

“FREEDOM OF SPEECH” AS A THREAT TO LIBERAL DEMOCRACY. NOTES ON STANLEY FISH’S CRITIQUE

LA “LIBERTAD DE EXPRESIÓN” COMO UN PELIGRO PARA LA DEMOCRACIA LIBERAL. APUNTES SOBRE LA CRÍTICA DE STANLEY FISH

Iván Ramírez de Garay



El Colegio de México

ivan.ramirez@colmex.mx

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Abstract: In his polemic and seminal book, *There's No Such Thing as a Free Speech and It's a Good Thing, Too*, Stanley Fish argued that the advocates of an unrestrained, absolute freedom of speech ended up weakening the very same thing they intended to defend: liberal democracy. In this essay, Fish's arguments are reviewed and analyzed in order to show that, both from a philosophical and a practical perspective, the universalist position on free speech is untenable. It inevitably slips on utilitarian grounds, and ends up denying its grounding principles: tolerance, neutrality and negativity. Instead, its arguments end up being political and partisan, as Stanley Fish shows. However, contrary to Fish's conclusions, this essay argues that it is precisely that political logic that makes it unwise to fully disregard “free speech” as a higher value.

Keywords: Free speech; Stanley Fish; Liberal democracy; Universalism.

Resumen: En su polémico y seminal libro, *There's No Such Thing as a Free Speech and It's a Good Thing, Too*, Stanley Fish argumenta que los defensores de la libertad de expresión absoluta, irrestricta, terminan siempre por debilitar exactamente lo que pretenden defender: la democracia liberal. En este ensayo, se revisan y analizan los argumentos de Fish para mostrar que, tanto desde una perspectiva filosófica como pragmática, es insostenible la postura universalista sobre la libertad de expresión. Inevitablemente termina deslizándose hacia terreno utilitario, y contradiciendo sus principios fundacionales: tolerancia, neutralidad y negatividad. En cambio, sus argumentos terminan por ser políticos y parciales, como demuestra Stanley Fish. Sin embargo, contra lo que Fish concluye, este ensayo sostiene que precisamente en virtud de esa lógica política, no conviene del todo descartar la "libre expresión" como un principio fundamental.

Palabras clave: Libertad de expresión; Stanley Fish; democracia liberal; Universalismo.

Introduction

It is widely acknowledged that the media has an indispensable role in liberal democracies, insofar as it allows its citizens to become familiar with public issues, to be informed about the different political options and, in general, to engage in political life. And it is commonplace to consider that freedom of speech and of the press must be considered as a universal principle in order for the media to be able to fulfil its democratic functions. Thus, Stanley Fish's famous assertion—that free speech is not universal, and that is a good thing—cannot be but perplexing, uncomfortable, and unacceptable to some.

In this essay I will explain in what sense, from Fish's point of view, the universality of "freedom of speech" can indeed be detrimental to liberal democracies, and at the same time I will argue in support of this view. The first two sections are devoted to this, with the first focusing on Fish's theoretical arguments, and the second putting stress on his more empirical observations. My agreement comes to an end when Fish assesses the implications of his conclusion that liberty of expression is not universal. On this point Fish is ambiguous, and the third section is devoted to analysing and discussing the possible implications of the author's account. It is on this point, I will argue, that it becomes most difficult to agree with Fish.

The philosophical impossibility of universal free speech

It is not easy to evaluate Stanley Fish's arguments regarding free speech. In this debate, his position seems to be somewhat paradoxical. He makes a devastating and, as I will argue, for the most part correct critique of the liberal view on free speech, yet it appears to me that he would hardly call himself an antiliberal. Far from this being the case, he seems to share the purposes that liberalism strives to achieve, but to his mind the universalism of this political doctrine provides a poor weapon with which to defend those aims. Fish's disagreement with liberalism starts being profoundly philosophical. Nevertheless, his attack on universalism does not aim at putting forward a better philosophical argument, for, according to him, philosophy is of little help in this debate. His whole objective is to show that, at least concerning free speech, liberalism is a self-defeating position; down in the battleground, due to its fascination with universalism, it is self-deceptive and, in the last analysis, it is in its own terms both theoretically untenable and practically unattainable. Neither more nor less (Robertson 313-315).

The core of Fish's argument can be summarised as follows. Contrary to what the advocates of a universalist position claim, speech is never valuable for its own sake. When we speak, we always do so for a particular purpose: we intend to convince someone to embrace our ideas, we try to get other people to do something, we aspire to persuade them. In his effort to be faithful to his liberal commitments, what the universalist fails to see is that in his defence of free speech he is speaking too on behalf of particular purposes. But soon he is drawn into a paradoxical circumstance in which, for the sake of philosophical coherence, he feels obliged to defend a universal and unrestricted view of free speech. Thus, he has to protect those very forms of expression that, if allowed to flourish, endanger his purposes, the ultimate ends that render valuable the protection of speech (Fish, *There's No Such Thing*).

What Stanley Fish shows is that there is no need for such a tragic destiny, for such a stoic virtue, because the universalist point of view has no philosophical coherence to take care of. Before going on to see how our author achieves this, it is useful to briefly map the debate on free speech, in order to better understand the contending positions and the target of Fish's critiques. On one side we have the so called "consequentialists", who argue that it could be valid and desirable to impose limits on free speech, when it has negative effects for society or when it harms the dignity or interests of certain groups. For them free speech is not a sacred, untouchable principle, but one among many others; when conflict occurs, its benefits should be in each case weighted against its possible consequences, as well as against other values and interests. At the (apparently) opposite side, we have the so called "strong position" on free speech.

Its supporters argue, to put it succinctly, that there can be hardly any good reasons for restricting the freedom of expression and the press. Free speech is taken to be of the highest value for liberal democracies and as a general principle it should never be restricted. This is the position typically expressed in the First Amendment of the United States' Constitution, which indicts the government to "make no law . . . abridging the freedom of speech, or of the press" (Dworkin 195).

Now, there are two different ways of arguing in favour of freedom of speech and the press. One is instrumental. It claims that freedom of speech is valuable mainly because of the benefits it brings about. Here we find the classical utilitarian arguments. A policy of liberty of speech and press is preferable to one of censorship because the former is more likely, firstly, to promote the pursuit of truth and, secondly, to enhance the moral perfection of citizens. Banning harmful, false, or disgusting ideas is undesirable, since critical analysis brings valuable truths into light, while the falsity of pernicious ideas is defeated. Which in turn allows citizens to exercise their rational judgement, all of which promotes a healthy and thriving democratic society (Mill 20-61).

Quite different is the second kind, the so-called constitutive argument, which considers liberty of speech to be valuable in itself, insofar as it is an inherent characteristic of free, responsible moral agents. The ability to choose among options is what defines autonomy and thus liberty of speech is constitutive not only because it provides the plurality of ideas indispensable for these choices to take place, but because it allows individuals to exercise their freedom. It is clear why free speech is taken to be a supreme and almost sacred principle. Governments that have regard for the freedom and dignity of their citizens—as liberal democracies are supposed to do—will avoid imposing restrictions on speech at all costs. Otherwise, their whole purpose would be rendered meaningless and human life itself would be deprived of its value (Dworkin 195-202)¹.

It is particularly this last idea that Fish disputes and especially its foremost implication: that expression should always be privileged above any other value or interest, and speech should always be legally protected notwithstanding what the real conse-

1 It seems to me important to clarify the distinctions between these arguments, in particular because Dworkin does not seem to take into account the existence of a consequentialist position, which apparently, he includes into the category of instrumentalism. However, the kind of reasons that can be advanced against the regulation of speech from a consequentialist standpoint are very different in nature from those of instrumentalism. It can be argued, for instance, that it is not advisable to ban hate speech because this would drive extremist groups underground, where it would remain unknown who they are and how much support they enjoy. Similarly, it could be argued that regulating the hateful speech of certain groups could enhance their resentment and, in the long run, provoke more violence (Parekh 217-223). As I hope to make clear later, what makes this kind of argument so different—much closer to Fish's—is that it does not need to rely on the assumptions of a universal human being provided with an essential rationality, as the "strong" position does. So we have the case that a strong free speech advocate like Dworkin is actually debating only within his own field of assumptions. An exclusion which tends to confirm Fish's argument, as will be latter explained.

quences are (Fish, "Interview"). Only such a constitutive point of view intends to provide grounds for justifying free speech as a universal and sacred value, for its own sake.

As Dworkin notes, a universalist position could not be maintained on instrumental premises, from which it too easily slips into consequentialist grounds (195-202). In order to justify the restriction of free speech, it would be sufficient to prove that certain forms of speech are not getting citizens closer to the truth, but reinforcing their prejudices, or harming their dignity. An instrumental position seems to be too close to consequentialism and, as Greenawalt argues, a strong position should not be consequentialist (Greenawalt 128). John Keane notes too "that the various justifications of liberty of the press are mutually conflicting in a philosophical sense", however, during the eighteenth century they were often used in combination by the early modern defenders of liberty of speech (48). It would seem that this confusion persists nowadays, and to prove this is the first step that Fish takes in order to advance his argument: the implausibility of a universalist defence of free speech.

Curiously enough, Fish's point is confirmed by Dworkin, one of the most prominent defenders of an unrestricted liberty of the press, when he points out that in reality instrumentalism and constitutivism are not as mutually exclusive as they would seem to be. It is, indeed, quite unusual to find universalists assuming a purely constitutive point of view (Dworkin 195). Indeed, in "On Liberty of Thought and Discussion", the cornerstone of the strong argument for free speech, John Stuart Mill tried to attain a synthesis between both arguments. Mill intended—and failed, in John Gray's opinion—to rework classical utilitarianism so as to make it coherent with a more fundamental—we could say metaphysical—view of reason and natural rights (Gray vii-xxx). A failure, as Stanley Fish would have it, that the strong free speech advocates have blindly inherited.

If such an unnatural communion seems plausible to the liberal mind, that is because both instrumentalism and constitutivism are grounded on common assumptions about the nature of human beings. The refutation of this liberal ontology, by demonstrating "the insubstantiality of its empirical foundations" (Gray xxix), is the point of departure of Fish's critique.

Key to this universalist ontology is the assumption, essential to liberalism, that Michael J. Sandel has called "the precedence of the right over the good". It is basically the idea that, in order to affirm the possibility of liberty and autonomy, the human ability to make choices has to be asserted and ontologically privileged. Individuals, so the argument goes, should be able to choose, amongst a variety of alternative goods and ideas, what they consider to be the best option for them. Which in turn means that, prior

to the moment of their selection, they should not be committed to any particular idea of the good. For if this were the case, if they knew beforehand what the good consists of, it would make sense for individuals to sacrifice their election for that particular conception (Sandel). Now, if it were true that human beings lack any previous conception of what is convenient for them, then it would be difficult to say what could possibly orient them in their decisions. Not for the liberal, who fills that vacuum with a rationality that is supposed to be an essential, universal characteristic of all human beings (Scanlon 533-534).

It is not difficult to see why all those who wish to affirm the inviolability of free speech, the supremacy of this principle above everything else, have an instinctive urge for universality. For them, freedom in general can only be asserted on the basis of a universal, rational human essence. Hence all the supporters of a strong position end up relying on this assumption.

One could start with the instrumentalist argument that free speech is preferable to a policy of censorship because it is more likely to promote the spread of true beliefs. But this could only hold if we assume, firstly, the existence of such clearly identifiable truths and, secondly, the intrinsic rational ability of human beings to discover them. Something similar occurs with the other instrumentalist statement, that liberty of the press fosters the development of individuals. This is embedded in another fundamental universalist assumption: the existence of a "free market of ideas", in which individuals can rationally and equally debate their diverging opinions in the pursuit of truth. However, as Bhikhu Parekh notes, it might well be possible that the result of such competition is not the individual's moral development, but the furtherance of inequality and the persistence of falsity. Too often certain individuals or groups are disadvantaged, either as a result of unequal material conditions or of prejudice, so that for them it is much more difficult to make their voices heard (Parekh 217-223). In such circumstances, not only can certain offensive and false ideas create an environment of inequality, they might impede the emergence of truth, since they are often intended to intimidate and silence certain groups (MacKinnon 69-113). To these objections, the standard response is that of Stuart Mill: censorship is in any case unwise since we do not know if the suppressed opinion might be true, and even if it is not, it is not uncommon that ideas that we regard as false still contain some portion of truth (22-59). Yet, once again, the risk is only affordable if we uphold the certainty that in the end it will produce valuable outcomes, namely, that those portions of truth will be discovered by rational individuals. Grievous speech must be tolerated because it is a worthy price to pay for a future benefit (Fish, *There's No Such Thing* 110).

So far, this review of the arguments for an unrestrictive view on free speech has had the intention of showing that, in any case, they end up being universalist². A first conclusion can be drawn at this point, that a strong position, as Dworkin rightly notes, cannot be sustained in instrumentalist terrain (203). It is always necessary to recur to a certain form of universalism. Now the next question to be asked is whether on these grounds the strong free speech position can be maintained, and Fish's answer is a straightforward no. His most pervasive argument is that universalist assumptions are empirically unsustainable, nothing else than a matter of faith, but I will save this demonstration for the following section. In any case, what Fish is committed to show is that, perplexing as it might seem, universalism—or a strong position, which from now on we can treat as synonymous—slides inevitably into consequentialism all the time.

I insist, if this is the case it is because universalist foundations of free speech are, to Fish's mind, untenable, so that a strong position on free speech is an impossibility. This, as I have been arguing, is what our author wants to prove, and he does so by departing from the ontological premises of a universal, rational human nature. His conception of what a human being is is a very different one. Now we shall keep in mind that his argument is not intended to be a philosophical one. His purpose is rather to show that in the actual practices in which speech is deployed, in the contextual environments in which the principle of liberty of the press is legally interpreted, politically defended and contested, things simply do not work as universalists would like. However, it is convenient to devote a few words to "Fish's ontology", in order to better understand what his argument is and how he supports it.

As opposed to the liberal point of view, Fish endorses what can be called an embedded conception of the self. To put it briefly, what this notion refuses to accept is the idea that there is a universal human nature, a rational essence that grants individuals their capacity to choose. In contrast, for Fish the self is inextricably constituted by previous commitments, values, frames of mind, etc., that individuals learn from their particular contexts. When making choices, when judging and speaking, human beings are, consciously or not, working towards purposes that they did not always choose, or at least not always entirely consciously (Robertson 230-288).

To see why Fish reaches this conclusion, and to grasp its consequences, it is necessary to understand why a strong free speech position needs to assert the existence of a universal and rational self. I already mentioned how this assumption is connected, in

² This is why in *There's no Such Thing as Free Speech*, Stanley Fish, whilst his natural enemy would seem to be the constitutive position, rather directs his critique against the strong argument, in general.

the liberal framework, with the general defence of autonomy. Now, it seems to me that, from a universalist perspective, there are three strong arguments as to why liberty of the press, in particular, is an essential precondition of freedom in general: 1) *Tolerance*. All opinions should be permitted to be published, so that a diversity of points of view may spring, amongst which free individuals can make decisions. To restrict this plurality is to impose limits on the exercise of personal autonomy. 2) *Neutrality*. This means that the government shall make no distinctions as to whether something is right or wrong, harmful or valuable, and thus should be published or not. This judgement is the expression of the rational capacities of citizens, and hence is something for them alone to decide. To limit it is to put into question their status as responsible moral agents. This is the principle paradigmatically expressed in the United States Constitution, where it is prohibited for the government to forbid any publication on the basis of its content (Dworkin 217-219). 3) *Negativity*. Free speech is considered to be a negative liberty, which means that its only function is to restrict the field of activity of governments, creating a space in which individuals can pursue, free of public interference, their own conceptions of what is good. That is, in this space governments cannot decide what is convenient or valuable for individuals to publish, to read, see and hear (Dworkin 215-216)³.

So far, I have tried to show how Fish demonstrates that universalist premises are, at best, incoherent and utterly false at worst. Now let's turn out to analyse why and how, in my view, Stanley Fish rightfully demonstrates that in actual practice free speech, as understood from a universalist point of view, is far from realizing the above mentioned principles. So that free speech, rather than being an essential precondition of freedom, always implies a limitation of someone's freedom for the benefit of someone else.

The actual impossibility of universal free speech

1. *Tolerance*. To begin with, according to Fish, what liberals preach is a "false tolerance". It is a tolerance that can only be practised under the condition that it "cannot take seriously" the values it appreciates. This comes from the liberal understanding of the self in relation to its autonomy. We saw that every value, every conception of the good, in order to be considered as really worthy, must be the result of a rational election. Thus, nothing is valuable in itself, but only inasmuch as it is a result of the exercise of freedom. Which means that the individual, if he is to remain free, must be able to change his mind, to discard his present values and embrace others at every moment. However, it turns

3 This is Isaiah Berlin's definition of negative liberty, as opposed to positive liberty: the power of individuals to participate collectively in defining a common, public good (215-280).

out that for a lot of human beings belief is a quite different matter. For them their values might not be interchangeable, nor easy to discard, for they are embedded in their self. Their very self-conception is inseparable from those beliefs. As Fish has it, "a deeply religious person is precisely that, *deeply* religious, and the survival and propagation of his faith is not for him an incidental (and bracketable) matter, but an essential matter, and essential too in his view for those who have fallen under the sway of false faiths" ("Boutique Multiculturalism" 380)⁴.

This way of believing and upholding values sits at odds with the kind of tolerance promoted by a universalist vision of liberty of the press. For disagreements will hardly be resolved by means of more speech and rational debates. The market of ideas is here of little help. The situation turns out even more uncomfortable, if those deeply embedded beliefs include contempt for equity and liberty, for human autonomy and free speech, in sum, for all those values dear to the advocates of liberty of expression. In this case, it seems all too natural to expect that the universalist will start resisting "the force of the culture he appreciates at precisely the point at which it matters most to its strongly committed members" (Fish, "Boutique Multiculturalism" 379).

Hardly could there be a more forceful demonstration of Fish's claims than the fact that even someone like Dworkin, one of the most notable advocates of a strong free speech position, recognises that the old liberal idea of an almost absolute tolerance was nothing but utopian thinking. The liberal illusion that all political virtues can be realized without conflict has proved to be false. The constitutive superiority of liberty of expression was based upon this hope. To be sure, now it is clear that freedom of speech and press can come into conflict with the values that it is supposed to enhance—autonomy, moral development of citizens, democracy, and debate (Dworkin 195-219). As Eric Barendt recalls, the experience of totalitarianism has shown the dangers of certain forms of political languages, the effects of which cannot always be countered with more speech, nor by rational persuasion; it also has shown that there might be much more greater evils than the restriction of the liberties of speech and press (172-175). Thus, even Dworkin (103) has come to accept what Fish says, that there are certain forms of expression that cannot be tolerated, not if they undermine the very purposes for which a society is constituted, the very reasons for its protection of free speech.

4 As a side-comment, it is somewhat strange and misleading that Fish talks about a "false tolerance", since it is difficult to imagine what an "authentic tolerance" would look like. If Fish's account of the "embedded self" is purported to be a general account of how humans acquire their values, and I think it is, it would seem that the only options left are either a "false tolerance" or no tolerance at all. And this ends up being an odd compliment to liberalism, though not a very flattering one.

In arguing this, Fish is doing nothing but describing what actually happens. It could be said that what seems to be universal amongst liberal democracies is not the absoluteness of their tolerance, but rather the fact that tolerance is everywhere limited. The extent of the restrictions, their constitutional shape and their particular targets vary according to the different legal traditions, histories, and political conflicts; it always depends on the context, past and present. The legal-political tradition in Europe seems to be defined by a proclivity to restrict dangerous forms of expression, yet how this tendency is interpreted and applied in each country varies greatly. Speech considered as harmful might be restricted either because it can cause violence, because it can be damaging for certain groups and stir hatred against them, or just because of its content; in most of the cases we find a combination of reasons weighted and shaped differently⁵.

Despiteful of standing "alone, even among democracies, in the extraordinary degree to which its Constitution protects freedom of speech and of the press", as Dworkin says, the United States, too, restricts the freedom of the press to great extents. It does so in an overt manner, by leaving unprotected under the First Amendment expressions that convey a "clear and present danger", or publications that are utterly obscene and that harm the rights of others, as in the case of child pornography. But it does so, too, in more subtle ways, for instance when the jurisprudence of the Court establishes distinctions between what can be considered speech and what cannot: "fighting words", for instance, utterances made with the sole intention to cause harm to a certain group, can be prosecuted. What Fish shows is that these distinctions, far from being sustained in universal and rational principles, are at best based on fuzzy criteria, and at worst are clearly arbitrary. In any case, the function they fulfil is obvious: to actually judge, by classifying it, the content of speech and exclude what seems undesirable without saying so, for the sake of philosophical, universalist coherence. Which takes us to the topic of neutrality.

2. Neutrality. This is a principle that, seemingly, most mature democracies have decided to give up to a great extent. Contrary to what a strong free speech position

⁵ The International Covenant on Civil and Political Rights requires its signatories to ban "any advocacy of national, racial or religious hatred that constitutes incitement to discrimination". Or, for instance, the International Convention on the Elimination of All Forms of Racial Discrimination demands a ban on "propaganda or organisations based on theories of racial superiority and incitement to racial discrimination and acts of violence" (Parekh 213). Now those restrictions can be typified in each country as general categories or as special protections for particular communities. For instance, both Germany and France prosecute, in general, the denial of crimes against humanity, a criteria supported by the European Rights Commission. However, the former country prosecutes in particular the denial of Holocaust and goes as far as prohibiting public meetings in which this kind of speech is pronounced. One of the reasons for prosecuting Holocaust denial as a criminal offence is that in Germany false factual claims are not constitutionally protected as free political speech. In this country, as in United Kingdom, restrictions can be justified because of the consequences of speech—including generation of violence and the damage inflicted on certain members or groups of society—but also because of its content, when it is considered abhorrent and intends to cause hatred (Barendt 172-181).

prescribes, a lot of these countries have granted their governments the right to judge, in certain cases, about the content of some forms of expression and prosecute those they consider abhorrent, opposed to the indispensable values of a democratic society. So, in the United Kingdom, publications whose content intends to promote hatred are not protected, and in countries like Germany, France and Austria, Holocaust denial is prosecuted as a criminal offence, on the grounds that false factual claims do not benefit from the protection of freedom of publication. It must be noted that, generally speaking, liberal democracies grant greater protection to political speech, since it is considered essential to democratic life, but even in this case there are restrictions; neither tolerance nor neutrality stand as absolute principles (Barendt 172-175).

As expected, for advocates of universalism all this amounts to little more than an unacceptable heresy, and they find their last consolation in what they regard as the last standing exception, namely, the United States. There, government is supposed to be prevented by the Constitution from passing judgment about the contents of speech and, hence, the universal purity of freedom of expression is apparently preserved. At least to a certain extent. For it is only political speech that is granted universal constitutional protection; it is only this category of expression that is declared to be absolutely free from censorship on the grounds of content. When it comes to political ideas, the judgement of the government cannot be trusted (Dworkin 202-205).

To this claim Stanley Fish responds with the same argument that he has been putting forward all along: this is not how things work in reality. Here, too, someone has to draw the line as to what political expression is and what it is not, and there are no fixed, universal or rational criteria to do so. It only can be done, as always, by judging the content of the speech against certain beliefs about what is acceptable and valuable, what is abhorrent and worthless, beliefs that vary from one context to another (*There's No Such Thing* 102-108).

It is better to illustrate Fish's argument with an example. Take two very similar cases that occurred in different cities in the United States, with quite different outcomes. In one, *R. A. V. v. St. Paul*, the Court considered unconstitutional an ordinance issued by the city of St. Paul, according to which a citizen was prosecuted for burning a cross on a black family's lawn, on the basis that this action was intended to cause "anger, alarm or resentment on others" because of their race. "Fighting words", the Court reasoned, can be prosecuted, but not discriminated due to their content (Barendt 185). Quite the same episode occurred in Virginia, where it was prosecuted in obedience of a statute that made an offense to burn a cross in another person's property or in a public place with an intimidating intention. This time the Court recognized the constitutional validity of

the statute, on the grounds that it prosecuted a form of expression on the basis of its intimidating character, but not of its content (Barendt 185). However, as Barendt argues, it is difficult to dissociate this decision from a history of strong and visible presence of the Ku Klux Klan in Virginia. Although it was not made explicit, this expression had indeed an implicit political content that was certainly considered by the Court. In spite of the philosophical, universalist coherence that the US Court wants to keep, the fact—as Fish argues—is that most of the time it is making judgements about the content of speech, considering its plausible consequences in particular contexts, balancing them against beliefs as to what is best for a concrete community (Barendt 185).

3. *Free speech as a negative liberty.* Finally, this discussion leads to the conclusion that free speech, in so far as its tolerance is always partial and its neutrality fictitious, cannot be considered merely as a negative right. Ultimately, the function of freedom of the press is not only to allow individuals to be free from the restriction of governments to pursue their ends and embrace their ideas, so long as they do not deprive others of their capacity of choosing. Free speech is always something more, and this is not only referred to the fact that an uneven market of ideas often requires, as aforementioned, affirmative action (Fish, "Boutique Multiculturalism" 380). Liberty of expression is, in the end, nothing but a positive affirmation of value. It is never neutral, for it entails distinctions, classifications and judgements that distinguish what kind of utterances should be protected. And these choices can only be made against the background of what is considered valuable. Even when strong interpretations argue in favour of an unrestrictive vision of free speech, they are preferring certain consequences to others and, hence, making a political choice. They are declaring, i.e., their unwillingness to sacrifice a free press in order to preserve the dignity of a religious community, as in the Salman Rushdie case in UK⁶.

Freedom of expression and of the press cannot be said to be constitutive of other values. Indeed, it can enter into conflict with them, as it often does,—i.e. with religious sensibility, equality, human dignity and so on and so forth. When strong advocates of liberty of speech declare the universal superiority of this principle, they are making a political choice not to privilege other values and to downplay the interests of certain groups. And there is nothing universal, nor neutral to it, and if there is tolerance in this, it is only partial. Freedom of expression always entails an act of exclusion and restriction

6 Here the Divisional Court in England declared that Rushdie's novel, *The Satanic Verses*, had no intention of creating violence. Yet, in the United Kingdom some expressions can be prosecuted if their content is harmful for certain groups. It seems clear, according to Barendt, that in this case, as in most of them, the right to publish, the consequences and the content of the message were put in a balance (164-167). In any case, there was clearly a conflict.

(Fish, *There's No Such Thing* 102-108). The universalist arguments for a strong position lack any solid grounds. And when they insist on the fundamental superiority of free speech, they are doing nothing but defending an ideology, as defined by Schauer: "a prevailing idea existing within an environment in which adherence to the idea is more or less required, and challenge to the idea more or less discouraged" (Schauer 855). And, once again, there is little universal to it.

In the end, all of Fish's argumentation is devoted to showing how things actually work. So, when he says that there is no such thing as free speech, he is saying that free speech does not work as liberals say, it certainly does not follow their universalist assumptions. Freedom of speech can only work in consequentialist ways. Its restrictions are always a matter of balancing different values and interests, amongst which liberty of the press is only one. There is always a pragmatic consideration of "each situation as it emerges", of the particular context in which something is uttered and its plausible effects. This is, for Fish, a good thing insofar as it allows us to take into consideration a variety of contesting points of view. It allows us to assess whether the damage of a certain expression to the values that are upheld will be greater with more or with less regulation (Fish, *There's No Such Thing* 108-127). What is wrong about the ideological commitment to universalism is that it impedes liberalism to effectively pursue its objectives. Paradoxically enough, the liberal feels guilty to overtly attack the discourses he himself despises and fears. Ultimately, the self-defeating nature of universalism resides not in its philosophical contradictions, nor in its failure to see reality as it is, but in its inability to defend the form of life that it is committed to.

After universalism: some final remarks on the functions of fiction

Up to this point, I have explained Fish's criticism of the universalist myth and, while doing so, I have also tried to show why, in my opinion, he is right. Now, what seems much more dubious and difficult to support are the consequences that Fish draws from his conclusion that free speech is not a universal principle. This is due, in part, to the fact that he remains quite ambiguous on this point.

When Fish declares the inexistence of free speech he does not mean, of course, that liberty of the press does not actually exist, nor that it should be abolished. What he seems to suggest is a different way of defending this asset of liberal democracies, one that would rather use a partisan language than an abstract appeal to principles. His bet, it seems to me, is to abandon any defence of free speech as a neutral or universal—i.e. in-existent—value and, instead, to endorse it as a real principle. Though it is not obvious

what this means, Fish gives us a hint: the agenda would be "not to eliminate racism but to harass and discomfort racists" (*There's No Such Thing* 394). His suggestion would appear to be: defend the form of life that you appreciate, with the benefits it conveys, in an overtly partisan way and in a consequentialist fashion. The corollary of which might be: identify your enemies and fight them not with appeals to abstract reason, but with the means provided by practical reason.

If this interpretation is right, it is far from being unproblematic. Take for instance the case *R. V. v. Lemon*, in which a film depicting the erotic fantasies of St. Teresa was banned in the UK on the grounds that it was offensive to religious sensibility. The verdict was contended by the film producers at the European Court of Human Rights on the grounds that the blasphemy law was not equitable, for it only protected Christian faith. The European Court responded that nothing was wrong with that since each country had the right to define the values dear to it. And, besides, extending the protection to Muslims would bring unacceptable complications (Barendt 185). This argumentation seems consistent with the kind of reasoning that Fish supports. Certainly, it could be contested on the same consequentialist, partisan grounds. But there is more to it. For it is almost inevitable to have the feeling that there is something unfair in this resolution: that the blasphemy law is not neutral and universal enough, since it leaves other religious faiths unprotected.

So it might seem that those "neutral", fake principles that Fish asks us to abandon are not that easy to discard. We would like "to harass and discomfort racists", but maybe we also like the idea that they have rights. It might be that the idea of granting constitutional rights even to those we regard as enemies is part of the reasons why we consider valuable the form of life that Fish asks us to fight for. If this is the case, Fish's position ends up being, to a certain extent, incoherent and self-deceptive as well. It could be that those neutral principles that Fish wants us to discard are part of the form of life we value; in discarding them, we would be weakening our own position.

It appears to me that this problem arises from Fish's simplistic view of what a principle is and how it relates to practice. Since free speech has no real meaning, not universal substance, it is useless, except as a masquerade, a false justification of political struggles. It is an empty concept that can be filled with whatever political purposes, an ideological construction of a political agenda. And, Fish concludes, it is not that principles are inherently bad: "they are inherently nothing"⁷.

7 He goes on to argue that "free speech principles don't exist except as a component in a bad argument in which such principles are invoked to mask motives that would not withstand close scrutiny . . . Free speech, in short, is not an independent value but a political prize, and if that prize has been captured by a politics opposed to yours, it can no longer be invoked in ways that further your purposes, for it is now an obstacle to those purposes" (Fish, *There's No Such Thing* 102, 113).

But the fact that, as Fish had demonstrated, a principle has no essential meaning does not mean that it is useless. Take the infamous *Skokie* case in which, in the United States, the Court declared unconstitutional the banning of a demonstration by a Neo-Nazi group in a neighbourhood populated mainly by Holocaust refugees. One way of reading this episode is Fish's: as a self-defeating act in which a liberal democracy was unable to reject a political expression that it despises, because it is fanatically enamoured with the principle of free speech. Yet, after all, regardless of how abhorrent the judicial decision might be, there is something significant in the fact that a group of violent Neo-Nazis went to the Court to defend their interests (Schauer 858).

It is plausible that the function of these kind of principles comes from the very fact that they have no fixed meaning, and thus their definitions and limitations, their relation to other values, can be contested⁸. A conversation, which often involves fundamental and unsolvable disagreements, can thus take place. This is a view that I cannot explain further here, but it does not mean that we have to return to a universalist stand on freedom of speech. It could be said that freedom of speech has a more limited universality, as Scanlon argues. Its universality is recognized by all liberal democracies as a right every citizen is entitled to. The error is to follow from this that free speech has to be universal as a policy too (Scanlon 520).

As Barendt reminds us, in every legal controversy involving free speech, this liberty is considered a universal right, constitutionally recognised (88-162). This need not mean that it is unlimited. There can be very good reasons for restricting it. But it must be acknowledged that something is being sacrificed. This something is freedom of speech, and part of its function and value comes from the fact that it is considered as universal, in this restricted sense (as a right).

If we discard liberty of expression as a principle, it might become too easy for governments to affirm that, by limiting the freedom of speech and of the media, what they are doing is safeguarding liberal democracy. What they might be really doing is endangering the liberty of the press, a fundamental aspect of liberal democracies. Their real intention might be to harness free speech whilst using the defence of democracy as a political argument. In some contexts, it might be necessary and convenient to establish certain boundaries to what can be said, and yet, it is utterly important to name this sacrifice, to call it for what it is.

8 It has to be noted that, at some points, Fish seems to endorse a position like this. For instance, he notes that freedom of speech might have the function of advertising Courts' actions as following from general principles, while remarking those principles in accordance with the exigencies of the day. Hence Law, he writes, "does not remain what it is because its every detail survives the passing of time, but because in the wake of change society still looks to it for the performance of a particular task" (Fish, *There's No Such Thing* 20-23). However, Fish's position remains uncertain on this point.

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