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Equality, Liberty, and Hard Cases: A Contemporary View

3.1 Introduction

Contemporary egalitarian liberals – unlike their classical counterparts – have lived through many contentious events where the right to freedom of expression has been tested to its limits: the Skokie, Illinois skinhead marches, hate speech incidents on college campuses, internet pornography and hate speech sites, Holocaust deniers, and cross-burners, to name just a few. Despite this contemporary tumult, freedom of expression has been nearly unanimously affirmed in both the US jurisprudence and philosophical discourse. In what follows, I will examine Ronald Dworkin’s influential contemporary justification for freedom of expression, which claims that a thoroughgoing right to freedom of expression is justified by the fact that it guarantees and preserves liberalism’s commitment to equality by offering everyone an opportunity to speak, whereas any other policy, such as state regulation, would fail to offer this equal opportunity.

In an interesting contrast to Mill, Dworkin’s justification for freedom of expression is based on equality, not liberty, and it is based not on the instrumental reasons for allowing a robust right to freedom of expression, but rather on reasons that Dworkin feels are ‘constitutive’ features of a democratic society. This justification is by no means immune to criticism, and has indeed been challenged by feminists and critical race theorists who find the cases of pornography and hate speech to be sufficient threats to the freedom of expression and equality of their targets – women and minorities – to warrant limiting freedom of expression in these cases. I will argue that if Dworkin is to take equality as seriously as he claims to, then, by his own lights, he must back away from an unrestricted freedom of expression – which entails a backing away from state neutrality – in light of these distinctly contemporary challenges of the harms of
systemic racism, sexism, and homophobia that underlie hate speech and pornography.

The core of Chapters 2 and 3 taken together, then, reveal that the liberal state’s focus on neutrality – as endorsed by Dworkin and by the dominant reading of Mill – does not in all cases preserve equality, and that in the cases of pornography and hate speech, it in fact operates to promote oppressive views of women and minorities. Given this, the neutrality requirement ought to be jettisoned in light of our racist and sexist culture, and the liberal state’s commitment to equality should instead be championed.

3.2 Dworkin on freedom of expression

Dworkin argues that freedom of expression is absolutely crucial to moral agency, and that moral agency is the cornerstone of democratic culture. As moral agents, we should all have an equal opportunity to influence the moral environment of our shared culture. Therefore, to do anything but endorse a bare negative right to freedom of expression for every subject is to violate the state’s core commitment to equality. Key to understanding Dworkin’s view of the nature of the right to freedom of expression is the distinction he makes between instrumental justifications for freedom of speech, such as Mill’s – which famously holds that protecting freedom of expression maximizes utility – and justifications, including his own, which view freedom of speech as a constitutive element of democratic fairness. Dworkin holds that the latter view is in fact the correct view, though he canvasses the history of American jurisprudence and admits (1997: 197–8) that most of the leading decisions have made much greater use of the former. Since the instrumental view is vulnerable to the charge that there is in fact a disutility to its exercise, Dworkin feels that his approach is inherently stronger.

Dworkin does not claim that instrumental justifications for freedom of expression are false, but rather that they fail to capture what really, fundamentally, underlies the right to freedom of expression. The instrumental and constitutive justifications, then, are not mutually exclusive, but the constitutive view is seen by Dworkin to hold even if the instrumental view is proven to be false.

What exactly does Dworkin mean by the constitutive justification for freedom of expression? The constitutive view...