry bottom of a slippery slope. After *Hustler Magazine v. Falwell*, the Court in the tort case *The Florida Star v. B.J.F.* concluded a series of First Amendment cases in which it progressively limited tort law's privacy protection against the public disclosure of embarrassing private facts, again in favor of the supposed intrinsic good of such public expression. In *The Florida Star* the Court determined that the press has the right to violate state law prohibiting the public disclosure of the name of a rape victim which had accidentally been disclosed in a police report. The enormous personal harm from such unnecessary public disclosures and the absence of any apparent value to the disclosure, together with the absence of any delimiting rationale within the Court's misconception of the intrinsic basis for public expression or, for that matter, any statement of the basis for the tort law protection, led the dissenters to indeed conclude, "Today, we hit the bottom of the slippery slope." Consider first, though, the very idea of balancing care against liberty.

III. BALANCING LIBERTY AND CARE

The context in which the Supreme Court most clearly declared liberty to be an intrinsic good—the tort cases *Falwell* and *Bose Corp.*—is important. It is important because liberty was not pitted against some arguably arbitrary or paternalistic state regulation, but against care. What was at stake was a person's well-being, and moreover, the manner in which one person ought to relate to another with respect to the other's well-being. If the Court's assertion that liberty is an intrinsic good had come merely in a case involving direct state regulation of speech, it would have been necessary to explore the purpose of that state regulation—to look,
as it were, for grounds or justifications on both sides of the ledger (the expression and regulation sides). But the Court’s assertion of liberty as an intrinsic good in a tort case, and indeed a case in which the defendant Flynt’s intent to harm had been proven, made it quite clear what the Court’s transcendent liberty was supplanting—the care we would ordinarily owe one another.

The consideration of free (false) speech usually has no place in pure tort cases such as when doctors give substandard advice injuring their patients. One would think that the only liability concern in such cases is the reasonableness of the care so exercised, or in other words what is the professional standard. But it is not merely the constitutional free speech concerns which have pitted liberty against care in tort cases. The blame for tort law’s running afoul of liberty should not only rest with the Supreme Court. That liberty is an interest competing against care was already accepted as a fundamental premise of tort law, independent of anything the Supreme Court has recently required of us.

Balancing tests are endemic to tort law. It is typically freedom against which we have come to balance care in tort law. Tort law commentator Heidi Li Feldman writes that in the law of negligence, we must strike a “balance between safety and freedom” which adequately represents those competing interests and values. David McCarthy writes that in the consideration of rights against risks, tort law balances personal security against personal liberty.

But it is not only that a balance need be stricken. It is generally conceived that there is a competition between care and liberty, in which one must limit the other. Robert Post writes in the Georgetown Law Journal that “privacy torts limit individual liberty” so as to enforce social norms. Gregory Keating in the Southern California Law Review summarizes the “task of tort

69. See Falwell v. Flynt, 797 F.2d 1270, 1273 (4th Cir. 1986), for more details than were provided in the Supreme Court’s opinion.
70. Post, supra note 9, at 1271.
72. Garvey, supra note 49, at 84.
accident law” as “to reconcile our competing interests in liberty and security” in our daily business.76

Others see it as even more than a balancing or competition between liberty and care. Some believe that tort law is actually harmful to liberty. Thus Mark Geisfeld in the *Georgetown Law Journal* perceives in his consideration of the coherence of tort law that “[a]ny precautionary obligations tort law imposes . . . would also be detrimental to [the] liberty interests” we daily exercise.77 And ultimately, as we have seen, some tort law commentators do more than pit liberty against tort law’s care. They suggest that liberty is the author and foundation of care—that tort law has its justification in liberty.78 Richard Wright suggests in a philosophical collection of leading tort law writers that individual freedom justifies tort law. That supposition must be quite the opposite of what is true, that one’s exercise of liberty depends upon, and is thus justified by, the exercise of reasonable care toward one another.

Is it appropriate though to balance a liberty interest against care in tort cases? Garvey’s analysis of the nature of freedom suggests one fundamental problem with this pitting of liberty against care, and of care against liberty. Garvey gave us a corollary to his thesis that freedom is not a universal right: that even where freedom does exist as a fundamental right, it should not be assumed that it is a bilateral form of freedom (a freedom to either do or not do what is under consideration).79 Bilateral freedoms do exist. They even have the benefit of an apparent even-handedness. The right for instance to practice a certain traditional religion reasonably implies a right to practice no recognized religion at all. But simply because one has a right to do something does not imply a right to do its opposite. The liberty of the North to prohibit slavery ought not to imply a liberty of the South to allow it. Garvey rightly

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characterizes the original Constitution's nearly fatal compromise on that issue as a "failure to pursue good and forbid evil . . . at the level of fundamental principles[] show[ing] a lack of character or a weakness of will." 80 That judgments concerning good and bad must be made is a conclusion fundamentally at odds with the neutrality of value that is at the center of liberalism. 81 But it is a conclusion nonetheless necessary to put the houses of care and liberty in order: Judgments as to good and bad must be made and must as a result constrain liberty.

Robert Post sees other problems with judicial balancing of liberty interests against anything. In his view, First Amendment cases do not assign rights and interests. Rather they authorize social practices in certain settings. 82 Indeed Post points to the 1988 case Pickering v. Board of Education 83 and the 1995 case United States v. National Treasury Employees, 84 in which the Supreme Court expressly rejected the metaphor that it was doing any balancing of anything. 85 Post further argues that balancing necessarily implies a muddled compromise of substantial rights and interests, when to the contrary what the courts hope to do is to authorize internally logical and coherent social practices. 86 Post writes that "judicial decisions can most helpfully be conceptualized as drawing boundaries between distinct social practices" rather than muddling through an unhealthy compromise of substantial rights and interests. 87 Finally, Post sees that balancing tests wrongly encourage a weighing of interests rudely abstracted from social settings which lend them their only particular meaning. Post concludes that "we cannot ever write on a clean slate, as though legal values and interests simply fell disembodied from a clear sky," and that purporting to do so enables the courts to skirt the pertinent social dimensions of the constitutional values. 88

The difficulty though is not merely with liberty being weighed in the balance against care. It is that when one of those two interests (liberty) is assigned an intrinsic value, the opposing

80. Id. at 18.
81. Id. at 40.
82. Post, supra note 9, at 1279.
86. Post, supra note 9, at 1279 n.141.
87. Id.
88. Id.
interest (care) really has no chance of outweighing it. Intrinsic goods have no instrumental equal. No balancing is really possible. Here, again, is where we reach the Supreme Court’s 1989 tort case *The Florida Star v. B.J.F.*, where this conceptual conundrum found its own unfortunate expression. As briefly summarized above, in that case the defendant newspaper unlawfully published a rape victim’s name which had mistakenly been included in a police incident report. The publication resulted in death threats purporting to be from the unidentified rapist, requiring the victim to relocate and receive counseling for distress. In the dissenting words of Justice White, the victim’s interest was to protect herself against what “[s]hort of homicide... is the ultimate violation of self.”89 The plaintiff had, in other words, a hugely substantial interest, for the violation of which the jury had awarded $100,000. But yet, *The Florida Star* majority found little to weigh in its favor when reversing the verdict. It did not expressly rely on an assumed inherent value in such speech, though a dissenting Justice White saw in the majority’s reasoning that very same absolutist approach. Decrying the Court’s increasingly absolutist position, Justice White asked for at least some balancing: “The Court’s concern for a free press is appropriate, but such concerns should be balanced against rival interests in a civilized and humane society. An absolutist view of the former leads to insensitivity as to the latter.”90

Balancing, though, is just the problem. Once one defines liberty as the intrinsic good, and self-expression as the fundamental value, there is little that care can do to combat the wrath of their ghostly manifestation. Man has been unleashed from both his creator and the created. There must be an alternative to balancing. Law in general and tort law more particularly can not be founded on liberty in the sense in which it has been conceived, or we will continue to find ourselves at these ends, allowing unidentified rapists to further harrow, and identified character assassins to further distress, their victims.

### IV. Care Authorizing Liberty

The universal ethic of care (or more prosaically love) for one another has always been tort law’s basis. The care ethic is the core


90. *Id.* at 547 n.2, 109 S. Ct. at 2616 n.2.
of the world's major and many of its minor religions. It is unfortunate that we do not share the Greek lexical distinctions in the forms of love, for it is of course the agape form, not eros, to which is our reference. On so essential and misunderstood a subject, our own English vocabulary is far too limited. It is the former kind of love which is intrinsically good. To that conclusion there may never have been a wise dissenter.

What though of the relationship of liberty to care? Could it be the care that authorizes liberty? The Supreme Court has in its more sensible moments concluded something like it. When Justice Stewart concurred in the tort case Rosenblatt v. Baer stating that "[t]he right of a man to the protection of his own reputation" from harm "reflects no more than our basic concept of the essential dignity and worth of every human being," he stated something like it. In case we missed the point, Justice Stewart immediately echoed the refrain that the "concept [is] at the root of any decent system of ordered liberty." Justice Stewart thus neatly pointed out that liberty, (or at least "ordered liberty") begins with the care not to harm.

Justice Stewart's insight for a time became the dissenters' refrain in a series of Supreme Court tort cases in which First Amendment liberties advanced and care retreated. His dissent was cited or quoted by the dissenters in Time, Inc. v. Hill in 1967, Rosenbloom v. Metromedia, Inc. in 1971, and Paul v. Davis and Time, Inc. v. Firestone in 1976. Finally, a Court majority quoted Justice Stewart's Rosenblatt dissent, when the First Amendment tide slowed in 1985 in Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc. Interestingly though, when the Court in a more recent tort case Milkovich v. Lorain Journal Co. again quoted

93. Id.
Justice Stewart's Rosenblatt dissent, it missed the essence of Justice Stewart's point that care in some fundamental sense authorizes liberty. For the Milkovich Court placed care on "another side to the equation"—explicitly using the traditional balancing language. At least in Milkovich, Justice Stewart's characterization of care as the fundamental organizing principle had succeeded in outweighing liberty in the balance.

For illustration purposes we might ask whether there are other intrinsic goods recognized and promoted by the law. Care may not be our only candidate. Interestingly, answering his own quite pertinent question "What are freedoms for?" Garvey suggests that the law protects freedom of religion precisely because the exercise of religion is a good unto itself (as well as an instrumental good). As Garvey's reviewer Foster paraphrased, "freedom of religion is protected because religion is a good unto itself and advances good ends; it needs no other justification." For its believers, religion is a good unto itself because God commands it, meaning that the believer has a duty to comply that transcends argument and needs no instrumental justification. That God is glorified is wholly sufficient. Religion though is also an instrumental good to the extent that its practice promotes life, peace, health, truth, and well-being.

Some caution should be taken in accepting the conclusion that there are other intrinsic goods besides care, the freedom of religion among them. For plainly certain exercises or acts taken in the name of religion have not been good—have not been promoting of the general welfare. But then, so too have many legislative and individual acts, which were taken in the name of good, and turned out not at all to be so. If one distinguishes devotion to care from the particular acts one may choose (perhaps unwisely) to represent that devotion, then the problem is eliminated or at least diminished. There is nothing wrong with care, ever. There is often something wrong with the way in which we attempt to express it or with the way in which we characterize it that has nothing to do with care but rather with greed, hate, or other opposites. So too with religion: If one distinguishes devotion to universal being from the particular acts of devotion, then the devotion indeed appears to be intrinsically good, notwithstanding that the particular devotional manifestations a person or group might choose from time to time—such as the sacrifice of a child or of the entire religious

100. Id. at 22, 110 S. Ct. at 2707.
102. Foster, supra note 49, at 86.
community—would indeed not be good at all but instead representative of a quite contrary condition.

Unfortunately, Garvey muddied the waters a bit on the good start he gave the subject. As noted above, Garvey concluded that freedom of speech is protected for the same reason that "it is intrinsically good because it promotes the pursuit of knowledge."\textsuperscript{105} Note here the immediate problem: Nothing can be \textit{intrinsically} good \textit{because} of anything. If something is good because it accomplishes some end such as the pursuit of knowledge, then it is not an intrinsic, but rather, an instrumental good. Indeed Garvey rightly acknowledges that some forms of speech do not promote knowledge. And he recognizes that as a consequence, "Advertising and other forms of commercial speech can be regulated to prevent fraud and discrimination or to promote public safety"\textsuperscript{104}—presumably because fraud and public endangerment have no value. Garvey also recognizes that we protect freedom of speech "because it allows us to monitor (through the press) the actions of elected officials and to criticize them if we disagree with what they are doing to serve our interests."\textsuperscript{105} Thus, we ought to conclude that freedom of speech has no intrinsic goodness but is instead good only to the extent that it accomplishes other ends.

So what then is freedom's proper place relative to care? It is indeed curious that these answers have become so hidden to us, when they were once so plain. Garvey points out that liberalism's autonomy justification is frankly inconsistent with fundamental principles of widely-held beliefs.\textsuperscript{106} The notion that we are in any conclusive sense autonomous may well be wrong, certainly so if one accepts any degree of divine calling, guidance, or purpose.\textsuperscript{107} Moreover, the notion that the free exercise of one's autonomy will lead to a greater good is also wrong if one accepts what many do accept as the corrupt nature of unconstrained man.\textsuperscript{108} Of what, then, does liberty consist? Liberty must in its essence be freedom from something, or it cannot be liberty. Do all the balancing you want: It is still not freedom from care which justifies liberty. Nor is it freedom from want. Rather, it has long been held outside the law that liberty consists of freedom from the absence of care—freedom from wrong, or what those of us who are not so

\textsuperscript{103} Id.
\textsuperscript{104} Id.
\textsuperscript{105} Id.
\textsuperscript{106} Garvey, supra note 49, at 45–46.
\textsuperscript{107} Id. at 46.
\textsuperscript{108} Id. at 45.
hidebound by liberalism would call freedom from sin. In essence, translating the penitent's verse, Garvey writes (in a context different from tort law) that freedom tells us what we can do and responsibility what we cannot.109

There are two ways in which we use the word "freedom." We must not confuse the two. In one respect, we say that we have the freedom to choose. And indeed we do. Our will is something innate to us. It is an essential and treasured aspect of our being. It is this form of freedom which some celebrate. But we also have the freedom to enjoy, or for that matter, to suffer consequences. There should be nothing about law's concept of freedom that would remove from us our inherent right to receive that which is due—whether good or bad—from our actions. Freedom to choose implies freedom to receive the consequences. We cannot (as the Supreme Court's jurisprudence to some degree does) glorify the freedom to choose, without also honoring the freedom to receive the consequences. When the Supreme Court or anyone else conceives of an arena where there is liberty to choose, but no liberty to receive the consequences, it is creating something quite unreasonable. It is creating a jail or prison, a vacuum in which actions have no consequences. It steals from us not only the enjoyable fruit of our labor but also something worth far more to us: the discipline for and correction of our wrongs.

Notice how care limits liberty by context. Physicians for instance are compelled by their duty of care to conform their conduct quite meticulously to a community standard when practicing on their patients—a standard determined not merely by a community of physicians but, in some cases, by a community of patients expressly as to what the physician must say or not say. The physician's standard of care is not merely as to conduct but as to expression. It is not merely as to what physicians might wish to express but what their patients might wish to hear. The "reasonable patient" standard dictates what information the physician must convey in order to obtain a patient's informed consent—that information which the reasonable patient would want to hear regarding the risks and benefits of the anticipated procedure. A physician is perfectly free to express the physician's self within those parameters, and indeed, perfectly free to express the physician's self outside of those parameters, then being equally free to receive the patient's condemnation when the patient is unreasonably injured.

109. Id. at 86.
In that sense, tort law’s rule of care is a law without limit, creating a perfect liberty—the liberty to do that which reflects an adequate level of care. You can drive your car within the speed limit and other rules of care as far, and for as long, and in whatever direction or path, you want. One has liberty to drive within the speed limit, and it is a perfect liberty. One has no liberty to drive in excess of that limit—or at best, an imperfect liberty fraught with untoward consequence. Given his nature, man has often sought to turn right or left from the way of care. Man has indeed always had that kind of liberty. But it is a kind of liberty that has always carried consequences including the consequence of reducing one’s liberty. Any other liberty, such as the *Falwell* liberty to intentionally inflict emotional distress on another or the *Bose Corp.* liberty to defraud through commercial speech, is not liberty at all. It deprives us of the discipline and redemption we require when we greedily, intentionally, or unreasonably injure. Liberty is found only within the parameters of care. Liberty in the positive, normative sense merely describes what is to the right of the line between right and wrong. Liberty has no normative value without that recognition. In fact it would have a negative normative value for everything to the left of the line that causes harm to oneself or to another.

Consider it one more time in this manner. The modern libertine claims a liberty interest and right of self-determination as intrinsic goods, when liberty and self-determination are instead for us quite neutral facts. We possess liberty, at least to a substantial degree. We are largely self-determined. Defining the self (self-determination) is (like liberty) only a conditional or instrumental good and, at that, a quite neutral fact of our condition. The goodness all depends on what self-definition one adopts. Define yourself as Dahmer did, and try to call that good. Self-determination as a murderer, misogynist, or child abuser is unreasonable. One can almost hear the libertine responding, okay, here it comes: You are going to start telling me how to dress, how to act, how to think, and other deprivations of my liberty. But the libertine often mistakes as if they were threats to liberty, what are instead simply good counsel or bad consequence. This writer is quite prepared to listen to anyone’s good counsel and indeed actively and frequently seeks it out. None of it is depriving of liberty. In fact it creates greater pleasure, as it diminishes the inevitable bad consequences of bad choices. That my wife might tell me not to wear a certain outfit to an important first meeting is not a constraint on my liberty but an invitation to greater liberties from the untoward consequences of following my own often-misguided taste and conscience.
Extremes like Dahmer are good teachers, but one need not support the argument by extremes. The libertine wears a long beard and Hawaiian shirt to the office as an emblem perhaps of the greater value he places on liberty, but then promptly wears the same long beard and Hawaiian shirt to a concert where everyone is similarly attired. The Hawaiian shirt speaks rebel in one context and conformist in another. Someone else wears a white shirt to the same office and a sadly out of place polo shirt to the same concert. Both individuals are following stylistic conventions associating them with their chosen groups. Both are fully self-determined but equally influenced by convention. Both may value those conventions quite highly. Who is to say that the Hawaiian shirt wearer values his opportunity to choose flowered attire any higher than the white shirt wearer values his opportunity not to? It might be quite the opposite that the white shirt wearer would not be “caught dead” in the Hawaiian shirt, whereas the Hawaiian shirt wearer would often wear a white shirt where the stakes (a job interview for instance) were just a little higher.

Are there other objections? The libertine or economist might say that some “value” liberty more than others value it, and that it is the opportunity to choose what to value (that choice being liberty itself) that is an intrinsic good. This assertion too is nonsense, at least in the manner in which it is often presented. It presumes a limit on value. It presumes that we each have only so much coin with which to value things, when in truth valuing is limitless for each of us. Or worse, the economist presumes that only those who have real coin (money) are able to participate in the valuing process. See for instance Judge Posner’s essay on the philosophical foundation of tort law, where he acknowledges at the outset that in his conception of this valuing process, the poor would not be able to “buy” anything at all—not even clean air to breathe. He simply deigns to “prescind” from this “baseline problem.”

Let us not prescind from anything, but instead cure baseline problems. Take the example of the epicurean who claims to “value” food taste so highly that he spends his last dollar on a sumptuous meal rather than tithing, caring for his family, or doing the other sensible things which fulfill responsibilities. The libertine and economist might claim that such is the nature of choice and of liberty that the epicurean ought in an efficient market to have that freedom to value food taste—that to the epicurean,

sensuality is the balance. But who is to say that the one who tithes and feeds his family rather than buying the lavish meal values food taste any less? Indeed in truth he may value it much more than the epicurean but believe only that the simple meal he will eat with his family, knowing that his other obligations are met, will taste far better than anything the epicurean could purchase. He who has found in care that perfect law of liberty has valued and purchased without limit. There is no limit to the coin of value. To solve Judge Posner's baseline problem, the poor man values his breath as much as the rich man who would deny it to him. Indeed he who would refuse to deny it to another may value it far more. To conceive of the value we place on one another or on that activity in which we engage as a limited market is a fundamental misconception. What one discovers (which history itself has taught us) is instead that these things have no limits.

Thus care is, or is an essential aspect of, that perfect law which authorizes liberty. The one who follows that perfect law has liberty indeed. Where there is good sense of care, there is also perfect freedom. That which constrains is not the duty of care so much as it is the commission of contrary, harmful acts. Constraint and bondage come not from caring for one another or even from caring for ourselves, but rather from failing to care. It is precisely when we abandon care as the perfect law of liberty that we become enslaved to the consequences of carelessness. The contrary myth that care constrains liberty, or still worse, that liberty is set against and constrains care, fundamentally misunderstands both the law of care and the nature of liberty. But that is precisely where our tort law has left us.