

## SEANA SHIFFRIN'S THINKER-BASED FREEDOM OF SPEECH: A RESPONSE

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As an instinctive consequentialist so far as First Amendment theory is concerned, I have to admit that I have never been so tempted by a non-consequentialist account as I am by what Professor Shiffrin has produced. My principal interest is the history of ideas regarding the freedom of speech. I have long been struck by how so many of the canonical writers on the subject have built their arguments from the starting point of the central importance of the freedom of thought. This is true of Milton<sup>1</sup> and Mill<sup>2</sup> in a basic, explicit, straightforward way (if Milton can ever be called “straightforward”), and of Holmes,<sup>3</sup> Brandeis,<sup>4</sup> and Meiklejohn<sup>5</sup> in more complicated (and disputable) ways. Of the major Anglo-American theorists of free speech, only Madison and Learned Hand do not glorify the independent-minded individual thinker, but they both rest their arguments for free speech on the central importance of meaningful political consent.<sup>6</sup> So I think Shiffrin’s project fits well with the inheritance, if that matters.

I also think that she has done an excellent job of explaining how the shift of emphasis that she urges has significant implications for doctrinal structure and priorities, as well as for

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1. See John Milton, *Areopagitica: A Speech for the Liberty of Unlicensed Printing (1644)*, in 2 THE COMPLETE PROSE WORKS OF JOHN MILTON 485, 560 (Ernest Sirluck ed., 1959).

2. See JOHN STUART MILL, ON LIBERTY 82 (David Bromwich & George Kateb ed., 2003).

3. See *United States v. Schwimmer*, 279 U.S. 644, 654–55 (1929) (Holmes, J., dissenting) (“[I]f there is any principle of the Constitution that more imperatively calls for attachment than any other it is the principle of free thought—not free thought for those who agree with us but freedom for the thought that we hate.”)

4. See *Whitney v. Cal.*, 274 U.S. 357, 372, 375 (1927) (Brandeis, J., concurring).

5. See ALEXANDER MEIKLEJOHN, POLITICAL FREEDOM 8–28 (1960).

6. See James Madison, *Report on the Alien and Sedition Acts*, in JAMES MADISON, WRITINGS 608, 652–53 (Jack N. Rakove ed., 1999); *Masses Publ’g Co. v. Patten*, 244 F. 535, 540 (1917) (Hand, J.).

justifying particular case outcomes such as *Barnette*<sup>7</sup> and casting doubt on others (*Virginia Board of Pharmacy*<sup>8</sup>? *Citizens United*<sup>9</sup>?) Moreover, I find convincing several of her arguments regarding how her version of an autonomy theory of free speech has certain advantages over rival autonomy accounts.

I have two misgivings. The first relates to the kind of person who would benefit most from the freedom that Shiffrin's intriguing version of autonomy is designed to advance. One of the attractive features of the conventional arguments for free speech from autonomy—arguments centered on notions such as dignity, decency, and consent; arguments largely about human beings being treated as ends not means—is that all persons benefit from having their autonomy respected, and benefit in roughly similar ways. In shifting the focus from speaking and listening to thinking, Shiffrin's novel autonomy argument may sacrifice that advantage to a degree. My second misgiving relates to her persuasive claim that the understanding of autonomy that she offers provides a more comprehensive, unified foundation for the protection of speech than is provided by rival versions of the argument from autonomy. I wonder whether having such a comprehensive, unified foundation is highly desirable, as she assumes. I should say at the outset that I consider my second misgiving the more significant of the two.

My first misgiving bears a resemblance to a problem that some readers have with Mill.<sup>10</sup> After sketching his paragon of the truly open-minded thinker, tolerant yet passionate and committed, courageously ready to follow his intellect wherever it leads him, if necessary willing to defy convention and proceed alone in the face of scorn, Mill announces that:

Not that it is solely, or chiefly, to form great thinkers, that freedom of thinking is required. On the contrary, it is as much, and even more indispensable, to enable average human beings to attain the mental stature which they are capable of.<sup>11</sup>

Missing from his account, however, is an explanation of how “average human beings” are to achieve the breadth of understanding and empathy and the degree of self-discipline

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7. *West Virginia Bd. Of Educ. v. Barnette*, 319 U.S. 624 (1943).

8. *Virginia Bd. Of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976).

9. *Citizens United v. Fed. Election Com'n*, 130 S. Ct. 876 (2010).

10. See EDWARD ALEXANDER, MATHEW ARNOLD & JOHN STUART MILL 129 (1965); JAMES FITZJAMES STEPHEN, *LIBERTY, EQUALITY, FRATERNITY* 67–73 (1967).

11. MILL, *supra* note 2, at 102.

necessary to meet Mill's demanding standard of fully engaged open-mindedness. Much as he sincerely desires to "raise[] even persons of the most ordinary intellect to something of the dignity of thinking beings,"<sup>12</sup> the question persists whether the freedom that Mill defends is of much greater value to people like himself and his ilk than to other persons whose abilities, aspirations, and patterns of living are less remarkable or differently directed.

Clearly Shiffrin believes that the thinker-oriented freedom she defends is of great value to persons with no intellectual pretensions, persons who simply need to think in order to figure out how to survive, hopefully flourish, do their moral duty, and be recognized for who they are by cohorts who may not value intellectual achievement at all. But is she right? Of course such people need to think. And of course such people deserve, as a basic moral proposition, some measure of respect for their humanity, dignity, and desire for self-authorship. The question is whether for their flourishing and recognition they need to develop, as fully and freely as Shiffrin believes is required, the particular capacities that her thinker-centered conception of the freedom of speech privileges.

Because she is making a non-consequentialist argument, Shiffrin has a more demanding burden of persuasion on this point than Mill, who claims that his argument ultimately rests on collective consequences, "the permanent interests of man as a progressive being."<sup>13</sup> The reason he gives for wanting to raise persons of ordinary intellect to the ranks of thinking beings is because his reading of history tells him that only in the atmosphere of "an intellectually active people"<sup>14</sup> do improvements "in the human mind or in institutions"<sup>15</sup> occur. If Mill is right about this, if broad-based intellectual independence and energy is valuable primarily for its contribution to the collective benefit of "progress," we all gain from the freedom of thought, at least indirectly. That is true even for those of us who do not value or practice the intellectual skills that a robust protection for the freedom of speech can help to develop. Consequentialist arguments of a different stripe, resting on such collective goods as political stability (Madison),<sup>16</sup> adaptability

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12. *Id.*

13. *Id.* at 81.

14. *Id.* at 102.

15. *Id.* at 103.

16. See Madison, *supra* note 6, at 631–58.

(Holmes)<sup>17</sup>, or the discharge of political responsibility (Brandeis,<sup>18</sup> Meiklejohn<sup>19</sup>) share the feature of attempting to protect and promote something that almost all persons value and have a stake in. So also does the “more is always better” listener-centered argument, recently in vogue in First Amendment thought, that any raw, quantitative increase in the fund of public communication is salutary without regard to calculations of utility, integrity, quality, or just distribution, simply because various people can draw on that fund in selective, multifarious, unpredictable ways.<sup>20</sup>

So my question is: why should we believe that persons other than intellectuals, reformers, students, and artists would benefit directly, in a manner that bears on their personal autonomy, from a First Amendment that is designed to place the emphasis on thinking rather than speaking and/or listening? Can it be that for most persons the development of the mental capacities on which Shiffrin bases her theory is as important as, say, respect for their dignity or enrichment of the menu of choices available to them as self-authoring individuals? Perhaps her implicit contention is that vigorous support for the development of those mental capacities actually is the key to respecting dignity and enriching the experience of choice, not just for persons with certain skills and interests but for all persons. For that to be true, however, the capacities that Shiffrin invokes cannot be too demanding or too specialized lest the benefits of her version of autonomy be concentrated on a favored class of citizens.

As someone who has both taught a course and co-authored an article with her,<sup>21</sup> I am the last person who would suspect Seana Shiffrin of constructing a social or moral argument with insufficient attention to the needs of ordinary persons. She is careful to specify that she values the freedom of speech not only for its contribution to the development of rational capacities but also “emotional capacities,” “perceptual capacities,” and “capacities of sentience,”<sup>22</sup> all of which, she claims, require for their develop-

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17. *Abrams v. United States*, 250 U.S. 616, 624 (1919) (Holmes, J., dissenting). See also Vincent Blasi, *Holmes and the Marketplace of Ideas*, 2004 SUP. CT. REV. 1, 24–33, 44–46 (2005).

18. *Whitney v. California*, 274 U.S. 357, 372, 375 (1927) (Brandeis, J., concurring).

19. MEIKLEJOHN, *supra* note 5, at 8–28.

20. See, e.g., *Citizens United v. Fed. Election Com’n*, 130 S. Ct. 876, 904–08 (2010).

21. Vincent Blasi & Seana V. Shiffrin, *The Story of West Virginia State Board of Education v. Barnette: The Pledge of Allegiance and the Freedom of Thought*, in CONSTITUTIONAL LAW STORIES 409 (Michael C. Dorf ed., 2d ed. 2009).

22. Seana Valentine Shiffrin, *A Thinker-Based Approach to Freedom of Speech*, 27

ment “the ability to transmit the contents of one’s mind to others.”<sup>23</sup> Moreover, when she speaks of “intellectual capacities” she includes exercises of the imagination and “the intellectual prerequisites of moral relations,”<sup>24</sup> so she has in mind capacities desired and possessed by persons who in no way consider themselves intellectuals.

That said, her argument depends heavily on a claim about how “external representation” aids the development of “a complex mental world,” “sufficiently complex ideas,” and “complex thought.”<sup>25</sup> Now, persons who possess “ordinary” mental abilities and who live “ordinary” lives no doubt have to grapple with various complexities. Their personal challenges and constraints are laced with contingencies, their thoughts and desires and commitments and resentments are layered. But in learning to cope with the complexities they confront, do most people really need to nurture the particular mental capacities that Shiffrin places at the center of her thinker-based theory? I wonder. The skills of articulate self-presentation, inquisitive and empathetic observation, and undistorted introspection that she privileges strike me as disproportionately useful to persons of an unusually imaginative or ruminative or provocative bent. In that respect, Shiffrin’s autonomy argument grounded in mental development seems to me less attractive on distributional grounds than the conventional autonomy accounts that look more to decency, dignity, consent, and opportunities for choice, and that take people as they are.

I concede that the factor of how broadly distributed are the benefits that are ascribed to free speech under various rationales is a problematic basis for comparing theories. Distributional concerns have almost never figured prominently in theoretical inquiry about the freedom of speech, and for good reason. It is all but impossible to measure in a meaningful way how the benefits of free speech are distributed. Nevertheless, I think it is worth raising distributional suspicions, even if one ought to be loath to give them much weight for lack of feasible verification. I might add that distributional concerns, should they be taken into account, are more threatening to an autonomy argument than to one based on collective consequences because autonomy by

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CONST. COMMENT. 283, 287 (2011).

23. *Id.* at 291.

24. *Id.*

25. *Id.* at 292.

definition is about what individuals have in common by virtue of their humanity.

Where Shiffrin's thinker-based approach does not raise distributional concerns is in the way she builds upon the value of sincerity. All of us, whatever our abilities, whether we are by nature deliberative or instinctive, passive or proactive, patient or impulsive, gregarious or reclusive, loquacious or reticent, need to develop the discipline to mean what we say—to ourselves as well as to others. Whether a well-established and fully enforced principle of freedom of thought does much to promote the virtue of sincerity is debatable. Are Americans more sincere in personal relations, or in self-examination, than the Chinese or the Cubans? Legal protection for heretical ideas can engender disputational energy in a population. It can help to make powerful actors accountable. But inducing or enabling people to eschew dissembling, trimming, equivocating, and exaggerating is an altogether more ambitious objective for a legal regime. Were that objective to be realized, however, even in modest measure, Professor Shiffrin's thinker-based approach to the freedom of speech would have a distributional bona fides worthy of an autonomy argument. All of us would benefit, and in the same ways.

My second misgiving relates to Shiffrin's claim that a thinker-based rationale offers a "more comprehensive, unified foundation for much of the freedom of speech protection than is yielded by starting from a more partial intermediate point."<sup>26</sup> Why exactly are the developmental objectives that she emphasizes more foundational? Presumably the answer is that the other goods (both individual and collective) that one might invoke to justify a robust freedom of speech, whether respect for the dignity of persons, or resources for listeners exercising choice, or progress, or the prevention of political enormities, or the satisfactions of participation, all depend on the ability of individuals to respond to reasons and facts, apprehend what is true, exercise their imaginations, practice moral agency, be authentic, live among others, etc.<sup>27</sup> True, but then I want to know why being foundational in this sense is such a recommendation. Does the fact that lots of different goods depend on the thinking capacities that Shiffrin describes make freedoms directly related to those capacities *ipso facto* more important than other

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26. *Id.* at 288.

27. *Id.* at 288–291.

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(perhaps more narrowly tailored) freedoms that relate only to capacities of a more specialized sort (say, political capacities or the ability to energize others) that come into play at a later point in the chain of inference?

To my mind, that the narrower capacities further down the chain are not foundational but rather are targeted to serve specific objectives counts in their favor. This is because the larger project, as I see it, is one of identifying a limited number of liberties that might properly constrain the majority will and that can be robustly protected without extracting too great a cost in terms of the multifarious social goods that free speech inevitably impinges upon. It seems evident that a system of constitutional protections keyed to the nourishing of specialized capacities will occupy a narrower footprint, and thus impose fewer social costs, than will a more ambitious, comprehensive system of protections focused on foundational capacities. Admittedly, an autonomy theory is not committed to counting the costs in the way that a consequentialist theory is. But that hardly means that an understanding of the freedom of speech should be preferred on the ground that its implications, some of which entail the imposition of social costs, are broader.

When Shiffrin contrasts the foundational and the intermediate she is referring not only to the difference between “comprehensive” capacities and more specialized ones, but also between goods that are intrinsically valuable and those that are only instrumentally so, such that the latter type of good depends on an empirical connection that might be disputed and certainly is contingent. She asserts that “[a] good free speech theory should identify a non-contingent and direct foundation for its protection.”<sup>28</sup> Perhaps we can say that the free and full development of the mental capacities on which she builds her argument is self-evidently good and also self-evidently advanced by the kinds of free speech rights she derives from her argument, while the justifications for a robust freedom of speech offered by the likes of Milton, Madison, Mill, Holmes, and Brandeis depend on empirical, and even normative, claims relating to collective consequences that are far more dubious and certainly more time-bound. I do confess to being nervous about my consequentialist inclinations on just this score. On the other hand, some consequentialist claims are more controversial than others. Those advanced by Madison relating to the prevention of

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28. *Id.* at 286.

major political transgressions and by Holmes relating to the value of adaptation to an ever-changing environment seem to me to rival, on the score of normative appeal and enduring empirical grounding, the claims on which Shiffrin builds her theory. I remain puzzled why, in the domain of free speech theory, “contingent” should function as an epithet, even as I understand why “speculative” should.

Shiffrin also defines “foundational” to mean that among the various forms of expression that she lists (dissent, religious speech, fiction, art, music, diaries, etc.) “there should not be a lexical hierarchy of value.”<sup>29</sup> She wishes to “avoid the convolutions” that complicate any First Amendment analysis that employs hierarchies of value and attends to contingencies.<sup>30</sup> I sympathize with her desire. The passage of almost thirty years has done nothing to discredit William Van Alstyne’s observation in 1982 that First Amendment doctrine was becoming as complicated as the Internal Revenue Code.<sup>31</sup> My own belief that the First Amendment should be outfitted to do service in pathological periods led me on one occasion to extol the virtues of doctrinal simplicity on grounds of strategic efficacy.<sup>32</sup> But Shiffrin’s desire to minimize hierarchy and contingency in free speech theory seems to be based on deeper concerns. And she is not alone. As Robert Post has noted, in modern times we have witnessed what might be called the “speech as such” movement.<sup>33</sup> There seems to be a powerful desire to embrace formal rather than functional criteria in delineating the ambit of First Amendment concern. I certainly don’t want to libel Professor Shiffrin by calling her a formalist, but I do think that she needs to say more, in a functionalist vein, to justify her assertion that a thinker-based view of the First Amendment is to be preferred in part because it leads to both a more unitary and less contingent set of doctrines and case outcomes.

I suppose my various misgivings all come down to the crude belief that, except in periods and places of rare societal self-confidence, the gesture of protecting threatening or infuriating acts of communication is difficult to pull off. In this view, the

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29. *Id.* at 285.

30. *Id.*

31. See Frederick Schauer, *Codifying the First Amendment: New York v. Ferber*, 1982 SUP. CT. REV. 285, 309 (1983) (reporting a private conversation with Van Alstyne).

32. See Vincent Blasi, *The Pathological Perspective and the First Amendment*, 85 COLUM. L. REV. 449 (1985).

33. See Robert Post, *Recuperating First Amendment Doctrine*, 47 STAN. L. REV. 1249, 1279 (1995).



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First Amendment is strong medicine that needs, like antibiotics, to be rationed. That makes me suspicious of foundationalism and attracted to an instrumentalist approach that emphasizes priorities and practicalities.