

## COMMENT ON SHIFFRIN'S THINKER- BASED APPROACH TO FREEDOM OF SPEECH

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A constitutionally protected right of freedom of speech is a limit on government policies that is deemed necessary to protect certain important values. Even among those who believe in freedom of speech, and believe that any defensible constitution has to include a protection of this kind, there is considerable lack of clarity and disagreement about exactly how the relevant values are best understood. So one central task of a theory of freedom of speech is to offer a clear account of what these values are and why we should care about them. The judicial decisions that make up the constitutional jurisprudence of a country in which freedom of speech is recognized as a constitutional right will involve a series of partial answers to these questions. One thing that a theory of free speech might try to do is to knit these partial answers into a coherent whole. As Shiffrin makes clear at the outset of her excellent essay, this is not her task. Her aim, rather, is the purely normative one of describing the values that really do make speech important and freedom of speech an essential ingredient in any defensible constitutional order.

Any account of the values supporting freedom of speech needs to have a certain degree of abstraction. The right to speak becomes controversial when there is disagreement about the merits of the speech in question, and a defense of the right to speak needs to appeal to some value that both sides of this disagreement have reason to recognize. For example, people may disagree about the merits of speech advocating (or opposing) tax cuts, or speech advocating (or opposing) anarchism. A policy defending the freedom to speak of various partisans to these debates needs to appeal to a value that abstracts from these disagreements, such as the value of being

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able to participate in politics by expressing one's opinion about important questions of public policy. To take an example from an adjacent area: people disagree about the merits of various forms of religion and religious practice. A policy of tolerance is therefore naturally defended by appealing to the more abstract value of living according to one's religious beliefs, whatever these may be.

Shiffrin's defense of freedom of speech carries this method of abstraction to a high level. The value that the right of freedom of speech protects is in her view the value of "the free development and operation of [one's] mind."<sup>1</sup> The many different things that count as speech and are protected by freedom of speech "serve the fundamental function of allowing an agent to transmit (or attempt to transmit so far as possible) the contents of her mind to others and to externalize her mental contents in order to attempt to identify, evaluate, and endorse or react given contents as authentically one's own."<sup>2</sup> Transmission and externalization of this kind is essential, Shiffrin argues, to the development and exercise of one's mental abilities.

She lists a number of other more specific interests that we have as thinkers, for which speech is essential. These include:

a. *A capacity for practical and theoretical thought*: developing her mental capacities to be receptive of, appreciative of, and responsive to reasons and facts in practical and theoretical thought, i.e. to be aware of and appropriately responsive to the true, the false, and the unknown.

b. *Apprehending the true*: believing and understanding true things about herself, including the contents of her mind, and the features and forces of the environment from which she emerges and in which she interacts.

c. *Exercising the imagination*: in addition, rational agents have interests in understanding and intellectually exploring non-existent possible and impossible environments. . . .

d. *Becoming a distinctive individual*: developing a personality and engaging more broadly in a mental life that, while responsive to reasons and facts, is distinguished from others' personalities by individuating

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1. Seana Valentine Shiffrin, *A Thinker-Based Approach to Freedom of Speech*, 27 *CONST. COMMENT.* 283, 287 (2011).

2. *Id.* at 295.

features, emotions, reactions, traits, thoughts, and experiences that contribute to a distinctive perspective that embodies and represents each individual's separateness as a person.

e. *Moral agency*: acquiring the relevant knowledge base and character traits as well as forming the relevant thoughts and intentions to comply with the requirements of morality. (This interest, of course, may already be contained in . . . (a-c)).

f. *Responding authentically*: Pursuing (a-e) through processes that represent free and authentic forms of internal creation and recognition . . . .

g. *Living among others*: Living among other social, autonomous agents who have the opportunities to develop their capacities in like ways . . . .

h. *Appropriate recognition and treatment*: being recognized by other agents for the person she is and having others treat her morally well.<sup>3</sup>

These interests are already quite abstract, but Shiffrin's account ties them together and grounds them in the yet broader overarching interest in the "development and operation" of one's mind.<sup>4</sup>

This account of the basis of freedom of speech has a number of advantages. It appeals to a value that everyone is plausibly held to share. As Shiffrin says, anyone who values him or herself as a thinker must value the conditions necessary to the development of his or her mind. Second, it supports a wide range of protections. Accounts of freedom of speech that begin with the importance of political speech—with the importance of participating in politics and gaining information needed to fulfill one's function as a citizen—either leave other forms of expression, such as artistic expression, out of the range of fundamentally protected speech, or else squeeze them in by some ad hoc stretching. By contrast, the value Shiffrin cites covers virtually every form of verbal and written expression as well as other forms of artistic activity. As she says, her view,

makes no important distinction, at the foundations, between communication about aesthetics, one's medical condition and treatment, one's regard for another, one's sensory percep-

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3. *Id.* at 288–90.

4. *Id.* at 287.

tions, the sense or lack thereof of the existence of a God, or one's political beliefs. All of these communications serve the fundamental function of allowing an agent to transmit (or attempt to transmit so far as possible) the contents of her mind to others and to externalize her mental contents in order to attempt to identify, evaluate, and endorse or react given contents as authentically one's own; further, they allow others to be granted access to the information necessary to appreciate the thinker, on voluntary terms, and to forge a full human relation with her.<sup>5</sup>

This breadth is an appealing feature. It might have been achieved, however, simply by recognizing all of these diverse interests as important. Shiffrin's account has the added feature of tying these together as aspects of a unified interest (or closely related set of interests). But I have some doubts about how much unity there is in fact in her account, and about how much of an advantage such unity would be.

The interests Shiffrin lists are varied, but the emphasis in her account is on what might be called *self-development*. She mentions, for example, such things as "developing her mental capacities," "developing a personality," becoming able to comply with the demands of morality, "development of self and character," and "responding authentically." Of course one has interests in the *exercise* of one's mental capacities for other reasons—for example, one has interests in acquiring true beliefs about aspects of the world because these are important for the achievement of particular aims that one has. The reasons one has to acquire true beliefs about different matters are varied and of varying importance, depending on the subject matter in question. A theory that tries to account for all of these reasons by appeal to our interest in self-development seems to me unhelpfully monistic and high-minded. It is like an account of the importance of political speech that sees political activity to be important because it is essential to the realization of our social nature, leaving out our interests in affecting particular policies, trying to influence who gets elected, and so on. If we read 'exercise' in the phrase "develop and exercise one's mind" as allowing for this diversity of interests served by its exercise the overall theory is less unified than may first appear. But this loss in unity would in my view be a gain, since a theory of free speech, if it is to guide us in setting the limits to public policy

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5. *Id.* at 295.

affecting speech, needs to take account of this diversity of interests and their varying degrees of importance.

Shiffrin's "thinker-based" theory bears an interesting relation to accounts emphasizing interests of speakers, such as an interest in being able to influence the opinions of others about politics, religion, or some other matter; and to accounts emphasizing "audience" interests such as the interest in having access to information and opinion about various subjects. Her emphasis on speech—on the "fundamental function of allowing an agent to transmit (or attempt to transmit so far as possible) the contents of [one's] mind to others" makes Shiffrin's view sound at first like a speaker-based theory.<sup>6</sup> But the primary interests of speakers in freedom of speech are commonly taken to include interests focusing on the effects that one's expression may have on others, such as interests in persuading them of certain things, or, at least, making them aware of one's views. Shiffrin's account is interestingly different, helpfully reminding us that speakers also have interests concerned with the importance of speech *for them*. Her list of our interests as thinkers also includes things that would have occurred more naturally on a list of audience interests, such as one's interest in acquiring true beliefs. All of this is just to say (not something that I think Shiffrin would deny) that some of the interests she lists are interests in *freedom* of speech, including the freedom of *others* to speak, at least as much as interests in *speech* (that is, in speaking oneself).

My own view of freedom of expression recognizes interests we have *qua* speakers, *qua* audiences, and *qua* bystanders (that is, people who are affected by expression but not as either speakers or as audiences who have an interest in receiving the message presented).<sup>7</sup> So I agree with Shiffrin in rejecting accounts that focus only on speaker or audience interests.

Earlier, I offered a view that, like hers, gave an important place to an idea of autonomy, although I thought of the autonomy in question as that of audiences.<sup>8</sup> The role of

6. *Id.* at 295.

7. See T.M. Scanlon, *Freedom of Expression and Categories of Expression*, 40 U. PITT. L. REV. 519 (1979), reprinted in T. M. SCANLON, *THE DIFFICULTY OF TOLERANCE* 84 (2003).

8. See T.M. Scanlon, *A Theory of Freedom of Expression*, 1 PHIL. & PUB. AFF. 204 (1972) reprinted in T. M. SCANLON, *supra* note 7, at 14–15. Although the Millian Principle was concerned with the autonomy of audiences, the overall theory I advanced in that article took the interests of speakers and bystanders into account as well. I wrote, "The theory of freedom of expression which I am offering, then, consists of at least four

autonomy in that theory was to provide a rationale for what I called the Millian Principle, which Shiffrin discusses. The function of this principle was to limit the considerations that can be appealed to as possible justifications for laws restricting expression. Specifically, it ruled out appeals to harm to individuals that consist in their forming false beliefs or to the harmful effects of actions that speech would lead people to believe they had reason to perform.

I agree with Shiffrin that this principle is too restrictive. It would, for example, undermine perfectly legitimate justifications for laws against false advertising. This was among the reasons that led me to reject the approach of that early article. It was a mistake, I concluded, to base a limit on justifications of laws restricting expression on a general idea of autonomy.<sup>9</sup> An account of freedom of expression needs rather to be based on the diverse reasons we have, as potential speakers, audiences, and bystanders to want ourselves to have access to means of expression or want others to have such access. These reasons vary, according to the subject matter being dealt with. An account of freedom of expression needs to be sensitive to these differences and also to empirical facts about the likely effects of granting governments various kinds of regulatory authority.

This brings me to the question of how one gets, in Shiffrin's view, from an account of the value of speech to an account of the content of freedom of speech—that is to say an account of the limits this right places on government policies. Looking at the matter in the simplest way, one might be tempted to understand freedom of speech simply as a limit on governmental power to ban speech of certain kinds or to burden it in various ways, such as by allowing civil suits for defamation. But this is obviously too simple. Freedom of expression also clearly requires the provision of some benefits, such as police protection for unpopular speakers. It is also compatible with, and can even require, limits

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distinguishable elements. It is based upon the Millian Principle, which is absolute but serves only to rule out certain justifications for legal restrictions on acts of expression. Within the limits set by this principle the whole range of governmental policies affecting opportunities for expression, whether by restriction, positive intervention, or failure to intervene, are subject to justification and criticism on a number of diverse grounds. First, on grounds of whether they reflect an appropriate balancing of the value of certain kinds of expression relative to other social goods; second, whether they insure equitable distribution of access to means of expression throughout the society; and third, whether they are compatible with the recognition of certain special rights, particularly political rights." *Id.* at 22–23.

9. These reasons are explained more fully in Section III of *Freedom of Expression and Categories of Expression*. Scanlon, *supra* note 7, at 93–100.

on competing speech, such as time limits on speeches at public meetings.

Beyond this, however, the values underlying freedom of speech will also be promoted by, and even depend on, policies that go beyond what freedom of speech itself requires. These values can be promoted by such things as public schooling, the Freedom of Information Act, longer opening hours of public libraries, and public access to the Internet. So one question is to what degree *freedom of speech* requires such things and, to the degree that it does not, how the boundaries of what it does require are to be drawn. I should say that I am myself uncertain how this question is best answered, but it seems an interesting question to ask about a proposed theory, particularly one that defines the values at stake as broadly as Shiffrin's does.

Shiffrin lists three ways in which "legal materials," in which she includes "laws, regulations, court rulings and resolutions," can be inconsistent with valuing the protection of individuals' interest in "the free development and operation of [their] minds:"

(1) the legal materials or the government activity may, on their face, ban or attempt to ban the free development and operation of a person's mind or those activities or materials necessary for its free development and operation; (2) the effect of the legal materials or of the activity may objectionably interfere with the free development and operation of a person's mind; (3) the rationale for the materials, or the activity, may be inconsistent with valuing this protection.<sup>10</sup>

Her clause (1) most directly captures the idea that freedom of speech limits governmental powers to ban speech. But this clause also applies to bans of "activities or materials necessary to the free development of one's mind." A ban on the education of women and girls might count under this heading as a violation of freedom of expression. Would a simple failure to provide adequate public education to anyone also count? Alternatively, perhaps a policy of not providing, or not adequately funding, such education would count under (2) as having effects that interfere with the free development and operation of citizens' minds. Whether this is so would depend, I guess, on how broadly 'interfere with' is understood. Similar questions arise about a policy of not providing materials of the sort required by the

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10. Shiffrin, *supra* note 1, at 287.

Freedom of Information Act. This policy would have effects that could be held to objectionably interfere with important “operations” of citizens’ minds, if not, perhaps, with their “development.” And a practice of banning access to important documents by classifying them Top Secret might be held to violate freedom of speech under (1) by banning “activities or materials” needed for the free operation of citizens’ minds.

Clause (3) is potentially broader. The *rationale* for not providing adequate public education might be that it is safer to keep the masses uneducated. Or the rationale might be that it is better, and more popular, to keep taxes low than to improve education. Either of these rationales would, I would say, be inconsistent with (properly) valuing citizens’ interest in the free development and operation of their minds. Would one or both of them be inconsistent with valuing the *protection* of this interest? Does the question of whether freedom of speech rules out such a policy depend on which of these rationales it is based on?

Two kinds of breadth are at issue in these examples. Focusing on speech, one question is the degree to which freedom of speech requires the positive provision of factors that improve citizens’ ability to speak meaningfully, and improve the quality of public discussion. Second, moving from speech to thinking, as Shiffrin does, government policies that interfere with our ability to think well by spreading confusion and disinformation, or through more radical means, are clearly objectionable. The question, however, is whether this is best put by saying that such policies are violations of freedom of *speech*.

Here I would note one possible difference between freedom of speech and freedom of thought. As I said earlier, an account of the protections required by freedom of speech needs to take into account the differing weight of the reasons people have to want to engage in different forms of expression, such as political speech, religious and philosophical debate, and activities such as insulting one’s neighbors or issuing commands to one’s criminal confederates. Such an account also needs to be sensitive to the degrees to which different forms of expression are likely to be vulnerable to over-regulation or to partisan constraint if governments have the power to restrict them. The fact that all of these forms of speech involve the externalization of the contents on one’s mind is too general to be a helpful guide. Where freedom of thought is concerned, however, things are different. We have a strong reason to object to the government’s



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interfering with the development and operation of our minds. In this case the objection is perfectly general, and founded on the very general value that Shiffrin emphasizes.

Shiffrin devotes much of her paper to arguing for the importance of speech for the development of our mental capacities. So it seems as she is offering an account of freedom of speech. But the distinctive and important basis of her argument lies in an idea of freedom of thought, and it is not clear that the best approach to the latter is the best approach to the former as well.

To reiterate, I am not certain what the correct answer is to the questions I have raised about the boundaries of freedom of speech. But would be interesting to know how Shiffrin understands these boundaries, given the robustness of her account of the underlying value.