

Freedom of Expression I

Justifications & Laws

Freedom of Expression (FoE)

- **“Freedom of speech”** is the principle that underlies the (legal or moral) rights of individuals and organizations to express ideas and opinions (in words, pictures, art, etc.) without fear of retaliation, censorship, or legal sanction.
- **FoE** is a nearly synonymous but slightly broader term in that it is typically taken also to include accessing, receiving, and imparting information or ideas.

I.e., what you say or show (*your* expression), but also you can hear, read, or learn (*other people’s* expression).

FoE: Relevance to Computing & ICT

- On the one hand: Computing technologies can be used to produce *works* that may be subject to censorship or expression-constraining regulation. E.g., **video games**, **pornography** (including “virtual pornography”), propaganda/“fake news,” **spam**.
- On the other: Computing and ICT are (or are part of) *communication mediums*, that may be censored, surveilled, and/or used either to constrain or facilitate expression...

<Concreteness Break>

To make that more concrete and specific:

- You, future computing professional, may one day find that your work is censored, overregulated, or simply made illegal. (E.g., violent video games, Backpage)
- You may also find that you are called upon – by your employer, by your government, or by market forces – to use your skills to restrict the FoE of users/subscribers/citizens (E.g., Facebook, YouTube)

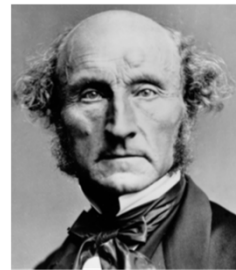
FoE: Why Value It?

Ethically speaking, there are at least two distinct grounds for positively valuing FoE:

1. FoE might be held to be an essential element of our freedom and autonomy – i.e., an **abstract (negative) right**.

E.g., (once again) **Locke's** conception of property rights: Since I own myself (including my thoughts and opinions), I have a right to express myself as I wish *provided I don't violate anyone else's rights in doing so*.

2. Alternatively, FoE might be valued insofar as permitting (some degree of) FoE leads to good consequences overall.



Mill

John Stuart Mill provides a particularly well-known and influential account of the U argument for FoE in his *On Liberty* (1859)...

“One very simple principle”

“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 a sufficient warrant. ... The only part of the conduct of any one, 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, *On Liberty* [1859], emphasis added

Mill's “Harm Principle”

- Each sane adult should be free to engage in whatever conduct she wishes, so long as it does not harm or threaten harm to others.
- Individuals who *do* harm others are rightly held morally responsible and/or made subject to legal penalties.

In cases *not* affecting others, however, Mill argues that individuals should be at liberty to choose for themselves...

Freedom & Utility

- Mill: This is not a matter of “*abstract right*,” it is instead a claim grounded in **utility**.
- For Mill, leaving individuals free to chose their own life plans (provided their choices don't harm others) is supposedly justified *precisely because* it will lead to good consequences overall.

Specifically, by allowing people to experiment with different ideas and ways of living; allowing the ‘**marketplace of ideas**’ to select what works and what doesn't, overall utility will be increased.

Expression

- So, with respect to **expression**:

Inciting a mob to violence, libel, or shouting “*fire!*” in crowded theatre (Oliver Wendell Holmes's famous example) etc., can rightly be restricted by law and/or made subject to social disapproval on U grounds.

- But, according to the harm principle, virtually all other forms of expression ought to be permitted.

Expression & Harm

- But what counts as harm? Actual or imminent *physical* or *financial* harm, certainly. (Cf. incitement, libel, etc.)
- Yet Mill argues that simply being exposed to false statements isn't necessarily a form of harm: Truth will prevail in the long run in the "marketplace of ideas."

(Compare: Restrictions on advertising and 'commercial speech')

- But what about *psychological* harm? What about *offense*? What about **hate speech**?

U.S. First Amendment

"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."

- Note (once again): A limit on the power of *governments*, not private parties...

- ...and (as with privacy) note the First Amendment's extension and (re-)interpretation as communications technologies have developed over time:
 - **Print media** (newspapers, magazines, books)
 - **Broadcast** (television, radio)
 - **"Common Carriers"** (telephone and postal systems, ISPs) [Compare, later, "net neutrality"]

Telecommunications Act of 1996

- Substantially deregulated telephone services in the U.S (for good or for ill); lifted restrictions on services that telephone companies can provide.
- Established a distinction between providers of "telecommunications services" (e.g., telephone companies) and providers of "information services" (e.g., ISPs).

Communications Decency Act of 1996 (CDA)

- S. 230: Established that no provider or user of interactive computer services (“*information services*”) shall be treated as a publisher of any information provided by third parties (including subscribers).
- First major internet censorship law, legislating restrictions on obscene content. (Though much of this was later overturned on First Amendment grounds).

Section 2 of the *Charter*

S.2: “*Everyone has the following fundamental freedoms:*

- a) freedom of conscience and religion;*
- b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;*
- c) freedom of peaceful assembly; and*
- d) freedom of association”*

- But 2 (b) (and all other *Charter* rights) are subject to the “**limitations clause**”:
- S.1: “*The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.*” (emphasis added)

- So, in Canada (in some contrast to the U.S.) courts have been more willing to accept ‘reasonable’ limitations on FoE.
- ***R v Keegstra*** (1990): Criminal Code provisions restricting **hate speech** do infringe S. 2 FoE rights, but such infringement can be justified under S. 1.
- ***R v Butler*** (1992): **Obscenity** can be restricted by law when it poses harm to the community, specifically when the expressive material involves cruelty, violence, and/or degradation.

- ***R v Labaye*** (2005): **Indecency** can be restricted by law only when it either a) interferes with the autonomy and liberty of members of the public, b) predisposes others to anti-social behaviour, or c) physically or psychologically harms persons involved in the conduct