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Mark G. Yudof

*University of Texas School of Law*

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# IN SEARCH OF A FREE SPEECH PRINCIPLE†

Mark G. Yudof\*

FREE SPEECH: A PHILOSOPHICAL ENQUIRY. By *Frederick Schauer*. New York: Cambridge University Press. 1982. Pp. xiv, 237. Cloth, \$37.50; paper, \$9.95.

*[T]he lesson of the past two hundred years is that we will do well to be on our guard against all-purpose theoretical solutions to our problems.*<sup>1</sup>

Many scholarly works on freedom of expression are reminiscent of maps in the middle ages. They are more symbolic than real, more reflections of faith than observed facts. The style is “symbolic, ornamental, and often beautiful; the . . . content, impoverished and usually misleading; the purposes, a representation of the mind more than of the Earth.”<sup>2</sup> From this perspective, Frederick Schauer is the Mercator of modern first amendment theorists, eschewing blind faith and hackneyed metaphors and embracing analytical and empirical methods. In *Free Speech: A Philosophical Enquiry*, Schauer disentangles and meticulously parses the traditional arguments for free speech, those based on the quest for truth, democracy, self-realization, and individual dignity and autonomy. If he errs in ignoring the synergistic nature of those arguments, he succeeds in calling to our attention the relationship between freedom of expression and the general tenets of nineteenth-century liberalism. He challenges the faithful to distinguish between government regulation of speech and regulation of all manner of human conduct (pp. 71, 94).<sup>3</sup> Professor Schauer relentlessly pursues a unitary principle of freedom of expression, aspiring to “an objective and universal standpoint.”<sup>4</sup> He attempts “to walk out of the cave, leave the city, climb the moun-

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\* Associate Dean and James A. Elkins Centennial Chair in Law, University of Texas School of Law. B.A. 1965; LL.B. 1968, University of Pennsylvania. Professor Yudof is the author of *WHEN GOVERNMENT SPEAKS* (1983) and a coauthor of *EDUCATIONAL POLICY AND THE LAW* (2d ed. 1983). — Ed.

1. G. GILMORE, *THE AGES OF AMERICAN LAW* 109 (1977).

2. J. WILFORD, *THE MAPMAKERS* 45 (1981); see also *THE PRINCIPLES OF SOCIAL ORDER: SELECTED ESSAYS OF LON L. FULLER* 60 (1981) (“Most of the literature of freedom is in essence exhortatory and quite innocent of any intention toward analytical profundity.”).

3. See generally Bork, *On Constitutional Economics*, 7 REG., Sept.-Oct. 1983, at 14; Coase, *The Market for Goods and the Market for Ideas*, 64 AMER. ECON. REV., PAPERS & PROC. 384 (1974).

4. M. WALZER, *SPHERES OF JUSTICE* xiv (1983) (reviewed in this issue).

tain," and survey the philosophical terrain from a distance. But he is equally willing "to stand in the cave, in the city, on the ground."<sup>5</sup>

## I

Schauer frees himself of much excess baggage by declining to discuss the specific meaning of the first amendment. He is not concerned with the positivist constraints of the language, text, and history of that amendment, nor is he much inclined to rehash decisions of the United States Supreme Court. He wants to explore the principles that may undergird freedom of expression. He is interested in illuminating matters of political philosophy, in estimating the consequences of differing approaches, in probing for inconsistencies and common threads. To be sure, he is concerned with defining "speech" and "liberty" (pp. 89-130), but his framework is more conceptual than legal (pp. ix-x). His emphasis is on conceptual clarity, on reducing analytical confusion. Thus Schauer divides his book into three parts: "The Free Speech Principle," "Explication," and "Applications." Broadly speaking, his aim is to connect political philosophy to law, with law being the dependent variable.

Professor Schauer begins by distinguishing between "independent principles" and those that are components of larger principles (p. 5). He suggests that we typically treat free speech as an independent principle, and that it must be so treated if it is to have "power and survivability" (p. 6):

Our intuitions may be erroneous. They do suggest, however, that enquiring into the foundations of an independent principle of free speech would be fruitful. If such foundations exist, free speech will emerge as an independent principle. . . . But if there are no sturdy foundations, if there is no principle of free speech independent of a more general liberty, then free speech is more a platitude than a principle. [P. 6].

The distinction between independent and dependent principles allows Schauer to urge that the question of free speech should be separated from the question of the general authority of the state to limit individual liberty (p. 7). While liberty may be an aspect of free speech (p. 7), he suggests that an independent free speech principle should not necessarily bind its proponents to concepts of the minimal state.

The urge to identify an independent free speech principle, to separate the importance of expression from general principles of libertarianism, lands Schauer in some considerable difficulties. As he grudgingly admits (p. 7), nearly all principles can be subsumed under broader principles.<sup>6</sup> Democracy or equality might be compo-

5. *Id.*

6. See Sokolow, Book Review (unpublished review of *FREE SPEECH: A PHILOSOPHICAL ENQUIRY*) (1983) (on file with author).

nents of a broader principle of justice, liberty, or utility.<sup>7</sup> By requiring independence, and by limiting arguments to those that would uniquely support a distinct principle, he may doom the case for free speech in advance. Free speech may not be an independent principle, and therefore a mere "platitude" in Schauer's lexicon, or it may be an independent principle with inconclusive justifications.

Equally important, the search for "the" free speech principle leads Schauer, in large part, to discuss the justifications for freedom of expression in isolation from each other, ignoring their cumulative and synergistic effects. For example, one may not believe that free expression invariably advances the truth, strengthens individual autonomy, or is a necessary condition for democracy. But the three arguments *together* might well support a free speech principle, whereas no single argument would be persuasive. And if one believes, for example, that democratic governments are more likely to protect individual autonomy, the overall impact of freedom of speech may be greater than the sum of the component justifications: the interaction of principles may create synergistic effects.

Let me give an example of the difficulties with Schauer's approach. He suggests that the self-realization justification for freedom of speech "suffers from a failure to distinguish intellectual self-fulfillment from other wants and needs, and thus fails to support a distinct principle of free speech" (p. 56). Even if it is true that communication may produce self-fulfillment, the same result can be produced by other experiences, *e.g.*, "world travel," "keen observation," or "changing employment every year" (p. 57). *Ergo*, self-fulfillment is a subprinciple of freedom, and "tells us nothing in particular about freedom of speech" (p. 58). Thus, "to the extent that a given society or government has for some reason elected to limit individual liberty in the broad sense, there remains no reason freedom of speech should not be subject to equivalent limitations" (p. 58). But suppose that speech, unlike a holiday in Rome, advances self-realization *and* contributes to the survival of democracy. Or that suppression of speech is more of an affront to an individual's dignity than regulation of travel abroad. Or that government decisionmakers are more likely to be biased in speech than travel cases. A holistic argument, premised on a number of justifications, might well yield a principle that supports a strong presumption for free speech.

Schauer's philosophical method produces other problems. The quest for an independent principle is quickly turned into a quest for a simple principle, an Occam's Razor. As Michael Sokolow has suggested in an unpublished review of *Free Speech*, one might create and examine a single complex principle rather than many simple ones:

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7. See, *e.g.*, Redish, *The Value of Free Speech*, 130 U. PA. L. REV. 591 (1982).

If speech does not offend so as to provoke others to violence and is not a falsehood that will undermine the judicial system's search for truth, and is more likely than not to lead to democracy, truth, and individual fulfillment, and is not a known falsehood uttered to ruin the reputation of a third party, then government cannot prohibit the utterance of that speech.<sup>8</sup>

At some point, so many nodules are added to a principle that it perhaps may no longer qualify as a principle. A new "paradigm" may emerge that incorporates the old theory and its many qualifications.<sup>9</sup> But the emphasis on independence appears to preclude, at least for this author, the formulation of a complex principle that embodies a variety of justifications. Schauer notes at one point that free speech may involve a collection of distinct but interrelated principles (p. 14), but he is content to treat relatively simple principles, one at a time, without attempting a holistic analysis. In this regard, he may be invoking an analytical technique more common to constitutional lawyers than to philosophers.<sup>10</sup>

One way to create a simple and independent principle of free expression is to assume that speech is self-regarding, that is that it does not have an effect on others. If this were true, then regulation of speech might be impermissible whereas regulation of other-regarding conduct would be permissible. The analogy would be to assertedly "victimless crimes." To Schauer's credit, he cogently demonstrates that speech is nearly always other-regarding:

Speech is plainly not a self-regarding act, even assuming there be a category of acts that are self-regarding. Affecting others is most often the whole point of speaking. There are words, such as 'deceive', 'persuade', 'convince', and 'mislead', whose very logic presupposes that speech acts will affect others. [P. 10].

Speech may be protected despite its impact on others or, in some circumstances, precisely because it is thought to influence others. But speech is not protected as a part of the Millian private sphere of action.<sup>11</sup>

The problem with Schauer's treatment of speech as other-regarding is that this apt characterization does not resolve questions of magnitude or of causation. He rightly argues that speech may damage a person's reputation, humiliate him, invade his privacy, or cause him to disobey the law (p. 10). And I have argued that government expression, for example the condemnation of a public employee as a felon or communist, may hurt a person as much as

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8. Sokolow, *supra* note 6, at 7.

9. See generally T. KUHN, *THE STRUCTURE OF SCIENTIFIC REVOLUTIONS* (2d ed. 1970); K. POPPER, *OBJECTIVE KNOWLEDGE: AN EVOLUTIONARY APPROACH* (rev. ed. 1979).

10. See, for example, *Eisenstadt v. Baird*, 405 U.S. 438 (1972).

11. See generally Scanlon, *Freedom of Expression and Categories of Expression*, 40 U. PITT. L. REV. 519 (1979).

physical incarceration or a taking of property.<sup>12</sup> But it does not follow that no distinction may be drawn between other-regarding speech and other-regarding acts, or that "libertarian arguments do little to explain a Free Speech Principle that protects other-regarding conduct" (p. 11). The fact that speech is not "necessarily ineffectual" or may be capable "of causing unpleasant consequences" does not necessarily suggest that "we must look elsewhere" for justifications (p. 11). Rather we must estimate and compare the magnitude of the effects of speech as opposed to other forms of action.

Suppose, for example, that advocating disobedience of the law were shown to have less of an impact on society than the actual acts of disobedience themselves. While the acts and the expression are both other-regarding, one might plausibly urge that the speech is less likely to cause harm than the illegal acts.<sup>13</sup> Such an argument would raise substantial problems as to what counts as evidence and who would make the necessary determinations. But, if we may suspend disbelief for a moment, assume that this is the case. From this premise, a polity might create a strong presumption in favor of free expression, one that could only be rebutted by a strong showing of the actuality or likelihood of harm. In the case of acts, however, there might be a strong contrary presumption: the acts themselves are overwhelmingly likely to cause the anticipated harms. The other-regarding nature of speech may demonstrate that speech is not necessarily harmless, but it does not demonstrate that expression and conduct need to be treated identically under libertarian principles.

Apart from omitting consideration of the magnitude of harm, Schauer's analysis is problematic on the subject of causation. The fact that speech *can* have a particular effect does not mean that it *will*. Recall Justice Holmes's characterization of the facts in *Abrams v. United States*<sup>14</sup> as "the surreptitious publishing of a silly leaflet by an unknown man." When a speaker urges a crowd to assault a public official, there are many questions that need to be asked about the actual or potential harm. Was the source of the message sufficiently legitimate and respected that the crowd would (or did) respond to the speaker? Were there conflicting messages at roughly the same time? Was the crowd already intent on violence or did the speaker incite the crowd to acts that it would not otherwise commit? Was the crowd attentive? Did it hear the message? Did the crowd have the present capacity to commit the crime? Was there time to deliberate and consider the message? These questions raise extremely difficult issues of causation, and a legal system might well prefer per se rules

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12. M. YUDOF, *WHEN GOVERNMENT SPEAKS: POLITICS, LAW AND GOVERNMENT EXPRESSION IN AMERICA* 263-80 (1983).

13. See Redish, *supra* note 7, at 601.

14. 250 U.S. 616, 628 (1919) (Holmes, J., dissenting).

to a case-by-case evaluation of all of these factors. Time and complexity are the stuff of decisional paralysis, not judicial consecration of winners and losers. But the link between other-regarding speech and harm is not nearly as secure as Schauer appears to indicate. And if causation in relation to words is more difficult to ascertain than in relation to actions and if speech advances vital interests not advanced by conduct, the distinction might well support a principle that presumptively protects speech.

Schauer's treatment of causation is all the more mystifying because, in other sections of *Free Speech: A Philosophical Enquiry*, he is quite skeptical of causal relationships. For example, he argues that "without casual link between free speech and increased knowledge the argument from truth must fail" (p. 19). To the question, "does knowledge triumph over ignorance" (p. 25), Schauer responds with the obvious answer. Sometimes untruths are quite attractive. "[T]he belief that truth will prevail when matched against falsehood" cannot be demonstrated empirically, for people are not necessarily as rational as the argument from truth assumes (p. 26). So too, while one's dignity may be affronted by restrictions on other-regarding speech, it may also be affronted by the regulation of other-regarding conduct (p. 64). But without a demonstration that the regulation of other-regarding speech causes more harm to one's dignity than the regulation of other-regarding conduct, defenders of freedom of expression are back in the old bind: they must defend a thoroughgoing libertarianism, a minimal state, if they are to defend free speech.

Why is it that Schauer subjects the purported benefits of free expression to the most exacting causal analysis, but subjects the supposed harms to only the most casual analysis? If there are counterexamples to the benefits of expression — situations where unregulated speech does not lead to truth, dignity, self-fulfillment, and democratic governance — are there not also counterexamples to the harms — situations where false speech does not harm reputations or where advocacy of illegal acts does not cause the commission of crimes? Schauer's approach would be more useful if he employed the same model of causation in assessing both benefits and harms. And even then, depending on the probabilities and the magnitude of effects, a polity might still decide to adopt a presumption in favor of all or particular types of expression.

## II

Schauer's teleological framework for probing the rationales for freedom of speech indicates his dedication to consequentialist or

utilitarian approaches.<sup>15</sup> His philosophical enquiry not only frees him of the constraints of positive law, it also allows him to consider broadly the consequences of various free speech principles. In a revealing footnote, he states that he uses

'utility' and 'utilitarian' in somewhat non-technical senses, to refer to practicality, or usefulness, or pragmatic considerations in general. I do not here equate utilitarian considerations with appeals solely to happiness or pleasure. Perhaps "consequentialism" might be a better word . . . , but I want to stress the difference between . . . practical considerations . . . and the more theoretical consequentialist arguments . . . . [P. 213, n.1].

But all of Schauer's consequentialism is of the theoretical rather than the practical variety; The book contains not a single reference to, much less discussion of, empirical studies of the questions he examines. This is so despite his mournful complaint that "the arguments cry out for empirical support," but regrettably "the [necessary] empirical research to support or refute these arguments has not been undertaken in a systematic way" (p. 73). His empiricism is one of imagination and experience, not one of data bases and carefully controlled social science surveys or experiments.

I do not depreciate the role of experience, history, and intuition in assessing the consequences of free speech principles. Quite to the contrary, I have argued elsewhere that such analyses are appropriate.<sup>16</sup> But Schauer appears to have a faith in empirical evidence that cannot be justified in the light of the existing state of social science research.<sup>17</sup> If he had perused the vast communications literature, he would have discovered that there is very little in the way of "hard empirical support" (p. 82) for virtually any proposition vital to the analysis of freedom of expression.<sup>18</sup> This is particularly true of mass communications, given the pre-existing attitudes of audiences, the stubbornness of individuals, the opportunities to tune out messages, the characteristics of the speaker, and the multiplicity of variables that potentially influence people.<sup>19</sup> Terms that lawyers and philosophers toss about with ease — like incitement, advocacy, captive audiences, and propaganda<sup>20</sup> — do not find easy empirical counter-

15. See generally Lichtenberg, Book Review, 92 YALE L.J. 544 (1983) (discussing consequentialist theory).

16. See M. YUDOF, *supra* note 12, at 89. See generally Yudof, *School Desegregation: Legal Realism, Reasoned Elaboration, and Social Science Research in the Supreme Court*, 42 LAW & CONTEMP. PROBS., Autumn 1978, at 68-77.

17. See M. YUDOF, *supra* note 12, at 71-89; see also Yudof, *supra* note 16, at 68-77.

18. Despite its notoriety, even studies of the effects of televised violence are inconclusive. See Krattenmaker & Powe, *Televised Violence: First Amendment Principles and Social Science Theory*, 64 VA. L. REV. 1123, 1134-70 (1978).

19. See M. YUDOF, *supra* note 12, at 71-89; see also J. KLAPPER, *THE EFFECTS OF MASS COMMUNICATIONS* (1960).

20. See generally Y. SIMON, *PHILOSOPHY OF DEMOCRATIC GOVERNMENT* 125-27 (1951).



parts in the communications literature.

The null hypothesis is dominant in the communication literature.<sup>21</sup> It is not so much that researchers believe that communications have no effects; rather, they find it extremely difficult to isolate those effects.<sup>22</sup> The null hypothesis is presently confronted, alas, by a revitalized school of critical theory, a school that emphasizes that "[t]he communication channels and messages are as much a part of the structure of domination as are the military forces and the strictures of the international banking system."<sup>23</sup> Despairing of isolating causes and effects, these critical theorists abandon this frustrating subject and emphasize the "social role" of communications "in maintaining, enhancing, or disrupting . . . the existing interrelationships of politics, economics, and culture."<sup>24</sup> Rhetoric now substitutes for theory and empirical research.<sup>25</sup>

But the news for Professor Schauer may be even worse. Not only is the ship of empiricism still at sea; he may be waiting in the wrong port.<sup>26</sup> Many of the questions he asks about self-expression, dignity, and truth may never be subject to even crude measurement, as they embody long-range empirical and normative judgments. What counts as progress toward higher levels of knowledge and dignity, for example, may be more a function of normative political and moral judgments than of any empirical calculus. And even if measurements were possible, a decision as to how much harm to tolerate from free speech in return for an ascertainable quantum of benefit may itself be a normative judgment. Schauer has not quite made good on his assertion in the preface that "conceptual analysis is more prominent in this book than normative argument" (p. ix). He implies as much in his "Explication" section, in an analogy to the criminal justice system that is many pages and concepts removed from his articulation of first principles (chapter 9).

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21. See Schramm, *Nature of Communication Between Humans*, in *THE PROCESS AND EFFECTS OF MASS COMMUNICATIONS 7* (W. Schramm & D. Roberts eds. 1971).

22. As I said on another occasion:

The communications literature . . . suggests that messages are more likely to be persuasive if they reinforce existing attitudes, or if they build incrementally on those attitudes. If the messages are addressed to a mass audience, common sense suggests that an appeal to widely-shared cultural, social, and political values is the key to success. Virtually by definition, such consensual values are likely to be embraced by a large number of mass communicators. If this is the case, the efficacy of the entire system of communications may be quite high even though empiricists cannot connect particular communicators or messages with specific effects.

M. YUDOF, *supra* note 12, at 84-85.

23. Schiller, *Critical Research in the Information Age*, 33 *J. OF COMMUNICATION*, Summer 1983, at 249, 250.

24. Slack & Allor, *The Political and Epistemological Constituents of Critical Communication Research*, 33 *J. OF COMMUNICATION*, Summer 1983, at 208, 214.

25. See generally Levinson, Book Review, 96 *HARV. L. REV.* 1466, 1484-86 (1983).

26. See generally C. LINDBLOM & D. COHEN, *USABLE KNOWLEDGE: SOCIAL SCIENCE AND SOCIAL PROBLEM SOLVING* (1979).

Schauer paraphrases Blackstone's maxim "that it is better that ten guilty men go free than that one innocent man be punished" (p. 136). This assumes, of course, that mistakes in the administration of laws are inevitable. But Blackstone's balancing of the harms and benefits of the criminal process affirms "the belief that the erroneous deprivation of individual liberty is far more serious than the erroneous release of one who is in fact guilty" (p. 137). This belief, however, is rooted in a value judgment and not in empirical analysis. The empirical data, optimally, may inform decisionmakers about the costs of a system — the number of guilty persons set free, the number of innocent persons who are punished — and costs may influence decisions about the nature of the system. Commitment to a norm may be strained or reinforced as costs are identified and measured. But empirical evidence alone cannot settle the question of the rightness of the norm.<sup>27</sup>

Consequences are irrelevant only to the mentally infirm and to neo-Kantians and others who have glimpsed the New Jerusalem.<sup>28</sup> As R.M. Hare has said, "a complete moral system will depend both on logical and on empirical theses — which makes it all the more important to be clear which are which."<sup>29</sup> This is true of principles of free speech. If the issue is whether to tolerate injuries to reputation in order to protect speech that is thought to advance democratic values, facts alone will not settle the matter. Empirical studies cannot tell us how much benefit from free expression is enough, or how much harm is too much. At best, they can tell us only the price of our moral and political commitments. The key is to distinguish moral thinking from "facts about the way things and people are, in the world as it is."<sup>30</sup>

One final point on this matter. Moral principles that are only presumptive in character may yield political principles that are absolute. Moral arguments over whether free speech yields increased knowledge or strengthens democracy may be close, and the consequences may vary depending on the context and circumstances. But if political principles, in a sense, are applied moral principles, and if political principles are fashioned and applied by imperfect human beings and institutions, it may be preferable to have per se rules that circumscribe the range of discretionary judgments. Professor Schauer recognizes the imperfections of decisionmaking in the real world, but declines to contemplate the possibility of absolute rules.

27. See Yudof, *supra* note 16, at 73-75.

28. See J. RAWLS, A THEORY OF JUSTICE 30 (1971) ("All ethical doctrines worth our attention take consequences into account in judging rightness. One which did not would simply be irrational, crazy.").

29. R.M. HARE, MORAL THINKING 5 (1981) (reviewed in this issue). See generally Greenawalt, *Policy, Rights, and Judicial Decision*, 11 GA. L. REV. 991 (1977).

30. R.M. HARE, *supra* note 29, at 5.

He notes that "in applying the law of defamation, it is necessary to recognize that judicial determination of truth or falsity may occasionally be in error" (p. 170):

Because of these uncertainties and risks in the process of ascertaining truth, a rule penalizing falsity has the actual effect of introducing some self-censorship as to statements *that are in fact true*. [P. 171, emphasis in original].

But instead of discussing the pros and cons of absolute rules, he argues that "[t]he problem is inevitably one of balancing interests":

Given the value of the circulation of accurate information, and given the harm of defamatory falsehood, no solution at either extreme seems tenable. [P. 171].

An extreme solution, however, may be tenable, not as a matter of moral principle, but as a recognition of the fragility of human institutions applying such a principle. This is a variant of the argument from uncertainty, the uncertainty over whether institutions will reflect our principles in their decisions. For example, depending on its preferences for protecting reputations or enhancing self-governance, a polity might choose to treat defamation of public officials precisely like any other case of defamation, or it might create a rule that public officials may never recover damages for defamatory statements relating to their fitness for public service or the discharge of their duties. Moral ambiguity need not necessarily be translated into political ambiguity.

### III

Professor Schauer's discussion of the competing candidates for a free speech principle (pp. 15-86) is provocative and interesting. In analyzing the argument from truth, the theory that "truth will most likely surface when all opinions may freely be expressed" (p. 16), he notes the circularity of many forms of the argument. If truth is not independently defined, and if it refers only to those propositions that are widely accepted (the "consensus" or "survival" theory of truth),<sup>31</sup> then the truth theory reduces itself to a preference for "a process of open discussion" over other methods of decisionmaking (p. 20). But in the absence of "independent criteria for truth,"<sup>32</sup> the

31. See generally Bork, *Neutral Principles and Some First Amendment Problems*, 47 *IND. L.J.* 1 (1971).

32. See, e.g., Chevigny, *Philosophy of Language and Free Expression*, 55 *N.Y.U. L. REV.* 157, 160 (1980). Professor Chevigny, while rejecting the justification from truth for free speech, makes the interesting argument that free speech is necessary to give propositions meaning, and the

loss of meaning is objectionable for any person or government that purports to act purposively. . . . If the lesson drawn from the philosophy of language is correct, that the meaning of statements within a system depends on formulating other aspects of the system through dialogue, then every theory must allow for dialogue concerning its supporting propositions. In other words, once a theory asserts that it means something, dialogue is

theory does not tell us why we should prefer open discussion "to any other process, such as random selection or authoritarian fiat" (p. 20). If majority rule and open discussion are favored processes, then the real preference is for democratic norms over other forms of governance, not objective truth over falsity. (pp. 34, 39).

Schauer also effectively argues that "the argument from truth may easily be characterized as an argument from uncertainty" (p. 31). Uncertainty is epistemologically important because "the validity of the argument varies in direct proportion to the degree of uncertainty inherent in the *category* of proposition involved" (p. 30). The more uncertain the truth, the more value there may be to open discussion. The argument from truth may be primarily rooted in a concern for aesthetic, ethical, political, and religious expression, categories of speech that are not likely to command a ready consensus (p. 31). We may be more certain of truths in mathematics or science, and hence be less certain an airing of contrary views will lead to the discovery of new truths and knowledge. Stated differently, there may be more concern over the impact of speech regulations in some contexts than in others.

As Schauer recognizes, even the most established of scientific theories is subject to revision in the light of new evidence. There are only degrees of certainty and consistency, even in mathematics.<sup>33</sup> But I was struck by the value of Schauer's insights in relation to current disputes over indoctrination in public schools.<sup>34</sup> It appears to be one thing for school authorities to embrace established scientific truths, to the exclusion of less accepted scientific theories,<sup>35</sup> and quite another for them to espouse political truths to the exclusion of alternative visions of politics.<sup>36</sup> The former is likely to be treated as

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necessary to establish that meaning. It follows that any political theory that denies a right of free discourse is internally contradictory since it condemns itself to a loss of meaning. *Id.* at 162. Compare *id.* with Tushnet, *Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles*, 96 HARV. L. REV. 781, 785 (1983) ("[T]he only coherent basis for the requisite continuities of history and meaning is found in the communitarian assumptions of conservative social thought . . ."); Levinson, *Law as Literature*, 60 TEXAS L. REV. 373, 377 (1982) ("[M]uch contemporary writing . . . is explicitly self-referential in its demand that the reader . . . confront the extent to which language and image are unavoidably ambiguous, and its assertion that any given . . . meaning is the product of an interchange between object and viewer rather than an attribute of the object itself.").

33. See the discussion of Godel's Incompleteness Theorem in D. HOFSTADTER, GODEL, ESCHER, BACH: AN ETERNAL GOLDEN BRAID 24 (1979) ("[N]o axiomatic system whatsoever could produce all number-theoretical truths, unless it were an inconsistent system.").

34. See generally S. ARONS, COMPELLING BELIEF: THE CULTURE OF AMERICAN SCHOOLING (1983) (reviewed in this issue); Yudof, *The State as Editor or Censor: Book Selection and the Public Schools*, in OFFICE FOR INTELLECTUAL FREEDOM, AM. LIBRARY ASSN., CENSORSHIP LITIGATION AND THE SCHOOLS 49 (1983); Harpaz, *A Paradigm of First Amendment Dilemmas: Resolving Public School Library Censorship Disputes*, 4 W. NEW ENG. L. REV. 1 (1981).

35. See *McLean v. Arkansas Bd. of Educ.*, 529 F. Supp. 1255 (E.D. Ark. 1982). See generally CREATIONISM, SCIENCE, AND THE LAW: THE ARKANSAS CASE (M. La Follette ed. 1983).

36. See *Board of Educ. v. Pico*, 457 U.S. 853 (1982).

involving the selectivity inherent in any educational process, while the latter is likely to be treated as a "pale of orthodoxy" or ideological censorship.<sup>37</sup> The distinction also parallels the differentiation of skill training and the inculcation of attitudes or moral values.<sup>38</sup> But before taking the uncertainty principle too seriously, perhaps one should recall Bertrand Russell's admonition about the truths of science:

Consider what we do to our children. We do not say to them: "Some people think the earth is round, and others think it flat; when you grow up, you can, if you like, examine the evidence and form your own conclusion." Instead of this we say: "The earth is round." By the time our children are old enough to examine the evidence, our propaganda has closed their minds, and the most persuasive arguments of the Flat Earth Society make no impression.<sup>39</sup>

The chapters on the arguments from self-expression, self-realization, and dignity<sup>40</sup> make vitally important points about the relationship of freedom of expression to a thoroughgoing nineteenth-century liberalism. As Schauer notes, happiness and self-realization of the individual may be important values, but what basis is there for distinguishing among types of freedoms that advance those values?

Many people indeed believe that freedom to express their opinions is a primary component of their happiness. But others are as likely to be satisfied with other freedoms, or prefer the security or intellectual anaesthesia that accompanies rigid controls on expression. [P. 49].

Our physical well-being, our non-intellectual pleasures, our need for food and shelter, and our desire for security are also important, although these are wants that we share with the rest of the animal world. Because any governmental or private action to restrict communication is usually justified in the name of one of these or other similar wants . . . , a particular protection of communication under this version of a natural rights theory must assume that communication is *prima facie* more important than these other interests. [P. 55].

Either we must admit that there is nothing special about self-fulfillment through expression, that free-speech stands on the same plane as other wants and needs (p. 56), or we must construct a normative theory based "not so much on what man is as on what man ought to be" (p. 49). If the self-fulfillment argument is to distinguish the sat-

37. See *Pico*, 457 U.S. at 853. See generally Stern, *Challenging Ideological Exclusion of Curriculum Material: Rights of Students and Parents*, 14 HARV. C.R.-C.L. L. REV. 485 (1979).

38. See Katz, *The Present Moment in Educational Reform*, 41 HARV. EDUC. REV. 342, 355 (1971).

39. B. RUSSELL, *POWER* 268-69 (1938).

40. See generally Baker, *Scope of the First Amendment Freedom of Speech*, 25 UCLA L. REV. 964 (1978); Redish, *supra* note 7. Even the proponents of self-realization theories do not agree on their meaning and application. See Baker, *Realizing Self-Realization: Corporate Political Expenditures and Redish's The Value of Free Speech*, 130 U. PA. L. REV. 646 (1982); Redish, *Self-Realization, Democracy, and Freedom of Expression: A Reply to Professor Baker*, 130 U. PA. L. REV. 678 (1982) [hereinafter cited as Redish, *Reply*].

isfaction and happiness of purchasing a home from that of writing a book, it must call upon a normative vision of liberty or an empirical distinction between the self-realization effects of speech and conduct.<sup>41</sup>

The power of Professor Schauer's analysis of self-realization may be demonstrated by consideration of Professor C. Edwin Baker's approach to the constitutionality of government regulation of commercial speech.<sup>42</sup> For Baker, "a complete denial of first amendment protection for commercial speech is not only consistent with, but is required by, first amendment theory."<sup>43</sup> Why is this? Because protected speech exists "as a manifestation of the self, and the self's choices and commitments . . . . As long as speech represents the freely-chosen expression of the speaker while depending for its power on the free acceptance of the listener, freedom of speech represents a charter of liberty for noncoercive action . . . ."<sup>44</sup> But is not speech in the marketplace a "freely-chosen expression of the speaker?" A reflection of self?<sup>45</sup> For Baker, the question raises concerns about false consciousness. In his view, the market creates the demands that it satisfies, and besides, "[h]ow 'profit' wants the world to be bears no necessary relation to how any individual wants it to be. To allow 'profit' to vote is to depreciate human freedom."<sup>46</sup> In short, commercial speech does not advance the self-realization objective of freedom of expression.

But how does Professor Baker know these things? Do not Madison Avenue artists and writers derive satisfaction from creating and distributing Coca-Cola advertisements? What of the vacuum cleaner salesperson who has the opportunity to deliver his entire talk on the glories of his product? Might not the choice of jobs reflect the satisfaction of speaking on the job as well as wages or profits? An anthropomorphic conception of "profit" will not do either. If the norms of profit maximization in corporations constrain the individual's range of choices over expression, this is also true of the articles

41. See, e.g., Redish, *Reply*, *supra* note 40, at 684. See generally A. MACINTYRE, *AFTER VIRTUE* (1981). Professor Redish also espouses a positivist justification for limiting the self-realization rationale to freedom of speech. Redish, *Reply*, *supra*, at 684.

42. Baker, *Commercial Speech: A Problem in the Theory of Freedom*, 62 *IOWA L. REV.* 1 (1976).

43. *Id.* at 3.

44. *Id.* at 7 (emphasis deleted).

45. See Redish, *Reply*, *supra* note 40, at 686 ("Equally damaging to Baker's [theory] . . . is . . . the impossibility of separating the profit orientation from the goal of self-realization.") (footnote omitted).

46. Baker, *supra* note 42, at 15-16. This view of the profit motive and self-realization leads to the supposition that corporations do not have free speech rights. See Baker, *supra* note 40, at 652, 677; Tushnet, *Corporations and Free Speech*, in *THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE* 253 (D. Kairys ed. 1982) (reviewed in this issue). See generally Powe, *Mass Speech and the Newer First Amendment*, 1982 *SUP. CT. REV.* 243, 254-60; Levinson, *supra* note 25, at 1478-80.

of a newspaper reporter working for *The Washington Post*.<sup>47</sup> It is certainly true of lawyers soliciting clients,<sup>48</sup> or textbook writers and publishers seeking to nail down sales in the Texas and California public school markets.<sup>49</sup>

And from the perspective of the listener,<sup>50</sup> how does one know that the capitalists have created wants and needs that would not otherwise exist? Do Polish and Chinese people, in the absence of mass advertising, decline to press for consumer goods like television sets and automobiles? Do not producers often satisfy real wants and needs, though they seek to induce consumers to buy their products and not the products of others? Is there not a mutually affecting relationship between consumer needs and producer advertising? The fact that mass advertising and hedonistic consumers coexist in a culture does not necessarily imply that the former caused the latter. In yielding to a simplistic etiology, Baker ignores a primal truth about cultures: they are culturally biased.

The concept of false consciousness<sup>51</sup> is pivotal to Professor Baker's self-realization principle for free speech, allowing him to reject arguments for protecting commercial speech. But how do we identify true and false expressions of preferences? Who is in charge of deciding such questions?<sup>52</sup> If a person has been indoctrinated to enjoy chocolate ice cream, and Professor Baker believes that right-thinking persons would prefer vanilla ice cream, does it follow that the deviant gourmand does not experience happiness upon eating chocolate? Would revelation and rumination cause the person to embrace vanilla?<sup>53</sup> Should we assume that the preference for chocolate was coerced by family, peers, mass media, state, and Baskin Robbins?<sup>54</sup>

47. See Levinson, *supra* note 25, at 1479.

48. For cases involving solicitation, see *Ohralik v. Ohio State Bar Assn.*, 436 U.S. 447 (1978); *In re Primus*, 436 U.S. 412 (1978).

49. See generally F. FITZGERALD, *AMERICA REVISED* (1979).

50. This perspective is rejected by Professor Baker. See Redish, *Reply*, *supra* note 40, at 686.

51. See generally R. GEUSS, *THE IDEA OF A CRITICAL THEORY* (1981).

52. As Professor Redish has stated:

Baker's fallacy on this point is his assumption that the value of self-rule is limited to whatever he would label "rational, intelligent self-rule." But such a limitation would totally undermine the concept, for to allow individuals to choose only what some external force determines is "rational" and "intelligent" is effectively to deprive them of self-rule. Redish, *Reply*, *supra* note 40, at 685 (citing Redish, *supra* note 7, at 618-19).

53. See Scanlon, *supra* note 11, at 525-26 (popcorn).

54. One approach to the dilemma of false and true wants and needs is identified by Raymond Geuss as arising from the writings of critical theorists:

[W]e may call a belief "reflectively unacceptable" to a group of agents if they would give it up, were they to reflect on it in the light of information about the conditions under which they could have acquired it . . . . Legitimizing beliefs are acceptable *only* if they *could* have been acquired by the agents in a free and uncoerced discussion in which all members of the society take part.

Further, as critical theorists<sup>55</sup> and others<sup>56</sup> have noted, false consciousness is also a problem in politics. Governments engage in massive communications activities, including public schooling, publication of pamphlets and books, maintenance of libraries, and advertising, and these efforts raise significant issues of indoctrination to government-embraced values.<sup>57</sup> Such indoctrination, potentially, may constrain the political speech of individuals. If an orientation towards profits reflects a false consciousness, so too might expressions in favor of voting rights and racial equality.

As Schauer suggests, the logic of the argument from self-realization, in the absence of normative theory of rights, will not yield an intelligible distinction between freedom of speech and a general theory of libertarianism. In the guise of distinguishing true wants from false ones, Baker has drawn an unjustifiable distinction between commercial and other forms of speech. To the extent that Professor Baker is displeased with capitalist men and women, he should be fashioning and defending a normative theory of the good life and a vision of the men and women who would inhabit that world.<sup>58</sup> Free speech may be essential to that epistemological process. Alternatively, he might espouse a broader theory of liberty, one that covers both political and commercial speech.<sup>59</sup>

Schauer is equally adept in his treatment of the argument from dignity, the notion that "when the state suppresses . . . [a] person's expression of . . . ideas, the state is insulting that person and affronting his dignity" (p. 62). The core difficulty, once again, is that dignity supports a global argument for liberty, "not an argument for a special liberty of speech" (p. 65):

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R. GEUSS, *supra* note 51, at 62 (emphasis in original) (footnote omitted); see also B. ACKERMAN, *SOCIAL JUSTICE IN THE LIBERAL STATE* 139-67, 180-86, 352-55 (1980). One should not lightly assume, however, that all beliefs contrary to those of a critical theorist have been acquired through coercion, nor that that awareness of the coercion would necessarily cause a person to change his or her beliefs. Further, the identification of what is coercion may itself be influenced by "ideology," as is clearly indicated by the writings of the critical theorists. And in a specific cultural context, the projection of true beliefs may be far more speculative and normative than empirical.

With all these difficulties, the reader may wonder why critical theorists remain so infatuated with the hermeneutic concept of "false consciousness." The answer lies in the disappointed expectations of would-be revolutionaries. See I. BALBUS, *MARXISM AND DOMINATION* 55-56 (1982) (concept of false consciousness arises out of the Marxist's need to explain the anomaly that "the consciousness and practice of the Western industrial working class has been directed toward the amelioration of its level of consumption rather than the transformation of its mode of production:").

55. See, e.g., Kennedy, *The Structure of Blackstone's Commentaries*, 28 *BUFFALO L. REV.* 205 (1979). See generally R. GEUSS, *supra* note 51.

56. See, e.g., M. YUDOF, *supra* note 12; Shiffrin, Book Review, 96 *HARV. L. REV.* 1745 (1982).

57. See generally M. YUDOF, *supra* note 12.

58. See generally A. MACINTYRE, *supra* note 41.

59. See Coase, *supra* note 3, at 389.



[W]hen words are other-regarding, whatever the precise definition of that term, the ideas of dignity and insult are no more dispositive than they would be if someone claimed his dignity to be insulted by restrictions on his freedom to pollute the atmosphere, commit assault, play the saxophone in church, or practice cardio-vascular surgery without a medical degree or licence. [P. 64].

My impression is that people gain dignity from adequate incomes, interesting jobs, meals on the table, shelter, and economically independent children. If dignity is the linchpin, and if the argument is that dignity in the sphere of ideas is somehow different from that in the economic sphere, the proponent of the distinction "has no arrows left in his quiver if and when his arguments for this broad Millian freedom are rejected" (p. 65).<sup>60</sup> If the argument is that personal dignity requires equal respect for individuals in political processes, in the public sphere, then the dignity argument merges with the normative argument from democracy.

Schauer's treatment of the justification from personal autonomy is similar to that for self-fulfillment and dignity (pp. 67-72).<sup>61</sup> In the absence of a demonstration that repression of speech is more harmful to personal autonomy than regulation of conduct, devotees of freedom of expression should join the ranks of laissez-faire capitalists. If governmental paternalism is accepted in the sphere of conduct, for example compulsory education and consumer protection laws, then the same types of justifications (avoidance of harms, affirmative liberty, transactional incapacities) ought to apply to paternalism in the realm of expression. Principles of free expression that focus on the interests of the listeners frequently are rooted in traditional libertarian ideas, and are difficult to disentangle from general theories of liberty generating visions of the minimally intrusive state. Indeed, the leading proponent of the autonomy theory, Professor Scanlon, recanted largely on this ground.<sup>62</sup> If autonomy is defined in terms of the political process, then it draws its normative force from its instrumental relationship to democratic values and not primarily from its intrinsic value to individuals.

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60. Of course, one might argue that self-realization from economic gain is inherently limited by virtue of scarce resources, whereas free speech is not so limited by scarcity. But presumably those who own television and radio stations and newspapers may deploy their resources for expression and thereby reach higher levels of self-realization than those who must rely upon face-to-face communication. Thus, the self-realization argument might well support access to newspapers and cable television channels, campaign financing laws, and other efforts to secure equality among speakers. See generally Barron, *Access to the Press — A New First Amendment Right*, 80 HARV. L. REV. 1641 (1967); Nimmer, *Introduction — Is Freedom of the Press a Redundancy: What Does It Add to Freedom of Speech?*, 26 HASTINGS L.J. 639 (1975).

61. See generally Scanlon, *A Theory of Freedom of Expression*, 1 PHIL. & PUB. AFF. 204 (1972).

62. See Scanlon, *supra* note 11, at 532.

## IV

The most perplexing aspect of the book is Professor Schauer's reliance on an analytical method in the chapters on theory and his tacit rejection of that method in the chapters on applications. Schauer treats the various theoretical justifications for free speech largely in isolation from each other, and he rejects principles if they are not self-sufficient. This approach is rhetorically effective, as when he keenly demonstrates, for example, that self-realization or the advancement of truth, standing alone, will not support a free speech principle. Conceptual flaws are largely demonstrated through counterexamples. In this fashion, the theoretical chapters are responsive to the rhetorical excesses of the philosophers of free speech who seek a general theory that draws on a single and coherent perspective — the one right theory that excludes all other justifications from its domain. Recall John Milton's unbridled reconstruction of human experience: "Let [Truth] and Falsehood grapple; who ever knew Truth put to the worse, in a free and open encounter?"<sup>63</sup>

But Professor Schauer's rhetorical style, while responsive to the perfectionism of other theorists, makes it appear that he too is a perfectionist, that if his fertile mind can conjure up one counterexample, a theory has been devastated. Yet, in the last part of the book, the author is far more practical and realistic, eschewing perfect conceptual arguments for the inevitable adjustment of conflicting principles in the flawed world in which we live. Thus, it is as if there are two Frederick Schauers. One is "eclectic"<sup>64</sup> about free speech theories and recognizes the limits of philosophical arguments. The other appears to be a perfectionist, adopting a reactive analytical style that belies that eclecticism. The two perspectives simply coexist in *Free Speech* and are never explicitly linked to each other.

The tendency to rebut through counterexamples, the pink snake style of argument, is disturbing. If X is a justification for Y, a free speech principle, and if X is not always true, then it follows that Y is not defensible. If a theorist imaginatively identifies a single counterexample, no matter how unlikely, the theory is discarded. One pink snake and the terrain is uninhabitable. In his chapters on principles, Professor Schauer sometimes succumbs to this "it ain't necessarily so" refrain. Let me give an example. To the proposition that free speech advances the search for truth, he responds that "it is simply a mistake to say that the expression of false or unsound opinions can never have unpleasant consequences" (p. 28). With respect to race relations, "[h]istory has shown us that people unfortunately are much more inclined to be persuaded of the rectitude of oppressing

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63. J. MILTON, AREOPAGITICA 58 (Cambridge ed. 1918) (1st ed. 1644).

64. See Shiffrin, *Government Speech*, 27 UCLA L. REV. 565 (1980). See generally Shiffrin, *Liberalism, Radicalism, and Legal Scholarship*, 30 UCLA L. REV. 1103 (1983).

certain races . . . than they are likely to accept other unsound and no less palpably wrong views" (p. 28). So much for the truth. But who asserts that "unsound opinions can never have unpleasant consequences?" If unsound opinions on race relations are harmful, does it follow that the argument from truth has no weight? Are we not worried about our uncertainty over what is true? Where are the sonar instruments that detect unsound views? How about the notion that, on balance, truth is advanced by free speech?

Another example comes from the author's discussion of the argument from democracy. The argument, as Schauer frames it, is that the citizenry should have access to information and opinions in order to exercise its political judgment and to exercise control over those who govern them (pp. 38-39). This perspective is taken from Meiklejohn's theory of freedom of expression and self-governing speech,<sup>65</sup> though Schauer, unlike Meiklejohn, perceives that both speakers and listeners require protection under the democratic theory. It is also similar to Blasi's notion of free speech as a check on government abuse of power<sup>66</sup> and my own notion of the "self-controlled" citizen.<sup>67</sup> Schauer has many interesting things to say about this rationale,<sup>68</sup> but he considers the "paradox of power" (p. 40) to be dispositive:

If the people collectively are in fact the sovereign, and if that sovereign has the unlimited powers normally associated with sovereignty, then acceptance of this view of democracy compels acceptance of the power of the sovereign to restrict the liberty of speech just as that sovereign may restrict any other liberty.

. . . [A] Free Speech Principle exists only if it is an exception to the general rule of majority sovereignty; only if it is a right, of indeterminate strength, against the majority. Any distinct restraint on majority power, such as a principle of freedom of speech, is by its nature anti-democratic, anti-majoritarian. [P. 40].

Thus, an argument for freedom of expression based on democratic premises is a contradiction.

As Schauer admits, his "argument may prove too much"; much lurks in the "sterile notion of democracy as majority rule" (p. 41). But because a democracy might choose not to remain a democracy, and foreclose the process by which majorities are formed and expressed, he rejects the strong argument from democracy. This particular pink snake comes of the intoxications of philosophy. If

65. See A. MEIKLEJOHN, *POLITICAL FREEDOM* (1960).

66. Blasi, *The Checking Value in First Amendment Theory*, 1977 AM. B. FOUND. RESEARCH J. 521; see also Anderson, *The Origins of the Press Clause*, 30 UCLA L. REV. 455 (1983).

67. See M. YUDOF, *supra* note 12, at 20-37.

68. But see Tribe, *The Puzzling Persistence of Process-Based Constitutional Theories*, 89 YALE L.J. 1063 (1980); Tushnet, *Darkness on the Edge of Town: The Contributions of John Hart Ely to Constitutional Theory*, 89 YALE L.J. 1037 (1980).

slavery is forbidden, may a man voluntarily sell himself into slavery? If human life is protected, may a person commit suicide? But a snake charmer can respond to the paradox of the suicidal urges of democracy: the polity should hobble along with the free speech and democracy until the Armageddon. Perhaps the majority can decide to stamp out free speech and majoritarian politics, thereby insuring a totalitarian future. That a democratic government will not necessarily protect freedom of expression does not mean that such freedom is not a necessary (though not sufficient) condition for democracy.

Or perhaps democratic values include root notions of countermajoritarian rights?<sup>69</sup> Or perhaps temporal majorities need to be distinguished from constitutional majorities over time, thereby legitimating a principle of paternalism to preserve democracy.<sup>70</sup> But however these hypothetical traumas are to be met, why is the argument from democracy for freedom of expression defeated because scholars can imagine situations in which our principles will turn back on themselves? Is it not sufficient if the principle works tolerably well in the here and now?

Needless to say, the "falsification" turf is normally reserved for philosophers, and I tread on it with some trepidation. Robert Paul Wolff, for example, has contrasted the philosophical method of "formal logic, where a theorem is invalidated by a single counterexample, no matter how bizarre or peripheral," with an "opposed conception of philosophy" that tests the power of the central insight of a philosophical position.<sup>71</sup> Wolff prefers the latter method, though he does not reject the former. I agree. In the realm of applied moral principles, which I have described as political principles to be applied by imperfect human beings and institutions, the method of "formal logic" has its place; it reaffirms our commitment to reason and our capacity for reflection. But formal logic is not all-encompassing. History and human experience also provide guidance. If free speech meaningfully contributes to democracy, the quest for truth, and human dignity, the existence of a few difficult and atypical counterexamples, imaginatively conjured up, should not be dispositive. Logic needs to be balanced against life, as imperfect people aim for principles that work tolerably well in an imperfect world. Virtually no practical principle of politics is immune to the virus of the counterexample. At some point, the counterexamples may be so numerous and compelling as to cause the abandonment of the principle. They may even be confirmed by evolving

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69. See R. DWORKIN, *TAKING RIGHTS SERIOUSLY* (1977).

70. See, e.g., A. BICKEL, *THE LEAST DANGEROUS BRANCH* 26-28 (1962); J. BUCHANAN, *THE LIMITS OF LIBERTY* 42-43, 93-98 (1975); L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 10 (1978).

71. R.P. WOLFF, *UNDERSTANDING RAWLS* 7 (1977).

experience. But logical possibilities should be only a part of an overall calculus as to whether the normative and empirical game is worth the candle.

Ironically, I have good reason to believe that Professor Schauer is largely in agreement with me on the falsification debate. In an upcoming article, he examines and rejects "the argument from weird cases" in responding to the hyperbole of the "deconstructionist" movement in constitutional law. He rightly suggests that it is a "*non sequitur* . . . [to] move from the proposition that language is imperfect to the proposition that language is useless."<sup>72</sup> So, too, of principles of free speech. Any principle or language employed to describe legal norms will inevitably be unclear in some circumstances. But there are core and fringe applications of rules and principles, and it certainly does not follow that a difficult case or a wrong result at the fringes necessarily means that the principle should be rejected. To paraphrase Professor Schauer's remarks about language, if principles are never perfect but "cannot plausibly be claimed to be always worthless, the argument from weird cases turns out to say almost nothing at all."<sup>73</sup> If these views fail to emerge clearly from *Free Speech: A Philosophical Enquiry*, it is only because of the author's compulsion to respond in kind to the rhetorical styles of free speech theorists. When he turns to the application of free speech principles, he is more modest about the possibilities of principled decisionmaking by human institutions.

## V

The argument for freedom of expression that Schauer finds most attractive appears in a chapter on "the utility of suppression" (p. 73). He characterizes the other arguments for a free speech principle as positive justifications, depending on the asserted benefits of unregulated speech (p. 81). He proposes instead a negative theory of expression:

Even if there is nothing especially good about speech compared to other conduct, the state may have less ability to regulate speech than it has to regulate other forms of conduct, or the attempt to regulate speech may entail special harms or special dangers not present in regulation of other conduct.

. . . Experience arguably shows that governments are particularly bad at censorship, that they are less capable of regulating speech than they are of regulating other forms of conduct. [P. 81].

In probing the "deeper reason" for his intuition that government cannot be trusted to regulate speech, Schauer perceives that regulatory authority is given to government officials who "have the most to

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72. Schauer, *Easy Cases* (unpublished manuscript).

73. *Id.*

lose from arguments against their authority" (p. 81). They may abuse their authority over speech — for example, with respect to treason and sedition — precisely because they have interests that diverge from the public interest in protecting the polity from harm:

Reasons of power, prestige, mission, or money inspire in people the desire to attain government office, and those same reasons also inspire in them the want to retain those positions.

. . . [A]ny system of regulating political speech puts in control those with the most to lose from the activities they are regulating. [Pp. 81-82].

He concludes with the maxim that no person ought "to be judge of his own cause" (p. 82).

The negative justification, or government incompetence argument, for free speech raises numerous difficulties. First, Schauer has once again been inconsistent with regard to the need for empirical proof and causal relationships to support a principle. For his own vision of a free speech principle, he is in no mood to rearrange the deck chairs on the Titanic. He admits that "[i]t is true that there is no hard empirical support for the proposition that government officials are likely to be over-aggressive censors for reasons of self-interest" (p. 82). Yet he presses on. He argues that the "nature of the relationship," and, I would add, history and experience, "justifies the assumption of bias" (p. 82). Further, he limits the incompetence argument in ways that are not intuitively (or empirically) obvious. For example, consider the potential of government to employ its communications powers to engineer the consent of the citizenry; government officials have a built-in incentive to indoctrinate citizens to norms that serve the interests of those in power.<sup>74</sup> But here (p. 56) and elsewhere<sup>75</sup> Professor Schauer overlooks or rejects this logical extension of the incompetence principle.

Second, he urges that the "slippery-slope" is more treacherous for the regulation of speech than for the regulation of conduct (pp. 83-85). But it is far from clear that the administration of laws governing speech inherently requires a more refined micrurgy than laws regulating action. The inability to convey precise meanings is inherent in law and language;<sup>76</sup> the vagaries of "cruel and unusual punishments" do not appear to be of lower order than those for incitement, advocacy, or pornography. Nor are the rules for conduct necessarily more easily learnable by administrators than those for speech regulations. Rules regulating conduct frequently call for dif-

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74. See M. YUDOF, *supra* note 12.

75. Schauer, Book Review, 35 STAN. L. REV. 373, 379-83 (1983) (reviewing M. YUDOF, *supra* note 12).

76. See Levinson, *supra* note 32.

ficult assessments of motivation,<sup>77</sup> as for example in racial discrimination and unfair labor practice suits. I suspect that the alleged vagueness of rules governing speech, and judicial sensitivity to vagueness in the sphere but not in others,<sup>78</sup> reflect the greater likelihood of governmental abuse of its discretion<sup>79</sup> and the abiding concern for the harms of censorship.

Third, the argument from governmental incompetence is unpersuasive in the absence of a positive justification for free speech. If speech is not valued for advancing personal autonomy or truth, for example, why should we be concerned that the government is biased? It is simply not responsive to say that "[t]he issue is not whether totalitarian groups should be allowed to speak, but whether anyone should have the power to decide which groups are totalitarian and which are not" (p. 62). He might equally say that the issue is not whether racism should be allowed, but whether anyone should have the power to decide what are unconstitutional racist practices. There are many responsibilities entrusted to governments that they do not discharge with great discernment. There is no particular reason to remove governmental authority from the free speech picture unless the results of government's ineptitude cause special harms or preclude the achievement of some particularly valued benefits. If inefficiency and incompetence are the starting points, there might well be animated public discussion of whether sedition acts, environmental protection regulations, or the postal service should be the first to be struck with the libertarian axe.

## VI

In the end, Professor Schauer falls victim to a philosophical method that values analysis over synthesis. He razes the free speech structure, examines the bricks one at a time, discards most, and then has trouble rebuilding the edifice. A defense of a free speech principle, rooted in uncertainty and distrust of government, requires a holistic approach if it is to stand. But perhaps I have unfairly accused Professor Schauer of not writing the book that I would have him write. His goal may have been only to illuminate the principles of free speech through "philosophical enquiry." That he chooses to probe the underpinnings of traditional free speech principles instead of synthesizing them into a more complex principle does not detract from the many virtues of his enterprise. The destruction of the existing edifice may be a necessary precursor to the erection of a new

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77. See P. BREST & S. LEVINSON, *PROCESSES OF CONSTITUTIONAL DECISIONMAKING* 454-69 (2d ed. 1983).

78. See W. LOCKHART, Y. KAMISAR & J. CHOPER, *CONSTITUTIONAL LAW* 730-38 (5th ed. 1980).

79. See Jeffries, *Rethinking Prior Restraints*, 92 *YALE L.J.* 409, 423-26 (1983).

one. The trouble with this view of *Free Speech: A Philosophical Enquiry* is that Professor Schauer has greater ambitions for his work. The book does not end on page 86 with his discussion of "The Free Speech Principle"; rather he goes on to include sections on "Explication" and "Applications." The titles of these sections suggest that there is a principle to explicate and apply, that something has risen from the ashes of his philosophical enquiry. But this principle never clearly emerges except in relation to his negative arguments for free speech. On the other hand, the careful examination of hard cases in the second half of the book and the unwillingness to embrace a dogmatic vision of free speech evidences an openness to integrative theories. But, by and large, these integrative possibilities remain inchoate in the larger work. Schauer fails to acknowledge openly that a powerful justification for a free speech principle requires him to connect the arguments from uncertainty, government incompetence, and democracy. Those arguments together operate to create a rationale that is stronger than any one argument standing alone.

The critical insight is that freedom of expression is an epistemological process for determining what the majority wants. It is not only, or even primarily, rooted in the need to protect minorities from the overreaching of majorities in democratic polities. In the absence of verifiable criteria for determining majority sentiment, expression, like voting and lobbying, is an imperfect technique by which preferences are formed, articulated, and aggregated. It is both a method of directly influencing government and a means of bolstering other mechanisms of governmental accountability. In other words, free speech is not only an instrumental principle in relation to other democratic constraints on government; it is itself a constraint. And these constraints are mutually affecting, with the entire panoply of constraints yielding a process that aspires to majority decisionmaking. "Majority rule" is indeed a "sterile" concept without such a qualification.

Government officials, through communications efforts and otherwise, have the self-interest and capacity to falsify consent, to manipulate the same public opinion from which they gain their authority. And even where self-controlled citizens, speaking and acting autonomously in matters of governance, are not overwhelmed by government communication, there will always be uncertainty as to whether the majority endorses a particular policy outcome.<sup>80</sup> Many citizens do not participate in voting, lobbying, and similar activities;<sup>81</sup> many are irrational and acquiescent (pp. 26-27); voters elect officeholders on the basis of many characteristics, not necessarily because their views overlap on all or most policy issues; legislative processes may

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80. The discussion in the text is largely taken from M. YUDOF, *supra* note 12, at 152-57.

81. See generally R. WOLFINGER & S. ROSENSTONE, *WHO VOTES?* (1980).



thwart majority will; and the Arrow Theorem tells us that the ordering of the legislative agenda may determine policy outcomes.<sup>82</sup> When some initiative is taken on behalf of the "majority," we can never be entirely sure that it is the majority and not just a self-interested government that is acting. Under such conditions of uncertainty, freedom of expression is the means by which we verify and affirm majoritarian processes of governance.<sup>83</sup>

Schauer's conditions for an argument from democracy are so stringent as to preclude synthesis of free speech principles (pp. 40-44). When he speaks of a "paradox of power,"<sup>84</sup> he assumes that he can ascertain that a majority opposes free speech (p. 40). But how does he know this? All that he can say with certainty is that a government, purporting to represent the majority, has declined to protect speech. He assumes that democracy is dependent on "equal participation in government," "equal competence and universal rationality" (p. 41). Otherwise, the people are not "sovereign." But such strong forms of the argument doom it to empirical collapse. Obviously, people are not equal participants, they are not equally capable, and they certainly are not uniformly rational. But even imperfect citizens can affect their leaders. Charles Frankel comes much closer to the mark in his more modest aims for a democracy:

"Government by consent" cannot be interpreted to mean that those who are governed necessarily agree with what their rulers decide to do. Nor can it mean that "the majority" agrees . . . .

But to speak of majorities and minorities and the inevitability of disagreements is to suggest what "government by consent" expresses. It expresses the hope for a society in which ordinary people can influence the actions their leaders take. This means they can exercise some control over who their leaders will be. And it also means that they are required to obey only after having been actively consulted by those who issue the orders.<sup>85</sup>

The point is that freedom of expression refers to the process by which the citizenry seeks to influence government. In the last analysis, as I have previously written, "[m]ajority rule in a democratic society is not a simple *substantive* concept; it is a complex *process* of consultation in which citizens are free to make up their minds and express their opinions."<sup>86</sup> Thus the principle of uncertainty combines with the argument from democracy; for freedom of speech is

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82. See K. ARROW, *SOCIAL CHOICE AND INDIVIDUAL VALUES* (1963); Levine & Plott, *Agenda Influence and Its Implications*, 63 VA. L. REV. 561 (1977).

83. M. YUDOF, *supra* note 12, at ch. 10.

84. See also Bollinger, *Free Speech and Intellectual Values*, 92 YALE L.J. 438, 451-52 (1983).

85. C. FRANKEL, *THE DEMOCRATIC PROSPECT* 34 (1962), quoted and discussed in M. YUDOF, *supra* note 12, at 153-57.

86. M. YUDOF, *supra* note 12, at 153.

an indispensable means of verifying that the majority has the opportunity to influence policy.

In fairness to Professor Schauer, he comes quite close to this conclusion without explicitly recognizing the synergistic relationship of uncertainty, governmental bias and incompetence, and democracy:

As our leaders become elected rulers rather than servants, governmental superstructures are more likely to become as concerned with perpetuation of their own power as with acting in what they perceive to be the public interest . . . . [T]he same motivations that lead people to aspire to governmental office also lead those people to want to retain those positions. Freedom to criticize the government is a check on the survival instincts of self-perpetuating governmental organizations. [P. 43].

Schauer thus builds on the impressive conceptual contributions of Professor Blasi.<sup>87</sup> But he fails to note that the problem is not simply one of the ill-will of government officers; it is also a problem of the uncertainty that surrounds any substantive concept of majority will in a democracy.

This refined version of the argument from democracy also invokes the argument from autonomy. I take it that it is this interface of principles that Professor Scanlon once recognized in saying "a legitimate government is one whose authority citizens can recognize while still regarding themselves as equal, autonomous, rational agents."<sup>88</sup> Citizens are not autonomous in the sense that they are free from all or most of the constraints of culture or government. Scanlon is not a proselyte of the minimal state or an apologist for libertarianism.<sup>89</sup> Citizens should be autonomous in relation to governing processes:

[T]he argument for the Millian Principle rests on a limitation of the authority of states to command their subjects rather than on a right of individuals . . . . There are surely cases in which individuals have the right not to have their acts of expression interfered with by other individuals, but these rights presumably flow from a general right to be free from arbitrary interference . . . .<sup>90</sup>

So too, equality need not be invoked in the broadest sense of persons being equal in their intellects, tastes, resources, achievements, and income. In the speech context, equality of treatment in the public sphere may suffice. As Michael Walzer has stressed:

Politics is always the most direct path to dominance, and political power . . . is probably the most important, and certainly the most dangerous, good in human history . . . .

87. Blasi, *supra* note 66.

88. Scanlon, *supra* note 61, at 214. I use the past tense in the text deliberately. *See* Scanlon, *supra* note 11.

89. *See* Scanlon, *supra* note 11.

90. *See* Scanlon, *supra* note 61, at 221.

One way of limiting political power is to distribute it widely. This may not work, given the well-canvassed dangers of majority tyranny; but these dangers are probably less acute than they are often made out to be.<sup>91</sup>

In the artificially constructed world of democratic politics, persons are to be treated as equal, autonomous, and rational, whatever their actual characteristics. In this sense, their human worth is affirmed. Such treatment leads to the recognition of a free speech principle, a principle that verifies majority rule and protects the processes of citizen influence over government. It is adherence to democratic norms that defines the treatment of citizens, not the characteristics of actual citizens that suggest the democratic norms.<sup>92</sup> And adherence to those norms may affirm fundamental social and intellectual values, thereby contributing to the development of a "democratic personality" in citizens.<sup>93</sup>

To a refined argument from democracy, Professor Schauer responds that the resultant principle of free speech is too narrow. He is unhappy because he "can make little sense of a notion of self-government in art, literature, or science" (p. 44). A satisfactory response, though a "Philistine and anti-cultural" one in some quarters,<sup>94</sup> might well be that if the most compelling justification for freedom of expression would not protect art, literature, and science, then they should not be protected. If Schauer's approach is self-consciously conceptual and empirical, not intuitive, he is not compelled to reject narrow, defensible principles. Indeed, in other parts of the book, he does narrow the coverage. For example, his conclusion that hard-core pornography is not protected speech — pornography is action because it provides sexual gratification akin to that associated with prostitution and "vibrating sex aid[s]" (p. 181)<sup>95</sup> — would benefit greatly from an infusion of the uncertainty, incompetence, and democracy arguments.<sup>96</sup> The trouble is that, for all of Schauer's philosophizing, there is no clear and sustained relationship between his articulation of principles in the first part of the book and his treatment of specific applications in the last part.

A holistic principle of free speech, which Schauer eschews, would recognize that the arguments from democracy, individual autonomy,

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91. M. WALZER, *supra* note 4, at 15 (footnote omitted).

92. *But see* Scanlon, *supra* note 11.

93. *See* Bollinger, *supra* note 84, at 458.

94. Beth, *The Public's Right to Know: The Supreme Court As Pandora?* (Book Review) 81 MICH. L. REV. 880, 882 (1983); *see also* Scanlon, *supra* note 11; Chafee, Book Review, 62 HARV. L. REV. 891 (1949).

95. I wonder if Professor Schauer would agree that governments ought to be able to ban Shakespearean comedies on the theory that a feather, used to tickle the viewer, might achieve the same response.

96. *See* Scanlon, *supra* note 11, at 542-50.

uncertainty, and governmental bias and incompetence are mutually relating and affecting.<sup>97</sup> For example, in some instances we may not view government decisionmaking as likely to be influenced by the self-interest of government officials. This strikes me as particularly important if we are discussing judgment distorting speech (pp. 30, 102), speech that “by-pass[es] our ability to consider . . . reasons.”<sup>98</sup> If some forms of speech — for example, perjury, incitement, and fraud — are likely to preclude deliberation by the listener and to inflict great injury, that type of speech may be a good candidate for regulation.<sup>99</sup> And in many circumstances, particularly with regard to commercial speech, we may have less reason to believe that the government will act in a self-interested and biased manner. Most commercial speech is not a threat to those in power. The government is not so much worried that the speaker’s views will gain adherents, as it is that the decisionmaking processes of listeners will be distorted.<sup>100</sup>

In other words, the application of the justification from bias and incompetence often may lead in different directions in commercial and political speech cases. This may partially explain the Supreme Court’s recent rejection of the “clear and present danger” test in political advocacy cases,<sup>101</sup> and its strong support for the regulation of false and misleading advertising in the commercial context.<sup>102</sup> As Professor Scanlon has stated, “where political issues are involved governments are notoriously partisan and unreliable.”<sup>103</sup> But Scanlon is wrong to suggest that the government bias argument supports his treatment of commercial and political speech as distinct

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97. The phrase “mutually affecting” and, to some extent, my method of analysis are drawn from P. BOBBITT, *CONSTITUTIONAL FATE* (1982) (reviewed in this issue); see also Bobbitt, *A Reply to Professor Ball*, 59 TEXAS L. REV. 829, 830 (1981).

98. Scanlon, *supra* note 11, at 525.

99. Professor Scanlon puts the matter this way:

What I conclude from this is that the distinction between expression and other forms of actions is less important than the distinction between expression which moves others to act by pointing out what they take to be good reasons for action and expression which gives rise to action by others in other ways, e.g., by providing them with the means to do what they wanted to do anyway.

. . . .

. . . A person who acts on reasons he has acquired from another’s act of expression acts on what *he* has come to believe and has judged to be a sufficient basis for action. The contribution to the genesis of his action made by the act of expression is, so to speak, superseded by the agent’s own judgment . . . .

Scanlon, *supra* note 61 at 212.

100. *See id.* at 209.

101. *See, e.g.*, *Hess v. Indiana*, 414 U.S. 105 (1973); *Brandenburg v. Ohio*, 395 U.S. 444 (1969). *See generally* Linde, “Clear and Present Danger” Reexamined: *Dissonance in the Brandenburg Concerto*, 22 STAN. L. REV. 1163 (1970).

102. *See, e.g.*, *Virginia Pharmacy Bd. v. Virginia Consumer Council*, 425 U.S. 748, 775-81 (1977) (Stewart, J., concurring).

103. Scanlon, *supra* note 11, at 534. Ironically, Scanlon does not assimilate such speech to his judgment-distortion justification for censorship. *Id.* at 525.

categories.<sup>104</sup> Consider, for example, the differences in the judicial attitude toward different types of commercial speech. Judges may trust more the competence of government officials when they seek to protect listeners against judgment distorting commercial speech, for example fraudulent representations, than when they seek to regulate commercial speech bearing on a controversial public policy issue (for example, energy consumption).<sup>105</sup> Perhaps cases involving commercial speech advocating a harmful activity are more difficult, *e.g.*, cigarette smoking and alcohol consumption. But unlike Professor Scanlon, who is troubled by a free speech principle that prevents "justified paternalism,"<sup>106</sup> I see political advocacy of totalitarianism and commercial advocacy of harmful substances as indistinguishable in terms of "justified paternalism." His categories of speech are entirely unhelpful. If there is a principled distinction, it lies in the potential for government bias, and this depends on the particular matters addressed by the speech.

But there should be no mistake about the fact that a holistic approach would raise many issues that, heretofore, have been largely ignored. Traditional categorizations of expression would need to be reexamined. For example, collective bargaining inevitably invokes the self-governing value of free speech. Yet there are many instances of the regulation of speech in this context. Secondary boycotts and picketing may be prohibited. The classification of topics as mandatory, permissive, or illegal subjects of collective bargaining may penalize participants for their expression. The employer's threats to close the plant or to fire employees, if they vote to be represented by a union, may be unfair labor practices.<sup>107</sup> Since collective bargaining is a governance mechanism, free speech theorists should reflect upon the legitimacy of such regulatory practices in the labor law field.

## VII

The Bible reminds us that "of making many books there is no end, and much study is a weariness of the flesh."<sup>108</sup> If so, Professor Schauer should be happily weary, for his book reflects enormous effort and dedication to scholarship. But he is more interested in criticizing concepts than he is in espousing them or in applying them to

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104. *Id.* at 537-42.

105. *See, e.g.*, *Consolidated Edison Co. v. Public Serv. Commn.*, 447 U.S. 530 (1980); *Central Hudson Gas & Elec. Co. v. Public Serv. Commn. of New York*, 447 U.S. 557 (1980).

106. Scanlon, *supra* note 11, at 532. *See generally* Stone, *Content Regulation and the First Amendment*, 25 WM. & MARY L. REV. 189 (1983).

107. *See* Swift, *NLRB Overkill: Predictions of Plant Relocation and Closure and Employer Free Speech*, 8 GA. L. REV. 77 (1973).

108. *Ecclesiastes* 12:12.

concrete speech problems. The last half of his book, which provides a careful and balanced perspective on current free speech issues, is almost entirely disconnected from the first half. As he discusses such issues as the scope of free speech, rights of access to the mass media, pornography, prior restraints, and the like, there are few references to the philosophical arguments from uncertainty, democracy, and governmental incompetence. He is no longer the perfectionist, and at one point, he confesses that he is engaged in "intelligent balancing" (p. 144). Once again, two Frederick Schauers emerge. The first is deeply troubled by the conceptional moorings of free speech; he is a skeptic who is not quite sure that a defensible free speech principle exists. The second Frederick Schauer is a lawyer who accepts, on balance, the need to protect broadly freedom of expression. The first Schauer is the more interesting and provocative; the second comes closer to a defensible free speech principle.

But whatever his shortcomings, Professor Schauer has made an enormous contribution to our understanding of the concepts that underlie freedom of expression. As George Orwell once said of Charles Dickens, he "is one of those writers who are well worth stealing."<sup>109</sup> For years to come, legal scholars, students, and judges will be borrowing from *Free Speech: A Philosophical Enquiry*. Few will agree with all of Professor Schauer's conclusions, for he attempts to map a terrain too treacherous for all but the most courageous. Although he refuses to obfuscate his vision with the rose-colored glasses of the true-believers<sup>110</sup> or with the ideological blinders of libertarians and critical legal theorists, partisans of all persuasions will be enriched by his efforts.

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109. G. Orwell, *Charles Dickens*, in A COLLECTION OF ESSAYS BY GEORGE ORWELL 48 (1954).

110. "The Devil is not the Prince of Matter; the Devil is the arrogance of the spirit, faith without smile, truth that is never seized by doubt." U. ECO, *THE NAME OF THE ROSE* 477 (1983).