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## Freedom of Thought and Expression

*All reforms owe their origin to the initiation of minorities in opposition to majorities.\**

Thomas Jefferson once said in defense of freedom of thought and expression that “it does me no injury for my neighbor to say there are twenty gods, or no God. It neither picks my pocket nor breaks my leg.”<sup>1</sup> What a man thinks and says, according to Jefferson, should not be the legitimate concern of government since its powers “extend to such acts only as are injurious to others.”<sup>2</sup> In his argument are contained the seeds of all the dilemmas that surround the moral issue of freedom of thought and expression.

An Enlightenment thinker and rationalist, Jefferson was a firm believer in the power of free, critical minds to search out and destroy any errors that infect the body politic. In this belief Jefferson brought fresh support to an ancient assumption: that truth can be reached not by the coercive powers of imposed authority, but by the free exercise of a self-determining rational mind.

### DILEMMAS OF FREEDOM OF EXPRESSION

In a perfect world Jefferson’s assumption would be unchallenged. But in a morally ambiguous world, is it always true that the free expression of ideas leads necessarily to the truth? Although it may be true on most occasions, it is not hard for us to think of cases in which the opposite result occurs. If

\*Mohandas K. Gandhi, *Non-Violent Resistance* (New York: Schocken Books, 1961. Copyright Navajivan Trust, Ahmedabad, 1951), p. 18.

<sup>1</sup>Thomas Jefferson, from *Notes on Virginia*, quoted in *Dissent*. Prepared by The Institute for Contemporary Curriculum Development (New York: Cambridge, 1972), p. 18.

<sup>2</sup>*Notes on Virginia*.

among three persons, one knows the correct path out of a deep forest and the other two do not, even though all three make the same claim to truth and have apparently equally persuasive reasons for doing so, there is a greater chance of remaining lost if the weight of the two false claims is believed to be greater than the weight of the one true claim. In other words, ignorance is not necessarily overcome by the free exchange of equally ignorant opinions.

There are other, more serious examples of situations in which complete freedom of expression would be problematic. The standard case is that of the freedom to stand up in a crowded theater and yell "Fire" without just cause. We know that some people will react to the announcement in panic, and in their rush for the exit many people will be hurt. Although Jefferson might believe that it will not break his leg for his neighbor to say there are twenty gods, it might very well break his leg if that same neighbor were to yell "Fire" in a theater in which Jefferson was sitting. Jefferson's defense of freedom of thought and expression is disingenuous because it seems to imply that speaking one's mind has no consequences for others. But this implication is clearly false as the examples just cited reveal.

Before pursuing the kinds of qualifications the right to free expression requires, it is necessary briefly to distinguish between two things so far considered together: freedom of thought and freedom of expression. Although morality is concerned with the nature of one's thoughts (e.g., one should not have lustful thoughts about another), the effectiveness of moral legislation is limited to those actions that are publicly *expressed*. This is not to say that the mind is beyond the influence of public action, but it is clearly the case that, even though some societies may have tried to proscribe certain types of thinking, beliefs and opinions cannot realistically be the object of moral legislation. Only the public articulation of them can be effectively coerced or forbidden.

### Relative Freedoms

Because expression of thought will necessarily have consequences for others, the real question in deciding the proper place to give to freedom of expression is what weight do we want to give to other freedoms? It has been argued recently by some developing countries that freedom from hunger and chaos, and freedom for the development of basic economic conditions are more important than complete freedom of political expression or freedom of the press. They argue that the latter freedoms depend on and presuppose an already achieved economic freedom from scarcity and dependence on other countries. They also point out that freedom of political expression presupposes a stable enough political process to permit different opinions to be heard without threatening the political order as such. In a social setting rife with dissension and anarchy they argue, it is

necessary to impose order and to clamp down, provisionally, on freedom of political expression.

Many people will not accept this argument in favor of curtailing freedom of expression under the conditions listed above. They will point out that anyone who forbids freedom of expression in the name of more basic freedoms, especially in the political realm, is claiming to be in possession not only of truth but also of the right to impose that truth on others. History is filled with examples of self-proclaimed messiahs who impose their visions of right on unwilling subjects.

There is no easy passage between the Scylla of complete freedom of expression and the Charibidis of imposing restraint on the expression of dangerous falsehood. Some degree of responsibility for the consequences of my expression is inherent in my freedom. If I know that I am slandering you when I allege certain things about you, I must be made responsible if that slander causes you harm. If a society permits a corporation to claim certain things about its product that are untrue as well as produce products that are harmful to those who buy them, then that society is being irresponsible to its citizens.

If I as an individual see you about to distribute as a beverage a liquid that I know is poisonous and you proclaim is safe, then I am irresponsible to you and to those whom you have convinced to drink the liquid if I do not snatch it away and forbid you to speak about it any longer.

The problem, of course, is that if we could all agree on the truth, the banning of falsehood would not be problematic. But we don't all agree on what is true. In fact, we don't all agree even on how the truth is to be discovered (some believe that only what science tells them is true, others look to divine revelations, others to intuition, others to what the majority thinks, etc.). Although this fact can be distressing, it is also our clue to the basis of the right to freedom of expression because it reveals one of the most important distinguishing traits of the human person: the capacity for self-determination.

### **TRUTH'S ADVANTAGE OVER ERROR**

But, indeed, the dictum that truth always triumphs over persecution, is one of those pleasant falsehoods which men repeat after one another till they pass into commonplace but which all experience refutes. History teems with instances of truth put down by persecution. If not suppressed forever, it may be thrown back for centuries. . . . It is a piece of idle sentimentality that truth, merely as truth, has any inherent power denied to error, of prevailing against the dungeon and the stake. Men are not more zealous for truth than they often are for error, and a

sufficient application of legal or even of social penalties will generally succeed in stopping the propagation of either. The real advantage which truth has consists in this, that when an opinion is true, it may be extinguished once, twice, or many times, but in the course of ages there will generally be found persons to rediscover it, until some one of its reappearances falls on a time when from favorable circumstances it escapes persecution until it has made such head as to withstand all subsequent attempts to suppress it. . . .

J. S. Mill, "On Liberty," in *Utilitarianism, Liberty, And Representative Government* (New York: Dutton, 1951), pp. 118-119.

### Determining the Truth for Oneself

Part of what it means to be fully human is to be able to determine freely what course our life shall take: to be able to make the basic decisions about the enactment of our intentions without coercion, to be able to enter into loving relations with others of our own volition. If the highest form of human relationship is one of love, then it is clear that we must have the freedom to create it since love can never be imposed or compelled. At the very foundation of our freedom to choose is our freedom to make those choices with the widest range of options possible and on the basis of the most accurate knowledge. Intelligence is a prerequisite for true freedom of action. Although all people are free to vote for whomever they wish, ignorance of candidates' views makes the decision for whom to vote virtually a random one. Freedom is not the same as randomness: it entails, in part, freedom from factors that influence one's choices unconsciously. To be really free to make choices, people need to know their options, what the likely consequences of their choices will be, and they must choose without being influenced by forces of which they are unaware.

Freedom of expression should be defended, therefore, essentially because it is a prerequisite for making self-determined choices with the greatest degree of critical intelligence. Reason and critical thinking may not always lead to the truth. And the right of free expression does not depend on an assertion being true. But apart from critical thinking, there is no way for a person to make intelligent, self-determined decisions. Any restriction on freedom of expression must make its case on the grounds that the consequences of erroneous choice are so obvious and clearly undesirable as to outweigh the negative consequences of limiting expression.

## OBSTACLES TO FREEDOM OF EXPRESSION

As we now examine specific cases in which freedom of expression is an issue, we will see the basic conflict between the need of a society to prevent certain undesirable consequences and its need to provide some way in which error and self-interest can be challenged by those whose contrary beliefs are not presently in the ascendancy.

We should first turn to those factors in society that, while not deliberately seeking to stifle freedom of expression, nevertheless work against it in subtle ways. One such factor would be habit or the inertia of accepting whatever happens to be the prevailing opinion at any time. Most of us find it easier not to be constantly examining and rejustifying beliefs and opinions. It is far more convenient to accept the general view of those around us on issues not of immediate concern. But while habitual ways of thinking have the virtue of freeing our minds for other matters, they have the vice of closing us off from new and potentially more truthful points of view.

Another aspect of unexamined thinking is prejudice or bias. To be biased *per se* is not necessarily bad (it means bending toward something) provided it is based on justifiable reasons. But prejudice and unevaluated bias lean us toward views that are more the product of emotional self-interest than disinterested investigation. Not only does prejudice lead to damaging consequences for others who are the target of our views but it also closes us off to insights and truths that, if adopted, could free us for new and exciting encounters with others.

We should also mention the fact of propaganda or self-interested advertising as an obstacle to critical thinking and freedom of expression. While presentation of information about a governmental policy or about a product for sale by a private company is a necessary part of the process of making an intelligent decision (and is itself a form of freedom of expression), propaganda is the presentation of false, misleading, or emotionally manipulative material. By working on parts of our decision-making faculties other than pure reason, propaganda inclines us toward choices over which we have relatively less control than those we make after careful deliberation and weighing of the evidence. When a piece of propaganda subtly questions a man's masculinity if he fails to choose a particular brand of cigarette, his choice is affected by emotional factors that are very powerful but not easily controlled by rational thought.

Another factor working against self-critical thought is the pressure of public opinion. All persons are members of various groups or publics. It is necessary to the success of such groups (from churches to cattle owners' associations) that the members express a high degree of unanimity on issues central to the groups' purposes. In such a context it is difficult for the individual member to express freely and in detail any qualifications or reservations she might want to make about the group's position. Because

the group's position must satisfy a wide variety of individual concerns, it must be simply stated and usually winds up being an oversimplification of a complex problem, something that could be put into a slogan such as "No Nukes." While the result may prove quite politically effective, it operates as an obstacle to critical thinking and freedom of expression because it leaves little room for individual dissent or modification. Since the individual does agree with the basic stand taken by the group, she is encouraged (both by her own self-interest and by the group as a whole) not to express her hesitation or engage in what might seem like nit-picking or trivial argumentation. But the end result is a diminution in critical evaluation and an increase in submission to the views of others.

### **The Opinion Poll**

One particularly pernicious aspect of the pressure of public opinion is the emergence in recent years of the public opinion poll. For many people who have succumbed to the obstacles of habit, prejudice, propaganda, and laziness of thought, the public opinion poll becomes a convenient way of deciding what to think. Most of us don't normally like to hold a minority viewpoint. Therefore, we find our thinking aided immeasurably by discovering what the majority of our fellow citizens think. Although this information might be enlightening, it can also be a convenient excuse for having our thinking done for us by other people. It has even been alleged that when the election results from one part of the country are flashed to other parts in which the polls are still open, many people decide to vote for whomever is leading, simply to be on the side of majority opinion.

### **Ignorance About the Bill of Rights**

It is this kind of mindless thinking that has led most of the famous voices of the past to write their defenses of freedom of expression. We have already examined the essence of Thomas Jefferson's position (with its attendant problems). His stand on freedom of thought and expression is, of course, particularly pertinent to us since much of it was incorporated into the famous Bill of Rights, the first ten amendments to the Constitution of the United States. The First Amendment is the clearest and most forceful: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances." As we shall see shortly, there is much debate on exactly how parts of this Amendment are to be interpreted: but its general thrust is clear. What is alarming to many defenders of freedom of expression is the degree to which large numbers of Ameri-

cans remain ignorant of this vital part of our constitutional legacy. It has now become an almost annual exercise for a researcher to present to citizens a copy of the Bill of Rights without identifying it as such and to ask them whether it is acceptable. A large percentage of persons reject it as being too "communistic" or "un-American." It would be ironic and tragic if this hard-won freedom were to be lost in part because people simply did not know of its origin or place in their own national history.

Jefferson was not, of course, original in his defense of freedom of expression. The English traditions, to take but a slightly earlier example, have long had forceful speakers on the issue. John Milton, one of the most important of English poets, wrote in his "Areopagitica," in opposition to a Parliamentary bill of 1643 that would have made all publications subject to prior approval of Parliament, "Who kills a man, kills a reasonable creature, God's image; but he who destroys a good book, kills reason itself."<sup>3</sup>

Another historic defense of freedom of expression was made by John Stuart Mill (1806–1873) in his essay "On Liberty." There, Mill said "If all mankind minus one were of one opinion, and only one person were of the contrary opinion, mankind would be no more justified in silencing that one person, than he, if he had the power, would be justified in silencing mankind." Even if the one opinion is clearly wrong, society gains by "the clearer perception and livelier impression of truth produced by its collision with error."<sup>4</sup>

We can be proud that our nation has built on and incorporated the ideas of such forceful defenders of a precious liberty. But no freedom is without its complications as it is lived out in the detail of everyday, social life, nor is it without its attackers and detractors. We now must turn to some of the more important specific issues facing us today with respect to freedom of expression.

## CONTEMPORARY ISSUES

### National Security

It is clear that groups of all kinds have a vested interest in retaining the loyalty of their members. A group shot through with conflicting opinions is rarely able to achieve its purposes. This is especially true of nations: a basic freedom each one desires is from the threat of destruction by external enemies. To secure this freedom, nations develop a security system that includes both military defense and defense against domestic betrayal. Few would challenge the right and need for a country to have a national security system; in fact, many of the most troubling incidents involving free-

<sup>3</sup>John Milton, "Areopagitica," *Major British Writers I* (New York: Harcourt, 1954), p. 430.

<sup>4</sup>John Stuart Mill, *Utilitarianism, Liberty, and Representative Government* (New York: Dutton, 1910), p. 79.

dom of expression in recent years have come in areas relating to national security. A recent president of the United States has even been alleged to have broken the law in order to suppress citizen's attempts to publish material critical of this country's handling of the Vietnam War—and the chief executive's action was justified on the grounds of national security. The question raised by this event is whether there are any limits to the use of national security against the right of free expression by those who disagree with a nation's policies. Clearly, handing over to an enemy agent information that could lead to the weakening of a country's defenses in time of war is a treasonous act. But on what grounds should a nation's laws be imposed on someone merely *suspected* of committing such an act? Surely, the legal protection would extend to this person just as it would to a suspected murderer, even though in the eyes of some the former crime is far more heinous than the latter.

The whole purpose of law is to keep individuals (no matter how exalted) from exploiting their power to enforce laws without due process when the accusation is based on mere suspicions or beliefs. In many cases, attempts to block the publication of dissenting views are motivated by a fear that what will be revealed will be damaging, not to the nation, but to a particular party, or person, or set of policies and judgments (the latter should not be identified with the security of the nation at large). Self-interest makes it hard for us to remember that although we might think a particular administration's policies are right, they are rarely, if ever, the only viable and loyal policies conceivable. The individual who sought to publish material damaging to a particular administration's conduct of the war claimed to be loyal to his country's best interests and opposed only to the way in which those interests had been, in his opinion, subverted by the administration in question. In fact the publication of the Pentagon Papers was eventually upheld by the Supreme Court on the grounds that the material contained in them was not detrimental to present security efforts even though it was damaging to the reputation of earlier policies and programs. In striking down attempts to quash the Papers, the Court in effect reminded the country, and especially those in particularly powerful positions, that the power to exercise restraint against free expression in the name of national security is so fraught with potential abuse that it must be employed with extreme caution and with heightened sensitivity to the right of minority viewpoints on national policy.

## The Loyalty Oath

A crucial part of the debate over the use of national security to curtail expression is the status of the loyalty oath. Although not as legally well entrenched as national security, the loyalty requirement has been used by many associations to ensure that their members are above suspicion in



fidelity to the groups' aims and policies. There are various consequences for failing to take such an oath, for example, the infamous "blacklist" used by many organizations to keep "suspect" people from employment. It is not hard to imagine the chilling effect a loyalty oath can have. Ironically, of course, those who are truly disloyal and are seeking to corrupt a group from within will be the first to sign such an oath since presumably they are not bound by the same scruples as those who are offended by the presumption of someone else questioning their loyalty. It is plain that the effect of the oath and its implied consequences is the stifling of free speech. Many can still remember the midfifties when the McCarthy scene frightened many Americans into silence and fearful conformity to the views of a few self-selected patriots. Hundreds of able writers, actors, teachers, and public servants were blacklisted and lost their jobs simply because they refused to sign a loyalty oath at their place of business. They based their refusal on the proper claim that they had done nothing to have their loyalty questioned in the first place and that the greatest personal safeguard of the American legal system is the presumption of "innocent until proven guilty" in the proper judicial arena.

Even more insidious was the stifling of free expression by self-proclaimed patriots. It became the norm to blacklist someone who refused to answer leading and intimidating questions (despite the fact that silence is no sign of guilt), or who had associations with people who had been blacklisted or suspected of some nefarious deed, or who belonged to an organization that one of the witch-hunters "thought" was in some way suspicious. This country has never passed through a period in which freedom of expression was so greatly in jeopardy as it was in those days.

We must not think that the kind of scare tactics that then threatened freedom of speech are a thing of the past. In less widespread but still chilling ways it is with us today. An actress who had espoused unpopular political views was recently attacked for taking a part in a movie sympathetic to the attacker's position: a singer loses bookings because her open espousal of certain sexual views is offensive to others. It is clearly the prerogative of all citizens to refuse to hear someone with whose views they disagree; however, it is not right to refuse that person employment if the views in question are unrelated to the kind of work or skills involved.

### **Obnoxious Views**

Needless to say there are some very difficult cases in which it is hard to feel strongly about these principles because the views expressed are so obnoxious as to be revolting. But it is precisely in the hard cases that we need to keep the principles visible. It is easy to do right when the situation is uncomplicated: it is hard but necessary to do right when the situation is demanding. If our morality depends on the ease with which it can be

implemented but falls apart under pressure, it is hardly a morality that can be counted on to safeguard basic liberties. The real test of freedom of expression comes when we must grant it to those who will use it to express views thoroughly repugnant to us. But unless we are willing to stick to the principle in this kind of hard situation, we may well find that our own views are someday suppressed because another group of people in a position of power find *them* repugnant and dangerous.

Perhaps one of the hardest of recent cases to test the principle of freedom of expression came in the town of Skokie, Illinois in 1978. Skokie is a town where a large number of survivors of the Nazi concentration camps live. Their memories of that holocaust are still vivid and painful. In the name of free speech, The Nazi Party of America asked for the right to demonstrate on the main streets of Skokie, carrying their banners and reading their speeches of vilification against the Jews and praising the work of Hitler in his attempt to exterminate the Jewish people. It is hard to imagine a more morally odious group than the Nazis or a more victimized, traumatized group than the Jewish survivors of the Holocaust. Because of the likelihood of the march stirring up old, painful memories and further traumatizing already damaged people, many persons otherwise sympathetic to freedom of speech sought to have the march prohibited. This was a true test case for freedom of expression. It made the application of the principle of that freedom difficult but admirable in the opinion of many because it had stood up under conditions and opposition with which even the defenders of freedom of speech could sympathize. Many people, in fact, remained genuinely torn in their opinions. One point around which much of the discussion turned was the applicability of the "fighting words" doctrine, which says that if a speaker knows ahead of time that his words will likely cause a riot or lead to damage, he can be held liable for what he says and his actions may be prohibited. Although it was clear that the speech of the Nazis would be troubling to those who heard it and although many of them would be particularly sensitive, given their past experience, to what would be said, it was argued from the other side that if undue consideration was given to how people *might* react or the degree to which they *might* be offended, then free speech was in danger in more than just this situation. Should black civil rights groups, on the same line of reasoning, have been forbidden from marching through racist, segregated neighborhoods simply because racists would be offended, perhaps even traumatized somewhat, by being confronted with the demands of civil rights?

It has been held by courts that if genuine riot or physical violence can reasonably be shown to be probable in the event of a demonstration, it can be stopped. But short of that eventuality, the courts generally have permitted free speech, no matter how morally repulsive its content is to the sentiments of the general population. They have done so in many cases because they believe the right of free expression is so precious that it

should be defended especially in the case of minority opinions because it is there that it takes on meaning and its full power and value can be seen. As one Jewish defender of the Nazi's right to speak said, "If we take away this loathsome group's right to express its views, who is to say when we (the Jews) will once again become a loathsome group in the eyes of some other protectors' of the public sensibility?" If the decision as to what views are acceptable and what are to be suppressed depends on popular sentiment, then the rights of minority groups must always remain precarious. The surest way of protecting one's own right to express opinions is to protect the right of those groups most opposed to one's own views.

### Scientific "Claims"

Another objection to free speech is that if ideas have consequences, some ideas, expressed often enough and with enough apparent credibility, could lead eventually to actions that would not have been contemplated had the listeners not been exposed to those ideas. A very controversial recent case has involved the expression of views by a prominent scientist (his prominence, incidentally, is not in the field about which he is speaking). Claiming the support of scientific evidence, this speaker asserts the inferiority of black people in the area of intelligence. On many campuses, he has been actively opposed and on some his appearance has been banned. Once again, the issue of freedom of expression is challenged by a hard case. The main argument of those seeking to ban his speaking is that in this particular case, his views could lend spurious, scientific credibility to racism that in turn could be used as justification by those who wish to legislate various forms of racial discrimination. For example, if his views are taken seriously, those who wish to limit funding for predominantly black schools would feel themselves justified in doing so on the ground that it makes no sense to spend money on those who cannot learn as well as their white counterparts. The proponents of limiting this scientist's freedom of speech remind people that if someone like Hitler were permitted complete freedom to express his anti-Semitic views in the guise of scientifically verified principles, he would convince many people who believe anything with scientific backing to support anti-Semitic legislation. They point out that public speaking does not have sufficient safeguards against misleading, distorting, and emotionally charged propaganda presented under the guise of scientific "truth."

Roughly the same kind of argument has been advanced against large corporations engaging in advertising aimed at selling children cereals and other items about which they are in no position to make a reasonable judgment. The advertisers, of course, claim that any attempt to limit the kind of advertising they do is a curtailment of their right of free speech. Their opponents point out that freedom of speech does not entail the right

to use persuasive techniques on defenseless people who are unable to sort out truth from fantasy, especially when the fantasy, if acted on, would lead to harm.

It should, of course, be noted that one important difference between the two cases is that in the former, a single individual is involved, and in the latter, the power of a giant corporation. Many would argue that corporations do not have the same kind of rights as individuals. Because their power is so much greater, corporations have a correspondingly greater responsibility to exercise due care in the expression of their ideas. The advertising power of a major cereal manufacturer exercised on Saturday morning television has a much more pervasive effect on the minds of children than does the power of a single speaker addressing an audience of adults.

Nevertheless, the issue of freedom of expression is roughly the same in both cases. To what extent should a society seek to protect people it believes are unable to sort out fact from fiction from the presentation of ideas that are admittedly important enough to cause major changes in the society, if acted on? It should be remembered that the defense of the right of free speech does not derive from the assumption that what is said is true. It is, in fact, the belief that truth can only *emerge* from the confrontation of alternative views that underlies one need for freedom of expression. The real issue, in our opinion, is not whether individuals or groups are free to express their ideas but whether they have a responsibility to avoid distortion and to respond to alternative views.

### Responsibility for Nondeception

It is a point of law that a company that deliberately deceives a consumer about the product he has purchased can be held liable for that deception. The right of free speech does not include immunity from damages done when people act on false information contained in the speech. Obviously when the consequences of acting on misleading information are far in the future and mixed with numerous other factors, it is impossible to isolate particular pieces of information as the direct causes of damaging acts. Nevertheless, many feel that speeches directly or indirectly abetting racism have the long-range effect of making racism respectable and thus leading to racist acts. How is it possible, therefore, for a society to ensure that racist speeches are responsibility made? Those who would seek to have free speech with no risk involved want the principle without the price. But the price of free speech is that many ideas will be expressed that are not only untrue but also contributory to harmful acts in the long run. This, we believe, is an expensive price, but the price of not paying it is to sanction the right of a society or powerful groups within the society to censor what at any given time they regard as unacceptable views. The potential abuse

to which such a right can be put is far greater than the abuse to which the right of free speech can lead. No right is risk-free.

In a free society, one way of minimizing the risk without eliminating it would be to require speakers to listen to alternative positions (even if they should not be forced to answer questions). The laws against deception would provide an additional boundary beyond which the speaker's claims could not go without some recourse by his opponents. In the case of corporate advertising, the basic principle that could be utilized in opposition to their propaganda aimed at children would be that freedom of expression assumes the encounter of reasonable people with differing ideas. If children have not yet reached the age of reason and yet are being treated as having the capacity to act, to their detriment, on emotions stirred by powerful propaganda, then it would not be unreasonable or an infringement of freedom of speech to restrict the kind of access corporate advertising has to them.

## PORNOGRAPHY

Another very volatile area in which freedom of expression is at stake is the question of whether pornography should be permitted to be sold openly to all adults who wish to purchase it. Freedom of expression is involved in the sale of pornography because many people believe that pornography is genuinely harmful to some people. There is much disagreement, even among the advocates of limiting the sale or display of pornography, over what kind of harm is caused and to whom. There are some who downplay the alleged harmful effects of pornography and instead base their desire to ban it on the principle that it is morally offensive to the larger community.

One of the underlying complicating factors in any discussion of pornography and free speech is the difficulty in reaching a single, agreed-to definition of what obscenity or pornography *is*. The root meanings of these two words are clearly related to that which sexually stimulates and that which is morally impure. There are some writers who have argued that to restrict obscenity to sexual areas is to miss the filth and moral impurity of such things as racism, war, and the prostitution of values in the name of money or success. Nevertheless, the difficulty in reaching a decision about the meaning of pornography means that at a fundamental level, the opponents in this debate simply do not agree that what is under consideration is truly, morally impure. The case for censorship holds that exposure of adults (let alone minors) to sexually stimulating material leads directly to various criminal acts. They point out that people who read or watch pornographic material are often involved in sex-related crimes. What is not clearly demonstrated (and, some would argue, has been refuted by counter demonstrations in Denmark where sex crimes went down when the sale of pornographic material became legalized) is that exposure to pornography is a *cause* of sex crimes. It is one thing to argue that the two go together, but the evidence could be interpreted to mean that people who commit sex crimes

would do so whether or not they had access to pornography—that their interest in the latter is a consequence of the same factors that lead them into sex crimes in the first place. Despite the conflicting evidence, however, if it could be shown beyond a reasonable doubt that reading pornographic material did have a strong causal effect on sex crime, the case for limiting exposure of pornographic material would be immeasurably enhanced. The point at issue, it should be remembered, is a factual one in this case.

### **Pornography as Dehumanizing**

Also somewhat dependent on factual evidence is the case against pornography based on the belief that a society exposed to it over a period of time will become dehumanized and loveless. It is argued that pornography displays people in mere carnal encounters that inevitably are less than personal, in which there is no room for love, tenderness, and the whole gamut of human feelings that go far beyond the sexual to make up a full personal relationship. A person exposed to enough of this kind of purely sexual emphasis will eventually come to think that sex alone is what makes a person “authentic.” Therefore, in the name of a loving society, there is solid ground for limiting or even banning the display of pornographic material.

This position is still dependent on some factual findings: if it could be shown that exposure to pornography does not, in fact, lead to a dehumanizing of personal relations, then the position would be correspondingly weaker. There are even some authorities who have argued that in many cases, exposure to pornography has helped love relationships. They point out that many couples have trouble expressing the sexual side of their relationship because of inhibitions and fear, the result of which is a less than wholesome relationship. By viewing allegedly pornographic material, they have been freed from their barriers to full expression and have gone on to develop full personal relations with others in which sex is an important part but by no means the central or dominating attraction. Those who argue this way claim that a desire to avoid (and have others avoid) sexual material is based on a fear of sex and is therefore ultimately debilitating. A free, open encounter with sex is the only way, paradoxically, that sex can be dethroned from its place in the pantheon of obsessions and reduced to what it should be in a healthy relationship: a necessary but not sufficient aspect.

### **Community Standards**

Finally, and least dependent on factual support, is the claim that pornography is offensive to the moral standards of the community and that the majority has a right to keep out of its sight what it finds offensive. Just as a

community, through zoning laws and other legal devices, can prohibit a junk yard from being built on a quiet, residential street, so it can prohibit establishments from dispensing what in its view is moral junk. Many of those advancing this position do not wish to prohibit the sale of pornographic material per se but merely to restrict the location in which it is sold so that nonconsenting adults need not have their moral sensibilities offended. Some cities, for example, have used this argument to "cordon" off a section of town beyond which no pornography can be displayed but within which it can be. All citizens are informed of its location and those who consent to buy pornography are free to do so and those who do not wish to be offended are forewarned to stay away.

Even this expedient, of limiting the location of pornographic supply shops and movies, is not sufficient to meet the demands of some who would argue that unless the exposure to pornography has been demonstrated beyond a reasonable shadow of a doubt to constitute a clear and present danger to the safety or well-being of the community, it should be permitted complete freedom of display. They would argue that it has not, in fact, been shown to lead directly to harmful effects, either for the person who is exposed to it or for others within the community. They reject the argument that pornography leads to a depersonalization of love and they are especially fearful of the argument that a community's moral sensibilities should determine the freedom of expression of members within it. The core of their argument is that as long as the acts of consenting adults do not harm others, it is no business of the society to dictate what they can and cannot do.

### **AVOIDING THE OFFENSIVENESS OF PORNOGRAPHY**

When printed words hide decorously behind covers of books sitting passively on the shelves of a bookstore, their offensiveness is easily avoided.

There is nothing like the evil smell of rancid garbage oozing right out through the covers of a book whether one looks at it or not. When an "obscene" book sits on a shelf, who is there to be offended? Those who want to read it for the sake of erotic stimulation presumably will not be offended (else they wouldn't read it), and those who choose not to read it will have no experience of it to be offended by.

Moreover, no one forces a customer to browse randomly, and if he is informed in advance of the risk of risqué passages, he should be prepared to shoulder that risk himself without complaint. I conclude that there are no sufficient grounds derived

either from the harm or offense principles for suppressing obscene literature, unless that ground be the protection of children; but I see no reason why selective prohibitions for children could not work as well in the case of books as in the cases of cigarettes and whiskey. . . .

Joel Feinberg, "Harmless Immoralities and Offensive Nuisances," from *Issues in Law and Morality*, ed. N. Care and T. Trelogan, (Pittsburgh: Case Western Reserve Univ. Press, 1973), as found in Thomas A. Mappes and Jane S. Zembaty, eds., *Social Ethics: Morality and Social Policy* (New York: McGraw-Hill, c. 1977), p. 256.

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In our opinion, there is a clear risk to the full enjoyment of freedom of expression, but once again, we feel it is better to take this risk than risk the dangers of the suppression of free speech. Assuming that it has not been demonstrated that exposure to pornography is a direct causal factor in harmful acts to others, and assuming that even if such exposure could conceivably constitute some kind of harm to the consenting adult, that harm is so hard to measure and would be so loaded with nonfactual interpretations that it is better to permit adults to make their own choices in this area. I may regard Mr. Jones going to see a pornographic movie as a waste of time, as indicative of some values on his part that I do not share, even as a sign that Mr. Jones does not have the capacity for a full personal relationship, but I also respect Mr. Jones' right to make a mistake and to choose to live a life that I find less than satisfying. That is the price of permitting each of us the freedom to determine our own lives. I can insist that Mr. Jones not leave pornographic materials in my mailbox or display them on a street down which I and my children must necessarily pass, and I can keep my mind open for evidence that would demonstrate that Mr. Jones' exposure to pornography is causing him to become a sex criminal, but I would be infringing without sufficient justification on the precious freedom of expression if I prohibited Mr. Jones from using his freedom to see and read what he wants.

It might very well be true that the moral values I feel are important to my community are degraded by an increasing preoccupation with pornography on the part of Mr. Jones and those like him. But, even apart from the



fact that clamping down on something is a sure way to excite interest in it, I would have to balance the moral tone pornography represents against the moral tone displayed by a community decision to prohibit freedom of expression. It will not do just to say that a community's moral tone is sufficient to prohibit certain offensive materials. The act of prohibition is itself, necessarily, a moral act and sets a moral tone: it is not a morally neutral event. Prohibition or curtailment of expression, while obviously necessary in certain instances, as we have already seen, can cast a chill over a community that may be, for many, too high a price to pay for staking out a moral claim against offensive literature. A price will be paid in either case: in our opinion the choice for freedom of expression in this instance sets the better moral tone.

### **Academic Freedom and the Censorship of Textbooks**

In a slightly less sensational way than in the case of pornography, many communities experience the dilemmas of freedom of expression in dealing with educational materials in their school systems. In recent years, there has been a wave of concern sweeping many school districts about the kind of "radical" or "subversive" material used in the classroom. On the basis of the principles that the community has a right to determine by what values its children shall be educated and that materials harmful to persons can legitimately be suppressed, many people have tried to remove from school libraries and curricula books that, in their opinion, are damaging because they represent values not held by the community as a whole. Although this issue has sometimes affected institutions of higher learning (and has led to the implementation of such safeguards as tenure and the protections of the right of free speech and research), its greatest effect is felt in those educational systems directly under public control. Although some of the protesters against allegedly controversial material are simply misinformed (many objections are raised against books that are American classics, like "The Scarlet Letter," and are often unread by the objectors), there is clearly an issue involved if a school is requiring its children to read books that advocate values the community finds offensive. Although it is better to err on the side of freedom of expression, the issue is complicated by the fact that, according to the objectors, those who are doing the reading are not yet old enough to form mature, intelligent judgments about what they read and that those requiring the reading are not critical or intelligent enough to put the material into a fair and comprehensive framework.

Although it is clear that some materials do present points of view that many of us would find morally repugnant, it is equally clear that the attempt to suppress the material is morally repugnant. There is a clash of values in this situation. In our opinion, the resolution of the conflict can be approached by a judicious balancing of the need for students to be exposed

to ideas that challenge their own and the need to experience that challenge with the tools of criticism, intelligence, and knowledge. Ideas, no matter how disturbing, do not go away simply because the materials in which they are contained are prohibited. The best way to deal with ideas is to confront them: examine their assumptions, their evidence, their consequences. If this kind of critical confrontation of ideas with ideas, values with values, is not done in the supportive context of an educational system, it is unlikely to be done elsewhere as well or as sympathetically.

### THE DEMAND FOR EXPRESSION VERSUS THE RIGHT TO PRIVACY

So far our discussion has involved only those cases in which people have sought to express their ideas and found some obstacles to that desire. However, there are cases falling under the general rubric of freedom of expression that involve the need of a society to gather information that individuals may not wish to supply. In these cases, expression of beliefs and knowledge would be withheld in the name of freedom and compelled in the name of overriding social needs.

For example, information about a person's financial dealings or health may need to be divulged if a credit card or an insurance policy is to be issued. A newspaper reporter may have some information relevant to the disposition of a court case that she is not willing to reveal because to do so would jeopardize confidential relations with an important news source. A person called before an investigative body may not wish to reveal information he alone knows about the life of someone else under suspicion of disloyalty.

Does a society have the right to coerce the expression of knowledge and opinion? Are there some things individuals have a right to keep private even though to do so would complicate the work of various social agencies? Some would argue that in a free enterprise system, it is necessary to give up some information about myself (such as my medical history) in order to get health insurance coverage since I am not guaranteed that coverage by the government. In other words, to get something you must give something. Although agreeing in principle, others argue that once that information gets stored in information banks, it can be pried loose by other agencies to whom I have not given my consent. In an age fascinated with the setting of records and the compiling of statistics, it is not too surprising that we are moving, as one critic put it, toward a Dossier Society. The federal government is reported to hold almost four billion (4,000,000,000) records on individuals. In addition, records are kept by banks, credit bureaus, insurance firms, utilities, medical facilities, subscription list distributors, investigating agencies, and even portions of the media.

The horror stories connected with the abuse and misuse of these records are legion. One man was declared dead by the Social Security computer in 1978 and is now spending month after month waiting to be resurrected. (Meanwhile, his checks and other vital services have been curtailed since, with foresight, the government does not expend its energies on dead people). It has been determined that the only way to bring him back to "life" is to "lie" to the computer, defraud it, in order to get it to alter its information. Thousands of people have been denied insurance because neighbors or associates have lied about the person's health or life style, and the lies have been duly recorded as fact without cross-checking and without being made available to the client for refutation.

Despite the injustices to which this kind of activity can lead, there are strong voices that say the risk is worth it. Since much of the illegal operation of business racketeering and white collar crime reveals evidence of itself only through bank records or phone calls, some law enforcement officials argue that unless they have access to such records, they cannot compile a sufficient case against the criminals. Many of the complicated crimes have been solved by knowing who talked to whom when, who made deposits in which bank, and so on. As criminals themselves employ data banks and create computer frauds, it is only fair, many claim, that legal agencies have the same power. (Unfortunately, in one case, the use of data records by the police enabled a convicted criminal to secure from those records the name of the person who informed on him and with that information ordered the murder of the informer.)

### **The Argument for Complete Privacy**

At the opposite end of the spectrum are those who argue for complete privacy: no information to be revealed except at the clients' bidding. Although this position clearly would protect against fraud and the misuses of information, it would effectively eliminate private insurance and credit extension since these agencies could not stay in business if they had to depend only on the information the client was willing to provide them. It would also be extremely difficult for the federal government to develop fair and just policies affecting the distribution of services to people if it had no accurate knowledge of their needs and abilities. Some have argued recently that it will become increasingly difficult to take an accurate census of the United States (required every ten years and used as a basis for all sorts of social planning) since so many people are afraid of what will be done with the information they reveal about themselves to the government.

There is a third set of voices being heard on this issue: those that wish to see complete open disclosure of all information, not just to private and federal agencies, but to the public at large. On the principle that secret information will be used fraudulently, they argue that an honest society

needs to be an informed society: that the voters and the general public can make better, wiser choices if all the information is available to them. Unfortunately, this would mean that personal matters, or matters regarding my choice of political groups or reading material or private entertainment could be made public. Whether the benefit to society at large would be worth that kind of public revelation is extremely difficult to determine.

### **Rights in Conflict**

Clearly in this area there are rights in conflict: the right of the society to defend itself against crime that seeks to hide behind the barrier of privacy and the right of individuals to protect their lives from intrusion that has no socially redeeming purpose. One way society can approach a responsible position on the issue might be for it to decide what *kinds* of information it wishes agencies to have. To make that decision wisely it should be presented with clear arguments setting forth the reasons why some information is relevant to policies with which the society agrees, for example, general income range to determine the kind of income supplementation necessary in certain deprived areas or the kind of taxes to levy. Other kinds of information, such as political affiliation, reading material, life style, and the like, would be irrelevant to most agencies' work. If a case could be made that such information *is* essential, then individuals could have a choice as to whether they wish to receive the services of that agency in return for giving up that kind of information. The problem with much information-gathering today is that the person about whom the record is compiled has no way of knowing what is in the file, no way of correcting what is erroneous, and no way of controlling to which agencies, other than the one agreed to, the material will be provided. In the end, society must seek to balance individual privacy against the social need for information.

### **Informing on Others**

Related to the issue of invasion of privacy, but somewhat less threatening to the personal life of the individual from whom information is sought, is the issue of whether people should be compelled to reveal information in court cases or investigative hearings. During the McCarthy scare, many individuals were called before congressional committees and asked to testify against friends and acquaintances. Quite apart from the legality and power of such committees, the question arose as to whether an individual had the right to protect a friend by silence even if he knew the friend to be guilty or suspect with regard to some crime. There is a strong version of private morality which holds that people should not inform on their friends: to do so would betray a basic lack of loyalty and confidence. Let the

investigating agency discover in other ways whether there is evidence of guilt or not: morally, I should not be put in the position of being my brother's accuser. As John Steinbeck put it: "To force personal immorality on a man, to wound his private virtue, undermines his public virtue."<sup>5</sup>

On the other hand, critics ask what happens if the situation is not that of a McCarthy-like witch-hunt for suspected traitors, but is rather one in which the investigation is looking for persons suspected of defrauding the poor of millions of dollars? Do I have a right, in the name of private virtue and a sense of personal loyalty, to shield a friend I believe may be involved in such a crime? How is that private virtue weighed against the need of my society to seek out those who would betray its basic principles of justice? To what extent must I as an individual contribute to its task? If I refuse my contribution, how can I expect others to make theirs? Once again, the dilemmas arise because of the need to balance individual liberty against social need. Unless we wish to assert that the individual can live without society, it is inevitable that at some point the needs of the one will have to be modified to meet the needs of the other.

### Obligations of the Press

Some have argued that while individuals, per se, do not have the right to arbitrarily choose to withhold information vital to the prosecution of a criminal case, certain classes of individuals do. Reporters, whose job it is to provide the public with the kind of information necessary to enable them to be informed citizens, are singled out as making up such a class. If there is to be a free flow of news, especially from and about places of decision making and power, it is crucial that some individuals provide information to the press that would not normally be forthcoming. These people can confidentially reveal to a reporter what they know to be going on, but the reporter cannot disclose the informer's identity to the public. To do so would automatically make it impossible for the reporter to be entrusted with the kind of information informers feed to the press. Some reporters have argued that even in criminal cases in which they have been asked to testify, the right of confidentiality of sources is so important that it should not be violated even if the information sought would be vital to the outcome of the case. They point out that if the government has the power to compel such information, the result would be a drying up of sources of information about all sorts of important institutions and policies. A government bent on protecting its own mistakes and fraudulent dealings could use such power to prevent damaging information about its illegal doings

<sup>5</sup>John Steinbeck, "The Trial of Arthur Miller," in *Contemporary Moral Issues*, ed. Harry K. Girvetz (Belmont, Calif.: Wadsworth, 1964), p. 73.

from being made public. Only if informants have the assurance that their identity remains inviolate will they provide the kind of assistance a free press depends on.

Opponents of this position argue that it is not fair to single out certain classes, especially the press, for immunity from releasing vital information. They would agree that other classes, such as the clergy, have a special kind of immunity, but that the media is such a diffuse, uncertified, nonaccountable body of persons that it is dangerous to grant it a power not granted to others. Just as withholding information by a government can be an abusive act covering up self-serving interest, so withholding information by a news person can be an excuse for suppression of facts harmful to the self-interests of the news agency. There is no monopoly on employing deceit or using cover-ups to hide self-interest and illegal activities by any one class of people. The press is no more altruistic, despite the vital service it performs, than any other class.

## PUBLIC DECISIONS

The ideal way to bring the right of freedom of expression into harmony with the need to restrict that right under certain circumstances would be to have a society decide, through open and critical discussion, those areas of its common life in which it wants some curtailment of freedom of expression. The real dangers of freedom of expression do not lie in those restrictions that have been agreed to by public discussion and selection: they lie in those restrictions imposed subtly, unconsciously, or in the name of arbitrary values by wielders of political power.

Most of the historical objections to curtailment of the freedom of expression have assumed often implicitly, that the real enemy is a coercive majority capable of imposing its view on a relatively powerless minority. Because society is created in part out of a mutual distrust of the self-interest of other people, especially as it congregates in associations that can exercise more power than individuals, freedom of expression is important in keeping the self-interest of one group from interfering with the self-interest of another group.

Truth is enhanced when it is able to be seen as such, which happens only when it can be challenged openly by counter views. If I wish to have you accept, for your own well thought out reasons, my claim that what you are about to drink is hydrochloric acid, I would rather have you challenge me to prove by public test that the liquid is acid rather than simply take my word for it. I know that only in this way will you be thoroughly convinced. As long as people feel that they are being forced to act for reasons they cannot accept, their obedience will be provisional and unstable since their action is compelled from without. If you wish to secure others' assent to

your belief, you must provide grounds for the belief that can pass the test of critical evaluation. The only mechanism for providing those grounds is an arena in which competing claims can be put forward for examination and appraisal. The mortar for building the arena is freedom of expression.

### **Group Self-Interest**

We should not be naive and expect that pure rational discussion will quickly, if ever, lead to the disappearance of error. Self-interest will always incline reason to serve its ends to some degree. But the manipulation of reason and critical thinking can be restrained if everyone has equal access to the arena of rational challenge and debate. Because manipulation becomes increasingly dangerous the more it is under the control of increasingly powerful groups, the more scope should be given to the individual to express his or her views against those of the established authorities. Established, governing groups are particularly susceptible to their own self-interest since they can be more easily lulled into the belief that what they are commanding is for the good of all. They must be especially sensitive, therefore, to those ways in which they retard the free expression of thought on the part of less-established minority groups and individuals. Although there are situations in which restraint on freedom of expression would be appropriate, those who would be the first to urge such restraint should be also the first to explore, with intense self-criticism, what vested interests they have in forbidding alternative views. The most dangerous members of any society are those people who not only claim to know the truth but also claim that their position is unconnected with an advantage to themselves and is only for the good of others. Their claims more often than not are based on a fear of permitting others to reach the same truth (if it be so) on their own, for reasons they can rationally accept. That fear is always a sign that some kind of self-interest is involved and is therefore suspect as a legitimate basis for restraining freedom of expression.

Ultimately there is no pure safeguard against the risks of free speech. The best a society can do is to help its citizens develop the critical weapons of intelligence and wise judgment. The danger of ideas comes when people are fooled into accepting them without sufficient warrant or justification. As long as a society remains ignorant of what a sound argument involves, of what is good as opposed to spurious or irrelevant evidence, of how to anticipate the long-range consequences of following a particular option, of how to sort out self-serving arguments from well-grounded claims, there will be no sure defense against being misled by harmful ideas freely expressed. A well-informed, critically sensitive society is its own best defense against the risks of free speech, and it is the only kind of society in which the excitement and creativity of the free expression of ideas can flourish.

## CHAPTER REVIEW

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### A. Dilemmas of freedom of expression

1. Does the free expression of ideas necessarily lead to truth?
2. There are occasions when expressing an opinion can lead to harm for others.
3. Are there conditions in which freedom of thought is relatively less important than some other freedom, e.g., freedom from political instability?
4. Freedom of expression is a prerequisite for making self-determined choices with the greatest degree of critical intelligence.

### B. Obstacles to freedom of expression

1. Some things work indirectly to stifle freedom of expression: ease of conforming to public opinion, emotional self-interest, propaganda.
2. In recent years the use of the opinion poll has led some people to allow others to do their thinking for them.
3. Ignorance about the Bill of Rights creates a climate in which defense of freedom of expression seems unimportant.

### C. Contemporary issues

1. The need for national security can lead to restrictions on freedom of expression.
2. The loyalty oath creates conflict in many who want to be loyal to their country's needs without informing on those persons not legally indictable for crimes against the state.
3. The expression of views regarded by nearly all members of the society as morally obnoxious (e.g., anti-Semitism or racism) presents a difficult challenge to the application of the principle of freedom of expression.
4. Equally troubling to many is the right of speakers with scientific credentials to present views that demean ethnic and racial groups.
5. Requiring all expressions of opinion to be nondeceptive can eliminate some of the risks of free speech.

### D. Pornography

1. The sale and availability of pornography is one of the most volatile issues falling under freedom of expression.
2. Much of the debate centers around the factual consequences of being exposed to pornographic material.
3. Some argue that pornography is dehumanizing; others argue that it can liberate people from sexual repression.



4. The standards and sensibilities of local communities are often considered in determining the right of pornographic distribution.
5. The censorship or oversight of classroom material by community spokespersons reveals some of the same dilemmas encountered in the question of pornography.

**E. The demand for expression versus the right to privacy**

1. Are there situations in which we should be compelled to reveal information about ourselves to others, for example, our medical history to an insurance company?
2. Are there dangers in compiling data banks on many aspects of our private lives? If criminals can hide behind the shield of privacy, does their right to privacy outweigh the government's obligation to catch wrongdoers?
3. In this area, clearly, rights are in conflict and a balance must be sought between complete privacy and the divulgence of all aspects of our personal lives to private or public agencies.
4. The conflict is particularly acute for those persons who are privy to information that could prove decisive in a court of law. Do I have a right to withhold knowledge of a crime that a friend committed?
5. Members of the press have faced this conflict recently when, compelled by courts to divulge their sources in legal proceedings, they have refused and have subsequently been jailed for doing so.

**F. Public decisions**

1. The society should decide publicly what areas of its common life need some restrictions on freedom of expression.
2. Recognizing the reality of group self-interest will help us to guard against uncritically accepting a group's claims to truth.
3. A well-informed, critically sensitive society is its own best defense against the risks of free speech.

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**SUGGESTED READINGS**

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