

# NEW YORK UNIVERSITY LAW REVIEW

VOLUME 55

MAY 1980

NUMBER 2

## PHILOSOPHY OF LANGUAGE AND FREE EXPRESSION

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*Drawing from the philosophy of language, Professor Chevigny offers a rationale for the right of free speech that is independent of individualistic political philosophies. He suggests that since words have no meaning without discourse, free speech depends on a societal commitment to the right of the speaker to reach his audience and the right of the audience to listen and answer. To ignore these rights, he argues, is to ignore the very essence of speech.*

### INTRODUCTION

Infringements of free expression provoke our outrage regardless of where in the world or under what government they may occur.<sup>1</sup> Yet the chief justifications for free expression in Anglo-American law are rooted in theories of individualism<sup>2</sup> and "free trade" in ideas,<sup>3</sup> notions which are rejected in much of the world<sup>4</sup> and perhaps face an uncertain future in the West.<sup>5</sup>

This Article suggests that objections to the suppression of speech, both in this country and elsewhere, are justified by a broader rationale than any of those traditionally advanced. The rationale

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<sup>1</sup> See Universal Declaration of Human Rights, G.A. Res. 217, U.N. Doc. A/810, at 74-75 (1948).

<sup>2</sup> See text accompanying notes 7-26 *infra*.

<sup>3</sup> See text accompanying notes 27-37 *infra*.

<sup>4</sup> See, e.g., Golunskii & Strogovich, *The Theory of the State and Law*, in *Soviet Legal Philosophy* 351, 371-72, 391, 420 (H. Babb trans. 1951); Pashukanis, *The General Theory of Law and Marxism*, in *id.* at 111, 195; Schmidt, *The Citizens' Freedoms*, in *Socialist Concept of Human Rights* 227, 249 (1966).

<sup>5</sup> See R. Unger, *Knowledge and Politics* 7-12, 174-88 (1975).

sketched here draws on the philosophy of language to argue that ideas lose meaning when dialogue is suppressed. It asserts that the source of the right of free expression can be conceived of as running deeper than the received views, down into the nature of speech and discourse itself. The right thus derived is applicable whenever individuals, groups, or governments want to understand ideas or make themselves understood, regardless of their adherence to the notion of a free market or to individualism. Finally, this alternative theory, by clarifying the nature of a right of free expression, casts a new light on some of the problems of speech under American law.<sup>6</sup>

## I

## THEORIES OF FREE EXPRESSION

## A. Individualism and John Stuart Mill

Our most important theories of freedom of thought and expression are traceable, in one way or another, to the writings of John Stuart Mill. In *On Liberty*,<sup>7</sup> Mill based his defense of free speech on the right of the individual to autonomy.<sup>8</sup> He took as fundamental not the right to engage in political debate but the right that we now think of as that of personal privacy, the right to pursue one's life as one pleases.<sup>9</sup> "The only freedom which deserves the name," according to Mill, "is that of pursuing our own good in our own way."<sup>10</sup> Since the right to express and publish one's opinions<sup>11</sup> is essential to this freedom, for Mill the rights of freedom of speech and press were "cognate" rights, inseparable from the underlying right to freedom of thought.<sup>12</sup>

Mill asserted that the core value of autonomy rests on social utility "in the largest sense, grounded on the permanent interests of man as a progressive being."<sup>13</sup> His argument thus involved an individualist premise—that the progress of mankind depends on the mental development of its individual members<sup>14</sup>—and a utilitarian

<sup>6</sup> See text accompanying notes 149-90 *infra*.

<sup>7</sup> J.S. Mill, *On Liberty*, in *Utilitarianism, On Liberty*, Essay on Bentham 126 (M. Warnock ed. 1962).

<sup>8</sup> *Id.* at 137-38.

<sup>9</sup> *Id.* at 226.

<sup>10</sup> *Id.* at 138.

<sup>11</sup> *Id.*

<sup>12</sup> *Id.* at 140.

<sup>13</sup> *Id.* at 136.

<sup>14</sup> *Id.* at 135-36, 160-61.

one—that free expression promotes the discovery and social acceptance of "truth."<sup>15</sup> This dual argument contains an apparent contradiction. On the one hand, Mill argued that no outside force can decide questions of taste and value for the individual, because there is no basis other than a personal one for making the decision. "Men's opinions on what is laudable or blamable, are affected by all the multifarious causes which influence their wishes in regard to the conduct of others, and which are as numerous as those which determine their wishes on any other subject,"<sup>16</sup> he said. As a result, Mill concluded, neither the state nor the majority is competent to prescribe such choices.<sup>17</sup> Nevertheless, despite his apparent denial of the possibility that anyone can ever be certain whether his opinions are true, Mill argued that free expression advances "truth."<sup>18</sup> He entertained what might be called a "discovery" theory, in which truth emerges from individual intellectual effort<sup>19</sup> and accumulates as human society evolves.<sup>20</sup> Mill maintained that dissenting opinions might contribute to the advancement of truth by being "true"<sup>21</sup> or "partly true,"<sup>22</sup> and that even if they were false they could clarify and emphasize truth by contrast with it.<sup>23</sup> These functions, he said, make discourse necessary "to the mental well-being of mankind."<sup>24</sup>

In arguing that suppression of speech threatens the meaning of ideas with extinction,<sup>25</sup> Mill touched on a notion which is at the heart of this Article—that discourse is critical to our understanding of freedom of speech. But because his rationale for free speech was premised on individualism and a preoccupation with "truth," Mill did not develop the notion that discourse is valuable in itself.<sup>26</sup>

<sup>15</sup> *Id.* at 147-49, 155.

<sup>16</sup> *Id.* at 131.

<sup>17</sup> *Id.* at 135; see Schauer, *Language, Truth, and the First Amendment: An Essay in Memory of Harry Canter*, 64 Va. L. Rev. 263, 269 (1978).

<sup>18</sup> J.S. Mill, *supra* note 7, at 142-44, 180.

<sup>19</sup> *Id.* at 160-62.

<sup>20</sup> *Id.* at 171 ("As mankind improves, the number of doctrines which are no longer disputed or doubted will be constantly on the increase: and the well-being of mankind may almost be measured by the number and gravity of the truths which have reached the point of being uncontested."), 212.

<sup>21</sup> *Id.* at 143-61.

<sup>22</sup> *Id.* at 173-80.

<sup>23</sup> *Id.* at 161-73.

<sup>24</sup> *Id.* at 180.

<sup>25</sup> *Id.* at 166 ("The fact, however, is, that not only the grounds of the opinion are forgotten in the absence of discussion, but too often the meaning of the opinion itself.")

<sup>26</sup> Nor has this notion been elaborated by Mill's theoretical descendants. Thomas Scanlon has refined Mill's argument based on autonomy without developing Mill's adumbrations of the value of meaning. Scanlon, *A Theory of Freedom of Expression*, in *The Philosophy of Law* 153

### B. The Market Idea of Liberty

The discovery notion of truth emerges again in the familiar idea of Justice Holmes that "the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market."<sup>27</sup> But the "free trade in ideas" metaphor nevertheless embodies a curious conception. It implies that ideas, like goods, are in some way alike and interchangeable. The intended metaphor is apparently that an idea may be tried out like, say, a suit of clothes, and if in the long run it fails to fit, it may be replaced by another that fits better, as long as there is no restriction on the sale of suits or ideas.

Critics of the metaphor have noticed that it brings together notions that do not dovetail.<sup>28</sup> Free trade in goods was not supposed to lead to anything as grand as "truth," but rather to exchanges that would give the maximum economic satisfaction, based on the money values the purchasers placed on the goods. But "free trade in ideas" implies no corresponding explanation how the competitive market was to decide that one idea was better than another. There is no hard currency in which an idea could be traded; such trade might be a measure of the acceptability or popularity of an idea, but not of its truth. In fact, although Holmes talked of truth, he seems to have

(R. Dworkin ed. 1977). In Scanlon's view, the power of the person to decide, without paternalistic intervention by the state, what he will or will not listen to is inherent in the notion of an autonomous and rational individual. *Id.* at 161, 162-63. The restriction on the state's power to censor rests on an implicit political theory that "a legitimate government is one whose authority citizens can recognize while still regarding themselves as equal, autonomous, rational agents." *Id.* at 161. David Richards has taken the argument a step further by justifying constitutional rights using a contractarian theory of morality based upon a recognition of the absolute autonomy and equality of individuals. D. Richards, *The Moral Criticism of Law* 44-56 (1977). According to Richards, the first amendment protections of speech and press, as well as other constitutional protections, can best be understood as an expression of such a contractarian moral theory. *Id.* at 57. Thus, both Scanlon and Richards provide a justification of free expression based on the sovereign autonomy of the individual, rather than any elaboration on the theme that meaning is important in itself. As a result, in a state in which individualism is not a strong agent for legitimation, these arguments must be expected to have less force.

<sup>27</sup> *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting). The marketplace metaphor as a rationale for the protection of speech is not original with Holmes but long antedates the framing of the first amendment. DuVal, *Free Communication of Ideas and the Quest for Truth: Toward a Teleological Approach to First Amendment Adjudication*, 41 *Geo. Wash. L. Rev.* 161, 188-89 (1972). The concept of the marketplace still exerts a strong influence on the way first amendment issues are framed. See, e.g., *Kleindienst v. Mandel*, 408 U.S. 753, 763 (1972); *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 390 (1969) ("It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail . . .").

<sup>28</sup> See, e.g., M. Shapiro, *Freedom of Speech* 52-53 (1966); L. Tribe, *American Constitutional Law* 576-79 (1978); DuVal, *supra* note 27, at 188; Schauer, *supra* note 17, at 271-72.

believed, like Mill,<sup>29</sup> that there is no standard that can establish the truth of values.<sup>30</sup>

Yet the market metaphor retains its popularity,<sup>31</sup> perhaps precisely because it conceals the painful question how there can be agreement about values in a society of individuals of the sort idealized by Mill. At the same time, it restates the powerful link, historical and cultural at least, if not logical, between economic and political individualism. In the world of work, the individual seeks his own benefit, free of the constraints of government and other individuals. If he makes his decisions to suit his own interest, it is thought that these decisions will in the long run suit the general interest of society as well. Just as economic independence is an essential condition of economic well-being, independence in matters of belief is viewed as necessary for social progress.<sup>32</sup> The individual's right to be sovereign and arbitrary in questions of value is a right that can never be ceded to the state because it is that right that gives the state legitimacy.<sup>33</sup>

### C. Toward a New View

Most commentators on liberal society,<sup>34</sup> whether they reject Western values, like some Marxist jurists,<sup>35</sup> or support them, like Holmes,<sup>36</sup> have supposed that the theory of free speech is linked either to individualism or the need for "free trade in ideas." As a result, it is difficult to find a basis for the right of free speech that would apply to societies that reject these notions, a situation dismaying both for those in conflict with capitalist society who want to

<sup>29</sup> See J.S. Mill, *supra* note 7, at 134-35; text accompanying note 18 *supra*.

<sup>30</sup> See M. Shapiro, *supra* note 28, at 52.

<sup>31</sup> See note 27 *supra*.

<sup>32</sup> The intellectual history of the connection is traced in G. de Ruggiero, *The History of European Liberalism* 23-66 (1959). Such an identity between the two markets is used by Coase, *The Economics of The First Amendment: The Market for Goods and the Market for Ideas*, 64 *Am. Econ. Rev.* 384 (1974), to argue against governmental regulation of economic markets on the ground that such regulation would not be allowed in the market of ideas, *id.* at 388-91. The argument that autonomy for the individual conscience is necessarily linked to a competitive economy is made by, for example, M. Friedman, *Capitalism and Freedom* 11-21 (1962).

<sup>33</sup> G. de Ruggiero, *supra* note 32, at 62; see, e.g., J.S. Mill, *supra* note 7, at 129-30; Scanlon, *supra* note 26, at 170-71.

<sup>34</sup> The leading exception is perhaps Alexander Meiklejohn, who specifically opposed Holmes' market concept of freedom with the idea that free discussion is essential to the conduct of democratic government. A. Meiklejohn, *Political Freedom* 62 (1960). Meiklejohn's argument presents even more problems than the argument from individualism because it is limited to a narrow class of governments and to "political" expression.

<sup>35</sup> See note 4 *supra*.

<sup>36</sup> See text accompanying notes 27-30 *supra*.



protect a right of free inquiry,<sup>37</sup> and for those within it who think that the right should apply in other societies.

In the sections that follow, I outline a theory of the right of free discourse that emerges from developments in the philosophy of language during the past century. Having abandoned the view of language as a "copy" of the "real world," a set of names for objects, and assertions that have meaning only to the extent that they faithfully represent reality,<sup>38</sup> philosophers increasingly think of language as a system of discourse in which assertions can have "meaning" and be "true" not as representations of "reality" but as ideas for which good reasons can be found in other parts of the system of discourse.<sup>39</sup> Essential to the meaning of any particular proposition is its relationship to such a system, a relationship which cannot be established without inquiry into the premises of both the proposition and the system of discourse. This is true for *any* proposition, even if it purports to be "factual" or "scientific."<sup>40</sup> When premises are exempted from discourse, all propositions within the system lose meaning.

This loss of meaning is objectionable for any person or government that purports to act purposively. We assume that every theory or system of political discourse explicitly or implicitly asserts its own meaning and validity. If the lesson drawn from the philosophy of language is correct, that the meaning of statements within a system depends on formulating other aspects of the system through dialogue, then every such theory must allow for dialogue concerning its supporting propositions. In other words, once a theory asserts that it means something, dialogue is necessary to establish that meaning. It follows that any political theory that denies a right of free discourse is internally contradictory since it condemns itself to a loss of meaning.

For persons with doubts about liberalism, free expression remains important despite the vulnerability of its liberal justifications. For persons with no doubts about liberalism, free expression is important for an additional, newly-defined reason.<sup>41</sup> In either case, the

<sup>37</sup> See S. Carrillo, *Eurocommunism and the State* 40-44, 96 (1978); M. Harrington, *Socialism*, chs. 3 & 4 (1972); R. Unger, *supra* note 5, at 277-81.

<sup>38</sup> See text accompanying notes 54-69 *infra*.

<sup>39</sup> See text accompanying notes 72-104 *infra*.

<sup>40</sup> See text accompanying notes 54-106 *infra*.

<sup>41</sup> It is not a principal point of this inquiry to quarrel with the justifications for the right of freedom of speech that prevail in this society. Certainly, in many cases, individualism is an important value that supports free speech rights. And although I have criticized the slogan "free trade in ideas" for its lack of logic, it serves a useful purpose because it conceals within it some of the theory I shall present here. As applied to ideas, the concept of "trade" makes sense only as an obscure approximation of dialogic discourse and the effort to understand.

theory advanced here should strengthen and clarify the right of free speech.

## II

### PHILOSOPHY OF LANGUAGE

#### A. A Copy Theory of Meaning

When Russell<sup>42</sup> and Wittgenstein, before the First World War, saw the universe disclosed by physical science as the model of reality, they embraced logic as the model of philosophy. Logic, they thought, had to be a "mirror image" of the perceived world.<sup>43</sup> For Carnap<sup>44</sup> and Ayer,<sup>45</sup> who shared this positivist outlook, mathematics and science supplied the only test for determining truth. If a proposition was not true or false by definition or did not give rise to an empirical prediction that could, in principle, be verified, the proposition was meaningless.<sup>46</sup> Language was properly a tool for logical analysis of symbols that referred unambiguously to the physical world. The implications and associations of words, their connotations, had no proper place in philosophy.

These ideas initially led Wittgenstein, in the *Tractatus Logico-Philosophicus*,<sup>47</sup> to a strict copy theory of meaning. "A proposition," Wittgenstein wrote, "is a picture of reality. A proposition is a model of reality as we imagine it."<sup>48</sup> Just as written notes are pictures of a piece of music, so propositions are pictures of reality.<sup>49</sup> Words and propositions that do not result from any sensation lack

<sup>42</sup> See, e.g., B. Russell, *Knowledge by Acquaintance and Knowledge by Description*, in *Mysticism and Logic* 209, 219 (2d ed. 1917).

<sup>43</sup> L. Wittgenstein, *Tractatus Logico-Philosophicus* § 6.13 (D. Pears & B. McGuinness trans. 1961) [hereinafter L. Wittgenstein, *Tractatus*]. Similar decisions were made by linguists in constructing a "science of signs" in imitation of the empirical natural sciences and as part of an endeavor to bring all knowledge under the umbrella of a unified science. In dividing the discipline into syntactics, semantics, and pragmatics, its originators made a tight distinction between "meaning" in its referential sense, and "usage," which was thrown in with pragmatics. See C. Morris, *Foundations of the Theory of Signs*, in *Writings on the General Theory of Signs* 13, 21-22, 28, 35, 43 (1971). Even pragmatics was expected to take on some scientific shape over the long run. Rudolf Carnap observed: "pragmatics is an empirical discipline dealing with a special kind of human behavior and making use of the results of different branches of science." R. Carnap, *Foundations of Logic and Mathematics* 6 (1 Int'l Encyclopedia of Unified Sci. No. 3, 1939).

<sup>44</sup> See, e.g., R. Carnap, *supra* note 43, at 6-16, 67-69.

<sup>45</sup> See, e.g., A.J. Ayer, *Language, Truth and Logic* (2d ed. 1946).

<sup>46</sup> *Id.* at 5, 31, 41, 107-10.

<sup>47</sup> L. Wittgenstein, *Tractatus*, *supra* note 43.

<sup>48</sup> *Id.* § 4.01.

<sup>49</sup> *Id.* § 4.011.

sense-content" and are meaningless.<sup>50</sup> Wittgenstein recognized that some words and propositions, such as expressions of value, lack sense-content, but he believed that such expressions are outside the province of philosophy.<sup>51</sup> He wrote that "it is impossible for there to be propositions of ethics. . . .<sup>52</sup> [E]thics cannot be put into words."<sup>53</sup>

To Wittgenstein, evaluative and normative decisions, including practical decisions about what ought to be done, were, as a philosophical matter, impossible to make. There was no method of determining the validity of the social norms on which such decisions might have been based because the basic questions were outside the realm of meaningful discourse—they could not be formulated in terms capable of logical or empirical truth. Under these philosophical conditions, if the notion of a doctrine of rights makes any sense at all, the most appropriate argument for freedom of speech would be that people ought to be allowed to say what they please, at least about questions of norms and values, because what they say is meaningless. The government could have no reason to restrain debate that might continue endlessly without hope of a fruitful result.

### B. Toward a Philosophy of Discourse

Although the retreat from this philosophical dead end for values was difficult, the very questions that the formally logical view failed to account for suggested a way.<sup>54</sup> Philosophy had traditionally asked questions and used words in a way quite different from the one prescribed by formal philosophy of language. To pursue their interest in the connections among logic, language, and reality that originally had

<sup>50</sup> Id. §§ 3.1, 3.13, 4, 5.4733. "Sense-content" is the term proposed by Ayer for the immediate data resulting from a sensation of any sort. A.J. Ayer, *supra* note 45, at 53.

<sup>51</sup> L. Wittgenstein, *Tractatus*, *supra* note 43, §§ 6.52-7.

<sup>52</sup> Id. § 6.42.

<sup>53</sup> Id. § 6.421.

<sup>54</sup> Some problems presented by positivist philosophy no doubt encouraged the change. The copy theory of meaning itself contained transcendental assumptions, assumptions that could not be verified empirically, e.g., that reality is knowable, and, more astonishing, that the structure of logical propositions follows the structure of reality. See D. Pears, *Ludwig Wittgenstein* 45-48, 83-85 (1970); L. Wittgenstein, *Tractatus*, *supra* note 43, § 6.13. Like judgments of value, the reason those transcendental assumptions were true could not be expressed in the language of philosophy. Such things, according to the *Tractatus*, simply "make themselves manifest." L. Wittgenstein, *Tractatus*, *supra* note 43, § 6.522 (emphasis omitted). Among the transcendental subjects that logical language could not describe were the axioms of the *Tractatus* itself; it required retreat to another language to establish the meaning and validity of its terms. Id. §§ 3.332, 4.12, .121; see K.-O. Apel, *Analytic Philosophy of Language and the Geisteswissenschaften* 8-12 (1967). See also Russell, *Introduction* to L. Wittgenstein, *Tractatus*, *supra* note 43, at ix, xxii.

led them to the problems studied by Wittgenstein and his teachers, philosophers could simply investigate what people did with words. This pursuit had much more modest pretensions than a philosophy that tried to justify a copy theory of meaning and a formally logical language. Yet this newer approach excluded nothing from its discourse; an ordinary language philosophy could talk about anything that was in fact talked about in the language. The focus of philosophy was no longer on formal logic, but instead on the question "How do we use a word?"<sup>55</sup>

### 1. Intention and Convention

Rejecting the view that all utterances that are not nonsense must report or describe facts and be susceptible of evaluation as either true or false,<sup>56</sup> J.L. Austin began to explore the influence of the speaker on meaning. Austin recognized that some statements are speech acts that are meaningful but not true or false.<sup>57</sup> Such utterances could be intended by the speaker to convey meaning in somewhat the same way that a gesture is an intentional act.<sup>58</sup> Among other things such utterances might "state something" in a deliberate sense, or they might simply memorialize an intentional act of the speaker.<sup>59</sup> Some English philosophers came to believe that the meaning of words is entirely dependent on the intent of the speaker.<sup>60</sup> But if the *Tractatus*, in entirely excluding the intent of the speaker, ignored the multifarious intentional uses of words, this view slighted the world of listeners, who are supposed in some way to understand or at least to believe what is said or written. It is the intention to communicate that gives rise to a core of conventional meanings to which both speakers and listeners subscribe.<sup>61</sup>

<sup>55</sup> See L. Wittgenstein, *Philosophical Investigations* §§ 43, 139 (3d ed. G. Anscombe trans. 1958) [hereinafter L. Wittgenstein, *Philosophical Investigations*].

<sup>56</sup> J.L. Austin, *Performative Utterances*, in *Philosophical Papers* 220, 220-22 (1961).

<sup>57</sup> Id. at 224.

<sup>58</sup> Id. at 232-33.

<sup>59</sup> For example, when a bridegroom says, "I do," he is not only speaking but also performing the act of marrying. Id. at 222. Similarly, when someone says, "I apologize," he is performing the ritual of apologizing, not describing a situation, and such utterance cannot be evaluated as either true or false. Id. at 233-34. In contrast, the statement, "he apologized," is a report on somebody's action and can be evaluated as true or false. Id. at 229. The distinction is familiar from the law of evidence, in which the out-of-court statements of a person are not hearsay when the words of the person quoted do not "point" to some physical event outside him but express a formal legal act. See J.L. Austin, *How To Do Things With Words* 13 (1962).

<sup>60</sup> See, e.g., S. Schiffer, *Meaning* 49-80 (1972); Grice, *Meaning*, 66 *Phil. Rev.* 377, 385 (1957).

<sup>61</sup> The progress of this dispute is traced in the essays collected in *The Philosophy of Language* (J. Searle ed. 1971). See also A. Giddens, *New Rules of Sociological Method* 86-91 (1976).

Wittgenstein himself, beginning at the end of the twenties, said that it is "illicit" to use the word "meaning" merely to signify some physical thing that "corresponds" to the word.<sup>62</sup> He wrote that "[f]or a large class of cases . . . in which we employ the word 'meaning' it can be defined thus: the meaning of a word is its use in the language."<sup>63</sup>

Wittgenstein attempted to capture the juncture between the speaker's intention and the conventional meaning of a word in his idea that the contexts in which words are used can be viewed as language games.<sup>64</sup> The processes of wishing,<sup>65</sup> hoping,<sup>66</sup> and recognizing<sup>67</sup> became new areas of investigation. The meaning of a word came to have at least a double sense, derived from the intention of the speaker as well as the convention required by the presence of "others." Our commonplace usages of the word "meaning" themselves convey the ambiguity: we say, "Do you really mean (intend) it?," and we also say, "This does not mean (convey) what you think it means." Stanley Cavell has said that the combination of the meaning intended and the meaning conventionally conveyed draws us into a world of duties to others when we speak to them: "[W]hat we mean (intend) to say, like what we mean (intend) to do, is something we are responsible for."<sup>68</sup> By identifying speech as "action" in a social context, the philosophers had come full circle from rejecting the world of value to treating even speech as a world in which acts have consequences for which speakers must take responsibility.<sup>69</sup>

The debate has certainly not come to an end. In expanding H.P. Grice's position that meaning is essentially intentional, Stephen Schiffer attempted to address the relationship between language, speakers, and listeners by introducing the concept of "mutual knowledge." S. Schiffer, *Meaning* 30-42 (1972).

<sup>62</sup> L. Wittgenstein, *Philosophical Investigations*, supra note 55, at § 40.

<sup>63</sup> Id. § 43 (emphasis omitted).

<sup>64</sup> Id. §§ 7, 23, 48.

<sup>65</sup> Id. §§ 437-440.

<sup>66</sup> Id. § 585.

<sup>67</sup> Id. §§ 602-607.

<sup>68</sup> S. Cavell, *Must We Mean What We Say?* 32 (1969).

<sup>69</sup> Throughout the Western world, philosophers after the First World War came to similar views. For the phenomenologist Husserl, all objects of consciousness were created by intentional acts of the mind and language was not essentially different from other such objects. Language was thought to have a dimension both of intention on the part of the speaker and of "world-meaning," created by the conventional and historical connotation of language. See J. Edie, *Speaking and Meaning* 152-59 (1976).

Even positivist philosophers, in studying natural language, concluded that the logical model is inapplicable. They found, for example, that no two words in ordinary language are precisely synonymous because their senses will always be somewhat different. See W. Quine, *The Problem of Meaning in Linguistics*, in *From a Logical Point of View* 47, 62-63 (2d rev. ed. 1961); Goodman, *On Likeness of Meaning*, in *Semantics and the Philosophy of Language* 67, 73 (L. Linsky ed. 1952); Mates, *Synonymy*, in id. at 111, 119.

As philosophers have continued to investigate intention and convention in the use of language, Wittgenstein's "language-game" concept has been criticized for a lack of precision.<sup>70</sup> Nevertheless, most philosophers have come to agree that the meaning of usages depends on context, changes in the world, and resolution of ambiguity.<sup>71</sup> That conclusion, although not surprising in retrospect, has enormous consequences for philosophy. It has meant that there is no simple or certain way to know the meanings of words and sentences; even their "truth" depends on the game in which they are used.

## 2. On Being Certain

Although words like "meaning" and "truth" do not have invariant definitions, they often are used in connection with the idea that there are good reasons for a belief.<sup>72</sup> If one is asked why one is "certain" of a conclusion, one is likely to say that there are compelling reasons to believe it and no reason to doubt it.<sup>73</sup> If asked why the reasons are "compelling," one gives further reasons.<sup>74</sup> These reasons, to be persuasive, must be part of a coherent system of interdependent propositions,<sup>75</sup> though rarely are all aspects of the system formulated and some may not be formulated at all.<sup>76</sup> Truth is therefore not a matter of matching problematic claims to reality, but rather one of being able to articulate a set of reasons that combine to form a coherent

<sup>70</sup> See D. Lewis, *Convention* 100-06, 204 (1969); P. Ziff, *Semantic Analysis* 34-35 (1960).

<sup>71</sup> Broadly similar conclusions appear in, e.g., Y. Bar-Hillel, *Indexical Expressions*, in *Aspects of Language* 69 *passim* (1970); D. Lewis, *Convention* 165, 172-73, 192-94 (1969); P. Strawson, *Meaning and Truth*, in *Logico-Linguistic Papers* 170, 179-80 (1971). Many students of semantics entertain parallel views, e.g., N. Chomsky, *Language and Responsibility* ch. 6 (1979); Stalnaker, *Pragmatics*, in *Semantics of Natural Language* 380, 395-96 (2d ed. D. Davidson & G. Harman 1972). But see Davidson, *Truth and Meaning*, 17 *Synthese* 304, 309-10 (1967).

The problem of ambiguity is illustrated by Austin's examination of the deceptively simple sentence, "Shut the door." J.L. Austin, supra note 56, at 231. The use of the imperative may indicate that the speaker is ordering another to shut the door, but that meaning is not certain. Instead, the speaker may be entreating, imploring, inciting, or tempting the other, each a subtly different act. Id. Austin's point is that the meaning of any sentence involves a difficult process in which the dictionary meaning of the given words provides only some help by suggesting aids to the understanding. Id. at 230. To determine what the speaker of such a sentence meant, the listener must resolve the ambiguity by reference to myriad interpretive aids: tone of voice, cadence, gesture, and, above all, the nature of the circumstances and the context in which the utterance is used. Id. at 231.

<sup>72</sup> L. Wittgenstein, *On Certainty* § 18 (G. Anscombe & C.H. von Wright eds. 1969); L. Wittgenstein, *Philosophical Investigations*, supra note 55, at 190.

<sup>73</sup> L. Wittgenstein, *On Certainty*, supra note 72, §§ 109-111, 117-137, 243.

<sup>74</sup> See id. § 144.

<sup>75</sup> Id. §§ 102-103.

<sup>76</sup> Id. § 88.

system that accounts for various experiences and supports various beliefs, while keeping inconsistency within the system at a minimum.<sup>77</sup>

Let us focus more specifically on "certainty" since being certain often suggests that the need for discussion has ended or is substantially diminished. Wittgenstein remarked that we can be as "certain" of a specific proposition as we are of the system in which the proposition occurs.<sup>78</sup> He said:

All testing, all confirmation and disconfirmation of a hypothesis takes place already within a system. And this system is not a more or less arbitrary and doubtful point of departure for all our arguments: no, it belongs to the essence of what we call an argument. The system is not so much the point of departure, as the element in which arguments have their life.<sup>79</sup>

One does not adopt this system or "picture of the world" by testing it against "reality."<sup>80</sup> Rather, the system is learned bit by bit until it constitutes a system of belief<sup>81</sup> that forms "the inherited background against which [one] distinguish[es] between true and false."<sup>82</sup>

The propositions that make up this "inherited background" often are exempted from discussion, but the possibility that they will be challenged and made the object of scrutiny always remains open. Wittgenstein said, "[i]t may be . . . that *all enquiry on our part* is set so as to exempt certain propositions from doubt, if they are ever formulated."<sup>83</sup> Such propositions constitute the "river-bed" of our thoughts,<sup>84</sup> and the more basic they are the more difficult they are to doubt. Nevertheless, "the river-bed of thoughts may shift,"<sup>85</sup> and "the same proposition may get treated at one time as something to test by experience, at another as a rule of testing."<sup>86</sup>

### 3. Certainty in the Social and Natural Sciences

A philosophy of discourse implies that the meaning of "information" about social "facts" and "events" is no less dependent on dis-

<sup>77</sup> Id. §§ 83, 92, 102-103, 141-142.

<sup>78</sup> Id. §§ 83, 111, 141-146.

<sup>79</sup> Id. § 105.

<sup>80</sup> Id. §§ 94-103.

<sup>81</sup> Id. § 144.

<sup>82</sup> Id. § 94.

<sup>83</sup> Id. § 88 (emphasis in original).

<sup>84</sup> Id. § 97. Examples of such "river-bed" thoughts are our sense of the laws of causation and gravity.

<sup>85</sup> Id.

<sup>86</sup> Id. § 98.

course than is the meaning of explicitly normative ideas. As social science theorists began to realize that whatever knowledge they had was bound up with their language and their assumptions about the world,<sup>87</sup> the notion that a researcher could create a "neutral" language with which to study society collapsed. For example, Charles Taylor<sup>88</sup> has argued that social scientists cannot understand social reality apart from the language in which it is discussed.<sup>89</sup>

[T]he vocabulary of a given social dimension is grounded in the shape of social practice in this dimension; that is, the vocabulary wouldn't make sense, couldn't be applied sensibly, where this range of practices didn't prevail. And yet this range of practices couldn't exist without the prevalence of this or some related vocabulary. There is no simple one-way dependence here. We can speak of mutual dependence if we like, but really what this points up is the artificiality of the distinction between social reality and the language of description of that social reality. The language is constitutive of the reality, is essential to its being the kind of reality it is.<sup>90</sup>

To Taylor, the unity of language and social reality gives rise to the concept of intersubjective meaning.<sup>91</sup> It is on the level of intersubjectivity that community among individuals is established.<sup>92</sup> Only

<sup>87</sup> Peter Winch was perhaps the first—certainly he has been the most controversial, see R. Bernstein, *The Restructuring of Social and Political Theory* 63-74 (1978)—to try to take the implied step of applying the method of ordinary language philosophy used by Wittgenstein to the world of custom and social action itself. In *The Idea of a Social Science* (1958), Winch argued that if social behavior is meaningful and rulebound, it is intelligible only as a language-game is intelligible, through learning its rules. To learn the implications of the behavior of the people in a society, the investigator has to learn its customs as a language: approaching the behavior with empirical tools cannot reveal the pattern of significance in the custom any more fruitfully than it does in the case of natural language. The nuances of meaning and the application of the custom to new cases cannot be understood except through the discourse of the people who use the custom. Id. at 131-36. Winch argued that use of "scientific" empirical methods, rather than his linguistic methods, results in distortion because of the presence of hidden assumptions (ways of structuring events) in the scientific methods. See id. at 83-94. An example of such distortion is perhaps described in Dyson-Hudson, *Structure and Infrastructure in Primitive Society*: Levi-Strauss and Radcliffe-Brown, in *The Language of Criticism and the Sciences of Man* 218 (R. Macksey and E. Donato eds. 1970). There, Radcliffe-Brown, a most thoroughly empirical anthropologist, is described as *conceiving the most diverse societies in the fashion of an "English lawyer," in terms of "individuals with prescribed rights and duties."* Id. at 235.

<sup>88</sup> Taylor, *Interpretation and the Sciences of Man*, 25 *Rev. Metaphysics* 3 (1971).

<sup>89</sup> Id. at 29, 32, 45.

<sup>90</sup> Id. at 24.

<sup>91</sup> Id. at 29-31.

<sup>92</sup> Id. at 30 ("Common meanings are the basis of community. Intersubjective meaning gives people a common language to talk about social reality and a common understanding of certain

No -  
not a  
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intersubjective

if people share a set of meanings can they truly understand one another.<sup>93</sup> Such understanding is not to be confused with consensus or agreement<sup>94</sup>—disagreement is most profound when those involved most fully understand one another.<sup>95</sup> When common meanings wither, however, the members of a community begin developing different languages and consequently begin to live in different social worlds.<sup>96</sup>

Although knowledge about the physical world may appear to be "verifiable"—and therefore "true"—in a way that knowledge about human action never is, discourse is nevertheless as essential to understanding in natural science as it is in social science. Recognition of the importance of discourse in the natural sciences perhaps began with the realization that an empirical theory cannot be given final confirmation by experiment—a realization that led Karl Popper to the view that a scientific theory is tested not by verification but by the constant effort to find an experiment that proves it false.<sup>97</sup> A theory can be tested only by investigators using intersubjective criteria—a shared language. The establishment of that language and the design of falsifying experiments explainable in it thus are essential to scientific knowledge.<sup>98</sup>

Imre Lakatos<sup>99</sup> drew on Popper's thought in arguing that scientific facts are embedded in theory and a shared language so completely that it is only through convention that we demarcate "background" from "theoretical" knowledge.<sup>100</sup> He concluded that a

norms, but only with common meanings does this common reference world contain significant common actions, celebrations, and feelings. These are the objects in the world that everybody shares. This is what makes community.").

<sup>93</sup> Id. at 28.

<sup>94</sup> Id.

<sup>95</sup> Id.

<sup>96</sup> Id. at 27, 31.

<sup>97</sup> K. Popper, *The Logic of Scientific Discovery* 40-41 (3d ed. 1968).

<sup>98</sup> Id. at 44 & n. \*1. Popper believes that scientists using different linguistic frameworks can speak to each other relatively easily; the shared languages are translatable. Others argue such translation is so difficult that different linguistic frameworks are incommensurable. Compare Popper, *Normal Science and Its Dangers*, in *Criticism and the Growth of Knowledge* 51, 56-58 (I. Lakatos & A. Musgrave eds. 1970) with Kuhn, *Reflections on My Critics*, in id. at 231, 266-67.

<sup>99</sup> Lakatos, *Falsification and the Methodology of Scientific Research Programmes*, in *Criticism and the Growth of Knowledge*, supra note 98, at 91 [hereinafter Lakatos, *Research Programmes*].

<sup>100</sup> All testing of theories depends on acceptance of a theoretical framework that is falsifiable. In a given context, however, the framework is treated as unproblematic while the scientist tests a theory in light of the "truth" of that framework. In a subsequent context, information that was treated as unproblematic fact can become a theory subject to test. The decision to demarcate background fact from theory under test is a methodological and conventional one. Id. at 106-07.

theory is not effectively "falsified" by an experiment unless there is available a new theory that explains the old background facts and the new experiment as well.<sup>101</sup> "There is no falsification," he said, "before the emergence of a better theory."<sup>102</sup> The question whether to replace a theory is not conceptualized as a clash of "facts" with "theory."<sup>103</sup> It is the conflict of rival theories ("research programmes") that constitutes the engine of scientific change.<sup>104</sup>

This conclusion might not be enough by itself to convince a positivist that one ought to be able to question absolutely every assertion about the empirical world. A positivist might argue that, even if the way a scientific theory is learned cannot be predicted, there nevertheless are physical things to which the theory may refer, and to which the same properties must be attributed by all observers.<sup>105</sup> But the breakdown of the distinction between background and theoretical knowledge is fatal to this view.<sup>106</sup> If facts are understood only through communicative means shared by scientists, that "language" itself becomes indistinguishable from a theory.<sup>107</sup> The observation can be found only in the theory. The retreat from the fact-theory distinction has been further accelerated by the conditions

<sup>101</sup> Id. at 120-21. In the absence of a new theory, a clever scientist can explain away counterevidence, and thus defend his theory against the argument that it has been falsified. Id.

<sup>102</sup> Id. at 119.

<sup>103</sup> Id. at 129. As Thomas Kuhn expressed it in *The Structure of Scientific Revolutions* (2d ed. 1970), a change in the "river-bed" propositions of thought (to use Wittgenstein's metaphor) occurs when one scientific paradigm—a system of background premises that shapes the questions and the answers formulated in scientific inquiry, id. at 10-11, 37—gives way to an entirely new paradigm. Id. at 92-94, 111. Such a scientific "revolution" occurs when anomalies can no longer be explained within the prevailing paradigm. Id. at 52-65, 97. The revolution is complete when a new set of background assumptions replaces the old set and resolves the major anomalies. Id. at 77, 97. A paradigm, like Lakatos' research program, would not be rejected until another was available to replace it. Id.

<sup>104</sup> Lakatos, *Research Programmes*, supra note 99, at 121-22, 129-30, 155.

<sup>105</sup> See F. Suppe, *The Structure of Scientific Theories* 14-15, 45-48 (1974).

<sup>106</sup> See notes 100 & 103 supra.

<sup>107</sup> To take a famous example, an object may appear to an observer to be a "tiger," based on his previous (partly linguistic) experience. His naming an object as a "tiger" asserts that it belongs to a particular group of animals; that it is an animal and not a mechanical tiger; that it is "alive"; and a host of other more or less questionable things implied by language. Compare P. Ziff, *Semantic Analysis* 184-85 (1964) with Kripke, *Naming and Necessity*, in *Semantics of Natural Language* 253, 316-19 (2d ed. D. Davidson & G. Harman eds. 1972). Popper and Kuhn both agree that all facts are theory-laden. Popper, supra note 98, at 51-52; Kuhn, *Logic of Discovery or Psychology of Research?*, in *Criticism and the Growth of Knowledge*, supra note 98, at 1, 2. The history of the breakdown in the fact-theory distinction is traced in F. Suppe, supra note 105, at 80-86, and is presented with an extended history of the philosophy of knowledge in the West in I. S. Toulmin, *Human Understanding* ch. 1 (1972).



of modern science, in which "facts" commonly are observable not directly but only through instruments that are themselves the creatures of theory.<sup>108</sup>

Changes in scientific theory, then, imply changes in the meaning of what is observed, just as, for the later Wittgenstein, meaning in ordinary language was thought to change as the language-game changed.<sup>109</sup> The problem of finding the meaning of scientific facts depends on finding the applicable theory, in the same way that finding the meaning of norms, values, and actions depends on finding their context and world. Scientific information is interpreted and scientific theory is tested through discussion that is indistinguishable in form from the discussion used to identify and test values and norms.

### C. Dialogue: Finding Reasons To Believe

So far I have argued the position of modern philosophy, that the "meaning" of a proposition in a system of discourse must be understood through language, and that our acceptance of the "certainty" of a proposition depends on our ability to derive reasons for the proposition drawn from that system. Although I thus have abandoned any notion that we can use words to talk about "things" in a way that is free from intervention by the speaker, I have continued to use the term "meaning" in a static sense. To consider how meaning is found within a system, I will now turn to a philosophy of interpretation.

A tradition in Continental philosophy has sought the solution to the problem of meaning in a dialogue between the interpreter and his text or subject in which meanings are proposed and modified by question and answer. Hans-Georg Gadamer<sup>110</sup> and Jürgen Habermas<sup>111</sup> in Germany, and Paul Ricoeur<sup>112</sup> in France, confront the problem of meaning through such methods, called hermeneutics—the study of what is hidden in a text.

<sup>108</sup> Although the findings of modern subatomic physics are the most noted example of this, it is an event common in astronomy as well. Feyerabend recounts that the original "findings" Galileo made by using a primitive telescope were incomprehensible without the aid of a theory of telescopic vision. P. Feyerabend, *Against Method* 35-36 (1975). Similarly, Lakatos recites the classical example of how Newton instructed Flamsteed, the first Astronomer Royal, to reinterpret some of his data since they contradicted Newton's lunar theory. Newton, who by his own confession made no observations himself, nevertheless explained to Flamsteed exactly how he should "correct" the observations. Lakatos speculates that the constant humiliation the great observer suffered by having his data improved by Newton's theories led finally to the quarrel between the two men. Lakatos, *Research Programmes*, supra note 99, at 130 n.5.

<sup>109</sup> See text accompanying notes 62-67 supra.

<sup>110</sup> See text accompanying notes 113-18 infra.

<sup>111</sup> See text accompanying notes 119-23 infra.

<sup>112</sup> See note 118 and accompanying text infra.

Gadamer accepts the notion that we come to know the world through language:

[I]n all our knowledge of ourselves and in all knowledge of the world, we are always already encompassed by the language that is our own. We grow up, and we become acquainted with men and in the last analysis with ourselves when we learn to speak. Learning to speak does not mean learning to use a preexistent tool for designating a world already somehow familiar to us; it means acquiring a familiarity and acquaintance with the world itself and how it confronts us.<sup>113</sup>

Meanings in a language so learned are both intentional and conventional because we can intend only what the language will bear in the context. For hermeneutic philosophers, dialogue is the process by which we try to bring the two together, to find out what is meant within the context, either in a written text or spoken words.<sup>114</sup>

For Gadamer, interpretive dialogue begins with the prejudgments of the interpreter, who first takes the words in the sense most familiar to him. Once the interpreter recognizes an apparent "error," he can see that he is outside his own tradition, and begin to try to understand another tradition. As Gadamer describes it, we may read a text as if it were a personal letter, conveying news from the writer that the reader takes to be true. "It is only when the attempt to accept what he has said as true fails that we try to 'understand' the text, psychologically or historically, as another's meaning."<sup>115</sup> It is

<sup>113</sup> H.G. Gadamer, *Man and Language*, in *Philosophical Hermeneutics* 59, 62-63 (D. Linge ed. 1976). Philosophers closer to the tradition of philosophy of discourse than to hermeneutics reach similar conclusions. When Stanley Cavell says that "we learn language and learn the world together," he means that when we learn words, we also learn what their utmost implications are, so that we can decide how things may be said to be alike and how unlike. S. Cavell, supra note 68, at 19-20 (emphasis in original). A parallel phenomenological view is described in J. Edie, supra note 69, at 154-58.

<sup>114</sup> H.G. Gadamer, *Truth and Method* 331 (G. Barden & J. Cumming trans. 1975).

<sup>115</sup> Id. at 262. Later, Gadamer returns to the point:

The hermeneutical experience also has its logical consequence: that of uninterrupted listening. A thing does not present itself to the hermeneutical experience without its own special effort, namely that of 'being negative towards itself.' A person who is trying to understand a text has also to keep something at a distance, namely everything that suggests itself, on the basis of his own prejudices, as the meaning expected, as soon as it is rejected by the sense of the text itself. Even the experience of the reversal of meaning, this constantly recurring experience in speech, which is the real experience of the dialectic, has its equivalent here. The unfolding of the totality of meaning towards which understanding is directed, forces us to make conjectures and to take them back again. The self-cancellation of the interpretation makes it possible for the thing itself—the meaning of the text—to assert itself.

the improbable or out-of-place event in the chronicle, the anomalous interpretation given to a term of value by a person we are arguing with or the amazing explanation by another culture for phenomena that are the keys by which we begin to reach the common ground of understanding.

In the case of dialogue about a normative question, the aim of the participants is to agree what the object of the discussion actually is, and how to resolve it. In the case of a text, the interpreter tries to say what the text can effectively mean, in the light of its words, the tradition of the text, and his own tradition. The interpretation ultimately found will not necessarily be either the original one naively seen by the interpreter nor the one "meant" by the person who uttered the statement. This is so because the words "mean" something only in their context, and because they may come to "mean" different things to readers and listeners than they do to the speaker or writer. The "truth" that is possible for Gadamer is only the truth that is yielded by the dialogic process. Yet there can be no other truth, at least for words that describe human action in ordinary language because the words do not have meaning at all except through the dialogue.<sup>116</sup>

Gadamer sees jurisprudence as a *locus classicus* for the methods of hermeneutics. In applying or making law, the judge usually draws on a text written by others. He may be fortunate enough to use a recent decision or statute, so that the meaning of the words at least comes from his own tradition; the interpretive problem, when solved with the assistance of lawyers arguing the meaning of the law, is similar to what it would be in dialogue with a contemporary. In other cases, the text may be quite old, and may come from a society very different from the one that now confronts the court; the judge fuses the meaning in the world from which the statute is drawn (as he understands it) with the meaning in the contemporary world. In either case, the problem is to interpret an objective linguistic fact—the text—in its bearing on a contemporary matter. What is important is the meaning of the words in the context of the current situation, rather than the elusive "intention" of the writer.<sup>117</sup>

1d. at 422. The acceptance by the interpreter of his own prejudices and preconceptions (insofar as he knows them), Gadamer thinks, is more honest and fruitful than a pose of "neutrality" which is, in the light of the shifting meanings of words, in any case not really possible. H.G. Gadamer, *Semantics and Hermeneutics*, in *Philosophical Hermeneutics*, supra note 113, at 82, 92-94.

<sup>116</sup> See H.G. Gadamer, supra note 114, at 446-47.

<sup>117</sup> See id. at 292-94, 304-05. A similar result advocating inquiry into a "purpose" of a statute in the broad sense, rather than into the "intent" of its drafters in the narrow sense, is familiar in

When people decide upon an action or a policy, the discussion is very much like the one they carry on in trying to decide a legal question. Once they understand one another's use of the words, it is clear what actions are possible and what are not, and the "meaning" of the words used is to some extent determined by the action that is taken. The "truth" that is possible for political action is the same—based upon dialogue among the participants—as the truth that is possible for the meaning of words that express norms or values.<sup>118</sup>

Habermas, like Gadamer, has roots in the hermeneutic tradition for deciding questions about human action. Although Habermas is willing to leave to technical methods the solution of questions about how a mechanical job may be carried out, in the world of "practice," for him as for other hermeneutic philosophers dialogue is the road to knowledge.<sup>119</sup>

Habermas differs most from the hermeneutic tradition, and from Gadamer as its heir, in his reluctance to accept as sufficient the ordinary methods of hermeneutics. He recognizes that the pattern of meaning in the normative words used in practical discussion may be hidden from the participants. Because they cannot recognize what economic interests or psychological drives may distort their view of the dialogue, their efforts to confront their traditions and to reveal

the English-speaking world. See H. Hart & A. Sacks, *The Legal Process* ch. 7 (Harvard Univ. mimeo. 1958).

<sup>118</sup> Similar parallels among text, action, and history are drawn by Paul Ricoeur in *Explanation and Understanding: On Some Remarkable Connections Among Theory of the Text, Theory of Action and Theory of History*, in *The Philosophy of Paul Ricoeur* 149, 149-66 (C. Reagan & D. Stewart eds. 1978).

<sup>119</sup> J. Habermas, *Theory and Practice* 8 (J. Viertel trans. 1973). The ideas schematized here are developed in J. Habermas, *Knowledge and Human Interests* (J. Shapiro trans. 1971). A principal question posed but never solved by Habermas' work is how to decide when a question is "practical" and when "technical." Neither has Habermas adequately defended his view that there are two categorically different forms of knowledge and inquiry: a natural science interested only in technical control and a human science interested only in understanding. See R. Bernstein, supra note 87, at 221-23; A. Ciddens, *New Rules of Sociological Method* 67-68 (1976). Habermas has made the distinction partly for polemical or normative purposes; aware of the tendency of social scientists to reduce policy questions to technical or "operational" questions, he seeks by means of his definition to make clear his view that political matters *always* involve choices of value. See J. Habermas, *Technology and Science as "Ideology,"* in *Toward a Rational Society* 81, 112-13 (1970); J. Habermas, *The Scientization of Politics and Public Opinion*, in id. at 62, 62-64, 68. Nevertheless, the problem cannot be done away with by a simple definition. For example, Hintikka, *Practical vs. Theoretical Reason*, in *Practical Reason* 83 (S. Korner ed. 1974), suggests once again that there is no hard-and-fast distinction between the natural and human sciences. id. at 84-90. A strategy adumbrated by Hintikka, which the hermeneutic philosophers have not used, would assimilate the methods of natural science more closely into those of the human sciences, rather than the other way around. A full discussion of the problems presented by Habermas' theories of knowledge is beyond the scope of this Article.

their prejudgments is always of limited effect.<sup>120</sup> Under these conditions, the value of the dialogue is problematic for Habermas, and increasingly so as dominant economic groups manipulate public consciousness.

For present purposes, the important thing about Habermas' confrontation with the problem of communication is that despite his criticism of the tradition, he can find no real alternative to dialogue as a source of knowledge about human action. Habermas has begun to outline a theory of "communicative competence," defined as the ability to carry on a dialogue free of the fetters of neurosis and ideology, using as one source of such competence Wittgenstein's notion of a language-game.<sup>121</sup> In any language-game, communication is possible only because of some underlying consensus about meaning, and the existence of that consensus itself, Habermas thinks, suggests the possibility of a dialogue that is neither manipulated nor manipulative.<sup>122</sup> It is in the nature of the discourse and the use of normative words that "we cannot explain the validity claim of norms without recourse to rationally motivated agreement or at least to the conviction that consensus on a recommended norm could be brought about *with reasons*."<sup>123</sup> Although for Habermas hermeneutics cannot supply any sure method of finding meanings hidden from the participants, it does serve to take account of the problem of hidden meanings, and opens the possibility of understanding.

### III

#### A NEW RATIONALE FOR FREE EXPRESSION

We are confronted at last with a general consensus,<sup>124</sup> in the philosophy of both the human sciences and the natural sciences, that

<sup>120</sup> J. Habermas, *Knowledge and Human Interests*, supra note 119, at 313-17.

<sup>121</sup> See J. Habermas, *Theory and Practice*, supra note 119, at 17-19.

<sup>122</sup> See id. at 17. Habermas finds a source and model for his hope of an emancipating dialogue in the self-reflective knowledge afforded by psychoanalysis, in which an internal dialogue assisted by a listener affords, as he sees it, some real knowledge of the self. Id. at 9, 22-24. A more extended treatment of psychoanalysis is found in J. Habermas, *Knowledge and Human Interests*, supra note 119, at 214-45.

<sup>123</sup> J. Habermas, *Legitimation Crisis* 105 (J. Viertel trans. 1975) (emphasis in original).

<sup>124</sup> The French structuralists searched for a science of meaning, for a "linguistics of connotation," as Barthes put it. R. Barthes, *Elements of Semiology* 90-91 (1968). Because they found in the world of value and action no concrete "signifieds" to which the words as "signifiers" refer but found instead that words refer to meanings created by other words, they were tempted to conclude that there are no core meanings. Derrida, *Structure, Sign and Play in the Discourse of the Human Sciences*, in *The Language of Criticism and the Sciences of Man* 247, 249-60 (R. Macksey & E. Donato eds. 1970). Paul Ricoeur has criticized this from the hermeneutic point of view in his *Structure, Word, Event*, in *The Philosophy of Paul Ricoeur*, supra note 118, at 114-15.

the meaning of man-made artifacts—linguistic facts—whether norms, values, acts, or scientific facts, can be understood only in a context determined through discourse. This consensus is an accepted, legitimate view from which other philosophical departures may be taken, a premise from which consequences may be drawn. It is accepted as fully as the consensus among liberal political philosophers on the importance of the autonomous individual, and its implications for political philosophy are no less legitimate.<sup>125</sup>

The consensus of modern linguistic philosophy about meaning implies a position about the right to speak. It implies that limitations on discourse about the meanings of words, especially those that relate to action and value, create a risk that those who use or hear words literally will not understand them, not know what they mean. It implies that there is no "speech" except free speech, because speech is dialogue to learn the meaning of words.

This rationale for freedom of expression, rooted in the nature of speech itself, implies that slogans, formulas for which no reply is permitted, are not really part of language. They have no meaning because they have no context, and cannot be put in context without the social dimension of language, without interplay between the slogan and a responsive reader or speaker. We cannot want to forbid dialogue about anything spoken or written in a human language, unless we want to eliminate the search for the purpose and understanding of what is said.

The force of such a rationale is perhaps most obvious in the analysis of ideas that are "political" on their face; indeed the philosophy of language underlying the rationale is applied to two leading endeavors in political philosophy in the section that follows. But the rationale is at bottom equally applicable to the discussion of the most basic phenomena. Debate on the proposition, say, that the earth is flat might lead to an interesting explanation of the physical conditions that would have to prevail if the earth were flat. It would certainly lead the round-earthers to reconsider the basis of their conviction that the earth is not flat, lead them to see why the conviction is true in the universe as they understand it, and how much that understanding depends upon assumptions that are the "river-bed" of their perceptions of the universe. The statement that the earth is not flat comes to life as "true" for those of us who are round-earthers because we come to understand why we believe it.

<sup>125</sup> Alvin Gouldner, working through similar sources with the purpose of discovering the source of rationality in social life, arrives at an analogous conclusion: rationality is located in dialogue. A. Gouldner, *The Dialectic of Ideology and Technology* 49 (1976).

## IV

MARXISM AND LIBERAL JURISPRUDENCE AS  
SYSTEMS OF POLITICAL DISCOURSE

So far I have attempted to show that the very meaning of propositions depends on the reasons that can be found in the relevant system of discourse, going all the way to the system's "river-bed" when it is called into question. In addition, I have attempted to show that proper reasons cannot be found without dialogue. In this section, I turn to a more specific examination of Marxism and liberal jurisprudence as systems of discourse in order to show that the establishment of meaning within both systems depends on free expression.

## A. Marxism

One possible objection to applying our justification for free speech to Marxist theory is that Marxism may rest on a copy theory of meaning. When Lenin quoted Paul Lafargue to the effect that "[a]n idea is as real as the object of which it is the reflection in the brain" <sup>126</sup> he embraced a long tradition of materialism in Marxism. Some modern positivist Marxists <sup>127</sup> have taken the short step from Lenin's materialism to a copy theory of meaning. Maurice Cornforth, for example, has said: "Language has words for the properties and relations of objects which we have come to recognise through our senses in the course of practical life." <sup>128</sup> To Cornforth, thought is a reflection of objective reality <sup>129</sup> and language is governed by a set of logical principles. <sup>130</sup> Within such a system, truth is the correspondence between an idea and the objective reality that it reflects. <sup>131</sup>

Because this view has no place for competing concepts of truth, its implications for free expression are ominous. As truth advances by being continually restated in a form more free from past distortions, <sup>132</sup> the number of areas about which rational differences of opinion may exist quickly diminishes. To argue for a right of free expression within such a system is to argue for the right to teach half-truths and plain errors. <sup>133</sup>

<sup>126</sup> V.I. Lenin, *Materialism and Empirio-Criticism*, in 14 *Collected Works* 17, 203 (1962).

<sup>127</sup> See, e.g., M. Cornforth, *The Theory of Knowledge* 26, 144 (3d ed. 1963). A modern version of this theory of knowledge appears in N. Poulantzas, *Political Power and Social Classes* 12-13 (1968).

<sup>128</sup> M. Cornforth, *supra* note 127, at 43.

<sup>129</sup> *Id.* at 53.

<sup>130</sup> *Id.* at 50.

<sup>131</sup> *Id.* at 135, 140.

<sup>132</sup> *Id.* at 136-37.

<sup>133</sup> *Id.* at 139.

Despite the views of writers like Cornforth, a copy theory of meaning is no more necessary to a Marxist than it is to an ordinary language philosopher; on the contrary, large parts of the Marxist tradition are nearly inconsistent with any copy theory. Marx himself believed that social forces determine forms of social consciousness, though the fact of that determination is commonly concealed from the people in the society. <sup>134</sup> They learn about their social consciousness, and the forms of social consciousness change, through dialectical means. These Marxist doctrines share common origins with hermeneutic philosophy, and are more compatible with it than with a narrow positivism. <sup>135</sup>

A tradition has emerged, using such elements of Marxism, that conflicts with the Leninist copy theory of meaning and is parallel to the non-Marxist consensus that dialogue is necessary to understand usage and context. In Russia in the twenties, Volosinov sketched a Marxist philosophy of language intended to be consonant with the notions that "individual consciousness is a social-ideological fact" <sup>136</sup> and that "[t]he immediate social situation and the broader social milieu wholly determine—and determine from within, so to speak—the structure of an utterance." <sup>137</sup> He concluded that "*any true understanding is dialogic in nature*. Understanding is to utterance as one line of a dialogue is to the next. Understanding strives to match the speaker's word with a *counter word*." <sup>138</sup>

During the succeeding fifty years, even as the ideas of Volosinov's generation were being suppressed, social scientists working within the Marxist tradition outside the Soviet world have largely rejected positivist Marxism. <sup>139</sup> The notion of a critical dialogue implicit in Marxism, on the contrary, requires constant inquiry and redefinition, a constant attempt to find and transcend the strictures of social consciousness. In short, it implies a hermeneutic process. <sup>140</sup>

<sup>134</sup> See K. Marx, *Preface to A Contribution to the Critique of Political Economy*, in 1 *Selected Works* 354, 356-57 (C. Duff ed. 1942).

<sup>135</sup> See, e.g., J. Habermas, *Knowledge and Human Interests*, *supra* note 119 *passim* especially chs. 2 & 3; Frankel, *Habermas Talking: An Interview*, 1 *Theory & Soc'y* 37, 48-49 (1974).

<sup>136</sup> V.N. Volosinov, *Marxism and the Philosophy of Language* 12 (1973) (emphasis omitted). The influence on contemporary Marxists of the views of Volosinov and others of his generation is reflected in R. Williams, *Marxism and Literature* 34-44 (1977). For an example of such contemporary views, see Bakan, *Book Review*, 35 *Telos* 244, 249-50 (1978) (reviewing K. Kosik, *Dialectics of the Concrete* (1976)).

<sup>137</sup> V.N. Volosinov, *supra* note 136, at 86 (emphasis omitted).

<sup>138</sup> *Id.* at 102 (emphasis in original). Volosinov and his work literally disappeared in the thirties with the ascendancy of the copy theory. R. Williams, *supra* note 136, at 34-35.

<sup>139</sup> See R. Bernstein, *supra* note 87, at 179-91.

<sup>140</sup> See A. Gouldner, *supra* note 125, at 49-54; J. Habermas, *Knowledge and Human Interests*, *supra* note 119, at 62-63; L. Kolakowski, *Karl Marx and the Classical Definition of*

The notion among modern Marxists of the need for critical dialogue converges with Habermas' concept of "communicative competence," through which dialogue becomes the more emancipating as it is freed from the constraints of special pleading and the economic and legal suppression of unpopular ideas.<sup>141</sup> Free expression still is the only instrument that a hermeneutic system like Marxism has to find the answers to political questions.<sup>142</sup>

### B. Liberal Jurisprudence

Liberal jurisprudence, like Marxism, can be viewed as a system of discourse in which right answers can be discovered and can have meaning only when the system's premises are subject to dialogic elaboration. In the legal philosophy of Ronald Dworkin,<sup>143</sup> a right judicial decision often is a matter of searching the legal system for "principles" from which a right answer can be derived.<sup>144</sup> According to Dworkin, "a principle is a principle of law if it figures in the soundest theory of law that can be provided as a justification for the explicit substantive and institutional rules of the jurisdiction in question."<sup>145</sup> Principles justify legal rules,<sup>146</sup> and such justification anchors the rule in the political and moral traditions of society.<sup>147</sup> Dworkin maintains that "[t]he origin of . . . legal principles lies not in a particular decision of some legislature or court, but in a sense of appropriateness developed in the profession and the public over time. Their continued power depends upon this sense of appropriateness being sustained."<sup>148</sup>

Truth, in *Toward a Marxist Humanism* 38-66 (1968); K. Korsch, *Marxism and Philosophy* 76-78, 83-84 (1970).

<sup>141</sup> J. Habermas, *Theory and Practice*, *supra* note 119, at 18.

<sup>142</sup> Essential to the argument made here is that the meaning of Marxism must be reformulated through dialogue. There is nothing about Marxism that is peculiarly "true" in the sense that it cannot be understood differently in a different context. There seems little doubt that Marx himself supposed that there was a final "truth" in his views. He was no more ready than other philosophers of his era to abandon the ultimate ground of belief. See J. Habermas, *Knowledge and Human Interests*, *supra* note 119, at 62-63; I. Balbus, *On the Absence of Political Theory in Marx* 27 (paper presented at the Second National Conference on Critical Legal Studies, Madison, Wisconsin, Nov. 10-12, 1978) (copy on file at New York University Law Review). Under the approach advanced here, Marxism may be taken as a framework for the interpretation of the world, but the framework as well as its application is always open to criticism. See J. McMurtry, *The Structure of Marx's World-View* 131-32, 174-76 (1978). See also G. Duncan, *Marx and Mill* 3-13 (1973); M. Markovic, *From Affluence to Praxis* 53-55 (1974).

<sup>143</sup> See R. Dworkin, *Taking Rights Seriously* (1977).

<sup>144</sup> See *id.* at 22-31.

<sup>145</sup> *Id.* at 66.

<sup>146</sup> *Id.* at 28, 67, 116.

<sup>147</sup> *Id.* at 67.

<sup>148</sup> *Id.* at 40. When a once-established principle is shown to have little current force it may be overridden. *Id.* at 122-23.

The legal principles of a liberal society may be characterized as a justificatory paradigm. When a judge concludes that one party has the stronger argument he presumably considers his answer to be right.<sup>149</sup> Assessment of the rightness of the answer takes place against the background of a system of principles of law which the judge draws on to defend his conclusion.<sup>150</sup> This method for using principles to make judicial decisions is in essence hermeneutic.<sup>151</sup> A decision may be criticized for either misapplying background principles or resting on principles that inadequately explain precedent or are inconsistent with other established principles.<sup>152</sup> In short, a judicial answer can be only as "right" as the legal system in which it is cast.

Thus, the implications of modern philosophy of language—that there is no meaning without dialogue, no "speech" except free speech—can be borne out in both Marxism and liberal jurisprudence. The right of free discourse is not simply derived from the values of free trade in ideas and individualism traditional to liberalism; instead, it plays a fundamental role in keeping liberalism, Marxism, or any other theory from decaying into a litany of dead slogans.

## V

### THE RATIONALE AT WORK

The rationale for free expression derived from individualism, as we have observed, imposes an obligation to recognize that freedom only on governments that derive their legitimacy in whole or in part from respect for autonomous individuals.<sup>153</sup> It is therefore fair to inquire under what circumstances governments ought to recognize a right of free expression using the rationale that there is no meaning without dialogue. We may then examine the implication of this new rationale for our conception of the legal safeguards required to protect free expression.

### A. Applicability of the New Rationale

Only those societies, it seems, in which the meaning of words and sentences is thought to be fixed will not experience political

<sup>149</sup> *Id.* at 35.

<sup>150</sup> See *id.* at 28, 41; text accompanying notes 75-86 *supra*.

<sup>151</sup> See R. Dworkin, *supra* note 143, at 106-10; Dworkin, *No Right Answer?*, 53 N.Y.U.L. Rev. 1, 25-29 (1978); text accompanying notes 115-17 *supra*.

<sup>152</sup> R. Dworkin, *supra* note 143, at 116-17.

<sup>153</sup> See text accompanying notes 26-33 *supra*.

pressure to recognize a right of free expression. One such society might be one in which language is magic. When words are thought to be so inextricably bound up with things that they have an incantatory power to affect the physical world, there is a fixed and dangerous meaning for those words in that society. If it is literally believed that the utterance of some form of words can bring rain, cure the sick, or sicken the healthy, those words may be subject to governmental control, and no one in the society will suppose that it should be otherwise.

Apart from the magical use of language, it is difficult to conceive of any societies that, under modern conditions, could avoid the legitimacy of the argument for free expression. Even the worst of dictators do not blandly state that they support a regime of lies and distortions; instead, they say, and sometimes perhaps believe, that they are acting in the general interest, for greater economic efficiency, cultural purity, or the like. These terms, of course, are terms of norm and value, and reliable judgments of meaning about them can be made only by discourse. Any government, then, that purports by even so much as its rhetoric to make political decisions according to any theory or purpose at all, implies a right of free discussion as a source of its legitimacy. Although it is not possible to make recognition of a right of free discussion into a universal source of legitimacy for all governments, that right remains an extremely strong obligation for most modern governments.

Once participants in any discussion accept the premise drawn from the philosophy of language that discussion is essential to understanding, then to be sure that they know what they are talking about, that they do not fail to take anything into account, and that they have some basis for believing their conclusions true, their discussion must take place in as open a system of discourse as possible. Their concern is to minimize the risks that the "wrong" meaning will be accepted and acted upon or, if a factual question is at issue, be recorded as a judgment of history or science. If a topic is excluded from discussion by governmental fiat, the inference is strong that the government does not want the participants to understand. In the case of a practical question, the exclusion implies that the government may aim to make a decision that is "wrong" for the context and the society. It may imply, for example, that the government wants the decision to appear to be one in the general interest, when discussion would show that it is not. When the participants are excluded from discussion, they do not "believe" the government's position because dialogue is the only basis for belief that they know. In short, once the right of free discussion is accepted, it creates a demand on the government to

preserve and extend it to every sort of inquiry. That demand will be the same even when the government says it values the "collective good" over "individual rights."

In recent years, since the publication of John Rawls' *A Theory of Justice*,<sup>154</sup> the question whether some particular liberty such as freedom of conscience and expression is "prior" to other values, in the sense that it ought not to be exchanged for any other value, has been discussed.<sup>155</sup> The rationale of "no meaning without dialogue" for freedom of expression implies the priority, in a logical sense, of the freedom to carry on the discourse. Since it is the instrument by which all decisions on other questions of value are decided by any society that subscribes to the accepted notions of language, free discourse must come before any other political value. To allow some other value in society to be "prior" in the sense that it is beyond inclusion in the discussion involves a contradiction because it is through the discussion that the hierarchy of values is decided.

#### B. Relation to Existing First Amendment Doctrine

Since the theory of free expression rooted in dialogic discourse is an alternative basis for rights that are recognized in our law for other reasons, its acceptance need not imply a rejection of American first amendment case law. Nevertheless, a comparison with currently received theories does cast interesting light on both those theories and issues in first amendment law.

##### 1. A Right of Dialogue

The rationale derived from dialogue is more closely allied to freedom of association than to the pure freedom of the autonomous individual to speak his mind. Discussion is conducted through language, entirely a social creation, and it depends upon artifacts of society, such as texts to read and other persons to talk to and listen to. The risk of misunderstanding or not finding a relevant meaning is the same whether the participant is a speaker, a listener, or a reader, and therefore the listener has as much interest in the discourse, if he cares to enforce it, as the speaker.

<sup>154</sup> J. Rawls, *A Theory of Justice* (1971).

<sup>155</sup> Rawls speaks of the priority of a small group of liberties including liberty of conscience, to which he gives the most emphasis. *Id.* at 205-08, 541-48. This concept of priority is discussed by Hart, *Rawls on Liberty and Its Priority*, in *Reading Rawls* 230, 249-52 (N. Daniels ed. 1975).

Although it is dialogue itself that is the focus of the free speech rationale sketched here, neither of the constituent parts of dialogue, the right of the audience to hear and the correlative right of the speaker to reach his audience, is rationalized in any clear way by current first amendment doctrine. Current doctrine is dominated by a view of free speech as a means of self-expression,<sup>156</sup> a rationale that protects principally the right of the speaker to utter his thoughts and has little to say about his need to reach or to be heard by his listeners. To support the right of the audience to hear and the correlative right of the speaker to reach his audience, current first amendment doctrine draws on the concept of "free trade in ideas."<sup>157</sup> This is an instance in which "trade" has perhaps served covertly to protect the need for dialogue that in fact may underlie the right of free expression.

The theory advanced here, under the banner of "no meaning without dialogue," puts the communication between the speaker and his audience at the heart of the interest in free expression. In balancing that interest against state interests, the theory requires the law to give a paramount place to the question whether the speaker can be heard and the listener can hear; it permits limiting that dialogue, if at all, only on a showing of a substantial interest that cannot be attained by any less drastic means.

The fullest recognition by the Court of a first amendment interest in dialogue is found perhaps in *Red Lion Broadcasting Co. v. FCC*.<sup>158</sup> In *Red Lion*, the Court was faced with an attack on two FCC rules embodying aspects of the "fairness doctrine": one rule affording a right of reply to personal attacks by the broadcast media and the other a right of reply to political editorials.<sup>159</sup> In upholding the validity of these two FCC rules against broadcasters' arguments that the rules abridged their freedoms of speech and press,<sup>160</sup> the Court recognized that one of the rights at stake was the public's first amendment right to open and vigorous debate of public issues.<sup>161</sup>

<sup>156</sup> See T. Emerson, *The System of Freedom of Expression* 6 (1970); T. Emerson, *Toward a General Theory of the First Amendment* 4-7 (1966); text accompanying notes 152 *supra* to 163 *infra*.

<sup>157</sup> See *Kleindienst v. Mandel*, 408 U.S. 753, 763 (1972) ("It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail . . .") (quoting *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 390 (1969)); L. Tribe, *American Constitutional Law* § 12-19, at 676 (1978).

<sup>158</sup> 395 U.S. 367 (1969).

<sup>159</sup> *Id.* at 373-74.

<sup>160</sup> *Id.* at 386.

<sup>161</sup> *Id.* at 390.

It is the right of the viewers and listeners, not the right of the broadcasters, which is paramount. It is the purpose of the First Amendment to preserve an uninhibited market-place of ideas in which truth will ultimately prevail . . . It is the right of the public to receive suitable access to social, political, esthetic, moral, and other ideas and experiences which is crucial here.<sup>162</sup>

Here the metaphor of "free trade in ideas" has served to protect the need for dialogic discourse.

Arguments premised on the view that the first amendment guarantees of a process of discussion, separate from the interest of individuals in self-expression, have not always received the recognition they received in *Red Lion*. Three years after *Red Lion*, in *Kleindienst v. Mandel*,<sup>163</sup> the Supreme Court upheld the denial of a visa to an alien,<sup>164</sup> Ernest Mandel, who had been invited to several universities to speak on Marxist economics.<sup>165</sup> In doing so, it rejected the argument of six professors who had invited Mandel or who expected to participate in colloquia with him that their first amendment rights to "hear his views and engage him in a free and open academic exchange" were violated by the visa denial.<sup>166</sup>

The Court initially appeared to frame the issue in terms of a dialogue theory of free expression: whether the appellee professors had a first amendment right to hear, speak, and debate with Mandel against which the government's decision to exclude Mandel must be weighed.<sup>167</sup> But the Court retreated from this formulation of the issue and refused to recognize that first amendment rights of the professors were at stake.<sup>168</sup> Instead, the Court gave empty recognition to these first amendment rights by characterizing them as "implicated" interests which could be abridged under the plenary power of the sovereign to make rules governing the admission of aliens.<sup>169</sup> Having restated the issue to avoid a direct confrontation with the first amendment, the Court was able to affirm the denial of Mandel's visa with a minimum of scrutiny.<sup>170</sup> The court could have given full weight to the interest of Mandel's colleagues only by recognizing a first amendment right in the process of dialogue to which all

<sup>162</sup> *Id.* (citations omitted).

<sup>163</sup> 408 U.S. 753 (1972).

<sup>164</sup> *Id.* at 770.

<sup>165</sup> *Id.* at 757.

<sup>166</sup> *Id.* at 759-60.

<sup>167</sup> *Id.* at 762-65.

<sup>168</sup> See *id.* at 768-69.

<sup>169</sup> *Id.* at 765-66.

<sup>170</sup> *Id.* at 770.

participants have equal claim.<sup>171</sup> By refusing to do so, it allowed the rights of the discussants to fade into the background, a course that was contrary to the free speech rationale presented here.

## 2. The Completeness of Dialogue

Critics may question whether the new rationale provides for the freedom of the individual to the same extent as the rationale derived from individualism. What is to happen when every foreseeable point has been covered in the discourse at least once, and almost everyone is satisfied with the consensus? Is the next person to be prevented from giving his views? The rationale from individualism would require us to permit him to speak, as an expression of his self-respect and autonomy as an individual; the question remains whether the new rationale would do so. I think it can be shown that dialogue is never complete in the philosophical sense and that there is always room for further interpretation.

In the case of a plan for action projected in the future, society ordinarily constructs ways of making decisions that are limited in such a way as to bring about a determinate result. Familiar examples are the broad focus of the political campaign in which argument, persuasion, and discussion are almost limitless, up to a fixed date on which a vote is taken, and the relatively narrow focus of the legal dispute, in which only the parties to the dispute are supposed to be heard and a decision made on what they adduce. But hardly anyone thinks that these devices are exhaustive, or that all possible arguments will be made or heard through such means; they are only ways of making sure that a decision is in fact made. Jaakko Hintikka has given a theoretical form to this commonsense judgment, arguing that the logic of decisions shows that there is, in general, no way of predicting how many factors must be taken into account in a practical deliberation.<sup>172</sup> This "leads to the almost paradoxical and highly significant result that the process by means of which we humans . . . reach our decisions is not itself decidable."<sup>173</sup> Hintikka's conclusion implies that there is no way to tell in advance of a decision how many arguments should be heard.

<sup>171</sup> Justices Marshall and Brennan apparently were willing to recognize such a view. See id. at 775 (Marshall & Brennan, JJ., dissenting) (The first amendment protects a process of thought and discussion in which the freedom to speak and the freedom to hear are "two sides of the same coin.").

<sup>172</sup> See J. Hintikka, *Logic, Language-Games and Information* 227 (1973).

<sup>173</sup> Hintikka, *Practical vs. Theoretical Reason*, in *Practical Reason*, supra note 119, at 100-01; see J. Hintikka, supra note 172, at 226-29, 239 (1973).

Once the decisionmaking process is over, do we know whether the right decision was made? The wisdom of the decision, it may be argued, should be clear from the results. The difficulty is that the "wisdom" of the decision was for a particular purpose at a specific time, and the decision now becomes a matter of history that necessarily is examined from a different perspective, ordinarily drawing on a universe of facts different from that of the original decisionmakers. So the certainty that escaped the makers of the decision also eludes their historian.

Finally, when a similar action is projected, it is for a somewhat different world, and the reiteration of old arguments may have a new bearing. There is, as a result, no inquiry with respect to human action for which it can be said in advance that no further arguments will be needed. Institutions may limit argument to get a result, but in logic there is no end to it.

An appreciation of the continuing need for dialogue provides a basis for a justification of the Court's decision in *Richmond Newspapers, Inc. v. Virginia*.<sup>174</sup> There, the Supreme Court faced the issue of the "right of access" of the press and public to a criminal trial—a proceeding that, although traditionally one of "factfinding," is carried out in a restricted arena according to specialized rules. Although the Court recognized the newspaper's right of access, the Justices revealed once again their inability to find any rationale for the right that will satisfy more than a few of them.<sup>175</sup>

The opening opinion of the Chief Justice, in which only two other Justices joined,<sup>176</sup> gave up the attempt to articulate a rationale, saying:

It is not crucial whether we describe this right to attend criminal trials to hear, see, and communicate observations concerning them as a "right of access," or a "right to gather information," for we have recognized that "without some protection for seeking out the news, freedom of the press could be eviscerated." The explicit, guaranteed rights to speak and to publish concerning what takes

<sup>174</sup> 100 S. Ct. 2814 (1980).

<sup>175</sup> The Chief Justice announced the judgment of the Court in an opinion joined by Justices White and Stevens. Id. at 2818. Justice Brennan, joined by Justice Marshall, drew on Meiklejohn's theory that the first amendment has a "role to play in securing and fostering our republican system of self-government." id. at 2833 (Brennan & Marshall, JJ., concurring in the judgment), to argue that the judicial branch of government is a proper subject of public scrutiny, id. at 2836. Justice Stewart thought that a trial courtroom is a place "by every definition" open to the public "[e]ven more than city streets, sidewalks, and parks," places traditionally open for debate. Id. at 2840 (Stewart, J., concurring in the judgment).

<sup>176</sup> Justice White and Stevens joined in the Chief Justice's opinion.



place at a trial would lose much meaning if access to observe the trial could, as it was here, be foreclosed arbitrarily.<sup>177</sup>

In support of this nondoctrinal conclusion, the Justices assembled evidence that Anglo-American trials have traditionally been open to the public<sup>178</sup> for their "therapeutic value" in channeling community demands for justice<sup>179</sup> and teaching the public how the legal system works.<sup>180</sup> They went on to quote Jeremy Bentham on the value of publicity in minimizing corruption: "'Without publicity, all other checks are insufficient: in comparison of publicity, all other checks are of small account.'" <sup>181</sup> Although all three Justices seemed to think these historical roots important, they could not fashion from them a theory to explain the source of a right of access to trials. I agree that these bits of tradition do suggest a direction in which a rationale can be found, and I think the theory outlined in this Article affords such a rationale.

The legal system has restricted the parties who may argue the facts and the law, and even the manner in which the facts and law may be presented. Although the results of a trial are definite, no one would pretend that they are definitive outside the confines of the proceeding. The law under which the decision was made may be thought wrong; the parties may have failed to find some of the facts; facts may have been excluded by the judge; the law, even if valid, may have been wrongly applied. In short, the result of a trial is based on judgments of fact and value which, outside the trial context, are typically open to debate.

A trial in the Anglo-American system is supposed nevertheless to bring out the truth—what literally happened. The nature of a trial in our system—a proceeding set about with restrictions designed to achieve a final result which yet is supposed to be true—makes it inevitable that the most complete possible discussion of the issues of the trial *outside* the confines of the courtroom must be allowed. All the elements that go into a trial, including the value judgments embodied in the law, the sequence of facts presented, their significance in relation to one another, present questions of judgment that beg for dialogue. If any "truth" in a sense acceptable to those outside the

<sup>177</sup> Id. at 2827 (Burger, C.J., announcing the judgment of the Court) (citations and footnote omitted).

<sup>178</sup> Id. at 2821-23.

<sup>179</sup> Id. at 2824.

<sup>180</sup> Id. at 2824-25.

<sup>181</sup> Id. at 2824 (quoting J. Bentham, *Rationale of Judicial Evidence* 524 (1827)).

trial is to issue from it, public access to information and debate is necessary.

It is in this connection that the "therapeutic" and "educational" values of a trial, the "check" of publicity upon the tribunal, come into play. Concealed in these words is the government's hope that the judgments of the courts will be found to be honest and accurate factually, and justified in law. It becomes necessary for everyone to have access to discussion about the law and the facts of the case because the government wants the public to accept the propositions that the trial is a "factfinding" process, not merely one for quieting claims, and that the law as applied has a rationale beyond the merely arbitrary. It is not rational to ask the observer to accept the belief, for example, that a trial is a "factfinding" process unless he can satisfy himself that the process does find facts as he understands them.

It is essential, finally, that the public debate on the facts and law of a trial be available during the course of the live proceedings. If such debate were based only on the transcript, the issue of the accuracy of that record would be foreclosed automatically. Part of the value of the estimate by observers about the truth of the testimony and the fairness of the judge must be based on the actual behavior of the witnesses and the judge. Finally, as the Supreme Court has had occasion to note in the past,<sup>182</sup> the interest of the observers in the whole debate is strongest when the proceedings are actually in progress. They will not be as interested in the factfinding process after its work is completed as during its operation. To exclude observers from discussion during the proceeding itself is to exclude them from debate at the time it most interests them.

When institutional restrictions limit the completeness of the dialogue, the new rationale might justify restrictions to ensure that there is in fact a dialogue and not a one-sided diatribe. The facts of *First National Bank v. Bellotti*<sup>183</sup> suggest an example. In *First National Bank*, the Court struck down a Massachusetts statute that prohibited corporations from spending money to communicate their views about any referendum subject that did not materially affect the corporate business.<sup>184</sup> Massachusetts had defended the statute in part by arguing that such restrictions were necessary to prevent a serious threat to the free interchange of ideas posed by institutions that might use their great wealth to dominate the discussion.<sup>185</sup> As

<sup>182</sup> See *Bridges v. California*, 314 U.S. 252, 268 (1941).

<sup>183</sup> 435 U.S. 765 (1978).

<sup>184</sup> Id. at 767.

<sup>185</sup> Id. at 809-11 (White, J., dissenting).

noted by Justice White in dissent, Massachusetts' recent experience with unrestrained corporate expenditures, which was mirrored in other states, provided evidence of such corporate domination.<sup>186</sup> Justice White reasoned that Massachusetts therefore had good grounds for restricting corporate expenditures.

The majority, rejecting Justice White's argument,<sup>187</sup> quoted *Buckley v. Valeo*<sup>188</sup> to the effect that, outside the special context of limited broadcast channels presented in *Red Lion*, the concept that one may restrict the speech of some in order to enhance the speech of others is "wholly foreign to the First Amendment."<sup>189</sup> The doctrine of *Red Lion*, however, cannot be restricted so easily. As noted by the dissent in *First National Bank*,<sup>190</sup> *Red Lion* may be read as recognizing a first amendment interest in protecting a system of free expression separate from any interest in self-expression.<sup>191</sup> That system, I have argued, is essential to ensure an open dialogue to determine meaning. It was to protect an open dialogue that Massachusetts passed the statute at issue in *First National Bank*. Recognition of that interest by the Court, using the doctrine of "no meaning without dialogue," would require a different analysis of cases like *First National Bank*. Although the Court might reach the same result, for example, on the ground that corporate speech does not present a substantial threat to open dialogue, it could not do so with the bold assertion that the effort to maintain such dialogue is "foreign to the First Amendment."

### 3. Tolerating Dangerous Ideas

Governments may accept our conclusion—that dialogue must have no limits, except when institutional restrictions make limits inevitable—as a mere matter of theory, without being persuaded that it solves political problems in a "realistic" way. A government may

<sup>186</sup> Id. at 810 (White, J., dissenting).

<sup>187</sup> The Court's discussion of these issues was not completely consistent. At one point, it appeared to recognize the validity of the State's argument in theory but to state that such argument failed in the instant case for lack of factual support. The Court stated: "If appellee's arguments were supported by record or legislative findings that corporate advocacy threatened imminently to undermine democratic processes, thereby denigrating rather than serving First Amendment interests, these arguments would merit our consideration. Cf. *Red Lion Broadcasting Co. v. FCC* . . ." Id. at 789.

<sup>188</sup> 424 U.S. 1 (1976) (per curiam).

<sup>189</sup> 435 U.S. at 791 & n.30 (quoting *Buckley v. Valeo*, 424 U.S. at 48-49).

<sup>190</sup> See id. at 791 n.30; id. at 804-09 (White, J., dissenting).

<sup>191</sup> This analysis is consistent with the arguments put forward by the dissents in *Kleindienst v. Mandel*. See 408 U.S. at 773 (Douglas, J., dissenting); id. at 775 (Brennan & Marshall, JJ., dissenting).

contend that experience shows that some information or doctrine is too dangerous to be discussed. Two categories of speech are likely to be singled out as dangerous, the categories that matter most in testing a right of free expression: (1) secret information said to have some value to the state which would make its disclosure dangerous, and (2) doctrines that are considered false and at the same time dangerous because they are attractively simple or peculiarly well suited to the interest of some influential group. The free speech rationale outlined here does not support limitations on either category of speech.

The classic example of the first category is the "'publication of the sailing dates of transports or the number and location of troops'" during a war, repeatedly described as a limiting case.<sup>192</sup> More recently, the United States sought to suppress speech in the first category by bringing an action to enjoin the magazine *The Progressive* from publishing an article in which a reporter had, by his own independent study, apparently determined some elements of a nuclear fusion bomb.<sup>193</sup> These are cases in which, although discussion is the norm in society, the government seeks to fence participants away from part of the discussion of public policy. The government in effect tells the public that the case is one in which no understanding is to be permitted, in which stupidity on the part of potential participants is the desired end.

In attempting to quash the dissemination of secrets, the government poaches on the priority of the right to conduct dialogue. It disables the participants from deciding whether the policy decision made by the government is a valid one. In very simple cases, such as the one about troop movements, the policy decision may be of no consequence and the understanding lost may be nugatory; but these cases are rare, and would not include the suppression of information on the nuclear bomb. In that case, had the Government succeeded in suppressing the magazine piece we would not even know precisely what the article was about. Thus, even if it were appropriate to suppress a piece describing a hydrogen bomb, a policy decision which is itself not obvious,<sup>194</sup> we would not be able to evaluate whether the article

<sup>192</sup> See *New York Times Co. v. United States*, 403 U.S. 713, 726 (1971) (Brennan, J., concurring) (quoting *Near v. Minnesota*, 283 U.S. 697, 716 (1931)).

<sup>193</sup> *United States v. Progressive, Inc.*, 486 F. Supp. 5 (W.D. Wis. 1979); *United States v. Progressive, Inc.*, 467 F. Supp. 990 (W.D. Wis.), appeal dismissed mem., 610 F.2d 819 (7th Cir. 1979).

<sup>194</sup> For example, the affidavit of Alexander De Volpi, dated March 20, 1979, in the *Progressive* case, states in ¶ 8:

[T]here are inherent technical choices that can be made to diminish or preclude the accessibility, utilization, or effectiveness to other nations of nuclear materials or designs of

in question fits that description. In a society that values the understanding that comes from discussion, the decision to prevent informed dialogue is enormously damaging to the legitimacy of the state because the participants are being asked to "believe," without any basis for belief.

The second category of "dangerous" speech is more common; it comes up every time a municipality refuses to allow a forum for Communists or Nazis. And though action pursuant to an idea, or incitement so immediate that it does not allow for argument, may be suppressed,<sup>195</sup> the conclusion of this Article that no doctrine has meaning except in a context suggests that there is no idea so dangerous that it should not be discussed. A political idea, no matter how brutal and horrifying, always "means" the history of the idea as well as the emotional makeup of those who have embraced it. Can we understand these by a dialogue with history alone, and without entertaining the possibility that someone will take the idea seriously? If the idea is dangerous enough to raise a demand for its suppression, it is important enough for someone, and usually thousands of people, to take seriously. The idea takes on meaning only when we see what social and emotional forces drove people to embrace the idea, and what might drive them to do so again. In the absence of this concrete understanding, the "falsity" of the idea is a mere pious dogma, without any meaning except a ritual one. A dangerous idea "means" its importance as well as its falsity, and we need to hear it advocated, if we can, on pain of forgetting why it is important.

Although this explanation seems to me sufficient, there is another reason that the advocacy of ideas without apparent redeeming virtues should be tolerated. Habermas and others have argued that

fission or fusion explosives. Some of these choices involve tradeoffs or compromises that are not necessarily consistent with present Government policy. The various claims and counterclaims can only be understood upon knowledgeable application of fundamental physical principles regarding nuclear weapons. To derive these principles, it is not necessary to have access to classified data. Yet the exchange or publication of such derived information, to gain peer review of the concepts, is threatened by the potential for prior restraint. Some considerations stated in Morland's article are indispensable in a debate regarding different political approaches to the control and spread of nuclear weapons. Therefore, if the article is censored, the Executive Branch will have established a precedent for suppression of valid public debate.

<sup>195</sup> At the outset, we may note one doctrinal touchstone that the rationale derived from meaning shares with existing justifications for free speech: any expression deserves more protection from the law if it allows for reflection and answer. The value of any expression for understanding obviously increases as there is time for others to get into the discussion. See *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (per curiam); *Whitney v. California*, 274 U.S. 357, 376, 377 (1927) (Brandeis & Holmes, JJ. concurring).

the act of participating in dialogue is enough by itself to create an ethical commitment to the others in the dialogue.<sup>196</sup> As Karl-Otto Apel has put it:

Whoever poses the . . . question of the justification of the moral principle already takes part in the discussion. And one can "make him aware" . . . of what he has "already" accepted, and that he should accept this principle through intentional affirmation as the condition of the possibility and of the validity of argumentation.<sup>197</sup>

I am doubtful that this argument for an ethical commitment from discussion alone will hold in the bare form that I have quoted it. There seems to be insufficient reason, for example, to assume that each of the speakers thinks he is "speaking" in the same sense as the others; a speaker who believes that words are magic may suppose that he is uttering a deadly curse instead of an idea. As with other ethical precepts, in short, it is doubtful whether the "ought" can be derived from the "is" without the intervention of other factors. In a proper institutional setting, of course, a mere "fact," such as an act, may give rise to an obligation.<sup>198</sup> I suggest that the acceptance by society of the notion of meaning I have earlier outlined in this Article,<sup>199</sup> and the establishment of rights based on that notion, supplies the institutional setting missing from the bare idea of "communicative ethics." When the society accepts the precept that normative and historical questions will be resolved through dialogue, each of the speakers is aware that he is speaking in a situation in which that precept is accepted. It matters little whether one of the speakers has contempt for the communicative institutional setting or will not listen to the answers to his ideas; he knows that when he presents an idea under conditions in which an answer is possible, he opens the idea to questions of its validity and himself to questions of motive and character. By presenting the idea discursively, rather than through force, he has expressed his recognition of the dialogical assumptions of the

<sup>196</sup> See J. Habermas, *Legitimation Crisis*, supra note 123, at 107-10.

<sup>197</sup> Quoted in id. at 159 n.16 (emphasis in original). A similar argument is implied perhaps by Stanley Cavell's thesis that speaking carries a responsibility with respect to meaning. S. Cavell, supra note 68, at 32. Although I have drawn the discussion that follows in part from Habermas and his associates, it is fair to say that it is unclear whether Habermas would agree. While he says that discussion is oriented toward truth, as noted here, he has argued elsewhere that speech outside an "ideal" situation may be more destructive than liberating. See J. Habermas, *Knowledge and Human Interests*, supra note 119, at 314; J. Habermas, *Theory and Practice*, supra note 119, at 3-4.

<sup>198</sup> J. Searle, *Speech Acts* 175-88 (1969) adduces the simple example that the "fact" of a promise, under minimal institutional conditions, gives rise to an obligation.

<sup>199</sup> See text accompanying notes 71-124 supra.

institutional setting. He knows that the idea will be discussed, and not accepted as magic or incantation, and sooner or later he will have to answer objections or step out of the discourse.

For the society that purports to accept the precept that normative and historical questions are to be settled through discussion, the importance of adhering to this principle arises also from the institutional setting. The speaker cannot be drawn into the discourse with the awareness of the society's assumptions unless the society adheres to the principle of discussing every idea. Any other course implies that society does not in fact believe that discourse is the way to understanding. The proponent of the dangerous idea has no reason to suppose that his idea will be investigated and understood for what it is.

Under the standard of "no meaning without dialogue," then, permitting discussion of dangerous ideas will be an element of the legitimacy of the government, for whatever reason the ideas may be thought dangerous. When the discussion is considered dangerous because the idea is secret, discussion is necessary to understand policies about the secret idea. When the discussion is considered dangerous because the idea is "false," discussion is necessary both to understand the idea and to express the obligation that is created by the promise of a dialogue.

#### CONCLUSION

Modern philosophy has moved from the position that questions of political and social knowledge have no meaning to the view that such questions take on meaning only by resolution of ambiguities in a society and a context. A similar conclusion has been reached concerning natural sciences that the meaning of a scientific fact or theory is determined through discussion. There is no way, it has turned out, to define meaning except through the dialogue of those who discuss it. This is at bottom a complex way of saying that if people and governments want to understand the meaning of what they say and do at all, they are bound not only to talk but also to listen and answer.

## INTRACTABLE CASES: THE ROLE OF UNCERTAINTY IN THE CONCEPT OF LAW

JOHN M. FARAGO\*†

*Responding to the assertion that right answers exist for all legal questions, Dean Farago sets forth formal criteria for assessing the capacities of legal systems. To possess a substantively certain answer for each case, he reasons, a legal system must be both complete and consistent. Yet, these conditions are unlikely to be fulfilled without recourse to norms derived from outside the legal system. As with logical systems that are susceptible to Gödel's theorem or political theories susceptible to Arrow's theorem, we may have to accept the inevitability of inconsistency or uncertainty in law. But the resulting need for judicial discretion should not be troubling. On the contrary, we should welcome the continued infusion of human values into the adjudicatory process.*

#### INTRODUCTION

Contemporary legal theory has accustomed us to the presence of hard and even intractable cases. Although we seek to minimize this uncertainty whenever possible, it is nevertheless the presence of uncertainty that makes it possible for us to inject human values into our legal and political structures.

This benefit, if it is one, has not always been perceived as such, and in a less skeptical world it was possible to believe in a theory of law that did not include intractable cases. For centuries jurisprudence luxuriated in that paradise of natural law.<sup>1</sup> In those prelapsarian

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† This Article benefited from the criticisms and suggestions of several colleagues, teachers, and friends, including Samuel Atkin, Richard Baepler, Dierdre Burgnan, Marc Campisano, Ronald Dworkin, John Griffiths, Jack Hiller, Douglas Hofstadter, Karl Krause, David Myers, David A.J. Richards, John Leigh Smith, and Richard Stith. I owe a special debt to Professor William Alfred and to the late Alfred Baruth, both of whom must share the responsibility (or the blame) for my interest in tragedy and paradox. The responsibility for all errors of fact or reasoning are, of course, my own, a burden intensified by the fact that I have not accepted all the suggestions that were tendered.

<sup>1</sup> I will use the term "natural law" to refer to theories providing for rules and principles of law that are determined outside of, or antecedently to, the legal system. A tripartite classification of natural law theories may be found in Richards, *Taking Rights Seriously* Seriously 52 N.Y.U.L. Rev. 1265, 1275-78 (1977) [hereinafter Richards].

Among the most influential contributions to natural law jurisprudence is Aquinas' *Treatise on Law*. T. Aquinas, *Summa Theologica* I-II, Ques. xciv-cviii, in 2 *Basic Writings of St. Thomas Aquinas* 742-978 (A. Pegis ed. 1945) [hereinafter Aquinas]. I will most commonly refer to a model of natural law drawn from this source.

This and subsequent footnotes serve a multiplicity of functions, providing greater detail, precision, or depth of analysis. They are united, however, by a uniform tendency to disrupt the flow of the argument presented in the text. I suggest, therefore, that the reader consult the footnotes only when compelled to by the opacity of the argument, a violent disagreement with its substance, or an overwhelming boredom with the material in the text.

## ON A NEW ARGUMENT FOR FREEDOM OF SPEECH

MICHAEL MARTIN \*

*Professor Martin takes issue with Professor Chevigny's thesis that a right of free speech may be bottomed on the philosophical doctrine that language is meaningless in the absence of dialogue. Professor Martin draws a series of terminological and conceptual distinctions and uses them to demarcate several possible derivations of freedom of speech from the notion of dialogue. He then proceeds to criticize each of these derivations and concludes that governments not already subscribing to liberal tenets will not be swayed by dialogic arguments for freedom of speech.*

### INTRODUCTION

In his article *Philosophy of Language and Free Expression*, Professor Paul G. Chevigny presents a new argument for freedom of speech based on considerations from the philosophy of language.<sup>1</sup> Professor Chevigny claims that his argument has decided advantages over traditional arguments for freedom of speech such as those presented by J.S. Mill.<sup>2</sup> Traditional arguments for freedom of speech are, according to Professor Chevigny, "rooted in theories of individualism and 'free trade' in ideas, notions which are rejected in much of the world and perhaps face an uncertain future in the West."<sup>3</sup> Professor Chevigny's new argument has no such limitation, for it is based on considerations of language and meaning—considerations that, according to Professor Chevigny, are crucial for Western and non-Western forms of government.<sup>4</sup>

According to Professor Chevigny, "individuals, groups, or governments want to understand ideas or make themselves understood, regardless of their adherence to the notion of a free market or to individualism."<sup>5</sup> However, the only way people or governments can make themselves understood is to permit dialogue. Further, according to Professor Chevigny, the necessity of dialogue undermines political theories that deny the right to free speech. He argues:

We assume that every theory or system of political discourse explicitly or implicitly asserts its own meaning and validity. If the lesson

drawn from the philosophy of language is correct, that the meaning of statements within a system depends on formulating other aspects of the system through dialogue, then every such theory must allow for dialogue concerning its supporting propositions. In other words, once a theory asserts that it means something, dialogue is necessary to establish that meaning. It follows that any political theory that denies a right of free discourse is internally contradictory since it condemns itself to a loss of meaning.<sup>6</sup>

The view that dialogue is necessary to understand the meaning of one's words follows, according to Professor Chevigny, from modern philosophy of language and its rejection of the copy theory of meaning, i.e., the theory that words have meaning only in so far as they mirror reality.<sup>7</sup> Contemporary philosophy of language stresses that words derive meaning from their function and use in particular contexts.<sup>8</sup> In order to understand the contextual use of language, however, one must be able to engage in dialogue in order to clarify the meanings of terms as they are actually being used. Moreover, according to Professor Chevigny, this dialogue is never complete; there is no setting a limit to the process because there is no stating in advance when a need for clarification through dialogue will arise.<sup>9</sup> Thus, the interest in meaning implies a right to engage in open-ended dialogue, and this in turn amounts to freedom of expression.

In constructing his argument, Professor Chevigny utilizes not only recent developments in Anglo-American philosophy of language—for example, the work of Wittgenstein and J.L. Austin<sup>10</sup>—but also the work of Continental philosophers, in particular, scholars in the hermeneutic tradition, such as Gadamer,<sup>11</sup> and scholars in the Marxist tradition, such as Volosinov.<sup>12</sup> The argument itself is not without parallel in contemporary philosophy of language.<sup>13</sup>

In this Article it will be shown that Professor Chevigny's new argument has serious flaws and cannot do the job he intends—

<sup>6</sup> Id. at 162.

<sup>7</sup> Id. at 162, 163-64.

<sup>8</sup> Id. at 164-76.

<sup>9</sup> Id. at 186.

<sup>10</sup> Id. at 165-68.

<sup>11</sup> Id. at 172-76.

<sup>12</sup> Id. at 178-79. As Professor Chevigny notes, there is some overlap between the hermeneutic and Marxist schools.

<sup>13</sup> Drawing as it does on a wide range of schools of thought to forge connections between meaning and dialogue and thereby to argue for freedom of expression, Professor Chevigny's position is strikingly similar to that of Jürgen Habermas. For a suggestive exposition of Habermas' theory, see McCarthy, A Theory of Communicative Competence, 3 Phil. Soc. Sci. 135 (1973). See also Habermas, A Postscript to Knowledge and Human Interests, 3 Phil. Soc. Sci.

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<sup>1</sup> Chevigny, Philosophy of Language and Free Expression, 55 N.Y.U. L. Rev. 157 (1980).

<sup>2</sup> See id. at 158-61.

<sup>3</sup> Id. at 157.

<sup>4</sup> See, e.g., id. at 178-81.

<sup>5</sup> Id. at 158.

namely, that of providing a solid foundation for freedom of speech. In particular, it will be shown that Professor Chevigny's argument for free speech provides no justification for a citizen's right to criticize the government and that, without this right, dialogue provides no foundation for free speech. Part I of this Article will point out a number of unclaritys contained in Professor Chevigny's piece. Part II will state his argument in formal terms and highlight problems with some of the premises of his argument.

## I

### SOME UNCLARITIES

#### A. *Unrestricted, Clarification, and Exegetical Dialogue*

One basic unclarity in Professor Chevigny's argument concerns his use of the term "dialogue." In the ordinary sense of the term, a dialogue is simply a conversation between two people:<sup>14</sup> one person talks, the other responds, and so on. A dialogue in this ordinary sense can be governed by strict regulations that control its content and the manner in which it is conducted. In the military service, for example, a sergeant and a general may have a dialogue, yet what is said and how it is said will be strictly prescribed. The sergeant, for example, must not challenge the orders of the general but may ask for clarification of, say, an order or authorization. Let us call this example a case of *restricted dialogue*.

A restricted dialogue can take different forms depending on the type of restrictions that operate. For the present purpose let us consider one type of restricted dialogue, a *clarification dialogue*. The participants in such a dialogue are restricted to queries directed at ensuring that there is an understanding of the terms used between them. Suppose, to continue the military example, that the sergeant asks the general what was meant by certain orders and that the general answers the sergeant's questions. The general then asks the

157 (1973). Habermas' views intimate a connection between meaning, truth, and freedom. See McCarthy, *supra*, at 145-46.

Whether Habermas' rich and complex views raise the same problems as Professor Chevigny's argument, however, is another issue. The crucial questions raised by this Article regarding Habermas' thesis are: (1) Are Professor Chevigny's ideas based on the same fundamental assumptions as Habermas'? (2) If so, do my criticisms of Professor Chevigny also refute Habermas' thesis? (3) If not, how could Habermas' theory be explicated so that a sound argument for free speech would result without running afoul of criticisms such as those raised in this Article? Unfortunately, these important inquiries are beyond the scope of this Article.

<sup>14</sup> Webster's New Collegiate Dictionary (1951).

sergeant if he understood the general's response and the sergeant, in turn, answers. The sergeant's questions may take the following forms:

Q1: By the order "Mine all thoroughfares into the city" did you mean all roads, paved and unpaved?

Q2: Could you clarify what you meant by your order?

The questions the general asks of the sergeant may take the forms:

Q1: Do you understand that by my order "Mine all thoroughfares into the city" I meant all roads, paved and unpaved, but not footpaths?

Q2: Do you see that one implication of what I said when I asserted that the rivers are non-navigable is that they need not be mined?

In this clarification dialogue the sergeant challenges neither the truth of anything the general says nor the validity of any of the general's judgments and we may assume further that it is mutually understood that such challenges are not to be countenanced.

Other dialogues are not restricted with respect to challenges of truth or validity. People engaged in them may speak in order to challenge what someone says as well as with a view to clarifying what was said. The other person may then come back with a defense of his or her position. Let us call this sort of dialogue an *unrestricted dialogue*. The principal purpose of unrestricted dialogue is usually not the clarification of meaning but the elimination of error and the establishment of truth. When the truth of one's statement is challenged, one tries to defend one's position by giving arguments. If it cannot be done, one's position is unjustified; if it can be done and the reasons stand up under critical attack, one's claims are justified.<sup>15</sup>

In a more attenuated sense of the term, a dialogue need not be a conversation between two people but may include any interpretive interaction between a text or similar item<sup>16</sup> and a person. The person attempts to determine what the text means, perhaps by "posing" certain questions to the text. Because of certain obscurities the text, in

<sup>15</sup> Where the utterance under challenge is a directive rather than a statement, the aim of the dialogue is justification not in terms of truth but in terms of the reasonableness of the order.

<sup>16</sup> Dialogue in this broad exegetical sense need not occur only when a person interprets a text or another piece of written material. One can interpret the speech or behavior of other persons without holding a conversation with them and in the broad sense engage in a dialogue with them.

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Why?

turn, may raise certain questions for the person. In this sense of "dialogue" scholars have a dialogue with the Old Testament and with Aristotle's *Ethics*. Similarly, the average person has a dialogue with a daily newspaper or a sign in a shop window when interpretation is involved. Thus, dialogue in this sense seems inevitable in so far as interpretation is inevitable. Let us call this sense of dialogue *exegetical interpretation* or *exegetical dialogue*. Dialogue in this extended sense is compatible with severe restrictions on criticism. There is no need to challenge the truth or reasoning of a text when interpreting it. As in an ordinary clarification dialogue between two persons, the main object may be to understand what is said rather than to arrive at truth.

Unfortunately, it is not completely clear in which of the above senses Professor Chevigny is using the term "dialogue." Sometimes he seems to use the term in the restricted clarification sense, as for example when he says that even a dictator needs dialogue to be understood.<sup>17</sup> At other times he seems to be using the term in the unrestricted sense, as when he speaks of dialogue as "finding reason to believe."<sup>18</sup> At still other times, for example when he relates his views to hermeneutic philosophy,<sup>19</sup> what he says will only make sense if one assumes he is talking about exegetical dialogue. The plausibility of Professor Chevigny's argument varies depending on what sense of the term is being invoked.

### B. The Function of Dialogue

Closely tied with the unclarity of what Professor Chevigny means by "dialogue" is the unclarity of what he thinks dialogue accomplishes. Although it seems in most places in his Article that Professor Chevigny is attempting to justify freedom of speech in terms of its ability to clarify the meaning of what is said, at times he seems to be attempting to justify dialogue in terms of its ability to justify people's beliefs. For example, Professor Chevigny says that Mill "touched on a notion which is at the heart of this Article" when Mill argued that "suppression of speech threatens the meaning of ideas with extinction."<sup>20</sup> Later on in the Article, however, Professor Chevigny's emphasis seems to be on the epistemological value of dialogue; he argues

that the truth or certainty of a proposition depends on our ability to derive reasons from the system of propositions to which it belongs.<sup>21</sup> Professor Chevigny speaks of dialogue as "finding reasons for belief."<sup>22</sup> Presumably, the idea here is that in dialogue, when a person's beliefs are challenged, the person is forced to defend his or her conviction by giving reasons. Professor Chevigny relates dialogue to a debate on the flatness of the earth where round-earthers would have to "reconsider" their views and "see why the conviction is true in the universe as they understand it."<sup>23</sup> This justification of dialogue seems close to an epistemological justification. It is not a justification in terms of meaning clarification. Arguments for the value of unrestricted dialogue in ensuring the justification for—as opposed to the clarification of—one's belief take us well beyond consideration from the philosophy of language to epistemology, and such arguments should therefore form no part of Professor Chevigny's position.<sup>24</sup>

### C. Certain vs. Probable Knowledge

Another unclarity in Professor Chevigny's position is that it is not obvious if he holds that (1) a dialogue is necessary for certain knowledge of what a person or government means or (2) a dialogue is necessary for even *probable* knowledge of what a person or government means. Different consequences flow from these two theses.

Suppose the President issues an edict that "all Communists shall be prosecuted." If only thesis (1), the weaker thesis, were correct, then, in order to know with certainty what the government means, it may be necessary to question the edict, *i.e.*, to engage in some form or other of dialogue. I might, for instance, engage in what I called a restricted clarification dialogue, asking questions such as, "By Communist do you mean a card-carrying member of the Communist Party

<sup>21</sup> *Id.* at 172.

<sup>22</sup> *Id.*

<sup>23</sup> *Id.* at 177.

<sup>24</sup> Indeed, the epistemological value of dialogue was stressed long ago by Mill and is not a new consideration. See J.S. Mill, *On Liberty* (London 1859).

Whether one can be justified in one's claim without engaging in unrestricted dialogue is an important question. This question should not be confused with another question: whether one can be as justified in one's claims without unrestricted dialogue as with it. It may well be that successful defense of one's claim always can strengthen one's case but that one's case can be fairly strong without engaging in dialogue. For example, someone may have a good case for the belief that the earth is round without successfully defending the belief against those who believe the earth is flat, even though a successful defense against the "flat-earthers" may increase the strength of one's case. If so, unrestricted dialogue could be necessary only to maximize, not to ensure, justification.

<sup>17</sup> Chevigny, *supra* note 1, at 182.

<sup>18</sup> *Id.* at 172.

<sup>19</sup> *Id.*

<sup>20</sup> *Id.* at 159. As Professor Chevigny properly notes, Mill's central position concerned "truth," not meaning. *Id.*

or anyone espousing Marxist doctrines?" At the same time, however, probabilistic knowledge of what the government means might be obtainable without holding a restricted clarification dialogue. Indirect means, such as determining how the government has prosecuted Communists in the past and what statutes are available for enforcement purposes, could be utilized to give me enough of an idea of what the government means for practical purposes.<sup>25</sup> In that case no dialogue would be mandated if, as is ordinarily the case, absolute certainty is not required. The stronger thesis, (2) is required if it is to be argued that such indirect nondialogic methods of ascertaining a speaker's probable meaning be ruled inadequate, since it is only according to thesis (2) that probabilistic knowledge of meaning can be acquired only by dialogue with the government.

The most charitable interpretation of Professor Chevigny's position is thesis (1), for thesis (2) is a very strong thesis; indeed, it is one that seems difficult to defend. Yet Professor Chevigny never makes the distinction between (1) and (2), and he may in fact be committed to thesis (2). He does not seem to allow any other way to obtain knowledge, even probable knowledge, of what people or governments mean except by dialogue.

Professor Chevigny may not be allowing any way to obtain knowledge other than dialogue because at this point in his argument he may be using "dialogue" in the broadest possible sense, including not only dialogue in the ordinary sense but also exegetical dialogue. For if I attempt to find out what the government means by its order "all Communists shall be prosecuted" without questioning it directly, *i.e.*, without engaging in dialogue in the ordinary sense, yet do go about inquiring, in an interpretive way, into the relevant textual materials,<sup>26</sup> I am still engaged in an exegetical dialogue with the government. Thus, in the broadest possible sense of dialogue, there does seem to be no way to obtain even probable knowledge of what the government means except by dialogue. But this reduces Professor

<sup>25</sup> The scope of the presidential edict would be limited by the strictures of the Smith Act, 18 U.S.C. § 2385 (1976). But my exegetical inquiry into meaning need not end there. I could also examine Supreme Court pronouncements on the Smith Act. I would then learn that the government could prosecute successfully only those Communists who were "active" members of the Party, with a specific intent to bring about violent insurrection as soon as circumstances would permit it. See *Law Students Civil Rights Research Council, Inc. v. Wadmond*, 401 U.S. 154, 165 (1971); *Scales v. United States*, 367 U.S. 203, 228-30 (1961); *Yates v. United States*, 354 U.S. 298, 318 (1957); *Dennis v. United States*, 341 U.S. 494, 499-500 (1951). At the same time, however, while the conclusion I draw from this exegesis might be reliable, it would not be risk-free, since the executive might not have meant its words within the established legal framework.

<sup>26</sup> See text accompanying note 25 *supra*.

Chevigny's thesis to a rather weak one. Importantly, it is a thesis compatible with restrictions against criticism of the government. For although one may need to have "dialogue" with the anti-Communist government in the example above—in the sense that one may need to interpret what the executive means in order to understand its repressive measures—it does not seem to be true that one needs to criticize the government in order to understand these measures.

The point remains valid, I believe, if one looks at the above example from the standpoint of the anti-Communist government instead of from the point of view of those under its rule. In order for the government to have relatively certain knowledge of what its own order means, it may be necessary to engage in dialogue in the restricted sense. But whether it is necessary to engage in this sort of dialogue in order to have probable knowledge of the meaning of its order is another question. The government—no less than the citizen—can interpret its own utterances in the light of the evidence available to it. Of course, in the broad sense of dialogue which includes exegetical interpretation, dialogue is necessary for the government; the government must interpret its own orders to understand them.

It should also be noted that even if dialogue in the ordinary sense—an actual conversation with the government and people—is necessary for the government to have even probable knowledge of the meaning of its own order, this dialogue need not be dialogue with the average citizen. It could be with certain people in the government. For example, the highest officials in the government could get their orders clarified through dialogue with lesser officials or with certain privileged classes in the society. Thus, even though dialogue is necessary for the government to understand its own orders, it is not necessarily true that all people must be permitted to engage in dialogue, even restricted dialogue, in order to clarify the government's orders.

#### *D. Free Speech Under Which Governments?*

Still another unclarity in Professor Chevigny's argument concerns the scope of application of his argument. One of the faults he finds with traditional arguments for free speech is that they apply only to Western societies.<sup>27</sup> One assumes then that his argument applies to both Western and non-Western societies. He apparently believes that his argument also applies to dictatorships and to countries governed by Marxist principles.

<sup>27</sup> Chevigny, *supra* note 1, at 161-62.



At one point Professor Chevigny says: "Apart from the magical use of language, it is difficult to conceive of any societies that, under modern conditions, could avoid the legitimacy of the argument for free expression."<sup>28</sup> Since presumably no modern society has a magical belief in the use of language, *i.e.*, the view that words have incantatory powers to affect the world, all existing governments seem to be covered by his argument. Professor Chevigny also says "[a]ny government . . . that purports by even so much as its rhetoric to make political decisions according to any theory or purpose at all, implies a right of free discussion as a source of its legitimacy."<sup>29</sup> It is somewhat surprising, then, to find Professor Chevigny saying in the next sentence, "[a]lthough it is not possible to make recognition of a right of free discussion into a universal source of legitimacy for all governments, that right remains an extremely strong obligation for most modern governments."<sup>30</sup>

One wonders, of course, in the light of what Professor Chevigny says, why he restricted his argument to "most modern governments." No modern government has a magical view of language and all modern governments make political decisions according to some theory or purpose. One must wonder to which modern government his argument does not apply and why. These questions are unfortunately not answered in Professor Chevigny's Article.

## II

### FORMAL STATEMENT OF THE ARGUMENT AND PROBLEMS WITH ITS PREMISES

Given these unclaritys in Professor Chevigny's position, it is somewhat difficult to state his argument in any clear and explicit way. The last problem mentioned is especially vexing since Professor Chevigny's position with respect to the scope of his argument is unclear and apparently incoherent. We shall assume, despite what he says at one point, that Professor Chevigny does indeed intend his argument to apply to *all* modern governments.

I will reconstruct from Professor Chevigny's Article two basic arguments which he does not clearly distinguish: an epistemological argument based on an unrestricted dialogue and an argument from meaning clarification based on restricted dialogue. The former seems

<sup>28</sup> *Id.* at 182.

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

to be less original and less well developed than the latter.<sup>31</sup> Each of these arguments lends itself to different interpretations in the light of some of the unclaritys listed above.

#### A. The Epistemological Argument

Professor Chevigny's epistemological argument runs as follows:

- (1) All governments desire their policies, doctrines, and views to be rationally justified.
- (2) The only way for a government to have its policies, doctrines and views rationally justified is to have an unrestricted dialogue with its citizens.
- (3) If (1) and (2), then all governments should have freedom of speech.
- (4) Therefore, all governments should have freedom of speech.

There are problems with each of these premises. Consider premise (1). If one interprets that premise as a factual statement about what all governments desire, it is not true. Some governments have prided themselves on their rejection of political rationalism.<sup>32</sup> If, on the other hand, one interprets premise (1) as a normative claim—"All governments *should* desire that their policies, doctrines, and views be rationally justified"—then one surely needs some argument to support it since this is exactly what some political theorists deny. One does not find this kind of argument in Professor Chevigny's Article.

Consider premise (2). This premise is dubious if by "rationally justified" one means having reasons that offer only probabilistic as against certain support for the government's policies, doctrines, and views. After all, it is certainly not obvious that a government may not have some justification for its policies before a dialogue begins.<sup>33</sup> Although successfully defending its position against a challenge in a dialogue may strengthen the case for its position, a government may marshal strong evidence and argument to support its case prior to any dialogue.

<sup>31</sup> As noted earlier, see text accompanying note 24 *supra*, the former argument does not trace to philosophy of language. There is thus reason to disfavor it as a reading of Professor Chevigny's position.

<sup>32</sup> See Communism, Fascism, and Democracy 320 (C. Cohen, ed. 1962) (discussing the influence of political irrationalism on fascist philosophy in the twentieth century).

<sup>33</sup> See note 24 *supra*.

If, on the other hand, rational justification is used in a stronger sense to mean justification that is nearly certain, premise (2) becomes more plausible. A government that successfully defends its position in the light of criticisms may make the justification for its policy nearly conclusive, given other independent evidence and arguments. But even here one must be careful not to infer too much. First, the unrestricted dialogue the government is exposed to need not be dialogue with the average citizen. Perhaps successfully defending its position against a diligent devil's advocate in the government's own organization may be enough to increase the justification to something approaching certainty. Second, although unrestricted dialogue with someone may increase the rational justification of the government's position to something approaching certainty, it is unclear that it is always wise to demand a justification that is near certainty.

This point brings us to premise (3). Premise (3) seems to be false unless it is interpreted to permit exceptions. Sometimes governments have to act quickly, and rational justification may not be possible or desirable even if the government does and should desire rational justification for its policies. If dialogue is required to achieve this justification, then more pressing needs may require that dialogue be suppressed.<sup>34</sup>

### B. *The Argument from Meaning*

The argument from meaning<sup>35</sup> runs as follows:

- (1) All governments desire that the meaning of their policies, doctrines, and views be known.
- (2) The only way for a government to have the meaning of its policies, doctrines, and views known is to have a dialogue with its citizens.
- (3) If (1) and (2), then all governments should have freedom of speech.
- (4) Therefore, all governments should have freedom of speech.

<sup>34</sup> This point seems especially relevant when justification that is near certainty is what is referred to in premise (1). This degree of justification may be too costly and too time consuming to endure in certain cases; a trade off would have to be made. A government might well sacrifice some justification for its policies in order to further other goals. This sacrifice might entail the government proposing and acting on certain problems without these problems being discussed in a dialogue with its citizens or anyone else. If so, freedom of speech may be limited without a full curtailment of rationality. See Chevigny, *supra* note 1, at 191.

<sup>35</sup> This argument is more likely to be Professor Chevigny's intended argument as it traces to a thesis in the philosophy of language.

There are several problems with this argument. Consider premise (1). This premise could be understood to mean: (1a) "All governments desire that the meaning of their policies, doctrines, and views be known by their citizens." But this premise as so interpreted is not true. Some repressive governments want to keep their policies and doctrines hidden from their citizens and, given their goals, this desire seems quite reasonable.

Of course, premise (1) could be understood as a normative principle, viz: (1b) "All governments should desire that the meaning of their policies, doctrines, and views be known by their citizens." This normative principle may be true, but it is not argued for in Professor Chevigny's Article.

Looking at the situation in a different way, premise (1) may mean: (1c) "All governments desire that the meaning of their policies, doctrines, and views be known by the government itself." This premise seems more plausible than (1a); it would seem to take a highly irrational government not to want to know the meaning of its policies and doctrines. But even granted (1c), this premise by itself does not take us very far in justifying freedom of speech.<sup>36</sup>

Consider premise (2). This premise seems false or at least dubious under several interpretations. First, premise (2) can be understood to mean: (2a) "The only way for a government to have the meaning of its policies, doctrines, and views known by its citizens is to have a dialogue with its citizens." So interpreted, premise (2a) is false if "dialogue" refers to an unrestricted dialogue where criticism of the government is permitted. As suggested above,<sup>37</sup> citizens can understand what a government means by restricted clarification dialogue. Let us then interpret (2a) to refer to a restricted clarification dialogue. But (2a) so interpreted is still false if we understand "known" in a probabilistic way. As I stressed above,<sup>38</sup> there are alternative ways of finding out what a government means: clarification dialogue may be the only way to achieve knowledge that is near certainty when it is combined with other sources of evidence. It is not, however, the only way to provide probabilistic knowledge.

Of course, premise (2a) is true if one interprets "dialogue" in the broad sense that includes exegetical interpretation, for in order to have even probable knowledge of what the government means, it is necessary to interpret the government's pronouncements in the light of

<sup>36</sup> See text accompanying note 27 *supra*.

<sup>37</sup> See text accompanying notes 14-19 *supra*.

<sup>38</sup> See text accompanying note 25 *supra*.

available evidence. But the necessity of dialogue in this sense surely does not get us very far in justifying freedom of speech. In fact, premise (2a) is a fairly trivial assertion on this reading, stating merely that a government, wanting its positions understood by its citizens, wants its citizens to interpret what the government says.

Premise (2) could also mean: (2b) "The only way for a government to have the meaning of its policies, doctrines, and views known by the government itself is to have dialogue with its citizens." This premise seems obviously false for unrestricted dialogue. Nazi leaders presumably could know with an assurance approaching certainty what their doctrines meant without engaging in an unrestricted dialogue with the German citizens, *i.e.*, without allowing the German citizens to criticize their doctrines.

As I have also pointed out, however, even if one is talking about a restricted dialogue and near certain knowledge, premise (2b) seems dubious. It seems plausible to suppose that Nazi leaders could come to know the meaning of their policies with an assurance approaching certainty without engaging in a restricted dialogue with the German people generally. They could have clarified the meaning of their doctrine by engaging in a dialogue with Aryans or even with lower level members of the Nazi party.

When the dialogue referred to in premise (1) is understood as restricted, premise (3) is false for all plausible interpretations of freedom of speech. For freedom of speech, as it is usually interpreted, involves the freedom of any citizen to criticize the government while restricted clarification dialogue does not embrace criticism of the government. It may well be that premises (1) and (2) are true if "dialogue" is used in the restricted sense. For example, it may be true that a repressive government wants the meaning of its policies and doctrines known to its citizens and that the only way to achieve this is by clarification dialogue. But the government would not be compelled to have freedom of speech if this entailed the freedom to criticize the government. It could simply function in the manner exemplified in the military example presented earlier.<sup>39</sup> Thus, the right to free speech would not follow from the desire for dialogue.

On the other hand, premise (3) may be true if "dialogue" in premise (2) refers to unrestricted dialogue. But, as we have seen, dialogue in this sense would make premise (2) false. It is therefore difficult to see how a plausible interpretation of premises (2) and (3) can be given such that both premises come out true, given an unequiv-

<sup>39</sup> See text accompanying notes 14-15 *supra*.

ocal interpretation of "dialogue" and given that freedom of speech is understood as allowing criticism of the government.

#### CONCLUSION

I conclude that Professor Chevigny's argument is unsound. Whether another argument based on a notion of dialogue would succeed where Professor Chevigny's has failed is a question that cannot be answered here. However, given the various problems with Professor Chevigny's argument, it seems doubtful that any similar argument for free speech based on the notion of dialogue can succeed.

The moral to draw from my examination of this argument is as follows: Freedom of speech involves the right to criticize the government. Dialogue, except in the unrestricted sense, need not allow for criticism. A defense of freedom of speech thus cannot be based upon dialogue. Professor Chevigny's argument has superficial plausibility only until the ambiguity of the concept of dialogue is resolved.

writing

# THE DIALOGIC RIGHT OF FREE EXPRESSION: A REPLY TO MICHAEL MARTIN

PAUL G. CHEVIGNY\*

*Professor Chevigny responds to Professor Martin's criticism of his language-based argument for freedom of expression. Professor Chevigny explains in greater detail the connection between the requirement that words have meaning and the right to criticize the government and offers a response to the charge that nonliberal governments lie beyond the reach of his argument. The author remains convinced that the need for dialogue provides a basis for freedom of expression.*

## INTRODUCTION

I am delighted that Professor Martin has undertaken a critique of my essay, *Philosophy of Language and Free Expression*,<sup>1</sup> even though his is a root-and-branch attack, because it gives me an opportunity to explain and expand some of the ideas in that essay. Some of his arguments seem to raise profound issues, while some seem to be rooted in misunderstanding. In this response I hope to make my ideas as concrete as I can, in order to avoid any further misunderstanding.

In synoptic form, the argument of my essay runs as follows:

- (1) A right to free expression need not be derived, as it has been traditionally, from the personal autonomy of the individual and free trade in ideas, but may also be rooted in the nature of language itself.
- (2) Modern philosophy has come to accept the view that the meaning of words is a social matter, depending on usage and context. The meaning is ascertained through a dialogic process among participants. The necessity of such a dialogue in order to understand words at all, rather than merely to make decisions, gives rise to a necessity that the society allow the dialogue to proceed: that is, society should afford its citizens a right to participate in the dialogue.
- (3) Logic tells us that there are no predictable limits on the number of participants or on the length of time the dialogue ought to go on. Although society imposes institutional limits in an effort to reach finite decisions, for example in elections and lawsuits, such limits may afford only a decision; they do not foreclose debate about the decision.

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<sup>1</sup> Chevigny, *Philosophy of Language and Free Expression*, 55 N.Y.U. L. Rev. 157 (1980).

Professor Martin has put his criticisms of these notions into two "syllogisms" which he attributes to me and claims are false.<sup>2</sup> In sum, the shortcomings of my arguments, according to Professor Martin, are four:

- (1) "Meaning," which is the province of philosophy of language, is independent of "knowledge," which is the province of epistemology. Professor Martin holds that the "justification" for ideas, which is important for epistemology, has little or no part in the philosophy of language. I am accused of confounding all these concepts.
- (2) Discussion of policies does not require that everyone be permitted to participate in the dialogue: a devil's advocate or ruling elite would be sufficient to evaluate the policies of the government. Thus, my broad-based argument for free speech for everyone fails.
- (3) Discussion of policies, even when permitted, need not go beyond the accepted conventions and values of the society.
- (4) My argument that "there is no meaning without free speech" is too narrow because it does not come into play unless the government wants its policies either to be understood or to be justified by rational argument. It is manifestly clear that some governments do not wish to do either and therefore they fall outside the scope of my argument.

In what follows I will show that the argument made in the earlier Article does in fact protect the right of full criticism by all. I must begin, however, with an attempt to clarify the philosophical difference between Professor Martin and me, because everything else depends upon it.

## I

### MEANING AND JUSTIFICATION

Professor Martin faults me for not being clear as to whether I intended to assert that dialogue serves to promote meaning or instead to assert that it promotes rationality or justification. I meant to assert both, although the principal concern of the Article is with the way in which dialogue facilitates understanding of what a speaker means. However, more needs to be said, as it appears my view of the link between justification and understanding has been misconstrued by Professor Martin.<sup>3</sup>

<sup>2</sup> Martin, *On a New Argument for Freedom of Speech*, 57 N.Y.U. L. Rev. 906, 914-15 (1982) [hereinafter Martin].

<sup>3</sup> Martin, pp. 910-11.

Perhaps the principal notion underlying my thesis that understanding requires freedom of speech is that an important way of reaching an understanding of what a speaker means is by looking to the speaker's purported justification for the assertion. This notion casts doubt on the idea, espoused by Professor Martin, that dialogue directed at clarification can be neatly separated from dialogue aimed at promoting rationality. To the extent that inquiries into a speaker's justification tend to weed out assertions that are not justified, and to the extent that the prospect of such inquiries deters speakers from making assertions that lack adequate support, the process of investigating a speaker's reasons for believing something in order to understand the speaker will inevitably foster rationality. I regard the objectives of understandability and justification as so bound up with each other as to be inseparable in practice. When Professor Martin writes such passages as "[a]rguments for the value of unrestricted dialogue in ensuring the justification for—as opposed to the clarification of—one's belief take us well beyond considerations of the philosophy of language to epistemology,"<sup>4</sup> he reveals an unstated assumption that the concerns of the philosophy of language are separable from those of the theory of knowledge. For reasons just stated, I disagree: We know what we mean when we talk to others, largely because we know how our views would be justified in the course of argument.<sup>5</sup>

A familiar enough illustration of this link between inquiring into meaning and inquiring into justification is found in the interpretation of laws and statutes. We draw out a first approximation of a statute's meaning simply by reading its text and applying it to the facts of the case. In a simple case we may be able to stop at this point. We may, however, have to extend our inquiry to decide between possible readings on the basis of which one the legislature most reasonably could have meant given the common law and statutory backdrop against which the legislation was enacted. In an extreme case, we may decide that a proffered reading is to be disfavored because it would render the statute unconstitutional. In so doing, we eliminate the interpretation on the ground that, given the most basic values of our society, no legislature could have reasonably enacted such a statute. Thus,

<sup>4</sup> Id. at 911.

<sup>5</sup> See B. Harrison, Introduction to the Philosophy of Language 127-41 (1979). I do not consider here the question whether we can be internally "sure" about our perceptions when, for example, we are touching something "wet." Freedom of expression rather concerns the communication of perceptions, among other things, between persons. For such communications to be meaningful, a context is indispensable. See Hockney, The Bifurcation of Scientific Theories and Indeterminacy of Translation, 42 Phil. of Sci. 411-27 (1975).

whether we settle upon a given interpretation can depend on whether the enunciator has a rational justification under that interpretation.

Nor is statutory interpretation an isolated example. A maxim of interpretation in analytic philosophy of language is the "principle of charity," which mandates that, other things being equal, a translator prefer one interpretation of a remark over another if the latter alone casts the speaker as being unreasonable.<sup>6</sup> An interpreter operating under this maxim, faced with a remark that translates into a dubious assertion on a first reading, must select between possible interpretations at least partly on the basis of which interpretation puts the speaker in the most reasonable light. Thus, deciding that a legislature "must have meant so-and-so" on the ground that the constitutional, precedential, or legislative backdrop imposes this reading on the legislature on pain of gross inconsistency is not a matter either of exerting authority over the legislature or of holding it to a special standard because it is supposed to be especially rational. It is just one example of how we determine what a person means on a given occasion by reconciling it with related things to which the person subscribes.

Apart from showing why my Article touched on matters relating to justification in expounding a view of meaning, this explanation of the link between meaning and justification sheds light on one of my central points, to which I now turn, namely, that the clarity of meaning is jeopardized unless free speech—understood as including the right to criticize—is sanctioned by government.

## II

### CLARIFICATION OF MEANING AND THE RIGHT TO CRITICIZE

Professor Martin distinguishes three senses of "dialogue"—unrestricted, restricted clarification, and exegetical—and maintains that a government's interest in being understood and in understanding itself at most impels it to authorize dialogue of the latter two sorts.<sup>7</sup> Whatever may be required to ensure the *justification* of policies, doctrines, and views,<sup>8</sup> he says, governments may promote the *understanding* of language they use even while imposing substantial restrictions on dialogue. In particular, they need not brook criticism, *i.e.*, challenges to the validity of their pronouncements and actions; at most, only "clarifying" or "exegetical" requests for definitions of terms need be permitted.<sup>9</sup> Since free speech embraces the right to criticize, there is,

<sup>6</sup> W. Quine, Word and Object 59 & n.2 (1960).

<sup>7</sup> Martin, pp. 908-10, 912-13, and 917-19.

<sup>8</sup> Id. at 915-16.

<sup>9</sup> See id. at 918.

according to Professor Martin, no connection between the interest in meaning and free speech.

The fundamental disagreement between Professor Martin and me concerns the scope and character of verbal interactions that serve to minimize the risk of misunderstanding. I maintain that meaning cannot be clarified through simple definitional exercises, but must be learned instead through extensive dialogue in which meaning becomes apparent through contextual use. The way in which this view of meaning, which I regard as a summation of much in contemporary philosophy of language,<sup>10</sup> supports the right to criticize the government is worth spelling out, in order to clarify the extent of the disagreement between Professor Martin and me.

Two aspects of the clarification process as I have characterized it make criticism an element of efforts to reach understanding. First of all, since understanding often requires familiarization with a speaker's purported justification for a given assertion,<sup>11</sup> it can be inferred that unjustified assertions will often come to light in the course of inquiries into a speaker's meaning; but the conclusion that someone's assertion is unjustified is "criticism" of that speaker. Second, the unpredictability of dialogue directed at clarification implicates criticism as an element of the process. It seems to me impossible for dialogue about government policies to be reliably restricted within a conventional realm of discourse<sup>12</sup> because meaning cannot be reliably restricted. It is always context-dependent, and the variations in the context cannot be foreseen. It is impossible to say at the beginning of a discussion directed at clarification, even a relatively narrow one, whether it is going to be possible to finish the discussion without stepping outside specified confines. When the discussion involves a number of participants and concerns basic questions of policy, the course of the discussion is even more unpredictable.

We tend to think of the art of interpretation in law or in translation, for example, as closely confined by convention. It is traditional for professionals, especially lawyers, to exhibit annoyance when the uninitiated fail to "stick to the subject" in a specialized discussion. Yet

<sup>10</sup> Consider the oft-quoted remark that "[f]or a large class of cases . . . the meaning of a word is its use in language." L. Wittgenstein, *Philosophical Investigations* § 43 (1953). See also *id.* at §§ 241, 242; Chevigny, *supra* note 1, at 164-76.

<sup>11</sup> See text accompanying notes 3-6 *supra*.

<sup>12</sup> I have, of course, in the argument above, implicitly rejected any restricted definitions of dialogue which would figure in such a restriction as offered by Professor Martin, pp. 908-10, but the distinction is not a mere quibble between us about definitions: it is rooted in our understandings of the nature of language.

there is nothing in law or translation or political theory which confines us to the designated realm of discourse.

To press the point within Professor Martin's framework, an "exegetical" dialogue that interprets a text would seem to be a classic example, if one exists, of a "restricted" dialogue. Take the case of an attempt to translate a prose text from French into English, for example, Tocqueville's *Democracy in America*. We will not be able to carry out such an interpretive project without evaluating the work as a "book" as well as a "piece of prose." We can try to evaluate it on the narrowest basis, by trying to reexamine the contemporary evidence on which Tocqueville relied, or, more broadly, as a reflection of social currents which we may also recognize under other, similar evidence. Finally, we might see it as a crystallization of aristocratic attitudes toward perennial problems of democracy. Thus, we can evaluate the book as reportage, as more general sociological theory, or as political theory. Each of our different approaches to Tocqueville's text tends to affect the others. We translate the book in a special way knowing simply that it is a work of sociology, and somewhat differently depending on how we evaluate it as a work of sociology. We cannot "translate" it adequately without thinking about what sort of work it is and what we think the author was intending to accomplish by writing it.<sup>13</sup>

There is nothing in the nature of any mode of discourse which prevents us from stepping out of the framework of discourse even more drastically by questioning the validity of the mode itself. We may decide that one language is radically untranslatable into another, or that the system of legal discourse has no independent rules of its own, but is in fact the sham instrument of other forces in society. Questioning the assumptions of a realm of discourse once again affords us knowledge but in a different universe of discourse, a fact which we memorialize by giving such inquiries a new professional label. Arguments that languages are untranslatable we brand as theories of "linguistic anthropology," and arguments that legal discourse is socially determined we brand as "sociology." The knowledge that such radical questioning affords us, moreover, affects our knowledge within the original mode of discourse; we do our law and our translation differently, if we do them at all, after we become aware of such radical critiques.

<sup>13</sup> See W. Benjamin, *The Task of the Translator*, in *Illuminations* 75 (Hannah Arendt ed. 1969) ("All translation is only a somewhat provisional way of coming to terms with the foreignness of languages.").

The effects of this unpredictability can be illustrated by using Professor Martin's own example of a hypothetical statute which states: "All Communists shall be prosecuted."<sup>14</sup> Engaged in a clarification dialogue about the application of the statute, we might first try to decide what the statute was intended to do, to what mischief it was directed. If "Communism" is prohibited because its ideological tenets are thought to be pernicious, then it does not seem to serve the purposes of the statute to limit its application to the "card-carrying members" of some organization, which could be dissolved as a matter of form overnight. All those who espouse the doctrines will have to be ferreted out and prosecuted, a prospect which leads us into the quagmire of deciding what the ideas of "Communism" are, who subscribes to them, and to what degree. The broadest questions of history, philosophy and legal policy would be implicated in such a determination, and criticism—questioning the justification of the statute's wide sweep—would be likely to result and difficult to curtail.

If "Communism" is prohibited for some narrower reason, such as that its adherents are thought to be violent saboteurs, then the interdiction of "Communists," apparently including adherents who are not saboteurs, seems to be too general.<sup>15</sup> We may be forced to conclude that the statute is unworkable in the sense that it cannot be applied in a consistent manner, or that it must be limited in some way that is not obvious. In short, even the briefest canvass of the problems presented by the anti-Communist statute tells us that the path of the "clarification" dialogue is not predictable, but may spill over into criticism of the statute and the underlying policies of the government.

In sum, my argument is that, because of the link between meaning and justification and the unpredictable course of inquiries into meaning, criticism cannot be banned from dialogue aimed at clarification without incurring serious risk of misunderstanding or meaninglessness. Without the benefit of such dialogue, state pronouncements degenerate into incomprehensible doctrine or meaningless slogans.

The preceding discussion shows why a ban on criticism is significant by reference to considerations about meaning. Appreciation of the same point is enhanced by considering two likely types of restrictions on speech or criticism: restricting the participants in a dialogue and restricting the subject matter of dialogue. First, consider the participants. Although Professor Martin has suggested that nothing in my argument prevents the government from restricting discussion to a

select group,<sup>16</sup> it seems to me that such a course leads to contradictions. The members of an elite group or a devil's advocate that might be permitted under such government rules to discuss policy issues will never be able to know whether they have canvassed all the issues that would be of interest even to themselves, unless they are willing to listen to arguments from the proscribed multitude. They might, for example, miss some economic policy or combination of economic policies, arguably to their advantage, which they cannot conceive because it is outside their experience.

Members of the ruling elite and the elite's little policymaking body might consider that theoretical difficulty an insufficient reason to extend participation in the dialogue; they might persuade themselves that, in almost every foreseeable case, those outside the elite could not have anything of any value to say. Once they make that judgment, however, a much more difficult problem is presented. Because of the unpredictable nature of discussion, it is always possible for some member of the ruling elite to question the conventions of the discussion. If the elite group has a freewheeling discussion, someone is bound to ask why it doesn't get opinions from outside the group. Perhaps less frequently someone will inquire into the justification for excluding an entire class of people who are affected by the decisions of the group. There are, of course, no graceful answers to those questions, and the only alternative will be to establish a rule that the subject of outside participation may not be discussed even by the elite group.

The ruling elite might swallow that limitation on its rights, on the ground that the alternative presents too many pitfalls to contemplate in comfort. Still, its troubles are not going to be at an end. It will be unable to predict how and in what context the justification for the existing system and for the exclusion of others from discussion may come up; the discussion of every policy question will have to be conducted with the greatest circumspection. The counselors and even the devil's advocate will become obsequious "yes-men" because they will not be able to tell where they will transgress convention and start attacking the basis of society. As a consequence of the unpredictability of the meaning of words and of the course of discussion about meaning, then, it turns out that the ruling group cannot limit the rights of others without in the long run severely limiting its own rights.

In light of these contradictions, inherent in any attempt to restrict the dialogue to a select group of participants, the defect in any

<sup>14</sup> See Martin, pp. 911-13.

<sup>15</sup> See *Scales v. United States*, 367 U.S. 203 (1961); *Yates v. United States*, 354 U.S. 298 (1957).

<sup>16</sup> See Martin, p. 913.

attempt to limit the subject matter becomes readily apparent. Such a limitation cannot be effective because, if any discussion is permitted, the question of the definition of and justification for the limitation must come up. When an economic system is erected on the backs of members of an oppressed class, for example, it might be considered advantageous if everyone, including the ruling group, were prevented from criticizing the basis for the system. If the ruling group participates in otherwise open discussion, however, it cannot avoid talking about the economic system, and then about the restrictions on discussion. If it tries to avoid the subject, the question of the justification for the system becomes the dirty secret no one will talk about, which gradually poisons the sense of liberty about every other subject. In the slave-holding South before the Civil War, for example, freedom of thought withered gradually, not only in relation to the subject of slavery but generally as to all topics and all citizens. Although originally abolition was the forbidden topic, every discussion came to be limited because no one could predict when any discussion might be contaminated by the taboo. Orthodoxy in religion was preserved, and scientific ideas about geology and the descent of man were discouraged, because of the fear that they might call into question the separation of the races.<sup>17</sup> Parents were discouraged from sending Southern youths to other sections of the country to be educated, so that they might be "shielded from . . . the inculcation of . . . false doctrines and prejudices against home institutions."<sup>18</sup> Professor Martin has suggested, furthermore, that nothing in my argument prevents the government from restricting discussion to a select group.

When the dialogic rationale for free expression is cast in a legal system, finally, it takes on a vigor that it does not have when viewed in the abstract, outside its institutional context. If the right of free expression is recognized by the law for any restricted group of ideas or persons, the dynamic of the legal system will tend to destroy the restrictions.<sup>19</sup> The principle underlying the right implies that meaning can be found only through an inquiry, the scope of which cannot be predicted, and which is prior to every other value judgment, because the ordering of values is part of the inquiry. The restriction of the right to special groups or ideas is difficult to sustain under this ration-

<sup>17</sup> C. Eaton, *Freedom of Thought in the Old South* 292-93, 306-10 (1940).

<sup>18</sup> *Id.* at 209.

<sup>19</sup> I take it as basic to the notion of any rule called "legal" that it be capable of general application and that like cases should be treated alike. See, e.g., H.L.A. Hart, *The Concept of Law* 120, 155 (1961); L. Pospisil, *Ethnology of Law* ch. 4 (1978).

ale, once it is subjected to reasoned elaboration. If the courts should try to exclude some topics or some class of participants, the irrationality of the decision would shortly be apparent because it is not in the nature of the inquiry to be so limited. The courts might appeal, as they so often have in fact, to some paramount political justification, such as the argument that it is too dangerous to the existing regime for it to permit an idea or a group to be heard. But that justification is itself as much in question as any other; once the value of dialogue is accepted, the courts cannot arrange through some other value to step outside the dialogue. The arbitrariness of the courts' restrictions would become evident all the more quickly because in order to maintain them, the courts would have to prohibit those who are privileged to speak from thoroughly exploring the reasons for the limitations. In short, if the dialogic rationale is elaborated through the system of law in such a way as to include restrictions of subjects or participants, it must lead to painful contradictions.

If these contradictions are unacceptable, then the system of law moves toward a situation where all arguments and all participants are tolerated. The result will be that described at the end of my original essay<sup>20</sup> where all participants expect that their arguments will be subjected to criticism. Whenever anyone enters into the dialogue under such conditions, he will know that there are no limits either to what he can say or to the possible criticism which may be made against what he says. Even if he claims he is opposed to free speech, the participant entering into the dialogue accepts its terms because he knows that in so doing he opens himself to any possible criticism. In the end the participants most respect the dialogue as a way to knowledge if there are no limits on the participants in the discussion or its scope.

### III

#### THE SCOPE AND APPLICATION OF THE ARGUMENT

Professor Martin's final criticism of my argument concerns the scope of its application. He doubts that any argument rooted in the necessity to arrive at "meaning" can have any force for a government that does not want to make rational or understandable decisions of policy. I doubt it myself. I never claimed that the dialogic basis for free speech could be made applicable to all governments. I recognize that if the government can contrive to reject a modern view of lan-

<sup>20</sup> Chevigny, *supra* note 1, at 193-94.



guage and decisionmaking or is simply indifferent about the prospects of meaninglessness and incomprehension, then it may reject my conclusions. The application of my argument concededly depends on the type of government being considered, but I do not think this fact weakens my argument. On the contrary, a consideration of the various "exceptions" serves only to reinforce the rule.

In my original Article, I spoke of the magical use of language, thinking of a tribal society to which the modern ideas of language and politics seemed particularly inapposite.<sup>21</sup> If, in such a society, the language employed by authorities has only magical uses, then there is no need for understanding by its members. The motivating end of my argument—the facilitation of understanding—is not present. I would suggest, however, that such a case presents a rare exception to the general notion that governments need or desire understanding.

A second exception is a government that cannot hold itself out to citizens as legitimate. It is possible, when the legitimacy of government breaks down, to rule entirely by brutality. A government which has no legitimacy is, of course, impervious to my arguments, as it is to all other arguments in favor of liberty. But it is, in fact, scarcely a government at all. The experience in Latin America suggests that the most brutal governments—those that rule in the name of force and hardly by persuasion at all—are not strong but weak. If the *junta* of the moment is replaced at gunpoint by another, there is hardly a ripple of discontent because the *junta* has no comprehensible argument, no justification to remain.<sup>22</sup> If there is no reason other than violence why one group should rule, then it can continue its rule only by violence. The moment it lets its guard down, it is swept away and the lesson of its disappearance is that, for modern governments, a claim to legitimacy implies acceptance of a notion of understanding that leads to the need for free discussion.

A third possible exception is suggested by Professor Martin. He posits a government rooted in an emotional folk-culture rather than in rational policy, such as a Fascist government, as an example of a government impervious to arguments for free expression of the sort that I have made. It may be possible to conceive of such an utterly irrational government, but in fact, repressive modern governments generally seem to try to have things both ways: they restrict some topics to slogans and magic and subject others to rational decision-making. A frequent result is that those who participate in the rational

<sup>21</sup> Id. at 181-82.

<sup>22</sup> P. Lernoux, *Latin America: A Political Guide to Thirty-Three Nations*, in 233 *Nation* 133-48 (1981).

process in the long run want to subject the magical parts of the polity to rational inquiry as well.

Fourthly, authoritarian Socialist governments, which on the one hand promise equality and progress through rational policies and plans and on the other tolerate no open disagreement with government policy, are particularly subject to such crises. When the one "true" way does not produce an economic miracle, the vast majority of citizens—in whose interest the state claims, after all, to govern—sees no reason why it should not be able to question and criticize. The government finds, as I think the Polish government has found during the Solidarity protests of 1981 and 1982,<sup>23</sup> that the attempt to combine magic and reason undermines the legitimacy of the government. Permitting criticism increases the legitimacy of government by affording justification for policies and minimizing the risk of misunderstanding by citizens. Governments, then, are included within the scope of my argument insofar as they need understanding of their policies in order to be assured of legitimacy and hence a continuing vitality.

#### CONCLUSION

I hope I have shown that Professor Martin is in error in saying that "dialogue . . . need not allow for criticism" and that therefore "a defense of free speech cannot be based on dialogue." Because every dialogue is potentially critical, and the direction it may take cannot be predicted, dialogue does provide a basis for free expression.

While it is in the nature of a political right such as freedom of expression, furthermore, that no government can be forced to recognize it merely by the logic of the need for the right, I conclude that in most cases free discussion is essential to the legitimacy of modern governments.

<sup>23</sup> A. Bromke, *Policy and Politics in Gierk's Poland*, in Simon & Kanet, *Background to Crisis: Policy and Politics in Gierk's Poland 3* (1981); S.M. Terry, *The Sejm as Symbol: Recent Polish Attitudes Toward Political Participation*, in id. at 27, 52-54.