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THE CASE AGAINST FREE SPEECH

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THE CASE AGAINST FREE SPEECH

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Abstract

Free societies employ a variety of institutions—including courts and schools—in which speech is heavily regulated on the basis of its content (and with regard to the cognitive infirmities of listeners) in order to promote other desirable ends, including discovery of the truth. I illustrate this with the case of courts and rules of evidence. Three differences between courts and the polity at large might seem to counsel, of course, against extending that approach more widely. First, the courtroom has an official and somewhat reliable (as well as reviewable) arbiter of the epistemic merits, while the polity may not. Second, no other non-epistemic values of speech are at stake in the courtroom, whereas they are in the polity. Third, the courtroom’s jurisdiction is temporally limited in a way the polity’s may not be. I argue that only the first of these—the “Problem of the Epistemic Arbiter” as I call it—poses a serious worry about speech regulation outside select institutions like courts. I also argue for viewing “freedom of speech” like “freedom of action”: speech, like everything else human beings do, can be for good or ill, benign or harmful, constructive or pernicious, and thus the central question in free speech jurisprudence should really be how to regulate speech effectively—to minimize its very real harms, without undue cost to its positive values—rather than rationalizing (often fancifully) the supposed special value of speech. In particular, I argue against autonomy-based defenses of a robust free speech principle. I conclude that the central issue in free speech jurisprudence is not about speech but about institutional competence; I offer some reasons—from the Marxist “left” and the public choice “right”—for being skeptical that capitalist democracies have the requisite competence; and make some suggestive but inconclusive remarks about how these defects might be remedied.

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I. Introduction

One major accomplishment of the post-Enlightenment revolutions in moral and political thought that began in the 18th- and 19th-centuries is that the “value of free speech” is now widely taken for granted on all ends of the political spectrum in the capitalist democracies. This consensus, I will argue, has now gone badly awry, even by Enlightenment standards. Much, perhaps most, speech, in fact, has little or no positive value *all things considered*, so the idea that its free expression is *prima facie* a good thing should be rejected. And since the only good reasons in favor of a legal regime of generally free expression pertain to the epistemic reliability of regulators of speech,¹ we should focus on how to increase their reliability, rather than assume, as so much of popular and even some philosophical discourse does, that unfettered speech has inherent value. If much of what I will henceforth call “non-mundane” speech were never expressed, little of *actual* value would be lost to the world—or so I will try to persuade you.

That my topic is “non-mundane” speech bears emphasizing at the start. The category of what I will call “mundane speech” is quite central to human life, and almost never noticed by the law, even in obviously unfree societies: that is, the kind of speech that allows us to arrange to meet our friends at a particular restaurant at 8 pm, or the speech that gets our kids to finish their homework. *Most* speech is mundane speech, and most societies, even unfree ones, do not bother with mundane speech, the kind of speech that facilitates our discharge of the ordinary and unnoted business of daily life. Non-mundane speech—speech about matters of political and moral urgency, speech that purports to be of

¹In the useful categorization suggested by Joshua Cohen, “Freedom of Expression,” *Philosophy & Public Affairs* 22 (1993): 207-263, I will be defending a kind of “minimalist” view (which focuses “on the magnitude of the evil those protections [for speech] prevent, rather than the magnitude of the good they protect” [*id.* at 218]), and rejecting the “maximalist” view that “the transcendent value of expression guarantees that it trumps” all costs. *Id.* at 210. Cohen’s own view, which has minimalist and maximalist elements, may not be structurally that dissimilar from where I end up, though I have doubts about how he conceives the “fundamental interests—expressive, deliberative, and informational” (211) at stake, and doubts about how he assesses the costs of bad speech and the remedies for it. I shall return to those issues, below, in the notes. Cohen’s position is also affected by his allegiance to the later Rawls’s “political liberalism,” but I will bracket my doubts about that for purposes of the discussion here. On that issue, David Enoch, “Against Public Reason,” is particularly good: <http://law.huji.ac.il/upload/AgPubRea.pdf>

aesthetic value, speech that purports to help us understand the truth about matters of societal importance, speech that is thought central to self-formation and the good life—is what is really at issue in debates about the regulation of speech,² and my claim is that most speech of this kind in fact has little or no net positive epistemic value (that is, value for helping us discover the truth) and not enough non-epistemic value (either for the speaker or for the listeners) to justify its expression *regardless of the costs* to social welfare. In a slogan: most non-mundane speech people engage in is largely worthless, and the world would be better off were it not expressed. The Internet is the final confirmation of this truth, I shall suggest, though the plausibility of this claim predates that technological innovation.³

I propose to get to that conclusion by starting far from it, namely, by calling attention to the fact that the Western liberal democracies are rife with institutions that view massive restrictions on speech as essential to realizing the ends of free societies.⁴ In universities and schools, for example, no one thinks the classroom should be turned over to unregulated expression of opinion, without regard to cognitive value, civility, or pedagogical purpose. But I shall focus here on just one central institution: the courts. In courts, the idea that the “unfettered interchange of ideas” (to quote a typical formulation of the United States Supreme Court⁵) has any value is rejected from the start. Moreover, it is rejected without considerable controversy, indeed, without attracting much critical notice or comment. Let me explain.

If speech were actually “free” in the courts—that is, unrestricted by state power—then there would be almost no need for most rules of evidence. A judge or judges would be summoned as the

²See generally, Frederick Schauer, “The Boundaries of the First Amendment,” *Harvard Law Review* 117 (2004): 1765-__.

³For an earlier foray into this general topic, on which I occasionally draw here, see Brian Leiter, “Cleaning Cyber-Cesspools: Google and Free Speech,” in S. Levmore & M. Nussbaum (eds.), *The Offensive Internet* (Cambridge, Mass.: Harvard University Press, 2010).

⁴Cf. James Cox & Alvin Goldman, “Speech, Truth, and the Free Market for Ideas,” *Legal Theory* 2 (1996), esp. pp. __-__, for a useful catalogue of such institutions.

⁵C.J. Roberts in the subsequent Arizona campaign finance case: “The First Amendment embodies our choice as a Nation that, when it comes to such [democratic] speech, the guiding principle is freedom—the ‘unfettered interchange of ideas.’” [this comes right at end of section 1 of the majority opinion]

official arbiters, triers of fact (if different) would be assembled, and then the parties, or their advocates, would say anything and everything, adduce any and all evidence that they believe might help their case. There might, of course, be rules that constitute, as U.S. free speech doctrine has it, “time, place and manner” regulations, but beyond that, advocates could say anything, call any witnesses, offer any evidence, engage in any rhetorical trope that suits their cause.

The preceding is not the rule in any liberal democracy, but I shall focus on the American case, for two reasons: first, it is the one perhaps most notable, or notorious, for investing a lay jury in almost all cases, both civil and criminal, with figuring out the truth about what transpired;⁶ and second, in its free speech jurisprudence, the United States accords the widest legal latitude to speech of any Western democracy.⁷ Nazis, racist sociopaths, and misogynistic pornographers are all constitutionally protected members of the fabled “marketplace of ideas” in American society at large. Or as Adrienne Stone and Simon Evans aptly put it in a review of Australian free speech jurisprudence, but referring, in this instance, to the exceptional character of American law: “No other constitutional system of freedom of expression confers so much protection on...unpleasant, caustic, insulting, and vulgar forms of speech.”⁸

Most common-law jurisdictions, indeed most legal systems in the advanced liberal democracies, assign fact-finding to professional jurists in many (if not all) cases, but the United States is notable in this context for investing discovery of the truth almost exclusively in the hands of ordinary people—the same people, it bears emphasizing, who are supposed to discover the truth about the great political issues of the moment, whether it is climate change, or universal health care, or the most just tax policy. How the United States approaches free speech in the context of the jury trial is, I suggest, revealing

⁶[Schauer point: absence of civil juries in most common law jurisdictions, except in special cases [e.g., libel in Australia]. Also case of South Africa: no juries during apartheid era for racist reasons, but post-apartheid, they have not brought them back!]

⁷Public speech in the United States has considerably more narrow latitude in practice than in many other Western democracies, but this is not a result of government regulation of that speech, but of certain pathologies flowing from corporate control of the major media.

⁸Adrienne Stone & Simon Evans, “Australia: Freedom of speech and insult in the High Court of Australia,” *Oxford Journal of Legal Studies* 4 (2006), p. 686.

about free speech and its value. And the central fact about the rules of evidence in the United States is that they are predicated on distrust of lay juries. Ironically, this co-exists with a popular culture that celebrates the ideal of a “jury of one’s peers,” but the reality is that the evidentiary rules reflect, again and again, doubts about the competence of ordinary people as triers of fact.

More precisely, the rules reflect doubts about the epistemic capacities of lay jurors, that is, their ability to arrive at the truth unless the speech they are exposed to is carefully controlled. The rules are predicated, in other words, on what I have called in earlier work “epistemic paternalism.”⁹ Paternalistic rules substitute the rule-maker’s judgment for what is in the interest of the subject for the subject’s own judgment on that score.¹⁰ Epistemically paternalistic rules substitute the rule-maker’s judgment about what would be in the *epistemic interests* of the subject—that is, his or her interest in discovery of the truth—for the subject’s own judgments.¹¹ The American rules of evidence are deeply paternalistic in this epistemic sense, and, as a result, deeply hostile to free speech.

It is basic to the Federal Rules of Evidence in the United States, for example, that evidence that might make more or less probable the existence of some material fact—“relevant” evidence, for short--can nonetheless be excluded by the judge if the risk that it will confuse or prejudice the jury is too great, that is, render them less capable of rendering an epistemically reliable verdict. So, for example, very gruesome crime photos *might* be excluded, so too facts about a defendant’s criminal history, and so too evidence that a defendant in a homicide settled a civil wrongful death action related to the same incident. All these bits of evidence are relevant to assessing the truth of what happened, but in each case the rules of evidence take the view that they can be excluded since lay jurors might draw improper

⁹ Brian Leiter, “The Epistemology of Admissibility: Why Even Good Philosophy of Science Would Not Make for Good Philosophy of Evidence,” *Brigham Young University Law Review* 1997: ___-___.

¹⁰For different formulations of paternalism, see Gerald Dworkin, “Defining Paternalism,” in Christian Coons & Michael Weber (eds.), *Paternalism: Theory and Practice* (Cambridge: Cambridge University Press, 2013), esp. pp. 28-31. For purposes here, I am relying on something like his “Definition A.”

¹¹The interest of jurors in discovering the truth is an interest the system imputes to the jurors, to be sure, though some evidence suggests they take it seriously. [add cites to standard literature].

inferences from them: for example, they might let disgust at the gruesomeness of the crime outweigh their sober weighing of the evidence against the defendant; or they might fail to understand that the standards of proof are different in the civil and criminal context, and so misinterpret the probative value of a civil settlement in a criminal prosecution.

The distrust of jurors in the United States is most apparent in our baroquely complicated hearsay rules. Officially, the rules prohibit the use of out-of-court statements to prove the truth of what they assert—the U.S. legal system does not trust laypeople to adequately discount the probative value of evidence not subjected to ordinary cross-examination and other putative trial safeguards.¹² But in reality, hearsay statements can come into evidence under one of about 30 different exceptions (though they are not all called “exceptions,” for reasons that need not concern us here), exceptions all predicated on the idea that *this particular* kind of out-of-court statement has some alleged circumstantial guarantee of reliability. So, for example, an out-of-court declarant who is in a state of excitation is thought to be reliable (a somewhat bizarre supposition, though it is probably right that those in a state of excitation will not lie); so too one who is talking to her doctor about her medical condition; so too one describing how he feels at that very moment; so too one who implicates himself in a crime, and so on. The only reason the hearsay rules are so complex in the United States is that lay people are the main triers of fact, and, on the one hand, the legal system does not trust ordinary people to weigh hearsay evidence properly, yet, on the other hand, we all know that hearsay evidence is often useful and probative. The U.S. rules strike a somewhat odd, but revealing, compromise: judges are charged with being “gatekeepers” for what the “ordinary” people on a jury can hear. And, with a few exceptions, the judge’s main charge is to see that the ordinary folk hear only what will help them discover the truth, and nothing that will impair their epistemic task.

¹²[but cite to 1990 Wellborn paper on how poorly people do in evaluating demeanor evidence; also more recent work by Jeremy Blumenthal; cf. Schauer, “Can Bad Science Be Good Evidence,” *Cornell Law Review* 95 (2010) for other references and discussion]

Expert testimony is another area where the U.S. approach betrays its distrust of jurors and assigns the judge an ever-more-complicated “gatekeeping” function. For many years, most U.S. Courts followed what was known as “the Frye rule” (after a New York case from the 1920s), according to which putatively ‘scientific’ evidence could be admitted if it was “generally accepted” in the scientific community as reliable. (The Frye case itself involved lie detectors tests, which are still not admissible in federal courts in the U.S..¹³) The Frye standard, in other words, was a *proxy* criterion for scientific reliability: it did not require courts to assess the quality of the science on which a putative expert would rely, but it did require that such evidence have been “generally accepted” by scientific experts. In 1993 in the *Daubert* case,¹⁴ the U.S. Supreme Court made clear that the Frye standard was not the relevant standard under the Federal Rules of Evidence. Rather, judges were to admit scientific evidence if it was produced by scientifically reliable methods. The Court even cited, as an aid to the lower courts, the philosopher of science Karl Popper for the idea that genuine scientific theories should be “falsifiable.” The late U.S. Chief Justice William Rehnquist, a member of the conservative wing of the Court, remarked in dissent, “I defer to no one in my confidence in federal judges; but I am at a loss to know what is meant when it is said that the scientific status of a theory depends on its ‘falsifiability,’ and I suspect some of them will be, too.”¹⁵

The admission is telling on several fronts. The late Chief Justice’s reasonable concern indicates that the arbiters of worthy speech in the courts may not, in fact, be competent to adjudicate the epistemic value of the speech they are charged with evaluating. The worry is confirmed by the confusions in the Supreme Court’s *Daubert* opinion itself, since it equates Karl Popper’s view with that of the philosopher Carl Hempel’s, even though they are actually *competing* views about the nature of science! That is, the United Supreme Court declares that one mark of the scientific reliability of

¹³[note on possible changes, e.g., New Mexico—cf. Schauer *Corn L. Rev.* on this]

¹⁴[cite]

¹⁵[cite].

evidence is that it is “falsifiable” or “verifiable,” citing, respectively, Popper and Hempel. Unnoticed is that Popper and Hempel’s views conflict, that falsifiability and verifiability are not the same thing. Popper was a diehard empiricist and follower of David Hume: he accepted that induction from past experience to conclusions about laws of nature was irrational. Even if every swan we have ever seen was white, it wouldn’t follow that all swans were white, unless one assumed that the future must be like the past. But our only evidence that the future must be like the past involves the very same inference at issue in the swan case. Popper concludes that, since inductive inference is not rational, all we can hope for in science is claims that are falsifiable, that is, claims for which we can imagine possible evidence that would contradict the generalizations.

Popper’s view had the unhappy consequence of rendering many scientific claims “non-scientific.” Take a claim typical in astronomy like, “There exists a black hole.” This can not be a scientific hypothesis according to Popper since it is not falsifiable. No amount of evidence could falsify a claim about the existence of an X without an inductive inference of precisely the kind forbidden by the Humean argument against induction. In part because of these worries, other philosophers of science, like Hempel, proposed a different criterion of scientific or cognitive content, a kind of empirical verifiability, that is, the possibility that the hypothesis could be supported (at least partially) by empirical evidence via a logic of confirmation--the kind of evidence deemed rationally insufficient on the Hume/Popper view. That Hempel’s view, the opposite of Popper’s, was conflated with it in a court opinion specifying the criteria for the admissibility of scientific evidence might seem a good argument for more freedom in the admissibility of evidence.

In reality, though, almost nothing has turned on this conflation. The main practical consequence of *Daubert* in the United States has been the creation of an industry of lawyers and technical advisors devoted to litigating the scientific reliability of putative experts. Since the standard for admissibility for scientific evidence is, in effect, that it be good scientific evidence, and since in any case presenting

complicated causal questions, the admissibility of the scientific evidence is often decisive, many pre-trial motions are now devoted to adjudicating whether each party's science is really good science.

But why impose such barriers on "scientific" evidence in the first place? Why not permit a "marketplace of ideas" in which any alleged expert can take the stand and make his or her best case, and then the jury sorts it out? Again, anyone familiar with American political culture can imagine a good answer: because in a "free market" of ideas, in which any paid hack or shill can argue anything, you end up with a majority of the population dubious of Darwin's theory of evolution by natural selection and skeptical that human activities have any effect on global warming.¹⁶

To sum up the discussion so far: ordinary people in the United States are charged with making findings about the truth of what transpired in disputed incidents that come before the civil and criminal courts. No one thinks they should be exposed to a freewheeling marketplace of ideas, an unregulated and unrestricted presentation of evidence and arguments; instead, the basically untrustworthy laypeople are subjected to the paternalistic care of a judge, whose job it is to decide what they can safely hear that might actually facilitate their correct findings of fact, allowing for their cognitive and other biases and limitations. There is no free speech in the courtroom, and no one thinks there should be.

By contrast, when these same laypeople are asked to choose a President, someone who will decide American tax policy, whether to go to war, the correct approach to climate change, and who should get healthcare, the basic constitutional posture in the United States is that everyone (whether person or corporate entity) should be able to say almost anything, and without any meaningful restrictions on the advantages that accrue to those with wealth and access to the major media of communication. Can we explain why the public sphere should be a free-for-all of distortion and

¹⁶See the discussion *infra* nn. ___-___ and accompanying text.

misinformation, as it too often is in the United States, while the juridical sphere, where matters of life and death, freedom and incarceration, wealth and penury, are decided, is not?

Obviously, the two cases are different in lots of ways, but I think it will be useful to be clear about what those differences really are and why they might matter. There are, it seems, three primary differences between the courtroom and the polity at large relevant to our purposes. First, the courtroom has an official and somewhat reliable (and, importantly, *reviewable*) arbiter of the epistemic merits, while the polity may not. Second, no other non-epistemic values of speech are at stake in the courtroom, whereas they are in the polity. Third, the courtroom's jurisdiction is temporally limited in a way the polity's may not be. I shall refer to these three crucial differences between the courtroom and the public sphere, in shorthand, as the Problem of the Epistemic Arbiter, the Problem of Non-Epistemically Valuable Speech, and the Problem of Time. I shall take these up in reverse order, which also corresponds to an ascending order of significance.

II. The Problem of Time

A functioning legal system must be sensitive to the amount of time required to adjudicate disputes, and the American rules of evidence are not unusual in acknowledging temporal considerations as a proper ground for excluding otherwise probative evidence. But functioning polities also operate under time constraints, with major decisions about war and tax policy--decisions that affect far more momentous matters, like the well-being of tens of millions--being taken sometimes in a matter of months, not unlike complicated trials. More importantly, how much time should be accorded to a decision should be proportional to the moral magnitude of the decision's outcome. Three months to litigate a complicated securities fraud case might seem just right or excessive, but what is at stake may only be the liberty of a handful of individuals and millions of dollars. Yet in less than eighteen months after the 9/11 attacks, the United States "decided" to launch a war of aggression against Iraq, which killed and wounded at least several hundred thousand people, and turned several million people into

refugees. Is it really true that temporal considerations were irrelevant in the latter case? Since what is at stake—the risks of great benefits and catastrophic costs—are often (probably more often) as great or greater in the context of political decisions than in legal ones, should we really think that the limited temporal horizon has special importance *only* in the juridical context? Such a conclusion strikes me as incredible.

It is often said—in an optimistic but not necessarily realistic spirit—that the “truth wins out” over the long haul. That is usually complemented by Keynes’ correct observation that over the long haul, we are all dead. Courts and societies should be sensitive to both points. Certain truths, such as truths about the causal structure of the world, will win out, because they can not be ignored forever: no amount of argument will change the fact that the locked door will causally block your exit from the room. And no amount of propaganda will alter the causal reality of climate change. But if there are other truths—say, about whether Nazi Germany or democratic Australia best promotes the well-being of its population—we have fewer guarantees about how the long haul will go. To be sure, non-Aryans might cause great difficulty for their Nazi overlords, but the Nazis had a solution to that problem. More realistically, the capitalist overlords of nominally democratic societies have their own, generally less final, solutions to the risk of causal disruption by the disgruntled masses. But we might all be dead, or immiserated, before the latter injustices make themselves known. That is another reason to think that temporal considerations are as relevant in the polity as in the courtroom.

Yet even if one thought the temporal pressures on courts rather than polities were morally more significant, that does not change the fact that reasons of *epistemic paternalism* are, quite explicitly, the primary reasons why American courts regulate what it is the triers of fact may hear. If we are to find important disanalogies between the courtroom and the polity when it comes to the regulation of speech, they must be sought elsewhere.

III. The Problem of Non-Epistemically Valuable Speech

The massive restrictions on speech in the courtroom impose no limits on the kind of speech often thought morally and legally important not because of its *epistemic* value, but because of its non-epistemic value to the speaker or society. The speaker restricted in the courtroom can still vent on a street corner, or on a blog, or in an opinion piece in the local newspaper. So, too, regardless of hearsay rules and evidential prejudice, she may, outside of the courtroom, write poetry or upload videos of herself on YouTube. Courts may impose massive restrictions on speech for epistemic reasons, but those restrictions take away almost nothing from the two other most important values associated with freedom of speech: effective democratic self-government, on the one hand, and the various non-epistemic values—broadly eudaemonic and autonomy-based values—for the speaker and society.¹⁷

This might seem a decisive difference between courtroom and polity when it comes to the regulation of speech, but the matter seems to me more complicated. First, and most obviously, the contribution of speech to valuable democratic self-government itself depends on epistemic considerations. The promulgation of falsehoods, innuendo, and lies may undermine democratic self-government, not promote it.¹⁸ And second, while the eudaemonic value of expression is often apparent, that hardly settles the question of the relative priority of values the law should promote when it regulates expression. No one thinks the eudaemonic value of sexual orgasm, for example, settles the question of the moral or legal propriety of involuntary sexual contact, or public masturbation, or

¹⁷[Eudaemonic views: e.g., self-fulfillment, self-expression (Redish, Baker); autonomy views: T.M. Scanlon, “A Theory of Freedom of Expression” and _____ in his _____; David A. Strauss, “Persuasion, Autonomy, and Freedom of Expression,” *Columbia Law Review* 91 (1991): 334-371; Shiffrin’s thinker-oriented view. Also J. Cohen’s “interests” theory [in PPA] a version of the autonomy view, but with willingness to measure costs of speech—Strauss too incorporates a calculative element. I argue below in favor of collapsing autonomy views into eudaemonic views]

¹⁸Justice Kennedy in *Citizens United*: “Speech is an essential mechanism of democracy, for it is the means to hold officials accountable to the people. The right of the citizens to inquire, to hear, to speak, and to use information to reach consensus is a precondition to enlightened self-government and a necessary means to protect it.” [but reaching consensus is not valuable *per se*, without regard to the epistemic merits of the consensus in question] [also cf. Blasi on ‘checking value’]

prostitution, so it is surprising that anyone would think the eudaemonic value to the speaker of expression should be dispositive as to its value or the propriety of legal regulation. Arguments for free speech based on autonomy can sometimes be predicated, dogmatically but implausibly, on the priority of autonomy over all other interests and values.¹⁹ Unfortunately, the most plausible metaphysics and psychology warrants the conclusion that people are not autonomous; autonomy interests of persons are, I will argue, just certain kinds of eudaemonic interests. We should think of “free speech” like “free bodily movement”: it has a lot of utility, but only within limits. Once the autonomy interests of speakers and listeners are put into the mix of competing eudaemonic considerations, the balance to be struck among them does not obviously favor free speech—or so I shall argue.

Let us take these points up in turn.

A. Democratic Self-Government

Speech *can* contribute to democratic self-government, but it can equally well contribute to fascism, genocide, and even less egregious kinds of injustice. Hitler was a very effective speaker, and so too were the radio journalists in Rwanda exhorting their comrades to finish off their Tutu neighbors. In the United States, purveyors of misinformation and ignorance like the TV personality Sean Hannity, the radio commentator Rush Limbaugh or the popular website operator Matt Drudge have tens of millions of followers and no doubt have some influence on how their audience votes, but only someone who thought the popular will had intrinsic value regardless of its basis or its content could possibly think a polity ruled by their fictions and half-truths justified a free speech regime.²⁰ If democratic self-government always led straight to moral catastrophes, who in their right mind would suggest that that

¹⁹I have learned much from the comprehensive treatment in Susan Brison, “The Autonomy Defense of Free Speech,” *Ethics* 108 (1998): 312-339, which distinguishes six different kinds of “autonomy” that have been invoked. As she aptly notes, some of these accounts are basically consequentialist in structure and so admit balancing of “autonomy” against other considerations. *Id.* at 332.

²⁰I single out the far right end of the political spectrum in the U.S for the obvious reasons--its existence depends disproportionately on ignorance and falsehoods. The structure of the worry is not proprietary to the right, especially in other countries with greater diversity of political debate. [on the ‘liberal’ end of the spectrum even in the US: hysteria about genetically-modified foods is a good example].

form of government has any value? The often suppressed premise in all arguments for free speech based on the value of democratic self-government is that a polity so governed will not lead to such moral abominations.²¹ But that premise, as far as I can see, is just wishful thinking, not a realistic assessment of how a regime of unfettered speech can influence a polity.²²

The American experience is instructive on this score, as a few salient examples will show.²³ There is no meaningful controversy among scientists about the fact that human activities are causing potentially catastrophic changes to the world's climate. The Intergovernmental Panel on Climate Change, for example, declared in 2007 that "most of the observed increase in globally averaged temperatures since the mid-20th century is very likely [i.e., more than 90 percent likely] due to the observed increase in anthropogenic greenhouse gas concentrations."²⁴ Meta-analyses of the scientific literature, as well as surveys of climate scientists, confirm that roughly 98% of all researchers concur.²⁵ By contrast, a 2008 poll found that only 47% of the American public had the true belief that global

²¹[note on Holmes, who arguably didn't care about the outcome—but he held a silly subjectivist view of well-being]

²²The suppressed premise can be weakened to say: a polity governed by a free speech regime is *less likely* to lead to such abominations than the alternatives. That may be true, though the evidential question is complex. In any case, this weakening effectively smuggles in the question I think we need to treat as separate: namely, whether competent regulation of speech is possible. I return to that issue, below.

²³The phenomenon is certainly not limited to the United States. The British public, for example, is also massively misinformed about a range of issues: <http://www.independent.co.uk/news/uk/home-news/british-public-wrong-about-nearly-everything-survey-shows-8697821.html>. Britain, of course, is also hostage to a Murdoch empire of misinformation and propaganda masquerading as news.

²⁴ IPCC WORKING GROUP I, THE PHYSICAL SCIENCE BASIS: SUMMARY FOR POLICYMAKERS (2007).

²⁵This consensus is reflected in the scientific literature. Both a 2005 analysis of 928 abstracts published in refereed scientific journals between 1993 and 2003, Naomi Oreskes, *The Scientific Consensus on Climate Change*, 306 SCIENCE 1686 (2004) and then a 2013 analysis of 11,944 peer-reviewed articles on climate change published between 1991 and 2011, found overwhelming support among scientists (over 98%). John Cook, et al., *Quantifying the Consensus on Anthropogenic Global Warming in the Scientific Literature*, 8 ENVIRON. RES. LETT. 1, 3 (2013). The same conclusion has been reached by the National Academy of Sciences, the American Meteorological Society, the American Geophysical Union, and the American Association for the Advancement of Science. See Oreskes, *supra* note 11, at 1686. Likewise, surveys of climate scientists have found near-unanimous agreement (97 to 98 percent) among publishing climate experts. See William R.L. Anderegg, et al., *Expert Credibility in Climate Change*, 107 PROC. NATL. ACAD. SCI. 12107 (2010); Peter T. Doran & Maggie Kendall Zimmerman, *Examining the Scientific Consensus on Climate Change*, 90 EOS TRANS. AM. GEOPHYS. UNION 22 (2009)

warming was due to human activity (that dropped to a mere 36% in 2009!).²⁶ The fact that only a minority of Americans had a true belief about global warming was due almost entirely to delusions among Republicans, the right-wing party in the U.S.: in 2008, just 49 percent of Republicans said there was even solid evidence that the earth's temperature was even rising (down thirteen points from 2007!), while only 27% of Republicans said that global warming is caused by human activity. The massive public ignorance has certainly made it easier for the U.S. to take no meaningful steps to address climate change.²⁷

In March 2003, the United States launched what was under international law a war of criminal aggression against Iraq; hundreds of thousands died as a result, and millions more have been displaced. This crime was facilitated, domestically, by rampant false beliefs about connections between Iraq under the dictator Saddam Hussein and the terrorist group, al Qaeda, which carried out the 9/11 attacks on the U.S., among other crimes. Two months before the war began, a poll found that 68% of Americans held the false belief that Iraq was involved in the 9/11 attacks, with 13% even claiming that “conclusive” evidence of Iraq's involvement had been found.²⁸ This was presumably a direct result of the Bush Administration's strategy of linking Saddam Hussein's Iraq to Osama bin Laden's al Qaeda—occasionally explicitly, often implicitly, but generally unmistakably.²⁹ By summer and early fall of 2003, 45 to 52% of Americans said that they believed—again falsely—that the U.S. had “found clear evidence in Iraq that Saddam Hussein was working closely with the al-Qaeda [*sic*] terrorist organization.”³⁰ Researchers examining this incidence of false belief found, among other things, that watching the right-wing Fox

²⁶ See PEW RESEARCH CENTER, A DEEPER PARTISAN DIVIDE OVER GLOBAL WARMING (2008), available at <http://www.people-press.org/files/legacy-pdf/417.pdf>.

²⁷What the precise causal contribution of false belief is to U.S. inaction is a harder question, but it seems unlikely to help!

²⁸ Steven Kull, et al., *Misperceptions, the Media, and the Iraq War*, 118 POLI. SCI. QUART. 569, 572 (2003/2004).

²⁹ Excellent accounts are given in RICHARD M. PIOUS, WHY PRESIDENTS FAIL: WHITE HOUSE DECISION MAKING FROM EISENHOWER TO BUSH II 222–23 (2008); Chaim Kaufmann, *Threat Inflation and the Failure of the Marketplace of Ideas: The Selling of the Iraq War*, 29 INTERNATIONAL SECURITY 5, 16–19 (2004).

³⁰ See Kull, et al., *supra* note 34, at 572.

news network (part of the Murdoch media empire) was “the most consistently significant predictor of misperceptions.”³¹ For example, those who primarily watched Fox were twice as likely to believe that links between Hussein and al Qaeda had been discovered; by contrast, those who generally watched or listened to public TV or public radio were 3.5 times less likely to believe that links to al Qaeda were discovered.³²

Two related considerations might, however, be adduced in favor of unfettered expression to democratic self-government, notwithstanding the triumph of falsehood it sometimes makes possible.³³ First, there is the idea, which we may associate with Friedrich Hayek, that unfettered speech by the masses is an important device for aggregating widely dispersed “information.” Second, there is the worry that governing elites can hardly be trusted to decide which opinions deserve to be part of the marketplace of ideas in a democracy. The second worry—a very serious (perhaps decisive) one, I hasten to add—is actually just an instance of the general worry about identifying a reliable Epistemic Arbiter, one who sorts inputs into deliberation based on their epistemic value, and not irrelevant considerations; as such, I shall postpone it to the final part of this lecture. The Hayekian point, by contrast, seems—at

³¹ *Id.*

³² *Id.* at 589–90. Even the consumers of public TV and radio news still had false beliefs, it bears noting! There are, of course, many other topics on which the American public has been ill-served epistemically by the robust protections for free speech, including false speech. There is no scientific controversy, for example, about the theory of evolution by natural selection—as the U.S. National Academy of Sciences correctly put it, “No other biological concept has been more extensively tested and more thoroughly corroborated than the evolutionary history of organisms”—yet in 2012, 46% of Americans believed God created humans in their familiar form in the last 10,000 years. Frank Newport, *In U.S., 46% Hold Creationist View of Human Origins* (June 1, 2012), available at <http://www.gallup.com/poll/155003/Hold-Creationist-View-Human-Origins.aspx>. Only 15% of the population held the correct view that human beings evolved without divine intervention. False beliefs about biology have pernicious effects on science education, but usually do not kill people. False beliefs about Iraq’s involvement with 9/11 or about climate change did and will contribute to killing people. Robust protections for freedom of speech in the United States facilitated these catastrophic errors that undermine the putative value of democratic self-government.

³³ I take no position yet on whether regulation would be worse than a regime of unfettered expression along the dimensions noted—that is just the Problem of the Epistemic Arbiter, to which I return.

least initially—to be more specific to the value of free speech for democratic self-government, and so merits further consideration now.³⁴

The Hayekian objection can be parsed in two, depending on the kind of widely dispersed “information” thought to be at issue. On the one hand, information about what I will call “basic needs”—needs for food, shelter, and the basics for survival—is, indeed, very widely dispersed and needs to be freely available to avert catastrophes. As Amartya Sen’s research has shown,³⁵ famines do not occur where there is freedom of the speech and press, since governments and fellow citizens are put on notice when people are starving. On the other hand, also widely dispersed in a population are individuals’ conceptions of their “interests” apart from their basic needs, for example, their preferences, wants, and other values. Hayek himself held the implausible view (what I will call the “subjectivist” view) that people are reliable arbiters of their interests, whether basic or non-basic.³⁶ The subjectivist view has had legions of philosophical critics—from Plato and Aristotle in antiquity, to Hegel, Marx, Mill, Marcuse, Brandt, and Railton in the modern era—and has had almost no defenders apart from doctrinaire free-market proponents. People, to be sure, usually know what they want, but they often do not know what they need, or whether their wants serve their needs, and sometimes even how to get what they want or need. Everyone recognizes that addicts or those brainwashed by religious or political cults will ignore even their basic needs, and so will fail miserably in meeting their interests. But overwhelming evidence from cognitive science also shows that even so-called “ordinary” people make systematic mistakes in the instrumental reasoning required to meet both basic and non-basic interests.

³⁴It may also provide a reason for non-democratic regimes to favor more free speech, as a way of aggregating information relevant to successful governance. (Thanks to David Strauss for pointing this out.)

³⁵Sen 1999, p. 152

³⁶Hayek probably also held the view that, even if subjectivism is false, people are better arbiters of their interests than the alternative arbiters—but that just raises, again the Problem of the Epistemic Arbiter, to which I will return, below.

The philosopher Sarah Conly, in her recent defense of coercive paternalism,³⁷ gives a useful summary of what are by now familiar empirical findings:

We are...unduly influenced by the particular description used in the presentation of our options (more likely to choose a medical procedure with a 20 percent chance of success than one described as having an 80 percent chance of failure); unduly prone to think that we ourselves are less likely than others to suffer misfortune, even of something entirely random, like lightning; prone to miscalculate the value of a thing depending upon when we do or don't yet own it; prone to assuming things that have one superficial characteristic in common also have similarities throughout (commonly known as stereotyping).³⁸

Conly correctly sees the connection between this line of research and earlier critiques of human rational agency; as she puts it: "We have already revised our view of human agency, following Marx, Freud, and the philosophical insights of feminism. What we see now, in light of contemporary psychology and behavioral economics, is that some further revision is necessary."³⁹ The import of these earlier lines of critique, however, was not simply that we do a poor job at instrumental reasoning about how to realize our basic and non-basic interests, but that our very conception of our interests, including our non-basic interests, is often an artifact of irrational social, economic and psychological forces, forces that, *in addition*, also can impede the realization of even our basic needs.⁴⁰

³⁷Sarah Conly, *Against Autonomy: Justifying Coercive Paternalism* (Cambridge: Cambridge University Press, 2013).

³⁸*Id.* at 21-22. The philosopher J.D. Trout draws a similar conclusion from a review of the psychological research: "We severely underestimate our health risks, from HIV to heart disease and cancer, and so don't take adequate precautions (the "optimistic bias"). We discount the future value of resources, and so radically undersave for a variety of important and foreseeable prospects, ranging from the costs of college education and health care to retirement (the "discounting bias"). These biases of reason and emotion are in no way exotic; they afflict normal people under normal stresses. Their effects are both routine and expensive. Because they are allowed to go uncorrected, people unnecessarily suffer disease and poverty." J.D. Trout, "Paternalism and Cognitive Bias," *Law & Philosophy* 24 (2005): 393-434, at p. 393.

³⁹Conly, p. 7.

⁴⁰[adaptive preferences literature as one example]

That stronger conclusion also wins support from contemporary cognitive science. As the philosopher and cognitive scientist Jesse Prinz has argued,⁴¹ emotional responses drive our evaluative judgments, yet our dispositions to have particular emotional responses are artifacts of biology, as well as familial and cultural influences, over which we have little or any autonomous control.⁴² Without a doubt people identify with their values, and so regulation that infringes on those values affects people's eudaemonic well-being; but it can hardly be considered an infringement on their *autonomy* to regulate expression of those values, given that those values do not themselves result from autonomous choices.⁴³

Strikingly, the recent cognitive science literature complements the critique developed in the last century by Frankfurt School theorists like Max Horkheimer, Theodor Adorno, and Herbert Marcuse.⁴⁴ They described the ways in which capitalist societies generate “wants” and “interests” in the population, thus actively shaping their values and desires. So, for example, Horkheimer and Adorno called attention, in particular, to the way in which market economies turn cultural products—novels, films, even music—into commodities that are designed to deliver predictable and ephemeral satisfactions, while also molding their consumers' sense of what has value. In an era when we are most of us now numb to the endless recycling of cinematic plots and emotions—no movie is a success, after all, if it does not lead to at least two or three sequels with the same name followed by the appropriate Roman numeral—consider how prescient Horkheimer and Adorno were to observe in the early 1940s that the “culture industry...infect[s] everything with sameness,”⁴⁵ noting that the “standardization and mass

⁴¹[Prinz on Emotional Construction of Morals, and “moral bondage”]

⁴²See also the discussion in Brian Leiter, “Moralities are a Sign-Language of the Affects,” *Social Philosophy & Policy* __ (2013), esp. pp. __-__.

⁴³I return to the issue of “autonomy,” below.

⁴⁴[H & A, Dialectic of enlightenment, on “culture industry”; Marcuse, One-Dimensional Man, maybe also Essay on Liberation]

⁴⁵Horkheimer & Adorno, p. 94. Further citations are included parenthetically in the body of the text. Totalitarian countries have produced their own aesthetic monstrosities, but that has no bearing on Horkheimer

production” of cultural products—such as “hit songs, stars, and soap operas”—requires that they “conform to types recurring cyclically as rigid invariants” so that the “details become interchangeable” (98). “Its element is repetition” (108), as Horkheimer and Adorno write, a slogan that should be emblazoned in the sky over Hollywood and Bollywood.

The nightmare world of the Frankfurt School theorists—which, alas, is our world—is one in which people’s conception of their non-basic interests tracks what the market can deliver precisely because the market has nurtured people to have precisely those interests. (Sometimes people even confuse non-basic interests for basic ones.) There is no “natural” interest in being extremely thin, or having an expensive wristwatch, or having teeth with a certain glistening whiteness;⁴⁶ but many people conceive of their non-basic interests in ways that are responsive to the massive indoctrination by the capitalist advertising industry, which bombards human beings, from their childhood, with images and messages designed to determine that they will want what profiteers can deliver. This wicked and depraved cycle of artificial need and pointless consumption flourishes thanks to our fetish for “free speech,” which, in the United States, extends even to substantial protections for commercial speech.

To sum up: the Hayekian argument in favor of “free speech” in the service of democratic self-government—namely, that “information” is widely dispersed and can only be heard in a regime with robust protections for free speech—is only partly successful. People are usually rather good at expressing their basic needs for food, shelter, and safety—at least in the extreme cases—but they do less well at the instrumental reasoning required to meet their basic needs, at least over the long term, and do extremely poorly when it comes to forming their non-basic interests, where they are largely hostage to extraneous forces, not autonomous self-direction. The Enlightenment was often predicated on faith in the capacity of human beings for rational self-governance, and arguments for free speech based on

and Adorno’s correct descriptive observation about cultural products in capitalist societies. The only point at issue here is that subjects’ conceptions of their non-basic interests is heavily molded by socio-economic forces.

⁴⁶[note on Rousseau and *amour propre* here?]

democratic self-government, as well as Hayekian arguments, are torch bearers of this Enlightenment faith. The Enlightenment also valued the realization of certain *ends*, such as the well-being and flourishing of all persons. Frankfurt School theorists like Marcuse share that Enlightenment ambition, but emphasize, correctly I think, that under current conditions it is not necessarily compatible with a libertarian approach to speech. As Marcuse famously put it: “society cannot be indiscriminate [in its tolerance of speech] where the pacification of existence, where freedom and happiness themselves are at stake.”⁴⁷ As heirs of the Enlightenment, we should ask both *when does free speech contribute to rational self-government* and *when does free speech contribute to human flourishing?* Both those questions have, I suggest, been neglected in theoretical work over the last century.

B. Eudaemonic and Autonomy-Based Values of Speech

If free speech’s contribution to democratic self-government also depends on its epistemic value—on the extent to which it is not simply an instrument of falsehood and misunderstanding, including self-misunderstandings—the same can not generally be said, however, about the other values often ascribed to freedom of expression, namely, its contribution to individual well-being (which I will call, for short, its “eudaemonic” value) and to the autonomy interests of speakers and listeners. In this section, I shall argue that the *only* interests at stake are *eudaemonic* in character, that all so-called *autonomy* interests are really just *eudaemonic* ones.

I have already given some reasons in the prior sections for thinking that neither speakers nor listeners are actually “autonomous,” that they are, instead, mostly artifacts of social, economic, and psychological forces beyond their control, mere vessels through which the various prejudices of their communities pass. But here I want to make a stronger claim, namely, that the Kantian/Christian rhetoric about autonomy is a fiction: we are not autonomous beings, and so our alleged “autonomy” interests

⁴⁷[“Repressive Tolerance,” p. 4]

deserve no weight in considering the value of free speech, though our eudaemonic interests in speaking and listening as we want probably does.

At this point, we need to consider in some more detail the “autonomy”-based defenses of free speech to see what is at stake in such accounts.⁴⁸ Their core idea is that persons are, in some sense, rationally “self-governing” or “self-directing,” and that respect for that fact means that speech can not be regulated on the ground that autonomous persons might act badly or cause harm on the basis of speech to which they are exposed. “Jews are parasites that destroy social well-being” or “The poor deserve their fate, they don’t work hard enough” or “Atheists are godless and immoral people who should be imprisoned” should all be part of protected speech, because respect for the autonomy or the autonomous interests of persons requires that we allow the listeners to assess such claims (it also requires that we let the speakers articulate such claims).

In what sense are persons “autonomous”? Here I follow philosopher Susan Brison, who has documented many of the senses of “autonomy” invoked in the literature defending worthless speech. As she notes, “autonomy” has something to do with “self-government” and “self-rule.”⁴⁹ That might mean, as T.M. Scanlon puts it, that “An autonomous person cannot accept without independent consideration the judgment of others as to what he should believe or what he should do.”⁵⁰ Or it might mean, as Thomas Nagel puts it, that “the sovereignty of each person’s reason over his own beliefs and values requires that he be permitted to express them, expose them to the reaction of others, and defend them against objections.”⁵¹ But can people decide to “accept” without “the judgment of

⁴⁸Here I have been strongly influenced by the illuminating analysis and critique in Brison, “The Autonomy Defense,” *op cit*. Brison is mainly concerned to show that “autonomy” defenses of free speech do not rule out the regulation of “hate speech.” I find her persuasive on that point, but my target is bigger: I want to show that “autonomy” defenses also do not rule out the content-based regulation of speech on other grounds.

⁴⁹Brison, p. 323

⁵⁰Scanlon, “Freedom of Expression,” p. 216

⁵¹Thomas Nagel, “Personal Rights and Public Space,” *Philosophy & Public Affairs* 24 (1995): 83-107, at p.

others” what to believe? And is “each person’s reason” really “sovereign[.]...over his own beliefs and values”? I think the answers to both questions are “no,” and that the autonomy-based rationales for freedom of speech are predicated on a fiction.

There is a longstanding debate in modern philosophy of the past several hundred years about whether the idea of our freedom or autonomy can be reconciled with a scientific picture of how the world works. The classic form of the problem—the one that exercised, for example, Kant—was based on the supposition that all physical matter was governed by the deterministic laws of Newtonian mechanics, and thus everything that happens *must happen*; since we ourselves are composed of law-governed matter, so too for everything we do.⁵² Kant thought the only way to rescue genuine autonomy was to suppose that the will could also operate outside the law-governed realm of natural phenomena. How that was possible remains mysterious, as even Kant recognized, since his official position was only that *if* anyone is really autonomous, their actions would necessarily have to have as their source a will that stands outside the ordinary causal order of nature. But that leaves open the possibility that no one ever acts autonomously or responsibly.

The dominant view among philosophers—who, as a group, continue to be very fond of morality and freedom—is that our autonomy and moral responsibility is fully compatible with our will being causally determined. Of course, we now know that Newtonian mechanics is false at the quantum level (a fact that does not do much to help non-quantum humans!), but the anxiety about our autonomy has found new sources: in the influence of socio-economic forces, of the unconscious, of our emotions, and of the neurophysiology of the brain. But the central “compatibilist” idea—the idea that our autonomy is compatible with causal determination—has always been that it suffices for autonomy that our choices

⁵²[van Inwagen for the contemporary and formal version of the argument]

be caused in the right kinds of ways: for example, by the desires or feelings we “identify with,” or based on a conception of the good that we accept (for whatever reason), and so on.⁵³

Thomas Nagel famously described this compatibilist response as “even less plausible than” the Kantian kind: “All such accounts fail to allay the feeling that, looked at from far enough outside, agents are helpless and not responsible.”⁵⁴ Nietzsche famously remarked that “a thought comes when ‘it’ wants, not when ‘I’ want,”⁵⁵ a claim that is phenomenologically indisputable: but that means all the thoughts that precede our actions, including our speech, have causal determinants that are unknown to us. Galen Strawson, arguing self-consciously in a Nietzschean vein, notes that everything we say and do is surely traceable to our “character,” to that amalgamation of antecedent cognitive, affective and conative states that comprises our sense of who we are—and those states are, of course, heavily affected by the “judgments” of others.⁵⁶ But, as Strawson notes, it is obvious that we are not responsible for our “character”; indeed, even if we try to modify our character, we are led to do so by our pre-existing cognitive, affective, and conative states for which we are not responsible, so even changes in our character originate from causal forces for which we bear no responsibility. We are, in short, not responsible for who we are, since we are the products of vastly complicated causal networks that extend well beyond us; but who we are determines what we do, including what we say. If there is any room for an ideal of “autonomy” in a realistic picture of the human situation, it will be highly

⁵³Brison notes the continuing resonance of such views with contemporary “autonomy” defenses of free speech: see esp. p. 331 in her essay.

⁵⁴Thomas Nagel, *The View from Nowhere* (New York: Oxford University Press, 1986), p. 113.

⁵⁵*Beyond Good and Evil*, sec. 17. Cf. Brian Leiter, “Nietzsche’s Theory of the Will,” *Philosopher’s Imprint* (2007): ; also reprinted in K. Gemes & S. May (eds.), *Nietzsche on Freedom and Autonomy* (Oxford: Oxford University Press, 2009).

⁵⁶Galen Strawson, “The Impossibility of Moral Responsibility,” *Philosophical Studies* 75 (1994): 5-24.

revisionary of the Christian/Kantian ideals that undergird contemporary “autonomy” defenses of free speech.⁵⁷ That, in any case, is what I will assume for the remainder of the paper.⁵⁸

Now speakers and listeners plainly *take themselves* to have something like autonomy interests, but as best I can tell these are really just certain kinds of “eudaemonic” interests, that is, the interests of speakers and listeners in satisfying their own conception of what they want to say or hear, no matter the actual causal determinants of those interests.⁵⁹ To be sure, humans are discursive animals, creatures who live in the domain of meanings and reasons and inferences, however imperfectly they traverse the territory. And because of our basic discursivity, our eudaemonic stake in being able to express our views is substantial. (The Internet now confirms that latter point, alas, to the point of

⁵⁷We might distinguish, for examples, between kinds of causal determination and their sources. For the contours of one alternative, see Donald Rutherford, _____, *Inquiry* __ (2011):

⁵⁸Like most philosophical disputes, this one can not be easily resolved, at least if “easily” means securing agreement among all disputants. But disputants here have far too many ulterior motives to make it productive to pursue the topic at length in the context of an essay about free speech.

⁵⁹So, e.g., David Strauss, in a quite sober version of an autonomy account, says that regulating speech that might “persuade” someone to a bad end is objectionable because it “interfere[s] with a person’s control over her own reasoning processes” (354). Strictly speaking, of course, people do not “control” their reasoning processes: what one believes is not a matter of volition, and the best evidence from cognitive science suggests that most “thinking” is unconscious. [cf. D. Rosenthal’s 2005 book]. Cf. Robert Mark Simpson, “Intellectual Agency and Responsibility for Belief in Free Speech Theory,” *Legal Theory* 19 (2013): 307-330. What Strauss has in mind, however, is not really control of reasoning, but rather the worry that reasoning might be distorted by non-rational forces. Thus, his “persuasion principle”—that the state should not regulate speech that might persuade people in harmful directions—is limited to speech that involves *rational* persuasion; even on Strauss’s account “the persuasion principle can be overridden if the consequences of permitting the speech are sufficiently harmful.” *Id.* at 360. But what is “rational” persuasion, the putative limit on regulation before we get to rationally persuasive speech that is “sufficiently harmful”? Strauss says only that non-rational persuasion involves “false information” and tries to produce “an ill-considered reaction.” *Id.* at 335. This clearly can not suffice, however, to demarcate kinds of persuasion for a variety of reasons. Only on the assumption that rational persuasion requires that the premises taken to justify a true conclusion must themselves be true does the first restriction follow. But why does rationality mandate that? On an instrumental conception of reason, and even assuming true belief is the desired end, it is perfectly rational to be led to true belief via falsehoods. But on an instrumental conception of rationality, even true belief is an optional outcome: it depends on what our ends really are. If human happiness depends on false belief (as it probably does), then it is instrumentally rational to get people to believe happiness-inducing false claims, and rational to do so by presenting them with false information, if that is necessary to induce the happiness-inducing states. That suggests that the “persuasion principle” requires some substantive conception of rationality. (Notice that commitment to the logical validity of inferences will not elide the problems already noted with a merely instrumental conception of rationality.) Unfortunately, there are no plausible substantive conceptions of rationality, though it is easy to see how Strauss’s constraints make sense if one shares Kantian intuitions. Indeed, his second constraint—namely, speech that induces “ill-considered action”—is transparently parasitic on a substantive conception of reason that remains unspecified. (Action is only “ill-considered” relative to either an instrumental or substantive conception of rational considerations.)

excruciating tedium.) But these eudaemonic interests in expressing ourselves have to be balanced against the costs of bad and worthless and harmful speech, such as those attendant upon our “brave new” cyber-world of 24-hour often irresponsible, dishonest and twisted invective. Henceforth, I will treat the so-called “autonomy interests” of individuals as just another kind of eudaemonic interest, one that certainly deserves substantial weight, but is just, ultimately, one consideration among many.⁶⁰

How might the eudaemonic interests in speech fare in such an assessment? Cyberspace provides a useful case study, because it makes vivid the character of both mundane and non-mundane speech as it really exists in the world, and so also makes vivid what is at stake in the regulation of speech with an eye to its eudaemonic value. Much of the speech on the Internet is simply the cyber-version of the traditional mass media, so I want to put that to one side for the moment, and much of it is plainly non-mundane, e.g., speech about gardening, cooking, home repair, dining out, and the like.⁶¹ With respect to the non-mundane speech that is really distinctive of the Internet, let us be candid that it falls primarily into three categories:

(1) endless varieties of pornography, that is, the sexual depiction, in both images and words, of, *inter alia*, girls and women (and, to a lesser extent, boys and men) naked, having vaginal and anal intercourse, performing oral sex, and/or being bound, whipped, ejaculated upon, and otherwise humiliated;⁶²

⁶⁰This conclusion is not, I suspect, inconsistent with Cohen’s specification of the three “interests” in free speech: namely, the “expressive interest...in articulating thoughts, attitudes, and feelings on matters of personal or broader human concern” (224), the “deliberative interest” in figuring out “what is best” or “genuinely worthwhile” (228), and the interest “in securing reliable information about the conditions required for pursuing one’s aims and inspirations” (229). Each of these are interests whose satisfactions contribute to eudaemonic well-being, though both the “deliberative” and “informational” interest must clearly be checked by consideration of human irrationality and influences that defeat successful deliberation.

⁶¹One reason to do so is that the traditional media, even in their on-line forms, tend to regulate speech quite heavily.

⁶²This is rather tricky to measure, but according to one study, roughly 30% of all data transferred across the Internet is pornographic: http://www.huffingtonpost.com/2013/05/03/internet-porn-stats_n_3187682.html.

- (2) insult, abuse, and invective based on ideology, opinion, gender, race, ethnicity; and,
- (3) the expression of opinions about the moral, political, cultural, and aesthetic issues of the day, most of which simply regurgitates trite pabulum and the various *au courant* prejudices of whatever culture in which the speaker originates.

The last category *might* have some epistemic value, and sometimes the second might too, but all three can justify their existence primarily in either eudaemonic terms (in the case of pornography, the eudaemonic value at issue is primarily, though not exclusively, to the consumer, in the case of invective, primarily, though not exclusively, to the producer), or in terms of the putative autonomy interests of speakers and listeners--though realistically understood, these are just a particular *kind* of eudaemonic interest as I have argued. Please do not misunderstand me: there is much that is no doubt wonderful and valuable about some pornography and some invective, but that they have taken over so much of the Internet is obvious confirmation of the anti-Enlightenment thought that creatures like us are not primarily rational and are primarily instrumentalities of our very powerful drives, drives for sexual gratification, cruelty, domination, and so on. This is a fact about persons that serious social and legal policy should acknowledge, not wish away.

What might we conclude about the eudaemonic value of speech from the evidence of speech on the Internet, assuming I have correctly characterized it? Three points stand out. First, much unmediated non-mundane speech has little epistemic value, though it has some. Second, the undeniable eudaemonic value of this speech comes at various costs--direct costs to the eudaemonic value for those harmed by pornography and invective, for example, and indirect costs to those harmed by the epistemic distortions that follow from pornography, invective and the endless repetition of silly

Note that I am putting pornography into the category of non-mundane speech because of its apparent centrality to the self-formation and self-expression of hundreds of millions of people.

opinions.⁶³ Examples of the latter categories would include those victimized by sexual or “hate” crimes after cyber-incitement; those subject to cyber-harassment of all kinds,⁶⁴ and those harmed by social policies that can trace their origins to the massive orgy of ignorance and falsehood that is so much of the unmediated Internet. Here, in particular, we should be alert to the effects of “group polarization,” in which like-minded individuals who interact only with each other end up gravitating towards extremes.⁶⁵ *Discussion* among like-minded individuals *magnifies* the effect, but if individuals with the same attitude are simply exposed to others with the same attitude, that alone can produce movement to the extreme.⁶⁶ Various explanations for the phenomenon have been proposed: for example, that individuals are sufficiently sensitive to social comparisons that they will opt for the most extreme position that they deem to be dominant in their group to make sure they are included⁶⁷; or that like-minded individuals tend to come up with the best arguments for the position to which they are already disposed, but those arguments simply reinforce the antecedent position.⁶⁸ Whatever the explanation, the phenomenon is real, and operates in alarming ways among communities of, for example, on-line misogynists and pedophiles.⁶⁹ Third, and finally, the eudaemonic interests of speakers and listeners also have to be evaluated in light of the costs just noted, since, as argued earlier, what is really at issue is the ability of speakers and listeners to satisfy their conception of what they want to say and hear.

⁶³[on pornography, see _____; on invective, see Waldron, *Harm in Hate Speech*]. All three kinds of costs that Cohen distinguished (231-232) are at issue, though I have doubts about the distinction between Cohen’s “indirect costs” of speech in which “the injury results from the expression causing (by persuasion, or providing information) someone to do something harmful” and speech that “constitute[s] a degraded, sickening, embarrassing, humiliating, obstructively moralistic, hypercommercialized, hostile, or demeaning environment” (232, 231). I also don’t think the differences matter: the only question is whether there is a reliable causal connection.

⁶⁴See Leiter, “Cleaning Cyber-Cesspools: Google and Free Speech,” in *The Offensive Internet*, *op cit*.

⁶⁵David G. Myers & Helmut Lamm, “The Group Polarization Phenomenon,” *Psychological Bulletin* 83 (1976): 602-_____.

⁶⁶Daniel J. Isenberg, “Group Polarization: A Critical Review and Meta-Analysis,” *Journal of Personality and Social Psychology* 50 (1986): 1141-44

⁶⁷See, Roger Brown, *Social Psychology* (_____, 1965), p. 701.

⁶⁸Dean G. Pruitt, “Choice Shift in Group Discussion: An introductory Review,” *Journal of Personality and Social Psychology* (1971), p. 340.

⁶⁹[add cites]

Whether those eudaemonic considerations outweigh the harms to well-being of speech is surely an open question.

I do not want to overstate the points. The eudeamonic value of expression outside cyberspace requires more sustained consideration. And the Internet certainly makes accessible plenty of real information and knowledge, but mostly in virtue of making access easier to the traditional mediated sources of information, such as reputable newspapers around the globe, and scholarly and other scientific research.⁷⁰ The self-congratulatory rhetoric of bloggers and tweeters notwithstanding, the unmediated blather that is so much of cyberspace has added little net value to the world.⁷¹ It is in desperate need of an epistemic arbiter.

C. What about Mill?

But what about John Stuart Mill, more than one of you is probably thinking? How can these kinds of skeptical considerations about free speech be reconciled with the arguments of Mill, the patron saint of liberty in the modern era, at least in the capitalist democracies? In fact, the case against free speech so far is, even by Millian lights, hardly out of bounds. Mill, himself, was quite clear that his arguments for liberty presupposed certain background conditions among speakers and listeners, especially education and maturity—without such conditions being satisfied liberty would be unlikely to maximize utility after all.⁷² Liberal capitalist democracies tend to assume, in a self-congratulatory spirit,

⁷⁰Here the single German word *Wissenschaftlich* is closer to the mark than the English, which demands that the “scholarly” and the “scientific” be distinguished. A *Wissenschaft* is a disciplined and epistemically reliable method for investigating some subject. Although some humanities subjects have collapsed as *Wissenschaften* since the 1970s—English and Comparative Literature are the most notorious examples, though they may be recovering—many others remain intact. Of course, a *Wissenschaft* may produce falsehoods—think of behaviorism in psychology in the last century, and neoclassical macroeconomic in the last half-century—but it still involves methodological strictures that are meant to block extemporaneous and ungrounded opining of the kind one associates with, e.g., followers of Leo Strauss (“Straussian”), postmodernists, members of the Ayn Rand cult, and so on.

⁷¹[use example from earlier paper: only evidence offered was rick-rolling!] [example of how the bloggers made a mess of the Bush draft dodging story, missing the forest for the trees]

⁷²John Stuart Mill, *On Liberty* (New Haven: Yale University Press, 2003), p. ___. Cf. also Conly, *Against Autonomy*, pp. 52 ff. for skepticism about Mill’s ideas about the limits on this caveat.

that they of course meet those conditions, but it is far from obvious that they do. Let us recall Mill's specific arguments.

Mill believes that discovering the truth (or believing what is true *in the right kind of way*) contributes to overall utility, and that a largely unregulated "marketplace of ideas" (as it has come to be called) is most likely to secure the discovery of truth (or believing what is true in the right kind of way). Mill's commitment to the so-called "marketplace" is based on three claims about truth and our knowledge of it. First, Mill thinks we are not justified in assuming that we are infallible: we may be wrong, and that is a reason to permit dissident opinions, which may well be true.⁷³ Second, even to the extent our beliefs are partially true, we are more likely to appreciate the whole truth to the extent we are exposed to different beliefs which, themselves, may capture other parts of the truth. Third, and finally, even to the extent our present beliefs are *wholly* true, we are more likely to hold them *for the right kinds of reasons*, and thus more reliably, to the extent we must confront other opinions, even those that are false.⁷⁴

For this line of argument to justify freedom of expression, the expression in question must be related to the truth or our knowledge of it, and certain background conditions must obtain, that is, those exposed to speech must be able to evaluate it (Mill did not, remember, believe in free speech for children). As the philosopher David Brink has emphasized, Mill assumed that valuable speech had to assist our deliberative capacities, our abilities as putatively rational agents to weigh evidence, reason logically, and draw appropriate conclusions.⁷⁵ Much non-mundane speech has no plausible claim to enriching our deliberative capacities; Brink focuses on "hate speech," but the point extends more widely. Mill also assumed, contrary to the evidence we now have, that people are largely capable of

⁷³Mill, p. 104.

⁷⁴[note empirical character of some of these claims: cf. Schauer, "Social Epistemology, Holocaust Denial, and the Post-Millian Calculus," in Herz & Molnar (eds.), hate speech book (Cambridge, 2012)]

⁷⁵David O. Brink, "Millian Principles, Freedom of Expression, and Hate Speech," *Legal Theory* 7 (2001): 119-157. See also, David O. Brink, *Mill's Progressive Principles* (Oxford: Clarendon Press, 2013), esp. Chapter 7.

rational deliberation and evaluation of evidence; but if they are not, then the Millian argument no longer applies, as even he would have to agree.

Mill's fallibilism also involves certain nuances that should not be forgotten. "All silencing of discussion is an assumption of infallibility,"⁷⁶ he famously asserts, but that is false, as the example of speech restrictions in the courtroom demonstrates. We often silence discussion in contexts where we both have reason to assign a high level of credence to what we believe *and* where there will still remain opportunities for critical discussion and thus discovery of the truth—outside *this* courtroom, or *this* classroom, or even *this* electoral cycle. But let us also remember that even Mill did not actually accept the thesis about our fallibility in its strongest form.⁷⁷ For Mill held that there is no reason to have a "free market" of ideas and arguments in the case of mathematics (geometry in particular) since "there is nothing at all to be said on the wrong side of the question [in the case of geometry]. The peculiarity of the evidence of mathematical truths is that all the argument is on one side." This is all the more striking a posture in light of the fact that Mill is a radical empiricist, and so denies that there is any *a priori* knowledge: even logical and mathematical truths are *a posteriori*, vindicated by inductive generalizations based on past experience. On Mill's view, then, there simply would not be any epistemic case for making room for the expression of opinions on which there is no contrary point of view that could make any contribution to the truth.

This last point is particularly important when it comes to some of the most contentious issues about speech regulation in free societies. In the United States, for example, there was considerable controversy in the 1970s when "civil liberties" advocates came to the defense of the right of American Nazis to march in a Chicago suburb with a large number of Holocaust survivors and their relatives. The civil liberties advocates took the position that "unpopular" speech deserves protection. The Nazi

⁷⁶*On Liberty*, p. 17.

⁷⁷[cf. T. Campbell's critique of Mill on fallibilism in the 1994 Campbell/Sadurski volume on *Freedom of Communication*]

speech was, fortunately, “unpopular,” but it was also false and harmful. The American Civil Liberties Union (the “ACLU”), which defended the Nazis, lost members over this incident, but that hardly proves the ACLU was wrong. The ACLU was surely correct in thinking that “unpopularity” is not an epistemically reliable indicator of falsehood or harmfulness. But that does not mean that Nazi speech is not both false and harmful: as even a radical empiricist like John Stuart Mill could acknowledge, doing a simple inductive inference over the horrible experiences of the twentieth-century would support a confident conclusion that Nazi speech is worthless, that Nazis simply have nothing to say that is worth hearing. (In addition, their speech is understandably harmful to the Holocaust survivors exposed to it, though not only to them.)

That last observation brings us to a final ambiguity in Mill’s position. Liberty can be limited when it causes “harm” to others on Mill’s view. But what counts as a harm, beyond the obvious cases of physical violence? Psychological harm is *real* harm, as anyone familiar with someone suffering from mental illness will recognize.⁷⁸ Yet we certainly do not, as Mill understood, want to treat simple “offense to moral sensibilities” as a case of harm to which the law might respond, since it would make a mockery of the value of liberty. But there is a partial solution to that worry.⁷⁹ Harm to someone’s psyche does not warrant legal regulation, we can say, when either (1) the harm derives entirely from violating the harmed person’s beliefs about how *others* should behave; or (2) the harm derives entirely from attacks on the beliefs the harmed person holds about the world. The first category deprives moralistic busy-bodies of a claim to protection; the second deprives dogmatists of all stripes from having a claim. But the characteristic harm associated with hate speech, for example, raises a colorable concern, since the harm results not from violating the target’s sense of how others should behave or the target’s beliefs about the world, but from the threat to the target’s sense of his or her own well-being

⁷⁸[cf. Schauer, “The Phenomenology of Speech and Harm,” *Ethics* 103 (1993), pp. ___-___]

⁷⁹[cf. Dworkin’s discussion of ‘internal’ and ‘external’ preferences?]

and worth.⁸⁰ Even a target who thought there was a moral right for Nazis to march and speak would still be harmed in the relevant sense. Pavlov's dogs developed instinctive responses to the sound of bells; is it so surprising that survivors of Nazi concentration camps might suffer nausea, nightmares, and anxiety attacks when confronted with Nazis marching down the street? Mill, without the benefit of the empirical evidence of the 20th-century's horrors, could hardly be criticized for not thinking about such cases. But if the "harm principle" is still thought to be a legitimate constraint on state power, then it must surely accord due weight to the harm to the mental lives of its citizens, not just their physical well-being.

I conclude that Millian considerations do not block the skeptical considerations about free speech adduced so far, which brings us to the final issue.

IV. The Problem of the Epistemic Arbiter (and the Value of Democracy)

With respect to the non-epistemic values of speech, then, the challenge to its unregulated expression comes down to one issue: can we confidently develop a mechanism for the regulation of such speech with regard to maximizing its epistemic (and other) value and minimizing its harm to the well-being of others, including the eudaemonic interests of speakers and listeners?⁸¹ The best case for unfettered expression as a contributor to democracy is that any attempts to impose fetters are as likely to undermine as promote Enlightenment values of democratic self-government and the flourishing of human beings. The best case for unfettered expression in virtue of its value to the speaker is that any attempt to limit such expression with regard to other values—including the well-being of other people, as well as the well-being of the polity—is as likely to minimize overall well-being as promote it.

⁸⁰[; cf. Cohen on "direct" harm; cf. also Waldron, who is good on this topic; also address MN's objection about those with strong religious sensibilities: they fall into the category of moralistic busy-bodies and dogmatists, don't they?]

⁸¹[add note (maybe text?) on fact/opinion issue—cf. discussion in Ch. 1 of Sadurski 1999 for instance; also Schauer in UCLA L. Rev.]

Courts and classrooms have epistemic arbiters, judges and teachers, respectively, who try to remedy the deficiencies of any regime of genuinely free speech. But to the extent judges and teachers fail in their role as epistemic arbiters, some of the goods associated with free speech—such as discovery of the truth or self-realization—can happen elsewhere. *There is only one serious argument against regulation of speech for all its pernicious effects and that is the worry that in society writ large we do not have a reliable epistemic arbiter, and, moreover, any attempt to designate one runs the risk of sacrificing all the other goods associated with free speech insofar as the arbiter is unreliable.*⁸²

That concern is the central theme of American free speech jurisprudence: “we,” it is said, do not trust the government to decide what speech is worth hearing.⁸³ Not trusting the government is hardly an unreasonable posture, especially in a plutocracy like the United States, but the reality, of course, is that even in America we trust the government to do all kinds of rather alarming things, such as hiring and arming individuals to police the rest of us, even investing in them the power to invade our homes, put us behind bars, or shoot us dead if necessary. Empowering the state to decide that we can’t say certain things seems rather more trivial by comparison.

Or does it? One might think the crucial difference is this: as largely irrational but still discursive creatures, human beings can be influenced about what to do by what others say. Sometimes that influence may qualify as “rational”,⁸⁴ sometimes irrational, but to the extent that state power has to be responsive to the will of its subjects, however indirectly, then the ability to speak freely is crucial to mobilizing action, and thus affecting the direction of state power. When it comes to people’s basic

⁸² [Internet may ameliorate some of the risks, insofar as it makes available different free speech regimes in different countries, and thus different sources of information etc. Of course, Internet may also moot the effectiveness of much speech regulation!]

⁸³ [cite Schauer, G. Stone, note Schauer 1982 as the most sustained argument for this conclusion, though conditional as well on governmental competence]

⁸⁴ I should admit that I view “rational” as basically a term of commendation, and thus without cognitive content (except in stipulative, technical contexts, e.g., *modus ponens* supports a rational inference). See Allan Gibbard, *Wise Choices, Apt Feelings* (Cambridge, Mass.: Harvard University Press, 1990). Cf. the discussion in n. __, *supra* (re: Strauss’s view). Instrumental “rationality” dominates our thinking about what is “rational” for reasons Hume would have well-appreciated: it is obviously the default practical norm for creatures like us.

needs, moreover, their ability to express them seems crucial, as Amartya Sen has shown, to insuring that such needs be met. If the state abuses our trust in the way it manages the police, a regime of free speech can, in principle, check that abuse, and hold the government to account. When it comes to trusting the state to regulate speech, we are being asked to trust the state in a domain where there is no meaningful remedy if that trust is abused, apart from violent resistance or revolution.

These considerations should be taken seriously, though tempered by the realization that many democratic societies, with robust free speech cultures, from Germany to Canada to Australia, employ such arbiters, and not primarily with regard to epistemic considerations, but rather moral ones, such as the protection of dignity or equality.⁸⁵ The crucial point is that the worry at issue is *only* that the state may suppress or regulate speech that has some kind of value, not that any speech is presumptively valuable. Speaking, like everything else human beings do, can be for good or ill, benign or harmful, constructive or pernicious. Even if the “unpopularity” of speech is not an epistemically reliable indicator of either its falsity or harmfulness, that hardly warrants the irresponsible libertarian position that we should tolerate the damage to truth and to the well-being of the victims of bad speech as necessary costs to be borne on behalf of insuring that *possibly* true, non-harmful, and otherwise valuable speech might be heard, even though unpopular. The real question is: can we, as free societies, regulate speech to minimize its very real harms, both to the fragile psychology of persons and to the pursuit of welfare-enhancing social policies in the polity at large, without undue cost to the other values of speech?

If the key question in free speech jurisprudence is how to insure competent regulation of bad speech, given that much, maybe even most, non-mundane speech may turn out to be bad speech, then the question is not about free speech at all, but about political institutions. For the recurring worry in free speech jurisprudence is that state actors, even in democratic societies, will suppress speech not because it has little or no value, but for reasons unrelated to its epistemic or social value. In Marxist

⁸⁵[footnote on German and Canadian approaches, i.e., those that privilege “dignity” and “equality” over “freedom” of speech in many contexts]

theory, the worry is that the state is just an instrumentality of the ruling class, and thus it will repress speech with an eye to the interests of those with money and property. At the other end of the political spectrum, public choice theory worries that the state will do the bidding of whatever well-funded “interest” group can capture its regulatory and legislative processes. The difference between the two is one of degree, rather than kind: public choice theory typically does a good job (at least in an American context, I am agnostic about elsewhere) explaining legal outcomes *against the backdrop of the ideological parameters set by the interests of the ruling classes*; Marxist theory typically does a better job explaining why the only “interest” groups that compete meaningfully are ones that do not threaten the basic perquisites of capitalist elites.⁸⁶ But if both are right, then looking to the state to be epistemically reliable arbiters of speech, with an eye to maximizing social welfare, is a dangerous illusion. Capitalist democracies, given their pathologies as diagnosed by the left and the right, can not be trusted to do the job.⁸⁷

I have considerable sympathy for these worries, especially in the American context with which I am most familiar. But since the problem at issue is *not* that the expression of non-mundane speech is *prima facie* valuable and worth protecting, we should focus on the real problems. First, can democratic institutions be reformed to make them more reliable at regulating harmful speech? Second, perhaps capitalist democracies are simply incapable of regulating speech to maximize human well-being, in which case the problem is not one of democratic theory, but of the kind of socio-economic order we should have?

⁸⁶Consider by way of example: no “talking head” ever appears in the national media in the U.S. who suggests that the way to secure medical and retirement benefits for the elderly and infirm well into the future is to confiscate the fortunes of the Koch Brothers and the Walton children and similar beneficiaries of family good fortune. Perhaps that is a *bad* idea, but it is not even discussed or broached, because of the ideological parameters in which public debate takes place.

⁸⁷It goes without saying, I would hope, that non-democratic societies can not be trusted either!

Before turning to these questions, however, let me take up a threshold objection, namely, that all the arguments against freedom for bad speech canvassed so far are really just arguments against democracy itself, so a worry about reforming democracy is already beside the point.

A. Is this an argument against democracy?

If the real problem with false and pernicious speech is, in democratic societies, that it leads some benighted individuals to vote for those who will carry forth harmful agendas—think of the strange “Tea Party” phenomenon in the United States—then isn’t this really an argument against democracy? Democratic procedures, however, also have dignitary values that are not touched by the case against free speech so far; indeed, the thrust of the arguments here are largely concerned with making democratic procedures more conducive to well-being, not supplanting them. Democratic procedures, at least when functioning, register (however imperfectly) what people want or desire, and doing so has both a kind of dignitary value as well as eudaemonic value for persons.⁸⁸

The case against free speech so far would only be a case against democracy if we believed with Plato that there was such a thing as expertise about each individual’s good, *and* that there were some political process apart from democracy well-suited to realizing that good. (I am assuming, already with a nod to liberal democracy, that realizing the individual’s good is the relevant desideratum. That assumption is generally not contested in bourgeois political theory, and I adhere to local academic convention here.⁸⁹) I am skeptical about both claims. I assume—though I do not argue for here—that what is good for a

⁸⁸The same is, of course, true of speech itself, as should be clear from the preceding discussion. But expression may have another consequence, namely, that it contributes to *legitimizing* the outcomes of political processes, even when they do not go the way of all speakers. The *legitimation* function of expression is a value independent of the eudaemonic value to the speaker, but not independent of the eudaemonic value to society as a whole: and to the extent it is a good thing, it is contingent on the kind of social order that is legitimated. (Thanks to Sarah Conly for raising this issue.)

⁸⁹Here and elsewhere I have made a nod to Marx’s idea—one shared, in different ways, by materialist anthropology (e.g., Marvin Harris) and history (e.g., Eric Hobsbawm)—that the economic circumstances in which theorizing occurs influences, in ways not always apparent, the ideas that seem “obvious” or “acceptable.” Normative moral and political philosophy, dependent as it always is, on “intuitions” about the good and the right is especially vulnerable to this concern. I flag the generic problem here not because I have a suitable corrective for the problem—no one does—but as a warning for readers in very different circumstances, present or future, who may find all this puzzling.

person depends, at some level, on the person's wants and desires, even if heavily laundered by information. So one reason to regulate speech in a democratic society is to effect the laundering of wants and desires necessary for yielding meaningful information for the individual about his or her good. But I also assume—though I do not argue for here—that not everything that is *bad* for a person requires laundering individual wants and desires: we can be confident already that we know a lot about what is bad for a person. One might say I assume a kind of Platonism about “the bad” is true, even though Platonism about the good is false. And if that were right, then that would put constraints on free speech, even allowing for the independent value of democracy with respect to the good. Let me explain.

Even if what constitutes a good life is hostage to individual (or socially determined) variation in wants, “Platonism” about the bad for individuals is still quite plausible. I use the label “Platonism” ironically, since the claim is not that what is bad for persons is a supra-sensible truth, only that certain things are bad for humans “objectively,” in the sense that we do not need evidence of laundered wants and desires to know that they are bad. More accurately, it might be called “Objective Humeanism about the bad.” On a “Humean” view, goodness and badness are relative to *humans*, to creatures like us. It is a fact about the nature of creatures like us that our satisfactions are rather various, but it is also a fact, or so I will suggest, that there are natural limits on our well-being, natural limits that, as it were, set the threshold for bad speech. These limits should not seem very controversial: being killed, mutilated, raped, enslaved, starved, immiserated, humiliated, degraded, enervated, stupefied, etc. are not good things for creatures like us. Sometimes it might be valuable for others if Humean Bads (as I shall call them) are inflicted, but it would not be crazy to think that Humean Bads are, *prima facie*, bad for those subject to them. (The opposite of Humean Bads does not generate Humean Goods—or not many of them—since goodness is more demanding than just the absence of the bad.) The case against free speech assumes that there are such things as Humean Bads and it also assumes that it is a benchmark

for democracy that it is less likely to produce Humean Bads, which is probably true. (That is an inductive inference over a rather limited bit of evidence, i.e., roughly the last one hundred years. If the inference is wrong, then democracy may go by the boards too.) Bad speech leads to Humean Bads, we might say, and thus even if there are fewer reasons to regulate speech for the sake of producing a single good, there may be a lot of reason to regulate speech to prevent the realization of Humean Bads. Of course, there may also be reasons to regulate speech for the sake of the good, conceived pluralistically, since no one is well-served by living in a bubble of misinformation about the means to realizing their goods. But that point does not depend on whether or not there are Humean Bads in my sense.

B. Reliable Regulation of Speech: The Real Issue

So if the objection is not against democracy *per se*, and if the real problem, as I argued earlier, is not that the expression of non-mundane speech is *prima facie* valuable and worth protecting, then we need to return to the core issues given the challenge posed by public choice and Marxist critiques of democracy. First, can democratic procedures be reformed to make them more reliable at regulating harmful speech? Second, perhaps capitalist democracies are simply incapable of regulating speech to maximize human well-being, in which case the problem is not one of democratic theory, but of the kind of socio-economic order we should have?⁹⁰ Those are huge questions, but let me conclude with some suggestive remarks, even if they fall well short of resolving the issues.

On the first issue: recently, the philosopher Paul Woodruff and the political theorist John McCormick have drawn attention to some of the novel democratic devices of the ancient Greeks.⁹¹ To protect against the malevolent influence of existing wealth and entrenched interests, the Greeks employed some radical procedures, most notably, lotteries for governing offices and popular

⁹⁰Non- or pseudo-democratic capitalist societies like China and Russia also do a bad job regulating speech, as do other autocratic and non- or pseudo-capitalist regimes, like many of those on the Arabian peninsula; I assume that is not in serious dispute.

⁹¹See Paul Woodruff, *First Democracy: The Challenge of an Ancient Idea* (Oxford: Oxford University Press, 2005); John McCormick, *Machiavellian Democracy* (Cambridge: Cambridge University Press, 2011).

“tribunals,” the latter of which had the power to review and sometimes reject legislative and executive decisions. The lotteries also typically excluded from the eligible pool wealthy citizens, to insure representation from the lower classes. The beauty of this kind of lottery is that it can nullify some of the pernicious influence of both ruling elites and so-called “interest” groups, since those invested with power to, for example, regulate speech or review existing speech regulations are unknown before they win the lottery. The lottery device and popular tribunals that review legislative and executive action do not necessarily negate the pernicious effects of ideological indoctrination, however, and it would also be necessary to insure that once the lottery “winners” are known they are also insulated from outside influence and post-service rewards. Some of the worries associated with lay juries noted at the start could also recur in the context of popular tribunals. So an effective lottery and popular tribunal system would face many obstacles, quite apart from being enacted! But should we not ask whether radical democratic procedures like these might unsettle the pathologies of capitalist democracies diagnosed by the left and the right? Perhaps so. And perhaps conjoined with the work of an independent, and non-politicized, judiciary—something that many free societies already have--democratic societies might do better at dealing with the pernicious aspects of speech.

The second question raises even harder questions. What must a society be like such that free speech is actually welfare-enhancing? Mill’s strictures of education and maturity are hardly much help, especially given his own complacency that those strictures had relatively little bearing even on his own benighted readers in the 1860s! The preceding discussion in this paper has hinted at some of the relevant factors, for example:⁹² (1) the epistemic quality of the major media, since they bear primary responsibility for beliefs that are widely accepted in the society at large; (2) the effect that common cognitive biases have on decision-making; (3) the effect that state sector or private propaganda (“consumerism” in the latter case) have on human conceptions of their basic and non-basic interests;

⁹²I have been greatly helped here by smart comments from Tom Dougherty, though he should not be presumed to agree with the discussion in the text.

(4) the extent to which citizens are able to evaluate the epistemic authority of different sources of information and analysis, since almost everything we believe, about climate change or traffic conditions on our commute to work, depends on relations of epistemic authority.⁹³ One of the main problems in the U.S. right now is a complete breakdown in the ability to assess epistemic authority: so, for example, that the National Academy of Sciences endorses a view is not thought to be relevant by some substantial portion of the population.

How do we address these factors, such that they are all finely tuned to making speech welfare-enhancing? The poor epistemic quality of the media seems partly a function of private ownership (e.g., the Murdoch empire) and partly a function of market incentives (e.g., “pander” to the lowest common denominator). Although some public media (e.g., the Public Broadcasting Corporation in the U.S., the BBC in England) have rather good track records, others, shall we say, do not (e.g., *Pravda* circa 1975). Private sector propaganda seems endemic to capitalism, unless we were to enact dramatic restrictions on commercial speech, both for epistemic and ethical reasons (perhaps we should?). The inability of millions of people to assess epistemic authority sensibly seems mostly an artifact of private sector propaganda. Could these problems be rectified within the framework of the capitalist democracies? I do not know. But let me conclude by suggesting that these are the issues that we heirs of the Enlightenment should be examining, and that it is long past time to abandon the implausible idea that “free speech” *simpliciter* is an obvious force for further enlightenment and human well-being.

⁹³An epistemic authority is a source who tells us what to believe, and we believe it *just because the source told us to do so*. As Kuhn noted decades ago, almost all knowledge of science is acquired by means of epistemic authorities.

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