Freedom of Expression, no matter what?

Are we to uphold and secure the freedom of expression no matter what is expressed, and no matter what the consequences of unrestrained expression are? This fundamental question is one of several provoked by the topic of freedom of expression but unfortunately debates tend to focus on only one question, and that concerns the permissibility of censorship. Censorship is indeed an important issue, but it is not the only one, and possibly not the most crucial in our contemporary context.

The censorship debate is usually about whether the state should have powers to use instruments of the law to constrain what is expressed. But what about other forms of constraint on expression, not exercised by the state through the law, but by popular pressure via social media? Should not such limitations on the freedom of expression be viewed with equal severity? Another question is historical and asks how what originally was formulated as a freedom of speech over time came to be spoken of as freedom of expression. Why did this change occur, and was anything lost in the transition? Can freedom of expression be defended in the same terms as were used to defend freedom of speech? The freedom of speech and the freedom of the press have been conjoined for a couple of centuries, but is this still plausible in a changed world in which multinational media conglomerates are resistant to political pressure? This question is raised by the phone-hacking cases in the UK and the difficulties faced by the Levinson Enquiry in finding ways of making the media giants more respectful of the rights of individuals. It is no longer only a debate about how to protect the press against intrusions by the state, but also how to protect individuals and small businesses against the misuse of the economic and public power of media which can destroy lives and reputations. Mobbing by campaigners on all sorts of issues can deprive people of their freedom of expression, and even in the case of Professor Hunt of UCL’s Faculty of Life Sciences, of their position.\(^1\) Is such use of the social media to be allowed continue without restraint? Ironically, ‘No Platform’ cries in the name of various causes, all elements of the current trends to police political correctness, have been directed in the UK against two very public spokespersons for freedoms, Germaine Greer and Peter Tatchell.\(^2\) Not the state or its agents attempting to constrain them in their expression of their views, but the National Union of Students and its lobbying groups. The phenomenon of ‘hate speech’ generates its own questions, and the difficulties experienced in the USA because of the absolutization of the freedom of expression as a constitutionally protected right is increasingly an issue in Europe. There are many questions, and it is regrettable that the debate...
focuses mainly on the state censorship issue. As a result it may be the case that we miss opportunities of addressing the broader and bigger challenges facing our societies and political cultures.

**Law not the only form of constraint on expression**

John Stuart Mill, influenced by de Tocqueville’s *Democracy in America* which he had reviewed, was fearful of a tyranny of the majority, a tyranny which could be exercised both through the instruments of the law and through the pressure of public opinion. Both legal sanction and public disapproval could limit individuals’ freedoms of thought, speech and action and so he addressed both in his well-known principle formulated in *On Liberty*: ‘The object of this Essay is to assert one very simple principle, as entitled to govern absolutely the dealings of society with the individual in the way of compulsion and control, whether the means used be physical force in the form of legal penalties, or the moral coercion of public opinion.’ The strength of public opinion as a source of control on person’s freedoms was never underestimated by Mill and his essay was an attempt to raise awareness of this power so that it would not be misused. But in the general reception of Mill’s thought the main emphasis has been placed on the use of legal instruments of control by the state. The result of this may be a dimming of awareness of how our conventional wisdoms – even perhaps those which celebrate the sanctity of individuals’ rights – actually function as means of social control, so that they are no longer brought to consciousness and tested according to Mill’s standards. In the great concerns about freedom of expression, as for instance following the Charlie Hebdo murders, there may be scant acknowledgement of the ways in which our societies actually do constrain the freedom of expression, and for good reasons.

What are, or might be, those good reasons which warrant restriction of the freedom of expression? Are there valuable public goods at stake for the protection of which citizens might be asked to refrain from doing what might jeopardize them? This is the rationale behind the polite request that football fans refrain from wearing their team’s colours in certain contexts. In public houses and nightclubs around England and Scotland you may often see signs declaring that ‘Football Colours are Not Allowed’. This refers to the hats, scarves, t-shirts and training suits in the colours of their favourite teams which football fans like to wear. Of course, the law permits owners of licensed premises to refuse admission at their discretion, but subject to equality constraints. However, it cannot be overlooked that this is an instance in which people are denied their freedom of expression. Fans are not allowed to demonstrate their allegiance or support for their club through their choice of clothing in certain locations. Given the great concern about possible restrictions on
the freedom of expression in recent debates, is it not curious that society is so tolerant of this particular restriction?

Perhaps because it is a very reasonable restriction. No one is in any doubt about the dangers of violence erupting when groups of rival fans run into one another. The danger is known from experience. For the most part, the rivalry of football fans is carried on in good humour. But when alcohol is an additional factor, the calls and chants which in one situation are good-natured teasing become in an instant taunts and insults which bubble over into aggression and violence. So pub landlords and others avoid one pathway to the danger of violence by banning the wearing of football colours on their premises. The plea by fans that their colours and chants are not violent, and that the fault lies with those who take offence, will have no effect on the proprietors. They are not interested in finding who is at fault or laying blame. They are interested in preventing violence and injury to their customers, or damage to their property. Besides, they don’t want their premises to become the preserve of just one group.

In one context the freedom of expression can be restricted by polite request, while in another the suggestion that those who enjoy the right to free expression ought to exercise moral responsibility in what they express and how they choose to express it, is taken as an attack on the foundations of democracy. Such a request reflects a perfectly reasonable expectation that people willingly accept a restriction on their freedom of expression for the sake of public order. After all, the freedom of expression is not the same as the freedom of speech, even if the former has evolved from the latter as a protected right.

**From freedom of speech to freedom of expression**

Is there a difference between the freedom of speech and the freedom of expression? When John Stuart Mill wrote of the freedom of expression in his essay *On Liberty* he saw it as equivalent to the freedom of speech. The only kind of expression he had in mind was the expression of opinion, an instance of reasoned speech. He summarized his argument for the ‘freedom of opinion, and the freedom of the expression of opinion’ as necessary ‘to the mental well-being of mankind (on which all their other well-being depends)’. Mill argued for the centrality of this freedom because without it there would not be any possibility of testing public opinion or conventional orthodoxies with a view to eradicating error and advancing in knowledge. Freedom to experiment with ways of life and the liberty to reflect critically on the experience in public he saw as essential to making the kind of progress of which he considered humanity was capable. He based the liberties he defended not on
any conception of natural rights but on the capacities of humans as progressive beings. This is what he meant by utility, he explained, and for the sake of advancement in wisdom and truth about the human condition freedoms of various kinds should be protected. Freedom of speech is fundamental since without it the required learning could not take place. Hence the speech he wished to see protected was speech which contributes to rational discourse, the expression of opinions, which are made public and exposed to critical examination.

Mill was not the first to argue for such freedoms: it was a constant demand of enlightenment thinkers who confronted the censorious powers of Church and State. In England the Puritan John Milton appealed to Parliament to allow the publication of books without the requirement of a prior licencing by the authorities. His pamphlet, Areopagitica, was a response to an Order of Parliament of the previous year, 1643, requiring permission for each work before publication. His argument is an appeal for toleration, but not an unlimited one: he excluded the toleration of ‘Popery’. Over fifty years after his appeal Parliament revoked the order requiring prior censorship. Commentators note, however, that censorship and punishment subsequent to publication was consistent with Milton’s demand, and that he actually hoped for a form of censorship which would protect a range of Protestant puritan views. The value at stake for Milton was truth, even if he believed others to be excluded from a share in it.

While European and British thinkers argued for the freedom of speech and the desirability of a free press it was in The United States of America that the relevant rights were first explicitly encapsulated in law. The First Amendment of the Constitution (1791) imposed limits on the laws which the US Congress and (in July 1868 with the Fourteenth Amendment) the individual States’ legislatures could make limiting the freedoms of speech and of the press. The reasons given for the protection of these freedoms against the tendency of legislatures to limit them concerned the requirements of a democratic culture to foster open debate. To ensure that the government was responsive to the consent of the governed it was important to protect the free flow of information and opinion concerning policies and public officials who offered themselves for election. To facilitate the intelligent exercise by citizens of their public responsibilities it was thought necessary to protect the open and lively debate of opposing points of view. The freedoms protected had to do with the communication of ideas. Summarizing the various reasons enunciated by the US Supreme Court and its justices over the years former Fordham University’s Professor of Politics Francis Canavan concluded that the First Amendment’s guarantee of freedom of speech and press was meant to protect and facilitate communication among free and ordinarily intelligent people in the pursuit of
When in 1941 the justices of the US Supreme Court began to use the phrase ‘freedom of expression’ they understood it as shorthand for the longer phrase ‘freedom of speech and of the press’ in the Amendment, but just as in the writings of John Stuart Mill the kind of expression protected was understood in terms of the communication of ideas in the context of rational discourse. This was explicitly confirmed by Judges’ remarks: they often stated that the ‘expression to which they refer is the communication of thought, opinions or ideas’. A major shift in the attitudes of the Court occurred in the 1970s in a series of steps, whereby expression was extended to cover any form of expression, regardless of its content or whether it attempted to convey ideas, and the corresponding right was absolutized, such that no countervailing reason could ever prevail to entitle a legislature to curb the freedom of expression. Extraordinary judgments resulted as the Court overruled local zoning laws restricting live entertainment as infringing the freedom of expression of nude dancers in a peep show, or the overruling of Californian broadcast laws which had been applied to curtail the broadcast on radio of ‘Filthy Words’, a compilation of swear words, expletives and scatological expressions. Justice Frankfurter dissenting from the Court’s decision on a similar case remarked that the decision gave publications which have ‘nothing of any positive value to society’ constitutional protection. Canavan comments: ‘To maintain that publications that contain no ideas and are of no possible value to society deserve protection against the claims of a substantial public interest implies that speech or publication need have no rationally discernible relation to the ends of the First Amendment in order to come under its mantle.’ The connection between the right to be protected and the social goods for the sake of which the protection was offered, had been broken. The link had been made explicit by Mill’s argument for liberty for the sake of utility, the interests of the human as progressive, and it was present in the formulation and interpretation of the American constitutional law. With the breaking of that link, the right was made absolute. It was no longer relative to particular social purposes.

The reason given for making the right absolute, without exceptions, was the frequently quoted fear that any authorization of government to suppress supposed abuses of the freedoms of speech or press ‘is necessarily and always a greater threat to the purposes for which the guarantee of freedom was established than it is to tolerate the abuses’.
Hate speech to be protected, no matter what?
The expansion of the referent of ‘expression’ has led to a situation in the United States whereby ‘hate speech’ now enjoys constitutional protection. Hate speech can be defined as ‘speech that vilifies individuals or groups on the basis of such characteristics as race, sex, ethnicity, religion, and sexual orientation, which constitutes face to face vilification, creates a hostile or intimidating environment, or is a kind of group libel.’ Many eminent liberal philosophers (for instance Ronald Dworkin, Charles Fried, Thomas Scanlon, Thomas Nagel) endorse the constitutional protection of hate speech on the grounds that the infringement on the autonomy of those who choose to express themselves through hateful words, images, graphics or gestures would undermine a fundamental value of liberal democratic society, namely the freedom of the individual. In such defence, at least in the American context, there is no weight given to the counterbalancing social interests in maintaining an atmosphere of toleration of difference facilitating the peaceful coexistence of persons and groups with opposed views and values. It is different in Europe, where both United Kingdom and European legislators have taken steps to sanction speech and publications which incite to hatred, precisely out of concern for the public order.

The renowned English philosopher of law Jeremy Waldron draws attention to the requirements of Article 20(2) of the International Covenant on Civil and Political Rights, ‘which says that expressions of hatred likely to stir up violence, hostility, or discrimination must be prohibited by law.’ Waldron is critical of the absolutized understanding of the freedom of expression which extends protection of the law even to hate speech. While he acknowledges the differences between the United States and Europe, he does not shy away from challenging the total endorsement of the freedom to engage in hate speech in the American context. In making his case he takes great care to underline that he is not concerned about the personal pains of insult or offence which individuals may experience from being the object of hate speech targeted at their race, or religion, or political affiliation. ‘It is not just a matter of protecting people from spontaneous insult, offence, and wounding words. It is a matter of securing, in a systematic fashion, a particular aspect of social peace and civic order under justice: the dignity of inclusion and the public good of mutual assurance concerning the fundamentals of justice’.

Just as the original framers of the First Amendment intended that its protection of free speech would serve a social and a political good, so too does Waldron emphasize that the goods at stake in possibly restricting hate speech are social and political goods. He writes about it as the shared understanding in which individuals are acknowledged to possess an entitlement to recognition and respect as basic to their participation in public and political life. It is this recognition which is undermined or damaged by hate speech directed at people because of their religion or race
or political affiliation. Defending the possibility of enacting laws prohibiting group defamation he argues that such laws ‘are set up to vindicate public order, not just by pre-empting violence, but by upholding against attack a shared sense of the basic elements of each person’s status, dignity, and reputation as a citizen or member of society in good standing – particularly against attacks predicated upon the characteristics of some particular social group.’ The shared sense of what constitutes a person’s status, dignity and reputation as a member of society, is an important public good which ought to be protected. Without such a shared meaning social life would become impossible.

But interestingly, while arguing for the permissibility of restricting by law expressions which could qualify as hate speech, Waldron does not confine his comments to what might or ought to be done by legislators. He addresses himself also to citizens, who have duties to uphold this public good of the shared assurance of respect for individuals’ dignity. ‘But just because assurance is a low-key background thing, the prime responsibility for its provision that falls upon the ordinary citizen is to refrain from doing anything to undermine or to make the furnishing of this assurance more laborious or more difficult.’ The low-key background assurance is the sort of social reality which is taken for granted, and which people enjoy without have to attend to its provision or its nature. But being fragile, it can be damaged, and so it requires deliberate attention so that the shared public space sustained by common meaning is secured. For this he argues that negative duties fall upon citizens, that they not do anything to jeopardize this public good.

The arguments for the protection of the freedoms of speech and of the press in the eighteenth and nineteenth centuries appealed to a social purpose, in protecting the possibilities of open contestation of ideas and policies and the worthiness of public officials, all deemed intrinsic to the preservation of a democratic society. The arguments against hate speech appeal to another public good, the shared culture in which individuals are recognized as bearers of dignity and entitled to recognition and respect. These arguments and concerns remain cogent, even if the fashion of the day grants quasi absolute status to human autonomy and the right to freedom of expression. They may be raised in the context of debates about legislation restricting hate speech or other forms of expression deemed harmful. But it does not have to be a matter of legislation. As well as law and its instruments there is also the moral dimension of a shared public culture. In evaluating the moral acceptability of some non-verbal expression like cartoons there are two tests which can be applied. First, can the expression be interpreted as a rational contribution to a conversation inviting others to reflect on some matters of relevance to the shared interest in the democratic culture? Satire
traditionally directed against rulers and politicians bursting their bubbles of self-importance and assumed eminence could meet such a test. And second, does the expression support or undermine the fragile common culture of recognition and respect for persons as partners in the shared public space? But even in applying these tests opinions will differ. At least in acceptance of such tests for moral acceptability the terms in which the debate must be conducted are public and objective, and not a matter of measuring the extent of some subjective quality such as offence or insult. Adoption of these tests would help move the terms of debate from dogmatically proclaiming the sanctity of the right to freedom of expression in the face of perceived threat, to the consideration of both content and consequences of the relevant expression.

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References

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4 Mill, ‘On Liberty’ Chap. 2, p. 120.
6 Canavan, Freedom of Expression, p.6.
7 Canavan, Freedom of Expression, p.xii.
9 Canavan, Freedom of Expression, p.34.
10 Canavan, Freedom of Expression, p.7.
13 Waldron, The Harm in Hate Speech, p.104.
14 Waldron, The Harm in Hate Speech, p.47.
15 Waldron, The Harm in Hate Speech, p.93.