FREE SPEECH APART FROM LAW

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INTRODUCTION

Is there a moral principle of free speech? If so, how does it work? We are accustomed to think of free speech as something set up and sustained by law—by constitutional law in the United States upheld with strong judicial review—in a way that makes it hard to focus our thoughts on what morality in and of itself requires in this area. But it is something that's important to consider.

In this essay, I would like to get an understanding of some philosophical dimensions of the possible operation of the free speech principle—or *a* free speech principle—considered apart from law. Since domain makes a difference to such a principle's mode of application and what is at stake in the way it operates—I mean the domain of law as opposed to the domain of morality—I would like to set out some of the difficulties that might be involved in formulating and applying a free

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speech principle, unaided by law, in a purely moral or social domain. And in the second half of this essay, I shall call in aid the example of John Stuart Mill whose essay *On Liberty* tried to grapple honestly with the difficulties that a purely moral principle of free speech would have to face.

The question is not just academic. It is worth asking, first, as a practical matter, because we want to know how free speech operates at present in the United States in areas where the First Amendment does not apply—namely, areas that do not involve state action. The constitutional principle of free speech applies to the federal government and the states, not to private persons or entities. Congress may not pass any law abridging freedom of speech and (in our understanding of the Fourteenth Amendment) nor may state, county, or municipal legislators, or any other official entity like a state agency or a state university. But these are far from the only power holders in society, far from the only entities in a position to limit or challenge the free expression of ideas. So we may ask: How—in the sense of "by what principles?"—are these other power holders constrained?

I. Settings Unregulated by Law

We may think of the morality of free speech as an ethos that pervades our society and which governs our moral dealings with one another even in areas to which the black-letter constitutional law on the subject does not apply. Settings unregulated by law (so far as speech is concerned) can be formal speech occasions or informal ones: informal like the exercise of parental power at the family dinner table; formal like an employer's regulation of what may be said or displayed in the workplace; or mixed formal and informal like social media (considering both the audience opportunities they provide and the powers of exclusion that they exercise).[1] What role if any does free speech play in these settings?

Consider, for example, private universities. The University of Chicago maintains an aggressive ethos of free speech which it associates with its sense of educational mission, even though it is not required to do so by law. Its code contains principles such as this: "Because the University is committed to free and open inquiry in all matters, it guarantees all members of the University community the broadest possible latitude to speak, write, listen, challenge, and learn." And this:

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[1] For the hybrid case of social media, see Jack Balkin, *Free Speech Is a Triangle*, 118 Colum. L. Rev. 2011 (2018).

"[C]oncerns about civility and mutual respect can never be used as a justification for closing off discussion of ideas, however offensive or disagreeable those ideas may be to some members of our community."[2] A code like Chicago's may be thought of as a complement to the First Amendment or as a reflection of it or—to vary the image—the shadow that the First Amendment casts into areas it doesn't directly govern or—varying the image yet again—the gravitational force that the First Amendment exerts outside the orbit of its authoritative application. Certainly it is, in its own way, a response to some of the same moral considerations that inform the First Amendment's drafting and application.

Workplace codes may permit or restrict speech as employers and workers think fit—at best it will be a subject for negotiation, and such provisions will apply to workers as a matter of contract and employment law. These protections may be less than the law requires where the law operates. For example, Home Depot may limit employees' freedom to wear "Black Lives Matter" t-shirts at the store.[3] Employers may force their workers to listen to captive-audience speech opposing unionization.[4] We should consider whether there are moral considerations that can explain these lesser protections and, if there are, whether we should contemplate their application also at the level of law.

Churches and civil society organizations uphold their own versions of free speech too. The canon law of the Roman Catholic church, for example, embodies a principle of freedom of expression, though it is most certainly not subject to the First Amendment. It says that the faithful "have the right and even at times the duty to manifest to the sacred pastors their opinion on matters which pertain to the good of the Church and to make their opinion known to the rest of the Christian faithful," though it surrounds that with qualifications that refer to "the integrity of faith and morals[,] . . . reverence toward their pastors, and attentive[ness] to common advantage and the dignity of persons."[5]

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[2] These excerpts are taken from GEOFFREY STONE ET AL., REPORT OF THE COMMITTEE ON FREEDOM OF EXPRESSION (Univ. of Chicago, 2014), https://provost.uchicago.edu/sites/default/files/documents/reports/FOECommitteeReport.pdf.

[3] *See* Will Feuer, *Home Depot Punished Staff to Shut Down Black Lives Matter Activism, Labor Board Says*, N.Y. POST (Aug. 17, 2021).

[4] *See Rewriting Labor Law by Fiat*, WALL ST. J. (Apr. 12, 2022).

[5] Code of Canon Law, Bk. II, Part 1, Can. 212, § 3; *see also* Gerry O'Hanlon, *Free Speech in the Church*, 105 STUDIES: AN IRISH QUARTERLY REVIEW 199 (2016).

Social media like *Twitter* operate as extraordinarily important vehicles for free expression in the modern world, but they have their own rules as to which speech acts are permissible and which impermissible, rules they enforce by the temporary or permanent suspension of offending users from their platform. So Donald Trump was silenced—or at least *Twitter*-silenced—because of the threat of incitement to violence that his recent "tweets" seemed to promise.[6] There is no doubt that, in this instance, *Twitter* was enforcing a principle a little stricter than the constitutional limit on the publication of "true threats," but its executives plainly believed that a principle this strict was justified morally speaking.

Nobody thinks that because domains like these are not governed by the First Amendment, that therefore the idea of free speech has no application to them at all. At the very least, their rules and policies reflect the important moral presence that free speech has in American society, a presence that is sponsored by our familiarity with the First Amendment and that works in the shadow of the First Amendment even if it doesn't correspond exactly (or even roughly) to our constitutional doctrine. If the First Amendment embodies respect for a moral principle of free speech, then each of these other domains seems to exhibit a variant or a different conception of it, and our awareness of these variations can help us understand what is at stake when free speech, in any of these contexts, is contested or discussed. They provide interesting points of comparison and choice, as we ask ourselves: Why doesn't American constitutional law view free speech in the way the University of Chicago does or Home Depot or the Roman Catholic church?

II. Legal and Moral Principles

All this assumes we can figure out the moral underpinnings of the law so as to proceed with such comparisons. One simple characterization of a moral principle of free speech is that it is just the application of morality to the law's requirements. The law requires free speech in certain areas, and perhaps morality welcomes that requirement and demands that we should support it. But figuring this out may not be so easy. It is not just a matter of restating legal doctrine with a moral "ought" nailed on to it. We should be looking for insight into the reasons for our doctrine and the moral principles that give those reasons their force. Some of those reasons may bear specifically on the issue of state enforcement—morality counsels us to

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[6] Brian Fung, *Twitter Bans President Trump Permanently*, CNN Bus. (Jan. 9, 2021), https://www.cnn.com/2021/01/08/tech/trump-twitter-ban/index.html.

take care with the dangerously coercive apparatus of the state—and so they may not easily apply in a purely moral domain. Other reasons may survive the transition intact. Thinking of morality beyond the law helps identify differences of this kind.

Another way of looking at the law/morality relation is that what the Constitution says about free speech may represent the incorporation into law (in whole or in part) of an independent moral principle. On this account the moral principle doesn't just underlie the law and justify it; it is incorporated as part of the law.[7] This may be an instance of what Ronald Dworkin calls "the moral reading" of the Constitution.[8] Just as the Eighth Amendment requires us to make judgments about certain punishments by applying an incorporated moral principle forbidding cruelty, so the First Amendment can be read as requiring us to apply the moral principle that it references in the text "Congress shall make no law . . . abridging the freedom of speech." If the phrase "the freedom of speech" is supposed to pick out a moral principle as a component of a legal provision, then we need to have independent moral access to the idea that it references in order to understand, along with other its components, the full meaning of the constitutional provision.

To "get at" the moral principle underlying or incorporated within legal doctrine, it is tempting to engage in something like a process of abstraction, imagining how morality would govern issues of speech if law and state were absent. We might imagine, with John Locke, a sort of state of nature in which positive law is absent, but human relations are governed by natural law.[9] The relevance of such an exercise in abstraction is that we can identify the natural law principle governing an area of human life—like property or punishment or speech—and then cite that as a regulative principle for positive law in the area when positive law comes along.

But the abstraction need not be that radical. In abstracting from the role that American constitutional law plays specifically in regard to speech, we need not be thinking of a state of nature. We may be thinking of an established system of positive law with a First-Amendment-shaped hole in it. How would law operate without any enactment on this matter specifically? More subtly, we might want to compare

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[7] For the jurisprudence underlying the incorporation of morality into constitutional law, see WIL WALUCHOW, INCLUSIVE LEGAL POSITIVISM (1994).

[8] *See* RONALD DWORKIN, FREEDOM'S LAW: THE MORAL READING OF THE CONSTITUTION (1996).

[9] *See* JOHN LOCKE, TWO TREATISES OF GOVERNMENT ch. 5 (Peter Laslett ed., 1988) (on principles concerning property, abstracted from positive law).

American constitutional law with free speech law in other jurisdictions. That is, we might consider the way in which free speech works as a principle in societies that do not have the exact constitutional arrangements we have. We might ask: How does free speech operate in fact in Europe or South Africa or Canada, countries that do not have any replica of the First Amendment to the U.S. Constitution upheld by strong judicial review? We may look at Article 10 of the European Convention on Human Rights, or Article 16 of the South African Constitution's Bill of Rights, or section 2(b) of the Canadian Charter. There are many such provisions in the world, each with its attendant doctrines and exceptions. But comparison only begets insight when we understand the reasons that underlie different legal arrangements. Can the principles underlying these respective provisions be considered as different conceptions of one and the same moral concept of free speech?[10] We compare our doctrine with other provisions in order to appreciate how others can reconcile moral considerations that we treat as irreconcilable. And we may use this analysis to loosen up our sense of what a free speech principle must be and what sort of exceptions it must preclude.

We might even see it as an historical exercise. What was missing, as a matter of moral principle, when there was no Bill of Rights (immediately after ratification of the U.S. Constitution in 1787) and, a fortiori, no First Amendment? What was missing from a moral point of view? James Madison's draft of the Bill of Rights separated free speech from freedom of religion.[11] Most international and European systems do so too. But our Bill of Rights crowds them together into the First Amendment along with freedom of the press and the right to assemble to petition the government. Does this make sense from a moral point of view? Does either arrangement convey anything of moral importance?

For us, free speech is associated with strong judicial authority. But it wasn't always so—the Supreme Court only began striking down legislation restricting speech in 1931.[12] Before that, many people believed that the First Amendment prohibited only prior restraints on speech. But now judges are in the driver's seat, and

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[10] For the concept/conception idea, see RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 134–36 (1977); RONALD DWORKIN, LAW'S EMPIRE 70–76 (1986).

[11] *See* James Madison, *Proposed Amendments to the Constitution* (June 8, 1789), 1 ANNALS OF CONGRESS 451 (Joseph Gales, Sr. ed., 1834).

[12] In *Stromberg v. California*, 283 U.S. 359 (1931), the Supreme Court struck down a California

they think of themselves as permitted to strike down restraints of all kinds. So here's a question: To what extent do we justify the extent and limits of our free speech doctrine by reference to the character, the utility, and the possible dangers of judicial power. And—again—how much of that has to be put aside when we are thinking about the purely moral operation of a free speech principle?

Each of these questions requires us to separate at least in thought the content of legal doctrine from the considerations, principles, and ideals that might justify it. It requires us to come to terms with a moral principle of free speech, and to consider the possibility that it, like the doctrine it supports, might be otherwise. And it requires us to analyze the various moral considerations that are at stake and sort out how many of them depend on the specifically legal or governmental aspect of suppression.

III. LAW'S ROLES

So the exercise in abstraction is important in casting light on the different role or roles that law plays in our present-day reasoning about free speech. We learn what law does by imagining its absence. Law plays the following roles: (i) Law is understood first of all as the standard threat to speech, through legislative or other official restrictions.[13] (ii) The second role is law's status as protector of free speech, through its constitutional prohibition on such restrictions and their expression in the decisions of the judiciary. In its constitutional manifestation, law is a source of protection for speech, a canonical formulation of the right, and a basis and procedure on which officials may be stopped from legally interfering with it. So, when we imagine the work that a free speech principle may do in the absence of law, we are imagining *both* the absence of a certain kind of threat to free speech *and* the absence of a certain kind of protection. Law also plays a role as (iii) overall background, against which any consideration of restrictions on or protections of speech would have to operate. I mean background legal provisions upholding private property, for example, or prohibiting disorderly conduct, threats, nuisances, defamation, etc. (I shall leave this third role mainly to one side.)

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law that had forbidden the display of a red flag "as a sign, symbol, or emblem of opposition to organized government." *See also* ANTHONY LESTER, FREEDOM FOR THE THOUGHT THAT WE HATE: A BIOGRAPHY OF THE FIRST AMENDMENT (2007).

[13] For the idea of a "standard threat" to a right, see HENRY SHUE, BASIC RIGHTS: SUBSISTENCE, AFFLUENCE, AND U.S. FOREIGN POLICY (2d ed. 1996).

Now we might say that if we imagine away law in the first two roles I mentioned, we are imagining away the whole problem of free speech. No serious threat, so no real need for protection. However, nature abhors a vacuum. In the space that exists when law is taken away, we have to contemplate (i) other forces that may interfere with speech—threats from individual action, private power, and social coercion, for example—as well as (ii) other forces that might come to the aid of free speech—like the mood of civil society mobilized in its defense. How should we expect free speech to fare in this new configuration of forces?

On (i), for example, should we be worried about individual as opposed to governmental attacks on free speech? In his book, *Free Speech*, Fred Schauer considered the possibility that the principle might justify claims against private individuals:

> I am delivering a speech in a small village to a group of willing listeners. Four people come by and circle the village green in their automobiles, sounding the horns constantly, and thus effectively drowning out my speech. Although this may be a public nuisance under the law, I have at the moment no claim against the four individuals. But maybe I should be permitted to recover against them for damages.[14]

But Schauer is not inclined to view this as an important instance of free speech vulnerability or as an important occasion for free speech protection. He points to the relative triviality of the wrongs that seem to be involved in cases like this: "Speakers and listeners can move to different locations, and most of the serious cases of interference will be connected with some more tangible wrong."[15] (Notice that this last point may involve some of what we referred to a moment ago as (iii) background legal elements, like the law of nuisance.) Schauer's inclination is to draw a sharp differentiation between governmental attacks and private attacks on speech:

> If the justifying principle for freedom of speech is the particular danger of governmental interference, and if free speech is based largely on the negative aspects of controlling speech rather than the particular benefits that come from speaking, then there is no special reason to protect against private interference.[16]

The emphasis on the threat that comes from law and state in Schauer's case for

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[14] FREDERICK SCHAUER, FREE SPEECH: A PHILOSOPHICAL INQUIRY 123–24 (1982).

[15] *Id.* at 125.

[16] *Id.* at 124.

free speech challenges us to envisage what work a moral principle could do in circumstances where state interference was out of the question. I suspect though that Schauer puts these cases aside too quickly. If we don't count disruptive drivers in the village as a threat, it is not clear how we should classify cancel culture, platform denial, *Twitter*-exclusion, and hecklers' veto. Rightly or wrongly, modern discussion regards these phenomena as serious threats to speech, particularly when they operate against the background of a culture in civil society that seems to support them.

For Schauer, concern about free speech seems to be directly and straightforwardly concern about state coercion. That, on his account, is what we should address when there is a proposal to limit speech and that's the phenomenon whose metastasization we should worry about. A state that is empowered to punish hate speakers, for example, has to have discretion to determine what counts as hate speech—i.e., what counts as impermissible conduct—and this is a power that is often abused and tends to expand once it is introduced.

Free speech preoccupation with law is not just about the impact of coercion; it can also involve a concern about legitimacy. In an argument made by Ronald Dworkin, state interference with speech undercuts the legitimacy of other—arguably necessary—forms of state coercion (state coercion to combat discrimination, for example).[17] If coercion of the latter kind is permissible, it is so only because the enactment of anti-discrimination laws involved full and extensive deliberation on matters of race, gender, sexuality, and other grounds of discrimination. But if some speech is barred from this debate—speech by racists, for example—then deliberation is attenuated and the case for the legitimacy of the anti-discrimination law is undercut. So, this too is a free speech argument that is oriented to the role of state and law and would not be important if law were imagined away.[18]

IV. DISTRUST OF GOVERNMENT

Fear of government is a common factor in most free speech discussions. Consider the arguments that are currently used to protect hate speech. It seems that our

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[17] For a succinct statement of this argument, see Ronald Dworkin, *Foreword*, *in* EXTREME SPEECH AND DEMOCRACY v–ix (Ivan Hare & James Weinstein eds., 2010).

[18] I am not saying it is a conclusive argument, but it is certainly present in the free speech debate. For a critique, see JEREMY WALDRON, THE HARM IN HATE SPEECH ch. 7 (2012).

refusal to contemplate limitations on hate speech—for example, a hate speech exception to the First Amendment—stems from our distrust of government. Even those who are prepared to concede that in principle it would be good to get rid of hate speech worry about the slippery-slope implications of giving governments discretion to decide what counts as hate speech and what doesn't.[19] But take government (and concerns about government) away, and there is little to put up against the strong moral case against hate speech that many free speech defenders actually accept. Echoing a quote attributed to Voltaire—"I hate what you say, but I will defend to the death your right to say it"[20]—if there is no threat of state action then there is nothing to defend against (to the death or otherwise) and the hatred of what is said is left in possession of the field. This is particularly so in the case of philosophically sophisticated defenses of hate speech, which crowd all manner of criticisms, denunciations, etc. on the "hate what you say" side of the equation. No one is proposing to defend the hate speaker against any of that. So, what does it mean for such speech to be free, morally speaking? It can't surely mean free from individual or social criticism or condemnation.

Without the prospect of state interference, it remains legitimate, appropriate, right, maybe even obligatory to denounce someone's hate speech as wrong (e.g., because it demeans other persons or because it fosters bad attitudes in the community). And I must surely be allowed to act *somehow* on my judgment of its wrongness. Indeed, we might think this is even more the case when there is no question of legal interference: There is no longer a reason of prudence to cool one's criticisms for fear that they might provoke the intervention of the law.

Moral responses of this kind are exactly what free speech proponents advocate, when they say that the proper response to hate speech is more speech, not the prohibition of speech.[21] They mean *more speech attacking the purveyors of hate*. As Lee Bollinger has observed, "[w]hen we compare our reluctance to impose legal restraints against speech with our readiness to employ a host of informal, or nonlegal,

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[19] See NADINE STROSSEN, HATE: WHY WE SHOULD RESIST IT WITH FREE SPEECH NOT CENSORSHIP (2018).

[20] For doubts about the Voltairean provenance of this *bon mot*, see WALDRON, HARM IN HATE SPEECH, *supra* note 18, at 226–27.

[21] See STROSSEN, HATE, *supra* note 19, at 157–82. (Consider also Strossen's subtitle: "Why We Should Resist It [*Hate*] with Free Speech, Not Censorship.")

forms of coercion against speech behavior, the paradox is striking."[22] But there it is: informal or non-legal forms of pressure seem to be permitted. And if they are permitted in the presence of law, they can hardly be prohibited in the absence of law. We can't just shift what Bollinger calls "informal, or nonlegal, forms of coercion" to the other side of the Voltaire equation—something to defend against "to the death"—just because legal coercion is no longer present as a target and we need something to take its place. Doing that would expose as a charade our insistence in current circumstances that forms of forceful condemnation and social pressure are the proper response.

V. SOCIAL THREATS AND THE VALUE OF SPEECH

But fear of government is not the only consideration appealed to in defenses of free speech. In his account, Schauer alluded to but largely passed over a defense of free speech based on the value of the speaking to the speaker or to society—"the particular benefits that come from speaking."[23] We might identify the ideal of personal autonomy or the utilitarian benefits associated with "the marketplace of ideas" as values embodied in a moral principle of free speech. Perhaps one or both of these might justify our willingness to look more critically at some elements of non-legal coercion. In the shadow of legal suppression, those elements might have looked inconsiderable. But when that shadow is removed, we may want to consider in more detail the costs of allowing this sort of suppression to go unchallenged.

The philosopher who thought this issue through the furthest and who faced most honestly the difficulties that it involved was John Stuart Mill. Much of the rest of this essay is written under his influence.[24] Mill is a good case for us, because he truly believed that law had become practically irrelevant in the politics of free speech and individuality more generally and that its role could be more or less ignored. The laws that affected liberty of thought and discussion in nineteenth-century England struck him as no more than "the rags and remnants of persecution"

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[22] LEE BOLLINGER, THE TOLERANT SOCIETY 12 (1986), *quoted in* Susan Brison, *The Autonomy Defense of Free Speech*, 108 ETHICS 312, 317 (1998).

[23] For some discussion of the expressive benefits to the speaker, see SCHAUER, FREE SPEECH, *supra* note 14, at 104–06.

[24] Some of what follows draws on the argument in Jeremy Waldron, *Mill as a Critic of Culture and Society*, *in* ON LIBERTY: JOHN STUART MILL 224–45 (David Bromwich & George Kateb eds., 2003).

(OL 92).[25] "For a long time past," he wrote, "the chief mischief of the legal penalties is that they strengthen the social stigma. It is that stigma which is really effective" (OL 93) and that ought to be the focus of our concern.

> [W]hen society is itself the tyrant—society collectively over the separate individuals who compose it—its means of tyrannising are not restricted to the acts which it may do by the hands of its political functionaries. Society can and does execute its own mandates: and if it issues wrong mandates instead of right, or any mandates at all in things with which it ought not to meddle, it practises a social tyranny more formidable than many kinds of political oppression, since . . . it leaves fewer means of escape, penetrating much more deeply into the details of life, and enslaving the soul itself. (OL 63)

The whole argument in *On Liberty* proceeds from the premise that the real threat to liberty and individuality comes from the collective action of the public, lethally, if sometimes inadvertently, embodied in public opinion and a monolithic social atmosphere.

There are some free speech theorists—Fred Schauer, for example—who claim that the issue of free speech is transformed out of all recognition if we remove the state from the picture.

> The separation between the individual and government is central to the Free Speech Principle, and this feature is lost when, following Mill, we conflate social intolerance and governmental intolerance. Private intolerance . . . is a wholly distinct problem from those questions of political philosophy that generate a political principle of freedom of speech.[26]

If we have to set law aside, Schauer would prefer to concentrate upon one-on-one interactions like the speaker whose address is disrupted by a noisy driver in an English village.[27] I think Schauer underestimates the role of social influence. Certainly, it would be a mistake to think that once we take law out of the picture, we are left with the simple arithmetic of one-on-one individual interactions. A consideration of free speech as a purely moral principle might invite us to consider free speech as an individual ethic. But it need not take us immediately to the domain of individual ethics. For even if we abstract away from the machinations of law, there

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[25] Parenthetical references in this format are citations by page number to the text of JOHN STUART MILL, ON LIBERTY (Gertrude Himmelfarb ed., 1986).

[26] SCHAUER, FREE SPEECH, *supra* note 23, at 122.

[27] *See supra* text accompanying note 14.

is also social power, organized informally, to consider. When we contrast law and morality, we are not just contrasting positive law with critical morality held by individuals. As often as not, we are (or we ought to be) contrasting positive law with positive morality—social morality. This doesn't mean we lose sight of critical morality: Mill's essay *On Liberty* is precisely about the view that critical morality takes of some of the operations of positive morality. But, in that regard, Mill is prepared to look unflinchingly at the constitution of social morality and the problems that it gives rise to in the free speech debate.

VI. The Nature of Social Coercion

What does social coercion consist of? It is not an aggregate of lots of individual coercive acts, of the sort that one might see in mob behavior. Instead, it is the accumulative tendency of thousands of acts of individual disapproval, bearing down in both diffuse and focused ways on choices made by particular individuals, making it very hard to resist.[28] Beset by this tendency, people find themselves (in Mill's words) living "as under the eye of a hostile and dreaded censorship" (OL 125). A climate of opinion hostile to a particular point of view is not just like a few articles in the newspaper that one may look at or look away from; it is something that the proponent of the point of view in question has to face at every turn as he or she tries to make their way in life as a social animal. Just one particular denunciation may seem harmless in itself: The target of it can simply turn away. But one cannot turn away from a social atmosphere constituted by thousands or hundreds of thousands of such denunciations, reinforcing each other, poisoning all interactions with their target, and leaving him or her with no point of refuge or relief.

Social interference with thought and expression is one thing. But I am also interested in principles upholding free speech and how they work considered apart from First Amendment. Besides constitutional protection, what other sort of protection might there be? Again, we have to look to social influence. Mill talks about raising "a strong barrier of moral conviction" in society in favor of freedom and against the suppression of dissidence and individuality (OL 17). But as a practical matter, how do you go about doing this? Effecting social change is a much more difficult business than effecting legal change. Certainly, legal change is easier to get

[28] Elsewhere I have argued that the baleful effect of hate speech is also best understood in terms of an accumulation of small harms, analogous to the toxicity of auto-emissions. *See* Jeremy Waldron, *State Inspection*, 51 Seton Hall L. Rev. 225 (2020).

underway. "Society," however, is not under direct political control in the way that legislative action is, and initiating social change involves immense collective action problems. Not only does one have to convince people of the value of individuality; one also has to persuade people to take the risk of acting on that conviction. This may be costly for each individual considered on her own. It is hard for any one person to know what contribution her action or inaction may make to the tyranny of public opinion, and easy for her to suppose there is little she can do to ease the informal plight of liberty or individuality in mass society. Since this may be true of every member of the mass, it is conceivable that even if all could be convinced of Mill's concern, still nothing might happen to ameliorate the situation.

There are no doubt collective action problems involved on the other side, with the exercise of social pressure as well, the difficulties of the one matching the difficulties of the other. But they do not cancel one another out. And there is this important difference: Social pressure upholding conformity and suppressing individuality can be inadvertent and need not represent an effect that anyone has initiated. It is just what tends to happen in modern mass society when certain views are widely held. Its inadvertence is not necessarily randomness. Mill believed that left to itself social pressure would tend to suppress rather than uphold individuality. That's why someone must work deliberately to make what Mill calls "the intelligent part of the public" (OL 140) see the value of individuality and work together to raise a "barrier of moral conviction" (OL 73–74) against "the engines of moral repression" (OL 72). The collective action problems in this regard are acute.

VII. Social Pressure to Resist Social Coercion

There are also moral issues that surround any attempt to use social pressure against social pressure in the way that Mill advocates. Insofar as Mill is seeking to weaken social coercion (in certain areas), he necessarily must try to impose limits on what people do in their ordinary social lives. For the engines of moral repression are not external forces. They are nothing but the upshot of people's actions and inclinations in a social context. They comprise things that people want to do, things they feel like doing, in fact things whose doing is, in Mill's words, "energetically supported by some of the best . . . feelings incident to human nature" (OL 73).

So here's the worry: Protecting speech by placing limits on people's ability to act on these feelings and inclinations may itself give rise to an issue of liberty. People may have a right—or it may for other reasons be desirable—for them to have the

freedom to do things which, at least when taken *en masse*, constitute the social coercion which Mill is attempting to stop. Coercion by society consists, presumably, of a mass of actions, $a_1, a_2, \ldots, a_n$ (where n is very large) directed, say, at ostracizing some small circle of ethical or religious deviants. But any one of these actions, a_i, may be something which a person has a right to perform, even though its performance along with n others adds up to social coercion. It seems then that liberty is at risk on both sides of Mill's equation. It is at risk, he argues, from social pressure. But it is at risk, too, if we try to limit or eliminate social pressure, for what we are trying to eliminate just is a mass of individual moral expressions.

Moreover, our allowance of a_i in itself is not necessarily a grudging matter. We saw this already in our discussion of the Voltaire observation. Action a_i might involve a person remonstrating with another, criticizing their conduct, encouraging them to pursue better ways. As Mill notes, we have to allow this, for the overall position he takes is not one of "selfish indifference, which pretends that human beings have no business with each other's conduct in life" (OL 142). People owe each other "help to distinguish the better from the worse, and encouragement to choose the former and avoid the latter" (OL 142) so that their inclinations are directed toward "elevating instead of degrading, objects and contemplations" (OL 142). Not only that, but the exertion of moral pressure for and against various actions and lifestyles is, on Mill's account at least, an important aspect of an open society: As he argues in Chapter Two of *On Liberty*, only if we engage with each other antagonistically are we likely to get a full picture of what is at stake in our choice of position. To insulate individual liberty entirely from argument and contradiction, to deny, in effect, that moral persuasion was ever permissible, would undermine the whole basis of the argument in *On Liberty* about the importance of complacent believers' being confronted with moral and intellectual opposition (OL 96–108).

Somehow, then, Mill has to find a way to distinguish the sort of help that adds up to nothing more lethal to liberty than ethical encouragement, and the kind of intervention that, when combined with the interventions of others, adds up to a form of ethical compulsion. That is a problem that Mill faced up to, and to the extent that we accept his principle of the mutual obligation of ethical concern, we have to face it too. And it arises only when we are making an effort to combat social pressure. Nothing like this difficulty arises on the traditional understanding of Mill's argument, which has to do with the intervention of law not the intervention

of society.

The problem is aggravated by the fact that our intervention in others' lives is not just something we owe them, as a matter of ethical encouragement, and not just something we owe society in order to foster lively debate, but it may also be something we owe to *ourselves* in order to vindicate the integrity of our own ethical convictions. We have, says Mill, "a right . . . to act upon our unfavorable opinion of any one, not to the oppression of his individuality, but in the exercise of ours" (OL 144).

We are not bound, for example, to seek his society; we have a right to avoid it (though not to parade the avoidance), for we have a right to choose the society most acceptable to us. We have a right, and it may be our duty, to caution others against him, if we think his example or conversation likely to have a pernicious effect on those with whom he associates (OL 144).

Nothing like this difficulty arises on the traditional legalistic understanding of free speech. On the legalistic reading of *On Liberty* (the reading favored by Schauer and others), Mill is trying to alter the behavior of legislators. Now legislators are people too and no doubt they have their own individual interest in liberty. But they have no individual interest in legal interference, analogous to the liberty interest that an ordinary member of society might have in the expression and implementation of his own views. There can be no legitimate complaint about any limits we impose on the liberty of the legislators *qua* legislators. Although legislators are often quite heavily invested in their campaigns, it would be silly to reproach a First Amendment partisan with trying to interfere with their individual freedom by limiting their ability to legislate. However, if we are attempting to restrict society itself, rather than what Mill calls its "political functionaries" (OL 63), then we are in an altogether different ballgame. Now we are trying to restrict the way in which masses of private people interact with others because we fear the resultant of such interaction *en masse*. And that can be as much of an affront to the freedom of the individuals who are on the receiving end of it as any form of legal interference.

VIII. Does Mill Have a Solution?

Is there a way around this? The remedies that Mill considers as he grapples with this are unconvincing. Maybe if a distinction can be drawn between forceful and less-than-forceful application of social pressure, then we are less likely to end up in a situation in which the "barrier of moral conviction" we have raised against interference with liberty itself interferes with the self-expression of those whose own lifestyle seems to require active disapproval of others. Mill accepts that "the real

morality of public discussion" requires civility and mutual respect (OL 118). But he dislikes the idea that moral criticism has to be "mild" and "temperate." These are subjective assessments, he argues, and criticism tends to be condemned as intemperate and overly forceful whenever it is cogent and effective (OL 116). Anyway, the forceful impact of a large number of opinions may not be a straightforward function of the forcefulness of each constituent frown or avoidance. The difficulty arises from the fact that it is collective action we are trying to moderate not individual actions as such.

The same point can be made about a distinction Mill toys with between expressions of dislike that are intended punitively and those that are intended non-punitively. Mill seems to suggest that people have a right to be protected only against actions that are "purposely inflicted . . . for the sake of punishment" (OL 144). But as Mill's great Victorian critic James Fitzjames Stephen observed, a large punitive effect may derive from individual reactions motivated in all sorts of ways. "People form and express their opinions on each other, which, collectively, form public opinion, for a thousand reasons; to amuse themselves; for the sake of something to talk about; to gratify this or that momentary feeling; but the effect of such opinions, when formed, is quite independent of the grounds of their formation."[29] The resultant may be punitive in effect even if no one intends it should be so. In its effect social pressure is social pressure no matter what its motivation. And because it is the effect of social pressure that Mill is concerned about—its effect on the mental life of individuals, its effect on the pursuit of truth, its effect on progress, and its effect on the overall social atmosphere—I do not think that this distinction between intentionally punitive and nonpunitive pressure will do the work that Mill wants it to do.

So the difficulty is unabated. A moral case for free speech involves inherent paradoxes if there is an attempt to use social pressure in defense of freedom against social pressure that restricts freedom. For social pressure in defense of freedom *is* also social pressure that restricts freedom. A moral principle that addresses free speech issues in the absence of law finds that the very means it uses are as impactful on belief, expression, and individuality as the phenomena it has set out to oppose.

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[29] JAMES FITZJAMES STEPHEN, LIBERTY, EQUALITY, FRATERNITY (1873), *excerpted in* MILL'S ON LIBERTY: CRITICAL ESSAYS 175 (Gerald Dworkin ed., 1997).

Conclusion

As we have seen, these difficulties become apparent when we contemplate social pressure on its own, undistracted by considerations about law. If we were focusing only on the threat that law poses to free speech, we would not be forced to face these conundrums. But that does not mean they don't exist in a law-dominated society. They are not confined in their presence and impact to a state of nature.[30] They continue to affect modern phenomena of speech and conformity even in the presence, and alongside the presence, of legal threat and constitutional protection.

I have mentioned already a couple of theorists who say we should ignore the social problem and confine our attention to the legal one. Let me add one more voice along these lines. The English political philosopher D. D. Raphael once commented that

> [i]t is difficult enough to suggest a principle for limiting the authority of law, which consists for the most part of a definite series of rules. It is really impossible to suggest a practicable principle for limiting the exercise of social pressure which is manifested not only in action but also in words, looks, tone of voice, cast of countenance, all sorts of little things often not deliberate at all.[31]

This correctly identifies the source of the difficulty, but it errs in its suggestion that we should therefore refuse to confront it. Raphael thinks that Mill is attempting the impossible by trying to suggest "one simple principle" (OL 68) to govern the exercise of social pressure. So he says, in effect: Let us adopt the legalistic interpretation, which makes the problem easier. Let us look at Mill's principle as though it had nothing to do with social pressure at all.

But the guidance that we get from the canon of great works in political philosophy does not consist merely in their solution of problems that are easy to solve. It also embraces the difficulties they identify for us and the challenge shown by their example in attempting honestly to grapple with such difficulties. Moreover their failure to give us a solution does not mean that those difficulties should be avoided. I have talked a lot about John Stuart Mill in the second half of this essay—an essay that began as a thought experiment imagining free speech as a moral and social problem apart from its legal manifestations. I have cited Mill extensively because of

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[30] *See supra* text accompanying note 8.

[31] D. D. Raphael, *Liberty and Authority*, *in* Of Liberty: The 15th Royal Institute of Philosophy Lecture Series 5 (A. Phillips Griffiths ed., 1983).

the honesty of his identification of the difficulties that a moral principle of freedom of expression gives rise to, and the rigor of his attempt to grapple with them. If we follow his example, we don't end up with easy answers. And I fear that many theorists who cite Mill's essay *On Liberty* do so only because they are looking to secure venerable support for their own simple answers to questions about free speech as they are usually posed. But if we accept the terms on which he poses the issue of freedom of expression, we may end up with a richer and more challenging account of this issue than we began with.