REPLY TO CRITICS

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I am grateful for the thoughtful and challenging responses of the group members and pleased to have the opportunity to elaborate upon the thinker-based approach in reply. I wish Ed Baker were still here to continue the conversation alongside. Unfortunately, my remarks will be tentative, speculative, and most regrettably, partial. The excellent issues and questions posed by the commentators deserve a longer and more detailed treatment than time and space allow.

Broadly speaking, the responses fall into four categories, raising methodological issues, questions about scope, worries about under-inclusivity, and worries about over-breadth. I will address them only roughly in turn, because, given overlap, a strict separation would prove too rigid.

METHODOLOGY AND SCOPE

Vince, Steve, Tim, Jim and Susan posed a number of pertinent questions about the methodology operating in the backdrop of my proposed approach, its scope, and the theoretical advantages I associate with it.

My general approach is to start with the First Amendment and to ask what arguments for freedom of speech would make the most justificatory sense of its inclusion and its deontological status in a legitimate constitution. My short answer is that a legitimate, operative democracy both presupposes its citizens are functional thinkers and moral agents and, further, must treat them as such to respect their human rights. To respect the status

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and significance of its citizens *qua* thinkers, the state cannot retain its legitimacy while undermining the conditions necessary for the development and exercise of each member's capacities for free thought. Instead, given the significance of these capacities to each individual and to our joint social project of to cooperate and self-legislate justly, it must make the protection of those conditions a foundational priority. A freedom of speech protection is essential to that mission.

This immediately raises the question of scope and limits. Jim asks, why, then, would there be a state action requirement in the First Amendment? That is, why wouldn't the thinker-based theory condemn *all* limitations on the freedom of thought, whether the source of the limitations was the state or a private entity? In a complementary way, Tim might be read as asking, why wouldn't such an approach suggest requirements of positive provision—to establish schools and libraries, e.g., rather than merely to refrain from abridgment? Generally, mightn't what falls under a freedom of thought approach exceed what is typically thought of as protected under a freedom of speech rubric?

It is, in my view, a strength of the theory that it helps to explain what state abridgments of free speech have in common with private and social abridgments.[1] It also seems like a strength that the theory can explain the continuity between the idea that a commitment to freedom of speech may require governmental abstinence from active obstructing disfavored speech and the related idea that this commitment may demand certain positive provisions by the government, including but not necessarily limited to protection against hecklers and other forms of attempted private censorship, as well as provisions to ensure fair access to public fora for expression.[2]

Let me start with Tim's question about the relationship between freedom of speech and freedom of thought. Tim's suspicion that there are aspects of freedom of thought that may

1. This is not a unique virtue of this theory (although it does not as clearly hold of government-centered theories). For example, Mill's truth based approach to freedom of speech supplies reasons to be as concerned about social censorship as about governmental censorship. *See* JOHN STUART MILL, ON LIBERTY 161–64 (Penguin Classics 1985) (1863).

2. Here, I agree with Tim wholeheartedly. *See* T.M. Scanlon, *Comment on Shiffrin's Thinker-based Approach to Freedom of Speech*, 27 CONST. COMMENT. 327, 332 (2011).

not be well-captured or well-protected fully by a 'freedom of speech' protection may be correct. Although, for the most part, I think the connection is fairly close. In any case, as I will later argue (not that I take Tim to disagree), it is not a theoretical defect if a freedom of thought protection ranges beyond a strictly construed free speech protection.

Three points may clarify my view of the connection between freedom of thought and freedom of speech: First (for most people in most circumstances over an extended period of time),[3] freedom of thought cannot be achieved on one's own, solely within the confines of one's mind, because (complex) thought itself requires, for its development and refinement, access to others' thoughts and opportunities for the externalization of thoughts to oneself and to others. Hence, there is a very intimate connection between freedom of thought and freedom of speech. If externalization of mental content or communicative access to others is obstructed or otherwise significantly constricted, then speech is not free and, in turn, thought is not fully free.

Second, some protections of freedom of thought are not directly forms of free speech protection, as those terms are commonly used, but because they either are so closely connected, or they implicate when speech may be restricted, they usefully fall under the label of a broadly understood 'free speech' theory. Two examples may illustrate my point: First, although direct efforts to manipulate others' thoughts without restricting or manipulating their speech might be thought to jeopardize freedom of thought but not freedom of speech (or at least not freedom of speech directly), that separation seems too hasty. Some forms of thought control may take the form of speech (e.g. hypnotic, bombarding, or deliberately false speech). The thinker-based view would explain why *that* form of speech would not fall under the free speech protection but, rather, why that speech could be restricted (whether that speech is of government or private origin).[4] Other forms of thought control

3. I happily concede, as some have pointed out, that after childhood, a few, e.g. monks, find an extended period of solitude clarifying (although most such people read and write, even if they do not regularly speak).

4. My seeming openness to regulating individual, non-commercial, non-libelous false speech offered to be taken as true may seem surprising given my strong free speech orientation. My view on this matter is tentative, but I believe I concur with Ed Baker's view that intentionally false speech as such has only a precarious connection to the roots of the free speech protection. *See* C. EDWIN BAKER, HUMAN LIBERTY AND FREEDOM OF SPEECH 11, 34, 289 n.39 (1989). Everyday, intentionally false, testimonial speech that

or thought interference might use no speech at all: e.g., electronic waves might be aimed at the brain to disrupt its function. Here, though, we might point out that this case implicates freedom of speech because the speech of the victim would no longer be the product of authentically generated thought (as would also be true of the prior case). Although our primary aim in response to these scenarios should be to protect the free *thoughts* of the potential victim, the connection to free speech is not far.

Second, as Tim points out, access to information may be a necessary condition of freedom of thought, but it may not seem like the most natural locution to call restrictions on information provision abridgments of free speech. My response here takes a fairly similar form. Some withholding of information falls within the legitimate purview of individual privacy (some aspects of which are themselves essential to the individual *qua* thinker as I discuss below); perhaps some withholding falls within the purview of legitimate governmental secrecy. To fill out when information should be made available would require supplementing the thinker-based theory with a larger theory of acceptable privacy and secrecy. That supplementation does fall within the rubric of a 'free speech' theory because it concerns what sorts of things the government (and others) must speak about and what sort of speech they may legally refuse to engage in; further, when information is illegitimately withheld, free thought and free speech based on that thought is impaired. So, although I will not offer a theory of how broad the Freedom of Information Act should be and which part of it, if any, should be constitutionally mandated, I do think that the theory of its scope is an aspect of free speech theory and that the issue of information provision at least implicates so-called "free speech" values.[5]

is offered to be taken as true by individuals that falls outside special categories (e.g. perjury, commercial speech, defamatory speech) might nevertheless gain full protection partly because its articulation is often part of an effort to sniff out the true and test one's convictions and partly because policing sincerity that thoroughly would generate subzero chill and many false positives. S*ee also* Jonathan D. Varat, *Deception and the First Amendment: A Central, Complex, and Somewhat Curious Relationship*, 53 UCLA L. REV. 1107, 1110 (2006) (discussing, among other things, "First Amendment limits on government power to control deceptive assertions in several different realms, and the much less appreciated First Amendment limits on government speech restrictions that carry out or impose deception by the government").

5. Every aspect of the topic of information provision may not fall into the zone of judicially enforceable constitutional mandate, however, for two main reasons (both of

Third, the adequate conditions for freedom of thought may include measures like adequate food and other economic resources. Anti-poverty measures are not standardly thought to fall under the category of 'freedom of speech.' I surely grant that intuitive, ordinary language point. Whether the free speech protection should be more broadly interpreted to exude a penumbra that includes such measures that render the free speech protection meaningful is a venerable issue that implicates larger issues in constitutional theory and economic justice, the resolution of which is not entailed by the thinker-based theory on its own.[6] I am content here merely to acknowledge that if one cares about the adequate conditions of freedom of thought, one would be lead to care about its material as well as its intellectual conditions, whether under a constitutional 'free speech' lens or under some other viewing device.

Some might take the thrust behind some of these questions to suggest that a thinker-based theory seems to require more than the First Amendment is generally taken to cover. Further, this is a flaw because the theory is not well-tailored to explain and interpret the First Amendment speech clause, in particular. I agree that a concern about the social and material conditions adequate for free thought entails a larger agenda than is covered by freedom of speech, at least the judicially enforceable branch of that topic as it has been standardly interpreted. Perhaps the standard interpretation is correct. I am not sure of that (or of its particular limits) but the thinker-based approach is not inconsistent with the view that the First Amendment tackles

which are themes that repeatedly come up below): some of the boundaries of permissible secrecy and privacy may reasonably be expected to evolve and morph over time. So, some aspects of information provision might be reasonably thought to be better handled by a constitutionally-guided and inspired legislature that (in theory) has a greater capacity for agility and flexibility to respond to changing circumstances; further, some issues of information provision go to the quality of thought and not the adequate conditions necessary for freedom of thought, so that some matters of information provision, e.g. funding for some research perhaps, may promote free speech values but not be strictly required by a free speech commitment.

6. *See also* Susan H. Williams, *Free Speech and Autonomy: Thinkers, Storytellers, and a Systemic Approach to Speech*, 27 CONST. COMMENT. 399, 412 (2011); SUSAN H. WILLIAMS, TRUTH, AUTONOMY, AND SPEECH 222 (2004) [hereinafter WILLIAMS, TRUTH]. For a related prior discussion of such issues, see Frank Michaelman's famous effort to argue that anti-poverty measures may have a constitutional foundation (albeit a different source) in Frank Michelman, *Constitutional Welfare Rights and* A Theory of Justice*, in* READING RAWLS 319, 343–44 (Norman Daniels ed., 1975) (discussing education in the context of Rawls' opportunity principle). *See also* Frank Michelman, *The Constitution, Social Rights, and Liberal Political Justification*, 1 INT'L J. CONST. L. 13 (2003).

only part of that agenda. The thinker-based approach may suggest that the foundations of freedom of speech may demand the government (and perhaps other social institutions) do more than the First Amendment, itself, requires.

That consequence in itself should not feel surprising.[7] The theoretical foundations of the 4th and 5th Amendments most likely involve privacy values whose natural extension and satisfaction conditions range beyond merely protecting against unwarranted searches and seizures and self-incrimination. Other First Amendment theories also have (salutary) overhang. Democracy theories, like Jim's and Robert's,[8] draw on a commitment to democracy whose implications (e.g., one person-one vote) range beyond how to treat speech on public affairs or more broadly, speech within public discourse.

That does not mean that any of these theories suggest that the First Amendment, properly interpreted, does away with the state action requirement or the abridgement requirement, for that matter. "First Amendment values" may be promoted or satisfied by activities that the First Amendment itself does not require. In most circumstances, I take it that improvement or greater funding of the library system promotes First Amendment values but may not be required by the First Amendment. The acceptance of First Amendment values surely requires governmental attention to whether there is an adequate educational system in place. Perhaps the First Amendment itself requires government intervention or provision, as a backstop, if and on those occasions when other methods of provision fail, so that adequate schooling becomes unattainable for some portion of the citizenry, thereby threatening citizens' minimal abilities to develop and exercise their capacities for free thought. Perhaps the First Amendment requires even more, especially when considered in conjunction with the Fourteenth Amendment's Equal Protection and Due Process Clauses.[9] Resolving this

7. Indeed, this is a closely related cousin of the worry about whether speech is, and need be, special. *See* Seana Valentine Shiffrin, *A Thinker Based Approach to Freedom of Speech*, 27 CONST. COMMENT. 283, 303 (2011).

8. Robert Post, *Participatory Democracy as a Theory of Free Speech: A Discussion*, 97 VA. L. REV. 477 (2011); James Weinstein, *Participatory Democracy as the Central Value of American Free Speech Doctrine*, 97 VA. L. REV. 491 (2011).

9. A range of views on that question and its negative resolution are found in San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1, 35–39 (1973) (deferring to the legislature in choosing the most effective means to promote First Amendment values); *id.* at 63 (Brennan, J., dissenting) (arguing that "any classification affecting

question fully would require a theory of where to locate the line between what inaction, if any, abridges freedom of speech and what inaction merely fails to promote the highest achievement of free speech values, some aspects of which may be left to non-constitutional policy and some aspects of which may correctly lie at the feet of citizens to exercise their freedom well. Full identification of these lines would involve, among other things, a full theory of 'abridgement' as well as a theory of the substantive due process protection and how it bears on how we interpret the First Amendment guarantee and vice versa.

Now we return to state action. The need for a larger constitutional theory to resolve some issues of scope and coverage is not uniquely triggered by the thinker-based theory, but arises for virtually all free speech theories. All First Amendment theories also have to answer the question why, if their theories have broader scope, are the constitutional protections more limited, e.g. why is there a state action requirement embedded in the First Amendment? (They need not, however, interpret the state action requirement as narrowly as the current Court and may be open to broader understandings of how private structures assume state functions or in what way the government may be responsible to ensure that they do not impede an adequate foundation for freedom of thought and adequate opportunities for its expression.)

One adequate answer to this question is to interpret the state action requirement as rather more contingent and institutionally motivated than as deeply principled. Our Constitution is, generally, focused on enabling and constraining the state. Considering how, institutionally, we may implement our compulsory commitment to the conditions necessary for free thought, we may—in creating a state—think it crucial to ensure and to underline that the state itself not transgress the boundaries associated with this commitment. We may take this stance because: the state has historically posed a large threat to the realization of these values; or because this stance is the most salient symbolic public commitment to this value we can make while still preserving legislative flexibility in other domains; or,

education must be subjected to strict judicial scrutiny" because "education is inextricably linked to . . . the First Amendment"); *id.* at 112–17 (Marshall, J., dissenting) (similarly arguing that the "fundamentality of education" calls for heightened scrutiny for classifications affecting education and discussing First Amendment argument for constitutional basis for an equal funding requirement).

because the state constitutes the background structure and framework within which other social practices and institutions may evolve and be better managed through direct legislative control or through individual, decentralized control; or some combination of such reasons.

All First Amendment theories, to be complete, must address whether the state action requirement is interpreted in a narrow way to require positive state action or whether certain forms of state inaction constitute acquiescence or a failure of duty of a sort that amounts to a governmental abridgment of freedom. I cannot take on the larger range of issues that question raises here, but I see no reason to worry that question is harder for a thinker-based theory to answer than the other free speech theories that must confront this issue as well. I think we can make progress on a wide variety of issues without resolving all boundary issues at the outset.

To turn to a different issue, my claim that the thinker-based argument offers 'greater unity' and is more foundational than rival theories elicited, in somewhat different forms by Vince, Steve, and Tim, the quite reasonable question why that matters and why it should speak in favor of the theory. I may have put more emphasis on these features than they merit. A sheer theoretical preference for simplicity and unity should not be thought to do much work. On the other hand, many freedom of speech violations seem to offend against the same value—that, for instance, something similar is at stake between the disparate fact patterns of *Brandenburg v. Ohio*,[10] *West Virginia Board of Education v. Barnette*,[11] and *Cantwell v. Connecticut*.[12] A theory that can vindicate, or more modestly, make some sense of the perceived connection between them would be desirable. Further, it seems desirable to avoid arbitrary distinctions or privileging of some activities over another, even when they—at bottom—are manifestations or aspects of the same value. Identifying the foundational value underlying speaker interests, for example, may help to ensure that we do not accidentally arbitrarily

10. 395 U.S. 444 (1969) (overturning the conviction of a Ku Klux Klan leader for advocating violence and holding incendiary speech to be protected unless it is directed and likely to incite imminent illegal action).

11. 319 U.S. 624 (1943) (overturning a state law compelling school children to recite the pledge of allegiance).

12. 310 U.S. 296 (1940) (overturning a state law requiring religious solicitors to obtain a license).

privilege *speaker* interests, per se, over other interests that share in the same underlying value but that perhaps, in the past, have not been under threat and hence have not been the subject of litigation.[13] Identifying foundational interests may also help us to identify which free speech protections should be regarded as bedrock because a fundamental speech value is at stake, and which represent important, but perhaps instrumental or prophylactic, responses to particular, contingent social conditions. This kind of categorization may, I think, make a difference to how we approach some doctrinal questions.[14]

Whether we view a protective stance against dissent as motivated by the special intrinsic value of dissent or by its tendency to be vulnerable in many political conditions may make a doctrinal difference. The latter view may give rise to special forms of epistemic scrutiny of regulations to ensure they are not motivated by conformism or the desire to protect the status quo, or to strong protections against retaliation for unwelcome speech or for other institutional, structural protections to ensure that vulnerability isn't exploited; the former view may lead to more content-based distinctions, such as the sometimes misleading suggestion that parody in particular should be protected.[15] Finally, unity that is achieved without oversimplification or false reduction may make the theoretical apparatus easier to apply, at least if (and this may be a questionable assumption) it is more manageable to work out the implications of one principle than to engage in the difficult task of relating one principle to another.

Steve and Tim reasonably ask how other principles of freedom of speech and of other constitutional values relate to this principle. It is an entirely reasonable question the answer of

13. For these and related reasons, I have reservations about Frederick Schauer's (spoken) suggestion at one of the Virginia symposium panels that a free speech theory should be designed around the threats freedom of speech actually faces. Although this is a natural target of attention, it is also important to theorize those freedoms that now seem entirely safe and internalized, both to protect against the emergence of threats that now seem unthinkable and also to recognize and validate the basis for the public acceptance, enjoyment, and acclaim for the right.

14. Depending upon how other matters in constitutional theory are resolved, it may also make a difference to whether a *constitutional* approach to the question is apt and what governmental agents should bear responsibility for its resolution.

15. *See e.g.*, Seana Valentine Shiffrin, *What Is Really Wrong with Compelled Association?,* 99 NW. U. L. REV. 839, 871 n.87 (2005); Amici Brief for Eugene Volokh & Erik S. Jaffe at 7–10, McFarlane v. Twist, 110 S.W.3d 363 (Miss. 2003) (No. 03-615), *cert. denied*, 124 S. Ct. 1058 (2004), *reprinted in* 11 UCLA ENT. L. REV. 1, 3 (2004).

which I will have to defer to another occasion. I agree, however, with what is implicit in their question, namely that I do not think the thinker-based theory is the exclusive theory of the value of freedom of speech that should resonate in our jurisprudence.

DILUTION

Another methodological concern echoed in some of the critiques, e.g., by Jim and Vince, is one about dilution: A strong free speech theory with wide scope will entail a broad free speech protection that will inevitably be infringed or misapplied. The rationalizations rallied, in turn, to support these curtailments will themselves be used in a way that jeopardizes the most essential forms of speech. A more modest theory, one that at least identified and prioritized some core instances of speech, would provide a more secure theoretical bulwark for recurrent wavering about free speech.

These predictions *may,* unfortunately, be accurate. Still, I do not believe that the ideal critical theory should be attentive to them in a way that results in substantial modifications. There is something quite strange about criticizing the *content* of a theory on the ground that it will be misunderstood, defied, or ignored in a particular institutional context or by particular institutional actors. The predictability of a pernicious misunderstanding does not demonstrate that the content, as such, is mistaken. By and large, a theory of the value of speech and of free speech should, I think, avoid barbering itself simply because we worry others are unreasonably scissor-happy, especially if the point of the theory is to illuminate and educate about when trims are apt and when growth, even to the point of shagginess, has more to recommend it. The more appropriate way to respond to concerns about mistakes in institutional implementation is in part, if the theory is correct, to do more by way of justification and education to avoid misinterpretation, rather than to assume interpreters are incorrigible.

That said, I have no particular objection at the level of application to temporary and/or contingent institutional maneuvers, including doctrinal constructions, to protect against predictable errors. Identifying some sorts of speech as 'core' or 'untouchable' may well serve the aim of ensuring that an alarm alert is triggered if restrictions threaten it. That strategy may ensure the predictable ebb and flow of politics and judicial

adjustments and reactions is not permitted to grow into a flood that threatens the levees.

I would find more objectionable any (theoretical) stipulation, unsupported by a substantive ground for the distinction, that such core speech is qualitatively distinct from that speech deemed outside the core and that it is sufficiently distinct that the former falls in the scope of protection and the latter falls entirely outside it. I regard that stance as an overreaction to the perceived threats to freedom of speech and one that is inconsistent with the best theoretical arguments for the value of speech. Furthermore, arbitrary, strategic distinctions upon which a great deal of weight is put do not, I think, exert much protection in the long term. Their disingenuousness is detected and, consequently, they cannot support the burden they are asked to carry.

THE NARRATIVE APPROACH TO AUTONOMY

I am in large agreement with Susan, as she herself suggests. Indeed, we may be in more agreement than she thinks.[16] Although I believe our possession of autonomous capacities (for freedom of thought) merits respect, I agree that their development, expression, and the full achievement of their potential is a process that transpires over time and that the free speech protection aims to protect access to that process as well as instances along the way. I also agree that it is important to ask how social systems support or detract from the conditions that give rise to free thought. Indeed, I am not certain how deep our disagreements go, but I will mention a couple methodological points of potential divergence.

Susan emphasizes, as I do not, characterizing autonomy as an effort to narrate one's self and one's commitments to others.[17] Although this idea of autonomy has a great deal of insight in it and certainly captures a large part of what is of value in many exercises of autonomy, I eschew this characterization for a few reasons. First, Susan's position is motivated by a skepticism

16. See Williams, *supra* note 6, at 404 n.23. Although, in a minor way, we may differ more than she thinks. In an approving tone, Susan characterizes the appeal to the thinker as a metaphor. Williams, *supra* note 6, at 404. I confess I do not mean it to operate as a metaphor, but since I am unsure what motivates her characterization, I do not know if much hangs on this difference.

17. *Id.* at 404–06; WILLIAMS, TRUTH, *supra* note 6, at 131–37.

about choice upon which I do not rely.[18] An account of autonomous thought as thought that is not dictated or scripted by forces distinct or orthogonal to the relevant reasons that bear on what is thought about[19] need not endorse or reject such skepticism. In that respect, my model is less controversial.

Second, I worry that a narrative approach places an over-emphasis on speech about or central to one's self, one's character, or the arc that characterizes one's life.[20] It also (perhaps only by connotation) seems to suggest a self already fairly far along in construction. I worry that this over-emphasis may orient our appreciation of the value of speech to speech about ourselves, rather than also directly on efforts to understand the world. I also worry it arbitrarily privileges speech that fits one's narrative structure over speech that is out of character, and it does not (as) directly capture the speech of children and young adults whose self-narrative and commitments are still fledgling.[21] One way to capture the difference between us (again perhaps only in connotation or perhaps more on emphasis and type of justification) is that my theory aims to offer an autonomy justification for speech instances (whether as thinker, speaker, or listener) as each an aspect or instance of the free development and exercise of the

18. Williams, *supra* note 6, at 408–10; WILLIAMS, TRUTH, *supra* note 6, at 149–50, 200 (downplaying the importance of choice to narrative autonomy).

19. Shiffrin, *supra* note 7, at 409–11 (describing relevant form of authenticity).

20. WILLIAMS, *supra* note 6, at 148 ("In order for [a narrative] process to qualify as an exercise in autonomy, the meaning at issue must be personal: it must relate to the meaning of one's own life."). *See also* Shiffrin, *supra* note 7, at 286 n.7 (marking a related reservation about Joshua Cohen's emphasis on significant speech in his deliberative democratic approach).

21. *See* Shiffrin, *supra* note 7, at 287 n.9. I should clarify that, although I remarked in the target piece that children's speech should partake in First Amendment protection more than current Court doctrine allows, I do not think adults' and children's speech rights run in absolute parallel. For example, I surely believe that mandatory education requirements are simpler to justify with respect to children (because they must come to possess minimally developed capacities for thought) than they are for adults. *See also* Seana Valentine Shiffrin, *Inducing Moral Deliberation: On the Occasional Virtues of Fog*, 123 HARV. L. REV. 1214, 1232 (2010) ("[O]nce citizens have achieved adulthood, efforts to enroll adults in compulsory forms of education violate their rights of autonomy and, in particular, their freedom of thought."); Shiffrin, *supra* note 15, at 880–88 (explaining, among other things, why children's associational rights are less robust than the associational rights of adults). A more nuanced theory would also have to be developed for the mentally disabled and demented who are, as I have argued elsewhere, capable of some forms of autonomy but may nevertheless reasonably be subject to different treatment to respect that autonomy. *See* Seana Valentine Shiffrin, *Autonomy, Beneficence, and the Permanently Demented*, *in* DWORKIN AND HIS CRITICS 195 (Justine Burley ed., 2004).

autonomous thinker; Susan's theory characterizes the relevant exercise of autonomy as occurring over an extended period of time for which individual speech instances are partial components but not fresh exercises of autonomy as such.

Third, the emphasis of Susan's theory is one in which communication with others is taken as the paradigm case and the paradigm source of value or justification, whereas my theory aims to allow personal diaries and musings and other purely intra-personal communication to be as paradigmatic as communications to others, but without assimilating intrapersonal communication to the model of communication between people.[22]

We both strive to stress the role of the social and the relational in accounts of individual autonomy. In my theory, *access to* and *opportunities for* social communicative relations are essential for a complete set of *apt conditions* for thought formation, evaluation of ideas, and moral relations, which themselves are the sites of individual autonomy; in Susan's theory, social communicative relations are more directly the sites of autonomous exercise.

ELITISM

Finally, Vince wonders whether the theory is overly rationalist and even elitist. He worries it might be interpreted to extend only to highly deliberate and articulate speech, issued from thinkers self-consciously dedicated to nurturing and developing the interests I articulate, or, more mildly, to imagine their speech as the core of what is to be protected.[23]

I am anxious to dispel this impression. Being, acting like or aspiring to a bookish bent is neither a necessary condition of free speech protection, nor is the cultivation or production of such figures an aim or background ideal of the theory. Ironically, I had hoped to design the theory to avoid the pitfalls of hyper-intellectualism, but I may have contributed to a misimpression by not drawing attention to this aspiration.

22. WILLIAMS, *supra* note 6, at 150–54 (narrative autonomy is dependent on social connection); *id.* at 200–04 (arguing that, at least for symbolic speech, the speaker must intend to convey a meaning and the audience must understand that the speaker is attempting to convey a meaning).

23. *See* Vincent Blasi, *Seana Shiffrin's Thinker-Based Freedom of Speech: A Response*, 27 CONST. COMMENT. 309, 310–12 (2011).

By stressing the role of emotional responses and reactions as a part of the way rational capacities encode their responses to the world and manifest them to others, the articulated interests of thinkers to which the theory aims to be responsive are not restricted to the discursively cognitive.[24] This more expansive conception of the person is then reflected in the theory's effort to cover, directly and at the outset, art, music, banal interpersonal conversations as well as associational connections, whether or not they have an articulate point.[25] By stressing the role others may have to play in forming one's thoughts[26] as well as the welcome tentativeness of some speech, the theory also makes clear that speech need not be well-formulated or articulate to gain protection or to be celebrated by the theory. True, the theory stresses the connection between opportunities for externalized thought and access to the thoughts and reactions of others and the conditions necessary for citizens to become full moral agents and the sort of informed individuals who can make most sense of our democratic commitments.[27] Still, those desiderata may be promoted by the free speech guarantee while being met by a wide range of people in a variety of ways (although I certainly would defend the opportunity to develop one's cognitive capacities into a bookish bent).

24. Indeed, I might also add that the need to externalize mental content whether to gain distance from it, to help to formulate it more determinately, or to convey it to others holds true as much of children, the mentally disabled, and those suffering dementia as of the highly educated and the basic normative importance of ensuring the opportunity to satisfy that need does not substantially vary depending upon the sophistication of the mind at issue.

25. *See* Shiffrin, *supra* note 7, at 285–87; Shiffrin, *supra* note 15, at 875 ("The autonomous agent must have some ability to control what influences she is exposed to, to what subjects she directs her mind, and whether she, at all times, directs her mind toward anything at all or instead 'spaces out' and allows the mind to relax and wander.").

26. Steve characterizes this view of intimate associations as instrumental, but stresses that friendships and other intimate associations have intrinsic value, involving substantial and substantive forms of altruism. Steven H. Shiffrin, *Freedom of Speech and Two Types of Autonomy*, *in* 27 CONST. COMMENT. 337, 344 (2011). I hasten to agree. Because the thinker-based approach stresses the importance of having access to the opportunities necessary to be known as a distinctive individual as well as to behave morally and treat others well, *see* Shiffrin, *supra* note 7, at 291–92, I regard it as (implicitly) acknowledging these intrinsic values and as arguing that the free speech protects this avenue of access for thinkers. Whether they follow that path and use it well is, of course, an aspect of their freedom and responsibility.

27. Shiffrin, *supra* note 7, at 294–96.

UNDERINCLUSIVITY

Some worry a thinker-based theory will, in some respects, be insufficiently protective of speech. Relative to other autonomy theories, the thinker-based theory confronts fewer issues of under-inclusivity because it subsumes (and unifies) the sweep of both speaker and listener-based theories, while also directly addressing those threats to the authenticity of the thought process that may not directly impinge upon speaker or listener interests as they are often articulated.

So, in reply to Eugene, although protecting access to the speech of the dead is typically disconnected from the thinker-oriented needs of the deceased to communicate with contemporaries, that speech squarely connects to each living thinker's interests in access to other minds and their perceptions as a way of understanding one's environment. Understanding one's environment frequently involves understanding history and the information contained within historical perspectives. So too, access to the speech of the deceased connects to thinkers' interests in being well treated by other agents, from whom relevant insights, messages, perspectives, and information may be owed and conveyed, even once they are deceased.

In this respect, ensuring protection for the speech of the dead also protects contemporary thinkers' interests *qua* speakers. Discharging moral duties we now have to future generations may require that we have the free opportunity to communicate with them and to contribute to the human cache of knowledge by leaving a record of our thoughts that persists after our deaths. This current interest of ours may be frustrated retroactively by a future regulation or restriction on distribution of the speech of the dead. In sum, both speaker and listener interests are stymied by restrictions on access to the publications of the deceased.

This rationale for protecting the speech of the dead does not threaten to unravel the argument I earlier sketched to explain why non-press, for-profit commercial or corporate speech might legitimately receive a different sort of treatment or be subject to a different level of review on a thinker-based account. That argument, broadly rendered, was that, for reasons related to our economic endeavors, the structure in which commercial and corporate speech is produced does not show sufficient sensitivity and pushes against the issuance of authentic, sincere speech by

individual thinkers. Rather, its content is largely determined by the needs imposed by the marketplace, the structure of which is not designed to serve the underlying interests of thinkers as such, but rather to make such authenticity highly unlikely and possibly destructive to the speakers' own economic interests. The structure encourages indifference to the (perceived) truth and so, its output has a strained and unreliable connection to the interests, even the listener-based interests, that propel a thinker-based protection since these are keyed primarily to the sincere expressions of speakers' perceptions, beliefs, opinions, etc., and their genuine efforts to represent the world and themselves.

Of course, corporate speech is written and conveyed by real individuals, but given the corporate hierarchical structure as well as the pressures associated with the larger economic structure within which they speak, there is no reason to think this speech reflects their personal, sincere thoughts; the fact individuals author the speech does not undercut my argument that the speech may be more susceptible to regulation, although it would suggest that such regulations should not demand individuals engage in insincere or false speech. And, of course, as I argued earlier, any motivation for regulation must itself be consistent with acceptance of the values underlying the free speech protection. The ethical difficulties presented by those tensions between the content dictated by employers' agendas and the employee's sincere convictions, however, may suggest a much more speech- and dissent-protective approach to employee speech than the Court has recognized in such cases as *Connick v. Myers*,[28] and, more recently, in *Garcetti v. Ceballos*.[29]

Susan asks why corporate and commercial speech is any more determined or coerced than speech by members of a religious group;[30] I take it that, with respect to some groups, her concern is that members' dissent may earn them expulsion and

28. 461 U.S. 138 (1983). *See also* STEVEN H. SHIFFRIN, DISSENT, INJUSTICE, AND THE MEANINGS OF AMERICA 110 n.144 (1999) (arguing that the *Connick* decision is less than "admirable").

29. 547 U.S. 410 (2006). I discuss related tensions and pressures on integrity that employees may face in the contract context when they form promises on behalf of companies and place their own integrity at stake, but may not control the decision whether to perform and may be under structural pressure to treat promises on behalf of corporations less seriously than promises they initiate on their own behalf. Seana Valentine Shiffrin, *The Divergence of Contract and Promise*, 120 HARV. L. REV. 708, 746–49 (2007).

30. Williams, *supra* note 6, at 407–08.

this is analogous to the market death that Crest (to take a purely hypothetical case) would suffer if it gamely admitted in its advertising that its product was worse than its rivals, just higher-priced. I do not deny that sincerity and unpopular speech may often come with great costs, but I regard the differences as follows: The market and legal pressures for Crest to do what it can to stay in business are tighter and greater than the pressures for a religious thinker not to change her mind in light of her sincere doubts. Moreover, Crest is a simpler entity with a less complex set of interests. When a believer changes her mind in light of her sincere doubts, she serves her own interests as a thinker directly by responding to what she takes to be the truth. Her continued affirmation of religious tenets furthers her interests as a thinker only if that affirmation is actually sincere. Further, although her expulsion from a religious community may involve tremendous costs, it does not (typically) involve her complete eradication. Whereas, Crest's interests to maximize profit and to survive in a competitive market are not furthered by its sincere admission that its products are inferior (except and only insofar as it has instrumental reasons to admit this when it believes others have already perceived this). The actual sincerity or insincerity or accuracy of its communications are irrelevant to its interests, except to the extent that these play an instrumental role in gaining or retaining market position, because of others' perception or because of the sort of regulations I am arguing are constitutionally palatable.

Much more should be said in a full treatment of this topic, including something about the more complex case of non-profit corporations that operate in a market environment and the case of other market actors pursuing morally infused agendas.[31] But, in brief, as a general, probably exception-ridden matter, I take for-profit, non-press commercial speech to be different from individual and expressive associational speech (and therefore subject to different standards of review, not necessarily prohibitable outright) because of the fiercely competitive and fairly inflexible environment in which the former operates and because the commercial entity's interests are so narrowly limited so that the accuracy and sincerity of its speech are valuable to it only if instrumentally that is made to be the case. Its narrowness

31. I began a tentative discussion of the morally motivated market actors in Seana Valentine Shiffrin, *Compelled Association, Morality, and Market Dynamics,* 41 LOY. L.A. L. REV. 317 (2007).

is no surprise: the non-press commercial entity is not a really a person and with some important exceptions, for the most part, the quality of its speech and its products do not intrinsically enhance or detract from the satisfaction of its interests or aims depending upon whether they are sincere, accurate, morally sensitive, or wildly reckless. These features do not hold to as great a degree of individuals, nor are they structurally true of them.

OVER-INCLUSIVITY

Jim raises two concerns that roughly amount to worries about over-inclusivity: his worry that this approach would protect harassing speech and the concern that it would extend high levels of protection to scientific research, even that research whose dissemination threatens significant harm. As I read him, he believes both that such protection is implausible but also, that whatever its merits, courts could not live with this result; judicial methods of avoiding it, however, would inevitably threaten the protection of core, democratic speech. So, although the worry originally registers as one about overinclusivity, its after-echo resonates as one about overly scant protection: in an institutional context, a theory that extends such wide protection will inexorably be scaled back in blunt ways that threaten essential speech.

The first case is the simpler one to address. As I have argued, it is to the credit of the thinker-based approach that it handily protects speech between intimates in private as well as between citizens in the public sphere. I think it may readily, however, distinguish harassing speech on the grounds that it does not involve a consensual communicative relation. Although as thinkers we have an interest in expressing our thoughts and in being known, we do not have a right to command the *personal* audience of any other thinkers we like, irrespective of their interests in hearing us out. That would not be compatible with the other's autonomy as a thinker since each of us also has an interest *qua* thinker in being left alone and maintaining a sphere of privacy free from unwanted intrusion by others. One cannot be a free thinker while being subject to intrusions that overtake one's mental agenda. Protecting opportunities to satisfy thinkers' interests both in privacy and in forging relationships with others can be done by permitting restrictions on nonconsensual but targeted and intrusive contact, even that contact that solely

involves speech, while still protecting consensual interpersonal communication as well as public proclamations and revelations, even if offensive and even if they concern particular individuals. So, if Melvin directs his confessions at Miranda personally and she objects, his speech to her thereafter may be curtailed on the grounds that it infringes upon her thinker-based interests in maintaining a sphere in which she may enjoy privacy of the mind. Assuming they do not share a workplace,[32] I do not think she has a legitimate claim, however, to enjoin all efforts by Melvin to engage in purely public forms of self-revelation, even if his revelatory remarks are about her and offend her, so long as she in particular is not made to listen to his remarks.[33]

As for scientific speech, the thinker-based approach probably would extend protection fairly far, as Jim suspects. I am less convinced that this constitutes an embarrassment for the approach. Although publication of formulas for virulent biotoxins makes me very uneasy, so too does the history of past, and prospect of further, state suppression of scientific research that threatened governmental or corporate power or the state's

32. I discuss some of the reasons why anti-discrimination laws that limit speech content may have a permissible role in workplaces and other spheres of predominantly economic activity in Shiffrin, *supra* note 15, at 877–78.

33. Thus, the outcome of *Snyder v. Phelps* seems correct, despite the abhorrent behavior of the protestors. Snyder v. Phelps, 131 S. Ct. 1207 (2011) (finding peaceful protestors who picketed a military funeral on public land 1000 feet from the funeral and who displayed provocative and aggressive signs were shielded from tort liability for intentional infliction of emotional distress by the First Amendment). Although the Phelps' organization unquestionably behaved in a brutally insensitive way, the fact that the protest was located a substantial distance from the funeral and that Mr. Snyder was unaware of the *content* of their protest signs until he later encountered videos and other reports of them in the public sphere, via television news coverage and later on the internet, suggests the 1000 foot time, place, and manner restriction was sufficient to protect the Snyder family's reasonable privacy interests on the occasion of the funeral. In that light, Mr. Snyder's complaint seems to reduce to offense at the content of the Phelps' speech and its issuance on and association with the occasion of Matthew Snyder's funeral. The sphere of privacy necessary for thinker autonomy cannot reasonably be construed to extend so far as to prevent non-libelous, sincere public discourse about an individual just because its critical content is offensive or distressing.

It is arguable, however, that the U.S. approach does not extend far enough to protect against incursions to privacy caused by non-consensual truthful revelation of purely private information; such revelations arguably violate an individual's discretionary power over whether and when to reveal herself to others. England currently takes a different approach. *Contrast* Campbell v. Mirror Group Newspapers Ltd., [2004] UKHL 22, [2004] 2 A.C. 457 (appeal taken from Eng.) (holding a tabloid liable for violating the privacy of a famous model by revealing specific details of the model's drug rehabilitation treatment) *with* Florida Star v. B.J.F., 491 U.S. 524 (1989) (finding unconstitutional a Florida law permitting civil liability for publication of the accidentally revealed name of a rape victim).

orthodoxy about religion, safety, or other matters.[34] Scientific speech may constitute an arena in which we regulate strongly the uses to which it is put and otherwise, we have to depend upon the good judgment of fellow citizens about what should be published, what knowledge would better remain privately held and undisseminated, and, on the audience side, to what uses information should be put. This seems to me little different than much of the rest of free speech practice. Incendiary and offensive political speech may merit *legal* protection, but in a well-functioning polity, citizens will have to develop and exercise good judgment about when to engage in it and when, as audience members, to take it seriously. Not all political sentiments should be voiced or acted upon just because we offer the opportunity to voice and consider them. Having the opportunity to engage in speech may be essential to protecting the autonomy of thinkers, but that does not mean that the theory recommends its exercise. It shouldn't be news that, as with democracy more generally, a free speech regime requires a measure of trust in fellow citizens that will, at times, create anxiety and discomfort. The thinker-based theory does not freshly introduce this dependence.

Of course, some transmissions of scientific information may constitute a part of a criminal attempt or an effort to further a criminal conspiracy, when provided at the relevant time to someone attempting to use the information to commit a crime. Such uses could be regulated as falling more on the speech-act side than on the pure speech side. Finally, I should observe that, doctrinally, assuming scientific and political speech are treated with parity, then situations where publication would create significant, immediate harm might submit to regulation compatible with the application of strict scrutiny. But, I concede that the intermediate cases Jim is most worried about further developed in his excellent article on the subject,[35] in which publication of scientific research may threaten important ends but not compelling state interests, may well be protected on this analysis.

34. The relevance of much scientific speech to policy decisions as well as historical governmental efforts to suppress scientific speech that might embarrass the government or generate the basis for state liability suggest that it is not so evident that scientific speech does not make a contribution to our resolution of public questions. If so, it is less clear the problems Jim raises are clearly segregable on a democracy approach.

35. James Weinstein, *Democracy, Individual Rights and the Regulation of Science*, 15 SCI. & ENGINEERING ETHICS 407 (2009).

Finally, Steve wonders whether my effort to justify strong protections for art entail that the same protection should be extended to image advertising that would extend to informational advertising. His question implies a concern that image advertisements are more powerful in illicit ways—that they influence viewers in substantial ways that are not perceptible to them. This, of course, may also be true of political rhetoric and persuasive speech. An aspect of the responsibility of autonomous thinkers is to be aware of the influences they may be subject to and to assess and police that influence.[36] On the other hand, some modes of communication may circumvent or evade our capacities to engage in such self-regulation either *writ large* or *writ small*; thereby, they may threaten thinkers' capacity to form authentic, unscripted thoughts.[37] I have in mind the popular conceptions of brainwashing techniques, subliminal messages, and hypnosis (which, notably, often involve words). I do not know whether our popular conceptions are accurate or apocryphal or whether some forms of image advertising (or, as some have alleged, pornography, fighting words, or face-to-face hate speech) work on us in ways that significantly obstruct or impair the exercise of responsible assessment and self-management. If substantial evidence suggested that image advertising resisted or stymied otherwise competent, responsible

36. Full treatment of this issue would require a more elaborate account of what responsibilities listeners may be expected to bear, but that, unfortunately, is beyond the scope of this discussion. Briefly and generally, though, it seems fair to ask listeners to exercise responsibility over how they allow the sincere speech of interlocutors to affect them (e.g. whether to believe or remain skeptical, whether to guard against emotional impact or use emotional force as a guide to plausibility, etc.), assuming that speech does not disable or circumvent the capacities that undergird such responsibility. For, exercising that responsibility involves using the thinkers' critical capacities while at the same time permitting the speakers' capacities for thought and expression to be fully and freely implemented; the opportunity and value of both exercises underlies the justification and value of free speech and its protection. It is arguable that this general argument may have less traction, however, when the speech involves matters about which listeners' responsibility could only be exercised competently if the listener had well-developed expertise that it is unreasonable to expect listeners to cultivate. Hence, we might subject speech by experts directed at lay people to higher standards of accuracy or care. So too a heavy burden of epistemic responsibility, broadly construed, on the listener *may* also be inapt in the case of insincere, false speech, particularly with respect to information that is not readily accessible or publicly verifiable by listeners (e.g. speakers' mental contents). Deliberately false speech may also jeopardize many of the conditions under which speech generally has value and this also cuts against the claim speakers have a foundational interest in expressing deliberately false speech (represented as true). I discuss the threat lies pose to the moral function of communication in Seanna Shiffrin, Lies and the Murderer-Next-Door (unpublished manuscript).

37. Shiffrin, *supra* note 7, at 288, 299–300.

agents' reasonable efforts at effective methods of avoidance, reflection, assessment, and revision, then I believe a thinker-based approach would have the resources to suggest such speech was more susceptible to regulation to limit such exposure to destructive and disabling effects, especially with respect to children. Of course, these points are only suggestive and a more comprehensive treatment would be necessary to settle the issue.

Regretfully, I have not attempted to answer many worthy issues raised in the group's rich and stimulating replies. With respect to those issues I have addressed, the treatment is overly cursory. I look forward to thinking further about these questions for some time to come and I reiterate my appreciation to the group for their critical engagement with these still preliminary ideas.