A NEW PARADIGM FOR FREE SPEECH SCHOLARSHIP

DAVID A.J. RICHARDS†

What is the proper scope of protection of the American constitutional doctrine of free speech? Both C. Edwin Baker's *Human Liberty and Freedom of Speech*[1] and Kent Greenawalt's *Speech, Crime, and the Uses of Language*[2] make major methodological and substantive contributions to our understanding of how this question should be understood and answered.

For Baker and Greenawalt, both the interpretation and critical evaluation of the American doctrine of free speech must methodologically bring into play deeper premises of democratic political and social theory, in which free speech plays a pivotal role. Baker deploys a critical social democratic theory prominently associated with Jurgen Habermas[3] in his analysis, and Greenawalt, building on his own previous major contributions to both the theory of law and morality and the theory of religious liberty,[4] embeds his discussion of free speech in a larger political theory of constitutional government. Both books are thus ambitiously and successfully interdisciplinary, making crucial appeals to philosophical and social theories not only of just government but (in Greenawalt's case) to philosophical theories of language. Each book brilliantly demonstrates the interpretive and critical fertility of this kind of approach, and their publication in the same year marks a new era of free speech scholarship in which the best work—pitched at the level of ambition and rigor of Baker and Greenawalt—powerfully integrates legal analysis with critical and philosophical theory.[5] This essay attempts

---

† Professor of Law, New York University School of Law. A.B. 1966, Harvard University; D. Phil. 1970, Oxford University; J.D. 1971, Harvard University. Member, New York Bar.

[1] C.E. BAKER, HUMAN LIBERTY AND FREEDOM OF SPEECH (1989).

[2] K. GREENAWALT, SPEECH, CRIME, AND THE USES OF LANGUAGE (1989).

[3] For a useful critical commentary on Habermas's work and his own response to his critics, see HABERMAS: CRITICAL DEBATES (J. Thompson & D. Held eds. 1982).

[4] *See* K. GREENAWALT, CONFLICTS OF LAW AND MORALITY (1987); K. GREENAWALT, RELIGIOUS CONVICTIONS AND POLITICAL CHOICE (1988) [hereinafter K. GREENAWALT, RELIGIOUS CONVICTIONS].

[5] An important previous work in this genre is F. SCHAUER, FREE SPEECH: A

to characterize both the distinctive methodology and substance of this new approach to the theory of free speech.

The major contribution of this new paradigm of free speech scholarship is twofold: first, it clarifies larger patterns of interpretive principle implicit in the current law of free speech in the United States; and second, it affords better critical thinking about whether the current state of law is correct. Both issues are central to the agenda of free speech scholarship in the United States, and we want an understanding of both issues from a theory of free speech. The American law of free speech is notoriously controversial within the Supreme Court itself, the legal profession, and the larger political community of the United States. Responsible free speech scholarship accordingly must assist us not only in understanding the law that is uncontroversially clear and settled but also the law that is interpretively controversial.

The familiar positivist understanding of this project sharply demarcates the task of describing the clear and settled law—the easy cases governed by rule or clear convention—from that of discussing the more controversial interpretive questions—the hard cases governed by normative goals, including, conspicuously, those of utilitarian policy.[6] The signal importance of the new paradigm of free speech scholarship practiced by Baker and Greenawalt is that it abandons this positivist understanding in favor of the alternative idea that *both* tasks make crucial reference to deeper issues of critical and philosophical theory, including, prominently, the explication of anti-utilitarian claims of human rights. One is not, as it were, only free to play political philosophy in the lacunae of open-ended policy-making not already filled by settled law and precedent; rather, the task of political philosophy in law under a rights-based constitution is pervasive throughout the interpretive enterprise of law.

PHILOSOPHICAL ENQUIRY (1982). Schauer's work is notable mainly for identifying some of the main philosophical issues in the theory of free speech and focusing on difficulties in current philosophical approaches to these issues. The book does not, however, itself advance a coherent philosophical approach to these matters of the sort that Baker and Greenawalt respectively propose; indeed, Schauer's constructive argument—one of toleration—is ill-defined and problematic. For an approach similar to Schauer's, see L. BOLLINGER, THE TOLERANT SOCIETY: FREEDOM OF SPEECH AND EXTREMIST SPEECH IN AMERICA (1986). For criticism of both Schauer and Bollinger, see Richards, *Toleration and Free Speech*, 17 PHIL. & PUB. AFF. 323 (1988).

[6] The classic contemporary statement of this position is H.L.A. HART, THE CONCEPT OF LAW 121-32 (1961).

Greenawalt's book—a major contribution to the theory of free speech—rather brilliantly demonstrates the nature and fertility of this new approach to legal theory. The book's theoretical focus is the interpretive explanation of an uncontroversial commonplace of free speech doctrine in the United States: criminal law doctrines criminalizing forms of speech—for example, the speech acts involved in criminal solicitation, conspiracy, accessorial liability—typically do not raise free speech issues, a point that Oliver Wendell Holmes made in its classic form in the quartet of early free speech cases with which the study of the contemporary American doctrine usually begins.[7] Greenawalt takes as a central issue of free speech scholarship the general acceptance of Holmes's exclusions from free speech protection, and constructs a general theory of the protection of free speech to explain why these uncontroversial interpretive banalities reflect defensible principles of free speech protection. Those principles are, in turn, critically used in the evaluation of more controversial cases of free speech interpretation, in which Greenawalt offers plausible, if not always convincing, arguments for why the issue is not properly in the core of free speech protection.

Baker's book comparably starts from a general theory of what he considers the core value of free speech protection implicit in much current free speech doctrine: his liberty theory of free speech. He then uses the theory to evaluate other views—in particular, what he calls "the classic marketplace of ideas theory"[8]—that betray that value, and offers a critical indictment of bodies of current law that, in Baker's view, also betray that value, including not only the rather controversial recent expansion of free speech protection to advertising,[9] but the rather uncontroversial general doctrines of neutral time, place, and manner regulations[10] and their specific application to mandatory parade permits.[11]

The common methodology of both books enables them to make searching criticisms of orthodox views of free speech. For example, an important contribution of both books to substantive issues of free speech protection is their quite convincing challenge to the

---

[7] *See* Abrams v. United States, 250 U.S. 616 (1919) (Holmes, J., dissenting); Debs v. United States, 249 U.S. 211 (1919); Frohwerk v. United States, 249 U.S. 204 (1919); Schenck v. United States, 249 U.S. 47 (1919).

[8] This is the title of chapter one of Baker's book. *See* C.E. BAKER, *supra* note 1, at 6.

[9] *See id.* at 194-224.

[10] *See id.* at 125-37.

[11] *See id.* at 138-60.

dominant political process model of free speech protection associated classically with Alexander Meiklejohn[12] and, more recently, with John Hart Ely[13] and (in a particularly cramped and narrow form) with Robert Bork.[14]

This theory of free speech conceives the core function of such speech to be the protection of the democratic political process from abusive censorship of political debate by the transient, elected majority in political power. The appeal of Ely's form of the theory is its forthright response to the democratic objection to judicial review. With this model of free speech protection, judicial review on free speech grounds does not run afoul of the democratic objection to judicial review, for judicial review here protects the integrity of democracy itself from the illegitimate attempt of a transient majority to entrench its own power by manipulating the agenda of political debate in its own favor.[15] The judiciary does not, in Ely's view, illegitimately impose its substantive values on democratic majorities, but legitimately insists upon and monitors a view of democratic procedural fairness.[16]

The very coherence of this approach to free speech protection requires a background conception of democratic legitimacy, that is, forms of political power that democratic majorities may and may not legitimately exercise. Such a background conception must itself be a substantive view of the values of democratic constitutionalism. Both Baker and Greenawalt cogently question whether these values can be understood in terms of perfecting the majoritarian political process. Baker puts the point in terms of a substantive value of equal respect for the moral self-determination of all persons, and assesses the legitimacy of democracy, to the extent it is legitimate, as a political process that realizes that independent value:

> Liberty presumably must include the opportunity for involvement in the choice of, or responsible acceptance and affirmation of, those elements of our world that are matters of human creation and that are important for a person's self-definition and self-realization. This notion of liberty, combined with the obvious fact

---

[12] *See* A. MEIKLEJOHN, POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE 26-27 (1960).

[13] *See* J.H. ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 105-16 (1980).

[14] *See* Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 20-35 (1971).

[15] *See* J.H. ELY, *supra* note 13, at 102-03, 106-07.

[16] *See id.*

> that many of these elements are necessarily a matter of collective practice, choice, or consensus, means that liberty must permit involvement in this collective process, presumably in a manner that permits a like involvement by others—in other words, respect for liberty implies some type of democracy.[17]

Greenawalt advances a similar argument in terms of the remarkable American constitutional commitment to principles of religious liberty and the important place of free speech in giving proper expression to these principles.[18] To the extent free speech must give expression to the communicative interests of liberty of conscience, the limitation of protection of free speech to politics is clearly inadequate: "Once freedom of religious ideas is acknowledged, distinguishing protected speech from unprotected speech, say about science or personal morality, becomes almost absurd."[19]

From the perspective of Baker and Greenawalt, constitutionally legitimate political power must respect substantive spheres of moral independence—like liberty of conscience, including all matters of fact and value fundamental to the exercise of conscience—and the right of free speech, through which persons exercise their constructive powers of moral independence, must correlatively extend to all such matters. The limitation of free speech protection to politics is, on this view, illegitimate because it allows forms of censorship that deprive persons of the liberties essential to the moral self-government of a free people.

Baker and Greenawalt suggest (in my view quite rightly[20]) a larger research project about the principles of democratic constitutionalism. Those principles cannot, as a matter either of sound interpretation of our tradition or of defensible democratic political theory, be understood on the political process model of perfecting the majoritarian political process.

As an interpretive matter, the constitutional tradition regards all forms of political power—including the power of democratic majorities—as corruptible, and subjects such power to a system of institutional constraints—including judicial review—designed to harness that power to the legitimate ends of government, namely, respect for human rights and the use of power to advance the public

---

[17] C.E. BAKER, *supra* note 1, at 31.

[18] *See* K. GREENAWALT, *supra* note 2, at 177-79.

[19] *Id.* at 178.

[20] I develop this argument at greater length in D. RICHARDS, FOUNDATIONS OF AMERICAN CONSTITUTIONALISM 189-201 (1989).

good. A perfected political majoritarianism cannot be and is not the measure of constitutional legitimacy because, by virtue of its majoritarian character, it remains hostile to the rights and interests of minorities.

For example, a majority's views of dangerously subversive speech are constitutionally unacceptable grounds for the repression of speech:[21] dissident minority challenges to majoritarian views are precisely those that most require protection, and majoritarian views cannot justly be the measure of such protection.[22] Further, as Greenawalt makes clear, the very focus of political process models of free speech on politics as such fails to do interpretive justice to the important strand of free speech protection rooted in the right to conscience. If a free speech theory must satisfy some minimal threshold of accommodating the main interpretive strands of our free speech tradition over time, the political process model clearly fails to do so. Its descriptive value is inadequate, indeed distorting. Is its normative value as political theory any better?

As a matter of democratic political theory, political process models familiarly rest on a form of preference utilitarianism. For example, Ely understands democracy as "the pluralist's bazaar"[23] that, properly functioning, aggregates human interests by means of shifting coalitions that achieve their ends through majoritarian interest group politics. Democratic majority rule is the political decision procedure that best achieves the ends of utilitarian aggregation. Utilitarianism has, however, been subjected to profound contemporary criticism as an inadequate normative theory of equality, in part because its theory of equality gives no adequate expression to the place of respect for human rights in the normative idea of treating persons as equals.[24]

The utilitarian theory of free speech clearly exemplifies this inadequacy; the net aggregate of pleasure over pain is often advanced, not frustrated, by the restriction of speech. Large populist majorities often relish (hedonically speaking) the repression of outcast dissenters, the numbers and pains of dissenters are by

---

[21] *See* Brandenburg v. Ohio, 395 U.S. 444 (1969).

[22] For fuller elaboration of this view, see D. RICHARDS, TOLERATION AND THE CONSTITUTION 178-87 (1986).

[23] *See* J.H. ELY, *supra* note 13, at 152.

[24] *See generally* J. RAWLS, A THEORY OF JUSTICE (1971) (proposing as the most appropriate moral basis for a democratic society a theory of justice having its foundations in the traditional theory of the social contract, as espoused by Locke, Rousseau, and Kant).

comparison small, and often no offsetting future net aggregate of pleasure over pain exists to make up the difference.[25] We need a political theory of free speech that correctly interprets free speech as a human right that, as a matter of basic constitutional principle, outweighs such utilitarian calculations.

American doctrines of religious liberty and free speech are natural starting points for this alternative research project, as they are pivotal constructive components of the kind of reasonable public argument in terms of which exercises of political power must be justified if they are to be constitutionally legitimate. Constitutional argument in the United States has a dignity and weight distinctive from ordinary political argument because it addresses the fundamental question of what lends legitimacy to any exercise of political power. It is fundamental to the constitutional project not only that all forms of political power are corruptible, but that they are corruptible in a distinctive way: they deprive persons of the capacity to know, understand, and make effective claim to their basic human rights. Correlatively, corrupted political power is distorted from its proper role of advancing the interests of all alike in pursuit of justice and the public good. The argument for religious toleration was, for leading American constitutionalists like Thomas Jefferson and James Madison, a model for both the corruptibility of political power—subverting the right to conscience—and its constitutional remedy—namely, depriving the state of any power to enforce or endorse sectarian religious belief.[26]

In effect, the exercise of political power for religious ends had entrenched a sectarian conception of religious truth as the measure of all reasonable inquiry about religious matters, and thus had deprived persons of their inalienable human rights reasonably to exercise their own moral powers about such matters. Such exercises of political power solidified a kind of self-perpetuating political irrationalism that deprived people of reasonable government. In effect, government exercised its political power in ways that neither respected people's right to reasonable self-government in their own moral and religious life, nor subjected its own power to reasonable justification in terms of the pursuit of equal justice and the public good. Arguments of constitutional principle have the weight that they do precisely because they subject such corruptions of political

---

[25] *See* D. RICHARDS, *supra* note 20, at 191-92.
[26] *See* D. RICHARDS, *supra* note 22, at 111-16.

power to appropriate constraints that require reasonable justification of political power in terms of respect for rights and the use of political power to advance justice and the public good.

The principle of free speech plays the central role it does among constitutional principles and structures because it deprives the state of power over speech based on self-entrenching judgments of the worth or value of speech that expresses sincere convictions about matters of fact and value in which a free people reasonably take interest.[27] Speech in the relevant sense must be free from certain forms of state control both to insure that censorious state judgments are not the measure of reasonable discussion in society at large, and to allow the broadest possible exercise of a free people's reasonable powers consistent with respect for their human rights and their rights as citizens to hold exercises of political power accountable both in terms of respect for rights and of the use of power to advance equal justice and the public good.

If constitutional argument depends for its dignity and weight on subjecting political power to such independent tests of reasonable justification, free speech is the foundation for the practicability of such justification. Free speech insures a constitutional space for the kind of reasonable public argument, open debate, and criticism to which, on grounds of constitutional legitimacy, all forms of political power must be subject. It would, of course, doom the entire project to emptiness and triviality if the state's judgments were the procrustean measure to which all such discourse must be fitted.

Both Baker and Greenawalt endorse and develop a view of the basis for free speech along these general lines. What attracts Baker to Habermas's dialogical ethical and political theory is precisely the central role that theory accords communicative independence and the implicit normative requirement of reasonable justification in the communicative situation;[28] Greenawalt's pluralistic account of the foundations of free speech gives prominent weight to autonomy and reasonable justification.[29]

---

[27] For a more developed discussion of this perspective, see D. RICHARDS, *supra* note 20, at 172-201; D. RICHARDS, *supra* note 22, at 165-227.

[28] *See, e.g.*, C.E. BAKER, *supra* note 1, at 107, 110 (concurring in Habermas's view that progressive social change can only fully be achieved through employment of communicative action rather than reliance on mere instrumental action).

[29] *See, e.g.*, K. GREENAWALT, *supra* note 2, at 26-27 (stating that the free exchange of ideas encourages people to decide for themselves, a process, which, when pursued in a rational manner, leads to self-fulfillment).

Neither theorist gives extended treatment to the nature and basis of the conception he proposes and assumes. Indeed, Greenawalt criticizes Thomas Scanlon's early, and later abandoned, formulation of the conception as too strong.[30] The idea, in Greenawalt's formulation, is that government should treat people as rationally autonomous by allowing them to have all the information that might be helpful to the choices of rationally autonomous persons. But the state, Greenawalt argues, has a legitimate interest in protecting people from social harms when they do not act in a rationally autonomous way, and this interest may require that the state not always allow every person to have all the information that a rationally autonomous person might want. Greenawalt critiques not, of course, the idea of reasonable justification as the test for free speech, but rather a certain (in his view) implausible application of the test. In effect, his argument is that the simple principle of information for rationally autonomous people is not reasonable because it fails to give weight to considerations relevant to a reasonably justifiable principle of free speech. But Greenawalt offers us no general constructive account of the approach he assumes, an account that would presumably explain the weight that should properly be accorded autonomy and the nature and the weight of the harms that may be traded off against autonomy.[31] It is much more clear that Greenawalt, like Baker, regards the political process models and the utilitarianism such models usually assume as a wholly unacceptable approach to the theory of free speech.

Within this general conception of the role of free speech in American constitutionalism—one shared by both Baker and Greenawalt—there is, of course, much room for continuing debate and disagreement about the proper scope of the protection of free speech. Baker, for example, offers two quite radical criticisms of the current state of American constitutional law: first, he questions the accepted wisdom of the constitutional acceptability in general of time, place, and manner regulations[32] and the particular acceptability of mandatory parade permits;[33] second, he funda-

---

[30] *See id.* at 31-33.

[31] Greenawalt more elaborately explored this issue in an earlier work. *See* K. GREENAWALT, RELIGIOUS CONVICTIONS, *supra* note 2, at 87-211. For my critique of that book, see Richards, Book Review, 23 GA. L. REV. 1189 (1989).

[32] *See* C.E. BAKER, *supra* note 1, at 125-37.

[33] *See id.* at 138-60.

mentally criticizes the recent expansion of free speech protection to commercial speech.[34] Greenawalt also raises some questions about the latter expansion,[35] though not the former.

Baker's worries about the alleged constitutional reasonableness of time, place, and manner regulations, and in particular, mandatory parade permits, derive from the priority he accords free speech among constitutional and political values. Time, place, and manner regulations are conventionally constitutional because the state regulatory judgments do not advert to the value of the speech in question, but, rather, reasonably accommodate the interests of all speakers equally to legitimate state interests such as traffic control.[36] Baker's point is that the relatively weak reasonableness test to which the judiciary subjects such regulations unfairly tilts the constitutional balance against the most controversial forms of dissident speech; in effect, the state protects the status quo under cover of appeal to the reasonableness of the regulation in question. His analysis is particularly critical of mandatory parade permits because a voluntary system would better accommodate legitimate state interests without the untoward prejudice to "value-based dissent and self-expressive peaceful deviance."[37] If free speech does enjoy the priority among political values that Baker rightly accords it, his critical arguments here have, in my judgment, great force.

The critical force of his argument against the free speech protection of advertisements is much more questionable. The nerve of Baker's objection is that the core of free speech protection is the spontaneous and authentic expression of sincere moral, social, or political conviction, and that commercial speech does not express such conviction, but is rather controlled and manipulated by economic interests and structures.[38] The problem with Baker's

---

[34] *See id.* at 194-224.

[35] *See* K. GREENAWALT, *supra* note 2, at 22, 117, 133-34, 271, 276, 321-22.

[36] *See, e.g.*, Cox v. New Hampshire, 312 U.S. 569, 574-76 (1941) (upholding a state statute requiring that a special license first be obtained before commencement of a "parade or procession" upon a public street); Lovell v. Griffin, 303 U.S. 444, 450-52 (1938) (declaring facially invalid a city ordinance that "prohibit[ed] the distribution of literature of any kind at any time, at any place, and in any manner without a permit from the City Manager").

[37] C.E. BAKER, *supra* note 1, at 159.

[38] Greenawalt makes a similar point, but to more modest critical effect: he emphasizes that the regulatory power of the state in areas such as deceptive and false advertising is greater than would be appropriate in other areas of free speech protection such as political and religious speech. *See* K. GREENAWALT, *supra* note 2, at 321-22.

form of criticism is both its questionable denigration on alleged free speech grounds of speech motivated by economic interests, and its problematic theory of manipulative causation by economic forces. Much clearly protected speech is economically motivated, including, of course, much of the print media. It would be unacceptable to give less protection to such free speech interests because of background economic motivation when the same worries about state censorship apply here as elsewhere. The economic motivation of advertisements does not as such disqualify them from free speech protection to the extent such protections are otherwise in order.

Baker's structural theory of manipulation equally proves too much: much clearly protected speech—including religious speech embedded in a church hierarchy—would be unacceptably disqualified on similar such grounds. We need a theory for determining when background institutions, which the speaker assumes, do and do not disqualify her speech from free speech protection, and it is difficult to square any such theory with the neutrality called for by the First Amendment. It would appear particularly difficult for Baker to offer such an account when his general views are so sensitive to the role of background social institutions, including language, in the formation of moral identity and the need for sufficient state neutrality among such institutions to allow a constitutional space for personal liberty that fosters sufficient moral autonomy for the person to make reasonable choices among these background institutions. But these arguments against Baker's view assume that at least some regulations of commercial speech might plausibly raise valid free speech concerns. Do they?

The principle of free speech, as we have seen, deprives the state of power over speech based on self-entrenching judgments of the worth or value of speech that expresses sincere convictions about matters of fact and value in which a free people reasonably takes interest. At least some state prohibitions of true advertisements reflect constitutionally suspicious judgments by professional groups that self-entrench power and privilege at the expense of persons' wholly reasonable interests in knowing facts relevant to securing services and products that other persons sincerely want to make known to them. Undoubtedly, there are constitutionally significant differences between the level of protection to be accorded advertisements in general and forms of speech about critical value in living or political matters; but the principle of free speech validly applies at least to some true advertisements, and the judicial

scrutiny of such advertisements on free speech grounds is, pace Baker, a reasonable elaboration of the principle of free speech.[39]

Baker is understandably concerned with integrating the principle of free speech into the larger framework of a theory of economic and social redistributive justice, and his analysis of commercial speech may reflect this concern. One may agree, as I do, that the principle of free speech should be sensitive to these concerns, but disagree with the way in which Baker gives expression to this concern. The extension of free speech analysis to commercial speech in the way defended above may have, if anything, undercut the power of privileged professional groups and empowered the capacity of ordinary people to secure goods and services at lower prices;[40] the redistributive effects of such free speech scrutiny thus work in the direction that Baker should endorse. Paradoxically, Baker questions these decisions, and does not question others—notoriously, *Buckley v. Valeo*[41]—that, on specious free speech grounds, disabled the state from attempting to equalize the degree to which economic power is transformed into political power.[42]

Greenawalt's theory is, in contrast to Baker's, less starkly critical of the current state of free speech law in the United States. Indeed, it may not be critical enough. Greenawalt defends, for example, the current judicial understanding of the exclusion of allegedly obscene materials from free speech on the ground that hard-core pornography has "little enough expressive value" in contrast to "ordinary claims of fact and value."[43]

Greenawalt's treatment of this issue is rather strained and ultimately unconvincing since he does not adopt the dominant view of those who take this position—namely, that hard-core pornography, appealing to prurient interests, is not intellectually communicative in the way that free speech protection requires. As Barendt

---

[39] For further development of this argument, see D. RICHARDS, *supra* note 22, at 209-15.

[40] This argument was prominent in Justice Blackmun's opinion for the Court in Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748 (1976). *See also* Bates v. State Bar of Arizona, 433 U.S. 350 (1977) (noting that advertising might reduce cost of legal services).

[41] 424 U.S. 1 (1976).

[42] For fuller discussion, see D. RICHARDS, *supra* note 22, at 215-19. For Baker's objections to the equalization of free speech power, see C.E. BAKER, *supra* note 1, at 41, 45, 297 n.50.

[43] *See* K. GREENAWALT, *supra* note 2, at 308. Baker, consistent with his generally more critical posture to conventional judicial wisdom, attacks the exclusion. *See* C.E. BAKER, *supra* note 1, at 68-69.

recently put this point, hard-core pornography is no more speech than "the supply of sex aids, or the provision of prostitutes."[44] Of course, a hard-core pornographic depiction is a communicative symbol; it is neither a dildo, nor a prostitute. It is surely confused to equate the stimulation of erotic and sensual imagination by use of pornography with sexual devices or partners; that is the same kind of confusion, so transparently inimical to legitimate free speech interests, that led the Puritans to equate the imaginative pleasures of an evening at the theatre of *Hamlet* with actual fratricide, incest, and revengeful murder. Greenawalt is not confused in this way, and clearly recognizes that free speech protection now may extend to many forms of art that "create intense emotional experience that does not involve detachment."[45] In view of his appreciation of these issues, Greenawalt's appeal to "little enough expressive value" hardly meets the free speech objection to censorious state judgments aimed at speech; rather, his appeal—to a kind of unexamined conclusory judgment of conventional and often today quite hypocritical Puritanical sexual moralism—instantiates the objection.

Greenawalt fails to take sufficiently seriously what should be at the heart of a principled free speech analysis of this matter: that obscenity laws are directed at the kind of erotic imaginative life of which hard-core pornographic material is the natural communicative vehicle, on grounds of a self-entrenching political objection to the humane values of imaginative erotic sensuality and sensibility. Historically, obscenity laws have been used to object to the erotic imagination as such as a human good independent of procreation. There are compelling free speech principles that extend protection against continuing attempts to prohibit material on such grounds, prohibitions that would deprive free persons of the reasonable exercise of their imaginative powers over issues central to finding value in life. The argument that such material has "little enough expressive value" embodies precisely the kind of judgment of which we have good reason, on grounds of free speech, to be constitutionally suspicious: the objection of conventional majoritarian taste to the independent exercise of the conscientious moral powers of free people.

---

[44] E. BARENDT, FREEDOM OF SPEECH 272 (1985).

[45] K. GREENAWALT, *supra* note 2, at 305.

The tendency of politically repressive majoritarian tastes to hystericalize harms and denigrate value in the communicative expression of dissenting convictions is at the very heart of the constitutional principle of free speech that forbids such majoritarian taste to be the measure of legitimate public discussion and expression. It subverts the critical purpose of such a constitutional principle to truncate its demands on the basis of precisely the conventional denial of expressive value in a communicative medium that has been the traditional argument for the repression of freedom of thought, inquiry, and expression.[46]

Even when Baker and Greenawalt agree about an issue of the scope of free speech protection—that coercive speech is and should be unprotected speech—they offer provocatively different reasons for their common conclusion.[47] Baker would exclude such speech because of its coercive character. Such speech, by virtue of its coerciveness, does not enjoy protection on the kind of liberty theory that Baker proposes. For Greenawalt, on the other hand, the crucial issue is that coercive speech is not an expression of claims of existing facts and value at the core of free speech protection but a species of speech act that does not enjoy such protection because it alters the situation from what it was previously.

Baker and Greenawalt discuss each other's views at some length, and their disagreement bears close study. Baker makes the cogent point that Greenawalt's grounds for exclusion do not precisely correspond with what he wants to include in and exclude from free speech protection. The core of free speech protection may be the conscientious expression of facts and values on issues in which a free people takes a reasonable interest, but such fully protected expressions sometimes achieve their point in situation-altering speech acts of public civil disobedience and refusal to obey—including challenges, orders, demands, and pleas. These speech acts are, of course, still fully protected and thus subject to the usual heavy burden on the state to justify abridgement.[48]

---

[46] For further elaboration of this view, see D. RICHARDS, *supra* note 22, at 203-09.

[47] *See* C.E. BAKER, *supra* note 1, at 62-65; K. GREENAWALT, *supra* note 2, at 96-99.

[48] *See, e.g.*, Shuttlesworth v. Birmingham, 394 U.S. 147 (1969) (finding freedom of speech rights violated by allowing officials unfettered discretion in regulating use of streets for peaceful parades and meetings); Cox v. Louisiana, 379 U.S. 536 (1965) (holding that police officials ordering the dispersement of African-American college students peacefully expressing their grievances to citizens of South Carolina violated freedom of speech); Edwards v. South Carolina, 372 U.S. 229 (1963) (ruling that the use of streets for picketing and parading is subject to regulation, but may not be completely

Greenawalt resorts to an artificial semantic category that does not really work because he wants to resist excessive theoretical dependence on a moral concept of autonomy, like Baker's, that may be too controversial.[49] Greenawalt's argument might have more weight if his own view plausibly fit the case law he, like Baker, endorses, but it does not. Baker's theory has at this point—in contrast to many other cases—the competitive edge over Greenawalt's in explaining and justifying conventional judicial wisdom. Neither theorist would regard mere fit with existing case law as sufficient to justify his view; each would place independent weight on the critical power of his views as democratic political theory. But at this point, again, Baker's views more plausibly explain the unprotected character of coercive speech as a consequence of the basic way in which constitutional democracy regards citizens, namely, as free and rational persons whose free exercise of their deliberative powers is the test for the legitimacy of government. For this fundamental reason of democratic political theory, coercive speech does not and should not enjoy the protection of the principles of free speech that preserve—immune from political bargaining—the status of citizens as free and equal.

The new paradigm of free speech scholarship implicit in these two important books leaves open many important questions for future debate, and neither book will be the last word on the controversial questions they examine. The very range of their differences in style and in substance bespeaks the extraordinary diversity of thought and feeling that their common paradigm makes available to free speech scholarship. Their paradigm thus promises to liberate both the depth and range of our interpretive powers. We are only at the beginning of the most rudimentary understanding of how misconceived much traditional legal scholarship about free speech has been, and how much remains to be done if we can bring to the task the integrity and vision that Baker and Greenawalt show us now to be within our grasp.

These books raise the constitutional theory of free speech to a new level of interdisciplinary sophistication and depth. They are pathbreaking achievements of constitutional scholarship in particular and legal scholarship more generally. We will be worthy of their achievement when we understand, as they do, that the life of the

---

denied).

[49] *See* K. GREENAWALT, *supra* note 2, at 97.

mind in law cannot be isolated from the life of the mind in the universities from which American law schools remain unfortunately and stupidly alienated. Baker and Greenawalt show us by their practice that the life of the mind in law is one with the life of the mind in social and political philosophy, that we cannot be adequate to the interpretation of law until we bring to the interpretive enterprise the better tools of political philosophy that are now available. In short, a better interpretive practice requires better and more responsible use of theory, and conversely. It is educationally bankrupt hermetically to isolate the study of these subjects in different schools of the university; the study of law should be, in universities, what it is in fact, the central subject of the humane education of a free and civilized people.

Could it be that our generation might make more of the position of the law school in the university than the misleading and often cruel mockery it has been for our students? If we could or would, the American law school might yet show us that American democratic anti-intellectualism—with its sharp division between theory and practice—is worse than stupid and vapid. It is tragically irresponsible. It fails to grasp what democratic education should have imparted to our public culture: the unity of theory and practice is at the very heart of the interpretive responsibilities of a free people worthy of their constitutional freedoms.[50]

[50] For a fuller statement of this view, see D. RICHARDS, *supra* note 20, at 294-99.