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Justifications of Freedom of Speech: Towards A Double-grounded Non-consequentialist Approach

Abstract

This paper aims to develop a ground for freedom of speech that combines two justifications- democratic participation and autonomy. First, it is argued that consequentialist justifications, such as discovery of truth and personal development, are far from providing a strong justification for free speech due to their reliance on uncertain empirical validation. Second, it is claimed that a stronger and better ground for free speech can be constructed by articulating two non-consequentialist justifications for free speech- democratic participation and autonomy. This articulation, which I call the *double grounded non-consequentialist justification* for free speech, considers autonomy and democratic participation as complementary principles. In this sense, a *double-grounded justification* engages justification as autonomy and democratic participation in a dialogue in order to provide remedies for the specific weaknesses of these two positions.

Key words: Free speech, freedom of expression, free speech principle, autonomy, democratic participation, discovery of truth, personal development

Introduction

Freedom of speech is one of the most significant political values and fundamental rights in the contemporary world. Although it might be regulated in certain situations, such as libel, obscenity, slander and certain expressions of hatred towards ethnic, cultural and sexual identities of persons, it is considered as a fundamental right that is in need of protection in a democratic society.

There are various positions that argue for the justification of freedom of speech. While each of these positions that justify freedom of speech emphasizes one major value, this paper claims that the best ground for freedom of speech can be founded on non-consequentialist justifications,

such as autonomy and the democratic participation of citizens. In this manner, I also claim that consequentialist justifications, such as discovery of truth and personal development, cannot provide strong grounds for freedom of speech (even though they provide some grounds) because they base their arguments on uncertain empirical grounds. In line with this, I provide a justification for free speech which is founded on the idea of respect for the equal autonomy of individuals and which considers right to free speech as an integral component of democratic participation. In this sense, it relies on two complementary grounds that recognize free speech as a fundamental right of individuals. I argue that the combination of the two principles of democratic participation and autonomy provides the better justification for freedom of speech than any other single justification and is better than either of these on their own.

In the paper, first, I intend to discuss the structure of free speech as a principle: what it means to refer to free speech as a principle specifically. Then, in the second part, I aim to clarify conceptually what I mean by speech. This part aims to set out the conceptual scope of the free speech principle. Then, in the third part, I critically analyze four major justifications for freedom of speech: first consequentialist justifications (discovery of truth and personal development) and second, non-consequentialist justifications (autonomy and citizen participation). I aim to construct a ground for freedom of speech which is rights-based and non-consequentialist but at the same time plural (double-grounded).

Characteristics of the Free Speech Principle

This paper considers freedom of speech as an independent principle that requires justification of its own regardless of the justifications for freedom in general or any other concept in political theory. That is, the acceptance of freedom of speech does not need to depend on the acceptance of the argument for a broader principle. Yet, this does not mean that freedom of speech cannot be

justified as part of a broader principle, such as freedom, but it means to argue that it requires a separate argument that explains the importance of free speech and why it should be protected.

Most liberal theories consider free speech as a principle. Commitment to free speech means extending special protections to speech that we do not extend to other actions. In this sense, “when a free speech principle is accepted, there is a principle according to which speech is less subject to regulation (within a political theory) than other forms of conduct having the same or equivalent effects. Under a free speech principle, any governmental action to achieve a goal, whether that goal be positive or negative, must provide a stronger justification when the attainment of that goal requires the restriction of speech than when no limitation on speech are employed” (Schauer 1982, 7-8). When the issue of limiting or regulating speech arises, the threshold of justification is higher than for other forms of conduct.¹

Not everyone agrees with the regulation of free speech, for instance free speech absolutists. A naïve version of free speech absolutism claims that speech cannot ever legitimately be regulated (Maitra and McGowan 2012, 4). However, this position is unacceptable from both principled and practical points of view. As a matter of principle, if we take that argument as true, we would end up violating some very basic principles, such as equal respect and autonomy, and also rights, such as the right to privacy. For example, some situations of racist hate speech might violate the principle of racial equality. From a practical point of view, if we try to apply an absolutist position in real life, we would end up in chaos, with the state losing its capacity to protect individuals’ basic rights. For instance, in cases of targeted private libel, certain individuals might be seriously harmed even to the degree of physical harm. That is to say, we can think of free speech cases that require regulation.

Arguing for a free speech principle does not necessarily mean holding an absolutist position about the regulation of speech, and moderate versions of the absolutist argument accept regulation to a certain extent. Although, it is generally accepted that the state should not interfere with speech if it is not aiming to prevent harm, still the mere fact that a particular category of speech is harmful does not provide full justification for state regulation. Rather, it must also be demonstrated that the harms associated with that category of speech prevail over the concerns in favor of permitting it (Maitra and McGowan 2012, 12).

Considering free speech as an independent principle lies in the belief that speech is valuable in a distinct way which requires special protection. Political theorists have different views about what makes speech so valuable and worthy of protection, and the importance and relevance of the free speech principle differs from one approach to other. As mentioned before, the goal of this paper is to examine these various ways of justifying free speech in order to argue for a revisionist ground for the principle of freedom of speech. Below, after discussing the scope of free speech, I intend to begin the analysis of different reasons for freedom of speech: to what extent they can offer satisfactory reasons for freedom of speech.

Free Speech and Its Scope

I begin by drawing the conceptual and substantive boundaries of speech that falls under the free speech principle. As a general point to start with, I use the concept of expression interchangeably with the concept of speech, although, needless to say, not all types of expression can be considered as speech. For example, there are certain expressions which solely aim at self-expression without any interpersonal communicative intent. These cannot fall under the free speech principle.

In order for a type of expression/speech to be counted as a subject of the free speech principle, it has to have a communicative and other-regarding character. Thus, acts and expressions that aim to be heard and evaluated by others constitute the main concern of freedom of expression. Here, as Schauer rightly points out, we cannot consider any type of self-expression under the free speech principle since that would be an over-inclusive theory lacking the capacity to delineate a meaningful scope for the free speech principle (Schauer 1982, 92). Instead, we need a sound and concrete scope for the free speech principle in determining what counts as free speech and what does not.

On the communicative character of speech, Alan Haworth provides a good illustration which enables us to comprehend better how constitutive and significant this aspect is for speech to fall under the free speech principle. He says:

Imagine, then, that the ruling junta of some monolithic, one-party, totalitarian state decides to erect 'free speech booths' at accessible points throughout the land; at street corners in cities and towns and elsewhere. Suppose that these resemble telephone booths but that, unlike telephone booths, they have no windows. Suppose that they are sound-proof, too. The point is that once inside the booth you have complete privacy. Under the system you are at liberty to enter an unoccupied booth whenever you like and express any opinion you want in any tone of voice. You can mutter imprecations or you can scream out loud 'Down with the dictators!' Let us suppose that there is even a graffiti wall with pens provided gratis and that—as you leave—this is automatically wiped clean, ready for the next occupant. (Haworth 1998, 11)

Can we argue that these private speech booths provide a realm of free speech? The answer is not at all. This example proves better that without its communicative (other-regarding) character, speech is no longer a free activity. Even if it is institutionalized and counted as a legitimate activity, as long as it is not communicated, it loses its public character.

I use expression and speech as functional terms in order to define the scope of the free speech principle. For this reason, I do not reduce speech to solely linguistic expressions as in actually speaking. Expression/speech has a broader meaning, including symbols, phrases, slogans, pictures, photographs, bodily movements and other types of visual and auditory expressions.

What is important for an expression to be counted as free expression is its other regarding and communicative character, not its form.

Given that an expression must have a communicative character to be counted within the scope of the free speech principle, a diverse realm of activities can be included: public speeches and declarations, whether made by institutions or individuals, various publications, such as books, journals or newspapers, other types of media, such as TV programs and internet websites, and even artistic works and performances. Here, it is important to mention that I do not necessarily argue that the expressions in those realms should not be regulated. There might be situations that direct their regulation, but even their regulation should be subject to the constraints of the free speech principle.

As already explained, in order to fall conceptually under the scope of the free speech principle, the speech has to be communicative, other-regarding and public. However, as argued above, this does not mean that any speech that has these characteristics is protected. For instance, depending on whether speech is political or not, it can be subjected to certain regulations. From a normative (substantive) point of view, political speech that aims to contribute to public political deliberation requires higher standards of protection than other non-political speech, such as commercial speech, pornography or hate speech. This is required by the special characteristics and vital importance of political speech, as a constitutive element of democratic participation. This is to say, without free political speech, we cannot have political deliberation. This point will be illustrated in detail in the last part of the paper.

Discovery of Truth as a Reason for Freedom of Speech

One of the most significant justifications for freedom of speech is the discovery of truth. It is first developed by John Stuart Mill in *On Liberty*. Indeed, we might refer to two separate

interpretations of Mill's conception of freedom of speech in *On Liberty*: discovery of truth as a justification for freedom of speech and autonomy as a justification for freedom of speech. According to the argument from discovery of truth, diversity of opinions is essential for reaching the truth. In this part of the paper, I critically analyze Mill's argument about discovery of truth as a reason for freedom of speech and then in the part where I deal with autonomy as a justification for freedom of speech, I concentrate specifically on his justification of freedom of speech as autonomy.

We might find the ground of Mill's argument on discovery of truth as a justification for free speech in the following lines:

1. Any opinion that is compelled to silence may be true and to deny this would be assuming infallibility.
2. Even if the silenced opinion is an error, it may contain a portion of truth and since the general opinion on any object may rarely or never involve the whole truth, it is only by the articulation of various opinions, we may reach the truth (Mill 1986, 60).

Here, Mill grounds his theory on skepticism by claiming that we cannot be sure whether the silenced opinion is right or wrong. Therefore, for him, to refuse a hearing to an opinion means assuming ultimate certainty and infallibility (Mill 1986, 24). However, no authority can assume infallibility in its judgments.

The argument from skepticism is not problematic in itself. Rather, the difficulty arises with Mill's assumption that a diversity of opinions and their free discussion necessarily leads to the discovery of truth and to better individual and social decisions. This is one of the most criticized and contested parts of Mill's argument on truth and free speech since it is generally claimed that

to prove or disprove this assumption empirically is not possible. I agree with this criticism in general, though with some qualifications.

Alan Haworth illustrates quite well what Mill has in mind about the relation between truth and free speech. He thinks Mill's conception of liberty resembles what he calls 'the liberty of the seminar room'. Haworth qualifies what he means by the seminar group: a group of earnest and rational individuals whose purpose is to find the truth (Haworth 1998, 27). Individuals express their opinions in turn for consideration by others and arguments are elaborated with the hope to make some advancement towards the truth. All opinions, even the ones that appear wild and extravagant, are treated with equal seriousness. (Haworth 1998, 27) In my opinion, that type of free speech best fits with scientific communities and universities, where free expression of ideas and opinions are essential for improving scientific, technical, theoretical and social knowledge.² Imagine a totalitarian society where there is censorship on the dissemination of certain type of scientific research due to the fact that it is against the state's doctrine. By censoring it, the state prevents any contribution that this scientific research might supply to the society. Moreover, in scientific circles, knowledge and dominant scientific paradigms change by way of being criticized and challenged by rival paradigms. If the authorities apply censorship in the expression and dissemination of new scientific findings, then it would be naïve to expect much scientific progress. These considerations suggest that Mill's theory of free speech based on truth discovery has relevance for environments where there is a commitment to the discovery of truth, such as scientific communities.

But what about the society? Can we as easily claim that free expression and discussion of ideas and opinions lead to the discovery of truth and individual and social growth? Here, Mill's argument is in need of empirical evidence since it is formulated as an empirical claim. However,

as an empirical claim, this view faces important counter-examples from history. For example, as Eric Barendt reminds us, the Nazis came to power in Germany in 1933 even though there had been (relatively) free political discourse under the Weimer Republic during the 1920s (Barendt 2007, 11). Of course, this is not to argue that truths are more likely to be discovered in non-free speech contexts or we do not need freedom of speech at all for truth. Rather, it can provide reasons for regulating speech in certain situations so as to provide room for true propositions to emerge.

What is weak and what is strong in Mill's justification of free speech as discovery of truth? It is the relationship that he established between the discovery of truth and free speech that seems to be problematic rather than his skepticism regarding the truth claims expressed in the fallibility of human judgment. In the light of what we discussed above, I think we might contend that skepticism as the only ground for freedom of speech might be a weak ground to justify the free speech principle, although this does not mean that we cannot benefit from skeptical argument concerning the truth when justifying free speech. In the part on autonomy as a justification for freedom of speech, I discuss Mill once again but this time relating to his another justification of freedom of speech; that is autonomy as a stronger ground for freedom of speech.

Personal Development as a Justification for Freedom of Speech

One of the major grounds of free speech is personal development. Barendt formulates the main argument of this theory as follows: "Restrictions on what we are allowed to say and write, or (on some formulations of the theory) to hear and read, inhibit our personality and its growth" (Barendt 2007, 15). People need to express their opinions freely, and be listened to and criticized

by others, since this is important for developing their personality and ideas. That is, free speech is necessary for intellectual, emotional and spiritual development of one's personality.

It can be inferred that this type of justification considers free speech as a human need for a person's self-fulfillment. However, it seems to be difficult to prove this type of empirical claim. As Barendt notes, "it is far from clear that unlimited free speech is necessarily conducive to personal happiness or that it satisfies more basic human needs and wants than, say, adequate housing and education" (Barendt 2007, 15). Here, it seems that one is required to say something more about the significance of free speech for human beings.

One possible way to argue for the importance of free speech for personal self-fulfillment would be founded on the communicative character of speech that emphasizes the instrumental role of free speech for intellectual development. That is, it is only by way of speech (including symbolic expressions) that human beings communicate their opinions, judgments and feelings. Without communication, individuals will not be aware of the reaction and judgment of other individuals. Most intellectual production is generated by deliberating communicatively the ideas and judgments of other individuals, with speech forming the medium located in the inter-subjective realm where individuals interact. Nevertheless, it is still difficult to argue for the priority of free speech compared to other human needs even if we accept that it has an instrumental value for personal development.

Another possible way to argue for the importance of speech for intellectual development can be founded on the ontologically existential character of speech for personal self-fulfillment. Grounding speech as a distinctive characteristic of human beings that express themselves publicly might provide a non-consequentialist aspect to the theory of personal development. In an Arendtian sense, one might attribute to speech an existential significance: only by way of

speech do human beings express their unique identity among others in the public realm.³This might provide a stronger non-consequentialist dimension for the justification by personal development. However, the argument that unlimited free speech serves intellectual and personal development still needs empirical validation, which leaves the justification by personal development a weaker basis for explaining why free speech is important.

Joseph Raz develops a complementary version of the justification as personal development. Raz states that “an important case for the importance of freedom of expression arises out of the fact that public portrayal and expression of forms of life validate the styles of life portrayed, and that censoring expression normally expresses authoritative condemnation not merely of the views or opinions censored but of the whole style of life of which they are part of ” (Raz 1991, 310). Here, Raz assumes that it is indeed the life styles that are censored, not the expressions of opinions, because expressions of opinions reflect the life styles of individuals.

Raz claims that freedom of expression enables the validation of life styles in two ways: first, ways of life are validated through open expression and portrayal; second, when a specific way of life is censored, it is not only its expression that is disapproved but the whole way of life of which it is a part (Raz 1991, 312). Yet, why should we allow free expression of different life styles, or why is censorship of different life styles wrong? Raz replies that free expression is a public good. It is part of public culture not only in showing the absence of censorship but also of providing access to the expression of various ways of life. That is, censorship denies individuals the benefits of a culture in which expression is free. Through validation of their viewpoints, adherents of distinct ways of life benefit from a reassurance of their way of life and public acceptance of their conception of the good life.

Raz emphasizes that the argument about personal development concerns not only the interests of the right-holders but also those whose interests are served by the condemned way of life (Raz 1991, 314). In this sense, censorship is a harm done to the common interest of all. The free speech that serves the personal development of the person who expresses it also serves the personal development of other individuals who identify themselves with the same way of life. For instance, it would be wrong to censor an opinion due to the fact that it expresses contents that we do not like, favor or approve of because the life of the adherents of that particular conception of good is as valuable as our way of life.

Joseph Raz's justification as personal development is founded on the idea that cultural diversity is a good in itself to be protected because distinct ways of life are significant for the personal development and identification of individuals. Individuals are born, raised and developed in certain cultures that are the expressions of various conceptions of good life. For equal public validation of conceptions of good life, which are essential for personal identification, censorship should not be permissible. I think one can agree with this ground as a matter of empirical fact in daily life. However, Raz's argument seems to suffer from an ambiguity: as presented, it does not offer us any clue regarding the regulation of speech, especially certain categories of hate speech. Is any kind of speech valuable for personal identification or, if not, what are the categories of speech that can be regulated? It seems Raz's theory needs to provide an answer to these questions.

The theory of personal development, like the theory of discovery of truth, suffers from a reliance on empirical validation to justify free speech. This aspect means the theory offers weaker grounds for free speech since we do not know if empirical validation is possible and, even if it is possible, to what extent this argument might be considered as a justification for free

speech, particularly in light of cultural diversity. That is, individuals born in some cultures may have different values that do not prioritize free speech and can be happy and develop satisfactorily without it. Therefore, it is difficult to prove empirically the relation between free speech and personal development. While Raz's theory seems to offer a stronger ground by linking free speech and identification with distinct ways of life, his theory still needs to define the boundaries for regulating categories of hate speech.

Democratic Participation as a Justification of Free Speech

This justification has been promoted by thinkers such as Meiklejohn and Sunstein. The core idea is that free speech is essential for the functioning of democracy since it is necessary for the political participation of citizens. Citizens need to be aware of various viewpoints in order to form their opinions and judgments concerning political problems and decisions. It is a right of a citizen to participate in democratic political processes, so government censorship violates that right to political participation. Put this way, this is a non-consequentialist, rights-based justification as long as it recognizes free speech as a constitutive element for political participation and democracy, rather than just a means to achieving them. Indeed, it is hard to imagine genuine political participation under conditions of government censorship.

Justification as democratic participation is founded on different interpretations of the First Amendment of the US Constitution. Alexander Meiklejohn's interpretation, which is one of the most significant, emphasizes political participation as the core element of a democracy. For Meiklejohn, freedom of expression should be cultivated in order to enable genuine participation of citizens in the active sharing in the government of their country (Meiklejohn 1961, 260-261). Free expression should be cultivated in cultural centers in every town and village, where citizens have the chance to discuss public policies. Here, Meiklejohn does not instrumentalize freedom of

speech for the purposes of democratic participation. Instead he argues that free expression is an essential component of political participation.

As far as regulation of speech is concerned, the distinction between public and private matters. Meiklejohn says that, in cases of private defamation where one individual does damage to another by word or pen, the First Amendment does not protect the person's speech (Meiklejohn 1961, 259). However, if the same verbal attack is made to show that a candidate is unfit for a governmental position, then this speech is protected by the First Amendment because the act is considered as an act of political participation. In this sense, it is considered that the verbal attack is related to the business of governing. The same principle applies to speech that condemns or disapproves of the policies of a government or the structure of the Constitution (Meiklejohn 1961, 259). These are public issues regarding which the citizens have the authority and are assumed to have competence to judge. In this sense, for Meiklejohn, private libel is subject to legislative control whereas political or seditious libel is not (Meiklejohn 1961, 259).

There are two major criticisms regarding the justification as democratic participation for free speech: protection of non-political speech and speech that advocates the overthrow of democracy. Barendt criticizes Meiklejohn by arguing that, as long as the argument is founded on the need to provide citizens with a variety of views to hold government to account, free speech only covers political speech so there would be little justification for extending its protection to other forms of speech, such as literary and artistic discourse, sexually explicit material or commercial speech (Barendt 2007, 19). However, I think Meiklejohn's own theory provides an answer to this criticism. He claims that the First Amendment protects 'obscenity' in arts and literature because the authority of citizens to decide what they shall write, read and see has not been transferred to any of the branches of the government (Meiklejohn 1961, 262).⁴

Here, Meiklejohn recognizes free speech as a basic right of citizens who are the sovereign authority in a democracy rather than just an instrument for democratic participation. This again demonstrates that Meiklejohn's theory is not a consequentialist theory but considers free speech and political participation as complementary rights.

The second criticism claims that the democratic participation argument cannot cover non-democratic speech under the free speech principle. We can also find an answer within Meiklejohn's theory to counter that argument to a certain extent. As mentioned before, Meiklejohn recognizes criticism, disapproval and condemnation of government policies and the structure of the Constitution as a right to political participation since these issues are public concerns. It therefore might be inferred that Meiklejohn's theory has the potential to cover even speech that aims to overthrow democracy, although I believe that it needs to be argued more firmly and strongly.⁵ As Barendt mentions, here we need an argument which relies on a broader freedom of expression rather than relying merely on democratic participation (Barendt 2007, 22). It is possible to include speech that aims to overthrow democracy with a justification that bases itself on the recognition and respect of the equal status of all citizens, including minority groups and parties. The autonomy-based arguments that provide this possibility are addressed in the next section of the paper.

Sunstein develops a parallel argument to Meiklejohn in arguing for democratic participation as a justification for free speech. Sunstein, referring to Madison, emphasizes the significance of free speech for the deliberation of people who are the sovereign in a democracy. He says: "Madison did place a high premium of political (not economic) equality and on the deliberative functions of democracy. He understood the free speech principle of the American Constitution, for which he above all, was responsible, in the light of these commitments. It therefore seems

reasonable to describe the Madisonian conception as one that associates free speech with his distinctive understanding of politics” (Sunstein 1995, xvii). In Sunstein’s view, the Madisonian understanding of politics considers people as the sovereign whose exercise of sovereignty is manifested in deliberative political participation. In this respect, freedom of speech is considered as an essential component of political participation since it contributes to the democratic decision-making process by facilitating democratic articulation of interests and by providing knowledge about the merits and demerits of the candidates for public office. Thus, deliberative political participation is possible only with freedom of speech: free speech is a constitutive component of political participation.

Sunstein calls his theory a two-tier First Amendment theory of free speech. A two-tier theory protects speech on the basis of its value, distinguishing between political speech and non-political speech: political speech is considered as high value speech that requires high standard protections: “I mean to treat speech as political *when it is both intended and received as a contribution to public deliberation about some issue*” (Sunstein 1995, 130).⁶ He adds that it is not necessary that the political intention must be understood by everyone and the political character of the speech is independent of the writer’s or artist’s understanding of politics. This means it is enough if a few people recognize the speech’s political content regardless of the judgment of the writer or artist. Making reasonable inferences from the speech is enough to determine the political character of the speech (Sunstein 1995, 131).⁷ Sunstein includes art and literature in his definition of political speech because he considers most art work as a contribution to social deliberation.

The reason Sunstein thinks political speech requires high standards in regulation is due to his belief that political speech aims to contribute to public deliberation and political participation,

which ultimately serves the functioning of democracy. That is, political speech contributes to democracy as an important component of public deliberation. Why is the theory two-tier but not one tier? The answer lies in the distinction between the characteristics of political and non-political speech because we cannot apply the same standards of regulation to political and non-political speech. Thus, he claims: “A system in which the most stringent standards were applied across the board would probably ensure that government could not regulate (among other things) criminal solicitation, child pornography, private libel, and false or misleading commercial speech. The harms that justify such regulation are of course real. But if we are to be honest, we will have to conclude that those harms are insufficient to permit government controls under the extremely high standards applied to regulation of political speech” (Sunstein 1995, 128). Thus, the unique character of political speech in relation to democracy requires different and higher standards for its regulation.

What about the second tier? Is second tier (nonpolitical) speech subject to too much censorship in Sunstein’s theory since it is subject to lower standards in regulation? Sunstein answers this with a straightforward no, arguing that his theory allows much room for challenges to regulatory efforts aimed at any speech, including non-political speech (Sunstein 1995, 155). He lists what he calls *impermissible government justifications* for the regulation of any speech: “In general, government cannot regulate speech of any sort on the basis of (1) its own disagreement with the ideas that have been expressed, (2) its perception of the government’s (as opposed to the public’s) self-interest (3) its fear that people will be persuaded or influenced by ideas, (4) its desire to ensure that people are not offended by the ideas that speech contains” (Sunstein 1995, 155).

Both Meiklejohn and Sunstein emphasize the quality of free speech as public and political speech. In this manner, as a constitutive component of public deliberation (not a simple instrument to public deliberation), free political speech contributes to democratic participation. This does not mean other forms of speech should always be subject to regulation but we might allow less stringent standards of protection. Considering free speech as a constitutive aspect of democracy and, therefore, treating it with extremely high standards of regulation is valuable because the protection of the right to free speech is one of the most significant principles preventing a regime developing authoritarian tendencies. That is, it is one of the most important guarantees of democracy.

Autonomy as a Justification for Free Speech

Autonomy is one of the most significant justifications for freedom of speech. Generally, the argument can be formulated as follows: individuals, as rational and equal beings, have the right to autonomous choices of their own on the basis of their conceptions of good. The government should therefore treat individuals as rational and autonomous by allowing them all the information and advocacy that might be helpful to a rational, autonomous person making a choice (Greenawalt 1989, 150). In what follows, I refer to the versions of the theory developed by J. S. Mill, Ronald Dworkin and Thomas Scanlon.

Most literature on J.S. Mill ignores the autonomy dimension of his free speech theory, solely concentrating on discovery of truth as a justification for freedom of speech in *On Liberty*. Earlier in this paper, I also discussed in detail Mill's argument on discovery of truth as a justification for free speech. I claimed that due to its reliance on uncertain empirical validation, this justification is far from providing a strong principled ground for free speech. On the contrary, now, I want to

draw attention to an important dimension in Mill's free speech theory that allows us to develop a listener-based autonomy justification for free speech.

In *On liberty*, Mill argues even if the received opinion is the whole truth, it is in need of contestation and criticism (Mill 1986,60-61). Otherwise, the held opinion would be no more than a prejudice with little comprehension of rational grounds. Moreover, he adds that without the contestation of counter opinions, the meaning of the doctrine will be lost and the dogmas will prevent the growth of real convictions from reason or personal experience (Mill 1986, 60-61). Without the challenge of contestation and criticism, the opinions and doctrines will be left without any real justification and rational grounds.

Why is being justified in one's criticism significant for autonomy and free speech? I think what Mill's wants to argue is that as autonomous and rational beings, individuals are required to hear all the opinions regardless of the nature of these opinions in order to develop justified criticisms as part of whatever conception of good they want to follow in life. Censorship of certain opinions would prevent those persons who would criticize these opinions from fully justifying their claims, and justified claims are significant for choosing and following a conception of good freely. In this sense, as Daniel Jacobson rightly argues, Mill's argument is not straightforwardly consequentialist in the sense of marketplace of ideas maximizes true belief and that Mill's argument concerns justification rather than truth (Jacobson 2007, 89). It is a requirement of autonomy to hear all sorts of counter opinions and arguments freely both as a speaker and listener and therefore to be justified in one's opinions and criticisms. As autonomous individuals, we should be able to develop freely whatever conception of good we want to follow in life and this is only possible without an external intervention on opinions that we need to

hear. We encounter a similar listener-based argument in Scanlon which will be taken up also in this section of the paper later.

As one of the contemporary versions of the autonomy justification for free speech, Dworkin developed an argument on the basis of what he calls moral independence. He says: "People have the right not to suffer disadvantage in the distribution of social goods and opportunities, including disadvantage in the liberties permitted to them by the criminal law, just on the ground that their officials or fellow citizens think that their opinions about the right way for them to lead their own lives are ignorable or wrong. I shall call this (putative) right the right to moral independence," (Dworkin 1981, 194). The right to moral independence recognizes the autonomy of individuals in making their decisions without being forced or hindered. Any intervention on the basis of the belief that a particular way of life is wrong or ignorable is unjustifiable.

Yong correctly identifies that the justificatory foundation of the right to moral independence lies in the principle of equality (Yong 2011, 392-393). Dworkin founds his argument of moral independence on the principle of equal respect and concern for all citizens as a foundational principle of political morality. He asserts that we need rights as distinct elements of political theory when some decisions harm some people yet claim to make the community as a whole better off in terms of its well-being. In this way, he claims, we must say that the decision is wrong because it does not take the damage done to some individuals into account and, therefore, does not treat these individuals as having equal status entitled to the same respect and concern as others (Dworkin 1981, 211). This means that laws should not impose and privilege one conception of good life over others. The right to free speech requires equal respect and concern for all conceptions of the good and the right to moral independence.

We might claim that Dworkin develops a theory of free speech which is concerned more with the interests of the speaker. His conception of moral independence aims to allow people to express themselves freely. But this does not mean that his theory rules out the interests of listeners. The government's imposition of one conception of good over others prevents individuals making autonomous choices (both listeners and speakers) because, in this way, the government does not recognize individuals as equal citizens who can decide how to live their life.

Scanlon also develops an account of free speech that is based on autonomy. He asserts that, as a general principle, "the powers of a state are limited to those that citizens could recognize while still regarding themselves as equal, autonomous, rational agents" (Scanlon 1972, 215). He states that this principle is a Millian principle which restricts governmental authority over the lives of individuals: a government is not entitled to censor speech on the grounds either that its audience will form harmful beliefs or that it may commit harmful acts as a result of these beliefs (Scanlon 1972, 213).⁸In this sense, Scanlon's Millian Principle is founded on a similar ground to Dworkin's principle of moral independence: both principles forbid illegitimate state suppression on the ground that the speech is ignorable, wrong or harmful to others.

Although Scanlon's account of free speech concerns the autonomy of individuals in general, we might claim that he explicitly regards the interest of the listener when developing a rights-based thesis. The individual has a right to hear views and opinions and to consider acting on them as a requirement of being an autonomous person. "An autonomous person cannot accept without independent consideration the judgment of others as to what he should believe or what he should do" (Scanlon 1972, 216). He may decide to rely on the judgment of others but, even for this, he has to evaluate freely and independently the opinions and evidence that are proposed by

others. Thus, individuals not only have a right to free speech but also a right to hear and evaluate the speech of others freely and independently.

Considering the arguments raised for free speech from autonomy, perhaps the most serious criticism that we can make is that autonomy-based arguments fail in some respect to differentiate between different categories of speech. The same principle of the right to autonomy (Mill's justification in one's criticism, moral independence in Dworkin, and the Millian Principle in Scanlon) seem to apply to all categories of speech with the same force. Scanlon, in a later article on free speech, tries to rectify this weakness by claiming that, although he still endorses most of the consequences of the Millian principle, he rejects the thesis that the Millian Principle applies to all categories of speech with the same force (Scanlon 2003, 96). He seems to suggest instead that political speech, as a category, should have a higher standard of protection because, where political issues are concerned, governments are partisan and unreliable (Scanlon 2003, 98). However, we need to ask whether this justification is enough for designating the specific status of political speech. It seems that a more foundational justification is required for vindicating the significance of political speech as a category.

One of the most frequent criticisms of the autonomy argument is that, in reality, individuals' choices hardly reflect their self-mastery. Along these lines, Sunstein claims that some forms of commercial speech or racist hate speech may not reflect speaker autonomy at all (Sunstein 1995, 143). Moreover, there are many real life obstacles to exercising full autonomy, such as lack of education, information and opportunities (Sunstein 1995, 143). Although these criticisms are valuable and point out realistic conditions of exercising of autonomy, they do not go beyond merely addressing how difficult it is to act as fully autonomous individuals. Thus, they are hardly challenges to the principle of autonomy considered as an essential element of human dignity. In

this respect, autonomy as a human capacity provides a principled justification for free speech, if not a complete justification.

Towards a Double-grounded Justification of Freedom of Speech

So far, I have claimed that consequentialist justifications fail in certain respects to provide a strong ground for free speech due to their reliance on uncertain empirical arguments. For this reason, I contended that we need to look for non-consequentialist justifications if we want to rely on stronger justifications for free speech. I therefore analyzed two other justifications: democratic participation and autonomy.

In the following sections, I aim to think over some possible grounds that combine these two types of justifications of freedom of speech- democratic participation and autonomy. This reflection mainly focuses on non-consequentialist justifications in search of principled ground(s) for freedom of speech. I do not claim that the combination of these two justifications can offer a complete theory that solves all the problems regarding hard cases about freedom of speech but I believe that a good articulation of these grounds at least provides a strong principled justification that is also capable of providing possibilities of solutions to certain problems of freedom of speech.

My double -grounded justification is based on two principles. First, it considers autonomy as one of the fundamental grounds for freedom of speech. Here, autonomy is understood as an essential element of our human capacity to choose the way of life that we want to live and decide on matters of life on the basis of our choices, without being subject to any intervention or imposition of another way of life on us. This definition thus embraces Mill's justification in one's criticism, Dworkin's right to moral independence and Scanlon's Millian principle. The right to free speech is essential for both expressing my opinions freely and hearing the opinions of others

freely because that is a requirement of my autonomy as an individual. Thus, a double-grounded justification is both speaker-based and listener-based.

A double-grounded justification also embraces an egalitarian dimension in the sense that the state should show respect to the equal autonomous status of all conceptions of good. It should refrain from imposing any conception of good over others because that would mean silencing or censoring some opinion on the basis of the belief that it is wrong or ignorable. Censoring an opinion because it is either wrong or ignorable is a clear indication of disrespect to the autonomous status of certain individuals because it implies that those individuals are not capable of free deliberation and choice for themselves.

Second, a double-grounded justification is founded on the idea that free speech is a constitutive element of democratic participation. In this sense, like the theories of Meiklejohn and Sunstein, it argues that free speech provides the conditions of democratic articulation of different interests, information on the merits and demerits of candidates for public office, and various opinions about public political problems. Thus, it facilitates democratic deliberation in the sense that, without free speech, we cannot exercise our right to democratic participation. Free speech is not a simple instrument that helps democratic deliberation but is rather a constitutive and essential component of democratic participation.

A double-grounded theory considers the two above-mentioned principles (autonomy, democratic participation) as complementary principles. At least, we might say that there is nothing contradictory in presenting these two principles as a double-ground for free speech. That is, the right to autonomy and the right to political participation both provide strong grounds for free speech. Free speech is a requirement and an essential element of a person's autonomy because, without free speech, the exercise of autonomy is unthinkable. In a similar vein, as stated

above, free speech is a requirement and essential element of political participation because, without free speech, the exercise of political participation is unthinkable.

In considering autonomy and democratic participation as complementary grounds, a double-grounded theory not only aims to address the strong aspects but also to identify and address the weak aspects of these justifications for free speech and to try to consider possible remedies for rectifying these weak aspects. By analyzing these two justifications in a dialogue with each other, it aims to provide an effective articulation of the two standpoints so that the shortcomings of each theory can be overcome.

As explained above, perhaps one of the most acute shortcomings of the justification as autonomy is its ambiguity in identifying categories of speech and regulating speech on that basis. It seems that the right to autonomy requires the protection of any kind of speech under the free speech principle. Yet, what should we do about racist hate speech or violent pornography? Are they also subjected to the same protection as political speech? Here, the argument from autonomy seems to be incomplete.

Some might argue that the harm principle might work here to classify the regulation of certain harmful speech. However, given the ambiguity of the harm principle as to what precisely counts as harm or not, it seems still impossible to produce even a vague categorization of speech and regulation on that basis. For instance, most thinkers that base their arguments on autonomy do not consider pornography as harmful. Yet, from some feminist perspectives, we might claim that it is harmful because it presents the body of women as an instrument of sex in the service of men, which might lead to serious psychological and social harm because it disrespects the individuality of women. Some might therefore claim that the offence principle serves better for

categorizing and regulating speech. However, the offence principle too seems ambiguous because it can be interpreted in many different ways.

In the light of what has been said, a double-grounded justification embraces a categorization that assigns a high value to political speech. Political speech that aims to contribute to public deliberation should receive the highest standards of protection under the free speech principle. Following Meiklejohn and Sunstein, a double-grounded justification categorizes speech in two tiers: political speech and other types of speech. This is founded on the assumption that free speech is a constitutive and essential component of political deliberation and, therefore, requires higher standards of protection. For instance, it claims that, whereas we need to protect even untruthful (deceptive) political speech, untruthful (deceptive) commercial speech might be regulated in case it harms individuals.

What categories of speech are included in the definition of political speech? As stated above, speech intended as a political contribution to public deliberation counts as political speech. In this sense, like Meiklejohn, a double-grounded theory considers most art work and literature as political speech since they are eventually social contributions. The reasonable judgment of people is enough to claim that a particular type of speech is political. Yet, what about hate speech? Is this counted as political speech? A double-grounded justification does not consider hate speech as political communication that aims to contribute to public deliberation. Similarly to Meiklejohn, it takes political speech to be communication among free and equal persons.⁹ Since hate speech does not recognize the individuals that it targets as free and equal, it does not respect them. Therefore, hate speech falls categorically outside the scope of fully-protected free speech, belonging instead to the category of non-political speech category that includes violent

pornography, private libel, false and deceptive commercial speech. Therefore, it can be regulated.

In line with what has been said above, it is still needed to address the position of double-grounded theory on hate speech more firmly. How does double-grounded theory react if a person tries to justify hate speech on the grounds of autonomy by claiming that it is a requirement of his or her autonomy to speak up freely and also hear those opinions that he or she would criticize for a full justification of his or her own opinions? Is it enough to claim that hate speech falls categorically outside the scope of protected political speech since it does not aim to contribute public deliberation to counter this challenge?

In order to answer this question, it is significant to define what hate speech amounts to. Bhikhu Parekh defines hate speech as speech that “expresses, advocates, encourages, promotes or incites hatred of a group of individuals distinguished by a particular feature or a set of features.” (Parekh 2006, 214) Thus hate speech is not simple disrespect and disapproval of others, rather it is a manifestation of hostility, rejection and a wish to harm and destroy the targeted group of people. On these lines, Parekh defines three characteristics of hate speech. First, he says, it singles out an individual or a group of individuals on the basis of certain features. Second, hate speech ascribes to its target group constitutive qualities that are highly undesirable and unchangeable. Lastly, and perhaps most strikingly, the targeted group is placed outside the normal social set of relations in the sense that the group is presented as disloyal to the shared institutions of the society. (Parekh 2006, 214) Since the group is labeled as unreliable in entering into meaningful relations with other members of the society and observing the rules governing society, one implication of hate speech would be that the targeted group may therefore

be legitimately expelled, discriminated against or at best tolerated as an unavoidable evil (Parekh 2006, 214).

As described above, hate speech does not recognize the members of the targeted group as individuals who are capable of free deliberation and choice for themselves. This means denying their autonomy as equal and free citizens in a political society. There are serious implications of the hate speech for the members of the targeted group and the society in which this group of people live. Hate speech violates the dignity of the members of the targeted group by labeling them as individuals who are incapable to abide by the rules of the political and social institutions of the society. As a result, the targeted group members feel intimidated in participating public political life and speak up their opinions freely. Moreover, the full freedom that is given to hate speech towards them by the community might lead them to think the political community either shares the sentiments of the hate speech or does not respect their dignity and self-respect to take any action (Parekh 2006, 217). This would lead to more alienation of the members of the targeted group from the public political life. In this manner, eventually hate speech prevents the exercise of the autonomy of these people by denying their autonomous capacity through various mechanisms of labeling, targeting, advocating, discrimination etc.

Given these features of hate speech, how do we respond to the person who is against the censorship of hate speech on the grounds to fully justify his own counter opinions? As demonstrated above, hate speech denies the equal autonomy of certain group of people and in this sense, it rejects the primary assumption of autonomy argument itself which declares that autonomy is a human capacity of all individuals. In line with this, it rejects the universal procedural rules of public political deliberation by denying equal and free status to all citizens in a political community. Thus, hate speech does not constitute a proper public political

argument/validity claim that is formulated in an acceptable way by other free and equal persons of political dialogue.¹⁰ Given these characteristics of hate speech, it is undesirable to regard hate speech as political speech that should be fully protected. It can be regulated as a second-tier type of speech like other non-political speech such as commercial speech and private libel.

Denying full protection to hate speech does not mean we should regulate hate speech in all aspects of life. In certain social settings, esp. in private settings such as family and even in civil society, hate speech would continue to appear unregulated in various forms. It is also practically impossible to regulate all hate speech in all aspects of life. Therefore the person who tries to justify hate speech on the grounds of autonomy for full justification of his or her counter opinions would not be left without any challenge to his or her counter arguments. Double-grounded theory is concerned with hate speech in public political domain and its possible regulation since hate speech is not regarded as first tier fully protected speech.

In previous parts of this paper, I claimed that justification as democratic participation seems to be ambiguous on the status of speech that aims to overthrow democracy. I mentioned that Meiklejohn allows room for speech that criticizes, disapproves and condemns government policies and even the structure of the Constitution, yet a more robust inclusion of non-democratic speech is required. I think the argument from autonomy might help us here. The justification as autonomy recognizes the equal status of all individuals in determining their conception of good and leading their lives on that basis. In this manner, free speech as an equal right of both speakers and listeners is a requirement of the principle that every individual is morally independent in choosing his/her way of life. Therefore, even those who do not believe in democracy should be allowed to speak freely since it is a requirement of their equal autonomy. Thus, we can affirm that a double-grounded theory includes even non-democratic

speech within its scope. Nevertheless, as Steven Heyman reminds us, “when revolutionary speech unjustifiably poses a serious danger of unlawful action, it violates the rights of others and may be prohibited” (Heyman 2008, 125). However, this does not mean that non-democratic speech is unprotected: on the contrary, speech that criticizes the government and the existing political order should receive the greatest protection due to its political character in contributing to public deliberation and the requirement of recognizing the equal status of all individuals in a community.

How does the autonomy component of the double-grounded theory relate to the rejection of anti-democratic/non-democratic speech? Like in the case of non-democratic speech, justification of autonomy also regards the opinions of those who reject anti-democratic speech as first tier political speech which should be protected. The persons who reject anti-democratic speech should be allowed to speak freely since it is a requirement of their autonomy. People should be able to choose any conception of life- be it democratic or anti-democratic- and express their opinions about these conceptions of good freely. Complementarily, justification of democratic participation regards the expressions about the rejection of anti-democratic speech as speech that aims to contribute to public political deliberation and therefore must receive the highest protection.

Conclusion

In this paper, I aimed to develop a ground for freedom of speech that combines two separate justifications- democratic participation and autonomy. First, I critically analyzed possible justifications for free speech (both consequentialist and non-consequentialist justifications), namely discovery of truth, personal development, democratic participation and autonomy. Then, by developing a revisionist justification of free speech, I contended that the best

ground for free speech can be established by articulating certain aspects of non-consequentialist justifications, such as democratic participation and autonomy.

Before beginning to examine the various justifications of free speech, I first explained the characteristics of the free speech principle and its scope. I claimed that it is an independent principle which requires a justification of its own regardless of the justifications of freedom in general or any other concept. Moreover, although I contended that communicative, other-regarding and public speech fall under the conceptual scope of the free speech principle, I also argued this does not mean that all speech that carries these characteristics is fully protected. Specifically, I argued that political speech is the most critical speech to be given the greatest protection.

After examining discovery of truth and personal development as consequentialist justifications for free speech, I concluded that, although they offer good reasons for free speech to a certain extent, eventually their arguments require empirical proof. This requirement of empirical validation makes them weak foundations for free speech due to the uncertainty of finding empirical proof.

The revisionist justification for free speech that I developed, a double-grounded justification, is founded on two complementary principles: autonomy and democratic participation. It considers the rights to autonomy and democratic participation as two complementary principles. Without the right to free speech, the exercise of autonomy is impossible and, in a similar vein, without free speech, democratic participation is impossible. Therefore, free speech is a constitutive value and right that is an essential prerequisite of autonomy and democratic participation.

A double-grounded justification engages justification as autonomy and democratic participation in a dialogue to rectify the weaknesses of each position. First, it claims that justification as autonomy alone fails to distinguish between different types of speech, so it seems to run the risk of suggesting that any type of speech is protected. The strategy that is developed by justification as democratic participation offers a valuable remedy to this problem. Specifically, a double-grounded theory adopts a categorization that prioritizes political speech over non-political speech by suggesting that political speech should receive the highest standard of protection under the free speech principle.

In line with the two-tier categorization of the double grounded theory, complementarily, both autonomy component and democratic participation component of the double-grounded justification consider hate speech as non-political speech that could be regulated. Hate speech denies the equal autonomy of certain groups of people and therefore rejects the primary assumption of the autonomy argument that claims autonomy is a human capacity of all individuals. Secondly, it denies the universal procedural assumptions of public political deliberation by non-recognition of equal and free status of all individuals in a shared political community. For these reasons, I contended that hate speech does not constitute a proper political argument and thus does not receive the highest first tier protection by the double-grounded justification.

Lastly, I claimed that justification as democratic participation cannot provide a straightforward argument for the inclusion of non-democratic speech that aims to overthrow democracy. I therefore contended that the justification as autonomy for free speech might incorporate non-democratic speech under the free speech principle. According to the autonomy argument, all individuals have an equal right to pursue whatever conception of good they think is

the best. Therefore, even people who do not believe in democracy should also be able to speak freely in line with their conception of good since freedom of speech is a requirement of the equal autonomy of all individuals. Likewise, people who reject anti-democratic speech should be able to express their opinions freely too as a requirement of their autonomy.

Notes

¹The standard of this threshold is subject to debate. Most commonly, it is held that, as long as the speech does not cause harm, it should not be regulated or limited. Another approach to define the threshold might emphasize offence as different from harm. But, in both cases, the definitions of harm and offence, and which type of harm or offence matters in regulation is subject to debate too.

²A similar argument is stated by Eric Barendt on the relevance of the relation between truth discovery and free speech. He claims that the assumption that freedom of discussion necessarily leads to the discovery of truth and to better decisions is warranted in environments where there is usually a shared commitment to the discovery of truth, such as universities and members of a scientific community. He states that it is clearly wrong to censor expression in such communities on the ground that it challenges received wisdom (Barendt 2007, 10).

³See Hannah Arendt. 1958.*The Human Condition*, Chicago: The University of Chicago Press.

⁴Unlike Meiklejohn, Robert Bork does not extend the scope of explicitly political speech to literary and artistic expressions. He states that “explicitly political speech is speech about how we are governed, and the category therefore includes a wide range of evaluation, criticism, electioneering and propaganda. It does not cover scientific, educational, commercial or literary expressions as such.” (Bork 1971, 28)

⁵On the issue of enlarging speech beyond simply governmental dissent, Robert Bork argues for a counter position. For him, first amendment protects speech that is explicitly political but not any speech that concerns government and law. He claims that speech that advocates forcible overthrow of the government and violation of law must be excluded. Forcible overthrow of government violates constitutional truths since it does not aim to define political truth by a legislative majority. In a similar vein, advocacy of law violation is a call to set aside the outcomes that are reached by political speech (Bork 1971, 30-31).

⁶Italics belong to the author.

⁷ Sunstein distinguishes between speech with broadly political consequences and speech which is political in a constitutional sense: “For purposes of the Constitution, the question is whether the speech is intended and received as a contribution to political deliberation, not whether it has political effects or sources” (Sunstein 1995, 154). For Sunstein, while obscenity, commercial speech, perjury, threats and attempted bribery all have political consequences, they are nevertheless not entitled to the highest form of protection because they do not count as political in the constitutional sense.

⁸ It is important to mention that Scanlon’s Millian Principle is not founded on any assumption that truth will emerge from open discussion. Rather, his emphasis on Mill is limited to autonomy and, therefore, the legitimate limits of governmental authority over the lives of individuals.

⁹ In a similar vein, Steven Heyman asserts that political speech is a discourse among individuals who recognize each other as free and equal persons. Thus, for him, on a Meiklejohnian and Habermasian view, both of which he also endorses, hate speech is not aimed at mutual understanding, but rather domination and subordination of others (Heyman 2008, 177-178).

¹⁰ Here, I rely on a Rawlsian – Habermasian ground that considers public deliberation as an activity based on reasonableness and public reason as two principles that play a major role in debates regarding political matters. In political deliberation, citizens are expected to raise their arguments in a way that other reasonable free and equal citizens can understand and accept. For a detailed debate on this, see Rawls, John. 2005. *Political Liberalism*. New York: Columbia University Press, Rawls, John. 2005. “The Idea of Public Reason Revisited.” in *Political Liberalism*. New York: Columbia University Press, Habermas, Jürgen. March 1995. “Reconciliation Through the Public Use of Reason: Remarks on John Rawls’s *Political Liberalism*”, *The Journal of Philosophy*, Vol. XCII, No.3, Habermas, Jürgen. 1998. “Reasonable versus “True”, or the Morality of the Worldviews” in *Inclusion of the Other – Studies in Political Theory*, edited by Ciaran Cronin and Pablo De Greiff. MIT Press.

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