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Freedom of speech

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Introduction

In this entry freedom of speech will be treated solely as the subject of a political right, that is, a right of private persons against the state, leaving other topics, e.g. government speech, outside its purview. It will also be understood to encompass any instance of expression, whether or not it has propositional content, as speech, narrowly defined, does.

The good of free speech

According to one family of views, the right to free speech is grounded in the good that is being produced by the guarantee of such a right. For some the good consists in that free speech promotes the speaker's interest in autonomy. For example, Mill (1859, 31) writes that restricting speech compromises 'the entire moral courage of the human mind'. (See also Richards 1974.) Others contend that in a society where speech is free and viewpoints compete in a 'marketplace of ideas', the truth is more likely to emerge and become ascendant than in a society where viewpoints cannot be freely disseminated unless they are deemed worthy by state officials. On this rationale, free speech has value not only for the speaker but also for the listeners. For example, listeners also benefit from having true beliefs on important matters. The marketplace of ideas is a method for collectively arriving at true beliefs.

It is argued that this type of instrumentalist grounding of a right to free speech is 'more fragile and more limited' (Dworkin 1996, 201; see also Schauer 1982). It is more fragile because it makes the existence of the right contingent on the consequences of recognizing it, which may well vary depending on social conditions, and more limited because it is implausible to suggest that all forms of speech have the beneficial consequences that are taken by this kind of view to ground the right to free speech. On the other hand, it does have the resources to delimit the scope of the right in a more fine-grained way so as to track features of speech that we tend to think should make a moral difference, e.g. by taking into account the relative value of speech in different settings and weigh it up against its costs (Scanlon 2003a). Hence, it offers a consequentialist explanation why, for instance, we seem to want to accord certain forms of expression a privileged position. Take for example political and journalistic speech. Here, it is widely thought that the common good is served by allowing all views to be expressed and heard, especially because an alternative regime which authorizes the drawing of distinctions between instances of speech that have beneficial consequences and those that do not would be extremely vulnerable to abuse. Rulers have a very strong interest in using the power of drawing such distinctions so as to shield themselves from criticism and exposure of their failings by their political opponents and journalists.

The right to free speech

On some theories of rights, we have seen, the good of free speech is a necessary ingredient of the case for the existence of a right to free speech. We can call such theories good-based. A contrasting view -call it deontological- decouples the right to free speech and the good of free speech, and instead grounds the former in a deontological principle whose force is independent of the contribution the recognition of the right makes to the good, either of the speaker or broader society.

Notably, such a principle is drawn from the theory of political legitimacy. Now, clearly, on any view the right to free speech will be relevant to political legitimacy. What differs is the order of explanation. For good-based views, a state's legitimacy depends on respect for certain fundamental moral rights of individuals, and the right to free speech is one of them. But the theory of legitimacy does not determine what is the content of that right. For deontological views, legitimacy requires that individuals be treated in certain ways. The existence and content of the right to free speech -and perhaps other rights- is derivative from that requirement.

There are two versions of the deontological view that have been prominent in recent years. On the first version, a legitimate state accords individuals a certain status, from which flow a set of more specific constraints. Thus, Dworkin (1996, 200) contends that it is a condition of a government's legitimacy that it treat persons as responsible moral agents who 'insist on making up their own minds about what is good or bad in life or in politics, or what is true and false in matters of justice or faith'. Elsewhere, he refers to a related 'right to moral independence' (Dworkin 1985, 353-72). Relatedly, on Scanlon's early view it is not legitimate for the state to restrict acts of expression in order to prevent '(a) harms to certain individuals which consist in their coming to have false beliefs as a result of those acts of expression, (b) harmful consequences of acts performed as a result of those acts of expression, where the connection between the acts of expression and the subsequent harmful acts consists merely in the fact that the act of expression led the agents to believe (or increased their tendency to believe) these acts to be worth performing'. (Scanlon 2003a, 14) Scanlon maintains that, insofar as the state adheres to this so-called Millian principle, citizens can '[regard] themselves as equal, autonomous, rational agents' (ibid, 15). He writes: 'An autonomous person cannot accept without independent consideration the judgment of others as to what he should believe or what he should do' (ibid, 16). A similar conception of autonomy may be thought to underpin a deontological conception of freedom of expression that relies on a putative moral right that individuals have independently of the state rather than a principle of state legitimacy (Nagel, 1995).

Common to both Dworkin's and Scanlon's early account is that they do not start their theory from circumscribing a privileged class of acts of expression, whose restriction triggers their respective principles of legitimacy. The emphasis is, rather, on the reasons for government intervention, whether it targets artistic or political expression or expression without propositional content. By contrast, according to Kramer (2021, ch 2), who also advocates a deontological view, we must first identify what is a 'communicative activity', because the principle of legitimacy only imposes a constraint on government measures aiming to curb the 'communication-dependent' effects of expression, and we need to know what makes an activity communicative in order to distinguish communication-dependent and communication-independent effects. Specifically, it is legitimate for government to impose restrictions on expression to avert effects that can be caused either by communicative or non-communicative means. In this category Kramer includes incitement to imminent lawless violent action. Though such incitement may be committed by communicative means, it is 'sufficiently proximate to [the ensuing criminality] (ibid, 37) to be subsumed to it 'as some of the initial stages thereof' (ibid, 36).

Proponents of this version of the deontological view insist that it should not be confused with the view according to which free speech promotes the autonomy of either speakers or listeners, understood as an aspect of their good. However, it has been suggested (notably by Scanlon himself in later work modifying his earlier account) that built into the Millian principle are, in fact, certain assumptions about the moral weight of certain key interests in speech that we have qua listeners. That is, the Millian principle seems to be intended to leave it entirely to individuals to evaluate the merit of the information they receive and decide on the basis of this evaluation whether something is good or bad, true or false. But it is controversial that we would be willing to protect this capacity of ours against the government at all costs. In fact, says

Scanlon (2003b, 98), there may be circumstances under which we would be better off if 'we could shield ourselves from some influences', possibly with the help of government restrictions, as in the case of deceptive advertising. If we think that the Millian principle implausibly condemns this type of government restriction as illegitimate, then surely we do so because we take a different view about the relative weight of interests in speech, which suggests that the Millian principle is not entirely independent of the good. Note, though, that this does not entail that this view collapses into consequentialism.

According to a second version of the deontological view it is illegitimate coercively to enforce a policy against those who object to it, unless they had been given an opportunity to present their viewpoint (Dworkin 2009, vii). A right to free speech guarantees such an opportunity. Again, this position should be distinguished from the instrumentalist view that free speech promotes democracy by facilitating the free exchange of political ideas and government accountability. Here, the relationship between free speech and democracy is constitutive, underpinned by an idea of fairness. According to the latter, legitimate policies must be decided by fair contests, and there is no level playing field when dissenting viewpoints are silenced.

It could be objected that, although the argument from fairness, if sound, can justify, say, opposition to bans on hate speech and other political speech, it is doubtful that it can provide a general account of the right to free speech, including in non-political matters (Waldron 2012, 281ff). According to this objection, non-political speech like pornography may of course also be the subject of a ban or restriction, but the argument from fairness extends, at best, to advocacy for freedom of pornographic expression rather than pornographic expression itself. In response to this objection, it is argued that many people voice their preference for a certain type of speech not by making the case for its protection in the design of public policy but simply by engaging in it and thereby seeking to shape their cultural environment (Dworkin 2009, vii). However, the further we shift from political advocacy, the more the boundaries between the two versions of the deontological view are blurred.

Freedom of speech and content neutrality

It is commonly thought that the right to free speech on the deontological view issues in a demand for a degree of 'content neutrality'. At a minimum, content neutrality in this context is understood to mean that government should not ban or otherwise restrict speech on the basis of a judgment that the content of the speech in question is worthless, bad or false, because this would amount to a failure to treat persons as responsible moral agents in the sense specified by the deontological view. However, as theorists like Kramer warn, it should not be taken to imply that the justification of a restriction on expression cannot refer to the content of the expression at all. Surely, the wrongness of shouting 'Fire' in a crowded theatre has to do with the content of the utterance. So, what is a characteristic affront to freedom of speech is 'viewpoint neutrality'. According to Kramer (2021, 38-40) freedom of speech also condemns restrictions that violate 'subject neutrality' inasmuch as they treat differently not a certain viewpoint but a certain category of speech, say, political as opposed to artistic speech, and 'speaker-neutrality', which single out certain individuals for favourable or unfavourable treatment.

The harm of free speech

On any view of the right to free speech it is a separate issue under what circumstances some speech may be restricted. In some cases, this may be because the speech in question does not instantiate the value or promote the good that the view identifies as the moral basis of the right. For example, a good-based account of the right to free speech might exclude pornographic expression from the right's protective scope on the grounds that it is highly unlikely to contribute to the search for truth. In other cases, it will be because, though the

speech in question falls within the protective scope of the right, there are countervailing reasons in favour of removing the protection. For example, that could be said of various restrictions on free speech to protect national security during an emergency situation like a war or of the prohibition of speech that incites violent action. Rather than offer a comprehensive account of justifiable restrictions on free speech, this section will examine a number of controversial proposals about the kind of reason that can furnish a basis for such restrictions. What makes them controversial is that they stand in tension with the aforementioned demand for viewpoint neutrality.

An especially problematic option, as far as viewpoint neutrality is concerned, says that a permissible reason for restricting a certain type of speech is that it causes offence to some people. In this vein Feinberg (1985, 1) writes: 'it is always a good reason in support of a proposed criminal prohibition that it would probably be an effective way of preventing serious offense...to persons other than the actor, and that it is probably a necessary means to that end'. However, he clarifies that the case for prohibition should take into account other considerations such as, crucially, whether the offence is easily avoidable.

More plausible is the idea that some viewpoint-based restrictions can be morally justified if they target speech that causes harm to the dignity of those it is directed against. In this vein, Waldron (2012, chs 3 and 4) argues that, even if hate speech does not lead to, say, imminent violent and lawless action, it has -by virtue of the viewpoint it expresses- a deleterious effect on the status of some individuals as equal members of society. He contends that hate speech has this effect because it undermines an important public good that sustains equal status, namely, the existence of public assurances that one's position in society is respected and secure. We all have a responsibility to uphold such assurances towards one another. It is this responsibility that bans on hate speech enforce. They, thus, provide another layer of assurance of equal status.

A different view rests, instead, on the idea that some speech may be restricted because it is subordinating. This view has been developed primarily with reference to pornographic speech and its effects on women's social position (See Langton 2009, Langton 1993, MacKinnon 1993, 31), though it has also been applied to hate speech (Langton 2018). It has affinities with but should be distinguished from the view that pornographic speech is harmful because it is causally linked with, say, rape committed by consumers of such speech by conditioning their beliefs and sexual desires. The latter theory has been criticized by, among others, Dworkin (1996, 230ff) on the grounds that there is a lack of evidence correlating consumption of pornographic speech and an increase in sexual violence against women. By contrast, the view under consideration here does not depend on this kind of correlation. Drawing on speech act theory, it claims that pornography is an exercise of authority that changes the normative standing of women (or, analogously, victims of hate speech) in society by assigning inferior worth to them, licensing their discriminatory treatment and taking away some of their rights, for instance, their right to withhold consent to intercourse.

A key premise of this view is that pornographic speech is indeed authoritative. As Langton (2009, 37) puts it, '[s]ubordinating speech acts are authoritative speech acts, so if we are ever to count some class of speech acts as subordinating speech, the speakers in question must have authority'. Of course, neither epistemic nor practical authority is expressly claimed by pornographers, much less formally bestowed upon them. Rather, Langton argues, pornographers acquire this status informally through a process of presupposition accommodation, whereby their assertions (about women's inferior worth, the permissibility of treating them in a discriminatory fashion and denying them their rights) presuppose the pornographers' authority on sexual matters, and that presupposition is accommodated by their audience, thereby becoming part of the context of the interaction between them and the pornographers. However, it is doubtful that pornographers presuppose that they have

epistemic and even less practical authority or that consumers of their speech typically accommodate any such presupposition (Kramer 2021, ch 4).

Conclusion

Summary

This entry distinguishes two ways of grounding a moral right to free speech, one based on the good of not restricting speech and the other that does not rely on the good of unrestricted speech but rather on the principle of the state's legitimacy. It then goes on to explain the connection between free speech and the concept of viewpoint neutrality. Finally, it discusses a number of controversial proposals for restricting speech in the name of averting offence, protecting the dignity of others and averting their subordination.

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