

# The Fact of the Matter

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Frederick Schauer, *Facts and the First Amendment*, 57 **UCLA L. Rev.** ---- (forthcoming, 2010). Available at [SSRN](#).

"Facts," the songwriter David Byrne once observed, "all come with points of view." Americans, Frederick Schauer adds, credit any number of "facts" with points of view. President Obama is *not* "President" Obama, but a constitutionally ineligible interloper born in Kenya. President Bush was hardly surprised by the 9/11 attacks, given that his government either staged them or had advance warning of them. And so on. The same phenomenon is observable across the world. There surely are "facts" about the conduct of the Israeli military and Hezbollah in Lebanon, or the proper treatment for AIDS in South Africa, but they are hedged round with points of view, some sensible and some lunatic. That there is a fact of the matter Schauer does not doubt; but there is today, he says, an apparent "increasing and unfortunate acceptance of factual falsity in public communication."

What will be more surprising to many is that facts are so poorly accounted for in First Amendment law. The First Amendment and its jurisprudence and scholarship are startlingly reticent on questions of factuality and falsity. This is the subject of Schauer's recent Melville B. Nimmer Memorial Lecture, *Facts and the First Amendment*, delivered this past October at UCLA Law School. (Or so I assume!) Schauer does not seek to fill in all the gaps and provide a detailed First Amendment theory of facts. Instead, he argues that the First Amendment's inability to deal directly with these concerns is a symptom of its "smallness" – of the extent to which many of the questions that are seemingly central to the law of free speech lie outside its boundaries and in the realm of "politics, economics, and sociology" whose dimensions "are far more important than the legal and constitutional ones."

Schauer does not belabor the point that facts exist and are important; to do so, indeed, would run contrary to the spirit of his argument. Rather, he focuses on the scarcity of discussion of "the relationship between a regime of freedom of speech and the goal of increasing public knowledge of facts or decreasing public belief in false factual propositions." Most free speech theorists are content to settle the matter with a shopworn quote or two from John Milton's *Areopagitica* or John Stuart Mill's *On Liberty*, both of which assert in their own way that, in Milton's words, "who ever knew Truth put to the wors[e], in a free and open encounter?"

But these assertions now fail to satisfy as they once did. Milton, Schauer writes, was more concerned with "elusive and controversial" truths involving religion and politics than with plain facts. Even the secularist Mill was more concerned with theological and political "truths," not "issues of demonstrable and verifiable fact." When it came to science or mathematics, he argued that there is "nothing at all to be said on the wrong side of the question."

In any event, we may still ask: is it really true that the facts will win out in an encounter with falsity? That may (or many not) be the case in the long run, but that is a contested empirical question; and the truth certainly does not always win in the short run, which is where most of us spend our lives, surrounded by claims about miracle cures, must-have products, and so on. On these matters, Schauer

writes, “the venerable and inspiring history of freedom of expression has virtually nothing to say.”

Schauer raises some interesting doctrinal questions. Clearly false commercial claims are regulable under current law, and First Amendment law remains fairly staunch about this. Conversely, clearly false claims are far more likely to be given substantial leeway under the First Amendment, for reasons having less to do with their truth or falsity and more to do with the risks of government regulation of politics. But what about truth-claims that fall in the middle ground – questions about, say, the authenticity of the *Protocols of the Elders of Zion*? Here, the law is less clear, although such claims are more likely to be treated like political than commercial speech.

The larger question, Schauer suggests, is whether, “consistent with the First Amendment, there is anything that might be done to deal with this seemingly increasing problem of public and influential factual falsity.” Any answer, he argues, “should start where the First Amendment leaves off.” For one thing, the First Amendment does not prevent government from speaking in its own voice to “correct widespread public factual inaccuracy.” More broadly, Schauer argues that the relative incapacity of the First Amendment to deal with these issues should remind us that “the First Amendment is only a tiny sliver of communications policy.” The First Amendment cannot “be the cure for all of the communications and informational problems of our day,” he concludes.

By focusing on the question of the role of *facts*, as opposed to “Truth,” in the First Amendment, and on the surprisingly narrow boundaries of the First Amendment compared to the whole array of policy questions involving communication, Schauer has made a valuable contribution, one that also forms the subject of recent writing by Robert Post of Yale Law School. These issues are likely to gain increasing prominence later this year, when the Supreme Court hears a case about whether a federal statute limiting the kinds of advice that “debt-relief agencies,” including bankruptcy lawyers, can give their clients violates the First Amendment.

That does not mean Schauer’s arguments are complete or unshakeable. For one thing, it is itself a question of fact whether questions of fact and falsity actually pose an “increasing problem.” That there are salient recent examples of glaring falsehood, and that ignorance on basic questions persists in the population cannot be denied; but this does not tell us whether we are worse off today than we were 300 or 30 years ago. In the long run, to be sure, we are all dead; but over the long run, truth, at least in a pragmatic sense, may still manage to eke out a margin of victory, and it does not take a romantic civil libertarian to say so.

Moreover, although Schauer is surely right that the First Amendment is only one corner of communications policy, communications policy itself might be seen as being well-served by the First Amendment, precisely because it (imperfectly) carves out areas of relative autonomy for institutions, like libraries and universities, that serve as (imperfect) mechanisms for the generation of demonstrable and verifiable facts. These institutions are not a “marketplace for ideas” in the traditional sense, but they may be laboratories from which empirically verifiable facts emerge. Facts emerge from these laboratories under the pressure of scientific and other methods whose rules are not those of public discourse, but which are still granted a substantial degree of autonomy by the First Amendment.

By not doing too much in these areas, the First Amendment may do more to address and encourage the development of demonstrable facts than Schauer is willing to concede. Nevertheless, Schauer’s paper eloquently and usefully places a spotlight on an important question that is all too often glossed over in the First Amendment literature.

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