

Articles

Freedom: Positive, Negative, Expressive

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1. Introduction

I offer a defense of freedom, particularly freedom of expression, that is ethical, in that it shows freedom to be essential for general human fulfillment, and metaphysical, in that it grounds freedom in a characteristic attribute of persons. I take up Karl Popper's insights that what distinguishes persons is their capacity for critical rationality and that criticism is essential for the growth of knowledge, applying them to the problems of freedom and fulfillment in a way in which Popper did not do himself. In Section 2, I explain how fulfillment for persons in general is inseparable from critical rationality. In Section 3, I identify the exercise of critical rationality, including inter-cultural criticism, with positive freedom. In Section 4, I argue that positive freedom requires the negative freedom to conduct "experiments in living" and that an obligation of a legitimate state is to secure such negative freedom of the persons within its jurisdiction. In Section 5, I explain what freedom of expression is and why it is a part of the negative freedom required for positive freedom and personal fulfillment. In Section 6, I rebut objections commonly made to freedom of expression and I argue that currently fashionable university speech codes should be abandoned. I offer concluding remarks in Section 7.

2. The Good for Persons¹

In the case of an animal that is not a person, the best type of life that it can lead is determined by its biology; the animal normally

¹ This section draws heavily on Danny Frederick, "Voluntary Slavery," *Las Torres de Lucca* 4 (2014), pp. 115-37, sec. III.

tries to live a life of that kind by acting in accord with its biological instincts and the culture, if any, that it acquires from its local conspecifics. In contrast, a person is a creature with self-consciousness and the capacity for the argumentative use of language. Self-consciousness enables a person to be aware of her beliefs, thoughts, desires, expectations, emotions, and such like. Use of a language enables her to express the content of those states in words or other signs. The capacity to use language argumentatively enables her to distance herself from those linguistically formulated contents, to raise questions about them, to consider other options, and to formulate criticisms and tests to decide between alternatives.² This capacity for *critical rationality* can liberate a person from the blinkers that instinct and local culture impose upon non-persons because it enables a person to *evaluate* the way of living exemplified by herself and the people around her, by comparing it with alternative possibilities. Some of those possibilities may be more fulfilling for a person than the lifestyles that are traditional in her local community. Indeed, some possibilities may be fulfilling for some people while others (including a traditional lifestyle) are fulfilling for others. In consequence, critical rationality differentiates persons from non-persons in offering them not only liberation from inherited types of life, but also the possibility that fulfillment is relative to the person rather than to the species, the tribe, or the form that a species takes within a locally developed culture. Unlike animals that are not persons, a person is faced with the question:

- (q) What sort of life will be most fulfilling for me?

Exercise of critical rationality with regard to (q) might initially have been prompted by the discovery, through migrations, wars, trade, and travel, of previously unknown kinds of life being lived by other people.³ Today, thanks to the knowledge created by centuries of

² Karl Popper, "Epistemology Without a Knowing Subject," in Karl Popper, *Objective Knowledge*, corrected edition (Oxford: Clarendon Press, 1973), pp. 119-21 and 142-48; Karl Popper and John Eccles, *The Self and Its Brain* (London: Routledge and Kegan Paul, 1983), pp. 57-59, 108-12, and 144-46.

³ Cf. Karl Popper, *The Open Society and Its Enemies* (London: Routledge and Kegan Paul, 1945), chap. 10; and Karl Popper, "The Myth of the Framework," in Karl Popper, *The Myth of the Framework* (London: Routledge, 1994), pp. 36-43.

investigation and experimentation, there is an abundance of material that can help a person to answer that question, including studies by psychologists, anthropologists, and other social scientists concerning different ways of life; accounts of how different people have fared in different kinds of life in biographies, autobiographies, novels, dramas, and lifestyle discussions throughout the popular media; and a diversity of pornography replete with unusual ideas that can help people to discover sexual fulfillment.⁴ People for whom no currently available kind of life is fulfilling may imagine new options. The sort of life that a person will find fulfilling will still be related to the biology of that person's species (human, Martian, or whatever), but that relation may be tortuously indirect. For example, humans today can live sorts of lives that would have been inconceivable or thought physically impossible a few centuries ago, such as an astronaut, a transsexual model, a genetic engineer, or a web-site designer. In choosing a suitable kind of life a person also needs to know about herself, because what will fulfill one person may not fulfill some others. She may be able to learn about herself from family, friends, teachers, and other acquaintances, since other people sometimes know a person better than she knows herself, in at least some respects.

Such research will enable a person to form some conjectures about the sort of life she will find fulfilling, but those conjectures need to be tested. Even if another person's knowledge of the sort of life that will fulfill a specific person is better than the knowledge that that specific person has herself, the other person's knowledge is still fallible and needs to be put to the test. The crucial test of whether a type of life will fulfill a person is that person's own experience of living that type of life. That is especially so if the kind of life she conjectures will fulfill her is one that no one has lived before. Therefore, in order to answer (q), a person has to form a hypothesis about what type of life will fulfill her, criticize and improve that hypothesis in the light of available information, and then test that hypothesis by living that type of life, or at least an approximation to it, learning by trial and error. If she finds that the life she has chosen does not fulfill her, then her hypothesis is refuted. If she is to find an answer to (q), her next steps must be to try to learn from her mistake, think up another theory about who she is or who she should be, and then, insofar as she can extricate

⁴ Danny Frederick, "Pornography and Freedom," *Kritike* 5, no. 2 (2011), pp. 84-95.

herself morally from the circumstances of her current life, set out to test that new theory.

That, of course, is not a description of what people generally do. Some people, it seems, do not bother to strive for something better even if they are dissatisfied with the kind of life they have. Some strive but in a haphazard way, without properly evaluating results and learning the lessons from them, so their progress is meager unless they chance to be lucky. Although all persons have the capacity for critical rationality, they do not all exercise it, or exercise it well, with regard to what is personally the most important matter, namely, what kind of life will give them most, or at least better, fulfillment. Perhaps there are some tragic persons for whom no kind of life would be fulfilling, so that their striving, if they do strive, will never meet with success.⁵ One would expect evolution to produce some such defective cases.

Fulfillment is a matter of degree. A particular kind of life may be fulfilling, but not as fulfilling as another kind of life as yet untried. The question (q), therefore, may always be asked, even by a person who is satisfied with her current way of life. Fulfillment is not simply a matter of pleasure or of happiness in any purely subjective sense. Achieving fulfillment normally requires an open mind, the willingness to consider critical arguments and new theories that challenge currently cherished assumptions, and to behave in new, possibly very different ways. All of that can create in the agent a good deal of anxiety, fear, or other distress, and many experiments in living may be disappointing, extremely so in some cases. Still, even a life that contains little in the way of feelings of pleasure or happiness may be valuable for the agent and for others if it includes significant achievements and important lessons learned.

3. Positive Freedom

Isaiah Berlin characterizes positive freedom as follows:

I wish to be . . . self-directed and not acted upon by external nature or by other men as if I were a thing, or an animal, or a slave incapable of playing a human role, that is, of conceiving goals and policies of my own and realizing them . . . I wish, above all, to be conscious of myself as a thinking, willing, active

⁵ Cf. Philippa Foot, *Natural Goodness* (Oxford: Clarendon Press, 2001), pp. 90-98, for some relevant, though tangential, reflections.

being, bearing responsibility for my choices and able to explain them by reference to my own ideas and purposes.⁶

Positive freedom, as Berlin characterizes it, requires that the agent's actions depend upon his own ideas and purposes, not upon external influences. That suggests, if it does not explicitly state, that positive freedom requires that the agent reject all inherited presuppositions and starts from scratch, accepting only those ideas and purposes that he has accepted after critical appraisal. Similarly, Gilbert Ryle says, "The rationality of man consists not in his being unquestioning in matters of principle but in never being unquestioning; not in cleaving to reputed axioms, but in taking nothing for granted."⁷ And Thomas Scanlon says, "An autonomous person cannot accept without independent consideration the judgment of others as to what he should believe or what he should do."⁸

However, critical appraisal of theories (presuppositions, new hypotheses, received wisdom) requires an argument, and an argument requires premises. Where will those premises come from? The agent could take the premises from the theory being appraised and try to derive a contradiction from them. If he succeeds, the *reductio ad absurdum* will refute the theory. However, that method cannot be used to select a theory for acceptance unless all of the possible rival theories can be articulated and all but one of them shown to be self-contradictory. That is rarely possible outside of logic and mathematics. Generally, then, if the agent is to be able to accept a theory after critical appraisal, then at least some of the premises of the argument(s) used in the appraisal must come from outside of the theory being appraised. Either those premises have been accepted after critical

⁶ Isaiah Berlin, "Two Concepts of Liberty," in Isaiah Berlin, *Four Essays on Liberty* (Oxford: Oxford University Press, 1969), p. 131. He goes on to describe and criticize the way in which the idea of self-direction was equated by many thinkers with the potentially tyrannous idea of being a participant in collective coercion, but we need not consider that development here.

⁷ Gilbert Ryle, "Review of Karl Popper, *The Open Society and Its Enemies*," *Mind* 56 (1947), p. 167.

⁸ Thomas Scanlon, "A Theory of Freedom of Expression," in Thomas Scanlon, *The Difficulty of Tolerance* (New York: Cambridge University Press, 2003), p. 16.

appraisal or they have not. If they have not, then the agent is not positively free. If they have, then the agent has accepted arguments which have further premises which, if the agent is positively free, must have been subjected to critical appraisal, and so on *ad infinitum*. Positive freedom, on this interpretation of Berlin's characterization, involves a vicious infinite regress, and is thus impossible.

In contrast, critical rationality offers a characterization of positive freedom that is possible. When a person comes to exercise his critical rationality, he has been formed by his biology and culture, which means that he has a wealth of inherited assumptions. Some of those assumptions can be used as premises of arguments deployed in critical appraisal of alternative theories about how he should live. Such arguments will rule out some theories and render other theories more or less plausible. One inherited assumption, probably to be found in all cultures that have survived, is that rival theories should, where possible, be tested against experience and be rejected if they fail the test. Some inherited assumptions may be rejected after such testing. Since a proposition assumed uncritically at one time may be subjected to critical review at a later time, positive freedom is a matter of degree, depending on how much of an agent's inherited theoretical framework has so far escaped critical scrutiny. The fact that an agent cannot subject *all* of his inherited assumptions to critical scrutiny (at the same time) does not entail that there is *any* particular assumption that is forever immune to criticism.⁹

Some inherited theoretical assumptions can be difficult to identify because they seem so obvious that we do not even realize that we are making them. Even when they are identified, their apparent self-evidence can make it difficult to produce cogent criticisms of them. For instance, the proposition that if *A* is simultaneous with *B*, and *B* is simultaneous with *C*, then *A* is simultaneous with *C*, was

⁹ Karl Popper, "Towards a Rational Theory of Tradition," in Karl Popper, *Conjectures and Refutations*, 4th rev. ed. (London: Routledge and Kegan Paul, 1972), pp. 120-35; Karl Popper, "Science: Conjectures and Refutations," in Karl Popper, *Conjectures and Refutations*, pp. 49-52; Karl Popper, *Knowledge and the Body-Mind Problem* (London: Routledge, 1994), pp. 134-39. Also see Friedrich Hayek, "Rules, Perception, and Intelligibility," in Friedrich Hayek, *Studies in Philosophy, Politics, and Economics* (London: Routledge and Kegan Paul, 1967), pp. 60-63; Friedrich Hayek, "The Errors of Constructivism," in Friedrich Hayek, *New Studies in Philosophy, Politics, Economics, and the History of Ideas* (London: Routledge and Kegan Paul, 1978), pp. 3-22.

accepted uncritically for millennia in European societies, until Albert Einstein, wrestling with problems of Newtonian mechanics, discovered that the proposition may be false if the coordinate system in which *A* and *B* are simultaneous is not the same coordinate system as that in which *B* and *C* are simultaneous.¹⁰ An agent's enterprise of critical appraisal can be conducted more effectively if people with different perspectives can be recruited to participate by offering criticisms of his arguments and conjectures, and by proposing alternatives which he may criticize in return. Different cultures are a particular source of new ideas that may suggest novel solutions. For example, Benjamin Lee Whorf contends that Native Americans had a non-Newtonian conception of time.¹¹ Involving people from different cultures in open critical debate should generate a wider range of options for kinds of life to lead and a wider range of critical objections to each of them.

Consequently, positive freedom, though a property of individuals, is a social product. First, it depends upon arguments, which depend upon language, which evolves to satisfy a need for communication with others; an individual thus becomes capable of positive freedom only by being a member of a linguistic community. Second, the degree of positive freedom that an individual can attain depends upon inter-subjective criticism, particularly criticism from people with very different views, including different inherited theoretical assumptions.

Positive freedom is, in general, a requirement of human fulfillment—though only *in general* because there may be some persons whose most fulfilling life happens to be the traditional kind of life that they have been brought up to lead. For many people, positive freedom is not only a means to self-discovery by trial and error, it is also an end in itself, and is thus part of their fulfillment. For some people, critical appraisal is a burden. For them it will not be a part of their fulfillment but at best a means to it.

4. Negative Freedom

Positive freedom involves an agent formulating and criticizing conjectures for how she should live and then testing the most

¹⁰ Albert Einstein, *Relativity*, enlarged ed. (London: Methuen, 1962), pp. 21-27.

¹¹ Benjamin Lee Whorf, *Language, Thought, and Reality* (Cambridge, MA: MIT Press, 1956), pp. 57-64.

promising of those conjectures by living them. That requires that her experiments in living be permitted. Thus, positive freedom, which is generally required for personal fulfillment, in turn requires negative freedom.

Berlin describes negative freedom as follows: “I am normally said to be free to the degree to which no man or body of men interferes with my activity.”¹² He goes on to identify this negative freedom with “political rights, or safeguards against intervention by the state,”¹³ thereby conflating negative freedom as a contingent fact (no one happens to interfere) with negative freedom as a right (others have a duty not to interfere).¹⁴ It is the latter sense in which I use the term here: the scope of a person’s negative freedom is delimited by her rights to non-interference in her activities by others. Negative freedom is a matter of degree. That raises the question of whether the negative freedom of some should be greater than the negative freedom of others. Aristotle thinks so, claiming that some humans (including all non-Greeks) are natural slaves while others are natural slave-owners, with the latter entitled to enslave the former against their will. He argues that the difference in moral entitlement is due to the natural slave being deficient in moral reasoning so that, although the natural slave is enslaved for the slave-owner’s benefit, she is better off being enslaved.¹⁵

Virtually all thinkers who have pondered the point or function of morality have thought it to be the fulfillment of persons indiscriminately, not the fulfillment of some persons at the expense of others. Rule-consequentialists and act-consequentialists have stated the point explicitly. Theologians have opined that moral rules are designed for that purpose by God. Contractarians or contractualists think that

¹² Berlin, “Two Concepts of Liberty,” p. 122.

¹³ *Ibid.*, p. 124; see also p. 126.

¹⁴ We could call this “freedom as non-domination,” except that Philip Pettit has already appropriated that term to describe an attempted “naturalistic” analogue of the notion. See Philip Pettit, “The Instability of Freedom as Noninterference: The Case of Isaiah Berlin,” *Ethics* 121, no. 4 (2011), pp. 693-716.

¹⁵ Aristotle, *Nicomachean Ethics*, trans. J. A. K. Thomson (Harmondsworth: Penguin, 1973), VIII, x; Aristotle, *Politics*, trans. T. A. Sinclair (Harmondsworth: Penguin, 1962), I, ii, iv-vi, and xiii; III, xiv.

moral rules are, or would be, agreed between all individuals with a view to their own interests or the interests of all. Yet other theorists maintain that biological or cultural evolution tends to bring about general adherence to that moral code which, if acted upon, most benefits the species. It should be noticed that Aristotle is not an exception to this trend, for he claims that slavery fulfills the natural slave as well as being beneficial for the natural slave-owner. The problem with Aristotle's theory, given our account of critical rationality, is that it presumes to know which people will be fulfilled by living the life of a slave. Let us allow, for the sake of argument, that there are some people whose most fulfilling life would be that of a slave. We must also allow that the only way to find out *which* people are natural slaves would be by allowing people the negative freedom to experiment with slavery, or something close to it, and awaiting *their* verdict on whether it fulfills them. Thus if the function of morality is to facilitate the fulfillment of persons indiscriminately, then slavery is permissible, if at all, *only* when a person submits to it voluntarily after experimenting with it, or something close to it, thereby using her negative freedom to renounce her negative freedom (what David Archard calls a "self-abrogating" use of freedom¹⁶).

If the function of morality is the fulfillment of persons indiscriminately, and that fulfillment requires negative freedom to experiment with kinds of life, then persons ought to have equal initial negative freedom, even though some of them may freely relinquish at least part of their initial negative freedom for some advantage, for example, as employees submit to temporary and circumscribed domination within working hours.¹⁷ The question of what constitutes equal initial negative freedom is not easily answered.

John Stuart Mill famously proposes that an individual should have negative freedom with regard to actions, or "experiments in living," which do not harm others without their consent.¹⁸ However,

¹⁶ David Archard, "Freedom Not to Be Free: The Case of the Slavery Contract in J. S. Mill's *On Liberty*," *Philosophical Quarterly* 40 (1990), p. 459.

¹⁷ Ronald Coase, "The Nature of the Firm," in Ronald Coase, *The Firm, the Market, and the Law* (Chicago, IL: University of Chicago Press, 1998), pp. 39 and 53-55.

¹⁸ John Stuart Mill, *On Liberty*, in *Utilitarianism and On Liberty*, ed. Mary Warnock, 2nd ed. (Oxford: Blackwell, 2003), pp. 147-48, 152, and 163.

the interconnectedness of people in society means that many quite ordinary exercises of negative freedom cause harm to others without their consent. For instance, a man who marries a woman prevents her other suitors from marrying her (at least until a divorce). If I ride on a bus, I delay the journey of other passengers while I board and pay my fare, which may mean that some of them miss a train or are late for an important appointment. I might also take the last available space thereby preventing another person from making a planned journey. My offer to purchase a house, if accepted, will prevent others from buying that house; if rejected, it may raise the price that the buyer has to pay. If I paint the exterior of my house, I may seriously disturb the aesthetic sensibilities of some of my neighbors and even of passers-by. Almost everything we do in some way harms some other people, in the ordinary sense of making them worse off, so the harm principle would leave us hardly any negative freedom. If we restrict the relevant harms to those which involve physical injury, then the harm principle would allow people the negative freedom to swindle others by means of theft and fraud.¹⁹ Mill later recognizes such points and proposes that actions that cause harm to others can be permitted when it is “better for the general interest of mankind” to do so.²⁰ That brings us back to the thought that the equal initial negative freedom that persons should have is that which offers the best prospects for the fulfillment of persons indiscriminately.

The moral legitimacy of the state must depend upon its contribution to the provision of conditions in which its people can thrive. It must therefore be a duty of the state to secure that equal initial negative freedom which offers the best prospects for the fulfillment of the persons within its jurisdiction indiscriminately. (Delimiting the extent of that initial negative freedom is a large task for a separate inquiry.)

¹⁹ Mill sometimes defines “harm” as injury to a person’s rights (ibid., p. 147). Unfortunately, that prevents the harm principle from being used to delimit individuals’ negative freedom, because negative freedoms (rights to non-interference) are an important subset of rights; so, in order to determine what is a harm (in the sense of “injury to rights”) we must first know what people’s negative freedoms are.

²⁰ Ibid., pp. 163-64. See also John Stuart Mill, *Utilitarianism*, in *Utilitarianism and On Liberty*, ed. Warnock, pp. 190, 196, and 226.

5. Freedom of Expression

Freedom of expression is broader than freedom of speech in that it also covers the wordless expression of content, as in drawings, photographs, performance art, and symbols (e.g., a swastika). Freedom of expression obtains in a society when

- (a) no content is prohibited from being expressed and made available to the public at large *and*
- (b) no content is regulated in such a way as to make it unreasonably difficult to express it or to make it available to the public at large.

Freedom of expression is consistent with there being many restrictions on where or when or how specific types of content are expressed.²¹

Examples of defensible restrictions on where, when, or how specific types of content are expressed include the following. The risk of injury and death makes it reasonable to prohibit anyone from shouting “Fire!” in a crowded theater unless the theater is on fire, but the opinion that the theater in question is on fire at that time may be ventured freely in a discussion at another place or time. The opinion that the theater was on fire at an earlier time may be voiced in that theater when crowded, but not by shouting out the word “fire” while speaking the rest of the sentence in a whisper. Mill says:

An opinion that corn-dealers are starvers of the poor, or that private property is robbery, ought to be unmolested when simply circulated through the press, but may justly incur punishment when delivered orally to an excited mob assembled before the house of a corn-dealer, or when handed about among the same mob in the form of a placard.²²

It seems reasonable that in most public places the display of pornographic images should be forbidden, because many people do not want to see them or do not want to see them in those types of places.

²¹ Joel Feinberg, *Offense to Others* (Oxford: Oxford University Press, 1985), pp. 37-44; Mill, *On Liberty*, pp. 99-100; Laurence Tribe, *American Constitutional Law* (Mineola, NY: Foundation Press, 1978), pp. 580-82.

²² Mill, *On Liberty*, p. 131.

However, that is consistent with there being other, easily accessible, public places in which pornography is openly displayed, at least so long as those places have signposts or other means to warn unsuspecting persons of what they are likely to encounter there. Similarly, while freedom of expression demands that Nazis should not be barred from conducting processions involving the expression of anti-Semitic slogans and insults, they might reasonably be prevented from staging such a demonstration in a residential area with a large Jewish population.²³ A person may be sued for making false statements about a product as part of a contract of sale, but there is no penalty for making the same statements in some other contexts. If defamatory (libelous or slanderous) statements about an individual should be actionable because of their potential adverse effect on the individual's livelihood, they may yet be expressed with impunity after the individual's death. A devout person may bar guests from ridiculing his religion in his own house, but such ridicule may be expressed elsewhere. All such limited restrictions are enforceable either by prevention or by the imposition of penalties of some kind. In the case of the householder, the penalty may be the removal of the offender from the house.

Discussions of freedom of expression that do not observe the distinction between the prohibition of the expression of specified contents and restrictions on the time, place, and manner of their expression²⁴ are confusing. The question of what sorts of limited restrictions should be placed on time, place, and manner of expression of various types of content and what sorts of consideration are relevant, is important, complex, and much debated, but that is not our concern here.

Personal fulfillment generally requires positive freedom, which is attained through subjecting one's inherited views to critical appraisal by comparison with rival views, and replacing inherited views with any

²³ Famously, the U.S. Supreme Court came to a different decision in the case of *The National Socialist Party of America v. Village of Skokie*, 432 US 43 (1977).

²⁴ Such as Stanley Fish, *There's No Such Thing as Free Speech...and It's a Good Thing Too* (Oxford: Oxford University Press, 1994), pp. 102-19, and David van Mill, "Freedom of Speech," in *The Stanford Encyclopedia of Philosophy* (Summer 2014 ed.), ed. Edward N. Zalta, accessed online at: <http://plato.stanford.edu/archives/sum2014/entries/freedom-speech/>.

rival views that better withstand criticism. It requires a willingness to review and to shed long-held or ingrained theses, and a willingness to change one's style of life if an alternative offers the prospect of greater fulfillment. Every aspect of one's currently held view of the world, including one's most deeply held beliefs, hypotheses, arguments, loves, desires, hopes, and fears, must in principle be open to critical attack. Critical debate between people from very different cultures can achieve the most radical changes of view and can thus be a spur to the substantial development of the positive freedom of the participants of such debates, who will consequently have greater scope to discover which kind of life will better fulfill them. To achieve the best prospects for the fulfillment of persons, therefore, the negative freedom that is safeguarded by a legitimate state must include freedom of expression. Even people who do not exercise their critical rationality with regard to how they should live must be allowed the option of doing so; the challenges to their views that they are likely to encounter, if freedom of expression is permitted, may prompt some of them to exercise their critical rationality in new ways, thus increasing their positive freedom. So, freedom of expression permits and encourages a virtuous spiral of increasing positive freedom among the populace. Thus, the state is morally obliged to ensure freedom of expression and therefore to ensure that people with dogmatic mindsets either are prevented from encroaching upon the freedom of others to express types of content which the dogmatists dislike or face legal penalties for such encroachment.

Unfortunately, the greatest threat to freedom of expression typically comes from the state itself, since governments regularly institute laws prohibiting the expression of types of content. For example, the Australian, Austrian, British, Danish, Dutch, German, New Zealand, Israeli, and Swedish states have laws prohibiting "hate speech," which includes expressions of content which ridicules, insults, offends, or humiliates persons on account of their nationality, race, color, religion, ethnic origin, beliefs, or sexual preferences.²⁵ The states of Austria, Belgium, the Czech Republic, France, Germany, Hungary, Israel, Liechtenstein, Lithuania, Luxembourg, Poland, Portugal, Romania, Slovakia, and Switzerland have laws prohibiting Holocaust

²⁵ Raphael Cohen-Almagor, *The Scope of Tolerance* (Oxford: Routledge, 2006), pp. 11-12; Jeremy Waldron, *The Harm in Hate Speech* (Cambridge, MA: Harvard University Press, 2012), pp. 236-37.

denial.²⁶ The British state has prohibited “extreme pornography” that involves sado-masochism, bestiality, or necrophilia²⁷; other states prohibit “obscene” content.

Such state prohibitions of the expression of types of content, being curtailments of freedom of expression, are illegitimate, unless they are somehow required to enhance the prospects for the fulfillment of persons indiscriminately. It is therefore important to evaluate the sorts of reasons that theorists offer for such prohibitions.

6. Objections to Freedom of Expression

The reasons offered for prohibiting the expression of some types of content appeal to four kinds of consideration: falsity, harm, offense, and democratic principles. I consider these in turn before briefly considering freedom of expression in higher education.

a. Falsity

It may be said that there are some views which we now know to be so mistaken that they can safely be forbidden expression, and they ought to be forbidden expression so that people, particularly the less educated, cannot be misled by them. In this spirit, van Mill asks: “Is it likely that we enhance the cause of truth by allowing hate speech or violent and degrading forms of pornography?”²⁸ One problem with that is that we can never be sure which views are mistaken. Even if we could, some such mistaken views might contain hints or suggestions which, to an acute mind, can be used to transform the debate and lead to new discoveries. Science is the domain in which currently accepted theories are often thought to be most secure, but even in science views which had long been consigned to the dustbin have been resuscitated and transformed to make the next step in the progress of scientific knowledge. Describing a couple of such examples will suffice.

²⁶ Jacqueline Lechtholz-Zey, “The Laws Banning Holocaust Denial,” *Genocide Prevention Now* 9 (2012), sec. III, accessed online at: http://www.genocidepreventionnow.org/Home/GPNISSUES/GPNBulletinLA_WSAGAINSTDENIALSpecialSection9/tabid/164/ctl/DisplayArticle/mid/971/aid/470/Default.aspx.

²⁷ HM Government, *Criminal Justice and Immigration Act* (London: The Stationery Office, 2008), part 5, secs. 63-71.

²⁸ Van Mill, “Freedom of Speech,” sec. 5.

The theory that the earth orbits the sun was propounded by Aristarchus in the third century B.C., but it was discarded in favor of Aristotle's geocentric theory, which held sway for almost two millennia. When Nicolaus Copernicus revived and modified the heliocentric theory in the Renaissance it was generally regarded as a fiction, despite being useful for prediction, because it conflicted with so much of what was taken to be known at the time, including the available theories of the motion of terrestrial bodies and the accepted metaphysics concerning heaven, hell, and our place in the universe. The further work of Galileo Galilei and Johannes Kepler turned the long-discarded and apparently discredited heliocentric theory into the leading scientific theory of the heavens.²⁹

The birth of modern science in the Renaissance was inspired, amongst other things, by a revival of the ancient corpuscular metaphysics that sought explanations of physical changes in the motions of small particles which act on each other by means of collisions. Explanations in terms of Aristotelian "substantial forms" or Neoplatonic "occult influences" were derided. Astrologers had offered an explanation of the tides in terms of the influence of the moon, but the new mechanists would have no truck with that. Galileo offered an explanation of the tides in terms of the combination of the earth's orbital and rotating motions, but that explanation failed. A successful explanation, proposed later by Isaac Newton, took up the discarded astrological idea of the influence of the moon, but in the form of a gravitational force of attraction.³⁰ Many of Newton's contemporaries could not accept that theory because they regarded the force of gravity as occult.³¹ Indeed, the idea that matter could act at a distance through a vacuum was thought absurd even by Newton himself, who hoped eventually to replace it with something better.³² However, the law of gravity formed part of Newton's system, which explained not just the

²⁹ Thomas Kuhn, *The Copernican Revolution* (Cambridge, MA: Harvard University Press, 1957).

³⁰ Karl Popper, "On the Theory of the Objective Mind," in Popper, *Objective Knowledge*, pp. 170-76.

³¹ Kuhn, *The Copernican Revolution*, pp. 258-59.

³² Isaac Newton, "Letter to Bentley, 25 February, 1693," in *Newton: Philosophical Writings*, ed. Andrew Janiak (Cambridge, MA: Cambridge University Press, 2004), pp. 102-3.

tides but celestial and other terrestrial phenomena so successfully that the existence of a force of gravity was soon accepted as scientific fact (until it was later rejected by general relativity theory). In these examples, if discredited theories had been prohibited expression, if their advocates had been silenced by adherents of the prevailing orthodoxies, the spectacular growth of knowledge through the rise of modern science would have been frustrated.

The claim that there were no extermination camps in the Third Reich seems plainly false. However, if we attempt to expose the falsity of the claim in detail, we may discover that some significant parts of what we think about the Holocaust are false or that there are facts not previously generally known which alter our understanding of what happened or why it happened. Even views with minimal and derogatory content, such as “Muslims suck,” can be criticized, reformulated, further criticized, and so on, possibly leading to new discoveries. In principle, any new discovery may help someone somewhere in putting together a view of life and the world that helps her to formulate or criticize a theory about how she should live.

b. Harm

We saw in Section 5 above that some types of content are very likely to lead to harm if expressed in a particular way in particular circumstances, as with a denunciation or exhortation delivered to an excited mob, or shouting “Fire!” in a crowded theater. Insofar as the circumstances are easily recognizable, they can ground restrictions on time, place, and manner of expression. Such considerations could be invoked for complete prohibition of expression of a type of content only if expression of a content of that type would be highly likely to lead to harm in any circumstances (or, perhaps, almost any). However, there is no type of content that meets that condition, for two reasons.

First, anyone who encounters the expression of a particular content must interpret it. How a person interprets a particular content, including any implications for action that she draws from it, will depend upon her background views and her imagination. For example, in 1992, feminists in Canada succeeded in changing the law to prohibit materials that are degrading or dehumanizing to women. Given their background views, they expected the authorities to crack down on heterosexual pornography, but the enforcement agents, whose background views were more traditionalist, interpreted the law as applying primarily to gay, lesbian, and feminist material. In two-and-a-half years, well over half of all Canadian feminist bookstores had

material confiscated or detained by customs.³³ While those enforcement agents with their traditionalist background views interpreted feminist literature as degrading or dehumanizing to women and consequently acted in harmful ways, another person with the same background views, but who has started to question some of them, may find that the same feminist literature inspires her to take liberating actions that enrich her life.

Another example that depends on interpretation of content is a pacifist who accepts the injunction “We should kill the whites,” but who interprets “kill” metaphorically so that the injunction has no implication that white people should be harmed (except metaphorically). Another example is someone who accepts the proposition that we should do our best to help others but is thereby inspired to harmful actions because she holds a background theory according to which the best way of helping non-Greeks is to enslave them against their will, or the best way of helping people with physical or mental disabilities is to kill them humanely. Any content may inspire either beneficial or harmful actions, if accepted by a person with suitably tailored background views and imaginative capacity.

The second reason why it is false that expression of any particular type of content would be very likely to lead to harm in almost any circumstances is that a person need not accept a communicated content. Once she has interpreted it, she may ignore it, reject it, or criticize it. Even if she accepts the content while interpreting it in a way that implies that she should perform actions which (whether she realizes it or not) are harmful to others, she may yet go on to reject that content, along with its implications, if the next piece of content she encounters and accepts contradicts it. That can be illustrated with empirical research on pornography. Some laboratory research (contradicted by other laboratory research) has found that while men exposed to pornographic depictions of rape are more likely to behave aggressively toward women, the effect can be negated by pointing out to the men, after the experiment, that women do not like being raped.³⁴ As two critics put it, “if we were to take this discovery at

³³ Nadine Strossen, *Defending Pornography* (New York: Doubleday, 1996), pp. 229-32.

³⁴ Dennis Howitt and Guy Cumberbatch, *Pornography: Impacts and Influences* (London: UK Home Office, Research and Planning Unit, 1990), pp. 52-56.

face value, it would not entail censorship but the encouragement of exposure to pornography of all sorts combined with the education of the public regarding the facts of rape and assault.”³⁵

Catharine MacKinnon claims that pornography propagates a view of women that undermines their demand for equality and she recommends that pornography should be prohibited.³⁶ Even if her claim were true, her recommendation would be mistaken. Insofar as views that hold women to be inferior are reflected in, and reinforce, social practices that violate women’s moral rights, it is important that the views be openly expressed, dissected, and criticized so that the social practices can be rectified. Prohibiting expression of the views will mean that they are never effectively debated and rebutted, as their proponents will not get a hearing. As a consequence, the errors in the views will be insufficiently exposed and understood. That will hamper efforts to identify and institute better practices. Furthermore, without a good understanding of *why* they are better, any improvements in moral practice will be easily reversed in response to the next intellectual fad that runs counter to them.

MacKinnon’s discussion is obscure. One mystifying claim that she makes is that pornography silences women and thus violates their freedom of speech. Rae Langton and Jennifer Hornsby have attempted to formulate a literal version of that claim and to explain how it could be true, but their hypothesis has been effectively criticized by Alexander Bird.³⁷

³⁵ Augustine Brannigan and Sheldon Goldenberg, “The Study of Aggressive Pornography,” *Critical Studies in Mass Communication* 4 (1987), p. 277, quoted in Howitt and Cumberbatch, *Pornography*, p. 56.

³⁶ Catharine MacKinnon, “Francis Biddle’s Sister,” in Catharine MacKinnon, *Feminism Unmodified* (Cambridge, MA: Harvard University Press, 1987), pp. 163-97.

³⁷ Rae Langton, “Speech Acts and Unspeakable Acts,” *Philosophy and Public Affairs* 22 (1993), pp. 293-330; Jennifer Hornsby and Rae Langton, “Free Speech and Illocution,” *Legal Theory* 4 (1998), pp. 21-37; Alexander Bird, “Illocutionary Silencing,” *Pacific Philosophical Quarterly* 83 (2002), pp. 1-15.

c. Offense

It is a commonplace in multicultural societies that many people are made very uncomfortable by criticism of their firmly held assumptions. Joel Feinberg proposes the following principle:

It is always a good reason in support of a proposed criminal prohibition that it would probably be an effective way of preventing serious offense (as opposed to injury or harm) to persons other than the actor, and that it is probably a necessary means to that end.³⁸

Feinberg's "good reason" is intended to be a *pro tanto* one that may be overridden by other considerations. He also does not intend his principle to apply to the expression of particular contents *as such*, but only to their expression in *particular circumstances*.³⁹ Others regard offense as grounds for prohibition of types of content. In Britain, for example, sado-masochistic pornography is prohibited if it is "grossly offensive,"⁴⁰ and religious leaders have called for prohibition of contents that offend "widespread sensibilities" or "the feelings or beliefs of any section of society."⁴¹

Prohibitions of contents that offend are mistaken because they would create an obstacle to general human fulfillment not only for the people who would express or willingly receive the contents, but also, and primarily, for the people who are offended by them. It may be that for some people the most fulfilling life that they can lead just happens to be a kind of life which is compatible with their most cherished assumptions. However, no one can know that to be so if those people have never explored alternatives. Furthermore, for many people who unquestioningly accept a particular kind of life (often the kind of life that they have been brought up to live), there will be other kinds of life which offer greater opportunities for fulfillment. Protecting them from

³⁸ Feinberg, *Offense to Others*, p. 1.

³⁹ *Ibid.*, pp. 26, 32-33, and 37-44.

⁴⁰ HM Government, *Criminal Justice and Immigration Act*, part 5, sec. 63.

⁴¹ See Peter Jones, "Respecting Beliefs and Rebuking Rushdie," *British Journal of Political Science* 20 (1990), p. 435.

offense by prohibiting attacks on their cherished assumptions will tend to deny them the prospect of a more fulfilling life. In general, people must bear or overcome the discomfort of hearing their familiar assumptions impugned, and considering alternatives, if they are to achieve a greater degree of positive freedom. They can then take advantage of their negative freedom, either to experiment with different kinds of life or to continue with their current kind of life because their critical assessment of alternatives makes it plausible that a life of that kind is the most fulfilling one that they can lead. Even if, irrationally, they use their negative freedom to stop up their own ears, it is impermissible for them, or anyone else, to frustrate the fulfillment of others by stopping up the ears or mouths of those others.

Parenthetically, we should distinguish *being offended* from *taking offense*. Being offended involves feeling upset and feeling resentful toward the person who caused the upset. It is a natural reaction of a person when one of her cherished assumptions, particularly moral assumptions, is gainsaid. The person can free herself of her feeling of being offended by taking a critical attitude toward it and toward the cherished assumption in question, that is, by increasing her positive freedom. If a person is unable to do that, she is to that extent deficient as a rational creature, suffering some kind of neurosis or psychopathology.⁴² A person who has freed herself from her feeling of being offended may nevertheless *take* offense, that is, behave in ways typical of someone who is offended and perhaps try to convince herself that she is offended. Similarly, a person who has adopted dogmatically an assumption which she had previously either rejected or remained indifferent to, may *take* offense whenever that assumption is criticized. *Taking* offense is therefore phony.⁴³ People who are offended and remain so, and people who take offense, are to be pitied because they are closing their minds to potential opportunities for greater fulfillment.

Peter Jones points out that prohibition of content that some find offensive is often urged in order to prevent public disorder.⁴⁴ That

⁴² Popper, "Science: Conjectures and Refutations," pp. 49-50.

⁴³ Cf. Jeremy Waldron, "Tribalism and the Myth of the Framework," in *Karl Popper: Critical Appraisals*, ed. Philip Catton and Graham Macdonald (London: Routledge, 2004), pp. 209-16.

⁴⁴ Jones, "Respecting Beliefs and Rebuking Rushdie," p. 435.

places freedom of expression at the mercy of the willingness of some to react in disorderly and violent ways. That is unjust because the more aggressive and intemperate a group, the greater the “protection” it will receive⁴⁵ and because it frustrates the fulfillment of people in general in order to satisfy the demands of those who have turned their backs on fulfillment. It is analogous to outlawing fraternization between people of different races because racist bigots are liable to run riot at the sight of a black person and a white person holding hands.

d. Democratic principles

Raphael Cohen-Almagor says, “Democracy that is based on tolerance without proper boundaries endangers its [own] existence.”⁴⁶ He proposes that the public expression of contents which “do not coincide with the moral rationale at the base of liberal democracy”⁴⁷ should be *restricted*, though not wholly prohibited.⁴⁸ Jeremy Waldron says that a well-ordered society is one that assures its members of its commitment to the fundamentals of justice and which enforces “hate speech” laws to prevent that assurance from being undermined.⁴⁹ He recommends *prohibiting* publication of types of content that affirm that members of an identifiable group “are not worthy of equal citizenship.”⁵⁰ If that recommendation were followed, Aristotle’s *Politics* would be consigned to the flames (see Section 4 above). Typically, a totalitarian state prohibits views at variance with its basic principles. A liberal democracy is open to improvement through critical comparison of its basic principles with alternatives.⁵¹

Our previous discussion allows us to deal briefly with such proposals. Insofar as the ground for prohibition is the (assumed) falsity

⁴⁵ Ibid., pp. 435-36.

⁴⁶ Cohen-Almagor, *The Scope of Tolerance*, p. 26.

⁴⁷ Ibid., p. 80.

⁴⁸ Ibid., pp. 127-31 and 146-47.

⁴⁹ Waldron, *The Harm in Hate Speech*, pp. 69 and 93-94.

⁵⁰ Ibid., pp. 33, 37-39, 100-101, and 105-6.

⁵¹ At *ibid.*, p. 198, Waldron, inconsistently, acknowledges that last point.

of contents which contradict the principles of liberal democracy,⁵² the arguments that counter the objection from falsity rebut it. Insofar as the ground for prohibition is the *protection* of liberal democracy or of identifiable groups,⁵³ the arguments that counter the objection from harm rebut it.

A principle canvassed, but not endorsed, by Jones is that in liberal democratic societies people are required to *respect the beliefs* of others, which prohibits attacks on those beliefs.⁵⁴ However, if we respect people's beliefs by refraining from criticizing those beliefs, we are not respecting the people who hold the beliefs, because we are not treating them as persons capable of fulfillment through self-discovery.⁵⁵

e. Education

Mill defends freedom of expression as indispensable for the development of intellects, the growth of knowledge, and the consequent improvement of institutions. He argues that we can never be sure that our opinions are not false. Furthermore, engaging with diverse opinions and diverse criticism can help to expose our errors, to show the strength of our views that manage to withstand such critical onslaught, and to foster the moral courage to explore daring new hypotheses which enlarge the minds of those who propose them and those who evaluate them.⁵⁶ We might, then, expect that higher-education institutions would safeguard free debate and oppose attempts to prohibit types of content that may be expressed on their premises. That expectation is disappointed. In recent decades, many institutions of higher education in Britain and America have introduced restrictions on speech that prohibit the expression of specific contents. A 2016 survey of 115 British universities indicates that in 55% of them, the administration or the students' union mandates explicit restrictions on student speech, including, but not limited to, bans on specific

⁵² Ibid., pp. 192-97.

⁵³ Ibid., pp. 105-11.

⁵⁴ Jones, "Respecting Beliefs and Rebuking Rushdie," pp. 421-24.

⁵⁵ Cf. *ibid.*, pp. 429-32.

⁵⁶ Mill, *On Liberty*, chap. 2.

ideologies, political affiliations, beliefs, books, speakers, or words.⁵⁷ A 2015 survey of 440 American universities and colleges found that 49% of administrations maintain “speech codes” that clearly and substantially prohibit types of content concerning such things as race, color, national origin, age, marital status, sex, sexual orientation, disability, or religion, which are “biased,” “inappropriate,” “threatening,” “offensive,” “demeaning,” etc., where the quoted terms are given an unusually broad sense.⁵⁸ Such prohibitions are inimical to critical debate, upon which the growth of knowledge depends.

Popper traced the roots of the scientific tradition to the Ionian school of philosophy in ancient Greece. Primitive schools make it their task to impart a specific doctrine and preserve it, pure and unchanged. New ideas are not admitted; they are treated as heresies and lead to schisms. There is little rational discussion, though there may be denunciation of dissenters, heretics, or competing schools. In the main the doctrine is defended with assertion, dogma, and condemnation, rather than argument. In contrast, the Ionian school founded by Thales was based upon a new relation between teacher and pupil in which the pupil was encouraged to criticize the theories of the teacher, to attempt to come up with something better. The Ionian school was the first in which pupils criticized their teachers, in one generation after the other. That broke with the dogmatic tradition which permits only one school doctrine, and introduced a tradition that admits a plurality of doctrines which are critically appraised and compared as better or worse.⁵⁹ Thus, we can contrast schools of indoctrination, which have restrictive speech codes and whose teachers and pupils tend easily to be offended and often to take offense, with schools of learning, which encourage free debate and whose teachers and pupils tend not to take offense or to be offended. Even if citizens should have the negative freedom to set up schools of indoctrination, state funding or other support for such

⁵⁷ Spiked-online, *Free Speech University Rankings* (Spiked Ltd., 2016), accessed online at: <http://www.spiked-online.com/free-speech-university-rankings#.V-KdoK2dfwQ>.

⁵⁸ FIRE, *Spotlight on Speech Codes* (Philadelphia, PA: The Foundation for Individual Rights in Education, 2016), accessed online at: https://d28htnjz2elwuj.cloudfront.net/wp-content/uploads/2013/06/27212854/SCR_Final-Single_Pages.pdf.

⁵⁹ Karl Popper, “Back to the Presocratics,” in Popper, *Conjectures and Refutations*, pp. 136-53, sec. xi.

schools is incompatible with the state's duty of enforcing rules that offer the best prospects for the fulfillment of persons within its jurisdiction.

7. Conclusion

A person is distinguished from other beings by his capacity for critical rationality, which enables him to ask the question: What sort of life will be most fulfilling for me? In order to answer the question and achieve fulfillment he needs to undertake a critical review of different actual and possible kinds of life, including the kind that he is currently living, and then formulate a conjecture about how to live which he can test by trying to live that kind of life or something close to it. His engagement in that exercise is a central part of his positive freedom. It requires the negative freedom to experiment with kinds of life. Thus, personal fulfillment normally requires positive freedom, primarily as a means to self-discovery, and secondarily, for some people, as an end in itself, as a form of fulfillment appropriate to rational beings. It also requires the negative freedom to experiment with different kinds of life which are compatible with other persons doing the same sort of thing.

Freedom of expression means that no content is forbidden expression or made unreasonably difficult to communicate to any who may be interested in it. It is consistent with there being many restrictions concerning the time, place, and manner of expression. Freedom of expression is a component of negative freedom. It is also inseparable from positive freedom, because effective critical appraisal requires inter-subjective criticism, especially that which includes the participation of people from very different cultures, so that a wide range of alternative theories and criticisms are debated.

It is a duty of the state to secure the equal initial negative freedom of persons within its jurisdiction indiscriminately, including their freedom of expression. Objections made to freedom of expression on grounds of falsity, harm, offense, or the principles of liberal democracy do not withstand criticism. Speech codes that prohibit the expression of specific contents are incompatible with the purpose of an institution of higher education.

In short, the capacity for critical rationality makes persons responsible for discovering their own fulfillment in life; a person's discovery of what sort of life fulfills him normally depends upon his exercise of his capacity for critical rationality. The effective deployment of critical rationality constitutes positive freedom, the realization of which requires negative freedom. A central component

of both positive and negative freedom is freedom of expression, which is thus crucially important for the fulfillment of persons in general and so is a central ethical concern.

Finally, it might be protested that freedom is just the right to act without interference from others, so that all freedom is negative freedom. Expressive freedom, being the right not to be prevented from expressing any type of content, is just a specific form of (negative) freedom. So-called positive freedom, the exercise of critical rationality, is an activity rather than the right to act without interference. It is therefore not a kind of freedom.

There is, however, an analogy between freedom and critical rationality. As we noted above, a person's inherited social customs and ways of thinking define or indicate boundaries to what is permissible, praiseworthy, possible, and plausible. Those boundaries can operate like constraints on what hypotheses a person can entertain or even formulate (recall the example of simultaneity). So the exercise of critical rationality, which challenges and, in some cases, demolishes, those constraints is *analogous* to freedom. Prefixing "positive" to "freedom" signifies that the latter word is being used metaphorically, just as prefixing "social" to "justice" indicates a non-literal use of the latter expression. Of course, some analogies are better than others.⁶⁰

⁶⁰ I am grateful to Mark Friedman, the editors of *Reason Papers*, and an anonymous referee for helpful comments on earlier drafts of this article.

