

3-15-2009

Is It Better to Be Safe than Sorry?: Free Speech and the Precautionary Principle

Frederick Schauer

Follow this and additional works at: <https://digitalcommons.pepperdine.edu/plr>



Part of the [First Amendment Commons](#)

Recommended Citation

Frederick Schauer *Is It Better to Be Safe than Sorry?: Free Speech and the Precautionary Principle*, 36 Pepp. L. Rev. Iss. 2 (2009)

Available at: <https://digitalcommons.pepperdine.edu/plr/vol36/iss2/3>

This Symposium is brought to you for free and open access by the Caruso School of Law at Pepperdine Digital Commons. It has been accepted for inclusion in Pepperdine Law Review by an authorized editor of Pepperdine Digital Commons. For more information, please contact bailey.berry@pepperdine.edu.

Is it Better to Be Safe than Sorry?: Free Speech and the Precautionary Principle

Frederick Schauer*

I. CAUSATION AND THE FIRST AMENDMENT

Many of the problems of free speech are problems of causation. More specifically, the vast majority of events in which free speech concerns arise are ones in which an issue is presented about the relationship between some speech act and some consequence alleged to have been caused by that speech act.¹ And it is very much the same when we think, not of individual speech acts and individual consequences, but instead in terms of the causal connection between classes of speech acts and classes of consequences.

* David and Mary Harrison Distinguished Professor of Law, University of Virginia; Visiting Professor of Law, Harvard Law School. This Essay was presented at the Pepperdine University Law Review's Symposium on the First Amendment in the Modern Era, and was written while the author was George Eastman Visiting Professor and Fellow of Balliol College, University of Oxford. A subsequent version was presented at Ono Academic College, Tel Aviv, Israel, where the comments and questions from the audience helped to sharpen the argument.

1. Free speech advocates often claim that governments and others seek to restrict speech with which they "disagree," but that is almost certainly false. See, e.g., Clay Calvert, *Off-Campus Speech, On-Campus Punishment: Censorship of the Emerging Internet Underground*, 7 B.U. J. SCI. & TECH. L. 243, 253 (2001); Nadine L. Strossen, *Hate Speech and Pornography: Do We Have to Choose Between Freedom of Speech and Equality?*, 46 Case WES. RES. L. REV. 449, 454 (1996). Those who would restrict speech with which they allegedly disagree typically maintain that the speech at issue is the *cause* of some consequence they believe undesirable. Sometimes the consequence is uncontroversial, but the question of cause is contested—as with claims that speech will be the cause of terrorism or sexual violence—and sometimes what some think of as a harmful consequence is seen by others as not, as with claims that some speech causes an increase in sexual promiscuity or disrespect for the President. But regardless of the extent and type of disagreement, however, in almost all cases the proponent of a restriction is claiming not that she (merely) disagrees with the speech, but that the speech will be the cause of an unfortunate consequence. We can then debate the extent to which the consequence is actually bad, or we can debate the extent to which the speech at issue will increase its likelihood, or we can debate whether even an increase in the likelihood would justify restricting the speech, but we make little progress when we, usually inaccurately, attribute to those who would restrict a desire to restrict simply because of that disagreement.

That free speech scenarios involve causal relationships is not necessarily to say that identifying the causal relationship—or even the degree of causation—is always, or even usually, a difficult question. In the typical scenario involving offensive speech, for example, there is rarely an issue about whether the utterance involved has caused offense. Thus in *Virginia v. Black*,² there was little doubt as to whether burning a cross adjacent to the home of an African-American caused both offense and fear. Instead, the important question was whether the speech-caused offense and fear could constitutionally permit legal intervention.³ Similarly, in many defamation and invasion of privacy situations, the questions of whether privacy has been invaded or reputation damaged are decidedly subservient to broader policy questions about just which forms of reputation damage and privacy invasion may be punished or sanctioned consistent with the demands of the First Amendment.

In other circumstances, however, the causation question is at the forefront of free speech controversies. Will advocacy of terrorism increase the likelihood of terrorist acts? Will publication of instructions for making bombs⁴ or committing murders for hire⁵ (probabilistically)⁶ cause such acts to occur, in the sense of increasing the chances that such acts will take place? Will endorsing or glorifying sexual violence have an effect on the incidence of sexual violence?⁷ Will advocating resistance to the draft or overthrow of the government produce more draft resistance or more attempts to overthrow the government than would otherwise have been the case?⁸

2. 538 U.S. 343 (2003).

3. See Frederick Schauer, *Intentions, Conventions, and the First Amendment: The Case of Cross-Burning*, 2003 SUP. CT. REV. 197.

4. See *United States v. Progressive, Inc.*, 467 F. Supp. 990 (W.D. Wis. 1979), *mandamus denied sub nom. Morland v. Sprecher*, 443 U.S. 709 (1979).

5. See *Rice v. Paladin Enters., Inc.*, 128 F.3d 233 (4th Cir. 1997).

6. Typically, the law raises two varieties of causation questions. In one, an act has already occurred, and the question is: whom, if anyone, should be held legally responsible for causing that act? This is ordinarily the way in which causation questions arise in tort and criminal law, and such questions have generated a rich body of literature. See, e.g., H.L.A. HART & TONY HONORÉ, *CAUSATION AND THE LAW* (2d ed. 1985); ROBERT E. KEETON, *LEGAL CAUSE IN THE LAW OF TORTS* (1963); Guido Calabresi, *Some Thought on Risk Distribution and the Law of Tort*, 70 *YALE L.J.* 499 (1961). By contrast, in other circumstances the legal issue is about which acts should be prohibited or deterred, in the belief that those acts are the causes of other acts, and in such circumstances the somewhat different idea of probabilistic causation is at the forefront. Then the question is not whether we can predict with certainty that some future act will occur—for the answer to that question is almost always “no.” Rather, the question is whether some alleged cause—smoking cigarettes, for example—raises the probability of some consequence or effect—contracting lung cancer, for example—by a sufficient degree to justify legal intervention against the cause.

7. See Frederick Schauer, *Causation Theory and the Causes of Sexual Violence*, 1987 *AM. B. FOUND. RES. J.* 737 (1987).

8. See *Abrams v. United States*, 250 U.S. 616 (1919); *Schenck v. United States*, 249 U.S. 47 (1919); *United States v. Spock*, 416 F.2d 165 (1st Cir. 1969).

Will advertisements for gambling,⁹ cigarettes,¹⁰ or alcohol¹¹ increase the frequency of such activities? In all of these instances, and many others, issues of causation are highly relevant, and First Amendment doctrine has been shaped, and will continue to be shaped, by the answers that courts, legislatures, and commentators give to such questions of causation.

II. THE FIRST AMENDMENT AND THE PRECAUTIONARY PRINCIPLE

As with many legal questions about causation generally, most of the questions of causation surrounding the First Amendment arise under conditions of considerable empirical uncertainty. We have little idea, for example, about whether a charismatic speaker (or a well-designed website) who urges a repeat of the incidents of September 11, 2001, will increase the likelihood that such incidents will occur again, and if so, by how much. We do not know whether Clarence Brandenburg's calls for "revengeance" against African-Americans and Jews¹² increased the probability of such acts occurring. In his iconic dissent in *Abrams v. United States*,¹³ Holmes was confident that advocacy of draft resistance by the impoverished and socially marginal immigrant whom he described as a "puny anonymit[y]"¹⁴ would do little to cause an increase in draft resistance,¹⁵ but things may not have been so clear a half-century later when the educated and articulate household name of Benjamin Spock urged pretty much the same thing.¹⁶ The advertising industry appears committed to the premise that advertising for cigarettes and alcohol will increase consumption, but the extent of such an increase is not so clear; nor is it clear whether advertising produces a net increase in consumption, or if instead, as the cigarette companies insist, advertising simply facilitates consumer shifting from one brand to another.¹⁷ These examples are hardly unique, and much of First Amendment argument and decision-making takes place under conditions in which crucial questions

9. See *Posadas de Puerto Rico Assocs. v. Tourism Co. of Puerto Rico*, 478 U.S. 328 (1986).

10. See *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525 (2001).

11. See *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484 (1996).

12. *Brandenburg v. Ohio*, 395 U.S. 444, 446-47 (1969) (per curiam).

13. *Abrams*, 250 U.S. at 624 (1919) (Holmes, J., dissenting).

14. *Id.* at 629 (Holmes, J., dissenting).

15. See RICHARD POLENBERG, *FIGHTING FAITHS: THE ABRAMS CASE, THE SUPREME COURT, AND FREEDOM OF SPEECH* (1987).

16. *United States v. Spock*, 416 F.2d 165 (1st Cir. 1969).

17. See, e.g., ROGER BRADBURN, *UNDERSTANDING BUSINESS ETHICS* 73 (2001); Roscoe B. Starek, III, Comm'r, Fed. Trade Comm'n, Address Before the Am. Bar Ass'n: Advertising, Alcohol, and the First Amendment (Aug. 4, 1997), <http://www.ftc.gov/speeches/starek/aba97web.shtm>.

of causality cannot be answered with anything approaching strong confidence.

When we understand First Amendment theory and doctrine as an exercise in determining causation under conditions of uncertainty, we can see a parallel between many free speech questions and what is commonly referred to as the “precautionary principle.”¹⁸ Especially in Europe,¹⁹ but increasingly elsewhere, issues involving the environment, genetically modified foods, space exploration, nuclear weapons, nuclear power, and many others are analyzed through the lens of a principle that tells decision-makers to resolve causal uncertainty in a risk-averse or cautious way.²⁰ That is, even if we are highly unsure of the consequences of, say, genetically modified foods, it is better under conditions of uncertainty to restrict the production and sale of such foods because of the speculative—but possibly catastrophic—effects of their proliferation.²¹ “It is better to be safe than sorry,” the venerable maxim goes; a maxim that grounds a principle of conservatism in the face of causal uncertainty when we are unsure of the likelihood of various consequences—consequences that, should they occur, would almost certainly be dire.

From one perspective, much of American free speech doctrine can be seen as a rejection of the precautionary principle. Under conditions of uncertainty with respect to the potential consequences of speech, it is a mistake, longstanding doctrine maintains, to err on the side of caution.²²

18. See generally ARIE THOUWBORST, *THE EVOLUTION AND STATUS OF THE PRECAUTIONARY PRINCIPLE IN INTERNATIONAL LAW* (2002); David A. Dana, *A Behavioral Economic Defense of the Precautionary Principle*, 97 NW. U. L. REV. 1315 (2003); Jonathan Remy Nash, *Standing and the Precautionary Principle*, 108 COLUM. L. REV. 494 (2008); Leslie Wexler, *Limiting the Precautionary Principle: Weapons Regulation in the Face of Scientific Uncertainty*, 39 U.C. DAVIS L. REV. 459 (2006).

19. See Gary E. Marchant & Kenneth L. Mossman, *Please Be Careful: The Spread of Europe's Precautionary Principle Could Wreak Havoc on Economies, Public Health, and Plain Old Common Sense*, LEGAL TIMES, Aug. 15, 2005

20. See, e.g., JANE HOLDER & MARIA LEE, *ENVIRONMENTAL PROTECTION, LAW, AND POLICY* 15–34 (2d ed. 2007).

21. See, e.g., Margaret Rosso Grossman, *European Community Legislation for Traceability and Labeling of Genetically Modified Crops, Food, and Feed*, in LABELING GENETICALLY MODIFIED FOOD: THE PHILOSOPHICAL AND LEGAL DEBATE 32, 35–36 (Paul Weirich ed., 2007).

22. The common criticism of the precautionary principle objects that the principle ignores even the most elementary conception of expected value. See, e.g., INDUR M. GOKANY, *THE PRECAUTIONARY PRINCIPLE: A CRITICAL APPRAISAL OF ENVIRONMENTAL RISK ASSESSMENT* 9–10 (2001); CASS R. SUNSTEIN, *LAWS OF FEAR: BEYOND THE PRECAUTIONARY PRINCIPLE* (2005); AARON WILDAVSKY, *BUT IS IT TRUE?* (1995); Frank B. Cross, *Paradoxical Perils of the Precautionary Principle*, 53 WASH. & LEE L. REV. 851 (1996). Some argue that our existing decision-theoretic tools can account for the way in which we should worry more about high-danger, low-probability events, rather than about low-danger events with the same probability of occurrence. To impose a precautionary overlay on a rational calculation of expected costs or expected dangers, they insist, is scarcely rational. One rejoinder would maintain that whatever values one inserts into an expected value calculation cannot fully capture the degree of harm that certain environmental and related disasters would bring, and that the precautionary principle is one way of compensating for

Those who urge terrorist acts, or provide instructions or recipes for their commission, may possibly produce catastrophic effects, but the First Amendment, so the doctrine concludes, demands that we take the risk. To put essentially the same point differently, the First Amendment tradition demands that the risk of speech-caused negative consequences be borne by the entire citizenry, rather than being imposed on the speaker.²³ It is dangerous to free speech values, it is said and so the doctrine says, to prefer being safe to being sorry; thus the doctrine commands that here, unlike elsewhere, it is better to be sorry than safe.

As should be obvious, whether we place more importance on being safe rather than sorry—or instead, on protecting a right to free speech that might result in our being sorry rather than safe—depends on what we take to be the catastrophic occurrence.²⁴ The idea of the precautionary principle is that, having identified the possibility of a catastrophic occurrence—whether it be nuclear disaster, environmental upheaval, or the loss of many important species—under conditions of uncertainty, we should err on the side of eliminating those conditions that might possibly produce the catastrophe. Similarly, if in the free speech context we define the catastrophe as the overthrow of the government or a major terrorist attack, a commensurate precautionary principle would demand that we vigilantly restrict speech in the service of guarding against the catastrophe. Actual free speech doctrine, however, demands just the reverse. It requires us to accept the uncertain risk of a catastrophe rather than restrict the speech that might cause it. But if we were to define the catastrophe as the large-scale restriction of speech,²⁵ then we could understand existing free speech doctrine, not as a rejection of the precautionary principle, but instead as an embodiment of the precautionary principle—albeit with a different conception of the catastrophe against which it is necessary, at almost all costs, to take precautions.

this potential under-valuation of certain low-probability catastrophic consequences. Applying the same rejoinder in reverse explains why Learned Hand's "gravity of the 'evil,' discounted by its improbability" version of an expected value calculation in the free speech context, in *United States v. Dennis*, 183 F.2d 201, 212 (2d Cir. 1950), *aff'd*, 341 U.S. 494 (1951), is frequently taken to have ignored or underestimated the free speech values involved.

23. See Frederick Schauer, *Uncoupling Free Speech*, 92 COLUM. L. REV. 1321 (1992).

24. I am grateful for Eyal Benvenisti for very helpful comments and conversation on this point.

25. The ubiquity of "slippery slope" rhetoric in the free speech context is consistent with the view that when it comes to free speech, many people think that we need a precautionary principle with respect to excess restriction of speech, rather than a precautionary principle with respect to the consequences that speech may cause. See Frederick Schauer, *Slippery Slopes*, 99 HARV. L. REV. 361 (1985); Eugene Volokh, *The Mechanisms of the Slippery Slope*, 116 HARV. L. REV. 1026 (2003).

However, we normally think of disasters in terms of physical damage and not the impairment of individual rights, and thus it seems more natural to think of taking precautions against a terrorist attack, unlawful revolution, environmental catastrophe, or genetic disaster rather than precautions against restrictions of free speech rights. And that is why it may be better to think of the First Amendment doctrine as rejecting the precautionary principle rather than just embodying a different one,²⁶ but this is only a matter of form and not of substance. The logical structure of the precautionary principle is indeed a reversible one, and one person's riskiness is another's conservatism, depending on what each values most. To call the First Amendment a precautionary principle of a different stripe is thus not to make an error. Nevertheless, to think of the First Amendment in terms of a rejection of the precautionary principle may better capture the way in which the First Amendment—or at least longstanding First Amendment doctrine—demands that we accept risks of speech-caused catastrophes that, if speech were not involved, we would consider sufficiently important to guard against.

III. THE EMPIRICAL ASSUMPTIONS OF EXISTING FIRST AMENDMENT DOCTRINE

Although rarely framed in terms of the precautionary principle, the issue just discussed is hardly a new one. Holmes relied heavily on causal impotence in *Abrams*,²⁷ and Learned Hand's expected value calculation in *Dennis*,²⁸ with its famous attention to low probability but high danger consequences, can be understood as suggesting that sometimes it is better to be safe than sorry. The question then arises, however, as to whether the

26. Consider, for example, the original "clear and present danger" formula in *Schenck v. United States*, 249 U.S. 47 (1919). By requiring that dangers be clear and present, rather than speculative and distant, in order to be regulated consistently with the First Amendment, even the original articulation of this central free speech idea can be understood as another manifestation of the idea that the First Amendment demands that we be willing to be sorry rather than safe. The same idea, but in an even more extreme version, undergirds the modern understanding of clear and present danger in *Brandenburg v. Ohio*, 395 U.S. 444 (1969) (per curiam). By insisting that potentially danger-causing speech not be restricted unless the danger is likely, the danger truly grave, the advocacy explicit, and the temporal connection imminent, *Brandenburg* demands that we accept that causal speech whose serious causal consequences are, for example, likely but temporally remote, immediate but unlikely, and perhaps most seriously, both likely and non-remote, but produced by something other than speech explicitly urging the consequences. *Whitney v. California*, 274 U.S. 357, 374–75 (1927) (requiring danger to be likely and truly grave to be restricted); *Hess v. Indiana*, 414 U.S. 105 (1973) (Brandeis, J., concurring) (requiring advocacy to be explicit and the temporal connection to be imminent in order to justify restriction); see generally Larry Alexander, *Intent and Freedom of Speech*, in *FREEDOM OF SPEECH AND INCITEMENT AGAINST DEMOCRACY* 101, 118 (Francine Hazan & David Kretzmer eds., 2000); Gerald Gunther, *Learned Hand and the Origins of Modern First Amendment Doctrine: Some Fragments of History*, 27 *STAN. L. REV.* 719 (1975).

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

28. *United States v. Dennis*, 183 F.2d 201, 212 (2d Cir. 1950), *aff'd*, 341 U.S. 494 (1951).

(almost but not quite complete) rejection of the *Dennis* approach in modern doctrine is consistent with what we know about the world in which the Internet dominates, in which September 11 is a reality, and in which instructions for, rather than just advocacy of, catastrophic acts are an omnipresent reality.²⁹ Perhaps the answer is yes, and perhaps there are good normative reasons for adhering to the existing approach. But given that *Brandenburg* has never been applied by the Supreme Court to facts and instructions³⁰ rather than pure advocacy,³¹ and given that the case has never been applied by the Supreme Court to tort actions rather than criminal prosecution, there are good empirical and doctrinal reasons to think carefully about the issue. That is not to say that the existing approach ought to be modified. But the precautionary principle, and its contrast with uniquely American free speech doctrine, may provide a useful way of examining the issues in a careful and analytically rigorous way.

Like *Schenck* and like *Dennis*³² before it, therefore, *Brandenburg* can be understood to be premised on a view about which consequences are in fact likely, about what the causal relationship between speech and such consequences is likely to be, and about just what the dangers of those consequences really are. Legal doctrine is created in light of empirical estimates about the state of the world,³³ and as new events cause us to revise our previous estimates, it should come as little surprise that these new events should cause us to re-examine—which is not necessarily to change—the doctrines that have emanated out of earlier and possibly outdated empirical estimates.

29. Because most free speech commentators are sympathetic to the uniquely protective American approach to freedom of speech, it is not surprising that the literature shows little sympathy for modifying free speech doctrine in light of recent events. See, e.g., GEOFFREY STONE, *PERILOUS TIMES: FREE SPEECH IN WARTIME FROM THE SEDITION ACT TO THE WAR ON TERRORISM* (2004); Laura K. Donahue, *Terrorist Speech and the Future of Free Expression*, 27 *CARDOZO L. REV.* 233 (2005); but see Liezl Irene Pangilinan, "When a Nation is at War": A Context Dependent Theory for the Regulation of Weapons Recipes, 22 *CARDOZO ARTS & ENT. L.J.* 683 (2004).

30. See, e.g., *United States v. Moss*, 604 F.2d 569 (8th Cir. 1979); *United States v. Butorff*, 572 F.2d 619 (8th Cir. 1978).

31. See generally Kent Greenawalt, *SPEECH, CRIME, & THE USES OF LANGUAGE* (1989); Marc Rohr, *Grand Illusion: The Brandenburg Test and Speech That Encourages or Facilitates Criminal Acts*, 38 *WILLAMETTE L. REV.* 1 (2002); Eugene Volokh, *Crime-Facilitating Speech*, 57 *STAN. L. REV.* 1095 (2005); Leslie Kendrick, Note, *A Test for Criminally Instructional Speech*, 91 *VA. L. REV.* 1973 (2005).

32. See William Wiecek, *The Legal Foundations of Domestic Anticommunism: The Background of Dennis v. United States*, 2001 *SUP. CT. REV.* 375.

33. See Frederick Schauer, *Do Cases Make Bad Law?*, 73 *U. CHI. L. REV.* 883 (2006).

In engaging in such re-examination, however, it may be important not to take either the acceptance or the rejection of the precautionary principle as an end point. Rather, bringing the well-known precautionary principle into First Amendment analysis is just a way of reminding us that many First Amendment problems involve assessing speech-produced causation under conditions of uncertainty, and that addressing *that* issue is not simply a matter of accepting or rejecting the precautionary principle, but rather of considering many First Amendment issues as being, at bottom, questions of decision theory. It is to this that I now turn.

IV. FREE SPEECH, THE PRECAUTIONARY PRINCIPLE, AND THE SEARCH FOR TRUTH

In thinking about the First Amendment as a question of decision theory, it is useful to recognize that the issues presented by the precautionary principle, and the framing of free speech questions in precautionary principle terms, have particular relevance in the context of an understanding of freedom of speech that sees its greatest value in its ability to foster the search for truth—the oldest and most enduring of the theoretical justifications for freedom of speech.³⁴ From John Milton's 1644 *Areopagitica*³⁵ to the modern era, advocates of freedom of speech have maintained that an official policy of allowing the expression of the widest possible range of facts, opinions, and ideas is crucial to the acquisition of new knowledge and to the ability for a society to locate, and thus to reject those parts of the received wisdom that are in actuality false.³⁶ Free speech, so it is said, is a necessary condition for the search for truth.³⁷

Although this argument from truth has a distinguished provenance and endures as a civil libertarian slogan, it has not fared nearly as well in the theoretical literature.³⁸ The phenomenon of persistent falsehood—astrology is the frivolous example; the authenticity of the *Protocols of the Elders of Zion*,³⁹ a far more serious one—demonstrates, so the critics say, that a

34. See FREDERICK SCHAUER, *FREE SPEECH: A PHILOSOPHICAL ENQUIRY* 18–34 (1982).

35. JOHN MILTON, *AREOPAGITICA: A SPEECH OF MR. JOHN MILTON FOR THE LIBERTY OF UNLICENCED PRINTING, TO THE PARLIAMENT OF ENGLAND* (1644).

36. See, e.g., Carl Auerbach, *The Communist Control Act of 1954: A Proposed Legal-Political Theory of Free Speech*, 23 U. CHI. L. REV. 173 (1956); Benjamin S. DuVal, Jr., *Free Communication of Ideas and the Quest for Truth: Toward a Teleological Approach to First Amendment Adjudication*, 41 GEO. WASH. L. REV. 161 (1972); William P. Marshall, *In Defense of the Search for Truth as a First Amendment Justification*, 30 GA. L. REV. 1 (1995).

37. See Steven D. Smith, *Skepticism, Tolerance, and Truth in the Theory of Free Expression*, 60 S. CAL. L. REV. 649, 703 (1987).

38. See, e.g., SCHAUER, *supra* note 34; Alvin I. Goldman & James C. Cox, *Speech, Truth, and the Free Market for Ideas*, 2 LEGAL THEORY 1 (1996); Stanley Ingber, *The Marketplace of Ideas: A Legitimizing Myth*, 1984 DUKE L.J. 1.

39. *The Protocols of the Elders of Zion* is a tract, most likely concocted by the Czarist secret

regime of freedom of expression does not necessarily lead to the discovery of truth,⁴⁰ and may at times even impede it. And as a result of such skeptical conclusions about the ability of truth to emerge and about the capacity of falsehood to be exposed, even under strong free speech conditions, various other arguments—for example the relationship between free speech and the mechanisms of democracy,⁴¹ the importance of deliberation in fostering equality and self-governance,⁴² the link between autonomy and the value of unrestricted access to ideas and opinions,⁴³ and the centrality of self-expression to personal identity⁴⁴—have all ascended in importance as the number of adherents to the argument from truth has dwindled.

Yet although the argument from truth has diminished in relative importance in the theoretical literature, its public and rhetorical prominence persists.⁴⁵ Moreover, the argument from truth still provides the basis for

police, describing a fabricated account of a Jewish plot to take over the world. It has since been proven to be a hoax. See Michael J. Polelle, *Racial and Ethnic Group Defamation: A Speech-Friendly Proposal*, 23 B.C. THIRD WORLD L.J. 213, 219 (2003); STEVEN L. JACOBS & MARK WEITZMAN, *DISMANTLING THE BIG LIE: THE PROTOCOLS OF THE ELDERS OF ZION* (2003).

40. A more plausible version of the argument from truth would not make such stringent demands on speech's epistemological reliability. It would recognize that sound ideas do not always prevail in the marketplace of ideas, and that unsound ideas are often accepted despite their unsoundness. But it would maintain that freedom of speech is epistemologically valuable, precisely because the truth of a proposition is a reliable—even if imperfect—predictor of the likelihood that a proposition will be accepted. Whether this is in fact so, however, is an empirical claim subject to testing, and should hardly be taken as axiomatic.

41. E.g., ALEXANDER MEIKLEJOHN, *POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE* (1960); Alexander Meiklejohn, *The First Amendment is an Absolute*, 1961 SUP. CT. REV. 245; ROBERT C. POST, *CONSTITUTIONAL DOMAINS: DEMOCRACY, COMMUNITY, MANAGEMENT* (1995); Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1 (1971); Robert C. Post, *Reconciling Theory and Doctrine in First Amendment Jurisprudence*, 88 CAL. L. REV. 2353 (2000); Martin H. Redish & Abby Marie Mollen, *Understanding Post's and Meiklejohn's Mistakes: The Central Role of Adversary Democracy in the Theory of Free Expression*, Northwestern Public Law Research Paper No. 08-26 (2008), <http://ssrn.com/abstract=1177788>.

42. E.g., CASS R. SUNSTEIN, *DEMOCRACY AND THE PROBLEM OF FREE SPEECH* (1995).

43. See, e.g., Thomas Scanlon, *A Theory of Freedom of Expression*, 1 PHIL. & PUB. AFF. 204 (1972); David A. Strauss, *Persuasion, Autonomy, and Freedom of Expression*, 91 COLUM. L. REV. 334 (1991).

44. E.g., *Ford v. Quebec (Attorney General)*, [1988] S.C.R. 712 (Can.); C. Edwin Baker, *Scope of the First Amendment Freedom of Speech*, 25 UCLA L. REV. 964, 974 (1978); Sheldon Nahmod, *The GFP (Green) Bunny: Reflections on the Intersection of Art, Science, and the First Amendment*, 34 SUFFOLK U. L. REV. 473, 475 n.11 (2001); Martin H. Redish, *The Value of Free Speech*, 130 U. PA. L. REV. 591 (1982).

45. See ERIC BARENDT, *FREEDOM OF SPEECH* 7–13 (1985); Vincent Blasi, *Reading Holmes Through the Lens of Schauer: The Abrams Dissent*, 72 NOTRE DAME L. REV. 1343 (1997); Guy E. Carmi, *Dignity—The Enemy From Within: A Theoretical and Comparative Analysis of Human Dignity as a Free Speech Justification*, 9 U. PA. J. CONST. L. 957 (2007); Kent Greenawalt, *Free Speech Justification*, 89 COLUM. L. REV. 119, 132–33 (1989); Matthew Lynch, *Closing the*

much of the modern discussion—both theoretical and public—of academic freedom and freedom of scientific research,⁴⁶ for here again we see recurring arguments that the importance of allowing free communication and unrestricted inquiry lies in the way in which the lack of restrictions will foster the search for truth and the increase in human knowledge. The argument from truth, with its provenance in Milton, in John Stuart Mill's *On Liberty*,⁴⁷ and in the judicial opinions of American judges like Oliver Wendell Holmes, Learned Hand,⁴⁸ and Felix Frankfurter,⁴⁹ may have receded from the forefront of free speech discourse, but it is very far from having disappeared. And as a consequence of the continuing importance of the argument from truth, it may still be worthwhile to examine the argument, and to examine it in a way that attempts to transcend many of the slogans with which it is traditionally attached.

We associate the argument from truth with literary figures such as John Milton, with philosophers such as John Stuart Mill and Karl Popper,⁵⁰ and with jurists such as Oliver Wendell Holmes⁵¹ and Learned Hand, but at the heart of the argument is a claim that is far less literary, philosophical, or legal than it is *empirical*. The claim that freedom of speech will lead to increased knowledge necessarily presupposes the claim that true propositions are more likely to be accepted than false ones; or to put it more precisely, that the truth of a true proposition has considerable explanatory power in determining whether, for some audience, and in some context, that proposition will be accepted or rejected.

When phrased in this way, it becomes clear that the most realistic form of the argument from truth is one that recognizes its inherently uncertain and probabilistic character. It is of course true that some false propositions are accepted by the population, or by some subset of it, and in some contexts, despite their falsity. But even a plausible version of the argument from truth would not, and could not, deny this. Rather, it would maintain that, although

Orwellian Loophole: The Present Constitutionality of Big Brother and the Potential for a First Amendment Cure, 5 FIRST AMEND. L. REV. 234, 301–02 (2007); L.A. Powe, Jr., *Situating Schauer*, 72 NOTRE DAME L. REV. 1519 (1997).

46. See, e.g., Paul Horwitz, *Grutter's First Amendment*, 46 B.C. L. REV. 461 (2005); Paul Horwitz, *Universities as First Amendment Institutions: Some Easy Answers and Hard Questions*, 54 UCLA L. REV. 1497 (2007); John A. Scanlan, *Aliens in the Marketplace of Ideas: The Government, the Academy, and the McCarran-Walter Act*, 66 TEX. L. REV. 1481 (1988); James Weinstein, *Institutional Review Boards and the Constitution*, 101 NW. U. L. REV. 493 (2007).

47. JOHN STUART MILL, *ON LIBERTY* (David Bromwich & George Kateb eds., 2003).

48. In addition to *Dennis v. United States*, 341 U.S. 494 (1951), see *International Brotherhood of Electrical Workers v. NLRB*, 181 F.2d 34 (2d Cir. 1950).

49. See *Dennis*, 341 U.S. at 546–53 (Frankfurter, J., concurring).

50. See KARL R. POPPER, *THE OPEN SOCIETY AND ITS ENEMIES* (5th ed. 1966).

51. In addition to *Abrams v. United States*, 250 U.S. 616, 624–31 (1919) (Holmes, J., dissenting), and *Schenck v. United States*, 249 U.S. 47 (1919), see *Gitlow v. New York*, 268 U.S. 652, 673 (1925) (Holmes, J., dissenting).

some false propositions are accepted despite their falsity, and some true propositions are rejected despite their truth, it is nevertheless the case that true propositions, just because of their truth, are more likely in numerous domains to be accepted than false ones.

Yet this is hardly self-evident. If we think of truth (or falsity) as one attribute of an articulated proposition, we can see that other attributes would include, for example: the identity of the speaker, the various persuasive or charismatic qualities of the speaker, the consistency of the proposition with propositions already accepted by the audience, the general biases and prejudices and attitudes of the audience, the frequency with which the proposition is asserted, the style or manner in which the proposition is asserted, and many more. At the heart of the argument from truth is the claim not that none of these factors will make much difference in determining which propositions will be accepted, and that even in the face of such phenomena—recognizing that each factor has some explanatory power over which propositions will be accepted or rejected—the truth of a proposition nonetheless has considerable power in explaining why some propositions are accepted and others rejected.

When put in this way, the empirical core of the argument is exposed. That does not make the argument any more or less sound, but it does call into question the basis for the traditional arguments. In *Areopagitica*, Milton asked rhetorically, “Let [Truth] and Falshood [sic] grapple; who ever knew Truth put to the wors, [sic] in a free and open encounter.”⁵² But Milton’s eloquence in posing the question hardly entails the conclusion that he would have been among the people most qualified to answer it. Indeed, and perhaps more controversially, we might say much the same about John Stuart Mill’s claim in *On Liberty* that articulated challenges to received opinion will often, if true and allowed to be circulated, lead to the acceptance of the challenge and the rejection of the previously received opinion.⁵³ So too with Oliver Wendell Holmes’s famous claim that “the best test of truth is the power of [an idea] to get itself accepted in the competition of the market.”⁵⁴ All of these claims may well be true, but to find out if that is the case we might be better off consulting the marketing experts rather than the philosophers and the lawyers.

52. MILTON, *supra* note 35, at 35.

53. See MILL, *supra* note 47.

54. *Abrams*, 250 U.S. at 630 (Holmes, J., dissenting).

V. TOWARDS A DECISION THEORY OF FREE SPEECH

This is not the occasion on which actually to test the empirical claims I have just sketched, but appreciating the empirical nature of the argument enables us to examine the normative free speech claim with considerably greater precision. Implicit in the foregoing is the view that for some members of the population—the public at large, politicians, scientists, etc.—communicating a proposition now thought to be false (for example, that the Holocaust did not happen, that AIDS was intentionally introduced into the population by the American government, or that wearing special diet slippers or diet earrings will help people lose weight)⁵⁵ will increase the acceptance of that proposition if that proposition turns out to be true. And this is, of course, the conventional freedom of expression wisdom, from Milton to Mill to Holmes to the present. What is less conventional, however, is the likelihood that communicating a proposition now thought to be false will increase the acceptance of that proposition by some members of the population even if the proposition is actually false. When we allow people to say that diet slippers help with weight loss, there is a risk that such communications will increase the number of people who believe that proposition, and that the falsity of the proposition, even if it has some explanatory power, will be an imperfect guarantor of its non-acceptance.

The acceptance of false propositions, of course, is a problem only if some harm ensues from it. It may well be that the harms coming from the strangely truth-resistant belief in astrology are small, but it would be hard to say the same thing about the harms coming from acceptance of the belief that garlic rubs are a more effective treatment than anti-retroviral drugs for HIV-AIDS, or that gay men are on average less physically courageous than their heterosexual counterparts. Still, not all false beliefs are harmful, and not all of the harmful false beliefs are equally harmful. So the next step in the analysis would be to say that what is at issue is not simply the question of harm, but rather the question of the expected benefit flowing from acceptance of some belief now thought to be false if it turns out to be true, compared to the expected harm flowing from the increased acceptance of some belief now thought to be false if in fact that belief is in fact false.

The same analysis can be reformulated in terms of the statistician's familiar distinction between Type I and Type II errors. If we label as the

55. See, e.g., DEBORAH E. LIPSTADT, *DENYING THE HOLOCAUST: THE GROWING ASSAULT ON TRUTH AND MEMORY* (1994); ALAN CANTWELL, JR., *AIDS AND THE DOCTORS OF DEATH: AN INQUIRY INTO THE ORIGIN OF THE AIDS EPIDEMIC* (1995); FED. TRADE COMM'N, *DECEPTION IN WEIGHT LOSS ADVERTISING: A WORKSHOP 8* (2002), <http://www.ftc.gov/bcp/workshops/weightloss/transcripts/transcript-full.pdf> ("We're talking about screening out the most egregious examples [of fraudulent marketing]. Weight loss earrings or shoe insoles, pills that tell consumers they can eat whatever they want and still lose weight, and products that make physically implausible claims like lose 30 pounds in 30 days.").

Type I error the non-acceptance of a true belief (and this is of course what most concerned Mill, Mill, and their successors),⁵⁶ and if we label as the Type II error the increased acceptance of a false belief, then the normative or institutional design task is one of weighing the expected costs (or harms) of the Type I error against the expected costs or harms of the Type II error. Yet although this way of putting the issue may now seem obvious, it was not so obvious to Mill, who implicitly appears to have taken the position that the avoidance of Type I errors is overwhelmingly more important than the avoidance of Type II errors, such that it would be worthwhile to endure a substantial increase in acceptance of false propositions in order to avoid even the slightest possibility of missing (non-acceptance) a currently unknown truth.⁵⁷

Mill's implicit calculus may well have been correct, although it is hard to imagine that it would be equally correct for all propositions or for all types of propositions, and for all populations in all contexts. But Mill's hidden presupposition does prompt us to make the calculus even more sophisticated by recognizing three additional features. First, the value of knowledge may in fact be less than infinite. Truth is important, and knowledge arguably more so, but there is scant reason to believe that even the smallest bit of increased knowledge is worth an infinite cost. That truth is valuable hardly seems controversial. That the value of truth is lexically prior to all other values seems considerably less obvious, as is the related idea that truth is not only valuable, but priceless.⁵⁸

Second, it is hardly the case that truth is itself without costs. Truthful invasions of privacy may be among the more common examples, but there are many others. Anyone who has commented honestly on another's appearance or habits has discovered the venerable maxim that "the truth hurts." More importantly, perhaps, is that as science enables us to learn more and more about ethnic, racial, gender, and other differences among people, and about the extent to which, if at all, such differences have a genetic component as well as a cultural one, we ignore at our peril the possibility that science may at some point offer us truths whose widespread acceptance will be severely detrimental to values of equality, democracy, dignity, respect, community, and even public order.

56. See discussion *supra* Part IV.

57. See MILL, *supra* note 47.

58. See Frederick Schauer, *Reflections on the Value of Truth*, 41 CASE W. RES. L. REV. 699 (1991).

Third, as Mill most notably insisted, even falsity has its value.⁵⁹ For Mill, this was the value in fostering a better understanding of propositions that are in fact true, and at times also enabling us to enrich our true propositions by incorporating within them the truths in propositions which are largely false, but it does not take very much imagination to think of various other ways in which acceptance of falsity may have some less obvious benefits accompanying its obvious costs. One, for example, might be the way in which falsity tells us something about its utterer, a phenomenon quite widespread in modern politics. And another might be the way in which false propositions play a valuable role in literature.

These three factors are more than merely interesting complications. They are factors that a fuller decision theory of truth discovery and error identification would incorporate. Such an analysis would thus take into account all of the possible costs and benefits of locating a previously undiscovered truth, and might even recognize that these costs and benefits would be different for different sub-populations of some larger population. This analysis would thus, in theory, allow a determination of the expected cost of failing to locate a new truth and the expected cost of increasing the circulation of a proposition now believed to be false. Moreover, such an approach—as a structure for analysis but *not* as a formula into which numerical variables might be inserted—would enable us with respect to particular propositions, or for the aggregate of propositions of some type, to determine whether the game was worth the candle.

VI. CONCLUSION: SIMPLY A BEGINNING

The foregoing merely scratches the surface of what a full-scale decision-theoretic approach to freedom of speech would contain. For example, the model would have to be expanded to take into account the obvious problem of institutional empowerment. For although it would in theory be possible to make such calculations on a decision by decision, or even proposition by proposition basis, in reality the decision is one of institutional design, in which we are asking less about whether a particular decision to suppress is wise, taking into account all of the above under conditions of uncertainty about the truth or falsity of the suppressed proposition, but about the aggregate consequences of a suppression (or non-suppression) rule, and about the aggregate consequences of suppression and non-suppression institutions.

For these purposes, however, it is not so important that we list all of the possible consequences. What is important is that we recognize both that many seemingly false propositions really are false, and also that the

59. See MILL, *supra* note 47.

circulation of false propositions (and some true ones) is not without cost. Once we take these seemingly non-controversial propositions on board, as much of the (especially American) free speech culture often does not, the path towards a more systematic and decision-theoretic analysis of central issues in the theory and practice of freedom of expression may become substantially easier to follow.

