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## Book Review: Speech, Crime, and the Uses of Language. by Kent Greenawalt.

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of the dissent before joining the majority opinion. And it is nearly criminal to change one's mind, particularly after one has already cast one's vote, and particularly if one has voted with a five member majority. Operating together, the Court's informal "rules" protect Justices from having to persuade or resist persuasion, from having to closely scrutinize each other's work, and from having to address or correct deficiencies in their opinions.

This is a relatively new phenomenon. Rehnquist's own account of the 1951 Term and discussions I have had with former law clerks suggest that the sterile environment in which the Justices now function contrasts sharply with the relatively collegial atmosphere in which at least the Vinson and Warren Courts worked. Perhaps the Chief Justice is so accustomed to the present conditions that they no longer trouble him. Perhaps he believes that the situation is not as bleak as I portray. Or perhaps he feels that the Court's workload requires Justices to make up their minds quickly, stick with their decisions, forego trying to persuade their colleagues, and sometimes accept unsatisfactory work. Rehnquist's unusual defense of the Court's insipid conferences suggests that the lack of "interplay" among his colleagues—and what that might reflect—concern him, but his full views remain unknown.

*The Supreme Court* is a worthwhile book, full of pleasant and interesting anecdotes about the Court and the Chief Justice who now leads it. But it could have been much more. One is left wishing that Rehnquist had not attempted to write three books at once, but had instead devoted his considerable gifts to a serious examination of the way in which the present Court goes about its business.

**SPEECH, CRIME, AND THE USES OF LANGUAGE.** By Kent Greenawalt.<sup>1</sup> New York and Oxford: Oxford University Press. 1989. Pp. viii, 349. \$45.00.

*Maimon Schwarzschild*<sup>2</sup>

The power of speech is an essential part of what makes us human: it is the basis of politics and of civilization itself.<sup>3</sup> Through speech, people join together to hunt for food, build houses, farm the

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3. ARISTOTLE, *POLITICS*, Book 1, sections 9-11, pp. 9-11 (Loeb Classical Library 1944 ed.)

land; through speech they can express love, create poetry, and bring out the best in one another. And as Vaclav Havel wrote a month or two before the wondrous collapse of European communism, “a writer’s congress or some speech at it is capable of shaking the entire structure of government.”<sup>4</sup>

But alongside its miraculous power for good, speech also has an immense capacity for evil. In personal relations, hard words inflict real pain, and how can you really “take back” a sharp word once it has been spoken? Through speech, we insult each other, betray each other, threaten each other. Political speech can promise utopia, and deliver genocide. As Havel puts it, words of freedom and truth are matched by words that inflame and deceive—and sometimes these words of good and evil are the very same words, “even both at once.”<sup>5</sup>

One of the most unsettling things about words is that they differentiate people as well as join them together. Only in words can you express likes, dislikes, principles, values that are individual, that are yours and not mine.<sup>6</sup> “You say tomayto, I say tomahto; You say potayto, I say potahto.” Real freedom of speech, accordingly, features only in those societies—historically rare—that value individuality and personal independence: liberal societies, in short. Given the propensity of speech for evil as well as good, such freedom of speech undoubtedly carries great dangers.

Professor Kent Greenawalt’s scrupulous new book explores whether there are types of communication that can properly be forbidden even in a society that believes in free speech. Professor Greenawalt focuses on the philosophical and constitutional status of communications that have traditionally been criminal in America: solicitation of crime, fraud, and “offensive” communications like pornography. The tendency of the book is to support the broad thrust of American criminal law in these areas, by arguing—fairly persuasively, it seems to me—that such forbidden communications are different in kind from the sorts of speech that ought to be free.

## I

Greenawalt begins by suggesting that if you believe in free speech, you probably do so for a variety of reasons and not for one reason alone. You may think free speech promotes good conse-

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4. Havel, *Words on Words*, New York Review of Books, Jan. 18, 1990, at 5.

5. *Id.*, pp. 5-6.

6. See G. STEINER, *AFTER BABEL: ASPECTS OF LANGUAGE AND TRANSLATION* 56 (1975) (“languages have been, throughout human history, zones of silence to other men and razor-edges of division”).

quences: that it is conducive to discovering truths (or at least more conducive than government suppression of discussion); that it facilitates discovery of what people want, so that their interests can perhaps be accommodated and social frustration forestalled; that it enables people to expose abuses of authority; that it gives people an emotional outlet and promotes learning and personal development. You may also think that free speech is good in itself, essential to personal autonomy or personal dignity.<sup>7</sup>

Considering the immense range of things that people can communicate to one another, Greenawalt is surely right that you are unlikely to have only one reason for permissiveness towards all the different things that people might say or write. Greenawalt's point is that the various justifications for free speech overlap only in part with general libertarian principles; many of the justifications—or many combinations of them—really apply only to communication. Accordingly, the scope of free speech ought to correspond to the reasons people have for supporting free speech.

The next step in Greenawalt's argument is the crucial one in the book. Some communications, he says, make assertions—or carry on a discussion—about facts or values. This is self-expression, and it is squarely covered by the justifications for free speech. Freedom to say "China tested a nuclear bomb yesterday" is conducive to discovering the truth of the matter; so likewise is freedom to say "Your wife has a lover." "I want to earn five dollars an hour" facilitates meeting my desire. "I'm angry" gives me an emotional outlet and affords me the dignity of self-expression. "Nixon violated the election laws" exposes an abuse of authority. And so forth. The justifications for free speech cover communication about private as well as public matters, since people obviously care deeply about private matters and since our understanding of personal matters affects our views about matters of general concern.

There is another kind of communication, however, which is not primarily an assertion of fact or of value, but which Greenawalt calls "situation-altering." Utterances like "I bid three hearts" or "I promise to deliver three tons at one hundred dollars a ton" or "Let's mug that guy and divide whatever we find in his wallet" or "Your money or your life" work direct changes in the social context. Such utterances are primarily ways of doing, not of asserting. According to Greenawalt, they are not covered by the justifications

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7. Cf. Epstein, *The Utilitarian Foundations of Natural Law*, 12 HARV. J. LAW & PUBLIC POLICY 713 (1989) and Wonnell, *Four Challenges Facing a Compatibilist Philosophy*, 12 HARV. J. LAW & PUBLIC POLICY 835 (1989) (suggesting that consequentialist and good-in-themselves "natural rights" considerations do not conflict as much as most philosophers have tended to assume).

for free speech, or at least not nearly to the same degree that assertions are, and hence the free speech principle should not protect them. And, in fact, it is communication of this sort that is regulated by American contract law and forbidden by the laws against threats and solicitations to commit crime.

Greenawalt's distinction is inspired by the philosopher J. L. Austin's concept of "performative" utterances.<sup>8</sup> It also resembles the rough-and-ready line between "speech" and "action" which the courts sometimes rely on in close free speech cases.<sup>9</sup> Greenawalt acknowledges that the boundary between expressive and situation-altering communication will often be fuzzy, but he says that the distinction still offers a reasonable guide for regulating communication in a society committed to free speech.

Judged by Greenawalt's distinction, a lot of ordinary communication is troublingly ambiguous. When I say "China tested a nuclear bomb yesterday," I may radically change your view of China, of me, of whether it is worth your while reading law reviews now that the end is nigh. When I say "Your wife has a lover," my assertion might be situation-altering in even more obvious ways. And just as assertions can be situation-altering, so a classically situation-altering communication like "Your money or your life," when spoken by Robin Hood perhaps, can express a uniquely memorable homily about social justice and the fair distribution of wealth.<sup>10</sup>

And yet, while Greenawalt's distinction—like so many theories—has a way of dissolving if you look at it too hard, it also has strong common-sense appeal. Like the hoary speech-action distinction, it goes some distance towards explaining why no one seriously suggests that "Give me your wallet or I will kill you" is protected by the first amendment. In a great many cases, weighing whether a communication is more nearly "expressive" or more nearly "situation-altering" is as good a way as any to think about whether it may properly be suppressed.

## II

Weighing a great many such cases fills up the bulk of *Speech, Crime, and the Uses of Language*. Greenawalt painstakingly assesses countless hypothetical threats, offers, encouragements, solici-

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8. See Austin, *Performative Utterances*, in *PHILOSOPHICAL PAPERS* 233 (J. Urmson & G. Warnock eds. 3rd ed. 1979).

9. See, e.g., *U.S. v. O'Brien*, 391 U.S. 367, 376 (1968) (burning a draft card is "conduct" and may therefore be punished as a crime).

10. As Greenawalt points out, Austin himself in later life grew doubtful of his concept of "performative" speech, precisely because so many messages are equivocal in this way. See J. AUSTIN, *HOW TO DO THINGS WITH WORDS* (2d ed. 1975).

tations, and fraudulent representations. He recognizes that ordinary communications are often both expressive and situation-altering. The typical threat, for example, asserts a fact ("unless you do X, I will do Y"); it may also involve an outpouring of emotion, and freedom of speech is often justified in part as an outlet for emotion. But when someone threatens you, the social situation changes in the very basic sense that you may be terrorized into doing something that you do not want to do, just as if physical force had been used against you. Free speech should not be a licence for people to terrorize one another. With communications that are both expressive and situation-altering, Greenawalt's approach is to balance expressive value against undesirable social consequences. In the case of a threat, what is the listener being asked to do? How harmful are the threatened consequences? Is the threat solely a form of pressure, or does it also convey information about what would happen even if no threat had been made?

By contrast with this "balancing" approach, the Supreme Court sometimes claims that it will strike down virtually any restriction on speech (by "strictly scrutinizing" the restriction).<sup>11</sup> The strict scrutiny standard is actually applied, for the most part, in cases involving more or less "political" speech. By announcing that freedom of speech is virtually absolute, the court emphasizes the importance of this freedom and eschews balancing it against other concerns. The implicit lesson is that free speech should not get short shrift when weighed against other values. But the Court's stated approach invites the question of whether threats, extortion, blackmail, and criminal solicitation are not also speech. And in other areas where the Justices are reluctant to strike down all restrictions, like commercial communication and especially pornography, the Court's doctrine is notoriously tangled.<sup>12</sup>

Greenawalt obviously does not consider the "all-or-nothing" strict scrutiny standard to be intellectually serious. He scarcely mentions it in the book. "Your money or your life" is, after all, a speech, yet it is hard to imagine any society that would give it much

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11. See, e.g., *Perry Education Assn. v. Perry Local Educators' Assn.*, 460 U.S. 37, 45 (1983) (content-based regulation of speech in the public forum is impermissible unless "necessary to serve a compelling state interest"); *Consolidated Edison Co. v. Public Service Commission*, 447 U.S. 530, 540 (1980).

12. On commercial speech, see e.g. *Va. State Board of Pharmacy v. Va. Citizens Consumer Council Inc.*, 425 U.S. 748 (1976) (Constitution protects advertisements of pharmaceutical prices); *but cf.* *Posadas de Puerto Rico, Associates v. Tourism Co. of Puerto Rico*, 478 U.S. 328 (1986) (Constitution does not protect advertisements for legal gambling).

On pornography, see e.g. *Miller v. California*, 413 U.S. 15, 22 (1973) (conceding that "no majority of the Court has at any time been able to agree on a standard to determine what constitutes obscene, pornographic material subject to regulation").

free-speech credit. Greenawalt relies, instead, on his case-by-case balancing approach, which really requires two sorts of balancing: first, to weigh whether a particular message is more expressive or more situation-altering, and then to weigh the worth of whatever expression the message contains against the social costs of allowing it to be communicated.

Some such weighing is often inescapable. The rub, as with many balancing tests, is that you have to balance interests that are not really comparable: the expressive impact of a message against its situation-altering effects and then freedom of speech itself against various anti-social consequences. Apples and oranges (or apples and orangutans) at each juncture.

This is the problem with Greenawalt's hypotheticals, which too often conclude with his arbitrary statement about which way he would decide, giving no real explanation of what his standards are for weighing the competing considerations. For instance, in his chapter on "encouragements to crime," Greenawalt argues that when I urge you to commit a crime, intending that you should promptly commit it, I ought to be liable to punishment, because my message is more situation-altering than expressive. But if you come to me for advice, and I disinterestedly recommend a crime, Greenawalt says I should be exempt, because "sincere advice [is] important for personal deliberation." Why does the social value of advice outweigh the social cost of the encouragement to crime? If I do not explicitly urge a crime, but tell you a fact, intending thereby to encourage a crime ("Your employee at the cement factory is a police informer") Greenawalt says I should be liable, but only "upon the most clear evidence" of my intent. Why should it not suffice to meet the conventional burden of proof in such a case? If I publish dangerous information—the recipe for a hydrogen bomb, say, or the identities of CIA agents in countries where they might be murdered—Greenawalt would hold me liable, but only if I intend that a crime should be committed as a result of what I publish. Why is negligence about whether a crime will result not enough to make me liable? The problem is not that Greenawalt's conclusions are necessarily wrong, but that the scale on which he weighs the interests is unexplained.

While Greenawalt's conclusions often invite this kind of question, in most of the cases he considers—threats, offers, criminal encouragements, and so forth—the competing claims for free expression and for regulation are at least carefully set out. The hypotheticals are often intriguing, and Greenawalt's treatment is always clear, thoughtful, and thorough.

*Speech, Crime, and the Uses of Language* is not, however, an easy book to read. This is partly a matter of organization. The book is in three parts: first, a theoretical overview of free speech in light of the distinction between expressive and situation-altering messages; then, several chapters on how legislatures might use the distinction to make laws against criminal communications; finally, chapters that assess the constitutionality of such laws. As the author disarmingly warns, this means that many points in the book are made three times. The author's penchant for drawing fine distinctions among hypothetical cases also demands a lot of patience in the reader.<sup>13</sup>

What makes this immensely sober book most difficult to read, however, is its very sobriety, its lack of passion and its distaste for controversy. The tone of the book implies that all reasonable people surely value free speech very highly, as indeed the author clearly does. So Greenawalt concentrates on criminal scenarios that are not in any social or political sense very controversial. The book's treatment of truly controversial matters, by contrast, is curiously off-handed.

"Group defamation," for instance, including racial insults—a volatile topic, at least on university campuses—gets six pages in the "legislative" section of the book and ten more in the "constitutional" chapters. (Actually, both these treatments are considerably diluted by discussions of the much less controversial topic of ordinary personal insults.) Greenawalt acknowledges that rough words are expressive, indeed that a general prohibition on racial slurs "is not to nibble at the edges of expression . . . it is consciously to attack communications" because their ideas are abhorrent.<sup>14</sup> He points out how difficult it is to draw a line between abuse—if it is to be prohibited—and permissible discussion of the characteristics of groups or their members. He concludes equivocally that these is-

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13. Greenawalt distinguishes "warning threats", for example, from "manipulative threats." A warning threat ("If you sell pornography I will inevitably be so angry at you that I may commit violence") conveys information and is arguably more nearly within the free speech principle than a manipulative threat ("I'll burn down your store unless you give me \$1,000"), where the speaker would not dream of burning down the store except in the context of having made the threat. After analyzing many such threats, Greenawalt adds the rather charming postscript that his distinction should make no practical difference to the law: when, on balance, either type of threat is socially dangerous it should be suppressed.

14. Greenawalt floats—without really analyzing—the suggestion that verbal abuse of a minority is more offensive than abuse of a secure majority ("'honkey' hurts a lot less than 'nigger'" (p.147)). The implication is that a legal double standard might be appropriate. Greenawalt does not suggest who ought to decide which groups in a very pluralist society are secure and which are not, nor does he consider what the social implications might be of legal double standards depending on whether you identify yourself with a group which successfully casts itself as "disfavoured."

sues are “not easy”; there are weighty considerations of “equality and dignity” to support greater censorship, but Greenawalt’s judgment is that the law’s present, generally permissive, approach is “about right.” Pornography, another topic of sharp public controversy, gets eleven pages in all, and here too the treatment is equivocal as well as summary. Greenawalt concludes that pornography does involve expression, but that traditionalist and feminist advocates of censorship also have valid concerns, and hence that the whole question “can reasonably be debated.”

### III

Greenawalt’s approach assumes a stable consensus for freedom of speech, at least for freedom of relatively serious “expressive” speech. When line-drawing problems arise in marginal cases, he implies, careful analysis should enable reasonable people to do the necessary balancing. But as Greenawalt himself suggests, no standards exist for this balancing except by reference to the justifications for free speech. Hence, it is important to be explicit about what those justifications are and how they bear on the social costs and benefits of permissiveness or censorship for any particular class of messages. This is especially true when you consider that people’s support for free speech as a primary value cannot really be taken for granted.

Throughout most of human history, after all, the idea that there should be broad freedom of expression would have seemed perverse. In some cultures, it is not expression at all—free or otherwise—that is most prized, but silence.<sup>15</sup> It is certainly quite plausible to view heresy as an act of betrayal, corroding the communal ties that make it possible for people to live together. Speech does have grave power for evil. And really free speech is an especial threat, precisely because it is an instrument for non-conformity and individuality.

There are plenty of arguments to support free speech, to be sure, although as Greenawalt suggests, no single argument is necessarily very convincing on its own. Perhaps the whole battery of arguments is unlikely to persuade anyone who finds free speech temperamentally uncongenial. Firm support for free speech, in

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15. See G. STEINER, LANGUAGE AND SILENCE 12-13 (1967) (the essentially verbal character of Western civilization is unusual and is not shared, e.g., by Buddhism or Taoism); cf. S. Schwarzschild, *Rav. I. Hutner*, in CONTEMPORARY JEWISH THINKERS (S. Katz ed.) (B'nai B'rith Pub. Co. Washington D.C.) (forthcoming 1991) (“Perhaps the single most famous doctrine of the Kotzker Rebbe is the virtue and practice of silence: what is not said and cannot be said is at least as important as what is put in words.”)

fact, is usually associated with support for a bundle of other values, which can be summed up as the values of modernity or of the Enlightenment.

These values include rationality, individualism, careers open to talent, considerable economic freedom, privacy, and the rights of citizens under law. There is a practical link between each of these values and freedom of expression. Rationality—unlike argument from authority—requires some freedom of discussion. Individualism is largely a matter of what you are free to say. Careers can only be open to talent if you are free to communicate your talent. Economic free markets require some freedom of commercial speech. Privacy is jeopardized in a society devoted to suppression of heresy. And legal rights imply some freedom of disputation, without which no right can be asserted. These Enlightenment values, with their links to free speech, also have practical links to the economic prosperity of modern life.<sup>16</sup> Free speech, from this point of view, is part and parcel of a uniquely successful material culture.

The Enlightenment outlook has itself prospered of late, most dramatically in the transformation of eastern and central Europe. But it is important to remember that there are many other human outlooks, quite coherent in their own terms, that value free expression little or not at all.

Among intellectuals, for example, there has never been a consensus for the Enlightenment outlook. Historically, hostility to Enlightenment values has usually come from conservative or reactionary thinkers, from Burke and Carlyle, Leontiev and de Maistre. There is little trace of that tradition in respectable intellectual circles nowadays, especially in America.<sup>17</sup> In the American university world, on the other hand, rejection of the Enlightenment is a popular stance among radical and feminist academics,<sup>18</sup> who often repudiate reason, individualism, careers based on merit, market economics, privacy, and the rule of law.<sup>19</sup>

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16. See generally M. WEBER, *THE PROTESTANT ETHIC AND THE SPIRIT OF CAPITALISM* (tr. T. Parsons 1958 ed.) on the links between rationalism, individualism, toleration, and the material wealth of modernity.

17. There are echoes of the reactionary anti-Enlightenment tradition in the monthly *Salisbury Review* in England, and among the intellectuals around Mr. Russell Kirk in this country. The cognate slavophile tradition appears to be increasingly influential in the post-*glasnost* USSR.

18. Writing in the socialist journal *Dissent*, Professor David Bromwich describes as "dominant" this mood of "institutional radicalism," noting that "the prejudices of institutional radicals tend to be antihumanist and anti-Enlightenment." Bromwich, *The Future of Tradition*, 36 *DISSENT* 541 (1989).

19. For an example of feminist rejection of reason, see J. COCKS, *THE OPPOSITIONAL IMAGINATION* (1989). Writing in the left-wing journal *New Politics*, Janet Biehl condemns the feminist rejection of rationality, and speaks of a "counter-Enlightenment fog settling over

The intellectual source of this anti-Enlightenment stance run back to Marx's rejection of civil and political rights,<sup>20</sup> and to Herbert Marcuse's more recent idea that tolerance is "repressive," and that a truly "liberating tolerance . . . would mean intolerance against movements from the Right and toleration of movements from the Left."<sup>21</sup> There is now an active cottage industry in academic literature favoring punishment for speech deemed racist, sexist, homophobic, or demeaning,<sup>22</sup> in addition to the feminist literature calling for the suppression of pornography, not on the traditional ground that it isn't speech but on the ground that it propagates harmful ideas.<sup>23</sup> At the practical level, universities around the country are taking steps to restrict expression considered offensive. The University of Michigan, for example, adopted rules prohibiting any communication that "stigmatizes," giving as examples of forbidden speech, "A male student makes remarks in class like 'Women just aren't as good in this field as men,'" "Telling jokes about gay men and lesbians," or "Laughing at a joke about someone in your class who stutters." Because the University of Michigan is a state institution, these rules were struck down by the federal courts as violating the first amendment.<sup>24</sup> But private universities are under no such constitutional constraint, and "speech codes"—some of them as sweeping as Michigan's—have been

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American academe." Biehl, *On Feminism and the Retreat from Reason*, 2 NEW POLITICS 180 (1990).

20. Marx, *On The Jewish Question*, in K. MARX, EARLY WRITINGS 211 (1975 ed.) (rights are intrinsically linked to the egoism, competitiveness, and isolation of the bourgeois individual). Contemporary radicals seldom cite this source directly, perhaps out of embarrassment with Marx's claim that the prototype of the hateful bourgeois is the Jew.

21. Marcuse, *Repressive Tolerance*, R. WOLFF, B. MOORE, AND H. MARCUSE, REPRESSIVE TOLERANCE 81, 122-23 (1969). Criticizing Marcuse generally, Professor Kolakowski suggests that "there could hardly be a clearer instance of the replacement of Marx's slogan 'either socialism or barbarism' by the version 'socialism equals barbarism.'" L. KOLAKOWSKI, 3 MAIN CURRENTS OF MARXISM 420 (1981).

22. For a small sample, see Lawrence, *If He Hollers Let Him Go: Regulating Racist Speech on Campus*, 1990 DUKE L.J. (there should be strict regulation of speech that vilifies "subordinated" groups); Delgado, *Words that Wound: A Tort Action for Racial Insults, Epithets, and Name-Calling* 17 HARV. CIV. RTS.-CIV. LIB. L. REV. 133 (1982); Arkes, *Civility and the Restriction of Speech: Rediscovering the Defamation of Groups*, 1974 SUP. CT. REV. 281. See also Minow, "Looking Ahead to the 1990's: Constitutional Law and American Colleges and Universities" (key-note address to the National Association of Colleges' and Universities' Attorneys, June 1989) (suggesting, in words echoing Marcuse, that universities should have the "courage . . . to be intolerant toward behavior that prevents anyone" from feeling comfortable in the university community).

23. See, e.g., Sunstein, *Pornography and the First Amendment*, 1986 DUKE L.J. 589 (1986); Mackinnon, *Not a Moral Issue*, 2 YALE L. & POLICY REV. 321 (1984); A. DWORIN, *PORNOGRAPHY: MEN POSSESSING WOMEN* (1981). At its most extreme, this literature sometimes implies that all non-feminist speech is pornography, just as all heterosexual sex is rape.

24. *Doe v. Univ. of Michigan*, 721 F. Supp. 852 (E.D. Mich. 1989).

adopted at Yale, Stanford, Tufts, Emory, and elsewhere.<sup>25</sup> These rules apply to faculty as well as to students, of course, which creates considerable pressure on scholars not to pursue "offensive" ideas.<sup>26</sup>

If broad freedom of expression cannot be taken for granted on American university campuses, perhaps it cannot be taken for granted anywhere. Indeed, even the firmest believer in free speech cannot rest on a general rule that no communication should ever be suppressed. The lesson of Greenawalt's stubbornly intolerable threats, conspiracies, perjuries, false alarms, and frauds is that any society—however committed to free speech—must continually balance this freedom against the social dangers of evil or hurtful messages. And there is no science that tells you how much weight to attribute to either side of the scales in any particular case. Greenawalt's distinction between expressive and situation-altering speech, for example, is a helpful way to think about what messages should be free of censorship, but it can only be a very rough guide, given the enormous range of messages that are both expressive and situation-altering.

Perhaps the most important thing is that whoever decides the cases should be genuinely committed to free speech as a matter of fundamental outlook. So long as someone like Kent Greenawalt is at the scales, there is no reason to fear that free speech will be balanced lightly away; Greenawalt's earnest concern for free speech shines through in every case he considers. But for most of us, the reliability of our commitment to free speech probably depends to a great extent on the strength of our broader attachment to Enlightenment values. These values are the best guarantee that the inevitable prohibitions of some kinds of communications will not be allowed to overwhelm free speech as a whole. Enlightenment values even provide a fairly specific framework for balancing free speech against competing concerns: in each case you would have to consider the costs, in terms of these values, of suppressing a particular kind of communication. It is always helpful to be explicit about these values, both because they do provide some standard for decid-

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25. See *Campus Debate Pits Freedom of Speech Against Ugly Words*, N.Y. Times, Apr. 25, 1989, at 1 (reporting on the steps taken by these universities "to restrict forms of expression deemed offensive"). See also *Tufts: Students Protest Policy to Limit Speech Practices*, N.Y. Times, September 17, 1989, at 61; Hentoff, *An Unspeakable Crime at Yale*, VILLAGE VOICE, July 15, 1986, at 33.

26. In a report entitled *Universities: Take Care*, the London *Economist* gives such examples as the Tufts professor publicly charged with "racism and callousness" for recommending "a standard work of urban anthropology . . . and raising some questions about affirmative action"; and "the country's leading demographer of race" at the University of Michigan, pressured into "abandoning a course on race relations." THE ECONOMIST (London), at 20, 23, February 10, 1990.

ing the hard cases and because they represent, after all, a controversial commitment: one way of looking at the world, but by no means the only possible way.

Greenawalt undoubtedly shares the Enlightenment values. In his restrained, judicious style, however, he shies away from saying why, and he does not bring these values explicitly to bear on his argument. His philosophical and legal close-order drill would be more interesting, and perhaps more persuasive, if he unbent a little and conveyed more fire about why free speech is important to him: why it matters for the sort of civilization he obviously believes in.

**INDIVIDUALS AND THEIR RIGHTS.** By Tibor Machan.<sup>1</sup> LaSalle, Ill.: Open Court Publishing Co. 1989. Pp. xviii, 250. \$32.95, cloth; \$16.95, paper.

*Michael Zuckert*<sup>2</sup>

"The owl of Minerva," said Hegel, "flies only at dusk," by which he meant that only after an historical order is well-established or even fading do the philosophers come to bring understanding of it. Whether Hegel's utterance has such universal bearing as he believed is a nice question, but regarding the issue of rights there is much to be said for his assertion. We have had our "rights revolution," and now we are getting philosophy's attempts to bring some wisdom about rights. Since the mid-seventies or so many talented writers have philosophized about rights. To mention but a few—Robert Nozick, Ronald Dworkin, and Alan Gewirth have presented sophisticated theories of rights, all purporting to make sense of this concept so central to our political life, and each (of course) presenting doctrines quite different from the others.

Tibor Machan is a frequent contributor to discussions about rights in the journals, and he published an earlier book on the subject in 1975. He has now drawn together his more recent work into another book. It could have been an important book, but its value is much diminished by various failings. To begin, it is not well-tailored. Machan has stitched the book together from previously published essays: the seams show; annoying repetitions occur regularly, and it would have benefitted from a much more thorough rewriting.

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