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The Value of Dissent

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BOOK REVIEW

THE VALUE OF DISSENT

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DISSENT, INJUSTICE, AND THE MEANINGS OF AMERICA. By *Steven H. Shiffrin.*†† Princeton: Princeton University Press, 1999. Pp. 204. $29.95.

INTRODUCTION: THE FAILURE OF FREE SPEECH THEORY

Theorizing about the freedom of speech has been a central enterprise of contemporary legal scholarship. The important contributions to the debate are simply far too numerous to categorize.[1] One ambition of this theorizing is the production of a comprehensive theory of the freedom of expression, a set of consistent normative principles that would explain and justify First Amendment doctrine.[2] Despite an outpouring of scholarly effort, the consensus is that free speech theory has failed to realize this imperial ambition.[3] Rather than search-

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1 *See, e.g.*, C. EDWIN BAKER, HUMAN LIBERTY AND FREEDOM OF SPEECH (1989); LEE C. BOLLINGER, THE TOLERANT SOCIETY (1986); ALEXANDER MEIKLEJOHN, POLITICAL FREEDOM (1965); FREDERICK SCHAUER, FREE SPEECH: A PHILOSOPHICAL ENQUIRY (1982); CASS R. SUNSTEIN, DEMOCRACY AND THE PROBLEM OF FREE SPEECH (1993); Thomas I. Emerson, *Toward a General Theory of the First Amendment*, 72 YALE L.J. 877 (1963).

2 *See* U.S. CONST. amend. I. The idea that legal theories can explain and justify legal practice is a central tenet of Ronald Dworkin's approach to the theory of judicial decision making. *See generally* RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 115-18 (1978).

3 *See* Edward J. Eberle, *Practical Reason: The Commercial Speech Paradigm*, 42 CASE W. RES. L. REV. 411, 414-15 (1992); Daniel A. Farber & Philip P. Frickey, *Practical Reason and the First Amendment*, 34 UCLA L. REV. 1615, 1615-16 (1987); Steven Shiffrin, *The First Amendment and Economic Regulation: Away from a General Theory of the First Amendment*, 78 NW. U. L. REV. 1212, 1212 (1983). Ronald Cass's critique of grand theorizing about the First Amendment well represents this position:

> [N]o single value or interest explains the speech clause and no simple formula can implement it. The negative approach also takes the various values not as freestanding goals but as bases for the concerns that support limitations on government.
>
> The appropriate theoretical effort, on this view, is not the construction of "global" models, but the creation of "local" solutions to particular speech problems and the linkage of these solutions by broadly applicable principles.

Ronald A. Cass, *The Perils of Positive Thinking: Constitutional Interpretation and Negative First Amendment Theory*, 34 UCLA L. REV. 1405, 1490 (1987).

ing for the global theory of the First Amendment, constitutional scholars are content to aim for a local theory; offering partial conceptualizations, local theories explain, justify, or critique some portion of free speech doctrine without attempts at global synthesis.[4]

Steven Shiffrin's *Dissent, Injustice, and the Meanings of America*[5] (hereinafter *Dissent*) stands squarely in the tradition of modest, localized theorizing about the freedom of speech. Rather than attempting to integrate all of free speech doctrine, he focuses on one free speech value: the value of dissent and its contribution to the illumination of particular First Amendment problems.[6] This compact, densely argued, and brilliantly insightful book leaves free speech theory far the richer. Shiffrin has important things to say about flag burning,[7] advertising,[8] and racist speech.[9] Moreover, *Dissent* addresses a topic that is all too often neglected by free speech theorists: the methods by which institutions other than courts, such as schools and the media, can promote the values of free speech.[10] Throughout, *Dissent* never loses

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4 To be more precise about the distinction between local and global theories, we might say that global theories aim to provide a normative and descriptive account that "fits" and "justifies" (to use Ronald Dworkin's terminology) a whole domain of law, such as the whole of free speech doctrine; on the other hand, local theories aim only to explain and provide normative foundations for some subset of the domain, like free speech doctrine as it applies to dissent. DWORKIN, *supra* note 2, at 115-18 (explaining how legal theories aim to "fit" and "justify" legal doctrine). The ultimate global theory would fit and justify the law as a whole, reflecting the notion that the law is or should be treated as a "seamless web." *Id.* at 115-16; *see* RONALD DWORKIN, LAW'S EMPIRE 239-40, 264, 354, 379-91 (1986); Ronald Dworkin, *No Right Answer?*, *in* LAW, MORALITY, AND SOCIETY 58, 84 (P.M.S. Hacker & J. Raz eds., 1977).

Particular legal theories lie along a spectrum from theories that are fully global (taking the law as a whole as their object) to theories that are strongly local (taking, at the extreme, only a single application of a particular legal rule as the legal phenomenon to be explained or justified). Relative to theories of the law as a whole or theories of all free speech doctrine, Shiffrin's views can be said to be local; but if compared to theories that address only a particular aspect of free speech doctrine, Shiffrin's theory might be said to be global by comparison. For an example of an approach to free speech doctrine that can be said to be relatively more localized than Shiffrin's, see Marcy Strauss, *Redefining the Captive Audience Doctrine*, 19 HASTINGS CONST. L.Q. 85 (1991).

Different theorists use the distinction between local and global theories differently, but the sense in which they use the terms is closely related to common usage in contemporary legal theory. *See* Cass, *supra* note 3, at 1490 (distinguishing local and global free speech theories); *see also* John Stick, *Formalism as the Method of Maximally Coherent Classification*, 77 IOWA L. REV. 773, 784 (1992) (distinguishing between global and local theories of tort law); Adrian Vermeule, *Judicial History*, 108 YALE L.J. 1311, 1350-51 (1999) (distinguishing between global and local theories of legal history).

5 STEVEN H. SHIFFRIN, DISSENT, INJUSTICE, AND THE MEANINGS OF AMERICA (1999).

6 *See id.* at xi.

7 *See id.* at 4-18.

8 *See id.* at 32-48.

9 *See id.* at 49-87.

10 *See id.* at 112-20.

sight of its central thesis: The value of dissent is essential to understanding the freedom of speech.[11]

If free speech theories should not be too ambitious, then neither should they be too modest. If *Dissent* has a flaw, it is that Shiffrin does not push his argument far enough to weave a tapestry with sufficient breadth and depth to allow us to see the relationship between a local theory of dissent and the whole landscape of free speech jurisprudence. At times, the threads of argument developed in *Dissent* seem truncated, leaving the reader uncertain as to whether a consistent vision exists.[12] *Dissent* would have been a more satisfying work if Shiffrin had developed the central theoretical concepts in more depth and then applied them to a broader range of particular problems in free speech theory. Notwithstanding this criticism, no one who gives *Dissent* the attention it deserves can fail to appreciate the strong vision of social justice and deep knowledge of free speech doctrine that permeate Shiffrin's fine book.

Part I of this Review provides a brief exposition of some of Shiffrin's main points in *Dissent.* In Part II, I offer a critical analysis of *Dissent*'s central theory that the promotion and protection of dissent are central functions of the freedom of speech. In order to clarify Shiffrin's central claims, I will compare his analysis with John Stuart Mill's famous defense of the liberty of expression in his essay *On Liberty.*[13] Part III concludes with some observations about the lessons to be learned from Shiffrin's successes and failures.

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11 *See id.* at xi-xii.

12 *Dissent* offers deep and sophisticated discussions of a variety of topics, but many of them end without either advocating a position on the shape that doctrine should take or integrating the discussion into a coherent view of free speech theory as a whole. For example, the conclusions to the discussions of commercial speech, *see id.* at 48, racist speech, *see id.* at 86-87, and campaign finance reform, *see id.* at 120, are more suggestive than programmatic. This approach seems to be a deliberate choice on Shiffrin's part. In the conclusion to Chapter Four with respect to the topic of campaign finance reform Shiffrin writes:

> As I have said, I am content to provide this sketch without further elaboration. Some readers might have preferred long discussions of these proposals, but most of them have been discussed pro and con by many others elsewhere. Many of those readers may nonetheless experience a sense of unease. There frequently is an unstated belief that if there is a problem, there must be a tidy solution. I wonder how much of that unease is prompted by a desire to believe that our society is more or less just, or could be with only a few changes.

Id. at 120.

The acknowledgement of complexity is admirable, but the unavailability of simple solutions hardly alleviates the need for the clear and comprehensive articulation of more complex and nuanced positions. This reader would have felt less uneasy if Shiffrin had tackled the complexities in detail rather than waving his hand at discussions "by many others elsewhere."

13 JOHN STUART MILL, *On Liberty, in* ON LIBERTY AND OTHER ESSAYS (John Gray ed., 1991).

I
MEANING, DISSENT, INJUSTICE

Dissent, Injustice, and the Meanings of America continues a project that has been a central focus of Shiffrin's scholarly career. As in his prior book, *The First Amendment, Democracy, and Romance*,[14] Shiffrin's aim in *Dissent* is to explain the special relationship between the First Amendment right to free speech and the social role of dissent in a democratic society.

Dissent is a dense book that addresses many topics, with intricate and nuanced examinations of Supreme Court opinions on a variety of topics. This summary cannot hope to replicate Shiffrin's fine work. My aim is rather to give a sense of the broad themes, with an occasional focus on particular arguments by way of illustration. My explication of *Dissent*'s argument begins with some preliminary points concerning the definition and value of dissent and then proceeds to survey Shiffrin's treatment of several problems in First Amendment doctrine.

A. The Meaning and Value of Dissent

Dissent is the key concept in *Dissent, Injustice, and the Meanings of America*. It is therefore surprising that Shiffrin gives only scant attention to its meaning. He defines dissent as "speech that criticizes existing customs, habits, traditions, institutions, or authorities."[15] In his discussion of racist speech, Shiffrin characterizes dissent as a "popularly disdained view[ ],"[16] and in his discussion of commercial speech, he suggests that tobacco advertising is not dissent, because it "is no part of a social practice that challenges unjust hierarchies with the prospect of promoting progressive change."[17] These definitions may not be consistent, a theme that I will take up later in this Review.[18]

In order to better understand this theory, we need to remind ourselves of the foundation that Shiffrin lays in his important work on free speech theory that preceded *Dissent*. Why is dissent valuable? *The First Amendment, Democracy, and Romance*, identifies a set of interlocking values that the promotion and protection of dissent serve. Dissent fosters community or "engaged association" rather than atomistic individualism, because "[d]issenters seek converts and colleagues."[19] Indeed, dissenters are critics of the excesses of individualistic material-

14 STEVEN H. SHIFFRIN, THE FIRST AMENDMENT, DEMOCRACY, AND ROMANCE (1990).
15 SHIFFRIN, *supra* note 5, at xi.
16 *Id.* at 77.
17 *Id.* at 42.
18 *See infra* Part II.A.
19 SHIFFRIN, *supra* note 14, at 91.

ism that permeates American culture.[20] Moreover, dissent fosters the emergence of truth.[21] Shiffrin makes this claim despite his acknowledgement that "[d]issenters are often wrong."[22] Central to his argument is the notion that truth does not necessarily prevail in the marketplace of ideas, and therefore that active promotion of dissent may be necessary to create "a robust, burgeoning marketplace."[23] But the greatest value of dissent is "that the sponsoring and protection of dissent generally have progressive implications" for social change because "[d]issent communicates the fears, hopes, and aspirations of the less powerful to those in power."[24]

B. Identity, Culture, and the Freedom of Speech

Part I of *Dissent*, entitled "The Meanings of America," argues that the meaning of First Amendment freedom of speech is intertwined with cultural struggles and identity politics: "[T]he First Amendment itself is at the heart of America's cultural struggle."[25] The role that the constitutional right to free speech plays in struggles over American culture is illustrated by debates over government funding for so-called blasphemous art and by the flag burning cases. Shiffrin points to Justice Brennan's opinion in *Texas v. Johnson*,[26] the leading flag burning case, for its expression of "the 'bedrock principle . . . that the Government may not prohibit the expression of an idea simply because society finds the idea offensive or disagreeable.'"[27] Shiffrin zeros in on the key notion of Brennan's principle: Freedom of speech protects ideas,[28] a doctrinal legacy of Justice Holmes's marketplace-of-ideas theory.[29] But, Shiffrin argues, the marketplace is flawed: "What emerges in the market might better be viewed as a testimonial to power than as a reflection of truth."[30] The real point of the flag burning case is symbolic: "[T]he American community is committed to the notion that dissent should be protected, and the First Amendment is the legal manifestation of that cultural commitment."[31]

Shiffrin continues his investigation of the meanings of America by examining the Supreme Court's commercial speech jurispru-

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20 *See id.* at 93.
21 *See id.* at 96.
22 *Id.* at 95.
23 *Id.*
24 *Id.* at 96.
25 SHIFFRIN, *supra* note 5, at 3.
26 491 U.S. 397 (1989).
27 SHIFFRIN, *supra* note 5, at 5 (quoting *Johnson*, 491 U.S. at 414).
28 *Id.* at 6.
29 *See* Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).
30 SHIFFRIN, *supra* note 5, at 6.
31 *Id.* at 18.

dence[32] and in particular its decision in *44 Liquormart, Inc. v. Rhode Island*,[33] which struck down Rhode Island's prohibition of liquor price advertising.[34] Shiffrin argues against such protection, stating that "[c]ommercial advertisers are not dissenters."[35] Or are they? Shiffrin recognizes the complication that "tobacco advertising has some elements of dissent," because the products advertised are "socially stigmatized."[36] However, he contends that because "tobacco advertising misses vital elements ordinarily associated with our valuing of dissent,"[37] it "is no part of a social practice that challenges unjust hierarchies with the prospect of promoting progressive change."[38]

But why does tobacco advertising not promote progressive social change? One might argue that prohibitions on tobacco advertising are unjust restrictions on individual freedom, because they violate John Stuart Mill's famous liberty principle: "That the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant."[39] Of course, Mill's theory is controversial,[40] and he may well be wrong. In fact, the prevailing opinion surely is that he is wrong, although there are dissenters.[41] But trying to settle such controversies as a matter of First Amendment theory seems strange. It seems odd to claim that the question of whether tobacco advertising should receive First Amendment protection hinges on whether a libertarian approach to harmful substances represents progressive social change.[42]

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32 *See id.* at 32-48.

33 517 U.S. 484 (1996).

34 *See id.* at 489.

35 SHIFFRIN, *supra* note 5, at 41.

36 *Id.*

37 *Id.*

38 *Id.* at 42.

39 MILL, *supra* note 13, at 14. I am setting aside questions regarding second-hand smoke. One Millian approach would be to directly regulate second-hand smoke, for example, by prohibiting smoking in public places, in the workplace, and even at home in the presence of children.

40 Questions about the proper limits of government authority are among the most controversial in political philosophy, and Mill's views in particular have been hotly contested, beginning with his contemporary critics and extending through today. *See* Benjamin R. Barber, *The Market as Censor: Freedom of Expression in a World of Consumer Totalism*, 29 ARIZ. ST. L.J. 501, 503 (1997) (discussing a debate between Mill and James FitzJames Stephen as it has been reflected in a more contemporary debate between H.L.A. Hart and Lord Devlin); Stephen Gardbaum, *Liberalism, Autonomy, and Moral Conflict*, 48 STAN. L. REV. 385, 393 (1996) (discussing Mill's and Kant's "ideals of autonomy and individualism" as "paradigmatic examples of controversial comprehensive conceptions of the good").

41 *See, e.g.*, RANDY E. BARNETT, THE STRUCTURE OF LIBERTY 326 (1998) (advocating a contemporary libertarian theory of the proper role of government).

42 I will take up this oddity again in Part II of this Review.

Shiffrin concludes his investigation of the meanings of America with an illuminating discussion of racist speech and the Supreme Court's decision in *R.A.V. v. City of St. Paul*.[43] By taking up this topic, Shiffrin fills a noted gap in his prior work on dissent and the freedom of speech.[44] He contends that "the argument that First Amendment values . . . dictate that racist speech cannot be regulated is ultimately indefensible."[45] Shiffrin argues that Justice Scalia's opinion in *R.A.V.* is ultimately motivated by "a particular vision of America—as a nation that spurns paternalism and tolerates different points of view, however hateful."[46] Scalia's proposed alternative to the St. Paul ordinance that targeted only fighting words based on race, creed, color, or gender was a content-neutral fighting-words ordinance, which lacks "symbolic power."[47]

Shiffrin proposes that we tell a different story about the St. Paul ordinance—one that focuses on dissent. A dissent-based approach to hate speech, however, is complicated. Shiffrin recognizes the difficulties:

> Because both aggressors and victims [of racist speech] can be characterized, with some accuracy, as dissenters, the dissent story underscores the difficulty of the First Amendment status of racist speech. On the one hand, the dissent perspective seeks to protect those with popularly disdained views and, in an important respect, this includes those who publicly express racist views. On the other hand, the dissent perspective seeks to assure that those who are out of power or lower in a hierarchy have the means to protest their status and to combat the inevitable abuses of power by higher-ups. A regime that is blind to the importance of assuring that disadvantaged groups are not intimidated will contain, as its status quo, substantial corruption and abuse.[48]

Shiffrin then suggests that this conflict should be resolved against First Amendment protection for racist speech.[49] Because racist speech denies the equality of all persons, it "makes a negative 'contribution' to public political dialogue."[50] Although racist speech alerts us to the existence of racism in society, "the best test of truth is the system's

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43 505 U.S. 377 (1992); *see* SHIFFRIN, *supra* note 5, at 49.

44 *See* Nicholas Wolfson, *Free Speech Theory and Hateful Words*, 60 U. CIN. L. REV. 1, 11 n.49 (1991) (noting that Shiffrin avoided the topic of hate speech in *The First Amendment, Democracy, and Romance*).

45 SHIFFRIN, *supra* note 5, at 50.

46 *Id.* at 64.

47 *Id.* at 65.

48 *Id.* at 77.

49 *See id.*

50 *Id.* at 78.

foundational premise of equality, not whether racist speech can emerge triumphant in the marketplace of ideas."[51]

C. Injustice and the Role of Dissent

The second part of *Dissent* focuses on the role of dissent in combating injustice. Shiffrin opens with the following claim: "Free speech theory should be taken beyond protecting or tolerating dissent: the First Amendment should be taken to reflect a constitutional commitment to *promoting* dissent."[52] Why? The answer is that "dissent is necessary to combat injustice."[53] Injustice is the ordinary condition of human societies, because those with power tend to protect their privileges.[54] Shiffrin explains that "[d]issent attacks existing customs, habits, traditions, institutions, and authorities," and "[i]t spies injustice and brings it to light."[55]

Shiffrin's abstract statement of these claims leaves many important questions outside the scope of his inquiry. What conception of justice is being assumed? How is that conception justified? What social theory leads to the conclusion that dissent can be efficacious in combating injustice? A fuller telling of Shiffrin's First Amendment story would encompass these questions, but *Dissent* elides them.

1. *Dissent and Political Liberalism*

Shiffrin does make one significant foray into philosophical theories of justice in support of his position. He argnes that fostering dissent is consistent with the deep principles of John Rawls's *Political Liberalism*,[56] despite some evidence to the contrary in Rawls's own statement of his theory.[57] This argument is worth examining in depth, because it reveals something of the deep structure of Shiffrin's own views.

In *Political Liberalism*, Rawls addresses the question of stability in a just society.[58] This question arises because a just society, with liberty of conscience and with freedom of speech and association, will be characterized by reasonable pluralism.[59] In other words, a just society will include citizens who affirm a variety of comprehensive moral and philosophical doctrines. For example, some citizens might affirm a variety of religious perspectives, philosophical doctrines such as utili-

51 *Id.*
52 *Id.* at 91.
53 *Id.*
54 *See id.*
55 *Id.* at 93.
56 JOHN RAWLS, POLITICAL LIBERALISM (1996).
57 *See* SHIFFRIN, *supra* note 5, at 93-95.
58 *See* RAWLS, *supra* note 56, at xviii-xix.
59 *See id.* at xvii.

tarianism or Kantianism, and other viewpoints. How can such a pluralist society be stable? Would the various groups not contend with one another, each group seeking to impose its own comprehensive views on the others? Rawls's answer is the notion of an "overlapping consensus," whereby stability is achieved when each group affirms the basic principles of justice from its own comprehensive point of view.[60] Catholics might affirm principles of justice from within a natural law tradition, while Kantians might affirm the same principles on the basis of their contribution to individual autonomy.

With this background in mind, consider Shiffrin's argument. Shiffrin claims that if Rawls were to address the question,[61] he would endorse a constitutional theory that encourages dissent but "might confine such encouragement to a narrow conception of political injustice."[62] Some explanation is in order here. Rawls's theory of justice is "narrow," to use Shiffrin's term, in the sense that Rawls confines it to the topic of justice and the realm of the political. Rawls does not address deep questions about the ultimate nature of the good, the truth of religion, and so forth. If Rawls's theory were to take a stand on such issues, it would go beyond "public reason"[63] and hence violate "the liberal principle of legitimacy,"[64] which states that "our exercise of political power is proper and hence justifiable only when it is exercised in accordance with a constitution the essentials of which all citizens may reasonably be expected to endorse in the light of principles and ideals acceptable to them as reasonable and rational."[65]

A theory of justice that rested on a comprehensive doctrine would be regarded as illegitimate by those whose deepest beliefs were incompatible with that doctrine. For example, we could not expect a religious citizen to endorse basic principles of justice on the basis of a comprehensive secular doctrine that denies the existence of God. A similar principle operates with respect to the use of state power to inculcate particular belief systems. A Rawlsian state could not use the public schools to favor any particular comprehensive doctrine, whether it be religious or secular. The public schools could, however, be used to reinforce the public values of equality, tolerance, and so forth. Shiffrin disagrees with Rawls at this point:

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60 *See id.* at 133-72.

61 Shiffrin notes that Rawls does not address this question because, as Rawls explains, it belongs to "'political sociology'" and not political philosophy. SHIFFRIN, *supra* note 5, at 94 (quoting JOHN RAWLS, A THEORY OF JUSTICE 226-27 (1971)); *see* RAWLS, *supra* note 56, at 327.

62 SHIFFRIN, *supra* note 5, at 94.

63 RAWLS, *supra* note 56, at 213-16.

64 *Id.* at 217.

65 *Id.*

> Rawls would not permit the state to use its educational process or other means to promote citizens who prize autonomous decision making. On Rawls's understanding, this would constitute endorsement of a comprehensive conception of the good, which a just and stable state is not permitted to do. If one believes, however, that injustice is a permanent feature of even democratic societies, encouraging autonomous decision makers is a prescription for justice and its maintenance, not an endorsement of a comprehensive conception of the good.[66]

Quite a lot is packed into this brief passage, and careful explication is required if we are to get at the heart of Shiffrin's disagreement with Rawls.

Initially, we must discuss a minor difference between the basic goals of Shiffrin and Rawls. Rawls's enterprise is an exercise in developing an "ideal theory"—principles of justice to regulate a society which would comply with them.[67] Shiffrin's work clearly addresses problems of nonideal theory: the problems of justice that arise in a society that is not in compliance with the requirements of justice. To some extent, the disagreement between Shiffrin and Rawls may stem from this difference in aim.

This minor point about ideal theory, however, does not capture the most significant disagreement between Rawls and Shiffrin. Shiffrin wants the state to promote dissent as a way of life. For example, he wants the educational system to encourage the formation of citizens who prize autonomy as a fundamental value.[68] Rawls also endorses autonomy as a value, but the autonomy that plays a role in Rawlsian theory is political autonomy and not ethical autonomy. Rawls explains:

> Here I stress that full autonomy is achieved by citizens: it is a political and not an ethical value. By that I mean that it is realized in public life by affirming the political principles of justice and enjoying the protections of the basic rights and liberties; it is also realized by participating in society's public affairs and sharing in its collective self-determination over time. This full autonomy of political life must be distinguished from the ethical values of autonomy and individuality, which may apply to the whole of life, both social and individual, as expressed by the comprehensive liberalisms of Kant and Mill. Justice as fairness emphasizes this contrast: it affirms political autonomy for all but leaves the weight of ethical autonomy to be decided by citizens severally in light of their comprehensive doctrines.[69]

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66 SHIFFRIN, *supra* note 5, at 94-95 (footnotes omitted).

67 RAWLS, *supra* note 56, at 285.

68 *See* SHIFFRIN, *supra* note 5, at 112-15.

69 RAWLS, *supra* note 56, at 77-78.

What then is the nature of the disagreement between Shiffrin and Rawls? Pinning Shiffrin down on this score is not easy.

Perhaps Shiffrin means to endorse comprehensive liberalism as a matter of ethical theory. Under this interpretation, Shiffrin would be stressing the role of dissent in promoting individual self-development and ethical community. If so, then his view of justice is fundamentally at odds with Rawls's view. Perhaps Shiffrin takes political justice as his goal but disagrees with Rawls about the means for achieving it. Shiffrin may believe that a just society can exist only if the state promotes comprehensive liberalism. Why might Shiffrin believe this? One possibility is that, in Shiffrin's view, only ethically autonomous individuals are capable of making the arguments and taking the actions that will promote social justice. If this interpretation is correct, then a major gap exists in Shiffrin's argument, because he does not provide any backing for this ambitious claim.

2. *Education and Dissent*

One of the most interesting and attractive features of *Dissent* is closely related to Shiffrin's encounter with Rawls. Shiffrin argues that "[a]ny society committed to encouraging dissent must begin its encouragement in its system of education."[70] Current educational practice, Shiffrin claims, encourages conformity and not dissent.[71] The pledge of allegiance to the flag and textbook definitions of good citizenship are evidence that schools "give lip service to" autonomy and dissent, but do not give them real emphasis.[72] Shiffrin suggests that schools should require courses in argument and debate and should incorporate skills in critical assessment of the media.[73] Students should be taught to identify and challenge injustice in their own communities.[74] Besides education, Shiffrin targets the practice of journalism and access to the media.[75]

We should surely applaud Shiffrin's move beyond legal doctrine to the institutions that shape public culture. If anything, Shiffrin should have devoted even more attention to these topics. As a practical matter, how can we accomplish institutional reform given Shiffrin's views about the entrenched hierarchy of those in power? At first blush, to hope that the public schools will train students to attack injustice in their local communities seems utopian. Whereas judges, and hence free speech doctrine, are at least to some degree insulated

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70 SHIFFRIN, *supra* note 5, at 113.
71 *See id.*
72 *Id.* at 112-13.
73 *See id.* at 114.
74 *See id.*
75 *See id.* at 115-17.

from political pressure, the same cannot be said of local school boards. If encouraging dissent requires the cooperation of political institutions, then we need to know more about the politics of dissent. How can dissent, which challenges existing institutions, become welcome and even promoted by them? Shiffrin seems to avoid questions about the political practicality of his positions, but we cannot ignore such a practical agenda if we are engaged in nonideal theory—the enterprise of discerning the requirements of justice under real world conditions in which institutions and individuals frequently act contrary to the requirements of justice.

3. *Political Reality*

Shiffrin does take up questions about political realism in the final chapter of *Dissent.*[76] He engages Frederick Schauer's argument that "the commitment to free speech . . . tilts against those out of power."[77] Schauer's argument, which Shiffrin dubs the "market capture thesis," contains three assumptions: (1) "the market is controlled by [forces inimical to progressive change], (2) the free speech principle is a laissez-faire principle, and (3) the free speech principle is harmful to [progressive social change]."[78] The upshot of Schauer's argument is that liberal support for freedom of speech is actually counterproductive. The limits that free speech jurisprudence imposes on campaign finance reform provide at least some support for Schauer's position.

Shiffrin disagrees with Schauer about the details. For example, Shiffrin argues that political support for free speech is stronger today than ever and that free speech doctrine, as exemplified by the flag burning cases, supports dissent more.[79] But the central focus of Shiffrin's critique is the notion that the free speech principle is a laissez-faire principle.[80] Here Shiffrin reiterates his opposition to the marketplace-of-ideas metaphor;[81] because the market fails, the free speech principle should emphasize the promotion of dissent.[82] Shiffrin concedes that a conservative Supreme Court may interpret the First Amendment in ways that do not favor the left, but insists that freedom of speech "is an important cultural and political force of its own wholly apart from the Court."[83] For example, free speech values

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76 *See id.* at 121-30.

77 *Id.* at 122; *see* Frederick Schauer, *The Political Incidence of the Free Speech Principle*, 64 U. COLO. L. REV. 935 (1993).

78 SHIFFRIN, *supra* note 5, at 122. I have reworded Shiffrin's summary of Schauer by substituting "inimical to progressive social change" for "conservative."

79 *See id.* at 125-26.

80 *See id.* at 127.

81 *See id.* at 127-30.

82 *See id.* at 128.

83 *Id.* at 129.

can foster grass-roots movements, such as the Free Speech Movement at Berkeley.[84]

Surely, Shiffrin's position must contain some truth. Freedom of speech plays a role in American political life that goes far beyond the current state of First Amendment doctrine. It is an ideal that has the power to move citizens and politicians, even when no threat of judicial coercion is on the horizon.

Granting this point to Shiffrin, we might still wonder about the real political efficacy of Shiffrin's dissent-based view of freedom of speech. Social consensus about the value of the right to free speech is likely to be strongest if and when the right is understood abstractly and generally. But when freedom of speech begins to impinge on important interests and to protect unpopular views, the political efficacy of the free speech principle is, at the very least, in doubt. The power of the free speech principle to inspire grass-roots movements hardly guarantees that such movements will succeed. Indeed, to the extent that the dissent-based theory of free speech emphasizes protection for despised and unpopular views, that theory might undermine, rather than strengthen, the practical political effectiveness of free speech rhetoric in enabling progressive political change. Of course, my armchair speculation on this topic is really no more convincing than Shiffrin's. My point is simply that such armchair speculation may not be sufficient to make a convincing case one way or the other.

II
THE VALUE OF DISSENT

What is the value of dissent? One of *Dissent*'s central contributions to free speech theory is to lay this question squarely on the table. In the course of developing his answer to this question, Shiffrin substantially contributes to our understanding of the role of dissent in the emergence of truth. His penetrating criticisms of the marketplace-of-ideas theory should forever change the way that theory is understood.

A. What Is Dissent?

At this point, I will take up the question that I put aside above. What is dissent? Shiffrin offers a number of different, perhaps conflicting, formulations.[85] Initially, he defines dissent as "speech that criticizes existing customs, habits, traditions, institutions, or authorities."[86] Another definition focuses on the popular attitudes towards

84 *See id.* at 126.

85 *See supra* Part I.A.

86 SHIFFRIN, *supra* note 5, at xi.

the view contained in the speech: "[T]he dissent perspective seeks to protect those with popularly disdained views . . . ."[87] Finally, Shiffrin defines dissent as "a social practice that challenges unjust hierarchies with the prospect of promoting progressive change."[88] Thus, we have dissent as criticism of the status quo, dissent as the expression of unpopular views, and dissent as the promotion of progressive social change.

These three definitions of dissent are not consistent and are potentially in conflict with one another. For example, speech that criticizes existing institutions might be popularly acclaimed, or speech that is popularly disdained might support rather than challenge unjust hierarchies. Of course, the various elements of the definition of dissent might be brought together in a variety of ways. In order to assess and understand Shiffrin's argument, we need to investigate his notion of dissent.

Shiffrin might resist this inquiry. Although he has recognized that his readers may ask, "[W]hat precisely is dissent?,"[89] he resists the question. Such a difficult question is "placed at too high a level of abstraction"[90] and mistakenly assumes that dissent "ha[s] an essence."[91] To the extent he is forced to deal with the question, his approach would be to ask "whether the values associated with dissent are present"[92] with respect to the speech at issue. This approach, of course, is familiar to students of American law. The realist critique of formalism is associated with the move from formal, conceptual analysis to consideration of underlying values or interests. But if this move were taken to its logical conclusion, it would dissolve Shiffrin's focus on dissent. Instead, we would focus on the role of a right to freedom of speech in promoting community, truth, and progressive social change—the values that Shiffrin identifies as the benefits of dissent.

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87 *Id.* at 77.

88 *Id.* at 42.

89 SHIFFRIN, *supra* note 14, at 100.

90 *Id.*

91 *Id.* at 107. To discern what Shiffrin means here is difficult, because the term "essence" has a variety of quite distinct senses. Thus, we might say that water has an essence: that water has a certain microstructure—H_2O—is a necessary property. Or we might say that larks have certain essential properties, because all normally functioning larks fly and have certain distinctive colorings. We might also say that the Dalai Lama has an essence, because his soul possesses an ineffable mystical quality. Shiffrin's cavalier assumption that dissent cannot have an essence seems to play off the third, quasi-mystical, sense of essence. Shiffrin surely is not arguing that dissent cannot have an essence in the sense that for speech to count as dissent it must have some set of properties. Shiffrin might hold the view that all terms in natural languages lack essences in the sense of either definite criteria for their application or a focal meaning from which secondary meanings deviate. But to see how a respectable philosophy of language could incorporate such a view is difficult.

92 *Id.*

If Shiffrin's book is to make its case, then dissent must be a meaningful concept, one that stands apart from the values it serves.[93]

We might begin with Shiffrin's initial definition of dissent as "speech that criticizes existing customs, habits, traditions, institutions, or authorities."[94] We can stipulate that the term "social practice" includes "existing customs, habits, traditions, institutions, or authorities," the elements that Shiffrin includes in his definition.[95] An additional step might be to stipulate that speech counts as criticism of a social practice if it is a claim that a social practice (1) should be changed, (2) because it (a) violates requirements of justice, (b) creates bad consequences, or (c) is an inefficacious means of achieving a desirable social goal. This stipulation is intended to encompass social criticism regardless of the underlying normative framework within which the criticism occurs. Thus, a given social practice might be criticized because it violates the moral rights of persons (a deontological criticism), because it produces bad consequences, because it does not efficiently achieve a socially desirable goal (a consequentialist criticism), or because it has a degrading effect on the character of citizens (a virtue-centered criticism). Let us call criticism of social practices "social criticism." This classification allows us to summarize Shiffrin's initial definition of dissent: Dissent is speech that engages in social criticism.

How does dissent as social criticism relate to dissent as an unpopular view? One can see that sometimes a connection exists between

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93 Judge Richard Posner's opinion in *Herrmann v. Cencom Cable Assocs., Inc.*, 999 F.2d 223 (7th Cir. 1993), expresses this point well. *Cencom* addresses the scope of a claim for the purposes of the doctrine of res judicata. Posner's argument stands as a powerful indictment of any attempt to avoid the definition of a legal category by resorting to direct reference to the values that the category serves:

> We're all for pragmatism, but pragmatism is not an operational legal standard. Litigants and their lawyers are entitled to clearer guidance in an area where a false step can result in the forfeiture of valuable legal rights than generalities about practicality, convenience, similarities, and expectations can furnish. It is not wrong to emphasize these as factors bearing on the objectives of res judicata. Knowledge of objectives is helpful, often vital, in interpreting and applying rules. But objectives must not be confused with criteria. Where certainty is at a premium, sound lawmaking requires the setting forth of clear and definite criteria rather than a general directive to decide each case in the manner that will maximize the attainment of the law's objectives. The latter approach, carried to the extreme, would reduce all law to an admonition to do what's right.

Id. at 226. Posner's point applies with particular force in the context of freedom of speech. As in the case of claim preclusion, certainty is a premium in First Amendment freedom-of-speech interpretation. A lack of certainty regarding the protection of speech may well result in a chilling effect, and valuable speech may never be heard when the speaker cannot be assured a valid First Amendment defense. If the concept of dissent is to guide First Amendment doctrine, the law should establish definite criteria for what will count as dissent.

94 SHIFFRIN, *supra* note 5, at xi.

95 *Id.*

the two. Frequently, popular public opinion supports existing social practices; as a corollary, social criticism is frequently unpopular. This connection, however, is not necessary. Some existing social institutions may be unpopular, and hence criticism of them may be in accord with popular opinion. The income tax may be unpopular, and criticism of it may be popular indeed. At any given point in time, social practices may lag behind popular opinion, or elite decision makers may ignore popular opinion. Let us assume for a moment then that Shiffrin would limit the category of dissent to unpopular social criticism.

The connection between unpopular social criticism and progressive change is also tenuous. Unpopular social criticism comes from both the left and the right. Feminists and chauvinists, white racists and people of color, the rich and the poor, all engage in social criticism. Shiffrin does not, as far as I can tell, offer an account of "progress," although the gist of his position is not difficult to discern: progressive change is change in the direction of justice. Shiffrin's vision of social justice is concerned with the elimination of unjust discrimination and the equitable distribution of economic resources and social power. Some unpopular social criticism is progressive in Shiffrin's sense, and some is anti-progressive. Shiffrin offers no good reason to believe that unpopular social criticism is even more likely to be progressive than other categories of speech. Let us assume, then, that Shiffrin's concept of dissent is limited to unpopular progressive social criticism.

Is this category attractive for the basis of a First Amendment theory? Of course, what counts as progressive will be controversial. If judges who apply the First Amendment to concrete cases apply their own standards of justice to determine whether social criticism is progressive, then the Constitution will only protect unpopular speech with which judges agree. Moreover, as judges tend to be drawn from an elite and conservative segment of society, their conceptualization of free speech doctrine is unlikely to serve an agenda that Shiffrin would count as progressive. If Shiffrin were to insist that free speech doctrine favor speech that Shiffrin himself considers progressive, it is unlikely that this theory would find many adherents outside of the group that concurs with Shiffrin about matters of justice. Others will be tempted to see Shiffrin's theory of the freedom of speech as unprincipled;[96] the speech that should receive special protection is simply speech with which Shiffrin agrees.

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96 *See, e.g.*, Martin H. Redish & Howard M. Wasserman, *What's Good for General Motors: Corporate Speech and the Theory of Free Expression*, 66 GEO. WASH. L. REV. 235, 294 (1998) ("The fact that . . . Professor Shiffrin would deny protection to corporate speech while simultaneously claiming to protect unpopular voices indicates that [his] approach protects

If Shiffrin's definitions of dissent do not offer a workable theory of freedom of speech, we might do well to consider his own suggestion to look to the values served by dissent rather than the concept of dissent. Perhaps by attending to those values, we will be able to reconstruct a coherent and attractive dissent-based theory of the freedom of speech.

B. Dissent and the Marketplace of Ideas

Why is dissent valuable? One tempting answer points to the important role that dissent has played in overcoming injustice, ranging from the abolitionists to the civil rights movement, from the suffragettes to women's liberation, and from the labor movement to the anti-war movement. But Shiffrin wants to avoid this temptation, because it would transform a dissent-based theory of the freedom of expression into a conventional marketplace-of-ideas theory. As Mark Tushnet noted in his review of Shiffrin's *The First Amendment, Democracy and Romance*, Shiffrin's attempt to link the value of dissent to its potential for progressive change is difficult to maintain without collapsing into a marketplace theory:

> The difficulty is that Shiffrin needs to show that the general culture places significant value on dissent per se, but most of the examples of dissenters that come to mind—Martin Luther King, Jr., those who protested the war in Vietnam—are people whose dissent turned out to be right. These examples do not establish that the general culture values dissent per se; rather, they demonstrate the much more modest proposition that the culture values those expressions of dissent that, in the fullness of time, we now regard to have been correct. One can of course make this proposition somewhat stronger by noting that, when the dissent occurs, no one can be sure whether or not time will ultimately reveal its correctness, and, therefore, we ought to respect dissent today despite the fact that we disagree with its assertions. So transformed, the proposition appears to be a rather standard Millian or marketplace defense of free expression as a social process designed to achieve the best results in conditions of pervasive social uncertainty.[97]

Shiffrin emphatically rejects the notion that his theory is simply a standard version of the marketplace of ideas. Quite to the contrary, he believes that a dissent-based theory challenges the basic assumptions of the marketplace model.[98] Is Shiffrin correct? The answer to this question seems to depend on what one means by the marketplace

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not all unpopular views but only the unpopular views with which . . . Professor Shiffrin happen[s] to agree.").

97 Mark Tushnet, *The Culture(s) of Free Expression*, 76 CORNELL L. REV. 1106, 1111-12 (1991) (book review) (citation omitted).

98 *See supra* notes 28-31 and accompanying text.

of ideas. If the marketplace-of-ideas theory implies that the current dominant opinion must be true because people have accepted it in the market, then Shiffrin's view is clearly not a marketplace theory. However, if the marketplace-of-ideas theory has room for the notion that current dominant opinion is false, either because of a market failure or because a new idea has not yet been accepted in the market, then Shiffrin's view might be seen as consistent with a marketplace theory.

Of course, the marketplace of ideas is only a metaphor. Ideas are not literally bought and sold; no price mechanism exists. Ideas are "bought" in the sense that people believe or accept them. Ideas are "sold" in the sense that people advocate or offer them for consideration. The notion that truth is promoted by allowing ideas to contend with one another based on the assumption that free and fair competition among ideas will yield the truth is not inconsistent with the notion that, under current social conditions, we do not have a free and fair market. Indeed, the marketplace theory itself would predict that, under conditions of market failure, the truth would not win out. The fundamental premise that ideas should not be suppressed solely because we believe they are false does not preclude legislation or free speech doctrine from seeking to create conditions under which competition among ideas flourishes. We take the marketplace metaphor too seriously if we assume that a free and fair marketplace of ideas must somehow duplicate the perfect market of neoclassical economics.

This argument, however, does not imply that Shiffrin is a marketplace theorist. The marketplace-of-ideas theory places value on free speech because true ideas prevail under conditions of free and fair discourse. Should we value dissent for reasons other than the possibility that dissent expresses true ideas that will facilitate progressive social change? I will suggest that John Stuart Mill's defense of the freedom of expression offers support for an affirmative answer to this question.

C. Mill and the Value of False Dissent

John Stuart Mill's defense of the freedom of expression has surely been the most influential statement on the subject in modern political thought. Quoting Mill's own summary of the argument in full is useful:

> But the peculiar evil of silencing the expression of an opinion is, that it is robbing the human race; posterity as well as the existing generation; those who dissent from the opinion, still more than those who hold it. If the opinion is right, they are deprived of the opportunity of exchanging error for truth: if wrong, they lose, what

> is almost as great a benefit, the clearer perception and livelier impression of truth, produced by its collision with error.[99]

Justice Brennan quoted a part of this passage in his majority opinion in *New York Times Co. v. Sullivan*,[100] and legal scholars frequently cite it as well.[101] At this point, I want to emphasize that Mill offered two distinct arguments for the freedom of expression. The first argument is a conventional statement of the marketplace-of-ideas theory: If a censored opinion is true, then censorship prevents the emergence of the truth.[102] The second argument is quite different. Mill argues that even if the censored opinion is "wrong," those who disagree with it are deprived of a benefit almost as great as the truth: "the clearer perception and livelier impression of truth, produced by its collision with error."[103]

Mill's second argument for the freedom of discussion is one of the most elegant in all of political philosophy:

> However unwillingly a person who has a strong opinion may admit the possibility that his opinion may be false, he ought to be moved by the consideration that however true it may be, if it is not fully, frequently, and fearlessly discussed, it will be held as a dead dogma, not a living truth.[104]

Why does Mill affirm this conclusion? First, in the absence of confrontation with falsehood, truths will be held as mere opinions without supporting reasons. Such beliefs become mere "prejudice," and "are apt to give way before the slightest semblance of an argument."[105] Mill recognizes the objection that the grounds for truth could be taught, without allowing for the expression of dissenting falsehoods. But this approach is not sufficient, Mill argnes, "when we turn . . . to morals, religion, politics, social relations, and the business of life."[106] With respect to these subjects, "three-fourths of the arguments for every disputed opinion consist in dispelling the appearances which favour some opinion different from it."[107] Mill's summary brilliantly expresses the key argument: "He who knows only his own side of the case, knows little of that."[108]

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99 MILL, *supra* note 13, at 21.

100 376 U.S. 254, 279 n.19 (1964). Later opinions represent a retreat from this Millian view. *See* Hustler Magazine, Inc. v. Falwell, 485 U.S. 46, 52 (1988) ("False statements of fact are particularly valueless . . . ."); Gertz v. Robert Welch, Inc., 418 U.S. 323, 340 (1974) ("[T]bere is no constitutional value in false statements of fact.").

101 *See, e.g.*, BOLLINGER, *supra* note 1, at 54-55.

102 *See* MILL, *supra* note 13, at 21.

103 *Id.*

104 *Id.* at 40.

105 *Id.* at 41.

106 *Id.* at 42.

107 *Id.*

108 *Id.*

Mill's argument offers Shiffrin a sound reply to the question that Mark Tushnet posed: Why should we value dissent that turns out to be erroneous? Because only in the day-to-day confrontation with error does truth become a living conviction with a firm grip on belief and a capacity to motivate action. Mill's two arguments form a complete case for the protection of dissent. When dissent is true or partially true, its suppression prevents the emergence of the truth. When dissent is false, even completely false, its suppression clouds the meaning of the truth and drains truth of its force. In either case, we have good reason to value dissent.

With this point in mind, we can turn back to the question, What is dissent? Recall that Shiffrin offered three different definitions of dissent: dissent as an unpopular view, dissent as social criticism, and dissent as advocacy of progressive social change. These definitions are not equivalent, and we must define the relationships among them if dissent is to be a meaningful concept. A simplistic reading of Shiffrin might suggest that all three elements must be present for speech to count as dissent, but this interpretation would be uncharitable as it would yield a particularly unattractive theory of the freedom of speech. A Millian account of the value of dissent suggests a formulation that avoids the difficulties of Shiffrin's exposition.

In ordinary language, dissent has several different meanings. Dissent may simply indicate disagreement. Whatever assertion you make, the grammar of English permits me to respond, "I dissent." Call this first form of dissent "dissent as disagreement." "Dissent" also is used to refer to a minority point of view; for example, we refer to a judge's minority opinion in a multimember panel as a dissent. Call this second form of dissent "dissent as minority viewpoint." Finally, "dissent" sometimes is used in a more restrictive sense to define views that a strong social consensus rejects. Those who held religious beliefs that were in disagreement with the established Church in England or early America were dissenters in this sense. Call this third form of dissent "dissent as criticism of established opinion."

Mill's theory of the freedom of expression allows us to see why each of these three forms of dissent is valuable. Mills theory also enables us to understand why dissent as criticism of established opinion should receive the most exacting protection from the courts and why dissent as minority viewpoint needs more robust protection than mere dissent as disagreement. In Mill's view, all disagreement has value, because disagreement sharpens our understanding. Any view with which we disagree could turn out to be the truth, whether a majority or minority holds that view. Although censorship threatens minority and majority views, minority viewpoints are more likely to be suppressed both by the government in a majoritarian democracy and by

informal social pressures, irrespective of the form of government. Finally, dissent as criticism of established opinion is even more in need of First Amendment protection. Such speech is likely to be especially valuable. If the speech is true, it needs protection in order to be able to challenge and overcome established views. If it is false, it needs protection so that the established truth can be more than mere dogma. The confrontation between established truth and dissenting falsehood is the means by which established truths are deeply comprehended and given firm foundations.

D. Pluralism, Liberty of Conscience, and Dissent

The confrontation between Shiffrin and Rawls points to one final piece in the puzzle about the value of dissent. Recall that Rawls's theory is premised on "the fact of pluralism"—the fact that a "plurality of conflicting, and indeed incommensurable, conceptions of the meaning, value and purpose of human life" exists.[109] This pluralism is a permanent feature of a society committed to freedom of thought and discussion. It results from what Rawls calls "the burdens of judgment."[110] Rawls argues that disagreement about such matters, as about the nature of the good or ultimate value, is reasonable given the difficulties of arriving at a consensus about them. These difficulties include the following: complex and conflicting evidence, disagreement about what is relevant and about how to weigh relevant considerations, the underdeterminacy introduced by hard cases, and the fact that different kinds of normative arguments may exist on both sides of a moral question.[111] The following factor is particularly important:

> To some extent (how great we cannot tell) the way we assess evidence and weigh moral and political values is shaped by our total experience, our whole course of life up to now; and our total experiences must always differ. Thus, in a modern society with its numerous offices and positions, its various divisions of labor, its many social groups and their ethnic variety, citizens' total experiences are disparate enough for their judgments to diverge, at least to some degree, on many if not most cases of any significant complexity.[112]

Given the burdens of reason, we should expect citizens to disagree about many moral and political questions. Thus, the pluralism that characterizes modern democratic societies is a reasonable pluralism.[113]

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109 John Rawls, *The Idea of an Overlapping Consensus*, 7 OXFORD J. LEGAL STUD. 1, 4 (1987); *see also* Lawrence B. Solum, *Faith and Justice*, 39 DEPAUL L. REV. 1083, 1087-89 (1990) (affirming Rawls's "fact of pluralism").

110 RAWLS, *supra* note 56, at 54.

111 *See id.* at 56-57.

112 *Id.*

113 But not all disagreement is reasonable.

What is the relevance of pluralism and the burdens of judgment to our question about the value of dissent? If we are committed to the liberty of conscience and the freedom of discussion, then dissent is inevitable with respect to the normative evaluation of social practice: "customs, habits, traditions, institutions, or authorities."[114] Citizens who disagree about fundamental matters, such as religion and the nature of the good, will evaluate social practices. Inevitably, some citizens will dissent on almost any question of public policy or social mores.[115] Given this fact, it follows that respect for the political autonomy of citizens requires the toleration of dissent. From the perspective of political liberalism, dissent is not the price to be paid for liberty of conscience and freedom of discussion. Rather, dissent is to be celebrated as one of the great benefits of such freedom. Dissent is the product of human reason operating under conditions of freedom. Moreover, as Mill teaches us, dissent on contestable matters of "morals, religion, politics, social relations, and the business of life"[116] is properly seen as a great benefit by those who disagree with the dissenters.

CONCLUSION: LESSONS FOR FREE SPEECH DOCTRINE

By way of conclusion, I shall examine the implications of Mill's defense of the freedom of discussion for Shiffrin's account of hate speech. Recall that Shiffrin ultimately rejects the notion that racist speech should be protected as dissent despite the fact that, under current social conditions, racist speech is frequently the speech of an unpopular minority and hence presents a dissenting point of view. Although racists have views that are popularly disdained, Shiffrin maintains that the law should not protect these views, because they do not promote progressive social change.[117]

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114 SHIFFRIN, *supra* note 5, at xi.

115 Rawls believes that reaching an overlapping consensus regarding principles of justice is possible. *See* RAWLS, *supra* note 56, at 134. Thus, in a Rawlsian well-ordered society, arguably no dissent on these matters would exist. Three points should be kept in mind with respect to this issue. First, the scope of topics on which reasonable citizens can agree is likely to be quite narrow, limited to what Rawls calls the "constitutional essentials." *Id.* at 137. Second, not every rational member of society will be "reasonable" in Rawls's sense. Some competent adults will reject the principles of justice. Rawls's theory requires that this group not be so large as to undermine the stability of a well-ordered society, but his theory does not require that no dissent exist on the constitutional essentials. Given Rawls's conception of the burdens of judgment, dissent on such matters seems inevitable, even in the case of a well-ordered society considered from the perspective of ideal theory. Third, First Amendment theory is a nonideal theory; that is, a theory of First Amendment freedom of speech necessarily takes our actual society as its object. In our society, no overlapping consensus on principles of justice exists, and given the conditions of our society and the burdens of judgment, dissent on matters of justice is likely to be widespread.

116 MILL, *supra* note 13, at 42.

117 *See* SHIFFRIN, *supra* note 5, at 78.

We are now in a position to examine Shiffrin's key arguments against the protection of racist dissent. Shiffrin argues that racist speech makes no significant contribution to truth: "[T]he best test of truth is the system's foundational premise of equality, not whether racist speech can emerge triumphant in the marketplace of ideas."[118] Assuming that Shiffrin's premise is true—that racist speech is certainly false[119]—does it follow that racist dissent has no value? Mill would surely argue that it does. Through confrontation with racist views, we come to have a lively and deep understanding of the meaning of equality. If society could suppress all public expression of racist views, the result would not be to strengthen our conviction in equality but rather to weaken it. Let us further assume that racist views are unreasonable and that no fully rational and reasonable person would affirm them given full information and an opportunity for due reflection. It does not follow that no value exists in allowing unreasonable citizens to express their unreasonable views. Liberty of conscience will inevitably produce some unreasonable beliefs, and respect for the autonomy of all citizens requires the freedom to express such beliefs.

None of this implies that hate speech may not be regulated or that *R.A.V. v. City of St. Paul*[120] was correctly decided. Even a partial exploration of these topics is outside the scope of this review, but it is clear that some racist speech is harassment, that some racist speech does direct injury, and that some racist speech constitutes coercion and intimidation. My point simply is that we should not ground our justifications for the regulation of hate speech on premises that would justify the prohibition of all racist ideas. We should not lose sight of Shiffrin's fundamental premise: the value of dissent is incalculably large.

Steven Shiffrin's *Dissent, Injustice, and the Meanings of America* is an important book. It makes important contributions to the development of First Amendment doctrine and further develops Shiffrin's dissent-based theory of the freedom of speech. Shiffrin's book surely will generate discussion, disagreement, and dissent, but even those who reject its conclusion will see the freedom of speech in new ways. *Dissent, Injustice, and the Meanings of America* is a must read for every serious student of the First Amendment.

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118 *Id.*

119 From the point of view of political liberalism, we might say that racist speech denies the fundamental equality of citizens and hence is inconsistent with the premise that all reasonable citizens can reach agreement through the use of public reason.

120 505 U.S. 377 (1992).

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