GEORGE LETSAS*

INTRODUCTION TO SPECIAL ISSUE ON SEANA SHIFFRIN'S *SPEECH MATTERS*

(Accepted 26 July 2019)

Charles Fried once remarked in conversation that a theory is not only judged by what it explains; it is also judged by what it *doesn't*. His remark, as I interpret it, was meant to caution against the tendency of seeking to explain a specific part of our moral and political practices while ignoring what explains the remaining parts and how, if at all, the explanations of all the various parts hang together. Much of contemporary legal and political philosophy exhibits this tendency. Monographs and edited collections typically offer piecemeal inquiries about what justifies specific freedoms (such as freedom of contract, speech or religion), rather than explore possible links between them, or ways in which one might be an aspect of the other. The tendency is reinforced by the fact that legal doctrine itself comes demarcated in different fields and sub-fields, which serve – by the mere fact of their institutional significance – as a natural target for philosophical analysis.

There is nothing inherently problematic of course with narrowing down the object of one's philosophical inquiry. And there are known pitfalls in seeking to subsume everything under the imperialism of a unifying grand theory. Yet the tendency of piecemeal philosophical theorizing carries its own risks. One is that of theorists talking past one another. Often, theories that zero in on specific institutional contexts (e.g. the moral justifiability of an existing institutional framework) are presumed to be competing with theories that ex-

* Professor of the Philosophy of Law, UCL.

plore our pre-institutional commitment to certain abstract moral values and principles, even though they might be perfectly compatible.¹ Moreover, taking legal doctrine (e.g. the First Amendment) as the philosophical *explanandum* often ignores the fact that the distinctions between the various freedoms singled out in legal texts may be conventional or historically contingent, bearing little or no intrinsic normative significance.² Another risk is that of offering *ad hoc*, arbitrary explanations of the parts of a practice that a theory leaves unexplained or – worse still – of shunning those parts as morally objectionable.³ But perhaps the greatest risk is an unwarranted commitment to a thin patchwork of pluralistic justifications, when there might be a unifying moral explanation that can offer a deeper – and hence stronger – justification for all the various parts of a practice.

Seana Shiffrin's *Speech Matters* can be seen as a timely reaction to the dominance that piecemeal theories have traditionally enjoyed within the philosophy of free speech. Historically, free speech theory has been dominated by a battle between different liberal rationales for protecting it: speaker-oriented, listener-oriented, truth-seeking and democracy-based. Each one offers partial justificatory grounds and struggles to account for the very diverse forms of speech that we deem worthy of protection, including things like artistic expression, incendiary speech, private diaries, incoherent speech, or banal and repetitive messages. Shiffrin finds the familiar battles between the various free speech camps puzzling: 'Any of these approaches', she writes, 'seems objectionably partial and mysteriously so'.⁴ Instead, Shiffrin seeks to find a deeper connection that is unifying in at least two ways. First, it unifies the dominant strands of free speech theory

¹ See for instance the debate between so-called political and orthodox theories of human rights. See Joseph Raz, 'On Waldron's Critique of Raz on Human Rights' in Adam Etinson (ed), *Human Rights: Moral or Political?* (Oxford University Press, 2018), p. 139.

² For instance, freedom of thought is enshrined in article 9 of the European Convention on Human Rights (ECHR), alongside freedom of conscience and religion, separately from freedom of expression (art. 10 ECHR) and freedom of association (art. 11 ECHR). By contrast, the First Amendment to the US Constitution protects, in the same provision, freedom of speech and freedom of religion, whilst making no explicit reference to freedom of thought or association. Do the two jurisdictions protect the same or different freedoms? Is the textual reference (or lack thereof) to different freedoms evidentiary, or constitutive, of what is legally protected?

³ For a critique of such tendencies in the philosophy of contract law, see George Letsas and Prince Saprai, 'Contract Law Without Foundations', available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3211283.

⁴ *Speech Matters*, p. 83

by showing the more abstract normative presuppositions that they share in common. Second, it draws on values that underpin other salient parts of our moral and political landscape, such as the prohibition on lying, deception and promise-breaking.

Shiffrin finds that deeper connection in what she calls a 'thinker-based' approach. Whether we are engaged in the activities of speaking, listening, or democratic deliberation, we are at all times individuals who value their status as thinkers and value the capacities (rational, moral, emotional or perceptual) that define human agency. *Qua* thinkers, we have a number of fundamental interests, such as interests in developing and exercising our capacities, in knowing others and allowing others to know ourselves, in knowing and understanding the world and our social environment, in developing moral relations, and many others. By focusing on how our status as thinkers necessitates the realization of a number of seemingly disparate interests, Shiffrin believes that we can offer a broad and unified foundation for the protection of freedom of speech. This is because free speech offers distinctive and sometimes unique ways in which thinkers' interests can be realized. We would be unable, for instance, to make ourselves known to others, without the freedom to communicate accurately the content of our thoughts. 'Free speech', Shiffrin argues, 'is essential to the development, functioning and operation of thinkers'.⁵ Its importance is not exhausted by, nor is it ultimately grounded in, the need to avoid paternalism or abuse of power by government, or the need to legitimize the enforcement of democratic decision-making. Speech (the activity) matters because thinkers (the agent behind the activity) matter.

One of the remarkable strengths of Shiffrin's thinker-based approach is the strong normative link she is able to draw between freedom of speech and the wrongness of lying. Just like insincere speech renders communication unreliable, thereby flouting the conditions for moral agency, likewise curtailing speech prevents thinkers from using communication – the only reliable tool they have – in order to realize their interests as human agents. Both the liar and the censor act in ways that are incompatible with the intrinsic role that discursive communication plays amongst equal moral agents. The link pays many novel philosophical dividends,

⁵ Ibid, p. 91.

including revealing the normative inconsistency in the claim – popular amongst constitutional lawyers and judges – that the value of free speech condemns the legal regulation of lying. It also justifies the emphasis that deontological theories have always placed on duties of truthfulness and promise-keeping on one hand and constitutional protection of fundamental freedoms on the other. Much of contemporary political philosophy, particularly the strand influenced by the late work of John Rawls, sees a discontinuity between political and interpersonal morality and is deeply skeptical of justificatory resources premised on thick notions of moral agency. Shiffrin offers us instead an insightful reinterpretation of the Kantian tradition of liberalism, one that sees continuity and unity between our roles as citizens and as general moral agents. She does so with her characteristic philosophical approach, taking morality seriously while being acutely sensitive to the imperfections of human nature.

A mark of an original theory is that it does not in the end leave everything the same. The thinker-based approach has a sharp critical edge, condemning various parts of current US law and practice, such as police misrepresentation of suspects' legal rights during interrogation, or the disciplining of public employees who sincerely voice critical comments about workplace matters. *Speech Matters* however is far from just a book about freedom of speech in the US, let alone about the First Amendment. The theory it advances is aimed at universality and it does in fact travel really well. The emphasis Shiffrin places on self-development, self-knowledge and knowledge of others, as some of the foundational interests for the protection of specific constitutional freedoms (such as freedom of speech) resonates with the primacy afforded to the right to free development of one's personality in many European constitutions.⁶ It also helps to explain why many constitutional and human rights courts around the world struggle to draw sharp conceptual boundaries between the different freedoms protected in bills of rights. Shiffrin's thinker-based approach to free speech for example applies paradigmatically to cases of compelled association and employment dismissal. The European

⁶ This right is typically listed ahead of the fairly standard list of constitutional rights. See e.g. article 2 § 1 of the German Basic Law and article 5 § 1 of the Greek Constitution.

Court of Human Rights, by contrast, has often handled similar cases, not under freedom of expression, but under articles 11 ECHR (right to freedom of association) and 8 ECHR (right to private life).⁷ The European Court is often criticized for not explaining adequately which activities fall within the scope of each enumerated right. Yet the thinker-based approach, which shifts the normative significance away from the activity in question and onto the underlying rationale for protecting it, teaches us that the boundaries between the different fundamental rights are somewhat artificial. The justificatory foundations for each constitutional freedom are ultimately more common than the textual individuation might suggest. *Speech Matters* is effectively a book that should be of interest to anyone interested in the normative foundations of fundamental rights within a liberal constitutional democracy, and not just of freedom of speech.

This special issue of *Law and Philosophy* contains a number of critical comments to the main themes of *Speech Matters*, followed by replies by Shiffrin. It is based on a symposium on the book held at UCL in May 2016, at which the author treated the audience with detailed, engaging and print-ready responses to all commentators. In tension, perhaps, with the argumentative spirit of the book, commentators were asked to focus on one of its six chapters, rather than the thesis as a whole. Kate Greasley and Christopher Mills discuss Shiffrin's account of lying and deception in Chapter One of *Speech Matters*. Prince Saprai explores the account of duress offered in Chapter Two. Eric Barendt critically discusses the thinker-based approach (Chapter Three) and situates it within broader debates in free speech theory. Leslie Kendrick engages with Shiffrin's discussion of the legal regulation of lies in Chapter Four. Micah Schwartzman and Nicholas Hatzis scrutinize the argument advanced in Chapter Five in favor of constitutional accommodation of certain moral wrongs, such as autobiographical lying. Finally, Amanda Greene critically engages with how the duty of sincerity applies to governmental and other institutions, which aim to promote a number of different values (Chapter Six). I would like to thank all commentators for their excellent contributions and for their patience with the rigorous reviewing process of *Law and Philosophy*. I would also like to

⁷ See e.g. *Chassagnou and Others v. France*, 29 EHRR (1999) 615; *Sidabras and Dziautas v Lithuania* 42 EHRR 104 (2004); *Redfearn v. United Kingdom* 57 EHRR 2 (2013); *Fernandez Martinez v Spain* (2014) ECHR 615, Grand Chamber.

thank the journal's editors, Kimberly Ferzan, Larissa Katz and John Oberdiek, for giving me the opportunity to guest edit this special issue and for their invaluable support, assistance and professionalism. Special thanks are also owed to the UCL Faculty of Laws, particularly Dame Hazel Genn and Professor Cheryl Thomas for supporting the symposium, and Cat Balogun for her as ever invaluable administrative assistance.

This special issue would not of course have been possible without Shiffrin's committed participation and co-operation throughout the process, as well as the ample time she has made available, for which we are extremely grateful. Her meticulous replies to all commentators in this issue help, I hope, to clarify and expand on the main arguments advanced in the book, but also to prevent (further) misreadings of them. If I had to highlight one theme in Shiffrin's replies, that would be the recurrent need to stress that the central parts of her argument do not hang on the empirical consequences, important as they might be, of allowing lying or various restrictions on freedom of speech. That her theory should be open to this interpretation is, I think, the result of the pull that consequentialism still exerts on our philosophical thinking, even amongst those who reject it as a moral outlook. *Speech Matters*, with its distinctively deontological approach and philosophical imagination, serves as an inspiration for how to do legal and political philosophy.

Professor of the Philosophy of Law
UCL, London, UK
E-mail: george.letsas@ucl.ac.uk

Publisher's Note Springer Nature remains neutral with regard to jurisdictional claims in published maps and institutional affiliations.