

THREE APPROACHES TO FREEDOM OF SPEECH

R. George Wright*

It has been said that in the field of quantum theory, there have been periods when even second-rate scientists could do first-rate work.¹ This raises, however, the possibility that there may also be periods in which even the best theorists in a field can make contributions that rate only as good. It is proper to classify each of the free speech writers discussed as first rate. But it is also possible that the age in which they write inhibits the production of genuinely great work with a genuinely common goal.

The underlying problem for today's free speech theorists is no doubt multifaceted. But one important aspect thereof may involve our collective poring over the glittering remnants of a shattered mirror, even as our understandings of the possible uses of a mirror become increasingly unclear, contested, or unstable.²

In this respect, consider, without the slightest attempt to assess on the merits, the presumptive speech libertarianism of Floyd Adams, the contextually sensitive functional value balancing of Steven Shiffrin, and the broad scope of coverage view of Mark Tushnet, Alan Chen, and Joseph Blocher.

Perhaps our most distinguished free speech litigator-theorist, Floyd Abrams, argues that "the central purpose of the First Amendment was to impose strict limits on governmental authority over religion, speech, and press, and . . . recent arguments, primarily by liberal jurists and scholars, to the contrary are

* Lawrence A. Jegen Professor of Law, Indiana University Robert H. McKinney School of Law

¹ See P.A.M. Dirac, *Directions in Physics* 7 (Heinrich Hora & J.R. Shepanski eds., 1978); Steve Paulson, *My Life With the Dream Team: Freeman Dyson on Working With the Greatest Physicists of the 20th Century* (December 8, 2016), <http://nautil.us/issue/43/heroes/my-life-with-the-physics-dream-team>. See also J.C. POLKINGHORNE, *THE QUANTUM WORLD* 14 (1986) (referring to the "fertility" of the "great harvest period" of 1925-1926 for quantum theory).

² This analogy is to the broader historic scenario depicted in Alasdair MacIntyre, *After Virtue* 1-5 (2d ed. 1984). See *id.* at 2 (referring to "the fragments of a conceptual scheme, parts of which now lack those contexts from which their significance derived"). Put otherwise, freedom of speech as a "form of life" may today lack both internal coherence and sufficient continuity with its previous incarnations. See NORMAN MALCOLM, *WITTGENSTEIN: A RELIGIOUS POINT OF VIEW?* 77 (Peter Winch ed., 1994) ("language-games are internally connected with human activities, forms of life").

unpersuasive.”³ Relatively stringent First Amendment protection is thought to generally lead “to a better-informed public and ultimately a more representative government,”⁴ as well as to the crucial goal of “assuring individual self-fulfillment.”⁵

Abrams rejects the idea that the degree of protection properly accorded to any particular category of speech should directly reflect the perceived net value of the category of speech in question.⁶ The distinctively stringent American protection accorded to hate speech thus reflects not any obliviousness to the costs of hate speech, but a broader sense that “the dangers of permitting the government to decide what may and may not be said, far more often than not, outweigh any benefits that may result from suppressing or punishing offensive speech.”⁷ The view that free speech law should distinctively and especially protect those thought to be marginalized, subordinated, or crucially dissenting, according to Abrams, reflects neither original intent nor a proper sense of the risk therein to the liberties of all.⁸

Steven H. Shiffrin pursues a path remarkably different from that of Abrams, whether in any respects ultimately compatible or not. Professor Shiffrin refers to First Amendment worship,⁹ idolatry,¹⁰ and fetishism.¹¹ Shiffrin’s own summary holds that

the US Supreme Court has wrongly privileged speech over important values including privacy, justice, racial and sexual equality, animal protection, public health, and democracy. I have also argued that it has given short shrift to the importance of protecting dissent and has displayed a conspicuous lack of vigilance in affording constitutional protection to religious

³ FLOYD ABRAMS, *THE SOUL OF THE FIRST AMENDMENT* xix (2017).

⁴ *Id.* at 19.

⁵ *Id.* at 22.

⁶ *See id.* at 41 (referring in particular to the animal crush video case of *Stevens v. United States*, 559 U.S. 460 (2010)).

⁷ Abrams at xvii.

⁸ *See id.* at 27.

⁹ STEVEN H. SHIFFRIN, *WHAT’S WRONG WITH THE FIRST AMENDMENT?* 8 (2016).

¹⁰ *Id.* at 4.

¹¹ *Id.*

minorities. My primary complaint has been the almost total absence of proportion in accommodating conflicting values.¹²

Professor Shiffrin critiques, among numerous other sorts of free speech categories, the Court's commercial free speech protection,¹³ its overturning of restrictions on the sale of some violent video games to minors,¹⁴ and the Court majority's approach to the regulation of what are referred to as animal crush videos.¹⁵

One might say that the views of Floyd Abrams and of Steven Shiffrin, whatever their possible commonalities, tend crucially to amount to orthogonal vectors, with a third such orthogonal vector representing the views of Professors Tushnet, Chen, and Blocher.

The central observation of Professors Tushnet, Chen, and Blocher is in particular that “[n]onrepresentational art, instrumental music, and nonsense . . . all receive constitutional coverage under an amendment protecting “the freedom of speech,” even though none involves what we think of as speech -- the use of words to convey meaning.”¹⁶

Speech for constitutional purposes is then said to sometimes include activities or performances that “do not even involve the transmission of articulable ideas.”¹⁷

¹² *Id.* at 184. *See also id.* at 2, 115. Among the most interesting cases, on this theory, should be those in which traditional or customary views can also be characterized as currently dissenting or minority views.

¹³ *See id.* at 88 (“the commercial speech doctrine was a mess from the outset”).

¹⁴ *See id.* at 71 (“there is not the slightest evidence that the Framers of the Constitution would have thought that violent video games should enjoy First Amendment protection”).

¹⁵ *See id.* at 85 (endorsing the proportionalist interest balancing approach often applied by Justice Breyer, as distinct from a historically frozen categorical approach focusing on either strict or minimum scrutiny. *See supra* note 6 (contrasting view of Floyd Abrams).

¹⁶ MARK V. TUSHNET, ALAN K. CHEN & JOSEPH BLOCHER, *FREE SPEECH BEYOND WORDS: THE SURPRISING REACH OF THE FIRST AMENDMENT* 1 (2017).

¹⁷ *Id.*

And according to the authors, “[i]t must be right that art, music, and nonsense¹⁸ fall within the First Amendment’s sphere of coverage.”¹⁹

The authors are, however, skeptical of the idea that free speech protection for nonrepresentational art, instrumental music, and nonsense can be fully accounted for by any available “master theory.”²⁰ In this limited sense, the authors’ approach can be seen as anti-theoretical, or at least as skeptical of grand theory in the free speech area.²¹ The traditional values or purposes often thought to underlie free speech doctrine²² cannot fully suffice, alone or in combination, to explain the Court’s case law in this respect.²³ Instead, the authors opt for what is known as bricolage, in the form of “cobbling together bits and pieces from a range of approaches to constitutional law,”²⁴ in order to account for the judicial results noted above.

Thus we have Floyd Abrams’s presumptive speech libertarianism, Shiffrin’s contextually sensitive functional value balancing, and the broad scope of coverage view of Tushnet, Chen, and Blocher. It is tempting to suppose that they are engaged, in their clearly distinctive ways, in a common pursuit, and that each of their contributions will eventually be seen to converge on a common truth.

¹⁸ For some purposes, we might want to distinguish between strategic or otherwise pointed nonsense, and something like sheer nonsense with no such pointedness.

¹⁹ *Id.* at 4 (emphasis in the original). *See also id.* at 156-59 (addressing commercial nude dancing cases and free speech values). *See also id.* at 154-56 (expressing difficulty of cases involving local regulation of purely social dancing). The scope of coverage, or the issue of what counts as speech for constitutional purposes, of course says little about the depth or strength of constitutional protection of whatever counts as speech.

²⁰ *Id.* at 8.

²¹ *See id.* at 9.

²² *See id.* at 7 (citing the pursuit of truth or the marketplace of ideas; the facilitation of democratic self-government; and the value of autonomy). It is fair to say that all of these values, and the value of autonomy in particular, have been interpreted in various and often conflicting ways. For background, see Isaiah Berlin, *Two Concepts of Liberty*, in *LIBERTY*, 166 (Henry Hardy ed., 2002) (1958); Joel Feinberg, *Autonomy*, in *THE INNER CITADEL: ESSAYS ON INDIVIDUAL AUTONOMY* 27 (John Christman ed., 2014); Jonathan Jacobs, *Some Tensions Between Autonomy and Self-Governance*, in *AUTONOMY* 221 (Ellen Frankel Paul et al. eds., 2003); GERALD DWORKIN, *THE THEORY AND PRACTICE OF AUTONOMY* 3-20 (1988).

²³ *See* Tushnet, Chen & Blocher at 8.

²⁴ *Id.*

The quantum theory analogy with which we began²⁵ offers the encouraging example of the apparently quite different approaches of Erwin Schrodinger's wave mechanics and Werner Heisenberg's algebraic matrix mechanics. In due time, it was appreciated that these two approaches were, in fact, not only mutually compatible, but mathematically equivalent.²⁶

Perhaps some such consistency, if not a grand synthesis, will prove possible with regard to today's most interesting approaches to the meaning, scope, purposes, and appropriate weight of free speech interests in various contexts. There also remains, however, the possibility that free speech theorists are in the mainstream now pouring over the glittering remains of what they may not invariably recognize as a shattered mirror. Whether it is worthwhile, or even possible, to restore the remnants to something like a mirror, is largely absent from the agenda. The shattered mirror metaphor would suggest that unlike the quantum theorists, today's best free speech theorists are not engaged on a genuinely common project.

²⁵ See *supra* note 1 (including accompanying text).

²⁶ For background, see, e.g., Carlos M. Madrid Casado, *A Brief History of the Mathematical Equivalence Between the Two Quantum Mechanics*, 2 *LAT. AM. J. PHYSICS EDUC.* 152 (2008).