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A Theory of Freedom of Expression[1]

> Persecution for the expression of opinions seems to me perfectly logical. If you have no doubt of your premises or your power and want a certain result with all your heart you naturally express your wishes in law and sweep away all opposition. To allow opposition by speech seems to indicate that you think the speech impotent, as when a man says that he has squared the circle, or that you do not care wholeheartedly for the result, or that you doubt either your power or your premises. But. . . .
>
> —Oliver Wendell Holmes[2]

I

The doctrine of freedom of expression is generally thought to single out a class of "protected acts" which it holds to be immune from restrictions to which other acts are subject. In particular, on any very strong version of the doctrine there will be cases where protected acts are held to be immune from restriction despite the fact that they have as consequences harms which would normally be sufficient to justify the imposition of legal sanctions. It is the existence of such cases which makes freedom of expression a significant doctrine and which makes it appear, from a certain point of view, an irrational one. This feeling of irrationality is vividly portrayed by Justice Holmes in the passage quoted.

To answer this charge of irrationality is the main task of a philosophical defense of freedom of expression. Such an answer requires, first, a clear account of what the class of protected acts is, and then an explanation of the nature and grounds of its privilege. The most common defense of the doctrine of freedom of expression is a con-

1. This paper is derived from one presented to the Society for Ethical and Legal Philosophy, and I am grateful to the members of that group, as well as to a number of other audiences willing and unwilling, for many helpful comments and criticisms.

2. Dissenting in Abrams v. United States, 250 U.S. 616 (1919).

sequentialist one. This may take the form of arguing with respect to a certain class of acts, e.g., acts of speech, that the good consequences of allowing such acts to go unrestricted outweigh the bad. Alternatively, the boundaries of the class of protected acts may themselves be *defined* by balancing good consequences against bad, the question of whether a certain species of acts belongs to the privileged genus being decided in many if not all cases just by asking whether its inclusion would, on the whole, lead to more good consequences than bad. This seems to be the form of argument in a number of notable court cases, and at least some element of balancing seems to be involved in almost every landmark first amendment decision.[3] Thus one thing which an adequate philosophical account of freedom of expression should do is to make clear in what way the definition of the class of protected acts and the justification for their privilege depend upon a balancing of competing goals or interests and to what extent they rest instead on rights or other absolute, i.e., nonconsequentialist, principles. In particular, one would like to know to what extent a defender of freedom of expression must rest his case on the claim that the long-term benefits of free discussion will outweigh certain obvious and possibly severe short-run costs, and to what extent this calculation of long-term advantage depends upon placing a high value on knowledge and intellectual pursuits as opposed to other values.

A further question that an adequate account of freedom of expression should answer is this: To what extent does the doctrine rest on natural moral principles and to what extent is it an artificial creation of particular political institutions? An account of freedom of expression might show the doctrine to be artificial in the sense I have in mind if, for example, it identified the class of protected acts simply as those acts recognized as legitimate forms of political activity under a certain constitution *and* gave as the defense of their privilege merely a defense of that constitution as reasonable, just, and binding on those to whom it applied. A slightly different "artificial"

3. The balancing involved in such decisions is not always strictly a matter of maximizing good consequences, since what is "balanced" often includes personal rights as well as individual and social goods. The problems involved in "balancing" rights in this way are forcefully presented by Ronald Dworkin in "Taking Rights Seriously," *New York Review of Books*, 17 December 1970, pp. 23-31.

account of freedom of expression is given by Meiklejohn,[4] who finds the basis for the privileged status of acts of expression in the fact that the right to perform such acts is necessary if the citizens of a democratic state are to perform their duties as self-governing citizens. On his view it appears that citizens not expected to "govern themselves" would lack (at least one kind of) right to freedom of expression. In contrast to either of these views, Mill's famous argument offers a defense of "the liberty of thought and discussion" which relies only on general moral grounds and is independent of the features of any particular laws or institutions. It seems clear to me that our (or at least my) intuitions about freedom of expression involve both natural and artificial elements. An adequate account of the subject should make clear whether these two kinds of intuitions represent rival views of freedom of expression or whether they are compatible or complementary.

Although I will not consider each of these questions about freedom of expression in turn, I hope by the end of this discussion to have presented a theory which gives answers to all of them. I begin with an oblique attack on the first.

II

The only class of acts I have mentioned so far is the class "acts of expression," which I mean to include any act that is intended by its agent to communicate to one or more persons some proposition or attitude. This is an extremely broad class. In addition to many acts of speech and publication it includes displays of symbols, failures to display them, demonstrations, many musical performances, and some bombings, assassinations, and self-immolations. In order for any act to be classified as an act of expression it is sufficient that it be linked with some proposition or attitude which it is intended to convey.

Typically, the acts of expression with which a theory of "free speech" is concerned are addressed to a large (if not the widest possible) audience, and express propositions or attitudes thought to have a certain generality of interest. This accounts, I think, for our

4. Alexander Meiklejohn, *Political Freedom*, 2nd edn. (New York, 1965). See esp. p. 79.

reluctance to regard as an act of expression in the relevant sense the communication between the average bank robber and the teller he confronts. This reluctance is diminished somewhat if the note the robber hands the teller contains, in addition to the usual threat, some political justification for his act and an exhortation to others to follow his example. What this addition does is to broaden the projected audience and increase the generality of the message's interest. The relevance of these features is certainly something which an adequate theory of freedom of expression should explain, but it will be simpler at present not to make them part of the definition of the class of acts of expression.

Almost everyone would agree, I think, that the acts which are protected by a doctrine of freedom of expression will all be acts of expression in the sense I have defined. However, since acts of expression can be both violent and arbitrarily destructive, it seems unlikely that anyone would maintain that as a class they were immune from legal restrictions. Thus the class of protected acts must be some proper subset of this class. It is sometimes held that the relevant subclass consists of those acts of expression which are instances of "speech" as opposed to "action." But those who put forward such a view have generally wanted to include within the class of protected acts some which are not speech in any normal sense of the word (for instance, mime and certain forms of printed communication) and to exclude from it some which clearly are speech in the normal sense (talking in libraries, falsely shouting "fire" in crowded theaters, etc.). Thus if acts of speech are the relevant subclass of acts of expression, then "speech" is here functioning as a term of art which needs to be defined. To construct a theory following these traditional lines we might proceed to work out a technical correlate to the distinction between speech and action which seemed to fit our clearest intuitions about which acts do and which do not qualify for protection.[5]

To proceed in this way seems to me, however, to be a serious mistake. It seems clear that the intuitions we appeal to in deciding whether a given restriction infringes freedom of expression are not

5. This task is carried out by Thomas Emerson in *Toward a General Theory of the First Amendment* (New York, 1966). See esp. pp. 60-62.

intuitions about which things are properly called speech as opposed to action, even in some refined sense of "speech." The feeling that we must look for a definition of this kind has its roots, I think, in the view that since any adequate doctrine of freedom of expression must extend to some acts a privilege not enjoyed by all, such a doctrine must have its theoretical basis in some difference between the protected acts and others, i.e., in some definition of the protected class. But this is clearly wrong. It could be, and I think is, the case that the theoretical bases of the doctrine of freedom of expression are multiple and diverse, and while the net effect of these elements taken together is to extend to some acts a certain privileged status, there is no theoretically interesting (and certainly no simple and intuitive) definition of the class of acts which enjoys this privilege. Rather than trying at the outset to carve out the privileged subset of acts of expression, then, I propose to consider the class as a whole and to look for ways in which the charge of irrationality brought against the doctrine of freedom of expression might be answered without reference to a single class of privileged acts.

As I mentioned at the start, this charge arises from the fact that under any nontrivial form of the doctrine there will be cases in which acts of expression are held to be immune from legal restriction despite the fact that they give rise to undoubted harms which would in other cases be sufficient to justify such restriction. (The "legal restriction" involved here may take the form either of the imposition of criminal sanctions or of the general recognition by the courts of the right of persons affected by the acts to recover through civil suits for damages.) Now it is not in general sufficient justification for a legal restriction on a certain class of acts to show that certain harms will be prevented if this restriction is enforced. It might happen that the costs of enforcing the restriction outweigh the benefits to be gained, or that the enforcement of the restriction infringes some right either directly (e.g., a right to the unimpeded performance of exactly those acts to which the restriction applies) or indirectly (e.g., a right which under prevailing circumstances can be secured by many only through acts to which the restriction applies). Alternatively, it may be that while certain harms could be prevented by placing legal restrictions on a class of acts, those to

whom the restriction would apply are not responsible for those harms and hence cannot be restricted in order to prevent them.

Most defenses of freedom of expression have rested upon arguments of the first two of these three forms. In arguments of both these forms factors which taken in isolation might have been sufficient to justify restrictions on a given class of acts are held in certain cases to be overridden by other considerations. As will become clear later, I think that appeals both to rights and to the balancing of competing goals are essential components of a complete theory of freedom of expression. But I want to begin by considering arguments which, like disclaimers of responsibility, have the effect of showing that what might at first seem to be reasons for restricting a class of acts cannot be taken as such reasons at all.

My main reason for beginning in this way is this: it is easier to say what the classic violations of freedom of expression have in common than it is to define the class of acts which is protected by that doctrine. What distinguishes these violations from innocent regulation of expression is not the character of the acts they interfere with but rather what they hope to achieve—for instance, the halting of the spread of heretical notions. This suggests that an important component of our intuitions about freedom of expression has to do not with the illegitimacy of certain restrictions but with the illegitimacy of certain justifications for restrictions. Very crudely, the intuition seems to be something like this: those justifications are illegitimate which appeal to the fact that it would be a bad thing if the view communicated by certain acts of expression were to become generally believed; justifications which are legitimate, though they may sometimes be overridden, are those that appeal to features of acts of expression (time, place, loudness) other than the views they communicate.

As a principle of freedom of expression this is obviously unsatisfactory as it stands. For one thing, it rests on a rather unclear notion of "the view communicated" by an act of expression; for another, it seems too restrictive, since, for example, it appears to rule out any justification for laws against defamation. In order to improve upon this crude formulation, I want to consider a number of different ways in which acts of expression can bring about harms, concen-

trating on cases where these harms clearly can be counted as reasons for restricting the acts that give rise to them. I will then try to formulate the principle in a way which accommodates these cases. I emphasize at the outset that I am not maintaining in any of these cases that the harms in question are always sufficient justification for restrictions on expression, but only that they can always be taken into account.

1. Like other acts, acts of expression can bring about injury or damage as a direct physical consequence. This is obviously true of the more bizarre forms of expression mentioned above, but no less true of more pedestrian forms: the sound of my voice can break glass, wake the sleeping, trigger an avalanche, or keep you from paying attention to something else you would rather hear. It seems clear that when harms brought about in this way are intended by the person performing an act of expression, or when he is reckless or negligent with respect to their occurrence, then no infringement of freedom of expression is involved in considering them as possible grounds for criminal penalty or civil action.

2. It is typical of the harms just considered that their production is in general quite independent of the view which the given act of expression is intended to communicate. This is not generally true of a second class of harms, an example of which is provided by the common law notion of assault. In at least one of the recognized senses of the term, an assault (as distinct from a battery) is committed when one person intentionally places another in apprehension of imminent bodily harm. Since assault in this sense involves an element of successful communication, instances of assault may necessarily involve expression. But assaults and related acts can also be part of larger acts of expression, as for example when a guerrilla theater production takes the form of a mock bank robbery which starts off looking like the real thing, or when a bomb scare is used to gain attention for a political cause. Assault is sometimes treated as inchoate battery, but it can also be viewed as a separate offense which consists in actually bringing about a specific kind of harm. Under this analysis, assault is only one of a large class of possible crimes which consist in the production in others of harmful or unpleasant states of mind, such as fear, shock, and perhaps certain

kinds of offense. One may have doubts as to whether most of these harms are serious enough to be recognized by the law or whether standards of proof could be established for dealing with them in court. In principle, however, there seems to be no alternative to including them among the possible justifications for restrictions on expression.

3. Another way in which an act of expression can harm a person is by causing others to form an adverse opinion of him or by making him an object of public ridicule. Obvious examples of this are defamation and interference with the right to a fair trial.

4. As Justice Holmes said, "The most stringent protection of free speech would not protect a man in falsely shouting fire in a theater and causing a panic."[6]

5. One person may through an act of expression contribute to the production of a harmful act by someone else, and at least in some cases the harmful consequences of the latter act may justify making the former a crime as well. This seems to many people to be the case when the act of expression is the issuance of an order or the making of a threat or when it is a signal or other communication between confederates.

6. Suppose some misanthropic inventor were to discover a simple method whereby anyone could make nerve gas in his kitchen out of gasoline, table salt, and urine. It seems just as clear to me that he could be prohibited by law from passing out his recipe on handbills or broadcasting it on television as that he could be prohibited from passing out free samples of his product in aerosol cans or putting it on sale at Abercrombie & Fitch. In either case his action would bring about a drastic decrease in the general level of personal safety by radically increasing the capacity of most citizens to inflict harm on each other. The fact that he does this in one case through an act of expression and in the other through some other form of action seems to me not to matter.

It might happen, however, that a comparable decrease in the general level of personal safety could be just as reliably predicted to result from the distribution of a particularly effective piece of political propaganda which would undermine the authority of the govern-

6. In Schenck v. United States, 249 U.S. 47 (1919).

ment, or from the publication of a theological tract which would lead to a schism and a bloody civil war. In these cases the matter seems to me to be entirely different, and the harmful consequence seems clearly not to be a justification for restricting the acts of expression.

What I conclude from this is that the distinction between expression and other forms of action is less important than the distinction between expression which moves others to act by pointing out what they take to be good reasons for action and expression which gives rise to action by others in other ways, e.g., by providing them with the means to do what they wanted to do anyway. This conclusion is supported, I think, by our normal views about legal responsibility.

If I were to say to you, an adult in full possession of your faculties, "What you ought to do is rob a bank," and you were subsequently to act on this advice, I could not be held legally responsible for your act, nor could my act legitimately be made a separate crime. This remains true if I supplement my advice with a battery of arguments about why banks should be robbed or even about why a certain bank in particular should be robbed and why you in particular are entitled to rob it. It might become false—what I did might legitimately be made a crime—if certain further conditions held: for example, if you were a child, or so weak-minded as to be legally incompetent, and I knew this or ought to have known it; or if you were my subordinate in some organization and what I said to you was not advice but an order, backed by the discipline of the group; or if I went on to make further contributions to your act, such as aiding you in preparations or providing you with tools or giving you crucial information about the bank.

The explanation for these differences seems to me to be this. A person who acts on reasons he has acquired from another's act of expression acts on what *he* has come to believe and has judged to be a sufficient basis for action. The contribution to the genesis of his action made by the act of expression is, so to speak, superseded by the agent's own judgment. This is not true of the contribution made by an accomplice, or by a person who knowingly provides the agent with tools (the key to the bank) or with technical information (the combination of the safe) which he uses to achieve his ends. Nor

would it be true of my contribution to your act if, instead of providing you with reasons for thinking bank robbery a good thing, I issued orders or commands backed by threats, thus changing your circumstances so as to *make* it a (comparatively) good thing for you to do.

It is a difficult matter to say exactly when legal liability arises in these cases, and I am not here offering any positive thesis about what constitutes being an accessory, inciting, conspiring, etc. I am interested only in maintaining the negative thesis that whatever these crimes involve, it has to be something more than merely the communication of persuasive reasons for action (or perhaps some special circumstances, such as diminished capacity of the person persuaded).

I will now state the principle of freedom of expression which was promised at the beginning of this section. The principle, which seems to me to be a natural extension of the thesis Mill defends in Chapter II of *On Liberty*, and which I will therefore call the Millian Principle, is the following:

> There are certain harms which, although they would not occur but for certain acts of expression, nonetheless cannot be taken as part of a justification for legal restrictions on these acts. These harms are: (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.

I hope it is obvious that this principle is compatible with the examples of acceptable reasons for restricting expression presented in 1 through 6 above. (One case in which this may not be obvious, that of the man who falsely shouts "fire," will be discussed more fully below.) The preceding discussion, which appealed in part to intuitions about legal responsibility, was intended to make plausible the distinction on which the second part of the Millian Principle

rests and, in general, to suggest how the principle could be reconciled with cases of the sort included in 5 and 6. But the principle itself goes beyond questions of responsibility. In order for a class of harms to provide a justification for restricting a person's act it is not necessary that he fulfill conditions for being legally responsible for any of the individual acts which actually produce those harms. In the nerve-gas case, for example, to claim that distribution of the recipe may be prevented one need not claim that a person who distributed it could be held legally responsible (even as an accessory) for any of the particular murders the gas is used to commit. Consequently, to explain why this case differs from sedition it would not be sufficient to claim that providing means involves responsibility while providing reasons does not.

I would like to believe that the general observance of the Millian Principle by governments would, in the long run, have more good consequences than bad. But my defense of the principle does not rest on this optimistic outlook. I will argue in the next section that the Millian Principle, as a general principle about how governmental restrictions on the liberty of citizens may be justified, is a consequence of the view, coming down to us from Kant and others, that a legitimate government is one whose authority citizens can recognize while still regarding themselves as equal, autonomous, rational agents. Thus, while it is not a principle about legal responsibility, the Millian Principle has its origins in a certain view of human agency from which many of our ideas about responsibility also derive.

Taken by itself, the Millian Principle obviously does not constitute an adequate theory of freedom of expression. Much more needs to be said about when the kinds of harmful consequences which the principle allows us to consider can be taken to be sufficient justification for restrictions on expression. Nonetheless, it seems to me fair to call the Millian Principle the basic principle of freedom of expression. This is so, first, because a successful defense of the principle would provide us with an answer to the charge of irrationality by explaining why certain of the most obvious consequences of acts of expression cannot be appealed to as a justification for legal restrictions against them. Second, the Millian Principle is the only

plausible principle of freedom of expression I can think of which applies to expression in general and makes no appeal to special rights (e.g., political rights) or to the value to be attached to expression in some particular domain (e.g., artistic expression or the discussion of scientific ideas). It thus specifies what is special about acts of expression as opposed to other acts and constitutes in this sense the usable residue of the distinction between speech and action.

I will have more to say in section IV about how the Millian Principle is to be supplemented to obtain a full account of freedom of expression. Before that, however, I want to consider in more detail how the principle can be justified.

III

As I have already mentioned, I will defend the Millian Principle by showing it to be a consequence of the view that the powers of a state are limited to those that citizens could recognize while still regarding themselves as equal, autonomous, rational agents. Since the sense of autonomy to which I will appeal is extremely weak, this seems to me to constitute a strong defense of the Millian Principle as an exceptionless restriction on governmental authority. I will consider briefly in section V, however, whether there are situations in which the principle should be suspended.

To regard himself as autonomous in the sense I have in mind a person must see himself as sovereign in deciding what to believe and in weighing competing reasons for action. He must apply to these tasks his own canons of rationality, and must recognize the need to defend his beliefs and decisions in accordance with these canons. This does not mean, of course, that he must be perfectly rational, even by his own standard of rationality, or that his standard of rationality must be exactly ours. Obviously the content of this notion of autonomy will vary according to the range of variation we are willing to allow in canons of rational decision. If just anything counts as such a canon then the requirements I have mentioned will become mere tautologies: an autonomous man believes what he believes and decides to do what he decides to do. I am sure I could not describe a set of limits on what can count as canons of rationality which would secure general agreement, and I will not try,

since I am sure that the area of agreement on this question extends far beyond anything which will be relevant to the applications of the notion of autonomy that I intend to make. For present purposes what will be important is this. An autonomous person cannot accept without independent consideration the judgment of others as to what he should believe or what he should do. He may rely on the judgment of others, but when he does so he must be prepared to advance independent reasons for thinking their judgment likely to be correct, and to weigh the evidential value of their opinion against contrary evidence.

The requirements of autonomy as I have so far described them are extremely weak. They are much weaker than the requirements Kant draws from essentially the same notion,[7] in that being autonomous in my sense (like being free in Hobbes's) is quite consistent with being subject to coercion with respect to one's actions. A coercer merely changes the considerations which militate for or against a certain course of action; weighing these conflicting considerations is still up to you.

An autonomous man may, if he believes the appropriate arguments, believe that the state has a distinctive right to command him. That is, he may believe that (within certain limits, perhaps) the fact that the law requires a certain action provides him with a very strong reason for performing that action, a reason which is quite independent of the consequences, for him or others, of his performing it or refraining. How strong this reason is—what, if anything, could override it—will depend on his view of the arguments for obedience to law. What is essential to the person's remaining autonomous is that in any given case his mere recognition that a certain action is required by law does not settle the question of whether he will do it. That question is settled only by his own decision, which may take into account his current assessment of the general case for obedience and the exceptions it admits, consideration of his other

7. Kant's notion of autonomy goes beyond the one I employ in that for him there are special requirements regarding the reasons which an autonomous being can act on. (See the second and third sections of *Foundations of the Metaphysics of Morals.*) While his notion of autonomy is stronger than mine, Kant does not draw from it the same limitations on the authority of states (see *Metaphysical Elements of Justice*, sections 46-49).

duties and obligations, and his estimate of the consequences of obedience and disobedience in this particular case.[8]

Thus, while it is not obviously inconsistent with being autonomous to recognize a special obligation to obey the commands of the state, there are limits on the *kind* of obligation which autonomous citizens could recognize. In particular, they could not regard themselves as being under an "obligation" to believe the decrees of the state to be correct, nor could they concede to the state the right to have its decrees obeyed without deliberation. The Millian Principle can be seen as a refinement of these limitations.

The apparent irrationality of the doctrine of freedom of expression derives from its apparent conflict with the principle that it is the prerogative of a state—indeed, part of its duty to its citizens—to decide when the threat of certain harms is great enough to warrant legal action, and when it is, to make laws adequate to meet this threat. (Thus Holmes's famous reference to "substantive evils that Congress has a right to prevent.")[9] Obviously this principle is not acceptable in the crude form in which I have just stated it; no one thinks that Congress can do *anything* it judges to be required to save us from "substantive evils." The Millian Principle specifies two ways in which this prerogative must be limited if the state is to be acceptable to autonomous subjects. The argument for the first part of the principle is as follows.

The harm of coming to have false beliefs is not one that an autonomous man could allow the state to protect him against through restrictions on expression. For a law to provide such protection it would have to be in effect and deterring potential misleaders while the potentially misled remained susceptible to persuasion by them. In order to be protected by such a law a person would thus have to concede to the state the right to decide that certain views were false and, once it had so decided, to prevent him from hearing them

8. I am not certain whether I am here agreeing or disagreeing with Robert Paul Wolff (*In Defense of Anarchism* [New York, 1970]). At any rate I would not call what I am maintaining anarchism. The limitation on state power I have in mind is that described by John Rawls in the closing paragraphs of "The Justification of Civil Disobedience," in *Civil Disobedience: Theory and Practice*, ed. Hugo Bedau (New York, 1969).

9. In Schenck v. United States.

advocated even if he might wish to. The conflict between doing this and remaining autonomous would be direct if a person who authorized the state to protect him in this way necessarily also bound himself to accept the state's judgment about which views were false. The matter is not quite this simple, however, since it is conceivable that a person might authorize the state to act for him in this way while still reserving to himself the prerogative of deciding, on the basis of the arguments and evidence left available to him, where the truth was to be found. But such a person would be "deciding for himself" only in an empty sense, since in any case where the state exercised its prerogative he would be "deciding" on the basis of evidence preselected to include only that which supported one conclusion. While he would not be under an obligation to accept the state's judgment as correct, he would have conceded to the state the right to deprive him of grounds for making an independent judgment.

The argument for the second half of the Millian Principle is parallel to this one. What must be argued against is the view that the state, once it has declared certain conduct to be illegal, may when necessary move to prevent that conduct by outlawing its advocacy. The conflict between this thesis and the autonomy of citizens is, just as in the previous case, slightly oblique. Conceding to the state the right to use this means to secure compliance with its laws does not immediately involve conceding to it the right to require citizens to believe that what the law says ought not to be done ought not to be done. Nonetheless, it is a concession that autonomous citizens could not make, since it gives the state the right to deprive citizens of the grounds for arriving at an independent judgment as to whether the law should be obeyed.

These arguments both depend on the thesis that to defend a certain belief as reasonable a person must be prepared to defend the grounds of his belief as not obviously skewed or otherwise suspect. There is a clear parallel between this thesis and Mill's famous argument that if we are interested in having truth prevail we should allow all available arguments to be heard.[10] But the present argument does not depend, as Mill's may appear to, on an empirical

10. In chap. II of *On Liberty*.

claim that the truth is in fact more likely to win out if free discussion is allowed. Nor does it depend on the perhaps more plausible claim that, given the nature of people and governments, to concede to governments the power in question would be an outstandingly poor strategy for bringing about a situation in which true opinions prevail.

It is quite conceivable that a person who recognized in himself a fatal weakness for certain kinds of bad arguments might conclude that everyone would be better off if he were to rely entirely on the judgment of his friends in certain crucial matters. Acting on this conclusion, he might enter into an agreement, subject to periodic review by him, empowering them to shield him from any sources of information likely to divert him from their counsel on the matters in question. Such an agreement is not obviously irrational, nor, if it is entered into voluntarily, for a limited time, and on the basis of the person's own knowledge of himself and those he proposes to trust, does it appear to be inconsistent with his autonomy. The same would be true if the proposed trustees were in fact the authorities of the state. But the question we have been considering is quite different: Could an autonomous individual regard the state as having, not as part of a special voluntary agreement with him but as part of its normal powers qua state, the power to put such an arrangement into effect without his consent whenever *it* (i.e., the legislative authority) judged that to be advisable? The answer to this question seems to me to be quite clearly no.

Someone might object to this answer on the following grounds. I have allowed for the possibility that an autonomous man might accept a general argument to the effect that the fact that the state commands a certain thing is in and of itself a reason why that thing should be done. Why couldn't he also accept a similar argument to the effect that the state qua state is in the best position to decide when certain counsel is best ignored?

I have already argued that the parallel suggested here between the state's right to command action and a right to restrict expression does not hold. But there is a further problem with this objection. What saves temporary, voluntary arrangements of the kind considered above from being obvious violations of autonomy is the fact that they can be based on a firsthand estimation of the relative

reliability of the trustee's judgment and that of the "patient." Thus the person whose information is restricted by such an arrangement has what he judges to be good grounds for thinking the evidence he does receive to be a sound basis for judgment. A principle which provided a corresponding basis for relying on the state qua state would have to be extremely general, applying to all states of a certain kind, regardless of who occupied positions of authority in them, and to all citizens of such states. Such a principle would have to be one which admitted variation in individual cases and rested its claim on what worked out best "in the long run." Even if some generalization of this kind were true, it seems to me altogether implausible to suppose that it could be rational to rely on such a general principle when detailed knowledge of the individuals involved in a particular case suggested a contrary conclusion.

A more limited case for allowing states the power in question might rest not on particular virtues of governments but on the recognized fact that under certain circumstances individuals are quite incapable of acting rationally. Something like this may seem to apply in the case of the man who falsely shouts "fire" in a crowded theater. Here a restriction on expression is justified by the fact that such acts would lead others (give them reason) to perform harmful actions. Part of what makes the restriction acceptable is the idea that the persons in the theater who react to the shout are under conditions that diminish their capacity for rational deliberation. This case strikes us as a trivial one. What makes it trivial is, first, the fact that only in a very farfetched sense is a person who is prevented from hearing the false shout under such circumstances prevented from making up his own mind about some question. Second, the diminished capacity attributed to those in the theater is extremely brief, and applies equally to anyone under the relevant conditions. Third, the harm to be prevented by the restriction is not subject to any doubt or controversy, even by those who are temporarily "deluded." In view of all of these facts, the restriction is undoubtedly one which would receive unanimous consent if that were asked.[11]

11. This test is developed as a criterion for justifiable paternalism by Gerald Dworkin in his essay "Paternalism," in *Morality and the Law*, ed. Richard Wasserstrom (Belmont, Cal., 1971).

This is not true, however, of most of the other exceptions to the Millian Principle that might be justified by appeal to "diminished rationality." It is doubtful, for example, whether any of the three conditions I have mentioned would apply to a case in which political debate was to be suspended during a period of turmoil and impending revolution. I cannot see how nontrivial cases of this kind could be made compatible with autonomy.

The arguments I have given may sound like familiar arguments against paternalism, but the issue involved is not simply that. First, a restriction on expression justified on grounds contrary to the Millian Principle is not necessarily paternalistic, since those who are to be protected by such a restriction may be other than those (the speaker and his audience) whose liberty is restricted. When such a restriction is paternalistic, however, it represents a particularly strong form of paternalism, and the arguments I have given are arguments against paternalism only in this strong form. It is quite consistent with a person's autonomy, in the limited sense I have employed, for the law to restrict his freedom of action "for his own good," for instance by requiring him to wear a helmet while riding his motorcycle. The conflict arises only if compliance with this law is then promoted by forbidding, for example, expression of the view that wearing a helmet isn't worth it, or is only for sissies.

It is important to see that the argument for the Millian Principle rests on a limitation of the authority of states to command their subjects rather than on a right of individuals. For one thing, this explains why this particular principle of freedom of expression applies to governments rather than to individuals, who do not have such authority to begin with. There are surely cases in which individuals have the right not to have their acts of expression interfered with by other individuals, but these rights presumably flow from a general right to be free from arbitrary interference, together with considerations which make certain kinds of expression particularly important forms of activity.

If the argument for the Millian Principle were thought to rest on a right, "the right of citizens to make up their own minds," then that argument might be thought to proceed as follows. Persons who see themselves as autonomous see themselves as having a right to make

up their own minds, hence also a right to whatever is necessary for them to do this; what is wrong with violations of the Millian Principle is that they infringe this right.

A right of this kind would certainly support a healthy doctrine of freedom of expression, but it is not required for one. The argument given above was much more limited. Its aim was to establish that the authority of governments to restrict the liberty of citizens in order to prevent certain harms does not include authority to prevent these harms by controlling people's sources of information to insure that they will maintain certain beliefs. It is a long step from this conclusion to a right which is violated whenever someone is deprived of information necessary for him to make an informed decision on some matter that concerns him.

There are clearly cases in which individuals have a right to the information necessary to make informed choices and can claim this right against the government. This is true in the case of political decisions, for example, when the right flows from a certain conception of the relation between a democratic government and its citizens. Even where there is no such right, the provision of information and other conditions for the exercise of autonomy is an important task for states to pursue. But these matters take us beyond the Millian Principle.

IV

The Millian Principle is obviously incapable of accounting for all of the cases that strike us as infringements of freedom of expression. On the basis of this principle alone we could raise no objection against a government that banned all parades or demonstrations (they interfere with traffic), outlawed posters and handbills (too messy), banned public meetings of more than ten people (likely to be unruly), and restricted newspaper publication to one page per week (to save trees). Yet such policies surely strike us as intolerable. That they so strike us is a reflection of our belief that free expression is a good which ranks above the maintenance of absolute peace and quiet, clean streets, smoothly flowing traffic, and rock-bottom taxes.

Thus there is a part of our intuitive view of freedom of expression

which rests upon a balancing of competing goods. By contrast with the Millian Principle, which provides a single defense for all kinds of expression, here it does not seem to be a matter of the value to be placed on expression (in general) as opposed to other goods. The case seems to be different for, say, artistic expression than for the discussion of scientific matters, and different still for expression of political views.

Within certain limits, it seems clear that the value to be placed on having various kinds of expression flourish is something which should be subject to popular will in the society in question. The limits I have in mind here are, first, those imposed by considerations of distributive justice. Access to means of expression for whatever purposes one may have in mind is a good which can be fairly or unfairly distributed among the members of a society, and many cases which strike us as violations of freedom of expression are in fact instances of distributive injustice. This would be true of a case where, in an economically inegalitarian society, access to the principal means of expression was controlled by the government and auctioned off by it to the highest bidders, as is essentially the case with broadcasting licenses in the United States today. The same might be said of a parade ordinance which allowed the town council to forbid parades by unpopular groups because they were too expensive to police.

But to call either of these cases instances of unjust distribution tells only part of the story. Access to means of expression is in many cases a necessary condition for participation in the political process of the country, and therefore something to which citizens have an independent right. At the very least the recognition of such rights will require governments to insure that means of expression are readily available through which individuals and small groups can make their views on political issues known, and to insure that the principal means of expression in the society do not fall under the control of any particular segment of the community. But exactly what rights of access to means of expression follow in this way from political rights will depend to some extent on the political institutions in question. Political participation may take different forms under different institutions, even under equally just institutions.

The theory of freedom of expression which I am offering, then, consists of at least four distinguishable elements. It is based upon the Millian Principle, which is absolute but serves only to rule out certain justifications for legal restrictions on acts of expression. Within the limits set by this principle the whole range of governmental policies affecting opportunities for expression, whether by restriction, positive intervention, or failure to intervene, are subject to justification and criticism on a number of diverse grounds. First, on grounds of whether they reflect an appropriate balancing of the value of certain kinds of expression relative to other social goods; second, whether they insure equitable distribution of access to means of expression throughout the society; and third, whether they are compatible with the recognition of certain special rights, particularly political rights.

This mixed theory is somewhat cumbersome, but the various parts seem to me both mutually irreducible and essential if we are to account for the full range of cases which seem intuitively to constitute violations of "free speech."

V

The failure of the Millian Principle to allow certain kinds of exceptions may seem to many the most implausible feature of the theory I have offered. In addition to the possibility mentioned earlier, that exceptions should be allowed in cases of diminished rationality, there may seem to be an obvious case for allowing deviations from the principle in time of war or other grave emergency.

It should be noticed that because the Millian Principle is much narrower than, say, a blanket protection of "speech," the theory I have offered can already accommodate some of the restrictions on expression which wartime conditions may be thought to justify. The Millian Principle allows one, even in normal times, to consider whether the publication of certain information might present serious hazards to public safety by giving people the capacity to inflict certain harms. It seems likely that risks of this kind which are worth taking in time of peace in order to allow full discussion of, say, certain scientific questions, might be intolerable in wartime.

But the kind of emergency powers that governments feel entitled

to invoke often go beyond this and include, for example, the power to cut off political debate when such debate threatens to divide the country or otherwise to undermine its capacity to meet a present threat. The obvious justification for such powers is clearly disallowed by the Millian Principle, and the theory I have offered provides for no exceptions of this kind.

It is hard for me at the present moment to conceive of a case in which I would think the invocation of such powers by a government right. I am willing to admit that there might be such cases, but even if there are I do not think that they should be seen as "exceptions" to be incorporated within the Millian Principle.

That principle, it will be recalled, does not rest on a right of citizens but rather expresses a limitation on the authority governments can be supposed to have. The authority in question here is that provided by a particular kind of political theory, one which has its starting point in the question: How could citizens recognize a right of governments to command them while still regarding themselves as equal, autonomous, rational agents? The theory is normally thought to yield the answer that this is possible if, but only if, that right is limited in certain ways, and if certain other conditions, supposed to insure citizen control over government, are fulfilled. I have argued that one of the necessary limitations is expressed by the Millian Principle. If I am right, then the claim of a government to rule by virtue of this particular kind of authority is undermined, I think completely, if it undertakes to control its citizens in the ways that the Millian Principle is intended to exclude.

This does not mean, however, that it could not in an extreme case be right for certain people, who normally exercised the kind of authority held to be legitimate by democratic political theory, to take measures which this authority does not justify. These actions would have to be justified on some other ground (e.g., utilitarian), and the claim of their agents to be obeyed would not be that of a legitimate government in the usual (democratic) sense. Nonetheless most citizens might, under the circumstances, have good reason to obey.

There are a number of different justifications for the exercise of coercive authority. In a situation of extreme peril to a group, those in the group who are in a position to avert disaster by exercising

a certain kind of control over the others may be justified in using force to do so, and there may be good reason for their commands to be obeyed. But this kind of authority differs both in justification and extent from that which, if democratic political theory is correct, a legitimate democratic government enjoys. What I am suggesting is that if there are situations in which a general suspension of civil liberties is justified—and, I repeat, it is not clear to me that there are such—these situations constitute a shift from one kind of authority to another. The people involved will probably continue to wear the same hats, but this does not mean that they still rule with the same title.

It should not be thought that I am here giving governments license to kick over the traces of constitutional rule whenever this is required by the "national interest." It would take a situation of near catastrophe to justify a move of the kind I have described, and if governments know what they are doing it would take such a situation to make a move of this sort inviting. For a great deal is given up in such a move, including any notion that the commands of government have a claim to be obeyed which goes beyond the relative advantages of obedience and disobedience.

When the situation is grave and the price of disorder enormous, such utilitarian considerations may give the government's commands very real binding force. But continuing rule on this basis would be acceptable only for a society in permanent crisis or for a group of people who, because they could see each other only as obedient servants or as threatening foes, could not be ruled on any other.