

Phil 116, March 15, 2010
Scanlon, “A Theory of Freedom of Expression”

Expression: An act intended to communicate to one or more persons some proposition or attitude. Includes musical performances, mime, self-immolations, etc.

The puzzle: Why can't the state regulate *expression* that causes harm, when that harm is sufficient to justify the state in regulation *other* kinds of action?

Can we appeal, as Mill sometimes seems to appeal, to a distinction between “speech” and “action”? Can we say: “Speech” cannot be regulated, but “action” can?

- Seems to give intuitively wrong answers: mime—which seems like “action”—is protected, but yelling “Fire!” in a crowded theater—which seems like “speech”—is not.
- Why should the distinction matter morally?

Kinds of harm that justify regulating of expression:

It seems that the state is justified in regulating expression on the following grounds:

1. Direct physical consequences (e.g., starting an avalanche).
2. Intentionally producing in someone harmful or unpleasant states of mind, such as fear (e.g., “Your money or your life!”) or offense.
3. Causing others to form an adverse opinion about someone (e.g., libel).
4. Shouting “Fire!” in a crowded theater.
5. Contributing to the production of a harmful act by someone else (e.g., giving an order to a co-conspirator).
6. Disseminating a recipe for an easily manufactured nerve gas.

Problem: How is Type 6 different from Type 7: “a particularly effective piece of political propaganda which would undermine the authority of the government, or from the publication of a theological tract which would lead to a schism and a bloody civil war,” which doesn't seem to justify regulations on expression?

The Millian Principle:

There are certain harms which, although they would not occur but for certain acts of expression, nonetheless cannot be taken as part of a justification for legal restrictions on those acts. These harms are:

- (a) harms to certain individuals which consist in their coming to have false beliefs as a result of those acts of expression;
- (b) harmful consequences of acts performed as a result of those acts of expression, where the connection between the acts of expression and the subsequent harmful acts consists merely in the fact that the act of expression led the agents to believe (or increased their tendency to believe) these acts to be worth performing.

Solution to the above problem: Type 7 moves people by informing them of (putatively) good *reasons* for action. Type 6, by contrast, moves people only by giving them *means* to do what they already want to do.

Problem: Doesn't Type 4 move people by informing them of an allegedly good reason for action: namely, that the theater is on fire?

Solution: "The persons in the theater who react to the shout are under conditions that diminish their capacity for rational deliberation." So regulation does not interfere with what would otherwise be a genuine opportunity to make up one's mind about a question.

What the Millian Principle is not:

- Not a consequentialist defense: i.e., that the good consequences of allowing expression outweigh the bad consequences.
- No appeal to special rights, such as political rights, to support freedom of expression.
- Applies only to state regulation of expression, not to private individuals' interference with speech.

Argument for the Millian Principle:

Basic assumption about state legitimacy and authority: "the powers of a state are limited to those the citizens could recognize while still regarding themselves as equal, autonomous... agents."

Autonomy: "An autonomous person cannot accept without independent consideration the judgment of others as to what he should believe or what he should do. He may rely on the judgment of others, but when he does so he must be prepared to advance independent reasons for thinking their judgment likely to be correct."

Argument for (a): To allow such regulation, "a person would... have to concede to the state the right to decide that certain views were false and, once it has so decided, to prevent him from hearing them advocated even if he might wish to." In other words, a person would have to turn over to the state his capacity for assessing the evidence for certain claims. But he cannot do this, while continuing to view himself as autonomous.

Argument for (b): The argument for regulation: "Once the state has outlawed conduct, why can't it also outlaw its advocacy?" Reply: Because in so doing the state would deprive citizens of the grounds for arriving at an independent judgment as to whether the law should be obeyed. And so again they could not view themselves as autonomous.

Four different kinds of criticism of regulation of expression:

1. Does the regulation violate the MP? If not...
2. Does it balance appropriately the value of certain kinds of expression relative to other social goods?
 - It seems unacceptable (e.g.) to ban *all* demonstrations on the grounds of traffic, or *all* handbills on the ground of litter, *all* newspapers on the grounds of environmental impact, etc., even though this does not violate the MP. (Consider also regulation to prevent offense, which is of Type 2.) The problem is simply that this places too little value on expression and too much value on the free flow of traffic, clean streets, etc.
3. Does it ensure a fair distribution of access to means of expression?
4. Is it compatible with other rights, such as political rights?
 - Some political expression is necessary for the exercise of political rights.