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FREE SPEECH AND THE STATE

An Unprincipled Approach

David van Mill

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For Bec and my brothers three

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CHAPTER 1

Introduction

Abstract In this chapter the author outlines the scope of the book. The main question addressed is "what, if any, should be the appropriate limit on free speech?" He discusses some of the difficulties associated with answering this question: Why is speech important? Is it appropriate to limit the time and place of speech? Does harm prevention justify censorship? Can offensive speech be prohibited? Is it acceptable to prohibit hate speech? Does context matter, and should the state be neutral regarding the content of speech? Most liberal political philosophers answer these questions in a way that suggests there is a right to free speech deserving of special protection. The author rejects this approach and argues that speech only has instrumental value.

Keywords Free speech · The state · Liberalism · Rights

The term "free speech" is not ideal. The "free" part skews the discussion in favour of those who oppose regulation, and the "speech" part puts the focus on the spoken word, even though the discussion embraces wider communication including art, writing, films, plays, flag burning, and advertising. It might, therefore, be better to drop the term "free speech" to highlight that the debate is really about whether or not we should regulate the communication of ideas, thoughts, and beliefs. It is, however, quite difficult to come up with a short statement that adequately captures the complexity of the issues involved. The term "free communication", for

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example, solves the second problem but not the first. I have, therefore, decided to continue with the term "free speech" as useful shorthand with the caveat that "free" does not mean a lack of regulation, and "speech" covers a variety of activities.

The question addressed in this book is simple and straightforward: "What should be the appropriate limits, if any, to free speech?" Unfortunately, finding an answer is difficult because this question quickly collapses into many others. For example, should we limit the time and place where speech occurs, but leave content unregulated? This is largely the position adopted in the United States, but other liberal democracies have found it wanting. Does speech count as an act, and if not, how does this inform our understanding about the proper level of censorship? Is harm prevention the only reason to limit speech, as Mill at times suggests, or do other values also take precedence over what can be said? What, for example, should we do about speech that falls short of harm but is nevertheless deeply offensive?

More questions. How much does context matter to speech regulation? Is it acceptable to prevent Holocaust denial in Germany but not in Australia? And if it is acceptable, is this because the speech is more harmful or offensive depending on where it is said? Is there a right to free speech, and if so, what type of right? If there is such a right, how does it fit with other rights claims to privacy, equality, and security? Perhaps the most important question we have to ask is "why is speech important?" Philosophers have offered a variety of answers to this question, and I will examine the main ones in the next chapter. We also need to know whether speech is good in itself and trumps other values or whether it only has instrumental value Arriving at a coherent position on speech, therefore, requires answering a lot of questions and making a lot of value judgements. We might, for example, conclude that in some circumstances it would be worth curtailing speech in order to promote greater equality but still decide not to do so because the cost of state intervention would be too great. We have to reconcile the interests of the speaker, the listener, third-party bystanders, and society as a whole when we make these sorts of decisions. These are just some of the issues that make the topic challenging.

On top of these difficulties is another. Once we have decided on the appropriate limits to speech, we have to work out the suitable punishment for those violating the prohibitions. Should it be social approbation, legal penalties, or a combination of the two? This is not an easy problem to solve, and liberal democracies have imposed penalties for speech violations

that range from a slap on the wrist to the death penalty. Andrew Bolt, for example, who was involved in the most notorious recent case in Australia was found guilty of breaching the Racial Hatred Act but escaped without formal punishment. Julius Streicher, on the other hand, who was found guilty of aiding the Holocaust with his anti-Jewish propaganda, was sentenced to death at the Nuremberg trials. Given that this is a short book, I will not be able to deal with all of the issues just mentioned. It is not my goal to provide a definitive argument about where the limits on free expression should be drawn, and I offer my arguments and conclusions as cautious and modest possibilities.

I propose that speech should not receive unjustified favourable treatment over other core values. There is a tendency to suggest that there is a presupposition in favour of speech (PIFOS), and I argue that this should be resisted. Free speech poses a threat to important social goods such as privacy, the avoidance of unjustified harm, and equality, to name three. It is also true, especially in an age where the internet has seen an explosion of free expression, that a great deal of speech has little value. It is difficult to see how many of the traditional justifications for speech, such as the search for truth, or the autonomy argument, hold up in the face of the overwhelming amount of worthless speech that is produced today. A considerable amount of this speech is trivial and unrelated to important issues and can be safely ignored by the state. But some of it is not trivial and in these cases it is important for the state to get it right regarding what is and is not permissible to say. I hope to demonstrate that we cannot think about free speech without also thinking about how it should be limited.

My main objective is to provide a framework for how to think about free speech. If we fail to get the ontological nature of the problem right we are unlikely to arrive at persuasive arguments for the appropriate limits to free expression. My claim is that there is no Archimedean point from which to decide the appropriate limits on speech; the state, and only the state, can determine the boundaries. Philosophical principles can help us with the task, but such principles should be seen as advisory statements rather than as thing that can curb the power of the state. As I do not have space to address all possible arguments about free speech, my aim is to show that one particularly prominent defence of free speech fails. Liberal rights theorists have provided the most forceful argument for why speech should enjoy a privileged position, and their argument rests on two key pillars. The first is that there is a right to freedom of speech. Most liberals argue that this is a human right. The second is that this right should be

protected by constitutional mechanisms where the human right is transposed into a civil right. The combination of these two pillars is what I call the "principled defence of free speech", namely that the abstract notion of a human right to free speech is established as a constitutional principle that has priority over, and limits the activity of, the state. The limits that can be placed on free speech are restricted by a principle, or principles, that take precedence over democratic procedures.

I claim that attempts to offer such a principled defence of free speech should be rejected. My argument breaks down into several distinct components. As part of a broader discussion on PIFOS, I examine the idea that there is a pre-social human right to free speech. There is a very large literature on this topic. Most of it defends the idea that there is a right to free speech; however, Larry Alexander (2005) has disputed this claim. I join with him in challenging the idea that there is a human right to speech. His argument is built on a rejection of the concept of content neutrality, whereas I focus on the logical coherence of rights claims. I argue that a human right to free speech requires three distinct claims: the first is that the right belongs to all humans (the universal claim); the second is that the right belongs to all humans equally (the equality claim); and the third is that the right belongs only to humans (the exclusionary claim). All three components seem necessary to substantiate a human rights claim as found in documents such as the UN Declaration of Human Rights. I show there can be no such thing as a human right to free speech because there is no statement of such a right that will do what a human rights claim needs to do, namely meet the three justifications stated above. I complement this argument by demonstrating that it is illogical to make a rights claim to free speech based on our humanity. There is nothing about the biological category "human" that tells us anything about the normative requirements for free speech. I also argue that a Hobbesian analysis of the absolutist nature of the state shows that human rights claims cannot take precedence over the state. I conclude that the first pillar of the "principled" approach to free speech fails.

Liberal political philosophy is usually traced back to John Locke (1988) who was particularly concerned to demonstrate (a) political power is not absolute and (b) that power could be limited and separated across different branches of government. Prior to this argument Hobbes (1968) suggested that political power by its nature is absolutist. His claim is that whenever there is disagreement about fundamental political matters, it is the task of the state to determine the matter. Ruminating on politics in this

way has significant implications for how we think about free speech. The liberal approach attempts to put in place constitutional protections that limit the state. In this model the discussion starts from a position where restrictions on speech require special justification. Hobbes suggests that this is flawed because the decision to place speech in such an exalted position can only be made by the state. Hence the starting position for a discussion about free speech is that the state can place or remove limits on speech as it chooses. It is my intention to defend the Hobbesian view, which means I reject the ideas of constitutionalism and civil rights along with the claim that there is a human right to free speech. Hence, I argue that the second pillar of the "principled" approach to speech fails. This means I now defend a rather isolated position in the debate because Alexander strongly supports the constitutional protection of a civil right to freedom of expression.

My argument is not a defence of arbitrary power, nor does it demonstrate a preference for a totalitarian brand of politics, or excessive censorship. In a previous book (2006) I argued for a form of absolutism that is considerably more democratic than modern liberal democracies. The argument does not refer to any particular form of government; I am attempting to decipher the parameters of all states rather than any particular government structure, and the claim I make is that all states are absolute. This does not mean that each state will have the same policies on the appropriate limits to free speech, but it does mean that they all come up with these policies within the same conceptual framework. If my argument is correct, it follows that there are no rights, human or civil, that trump the power of the state, and this obviously includes the right to free speech. Instead of receiving special protection, speech should take its place alongside other valuable political goods, all of which depend on the state to be meaningfully exercised. This view is not popular with liberals, but I do think they need to support a position similar to the one I propose, and I think it is a decided advantage of my argument that it is not couched in terms of constitutions and bills of rights.

Despite offering a philosophical argument about the relationship between speech and the state, my conclusion is that there is no abstract principle that can set the appropriate limits on speech. This might seem to be a disappointing conclusion to my project because I do not offer a formula that will resolve the "problem" of free speech. I am convinced that no such formula exists. What I will offer is a way of thinking about speech that shows why principled arguments must fail. In their place I offer what I call an "unprincipled approach to free speech". I argue

that the boundaries of free speech must necessarily be set by the state, which, in liberal democracies, means through social and political contestation. Speech is not, in fact, a problem that can be solved; it is a social phenomenon that has to be managed, and it is the struggles of real life, not abstract philosophical principles, reified in constitutions, that ought to determine the limits on speech.

Free speech is a complicated and difficult topic requiring nuanced arguments that will vary depending on place and circumstance. Significant ground rules of engagement are necessary before meaningful discussion can even proceed. These rules can be complicated and depend on whether the speech is taking place publicly, privately, in the workplace, on the sporting field, and so forth, and each sphere has its own discursive requirements. In academia, for example, there are rules about the content I can cover in my lectures, the sort of language I can use in the classroom, and the manner in which I engage with students. Recognising that such rules are necessary immediately shows why we cannot get very far by thinking of speech in the abstract. It also shows why notions of a right to free speech are insufficiently nuanced to deal with the concrete realities of human interaction. A statement that runs to a couple of lines in a constitution or human rights document is of little help when dealing with the complexity of free speech. This is why liberals disagree about what a right to free speech means and why judges in America have invented a free speech doctrine that reaches far beyond what can be discovered in the foundational document. My argument, therefore, sits apart from most liberal defences of free speech because it engages the discussion from an "anti-rights" Hobbesian perspective. Many political philosophers will contend that this offers a flimsy defence of speech. I argue that it leads to a more nuanced understanding of the topic that fits better with the realities of politics, precisely because it is not shackled by unwieldy principles.

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