

Philosophy 104, Ethics, Queens College  
Russell Marcus, Instructor  
email: [philosophy@thatmarcusfamily.org](mailto:philosophy@thatmarcusfamily.org)  
website: <http://philosophy.thatmarcusfamily.org>  
Office phone: (718) 997-5287

Lecture Notes: Free Speech and Pornography

Mill

Wrote both *Utilitarianism* and *On Liberty*. In the first, he argued that the sole criterion for morality was the consequences of an action. In the second, he argued that individual liberties should be protected. This creates a certain tension in his work, since we would have no need for liberties if their only purpose was to establish good consequences; we could just appeal to the consequences at all times.

Mill bases *On Liberty* on a single, anti-paternalist principle, we now call Mill's Harm Principle:

...the sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of action of any of their number, is self-protection. That the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others. His own good, either physical or moral, is not sufficient warrant. He cannot rightfully be compelled to do or forbear because it will be better for him to do so, because it will make him happier, because, in the opinion of others, to do so would be wise, or even right...The only part of the conduct of anyone, for which he is amenable to society, is that which concerns others. In the part which merely concerns himself, his independence is, of right, absolute. Over himself, over his own body and mind, the individual is sovereign. (Mill, p 369)

Here's a metaphoric version: the limit to my freedom to swing my arm is the tip of your nose.

In the selection we read, Mill argues that censorship is immoral, basing his argument on the harm principle. In specific, he uses a proof by cases:

First case) If the opinion censored is right.

Second case) If the opinion censored is wrong.

If the opinion censored is right:

The censors wrongly assume their own infallibility, and society is deprived of the benefit of a true opinion.

E.g. perhaps tv violence doesn't cause more violence, but helps engender a healthy attitude toward it.

Or pornography, perhaps it isn't essentially abusive toward women, and can serve the social good.

An Objection: Isn't it the public's (i.e. government's) job to protect its citizens in the best way?

I.e. doesn't the government have the responsibility to make the assumption that it's right and act accordingly?

And thus censor when it believes the public good is served in this way?

Mill's response: There is a difference between assuming an opinion true because it has not been refuted and assuming it true in order to not permit its refutation.

The government has a responsibility to the former, but not to the latter.

If the opinion censored is wrong:

By censoring we leave ourselves open to the problem of the dead dogma, p 419.

Our beliefs become held as empty dogma instead of live opinions.

“He who knows only his own side of the case knows little of that.” 419b  
If we censor, we lose the ground for holding the right opinion.

There is a third possibility: some part of the attempted-to-be-repressed opinion is true, some part of it is false.

This is the most common situation.

Even the most false opinion has a grain of truth.

E.g. abortion foes can agree that abortions are bad.

And those who favor gun control foes can agree that eroding constitutional protections is bad.

Note Mill’s assumption that what can or may not be censored is an opinion.

That is, something capable of being true or false.

Contrast this with the common opinion that opinions aren’t truth valuable.

Also, contrast with art or pornography: are these opinions?

Today, in our country, censorship is rarely an issue. Speech is rarely censored. But great power arises from access to media. Unpopular, uncommon, views tend to lack access. Private media conglomerates choose what to report, and thus shape the issues that affect us. That is, censorship, strictly speaking, is less an issue than access to powerful media outlets.

Skokie v Nazis

Skokie is a suburb of Chicago, not unlike many Long Island towns.

Many holocaust survivors lived there in the late 1970's.

A group of Nazis wanted to march in Skokie.

The village got a court order prohibiting certain actions (statements, banners).

The Nazis got that modified by an appeals court, but still were not permitted to display swastikas.

The Illinois Supreme Court overturned even that ban (in this decision) saying that they could display swastikas.

They thus protected the free speech of the Nazis.

Should we protect the speech of the Nazis?

We do think there are some limits to one’s rights:

The Court, in Chaplinsky (1942), presented what is called ‘the fighting words doctrine’, p 425.

You can not yell “fire” in a crowded theater.

There are limits on free speech due to immediate harm which may arise.

This doctrine permits punishment of those who use fighting words.

But we severely circumscribe such limits.

Cohen (1971)

‘Fuck the Draft’ in a public building doesn’t constitute fighting words.

Millian defense.

Beautiful cacophony, p 426a.

“One man’s vulgarity is another’s lyric” p 426b

Rockwell (1960)

George Lincoln Rockwell, Nazi leader, allowed to speak in New York

1) Court can’t bar speech due to hysteria before the fact.

2) What one did yesterday, one might not do today.

- 3) We should punish wrongdoing after the fact, not before.
- 4) Such a censorship could, by parity of reasoning, silence the anti-racist.

Skokie urges that they should be able to restrain symbolic acts prior to their occurrence.

But the Nazis were allowed to speak, use swastikas.

There are reasons to limit speech, as in Chaplinsky, but, as Cohen and Rockwell show, these aren't any of them.

'Avert one's eyes' doctrine (Erznoznik, 427).

Everyone believes in freedom of speech for views with which they agree; it's the views we most revile that test our commitment:

If we don't believe in freedom of expression for people we despise, we don't believe in it at all. - Noam Chomsky

We live in oppressive times. We have, as a nation, become our own thought police; but instead of calling the process by which we limit our expression of dissent and wonder "censorship," we call it "concern for commercial viability." - David Mamet

## Pornography

The question: Should we censor pornography

Two schools of thought support censorship.

1. Feminists, who contend that pornography harms women.
2. Social conservatives, who oppose all sexually explicit material.

Obviously, this is an odd pairing, uncomfortable to both sides.

Feminists are concerned to sever sexual chastity and moral virtue, while social conservatives defend this connection.

The social conservative position seems clearly in violation of the free speech principles above.

We don't really want to censor Viagra commercials, and *The Joy of Sex* or the *Kama Sutra*

Our interest here is in the first school.

We need a definition of pornography.

Longino characterizes pornography according to the degrading depictions of women, p 437a.

This leaves room for morally acceptable sexually explicit representations, p 437b.

Note that on this definition, pornography is sexist, misogynistic, and degrading by definition.

Still, no one wants to censor a depiction of degradation which makes clear its disapproval, e.g. *The Accused*.

Longino provides two characteristics of pornography which we may use criteria to differentiate legitimate, acceptable depictions from illegitimate, morally unacceptable ones. 1. Endorsement, p 438a and 438b, and 438-9

2. Universalism, p 439a (typos) and b

Still, how could the presence of these images justify censorship?

Consider the presumption against censorship.

There seems to be no clear and present danger.

The 'avert one's eyes' doctrine: no one is forced to buy or watch pornography.

"One man's vulgarity is another's lyric" ( 426b) seems particularly appropriate, here.

Longino argues, though, that there are dangers.

Here, she's appealing to the harm principle.

Pornography's alleged harms:

- 1) Creates and buttresses sexism, p 440a
- 2) Denies humanity, p 440b, And is libelous, p 441
- 3) Leads to increased violence, p 440c

Wicclair, opposing censorship, notes that some of these charges are hopelessly ambiguous, pp 445-6

It's hard, or impossible, to determine when a work condones degrading behavior, since the meaning of art (conceived broadly) is difficult to determine, p 446a

Still, such issues could be resolved politically if the claim about violence were substantiated.

On the other hand, pornography seems at best an indirect, rather than direct threat.

Affects attitudes, rather than behavior, p 444a

And it may help to reduce an existing threat, by providing an outlet, p 444b

A censorship law would probably apply more broadly than intended.

We can't protect women, as a class, over degrading portrayals of minorities, or other oppressed groups.

It's hard to see this as a free speech issue, though, since it's hard to see this as speech.

Consider the type of material Mill was trying to defend.

Voltaire's 'I may not agree with what you say, but I'll defend to the death your right to say it' presupposes that you're saying something.