

Two Rights of Free Speech

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You would think that today, when anyone with a computer or a mobile phone can reach millions of readers and viewers all around the globe, trying to repress freedom of expression would be a quixotic endeavor. Alas, this is not the case. In some parts of the world, people languish in jail for saying things the government does not want others to hear. Political oppression still finds its ways of subjugation, almost unhindered by technological opportunities of free speech. But, even in the free world, these newly acquired opportunities of massive free speech are not unreservedly celebrated. The more free that speech has actually become in the last few decades, the more that people have come to see the various forms of harm it can bring about – harms sometimes borne by the most vulnerable segments of our society.¹ My main aim in this essay, however, is not to reevaluate the balance between the values of free speech and its potential harms, at least not directly. I want to reexamine the moral foundations of the right to freedom of expression, suggesting that there are two separate rights here, not one.

The justification of a moral right should start with an articulation of the main interests that the right in question is there to protect.² Philosophers are divided, however, over the question of what are the main interests that ground the right to freedom of expression. Roughly, the argumentative landscape is split between those who emphasize audience interests and those who emphasize speakers' interests. Following the spirit of J.S. Mill's argument, many philosophers have been drawn to the idea that the interests of potential hearers are foundational.³ Others think that the main interests in question are the

¹ See for example the collection of essays in Maitra & McGowan, *Speech & Harm*.

² In line with the interest theory of rights, that I largely assume here, I also assume that the notion of interest in play stands for anything that makes a person's life go better or is good for that person (individual, artificial or collective). Not everybody agrees that rights are necessarily tied to interests, even in this very expansive sense. Some rights might be justified by way of respect for a person's dignity or humanity, and it might be a stretch to maintain that dignity is valuable because it is good for persons. Perhaps, but I doubt that anything I say in this paper hinges on these controversies. One should read the notion of interest as a place holder for whatever it is about persons that grounds moral rights.

³ Mill, *On Liberty*, Scanlon [2], Alexander *Is There a Right to Freedom of Expression?* (Alexander is the most explicit that only audience interests can ground the right to free speech.)

expressive interests of potential speakers.⁴ Controversies abound about which of these kinds of interest is more foundational to the right, or whether we can embrace both kinds and hope that they are mutually supportive.⁵ I want to suggest here that there is something spurious about this controversy. Freedom of speech is not one complex right, but spans two separate rights that I will label the *right to speak* and the *right to hear*. Roughly, the right to speak stands for the right of a person to express freely whatever they wish to communicate to some other persons or to the public at large. The right to hear stands for the right to have free and unfettered access to any kind of content that has been communicated by others. It also includes, as we will see, a right to obtain information from agents who are under some obligation to disclose it. My main argument is going to be that the right to speak and the right to hear are distinct moral rights, grounded in different types of interests, implicating different moral concerns. Furthermore, taking into account a plausible assumption that the right to do something normally entails the right not to do it, we can demonstrate that the right to speak and the right to hear often come into direct conflict.

The right to speak, I will argue, is essentially a control right. The main interest it protects is our interest in being able to execute our choices about what and how we communicate with others. The interests protected by the right to hear are not so closely tied with the values of choice and control. In fact, the audience interests we have in free speech are multifarious, varying with different categories and domains of speech. Underlying those diverse interests, however, is a general interest we have in free and unfettered access to information, that is, to any kind of content communicated by others.

Before we proceed, a couple of terminological issues need to be put forward. Throughout this paper I will use the words “speak” and “hear” very expansively; by “speech” or “speak” I mean any form of communication, whether by natural language or other means, and by “hear” I mean anything that constitutes an uptake of some communicative act. And, for the lack of any obvious alternative, I will use the word “information”

⁴ e.g. C.E., Baker, *Human Liberty & Freedom of Speech*

⁵ J. Cohen, “Freedom of Expression”, seems to hold the view that both kinds of interests are in play. More recently, Seana Shiffrin also makes it explicit that her “thinker based” approach to free speech can accommodate both speaker and audience interests, see her *Speech Matters*, at 83-85.

to stand for any content, sense, impression, or image that can be communicated, linguistically or otherwise. Which means, of course, that “information”, as used here, does not have to be propositional content; it can be any kind of meaningful content.

1. The Right to Speak

Why would we have a right to express or communicate almost anything we want? Let us begin with some platitudes. One of the most important, distinctive, and morally significant aspects of being human is our ability to engage in very complex, creative communication. Being able to communicate in a natural language – a language that allows us to convey to other humans an infinite variety of content through the use of a limited number of symbols and rules – is quite possibly the most remarkable achievement of our species. Losing this ability would be losing an essential aspect of one’s humanity.⁶ Let us take this as our starting point for seeing how important creative expression is to the kind of creatures we are. And the crucial point here is to see the importance of the creative aspect of communication. Other species can communicate some limited set of content to their fellow creatures, and we can call it a rudimentary language if we like, but it is not the kind of language we have. Compositionality is what made our language a giant evolutionary leap, allowing us to create in our minds and to convey to our fellow humans new meanings, new ideas and complex thoughts. The ability to communicate creatively is one of the most important aspects of our humanity.

I hope that these trite observations are enough to show the fundamental interest we have in our ability to express our thoughts and feelings to other humans by way of communication. But this is only the first step in showing why freedom to express what we want is a fundamental interest we all share as human beings. Still missing in the articulation of the interest is the crucial element of personal control, and the wide scope of the interest’s reach. So let me turn to this now. I use the word *control* here to designate a person’s ability to make some meaningful choices that the person can execute under the cir-

⁶ See Shiffrin, *Speech Matters*, at 90-91.

cumstances.⁷ Many of our basic moral and legal rights protect, *inter alia*, an interest we have in some measure of control over various aspects of our lives. The interest in control in the communicative context, however, is absolutely essential. To be able to communicate with others just is, essentially, the ability to exercise control over the contents you convey to others. If you convey some content that was determined by somebody else, or perhaps by some chance, then you do not really communicate. Uttering meaningful sentences is not necessarily an instance of communicating anything. Any standard form of communication involves the exercise of choice over the content that the speaker intends to convey.

Of course, there are some nonstandard cases. If I am handed a note by a bank robber, threatening me to convey its content to the teller or else he will shoot me, I am likely to oblige and convey the message as ordered. So perhaps the content I convey to the teller is something I intend to convey without freely choosing to do so. But notice that, even in this case, there is a sense in which it is clearly not me who speaks. I just replicate somebody else's communication intentions; a machine can do the same. Perhaps there are also cases of unintended communication. Your facial expressions, for example, may sometimes betray your thoughts more than you realize. And we can think of other possible exceptions. But they are all just that – exceptions to the general idea that communication, by its very nature as an intentional and creative human activity, is an exercise of choice, normally requiring control over the content and manner of the communicative act.

So far we see that there is no humanity without language, no language without creative compositionality and, by and large, no use of communication without choice. But this is not enough to show that the freedom to express whatever one wants is of fundamental importance to human beings. Suppose, for example, that we can make it the case that Susan can only communicate her thoughts freely about most issues but not some. Or suppose we can make it the case that Sarah can say whatever she wants, but only to a circumscribed group of people and not to anybody else. It seems that, in these cases, we

⁷ There's a delicate terminological issue here; my assumption is that we can make choices about all sorts of things without having control, but not vice versa. I exercise control only when I execute a choice I've made. What makes choices meaningful and worth having is of course a complicated issue, that far exceeds the scope of this paper.

would have to admit that Susan and Sarah can speak and communicate. Their humanity is not threatened; they just cannot speak freely enough. At this point, therefore, the temptation to invoke the traditional liberal ideals of freedom or personal autonomy becomes evident: one might think that in order to ground a right to speak freely, we must invoke our general interests in freedom and autonomy, otherwise we are not going to get the kind of right we seek to establish.

Though there is certainly some truth in this line of argument, it may run too fast. My remarks about the importance of creative compositionality to what a natural language is were meant to point us in a certain direction, suggesting that the connection between freedom and communication is a very close one. And perhaps we can see better how close it is if we dwell for a minute on the connections between language and thought.⁸ Two ideas combine here. First, let us keep in mind the constitutive role that language plays in the kinds of things we can think and ways in which we can think about them. Some singular thoughts, perhaps, are not language dependent. But many are, and certainly any complex thought we have requires language, not only to express the thought to others, but also to be able to entertain it, as such, as the thought that it is. To think and to use language (in one's mind, at least) are often, perhaps most often, two sides of the same coin.

Second, let us also keep in mind that probably the most important freedom people have is the freedom to think. The very idea of human thought is very closely related to freedom. In fact, it is difficult to imagine something we can regard as a genuine thought process without freedom. The very ability to think, of the kind we humans possess, is the ability to think with freedom – that is, to make choices in our minds, to direct our mind to this or that, follow through with some ideas, emotions or attitudes we entertain, see where it leads us, and so on and so forth. The ability to think and the ability to think freely cannot be detached. Furthermore, there is a very close connection between the freedom to think and the ideas of personhood and moral agency. Imagine that A somehow manages to gain control over B's thoughts and direct them in certain ways. We would think that B

⁸ See, for example, J. Cohen "Freedom of Expression", at 224. S. Shiffrin (*Speech Matters*, ch 3) also emphasizes, and rightly so in my mind, the very close connection between the freedom to think and freedom to speak, though the details of our accounts are somewhat different.

is no longer the person he used to be. Having your thoughts controlled by others undermines your personhood. The freedom to think is quite essential to personhood and, of course, to moral agency.⁹

Admittedly, it is true that the curtailment of expression is not, ipso facto, a curtailment of thought. Forbidding you to say that X does not entail that you cannot entertain the thought that X. People can have many thoughts that they are not allowed to express. But it is important to realize that this is true only up to a point. Given the very intimate connection between language and thought, and given the essentially public, interpersonal aspect of language, an extensive curtailment of expression is bound to result in the curtailment of thought as well. Our ability to share our thoughts with others plays a crucial role in determining what thoughts we can entertain, and what thoughts we can develop by learning from others. Language, as we noted, constitutes central aspects of our mental lives; linguistic competence and mental competence are very closely related. Language, however, is a means of communication; it is essentially public, something that is shared between individuals. Thus, the more the use of language is limited or curtailed the more limited the thoughts affected people can entertain as well. Impoverished language is bound to result in impoverished mind.

Here's one way to see the point: Suppose the government forbids us to use any expression containing words designating colors, and let assume, so effectively that we actually stop using words describing color perceptions. It is not far fetched to surmise that, after a while, our color perceptions would become insecure, possibly confused and, no doubt, hugely impoverished. Without the ability to communicate our color perceptions, we are bound to lose the confidence we have in the perceptions we encounter and, over time, we may lose not just the words, but the perceptions themselves.¹⁰

⁹ See also Shiffrin, *Speech Matters*, ch 3.

¹⁰ The hypothetical is not entirely imaginary, it is inspired by the languages of the Dani tribes in Papua New Guinea that were found to have no words for color perceptions (only two, actually, one for dark shades and one for light). Research revealed that Dani people can come to recognize some colors even without having the words, but with difficulty and only at a fairly rudimentary level. (The original research was published by E. Rosch Heider (1972), and it engendered a huge amount of controversy. Needless to say, I do not intend to take sides in any of these scientific controversies.)

This is an extreme example, of course, but I hope you see where it is leading. Still, you might think that it is not leading us far enough. Our interest in free expression is bound to depend not only on our interest in the freedom to think and develop our own minds; it is also an interest in influencing other minds. And that, of course, is also true. We have a fundamental interest in having reasonable opportunities to try to influence what others think and feel. The ability to influence others' minds is why we have language to begin with, as it were, enabling us to negotiate our place in the social world we occupy. Our interests in the ability to influence others' minds pertain to almost every aspect of our lives. We care about what others think of us and how they feel about us. We often need to negotiate our standing with others, in personal life, in work and in our social, political and cultural environment. None of these and many other aspects of our lives can be accomplished without having the opportunity to influence other people's minds by way of communication.

One might be tempted to think that there is an elitist bias integral to this interest some of us, like academics, politicians, journalists and artists, have in expressing ourselves to others. After all, for the vast majority of the people in the world, articulating and expressing their views and ideas to some audience or other is not very high on the list of priorities in life. Most people just struggle to make ends meet, hoping to sustain a family, have some meaningful relationships, maybe some leisure time if they are lucky, and things like that. Expressing views and communicating ideas to some audience is important only for a tiny fraction of people in the world, mostly to those of us who make a living from it. But it would be a mistake to think that the underlying interest here is very closely tied to the value of personal autonomy and our right to choose our careers and life projects. There is that, too, for sure, and it is certainly important, but the interest in having the ability to influence others' minds by way of communication or expression is much more fundamental than that.¹¹ Every human being living in proximity to other human beings needs the ability to negotiate countless things they care about by trying to influ-

¹¹ Scanlon [2] was right to worry that the value of autonomy is too vague in this context and may not do all the work he had initially thought that it can. But this is different from the worry I try to respond to in the text. I do think that many articulations in the literature of the autonomy interests grounding free speech tend to rely on rather elitist conceptions of what people care about. The academic environment is not the right model to have in mind here. Cf Raz, "Free Expression", at 132.

ence other people's thoughts and emotions, even if those others are not typically distant and anonymous. Since our lives depend on each other in myriad ways, we have a fundamental interest in a fair opportunity to try to influence what others think and feel. Generally, if you cannot freely share your views and feelings about things you care about with people around you, your relationships with others will be strained, impoverished and alienated. Our freedom to speak is inseparable from the freedom to shape our interpersonal and social relationships in the world we inhabit.

I hope we said enough to show that our fundamental interest in the freedom to express ourselves to others is the kind of interest worthy of serious protection, let us grant, by imposing obligations on others, at least negative duties to avoid curtailment, suppression, censorship and such. An immediate question that arises here is whether the right to speak includes or entails a right to be heard. Clearly not, I would think, if by the right to be heard we include the right to be listened to, paid attention to, and things like that. My right to say something cannot impose an obligation on somebody to listen, that would be much too burdensome a duty to impose. What the right to speak should guarantee is people's reasonable ability to express themselves and convey their communicative content to the audience that they wish to reach. But no one, individual or group, can be obliged to become your audience, just because you want to say something.¹² I do not mean to assert something too strong here; there may be cases in which deliberate refusal to listen might be impolite, offensive, and perhaps in some cases, even clearly immoral. More than that; there are cases in which the unwillingness to listen to what others have to say, particularly when the unwillingness is systemic and grounded on racism, sexism and such, amounts to a violation of the speaker's rights, presumably the right not to be discriminated against. But this would still not show that the right to speak entails an obligation to listen or to pay attention to what a speaker wants to express. The right to speak is not the right to

¹² I am not denying, of course, that there are cases in which someone has an obligation to listen. Judges have an obligation to listen to the litigants in front of them, parents have an obligation to listen to their kids, etc., etc., But these obligations to listen derive from particular roles people occupy, they are not grounded in free speech interests.

have an audience, only a right not to have your reasonable access to audience denied, curtailed, or unjustifiably manipulated.¹³

Now, it used to be thought that the relevant obligations to allow people to speak freely are mostly of the kind that ought to be imposed on governments and agents acting on their behalf. No doubt it is mostly people in positions of power who are typically inclined to curtail others' speech and have the means to do so, and thus the right to speak is a right against those who can actually curtail it. But the world of communication has been greatly transformed in the last few decades, and it is no longer the case that the relevant powers are necessarily held by political sovereigns. It is still true that the most egregious violations of freedom of speech around the world are committed by authoritarian regimes; we should not lose sight of that. But, in the free world, private corporations are assuming an increasingly larger role in actually controlling important speech opportunities available to ordinary people. There is no reason to assume that corporate entities like Google, Twitter and Facebook, to mention some obvious examples, should be exempt from a moral obligation to allow free and equal access to the means of communication they created and control. The position they increasingly occupy in the world is like the position of a monopolist on the provision of printing machines after the advent of print. One could still copy books by hand if a print was not available, but at some point it obviously became a very poor substitute. It is the same idea these days but different means. You can still distribute pamphlets on the street corner if the Internet giants block your access, but that might be a very poor substitute.

From a philosophical perspective, there should be no surprise in this shifting of duties required to protect a given right. Rights are there to protect interests people have by way of imposing obligations on others, the kinds of obligations needed to secure the interest in question. Who should be under those obligations and to what extent depends on the circumstances of the particular society you live in, its power structure, means of production, resources and the like. Those are the kinds of things that change over time and from place to place. Hence the obligations that need to be imposed to secure one and

¹³ Manipulation is tricky; some kinds of manipulation are clearly wrong, others not necessarily, and it's often difficult to articulate the relevant moral difference. I cannot go into this complicated issue here.

the same underlying interest may change as well.¹⁴ In the case of free speech, they surely have. No doubt, governments still exercise a great deal of control over speech opportunities, but the new and exciting means of mass communication created by private corporations give those corporations enormous powers to engage in censorship as well. At least in principle, then, the right to speak can be a right against anyone who actually controls important means of communication.¹⁵

Admittedly, however, none of this yet shows the limits of the right. No right is absolute; all rights admit of some justified restrictions. The right to speak is no exception. I will get to the limits in the second part of the paper. For now, I would like to say something about the scope of the right to speak. The interest in free expression that grounds the right to speak is vague and its boundaries are certainly problematic. For one thing, it is certainly not confined to the use of natural language. We can communicate with others by using body language, music, dance, painting, photography, video and all sorts of other means. Since the interest in question here is essentially an interest in free communication, any means of communication should be covered by the right to speak. What matters here is our ability to communicate thoughts, ideas, attitudes and emotions, etc., not the means by which we convey those kinds of content.

But, of course, the means may come to matter. If I want to communicate my anger toward you by slapping you on the face, well, that is not exactly the kind of thing that any plausible right to free speech should protect. The main difficulty that comes up here stems from the fact that any attempt to distinguish speech from conduct or action is bound to fail. Speech is an act, an act of communication, but an act nevertheless. Saying something is always doing something, and different kinds of speech acts are different kinds of acts.¹⁶ This platitude raises serious concerns about the boundaries of the right to free speech. I think we can make some limited progress by noting that the right to speak should cover only those acts of communication in which the immediate communicative

¹⁴ In this I follow the analysis of Joseph Raz of what he calls the dynamic aspect of rights. See Raz, *The Morality of Freedom*, at 171.

¹⁵ It doesn't mean of course that just by controlling a means of communication you come under an obligation to allow anyone to use it. If I happen to own a loudspeaker I don't have to let you use it just because it will help you carry your message to the crowds. There are some difficult questions about conflicts between rights of private property and free speech that I cannot explore further here.

¹⁶ See, for example, Langton, "Speech Acts and Unspeakable Acts".

aspect of the act is something that is valued by the speaker as such – namely, as a means of conveying some content to others. It is, after all, the interest that the right to speak is there to protect. This will exclude cases in which we use speech not to communicate something to others, but to perform some other type of act. If I need to say something in order to gain access to the library, for example, then what I want is to gain access to the library, not to convey some content. I think that in these kinds of cases, in which speech is not purposefully used to convey some thoughts, ideas or emotions or such, but to do something else, the right to speak would not apply. Generally, the right to speak should focus on the purpose of the act, not on the means. If the immediate purpose is communicative, it comes under the purview of the right; if it is not, or not mainly, then probably it does not.¹⁷

One might object that we have not made sufficient progress here. Some cases still remain problematic, such as the example I gave earlier: We cannot have the right to speak apply to a case in which I want to express my disapproval of you by slapping you on the face. And that is so, even if my intention here is purely expressive. My suspicion is, however, that the only way to handle such cases is by recognizing that they involve a conflict of rights. Your right not to be assaulted outweighs whatever pro tanto right I may have to express myself by hurting you. I can see the temptation to deny that there is even a pro tanto right to express something by slapping someone on the face; it just does not seem to be the kind of expression anyone would want to protect. But I am not so sure. After all, we use harsh treatment as means of punishing convicted criminals, to, among other things, convey a strong message of disapproval of their criminal conduct.¹⁸ So we must think that in the case of criminal (and perhaps other forms of) punishment, the expressive value of the harsh treatment (probably combined with other values) outweighs its injury to the punished. In other words, I am inclined to the view that we would not be able to delineate

¹⁷ Notice the idea of an *immediate* purpose as communicative, not the ultimate or remote purpose. We can wish to communicate something for an endless variety of reasons and purposes, those are irrelevant here. Also, note that I remain agnostic about the relations between the rights to freedom of speech and freedom of association. There clearly is a close connection, though there may also be conflicts and tensions between these rights. Nothing that I say here is meant to entail any particular views about the right of free association.

¹⁸ For a more detailed (and somewhat critical) explanation, see M. Berman, “The Justification of Punishment” (The example should not be taken to imply that I endorse this particular way of thinking about the justification of punishment. I use it only as an example of a prevalent idea about punishment that is not obviously implausible.)

certain means of communication as inherently covered by the right to speak and others that are somehow initially excluded. Warranted exclusions would need to be justified by appealing to the competing rights of others. I will explore this issue further below.

It may be time to recap. So far, I argued that, regardless of any audience interests in the free dissemination of ideas, every person has a fundamental interest in having the freedom to communicate with others. It is an interest in the freedom to express one's thoughts, ideas, emotions, attitudes and the like, which is grounded both in our interests, as human beings, to develop our own minds and the character of our personhood, and in having reasonable opportunities to influence others' minds. These are fundamental interests to the kind of creatures we are, and they are certainly worthy of protection by the imposition of duties on others. Which is to say that – at least on one version of what a human right is¹⁹ – we have a human right to speak freely.

Before I move on to discuss the right to hear, let me answer an objection. Some philosophers have argued that there is no hope in grounding the right to freedom of speech in the expressive or communicative interests of potential speakers, simply because those interests are naturally tied to speakers who live and have interests, while freedom of speech aims to protect also publications and expressions of authors who are long dead.²⁰ Indeed, I admit that the interest in the freedom to speak is naturally tied to living persons; it does not extend beyond death. It is possible, of course, that we have a legitimate interest in the projects of our lives to persist after we are gone from this world, but this would be a different kind of interest, and one that I will not try to articulate here. I am willing to assume that the right to speak is not the kind of right that extends beyond the life of those whose right it is. But this will not turn out to be a serious worry: The right to hear will cover those cases in which we should think that it is wrong to censor or restrict access to publications of authors no longer living. I turn to this, the right to hear, in the next section.

¹⁹ In the sense of human rights as the rights we have as human beings; there is also a different notion of human rights, a political one, that is not relevant here.

²⁰ See Alexander, *Is there a Right of Freedom of Expression?* at 8-9.

2. The Right to Hear

Our audience interests in the speech of others are multifarious, spanning a wide range of domains and different categories or types of speech, such as politics and social issues, science, art and culture, commercial speech, even gossip, and whatnot. The main challenge here is not so much to show that we have serious interests in acquiring information; the difficulty is to show that the numerous kinds of information we may have an interest in having, typically for very different reasons, have something sufficiently robust in common to ground a general right, which I call the right to hear.²¹

Admittedly, there is something very captivating about Mill's view that the underlying interest here is the general interest we have in the *truth*. Freedom of speech is essential, Mill famously argued, for the truth to emerge, and it is, fundamentally, the truth that we should care about.²² The problem is that even if truth always matters, it is not always the thing that matters most, truth certainly does not always matter to the same degree, and more generally, it is not clear that truth really matters for its own sake. Religious people sometimes say that religion gives them spiritual comfort and hope, and they care about those more than they care about the truth. At least if we do not bracket truth entirely, this preference of spiritual comfort over truth may not be entirely irrational. A cancer patient may also prefer to hear, and understandably so, mostly that which would give him hope and encouragement, even if it is not quite the truth. And of course, even where truth matters, knowing it does not matter to the same degree; some truths, so to speak, are much more important than others. It might also help to keep in mind that often we would not do people any favor by telling them the truth about, for example, what we think of them or how we think they are perceived by others.²³ You probably should not tell your student that you think that he is not very smart, even if you are quite right about that. None of this is meant to deny that, generally, if we have a reason to believe that X, it

²¹ cf Scanlon [2]; for a skeptical view, suggesting that there is no general underlying interest here, see Raz, *The Morality of Freedom*, 169-170, and "Free Expression".

²² J.S. Mill, *On Libert*. The big question of whether free speech is, indeed, conducive to discovery of truth, as Mill had argued, is not my immediate concern here and I take no sides on this controversial issue. For a critique of Mill on this point, see for example, Schauer, *Free Speech*.

²³ See Nagel "Concealment and Exposure".

has to be the case that X is true.²⁴ But the mere fact that X is true is never quite sufficient to explain why would we have an interest in coming to believe (or to know) that X. There has to be something else about X that should explain why believing it or coming to know it is valuable, and to what extent.

The general idea that truth is not uniformly valuable and that different kinds of information have different values in different contexts is what probably drives the tendency to categorize the audience interests in free speech. Quite plausibly, we have very different reasons for having information in different domains. Some free speech scholars focus on the kind of information people have a right to have in virtue of their right to political participation. No doubt, this is a very important category that grounds a great deal of the interest we have in information in a decent democratic regime. The idea is simple enough: Political participation is valuable only if the participants are reasonably well-informed about the matters that might affect the decisions to be made. Since democracy is based on (or at least closely tied to) the idea that we all have a right to political participation, it follows that we all have a right to have all the information that might be relevant to the kinds of decisions that are in play. Admittedly, this covers a lot of ground. To be a reasonably informed participant in political decisions, one would need to know much more than politics; political decisions pertain to almost every aspect of our social, cultural and economic environment. But none of this leads to the conclusion that the right to hear is essentially a political right.²⁵ The audience interests we have in free speech are much wider than those that any plausible right to political participation can possibly entail. They include interests in beauty of various kinds and generally things of aesthetic value, interests in basic science, in creative imagination, in love, in sex, and in other aspects of our lives that have nothing or almost nothing to do with politics.

In short, and I think that most philosophers would agree, the audience interests in free speech are much wider in scope than those that can be derived from our right to po-

²⁴ But what about the value of believing something that is actually false – is that not a possibility we should also consider? I hope we can agree that the cases in which one would have a reason to believe something that is false are very rare and unique. Perhaps a patient with a terminal illness might have an interest in believing that he can recover, perhaps the remainder of his life will go a bit better if he believes something that is false. But very few cases are like this.

²⁵ see A. Meiklejohn, *Political Freedom*, & cf Scanlon's response in [1]. See also Shiffrin, *The First Amendment, Democracy and Romance*, ch 2.

litical participation. And now, if we combine this broad scope with the idea that not all truths matter to the same degree, we can see why it would make some sense to categorize audience interests, assigning different levels of importance to the right to hear in different domains.²⁶ It is widely assumed, for example, that the right to hear in the political domain is more important than the right to hear in the commercial domain; the right to hear in the domains of the arts and sciences seems more important than the right to hear gossip about celebrities; and so on and so forth. No doubt, there is a lot going for this categorization, as long as we bear in mind that the categories are rough and their boundaries fuzzy. Art often is, or may become, a form of social or political protest; widely advertised consumer products may affect the environment or the economy. The categories of speech are interconnected, their boundaries rife with vagueness, and they are subject to change over time. Furthermore, it is often the aim of social criticism to bring about a change in the categorization of things we take for granted. Matters of taste may become political, or vice versa; the political or social interest in certain kinds of things may subside over time and become a matter of taste or inclination. Categories of speech should always be subject to legitimate critique and challenge.²⁷

The right to hear is similar in various respects to the right to education.²⁸ Children have a right to education because up-to-date education is essential for people's ability to compete in the marketplace and make the best of their lives in line with their natural talents, abilities and choices. What counts as adequate education is always relative to the state of knowledge at a given time and place. Children have a right – and quite plausibly, an *equal* right -- to be educated in the body of knowledge that is available in their world, broadly speaking.²⁹ The right to education does not extend to a right to have more knowledge produced, only to learn – and again, probably to have an equal opportunity to learn-- that which is out there anyway. Similarly, I think, the right to hear is the right to have access to information that is out there, not a right to have more information produced. In other words, both the right to education and the right to hear are rights of access

²⁶ See Scanlon [2].

²⁷ This idea is not new, of course, it came up, for example, in the context of debates about pornography between R. Dworkin and K. McKinnon. See Dworkin, "McKinnon's Words" and references there.

²⁸ A connection between these rights is also noted by Shiffrin, *Speech Matters*, ch 3.

²⁹ I don't mean in their immediate surroundings, of course. And I cannot delve here into the complicated issues about equality, what equal opportunity means here, and what grounds it.

-- and presumably equal opportunity of access – to information³⁰ that is out there anyway in some form or other. The right to hear, however, divides into two subcategories: In some cases it is a right to obtain the relevant information from whoever is holding it. And in some cases it is only a right not to have information that was voluntarily disseminated by someone blocked or censored. Let me explain.

There are many types of information we have a right to have, either in virtue of our role as autonomous participants in the political process, or in virtue of our interests in personal safety, in our health, in our physical and cultural environment, etc. If, for instance, the government makes a certain decision, we would normally have a right to know the reasons. If the government is to be accountable to the governed, those who are governed have a right to get all the relevant information and the reasons that the government relies on. But the duty to provide information is not exclusively a duty of political sovereigns. If a private corporation introduces a new product to the market, we certainly have a legitimate interest in knowing that the product is safe, that its production does not pollute the environment, etc. If hospitals begin to use a new medical procedure, we should be able to learn how effective and safe it is, and so on and so forth. All of these, and countless other cases, demonstrate the idea that people who have certain information and rely on it in various ways may have an obligation to disclose that information to others, often to all of us. The right to hear, in other words, often includes the imposition of a duty on some entity to disclose or provide information.

The right to hear also extends, however, to those cases in which nobody is under an obligation to disclose anything. But once a piece of information is volunteered or disseminated by someone, we have a right to hear it. This is, essentially, the right against censorship. So the main question here is, what interest do we have in having unfettered access to information that, as we assume, nobody is under any obligation to provide?

In answering this question, some put the emphasis on how undesirable it is to have the government make any decisions about what we get to hear and what we do not.

³⁰ Remember that I use the word information in its broadest possible sense throughout, standing for anything that can be communicated or conveyed in some way, and that includes more than propositional content.

Governments are notoriously self-interested and generally unreliable in making these kinds of decisions.³¹ No doubt this is true, but it does not give us an answer to the questions of what is the relevant interest at stake and why it is important. Censorship might be wrong, and might violate our right to hear, even if it resulted from informal social pressure or actions of private entities.³² In order to get a more full picture of what is wrong with censorship, we need to articulate our general interest in having access to information, even if it is the kind of information that nobody was under any obligation to divulge.

Once again, I think that the relevant interest here is very similar to the interest children and young adults have in education. A school that taught children math but not literature (or vice versa) would be violating the children's right to adequate education. It would leave those children unprepared for the world they face, limiting their career options, their economic opportunities, and generally, their abilities to make the best of their lives. We live in a world, and increasingly so, in which knowledge is a vital resource. And this also means that access to content communicated by others is essential for our well-being. If we want to use Rawlsian terms, we can say that unfettered access to information is a *primary good*.³³ Namely, it is the kind of good that every person would want to have, and as much as possible, regardless of their conception of the good. Needless to say, nobody can be presumed to want to know everything there is to know; that would be crazy. But people have an interest in having unfettered *access* to information, to whatever it is one might be, or may later become, interested in knowing. This is the primary good in question.³⁴

Now you might think that there are bound to be pieces of information or communicated content that nobody has any reason to acquire or even to know about. That is more than possible, it is quite likely that there is a lot of communicated content out there that nobody has any reason to pay attention to. But what we need here is not reasons for

³¹ See J. Cohen, "Freedom of Expression", at 233-234.

³² It may be worth keeping in mind that Internet giants like Facebook and Google exercise censorship in their domains, often in direct response to social pressure.

³³ J Rawls, *A Theory of Justice*.

³⁴ You might think that one can have a conception of the good valuing ignorance. One can, of course; whether it is the kind of conception of the good that needs to be respected is a difficult question to answer. In any case, even if you value not knowing something, you should value having the opportunity to learn the truth about it, if and when you change your mind.

acquiring this or that piece of information, what we need to show is that there is a general reason to have *unfettered access* to any kind of information that was communicated by someone. In *this* respect, the right to hear and the right to education are quite different: the right to education is content dependent. Children's right to education does not extend to content that is false, stupid, or morally reprehensible; no plausible interest would be protected by providing children with content they may have absolutely no reason to acquire. But the right to hear is certainly not content dependent in this way. And this, I think, is the real challenge facing any philosophical account of the right to hear, it is the challenge of explaining what reasons people have for having unfettered access to information that they may have no good reason to acquire. Now you can see that there is a philosophical temptation to put the emphasis on choice and personal autonomy; we want to say that people should be left to make their own choices about the information they would want to access, it is a matter of respecting personal autonomy, you might think. I am not denying that there is some element of respecting people's choices that is in play here, mostly, as I will explain below, in the context of letting people chose what kind of information they actively seek out and pay attention to. But I don't think that the value of choice is foundational in grounding the right to hear, and my use of the idea of access to information as a primary good was meant to facilitate the argument in that direction.

There are many things that are good for people not because it is good for them to be able to choose it, even if, as is normally the case, they should have choices not to have it or choices about ways of having it. Health is a good example; it is good for people to be healthy, and as healthy as possible, but *not because* it is important to have a choice about one's health. The choice element is derivative and peripheral. I think that access to information is similar; it is good for us to have as much access to information as possible because our lives would go better, individually and collectively, in countless contexts, if we have such access, and not because it is good for us to have a choice about information we hear. The choice element is derivative and peripheral. What makes our lives go better is to live in a society where information, of all kinds, is widely available and access to it unhindered. This is the sense in which I suggest that access to information is a primary good. It is good for all of us to have as much of it as possible, regardless of the good in acquiring this or that particular piece of knowledge or information. The latter obviously

depends on one's conception of the good, on one's values and interests, and things like that. The general availability of information and free and equal access to it, however, is good for all, regardless of particular interests or conceptions of the good.

Two important caveats are in place. First, even if the main value of access to information is not grounded in choice, choice and control are important in the vicinity. For one thing, people normally have a great deal of control over what they pay attention to, and, by and large, this is as it should be. And we should certainly have a great deal of control over the kinds of information or expressions we seek out, where we do it and how. The fact that there is a good novel recently published that I should read does not mean that I can be forced in any way to read it; presumably not even to the extent that I need to come up with a reason to refrain. What information people seek out and how is normally something that should be left entirely to personal choice.³⁵

Secondly, there is a close connection between ways in which the right to hear can be violated and disrespect for the choices people should be allowed to make. It is a significant aspect of the right to hear that very often when the right is violated, especially by the government, *part* of what makes the violation a serious wrong is that it manifests disrespect for people's ability to make up their own minds about what they would want to hear. Violation of the right to hear is often a form of unjustified paternalism. Forbidding your 8 year old child to see a violent movie might be quite right; forbidding adults to see it is wrong partly because it treats adults as if they were 8 year olds. And that is particularly so when the censored expression is of the kind that people can easily avoid to hear, or at least pay attention to, if they want to. But we need to proceed with caution here. For one thing, it is not always the case that censorship involves manifestation of disrespect, even if often it does. For example, if the government censors information revelation of which it deems detrimental to the country's security or foreign relations, no disrespect might be involved, that is, even if the censorship is not warranted under the circumstances. When the government tries to keep some embarrassing information about its conduct under wraps, it is usually precisely because they suspect that if we hear about it we would

³⁵ I will return to this point in the last section.

be able to figure out how corrupt or incompetent they were. In short, not every wrongful censorship is implicated with disrespect for choice or unjustified paternalism.

More importantly, perhaps, we need to bear in mind that what makes violation of a right wrong is not always something that directly bears on the grounds of the right in question. Once we have a right to something, certain forms of violating the right might involve additional wrongs over and beyond undermining the main interest that the right is there to protect. Consider the right to health again; it is not grounded in values of choice and control but in the direct and obvious interest we have in our health. And yet the right to healthcare can be violated in ways that also disrespect or compromise other values, such as equality or choice (e.g. by making certain medical treatments very expensive or not providing patients with sufficient information to make informed choices about their treatment, etc.) In other words, the fact that censorship is often wrong because it amounts to a manifestation of disrespect for people's ability to make up their own minds about what to hear does not necessarily show that our right to hear is grounded in values of choice and control. The values of choice and control are derivative; the main value is the value of unfettered access to information, not the choice of what to hear.

But now the question arises, what if the relevant information we seek is actually false? Governments often claim that they censor information that is false, and they do it because it is false and likely to mislead. Of course we often do not believe those governments and for good reasons. And even if we did believe the government, we have good reasons to suspect that governments are not well positioned to make judgments about such matters, epistemically or otherwise. But I think that there is a more general answer here that does not depend on mistrust of the government, and it proceeds in two stages: The first step is to realize that there is no harm in entertaining false beliefs, per se. The second step is the principle that the government may not prohibit conduct that is not harmful.

In many cases holding a false belief may be harmful, but not only because it is a false belief. If I believe that the distance between Earth and Mars is X, whereas the truth is that it is Y, there is no harm whatsoever, neither to me nor to anybody else. It might become very harmful indeed if I'm involved in planning the next rover mission to Mars

and my mistake results in a faulty design. I am not suggesting that only actions on the basis of false beliefs are potentially harmful. Wrongful dispositions, misguided emotions, and the like, may amount to a harm in themselves, or at least get very close to it. But the mere fact that somebody believes something that is false is not, by itself, a form of harm. If it was, we would be harmed all the time; after all, we entertain, at any given time, many beliefs that are false.

You might think that there is one sense in which believing something false constitutes a harm: If we have a general interest in believing only that which is true, then any false belief we entertain would be a setback to our interest. But we have already seen that the mere truth of a belief would not be sufficient to explain why it would be valuable to hold it. Thus, even if it is true that we have no interest in holding a belief that is false (barring some very unusual circumstances), it does not follow that the mere falsehood of a belief held by someone is a harm to that person or to anybody else. Falsehoods may become harmful, of course, if the false belief plays a causal (or, perhaps, a constitutive) role in something else that is harmful, such as a bad intention, undesirable disposition, distress or such.³⁶

This leads us to the conclusion that the mere falsehood of some communicated content is never a sufficient reason for the government (or anyone else in a position of power, for that matter) to prevent people from hearing it. Unless, of course, you think that the harm principle does not set a limit to the government's coercive powers. I turn to this, and to the limits of the harm principle, in the next section.

3. Speech and Harm

I will assume here, without argument, that if a conduct is not harmful it should not be subject to legal prohibition. (I will also assume that harm consists in a setback to a person's interest, something that makes her life go less well in some sense.) Notice, how-

³⁶ There is some debate in the literature about hate speech and pornography about the question of whether a speech act may constitute harm, as opposed to merely having a casual role to play; see for example, Langton, "Speech Acts and Unspeakable Acts"; Mairta, "Subordinating Speech" in *Speech and Harm*, 94. I take no sides in this debate.

ever, the emphasis on prohibition. The law sometimes regulates conduct that is not harmful by way of imposing some restrictions on where and how one can engage in them, and that may be morally acceptable. A good model here is rules of debate; debating rules are justified, when they are, on grounds of facilitating the value of the debate, not to prevent harm. Many legal regulations are based on a similar rationale. But usually such regulations would have to be inconsequential restrictions that do not make the conduct in question prohibitively difficult to engage in, only regulating certain sensible ways (or places) of doing them.³⁷ Actually prohibiting conduct that is not harmful would be unjustified. Or so I will assume here, as I said, without argument. But this leaves most of the difficult questions about free speech and harm still open. I want to make three points in this section: First, that speech is often harmful and there should be no mystery about that; second, that we take the prevention of harm as a necessary requirement for the justification of legal prohibition on conduct, but not always as a sufficient reason; and, consequently, I will suggest that justified restrictions on the right to speak and on the right to hear derive from prevailing rights of others, not merely prevention of harm. In the last section, we will see how this plays out in the context of possible conflicts between the right to speak and the right to hear.

So let us begin by acknowledging that speech can be harmful and often is. In fact, I find it somewhat puzzling that considerable philosophical effort has been invested recently in showing that hate speech, pornography and things like that can bring about – sometimes even constitute, perhaps – harms of various kinds.³⁸ It only takes a moment's reflection to see how people can cause harm by speech all over the spectrum of our interpersonal and public interactions. Examples are abundant: gossip can be very harmful, it can ruin somebody's career or marriage; bad advice can be harmful; lies can be harmful; parents can cause psychological harm to their children by telling them things they shouldn't; and then, perhaps most importantly, think about the amount of harm caused, often very directly, by political speech. Our political leaders may tell us things that bring us to support an unjust war, or advocate a policy that results in our support for measures

³⁷ Zoning regulation of speech will be discussed in the last section.

³⁸ See, for example, J Waldron, *The Harm in Hate Speech*, & the volume by Maitra & McGowan, *Speech and Harm*.

that end up harming the poor, and things like that. Surely a lot of harm often ensues from political speech, even if it normally takes more than just speech for the harm to materialize.³⁹

We can go on and on, but I hope it is not necessary. There is, really, nothing special about the kinds of harms that can be brought about by an act of communication. Scanlon acknowledged this a long time ago, suggesting that the main challenge for a theory of freedom of expression is precisely the challenge of explaining why harms that would be normally sufficient to legally prohibit a certain type of conduct are generally not sufficient to put speech under legal restrictions.⁴⁰ But I think that, in this way of putting things, Scanlon implicated something that is rather inaccurate. Protection of free speech is not the only domain in which prevention of harm is not sufficient to warrant legal prohibition of the conduct in question. Preventing harm, even to others, is not a sufficient reason to justify prohibition of conduct in many contexts that have nothing to do with speech. At least one broad area in which oft-harmful conduct is shielded from legal prohibition is the commercial domain. When *Walmart* comes to small-town America, a lot of people are harmed; many people lose their jobs, and many others end up with lower-paid ones. And this, of course, happens all over the commercial world; the introduction of new products and new means of production often drives older ones out of business, harming those whose livelihood depends on them. The success of one business often comes at the expense of another, harming those who had benefited from it. And so on and so forth. The harm principle sets a necessary condition for the justification of legal prohibition, but not a sufficient one.⁴¹

³⁹ Since I am writing this paper during the season of the presidential campaign of 2015/16, I cannot resist the temptation to mention Donald Trump's anti-immigrants propaganda. Trump started his campaign by incinerating comments against Hispanic immigrants, declaring that they are by and large a bunch of criminals and rapists. And this became the motto and momentum of his entire campaign (so far). I don't see how anyone can deny that such neo-fascist demagoguery is tremendously harmful, it puts millions of people on the defensive, for no good reason, subjecting them to prejudice and potential persecution.

⁴⁰ Scanlon [1], at 153.

⁴¹ Let me mention two other areas in which prevention of harm is not generally regarded as sufficient to justify prohibition of conduct. One is parenthood; there is a great deal of harm caused to children by their parents or custodians, mostly psychological harm, that any reasonable legal regime in this area is willing to tolerate. The second example is in the domain of sports. Many well established and institutionally supported forms of sports are quite harmful to those who engage in them, yet there isn't much to prevent people and organizations from encouraging such activities, making a profit from them, etc.

We cannot deny, however, that prevention of harm is often a very good reason for the imposition of legal restrictions on conduct. In many cases the fact that a type of conduct is likely to cause harm is a good reason for prohibiting it. So how can we explain the difference? I think the difference stems from the fact that we do not have a general right not to be harmed. What we have is a right not to be harmed in certain ways. People can do a lot of harmful things to us without violating our rights. It is OK for you to open a business across the street competing with mine, and, if you succeed, you may cause a lot of harm to me without violating my rights. It is not OK for you, however, to lure the customers to your business by threatening them not to come to mine. We have a right, countless rights, actually, not to be harmed in certain ways. And, of course, it is not easy to articulate what distinguishes ways of causing harm that violate people's rights and those that do not. I will certainly not attempt to do so here. My only concern is to show that the prevention of harm is often not sufficient to justify legal prohibitions. Free speech is just one such case.

So if the prevention of harm is not sufficient to justify restrictions on speech, what else might be needed? Can we just say that legal restriction on speech requires showing *imminent* harm? That would not do. Harm caused by speech that generally is and ought to be protected, is often immediate. It may occur as soon as the speaker finishes the expression.⁴² Suggesting that the harm has to be significant or grave might sound more promising but I doubt that it will do the trick. Irresponsible political speech, for example, can cause a huge amount of harm.

There is another idea that comes up in the literature that is borrowed from the legal doctrine of superseding cause in torts (or seems like it is). Roughly, in tort law, one would not be held liable to a harm or injury caused to the plaintiff if the harm resulted from the intervention of another agent. The agency of another – including, often, the injured party himself – may sever the causal chain or, more precisely, the responsibility for it. Similarly, some people suggest that the harm in speech is typically the result of things people do with what they hear, including the propositional attitude they have about it. No

⁴² Imagine, for example, telling your best friend or your spouse that you've always considered them to be rather stupid; if you express this thought sincerely, the harm to your relationship is probably immediate. And of course, as many argued, the harm of hate speech is often immediate as well.

harm comes from telling someone an irresponsible piece of gossip unless the hearer believes you, and let us assume that she may not; certainly, she does not have to. Something similar can be said about the leader who marches us to war. It takes a lot of believing on our part, and probably more than that, before bad things start to happen. So the idea is that harms that result from a speech act are typically mediated by the involvement of human agency, other than the speaker of course. And then the thought is that only unmediated harm can justify restriction on speech (or, perhaps, that it makes the justification of restrictions easier to accept).⁴³

The main problem here is that the moral significance of this mediation idea is far from clear. At most, in those cases in which some mediation between speech and harm is present, it would potentially mitigate the speaker's responsibility for the harm. If between my saying something and some harm that ensues there is casual involvement of human agency, then my responsibility for the harm would naturally depend on the extent of the intervening cause, its foreseeability, and things like that. Even in tort law, intervening causes do not necessarily preclude the responsibility for the harm that eventuates, certainly not all of it. Responsibility can be shared by different agents. Demagogues may not be the only ones to blame for starting an unjust war, for example, but that does not mean that they are not morally responsible for their harmful speech.

I think we need a fresh start. We need to realize that the harm principle, modified or not, is not going to give us the answers to the difficult questions posed by the limits of the right to speak and the right to hear. Which is not to suggest that the harm principle is unimportant, or that it has no bearing on the rights to free speech. I have already relied on it earlier, suggesting that the mere falsehood of some propositional content is never sufficient to justify the prohibition of its dissemination because there is no harm in having a false belief, per se. So at least as a necessary condition, the harm principle is doing a lot of work. But to get a better sense of what would be sufficient to justify restrictions on free speech, I think we need to appeal to conflicts of rights. The right to speak and the right to hear can be restricted, no doubt, if the restriction is necessary to protect some-

⁴³ There is some indication to suggest that this problem of mediation between speech and harm is partly what motivates the effort to show how hate speech can sometimes constitute harm, not just cause it. See, for example, Mairta, "Subordinating Speech"; Langton, "Speech Acts and Unspeakable Acts".

body else's right that ought to prevail under the circumstances. Defamation would be a good case in point, but of course there are many others. My right to get some information from you may lose (or not) to your right to privacy.⁴⁴ My right to speak may lose (or not) to your right to decide how to use your own property, and so on and so forth. Conflicts of rights are prevalent and unavoidable. I am not sure that we can come up with general principles about ways of resolving conflicts between different rights; the circumstances for such conflicts to arise are too varied. But I think we can say something more helpful about the conflicts between the right to speak and the right to hear.

4. The Right to Speak and the Right to Hear in Conflict

The right to speak and the right to hear often live harmoniously together. My right to say whatever I want would normally serve your interest in hearing whatever people want to say. A free marketplace of ideas is, generally speaking, freedom for speakers and hearers alike. But conflicts between these rights are possible, and not all that infrequent. To see the potential for conflicts, we need to add a premise about the nature of rights: It is generally the case, especially with rights that protect (inter alia) some interests in choice, that a right to do something also entails the right not to do it. More precisely, if A has a right to φ , when φ stands for an act-type, and φ_1 is token of φ , then A has a right not to φ_1 . Examples are abundant: My right to do as I please with my body includes the right to scratch my head right now, which also entails my right not to do it; my right to hold a promisor to perform his promise entails that I also have a right to waive the performance; my right to marry entails my right to remain a bachelor; and so on and so forth. Generally speaking, then, the right to do something normally entails (though again, perhaps not always⁴⁵) the right not to do it if one so chooses. Thus, one would think that the same holds about the rights to speak and to hear. My right to speak would entail my right to remain

⁴⁴ Employers, for example, would normally have a right to know who is the person they are about to hire for a job, and some information they are no doubt entitled to get. But some information might be shielded by the prospective employee's right to privacy. There is often a conflict here that needs to be resolved.

⁴⁵ An exception, pointed out to me by Alex Sarch, concerns cases in which the right to do something is directly entailed by one's obligation to do it. These are rather special cases, I would think, and usually a right to do something that derives from your duty to do it is a liberty right, not a claim right.

silent, and my right to hear would entail my right not to hear this or that. And this, of course, might lead to conflicts.

To begin with, we have already seen that there are cases in which governmental agents, corporations and perhaps even some private persons are under a moral obligation to provide information they possess. Thus, when under such an obligation, the relevant agents or entities have no right not to speak. If, for example, an administrator is under an obligation to disclose her reasons for her administrative decision, her right to speak, though generally entailing a right not to speak, must be set aside for the sake of discharging her duty to disclose that which she is obliged to disclose. If and when there is an obligation to divulge some information, the obligation would normally trump the speaker's right not to speak. That is, after all, the point of the obligation. So this is one case, though probably the least problematic one, in which A's right not to speak conflicts, and may give way to, B's right to hear – that is, the right to get the information that A should divulge.

More problematic conflict, however, arises in cases in which hearers prefer not to hear something that a speaker wishes to express. Presumably governments and agents operating on their behalf would rather not hear criticism of their conduct, but I will assume here that we do not need to take such concerns seriously. Generally speaking, governments, I will assume, have no right not to hear. (An argument to establish this conclusion will take us too far into political theory, but I'm hoping that the conclusion is sufficiently uncontroversial to let me skip a detailed argument.) But the conflict is much more pervasive. Perhaps you want to tell me that in your opinion I am a callous person, but I would rather not hear that. Perhaps you want to express an anti-Semitic remark, or a racist one, or such, and I really do not want to hear it. Perhaps you want to display a painting or a photograph that offends my sensibilities and I do not want to see it. Such conflicts are everywhere. In other words, if the right to hear also implicates a right not to hear this or that, then the potential conflicts between the right to speak and the right to hear would seem to be very pervasive indeed. Let us see if we can limit the cases in which there is a genuine moral conflict.

By way of background, let me reiterate a point I tried to make earlier, that the right to speak is basically a control right, whereas control is not very central to the right to hear. Remember that the main interest that grounds our right to speak is an interest in having a great deal of control over what and how we communicate to others. People's ability to execute their own choices about things they want to express is really at the heart of the interest in question here. The various interests that ground the right to hear, however, are much less dependent on the value of personal choice and control. They have to do with the idea that access to information and knowledge are primary goods, something we want to have as much of as possible, regardless of anything else. The main interest here is in free access, not choice. Having some control may be useful, for sure. But control is not central to the kinds of interests that ground our right to hear.

If you suspect that I am heading toward the conclusion that people's right to make choices about what they get to hear is rather limited, you are not far off the mark. But we need to proceed with caution here. As I mentioned earlier, people should have a great deal of control over a number of things in the vicinity. We should have a great deal of control over what we pay attention to, and we should certainly have a great deal of control over the kinds of information we seek out, where we do it and how. But this last point generalizes in both directions. Most of the expressions one would rather not hear for some reason or other are the kinds of expressions one can choose not to hear, simply by not seeking them out. The fact that *Mein Kampf* is still out there and available to read does not mean that this filth is forced on me to read. Others can, if they choose, but I do not have to. In other words, there is a huge amount of stuff out there one can normally avoid to hear by simply not seeking it out.

This means that the difficult cases or, perhaps more accurately, the direct conflicts between the right to speak and the right to hear, are those in which we find ourselves literally confronted with expressions we would rather avoid. And, of course, there are such cases: The infamous neo-Nazi parade in Skokie, Illinois, is a case in point. People who lived there could not easily avoid the march. I remember times when many newspaper stands on main streets would display pornography all too openly for every pedestrian to see. And, of course, a racist bigot can shout his racist ramblings when you happen to pass

by on the street. Expressions are not always easy to avoid. Obviously, these are cases in which the right to speak and the right to hear may come into direct conflict. How to resolve such conflicts is not an easy question, and I cannot pretend to have the answer.

For now, let us return to those cases in which people find some expression objectionable and yet in some clear sense avoidable; cases in which you know that there is something out there you would wish, perhaps for very good reasons, not to have been expressed, but you have the option of not seeking it out, like the *Mein Kampf* you do not have to read or the pornography you do not have to watch, etc. Is there any plausible case to be made that your right to hear, entailing as we assumed a right not to hear, might justify preventing others from hearing it as well? I do not think so. Most scholars who advocate for the imposition of some restrictions on expression in such cases appeal to the harm principle. They argue that things like pornography, hate speech, racist propaganda and such are harmful, either because they tend to cause harm or, perhaps sometimes, constitute harm in humiliating or degrading. As I tried to argue in the previous section, I doubt that pointing out the harm to others is enough to justify legal prohibition on speech; if we bracket the argument from harm for a moment, then nothing is left for the hearer to rely on. My right not to hear something (that is not forced on me to hear) surely cannot extend to have others not hear it as well. Such an extension would entail that the space in which people can be free to make up their minds about what they seek out to hear would be alarmingly too small.⁴⁶

I use the space metaphor advisedly. I think that this last point is not really controversial. Practical controversies are about spaces, indeed, but in a more concrete sense. Conflicts between the right to speak and the right (not) to hear are often conflicts about the character of public spaces. The idea that different kinds of public spaces call for different kinds of protection is not new, of course. For example, I assume that most people would not think that there is anything wrong with nude sunbathing, but we would proba-

⁴⁶ None of what I say here should be understood as expressing a view on the complex issues of pornography and hate speech. Pornography, in particular, involves many complex issues that relate to the production side of it, including exploitation and coercion, that would certainly justify legal regulation in some contexts. And then there are many other complex issues about pornography I have not dealt with in this paper. About hate speech regulation the reader would not be surprised to hear that I have grave misgivings. But I don't take myself to have said enough here to justify my skepticism.

bly agree that nudism may be restricted to secluded beaches. Even those who would not advocate any legal prohibitions on pornography, to give another example, would probably concede that open display of pornographic images on main streets is unacceptable. In some sense, there is nothing terribly problematic about such regulations; they operate like zoning restrictions, and those we have, often for good reasons, in other domains as well. But the zoning of speech is much more delicate, of course, and sometimes very problematic. The categorization of audience interests we have in speech may become helpful here. It is arguable that the more highly valued a certain category of speech is, the less it can be subjected to zoning regulations. One can hardly make the case that social or political protest is fine, as long as it is not done on main streets. Or that you can publish a novel but not sell it on Amazon.com. Undoubtedly, we should be much more inclined to accept zoning regulations of low-value speech.⁴⁷ And this is fine, I think, as long as we also bear in mind that these categories are often vague, in flux, and should always be subject to legitimate challenge.

It is important to realize, however, that the issue here is not only about the relevant category of speech and its potential value; it is also a question about the nature of the public spaces we share. Some public spaces are such that it is warranted to guard them from certain forms of unwanted intrusions, but many others are quite the opposite; they ought to be open spaces where the right not to hear is severely restricted. For example, it may be perfectly OK to prohibit public displays of nudity in a residential neighborhood, but not OK to prohibit it in theaters. Some public spaces, by their very nature as such – as the kind of public forums they are and the values inherent in their public character -- are the kinds of spaces in which people should not have the right not to hear what others have to say. Contrary to what some of my colleagues advocate, I happen to think that research universities belong to the latter category; in fact, probably more so than almost any other public forum. But this particular debate is beyond the scope of this article. My only point here is that the conflict between the right to speak and the right to hear is partly a debate about the character of the public space in question.

⁴⁷ See L Green, “Pornographizing, Subordination and Silencing”.

5. Conclusion

My main argument in this paper is that the right to free speech is not a single right, complex as it may be. The right to speak and the right to hear are two separate rights, grounded in different kinds of interests. Choice and control are central aspects of the right to speak and much less central to the right to hear. I tried to show that this division of rights and their respective rationales can be utilized to explain how we think about some of the limits of the right to freedom of expression, particularly in the context of conflicts between the right to speak and the right to hear, conflicts that are rather pervasive. I have also argued, though perhaps less conclusively, that in thinking about the limits of freedom of expression, an exclusive focus on the harm principle would be misguided. There is no reason to deny that speech is often harmful, sometimes very much so, but the prevention of harm is not sufficient to justify legal prohibition, at least not in this case.⁴⁸

⁴⁸ I am very grateful to Alon Harel, Alex Sarch and Joseph Raz for helpful comments on previous drafts.

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