

What is free speech?

It is widely held that free speech is a distinctive and privileged social kind. But what is free speech? In particular, is there any unified phenomenon that is both free speech and which is worthy of the special value traditionally attached to free speech? We argue that a descendent of the classic Millian justification of free speech is in fact a justification of a more general social condition; and, via an argument that 'free speech' names whatever natural social kind is justified by the best arguments, that free speech is therefore this more general condition. This condition involves not merely the orthodox freedom (in some sense) of speakers to distribute words, but also two less frequently acknowledged dimensions of free speech: audience understanding and consideration. We conclude with some discussion of the policy implications of this conception of free speech.

What is the nature of free speech? More precisely: what is the nature of free expression, since we mean 'speech' to be broadly construed to include not simply orthographic items—words spoken or penned—but also photographs, paintings and performances. In short, the whole range of expressive acts that are produced with the intention of communicating an idea.¹

The standard approach to free speech takes a substantive issue—whether there exists a *prima facie* right to act expressively—to be settled. It makes the real debates in the area into ones about which domains are ones in which that *prima facie* right may be overridden, or else protected with more than usual vigilance.² Thus debates about pornography, hate speech, defamation and the like, often turn out not to be debates about free speech, but generalized debates about whether special harms outweigh the background assumption of a right to free speech. The justification for free speech lies in this background, as an only occasionally acknowledged Millian principle that is idle in living thought or debate about the role of communication in society.

This strikes us as quite the wrong approach. The borders of free speech should, at least most of the time, be patrolled by principles that are connected to the very point of having free speech in a society. There is a more important worry about the standard approach, however. It assumes that the issue of what free speech is, and the issue of what justifies it, are quite distinct. On the standard approach one first comes up with an analysis of what free speech is—via, for example, intuitive analyses of 'freedom', 'speech', and their intersection. One then asks separate questions about how far free speech should be protected, and what justifies it.³

But the important phenomena in ethics and politics are often best approached via their justification. Free speech is what is justified by its best justification, if anything. More strictly: free speech is what is justified by the best argument in favour of something generally named 'free speech'. Of course not just anything named 'free speech' will do as a starting place. Any analysis which began with a domain called 'free speech' that turned out to be normatively insignificant, would be mistaken: for the

natural ethical kinds, if any, are normative. So instead, we think that the domain of free speech should itself be marked out by the justifying principles. We propose to identify free speech with those conditions that best serve the ends of the classical justifications of ‘free speech’. Thus the limits of free speech will turn out to depend on the nature of free speech: the borders of its domains will be those that are explained by the point of free speech itself. Unjustified free speech will be for us an oxymoron. If there is no justification that works, there is no free speech, just unbridled license to communicate. We do not, however, think that this unwelcome conclusion is one that we are likely to have to draw.

We will start with a method that establishes a logical space in which we can plot degrees and ways in which speech can be free—but even this is no mere analysis of ‘freedom’, ‘speech’ and their intersection, for in extending our understandings of ways in which speech can be free, we concentrate on the *point* of freedom of speech.

This will narrow the space in which freedom of speech is to be found. We can then use a second method to delineate where exactly free speech is located in this space. We take it that free speech is meant to pick out some kind of natural social kind. If free speech were not some natural social kind, it could hardly have the widespread and cross-cultural importance that its proponents claim that it does. Perhaps gerrymandered social phenomena—such as the kind of footwear that counts as disgusting—might be important (because of its cultural impact) as a result of extreme contingencies within a culture, but it could hardly have the robust significance that many think that freedom of speech possesses. So, in common with natural kind terms of the lower level sciences, it is an implicit assumption that if there is some such unified phenomenon that plays a coherent role in political and moral theorizing and underlies discourse about free speech, then that phenomenon deserves to be called ‘free speech’, even if it violates some superficial commonplace assumptions.

But of course it cannot violate too many such commonplaces, for that would be to change the subject—it would move it out of the broad area indicated by the first method. Some might object that the second method leaves us hostage to the possibility that there may turn out to be no relatively principled kind. But we take this to be a benefit of our procedure. It leaves open the possibility that we may find that the importance of free speech is simply a cultural predilection. We do not think this is true, but nor do we think that it is obvious that a unified phenomenon deserving of the name ‘free speech’ necessarily exists.⁴

We think that in social and political domains, a better insight into the nature of disputed phenomena is often to be had by looking at the arguments for and against them: for the motivation is often located in these arguments. Free speech, we think, *is the principled phenomenon that is justified by the paradigm arguments used.*⁵ So our thought is this. Do not try to establish what free speech is independently, and then see

whether the standards arguments for it succeed. Instead ask: 'Is there a principled kind of phenomenon that these arguments support?' If so, then that phenomenon—so long as it is located in the broad area delineated by the first method—is free speech. It is the phenomenon that unifies part of the otherwise disunified terrain of various conceptions of what it is for speech to be free. So not only is it a conception of free speech, it is also the conception that forms a natural kind, and thus deserves to be the preferred analysis.

We can contrast this with the more orthodox view that the justification of free speech can be used to settle the scope of *protected* acts of speech. Many theorists think that whether a certain act of speech should be protected depends on whether its protection is justified by whatever justifies protections of speech in general. Our approach goes much further than this. We seek to explain the *nature* (not just the scope) of free speech in terms of the natural kind whose nature justifies and underlies various practices of protecting speech.

We will make a further conditional claim: if the best justification of the practices of protecting certain kinds of expression is a broadly post-Millian one, then free speech takes on a distinctive shape, insofar as that justification supports policies and practices that protect both somewhat less and somewhat more than traditional conceptions of free speech. We will not attempt to systematically show that this post-Millian conception is indeed the best justification: that would be a synoptic task beyond what can be attempted in a single paper. But our conditional claim does not require this. So the justification with which we will be principally concerned is the classic liberal justification of free speech—the idea of the marketplace of ideas due to John Stuart Mill.⁶ We use this to both add a dimension to the logical space in which we locate free speech, and also to pick out what parts of it constitute free speech. The idea is that the natural kind of free speech is that which, to repeat our slogan, is justified by the justification. We will argue that this turns out to be a social condition rather than a set of rights. Various acts and policies may be instrumental in bringing about that condition—toleration of dissent, encouragement of education, legislated rights, and so forth—but no one of them or group of them is free speech. They are rather instrumental in bringing about the social condition of free speech; and even then only contingently, for in other social conditions they might hinder it.

Of course, nothing in our view guarantees even that there is a *best* justifier of the practices of free speech. Even if we are right that the post-Millian one is a good justifier, others might be just as good. On our view, if this is the case, then 'free speech' turns out to be an ambiguous term. There may be more than one natural kind.⁷

The First Method

We will start by describing the logical space in which free speech can be located. We think this space has three axes. The first of these—and the one that has been most

prominent in the literature—we call the *distribution axis*. Speech can be free insofar as it is permitted or positively enabled privately, in small groups, large groups, elite groups, or in mass distribution. This dimension of freedom ranges over how far orthographic tokens are distributed. There is a continuum here. At one end of the distribution continuum, the production of token utterances is altogether prevented. At the other extreme of the distribution axis, universal production and distribution of token expressions is not only encouraged, but guaranteed.

However, there are ways of interfering with the capacity to speak freely other than by exercising control over the distribution of orthographic tokens. Speech is only genuine speech insofar as it can be understood: insofar as it communicates.⁸ So interfering with uptake or comprehension might interfere with freedom to (genuinely) speak.⁹ Thus, the second axis is that of *communication* or *understanding*; and freedom of speech ranges along that axis from a point where mere sounds are merely heard, to a point roughly mid-way on the axis where they are half understood, and so on—all the way to the other extreme of the communication continuum, where the speaker's intended meaning emerges completely unscathed.

Even successful communication has no point, however, if it is systematically and dogmatically ignored. Certainly, the justification of free speech we will discuss shortly makes sense only if the ideas are able to be of use; which means that they must be considered, rather than merely heard or comprehended. Our third axis, then, is the *consideration axis*, where freedom of speech can be interfered with by preventing ideas from being considered. Again, this can vary from brief consideration, at one end of the consideration spectrum; to testing of ideas in a thorough way, coupled with a disposition to adopt them if they survive the tests, at the other extreme.

Where in the space described by these axes does free speech lie? At low levels on each axis lies a position where there is a right to mutter incomprehensible sounds in private in a way which would not enter anyone's deliberations, even were they understood. Granting a right to this minimal conception of free speech is liberally acceptable: the most vehement libertarian could embrace it. At the other extreme lies a view which appears to guarantee a right to spread massively views whose comprehension cannot be interfered with (by way of stereotyping, or advertising, for example) and where there is some kind of mandated guarantee that the ideas will be seriously considered by all. This very thick conception is bound to introduce restrictions on other liberties, and indeed duties, that liberals may have difficulty in accommodating.

The Second Method

It is at this point that we introduce the marketplace of ideas. The classic marketplace of ideas justification says that freedom of speech is essentially a condition of free flow of

information. It allows for ideas to be tested in a market, and for truth to out. Throughout this section we write as though truth is the ultimate justifying value, for this what the classic Millian justification says. However, the conceptual points we make are indifferent to the detail of the justification. If some values other than truth justified the free flow of information then our points could be made equally well in terms of those values.

We thus look at the space of possibilities described by the axes above, and ask what positions in it best promote a condition of flow of information and testing of ideas that is most beneficial with respect to truth. The social state which best manages these trade-offs is the condition of freedom of speech. Unlike Mill, we do not assume that the condition in which ideas compete in such a way as to make truth most likely to emerge is one that is best realized in a free or unregulated market (or, at any rate, a market which is regulated only by market mechanisms, rather than state ones).¹⁰ In this respect, the ‘marketplace of ideas’ metaphor may be slightly misleading. We use that term to describe the condition in which ideas compete in such a way as to make truth most likely to emerge, but it is a further and open empirical question whether that condition is best realized by a free marketplace. The assumption that truth is most likely to emerge from a completely unregulated marketplace of ideas will be, if correct, contingently so—perhaps relative to particular cultural and historical circumstances. This assumption may in many cases turn out to be wrong. Indeed, we think that state intervention may sometimes promote, rather than hinder, the free flow information and the emergence of truth, so the condition of free speech may be one that requires some non-market mechanisms.

What, then, is the relationship between the kinds of positions on the axes that we describe, the free flow of information, its justification by truth, and any further justification that truth requires?

This is slightly complicated. The free flow of information is that setting on the axes that allows most information to circulate in a society. Of course this will involve trade-offs: it may be best to produce less speech in order to allow more consideration; encouraging too much consideration may not leave enough resources for distribution or production, and so on. Perfect free flow is whatever setting maximizes this overall trade-off.

What justifies maximizing this? Why do we want the free flow? That’s where truth comes in. Contingently, it is plausible that something as close to free a flow as possible is a social condition in which truth can prosper.

Note that we have said nothing about free speech in these last paragraphs. This is because free speech lies in the *interaction* between the social condition of free flow and its justification in terms of truth. The social condition of free speech is the condition of free flow *insofar as it is justified by truth*. That leaves us with two possibilities. What if we can engineer a conception of free flow, but it turns out (contingently) that it is inimical to truth? Then we have discovered that there is no freedom of speech, for

freedom of speech exists only if there is free flow *and* it is justified by truth. And what if there is a condition justified by truth, but it turns out that Plato was right, and strict controls on utterance and reading are required to weed out false belief amongst the masses? Then again, it turns out there is no free speech, for there is no social condition which both is free flow, and is justified by truth.

Why have we insisted that a social condition is free only insofar as it is justified by truth? Why not say that free speech is the social condition of free flow, and that free speech is desirable only insofar as it is justified by truth? In a way we would not object; the difference is close to being merely terminological. But our way of going has the benefit of explaining how it can seem to so many that free speech is a good independently of detailed calculation of its justification. Most liberals have the firm intuition that it is analytic that free speech is good. We agree: but we think there is a confusion between this analyticity, and the error that it is a logically necessary truth that the condition that is contingently free speech in a society—the free flow of information—is always truth-promoting, and thus good. We say that in a state where free flow subserves truth then that free flow is free speech. But should that free flow not subserve truth then it would not be free speech. So the analytic truth affecting the liberal intuition is correct—free speech, where it exists, is always justified. But this is not because it is guaranteed that the free flow is justified. Rather, it is because free flow is free speech only when it is truth-promoting.

The Justification of Truth

Finally, what of the connection between the justification by truth, and any further justification that truth may require? We are silent on this further question of what justifies truth. It might be that it is justified by its role in helping with public and private decisions, or it might be a social end in itself, which is one of many values that must be maximized together. Thus we have no view on whether the condition of free speech is desirable as an end in itself, or is in turn justified by other social values it subserves. This requires us, however, to return to the question of the borders of free speech that we mentioned earlier. If truth is in fact a value in competition with others, then the fact that free speech provides a *prima facie* reason to permit or encourage some activity will not be decisive. Even if the social condition which best promotes truth permits or encourages the activity, considerations other than truth may dictate that we do not in fact want the social condition that *best* promotes truth.

There is another worry: what if truth is not another value in competition with others? Suppose that some kind of monovalent consequentialism is true, and there is only one value—overall utility. It might then seem that there could be no natural kind that has ‘insofar as is justified by truth’ as constitutive. For truth itself, not being a value, would

play no natural justifying role. Every policy, every piece of calculation about what the best overall social condition is, would appeal directly to overall utility.

However, this ignores the difficulty of such global maximizing for beings like us, even if we were to think that ultimate justifications are of this nature. Even if values such as truth and health and so on are commensurable and reducible to utility, they can only be thought about and implemented piecemeal. So, insofar as we are concerned with one of these topics, we need to consider what conditions do best for *it*; and only then do we then compare and devise a trade-off overall condition. This preserves an important role for the individual social conditions that maximize the individual values. One might think of this as a species of indirect consequentialism: even if the values are theoretically commensurable, given human nature, encouraging dispositions to respond to them separately may be useful, and thus require an ethical theory and practice that treats them as important kinds. The naturalness of the kinds would be psychological rather than ethical; but insofar as that is the psychology we have to work with to achieve ethical and political ends, it is natural and important enough.

The Distribution Axis: Thought to widespread distribution

At the very least, freedom of speech requires a social context in which individuals are permitted to voice their thoughts. As almost everyone will agree, a society in which dissidents are bound or gagged or otherwise physically prevented from producing dissenting expression is a society in which dissidents do not have freedom of speech. Most will agree too, that a society in which a dictator sends her henchmen to stand over would-be dissidents, intimidating them into literal silence, or a society in which there are severe penalties for dissenting speech, are also situations where there is no freedom of speech. But is the freedom to voice one's thoughts without actual physical interference, or real threat of such interference, sufficient for freedom of speech?

Suppose now that the dictator allows the dissidents to make sounds and other expressive gestures, but surrounds dissidents with an invisible device that obliterates the dissenting sounds (or gestures) meters away from the speaker. Speakers are now free to make whatever sounds and gestures they like, but the obliteration device prevents those sounds and gestures from ever reaching an audience. Here too, we think, the dissidents lack freedom of speech. This should not be controversial, for it is widely thought that censorship of this and more traditional sorts paradigmatically undermine speakers' freedom of speech.

But there are a multitude of less overt ways in which speakers' capacity to produce and distribute words and their expressive equivalents might be interfered with. There is arguably a sense, for example, in which people may be 'prevented' from saying certain things by a social climate that is hostile or otherwise unsympathetic to what they have to say. Thus many victims of childhood sexual abuse, rape, and harassment, along with

those who wish to express anti-‘politically correct’ sentiments, complain of being ‘silenced’ by a social climate in which what they have to say would count as unacceptable or otherwise inappropriate. Likewise, there is perhaps a sense in which poverty, illiteracy, a lack of self-confidence, or a fear of public speaking, can prevent people from distributing words. Someone who can’t afford the fare to the public square to get her views heard, or who is paralyzed with fear upon taking the podium, can distribute her words less widely than her wealthier and more confident or articulate counterparts. Similarly, the wide distribution of speech cannot take place in a society that lacks a basic telecommunications infrastructure. The more tolerant and accommodating a community is of diverse and unpopular ideas, and the wealthier a community is, and the better the community’s telecommunications infrastructure, the more distribution of words takes place.

So the production and distribution of words might be interfered with in various ways and to various degrees. There is a continuum here. At one extreme of the continuum, would-be speakers are bound and gagged and so no words are even produced. At the other extreme, the widest possible distribution of words is not merely permitted, but guaranteed. The government plays an active role in encouraging all citizens to voice their thoughts whenever and wherever they choose (on the streets at night, in workshops, in the home, and at weddings). It runs regular courses in public-speaking, hands out special vouchers to travel to speech outlets, guarantees all citizens a regular 10 minute slot on Today Tonight and runs regular campaigns to promote a caring and sympathetic speech environment. In between these two extremes, the distribution of words is permitted or positively enabled to varying degrees.

Where on this continuum does free speech begin? It is hard to say exactly, for this is a continuum. At one end of the continuum, where would-be speakers are prevented from performing communicative acts at all, or where they can do so but only in private, there is no freedom of speech. At the other extreme, where speakers are not only permitted the widest possible distribution, but guaranteed real access to every speech forum and media outlet in the country, more words get distributed. This may not mean that this extreme is required for free speech, however: for the cost of enabling this much distribution might be paid in the coin of some other loss along one of the other dimensions. Somewhere along the continuum lies a point that is a boundary for the freedom of speech. Which point? The point that is part of the best overall social condition that promotes truth.

The Communication Axis: Words to successful communication

The traditional story about free speech focuses almost exclusively on the distributive dimension. To the extent that there are constraints and limits on the distribution of words and their expressive equivalents, speech is less free. So far as it goes, this picture

seems plausible enough. Actions or situations that prevent or limit the distribution of speech certainly make speech less free. Speakers who have no access to the means of communication are less free to speak than those who control those means; political dissidents are more free to speak in Australia and the United States than they are in China, Burma or Zimbabwe; and so on.

But insofar as the traditional picture of free speech is plausible, what makes it plausible is the assumption that it is genuine *speech* that is being distributed, not simply word-like sounds and symbols. And what makes sounds and symbols speech—in particular, speech that communicates ideas—is not merely, nor even primarily, a matter of their distribution. A speaker’s sayings of ‘numfutall’ can be as widely distributed as you like, but freedom to distribute only such meaningless sayings does not count as freedom to speak in any genuine or important sense. A society that permitted speakers to distribute only meaningless sounds and symbols would be no better off, so far as freedom of speech is concerned, than a society that prevented speakers from distributing sounds and symbols altogether.

Consider again the example in the previous section of the dictator who uses a sound obliteration device to absorb words after they have been successfully produced. Uncontroversially, this is a case of limitation on the distribution axis. But suppose she discovers a yet more ingenious and covert way of silencing dissidents: let them produce and distribute as many sounds and symbols as they like, but prevent those sounds and symbols from bearing their intended meaning. The dictator, let’s say, orders her henchmen to secretly implant a small device, a ‘meaning obliterator’, in the heads of members of the populace. The device works to cause selective failure of translation or comprehension in receivers. It makes the populace forget the meaning of certain sounds and scrawls—deleting them from receiver’s internal dictionaries, as it were—so that sounds, symbols and gestures which would otherwise constitute sounds, symbols and gestures of dissent are transformed into nothing but nonsensical gibberish. ‘Overthrow the dictator’, the dissidents chant; ‘numfutall, numfutall, numfutall’ is how it translates—or fails to translate—to receivers. Thanks to the intervention of the dictator and her goons, these sounds and symbols are no longer words in a language that hearers can recognize or understand.

Or suppose that a further advance in the technology of semantic interference results in the development of a device called the ‘meaning scrambler’. Like the meaning obliterator, when it is implanted in receivers, the meaning scrambler interferes with receivers’ ability to comprehend the meaning of certain words. But it does so, not by obliterating the meaning of certain sounds and symbols altogether, but by changing their meaning—by instilling a different, misleading translation schema in the heads of receivers. Like an internalized false dictionary, the meaning scrambler causes members

of the unwitting populace in whom it is secretly implanted to systematically miscomprehend the meaning of sounds of dissent. It tells receivers that sounds or symbols such as ‘overthrow’ in the context of phrases such as ‘overthrow the dictator’ should be understood as meaning ‘support’. The advantage of this device from the dictator’s point of view, is that not only does it silence dissent, but it turns attempted proclamations of dissent into proclamations of support and compliance. Try as they might, under either of these regimes of semantic interference, the dissidents have no way of communicating their dissenting ideas to others.

To be sure there is *some* sense in which even under these conditions people are distributing meaningful words and so on. If I speak English amongst monolingual Pashtu speakers my words are meaningful, but useless. So the obliterator does not prevent the dissidents from distributing meaningful words: it just makes them *seem* meaningless (or stupid) to the readers and hearers. But, of course, this violates the point of the distribution of words and symbols. The state of free speech is one in which (enough of the time) people can communicate. When we want free speech for ourselves, we want to be able to utter meaningful sentences, not because we fetishize the property of having a meaning in some language L, but rather because we expect that property to assist in our thoughts being communicated.

It seems to us that there is an obvious sense in which dissidents in the society just described do not have freedom of speech. They do not have freedom of speech, even though nothing is stopping them from producing or distributing word-like sounds and symbols that have a meaning in some language or other. The moral of the story is that freedom of speech thus requires more than mere distribution. It also requires some degree of comprehension on the part of receivers—or, at any rate, it requires that comprehension is at least permitted. Free speech requires that the sounds and symbols that are produced are sounds and symbols in a language, but that language also needs to be one that receivers are able to understand or else what is being distributed may as well be nonsensical gibberish, not speech. As a result, free speech can be undermined not simply by restrictions on the distribution of words and their expressive equivalents, as the traditional picture has it, but also by actions or situations which undermine the abilities of receivers to successfully grasp the meaning of those words.

Once it is seen how failure of comprehension can undermine free speech in this sort of hypothetical case, it is easier to see how more commonplace actions and situations might operate to undermine free speech in the same sort of way. Gross illiteracy among a population or sub-population can achieve, in a less directly malevolent way, much of what the evil dictator does. In extreme cases, where populations literally do not speak a language or do not speak the same language, communication is prevented entirely—at least, in the absence of translators. Speakers can speak, and receivers can hear, but communication fails to take place since receivers cannot even minimally comprehend

what speakers say. A condition in which a population is divided into mutually uncomprehending languages is a society in which free speech in this sense is much restricted: so policy recommendations either to allow many people to speak enough neighbouring languages so ideas can spread, or the teaching of a common language, will emerge. Society-wide comprehension is a basic precondition for free speech.

But minimal understanding of the speaker's language—say, knowing the meaning of 1,000 words in that language and some basic grammatical rules—may not yet be enough for the communication of ideas to occur. Understanding an idea often requires more than merely knowing the meaning of some, or even most, of the words that are used to express it. It often requires being able to follow arguments or whole trains of thought. More often than not, this requires not only understanding the meaning of whole paragraphs and passages of words, but also the exercise of practical reasoning skills: being able to see how the argument fits together; how the conclusion follows from the premises, if it does; or whether or how the premises are supported. A richer understanding of ideas requires being able to critically appraise those ideas for validity, soundness, inductive strength and the like. The better a community's reading, comprehension and practical reasoning skills the more communication is likely to take place. Indeed, Mill held that understanding only occurs at this very rich end of the spectrum. Individuals only properly understand an idea when those individuals are in possession of the reasons for and against the idea. An idea, however true, which is believed without such prior critical scrutiny is not properly understood and is held in the mode of mere prejudice, 'true dogma' as Mill puts it.¹¹ For Mill, along with many of his contemporary followers, the benefits of free speech—namely, the emergence of truth and the promotion of rational decision-making—only obtain where the reception of speech is appropriately critical.

But the successful communication of ideas may require even more of receivers than simply that they have the requisite level of linguistic comprehension and practical reasoning abilities to enable them to understand speakers' ideas. It also seems to require that they be inclined to make at least some effort to exercise those abilities in the pursuit of understanding. Understanding can fail because those who possess the requisite abilities simply cannot be bothered to exercise them, especially in cases where even minimal understanding requires some degree of effort on the part of receivers: perhaps the speaker has a thick accent, perhaps they express themselves in an unnecessarily and annoyingly convoluted and obscurantist way, or perhaps receivers fail to make an effort because they think that the speaker (a woman, a Revivalist Christian, a member of a minority ethnic group) is just not the sort of person whose ideas merit the trouble. In these sorts of cases, understanding the speaker's idea can take some effort; and where receivers fail to make the required effort, communication will fail to take place. There are, of course, degrees of effort that can be made. One can sit down with a tortuously

expressed piece of philosophy and simply read the words once through; one can read the words and attempt a cursory reconstruction of the argument; or one can engage in a careful, time-consuming and painstaking attempt to reconstruct the ideas and go off and consult an expert. Successful communication may not require effort on the latter scale, but it may require at least the former.

So there is a communicative continuum here, this time focusing on the receiver side of the equation. Understanding, and so successful communication, can take place to varying degrees depending on the abilities and inclinations of receivers. At one extreme end of the continuum—where no sounds or symbols are produced or distributed at all or where the sounds and symbols that are distributed are in an entirely foreign tongue—no communication takes place. At the other extreme, where receivers are perfectly fluent in a language and have systematically received marks of 100% in their PHIL101: Practical Reasoning courses, something approaching full understanding takes place. In between these two extremes, ideas are better or worse understood, and communication takes place to greater or lesser degrees. Receivers can be more or less fluent in the speaker's language, they can have better or worse comprehension skills, they may have more or less fine-tuned practical reasoning abilities and they may make more or less effort to understand speakers' ideas.

It is not only the abilities or inclinations of receivers, however, which affect the success of communication. How speakers present their ideas—how clearly, directly and non-obscurely they speak, how much rhetoric they use—also affects the success of communication. Even receivers exceptionally well versed in comprehension and critical reasoning skills may struggle to understand ideas that are ramblingly expressed and obscurantist—as many a well-trained philosopher can perhaps attest! Free speech may thus impose duties on speakers to express their ideas as clearly and straightforwardly as they can, as well as duties on receivers to make some effort to be in a position to understand the ideas expressed. We will return to this point later.

Exactly where on this continuum does failure of comprehension end and true communication begin? It is difficult to say, precisely because this is a continuum. No understanding takes place at one extreme; full understanding takes place at the other; and understanding takes place to varying degrees in between. Free speech clearly requires enough in the way of comprehension, but it is hard to specify exactly what point in the middle of the continuum counts as enough for genuine communication to occur. Again, it will depend on complex trade-offs between the benefits of extra comprehension and the costs of guaranteeing it.

The Consideration Axis: From deliberate discounting to careful and expert consideration

So far we have discussed two ways in which freedom of speech might be interfered with: by interrupting the distribution of sounds and symbols, on the one hand, and preventing them from being understood, on the other. But there is a third way in which speech can be interfered with. If sounds are distributed; if their semantic meaning is understood; but they are completely unreflectively dismissed, then there is an important sense in which the speech has been interfered with.

This may not be immediately obvious. For if the speech is distributed, and if the speech is successfully communicated, then how can any speaker object that free speech has been interfered with? For not only, it seems, has the right to free speech been preserved, in fact the speech has occurred.

But a consideration of the point of free speech, we think, supports our view that this third axis is a genuine dimension of free speech.¹² The idea that what justifies free speech is a marketplace of ideas which allows ideas to compete is such a way that truth will out requires not merely that information slosh around from person to person or community to community. It requires further that the information actually compete. The ideas must actually be tested against each other.

In the previous section, we imagined a dictator who, rather than preventing truth from coming out by restrictions on the distributions of sounds, symbols or images, instead interfered by some kind of device that scrambled the meanings of these attempted communications. We can imagine yet another device: the Input Buffer. It is a device that, rather than scrambling the meaning of the communications, prevents them from being taken as input to deliberation. In other words, the device doesn't prevent understanding, but it does prevent the information that is understood from posing any threat to the existing beliefs and desires of the hearer. It allows the hearer's beliefs and desires to evolve naturally, except that they are insensitive to what they have heard.

Of course, such a device would be an infringement of the hearer's liberties, but surely also of the speaker's. The speaker is rendered powerless and unable to perform the reasonable goal of speech: to communicate ideas, and to have those ideas assessed according to their merit and impact on the community around them according to their merit.

But, as before, complicated science fiction devices are not required to have this effect. If some speakers are sufficiently ridiculed, this has a plausibly merely causal effect on many listeners such that, while understanding the meaning of a speaker's words, they dismiss them out of hand. They do not allow their own beliefs to be tested by what the speaker has to say, and thus defeat the *telos* of free speech. If a kind of Muggletonianism is preached by the dictator (the view that reason and deliberation leads

to evil and/or error and only faith is a guarantee of truth), then that too can stymie attempts to contribute to the collective wisdom by speakers.

Consideration, like the other dimensions of free speech, is an axis. At the narrow end, minimal attention is paid; at intermediate levels, enough consideration is paid so that if overwhelming and obvious reasons are given for a hearer modifying their beliefs or desires they may; and at extreme levels, every utterance is taken terribly seriously and the hearer's beliefs are scrupulously updated in a paroxysm of Bayesian virtue.

Some of the elements of consideration may seem to be alarming; for example, the extent to which satire or ridicule purely causally limits hearer's tendencies to consider speech. Does this give us an argument against satire? Not in general, we think; for consideration works in different ways. There are views which are relatively immune from testing; and to the extent that satirizing these (the entrenched dogmas of a culture) renders them testable (and thus if retained after testing less dogmatic) then the causal effects of ridicule are benign. They in fact enhance free speech. But when views are ridiculed that are usually dismissed, and are thus unable to play a testing role in the marketplace of ideas, then the ridicule may be less benign. This is, we think, the grain of truth in the politically correct thought that ridiculing the powerless and oppressed is bad, but ridiculing the establishment is permissible or even desirable. It is not that the oppressed are likely to be more virtuous, or even more likely to be right. It is that truth and utility are more likely to emerge when there are no barriers to the testing process that is a component of free speech—and these blockages can come from either causally isolating entrenched views from testing, on the one hand, or sapping the power of minority speech to test, on the other.

Of course, any such objection to ridicule and satire of minority speech will be *pro tanto* at best. Many other considerations may rule it out, such as the difficulty of defining which groups' speech cannot be ridiculed; and legislative solutions may be inefficacious compared with the inculcation of social norms of respect. And it seems absurd to require each and every token of speech to be considered, even if each type of speech (each idea) should be considered by enough people. So heavy-handed legislative requirements, or even assumptions about strong duties of consideration, don't seem to be indicated. We address this issue in the section after next.

One objection to our view deserves to be considered here. There are parallels between the marketplace of ideas and the marketplace of goods. It would be alarming for us if an argument structurally parallel to ours in the domain of the marketplace of goods had a conclusion that was manifestly absurd. Robert Goodin has suggested that such a parallel argument has as its conclusion that there is some kind of duty to consume in the marketplace of goods and services. Despite the occasional blandishments of governments that try to make us accept that there is such a duty, we agree with Goodin that there is no such duty,

Of course, the promotion of listening and consideration raises the question of what the implications of the social promotion of consideration entails. If it is a proper object of public policy to promote consideration, then some may think that this must mean that there is a *pro tanto* and imperfect duty (even if not a legally binding one) to give consideration to ideas. For it would never be right, the thought runs, for the state to promote a behaviour that wasn't in some sense a duty. Goodin's suggestion is that when we consider the marketplace of goods, similar considerations will yield the imperfect duty to consume. Thus we should be suspicious of the imperfect duty to consider.

But this is a mistake. In the market for goods one in the end buys. And indeed there is no even imperfect duty to buy. Likewise, in the marketplace of ideas, in the end one accepts some ideas; but equally, there is no even imperfect duty to accept ideas. The imperfect duty is to *consider*; and that may apply in each case. In a market economy, perhaps consumers have at least some imperfect duty to consider the merits of competing products for which they have a need, in as much as an educated and discriminating public produces better producers overall. Furthermore, the imperfect duty to consider may even be thought to be a moral duty, in as much as it is has the potential for free-riding. When an individual considers carefully the options and influences the market by their choice, this is part of the process that results in the options being improved overall. It is possible for individuals to free-ride on this process simply by selecting popular products; but, of course, the more this is done, the less popularity is a guide to quality.

Even if you reject the consequentialist argument, in favour of a rights-based approach, the imperfect duty to consider could well be mirrored by a kind of 'imperfect right' to consideration.¹³ This will leave the consideration axis – a novel feature of our view – undisturbed. Our social condition idea can also be preserved on a rights-based account: for the imperfect right to consideration may reflect a perfect right to live in a social condition in which consideration is generally at an acceptable level.

The Justification of Free Speech

The classic liberal justification for the right to free speech is to be found in chapter II of John Stuart Mill's *On Liberty*. Mill's central idea is that truth is most likely to emerge from a situation in which all ideas are freely expressed, considered and debated by rational individuals. Via a process of free distribution and unfettered discussion, rational agents will choose to agree with the true ideas in the marketplace, while belief in the false ones will die out. It is only through the free expression of all opinions, however apparently extravagant or unpopular, and the "collision of adverse opinions", that the "truth has any chance of being supplied".¹⁴

The free marketplace of ideas defense of free speech is not the only justification liberals have offered for free speech. There is also the argument from autonomy, the argument from democracy, the argument from toleration and the argument from equal concern and respect, amongst others.¹⁵ We plan to concentrate on the marketplace of ideas justification here, in part because of its centrality in the debate, but also because we think at least some of the other justifications are connected to it in interesting ways. The argument from democracy, for example, if spelt out carefully, seems to rely on something like the marketplace conception. For why is freedom of speech relevant to democracy? The most salient concerns would seem to be in terms of its contribution to community debate and the making of informed decisions (perhaps in an oligarchy, free speech needs to be restricted to the rulers—Plato could be understood as endorsing free speech only in a limited domain). Thus the argument from democracy is also an argument that relies on truth, or its nearest epistemically available cousin, informed opinion. The difference is only in that it provides a further justification of the importance of truth in terms of its being required for a successful democracy. Perhaps, if fully spelt out, the argument from the marketplace of ideas tells you that you need free speech in the decision-making or influencing classes; and further considerations, such as democratic ones, tell you how large that domain is.¹⁶ We think that similar considerations may apply to many of the other sorts of justifications for free speech: they tend to be connected to the Millian justification, or at least deliver similar verdicts about free speech. They appeal to considerations that form a part of the overall free marketplace of ideas justification (indeed Scanlon even calls his principle of autonomy, the ‘Millian Principle’, to acknowledge its role in the classic Millian defense).¹⁷

Some may think that there is a purely deontological argument for democracy which entails a deontological side-constraint in favour of free speech. But it is hard to see how this entailment works. There are social conditions which seem to count perfectly well as democratic in which free speech is regarded as antipathetic to smooth collective decision-making: the views of small minorities can be expressed in a vote, but immoral or seditious talk is taken to undermine democracy. Of course, considerations of truth being conducive to best decisions count against this. But if we deny ourselves this, and deny ourselves consequentialist considerations, then it seems the best we can do is to appeal to a separate deontological intuition in favour of free speech. But then there is no argument from democracy for free speech; rather there are separate deontological considerations in favour of both democracy and free speech.

However, even if some of the justifications were independent, we would not be alone in believing that the Millian justification has a fair claim to constitute the orthodox liberal defense of free speech. Schauer, for example, writes that although throughout the ages many diverse arguments have been employed to attempt to justify a principle of free speech, the “most prominent and most persevering” of these has been Mill’s argument

“that free speech is particularly valuable because it leads to the discovery of truth”; and truth is most likely to emerge from a marketplace of ideas where every idea has a chance of being heard and scrutinized. This has been “throughout modern history the ruling theory in respect of the philosophical underpinnings of the principle of free speech.”¹⁸ Ronald Dworkin agrees. The marketplace of ideas defense of free speech is the “orthodox” liberal defense of free speech (though not the one Dworkin himself favours).¹⁹ Alan Haworth, in his important book on free speech, reaffirms the prominence of the Millian marketplace of ideas defense of free speech.²⁰ There is only one place to begin a book on free speech, he says, and that is with Mill’s free marketplace of ideas which “has played such a dominant role in the area for so long now that it easily merits the title, ‘the classic case for free speech.’”²¹

Of course, the claim that the marketplace idea is close to orthodoxy is no reason to be sure that it is the best (though by the marketplace idea, if the marketplace justification best survives the market, that is some reason for confidence!). However, as we have earlier mentioned, our principle concern here is not to defend the marketplace justification of free speech. Rather, we aim to argue for the idea that free speech is that which is justified by the best justification, and to reveal the surprising nature of the social conditions that are justified by a more sophisticated successor to the marketplace idea. Whether the marketplace defence is right of course depends on issues of high theory as to whether any consequentialist view is correct; and furthermore, within consequentialism, it still depends on empirical and sociological matters that require investigation.

Types and Tokens of Speech: Freedom as a social condition

By our lights, homeopathy is close to madness. Pure water, just because it was once in contact with pure water that was in turn in contact with some substance that may or may not have medicinal benefit, cannot cure afflictions—except perhaps dehydration. Is there any benefit in our reconsidering this carefully just because someone from the homeopathy lobby has knocked on my door, complaining of the evils of inoculation and claiming that exciting new evidence for the efficacy of homeopathy exists? Do we have any sort of duty?

Or consider a point from the second axis: there are many community languages in Australia. One of the authors speaks a little Italian, but no Greek. There are opinions in the Greek language press that he is unable to understand, and whose authors cannot reasonably hope to communicate to him. The Australian government has intervened in the community language programs, so now fewer Anglo-Celtic Australians have a chance to learn any Greek. Does this mean that this particular intervention is *necessarily* a violation of the condition of free speech?

We think not. To explain this we avail ourselves of a distinction between *types* of ideas and *tokens* of ideas. We are not concerned here with the type ‘free speech’, as against token conceptions of free speech. Rather, the idea is that a certain type of idea—say, for example, the idea that the world is roughly pear-shaped—should be protected. Generally, it should not be possible to prevent a *type* of idea from acquiring currency. But this need not involve protecting every single *token* utterance, as when a pear-worlder monotonously chants ‘the world is pear-shaped’ relentlessly. So the marketplace of ideas does not require that every token of an idea be distributed, understood, or considered. It requires only that enough types of ideas be distributed widely enough, understood well enough, and considered closely enough, to make it most likely that truth will out and be acted on. Indeed, on the contrary, if the most numerous ideas were considered closely every time they were uttered, then valuable processing time would be wasted which could be used on those that are less often presented.

Some people outside the Greek community need to speak Greek, perhaps, but not all. How many? It is a delicate trade-off between the importance of a conduit of ideas from that community into the broader one, and the issue of resources and opportunity costs. Wholesale breakdown of programs to facilitate inter-community understanding might indeed be violations of the condition of free speech. But there is something peculiar about focusing on a *particular* intervention and asking if it be such a violation.

What then is the condition of free speech?: Is it a condition in which persons have rights to distribute symbols whose comprehension and consideration is not interfered with? Certainly, not exceptionless rights. Rather, we hold it to be a social condition. It is the social condition in which *types* of ideas have enough of the distribution, comprehension and consideration conditions that we discuss above. Exactly how to achieve this is a delicate empirical and theoretical issue; we’ll say something about this in the next section. But it does suggest that the domain of free speech as understood by us—the natural kind closest to the folk conception—is not a matter of individual rights, though of course legislating rights may play an important instrumental role in realizing that condition. Minimizing the amount of censorship consistent with considerations of harm and so forth, may be part of it. Legislative rights of assembly may be important. Perhaps positive rights of access contribute to the goal. Education of enough people in community languages or the teaching of a *lingua franca* and laws preventing manipulative misrepresentation that affects issues of comprehension and consideration, all contribute to the goal. But what exactly contributes to the social condition of free speech—the condition in which ideas flow freely and genuinely compete—is an empirical question, and one which may depend on the initial condition of the society. A legislative right that will help in one society may be harmful in another. Prohibitions on certain kinds of material may be harmful to the flow of ideas in some places, and beneficial in others.

But we should not give the impression that the condition is best promoted *only* by concern with types of ideas and not ever with token expressions. If every political idea were preserved in the musty basement of the Bodleian Library, and as soon as the age of reason is achieved, each child is given a catalogue which tells them where to find the ideas, this would hardly make for an efficient marketplace of ideas, even though access to each type of idea is possible. For the marketplace works in part by the multiplication of tokens: suppose someone reads the tracts of the Lollards and is converted to the tenets of Lollardism. For the marketplace of ideas to work successfully, they need to be able to attempt to communicate this enthusiasm to others, who understand what they say and give some consideration to it. If it takes on, others may make the march to the Bodley, and eventually reprints will appear and so forth. Simply protecting the idea-type does not allow for this replication and spread, which is how new or unfashionable ideas can gain currency.

But, once again, for this process to be possible we don't need to protect every token Lollardish utterance. Many will be annoying—such as during a wedding—and quite rightly hushed. But there may be a principle which underlies what should go on: token utterances are not protected, but *prima facie* interference in distribution, or withdrawal of the means of comprehension, or failing to pay attention to them, should not take place if it lowers the overall flow of information. Efficiency may moderate this, as we will discuss below: some sort of division of labour with respect to consideration may make sense, where people specialize in paying attention to utterances in their field of expertise and conveying their judgments to the community—in which case they may fail to pay attention to something outside their area of expertise, providing that someone else whom they regard as having expertise and similar outlooks is doing so. Thus, taking into account the content of some speech may in fact justify its being ignored, for without this knowledge a listener may not know that the material is being attended to elsewhere.²²

Individuating types and tokens of utterance

There may appear to be some difficulties in deciding in what type to place a token utterance. Individual utterances can be members of many types; for example the expression 'Black Americans are the spawn of Satan' is a member of the type <anti-African-American utterance>, and of the type <anti-Satanic utterance> (insofar as it reinforces the idea that Satanism is pernicious). In some sense, it may even seem to be a member of the type <anti-American utterance> since all the people it denigrates are Americans.

Plainly, it would be a mistake to insist that each token is a member of only one type. Some utterances are indeed members of multiple types. When considering whether the default assumption of protection is appropriate, then, we need to consider each of the types the token falls under, and whether they are each sufficiently over-represented so

that none of the types needs to be preserved. Only in such cases would other consequential considerations easily justify not protecting the token utterance. If a token is a member of two types, one of which is endangered and the other over-represented as well as harmful, then consideration would have to be given to whether the endangered thought can be expressed independently.

Of course, many cases that appear to be instances of a token's being a member of multiple types are merely apparent. The fact that all the utterances of the type <anti-African American utterances> denigrate Americans, does not really make it a member of the latter type, since the implicit generalizations being made are very different. There is no *logical* inconsistency in believing that Americans are God's chosen people, but that some sub classes of them are prime candidates for the pillar of salt treatment. Thus an anti-African-American utterance need not be seen as anti-American. So the types should be individuated by the semantic content of the implicit generalizations.²³

Pragmatics will play a strong role here. If someone is accused of being a 'Queensland Moron', the literal semantics are specific: that this person, from Queensland, is of low intelligence. But, in many (though not all) contexts, it may be taken to implicitly endorse a generalization that Queenslanders are more than usually likely to be stupid. So pragmatic considerations will determine what generalizations are implied by an utterance, and thus what types to count the utterance under.

There is another way in which context will play a crucial role. We have talked about an utterance-type being over or under-represented. Representation, though, is something that depends on the community we are counting the expression as being uttered in, and this is also sensitive to context of utterance. There are many utterances, which are over-represented globally, but are under-represented in some local community. And similarly, there can be utterances that are rare globally, but extremely common in some local community. Communities are not cut off from each other, but either overlap or are contained in each other. Thus individual speakers will move from community to community, and which community should be used to evaluate the rareness of their utterance will depend on the context of utterance. Thus the oft observed (and puzzling to many) phenomenon that it seems fine for Blacks to use the word 'nigger' amongst themselves, or Jews to tell each other Jewish jokes, and yet there is some question as to whether such speech deserves protection in other contexts. If this is right, it will be because of the differing degrees of representation of the generalizations expressed by such speech in the relevant communities.

Justification and the natural kind.

So what then is freedom of speech on our view? It is the social condition justified by the justification, and is the important regulatory kind which underlies the many and heterogeneous folk conceptions of free speech. Freedom of speech is the overall social condition—the efficiency in the marketplace of ideas—that justifies individual actions and policies.

Where does this leave the connection between free speech and the idea of an act of free speech? There are two ways of understanding this on our view. The more radical reading denies that there are any individual acts of free speech as such. Free speech is a *condition*, and no particular act is an act of free speech. There is no individual right to free speech, except inasmuch as legislating such rights turns out to promote the condition. But these rights, if any, are contingent promoters of free speech, rather than constituting it. This understanding makes sense of the apparent ad-hocery of the exceptions to the right to free speech that the standard view seems to embrace. On the standard view, rules that prevent shouting ‘fire’ in a non-combusting theatre are allowed, but in an apparently ad-hoc way. Similarly, on the standard liberal conception, it’s permissible to put down hecklers. Our view makes sense of why there are *free speech* considerations in favour of the exceptions; for such exceptions to the instrumental legislative rights should be allowed on free speech grounds where, and only where, allowing heckling or shouting promotes the condition of free speech.

But why deny that there are acts of free speech? After all, if it’s a central commonplace that freedom of speech is a matter of social context (that freedom of speech has not just to do with what you *do* say, but what you *could* say), it might also seem to be a central commonplace about free speech that freedom of speech is a sort of *speech*. So why not combine the intuitions to say that freedom of speech is an act of speech that promotes the social condition?

This view is clearly mistaken. A speech act only becomes an act of free speech when it promotes the overall condition. Plenty of acts of speech that we might think of as intuitively free, but which have no effect on the promotion or preservation of the overall condition, would fail to count as acts of free speech (and strange acts, such as discovering a gold seam which is later used to fund community language programs, might count).

Alternatively, we might resurrect acts of free speech by thinking of them as speech acts performed under the regime of the general condition of free speech. On this view, their being acts of free speech is a highly extrinsic matter, depending on their taking place in a particular social context. When Pauline Hanson utters ‘down with the commies’ in Australia, she has spoken freely; but the same utterance produced in Nazi Germany, where the expression of any other political sentiment would land you in prison or dead, is not an act of free speech.

But what unites various acts that are performed under the regime of the social condition of free speech is only that they are performed in that underlying condition—an efficient marketplace of ideas. Since this is the condition that underlies and unites these diverse acts, we'd do better to identify free speech with it, rather than with the diverse collection of acts that might be directly or indirectly justified in terms of it. Of course, terminologically, there is nothing wrong with *calling* speech acts performed in the social condition 'acts of free speech', just so long as we recognize that they get this status derivatively.

The social condition view of free speech has an important upshot. Once we see that what is important for free speech is the condition in which ideas flow freely and genuinely compete, we can see that there are a range of acts and policies that really can be justified on free speech grounds: not only those policies that are typically targeted so as to make their beneficial effect on the marketplace of ideas the primary goal (such as legislation about censorship, rights of assembly, the issuing of television licenses and so on), but a range of other policies which are ordinarily not targeted or justified on these grounds. Rarely, for example, do we think "Goody: economic growth. That'll improve the marketplace of ideas!", even if it does. But, under some circumstances, such justifications may well be very important: economic factors really *can* be justified by free speech. Perhaps an overwhelming reason for supporting the restructuring of the Russian economy is not just that there will be more food, but rather that until levels of affluence and communication are realized, it will be impossible to have the kind of marketplace of ideas that best supports a stable democratic system, that in turn guarantees other freedoms and conditions of flourishing.

This would lead to another benefit of the theory. It gives a good analysis of acts of free speech, in the traditions that admit of such, which seem to be disturbing: hate speech, some kinds of pornography, or even the multitude of ordinary acts of speech which are legislatively protected in some jurisdictions but which have no bearing on the marketplace of ideas. Are these acts of free speech? On the classical conception, it is a worrying question. If they are not, then they do not deserve protection. If they are, it is hard to see why. On our view they are not acts of free speech: because nothing is. However, there is a perfectly good question: is permitting or facilitating such things beneficial in promoting the condition of free speech? It may well be, even if only because of the difficulty of discriminating between kinds of speech acts. The right question is not 'does this token act contribute to the social condition?', but rather 'does permitting or facilitating acts of this kind contribute to the social condition?'. This question may of course be very difficult to answer: but it is a difficult empirical, and in some respects theoretical, question which needs to be settled. At least we have a consequentialist analysis, not in overall terms of maximizing utility, but in terms of maximizing the condition of free speech. It is a further and separate question whether

the condition of free speech must always be maximized, or whether other social goals can override it.

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¹ This, roughly, is the construal that Thomas Scanlon gives in "A Theory of Freedom of Expression", *Philosophy & Public Affairs* 1:2 (1972): 206-226, p. 206.

² See, for example, Joshua Cohen "Freedom of Expression", *Philosophy & Public Affairs* 22:3 (1993): 207- 263; Susan M. Easton, *The Problem of Pornography: Regulation and the right to free speech* (London: Routledge, 1994); Ronald Dworkin, "Two Concepts of Liberty" in Edna and Avishai Margalit (eds.) *Isaiah Berlin: A Celebration* (London: Hogarth Press, 1991): 100-109; and Frederick Schauer, *Free Speech: a philosophical enquiry* (Cambridge: Cambridge University Press, 1982).

³ For an influential example of this approach, see Schauer.

⁴ Stanley Fish, for example, is a kind of error theorist about free speech (See Stanley Fish, *There's No Such Thing as Free Speech...and it's a good thing too* [Oxford: Oxford University Press, 1994]). This is because he notes that, on traditional understandings of free speech, decisions about the domain of free speech are *ad hoc* decisions with nothing in common except considerations of general utility. This is not so on our approach. On our view, there is a principled commonality in the kinds of reasons given for marking out the borders of free speech. But we take it that the error theory is still epistemically possible: should we be wrong that there are specific reasons, there would be no free speech.

⁵ This is not the only domain in which the nature of some phenomenon has been philosophically analysed in terms of its normative purposes. Some authors characterize free will in terms of that state which best justifies practices of assigning moral responsibility. Some authors analyse personal identity in terms of the relation that best justifies and explains person-directed practices (see, for example, Braddon-Mitchell, D. and C. West (2001). "Temporal Phase Pluralism" *Philosophy and Phenomenological Research* 62(1): 1-25). Anyone who finds the approach attractive in these areas might be tempted to take seriously the same approach in the case of free speech.

⁶ John Stuart Mill, *On Liberty* [1859] reprinted in *Three Essays* (Oxford: Oxford University Press, 1975): 5-141, esp. Chapter II. Some of the central themes are foreshadowed in John Milton, *Areopagitica* [1644] reprinted in Patrides, C.A. (ed.), *John Milton: Selected Prose* (London: Penguin, 1974).

⁷ This is widely understood to be the case with 'species' in the philosophy of biology: there is more than one principled kind in the vicinity, and 'species' is an

ambiguous term (see Kim Sterelny and P. Griffiths, *Sex and Death* [Chicago: University of Chicago Press, 1999], ch. 9).

⁸ We are not alone in suggesting that free speech involves a dimension of understanding or hearer 'uptake'. See Jennifer Hornsby and Rae Langton, "Free Speech and Illocution", *Legal Theory* 4 (1998): 21-37.

⁹Note that freedom to speak is not the same thing as free speech on our view. For it is conceptually possible that free speech requires that some (but certainly not most) instances of genuine speech be blocked.

¹⁰ Alvin Goldman and James Cox argue that in fact a pure unregulated market for ideas will not promote truth (Alvin I. Goldman and James C. Cox, "Speech, Truth, and the Free Marketplace for ideas", *Legal Theory* 2 [1996]: 1-32). For us, the condition of free speech involves the regulations and interventions that best promote truth.

¹¹ Mill, p.65.

¹² Mill agrees: "[T]ruth has no chance but in proportion as every side of it, every opinion which embodies any fraction of the truth, not only finds advocates, but is so advocated as to be listened to." Mill, p. 65.

¹³ We understand imperfect rights to be rights to an overall condition: the imperfect right to civility, for example, is the right to be able to expect reasonable levels of civility from others enough of the time. This does not mean that there is even a *pro tanto* right to civility on any particular occasion. This controversial conception is defended in our 'Imperfect Rights', MS 2003.

¹⁴ Mill, p. 65.

¹⁵ See Scanlon for a well-known statement of the autonomy defense. The argument from democracy is advanced by Alexander Meiklejohn, amongst others. See Alexander Meiklejohn, *Free Speech and its relation to self-government in Political Freedom: the constitutional powers of the people* (New York: Oxford University Press, 1965). A classic sketch of the argument from toleration can be found in John Locke, *A letter concerning toleration*, J.W. Gough (ed.) (Oxford: Basil Blackwell, 1948). A brief statement of the argument from equal concern and respect can be found in Ronald Dworkin, "Women and Pornography", *The New York Review of Books* Vol. XL, no. 17 (1993): 36-42, esp. p. 41. A secondary discussion of the argument from democracy, amongst others, can be found in Schauer, pp.35-45. Of course, it is also possible to hold that free speech is an ultimate good or end in itself, requiring or admitting no further justification. However, the arguments in this paper concerning the extremely vague boundaries of free speech, which require the use of the justifications to resolve, provide reason for not holding this view: which in any case, for independent reasons, few liberals hold.

¹⁶ Of course the decision-influencing classes are larger than the decision-making classes. So under oligarchy or even dictatorship, to the extent that the population affects decisions, there might be an argument for a condition of free speech amongst them.

¹⁷ See Scanlon.

¹⁸ Schauer, pp.15-16.

¹⁹ See Dworkin.

²⁰ Alan Haworth, *Free Speech* (London: Routledge, 1998). Haworth suspects that the different justifications for free speech will identify different sets of communicative acts as special or protected (Haworth, p. 9). We think that these differences are reflected in the three axes discussed earlier.

²¹ Haworth, p.1.

²² This contrasts with a frequently expressed view in liberal circles (including by Mill himself) that it is wrong to either positively or negatively discriminate amongst speech on the grounds of content alone. On our view such a principle may apply to *types* of speech, but not to tokens. This seems a good result. For there always seemed to be intuitions both ways on this principle, and the distinction between types and tokens captures this well. Any principle that requires the facilitation of communication faces an issue of the distribution of limited resources. Thus decisions need to be made about how much to help with language programs, or how much attention to pay to various views. If Mormon theology has been much considered adequately at some time, then this may give reason enough to shut the door.

²³ We acknowledge that there will be difficulty in precisely individuating idea types in such a way as to match the intuition that what needs to be preserved is diversity of ideas (for some ideas may be similar to others). We expect that this task will have structural similarities with issues raised in the philosophy of biodiversity. See, for example, Vane-Wright, R. I., Humphries, C. J. & Williams, P. H., "What to protect? - Systematics and the agony of choice", *Biological Conservation*, 55, 1991: 235-254; Williams, P. H., Gaston, K. J. & Humphries, C. J., "Do conservationists and molecular biologists value differences between organisms in the same way?" *Biodiversity Letters*, 2, 1994: 67-78; Humphries, C. J., Williams, P. H. & Vane-Wright, R. I., "Measuring biodiversity value for conservation". *Annual Reviews of Ecology and Systematics*, 26, 1995: 93-111; Williams, P. H., "Measuring biodiversity value", *World Conservation [formerly IUCN Bulletin]*, 1, 1996: 12-14.