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FREE SPEECH AND AUTONOMY: THINKERS, STORYTELLERS, AND A SYSTEMIC APPROACH TO SPEECH

*Susan H. Williams**

Ed's and Seana's papers together present a powerful argument for the idea that autonomy is a fundamental value underlying the protection of free speech. As I have written elsewhere, I agree with this argument.[1] In this response to their papers, I would like to suggest that an autonomy approach focused on narrative rather than choice as the vehicle for autonomy offers some advantages. First, I will outline briefly the functions served by autonomy that provide a foundation for this value in our moral and political experience. Second, I will offer a narrative model of autonomy and describe how it serves the functions in our moral and political lives for which we need autonomy. Third, I will highlight the two primary advantages of this model: (1) seeing autonomy as an ongoing process rather than an assumed starting point, and (2) focusing our attention on systems of free speech—rather than only on individuals, whether they are speakers, listeners, or thinkers. I believe that this focus on systemic concerns is crucial to rethinking the commitment to free speech in a way that makes issues of inequality central and therefore holds the promise of making free speech a living and meaningful part of people's experience.

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* Walter W. Foskett Professor of Law and Director, Center for Constitutional Democracy at Indiana University Maurer School of Law. Thanks to all of the participants in the free speech theory group for the engaging conversation and to Jim Weinstein for organizing the group and keeping us moving along. And I would like to take this opportunity to express my deep gratitude to Ed Baker for his kind encouragement to me over the years and for the brilliance, integrity, and sincerity of his scholarship, which have inspired all of us.

[1] *See generally* SUSAN H. WILLIAMS, TRUTH, AUTONOMY, AND SPEECH: FEMINIST THEORY AND THE FIRST AMENDMENT (2004) (offering an approach to the first amendment based on a reconceptualization of truth and autonomy as the fundamental values and democracy as a particularly important application of both values).

I. THE FUNCTIONS OF AUTONOMY AND A NARRATIVE MODEL THAT SERVES THEM[2]

An autonomy theory needs grounding: it needs to explain the source of the particular version of autonomy that it is using, and that source needs to provide a basis for believing that this autonomy value is fundamental in a way that explains its constitutional status. For Ed, the source is a particular understanding of the respect that a government must show its citizens in order to legitimately demand their obedience to its laws.[3] For Seana, the source is the collection of capacities—rational, emotional, perceptual, and sentient—that "correctly constitute the core of what we value about ourselves" and that together constitute "the individual mind and the autonomy of its operation."[4] I take a more functionalist and relational approach that focuses on social practices. In order to know what autonomy means and why it matters, I begin by asking what is the work that we want and need the concept of autonomy to do in our moral and political lives? If those functions are of fundamental importance to us—as I believe they are—then we have both an explanation of the importance of autonomy and a framework for assessing a particular concept of autonomy to see if it can fulfill these functions.

I believe that there are at least four primary functions served by the concept of autonomy in our moral and political lives. These functions are fundamental in the sense that, if we did not have a concept of autonomy that could effectively do these things, we would both find our moral lives deeply disrupted and lose moral and political practices of great value to us. All of these functions are described in terms of social practices and the value of those practices runs both to the individuals involved in them in any given instance and to all members of the societies that can sustain them.[5]

The first function of autonomy is to ground a collection of attitudes towards ourselves, including self-trust and self-respect. Self-trust is the ability and inclination to rely upon oneself, even if it leads to vulnerability. Self-respect is the belief that one is worthwhile as a person and the disposition to act on that belief by, for example, resisting violations of one's rights, being committed to one's own projects and values, and maintaining one's personal standards.[6] Both of these attitudes allow us to experience ourselves as agents and not merely as objects of our own observation. Without self-trust and self-respect, we would be incapable of forming and working to implement plans. I assume that the value of this orientation toward ourselves is obvious enough to need little argument.[7]

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[2] The first two sections of this paper are a short summary of the argument I develop in greater detail in TRUTH, AUTONOMY, AND SPEECH. *See id.* at 130–72.

[3] *See* C. Edwin Baker, *Autonomy and Free Speech*, 27 CONST. COMMENT. 251, 251 (2011) [hereinafter Baker, *Autonomy*].

[4] Seana Valentine Shiffrin, *A Thinker-Based Approach to Freedom of Speech*, 27 CONST. COMMENT. 285, 287 (2011).

[5] Or, as Tim describes them in his comment, "bystanders." *See* Tim Scanlon, *Comment on Shiffrin's Thinker-Based Approach to Freedom of Speech*, 27 CONST. COMMENT. 327, 331 (2011).

These valuable attitudes toward ourselves are dependent upon a concept of autonomy. If one experienced oneself as the unwilling and helpless pawn of forces beyond one's control, with no capacity for self-direction, then it would be impossible to trust oneself.[8] Similarly, the projects of self-respect—resisting violations of rights, developing and being committed to one's own values, and maintaining personal standards[9]—are possible only if we see ourselves as agents capable of some meaningful self-direction. So, whatever our view of the world and the issues of causal determinism when we adopt the perspective of an "observer,"[10] we must also have available to us the perspective of the autonomous, that is, self-directing, agent.[11] Allowing us access to that perspective is one of the important functions of a concept of autonomy that any acceptable version must fulfill.

The perspective of the autonomous agent is also crucial to our understanding of character and the possibility of integrity. Character is a collection of personality traits, attitudes, and values held by an individual that is relatively stable over time. Character ties a life together, allowing us to see ourselves and others as more than simply arbitrary collections of behaviors and experiences. Owen Flanagan describes soldiers suffering from an identity crisis who were observed by Erik Erikson as follows:

> [T]hey normally experience themselves as the locus of a set of subjectively linked events, as a sort of conduit . . . What they lack . . . is any sense of coherent and authoritative "me-ness,"

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[6] *See* DIANA T. MEYERS, SELF, SOCIETY, AND PERSONAL CHOICE 210–13 (1989).

[7] *See* Robin S. Dillon, *How to Lose Your Self-Respect*, 29 AM. PHIL. Q. 125, 134–35 (1992).

[8] *See* KEITH LEHRER, SELF-TRUST 96 (1997).

[9] *See* Dillon, *supra* note 7, at 134.

[10] *See* Susan Wendell, *Oppression and Victimization: Choice and Responsibility in* "NAGGING" QUESTIONS: FEMINIST ETHICS IN EVERYDAY LIFE 57–66 (Dana E. Bushnell ed., 1995).

[11] *See* Richard Fallon, *Two Senses of Autonomy,* 46 STAN. L. REV. 875, 893 (1994).

> of personal sameness—any sense that these subjectively linked events occurring to and in them constitute a person, a self, a life.[12]

For these soldiers, there is not a complete breakdown of the boundaries of personal identity: they are aware when an act or emotion happens to them rather than to someone else. The problem is that they cannot see why the simple fact of the location of that act or emotion in them makes it theirs in any meaningful sense. They have lost a sense of authorship or autonomy. This sense of autonomous agency is the glue that holds together the disparate elements of a life into a single person with a coherent character.

Autonomy is also central to our understandings of moral responsibility. In the voluminous literature on responsibility, there is a general consensus that responsibility rests on autonomy.[13] Indeed, rather than arguing for the connection, it is usually assumed and marshaled in support of one or another conception of autonomy (as providing better support for the practices of responsibility). If we think of the ascription of responsibility as a social practice, then it has at least two purposes: one purpose is to attempt to change people's behavior in the future and a second purpose is to establish, maintain and repair the relationships of trust on which the moral community is based. In both of these purposes, the practice of ascribing responsibility relies upon a concept of autonomy.

The most obvious purpose of ascribing responsibility is to shape people's behavior in the future. The person held responsible for a bad act will, we hope, reflect and decide differently the next time.[14] And, of course, the practice of holding people responsible shapes the behavior of other actors who are aware of it as well. One need not adopt a contra-causal notion of freedom to make sense of this purpose, but one does need a basic concept of autonomy. It may not matter whether the agent could have done differently in the past, but she must have some capacity for decision-making and self-direction in response to the community's norms in order for the ascription of responsibility to affect her future behavior.[15]

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[12] Owen Flanagan, *Identity and Strong and Weak Evaluation*, *in* IDENTITY, CHARACTER, AND MORALITY: ESSAYS IN MORAL PSYCHOLOGY 48 (Owen Flanagan & Amelie Oksenberg Rorty eds., 1990).

[13] PETER CANE, RESPONSIBILITY IN LAW AND MORALITY 95 (2002).

[14] *See* MARION SMILEY, MORAL RESPONSIBILITY AND THE BOUNDARIES OF COMMUNITY: POWER AND ACCOUNTABILITY FROM A PRAGMATIC POINT OF VIEW 182 (1992).

The second purpose of the social practice of ascribing responsibility is to establish, maintain, and repair the relationships of trust on which the moral community is based. In order to live together, we must be able to trust each other, in general, not to violate the shared norms of our community. The practice of ascribing responsibility allows the victim of a violation of that trust to register her hurt and outrage and to assert the fundamental relationship of obligation between herself, the agent of the violation, and the community.[16] As with self-trust, however, this is possible only if the agent in whom trust is placed is seen as autonomous. Without a minimum degree of self-direction, an agent can't be trusted.[17] Thus, both of the central purposes of ascriptions of responsibility rest on a concept of autonomy.[18]

Finally, autonomy (understood as self-direction), is an important part of how we understand the possibility of social change and the meaning of politics. Obviously, if we are the helpless products of our social conditioning, we cannot hope to be the conscious agents of social change. Change may come, and it may even come through us, but it will not be under our direction unless we have some authorship of our own actions. Political movement and democratic politics, in particular, would make little sense in a world without autonomy. Or, to put it in the way that Ed has so persuasively argued the point, much of the reason that democratic politics has value for us is that it represents both an exercise of and respect for our autonomy.[19] This is the overlapping consensus that Jim sees between Ed's autonomy theory and democracy theories.[20]

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[15] *See id.* at 235–37.

[16] *See* MARGARET URBAN WALKER, MORAL UNDERSTANDINGS: A FEMINIST STUDY IN ETHICS 95 (1998).

[17] Of course, autonomy, while necessary, is not sufficient for trust. We might not trust an autonomous person whom we believed to be malicious, for example.

[18] The relationship between responsibility and autonomy is dialectical: the support and dependence runs in both directions. For a discussion of the ways in which our practices of ascribing responsibility support a concept of autonomy, see WILLIAMS, *supra* note 1, at 141–42.

[19] *See* Baker, *supra* note 3, at 265.

[20] *See* James Weinstein, *Free Speech and Political Legitimacy: A Response to Ed Baker*, 27 CONST. COMMENT. 361, 366 (2011).

II. A NARRATIVE MODEL OF AUTONOMY

I suggest that a model of autonomy in which the central activity is interpretive rather than volitional can serve these important purposes while providing some crucial advantages over a choice based model like Ed's. Seana's "thinker" is not as focused on choice as the central activity; indeed, her approach includes significant cognitive, perceptual, and emotional aspects that suggest that she is combining autonomy with elements that I have argued could be understood through a reconceptualized truth theory of speech.[21] Because I believe that blending elements of epistemology and moral/political theory is necessary to capture many of our deepest concerns, I am very sympathetic to the move, implicit in Seana's model, to bring both types of elements together in a metaphor like the thinker.[22] As a result, the contrast to choice based theories in my description below is intended to apply more to Ed's approach than to Seana's. In the next section, where I will explain the primary advantages of a narrative model, I will highlight the ones that are relevant to Seana as well as to Ed.

I intend to use the category of narrative in a very broad and inclusive way. In particular, I do not intend to limit narrative to stories as conventionally understood. Instead, I am using narrative to point to a broader category of activities in which a person "orders a sequence of events [or, I would add, people or things or concepts] for the purpose of revealing or creating meaning."[23] A narrative model of autonomy identifies the central focus of autonomy not as an act of choice, but as an act of interpretation: the primary experience and exercise of autonomy takes place when we make meaning. While "telling our own stories" is a useful heuristic device to capture this idea, we should not let the metaphor mislead us: many types of speech make meaning in this way without taking the form of a traditional story with plot or characters. The point is to focus not on these formal elements of storytelling, but on the central project of interpretation and meaning making, rather than on choice. The goal of autonomy in this model is that one's identity and life are not "the object or medium of someone else's speech, [but rather] the subject of one's own."[24]

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[21] *See* WILLIAMS, *supra* note 1, at 95–129, 175–98.

[22] *See id.* at 116–17. Indeed, Seana's wonderful paper is causing me to reconsider whether there is a single model or metaphor that can capture both of the sets of concerns that I discuss in the book under truth and autonomy headings. Such unity would be desirable for all the reasons she outlines and I think it might be possible that the thinker could serve such a function, but, in order to address the concerns raised in this paper, the model would need to be recast in more process-based and system-focused directions.

[23] Hilde Lindemann Nelson, *Resistance and Insubordination*, 10 HYPATIA 23, 27 (1995). Because I am using narrative so broadly, my view of storytelling may come very close to Seana's view of thinking, which also involves a very broad range of cognitive and emotional faculties.

One obvious question raised by this narrative model of autonomy is whether it has any role for action. In other words, if I can tell my own story but am subject to restraints that prevent me from acting on it, am I still autonomous? In answer to this question, I think it is useful to distinguish between freedom and autonomy. Freedom requires not only that I be autonomous in the sense described here, but also that I experience negative liberty (some degree of freedom from constraints on my action) and also often positive liberty (some degree of support for the resources, capacities, and opportunities necessary for my action). Issues related to action (other than interpretive, meaning-making actions) are best understood as raising these concerns of negative and positive liberty, which are, of course, the subject of many other legal protections, constitutional and statutory. Autonomy is one necessary, but not sufficient, element of freedom. One might, then, be autonomous but in many ways unfree, because of such limitations on negative or positive liberty.[25] This approach facilitates the important work of recognizing the autonomy that can be and often is exercised by people under conditions of oppression. Even when their freedom of action is drastically and unjustly curtailed, people can and do exercise the autonomy to tell their own stories and make their own meanings.[26]

This process of narrative autonomy is fundamentally relational. First, the model is substantively relational: the content or substance of the categories we use in telling our stories—the understandings of character, the familiar plot lines, the narrative techniques—are part of our cultural inheritance and are given to us through our social relations rather than created ex nihilo by us individually. Second, the model is causally relational: the capacities we use in the process of telling our stories are the product of certain social relationships and require such relations to sustain them. So, as many writers have recognized, both rationality and imagination are capacities that are learned, developed and sustained by social relationships.[27] Indeed, as Seana points out, isolating a person can lead to the loss of a whole range of such capacities, sometimes to the point of insanity.[28] Finally, a narrative model of autonomy is inherently relational: narrative (unlike choice) assumes a relational context. It is not that one cannot tell a story alone, but (1) the normal assumption is that stories are told to someone; (2) the exceptions to this norm often confirm it by positing an imaginary audience; and (3) even when the only audience is ourselves, we tend to replicate the social aspect by thinking of ourselves as separated into the part telling the story and the part hearing it. In other words, a narrative model builds a relational element into the concept of autonomy.

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[24] Susan J. Brison, *The Uses of Narrative in the Aftermath of Violence*, *in* ON FEMINIST ETHICS AND POLITICS 214 (Claudia Card ed., 1999).

[25] *See* WILLIAMS, *supra* note 1, at 145–46.

[26] *See id.* at 80.

This narrative model can serve all of the purposes of autonomy identified above. Moreover, it offers some interesting and potentially helpful insights into the nature of the various moral and political practices in which autonomy plays a part. For example, the basic self-trust and self-respect that we need to take an internal view of our own action can be grounded on the self-direction that we experience through the process of creative reinterpretation of our stories. Because symbolic systems always include the possibility for reinterpretation and transformation, our retellings are never fated to be simply parroting back what we were given: they always include the possibility of creativity, that is, of a conscious reworking of culturally given materials in light of our normative commitments. Because we have access to this form of agency (regardless of the truth or falsity of causal determinism on some other level), we are never simply the passive recipients of forces beyond our control. As a result, self-trust and self-respect are both possible and desirable.

Nonetheless, the relational elements of the model remind us that our autonomy is always partial: we can be the authors of our own stories, but we are never the only authors. In addition, our capacity for self-direction is itself a product of social relations and conditions often beyond our individual control. Thus, our autonomy is also always contingent. As a result, our self-trust and self-respect are consistent with both humility and interdependence—indeed, require them. We need others to help create and sustain in us the capacity for self-direction on which our self-trust and self-respect depend.

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[27] *See* ANNETTE BAIER, POSTURES OF THE MIND: ESSAYS ON MIND AND MORALS 83–90 (1985) (describing us as "second persons" because we are created through these relations.)

[28] *See* Shiffrin, *supra* note 4, at 305.

Character also is supported by a narrative model of autonomy: the process through which we claim our own characters, and discern those of other people, is fundamentally narrative. Again, however, a narrative model highlights the relational nature of our characters and, as a result, their fluidity and vulnerability to social conditions. We construct and reconstruct our own characters and that of others through a dialogue with other people. But the conditions of this dialogue are not the same for everyone and systems of social hierarchy and oppression are therefore relevant to our capacity for narrative autonomy: "we are not all in the same discursive positions any more than we are all in the same social ones. . . . There are moral problems with the social distribution of narrative resources and the credibility to use them."[29]

A narrative model of autonomy also serves the function of supporting our system of ascribing responsibility. The two primary purposes of this system, I suggested above, are to affect people's future behavior and to establish and maintain relationships of trust on which communities depend. The narrative model suggests that when a message of praise or blame is communicated to someone, two things happen: first, the agent is presented with certain information which she must assess in terms of, and perhaps incorporate into, her stories about herself and, second, the agent must respond to the effect of the ascription of responsibility on her relationships with her dialogic partners within the moral community. Again, the crucial question raised by this understanding of autonomy is: what are the conditions that help or hinder the agent in her efforts to exercise her powers of creative interpretation in carrying out these tasks?

Finally, a narrative model of autonomy also provides a meaningful basis for our practices of democratic politics. As is probably apparent, a narrative model of autonomy provides support for a dialogic model of democracy. Because our autonomous identities are created through a process of dialogue with others, it is a mistake to see our interests and values as endogenous to politics. Moreover, political interaction is one of the important realms in which we engage in building narrative autonomy.[30] The goal of politics is not to preserve a pre-existing sphere of individual autonomy, but to provide the types of interaction that constitute one part of our autonomy.[31]

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[29] WALKER, *supra* note 16, at 106–07.

Given that the model of autonomy proposed here is narrative, it is probably not necessary to go into great detail about how it is related to speech. So, I will just point out that there are two primary ways in which speech is related to narrative autonomy. First, many speech acts would themselves be exercises of narrative autonomy: telling one's story in the broadest sense. Second, the systems of speech (such as the structure of broadcasting markets or the financing of political campaigns) affect the possibility of autonomy for many people. Such systems can have two different types of effects: (1) increasing or decreasing the opportunities for the exercise of narrative autonomy, and (2) facilitating or hindering the development of the capacities needed for narrative autonomy. Speech is uniquely significant to the exercise of narrative autonomy (at both the individual and collective levels) because it is through the manipulation of symbolic systems that we create meaning, engage in interpretation, and communicate, which are the basic components of narrative. On the other hand, speech is not uniquely significant to the development of the capacities for autonomy. I will pursue this distinction a little further in the next section, when I explore a few of the implications of a narrative approach for specific speech issues.

III. THE ADVANTAGES OF A NARRATIVE MODEL

I believe that this narrative model has two primary advantages over more traditional autonomy theories. First, the narrative model sees autonomy as an on-going process rather than as a pre-existing capacity, and that shifts the analysis in ways that are useful for avoiding some of the pitfalls of traditional autonomy theories. Second, the narrative model focuses our attention on the social conditions that facilitate or frustrate the development and exercise of autonomy. It forces us to consider whether our systems of speech are helping or hindering that autonomy and not only whether they are frustrating its expression in a particular case. As a result, it makes considerations of inequality central to the concerns of the first amendment.

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[30] *See generally* IRIS MARION YOUNG, INCLUSION AND DEMOCRACY (2000) (developing a theory of communicative democracy).

[31] This need not be the only goal of politics, of course: politics might also serve utilitarian purposes of promoting the general welfare or, as Vincent Blasi has suggested, building certain character traits in citizens. But this understanding of democratic politics does have implications for these other purposes. *See* WILLIAMS, *supra* note 1, at 170.

The first advantage of a narrative model is that, in this model, autonomy is neither a preexisting condition that can be assumed for all persons (as I believe it is for both Ed and Seana)[32] nor is it an end state that can be taken for granted once achieved.[33] It is, instead, a process that must be continually ongoing for a person to be autonomous. Autonomy can, therefore, exist to different degrees and in different areas of one's life.[34]

There are several useful results of this shift to understanding autonomy as a process. First, when autonomy is seen not as an achievement or a precondition, but as an ongoing and always imperfect process, then we have a much better way of approaching the difficult issues raised by persons whose capacities are less developed. [35] Children or adults with mental disabilities, who may have reduced capacity for rational reflection compared to average adults, have, for that reason, often been seen as less autonomous and, therefore, less deserving of the rights due to autonomous persons. Women have

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32. *See* Baker, *supra* note 3, at 254 (formal conception of autonomy "consists of a person's authority (or right) to make decisions about herself"). Given Ed's conviction that the basis for governmental legitimacy rests on respect for autonomy, it must be the case that autonomy has to be assumed by the government as (at least) a starting point for all normal, adult persons. For Seana, the issue is somewhat less clear. Her paper suggests a similarly ascriptive role for autonomy. *See* Shiffrin, *supra* note 4, at 287 ("I will proceed from the assumption that, for the most part, we are individual human agents with significant . . . capacities . . . I will also assume that our possession and exercise of these capacities correctly constitute the core of what we value about ourselves."). Nonetheless, I think that Seana's focus on capacities opens the window for her to move in the direction I am outlining here: seeing autonomy as a process rather than an assumed starting point and paying attention to the social conditions necessary to develop and maintain those capacities. I just don't know whether she is interested in jumping out that particular window or not.

33. As it appears to be for some other, liberal autonomy theorists. *See, e.g.*, ALFRED R. MELE, AUTONOMOUS AGENTS: FROM SELF-CONTROL TO AUTONOMY 228–29 (1995) (describing the process of becoming autonomous in terms of the development of certain cognitive and motor skills).

34. Choice does not disappear from our experience in this model. Moments of choice are often the catalyst for telling or retelling our stories and choices are among the more important consequences of telling a particular story in a particular way. But choice is unique neither as the occasion for narrative autonomy (e.g. think about unchosen changes like the death of a loved one that cause a retelling of our stories) nor as the consequence of narrative autonomy (both forms of knowledge and relationships—not always experienced as chosen—are other common consequences of retelling our stories). *See* WILLIAMS, *supra* note 1, at 149–50.

35. I am grateful to Jill Hasday for raising this issue in her helpful comments on this paper.

sometimes been categorized the same way.[36] But from the perspective of a narrative model of autonomy, all persons' autonomy is partial, episodic, and imperfect. The issue is not to find some baseline of autonomy to mark out the persons who are autonomous enough to deserve rights. A narrative model does not divide people into categories of autonomous and non-autonomous on this basis or for this purpose. Instead, a narrative model suggests that the central issue is to think about the barriers and limitations that restrict autonomy for various persons and to work to provide people with the opportunities and resources necessary to increase their autonomy. In other words, the question in any given case is not whether such persons are currently autonomous enough to demand rights, but how to structure their rights so as to facilitate their autonomy. Children or people with developmental limitations may need rights that function differently to facilitate their autonomy than average adults. But no one is categorically excluded and the question for all persons is essentially the same.

Another important consequence of thinking of autonomy as a process rather than as a starting point is that it shifts our focus from the theoretical questions about free will and determinism that have plagued traditional theories of autonomy,[37] to the practical questions about the conditions necessary to support our experience of this process. Rather than struggling to explain exactly what sort of freedom from causal determinism is necessary to make autonomy work and how exactly that type or degree of freedom is possible, we can focus on the experience of being able or unable to tell our stories and the conditions that frustrate or facilitate this process.

This problem with seeing autonomy as a starting point is part of the reason that both Ed and Seana are led to what I believe to be an ultimately dissatisfying explanation for the limited First Amendment protection for commercial speech. Thinking of autonomy as a starting point to be generally assumed leads them to try to explain limited protection for commercial speech by pointing to conditions of coercion that take it out of the category of autonomous speech.[38] If autonomy is assumed as the normal starting point, then some argument like this appears to be necessary to explain why a particular category of speech is not deserving of protection. The problem, which both Ed and Seana have recognized and struggled with here, is that many forms of speech are subject to a vast range of types and amounts of coercion.[39] We all operate under such pressures constantly, and they interact in ways that are complex and highly individual in determining the range of choices open to us. There is no reason to believe that the pressures of the market on commercial speech are different either in kind or degree from the pressures experienced by other speakers in a host of situations in which we all agree their speech should be protected (e.g., religious organizations in which members are pressured to speak on behalf of the group's beliefs). Some people obviously do engage in commercial speech that reflects their values, and other people engage in non-commercial forms of speech that are more a response to social pressures than a reflection of their own values. Thinking of autonomy as a precondition for speech protection puts us in the untenable position of trying to draw a line to mark the area of speech that is autonomous enough to qualify for First Amendment protection.

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[36] *See* Diana T. Meyers, *The Socialized Individual and Individual Autonomy*, *in* WOMEN AND MORAL THEORY 145 (Eva Feder Kittay & Diana T. Meyers eds., 1987).

[37] *See, e.g.*, Joel Feinberg, *Autonomy*, *in* THE INNER CITADEL 27 (John Christman ed., 1989); GERALD DWORKIN, THE THEORY AND PRACTICE OF AUTONOMY (1988); ROBERT YOUNG, PERSONAL AUTONOMY: BEYOND NEGATIVE AND POSITIVE LIBERTY (1986).

Thinking of autonomy not as a given but as a process—and, in particular, as a process that is both dependent upon and actualized within social relationships—leads to a different focus. From the perspective of narrative autonomy, it is not the breadth or narrowness of choice left open by social pressures (market-driven or otherwise) that determines whether speech is protected. The central question is, instead, whether the speech systems surrounding commercial speech allow and encourage people to develop and exercise the range of capacities involved in telling their own stories. In other words, the issue is not whether commercial speech is sufficiently autonomous to be deserving of First Amendment respect; the issue is whether the commercial speech system is sufficiently protective of narrative autonomy.

This question would lead us to a set of different considerations with respect to commercial speech. In thinking about the speaker, we might ask whether the social safety net in our society is sufficient to allow people some meaningful opportunity to express their creativity at the risk of losing their jobs. We might ask about the ways of encouraging corporate cultures that nurture creativity. And we might ask about the structure of a market that could incorporate the pursuit of values in addition to profit. In terms of the listeners, we might ask about the impact of advertising on our capacities for reflection and our sense of self-worth. We might think about the potential for creative resistance to such effects and the ways in which speech systems might facilitate such resistance. I am not suggesting that any one (or even all) of these concerns would lead us to the conclusion that commercial speech is unprotected. Rather, they might lead us to the conclusion that certain kinds of government efforts to improve this speech system by altering underlying conditions, even at some cost to current speech, do not violate the First Amendment.

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[38] *See* C. Edwin Baker, *The First Amendment and Commercial Speech*, 84 IND. L.J. 981, 985–94 (2009); Shiffrin, *supra* note 4, at 296.

[39] *See, e.g.,* Shiffrin, *supra* note 4, at 296–97 (recognizing the limits of these arguments but reiterating the basic point).

The point is to focus not on whether a particular example of speech represents a sufficient exercise of autonomy to qualify for protection, but instead on whether the existing speech systems facilitate and encourage autonomy. That, after all, is the real problem. Denying First Amendment protection to commercial speech does not begin to address these underlying systemic issues, it simply makes them easier to ignore by blunting some of the social costs they impose. A model that focuses on autonomy as a process rather than a pre-existing state directs our attention to these more significant systemic concerns that shape our capacities for autonomy.

This point leads me to the second advantage of a narrative model: the general focus on systems. It is because a narrative model makes social relations so central to autonomy—causally and conceptually—that it leads to this focus on the background and systemic conditions that are so often overlooked by other autonomy theories.[40] In thinking about the protection for speech as serving the goal of protecting autonomy, we must pay attention to the systems of social relations that facilitate the development and maintenance of the capacities necessary for autonomy.

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[40] Both Ed and Seana include important relational elements that distinguish their approaches to autonomy from much of the traditional literature. For example, Ed focuses not only on self-expression but also on participation in social change as a central element of autonomy, *see* C. Edwin Baker, *The Scope of the First Amendment Freedom of Speech*, 25 UCLA L. REV. 964, 991 (1978), and Seana emphasizes the ways in which relationships with others are crucial to the faculties she identifies as fundamental to autonomy. *See* Shiffrin, *supra* note 4, at 284–85. But neither of them focuses attention on the relationships in which the capacities for autonomy are created and maintained as a concern of first amendment analysis. Again, the point is not to make such conditions themselves violations of the first amendment but rather to suggest that government action directed to addressing such conditions should be seen as contributing to the purposes of the first amendment even if it causes some interference with speech that is

I need to pause here to make clear that this systemic approach is not equivalent to a focus on what Ed calls "substantive equality" in his contribution to this exchange. He defines substantive autonomy as a person's "capacity to pursue successfully the life she endorses."[41] This he contrasts with the formal autonomy he is endorsing, which "consists of a person's authority (or right) to make decisions about herself—her own meaningful actions and usually her use of her resources—as long as her actions do not block others' similar authority or rights."[42] As I understand it, this distinction points to the difference between choice, which is the heart of formal autonomy, and action, which is the focus of substantive autonomy. So, when a critic of formal equality complains that there is not much point in a model of autonomy that protects a person's right to choose to be a lawyer if she has no realistic possibility of getting the training or opportunity to actually be one, that critic is relying on a substantive conception of autonomy.

A narrative model of autonomy is, however, not a substantive one in Ed's sense. A narrative model focuses on the ability to tell one's own story, but it does not address the ability to make that story a practical reality through action in the world. The latter ability is also crucial, but is best understood as liberty (both positive and negative) and is, as Ed points out with respect to substantive autonomy, inherently and inescapably partial.[43] The more important of such liberties are the subject of other constitutional protections and, like Seana, I think it is a strength of autonomy theories that they are able to offer a coherent account of how freedom of speech is related to, and interdependent with, other fundamental rights, such as privacy.[44]

Although narrative autonomy is not substantive in Ed's sense, there is a similarity between narrative autonomy and

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generated by the current, problematic systems of expression.

[41] Baker, *Autonomy*, *supra* note 3, at 253.

[42] *Id*. at 254.

[43] *See id*; *see also* text accompanying notes 24–26 (arguing that freedom is best understood as the combination of autonomy, negative liberty, and positive liberty.)

[44] *See* Shiffrin, *supra* note 4, at 288; WILLIAMS, *supra* note 1, at 204–05 (arguing that the first amendment should, therefore, be understood to have implications for our interpretation of other constitutional provisions).

substantive autonomy: both focus on the conditions in the world that are necessary to support the exercise of autonomy. In the case of narrative autonomy, there are two sets of such conditions: those social relations that provide the foundation for the various capacities needed to tell one's own story and those that allow the practice of such telling to flourish. The systems that help develop (or retard the development of) our capacities are, of course, much wider than speech systems. Certainly, an economic system that generates vast disparities in wealth is at least as important in affecting the potential for many people to develop capacities for autonomy as any system of speech. The First Amendment cannot directly address such non-speech systems, but the values underlying freedom of speech may have implications for the interpretation of other parts of the Constitution.[45] Nonetheless, while other systems have a large impact, speech systems are the primary mode through which narrative autonomy is practiced and one of the primary modes through which the capacities necessary for narrative autonomy are developed and sustained. The educational system, the mass media, the internet, political campaigns, the system of government funding for speech, the rules governing the use of government property for speech purposes—these are all examples of speech systems. The protection for freedom of speech should be understood as protection for the health and good functioning of such systems rather than only as protection for individual rights.

This shift in focus allows us to seriously consider some of the kinds of problems current speech doctrine has difficulty even recognizing: the ways in which systems of speech restrict the opportunities for narrative autonomy for groups of people even if they do not violate the rights of any particular individual. I have offered elsewhere an extended argument for the conclusion that attention to the systemic issues in political campaign finance regulation demonstrates that such regulations should be allowed when they have the purpose and effect of increasing the ability of the system to promote narrative autonomy, even if they involve some cost to speech produced under the current problematic system.[46]

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[45] *See* WILLIAMS, *supra* note 1, at 222 (arguing that protection of narrative autonomy might lead us to conclude that property-tax based school systems violate the equal protection clause).

[46] *Id.* at 210–21.

Similarly, a concern for the health of speech systems would lead to a rule that government action that has as its purpose the restriction of narrative autonomy should be suspect whether or not any particular person's opportunity to speak has been limited by that action.[47] This approach would suggest, for example that, regardless of whether a government funding program for speech involves a "penalty" or merely a "refusal to subsidize," the program is unconstitutional if its purpose is to restrict the ability of persons to engage in narrative autonomy. Thus, the crucial issue in *Rust v. Sullivan*,[48] in which the government prohibited family planning programs receiving federal funds from providing counseling regarding abortion, is actually about the autonomy of the women rather than about the autonomy of the family planning clinics whose speech was directly affected. The problem here is primarily a problem about the government's purpose in regulating this speech system, rather than about the impact on the speaker. The government's purpose in this case was not just to refuse government funding for abortions (which is not a First Amendment violation, whatever its status under the Fourteenth Amendment), but to limit the information women received in such programs in ways that would make it more difficult for them to decide to have abortions, regardless of the source of funding for the procedure. In other words, the government's purpose was precisely to restrict the autonomy of the women and, as such, it should have been unconstitutional regardless of whether the program involved a penalty or a refusal to subsidize.[49] This understanding of *Rust* is consistent, I believe, with the deep sense of moral outrage that the case inspires, which is based not on the impact on the doctors who were silenced, but on the impact on the women whose autonomy was deliberately reduced by the government action.

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[47] This insight represents the kernel of truth at the heart of the anti-paternalism argument the Court often relies upon. *See, e.g.*, *44 Liqourmart, Inc.v. R.I.*, 517 U.S. 484 (1996) (striking down a law prohibiting alcohol price advertisements).

[48] 500 U.S. 173 (1991).

[49] The focus in current doctrine on whether the government has created a public forum might persist, since the obligations on the government in a public forum go well beyond the minimal restriction discussed here. But even in the absence of a public forum, this limitation on purpose should apply.

CONCLUSION

In short, I agree with Ed and Seana that autonomy is a central value protected by freedom of speech and that it provides an important basis for the First Amendment. And, like them, I believe that we need a clear statement of the nature of autonomy and the reasons why it is so important in order to understand the nature of the legal protections that are necessary to sustain it. But I also believe that the conception of autonomy we should be using is one that makes human relations and social systems central to our analysis. Adopting this approach to autonomy allows us to see autonomy as a process rather than an assumed starting point and thereby avoids the problematic issues raised by refusing protection to speech that is deeply shaped by social (including market) influences. In addition, this approach refocuses our attention on the issues of inequality that prevent our speech systems from providing meaningful opportunities for autonomy to significant groups of people. Issues of inequality have been important to some democracy theories, but they have traditionally been less significant for autonomy theory because of its focus on choice, its failure to recognize the relationality of autonomy, and its assumption that autonomy is a starting point to be assumed for all. Bringing a concern for inequality into the center of autonomy theory is, I believe, one of the more important tasks of free speech theory.