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# FREE SPEECH JUSTIFICATIONS\*

Kent Greenawalt\*\*

## INTRODUCTION

This Article sets out what I believe are the relevant justifications for free speech, the term "free speech" being meant to cover both freedom of speech and freedom of the press. These are the justifications one might use to assess whether communications fall within a political or judicial principle of free speech and how great the protection of the communications that are covered should be. Such assessments are undertaken in a longer study that is mainly about the ways in which different uses of language affect the application of principles of freedom of speech to the criminalization of behavior.<sup>1</sup> That study concentrates on the communicative acts that lie on the border of free speech, especially solicitations to crime and threats, in an attempt to examine the proper boundaries of free speech.<sup>2</sup>

My broader purpose illuminates the ambitions and limits of this Article. What follows is an attempt to set out the various justifications for free speech in a systematic way. This attempt should provide some antidote for confusion and for oversimplification, the main disease of legal and philosophical scholarship. The Article reveals the subtle plurality of values that does govern the practice of freedom of speech; and one can surmise that a similarly close investigation would reveal a plurality of values behind almost any important social practice. This Article also reflects my own sense that, whatever may be true at some ultimate level, human beings dealing with practical problems not only

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1. This broader effort is to appear as a book entitled *Speech, Crime, and the Uses of Language*, to be published in 1989 by Oxford University Press.

2. The book considers both a "political principle of freedom of speech," relevant for liberal societies independent of whether they have written constitutions that yield judicial review protecting free speech, and the free speech and free press clauses of the United States Constitution. I contend that both political and judicial standards should be nuanced in response to how the justifications for free speech and free press reach variant uses of language. Some uses of language, words of agreement to rob a bank, for example, lie so far from the justifications for free expression that they should be regarded as wholly outside political and constitutional principles of free speech. "Wholly outside" means roughly that in practice legislatures may consider whether to penalize explicit agreements without worrying about free speech (although a principle of free speech does affect what counts as a serious agreement), and courts may sustain criminal sanctions without employing any first amendment test. I claim that some uses of language, particularly requests and encouragements that include neither threats nor inducements within the speaker's control, have enough expressive value to make free speech principles relevant, but that they may be suppressed in circumstances when straightforward claims of fact and value may not be suppressed.

do but should rely on a plurality of values. Rather than undertaking an exhaustive analysis of any individual justification, this Article attempts to set forth the relevant justifications for free speech as clearly, systematically and accurately as possible.

The main virtue of the following pages is that they provide a coherent and comprehensive overview of justifications for free speech, an overview that will enable the reader to see how one justification relates to others, to understand what may be left out if one or two justifications are portrayed as dominant, and to assess with a suitably critical eye claims about the content of particular justifications and why they should be given a central place or rejected.

Most of the Article is devoted to particular justifications for free speech, but first some preliminary matters are covered. Part I indicates why one can speak of a principle, or principles, of free speech only if there are bases for protecting speech that do not apply similarly to some substantially broader category of acts. Once Part I clarifies the idea of a principle of free speech, Part II examines the nature and classification of justifications. It maintains that efforts to arrive at any single unifying justification risk either simplifying or obscuring the complex values undergirding freedom of expression. This Part also suggests how the distinction between consequentialist and nonconsequentialist justifications usefully differentiates between reasons depending directly on empirical grounds and those resting on other normative claims. Parts III and IV then provide an account of multiple justifications divided along consequentialist and nonconsequentialist lines.

## I. HOW A GENUINE PRINCIPLE OF FREEDOM OF SPEECH COMPARES WITH A MINIMAL PRINCIPLE OF LIBERTY AND BROADER PRINCIPLES OF EXTRA PROTECTION

Given that various reasons for free speech apply unevenly to different sorts of communications, there is some question whether one should speak of “a principle” or “principles” of free speech. For simplicity’s sake, the singular form is adopted here, but that form should not obscure the complexities of the subject.

A principle of freedom of speech asserts some range of protection for speech that goes beyond limitations on government interference with other activities. While a minimal principle of liberty maintains that government should not inhibit communications that pose no legitimate threat of harm, a distinctive principle of freedom of speech posits more robust constraints. Even if no rationale for liberty applies uniquely to speech, a distinctive principle of freedom of speech may yet be warranted, given that reasons of general applicability and various reasons in combination may apply to speech with special force.

### A. *Beyond a Minimal Principle of Liberty*

A political principle of free speech is warranted only if reasons to protect speech go beyond the reasons for a minimal principle of liberty. According to a minimal principle of liberty, the government should not prohibit people from acting as they wish unless it has a positive reason to do so. The ordinary reason for prohibiting action is that the action is deemed harmful or potentially harmful in some respect; driving a car at 100 miles per hour is forbidden because people are likely to get hurt. Although sometimes the government may constrain behavior in order to compel some action that generates a benefit, or may potentially generate benefits,<sup>3</sup> that subtlety will be disregarded in order to concentrate on harm. What legitimately counts as "harm" is an important and controversial aspect of political theory,<sup>4</sup> but here the term is meant in an inclusive, nonrestrictive sense, including indirect harms, psychological harms, harms to the actor, and even harms to the natural order. Thus, sexual intercourse between human beings and animals might be prohibited on the ground that it has deleterious indirect effects on family life, is psychologically bad for the people involved, or is intrinsically unnatural.

Since governments have little apparent reason to prohibit action other than to prevent harm the action may cause, an assumption that people should otherwise be left free comes very close to being a principle of rationality for governance. A challenge to the principle is imaginable, but the theory of human nature and government it would represent would be most unattractive. Government control of perfectly harmless actions like whistling in one's room might be a technique to induce unquestioning obedience to government authority. In that event, the prohibition would be designed to prevent some harm, such as "unhealthy" independent civic attitudes, but the harm would be unrelated to acts of whistling or their effects.<sup>5</sup> Conceivably, such control of "neutral" matters may have a place in training techniques for highly

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3. This subject is complicated in ways that would demand examination were this not a preface to a discussion of free speech. Parents may be directly compelled to confer benefits, such as food and clothing, on their children. One argument for forbidding adultery is that it threatens families and less tangible benefits, such as loving companionship, that many children receive. Other acts might be compelled or forbidden in order that people develop regular habits of doing those acts that will lead overall to benefits for others. How far the last justification for control of adults is acceptable is something that may separate "liberal" societies from many others. Since any failure to receive a benefit may be understood as a harm, the line between actions that confer benefits and those that prevent harm is thin; but performing compulsory jury service, for example, may be viewed as a required conferral of a benefit, as may food and clothing for one's children.

4. See generally J. Feinberg, *Harm to Others* (1984) (developing a principle of harm that applies when harm includes both a setback of an interest as well as a violation of a person's rights).

5. This is what differentiates stopping whistling from stopping acts that themselves threaten harm over the long run.

disciplined subgroups, such as monastic orders or military personnel, but accepting its appropriateness for regulating the general class of citizens would be to embrace the kind of extreme totalitarianism suggested by fantasies like George Orwell's *Nineteen Eighty Four*.<sup>6</sup> The alternative—the “minimal principle of liberty”—is a fundamental premise of all “Western” governments, and in this modest form, is probably accepted as well by almost all authoritarian or dictatorial governments, whether of the right or the left.<sup>7</sup>

As far as speech is concerned, the minimal principle of liberty establishes that the government should not interfere with communication that has no potential for harm. To be significant, a principle of freedom of speech must go beyond this,<sup>8</sup> positing constraints on the regulation of speech that are more robust than constraints on the regulation of other matters. A principle of free speech could establish more stringent constraints than the minimal principle of liberty either by barring certain possible reasons for prohibition or by establishing a special value for speech. The latter way is the easier to understand. If some human activities have special value, a good government will need stronger reasons to prohibit them than to prohibit other activities. If speech has more positive value than acts of physical aggression, for example, more powerful reasons will be needed to warrant its suppression. A related but more subtle point is that legislatures or other political actors may be prone in particular instances to undervalue certain kinds of acts; were that true about speech, a principle of free speech might compensate for that tendency. In effect, the principle would tell those involved in government that acts of speech should be assumed to have a higher value than they seem to have in the immediate context.

The second way in which a principle might give special protection to speech is by positing that the government is barred from employing certain reasons for prohibiting speech. Such a constraint might derive from a notion that particular reasons for prohibitions are at odds with how human beings should be regarded or with the proper role of government. Thus, it might be claimed that because an aspect of the autonomy of human beings is that people should discover for themselves what is true, suppressing speech to prevent contamination by false ideas is impermissible. Or, it might be said that the government cannot suppress political ideas that pose challenges to it, because one aspect of a legitimate government is that criticism of those presently in power may be entertained. The import of a “disqualifying” principle might not warrant total exclusion of a reason for prohibition. A reason might

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6. G. Orwell, *Nineteen Eighty Four* (I. Howe 2d ed. 1982).

7. But the “nonliberal” government may be much more willing to forestall perceived indirect harms and to promote virtuous habits than a liberal government. See *supra* note 3.

8. See F. Schauer, *Free Speech: A Philosophical Enquiry* 5–12 (1982).

be viewed with great suspicion, but treated as a legitimate basis for prohibition if the case were sufficiently compelling.<sup>9</sup> Building on these arguments, a principle or theory of freedom of speech would claim that expression cannot be regulated on every basis that could surmount the minimal principle of liberty and satisfy ordinary prudential considerations regarding effective legislation.<sup>10</sup>

Some claims about the value of speech or about the inappropriateness of certain reasons for prohibition could be thought to be largely independent of wider assertions of political ideology, but many claims bear a distinctive relation to liberal political theory. A proponent of claims that involve a controversial liberal view of human autonomy and government might assert that the liberal view is fundamentally correct, and should be embraced by all peoples, or all peoples at a certain stage of economic and social development; in that event, a complete defense of the claims about free speech would require argument for the superiority of the liberal perspective. Alternatively, one who advances liberal claims might assert that since a particular society is grounded on liberal ideas, that society should act on their implications, at least absent opposed premises for social life that are clearly preferable and attainable.

Because the aim here is to elucidate standards that could be endorsed by people who disagree about many fundamental matters, the following account does not depend on a single systematic version of liberal political theory. But doubting whether there is a better form of government for large developed countries and strongly believing that no other form is clearly preferable and attainable, I assume in this study that conclusions about freedom of speech that can be drawn from basic premises of liberal democracy are sound, without examining possible competing premises.<sup>11</sup> Reliance on these basic premises does not mean uncritical acceptance of every liberal idea; rather, discrete arguments having to do with freedom of speech are scrutinized carefully in turn.

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9. One might say, to illustrate with an example not involving speech, that any government justification for enforced segregation based on violence that might flow from hostility between members of different racial groups should be viewed with extreme suspicion, but that temporary racial segregation in a prison might be warranted following an extensive race riot in which prisoners have been killed.

10. Prudential considerations, such as the costs of administration, might make it unwise to forbid much behavior that could be forbidden under a minimal principle of liberty.

11. The discussion that follows suggests the basic premises of liberal democracy. My views on that subject are developed in K. Greenawalt, *Religious Convictions and Political Choice* 14–29 (1988). I do not think that the basic premises of liberal democracy include extreme rationalism, extreme individualism, neutrality among ideas of the good, or exclusive reliance for political choice on shared premises and publicly accessible grounds for determining truth.

### B. Is There a Distinctive Principle of Free Speech?

A principle of freedom of speech does not itself flow from the conclusion that the minimal principle of liberty inadequately protects some liberties. The question remains why, and whether, freedom of speech should be singled out, since a sound principle more robust than that of minimal liberty might apply to matters other than speech. Only the analysis of the justifications for speech reveals the full response to this query, but that analysis can be clarified by a number of preliminary points.

First, a principle of freedom of speech is certainly compatible with other principles that are more protective of liberty than the minimal principle. One might defend, for example, a distinctive principle of religious liberty or of family liberty. The scope of another liberty can overlap with liberty of speech; for example, assertions of propositions about religion are covered both by religious liberty and by freedom of speech.

Second, a principle that covers most speech may or may not cover all speech and it may or may not cover only speech. Although it would be misleading to refer to any distinctive principle of free speech if a principle covered such wide areas that speech was only one small sub-category, or if a principle covered only a little of speech, someone might talk roughly about a principle of free speech if the principle reached a few other activities besides speech or failed to cover all speech. Another conceptual approach, the one mainly employed here, is to understand "speech" as including only, and all of, what is actually covered by a proper principle of freedom of speech, using some other term, like communication, to cover the broader class of activities that may superficially resemble what is covered by the principle.<sup>12</sup>

Contrary to what has sometimes been supposed,<sup>13</sup> a distinctive principle of freedom of speech may be maintainable even if no reasons for liberty uniquely apply to speech.<sup>14</sup> An insistence on unique reasons disregards the possible complexity of justifications. Reasons of more

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12. This is a fairly common approach, followed by F. Schauer, *supra* note 8, at 89–92, among others. The sentence in the text, however, requires an important qualification, or clarification. A government might prohibit acts, such as the sale of toy guns, that are not designed to communicate messages because it fears what observers will take as implicit messages, e.g., that shooting guns is fine. In such cases, a principle of free speech may affect the legitimacy of the prohibition although the acts viewed by themselves may not be speech. From this perspective, an activity may be affected by the free speech principle either because it qualifies directly as "speech" or because it is regulated on the basis of the government's view about appropriate messages.

13. See, e.g., Bork, *Neutral Principles and Some First Amendment Problems*, 47 Ind. L.J. 1, 25–27 (1971) (arguing that speech which merely develops human faculties and furthers happiness is indistinguishable from other human activity, and that a principled judge "cannot, on neutral grounds, choose to protect speech that has only those functions more than he protects any other claimed freedoms").

14. See generally M. Redish, *Freedom of Expression* 1 n.1, 40 (1984) (fact that a

general applicability may have special strength as to speech, and various reasons in combination may apply to speech in a way that is not true of other activities. In either event speech might warrant unique protection, though no single reason for protection uniquely applied to speech. However, should the only good reason for liberty of speech apply in the same strength to a much broader range of activities, any claim for a distinctive principle of free speech would be undercut.

Some aspects of a principle of free speech may lie closer to more general claims of liberty than do others. The reasons for protecting speech apply with variant strength to different sorts of speech. Even within the domain of what counts as speech, some communications may deserve more protection, or protection for different reasons or protection against different bases for suppression, than do other communications. A political principle of free speech need not, and should not, amount to a single rigid principle, having the same import for all kinds of speech. Indeed, a more precise portrayal might show a loose constellation of reasons, subjects, and subprinciples governing the protection of speech.<sup>15</sup> Some of these subprinciples might lie particularly close to principles governing certain nonexpressive activities. For example, as to communication whose main justification is that it provides an outlet for emotional release, the reasons behind its protection might cover other activities by which people vent emotions, such as vigorous athletic activities. Yet other reasons covering other forms of speech might have no bearing for athletic endeavors.

## II. THE RELEVANCE OF MULTIPLE JUSTIFICATIONS AND THE CONSEQUENTIALIST-NONCONSEQUENTIALIST DISTINCTION

What sorts of reasons justify acceptance of a principle that protects speech even when speech seems to carry a potential for harm that would warrant prohibition if all that were at stake were the minimal principle of liberty and ordinary canons of prudent legislation? Although their importance varies generally, and particularly in respect to discrete classes of communications, many reasons have substantial force that justifies protection for much speech. Since there is no single unifying justification for a principle of free speech, a problem arises as to how the various justifications should be classified. While no single categorization is uniquely correct, a division between consequentialist and nonconsequentialist reasons is the most useful for my purposes here.

### A. *Multiple Reasons or a Single Unifying Justification?*

Some have suggested in recent years that there is a single unifying

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conglomeration of traditionally accepted values is served by the protection of free speech does not disqualify them as rationales for free speech).

15. See F. Schauer, *supra* note 8, at 14.

justification for freedom of speech, at least as far as the law of the first amendment is concerned.<sup>16</sup> One of two unpersuasive strategies is followed to give credence to this initially implausible proposal.

The first strategy is elimination. Various reasons for free speech are found to be applicable to things other than speech and therefore are presumed to be nonsupportive of a distinctive principle of free speech, whatever their relevance for some more general theory of liberty.<sup>17</sup> A single reason for free speech is left, and that is said to be the reason behind a principle protecting speech. (Were no reason left over, the assumption is that no principle of freedom of speech would be warranted.)

Such efforts must be viewed with great skepticism. A reason that applies to other subjects may apply with special intensity to speech; various reasons may coalesce in a unique way with respect to speech. The idea that any justification with broader relevance may be written off as not bearing on a principle of freedom of speech is thus erroneous and must be strongly resisted.

The second strategy for arriving at a single principle is inclusion.<sup>18</sup> A number of reasons are taken as having some merit, but this merit is then shown as contributing to some yet larger value. Suppose, for example, that maximizing individual fulfillment is taken as the overriding value behind freedom of speech, and one considers the claim that speech also promotes scrutiny of government misdoing. The linkage is that government wrongdoing interferes with human fulfillment, and the seemingly independent reason is then swallowed up in the broader reason.

The strategy of inclusion suffers some basic defects. One is that any reason broad enough to yield a plausible claim that it includes everything else is bound to be extremely general and vague. Such a reason will not provide a very helpful starting point for dealing with many actual social problems if citizens, legislators, and judges must descend quickly to the more specific "subsidiary" reasons whose implications are clearer. And a reason broad enough to swallow up all

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16. See, e.g., M. Redish, *supra* note 14, at 1-86; Baker, *Scope of the First Amendment Freedom of Speech*, 25 UCLA L. Rev. 964-90 (1978); Bork, *supra* note 13, at 20-26. Since Redish includes within the broad value of self-realization both "the inherent value in allowing individuals to control their own destiny, and the instrumental value in developing individuals' mental faculties," M. Redish, *supra* note 14, at 30, it may be argued whether he settles finally on one or two values. A similar question may be raised about Baker, who talks of individual self-fulfillment and participation in change as key first amendment values. Baker, *supra*, at 991. And because Bork is concentrating on an appropriate principle of constitutional law for the courts and rejects the "safety valve" function of speech because it raises issues of prudence inappropriate for the judiciary, Bork, *supra* note 13, at 25-26, he might consider a safety-valve reason for free speech as having a place in a justification of a political principle of free speech.

17. See, e.g., Bork, *supra* note 13, at 25.

18. See, e.g., M. Redish, *supra* note 14, at 11-12.

narrower reasons for free speech is unlikely to apply uniquely to speech; further exploration will be needed of why the reason undergirds a principle of freedom of speech rather than some wider robust principle of liberty.<sup>19</sup>

Another defect of the inclusive strategy involves an error that creeps in during the process by which narrower reasons are subsumed. No doubt, holding the government to account contributes to individual human fulfillment, but there may be other reasons, such as social justice, for responsible government. The value of free speech for accountable government may be underestimated if only the relationship to individual fulfillment is addressed. Putting the point more abstractly, the process of inclusion may distort the significance of more discrete reasons whose importance lies partly, but only partly, in what they contribute to the most general value. This distortion often occurs when people seek to bring multiple and diverse considerations within some large umbrella value. For practical thought about most social practices, the distortion is best avoided by acknowledging a plurality of values.

#### B. *Consequentialist and Nonconsequentialist Reasons*

There is no single correct way of presenting the justifications that matter for a principle of freedom of speech. One can distinguish, for example, between reasons that focus on individuals and those that focus on society at large, between reasons that relate to speakers and those that relate to listeners or a broader public, between reasons that relate to the form of government and those that do not, between reasons that reflect optimism about human capacities and those that reflect pessimism, between reasons that concentrate on the positive value of speech and those that emphasize the untrustworthiness of government. Because the reasons for free speech are based on complex and somewhat overlapping elements, no basic division or multiple categorization can be wholly satisfactory.

This analysis of free speech justifications distinguishes between consequentialist and nonconsequentialist reasons. This division too has its drawbacks, requiring, among other things, a somewhat strained breaking down of arguments concerning individual autonomy and of arguments concerning democracy. Nonetheless, this familiar way of distinguishing reasons for action is useful here, because it differentiates claimed reasons that are to be viewed in light of factual evidence and claimed reasons that rest more purely on normative claims.<sup>20</sup>

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19. Redish acknowledges that his overall principle of individual self-realization covers more than speech, but he argues that communicative activities are especially likely to develop individuals' mental faculties, are less likely to be harmful than other courses of conduct, and, in any event, received special protection by the adopters of the Bill of Rights. See Redish, *Self-Realization, Democracy and Freedom of Expression: A Reply to Professor Baker*, 130 U. Pa. L. Rev. 678, 684 (1982).

20. It is likely that many nonconsequentialist claims rest on deep factual assump-

A practice has value from a consequentialist point of view if it contributes to some desirable state of affairs. Thus, to say that free speech contributes to honest government is to advance a consequentialist reason for free speech. The force of a consequentialist reason is dependent on the factual connection between a practice and the supposed results of the practice. A nonconsequentialist reason is one which claims that something about a particular practice is right or wrong independent of the consequences. Notable among reasons of this sort are reasons cast in terms of present rights or claims of justice: "Suppressing Joan's ideas is wrong because it violates rights or is unjust."

The relation between consequentialist and nonconsequentialist reasons is an enduring problem for moral philosophy. One philosophical position is to suppose that nonconsequentialist arguments are in some sense reducible to consequentialist considerations, that the only really good practices are those that produce desirable states of affairs broadly understood and that the better practice is one that produces better effects. On this view, it becomes an open question whether it is desirable that people should actually think in terms of effects. According to the most unqualified consequentialist position, citizens ideally would conceive moral problems in terms of consequences. But it is possible that overall better effects will occur if ordinary people accept some nonconsequential norms; for example, perhaps the most wholesome effects of truth-telling will be produced if people think it is always inherently wrong to tell a lie.

What matters for the purposes of practical thought about a particular social practice are the critical perspectives that members of a society would best adopt. Even if an outsider might rightly say that the best practice produces the best effects, even if in some ultimate sense nonconsequentialist reasons can be reduced to some form of consequentialist evaluation, a reason counts as nonconsequentialist here if it is the sort of reason to which citizens should give weight and it is best cast for them in nonconsequentialist terms. In our culture many nonconsequentialist claims are conceived as having force, and few are confident that it would be helpful to banish those claims from practical discussion. Nonconsequentialist reasons do have force for normative issues in moral and political philosophy.

On the opposite end of the spectrum from unmitigated consequentialism is the view that nonconsequential claims should dominate political and moral thinking, that what mainly is involved is according people rights and justice and that calculations of consequences should play a decidedly secondary role. Whether any such priority can be es-

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tions about human nature, so in this respect the distinction between consequentialist and nonconsequentialist reasons is less sharp than the text indicates. This problem is addressed in relation to a "natural duty" to obey the law in K. Greenawalt, *Conflicts of Law and Morality* 159–86 (1987).

tablished is highly questionable,<sup>21</sup> and freedom of speech affords an apt illustration of why such a priority is dubious in the evaluation of social practices. In any event, both consequentialist and nonconsequentialist considerations count and count significantly, and no collapse of one to the other or priority of one over the other works at the level of practical thought.

The line between consequentialist and nonconsequentialist claims, however, is not always clear. Part of the problem is deciding where the intrinsic nature of the act stops and consequences begin. Is the fact that a listener will be misled an aspect of the nature of lying (there are unsuccessful lies, so not every lie actually misleads), or is the likelihood of someone's being misled to count as a common consequence of lying? A second concern is the kinds of consequences that matter for a consequentialist justification. Although consequentialist reasons are often linked to claims about overall welfare or satisfying people's preferences or desires, this analysis counts as consequentialist any claim resting on the production of future consequences, including a claim, say, that the recognition of rights or justice will be promoted in the future if particular practices are engaged in for the present.<sup>22</sup> A third difficulty, which emerges as more serious in the context of free speech, is the status of certain reasons that are cast rather vaguely. Suppose it is said that free speech conforms with a view that people should be rational. If the idea is that free speech actually helps make people more rational, it is consequentialist. If the idea is that a principle of free speech treats people as rational, and that that is intrinsically appropriate, the reason is nonconsequentialist. Claimed justifications for free speech, then, may straddle consequentialist and nonconsequentialist reasons.

Closely related to this third difficulty for classification is another: how to treat coherence arguments for free speech. Suppose it is argued that given certain institutions or practices, having freedom of speech is required, or at least is positively indicated. A full defense of such an argument requires reasons why the underlying institutions may be taken as starting points and reasons why free speech connects to the underlying institutions. Roughly, the reasons for the institutions might be cast in terms of justice or fairness ("only democratic forms of government are just"), in terms of consequences ("democracy better serves human welfare than other forms of government"), or in terms of social acceptance ("whether better or not, liberal democracy is our form of government and should be taken as a starting point for evaluation of practices like free speech"). The coherence reasons for free speech might be cast in terms of what the underlying institutions some-

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21. An attempt to show the implausibility of any clear priority in one context is provided in *id.* at 207–25.

22. See *id.* at 213–20 (discussing in more detail claims based on effects on future compliance with rights and justice).

how imply ("to deny free speech is to refuse to treat people as democratic citizens"), or in terms of how free speech serves objectives of the institutions ("representatives will make better decisions if speech is free"). The complexity here is that the reasons supporting the connection of free speech to the more underlying institutions may or may not be of the same kind as the reasons why the institutions may be taken as starting points for evaluation. The classification that follows concentrates on the distinctive reasons for free speech. Since the purpose is not to develop a general theory of government, justifications for democracy are not explored. What is examined is how free speech connects to basic premises of democratic government.

### III. CONSEQUENTIALIST JUSTIFICATIONS

During most of the twentieth century, consequentialist arguments have dominated the discussion of freedom of speech, although the last two decades have seen a resurgence of nonconsequentialist arguments cast in terms of basic human rights and dignity.<sup>23</sup> This section examines the major consequentialist arguments: truth discovery, interest accommodation and social stability, exposure and deterrence of abuses of authority, autonomy and personality development, and liberal democracy. Consequentialist arguments reach public and private life; they reach governmental and nongovernmental matters; they reach speakers, listeners, and others who are indirectly affected.

#### A. "Truth" Discovery

1. *The Basic Justification.* — The most familiar argument for freedom of speech is that speech promotes the discovery of truth. Found in Milton's *Areopagitica*<sup>24</sup> and in eloquent opinions by Holmes<sup>25</sup> and Brandeis,<sup>26</sup> the argument is the core of John Stuart Mill's defense of freedom of speech in *On Liberty*.<sup>27</sup> Mill says that if the government suppresses communications, it may suppress ideas that are true or partly true. Moreover, even if an idea is wholly false, its challenge to received understanding promotes a reexamination that vitalizes truth.<sup>28</sup> Mill's assertion that government suppression of ideas rests necessarily

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23. For excellent modern discussions, see Emerson, *Towards a General Theory of the First Amendment*, 72 Yale L.J. 877, 877-86 (1963); Feinberg, *Limits to the Free Expression of Opinion*, in *Philosophy of Law* 217-32 (J. Feinberg & H. Gross 3d ed. 1986); Scanlon, *Freedom of Expression and Categories of Expression*, 40 U. Pitt. L. Rev. 519 (1979).

24. J. Milton, *Areopagitica* (London 1819).

25. Abrams v. United States, 250 U.S. 616, 624, 630 (1919) (Holmes, J., dissenting).

26. Whitney v. California, 274 U.S. 357, 372, 377 (1927) (Brandeis, J., concurring).

27. J.S. Mill, *On Liberty*, in *Selected Writings of John Stuart Mill* 121 (M. Cowling ed. 1968) (1st ed. 1859).

28. Id. at 136, 152-62.

on a false assumption of infallibility,<sup>29</sup> however, overstates his case. Suppression might correspond with a cynical skepticism about any truth, with a belief that, fallible as it is, government is likely to judge more accurately than a dissident minority, or with a conviction that true or not, some ideas are too destructive of a social order to be tolerated. But Mill's basic point that speech contributes greatly to the search for truth does not depend on whether suppression always represents a claim of infallibility. Mill's sense of truth is broad, covering correct judgments about issues of value as well as ordinary empirical facts and embracing knowledge conducive to a satisfactory personal life as well as facts of general social importance.

Although he does not assume that people will grasp the truth whenever it appears, Mill believes that if voice is given to a wide variety of views over the long run, true views are more likely to emerge than if the government suppresses what it deems false.<sup>30</sup> In this standard form, the truth-discovery justification combines a contained optimism that people have some ability over time to sort out true ideas from false ones with a realism that governments, which reflect presently dominant assumptions and have narrow interests of their own to protect, will not exhibit exquisite sensitivity if they get in the business of settling what is true.

Often taken as an axiom in liberal societies, the truth-discovery justification is subject to a number of possible challenges: that objective truth does not exist; that if truth does exist, human beings cannot identify it, or the conditions under which it is discovered; that if human beings can identify truth sometimes, free discussion does not evidently contribute to their capacity to do so; and that the way free discussion works in practice contravenes the open market of ideas that the truth-discovery justification assumes.<sup>31</sup> A searching answer to these doubts would require a systematic examination of notions of truth and evidences of truth and of human learning. Although such an exploration lies beyond the scope of the present investigation, the ensuing discussion of truth discovery is nonetheless much longer than the treatment of other justifications of free speech. This indulgence seems warranted by the need to understand how far these sweeping challenges really do threaten this most commonly offered rationale for free expression. Each of the four challenges is examined in turn, the one that is the most troublesome for a principle of free speech reserved for last: the doubt that free discussion contributes to the discovery of truth.

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29. *Id.* at 136.

30. *Id.* at 164–65.

31. See Baker, *supra* note 16, at 965–81; see also DuVal, *Free Communication of Ideas and the Quest for Truth: Toward a Teleological Approach to First Amendment Adjudication*, 41 Geo. Wash. L. Rev. 161, 190–94 (1972) (arguing that no good reason exists to suppose that freedom of expression will result in either greater or lesser understanding).

2. *Does Truth Exist?* — Contrary to the blithe assertion that “the assumption of the existence of objective truth is crucial to classic marketplace theory, [and] almost no one believes in objective truth today,”<sup>32</sup> the truth-discovery argument can survive a substantial dose of skepticism about objective truth.<sup>33</sup> This is most obvious with respect to factual matters. Suppose no objective truth exists outside human experience or that the only truth for human beings is the set of propositions that serves them best or most fully conforms with their experiences at a given stage in history. These positions about truth do not deny that people can learn from evidence and argument or that in some sense they can be closer or farther from understanding what is true. Given all the ways in which available evidence suggests that the earth is round rather than flat and the usefulness of people’s operating on that assumption, we can say that someone who believes that the earth is round is closer to the truth than the person who believes it to be flat. Similarly, the person who thinks that many Jews were killed in Nazi concentration camps in World War II is closer to the truth than the person who denies that such events took place. Whatever the ultimate status of the propositions that the earth is approximately a sphere and that many Jews were exterminated, virtually everyone accepts some notion of empirical truth that renders claims of truth something other than wholly subjective or relative.<sup>34</sup> That is a sufficient beginning for the truth-discovery theory.<sup>35</sup>

Claims of values pose somewhat greater difficulties, since the assertion that they are wholly subjective is not so plainly fallacious. I shall not pause here to defend my own belief that rational discourse can say a good deal about ultimate values,<sup>36</sup> but whether or not this is so, such discourse certainly can test the coherence of value claims, and can elucidate and clarify the values of a culture and of individuals. Thus,

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32. Ingber, *The Marketplace of Ideas: A Legitimizing Myth*, 1984 Duke L.J. 1, 25.

33. See Emerson, *Colonial Intentions and Current Realities of the First Amendment*, 125 U. Pa. L. Rev. 737, 741 (1977) (“The essential point is that the process is necessary for reaching the best social decision, regardless of whether ultimate values are conceived in absolute or relative terms.”); see also F. Schauer, *supra* note 8, at 18–26 (argument from truth does not require accepting the possibility of acquiring knowledge with certainty).

34. In T. Kuhn, *The Structure of Scientific Revolutions* 35–51 (2d ed. 1970), Thomas Kuhn takes a relatively skeptical position about the nature of scientific theories, but he does not deny that within a given paradigm answers to “puzzles” are correct or incorrect; that in choosing among possible paradigms, observations and experimental conclusions are highly important, if not completely determinative; and that later theories are generally better at solving puzzles than the earlier theories they replace. On Kuhn’s view of science, there are more than sufficient indicia of objective judgment to make justifications for free speech relevant.

35. See Wellington, *On Freedom of Expression*, 88 Yale L.J. 1105, 1130–31 (1979).

36. Although rational discourse can say much about ultimate values, many fundamental conflicts in values are not finally resolvable on rational grounds. K. Greenawalt, *supra* note 11, gives a fairly comprehensive account of my sense of the limits of reason.

for example, an American might have said during the 1950s: "Given the social history and racial attitudes of this country, acceptance of racial segregation in public facilities is in severe tension with a belief that people should be treated as morally equal." Propositions like these can be extremely important for how people try to resolve social problems, and one can say that such propositions may be true or sound without invoking an objective status for ultimate values. If the idea of truth is broadened a bit further to include people's understanding of the claims of value that best suit them personally, one could speak of truth discovery even in respect to claims of value and other matters as to which one doubted whether there was any interpersonal truth.

*3. Can People Identify Truth and Regimes That Promote It?* — These examples demonstrate that significant domains of truth exist even on relatively skeptical premises; the examples also show that many truths are accessible to people and that most people are somewhat open to evidence and argument about those truths. This is not to say that people can ever be completely sure of anything, but it is nonetheless reasonable for them to have a high degree of confidence about some propositions, for example, that "in the northern latitudes, January is usually colder on the average than July," or that "people who are deprived of what they value the most often resent those who they think have deprived them." Even when a dominant theory is understood to be provisional, as is the case with many abstract scientific theories, there may be a high degree of confidence that certain conceivable competitors are false.

If so much is granted, any idea that people are wholly incapable of evaluating what sorts of social practices promote discovery of truth is untenable. If truth is a meaningful concept and people are capable of asserting many propositions of fact and value with confidence, they must have some basis for recognizing what social practices promote the discovery of truth. One approach is to look at various societies and historical periods to see when the discovery of truth has prospered. That method obviously is most practical for questions of undisputed interpersonal truth; we can examine whether belief in the earth's roundness happened more quickly where discourse was relatively free. Assessing degrees of coherence about values or whether the values people accepted were personally suited to them, however, is a daunting task in respect to other historical eras and cultures. The needed judgments are incredibly complex and we are hard put to make the imaginative leap from our experience and values to those of other societies. In respect to values, personal experience may be of some help. Of course, experience is inevitably limited and people are notoriously incapable of assessing much of their own experience objectively; moreover, they can barely guess what their own internal life would be like in a society with very different social practices. Still, they can ask themselves whether open discussion has enlightened or confused them, helped them to

achieve a more coherent and personally satisfactory set of values or not. They can try to imagine what life would be like if certain ideas were not available, and they can draw from the experience of acquaintances who have been brought up in very different cultures, a rich source of enlightenment in a society with as many immigrants as the United States.

People can reasonably differ over the persuasiveness of available evidence connecting free speech to truth discovery. Judgments are undoubtedly subject to many of the uncertainties that infect psychology and the social sciences; and certainly few judgments about the effects of social practices on the fate of truth can have the degree of confidence attainable about propositions like the roundness of the earth. Any sensible position probably must distinguish among kinds of truths, among communities in which discussion is free, and among degrees of suppression. But what is important here is that all the uncertainties and needed qualifications do not show that the question of whether free speech promotes truth is somehow beyond our capacities to consider. Relevant evidence and arguments do exist.

4. *The Significance of Inequality in the Marketplace.* — Acquiring confidence that truth will advance in a regime of freedom would be simple if people rather quickly understood the truth when it was presented to them and if competing ideas had an equal claim on people's attention. Two claims undermine such confidence: the gross inequality among communicators in the marketplace of ideas and the inclination of people to believe messages that are already dominant socially or that serve unconscious, irrational needs.

Standing alone, the inequality of those who seek to communicate supports a particular understanding of freedom of speech rather than a rejection of the entire concept.<sup>37</sup> If people are reasonably competent to sift claims of truth, then a process in which all relevant claims are provided with a fair hearing is plainly preferable to government suppression of apparent falsehood. If the problem with present social arrangements is that an aggregation of economic and social power so largely determines what the public hears that unfavored ideas have no chance to gain a foothold, the government might make available new channels of communication or regulate existing channels to assure more equal access. Conceivably the latter approach would include restricting the frequency with which some kinds of messages were presented, but no message would be denied an outlet altogether. Such an approach to speech would emphasize fairness in the dissemination of messages rather than the unrestricted liberty of those who want to communicate and hear, and movement toward that approach might drastically alter the freedom some media presently enjoy to present what they choose. There is a conceivable equality-based argument that

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37. See D. Richards, *Toleration and the Constitution* 216–24 (1986) (suggesting a more equality-focussed approach to the first amendment); L. Tribe, *Constitutional Choices* 194–98 (1985) (same).

government is unable in practice to regulate the presentation of ideas in the interests of fairness and that the realistic alternatives are government suppression of ideas or domination by private centers. But given government's power to circulate ideas itself or make forums available, using the more drastic remedy of prohibiting the expression of some ideas altogether would clearly be unwarranted.<sup>38</sup>

5. *Free Speech and Capacities to Discover Truth.* — The claim that people are persuaded to believe what is already dominant or what fits their irrational needs is a much more serious challenge to the truth-discovery justification for free speech. If people were incapable of assessing claims of truth, then Mill's argument for free speech would falter at a critical point. People are able to learn some things from experience; if they find that each time they take the bus the trip takes over an hour and each subway trip to the same spot takes only twenty minutes, they come to realize they should take the subway when they are in a hurry. People also learn from communications of the experiences of others; out-of-towners told of the trips of residents will also understand that the subway is faster than the bus. But perhaps on deeper questions, people do not make reasoned judgments about competing positions but merely acquire reinforcement of views that conform with social conventions or serve their particular interests or unconscious desires. In that event, the "marketplace of ideas" of which Holmes speaks gives little promise of yielding truth even in the long run, particularly if the disproportionate influence of a few centers of private power over what gets communicated is likely to be exercised in favor of dominant and comforting views.<sup>39</sup>

The critical question is not how well truth will advance absolutely in conditions of freedom but how well it will advance in conditions of freedom as compared with some alternative set of conditions.<sup>40</sup> Suppose one were highly pessimistic about the capacity of people to ascertain important kinds of truths, but believed that governments that suppress ideas almost always manage to promote falsehoods, and, further, that the propensity of officials to support falsehoods flows from the nature of government and is not corrigible. One might then support freedom of speech as less damaging to truth than an alternative

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38. It may, of course, be argued that a principle of freedom of speech largely denies government the power to tell private media what to communicate. The point here, however, is that if the unfairness of the marketplace is raised as an objection to free speech altogether, accepting a version of free speech that allows such regulation makes much more sense than assuming that there is no principled barrier to complete suppression of some ideas. For a critique of a "market failure" model, see Baker, *supra* note 16, at 981-90.

39. See *id.* at 976-80; Ingber, *supra* note 32, at 26.

40. This claim is true at least if some minimum threshold of truth discovery is exceeded. If truth advanced terribly under any conditions but slightly better under freedom, perhaps it would be all right to forget about truth and concentrate on other objectives.

social practice. One's overall judgment on this subject must depend on a delicate judgment about people's responses to claimed truth, about the effects of inequality of private power over what is communicated, and about the soundness of government determinations about valid ideas.

A sensitive assessment requires subcategorization among domains of truth and audiences, and recognition of degrees of possible interference. For example, freedom of speech almost certainly contributes to the understanding of truth in the physical sciences. Although some broad scientific questions are not now answerable with confidence, and although most dominant theories are provisional and will probably not be accepted in some distant future, many important questions have fairly definite answers about which there exists a wide range of agreement.<sup>41</sup> There is also wide agreement that advancement in understanding among persons capable of assessing scientific claims is promoted by freedom of communication within the scientific community, that government intervention to suppress some scientific ideas in favor of others would not promote scientific truth.

For most scientific truths, ordinary people accept as accurate a view that is widely agreed upon among scientists. As to many subjects, people have no psychological investment in one account rather than another. Even when the dominant appraisal is unsettling, the general public is likely to accept it so long as the subject is widely understood to be scientific, the virtually unanimous judgment of scientists is well publicized, and the judgment matters to citizens. This generalization is supported by opinions about the dangers of smoking. Though much uncertainty remains about causes and effects, disinterested experts now agree that substantial smoking poses a serious risk to health and life. This message is one confirmed smokers were psychologically disinclined to accept, but nearly all smokers, in the United States at least, now believe it,<sup>42</sup> although the government has never forbidden communication of the competing message.<sup>43</sup>

Before a general lesson can be drawn about freedom of speech for scientific matters, we need to consider the possibility that broad freedom is unnecessary, only freedom within the scientific community. When the scientific community is relatively united behind judgments, it might make sense to allow contrary views to be presented to scientists but not to the general public, which would only be confused by opposing claims on matters it does not understand. But such a proposal

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41. See T. Kuhn, *supra* note 34.

42. At least they believe it on the general and abstract level. Quite possibly, many smokers do have a hunch that is not rationally based that they will not be seriously hurt by smoking.

43. The example is a less-than-perfect illustration because the government does restrict cigarette advertising on television and radio and requires the printing of a warning on advertisements and on packages of cigarettes.

would be very difficult to carry out within a generally open society. Many scientists teach at universities. Would they have to withhold dissent theories and the evidence for them from students in classes and from graduate students who help with research? Would students who have access be forbidden to disclose to other students? How would the government decide whether a view had become unanimous enough to warrant suppression of competitors? Who would decide exactly which expressions of views fell afoul of restrictions on broad publication? At the least, such a regime would be extremely unwieldy and would require setting up formal channels of communication among scientists not accessible to the general public. By far the simplest way to assure freedom of scientific communication within the community of experts is to have a general regime of free speech for science.

In domains other than the physical sciences, the grasp of truth is much less secure. For many value judgments, no one is a real expert, and for many interpretive judgments about complex historical and psychological questions, experts disagree about many fundamental questions. For subjects like these, confidence in any advance of truth needs to be highly qualified, but these are also the subjects in which judgments by governments are least to be trusted. Accepting of dominant opinion and desirous of preserving its own power, a government deciding what historical, political, and moral ideas to suppress is bound to be affected by aims other than the disinterested pursuit of truth.

Owners and editors of newspapers and television stations and other private individuals with huge influence over the dissemination of ideas will also have their own objectives to pursue; but private influence is a far cry from outright suppression. No private enterprise can prevent others from speaking. On many points, those with private power will have different visions of the truth or will have reasons to present competing claims. Even when that is not the case, competing ideas may gain some access, say through radical professors writing in academic journals, to some part of the public. Furthermore, if government intervention of some sort is warranted to redress an imbalance, regulation, as by the fairness doctrine for television and radio,<sup>44</sup> or government presentation of a competing point of view, is less drastic than outright suppression. One could sensibly support extensive suppression only if one were very skeptical of the ability of people to deal with claims of

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44. According to the fairness doctrine developed by the Federal Communications Commission, broadcasters had to present sides of a topic fairly. An adjunct of the doctrine granted people attacked a right to respond, and a parallel provision required equality of time for political candidates. The Supreme Court upheld aspects of the fairness doctrine against a first amendment challenge in *Red Lion Broadcasting Co. v. F.C.C.*, 395 U.S. 367 (1969), but in the second Reagan Administration, the Commission decided to drop the requirements imposed by the doctrine. See 52 Fed. Reg. 31,768 (1987); *Syracuse Peace Council v. Television Station WTVH*, 63 Rad. Reg. 2d (P & F) 541, 543 (F.C.C. 87-266, released Aug. 6, 1987).

truth and had a great deal more confidence in government than in private institutions.

Given important matters of degree, a comparison between a regime of free speech and one of suppression is overly simple. Indeed, one might look at the question as being how far constraints on conversation<sup>45</sup> imposed by the government will serve the truth. For the government to promote particular messages, as the United States government has done with advertising of the dangers of smoking, is already to depart from a pure marketplace approach to speech. And, if government prohibits some messages in some contexts, as it has done with broadcast advertising for cigarettes, and requires warnings of danger for advertising that is permitted, government is going further and restricting speech. If one concludes that free speech generally is better than suppression for discovering truth, it does not follow that every kind of government restriction on speech will be harmful to understanding truth. Suppose it were proposed that government suppression of scientific ideas is appropriate if, and only if, the following conditions are met: 1) there is virtual unanimity among scientists that the contrary ideas are correct; 2) the subject is one as to which government officials can be relatively dispassionate; 3) public misjudgments are likely; 4) public misjudgments will cause serious harm; and 5) suppression will extend only to communicators who have a dominantly commercial motive. It is at least possible that this and perhaps other modest limits on maximum freedom of speech will contribute to the promotion of truth.

6. *The Scope of the Truth-Discovery Justification.* — A final objection to truth discovery as a justification for free speech requires consideration, as does the appropriate political force of the justification if its intrinsic validity is in doubt. The objection is that even if the truth-discovery argument for liberty has some force, it has no special application to speech. Crudely put, the contention is that the discovery of truth comes from experience as well as speech and that, if valid, the reason should protect all forms of liberty, or many forms of liberty other than speech. The wider applicability of a reason for protecting liberty would not necessarily undercut its relevance for a distinctive free speech principle; the reason might have a special intensity for speech or coalesce in a special way with other reasons in respect to speech. But since truth discovery has traditionally been regarded as such an important support for free speech, it would be troubling if that support applies with equal force to many other activities.

To evaluate the claim that any truth-discovery rationale applies much more broadly, that claim must first be put in a reasonably precise

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45. There is a big step from believing in "constrained conversation"—in the sense of thinking that citizens and officials dealing with public matters in a liberal society should not rely on certain kinds of arguments such as personal superiority or religious insight—to believing that the government should mandate constraints.

and plausible form. Occasional intimations that experience and communication may be substitutable, that one can learn from either,<sup>46</sup> are at most true only at the margins. Experience and communication are both necessary conditions of understanding. Without communicating in language to their fellows, men and women would be incapable of understanding much more than nonhuman animals; without some personal experience of life besides cognitive thought, most ideas would have no reality for people. Only for people who have already received substantial amounts of communication and had substantial experience apart from communication could more of one be a good substitute for less of the other. And even this proposition about substitutability requires substantial qualification. Any sensible thought about communication and experience must recognize that as to some domains of truth personal experience has little to contribute and that for others communication can supply only a pale shadow of understanding; relatedly, though some forms of noncommunicative experience are highly valuable for understanding, other forms teach little about truth in any significant sense.

There are whole domains of knowledge that ordinary living hardly touches. An increase or decrease in my personal noncommunicative liberty will hardly affect my understanding of math or many aspects of the physical sciences. Although scientific experiments involve a kind of experience, and experiments may be indispensable to the learning of some scientific truths,<sup>47</sup> no one individual can perform many complex experiments. For learning the fruits of experiments, even a scientist's overwhelming reliance will have to be on communications about experiments performed by others. In respect to matters like history and politics, the role of personal experience is more complex. One's personal life provides a perspective against which to evaluate competing historical claims, but there are few pieces of ordinary living one can do to increase the ability to assess claims about particular historical events. Active involvement in local affairs may teach a good bit about contemporary political life. Travel can contribute to a grasp of both historical and political truth. A trip to the ruins of Athens can enrich one's appreciation of the ancient Athenian civilization, and a trip to Nicaragua could enlighten perspectives on the revolutionary government there. It would be odd to think that either of these experiences would have much truth value without extensive communication as well, but if travel were forbidden, important sources for truth discovery would be foreclosed.

For some forms of understanding, particular personal experience

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46. See, e.g., F. Schauer, *supra* note 8, at 57 (doubting that communication is a necessary condition for intellectual self-fulfillment); see also Baker, *supra* note 16, at 975 ("the individual is as likely to find needed information in experiences as in speech").

47. An outright ban on experiments with human embryos, for example, would impede discovery of some scientific truths.

is indispensable. If the truth in question is how one feels when one falls in love, has an orgasm, or drinks a lot of alcohol, no amount of reading or discussing can make up for a lack of experience. If the government were capable of foreclosing a kind of experience and did so,<sup>48</sup> it would sharply inhibit appreciation of particular truths of that sort.

Other limitations on liberty touch experiences that have little to do with the discovery of truth in any significant sense. Suppose the government is considering regulating the sale of alcohol, forbidding sales below and above certain prices. The experience of charging a certain price is not a significant avenue toward truth, and a truth-discovery rationale is no reason against the regulation.<sup>49</sup>

The following conclusions may be drawn. There are some basic aspects of human understanding, or understanding within a certain culture, that cannot be fully appreciated without immediate experience. Some particular kinds of experience, such as experiments and travel, may either be indispensable or a substitute for listening to communications. Other liberties of action bear only a remote relation to discovering truth, and for many truths the acquisition of much learning depends almost entirely on communication.

The truth-discovery reason is widely understood to reach activities like experiments and travel, which are properly seen as closely related to liberty of speech. It also underlies solid arguments against forbidding highly significant forms of experience, as Mill recognized in his claim that the interests of human beings as progressive beings were served by acquaintance with a wide diversity of styles of life.<sup>50</sup> Still, the truth-discovery reason has little to do with many liberties, and the connection between understanding and communication is powerful enough to warrant the conclusion that truth discovery is a very important reason for a distinctive principle of freedom of speech.

7. *Acting in Conditions of Uncertainty.* — If the challenges to the truth-discovery justification for free speech are largely misconceived, continued reliance on the justification is clearly proper; but suppose someone entertains much more skepticism about truth discovery than the discussion here reflects. What would be the appropriate practical place of the justification in the face of significant uncertainties about its force? One might say that no justification can stand unless supported by convincing evidence, but a different, more conservative, position values cultural

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48. Governments can forbid drinking alcohol but they cannot forbid falling in love (though they might create conditions that would make falling in love less common).

49. Knowing how it feels to break the law may be a significant experience, but that experience can occur only if liberty is curtailed and is thus not a reason against regulation. Knowing how it feels to set one's own price rather than be restricted may be a significant experience, but a person can have both experiences only if there is both regulation and liberty; so the experience of liberty cannot underlie a truth-discovery argument against any particular regulation, unless regulation is otherwise pervasive.

50. See J.S. Mill, *supra* note 27, at 171-89.

continuity and is modest about powers of rational understanding. If a justification that remains coherent in its premises has long been assumed to support a settled social practice, the justification is entitled to continued weight until the case against it becomes very strong. Since legal interpretation rightly gives effect to the justifications that lay behind the framing of legal norms, that conservative principle is certainly correct for reasoning within the law. Given the desirability of continuity of political institutions, discourse, and values, the principle is also appropriate for nonlegal political assessments. At a minimum the truth-discovery reason for free speech is neither incoherent nor evidently fallacious. This showing is sufficient to warrant continued reliance on the justification in our culture.

### B. *Interest Accommodation and Social Stability*

A good answer to many social problems depends not so much on the discovery of "true principles" as on an accommodation of competing interests and desires. Of course, no sharp line demarcates truth discovery from interest accommodation. Learning someone else's desires is discovery of one kind of truth, and even determining an optimal, or acceptable, accommodation of competing desires or interests can be seen as understanding a mix of relevant facts and values. And when social action (say, abolition of capital punishment) is based on an assessment of empirical information (that capital punishment does not uniquely deter) and a sound resolution of value questions (that retribution is an unacceptable basis for punishment), the decision may still work some kind of accommodation among affected interests. Still, a significant difference in approach remains between seeking to find true principles to resolve troubling issues like capital punishment and seeking to strike a sort of balance among conflicting desires, as in working out a schedule of household responsibilities.

Appropriate accommodations are more likely if those making decisions can assess desires and interests accurately, and communication serves this purpose. Few societies bar the expression of personal feelings and attitudes that contribute to acceptable accommodations in families and other small social units, but many societies proscribe public discussion of significant points of view, and they pay some price in their ability to estimate relevant sentiments within the community.

The interest-accommodation reason for free expression can be challenged on grounds similar to those advanced in respect to truth discovery. It may be said that free expression does not produce an adequate reflection of the spectrum of desires and interests. Because the desires of the rich, powerful, and articulate are given more voice than those of the poor, powerless, and inarticulate, decisionmakers, themselves mostly members of the favored group, get a false picture of what people generally want. The difficulty in respect to "real" interests goes deeper; so great is the control of culture by the privileged that the dis-

possessed lack even the ability to understand what their real interests are; even the expression of their desires is not a reflection of what they genuinely need.

No doubt this picture has much truth. In no society are desires and interests<sup>51</sup> assessed without distortion, and the distortion almost always favors the privileged classes to some degree. But what is the remedy, if any? Would matters be improved if the government suppressed the expression of certain desires and interests? For reasons indicated in connection with truth discovery, it seems highly unlikely that outright government prohibitions would produce a more accurate account of the desires and interests of citizens.

Failures of accommodation are often a source of social instability. Those who are resentful because their interests are not accorded fair weight are likely to be doubly resentful if they have been denied the opportunity to present those interests in the political process. If sufficiently frustrated, they may seek to attain by radical changes in existing structures what they have failed to get from officials within those structures. Though liberty of speech can often be divisive, it can, by fore-stalling this sort of frustration, also contribute to a needed degree of social stability.<sup>52</sup>

### C. *Exposure and Deterrence of Abuses of Authority*

Closely linked to truth discovery and interest accommodation is a consequentialist justification that warrants separate mention because of its historical significance and central importance: free speech as a check on abuse of authority, especially government authority. The idea, powerfully developed by Vincent Blasi in a well-known article,<sup>53</sup> is that if those in power are subject to public exposure for their wrongs in the manner exemplified by journalists' accounts of the Watergate scandal, corrective action can be taken. And if public officials know they are subject to such scrutiny, they will be much less likely to yield to the inevitable temptation presented to those with power to act in corrupt and arbitrary ways.

In major part, the justification based on exposure and deterrence of government abuse can be seen as a subcategory of the truth-discovery justification. When truths about abuse of authority are revealed, citizens or other officials can take corrective action. But an extra dimension of truth discovery is important here. In areas of human life

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51. I accept the basic premise that real interests may differ from desires; but that premise is not defended here nor is attention paid as to how the two things may diverge.

52. Since too much stability is undesirable, especially in the face of serious injustice or outmoded practices, it is very hard to estimate any ideal mix of stability and ferment or to say exactly how free speech affects an existing mix.

53. Blasi, *The Checking Value in First Amendment Theory*, 1977 Am. B. Found. Res. J. 521 (providing both an account of this rationale for free speech and an argument about its implications).

involving choice, what people do is partly dependent on what they think will become known. Most particularly, persons are less likely to perform acts that are widely regarded as wrong and that commonly trigger some sanction if they are not confident they can keep the acts secret. Thus, the prospect of truth being discovered influences what happens; public scrutiny deters. Viewed from the perspective of interest accommodation, a free press that exposes wrongs affects the balance of sensitivity to the interests of ordinary citizens as compared with the interests of the officials themselves and of those to whom they feel especially aligned by mutual advantage or common feeling. Perhaps the benefits of exposure and deterrence reach beyond anything neatly captured by truth discovery or interest accommodation. Apart from truths it actually reveals, and even when what its claims turns out to be inaccurate, a critical press affects how officials and citizens regard the exercise of government power, subtly supporting the notion that government service is a responsibility, not an opportunity for personal advantage.

The ways in which exposures of abuse contribute to healthy government are not limited to liberal democracies. Even for relatively authoritarian regimes in which ordinary citizens have little say about who makes up the government, the threat of exposure can restrain officials from personal abuses of office. In fact, in some countries, such as Yugoslavia, where selection for office remains largely the responsibility of a single party and proposals for complete change of that social system are beyond bounds, press criticism of official inadequacies can be quite sharp.

#### D. *Autonomy and Personality Development*

By affording people an opportunity to hear and digest competing positions and to explore options in conversations with others, freedom of discussion is thought to promote independent judgment and considerate decision, what might be characterized as autonomy.<sup>54</sup> This consequentialist argument connecting free speech to autonomy is not true by definition. Freedom of speech would not promote autonomy in this sense if it failed to bring the range of relevant considerations as effectively before people as would a structure of discourse controlled by government, or if, despite opportunities to converse and exposure to more of the relevant points of view, people in a regime of free speech passively followed the opinions of persons in authority or decided on the basis of irrational passions. The factual premises of the claim about autonomous decisions are that when all ideas can be expressed, people

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54. See D. Richards, *supra* note 37, at 167; see also S. Shiffrin, *The First Amendment, Democracy and Romance* (forthcoming) (stressing the role of free speech in protecting those who "speak out against . . . existing institutions, habits, customs, and traditions").

will be less subject in their decisions to the dictates of others and will be encouraged to exercise this independence in a considerate manner that reflects their fullest selves. The supposition is not that freedom of speech will actually produce fully autonomous persons, or even that by some measure it will produce people who are more autonomous than not; the claim is only that people will be more autonomous under a regime of free speech than under a regime of substantial suppression.

Any attempt to establish the claimed factual links convincingly faces severe difficulties. It is very hard to compare degrees of autonomy among citizens of different societies, and whether a country enjoys free speech is only one of many relevant cultural factors. Moreover, it is possible that a certain kind of freedom lulls people into a passive acceptance of things as they are, whereas stark suppression forces them to focus on their values. As evidence of the dangers of the "repressive tolerance" of freedom, it is sometimes remarked that political discussions at the dinner table in countries tending toward totalitarianism have a liveliness that is lacking in liberal democracies. Yet lively conversation is sometimes an outlet for those incapable of making choices that influence events; and the liveliness of ordinary conversation under the most oppressive regimes, such as Nazi Germany, was certainly not great. Matters of degree are important here, and confidence in generalizations must be modest; but we are warranted in believing that government control of communication usually tends to induce unreflective reliance on authority and that, if one regards societies in history, comparative autonomy of individuals is linked to relative freedom of opinion.

If one grants that free speech contributes to autonomy, there is still the question why independence of judgment and considerate decision are good. It may be believed that those who decide for themselves and in a rational manner are acting in a more distinctly human, and intrinsically better, way than those who passively submit to authority; then these personal qualities will be valued for their own sakes. The qualities may also be sources of achieving other values. For example, despite the burden of anxiety that often accompanies serious personal choice, many people can work out for themselves a style of life that is more fulfilling than what they could achieve by simply conforming to standards set by others. Both the valuation of autonomy for its own sake and the belief that it contributes to other satisfactions are aspects of traditional liberal theory.

The practice of free speech enhances the lives of those who seek to communicate in various other ways. For the speaker, communication is a crucial way to relate to others; it is also an indispensable outlet for emotional feelings and a vital aspect of the development of one's personality and ideas.<sup>55</sup> The willingness of others to listen to what one has

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55. See M. Redish, *supra* note 14, at 20–30 (arguing that free speech fosters the

to say generates self-respect. Limits on what people can say curtail all these benefits. If the government declares out of bounds social opinions that a person firmly holds or wishes to explore, he is likely to suffer frustration and affront to his sense of dignity.

Because communication is so closely tied to our thoughts and feelings, suppression of communication is a more serious infringement on our personalities than many other restraints of liberty, but some noncommunicative restraints, for example, those relating to sexual involvements or drug use, may equally impair personal self-expression in a broad sense. An argument based on the value of liberty as an emotional outlet and means of personal development is not restricted to speech alone. Indeed, it may reach widely and strongly enough to some other matters so that alone it would not warrant anything properly identified as a distinctive principle of free speech. But if a principle of free speech is supportable on other grounds, this justification does provide an extra reason why speech should not be prohibited and may help determine what the boundaries of protected speech should be.

#### E. *Liberal Democracy*

Arguments from democracy have been said in a comparative study to be the "most influential . . . in the development of twentieth-century free speech law."<sup>56</sup> The claim that free speech contributes importantly to the functioning of liberal democracy and to the values it serves is largely reducible to the reasons already discussed as they apply to political discourse and decisions and to the participation of people in the political process. A liberal democracy rests ultimately on the choices of its citizens. Free speech can contribute to the possibility that they, and their representatives, can grasp truths that are significant for political life; it can enhance identification and accommodation of interests; and it can support wholesome attitudes about the relations of officials and citizens.<sup>57</sup> Government officials are especially to be distrusted in deciding what political messages may be heard because of their interest in staying in office and in promoting the political ideas in which they believe. And government suppression of political messages is particularly dangerous because it can subvert the proper functioning of ordinary

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development of the individual's human faculties and facilitates the making of life-affecting decisions); Baker, *supra* note 16, at 966, 990–96 (self-expressive and creative uses of speech more fully and uniformly promote the key first amendment values, self-fulfillment and participation in change, than do other forms of speech); Emerson, *supra* note 23, at 879–80 (right to freedom of expression is justified first of all as the right of the individual to realize his character and potentialities through forming his own beliefs and opinions). As these writings reflect, consequentialist arguments in respect to personality development and autonomy are not sharply distinct.

56. E. Barendt, *Freedom of Speech* 23 (1985).

57. See generally A. Meiklejohn, *Political Freedom* 115–24 (1960) (revolutionary self-governing principles of constitution, exercised through a free vote, must be protected by absolute first amendment rights).

political processes that might serve as a check on other unwarranted suppression.<sup>58</sup> Unrestrained speech serves as a check on abuse of office; since citizens' votes matter so much in a liberal democracy, the importance of their being informed of government misconduct is particularly great under that form of government. It has long been assumed, though perhaps hard to prove, that a better informed citizenry will yield a better government and better political decisions.<sup>59</sup>

Whether participation in the political order is deemed uniquely important for people or one of many opportunities for realizing participatory values, that participation can be more autonomous if relevant information and arguments are available; and a regime of free speech may help develop the kinds of self-reliant, courageous citizens that Justice Brandeis holds up as an ideal in his opinion in *Whitney v. California*.<sup>60</sup> Finally, the healthy sense that one is participating as an equal citizen is enhanced if what one believes about politics can be communicated, and speech about injustice can help relieve frustration about an undesired course of political events.

Because a decent political process and informed decision making by citizens are such critical aspects of a model of liberal democracy, and because government suppression of political ideas is so likely to be misguided, the application of a principle of freedom of speech to political affairs is centrally important. The sorts of underlying consequentialist reasons for freedom are not radically different for political speech than for speech about nonpolitical facts and values, but these reasons take on extra weight when political matters are involved.

#### F. Promoting Tolerance

It has been suggested in a thoughtful recent book by Lee Bollinger that the main modern justification for a principle of free speech is its capacity to promote tolerance.<sup>61</sup> The basic idea is that if we are forced to acknowledge the right of detested groups to speak, we are taught the

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58. This, it seems, is the main reason why the fact of a majority vote to suppress is not sufficient. Even a majority should not be able to undermine the conditions for a fair political process. See J. Ely, *Democracy and Distrust* 135–36 (1980).

59. This conclusion does not itself depend on a presumed equality of all citizens. Even if some citizens could not vote, as women in the past could not, or citizens had weighted votes, there would still be strong reasons for each citizen to be as fully informed as possible. People whose votes count less than others need to be informed, as do nonvoters who talk with voters about public matters.

60. 274 U.S. 357, 375–77 (1927) (Brandeis, J., concurring); see Blasi, *The First Amendment and the Ideal of Civic Courage: The Brandeis Opinion in Whitney v. California*, 29 Wm. & Mary L. Rev. 653, 679–83 (1988).

61. L. Bollinger, *The Tolerant Society* (1986). The book leaves some doubt how far more traditional justifications that lie in the background still have force and how far the tolerance justification applies to matters other than dissenting and extremist speech. For a thorough and perceptive review of the book, see Blasi, *The Teaching Function of the First Amendment* (Book Review), 87 Colum. L. Rev. 387 (1987).

lesson that we should be tolerant of the opinions and behavior of those who are not like us. Almost certainly the core of Bollinger's claim is true; living in a regime of free speech helps teach tolerance of many differences, just as living in a regime of religious liberty helps teach tolerance of religious diversity. But it does not follow either that promoting tolerance is now the primary justification for free speech or that attention to tolerance should play the critical role in decisions whether to restrict speech.

If it is true that people in liberal societies have so internalized a norm of free speech that traditional justifications are no longer extensively argued, and the potential acts of suppression these justifications cover most strongly are not even attempted, that does not mean these justifications have somehow been supplanted by the aim of promoting toleration. And, even if Dean Bollinger is right that the tolerance justification has more force than any other for the extremist destructive speech of the Nazis,<sup>62</sup> it is not the main justification for many other forms of speech. Given the assumption that broad tolerance of how others live can be encouraged in different ways, it is doubtful that one would introduce and defend a principle of freedom of speech absent other more basic justifications, and it is questionable whether a persuasive argument against particular suppression can be grounded mainly in the tolerance justification.<sup>63</sup>

#### IV. NONCONSEQUENTIALIST JUSTIFICATIONS

Not all arguments for free expression rest on desirable consequences; some liberal conceptions of the relationship between state and citizen may suggest a liberty of citizens to express opinions that is independent of the likely consequences of prohibition. As the phrase "liberal conceptions" implies, these justifications draw more distinctly on characteristic value premises of liberal theory than do the consequentialist justifications, though embedded in many of the latter are common liberal assumptions about facts and values.

##### A. *Social Contract Theory: Consent and the Private Domain*

The Anglo-American tradition of liberal democracy has historically been linked to a theory of social contract, which grounds the legitimacy of the state in the consent of the governed and establishes significant limits on the authority of government. According to John Locke, whose views greatly influenced the revolutionary generation of Americans, the

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62. L. Bollinger, *supra* note 61, at 126–30.

63. See Schlag, *Freedom of Speech as Therapy* (Book Review), 34 UCLA L. Rev. 265, 281–82 (1986). One of the great strengths of Bollinger's book is its illuminating analysis of dimensions of tolerance. Since too much tolerance, as he recognizes, itself presents social dangers, notably passive acceptance of injustice, the use of tolerance to decide whether to suppress is troublesome. See L. Bollinger, *supra* note 61, at 140–44.

legitimate authority of government is based on consent and is limited to the protection of rights and interests that individuals could not adequately safeguard.<sup>64</sup> Individuals entering into a social contract consent to government power to secure their lives, liberty, and property; but they do not give the state authority to interfere in other domains. In his *Letter Concerning Toleration*,<sup>65</sup> Locke employs this analysis to put control of religious beliefs and expressions outside the ambit of secular authority, but his conclusions have broader implications, reaching all states of mind and activities that do not threaten interference with the limited aims a government may permissibly have.

Locke apparently supposed that at some early stage in history people actually entered into a social contract. That is implausible, but his theory can be interpreted in a hypothetical way, as indicating the form and purposes of government to which individuals leaving a state of nature would consent. To be morally legitimate a government needs to take this limited form and pursue only the prescribed purposes. Even in this hypothetical version, the theory is now highly controversial, because it posits individuals outside of organized society with needs, desires, talents, and property. Such an approach pays insufficient regard to the extent to which human nature and human purposes are themselves determined by organized society, and it underestimates the positive contributions that society and government can make to human flourishing. Still, the ideas that government should take a form to which people do or would consent and should do only those things that people need it to do (or that it is uniquely suited to accomplish) retain a powerful appeal in liberal societies.

The implications of these ideas, the conditions of consent and the concept of limited government, reach far beyond speech but they have considerable relevance for it as well. No doubt valid consent to something can often be based on less than full information, but a problem arises when the authority that seeks consent also controls available information. If someone asks my agreement to a course of action and then actively conceals much relevant information that would affect my judgment, my “consent” is of lessened or no effect. Under social contract theory, a government is legitimate only if it receives or warrants consent from the people under it. It may be debated exactly what conditions are required for valid actual consent, or for the hypothetical consent of persons whose natures and social conditions fit some model.<sup>66</sup> However, a claim of actual consent would certainly be under-

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64. J. Locke, [Second] Treatise of Civil Government, in 5 The Works of John Locke §§ 123–131 (1963) (1st ed. London 1690). But see G. Wills, *Inventing America* 167–74 (1978) (suggesting that the influence of the less individualist Scottish “common-sense” philosophy was greater than has been commonly realized).

65. See J. Locke, A Letter Concerning Toleration, in 6 Works of John Locke *passim* (1963) (1st ed. London 1689).

66. See the original-position analysis of J. Rawls, *A Theory of Justice* 136–42

mined if information highly relevant to evaluation of the government was systematically suppressed; rational actors in some idealized setting could not be expected to give valid consent in such circumstances and would be unlikely to approve in advance a regime that would conceal such information from actual citizens.<sup>67</sup> Thus, the idea that government should be of a kind that people would consent to, and the idea that actual citizens should have the opportunity to consent to the legitimacy of their governments, underlie a substantial argument against the suppression of political ideas and facts, even when a present majority approves that suppression.

The notion of limited government most obviously constrains what can count as harms and proper purposes for a liberal society. Suppressing expressions of belief simply to prevent mistakes about religion or aesthetics would not, for example, constitute a proper purpose. And the propriety of suppressing obscenity because it tends to make those who look at it unhappy would be doubtful, since liberal governments should not often be protecting individuals against themselves.

Most claims in favor of prohibiting speech in modern Western societies do not rest on asserted harms that are controversial in this way, perhaps partly because critical assumptions about the limits of government are deeply entrenched. Usually the harm that is to be avoided by prohibiting speech is a harm that a liberal government undoubtedly can try to prevent. But questions about limits on government power may remain—more subtle questions about the remoteness of the prohibited speech from the asserted harm and the extent to which the government may interfere in a normally private realm to accomplish concededly valid objectives. To take an extreme case, imagine a proposal that, because the attitude of racial prejudice generates the social harm of racial discrimination, the government should undertake compulsory psychological conditioning to erase that attitude from individuals who have

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(1971), which contemplates rational actors knowledgeable about general facts but ignorant about their own characteristics making a self-interested choice about principles of justice.

67. In considering possible hypothetical consent one needs to think of two stages or aspects. The first involves the conditions under which the hypothetical actors consent. As to these, it is hard to imagine any model that permits actively misleading the actors about true facts (although they may be in ignorance of certain facts, especially relating to their own personal talents and position). The second stage involves the conditions of consent for an actual society that the hypothetical actors would choose. It is conceivable that actors deciding in hypothetical "presocial" conditions might knowingly consent to live in a political regime that would then engage in active suppression of important political ideas, so that consent in the regime would be given in conditions of substantial ignorance. They might do so, for example, if their judgment (as hypothetical rational beings) was that actual people are so irrational and destructive that necessary social solidarity can only be achieved by the government rigidly controlling opinion. The sentence in the text assumes that the factual judgment of the hypothetical actors would not lead them to confer such unbounded power over ideas to the government.

it.<sup>68</sup> Almost everyone would agree that such an interference with the private domain would be unacceptable,<sup>69</sup> and many would say that the connection between private thought and harmful act is too remote or indirect to warrant social control, even though the government's ultimate objective is appropriate.<sup>70</sup> Similar concerns would be raised if instead of trying to control thoughts themselves, the government forbade all expressions of racial prejudice. The communication of attitudes would be regarded as closer to the private domain of having the attitudes than to the public domain of acting upon the attitudes in a socially unacceptable way.

In summary, the traditional idea of limited government operates at two levels with respect to free speech, setting some constraints on appropriate government objectives and requiring that the connection between prohibited speech and social harm be reasonably direct. Although social contract theory cannot plausibly be thought to yield the conclusion that all communication must be left untouched by government prohibition, the theory may illuminate some inhibitions on government interference with private individuals.

### B. *Recognition of Autonomy and Rationality*

Respect for individual autonomy may curb interference with expression. Whether or not speech actually contributes to the development of autonomy in citizens, there are two related nonconsequentialist arguments that the government should treat people as it would treat autonomous persons. Of course, every government prohibition of action interferes with free choice, and therefore with the exercise of autonomy. If autonomy is to undergird a principle of freedom of speech, a notion of autonomy is required that has some special relation to communication and that helps draw lines between permissible and impermissible regulation.<sup>71</sup>

The most straightforward claim is that the government should always treat people as if they were rational and autonomous by allowing them all the information and advocacy that might be helpful to a rational, autonomous person making a choice. This claim focuses on the autonomy of the recipient of communication. As Thomas Scanlon has

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68. This example assumes what not everyone accepts, that a liberal government can properly prevent "private" racial discrimination in housing and employment.

69. To be more precise, one would need to distinguish children from adults and coercive from educational efforts to influence thoughts. The government's latitude with respect to school children is greater in some ways than its latitude with respect to adults. Even as to adults, education to influence thoughts may be warranted. What are objectionable are coercive efforts to invade the private domain.

70. Edwin Baker's "liberty model" for free speech, Baker, *supra* note 16, at 990–1009, might be regarded as in part an elaboration of an idea of limited government, although Baker does not subscribe to social contract theory.

71. Two writers who place great emphasis on respect for autonomy are D. Richards, *supra* note 37, at 85, 167–69, 183; and Baker, *supra* note 16, at 991–92, 998.

put it, “[a]n autonomous person cannot accept without independent consideration the judgment of others as to what he should believe or what he should do.”<sup>72</sup> A principle that the government should always treat its citizens as autonomous would not necessarily lead to freedom for every kind of communication—outright lies and subliminal manipulation may not contribute to autonomous choice and might be restricted. But a strong version of a principle that the government must always treat citizens as autonomous by maximizing opportunities for informed choice would be powerfully protective of many kinds of speech.

The difficulty with the principle in this strong form lies in its implausibility. The government must protect citizens from social harms, and many fellow citizens do not act in a rational and autonomous way. If some communications are especially likely to lead irrational people to do harmful things, why must the government permit them access to those communications as if they were rational and autonomous, rather than protecting potential victims of their irrational actions? Few suppose that compulsory commitment of insane people who are demonstrably dangerous to others is a violation of liberal government; we cannot rule out in advance the possibility that government may regulate communications in a manner that takes account of frequent deviations from an ideal of autonomy.

Furthermore, a critical ambiguity lurks in the concept of rationality and autonomy. Does a rational and autonomous person always act with appropriate regard for the interests of others, or might such a person pursue his own interests unjustly at the expense of others? If it is supposed that the rational, autonomous person always acts morally, then such a person can be trusted with as complete information and advocacy as is possible. In that event the only worry about treating actual people as rational and autonomous is how far short people fall of being rational and autonomous. Matters are more complicated if it is supposed, to the contrary, that rational, autonomous people may freely choose to pursue their own interests immorally. In that case, were rational, autonomous people given full information about how to engage in undeterrable cheating on their income taxes, many would take advantage of the information by cheating. A principle ensuring full freedom of speech might thus lead to social harms that could be avoided if some information were suppressed. One might contend that the government’s treating people as autonomous is more important than preventing the social harms that would result from full information, but a defense of that position would then be needed.

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72. Scanlon, *A Theory of Freedom of Expression*, 1 Phil. & Pub. Aff. 216 (1972).

In an article<sup>73</sup> whose major thesis he no longer defends,<sup>74</sup> Thomas Scanlon develops a somewhat more complex claim about autonomy and expression. He takes as a standard for the limits of legitimate government "the powers of a state . . . that citizens could recognize while still regarding themselves as equal, autonomous, rational agents."<sup>75</sup> In this form the claim in favor of treating people as autonomous is grounded in a version of social contract theory that asks what rational, autonomous people would agree to. This extra step actually eliminates assurance that the government should treat people as autonomous and rational on every occasion. For the reasons that have just been rehearsed, rational, autonomous people deciding on the general limits of government interference would want to protect themselves from harms wrought by irrational people and by rational, immoral people (Scanlon is quite clear that his notion of autonomy and rationality does not guarantee moral action).<sup>76</sup> To protect themselves from those harms, rational, autonomous people might agree to constraints that would inhibit to some degree the extent to which all citizens, including themselves, would have available information and advocacy that would maximally serve rational and autonomous choice.

In brief, rational, autonomous people setting limits on government might well conclude that the government should not always allow people everything a rational, autonomous person would want to have in making a particular choice.<sup>77</sup> And if one simply asserts a principle that the government should never act to inhibit conditions for rational, autonomous choice, it is hard to see how that principle could be supported.

What may remain is a less rigorous standard, namely a premise of liberal democracy that human beings are largely rational and autonomous and should be treated in that way. That a proposed prohibition would not treat people in this manner counts against it, and prohibitions that do not respect autonomy may call for especially careful review of possible justifications.

### C. *Dignity and Equality*

A justification for free speech that is closely related to the points just made but that focuses on the speaker more than his listeners is the

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73. Id. The article and its claimed connection between freedom of speech and autonomy are perceptively criticized in Amdur, Scanlon on Freedom of Expression, 9 Phil. & Pub. Aff. 287 (1980).

74. See Scanlon, *supra* note 23, at 533–34.

75. Scanlon, *supra* note 72, at 215.

76. Id. at 215–22.

77. See id. Scanlon suggests that an autonomous decision permitting the government prospectively to disallow harmful expression would not jeopardize autonomy as long as the actor retained the freedom to judge independently whether the government's assessment was correct; for Scanlon it is the absence of valid information on which to base this judgment that constrains autonomy.

idea that the government should treat people with dignity and equality. As a matter of basic human respect we may owe it to each other to listen to what each of us has to say, or at least not to foreclose the opportunity to speak and to listen. Under this view, suppression represents a kind of contempt for citizens that is objectionable independent of its consequences; and when suppression favors some points of view over others, it may be regarded as failing to treat citizens equally.

How to take this argument depends on whether any infringement of liberty impairs dignity and any infringement that is significantly selective impairs equality. Many actions that people would like to engage in must be restricted, and some of these restrictions, for example, denying the right to practice medicine to those not certified in a prescribed way, are bound to be "selective." The concerns about dignity and equality may seem not to be specially related to speech but to be arguments, perhaps rather weak ones, in favor of liberty generally.

There may, however, be a tighter connection between restrictions on communications and affronts to dignity and equality. Expressions of beliefs and feelings lie closer to the core of our persons than do most actions we perform; restrictions of expressions may offend dignity to a greater degree than most other restrictions; and selective restrictions based on the content of our ideas may imply a specially significant inequality. So put, the notions of affront to dignity and equality bear a plausible relationship to free speech, though they also reach other forms of liberty, such as liberty of sexual involvement and liberty of personal appearance, that lie close to how we conceive ourselves.

#### D. *The Marketplace of Ideas*

One mistaken or incomplete argument for free speech claims that suppression is wrong because truth should not be impaired and that what emerges from the marketplace of ideas simply counts as the truth under a liberal government. The marketplace of ideas approach, so conceived, is either unpersuasive or must rest on some further unexpressed premises. Holmes's notion that the best test of truth is what is produced from the marketplace of ideas<sup>78</sup> is sometimes taken as a version of the truth-discovery theory already discussed—namely, that there are things that count independently as the truth and that the chances of those being accepted by people are enhanced by a marketplace of ideas. On that account, whether free speech contributes to truth is a factual question, however hard to answer. The alternative way of regarding what Holmes said is that there really is no test of truth except what comes out of the marketplace, because there is no independent truth. On that interpretation, a normative claim is made that people should accept as decisive the results of a marketplace of ideas rather than the results of some other process. But once the claim

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78. Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

is so understood, the question arises why people should accept those particular results. If the answer is "Because we live in a liberal democracy," the next question is why liberal democracy commits us to the results of a marketplace of ideas rather than, say, the results of democratically determined suppression. An attempt to answer that question returns us to the various justifications already considered. Unless an independent notion of truth is supposed, an argument that truth is what emerges from the marketplace of ideas does not yield distinctive support for a free speech principle.

#### CONCLUSION: THE IMPORT OF THE JUSTIFICATIONS

The nonconsequentialist justifications, like the consequentialist ones, fall short of setting clear principles that can be confidently applied to decide what practices of suppression are unwarranted. What all these perspectives do provide, however, is a set of considerations, a set of standards for the relation of government to citizens, that helps delineate what interferences with expression are most worrisome and that operate as counters, sometimes powerful ones, in favor of freedom.

Assertions of fact and value come to mind immediately as communications evidently covered by the justifications for freedom of speech. Claims about general facts are critical for people's understanding of the world they inhabit, for their choices about how to live, and for their decisions on public issues. The truth-discovery justification applies strongly to general factual statements, and suppression of such statements would undermine independence of judgment and personal development. Many general claims about facts are important to the considered appraisal of government on which consent must rest; a government that recognizes autonomy and dignity will allow speakers to express and listeners to hear such claims about facts.

The reasons for protecting claims of value look similar to those applying to factual assertions, if one believes that all or many value statements are in some sense true or false. But even if one is radically skeptical about the truth or falsity of claims of value, strong reasons exist for extending protection to them. As far as personal dignity and emotional release are concerned, freedom to express one's judgments of value is as important to speakers as freedom to indicate views about facts. Government suppression of talk about values circumscribes the process of self-development, perpetuates institutions that would no longer win knowing acceptance, and frustrates the desire of people to converse with others about matters that concern them deeply.

Claims to coverage become less secure, however, when assertions of fact and value are dominantly aimed at producing specific, often immediate action, and when utterances are primarily something other than statements of fact and value. Requests and encouragements are not such statements, but they are commonly intertwined with claims of fact and value. When a speaker tells young men not to volunteer for

the armed services because the country is fighting an immoral war, she has shown with clarity the practical consequences of her moral beliefs and she has evidenced their intensity. She might be able to indicate those specific consequences and her own intensity while falling short of actually encouraging a course of behavior, but pushing people to communicate in this manner creates certain difficulties. As the speaker comes closer to communicating all the beliefs about fact and value that would be contained in an encouragement, she comes closer to making that encouragement. And speech that matters is less free if ordinary persons must pick their words with exquisite care. If communications had to meet strict standards of correct formulation, people would be hesitant to speak their minds and what they did say would be less an expression of their personality, less an emotional release, than utterances that would come to them more naturally in the absence of constraint. Because requests and encouragements are designed to induce action and because much of what they implicitly communicate about facts and values could be otherwise communicated, they lie at the margin of a principle of free speech; but such a principle cannot disregard them altogether.

With considerations like these in mind, one is ready to move forward and grope with other elements in a theory about free speech and with the fascinating, intricate, and varied questions of how far speech should be left unrestricted in our liberal democratic polity.