

Free speech for everyone, except . . .

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[T]he citizens of the U.S.S.R. are guaranteed by law:—

- (a) Freedom of speech;
- (b) Freedom of the press;
- (c) Freedom of assembly and of holding mass meetings;
- (d) Freedom of street processions and demonstrations.

These rights of citizens are ensured by placing at the disposal of the toilers and their organisations printing presses, stocks of paper, public buildings, the streets, means of communication and other material requisites for the exercise of these rights.

— *Soviet Constitution 1936, Article 125*

Since everyone agrees that democracy is a Good Thing, even manifestly undemocratic regimes have felt obliged to style themselves as “people’s democracies”.

Similarly, everyone agrees that freedom of speech is a Good Thing. So the Soviet constitution of 1936 virtually plagiarised the American First Amendment in guaranteeing the freedom of speech, press and assembly — and even went it one better by promising that the workers would have access to the materials needed for free expression.

Of course this was a bald-faced lie: barely was the ink dry on this constitution when Stalin launched the Great Purge that took the life of at least 700,000 people, many of them loyal party members.

But freedoms guaranteed on paper can also be undermined, not by outright lies, but by hedges, qualifications and loopholes that hollow out the promised freedoms to a narrow shell. This is achieved, not by straightforward mendacity, but by deceptive argumentation and artfully ambiguous phraseology. My goal in this essay will be to analyze some representative present-day examples of that tactic, on both “left” and “right”.

Very little that I have to say here will be new; all the reasons commonly given for limiting the freedom of expression were carefully analyzed long ago by John Stuart Mill and others. My purpose here is simply to remind contemporary readers of these widely-forgotten arguments.

First, a trivial observation: Everyone supports the freedom of speech for people whose views accord with one’s own; even Hitler and Stalin would have no complaint about that. The real question is whether, and to what extent, you support freedom of speech for people who *disagree* with you — and who perhaps disagree profoundly, on issues that concern you viscerally. As the socialist revolutionary Rosa Luxemburg famously said, “freedom is always and exclusively freedom for the one who thinks differently”. So calls for restricting the freedom of expression are *always* calls for muzzling one’s opponents, and *only* them: Free Speech for Me, but Not for Thee, as the American civil-libertarian journalist Nat Hentoff put it.

Furthermore, everyone agrees that the freedom of speech does not include crimes that are by their very nature committed by speech — for instance, fraud, extortion, bribery, or threat of violence — or incitement to immediate criminal acts. If Peter is holding a gun to Paul’s head and Mary tells Peter to shoot, then Mary is clearly guilty of incitement to murder, whether or not Peter actually pulls the trigger. Likewise if Mary encourages Peter to shoplift.

But nowadays people surround their endorsement of the freedom of expression with many qualifications and hedges that go far beyond these uncontroversial exceptions. It is worthwhile to examine in detail some of these qualifications, and the reasons given for them.

One commonly asserted exception to the freedom of expression is “hate speech”. Of course this term is woefully ambiguous, and its possible definitions, as well as the proper responses to such speech, have been extensively discussed by philosophers. It would be too lengthy to enter into that debate here; instead, I would simply like to look at some contemporary real-life examples of how the “hate speech” appellation has been applied in practice.

Consider, for instance, a conservative Christian who sincerely believes that homosexual sex is sinful, and says so publicly. Is he guilty of “hate speech”? Many of the advocates of the “hate speech” exception would say yes, but on what grounds? This person *might* hate homosexuals, but if so, that would have to be proven by other evidence; there is nothing inherent in his view that entails any form of hatred. Indeed, as a Christian he might sincerely profess to *love* homosexuals and simply wish to persuade them to see the error of their ways — just as a feminist might seek to persuade a sexist, or a vegetarian seek to persuade a carnivore.

If this is pointed out, the advocate of the “hate speech” exception might concede that what is involved here is not really hate, but insist nevertheless that it involves the denial of gay people’s human rights. But is that really so? Even if one agrees (as I do) that any two (or more) consenting adults, regardless of their sex, have the right to engage in sexual relations if they so choose, asserting that homosexual sex is sinful does nothing to deny gay people that right. Gay people’s rights would be denied only if the conservative Christian argued not only that gay sex is sinful, but that it should be criminalised — as it was in the UK until 1967 — *and* Parliament enacted that prohibition into law. And even in that case, it would be the government that violated gay people’s human rights, not the conservative Christian; at most he would be guilty of advocating for a policy that in the critic’s (and my) opinion would be morally wrong.

But ought *that* be an exception to the freedom of speech? If so, people who believe that human life begins at conception would be equally justified in denying the freedom of speech to the advocates of legalised abortion. Or rather, they *would* be justified unless one added the condition that freedom of speech should be curtailed only when the policy being advocated is *actually* morally wrong — and that would raise the obvious question, who decides?

Of course, if one were to hold that gay people not only have the right to have sexual relations with any consenting adult of their choice but *also* have the right to prevent others from criticising their sexual choices, then gay people’s rights would indeed be infringed by the conservative Christian. But that is a radically totalitarian view; in a democracy, no one’s views or behaviour ought to be immune from critique. Everyone has the right to criticise, and everyone has the right to respond. Moreover, those who implicitly hold this view wouldn’t dream of applying it consistently: gay people’s sexual

choices may be immune from critique, but conservative Christian theology most certainly is not.

In recent years, “progressive” advocates of censorship have applied the concept of “hate speech” in an even more extreme way against gender-critical feminists, whom they misleadingly label as “transphobic”. These feminists do not, it goes without saying, hate transgender people; on the contrary, they stress that transgender people should be free to live their lives as they wish and should be fully protected from violence, discrimination and harassment. But gender-critical feminists disagree with some aspects of gender-identity ideology: that subjective gender identity should take precedence over biological sex in all social and legal situations; that transwomen (that is to say, biological males who consider themselves to be women) and natal women should be treated in the same manner in all situations (including single-sex changing rooms and women’s sports); or that teenagers questioning their gender identity should routinely be “affirmed” and prescribed puberty blockers. These disagreements on contested philosophical, social, political and medical issues are summarily labeled by trans-activists as “hate speech”, with a clear double aim: to discredit the gender-critical position as “prejudice” or as questioning “trans people’s right to exist”, and thereby to avoid confronting the actual substance of the debate; and, if possible, to block its expression entirely.

For instance, Saira Weiner, candidate of UCU Left for General Secretary of the University and College Union, recently offered an eloquent defense of academic freedom and the freedom of expression, going on to apply it (absolutely correctly in my view) to recent debates concerning Israel and Palestine. But when a Twitter (oops, X) user expressed pleasure “to see a UCU candidate coming out in favour of academic freedom”, Weiner hastened to clarify that “I do not support anyone’s right to hate speech that denies or questions people’s choice to determine who they are.” Indeed, the only reference to “freedom” in her election manifesto occurs in the remarkable sentence,

We must protect the concepts of freedom of speech and academic freedom from those who seek to abuse and distort their meaning to attempt to justify transphobia.

Black is white, apparently, for UCU Left. Similar sentiments were expressed by another faction, UCU Commons. I refer readers to an article by the Australian political philosopher Holly Lawford-Smith for a more extensive analysis of the question, “Is gender-critical speech hate speech?”

The same tactic has, alas, also been used on the right, by those who insist that characterising Israeli government policy in the occupied territories as apartheid is “antisemitic”. Aping the “progressives” but with an opposite target, they argue not only that such “hate speech” is unprotected by law, but that universities are in fact legally obliged to *suppress* it, based on a rather extreme interpretation of the Public Sector Equality Duty in the Equality Act 2010. (Ironically, on the other side, UCU Left wants to deny a campus platform to “supporters of Israeli apartheid”.)

Similarly, Home Secretary Suella Braverman has urged police to “use the full force of the law” against people who “invite support for Hamas”, display Hamas flags, or even use chants like “From the river to the sea, Palestine will be free.” She asked not only whether this chant “should be understood as an expression of a violent desire to see Israel erased from the world” — an interpretation that could in *some* instances be accurate —

but whether using it should “in certain contexts” be regarded as a criminal offence under Section 5 of the Public Order Act 1986, which forbids “threatening or abusive words or behaviour . . . within the hearing or sight of a person likely to be caused harassment, alarm or distress thereby”. This is a criminalisation of political speech, tendentiously recharacterised as hate speech and harassment.

Finally, even when hatred really is involved, the law sometimes takes bizarre turns. For instance, although in the UK there is no law forbidding “hate speech” as such, there is a law forbidding incitement to racial and religious hatred. That sounds reasonable — but think about it for a second. In a democracy, everyone has the right to hate whomever they want. Alice hates TERFs and Tories; Bob hates blacks and Jews. None of these hatreds are particularly nice, if you ask me; but they are lawful, and rightly so: it is not the business of the state to be policing people’s private thoughts. Of course, some *actions* predicated on hatred are unlawful — for instance, physical violence or employment discrimination — but hatred itself is not. But it is now a crime in the UK to incite people to do something that is in itself perfectly lawful. And that is bizarre even if the crime is limited, as it is here, to situations involving “threatening, abusive or insulting words or behaviour”.

One of the oldest canards, in circumscribing the freedom of speech, is that it does not permit “shouting ‘Fire’ in a crowded theatre”.

First of all, this phrase is a misquotation. What U.S. Supreme Court Justice Oliver Wendell Holmes actually wrote was:

The most stringent protection of free speech would not protect a man in *falsely* shouting fire in a theatre and causing a panic. [emphasis mine]

Moreover, this quote comes from an ignominious 1919 decision in which, as the late Christopher Hitchens has eloquently pointed out,

[Holmes] was sending to prison a group of Yiddish-speaking socialists . . . opposing President Wilson’s participation in the First World War and the dragging of the United States into this sanguinary conflict, which the Yiddish-speaking socialists had fled from Russia to escape.

In fact it could be just as plausibly argued that the Yiddish-speaking socialists, who were jailed by the excellent and overpraised Judge Oliver Wendell Holmes, were the real firefighters, . . . the ones shouting “fire” when there really *was* a fire, in a very crowded theatre indeed.

And as Hitchens observed, “who is to decide?”

For what it’s worth, Holmes himself changed his mind after reading Zacharia Chafee’s *Harvard Law Review* article “Freedom of speech in war time”, and he dissented in a similar case later that same year. Holmes observed that

Persecution for the expression of opinions seems to me perfectly logical. If you have no doubt of your premises or your power, and want a certain result with all your heart, you naturally express your wishes in law, and sweep away all opposition.

But, echoing John Stuart Mill, he continued:

But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas . . . That, at any rate, is the theory of our Constitution. It is an experiment, as all life is an experiment. Every year, if not every day, we have to wager our salvation upon some prophecy based upon imperfect knowledge. . . . I think that we should be eternally vigilant against attempts to check the expression of opinions that we loathe and believe to be fraught with death, unless they so imminently threaten immediate interference with the lawful and pressing purposes of the law that an immediate check is required to save the country.

Gradually the Supreme Court retreated from the panics of the Red Scare and, later, McCarthyism and appreciated the wisdom of Holmes' dissent. This evolving jurisprudence was finally consolidated in the 1969 case of *Brandenburg v. Ohio*, which held that all political speech — even the advocacy of violence or other unlawful conduct — is protected by the First Amendment unless it is aimed at inciting *imminent* lawless action. The rationale is simple: If an orator harangues an enraged mob and says “kill the Jews”, there is a serious danger that the mob might carry out the suggestion before anyone had an opportunity to present counterarguments. But if someone publishes an article or a tweet with the same vile message, sane people have ample opportunity to respond.

It goes without saying that this is a contested doctrine — though it is by now firmly established in American law — and people on both sides of the Atlantic are perfectly free to disagree with it and to argue against it on both philosophical and political grounds. Indeed, the current law in the UK enshrines — unfortunately in my opinion — a vastly narrower view of free speech, arising from parliamentary sovereignty and the absence of a written constitution, with only the notoriously hedged Article 10 of the European Convention on Human Rights serving as a partial constraint. The gross illiberalisms of our Terrorism Act — criminalising many forms of nonviolent political speech — are one scandalous example.

But don't ever let anyone get away with saying blandly that “freedom of speech is not absolute”. Instead, demand that they make precise *which* restrictions on the freedom of expression they are arguing for, and on what grounds. Demand that they answer Mill's two objections to restrictions on the freedom of debate. And make sure that they answer Hitchens' question: “Who decides?”

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