

## THE ARGUMENT FROM TRUTH AS A BASIS FOR LEGISLATION CONCERNING FREEDOM OF SPEECH

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**Abstract.** In recent discussion on free speech the so-called argument from truth has been evaluated from various critical perspectives. In this paper I would like to comment on some of the recent contributions. I shall argue that it is not necessarily a problem for the argument from truth that it works into two directions in the sense that it can justify both the freedom of speech and its limitations. I shall also try to show that “monistic” theories of free speech that emphasize only one value as a criterion in free speech legislation, need not be impractical, even though it is granted that our interest both in freedom of speech and its limitations are based on various values such as autonomy, democracy, diversity and truth. Finally, I shall argue that certain counter-examples that first come to mind do not necessarily show that the argument from truth is false.

### 1. Are consequentialist justifications of free speech necessarily implausible?

In recent discussion on free speech the so-called argument from truth has been evaluated from various perspectives. In what follows I would briefly like to comment on some of the recent contributions.

Many diverse arguments in defence of the freedom of expression of opinion have been popular through the years, but it is not an exaggeration to claim that the predominant argument in Western political thought has been the view that free speech is valuable and should be promoted because it leads to the discovery of truth. An early formulation of *the argument from truth*, as it is nowadays called, was made by John Milton in his *Areopagitica* (1684/1644). As is well known, however, the first systematic defence of the argument from truth comes from John Stuart Mill. In *On Liberty* (1859/1877:258) he summarizes the bases of the argument as follows:

First, if any opinion is compelled to silence, that opinion may, for aught we can certainly know, be true. To deny this is to assume our own infallibility. Secondly, though the silenced opinion be an error, it may, and very

commonly does, contain a portion of truth; and since the general or prevailing opinion on any subject is rarely or never the whole truth, it is only by the collision of adverse opinions that the remainder of the truth has any chance of being supplied. Thirdly, even if the received opinion be not only true, but the whole truth; unless it is suffered to be, and actually is, vigorously and earnestly contested, it will, by most of those who receive it, be held in the manner of a prejudice, with little comprehension or feeling of its rational grounds. And fourthly, the meaning of the doctrine itself will be in danger of being lost, or enfeebled, and deprived of its vital effect on the character and conduct: the dogma becoming a mere formal profession.

Needless to say, there has been considerable discussion on what Mill really intended to say with his argument, and it is not surprising that the argument from truth can be and has been interpreted in various ways (see e.g. Crisp 1997:189–199, Gordon, 1997:235–249, Ladenson 1997:251–276, Day 1998:41–45, 2000:189–194, Riley 1998:55–71, & Peonidis 2002:606–613). Some interpretations are consequential, while others are deontological; some interpretations are based on the positive value of knowledge, while others are based on the negative value of ignorance, or on the value of individuals' *possibility* to seek knowledge (Barry 2001:122), and so on.

Perhaps the most common objection to the argument from truth is directed against the typical version that states simply that truth has the best chances to emerge when opinions are allowed to compete freely in the “marketplace of ideas”, and that this is why there should be no restrictive legal speech regulations. The objection is that the argument makes freedom of speech depend on a contingent fact, namely, that unrestrictive laws often merely *happen* to contribute to truth and growth of knowledge. This point was recently made for instance by Susan J. Brison, who argues that “[i]f speech is to be protected solely on the basis of controversial empirical claims about the positive effects of free speech and the negative effects of restrictions (rather than on the grounds that speech is intrinsically worthy of protection), then this leaves the right to free speech vulnerable to being outweighed by the benefits of restrictions if the scales happen to tip the other way” (Brison 1998:321–322). This objection is reasonable in the sense that sometimes the constraints on conversation imposed by the government, not freedom, are those that serve truth. As pointed out, for instance, in many American law journals, *laissez faire* rules are certainly not always optimal from the point of view of knowledge growth (see e.g. DuVal 1972:191 & Baker 1978:966). However, it is not entirely clear why this should be a problem. If the argument from truth gives us *both* the justification of free speech *and* directions on how precisely that freedom should be limited, it sounds like a very convenient result (cf. Easton 1995:27). After all, it is the question of restrictions, not the question of justification, that is politically relevant and not mere academic speculation. Therefore, the real question here is whether *all* and *only* those restrictions on free speech that serve *veritistic ends*, i.e. the distribution of true beliefs and discovery of knowledge, should be enforced by law.

## 2. Are “monistic” theories of free speech necessarily impractical?

Naturally, the claim that there is a single unifying justification for freedom of speech is an “initially implausible proposal”, as argued by Kent Greenawalt (1989: 13), and, moreover, it seems still more implausible to argue that a single justification could justify the limitations of freedom of speech as well. People value freedom of speech because of autonomy, democracy, diversity, tolerance, truth, etc., and they support restrictions on it for various reasons as well. In Judith Lichtenberg’s words, “any ‘monistic’ theory of free speech, emphasizing only one of these values, will fail to do justice to the variety and richness of our interests in free speech” (Lichtenberg 1987:332).

It is important to note, however, that the fact that our interests both in freedom of speech and its limitations are pluralistic does not, as such, imply that legislation concerning free speech should not be based on a single value. At least in principle it is possible that there is a “basic” value that all the other values serve. It is also possible that there is a value that is stronger or more important than the others. Most interestingly, there may be a value that guides legislation to the same direction as the other values although it is not the “basic” value. Thus, whether or not people’s interests are pluralistic, it is in any case possible that all and only those restrictions on free speech that serve veritistic ends should be enforced by law. That is, there is no *a priori* reason to reject the argument from truth as impractical in the face of value pluralism, so to speak. What needs to be asked is whether there are plausible counter-examples against free speech legislation that uses veritistic ends as the only criteria.

## 3. Can the argument from truth be refuted by presenting counter-examples?

It appears to be clear that if all and only those restrictions on free speech that serve veritistic ends would be enforced by law, the result would be absurd. To read loudly *Encyclopaedia Britannica* in an opera house during a performance may very well serve veritistic ends, but no one thinks it should be allowed. “Knowledge-promoting criterion”, to use Alvin I. Goldman’s phrase, cannot be the *only* basis for restrictions on free speech (Goldman 1995:172). Similarly, it seems that not *all* restrictions based on the knowledge-promoting criterion are acceptable. Commercials and advertisements, for example, may often be harmful from a veritistic point of view, but still most of us agree that they are generally speaking acceptable (i.e. as far as they are not strictly and literally deceptive) (Goldman 1999:202). In his *Knowledge in a social world* (1999:202) Goldman analyses the relation between speech regulation and the effects of advertisements to veritistic ends as follows:

If advertisers are given unconditional speech rights (‘nonregulation’ by government), consumers will have to bear the cost of trying to ascertain whether the statements are true; otherwise they risk falling into error if the statements are lies or deception. Restricting advertisers to messages that

have been certified by scientific evidence (government ‘regulation’) will presumably reduce the incidence of false messages and consequent error on the part of consumers.

At this point, however, it is useful and fair to remember that the argument from truth was never intended to be a general theory of all speech regulation. Rather, it was an argument concerning the legal right to defend one’s “basic moral, political and aesthetic beliefs” in public (see Monro 1970:246 & cf. Lucas 1994:257), as pointed out in many places, most recently in Erik Lundeby’s dissertation *Free speech and political exclusion* (2000:63).<sup>1</sup> Although in *On Liberty* Mill mentions “scientific” and “theological” opinions, the argument from truth concerned and still concerns first of all *political arguments*. The question is, then, whether there are plausible counter-examples against free speech legislation regarding *political* speeches that use veritistic ends as the only criteria? Let us briefly consider three possible counter-examples.

### 3.1. The first counter-example

Suppose that during the performance someone from an opera audience criticizes capital punishment by presenting highly informative statistics to support her case. Evidently, the talk serves veritistic ends. But, naturally, it should not be allowed.

Whether this objection is successful, however, depends on what should be meant by a “political argument”. Presumably, arguments presented in opera houses or classrooms or churches are not political arguments in the relevant sense – whatever the arguments’ contents are. If “political arguments” are simply speeches or writings which have a “political content” (whatever that means) and which are appropriately given or presented in the media or on the internet or at political meetings, then the first counter-example does not really work.<sup>2</sup>

### 3.2. The second counter-example

Suppose a person insults a member of a particular ethnic minority by telling lies about her in a newspaper. Suppose also that the lies are intentional and they cause harm to the abused individual, that both the newspaper in question and the writer are influential, that although the member of the minority is not a public figure, her name is repeated in the article, etc. Suppose finally that in order to defend her claims the writer offers sociological evidence that indicates that sometimes the so-called multicultural politics tend to favor members of minorities and discriminate against members of the majority. Of course, the content of the

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<sup>1</sup> Moral and political beliefs can be “true” or “false” at least in a sense that they can be well or poorly grounded (cf. Schauer 1982:19).

<sup>2</sup> Arguably, the freedom of expression of opinion should cover more than only speeches or writings. Many political arguments have been presented by means of art, for instance (cf. Scanlon 1972:207).

article has political relevance, and although the article includes lies, because of the evidence presented, it serves veritistic ends relatively well. But surely most of us think that publishing such writings should be illegal.<sup>3</sup>

This objection, however, is based on the assumption that regulation of speech acts must be based on an ‘all or nothing’ ideology. That is, the objection assumes that the legislator cannot criminalize only a *part* of a speech (while permitting the other part). The assumption seems to be plainly false. From a veritistic point of view, it would probably make sense to criminalize libellous writings but permit offering evidence. Intuitively speaking, this sounds reasonable, too: while most of us condemn libels of private individuals, few condemn offering evidence – wherever it points to.

### 3.3. The third counter-example

Suppose that the most important newspapers and TV stations of a country give false information concerning the greenhouse effect and base their (identical, but wrong) economic predictions and proposals on this information. Although they try their best, at least for the most part, the immediate effects of the speeches and writings are disastrous from a veritistic point of view. But surely we do not want to allow only such speeches that are certainly true.

There are two possible replies to this objection. The first is the Millian claim that defending false opinions in public has *good* veritistic consequences eventually (for discussion see, e.g. Ingber 1984:13–14). Even if the immediate effects of groundless talk are sometimes negative, the final results of all speeches are *always* positive, i.e. if there are no restrictions on free speech. This extremist reply, however, must be empirically mistaken, and defenders of the argument from truth should be happy that it is. If all speeches had good veritistic consequences and if all and only those restrictions on free speech which serve veritistic ends would be enforced by the law, then all speeches, including libels of private individuals, would be allowed. That would be strange.

The second reply to the third counter-example is that even if it is intuitively clear that defending false opinions in public should be legal, it is far less clear that there would be no need for government intervention on the “marketplace of ideas” if it really happened that all of the most important newspapers and TV stations of a country would defend the same economic predictions and proposals that are wrong. In a broad sense of the word, a government can “restrict” the freedom of speech by controlling ownership of mass media or by supporting “alternative voices” with public money, for instance. From a veritistic point of view, such intervention would be justified. As far as our intuitions support this policy, the

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<sup>3</sup> It is interesting that while people are generally willing to criminalize libels of private individuals, they are not always ready to criminalize the so-called *hate speeches* that vilify individuals or groups on the basis of such characteristics as race, sex, ethnicity, religion, or sexual orientation. Many people seem to think that it is sufficient to condemn hate speeches *morally* (cf. Brison 1998:313, 317).

third counter-example does not threaten the proposal that free speech legislation concerning political speeches should use veritistic ends as the only criteria.

Now, more counter-examples could easily be construed, and they should be met on a case-by-case basis. To show that the three above-mentioned counter-examples do not necessarily work does not prove much. The previous discussion only indicates that perhaps the argument from truth is not as trivially false as is assumed in some of the recent contributions in free speech discussion, for instance in Brison's contribution (Brison 1998).

#### 4. Concluding remarks

Let me finish by recapitulating what I have argued. First, I tried to point out that it is not necessarily a problem for the argument from truth that it works into two directions in the sense that it can justify both the freedom of speech and its limitations. Rather, this may be a positive result. Second, I argued that "monistic" theories of free speech that emphasize only one value as a criterion in free speech legislation need not be impractical, even if it is granted that our interest both in the freedom of speech and its limitations are based on various values such as autonomy, democracy, diversity and truth. This is because it is possible that there is a value that guides legislation to the same direction as the other values. Finally, I tried to show that certain counter-examples that first come to mind do not necessarily show that the argument from truth is false. Of course, this does not mean that the argument is acceptable.

A serious problem with the argument from truth seems to be that knowledge-promoting criterion gives information, which is too vague for the legislator. It is often difficult to know whether an opinion is true (well grounded) or false (poorly grounded), and even in cases where the opinion's truth value is known, it is frequently hard to say whether the total sum of its veritistic effects is positive or negative, and how soon the potential positive effects will be achieved (if there are any).<sup>4</sup> No one knows for certain what kind of veritistic effects a particular arrogant libel of a private individual will have in the long run, and sometimes we do not even know what the *likely* effects will be. The permitting (or prohibiting) speeches without *any* idea of their veritistic effects cannot be based on veritistic considerations. More importantly, it is possible, and even likely, that some opinions do not *have* any veritistic effects – whether the opinions are true or false. If I iterate the same point 99 times for the same audience, the 99th repetition does not make my listeners less clever than they were before, but it does not make them any cleverer either. Granted that there are speech acts that cannot be evaluated from a veritistic point of view, the knowledge-promoting criterion seems to give a clearly insufficient basis for legislation. This is because all speeches must be either legal

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<sup>4</sup> Veritistic ends may contradict each other. An opinion may lead to the discovery of previously unknown knowledge (a positive veritistic effect) but at the same time it may misguide some people (a negative veritistic effect).

or illegal whether or not they have effects concerning our knowledge. Perhaps we should suspect the argument from truth, not because it says something that should not be said, but because it does not say anything when something should be said.

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