Routledge
Taylor & Francis Group

Javnost - The Public

Journal of the European Institute for Communication and Culture

ISSN: (Print) (Online) Journal homepage: https://www.tandfonline.com/loi/rjav20

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To cite this article: Dario Mazzola (2020) Free Speech and Ideology: Society, Politics, Law, Javnost - The Public, 27:4, 325-336, DOI: 10.1080/13183222.2021.1843848

To link to this article: https://doi.org/10.1080/13183222.2021.1843848

Published online: 01 Dec 2020.

Javnost: The Public, 2020
Vol. 27, No. 4, 325–336, https://doi.org/10.1080/13183222.2021.1843848

FREE SPEECH AND IDEOLOGY: SOCIETY, POLITICS, LAW

Dario Mazzola

Free speech remains a crucial question at the heart of every democracy. In Western countries, citizens ranging from progressive fringes to "constitutional conservatives" defend it as frequently as staunchly. In this paper, I discuss the tensions and contradictions of some formulations of free speech. Among other, I draw on two authors converging in their critique from two very different perspectives: Alasdair MacIntyre and Stanley Fish. After having assessed the extreme conception of free speech and having shown its implausibility, freedom of speech is characterised as ideological in at least one definition of the word, that employed by legal realists. I claim that free speech is indeed an incomplete, context-sensitive right granted to someone on some occasions, often depending on extra-legal, historical, sociological, political and practical factors. This leaves the door open to interpretations of the right to free speech as ideological in other and more substantial ways, such as in the venues of Critical Legal Studies. I conclude by drawing implications applicable to our societies in their current conditions, with a special focus on the role of new media.

KEYWORDS free speech; ideology; social media

Introduction: Free Speech Between Social Conflicts and Legal Criticism

On May 29, 2020, *The Washington Post* webpage hosted two pieces voicing rather different, but not outright opposite views. One was penned by Amber Phillips and eloquently entitled "No, Twitter is not violating Trump's freedom of speech." The other was written by Henry Olsen and held that "Twitter's double standard has become painfully clear." Both were dealing with the Trump-Twitter clash over the labelling of the President's tweets. Direct access to one of the tweets—in which Trump warned that "when the looting starts, the shooting starts"—was even blocked by Twitter. According to Olsen, the argument that the tweet would have constituted an incitement to violence was hardly compatible with Twitter's reactions to similar or even more graphic messages from actors of different political and cultural stripes—Ali Khamenei's threat that Israel would have been "uprooted and destroyed," to cite but one. Therefore, Olsen considered Twitter to have betrayed its purported neutrality, and to be drifting away from common societal standards by applying restrictions which would hardly be compatible with "freedom of speech." "I believe in freedom of speech," Olsen wrote, "and freedom of speech unfortunately often includes calls for generalized violence and gross exaggeration."

On the other hand, Amber Phillips dismissed Trump's own allegation that Twitter would have been "completely stifling FREE SPEECH." To the opposite, she noticed that the First Amendment of the American Constitution would rather have protected Twitter's discretion over the content to publish—or to censor. The reverse would have been true in

case of a similar attempt to control information *by the government,* as was the case, according to Phillips, with Trump's executive order on the matter, which would have struck down Section 230 of the 1996 Communications Decency Act.

In fact, claimed Phillips, Twitter is a private platform and can engage in all sorts of communicative acts, including censorship, as the First Amendment would be a check to ensure liberty *from,* rather than *of,* the State when it comes to speech and expression.

If these clear tensions still do not amount to contradictions, the following seems a more difficult case.

On 7 January 2015 12 victims were killed, and 11 injured, in the terrorist attack against the office of French satirical journal *Charlie Hebdo.* The massacre was vindicated by al-Qaeda as a reaction against the publication of cartoons satirising Muslim sacred symbols and persons, and which would be considered a crime of blasphemy under sharia law—thus punishable by executions. The French and Western world leaders reacted to the dramatic event by reasserting the fundamental values of liberal democracies, and especially the principle of free speech, and participated in "Republican marches" which mobilised millions of people worldwide.

However, among the many controversies of the days, one strikes as especially puzzling. The antisemitic and far-right leaning comedian Dieudonné mocked the anti-terrorism rallies on Facebook by overemphasising them as comparable to the Big Bang and "the crowning of Vercingétorix," and concluded with a provocative statement by declaring "Je me sens Charlie Coulibaly" ("I feel like Charlie Coulibaly"): a combination between the name of the magazine and that of a terrorist assailant who was detaining four Jewish hostages at the time of the post. He was immediately charged for apologia for terrorism, with then Prime Minister Manuel Valls commenting that "Racism, negationism, antisemitism, and apology for terrorism are not opinions: they are crimes" (*Le Parisien,* 12 January 2015). In the following years, Dieudonné has been found guilty of the crime and condemned. His attempted line of legal defence, as well as the doubt that might arise when considering the case, was that his was an instance of freedom of expression which should have been protected no differently than *Charlie*'s. And from a formal and abstract point of view, he seems to be right, as he was obviously expressing "speech." The relevant difference had to be lying somewhere else, as I will try to show in this article to answer the difficulties raised by these examples.

I begin by expounding over the mainstream/standard liberal conceptions of free speech briefly. I then recall two critiques of the general principle by Stanley Fish and Alasdair MacIntyre. I further substantiate these critiques and their implications by resorting to a liberal and legal realist conception of ideology, which can fruitfully be radicalised as a critical legal conception of ideology also. I then apply the concepts hitherto introduced to our current conditions of social expression. Finally, I draw summarising conclusions and return on the cases expounded over at the outset.

As it should be apparent from this résumé, this inquiry is scarcely dependent upon a specific angle in political theory. Even the tensions in liberal theory I analyse have been noted by liberal proponents of freedom of expression themselves since the outset and are currently the object of debates in the same tradition. However, I do employ concepts drawn from the scholarship of Critical Legal Studies significantly, and this should ensure a methodological and discursive continuity with the other contributions to this special issue —as for the thematic continuity, it should be self-evident, as this article draws on communication itself and on its legal standing and implications.

The first convergence between the view espoused here and the scholarship of Critical Legal Studies is the awareness that "Communication, in general, and legal communication, in particular, is an act with consequences, and comprises performative utterances with effects." (Hafner et al. 2012, 1), and this distinction, as I will show, already stands in the way of some common misunderstandings on the right to free speech and the application of the harm or offence principles.

Another convergence, which might trouble readers with a presupposition for the rational completeness and full efficacy of the law, is on the inherent ambivalence and openness of legal language, which the right to free speech exemplifies paradigmatically: "rules are not free from interpretation, from controversy … from social conceptions, manipulation, political beliefs and 'diplomatic' law" (Hafner et al. 2012, 2). With remarkable explicitness, the European Court of Human Rights clarifies that:

> … whilst certainty is highly desirable, it may bring in its train excessive rigidity and the law must be able to keep pace with changing circumstances. Accordingly, many laws are inevitably couched in terms which, to a greater or lesser extent, are vague and whose integration and application are questions of practice. (*The Sunday Times v. The United Kingdom* (1979) ECHR 1: para. 49; cited in Hafner et al. 2012, 3).

If this is true of law in general, it must hold all the more for such an abstract and fundamental principle as the freedom of expression or free speech (given the difficulties in distinguishing speech from expression, in this article I use the two words interchangeably unless otherwise noted). The prima facie obviousness and robustness of this principle itself, I will show, is more reliant on societal shared presuppositions than on the essence of the principle itself—conceding that it has any.

Freedom of Expression: Liberal Accounts

Perhaps the most influential and exemplary proclamation of free speech comes from John Stuart Mill's pamphlet *On Liberty,* published in 1859 (cf. summaries and discussions in Warburton 2009; Van Mill 2018). Therein, this founding father of modern liberalism famously held that every human being is entitled to the largest freedom of speech compatible with not *harming* others. The conception of harm is central in that formulation as it distinguishes it from accounts on which speech should be constrained within the limits of offence or implausibility. Harming others would consist merely in infringing directly upon their rights (Van Mill 2018), an incident which would be highly dependent on the context of speech itself. Mill himself provides the telling example of a dishonest corn dealer, who could be denounced freely on print, but not by haranguing her in front of an angry mob gathered before her house, as this latter might develop into lynching and violent disruptions of the public order. While a detailed reconstruction is obviously impossible here, a few of its elements need to be noted. First, Mill was generally referring to speech considered as articulate and would-be rational linguistic acts, as perhaps implicitly opposed to mere expressions, and presupposed the commitment of the speaker to a sort of "discourse ethics" he himself displayed (MacIntyre 2006, 222; Van Mill 2018). Second, Mill's account is teleological: being a consequentialist/utilitarian, Mill believed the justification of freedom of speech resided entirely in the function that such freedom would have discharged to the benefit of mankind, at least in general and in the long run. Unsuppressed speech—Mill advised refraining from censoring not only at a state and law, but also at a

social and individual level, except for extreme circumstances—would have ensured that dogmas were tested, and that truth triumphed either by its exchange with prejudice or by its collision with error. Mill's faith in progress through rational debates and reforms—especially by means of unconstrained speech—is a hallmark of his belonging to the nineteenth century and of the legacy of the Enlightenment. However, another sign of Mill's historical situation is the sharp distinction between actual—physical—harm and psychological damage. Finally, Mill's conception is highly contextual, as is clearly displayed by the corn dealer's example: the same utterance can be positive in one context and prohibited in another. It would be coherent with Mill's underlying principle that the example would be reversed under additional or different information: for instance if one knew for certain that a press campaign against the corn dealer would have been sufficient to provoke the ravaging of her manor, or if by converse it was assured that the "angry mob" would be too small in number to push through the house's fortifications. Therefore, Mill's principle, at least as it was originally conceived, would not only sanction a very radical and wide-ranging conception of free speech, but also recommend the scrutiny of careful prudence on each of its problematic applications.

While Mill's ideal and the harm principle remain at the core of liberal freedom of expression even nowadays, one important modification has been suggested by Joel Feinberg to the effect that an offence principle should rather be observed. This would ensure that hate speech, which does not cause any harm per se, would be condemned and reasonably sanctioned together with other expressions which would undermine the fabric of society by pitting ethnic, ideological or religious groups the one against the other. These approaches still mark the debate (Billingham and Bonotti 2019).

However, far more radical and far-reaching modifications have taken place within the liberal camp, with some authors writing on very different views (Fish 1994; Riordan 2016) to criticise the "absolutization" of free speech. This would have taken place in the United States most prominently and would consist in holding that speech no matter how offensive must be endured: an initially progressive absolute guarantee which would then have been exploited by extremists of all kinds.

Does Free Speech Exist? Two Critiques

It is, in part, to react to this dogmatisation of free speech, exemplified in his eye by those who refused to pass speech codes on campus thereby allowing attacks on minorities and even negationist views, that Stanley Fish made his controversial and provocative claim that "free speech doesn't exist" (Fish 1994). Nonetheless, the statement should be taken seriously and to the letter, as Fish argues in the same book and with similar persuasion that "liberalism doesn't exist more generally."

In order to understand these explosive statements, Fish's interest in John Milton provides important background. Indeed Fish finds some of the earliest examples of his point in Milton's seminal *Areopagitica,* published in 1644 as one of the first modern defences of freedom of the press (Warburton 2009) and whose very title is inspired by Ancient Athens' *parrhesia* (the freedom of speech enjoyed by free citizens in assembly). This is because Milton, after having passionately defended the right to publish before undergoing the scrutiny of the censor, "catches himself up short and says, of course I didn't mean Catholics, them we exterminate" (Fish 1994, 103), as tellingly witnessed by a quote from the poet:

> I mean not tolerated popery, and open superstition, which as it extirpates all religious and civil supremacies, so itself should be extirpate . . . that also which is impious or evil absolutely against faith or manners no law can possibly permit that intends not to unlaw itself.

Fish explains that the underlying rationale of this otherwise surprising and apparently paradoxical statement is in fact the same that not only limits but even justifies and gives meaning to norms of unrestrained expression. Indeed, what makes expression itself meaningful is its weight in the face of a societal—there is no such thing as purely private speech—choice or challenge, one that is dictated by pursuing this or that specific social purpose, and the contradiction of which society cannot tolerate.

Both limiting and enabling speech, as well as establishing the necessary background of silence—be it literal or figurative: the absence of disturbing or contradicting expressions—participate in this pursuit and acquire their value only within it. An absolute refusal to regulate such speech would not be a law, but a refusal to legislate—law that unlaws itself, as Milton has it—a mere withdrawal of communal and social practice from a public space than cannot then rest in a void, but rather be appropriated by other group or individual practices, that is, become regulated by and censored by normative spheres other than the law. Fish's more general critique of liberalism follows the same lines in highlighting its negative nature: liberalism is based on negative rights, rights not to be interfered with, especially to protect individuals and groups from state power, but this can only make sense within a broader perspective. In this latter, the state *has* values and purposes—as absolute neutrality would be tantamount to non-existence, or to self-destruction—and such values and purposes can be enumerated as democracy, personal dignity, education—which incidentally rules out unrestrained disinformation in schools and on campuses—and even more specific and historicised values such as racial equality and the recognition and condemnation of the Holocaust.

However, Fish's conclusion is not an invitation to abolish the U.S. First Amendment: he does indeed believe that it might be instrumentalized to slow down and block censorship and interference in an area where the presumptive assumption would be for non-intervention. Nonetheless, he advocates an even more daring usage of free speech to the purpose of substantive agendas:

> Therefore, even with a reduced sense of the effectivity of First Amendment rhetoric (it can not assure any particular result), the counsel with which I began remains relevant: so long as so-called free-speech principles have been fashioned by your enemy (so long as it is his hoops you have to jump through), contest their relevance to the issue at hand; but if you manage to refashion them in line with your purposes, urge them with a vengeance. (Fish 1994, 114).

While Fish writes from the general perspective of anti-foundationalism, he finds himself, partially, in an unexpected agreement with the Aristotelian-Thomist Alasdair MacIntyre. In his essay on "Toleration and the goods of conflict" (MacIntyre 2006) MacIntyre concedes much of the classical liberal common understanding of the issue by claiming "that we ought to agree with at least some of Locke's conclusions, or rather perhaps with conclusions drawn from lines of thought initiated by Locke, while deriving those conclusions from premises of a very different kind from Locke's, but that in Mill's case we should assent to some of his premises, while drawing very different conclusions." (208). MacIntyre does indeed endorse Locke's conclusion that the modern nation-state should be neutral and passive between different conceptions of the good—religious or otherwise.

Although, this is not because MacIntyre would be convinced of the sincere disinterestedness of the state. To the contrary, according to MacIntyre the modern nation-state is an increasingly developing power and institutional apparatus which has been secured, will be secured, or is in the process of being secured, in part or completely, by this or that particular interest group, with its own conception of the good, or anyways its specific partisan interests. The move of acting as arbiter is useful to secure the moral high ground and to subtract some basic claims from disputes, yet in the same way as a gambling house gains from the players' matches quietly and unnoticedly, so do the elites who dominate the nation-state profit from the conflicts they purport to regulate. These, say MacIntyre, come from "political parties and the mass media" (215), but from his general theory of social and individual conflicts one could expect them to include economic and other interest groups. Therefore, the toleration on the part of the state which is enjoyed by local communities of practices—such as universities, unions, families and the like—would be useful protection from interference in the pursuit of their substantive goals—which can claim genuine allegiance from individuals. Similarities with Fish's account should by this point have become apparent: yet they run even deeper as both thinkers require much stricter control of speech than generally recommended by Mill—for instance in the face of Holocaust deniers and hate speech. According to MacIntyre, the peaceful shunning and silencing of such disruptive or highly implausible and clearly discredited views by society are necessary to protect their practices of shared, respectful and rational debates and practices which presuppose mutual recognition and respect together with a commitment to truth and evidence.

MacIntyre does however differ from Fish in holding that resorts to First Amendment —in the American context—rights should be limited to protection from such and from state interferences. One could say, they would be reactive, protective, and negative in character: therefore MacIntyre holds that censorship would generally do without the coercive power of the state and would rely mainly on ignoring, avoiding, non-inviting—once again, a view which resonates with some liberal writers (Van Mill 2018; Billingham and Bonotti 2019). Instead, Fish is more prone to appropriating the language of constitutional First Amendment rights to promote progressive causes and changes in society.

Both accounts invite criticism on a number of points. In the first place, Fish (non?)-commitment to an anti-foundationalist agenda persuaded many of his critical readers to disqualify his approach as unprincipled, relativistic, and ultimately erratic and irrational. While it is not possible to retrieve his replies in full here, he answered in general by highlighting that making general, legal principles coincide with partisan values does not mean to deny either of the two, and—to charges of nihilism—that human truths, including moral and legal judgements, are partial and one-sided anyway and in general, and not only in his own case. Still, the agenda which would derive from his view would make free speech align with one's ideological and pragmatic views.

As for MacIntyre, a criticism which was latent in the very exposition of his views is that they seem after all less at odds with the liberal consensus he criticises, despite his contention of the opposite. With Millian premises and Lockean conclusions, one might wonder if this view differs so radically from a version of the liberal account of free speech, and even diffidence towards the nation-state and subsidiarity in favour of local communities resonate with small government thinking to some extent. However, MacIntyre does not discuss cases where state intervention would be necessary, such as the Skokie pro-Nazi

parade. If it is true that a negationist propagandist can be silenced or ignored, it is less so when an organised group expresses offensive ideas with insistence.

Finally, both thinkers can be accused of inviting an instrumental and insincere appropriation of free speech rights, while refusing to concede these latter any substance.

Whose Freedom, Which Speech? Ideology and the Substantive Value of Expressions

At the end of the previous section I have exposed some of the potential vulnerabilities of Fish's and MacIntyre's critiques of the prevailing liberal account of free speech: I will now turn back to their shared understanding in order to deepen its clarification and bring it forward.

This is indeed the *less* contentious aspect of their denouncing of the ambivalence of free speech rights, as van Mill partially recognises while agreeing that:

> The first thing to note in any sensible discussion of freedom of speech is that it will have to be limited. Every society places some limits on the exercise of speech because it always takes place within a context of competing values. In this sense, Stanley Fish is correct when he says that there is no such thing as free speech (in the sense of unlimited speech). Free speech is simply a useful term to focus our attention on a particular form of human interaction and the phrase is not meant to suggest that speech should never be limited. One does not have to fully agree with Fish when he says, "free speech in short, is not an independent value but a political prize" (1994, 102) but it is the case that no society has existed where speech has not been limited to some extent.

The limits to free speech are provided by law only in a general sense, and even when they are so provided, they often disclose the law as being ideological. This is already incidentally noticed by Fish when he discusses how the Canadian legislation guaranteeing free speech

> … is qualified by Section 1 [of the Charter]: "The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society." Or in other words, every right and freedom herein granted can be trumped if its exercise is found to be in conflict with *the principles that underwrite the society*. (Fish 1994, 105 my emphasis)

These societal underlying principles can be synthetically understood as the society's ideology, in a thin, non-evaluative or even liberal conception of the term. Sypnowich (2019) recalls how the first user of the term ideology, Claude Destutt De Tracy, understood it as "the science of ideas and their origins. Ideology understands ideas to issue, not haphazardly from mind or consciousness, but as the result of forces in the material environment that shape what people think." (Sypnowich 2019). Later on Daniel Bell's liberal and non-normative redefinition of the term defined ideology as an "action-oriented system of beliefs." It is apparent from both accounts that ideology so understood is inescapably part of human epistemology and, more broadly, of the human condition, as an inescapable but ever-evolving system of shared meanings.

What would be the implications of such conceptions of ideology when associated with the issue of free speech? They would reveal the oftentimes tacit—and as such more solid and unchallengeable—assumptions of society which would otherwise be

difficult to be made explicit. Such is, for instance, the historical inclination of British society *and law* towards the protection of the established religion—including by banning blasphemy and offensive expressions against it—as opposed to other Christian confessions and religious beliefs which lasted until the year 2008 (Warburton 2009). Or, the fact that there *are* values which are so sacred in French society and politics—beginning, most obviously, with the integrity of the Republic and the protection of its citizens—to the point of repression of expressions against them—such as Dieudonné's—by its members and by the state. While justification and vindication of some of such core values—as in the case of liberty and equality—or the criticism and rejection of some other—such as the asymmetric treatment of national and imported confessions—is the workaday business of liberal theory, hardly any of these tasks can be performed by the right to free speech as such, either directly or indirectly, unless in case of tortuous theoretical contortions. And yet these are rather easily unveiled by historical, political, sociological, or even pragmatic inquiries.

Mill's own harm principle is, in that sense, not impermeable to ideological saturation, as the very idea of *harm,* despite intuitive on the surface, requires more substantial and general assumptions, including of a moral character. As it has been noted, it was indeed peculiar of Mill's historical condition not to consider psychological and physical harm as equivalent. Yet in further adjudicating specific instances of what would be prohibited by the law, one could expect that Mill would have been inadvertently influenced by the then prevailing commonsense, despite his highly original and nonconformist mind. For instance, it seems legitimate to wonder whether he would have viewed blasphemy of the kind which was until recently prohibited by British law as *harmful* to society, while considering non-European religious beliefs as superstitions less worthy of protection, as would have been favoured by the colonialist mindset of the time. This would be all the least surprising as we have already seen that Milton, on his part, clearly and explicitly supported the asymmetric treatment of Catholic and Protestant press, and Locke did also exclude from the toleration he advocated both Catholics and atheists as presenting an unequivocal danger to society.

This completion of what the ECHR described as the law's inherent indeterminacy—in the quote recalled above—has already been noticed by seminal authors in the tradition of legal realism, such as Oliver Wendell Holmes or, more systematically, Karl Llewellyn. According to this latter, "what judges really do in such cases [which are inherently indeterminate or in which precedent is contradictory] is attempt to enforce the uncodified but prevailing norms of the commercial culture" (Sevel and Leiter 2016). And what I am arguing, in line again with the legal realist school, is that such influence of the commercial culture on business law can be generalised as a cultural influence on the law as such. And although such point could be criticised as trivially true—perhaps with a negative acceptation—it should advise against trying to solve legal and political conundrums such as free speech by relying on law as a purely formal, abstract, and free-standing source. Indeed the implication of legal realist theory is that this would be tantamount to running into a dead end.

The influence of legal realism should not be underestimated:

> By calling attention to the role of nonlegal factors in judicial decision making, Llewellyn and the realists initiated an interdisciplinary turn in American legal education and made clear the need for lawyers to draw on the social sciences in understanding the development of law and what judges do. Much contemporary political science literature

> on law and the courts takes its inspiration from realism by seeking to explain decisions not by reference to legal reasons (which are assumed to be indeterminate) but *by reference to facts about the politics, background, and ideology of judges*. (Sevel and Leiter 2016, my emphasis; cfr. also Marmor and Sarch 2019).

It is therefore not by running away from extra-legal influences, but by cultivating such "historicism of the present," that otherwise paradoxical principles such as free speech can be comprehended, redefined, and consistently applied. Before turning to the outcome and some evident difficulties of such an approach, however, I would shortly consider another and more demanding version of the ideological reading of free speech.

In the more common, Marxist conception of ideology, this latter is not merely a neutral term to denote the network of ideas in which society and individuals are embedded, but also the protective normative armour that entrenches factual modes of production and societal organisation, by revealing and distorting it at one time. In this sense—which is heavily influential on MacIntyre's conception of the relation between toleration, law, and power expounded over above, as MacIntyre was originally an analytic Marxist—understanding free speech as ideological would imply unveiling the hidden relations between the law and the power groups and struggles which give society and politics their fundamental shape and structure. Neutrality and universality—"free speech for all"—would then become the mask behind which the prevailing parties hide in order to subtract themselves from the assaults of competitors, and to be shielded from direct contestation. And this because to challenge the established order, minority and subordinated groups would first need to acquire its master language, and then most probably be entrapped by this as by an unlevel playing field. It is this critical version of ideology which enables the corresponding theorising of reality to which I now turn.

Sentinels of Truth: New Social Media and the Monopoly of Speech

I have hitherto argued that the normative principle of free speech can be completed —saturated—only by accepting as enabling constraints the presupposed and preceding purposes of the institutions, practices, and groups that sanction it at the public and private level, such as families, universities, political parties, sport clubs on to nation-states, assuming that the latter *can* be given a rational purpose at all—something which MacIntyre would dispute. These enabling presuppositions include the core elements of one's ideological identity, values, and interests, however dynamic and open to change these might be. And I have claimed that the operation of the law meant to identify what constitutes harm or offence and apply to individual cases cannot happen nor be understood without performing such realist, concrete inculturation. Furthermore, such an operation can help to disclose conservative, reactionary, or otherwise interested instrumentalizations of the principle of free speech when they occur. And if liberal theorists might well argue that these latter need not necessarily occur, they would also concede that they can and do occur.

Now, before drawing conclusions, I would merely focus these theorical lenses on the concrete modes of speech which seem to be prevailing in our societies, at our times. Despite the comprehensive conceptual paraphernalia that a century-long reflection on free speech has left as heritage, and which I could only cursorily and fragmentarily resume, this by itself needs being a never-ending effort because of social and cultural

change, and also an especially difficult one. While it is indeed the proper task of philosophy and theory to make a serious attempt at achieving transparent *Nachdenklichkeit*—the "reflectiveness" exemplarily theorised by Hans Blumenberg—these very experiences have embedded in the philosophical tradition the awareness of its constraints. One cannot be transparent to oneself, and this holds for collectives and for epochs.

Therefore, what I would sketch here is only a rather obvious and shallow application of the theory of free speech as I have reconstructed it so far. And it revolves around—or perhaps revolt against—the very medium which enabled it in practice.

Indeed it is by now the general if not universal experience that increasingly abundant, intimate, or otherwise important speech is articulated and mediated through digital technology and the new media. And while this is the object of constant sociological and journalistic inquiry, it has hardly been given the treatment it would deserve even by recent interventions—such as Billingham and Bonotti 2019. Nor do I pretend that I can do it here and now. It is important to notice, however passingly, that never in the history of humanity we have come as close to a unity and a monopoly of expression as we are now thanks (?) to the internet. Yet it is not only this convergence that is unique: the extent to which speech can be controlled, eliminated, modified, altered is also unknown in history. And so is the pervasiveness by which an eminently public and social universe has become able to penetrate and permeate individual, family, and private life in general. The pandemic has only accelerated and made more evident a development which was already in place. All of us have become accustomed to the ease with which it is possible to "mute" and "unmute" a participant in an e-meeting—or even make her disappear. Yet very few human beings can realise in concrete terms the kind of power which is entrusted to the handful of high-tech corporations which control our main—and under lockdown sometimes even our unique—means of communication. As these providers and platforms, whose astronomic revenues, accumulation of knowledge, and influence is well-known—and still rarely discussed—are also not only ethereal programmes filling the flatness of our screens, as they tend to present themselves, but hugely rich and powerful employers and interest groups, the most significant reflection about free speech in the coming years is or should be how to manage their potential—that is, first of all, how to *limit* it, unless the conversation is to be turned—as it has already happened with experiments in the manipulation of users' feelings and networks, on how *they would manage us.* Some of the traditional powers of the state pale when confronted with the capacities of these agents in dealing with our goods and ideas: for example, if warring states used to control written correspondence, now it is even possible to seize and unify the oral ones; if television finally succeeded in the siege of households by marketing and advertising, now each individual is automatically tempted to turn to its smartphone no matter where and when. The term of mass media has perhaps become inadequate and a wholly new reflection should start with regard to this *in*-media, inward, internal, or individual devices which would not be impossible to confuse with one's body and one's thought, and which according to statistics have become, for large numbers of people, more familiar and natural confidant than one's partner or children, at least based on the amount of time one spends with them. Among their dispositions is the overflooding with information and expressions that make each of them near-irrelevant by inflation—for instance when a carefully written comment is submerged in endless collections—and, conversely, the unique privilege to create the empty background—as is the blank Google search page—that is necessary for meaningful communication to emerge.

While from my analysis it would follow that no ready-made principle can regulate them, the mere possibility that such groups and instruments became the arbiter of truth requires urgent and prudent thinking and action, legal and of other kinds. *Quis custodiet ipsos custodes?*

Conclusion: Responsible Speech and the Burden of Particularity

In this article, I have recalled the difficulties and apparent paradoxes of free speech. I have sketched the liberal consensus on the fundamental importance of such right for democracy, and I have recalled two critiques of its ideological nature. Finally, I have better explained what it is meant and it is possible to disclose by making resort to a critique of ideology, as exemplified by the tradition of legal realism, and I have concretised this approach through a reflection on free speech in the current context—that is, in the context of social distancing and increasingly pervasive social and digital media.

I have not solved the riddles at the beginning, but I hope I have given the reader some promising venues to consider possible solutions. As the French state cannot be neutral on its definitional and foundational values, it cannot or would not comprehend what are perceived as existential challenges to them under the umbrella of free speech. And complete de-regulation of speech is unachievable by both private entities such as Twitter's and the American State.

However, in a normative environment shaped by liberalism, advancing one's partisan claims—be they *Charlie*'s or Dieudonné's, Trump's or Twitter—in the abstract and neutral language of free speech—the language of power—is likely to be the most effective move (as recommended by Fish). The various purposes this is put to by each of them would hardly make sense without reference to their distinctive, political identities and claims and is revealed by the kind of analyses I have quoted from *The Washington Times*. Which, since 2013, is controlled by Jeff Bezos, the founder of Amazon.

DISCLOSURE STATEMENT

No potential conflict of interest was reported by the author.

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