

Session 21 Scanlon's "A Theory of Freedom of Expression"

Mill's defense of freedom of expression

Why we must protect free speech:

- Otherwise, we might suppress the truth.
- We might suppress a part of the truth, which we'll get at only through free discussion.
- We might come to hold true beliefs only through dogmatism and prejudice, and lack the deliberative resources to fully understand and defend our beliefs.
- This might make those beliefs degenerate to a "mere formal profession, inefficacious for good."

Mill makes an exception for speech that "constitute[s]... a positive instigation to some mischievous act." (Corn dealer example...)

But on Mill's view, speech cannot be restricted simply to prevent harm. Harm justifies restricting speech only if it consists in a direct and clear violation of rights.

Mill's argument has two *limitations* as a defense of free speech:

(1) It depends largely on *empirical premises* about what limitations on government power will tend to promote the spread of useful knowledge.

- Is it always true that suppressing speech will be more likely to obscure the truth than to promote it? (What about harmful speech we *know* to be untrue (e.g., birtherism...))
- Is spreading the truth even always valuable (from the standpoint of promoting welfare)? (E.g., defamation cases, secrets necessary for national security...)

(2) It doesn't clearly establish any *absolute* protections of free speech.

- Because it rests its defense of free speech on claims about the value of promoting true beliefs, and that value can sometimes come in conflict with other values (like security), it might in any particular case be outweighed.

Scanlon's theory of freedom of expression is partly designed to overcome these limitations (though some people might see them as attractive features of Mill's view).

The question: Why is speech given a privileged status – immune from restriction even when it causes harms that would ordinarily justify legal sanctions?

What does freedom of expression protect?

- Clearly not *all* speech is protected:
 - Talking loudly in a library; shouting to start an avalanche; false advertising; marketing cigarettes to children; negotiating with workers other than union officials in a union shop; practicing law or medicine without a license; libel; blackmail; revealing state secrets; inciting a riot;

copyright infringement; threatening a bank-teller with death if he doesn't hand over the money; yelling "fire!" in a crowded theater; perjury...

- And some things protected by the First Amendment aren't "speech" in the ordinary sense:
 - Print; film; flag-burning; gestures; marching...
- Also, speaking is one way of *acting*; the state has a legitimate interest in preventing harmful actions. So why make a special exception of harmful actions that happen to involve our vocal chords? (This is the irrationality that Scanlon cites Oliver Wendell Holmes as exposing.)

Scanlon's theory of freedom of expression

Aims

- To clarify what kinds of acts are protected (not all speech or only speech seems to be protected, public speech seems more protected than speech not aimed at a wider audience...)
- To explain *why* they are protected (consequentialist: optimizing trade-offs between valuable goods, rights-based: there are certain things the government can't do to us even to secure the greater good, or some other approach?)
- To reveal the nature of the right to free speech (is it a "natural" moral right, or the "artificial" creation of particular political institutions? Or some combination of the two? (E.g., does the right to free speech derive from the justice of the constitution that secures it, or *vice versa*? Is the right independent of the features of the particular political institutions we adopt?)

Acts of expression: any act intended to convey a proposition or attitude.

- This includes lots of extremely harmful acts – e.g. terrorist bombings – that clearly are not protected by the right to free speech.
- Scanlon: there's no convincing, non-arbitrary way to narrow the definition of "speech" to include only those acts that may not be restricted.

Other ways of answering the question *when and why is harmful speech protected*:

- The cost of restricting the harmful behavior outweighs the benefits (consequentialist approach)
- Enforcing the restriction directly violates a right to the restricted behavior, or indirectly violates the right to something to which the restricted behavior is an important means (rights-based approach)
- The restriction would (unjustly?) prevent a harm by constraining the behavior of those not responsible for that harm

Two distinctive features of Scanlon's account of free speech:

- (1) Scanlon argues that the key distinction isn't between *speech* or *expression* (which is protected) and *other forms of action* (which aren't), but rather 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 actions by others in other ways, e.g., by providing them with the means to do what they wanted to do anyway.” (p. 212)

- Can this distinction be maintained? What exactly does it come to?
 - Consider the bank-robbery case: does the distinction mark a clear difference between advising the robber to rob Bank X, by pointing out reasons why it should be robbed, and providing the robber with means of robbing bank X? (E.g., in which category does telling her about X’s lax security practices fall?)
 - Also, can a threat (e.g. blackmail) always be cleanly distinguished from the provision of information? (“If you don’t give me money, I’ll publish the photos I have in my possession!”)
 - *Maybe the difference is between pointing out your (subjective) reasons and affecting them?*
- Scanlon argues that the distinction receives intuitive support from our ideas about *legal responsibility*.
 - Is this true? Do we think the advisor in the bank robbery case is less responsible for the robbery than, e.g., the getaway car driver?
- Scanlon’s distinction suggests I can properly be punished for engaging in forms of expression that *affect your reasons* (e.g., ordering you, threatening you, providing you with an incentive or reward, providing you with new means), but not for engaging in forms of expression that *illuminate your reasons* (e.g., by persuading you, enlightening you, etc...)

(2) Scanlon argues that the basic principle of freedom of expression is concerned *not* with the question of what acts are or aren’t protected, but instead with the question of what kinds of *justifications* for restricting speech are or aren’t legitimate.

- Scanlon’s *Millian Principle*:

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. (p. 213)

- Scanlon’s defense of the principle:
 - A legitimate government is one whose authority citizens can recognize while still regarding themselves as equal, autonomous, rational agents (Wolff).
 - An autonomous, rational agent must see herself as sovereign in deciding what to believe and in weighing competing reasons for action. She must be in a position to defend her beliefs as reasonable (cf. Mill). (p. 216)

- Scanlon notes that this is a weak condition of autonomy – autonomy of this kind is compatible with being coerced.
- If the state is to be acceptable to autonomous subjects, it cannot impose restrictions on free expression just to protect its subjects from forming false beliefs (since that will amount to the subjects’ not being able to rely on their own reasoning in forming their beliefs – to the subjects’ having conceded to the state the right to deprive him of grounds for making an independent judgment).
 - Exception? Consensual protection from false information. But must be truly consensual and reviewable? (p. 219) (Compare Mill on voluntary slavery...)
 - What about children? Consider restrictions on what may be taught in public schools...
- The state also cannot outlaw the mere advocacy of otherwise illegal activity (b), because autonomous citizens could not concede that right to the state, 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.
- “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.” (p. 221)
 - That is, Scanlon is not claiming that we have an inviolable right to be autonomous, and to the information we need for autonomy, but rather that no legitimate state can interfere with our autonomy – can take measures that are incompatible with it.
 - If taking such measures makes a state illegitimate, but not because we have a right to autonomy, *why* does taking such measures make the state illegitimate?
- Scanlon’s account has two striking features:
 - It appeals to the importance of our being free to *hear* what’s said, rather than the importance of our being free to *express ourselves* (the importance of the latter is derivative).
 - It doesn’t protect any particular acts or kinds of expression – it only prohibits the state from appealing to certain considerations in defense of interfering with expression. (So the very same act may be protected from one kind of government interference but not another.)
- Scanlon intends his account of the right to free expression to be compatible with the following exceptions:
 - (1) expression which produces direct physical injury or damage (e.g. shouting to cause an avalanche);
 - (2) expression which produces harmful or unpleasant states of mind (e.g. threats);
 - Why isn’t this protected by clause (a) of the MP?
 - (3) expression which causes others to form an adverse opinion, or defamation, or interference with right to fair trial;

(4) expression which causes panic (e.g. shouting fire in a crowded theater);
- Why isn't this protected by clause (b)?

(5) conspiracy to commit a crime (e.g. through issuing an order, a threat, or passing along a signal);

(6) expression which provides means rather than reasons (the nerve gas example).

- Why isn't this protected by clause (b)?

Can Scanlon's account explain or allow for all of these "exceptions"?

- Scanlon allows that while the Millian Principle identifies grounds that can never be used to justify restrictions on free expression, the government may, acting within the limits of that principle, restrict expression on a number of grounds:
 - By balancing the value of certain kinds of expressive goods against other social goods
 - By insuring the equitable distribution of access to means of expression through the society
 - By ensuring the compatibility of freedom of expression with the recognition of other special rights, particularly political rights.

Questions

- How is Scanlon's Millian Principle Millian? How is it not Millian?
 - Like Mill, Scanlon sees great *value* in a citizenry that not only has true beliefs (in some weak sense) but has arrived at them through reasoning and so can defend them. On Scanlon's view, only such a citizenry is compatible with the existence of a just state.
 - Not based on an empirical claim? Based on a conceptual claim about what kind of state power is compatible with the autonomy of its citizens.
 - Is this clearly a conceptual claim?
 - Unlike utilitarian arguments, the restriction of speech (on certain grounds) is directly bad, rather than (usually) having bad consequences.
 - Not based on the *value* of autonomy, which might compete with other values. Rather based on a claim about what's required for legitimate government. (But that claim is not itself defended.)
 - But Scanlon allows, in the end, that there might be circumstances in which the value of having a just state is outweighable...
- I always have to reach decisions with less than full information. But this doesn't seem to prevent me from acting autonomously. Why think that *any* power of the government to restrict harmful speech on the grounds Scanlon's theory prohibits will make that government incompatible with the autonomy of its subjects?
 - Remember, it's not the effects of government intervention that threaten my autonomy, on Scanlon's view, but certain principles of justification for intervention...

- Can Scanlon's Millian Principle explain what's wrong with *false advertisement*? What about some kinds of aiding and abetting (e.g. why isn't giving someone the combination of the bank's safe protected by (b)?)?
- How narrow is the right to free speech Scanlon's account defends? How vulnerable does it leave us to government interference?
- Can Scanlon's autonomy-, as opposed to value-based argument explain why restrictions on some kinds of expression (political expression, religious expression) seem more important to protect than others?
- Both Scanlon's and Mill's accounts of freedom of expression emphasize the free dissemination of *information* or *ideas*. But some cases of expression that have drawn the attention of the courts seem not to be about the dissemination of information...
 - E.g., freedom of expression as protecting forms of *entertainment* as opposed to the communication of ideas (pornography, video games...)
 - What would Scanlon's/Mill's account say about protecting those? Would Scanlon simply deny that they fall under any absolute restriction on the rights of the gov't to interfere?

Cases

New York Times v. Sullivan (1964)

- This case concerned a libel action against the *Times* for publishing an ad with erroneous content. By declaring such speech protected even if false, the Court took an important step away from an earlier pattern of deciding First Amendment cases by balancing harms and benefits. In this case, the Court ruled that balancing the value of truth, social utility, or further harmful effects against that of protecting free speech was not right way to protect free speech.

Smith v. Collin (1978)

- In this case, the Court ruled that the right of Neo-Nazis to march through a neighborhood of Holocaust victims was protected under the First Amendment, despite the considerable mental and emotional distress the march would inflict.
 - Can Scanlon's account explain this ruling?

More recently...

United States v. Stephens (2010)

- The Court rejected a law banning the production and sale of videos depicting cruelty to animals.
 - Why should the *depiction* of illegal acts itself be made illegal?
 - The gov't argued that the depictions of cruelty to animals were of such minimal social worth that they deserved no protection from the first amendment, and that banning the production and sale of "crush videos" was the only effective means of preventing the illegal activities they depict (while

at the same time preventing the further harmful consequences of marketing such videos).

- Roberts, for the majority, rejected any case-by-case “balancing of relative social costs and benefits” when it comes to speech. “The First Amendment,” he declares, “reflects a judgment by the American people that the benefits of its restrictions . . . outweigh the costs,” a judgment that he insists can not be revised “simply on the basis that some speech is not worth it.”
- Comparison to child pornography: the depiction is intrinsically related to the underlying abused.
- Would Scanlon have any problem with such restrictions?

Citizens United v. Federal Election Commission (2010)

- Court ruled that the government may not limit or ban political spending by corporations in candidate elections (striking down the McCain-Feingold Act).
 - Should the speech of corporations be protected along the same lines as the speech of individuals?
 - Scalia: First Amendment written in “terms of speech, not of speakers.”
 - Lawrence Tribe: “Talking about a business corporation as merely another way that individuals might choose to organize their association with one another to pursue their common expressive aims is worse than unrealistic; it obscures the very real injustice and distortion entailed in the phenomenon of some people using other people’s money to support candidates they have made no decision to support, or to oppose candidates they have made no decision to oppose.”¹
 - Kennedy wrote: “If the First Amendment has any force, it prohibits Congress from fining or jailing citizens, or associations of citizens, for simply engaging in political speech.” He also noted that since there was no way to distinguish between media and other corporations, these restrictions would allow Congress to suppress political speech in newspapers, books, TV and blogs.
 - President Obama called it “a major victory for big oil, Wall Street banks, health insurance companies and the other powerful interests that marshal their power every day in Washington to drown out the voices of everyday Americans.” Are there free-speech arguments to be made *in favor* of the ban on corporate spending?
 - What if the speech protection is really “devastating to the public interest”, as Obama also maintains?
 - From the *Times* editorial: “The Supreme Court has handed lobbyists a new weapon. A lobbyist can now tell any elected official: if you vote wrong, my company, labor union or interest group will spend unlimited sums explicitly advertising against your re-election.”
 - What would Scanlon say? (Consider Scanlon’s last two considerations...)

¹ Tribe, Laurence (2010-01-24). ["What Should Congress Do About Citizens United? An analysis of the ruling and a possible legislative response". SCOTUSblog.](#)

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