



Schauer

New Professor, New

Frederick F. Schauer this year joined the faculty at Marshall-Wythe School of Law as an associate professor. He came here from the faculty of West Virginia University College of Law, by way of Cambridge University. At Cambridge he was Visiting Scholar and Member of the Faculty of Law and Senior Member of Wolfson College. Professor Schauer earned degrees from Dartmouth College (A.B., 1967; M.B.A., 1968) and Harvard Law School (J.D., 1972). He is currently teaching constitutional law, jurisprudence, and conflict of laws, and is moot court advisor. He is well qualified for this latter duty by his experience as a finalist, best oralist, and team captain of the Ames Moot Court Competition while at Harvard and his substantial appellate practice as an attorney in Boston.

Professor Schauer's special area of interest is the first amendment. This interest is reflected in his many law review articles and his first book, *The Law of Obscenity* (Washington: B.N.A. Books, 1976). He has recently approached the topic of free speech from a more philosophical point of view; this approach is reflected in a book on which he is currently working, *The Philosophy of Free Speech*. The following sketch of his views is taken from conversations with him and from the manuscript for that book, which he expects to publish within the next year.

'Clearly, speech can
cause harm,' Schauer says

epistemological or metaphysical. Indeed, he hopes to remain epistemologically neutral, for his purpose is not to give a full-blown philosophy *per se* but to give an analysis of free speech that yields a free speech principle, namely, a justification for protecting speech in particular rather than a justification for a more general notion of liberty. Schauer's philosophical touchstone throughout is that if "free speech" means anything there must be a distinct principle, for its absence means "governmental power can be applied as effectively and efficiently in the regulation of speech as in the regulation of any other form of conduct." Schauer therefore rejects the justification of free speech in terms of the value of self-expansion, because almost any voluntary conduct is analytically indistinguishable from self-expression.

Schauer identifies one aspect of the argument from truth, however, as being importantly correct: By focusing our attention on our fallibility and making correction of falsity important, the argument from truth affords us partial justification for distinguishing between governmental suppression of opinion and other governmental action. Just as one person may have difficulty in discerning incorrect beliefs, so too may a governmental body. In fact, Schauer argues, history shows governments often have been incapable of distinguishing truth from falsity. To the extent that we have an interest in correcting our own beliefs we should be reluctant to give others authority to decide what is right or wrong, true or false, protected or suppressible.

He goes on to give detailed critical assessments of several other justifications for freedom of speech, e.g. the argument from democracy, and to pick them over for insights worth preserving; but the point Schauer makes about our fallibility becomes the driving force behind these assessments and serves as the point of departure for his own view. That view is that free speech is primarily a right of the individual against government. It is significantly related to the importance of discovering error in received views of government, where an erroneous received view can have the most harmful effects. This right is not one of the individual *per se*; rather, it is a right of the individual *vis* government. In Hobbes' state of nature there would be no such right. Nor would that right exist in a world in which government could and did always properly distinguish truth from falsity. This is to say that Schauer's free speech principle is instrumental, for it is parasitic on the government's inability always to know what the truth is. This is not to say, however, that holds there would be no free speech if government could properly decide, for some speech might still b

Book, New Approach

By Mary Jane Morrison

The first thing to notice about speech, Professor Schauer says, is that it can and sometimes does cause harm--to the speaker, to other persons, to the state. It can hurt feelings, damage reputations, lead to revolutions. Thus, freedom of speech cannot be justified by arguing in support of freedom for activities, which cause no harm to others. Speech, Schauer notes, is an inherently other-regarding activity, for the very purpose of speech is to have effects on others. Given these two points, why should speech be protected, and for whom should it be protected? These three questions are part of the framework for the analysis Schauer gives the bundle of concepts making up the concept of free speech.

Professor Schauer's method is philosophical by way of being critically analytic, without also being deeply

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governmental incompetency

The search for truth is not
society's only value

free as a consequence of a non-instrumentalist principle that liberty is a good in and of itself.

Thus, in critically examining the conventional and old argument from truth--that speech must be free, discussion must be open, if we are to disseminate truth and discover and correct falsity--Schauer does not rest his evaluation of the argument on an enumeration of the problems of justifying our aim for truth, of deciding what truth is or how it can be known. Instead he argues that although openness of discussion may be a necessary condition for arriving at truth, it is not a sufficient condition because truth is not always what survives open discussion. By failing to establish the appropriate link between open discussion and the survival of truth, he says, the argument from truth fails to explain why open discussion is to be prized. Because the search for truth is not the only value of our society, even were we to accept *arguendo* that open discussion leads to truth, the argument from truth is doomed to failure. It cannot explain and justify the suppression of some speech and must instead result in a virtually absolute freedom of speech.

It is initially counter-intuitive and paradoxical to think of the right to free speech as defeasible by the existence of a more perfect governmental ability to distinguish truth from falsity. Bertrand Russell, practitioner par excellence of the analytic method, once said "the point of philosophy is to start with something so simple as not to seem worth stating, and to end with something so paradoxical that no one will believe it." Schauer starts with the two obvious points that speech can cause harm and that governments cannot always discern what is true, and arrives at an analysis that free speech may in some possible world be unnecessary. Of course, Schauer's analysis does not end with this paradoxical, and perhaps dryly logical, result, for he goes on to apply the concept to traditional problems arising from the conflicts of free speech and other societal values in areas such as defamation, obscenity, picketing, and national security. Perhaps one of the characteristics inherent in close analysis is that such analysis uncovers more questions than it answers. As Schauer himself says, his analysis presents new ways of looking at old problems and raises more questions than we would have thought existed here. That is a healthy sign of good philosophical analysis in progress.

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