

The Book Has Two Faces: Trevor Ross's *Writing in Public: Literature and the Liberty of the Press in Eighteenth-Century Britain*

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Abstract

Trevor Ross's *Writing in Public: Literature and the Liberty of the Press in Eighteenth-Century Britain* traces the evolution of laws regulating public discourse after the decline of English print licensing. Ross argues that the development of the public sphere in eighteenth-century Britain left literature in a strange, contradictory position: simultaneously central to civic society and wholly apart from it. This claim has its contemporary counterparts. It echoes current debates about what literature is "for" among critics and philosophers. It also echoes debates about literature within contemporary free speech law, where Robert Bork and others have argued that literature should not receive protection because it is not sufficiently political, while literature's defenders have argued for its protection with varying levels of plausibility. Literature's relationship to public discourse continues to bedevil us, and Ross offers a stimulating account of how this might have come to be.

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Sometime in the early 2000s, when I was a graduate student in English literature, Richard Rorty came to speak at the Oxford English Faculty building. Before an audience of literature faculty and graduate students, Rorty claimed that one important function of literature is to cultivate empathy in readers so that they are able to identify with others in a pluralistic society. In Rorty's view, literature allows us to bridge the gap between private and public—between the private project of self-creation and the public project of justice and solidarity. Literature is a private act of self-creation that provides readers with avenues for understanding, or at least empathizing with, other people. In this way, the private act of creation serves the public goal of solidarity. As he put this claim in *Contingency, Irony, and Solidarity*:

[Human solidarity] is to be achieved not by inquiry but by imagination, the imaginative ability to see strange people as fellow sufferers. . . .

This is a task not for theory but for genres such as ethnography, the journalist's report, the comic book, the docudrama, and, especially, the novel. Fiction like that of Dickens, Olive

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Schreiner, or Richard Wright gives us the details about kinds of suffering being endured by people to whom we had previously not attended. Fiction like that of Choderlos de Laclos, Henry James, or Nabokov gives us details about what sorts of cruelty we ourselves are capable of, and thereby lets us redescribe ourselves. That is why the novel, the movie, and the TV program have, gradually but steadily, replaced the sermon and the treatise as the principal vehicles of moral change and progress.

In my liberal utopia, this replacement would receive a kind of recognition which it still lacks. That recognition would be part of a general turn against theory and toward narrative.¹

Rorty, a philosopher, effectively conceded that philosophy was incapable of generating human solidarity through argument. Instead, his best hope was that literature would generate it through feeling. One might have thought that this would be welcome news to a roomful of literature scholars. Instead, reactions ranged from bemusement to outright hostility. Most audience questions suggested that Rorty fundamentally misunderstood literature, which did not exist in the service of his civic goals. To generalize, and to bastardize Eliot, the mood in the room was, “That is not what I meant at all./ That is not it, at all.”

Rorty was neither the first nor the last thinker to attempt to define what literature is for. While some scholars of literature engage in this project, whether happily or defensively, others, like the Oxford audience, reject it as a non-sequitur. Anyone who asks what literature is *for* has missed the point. An instrumental orientation can never define literature, because literature is not instrumental. Either one understands this and therefore understands literature, or one fails to understand either.

I do not wish to replay this argument or, worse, contribute to it. I do wish to observe that Trevor Ross’s new book offers a compelling narrative about how literature came to occupy this strange, contradictory position, simultaneously central to civic society and wholly apart from it. In *Writing in Public: Literature and the Liberty of the Press in Eighteenth-Century Britain*, Ross argues that “literature” as we know it—and its dubious civic status—came about in the eighteenth century as a result of shifting legal rules and cultural norms.

According to Ross, legal changes from the demise of the Licensing Act in 1695 through modifications to copyright, defamation, and seditious libel law in the late 1700s reflected and fostered shifting cultural attitudes toward literature and its purpose. Over the course of the eighteenth century, the types of writings that occupied the public sphere moved away from literature and toward newspapers, pamphlets, and other prose writings. In Ross’s words, “The long revolution for free expression coincided with a broad reorganization of discourse in which, among other changes, literature was displaced as a vehicle of opinion by newer modes of public speech” (3). Ross’s subject is “what happened to literature once certain forms of discourse came to be perceived as public and entitled to be free of state or private control. The liberalization of public expression, I argue, necessitated a redefinition of literature’s social functions” (2). Ross dates the emergence of literature’s current, contradictory status to this time period: as beliefs about public speech began to change, “literature would eventually perform a singular and paradoxical role in democratic

¹ Richard Rorty, *Contingency, Irony, and Solidarity* xvi (1989).

society: helping to define a people while at the same time purposely serving no definable function in public life” (3).

Ross pursues his thesis through examination of three legal regimes relating to public discourse: copyright, defamation, and seditious libel. He takes pains, however, to emphasize that his is not a legal argument. Instead, he takes changes in legal rules to reflect shifts in cultural attitudes about public speech, and he uses legal materials such as opinions to illustrate those shifts.

This is perhaps the biggest challenge for Ross’s project: to define how exactly legal changes in the time period related to culture and to illustrate this relationship with particular evidence. In some ways, the story is most compelling in the broadest strokes. For example, it seems plausible, as Ross posits, that lengthening copyright terms would lead publishers to include fewer recent works in literature compendia and to focus instead on older, cheaper works. This, in turn, might lead to a conception of literature as distant from current political discourse. Similarly, the emergence of the idea/expression dichotomy could plausibly work to further a distinction between informative and creative works that placed the former at the center of the public discourse and pushed the latter out of it. In many ways, these broad-brush theories are more compelling than particularized evidence when the cultural shift at issue is not the explicit subject of legal deliberation but an incidental effect or correlating phenomenon.

Another challenge is to choose an appropriate level of generalization about both public discourse and literature. The level of generality that Ross selects is quite high. Various media—such as newspapers, essays, pamphlets—are distinct and might interact with literature differently. The particular role of the press, for example, in the development of public discourse would be an interesting topic in itself. In addition, the “public domain” created by copyright law is different from the “fair comment” domain created in defamation law, which in turn is different from the scope of legislative and other privileges. At a more detailed level, the term “public discourse” fragments into parts that have differing relationships to literature and to each other. So too with the term “literature.” For example, censorship for the stage was alive and well in England during the eighteenth century and did not end until 1968.² The relationship between drama and politics might have been viewed quite differently from that between, say, poetry and politics. The term “literature” might encompass both of these, as well as all other creative written work.

Nevertheless, Ross theorizes an interesting set of relationships. On a general level, it seems plausible that changes in the law bore some relation to changes to the public sphere, and that these changes in turn had implications for the cultural status of literature. For a seventeenth-century writer like Milton, as well as for his enemies and detractors, there was no question that poetry was political, and when he wrote against licensing he was talking about a free press for both poetry and prose. Once licensing ended, more focused forms of regulation crystalized, and they served to distinguish various formats that were themselves

² I am grateful to my colleague Dan Ortiz for this observation.

continuing to develop. Ross asserts that “public speech was not liberalized so much as the nature of the constraints on speech began to change during the eighteenth century, becoming less a set of prohibition about what could be said than a discursive order segregating legitimate from illegitimate uses of speech” (5).

Abolition of licensing is undoubtedly a liberalization, but Ross is correct to note that what followed was a turn toward the types of “time-place-manner” regulations that still exist today and heavily regulate discourse alongside seemingly strong commitments to the ideal of free speech. Copyright, for example, identifies some speech as property and forbids its dissemination for reasons not censorial but proprietorial. Defamation and seditious libel remained robust throughout the eighteenth century, but the evolution of certain privileges (such as fair comment, or privileges for judicial or parliamentary proceedings) did, as Ross argues, serve to delimit some realms of discourse from others. In this regard, Ross notes that literature might not have changed so much as other forms of discourse changed around it (see, e.g., 29). Once England abandoned licensing and prioritized the circulation of information, public discourse reoriented around transmitting knowledge swiftly and straightforwardly, “with minimal recourse of the devices of artful and fictive speech” (29). This coincided with growing utilitarian suspicion toward literature and rhetoric as tools that inflamed the passions and therefore corrupted politics rather than contributing to it (see, e.g., 5, 28). All of this may well have changed attitudes about what counted as public discourse and marooned literature as something apart.

Regarding literature as private, and agonizing about the relationship between its public and private functions, are not eighteenth-century inventions. As far back as Plato, philosophers and commentators have worried about the private orientation of art, about its internally-facing effects on individuals’ emotions, and about the ramifications for the polity. Plato fretted that artistic mimesis provoked powerful emotions that overrode rationality, while Aristotle posited, to the contrary, that it provided an opportunity for learning and brought balance through catharsis. Aristotle’s position offered a healthy public function for art’s private influence, to counter Plato’s much more pessimistic view. In a vague way, Rorty echoed Aristotle in attempting both to recognize and to reconcile the dichotomous nature of literature by claiming that its private expressions of humanity are precisely what enable it to serve the public function of promoting empathy and solidarity. The gambits are the same, except that the civic virtue at stake becomes solidarity rather than emotional balance. For both, literature’s public role grows precisely out of its private singularity.

All of this suggests that what happened in the eighteenth century might not be singular and profound but rather common and contingent—societal attitudes toward literature may be a pendulum that swings back and forth, depending on the forms and functions of expression available in a given period and the political attitudes dominant within it. Yet no matter which conception of literature is in the ascendant, it seems likely that both will persist, with private conceptions of literature co-existing alongside views that emphasize its public nature and its political engagement. It is a Janus with contradictory faces, and thinkers continue to try to reconcile them.

This same struggle plays out in modern-day legal debates about literature's status within freedom of expression. The dominant question in free speech theory is what makes expression different from other activity and therefore worthy of special protection against regulation. This was the fundamental question that preoccupied Milton when he gave an account of why licensing was wrong in *Areopagitica*, and it is a fundamental question today. Its answer dictates when freedom of speech interjects to prevent otherwise valid regulation and when it does not. Consumer data, food labels, search engine results, catcalls, and racist epithets can all be characterized as "speech" in the colloquial sense, but whether they are protected by "freedom of speech" depends on how far freedom of speech extends, which in turn depends on why it exists at all.

In the debates about the justification for freedom of speech, literature and art present real challenges. Two of the dominant justifications for freedom of speech are that it facilitates the search for truth and that it plays a significant role in democratic self-governance. If literature is a private phenomenon, removed from public discourse, then it does not serve to facilitate the types of truths generally valued by truth-seeking theories, and its relationship to democratic self-governance appears slim to non-existent. Robert Bork advanced a democratic self-governance theory that protected only discourse directly related to questions of policy.³ Therefore, Bork concluded, art and literature were not protected by the First Amendment.⁴

The third dominant justification for freedom of speech is that it is crucial for personal autonomy. This justification seems much more accommodating of literature as a private self-expression: it is just such personal expression, on this view, that freedom of speech is designed to protect. The challenge for autonomy views of freedom of speech is to explain why speech warrants more protection than other activities that also constitute self-expression. As Bork famously put it, arguments based on autonomy and self-development

do not distinguish speech from any other human activity. An individual may develop his faculties . . . from trading on the stock market, following his profession as a river-port pilot, working as a barmaid, engaging in sexual activity, playing tennis, rigging prices or in any of thousands of other endeavors These functions or benefits of speech are, therefore, to the principled judge, indistinguishable from the functions or benefits of all other human activity.⁵

If literature is self-expression, so is playing sports, choosing a profession, having sex, dancing, choosing what to wear, and much else besides. Yet those activities do not receive the special protection bestowed by freedom of speech. For some, this mismatch is reason enough to conclude that autonomy is not a plausible justification for free speech rights. This was Bork's conclusion.

³ Robert Bork, *Neutral Principles and Some First Amendment Problems*, 47 Ind. L.J. 1 (1971).

⁴ Id. at 20.

⁵ Id. at 25.

Granted, Robert Bork is a somewhat unusual figure: his theory of the First Amendment is the only one ever to have been intensely interrogated and ultimately rejected by the U.S. Senate Judiciary Committee. Nevertheless, Bork was well within the mainstream of free speech theory to identify the question he did; he was just unusually blunt in framing it and unusually frank in answering it. Far more people believe art and literature must be protected by freedom of speech than can explain why. If one adheres to an autonomy theory, the challenge is to explain why private *speech* is protected when so much other private activity equally appears to be an expression of personal autonomy. If one adheres to a democratic self-governance theory, then the private nature of literature poses a real threat to its protection. If literature is not really part of public discourse—if it is removed from discussions of politics and policymaking—then why include it in a right designed to protect that domain?

Free speech scholars have offered several answers. Some agree with Bork that art and literature are not technically within the scope of free expression but think that they should receive protection for prudential reasons.⁶ Some endorse autonomy theories but argue that free expression has a different and more significant relation to autonomy than other activities.⁷ Many endorse democratic self-governance theories but argue either that literature is in fact political or that the domain of public discourse is much broader than supposed.⁸ These strategies either redefine the term “public discourse” to accommodate literature or redefine the purposes of literature to be sufficiently public. My aim is not to evaluate these arguments here. It is instead to note that they precisely echo Ross’s themes: how public discourse is defined and how literature is defined in relation to it. Contemporary debates on the status of literature are part of our inheritance from the period Ross describes.

That eighteenth-century changes in law would reflect attitudinal changes toward literature, which would in turn influence contemporary legal debates, would hardly surprise Ross. His book highlights precisely such complexities in how society defines itself. He also posits some of his own theories about how literature might relate to a reoriented public square. One suggestion is that, as the norms of public discourse became tighter and more focused on informational exchange and rational argumentation, literature became the repository for the transgressive and irrational—the non-public space where people could actually exercise the liberty that increased freedom of speech brings (15-17). On this view, private self-expression might serve a public function as a liberalized space where norms are challenged and perhaps revised.

⁶ Lillian R. BeVier, *The First Amendment and Political Speech: An Inquiry into the Substance and Limits of Principle*, 30 *Stan. L. Rev.* 299 (1978).

⁷ See, e.g., Seana Valentine Shiffrin, *Speech Matters: On Lying, Morality, and the Law* (2014); Seana Valentine Shiffrin, *A Thinker-Based Approach to Freedom of Speech*, 27 *Const. Commentary* 283 (2011); Leslie Kendrick, *Use Your Words: On the “Speech” in “Freedom of Speech,”* 116 *Mich. L. Rev.* 667 (2018).

⁸ Robert C. Post, *The Constitutional Concept of Public Discourse: Outrageous Opinion, Democratic Deliberation, and *Hustler Magazine v. Falwell**, 103 *Harv. L. Rev.* 601 (1990); Jack Balkin, *Digital Speech and Democratic Culture: A Theory of Freedom of Expression for the Information Society*, 79 *N.Y.U. L. Rev.* 1 (2004).

Ross goes on to posit other public functions that literature can serve and to emphasize, above all, that its functions are indeterminate and plural. He suggests that “literature’s position as both inside and outside the public sphere—at once public and not, determinate and not—could paradoxically make possible its most vital public functions” (31). Ross recognizes that no one account of literature will ever fully explain it. Yet he also advances the optimistic and timeless view that its public and private functions complement rather than contradict each other. Whether or not one shares this view, Ross’s book provokes fascinating questions about literature’s public and private status and offers an excellent guide for thinking through those questions, in both an eighteenth-century context and today.