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TAKING FREE SPEECH SERIOUSLY:
Equality, Harm, and the Electronic Media

By

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ABSTRACT

Much of the philosophical and legal debate regarding the nature, scope, and limits of free speech focuses upon situations in which an individual either speaks directly to large audiences or addresses potentially larger audiences via newspapers, journals, and other "print media." Yet, such debates have given comparatively little attention to the relatively new modes of communication provided by the electronic media and, in particular, by television. In this dissertation, I consider the extent to which some of the more traditional explanations and defenses of free speech (and of restrictions upon speech) are applicable to television. I also discuss what new considerations might be introduced into debate about free speech by television and how these considerations affect our understanding of the nature, scope, and limits of this liberty.

Because concerns about free speech in the context of television are most forcefully and frequently raised in discussions of programs containing blatant violence or explicit sex, I begin by describing two sorts of harms that may be brought about by such programming. The first class of harms is exhibited in the results of psychological research demonstrating an increase in tendencies to engage in harmful or destructive behavior in those individuals who are exposed to such programming. The other type of harm must be explained in terms of the philosophy of language provided by J. L. Austin and can be illustrated by the critique of pornography developed by writers like Catharine MacKinnon. These harms point to some of the most important concerns

underlying attempts to restrict free speech and, also, to some of the more interesting considerations that are both unique to television and relevant to free speech debate. Although a seemingly plausible response to these harms can be built upon the defense of free speech offered by J. S. Mill in *On Liberty*, I argue that this response is inadequate given Mill's limited notion of censorship and the sharp contrast between his conception of speech and that which seems inherent to the television program.

More importantly, however, I reject Mill's theory because it cannot fully account for the intrinsic value and fundamental importance assigned to the right to free speech by our institutions and practices -- it cannot take the right to free speech "seriously." I thus turn to a formulation of free speech based upon the work of John Rawls and Ronald Dworkin, a view that explains and defends a strong right to free speech in terms of what Dworkin calls the "right to equal concern and respect." This "theory of free and equal speech" has, as its chief element, the familiar model of the "marketplace of ideas." Such a model imagines an exchange of ideas between persons regulated by the familiar principle of neutrality and by what I call a "principle of equity," which demands that individuals be treated as speakers and listeners and that conditions for such treatment be satisfied and maintained. I conclude by noting some consequences for particular programs given my approach.

TABLE OF CONTENTS

1	Harmful Television	1
	Behavioral Modification	5
	What Words and Images Can Do	18
	The Television Program as Speech Act	25
2	Free Speech and Television	46
	A Millian Response	48
	Conceptual Limitations: Censorship and Silencing	61
	Speech, Television, and Public Discourse	83
3	Taking Free Speech Seriously	113
	Rights, Goals, and Equality	117
	Speech, Equality, and the Marketplace of Ideas	137
	Speech and Power	151
4	Some Applications:	
	Justifiable Restriction and Prevention	181
	Justifiable Restrictions and Preventative Measures	186
	1. Justifiable Restrictions: Responding to Ranking and Silencing	191
	2. Preventative Measures: Responding to Behavioral Modification	212
	Rational Persuasion and Edifying Discourse	222

Harmful Television

There are, today, three very common ways in which to communicate to large audiences. One might engage in direct communication by simply speaking before a large audience at a political demonstration, university lecture hall, auditorium, shopping center, or other area that is regularly visited by a number of persons at one time. The speaker need not, of course, be present at such gatherings. A sign, drawing, or recording would serve the same function. A sizable portion of the voluminous literature addressing the nature, scope, and limits of free speech is devoted to clarifying and resolving the questions and problems raised by this sort of communication.

Communication also takes place via newspapers, magazines, circulars, fliers, and research journals. These print media have proven quite effective in presenting information, thoughts, beliefs, and arguments to large audiences. Although the "free speech" and "free press" clauses of the First Amendment of the United States Constitution (1) have been (and ought to be) treated separately both in the courts and in the literature, it is difficult, in many cases, to maintain their distinctiveness. Cases such as *New York Times v. Sullivan* (2), *Gertz v. Robert Welsh, Inc.* (3), and *Hustler Magazine, Inc. v. Falwell* (4) invoke arguments linked to and have implications for both liberties. These arguments and implications have also received an enormous amount of attention in the literature, especially since the *New York Times* case.

Finally, there is a third (and relatively new) mode of communication that has received comparatively little discussion in the literature concerning free speech. I am thinking of the electronic media, especially the medium of television. The popularity of television together with the ease with which persons have access to its programming raise interesting and important questions about the form, content, and consequences of such programming. Television programs (and the messages that they seem, implicitly or explicitly, to convey) have been blamed for everything from youth violence (5) to a general demoralization or "dispirited confusion" that can be observed in (and, perhaps, felt by) the public as a whole and that has, allegedly, led to (among other things) the unprecedented accumulation of public and personal debt during the 1980s. (6)

While psychologists and sociologists continue to identify and describe the detriments of some uses of the electronic media (and, especially, of television), little has been said in defense of these media, especially with regard to their entitlement to First Amendment protection. More specifically, we ought to be asking and addressing questions like the following: Can and ought the right to free speech, guaranteed via the combination of the First and Fourteenth Amendments of the U. S. Constitution (7) and celebrated and defended by moral and political theory since the seventeenth century, be extended to the electronic media and, in particular, to television? If so, what is the strength of this right in this context and how does this strength

compare to that had by the right in its more traditional contexts (e.g. print media or direct oral communication)? What new considerations does television (or other electronic mass media) introduce into debates and discussions about free speech and how do these considerations affect our understanding of the nature, scope, strength, and limits of this liberty?

In this dissertation, I want to begin constructing a theory of free speech that will assist us in answering such questions. However, I will not proceed by way of an abstract discussion of television programs in general. Rather, I wish to organize the discussion by focusing upon one class of programs, namely, those containing sexually explicit or blatantly violent material. This approach has several advantages. First and foremost, the problem of articulating and implementing a feasible and acceptable response to sex and violence on television has drawn increased public attention (even though it has, as we shall see, been of interest to scholars and researchers for some time). It is in the context of such discussions that questions and concerns regarding the legitimacy of First Amendment protection of television programming are most frequently and forcefully expressed. Hence, we have the opportunity to respond to an issue of public concern while, at the same time, attending to the more complicated and general questions I raised earlier.

Each side of the debate concerning the programs in which I am interested has been developed in some detail. On the one hand, those

who oppose restrictions upon these programs frequently invoke familiar and forceful arguments for free and open discussion and expression. The opportunity to acquire truth (or, at least, to uncover falsity), the benefits and opportunities spawned by a free exchange or "marketplace" of ideas, the need for tolerance and public exposure to diverse points of view in a pluralistic society, and the desire for an informed and thoughtful citizenry all serve as premises upon which to ground an argument for affording the most extensive liberties to broadcasters, viewers, and listeners. I shall consider some of these arguments in the chapters that follow, for, in deciding whether or not to extend the right to free speech to television, we must, at the very least, understand what values and purposes are to be advanced by this right and what individual interests it is meant to protect.

Proponents of severe restrictions or bans upon programs having sexually explicit or blatantly violent content tend to cite the harms and wrongs that can be brought about by such programs. The first class of harms that I will discuss in this chapter includes harms that are described in terms of the results of controlled psychological research demonstrating the injurious or destructive behavior that can (and does) result from exposure to the programs at issue. The other harms and wrongs that I want to consider here must be understood in terms of the philosophy of language presented by J. L. Austin. This philosophy of language (and, in particular, the notion of a "speech act" that lies at its center) has been successfully utilized in free

speech debate by Catharine MacKinnon and Andrea Dworkin in their critique of pornography.⁽⁸⁾ Their critique describes the way in which some forms of pornography work to establish and arrange patterns of sexual inequality. Although MacKinnon and Dworkin concentrate on pornography and sexual inequality, we shall find that this view (and the philosophy of language that supports it) is useful in analyzing a variety of television programs having a wide array of content.

Behavioral Modification

Like any other action or practice, television programs have their desirable and undesirable effects. When persons speak or write about the "harm" of programs containing blatantly violent or sexually explicit material, they are frequently pointing to one class of the more undesirable effects of such programs. This class includes those psychological effects upon viewers and listeners that increase (or are likely to increase) the tendency of these individuals to engage in injurious or destructive behavior. Research concerning the psychological effects of sex and violence in the media began in the 1950s (just after the introduction of television) and, for several decades, focused upon three such effects. I will not, of course, attempt to review the vast psychological literature regarding these effects. Rather, I simply provide a general description and some instances of each of these effects and the kind of behavior that can and does result from them. There is no need (nor, perhaps, would it

be possible) to conclusively establish a strong causal relation between viewing or listening to the programs in question and engaging in injurious or destructive behavior. I will be content if the reader, after considering the presentation to follow, acknowledges that such effects can and do occur and that they can and do, at times, result in harmful behavior.

Just as the physicist might employ, say, Newtonian mechanics or Einsteinian relativity theory to explain the nature of the forces that exist between physical bodies or to describe and predict events and states of affairs in which such forces might reveal themselves, so, too, the psychologist has various theories to describe the nature of harmful or destructive behavior and to predict, with some accuracy, the occurrence of such behavior. In the context of television, three of the most commonly discussed effects identified and predicted by these theories of *behavioral modification* are imitation, disinhibition, and desensitization. Imitation is, by far, the easiest of these effects to explain and illustrate. It is most readily revealed in the behavior of children who imitate or mimic a variety of TV or film characters. A child adopting the slang of the Teenage Mutant Ninja Turtles or trying to copy the moves of basketball star, Michael Jordan, are only two of the many examples that might be given.

As noted by H. J. Eysenck and D. B. Nias in their extensive survey of early psychological studies in this area (9), imitation has also been demonstrated in the laboratory. Many early experiments

involved showing children a 2.5-minute film of a child attacking a clown. The children were then sent to a playroom and, upon entering the room, a clown was identified and attacked by the children. A control group of children who had not seen such a film did not attack a clown in a similar setting. In this study, "mere exposure to the film was sufficient to produce imitation of physical aggression in most of the children." (10)

Instances of imitation provide those cases most often employed in arguments for restricting or prohibiting television programs containing sex or violence. They are, perhaps, also the most successful at capturing public attention and winning support for restrictions on these programs. In discussing the hearings before the Minneapolis City Council regarding her proposed pornography ordinance, Catharine MacKinnon writes, "If you want to know who is being hurt in this society, go see what is being done (and to whom) in pornography and then go look for them other places in the world. You will find them being hurt in just the same way." (11) A variety of individual cases cited in the testimony of women at these hearings confirms MacKinnon's claim. (12) Another excellent example of imitation and its persuasive power is the recent fire at a home in Moraine, Ohio in which a two-year-old girl was killed. The fire was the result of a five-year-old boy imitating the behavior of Music Television's "Beavis and Butt-head," a cartoon depicting two crude and obnoxious teenage boys who often play with (and insist upon the joy of playing with)

fire.(13) This case and the instances of imitation noted at the Minneapolis hearings were certainly key factors in the decision to restrict pornography in Minneapolis (14) and MTV's decision to edit several episodes of their "Beavis and Butt-head." (15)

However, such an effect, if taken in isolation from the others I will discuss, holds little weight in most arguments for censorship. One might argue that, although it is clear that individuals do imitate various television and film characters and that some of this new behavior is certainly destructive or harmful, those who would actually engage in such behavior would have done so with or without the newly acquired behavior. A teenaged boy who, say, murders a member of a rival gang in a way very similar to that shown in a movie about youth gangs he has just viewed would have, in all likelihood, murdered the other gang member without having adopted this novel style of homicide. Such cases are, perhaps, the least helpful in evaluating the legitimacy of any argument for restrictions upon programs because they offer evidence not for a significant connection between viewing violent programs and an increased tendency towards harmful behavior but, rather, only for a dubious connection between viewing particular scenes and engaging in activity that manifests a tendency towards harmful or destructive behavior that was already present. In short, instances of mere imitation can only reveal tendencies to injurious or destructive behavior; they do not create or increase such tendencies.

One effect that might work in conjunction with that of imitation

to increase a tendency towards (and, perhaps, actually produce) aggressive or destructive behavior is disinhibition. According to Eysenck and Nias, "disinhibition theory makes the assumption that certain responses already exist but that their expression is inhibited." (16) Put another way, disinhibition theory assumes the presence of aggressive tendencies rather than hypothesizing their creation by television violence or other factors. Thus, for instance, the desire to imitate a physical attack upon a child just seen during some television program may be present in the child who has witnessed the scene when this child is, say, angered by a playmate. Yet, because of a strict upbringing and the inculcation of values that make fighting appear wrong or undesirable to that child (the inhibitions), the imitation will not occur. Given disinhibition theory, however, viewing certain kinds of violent displays might lead to the weakening or elimination of these inhibitions and, hence, to the imitative behavior. Thus, while imitation theory describes the acquisition of new sorts of behavior, disinhibition theory points to the reconstitution or reorganization of the motives of behavior.

The effect of disinhibition can be exhibited in the psychological laboratory. It is obtained by "providing a permissive situation in which aggressive urges could be freely expressed." (17) One might object to the construction of such "permissive situations" because, in such cases, inhibitions are likely to be weak from the outset. It is important to keep in mind, however, that disinhibition theory does not

contend that the strongest of our inhibitions can be severely weakened or removed by a single or short-term exposure to violent scenes but only that some weakening will take place. Just as it would be difficult (if not impossible) to demonstrate the benefits of chemotherapy for a patient with widespread and advanced bone cancer due to the strength and maturity of the disease, so, too, it would be unfair to expect to witness disinhibition in an individual who has very strong inhibitions against violent or aggressive behavior after that individual has only viewed one or two violent scenes.

Eysenck and Nias describe several studies illustrating this effect.(18) In one such experiment, adult males are told that they will aid in studies of punishment and that, upon witnessing an error, they are to administer shock to a confederate of the experiment, who, unknown to the participants, is never actually shocked but only acts as if he were electrocuted. Two groups are observed with regard to the amount of punishment administered, measured in terms of the intensity and duration of the shock given. During the experiment, one group is shown a knife fight scene from the movie, *Rebel Without A Cause*, while the other is shown an educational film. Aggression was compared before and after the films and the result was that the group that was shown the violent clip punished the confederates more severely than did the controls, who exhibited little or no change in the amount of aggression. Since both the test and control groups exhibited the tendency to perform harmful behavior in a permissive

situation before exposure to the film and, too, because this tendency seems to be strengthened in the violent film group after exposure, it is hard to account for this increase with any other effect besides that of disinhibition.

A more recent study indicates the potential danger of disinhibition when it is the result of exposure to violent, sexually explicit material. In a 1985 study (19), 430 students viewed one of four sorts of films: 1) films depicting violent sex acts, 2) films displaying acts that are degrading to women but nonviolent, 3) sexually explicit, but nonviolent and nondegrading scenes, or 4) films which were neither violent nor sexual in nature. Students were exposed to these films for a total of 90 minutes during three separate 30-minute sessions. In a questionnaire to be completed during a fourth and final session, students were asked (among other things) how likely they would be to commit a rape if they could be assured of not being caught and how likely they would be to forcibly evoke unwanted or undesirable sexual activity during sex. "Subjects exposed to violent pornography," notes Daniel Linz in summarizing the study, "were more likely to report that they might commit a rape if assured that no one would know and they would not be punished. A similar result was found for subjects' willingness to use force to coerce a female into other forms of unwanted sexual activity." (20) It is unlikely that this short-term exposure would have created the tendency to rape or to use force to procure unwanted sexual activity. Thus,

the experiment seems to indicate that violent pornography weakens or removes (at least temporarily) some of the inhibitions that would normally prevent one from entertaining the possibility of acting upon these tendencies.

Disinhibition should not be confused with the final effect to be discussed, namely, desensitization. Unlike disinhibition, which effects the organization of the motives of behavior, desensitization alters our physical and emotional reactions to certain types of behavior or states of affairs. Such reactions might include nausea, discomfort, fear, anxiety, increased or decreased heart rate, or some combination of these and other reactions. Hence, while disinhibition is an effect that rearranges or alters those values, aversions, and desires that encourage us to or discourage us from behaving in certain ways, desensitization is an effect that weakens or completely eliminates our reaction to certain forms of behavior or states of affairs. In the one case, we become more likely or less likely to perform certain kinds of conduct while, in the case of desensitization, we become less apt to react to (and, hence, more tolerant of) a certain kind of behavior or state of affairs. (Of course, desensitization might contribute to disinhibition in a given case, as I shall point out momentarily. The effects should, nevertheless, be kept distinct.)

Let us consider an ordinary example offered by Eysenck and Nias that illustrates how desensitization takes place.(21) Suppose a child

is afraid to take a bath in a bathtub. Two essential steps are required to dispose of this fear. First, the child must be relaxed. This might be accomplished by the parent reading to or playing with the child. Second, the parent must construct a "hierarchy" of situations that will, over time, bring the child to the point of comfortably taking a bath in the tub. The parent might begin by having the relaxed child bathe in a small wading pool or basin. The parent might then, after a few days, wash the child's feet in the bathtub, still having to relax the child before proceeding. Eventually, the child will be completely comfortable taking a bath in the tub because, with the continuing relaxation procedure, the child has come to associate the bathroom and the bathtub with relaxation. It is important for the parent never to force the child beyond a particular step in this hierarchy without the child's being completely at ease. In this example, then, the child has been desensitized because the initial reaction to the bathtub (or, perhaps, to bathing in it), namely, the fear or anxiety, has been eliminated. Effective desensitization, then, requires both relaxation at all points during the process and a long-term, hierarchical succession of states of affairs or situations that ends with the situation or state of affairs to which the subject is to be desensitized.

Many studies affirming desensitization involve repeatedly exposing subjects to particular scenes of a brutal beating or gruesome accident while monitoring certain physical functions such as pulse,

muscle tension, and skin moisture for evidence of a lessened reaction to the scene viewed. However, such studies do not always show a tendency for individuals to become desensitized to scenes of violence of a different sort than that presented to the subjects nor to actual violent events. If this were to have been exhibited, it would have been evidence of what psychologists call generalization. It is the phenomenon of generalization that most worries those who advocate censorship, for it is rendering actual violence and acts of aggression more tolerable that is most likely to increase aggressive behavior and to reduce the likelihood of intervention in or prevention of violent occurrences. In a 1974 study summarized by Eysenck and Nias (22), we have evidence that generalization does, indeed, take place. A group of children is shown a violent film while a control group of children is allowed to view an exciting sports match. Each of the two groups was then asked to observe a couple of children at play and to call the experimenter when and if the observed children began to act aggressively towards one another. The amount of desensitization (and, in this case, of generalization) that had taken place was measured by noting the time taken for each group to summon the experimenter. As Eysenck and Nias report, "Children who had watched an excerpt from *Manics* took an average of 145sec. before summoning help whereas those who had watched an exciting baseball film took only 88sec." (23) The results of viewing violence are, in this experiment, precisely those of which those who advocate censorship are most afraid. One could

imagine what years of viewing films as violent or more violent than *Manics* might accomplish in terms of desensitization theory.

One might object that, while desensitization may make violence towards others more tolerable or acceptable, it need not increase one's tendency to behave violently. Thus, the existence of this effect may not support an argument for censorship of or restrictions upon the programs in question that is based upon the ability of these programs to create or increase tendencies towards violent behavior. Of course, desensitization need not lead to an increased tendency to act aggressively or destructively but we need only show that such a possibility is conceivable and that, perhaps, such occurrences have taken place. "According to the reports of cinema managers," note Eysenck and Nias, "some members of the audience fainted or were sick during scenes of *Soldier Blue* and *A Clockwork Orange*." (24) Such a reaction, ironically, is precisely that which Alex and his friends did not experience during their violent conduct in *A Clockwork Orange* and, presumably, it was the absence of such a reaction that made their crimes easier. On the other hand, the members of the audiences to which Eysenck and Nias are referring would not, it seems, engage in the sort of behavior exhibited in the movie. Such individuals are "sensitized" to this activity and its results and this sensitization serves to inhibit such behavior.

The phenomenon of desensitization has been invoked in many arguments against the distribution of pornography. Recent

psychological research supports this appeal. In a 1988 study (25), 156 college-aged males were asked to view a series of either two or five films. The students were divided into four groups. One group viewed R-rated, violent films that contained some sexual imagery, another viewed X-rated, sexually explicit, nonviolent films, and a third group was exposed to R-rated "teenage" sex films that contained no explicit sex but which featured male characters pursuing women and young adults continuously discussing sex or engaging in sexually related activity (e.g. flirtation). The fourth group saw no films except for a reenactment of a rape trial that was also witnessed by all other subjects after they had viewed the films assigned to their group. The aim of the experiment was to identify any desensitization in those individuals exposed to the three types of films and to compare each group's reaction to the trial.

In this experiment, desensitization was measured via a scale that psychologists have devised in order to quantify anxiety and depression. Desensitization was observed in all of the film groups and occurred very quickly in those who viewed the R-rated, violent films. The reactions to the mock trial were measured using a number of scales that tried to gauge the subject's sensitivity towards or empathy for the rape victim. The researchers write, "Subjects exposed to R-rated filmed violence against women showed a tendency to be less sympathetic towards the victim of rape portrayed in the trial....More robust was the finding that the R-rated violent film subjects were

less able to empathize with rape victims in general when compared with no-exposure control subjects and subjects exposed to other types of films." (26) Such studies suggest not only desensitization but, more importantly, the phenomenon of generalization, a lessened sensitivity to violent acts or to the suffering of others not represented or portrayed in the program viewed.

It is just such studies that many writers have in mind when they speak of pornography's ability to change men's perception of women or to modify the attitudes or beliefs of males who view it. Again, in defending her proposed ban on pornography, MacKinnon writes, "Crucially, all pornography (by our definition) acts dynamically over time to diminish the consumer's ability to distinguish sex from violence. The materials work behaviorally to diminish the capacity of men (but not women) to perceive that an account of a rape is an account of a rape." (27) When rape is seen as sex, when brutality towards or the torture of a woman is not regarded as harmful, or when the screams and shrieks of women are heard as cries of joy and ecstasy, desensitization has taken place and it is this effect that is produced by pornography. The claim is not merely that the already disturbing and undesirable views of women are being perpetuated by pornography, but that pornography creates and sharpens these beliefs and attitudes.

I hope that the patience of the reader has not been exhausted by this extended discussion of the psychological research in this area

but it seems, to me, necessary in the light of so many claims about the inconclusiveness or dubious nature of psychological studies. As I have tried to show, we are, indeed, affected by viewing blatantly violent and sexually explicit material and these effects may and do result in aggressive or destructive behavior. If such effects can be produced by viewing only single clips or a small series of scenes or films, we can only speculate about the sort of effects produced by long-term exposure to such programming. To deny these tendencies is to refuse to take seriously the claims of psychologists engaged in professional scientific research. We might raise questions about the sorts of individuals that are effected in the ways just described or about the extent to which these effects produce or encourage injurious or destructive action, but we cannot plausibly question the occurrence of these effects and the tendencies they create and strengthen.

What Words and Images Can Do

Thus far, I have described the harm of television programs containing blatant violence or explicit sex in terms of the injurious and destructive behavior that can and does result from the psychological effects upon viewers produced by these programs. To understand the other set of harms and wrongs that might be brought about by the programming at issue, we must, as I said, turn to the philosophy of language offered by J. L. Austin and to the notion of a "speech act" that lies at the heart of this philosophy. In this

section, I describe this notion in some depth and use it to analyze a photograph or display not conveyed via the electronic media. Given Austin's view, I will argue that such a display might be seen as ranking African Americans as inferior or as less than persons. My claim will be not merely that this display depicts or conveys or perpetuates the ranking of such persons. Rather, I will maintain that, given its content and context, the display to be considered, in and of itself, ranks African Americans as inferior or as less than persons. In the next section, I show how Austin's philosophy is utilized by Catharine MacKinnon and Andrea Dworkin in order to demonstrate that some forms of pornography rank women in this way. I also try to explain how this view can be used to show how other television programs and films containing blatant violence or explicit sex might constitute similar activity.

Consider a picture depicting an African American male bound to the hood of a jeep with thick rope and heavy chains. Two white males wearing white hoods sit in the jeep holding rifles that extend slightly beyond the picture frame. The African American is wearing tattered clothes, his eyes are closed, and his head leans to the left while his arms and legs are spread so as to secure his hands and feet to the corners of the hood and to the side mirrors of the vehicle. The caption below the picture reads, "Coon hunting was especially good for these two sportsmen." Now, imagine this picture being circulated in a widely distributed magazine. Clearly, many individuals of all

racess and ethnic groups would be offended. It might be argued that those individuals exposed to this picture might, upon seeing an African American on the street late one evening, attempt to imitate the behavior depicted in the photograph or that such individuals might become desensitized to violence against African Americans.

Nevertheless, such considerations would not capture the more forceful objections that are most likely to be made to such displays. Such scenes are unacceptable (and, in many instances, prohibited) not because of the effects they might have on persons and their behavior but, primarily, because they are acts of racial harassment and discrimination. Noting similar displays, MacKinnon writes, "The fact that such verbal behavior serves as a vehicle for a bigoted ideology has not made it protected expression....Under discrimination law, such expression is not a political opinion, it is a smoking gun." (28) The picture in question is not a mere picture, a simple expressive act; it is an act of harassment or of discrimination. Its chief accomplishments include subordination and denigration rather than persuasion and communication.

Any African American male encountering this picture would be shocked, outraged, or even afraid or anxious. Yet, he would also know that he, as a black male, has been set up as a potential target for ridicule, scorn, and hatred, placed in a subordinating position, degraded, and dehumanized -- the picture (and its author) is doing more than speaking to him. At bottom, the display in question not

only conveys and perpetuates inequality, it establishes, enforces, and arranges it. As MacKinnon reminds us, "Words and images are how people are placed in hierarchies, how social stratification is made to seem inevitable and right, how feelings of inferiority and superiority are engendered, and how indifference to violence against those on the bottom is rationalized and normalized." (29) The fact that language is used to create and destroy, enforce and undermine patterns of social inequality and the more general notion that language is used to *do* rather than merely to *say* something has, until recently, been ignored or neglected in debates about free speech.

This neglected capacity of language was originally identified and discussed in some detail by J. L. Austin in his How To Do Things With Words (30) and has recently been summarized and developed in an illuminating article by Rae Langton. (31) One of the main themes of Austin's book is that to *say* something is always to *do* something and that the distinction so frequently drawn between expression and action or speech and conduct is misleading and, perhaps, artificial. Austin writes, "Once we realize that what we have to study is not the sentence but the issuing of an utterance in a speech situation, there can hardly be any longer a possibility of not seeing that stating is performing an act." (32) It is the analysis of language that arises from this contention that is essential to an understanding of the claims I have been making about the display under scrutiny.

Consider my yelling "Fire!" in a crowded theater. According to

Austin's analysis, there are three senses in which to issue this utterance, to perform this *speech act*, is to do something. First, my screaming the word 'fire' means that I have uttered certain sounds and, more precisely, a word from a recognized and accepted vocabulary. I have uttered sounds but I have also put together a meaningful vocable, an utterance of semantic value or import. I have, in short, performed a locution. This is the most basic way in which I do something when I say something.

My shouting "Fire!" also has certain effects on those around me. Persons may feel startled or anxious, turn to the source of the scream, talk loudly and frantically among themselves, and, perhaps, quickly exit the theater. In focusing on these effects, we are describing the perlocutionary aspect of this act of expression or noting the perlocutions of this act. Those who emphasize the results of research on behavioral modification believe that the harm produced by television programs that contain blatantly violent and sexually explicit material can be described in terms of a certain class of psychological (and, perhaps, physiological) effects that stem from these programs and the behavior thought to result from these effects. Thus, proponents of such research attend to the consequences or effects of these programs, that is, to their perlocutionary aspect.

Austin believes that there is a third aspect of acts of expression, that, even after explaining what such acts convey and what effects they have upon the environment in which they are performed,

something else can be said of them. I am doing more, here, than simply uttering the word 'fire' and communicating to others. In sincerely yelling, "Fire!," I am warning, urging persons to leave the area and, if I had the appropriate position and authority (e.g. if I were a fire-fighter or theater manager), commanding persons to leave immediately. Noting my "action" in such cases is, for Austin, to identify the illocutionary aspect or force of expressions, to emphasize what they do or accomplish rather than what they say or how persons react to them. Borrowing the phrase from Austin, Langton writes, "An illocutionary act is the action performed simply in saying something, a perlocutionary act is the action performed by saying something." (33) In the one case, we are asking what happens as a result of or in addition to the utterance or depiction or broadcast while, in describing the illocutionary aspect, we are asking what it accomplishes, what act it constitutes.

Content and context are extremely important in an evaluation of the illocutionary force of an act of expression. Consider the foreperson of a jury saying, "Guilty as charged," in a court of law at a criminal trial. The words would not accomplish the same task if, say, they were uttered in front of the courthouse or by an observer of the trial. Furthermore, it is this collection of words (or one very similar to it) that accomplishes the act of conviction. In short, understanding the content of the phrase 'Guilty as charged' in the appropriate context means more than an understanding, especially

for the person being tried. It does not imply or convey or communicate a conviction -- it *is* a conviction. Put another way, saying, "Guilty as charged," when spoken by the foreperson of a jury in a court of law at a criminal trial, is not communicating but convicting; once the defendant has understood the phrase in this context, he/she realizes that a conviction (and not a mere communication) has occurred.

We can invoke Austin's philosophy of language in order to analyze a variety of acts of expression and I shall be especially interested in applying it to many different television programs. As just indicated, two matters will be of special importance in such an analysis. First, it is important to understand what action is constituted by a particular television program and not to focus merely upon the message(s) that are intended in or received as the result of such a program. Second, if we are to fully grasp the activity constituted by a program (that is, if we are to understand its illocutionary force), the context of the program (with reference to both the immediate environment and general social context in which it is viewed and to how it is situated among other programs) must be carefully considered.

We are now in a better position to analyze the display described at the outset of this section. The words and images in the display are meaningful, they have semantic import, and they can be understood by persons. Moreover, persons encountering the display (especially

African Americans) may be shocked, offended, or outraged. They may, as a result of encountering this display in a newspaper, for example, call the paper's editors or cancel their subscription to the paper or encourage others to take similar actions. These would be some of the perlocutions of the display in question.

In order to understand the illocutionary force of this speech act (and, hence, the act it constitutes), much more must be known about the situation in which the display is encountered. The intent of its author, the medium in which it has been printed (e.g. a newspaper, magazine, political pamphlet, etc.), the historical and social context (especially with regard to race relations) surrounding the printing, and many other factors must be understood in order to determine what is being done in presenting (and in viewing) such a display. Those reading this dissertation might be shocked or outraged at the described scene but they are not, I think, subordinated or denigrated in my describing it. On the other hand, in placing it on the desk of an African American coworker, I am likely engaging in a form of racial harrassment or discrimination.; my speech act might, in and of itself, constitute such activity.

The Television Program As Speech Act

The central claim of the Dworkin-MacKinnon critique of pornography is that pornography, like the picture just discussed, is

not mere words and images conveying and communicating ideas about sex and women. Like the display just described (from which it is hard to distinguish some pornographic material (34)), pornography not only perpetuates and maintains social inequality, it can establish and arrange patterns of social inequality and sexualize this arrangement. In short, given the appropriate context, we are, in attending to or viewing pornography (or in distributing or broadcasting it), engaging in a form of sexual discrimination or harassment; the illocutionary force of such acts is sexual discrimination or harassment.(35)

We can, of course, discuss the locutionary aspect of pornography. A study of the words and images of which pornographic material is composed, of their relative importance in what might be called the "vocabulary" or "language" of pornography, or of what is literally to be understood by those who hear the utterances of the models, actors, and actresses in the film or scene might all be undertaken by one who wishes to give a description of the locutionary aspect of pornography. Also, we have already discussed some of the perlocutions of pornography, some of its intentional and unintentional, desirable and undesirable effects. The passages quoted from MacKinnon's writings and the studies concerning the psychological and physiological effects of viewing pornography aid in describing this aspect.

The Dworkin-MacKinnon position, however, focuses upon the illocutionary force of pornography. It attempts to give an account, in other words, of what action is constituted by or what is done in

viewing or attending to or distributing or broadcasting pornographic material.(36) We begin with the obvious, namely, that pornography gives men erections and is one element of the sexual activity of many men. In MacKinnon's words, "What is real, here, is not that the materials are pictures but that they are part of a sex act. The women are in two dimensions but the men have sex with them in their own three-dimensional bodies, not in their minds alone."(37) In viewing pornography, men are having sex or engaging in sexual activity; in broadcasting pornography, sex or sexual stimulation is given. The primary accomplishment of pornography, the act it constitutes, is not communication but physical stimulation, not providing enlightenment or understanding but giving erections -- pornography is consumed, not conveyed. The words and images of pornography function more like the words used by a lover in attempting to arouse or seduce his partner than, say, those used by a professor or scientist in instructing her students or explaining her research to colleagues.(38) Such speech constitutes sexual activity, not instruction or exposition.

Broadcasting, distributing, or viewing the sort of pornography had in mind by the Dworkin-MacKinnon position might also constitute other action such as the dehumanization or objectification of women. In broadcasting some kinds of pornography, we are, in the appropriate context, ranking women as inferior or as less than human. In the display discussed earlier, the presence of the rifles, the ties and the chains, and the reference to "coon" work together to dehumanize

the African American, to rank him as inferior or less than human. In the context of this dissertation or in that of a documentary on racism in America, the display might correctly be said to only depict or convey dehumanization. If, on the other hand, the display is circulated in a widely read sports magazine or used in a political advertisement for a white supremacist group, the display might, I think, rank African Americans as inferior or less than human.

Doubt as to whether or not the given display constitutes a kind of ranking in these sample contexts stem from questions regarding the extent to which these contexts satisfy certain "felicity conditions," conditions that must be satisfied if a given speech act is to constitute a certain action or have a certain illocutionary force. Speech acts that constitute a ranking are placed in the category of acts of expression that Austin calls verdictives. "Verdictives," writes Austin, "consist in the delivering of a finding (official or unofficial) upon evidence or reasons as to value or fact, so far as these are distinguishable." (39) As verdictive acts, there are two important felicity conditions that must be satisfied by a speech act if it is to constitute an act of ranking: 1) the person or agency issuing the speech act must be in a position of authority or occupy an important and widely recognized social position or status and 2) the evidence or reasons supporting the finding are regarded as true or accurate and the conditions under which the evidence or reasons are gathered are acceptable. Thus, for instance, someone's calling "Out!"

at a baseball game as the runner slides into home may be rejected as a verdict either because the person calling out is not an umpire for that game (or the most appropriate umpire, the home plate umpire) or because the person, as umpire, was not looking at the play or had her eyes closed or was drunk. In any of these cases, the call "Out!" would fail and the ranking would not take place.

The speech acts noted earlier might fail to rank African Americans because they fail to satisfy one or both of these conditions, which, for the sake of brevity, I shall refer to as the authority and evidence conditions, respectively. For example, one might argue that the display in question, when distributed in the sports magazine, fails to satisfy the evidence condition because there is simply no argument (or anything that might be interpreted as argument) present in the display. This condition would, however, be satisfied if, say, that issue of the magazine had also included an article reporting on the superior running, jumping, reaching, climbing, and maneuvering abilities of black males when compared to those of white males. Neither the picture nor the article would, in and of itself, rank African Americans as less than human but both might work in tandem to do so.

Again, consider the advertisement made by the white supremacist group. One might object that ranking is not constituted in broadcasting such an ad because the authority condition is not met. White supremacist groups do not occupy the authoritative position or

possess the social status required by the authority condition. If, however, such groups were to gain significant political ground and social acceptance (say, through new "White Power" cable channels and radio stations), the broadcasting of such acts seems more likely to constitute a kind of ranking. This would be especially true because such channels or stations would, in all likelihood, present arguments and evidence that would satisfy the evidence condition. Disagreement about the ability of such speech acts to, through their illocutionary force, rank African Americans will continue. The point, here (besides, once again, noting the importance of context), is that such acts are more akin to a "Whites Only" sign with regard to their ability to constitute acts of racial inequality than to, say, racist political pamphlets that merely advocate or depict such inequality.

Some pornographic material (40), including some pornographic videos and films, according to the Dworkin-MacKinnon view, ranks women as less than human, as sex objects, or, perhaps, even as "sexual slaves." (41) To provide a thorough defense of such a claim would take me far beyond the scope of this dissertation. Nonetheless, if we simply consider the degree to which the authority and evidence conditions are satisfied by some pornographic programs and films, there is some significant evidence for this claim.

One of the most disturbing aspects of pornographic films and programs is the manner in which they satisfy the evidence condition. Women are seen as enjoying everything that is done to or with them.

Beatings, cuts, slashes, burns, strangling, tying, strapping, whipping, and penetration with a variety of objects (e.g. screwdrivers, guns, knives, etc.) are all portrayed as producing intense pleasure and ecstasy in the women who are the subjects of these acts. Moreover, such activity is enjoyable, so the film suggests, especially when it pleases men. Women will, it seems, do anything for men and they will feel great joy in doing so. The fact that all of this is on film is, in itself, "proof" of the enjoyment women receive from such activity. Seeing is believing and television and film are especially effective in making things plainly visible (and credible) to us.

The extent to which the authority condition is fulfilled is also clear when we consider the position of those who produce, distribute, and broadcast pornographic material. Pornographers enjoy a significant amount of legal protection because their industry (unlike almost any other industry or business) is explicitly protected by one of the most fundamental freedoms in our society, freedom of speech. In addition, the pornography industry is a \$10 billion industry so that pornographers possess extensive influence upon political and social policy. Such financial resources also allow extensive access to the media of television and film, which, given their legal and social structure in society today, create a direct relation between speech and capital. (I will return to this point in Chapter 3.) Finally, pornographers are, to some extent, regarded as "experts" in

their field, namely, that of human sexuality. Because they regularly observe and work with women, they are in a suitable position for making judgments about the beliefs, desires, and character of women with regard to their sexuality. The satisfaction of these two conditions, then, lends some weight to the contention that pornography ranks women, although this argument is far from complete. (42)

Because, in viewing pornography, we are engaging in sexual activity and because, in broadcasting or distributing pornography, pornographers are ranking women, pornographic material, as a speech act, constitutes one further action that should be noted here. Pornography legitimates or justifies or excuses sexual inequality by making the ranking it achieves or accomplishes seem part of or essential to sexual relations between men and women; pornography, it is often said, "sexualizes" this inequality. In other words, the ranking that is constituted in broadcasting or distributing pornography is not, in fact, seen as ranking but, rather, as sex or as a part of sex. In turn, because sex is an acceptable and essential part of human relations, so, too, is the ranking that is accomplished via the sex act of viewing pornography. In short, we might simply say that pornography legitimizes sexual inequality by sexualizing it. (43)

It might be objected that the sort of pornography targeted by the Dworkin-MacKinnon ordinance is not likely to be shown anywhere on television and that, therefore, I am dwelling on material not central to this dissertation. I admit that finding such material on network

or cable television would be difficult yet the proliferation of home video rental and the mere fact that such videos are viewed on one's television must pose at least some questions and concerns similar to those introduced by the actual broadcasting of such material.

Moreover, some sexually explicit television programming does, indeed, seem to rank women in the ways described by Dworkin and MacKinnon. Consider, for example, the program, "Real Sex," which is produced and distributed via the Home Box Office (HBO) cable network. During one episode (Episode #10 shown in December 1994), one topic for discussion was new CD interactive games involving the pursuit of women by men. One game, "Seamore Butts," involved a player attempting to pick up and have sex with the woman playing the main character of the story around which the game centers. Clearly, women are portrayed as commodities by this advertisement, though because it appears as a part of a show that purports to describe and defend the sexual practices of everyday individuals (a show entitled "Real Sex"), this fact is disguised.

The ranking of women might take place even when little (or no) sexually explicit activity is evident. For example, consider, once again, MTV's "Beavis & Butt-head." Beavis and Butt-head regularly refer to women as "babes" and "chicks" and often insist that the music videos they watch would be vastly improved by the presence of "naked chicks." The terms 'chick' and 'babe' certainly degrade women whether they are utilized by Beavis and Butt-head or in our own lives. The insistence of the characters that naked chicks improve the quality of

music videos also turns attention from women to their bodies and, more specifically, to the use of their bodies as commodities (or, at least, as elements of the commodity of the video). The use of such phrases and the ranking of women as commodities whose bodies enhance the quality of a music video might be viewed as mere instances of the depiction of ranking rather than as constituting ranking itself.

Other aspects of the context in which this program is viewed and aired, however, may increase the likelihood that the speech of Beavis and Butt-head actually constitutes the ranking of women. For example, many of the advertisements shown during the course of the program are, in fact, advertisements for 1-900 sex lines and for magazines like *Playboy*. Such advertisements can be regarded as affirming the legitimacy of (and, to some extent, as realizing) the ranking that is merely depicted in the television program. In short, such advertisements help satisfy the evidence condition necessary for a speech act to constitute ranking; they play the role held by the article describing the superior athletic ability of African Americans in the sports magazine containing the display discussed earlier. The ranking of women is even more likely when we consider that so many children watching "Beavis & Butt-head" idolize these characters, assigning them a significant social status and, therefore, giving them the authority necessary to satisfy the authority condition.

Given Austin's analysis, we can see how other television programs might rank other groups. Consider a group that is rarely discussed in

free speech literature (or, for that matter, in nearly any literature whatsoever), namely, persons with disabilities. In 1956, Cindy Jones, a five-year-old girl, was selected as the March of Dimes "Poster Girl." A few months after her photo sessions (in which she was clothed in a fancy, white party dress with her crutches), her picture appeared on fliers that urged parents to vaccinate their children against polio. The headline at the top of the flier read, "PARALYTIC POLIO IS INCREASING AGAIN!!" Under this caption appeared two pictures. The first depicted a young boy and girl holding hands and playing joyfully while the other showed Jones in her fancy dress with her crutches. Above the first picture was stamped the word 'THIS' while above the picture of Jones were the words, "NOT THIS." (44)

Of course, the flier conveys certain ideas about persons with disabilities. It perpetuates the belief that such persons are incapable, pitiful human beings who are deserving of sympathy rather than respect. It seems likely that the flier might also convince others that persons with disabilities are inferior, for it could not urge parents to vaccinate their children unless it persuaded them that to be healthy and fully able-bodied was to be preferred to a state of incapacity. Moreover, Jones, herself, would certainly have felt humiliated, embarrassed, angered, or degraded upon seeing this picture (which, in fact, she did. These effects would be included among the perlocutions of this speech act and they are, I believe, disturbing in and of themselves.

When we turn to the illocutionary force of such a speech act, however, it seems even more harmful (or, better still, wrongful). *Anything* that can be said about the oppression of women or African Americans can be said of persons with disabilities. Persons with disabilities have, throughout history, faced the scorn, contempt, and ridicule of others, they have been stereotyped and stigmatized as pitiful, loathsome, and even as leading worthless and unfulfilling lives, and they have suffered discrimination in all areas of life including employment, education, and leisure.⁽⁴⁵⁾ In short, the social and political context surrounding the polio flier was (and, for the most part, still is) one in which persons with disabilities are regularly and systematically subordinated and degraded. This context, in part, contributes to the ability of the flier to rank such persons rather than to merely persuade others of our inferiority.

The ability of the flier to rank persons with disabilities as inferior is strengthened when we consider it with respect to the evidence and authority conditions mentioned earlier. The source of the flier is the medical community, which has rightly been given substantial authority with regard to our physical well-being and in issuing judgments and prescriptions about the care of our bodies. In addition, the evidence for the legitimacy of the ranking is the picture itself, which exhibits the joy and vitality that accompany health and the incapacities and ailments that accompany a disability. Thus, the felicity conditions for ranking have been, to a significant

degree, satisfied by the context of the act of expression in question.

Television programs and films are as capable of ranking persons with disabilities and establishing patterns of social inequality as is the polio flier. For example, the Muscular Dystrophy Association's Labor Day Telethon, hosted annually by comedian, Jerry Lewis, is often cited as perpetuating many of the myths that I have been discussing. The extent to which the telethon, as a speech act (or series of speech acts), satisfies the authority condition is especially noteworthy. Jerry Lewis began running the show in 1966 and has, over the years, gained wide recognition and respect in his efforts to acquire support for the causes served by the program. The extent of his authority is captured in the famous (or infamous) slogan, "Jerry's Kids," which situates him as the paternalistic protector and savior of the children he represents. The authority necessary in order to achieve the ranking of individuals is significant, also, because the show regularly appeals to the findings and innovations of the medical community, which has been given substantial authority over the care and in judgments about the care of our physical and mental well-being. Finally, most of the individuals responsible for operating and encouraging participation in the telethon (e.g. local fund-raising centers, celebrities, etc.) are persons without disabilities. This, together with the significantly inferior status of persons with disabilities in our society (as exemplified by unemployment rates of up to 66%), increases the ability of the program to satisfy the

authority condition.

For now, the question is how we are to respond to the harms just discussed. Given that there are serious psychological effects of exposure to television programs containing sex and violence and that these effects can lead to injurious and destructive behavior and, too, given that other programs can, via their illocutionary force, constitute harmful or wrongful action, ought such programs be censored or, at least, severely restricted? On the other hand, because both the adherents to the theory of behavioral modification and proponents of the Dworkin-MacKinnon view admit that such programs carry messages and convey thoughts about matters of public interest, can we, in the light of the First Amendment and the body of law that has developed and enriched it, justifiably restrict or prohibit such programs? Can we defend a significant right to free speech that will protect such programs even in the light of the difficulties just discussed or is the magnitude of these harms so large as to preclude such a right?

A theory of free speech must not only explain why and how this liberty is to be protected but, in addition, be capable of answering these questions. More generally, it must specify the conditions under which restrictions upon or prohibitions of speech are justifiable. The two theories to be considered in Chapters 2 and 3 attempt to perform both of these functions. In the next chapter, I turn to the theory of free speech offered by John Stuart Mill in On Liberty and, in Chapter 3, I turn to a "theory of free and equal speech," which can

be constructed from the work of John Rawls and Ronald Dworkin and which, I argue, is much more suitable to the considerations and questions resulting from attempts to extend the right to free speech to television. In Chapter 4, I will return to the harms and wrongs discussed in this chapter and show how the theory introduced and developed in Chapter 3 might respond to them.

Notes

1. The part of the First Amendment in which we will be interested reads, "Congress shall make no law...abridging the freedom of speech or of the press..."
2. 376 U. S. 254, 1964
3. 418 U. S. 323, 1974
4. 485 U. S. 46, 1988
5. As an example, so-called "hard core" or "gangster" rap music was recently accused of contributing to the increased violence among young black males at a conference on youth violence in African American communities. See the New York Times, Jan. 8, 1994.
6. Media Blight and the Dehumanizing of America by William K. Shrader, New York, Praeger, c. 1992, especially Chapter 3.
7. The First Amendment commands only that Congress not make laws abridging speech. It is now accepted that the Fourteenth Amendment, which guarantees that, "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law," must be invoked in order to defend a genuine right to free speech and to extend the scope of the First Amendment's protection.
8. The popularity of their work is due, in part, to an ordinance based upon their arguments restricting the production and trafficking of pornography enacted by the city of Minneapolis in 1983. This

popularity intensified (as did opposition to this position) when a similar ordinance was enacted in Indianapolis in 1984 and then defeated in *American Book Sellers v. Hudnut*, 598 F. Supp. 1327 (SD Indiana, 1984).

9. Sex, Violence, and the Media by H. J. Eysenck and D. B. Nias, St. Martin's Press, c. 1978.

10. *ibid.*, p. 150. The fact that "mere exposure" was enough to produce aggressive behavior is, to some extent, not surprising. Imitation is one of the first ways in which we learn new behavior. As Dr. Brandon Centerwall points out, "Neonates are born with a instinctive capacity and desire to imitate adult human behavior." He cites studies in which new-borns, within a few hours of their birth, imitate facial expressions (without, of course, cognitive awareness of their actions). He adds, "Whereas infants have an instinctive desire to imitate observed human behavior, they do not possess any instinct for gaugeing a priori whether a behavior ought to be imitated. They will imitate anything, including behaviors that most adults would regard as destructive and anti-social." See "Television Violence: The Scale of the Problem and Where to Go From Here," Journal of the American Medical Association, Vol. 267, 1992, pp. 3059-3064.

11. Feminism Unmodified: Discourses On Life and Law by Catharine MacKinnon, Harvard University Press, c. 1987, p. 188.

12. *ibid.*, pp. 187-190. The text here provides instances of all three of the effects to be discussed.

13. New York Times, Oct. 10, 1993.
14. See citations in Hudnut, note 8.
15. Upon receiving numerous complaints about similar incidents and because of the outrage caused by the case just noted, MTV decided to move "Beavis & Butt-head" to a later time slot and to edit or cancel all episodes that referred to 'fire'.
16. Sex, Violence, and the Media, p. 59
17. *ibid.*, p. 154
18. *ibid.*, pp. 151-152
19. "Exposure to Sexually Explicit Materials and Attitudes Towards Rape: A Comparison of Study Results" by Daniel Linz, Journal of Sex Research, Vol. 26, 1989, pp. 50-80.
20. *ibid.*, p. 68
21. Sex, Violence, and the Media, p. 49
22. *ibid.*, pp. 180-181
23. *ibid.*, p. 181
24. *ibid.*, p. 182
25. "Effects of Long-Term Exposure to Violent and Sexually Degrading Depictions of Women" by Daniel G. Linz, Edward Donnerstein, and Stephen Penrod, Journal of Personality and Social Psychology, Vol. 55, 1988, pp. 758-771.
26. *ibid.*, p. 768
27. Feminism Unmodified, p. 187
28. Only Words by Catharine MacKinnon, Harvard University Press, c.

1993, pp. 50-51.

29. *ibid.*, p. 31

30. How to Do Things With Words by J. L. Austin, Harvard University Press, c. 1975, 2nd ed. MacKinnon admits to using this work as a basis for her own theory of pornography. See Only Words, Chapter 1, note 22.

31. "Speech Acts and Unspeakable Acts" by Rae Langton, Philosophy and Public Affairs, Vol. 22, 1993, pp. 293-330.

32. How To Do Things With Words, p. 139

33. "Speech Acts and Unspeakable Acts," p. 300

34. My example is quite similar to an illustration from Hustler Magazine cited by Andrea Dworkin. The primary difference is that my example involves an African American who is referred to as a "coon" rather than a woman who is designated a "beaver." It is striking, to me, that a picture like the one I describe in the text would be so readily condemned by so many whereas Dworkin's illustration is accepted and protected. See Pornography: Men Possessing Women by Andrea Dworkin, G. P. Putnam & Sons, New York, c. 1981, pp. 25-26.

35. It seems appropriate, at this point, to remind the reader that I am concerned with the electronic media and, in particular, with television. Hence, the material I have in mind is being broadcast or sent via cable networks. Many of the features of television most relevant to the discussion that follows are shared by videos and films so that I include this material as well.

36. "Pornographic material" includes that material identified in the Dworkin-MacKinnon ordinance. See Feminism Unmodified, p. 176.
37. Only Words, p. 17
38. See MacKinnon's discussion of the Anita Hill hearings during the nomination hearings for Justice Clarence Thomas in *ibid.*, pp. 64-67.
39. How To Do THINGS With Words, p. 155
40. See note 36. MacKinnon, herself, admits that there are acceptable forms of pornography but she does not typically refer to this class as "erotica." See Feminism Unmodified, pp. 88-90.
41. Pornography, pp. 199-203
42. One important question is whether or not an intention to rank must be present if ranking is to occur. Langton discusses this matter in "Speech Acts and Unspeakable Acts," pp. 322-325.
43. Langton contends that there are three conditions that must be satisfied if a speech act is to subordinate a particular group: 1) the group must be ranked as inferior, 2) the ranking and other discriminatory practices must be legitimated by the act, and 3) the group must be deprived of certain liberties or privileges. (pp. 302-303) Given the validity of the argument that pornography ranks women and the fact that it seems to legitimize this inequality, one need only show a deprivation of liberty produced by the pornography to show that pornography subordinates women. This is a chief contention of many feminist critics of pornography. The possibility that pornography subordinates women is quite real given Langton's

contention that pornography "silences" women, an argument to which I will return in the next chapter.

44. Jones' story is given in No Pity: People With Disabilities Forging a New Civil Rights Movement by Joseph Shapiro, Times Books, New York, c. 1993, pp. 12-13.

45. Shapiro documents such discrimination throughout his book. See especially Chapters 4 and 5.

Free Speech and Television

Television programs that contain sexually explicit or blatantly violent material are, according to the account in the preceding chapter, troublesome for at least two reasons. First, given psychological theories of behavioral modification, such programs increase the tendencies of those who are regularly exposed to them to behave aggressively or destructively towards others. Imitation, disinhibition, and desensitization are just some of the effects described and predicted by these theories that can and do result in such conduct. Second, the programs in question can, in and of themselves, constitute harmful (or even wrongful) activity. Given the content of a particular television program, together with the context in which this content is presented, this program (or speech act) might constitute, say, an act of discrimination, an act that creates, arranges, or enforces patterns of social inequality. This seems true, according to the Dworkin-MacKinnon view, of much pornography and of at least some comedy, films, and other products of the electronic media. These are, without doubt, serious charges and they must be considered by any theory of free speech that is to be applied to the electronic media and, in particular, to television.

One response to these difficulties might be given in the light of one of the most famous and eloquent defenses of free speech, that offered by John Stuart Mill in On Liberty.⁽¹⁾ According to Mill, free speech is to be explained and supported in terms of the benefits that

can be expected by (and those that have been realized in) those societies in which it is protected and promoted. The theory of free and open discussion offered by Mill has, until recently (2), dominated discussions regarding the nature, scope, and limits of free speech. Its prevalence has, as I shall note, been intensified and given legal significance in much philosophical and legal writing.

After presenting Mill's defense of free speech and his account of how it might be limited, I want to consider its adequacy for and applicability to the difficulties at hand. I will argue that there are at least four problems with using Mill's theory of free speech to attempt to resolve these matters. The first and second of these problems are what I term "conceptual limitations" because they point to important distinctions and conceptions that are absent from Mill's approach. First, I will argue that there are at least three kinds of censorship and that each type, once understood, seems justifiable to a different degree. These different levels of justifiability are, I will maintain, unacknowledged by Mill. I will also explore the various ways in which persons might be "silenced" by acts of expression, ways in which words can, at times, prevent others from saying what they wish to say or from doing with their words what they want to do. I believe that these conceptions and distinctions are essential to appreciating many issues surrounding free speech in the electronic media (and, perhaps, free speech in general).

Besides these conceptual limitations, there are two other (and

more troubling) problems with Mill's account of free speech. The first of these concerns the notion of "speech" or "discussion" that is both implicitly and explicitly developed in On Liberty. This notion stems from the notion of discourse that developed in the centuries that followed the introduction of the printing press and may well be ill-suited for the problems and questions posed by the electronic media and, more specifically, by television. The final difficulty (and, I think, the most insurmountable) is that Mill's account does not, in Ronald Dworkin's sense, take free speech "seriously." (3) In brief, this means that Mill sees the liberty of discussion as an especially useful or valuable instrument in the pursuit of various political and social goals rather than as a potent individual right that constrains such pursuits. I shall develop these and related notions in more detail in the next chapter.

A Millian Response

In America, today, there is a heavy presumption against censorship of any kind. Indeed, my very mention of the harms that can and do result from television programs will, without doubt, call forth the possibility of stringent and broad restrictions upon these programs in the minds of many persons and, in turn, stir these persons to an immediate and vigorous defense of such programs. One very plausible and popular defense consists in pointing out the value or worth of television programs and in stressing the imminent dangers of

censorship. Free and open discussion, at bottom, must be the rule, censorship must be the rare (and, if necessary, the carefully administered) exception.

This presumption against censorship receives one of its clearest formulations in Chapter 2 of On Liberty. The explication and vigorous defense of this presumption comprise one of the chief components of an argument for the more general principle of liberty being developed by Mill. This principle consists of two "maxims." These are, "First, that the individual is not accountable to society for his actions in so far as these concern the interests of no person but himself," and, "Secondly, that, for such actions as are prejudicial to the interests of others, the individual is accountable and may be subjected either to social or to legal punishment if society is of the opinion that the one or the other is requisite for its protection." (4) The first maxim demands that the most extensive liberties (with regard to both their number and scope) be secured for each individual. This range of individual liberties includes the "liberties of thought and discussion." (5) These particular liberties (as well as the other liberties identified by Mill) are supported by noting the benefits that can be procured by their being protected and advanced.

Most readers will be familiar with those benefits of free speech and open discussion identified by Mill. First and foremost, free and open discussion offers us an opportunity for rendering our claims and beliefs more correct or plausible. Although our opinions may be false

or contain only partial truths, they are always corrigible, always capable of being made more correct or acceptable or, at least, of being stated in a way that does not raise as many difficulties as did their previous formulations. Also, our opinions and beliefs are, in many cases, useful to us and, we like to believe, to others as well. Whether or not an opinion is useful is a matter for debate given the facts of the experience in question and the results of applying this opinion to said situation. Hence, free and open discussion assists in the formulation of correct or plausible opinions and in the affirmation of the utility of these opinions; it gives us the opportunity to increase the value or worth that an opinion has for us and for others.

The benefits of free and open discussion can contribute not only to the worth of opinions and beliefs but, also, to the "worth of the manner in which they are likely to be held..."(6) One of the more important questions to be asked when giving an account of the way in which beliefs are held or apprehended must, in Mill's view, address the certainty or confidence with which the belief is held. Questions of certainty concern the extent to which an individual is convinced of a belief or opinion that he/she holds and the degree to which an individual feels confident in regulating his/her conduct according to the belief adopted. Another benefit of open discussion is that it can increase our certainty of opinions and positions. Open and public discourse about a matter forces us to confront the quandaries raised

by our beliefs, such confrontations serving as tests of our own certainty with regard to these beliefs. Discussion allows us to encounter the powerful arguments of others who hold beliefs contrary to our own and, hence, provides an opportunity for defense and further confidence in our own positions. There is, perhaps, no better way to strengthen such confidence than to witness the survival of our opinions through serious debate.

Finally, free and open discussion, in providing opportunities for the formulation and modification of opinions, also produces opportunities for exercising the abilities utilized in such formulation and modification. The nurturing and strengthening of these abilities is, for Mill, essential to individual development. "Where not the person's own character but the traditions or customs of other people are the rule of conduct, there is," Mill claims, "wanting one of the principal ingredients of human happiness and quite the chief ingredient of individual and social progress." (7) Through open discussion and the thought required to seriously participate in it, reason, judgment, observation, critical thinking, and other faculties and abilities are employed and improved. In enforcing traditions and customs, in forcing the individual to shape her/his experiences and situations according to the principles and maxims dictated by these traditions and customs, society is inhibiting individual development by denying the use of abilities essential to it.

The possibility of rendering our opinions more correct or

plausible, of affirming their utility, of increasing our certainty with regard to them, and of fostering individual development, then, makes free and open discussion a potentially beneficial practice. In turn, the expectation of such benefits (and, at times, their realization) supports the protection and encouragement of the liberties of thought, speech, and discussion. Moreover, because these benefits are clearly evident in and legitimately expected from television programs, such programs ought to remain, so far as possible, unrestricted. The news and information we receive from television help us to form and develop our opinions regarding a host of issues such as crime, health care, violence amongst youths, human sexuality, and race relations. The talk show, the film of real occurrences and affairs, the press conference, the television commercial, and many other programs are just as important as newscasts in serving these ends.(8) Even those programs which do not serve to inform or enlighten can be used to do so when set in the appropriate context. The violent behavior of a criminal portrayed on a television program or the inappropriate language of a cartoon character might, under the proper supervision, serve as examples of inappropriate or unacceptable behavior and the consequences that follow from such behavior.(9) Finally, these programs (and many others) present a wide variety of characters and personalities in a host of differing situations. These characters practice different ways of life and espouse a plethora of opinions and beliefs thus challenging our own

points of view and fostering confidence and individual development. Such benefits are even more likely to be obtained and more widespread because of the wide availability and ease of access to television.

The numerous benefits afforded by and to be expected from television programs together with the immense pleasure so many persons receive from viewing such programs provide, on this view, a strong argument for protecting and encouraging them. Yet, the second maxim of Mill's general principle of liberty permits us to entertain the possibility of prohibiting or limiting certain kinds of programs (e.g. those containing explicit sex or blatant violence) if it can be shown that these programs harm (or are likely to harm) others. Mill states, "If anyone does an act hurtful to others, there is a prima facie case for punishing him by law or...by general disapprobation." (10) Thus, an exercise of liberty (including that of speech or discussion) that results (or is likely to result) in harm to others offers a case for public scrutiny but not necessarily for immediate punishment or prevention. Given the arguments of the preceding chapter, I assume that at least some programs containing blatant violence or explicit sex might be challenged by appealing to this second maxim.

Once under the domain of the second maxim, the exercise of liberty (the television program or series of programs) must satisfy one of two conditions in order to render restrictions upon it fully justifiable. (11) First, it might be that the detrimental consequences of an exercise of the liberty of speech or of discussion produce (or

are likely to produce) a decrease in overall net benefit. This condition might be satisfied whether one assumes that the benefits and harms to be considered in the computation of net benefit are those that result from a particular exercise of individual liberty or those that would be realized after that liberty had been regularly protected and exercised by many individuals for some period of time. Mill argues, for instance, that we could not allow someone to proclaim that corn dealers are robbers of the poor in front of an angry mob gathered around the house of a corn dealer. Obviously, a great deal of harm is likely to be suffered by the corn dealer and his/her family and property (and, perhaps, by some of those participating in the demonstration). Today, we could imagine a similar argument being offered against allowing an anti-abortion activist to demand vengeance for the murder of innocent babies in the presence of an angry mob of pro-life demonstrators gathered in front of the home of a doctor who performs abortions at a local clinic. In both cases, the harm that is likely to result is so much greater than the benefits likely to be achieved that prevention of such speech (or punishment of the speaker) would be justifiable for Mill.(12)

The alternative condition that might be met in attempting to justify intervention into free speech stems from the fact that it is the set of benefits to be acquired from free and open discussion that provide it with its chief support. Hence, any situation or period of time in which the conditions for enjoying these benefits are

significantly threatened, extinguished, or wholly absent is one in which the liberties of speech and discussion can be restricted. (13) For example, Mill excludes so-called "backward states" as places in which his principle might be implemented not because its implementation would decrease overall net benefit but, rather, because the conditions for realizing the benefits offered in support of free and open discussion could not be fulfilled. He writes, "Liberty, as a principle, has no implication to any state of things anterior to the time when mankind has become capable of being improved by free and equal discussion." (14) It would, in the end, be odd (if not contradictory) to claim that free speech ought to be permitted and protected due to the benefits it promises and, at the same time, to assert that the conditions for procuring these benefits had been extinguished or had not yet been established.

Let us now consider whether or not the programs at issue meet either of these criteria. The first condition requires that there be a decrease in the overall net benefit as a result of these programs or that they are likely to lead to such a decrease. Thus, for example, one might show that the injury and destruction that has resulted from imitation, disinhibition, and desensitization exceeds the gains provided by programs containing violence. This is one of the most popular and straightforward ways to frame the debate yet it is also, I believe, one of the least promising approaches.

Besides the difficulties that I will describe in the pages that

follow, there is a practical problem to be resolved. This problem, familiar to utilitarians and their critics, is that of quantifying and comparing benefits and harms. In my discussion of the psychological research regarding television violence and its effects upon viewers, I noted that some of the psychological effects of television programs can be quantified and compared. Yet, it is difficult to conceive of a method for quantifying or measuring the injury or destruction to which these effects sometimes lead or the benefits supporting the liberties of speech and discussion. Even if such a method were developed, a scale for rendering all of these measurements commensurate with one another for the purposes of comparison would be necessary.

Some utilitarians have suggested that such comparisons are neither novel nor difficult, for we make them regularly in our everyday lives.⁽¹⁵⁾ However, the comparisons often cited as examples (e.g. deciding whether to attend a dinner or go to a movie) are trivial when juxtaposed to the comparisons that would be required for the issues at hand, comparisons that would determine public policy and, perhaps, legislation regarding important political and social issues.⁽¹⁶⁾ These matters become even more intractable when we turn to, say, the social inequality produced by the kinds of programs that can be challenged by the Dworkin-MacKinnon view. The strong presumption against censorship set up by the initial argument, then, is not likely to be displaced by arguments that rest upon questionable assumptions about the quantification and comparison of a diverse range

of benefits and harms and upon the abstract calculations that are derived from such assumptions.

Rather than attempt such complex quantifications and comparisons, the proponent of Mill's view might try to show that the behavioral modification caused by the programs in question would threaten or extinguish the conditions under which the benefits of free and open discussion can be enjoyed. I have said nothing, thus far, with regard to what these conditions might be. Spelling them out in any detail would take me too far astray from my more immediate concerns. Nonetheless, one of these conditions does merit some attention given some of the current arguments for restricting the programming at hand.

One condition for enjoying the benefits of free and open discussion is that of order. Rules of order, whether given explicitly in codes (e.g. Roberts' rules) or understood implicitly, are practiced and enforced at meetings, conferences, lectures, presentations, in the classroom, city hall, and on the talk show. More generally, overall social order must be maintained. Foreign invasion, overwhelming poverty and despair, or large-scale natural disaster might seriously disturb social order and, in turn, the possibility of making significant advances on some matters via discussion.

Now, it might be argued that some trends in current television programming (especially those towards violent programming) threaten this condition of order and, hence, the possibility of obtaining the benefits of open discussion. For example, one might contend that

America has become an increasingly violent, dangerous, crime-ridden society and that these attributes are due, in large part, to careless and irresponsible television programming. Such an argument has recently been given force by Dr. Brandon Centerwall in a fascinating study.(17) Centerwall compares the white homicide rates of the United States and South Africa during the periods in which television was being introduced in each country. Both rates are compared to the total homicide rate of Canada so as to avoid the objections to television's influence on violence in the United States based upon the effects of civil unrest and the Vietnam war.

Between 1945 and 1974, when television became popular in the United States, the white homicide rate increased 93% in that country while the same rate decreased 7% in South Africa during this period. In Canada, where television was also becoming quite common, the total homicide rate jumped 92% in this period. On the other hand, between 1975 and 1987, the rise in these rates for Canada and the U. S. was significantly smaller than that for South Africa, which had been introduced to television during this time and had experienced a 130% increase in the white homicide rate. "It is concluded," writes Centerwall, "that the introduction of television in the 1950s caused a subsequent doubling of the homicide rate...Although the data are not as well-developed for other forms of violence, they indicate that exposure to television is also a causal factor behind a major proportion (perhaps one half) of rapes, assaults, and other forms of

interpersonal violence in the United States." (18) If such a study is accurate, it is disturbing, for it seems hard to account for such significant increases in crime without including television as at least one of the primary factors.

Given such studies, one might argue that television is creating disarray and disorder. One of the chief conditions for enjoying the benefits of free speech, social order and security, has been seriously threatened by television and, hence, the support for this liberty has been compromised. It seems, then, that legal or social intervention is justifiable. (19) In reviewing Centerwall's study, Senator Ernest Hollings seems to imply just such an argument in referring to the connection just described as the "television time bomb." Hollings cites Centerwall's study in supporting the Children's Protection from Violent Programming Act of 1993 offered by him and Senator Daniel Inouye, which would place significant restrictions upon both network and cable television programming. (20)

It is most likely that there are other conditions that must be fulfilled if a society is to fully enjoy the benefits of free and open discussion. Whether or not these other conditions are threatened by the presence of television is a question that seems pertinent to the success of this response to harmful (or potentially harmful) programming. Even the extent to which the condition of order has been jeopardized by the introduction of television seems dubious since, after all, much public discourse continues and many benefits are

procured through it. A final matter is that Centerwall's study and the argument based upon it address only the introduction of television in general rather than any particular sort of programming. Clearly, the inference drawn by Hollings and Inouye, that restricting the degree to which children are exposed to violent programs will address the concerns raised by the study, is questionable. Only the complete removal of television would, given this study, have a chance of addressing the overall detriments noted by Centerwall and it is likely that such a measure would be unacceptable on Mill's view. (21)

When we turn to programs that, through their illocutionary force, constitute harmful activity and ask whether or not these programs meet the demands of the second condition, a less plausible argument emerges. Of course, if there are television programs that, in and of themselves, erode or destroy the conditions under which the benefits of free and open discussion can be enjoyed, these seem, on Mill's view, justifiably censored or limited. (I will consider such speech acts in Chapters 3 and 4.) Nevertheless, the problem with pornography, for example, is that it constitutes sexual inequality. The point was that pornography was violating the individual rights of women and not that it threatened or extinguished the conditions under which some set of benefits are enjoyed. In the preface to her book, Andrea Dworkin writes, "The question this book raises is not whether the First Amendment protects pornography or should, but whether pornography keeps women from exercising the rights protected by the

First Amendment." (22) The conditions being threatened (or that might be absent altogether) are not those under which the benefits of open discussion are procured but, rather, those under which the rights to free speech, discussion, and expression are or can be exercised.

Because I have not yet considered the notion of a "right" and because I will argue that Mill cannot account for the fundamental role that this notion plays in our social discourse, it seems premature to explore the similarities between these two sets of conditions or the extent to which the Dworkin-MacKinnon view can be accommodated by this second criterion. As stated, at any rate, this criterion cannot yet be employed to defend the restrictions that might be implied by the Dworkin-MacKinnon view or by the possibility that some television programs rank women or other groups.

Conceptual Limitations:
Censorship and Silencing

At this point, then, the presumption against censorship stands firm. Not only does television programming promise the numerous benefits that, for Mill, support free speech and open discussion, but, in addition, neither of the conditions for rendering restrictions upon such programming justifiable are satisfied. The problems surrounding the quantification and comparison of benefits and harms make it difficult (if not impossible) to show that the first condition is satisfied in the present context. Moreover, an attempt to satisfy the

second condition by showing that the order requisite for enjoying the benefits of free speech is threatened or eroding as a result of television programming falls far short of what seems to be required if such programming is, indeed, to be restricted. Perhaps the difficulties surrounding the quantification and comparison of benefits and harms can be resolved or other conditions for enjoying the benefits of free speech can be identified and shown to be threatened by television programs containing blatant violence or explicit sex. Still, as I suggested earlier, there are many other problems with this Millian defense of such programs.

Before presenting what I take to be the most serious problems with this Millian response to potentially harmful television programs, I want to note two less troubling (though important) limitations of Mill's approach. These problems might be described as "conceptual limitations" because they point to useful conceptions and distinctions that are absent from Mill's theory of free speech. I want to note two such limitations. First, I will describe three kinds of censorship. Although the effects of most (if not all) acts of censoring are quite similar, the purposes, sources, and mechanics of these acts are very different and these differences lead, I think, to different conclusions about the degree to which each form of censorship is justifiable or acceptable. Second, I want to consider (again drawing on the feminist critique of pornography and its use of J. L. Austin's philosophy of language) the various ways in which persons can be

"silenced," for, if an individual is silenced, the liberty to speak is useless to that individual. Such conceptions are missing from Mill's model of free and open discussion and this deficiency renders his theory less applicable to many of the problems presented in the previous chapter. The absence of such conceptions and distinctions need not be fatal to Mill's theory. However, it does, I suggest, raise questions about the adequacy of this approach for many current debates about free speech in the electronic media.

The chief effect of censorship is to restrict speech or writing. However, these restrictions can be initiated and implemented in very different ways. We can distinguish between three types of censorship, depending upon the individuals or groups that conceived of and imposed the restrictions included in it. First, there is what might be called political censorship. In cases of political censorship, prohibitions of or severe restrictions upon speech are initiated and imposed by a government (or by some agency of a government). A classic example of political censorship is the Sedition Act of 1798. Enacted by the Adams administration, this act made it illegal to write or utter any statement that was false of or scandalous towards the Congress, the President, or the United States government in general. (23) Such legislation is an act of political censorship not because of the sort of speech or writing it prohibits but, rather, because of the position in society of the institution or agency that gave rise to its conception and imposition.

Mill is clearly concerned with this form of censorship. Whether in a monarchy or democracy, citizens must protect themselves against attempts by governments to restrict or prohibit their conduct, including speech or expression. In ancient and early modern monarchies, Mill notes, "The aim...of patriots was to set limits to the power which the rulers should be suffered to exercise over the community and this limitation was what they meant by liberty." (24) He adds that, "The limitation...of the power of government over individuals loses none of its importance when the holders of power are regularly accountable to the community..." (25) Even in a democratic society, which glorifies and attempts to establish the "power of the people," such limitations are necessary, for, as Mill notes, "...phrases like...the 'power of the people over themselves' do not express the true state of the case. The people who exercise the power are not always the same people with those over whom it is exercised..." (26) Political power, whether wholly in the hands of a monarch or distributed over many persons and agencies in a democracy, includes the power to restrict speech. When these restrictions stem entirely from the governing body itself, we have an instance of political censorship. Because Mill is concerned with limitations on political power, he is also interested in limiting instances of political censorship. In our own Constitution, limitations on political censorship are dictated by the First Amendment and by the due process clause of the Fourteenth Amendment.

There are a variety of reasons for severely limiting political power and, in particular, for limiting the conditions under which political censorship would be desirable or necessary. For Mill, these reasons include the importance of individual development and its potential contributions to the betterment of society along with the other benefits of free speech already mentioned. Other philosophers, such as T. M. Scanlon (27), have argued that such limitations prevent invasions into individual autonomy, the individual's ability to see her/himself as "sovereign in deciding what to believe and in weighing competing reasons for action." (28) To grant governments the power to regulate the opinions that are to be distributed would not, Scanlon contends, allow individuals to be (nor to regard themselves as) equal, autonomous agents. (29) More familiar, perhaps, are the dystopian novels like 1984 and Brave New World that vividly illustrate the ways of life and societies that might arise from such power. Such arguments and illustrations have proven quite plausible and suggest that, given the possible consequences for particular individuals and for society at large of governmental power, this power (and the privilege of political censorship that is derived from it) must be closely scrutinized and sparingly exercised.

Decisions to restrict speech are sometimes made by private institutions rather than by government. Of course, not all of these decisions, when implemented, constitute censorship. Frederick Schauer has noted two conditions that must be satisfied if we are to regard

such decisions as instances of private censorship.(30) First, such decisions cannot be forced by a lack of resources or opportunities. Libraries, for example, have only so much shelving and can, therefore, only permit so many books to be stored. Again, radio stations must budget their resources and cannot be expected to purchase and broadcast every piece of music that might be consistent with their format. Second, when the decision to restrict communication is not made in one of these "necessary choice situations," the criteria and considerations according to which the choice was made must be related to the goals and purposes of the institution. Hence, with ample shelving space available to them, librarians who continuously reject books about communism because they find such ideas disagreeable can, perhaps, be seen as censoring this material. Presumably, one of the goals of the library is not to satisfy the literary and intellectual tastes of its librarians.

Thus, we can, following Schauer, point to a second kind of censorship, private censorship.(31) Private censorship includes those attempts by private institutions (or public institutions not affiliated with a government) to restrict speech, these actions failing to meet the conditions just mentioned. Recently, for example, Inner City Broadcasting, the owner of many radio stations in large cities throughout the United States, decided that its stations would no longer broadcast so-called "gangster rap," music that seems to glorify murder and degrade women. The decision was made in an attempt

to respond to the dramatic increases in violent crime in the cities in which many of the company's larger radio stations were situated.(32) Because the stations had already been playing this music and because this move was not in response to financial (or any other) constraints, the decision was clearly not made in a necessary choice situation. Thus, whether or not this act constitutes private censorship will, given Schauer's conditions, concern the purposes and goals of the radio station. In particular, the question is whether or not (and to what extent) radio stations are participants in (rather than mere forums for) discussion of public issues and social values.

The advocate of Mill's position might suggest that the company has censored the music in question, for it has prohibited the broadcasting of certain kinds of music due to their content and restricted the sorts of messages that will be conveyed by its stations. In this way, the radio station is seen as a mere forum for or fountain of public discussion, as a space in which free and open discussion is to occur. On the other hand, the decision to ban the rap music might be seen as an act of expression and, in turn, the radio station (or its managers and owners) might be seen as participants in public discourse. The decision to prohibit the music is an act that consists in a refusal to broadcast or to participate in the conveyance of a certain message, which is, to be sure, a privilege included in any liberty to speak. The point, in Schauer's words, is that "the act of censoring by a private agent can, in many instances,

be an act of speech by that agent and that remedying this act of censorship by a private agent can be a governmental restriction on that act of speech....This additional dimension of private suppression as an act of speech (or, at least, a corollary to it) sharply distinguishes private from government censorship and makes the notion of private censorship almost self-contradictory." (33) Media enterprises such as newspapers, journals, and television stations are not mere channels for or fountains of discussion. In so far as questions regarding their autonomy and accountability in broadcasting arise (as they do in the present case), these organizations must be seen as participants in free and open discussion. Some of the activities of the mass media may, indeed, detract from or stifle free and open discussion. Yet, because such activities may be simultaneously viewed as instances of private censorship and as free acts of expression, they seem more justifiable than those included under the heading of political censorship. Hence, while Mill would likely regard the decision to restrict the rap music as an act of censorship, we can view this act as an act of expression by invoking the notion of private censorship and by attempting to justify the decision in question by showing that this decision does not constitute an instance of this form of censorship.

The third kind of censorship that I wish to discuss might be called social censorship. Social censorship takes many forms but can be defined, in general, to include those restrictions upon speech that

stem, ultimately, from the reasonable and well-grounded demands of some portion of the populace. Mill is explicitly concerned with this form of censorship. He writes, "Society can and does execute its own mandates and, if it issues wrong mandates instead of right, or any mandates at all in things with which it ought not to meddle, it practices a social tyranny more formidable than many kinds of political oppression since, though not usually upheld by such extreme penalties, it leaves fewer means of escape, penetrating much more deeply into the details of life and enslaving the soul itself." (34)

In Chapter 4 of his essay, Mill describes some extreme forms of social interference (such as sabbatarian legislation or prohibitions against dancing or drinking) that are akin to what I have in mind in speaking of "social censorship." Today, the sensitivity about certain terms used to denote minority groups is an excellent example of social censorship as Mill seems to understand it. Although there is, to my knowledge, no legislation either in place or pending that forbids one from referring to an African American as a "Negro" or that requires one to identify persons with disabilities as "physically challenged," such restrictions are regularly practiced and deviations from these practices can result in substantial public censure and outrage. The case in which MacKinnon and Dworkin were able to win support for and enactment of their ordinance against pornography in the city of Minneapolis also illustrates social censorship. The source of the restrictions consists of MacKinnon, Dworkin, and their constituency

and not the city of Minneapolis, which merely listened to these persons and, after deliberation, enacted their recommendations. Again, the case in which persons successfully forced Music Television to edit episodes of "Beavis & Butt-head" is one of social (not private) censorship. We keep these different forms of censorship distinct when we refer not merely to their effects upon speech but, more importantly, to the sources of their conception and the means through which they are imposed.

Although Mill is conscious of the distinction between political and social censorship, the possibility of their being susceptible to different modes and degrees of justification is not considered. For Mill, either form of censorship has the same effect -- they both inhibit free and open discussion and the benefits that flow from it. As with private censorship, the extent to which social censorship may be justifiable seems greater than that to which political censorship is justifiable. This seems especially plausible when social censorship uses legitimate means to advance its end. James Madison, one of the chief architects of the First Amendment, said, "If we advert to the nature of Republican government, we shall find that the censorial power is in the people over the government, not in the government over the people." (35) Schauer makes the same point when he writes, "Government derives its ideas from the population, it does not initiate them." (36) Both Madison and Schauer are distinguishing between what I have been calling political and social censorship and

both writers also seem to look much more favorably upon social than upon political censorship.

The conclusions reached by Madison and Schauer seem to agree with our intuitions about some of the cases already discussed. For example, it would be ridiculous to suggest that concerned parents ought not to write to Music Television or that MTV, upon receiving and being persuaded by these complaints, ought to be prohibited from editing its programming. The means employed here (like the political means used by MacKinnon and Dworkin) are legitimate and appropriate, especially in a democratic society. Seen in this way, the restrictions that have resulted from the actions of parents and MTV seem more justifiable than, say, the restrictions that might have resulted from the actions that might have been taken by Congress or the Federal Communications Commission.

Mill's theory cannot account for the different degrees to which political, private, and social censorship seem justifiable. On his view, such interventions (legal or social) are understood and justified in terms of their consequences alone and without regard to their source and the means through which they were implemented. We cannot explain or defend these different levels of justifiability without referring to such factors. Once we understand the different forms of censorship and their differing levels of justifiability, the presumption against censorship (which seems infeasible at this point) might be more easily overridden in some cases.

Let us suppose that, in the end, the presumption against censorship cannot be overridden in any of the instances discussed thus far. In such cases, Mill would have to contend that MTV or the pornographers or the rap musicians can only be subject to "the inconveniences which are strictly inseparable from the unfavorable judgment of others." (37) Later, in summarizing his position, he adds, "Advice, instruction, persuasion, and avoidance by other people, if thought necessary by them for their own good, are the only measures by which society can justifiably express its dislike or disapprobation of...[their (e.g. MTV's or the pornographers')]...conduct." (38) Thus, even when the conditions for censorship stipulated by the Millian approach cannot be met, there are still ways in which to express our objections to programs. These might include, say, avoiding the programs of MTV or the movies of pornographers or, again, attempting to persuade the producers, sponsors, and distributors of these programs and movies. Bearing our avoidance or attempts at persuasion are just some of the "inconveniences" that stem from our disapproval.

Mill could not have foreseen the television industries nor the conglomerates of powerful sponsors that support their programming. Today, the "inconveniences which are strictly inseparable from the unfavorable judgment of others" can, themselves, result in censorship as it is understood by Mill. The Reverend Donald Wildmon and his American Family Association have campaigned against a number of popular television programs by boycotting some of the chief sponsors

of these programs. (39) Had these campaigns been successful, the "inconveniences" that would have been encountered by viewers as a result of these attempts to "persuade" or "avoid" would have been indistinguishable from censorship. My point is that the line Mill wishes to draw between the effects of social disapprobation and those of justifiable social or legal interference is, in many instances, hazier today than in Mill's day. Thus, it is difficult to say whether Wildmon and his followers would have been (had their activities been successful) engaging in social censorship or in mere disapprobation.

Regardless of the form of censorship being practiced or of whether it is the result of justifiable intervention or social disapprobation, the proponent of Mill's position might object, the aim, at bottom, is to promote and protect free and open discussion and its many benefits. Wildmon, MacKinnon, Dworkin, Inner City Broadcasting, and parents might better serve their respective causes, it might be urged, not by censoring opinion but by offering their own views and attempting to persuade others. For example, the executives of Inner City Broadcasting could broadcast public service announcements regarding their distaste for gangster rap rather than simply prohibit the broadcast of such music. Again, parents can instruct their children with regard to the behavior of Beavis and Butt-head, making them aware of the undesirable consequences of the behavior portrayed and encouraging them to act in a more laudible manner. In short, the more discussion, the better, so long as it is

not replaced by or does not end in censorship.

Rae Langton considers the same sort of argument with regard to pornography.⁽⁴⁰⁾ Perhaps pornography does constitute sexual discrimination, the advocate of Mill's position might concede. Again, however, as in the cases of gangster rap or "Beavis & Butt-head," the answer lies in fuller and broader discussion rather than in censorship of this material. Women must demonstrate to persons what pornography does and the extent of its damage. They must counter the "arguments" given by pornography and attempt, through persuasion and instruction, to establish the sexual equality that it impedes or denies. ("All this may be possible," Langton notes, "if women can, indeed, fight speech with more speech. But, if pornography...silences women, it is not easy to see how there can be any such fight."⁽⁴¹⁾ Thus, the argument for fuller discussion as an alternative to censorship will not succeed if some of the participants have been, in some manner, silenced.

There are, for Langton, three ways in which a speech act might silence another, corresponding to the locutionary, perlocutionary, and illocutionary aspects of such acts. In the first (and most obvious) sense, persons are silenced when they are prevented from speaking, writing, or, more generally, from performing a locution. This sort of silencing occurs when, say, a thief enters a bank and screams, "Move and you're dead!" An individual might also be silenced when, although he is heard and understood, his speech or communication is

ineffective. Consider the speech act of issuing an invitation. If I convince everyone that Smith is a bore and that her parties are dull, her subsequent invitation will have little effect; she would be silenced (or, we might say, her invitation would "fall on deaf ears"). Langton labels this sort of silencing perlocutionary frustration.

There is also a third manner in which one might be silenced, this corresponding to the illocutionary force of an act of expression. In cases exhibiting this kind of silencing (which Langton calls illocutionary disablement), the speaker says something and certain effects (desirable or undesirable) are produced. However, he/she fails to perform the action intended in and normally constituted by speaking. If, for instance, two males wish to be married, they may obtain a priest and participate in a traditional marriage ceremony. Nevertheless, their saying, "I do," will not constitute a marriage as it would for heterosexual couples. In Langton's words, "The act of marriage is not speakable for homosexual couples." (42) The homosexual, in this context, has been silenced -- he speaks, his words are understood, and he conveys his desire to marry, but he does not marry. Given the conditions established by law and social convention under which 'I do' constitutes a marriage, he cannot use his words to do what he wishes them to do or to do what they would normally do. In this way, acts of expression are used to set (or, in this case, to limit) the conditions under which other acts of expression have (or do not have) illocutionary force. As Langton puts it, "Some speech acts

build a space, as it were, for other speech acts, making it possible for some people to marry, vote, and divorce. Some speech acts, in contrast, set limits to that space, making it impossible for other people to marry, vote, or divorce." (43) In the current case, the illocutionary force of law creates illocutionary disablement; speech acts, themselves, render other acts unspeakable. (44)

Threats, my slander of Smith, and laws that make homosexual marriage illegal are all speech acts that, through their illocutionary force, silence others. One of Langton's chief contentions is that pornography, as a speech act, can (and does) silence women in all three of the ways just described. For example, there are cases in which a woman or child is involved in the production of pornography and then later told that this material will be distributed to friends or family if she reports abuse or abandons the enterprise. (45) Like those held up at gun point in the bank, persons are prevented from performing even the most basic locutions.

Again, given that some pornography portrays women as resisting or refusing the sexual advances or attacks of men, men who regularly view and masturbate to such pornography might learn to associate arousal with a woman's refusal or protest. In this way, pornography, Langton contends, "eroticizes refusal itself, presenting the overpowering of a woman's will as exciting." (46) As a result, the refusal of the woman on the street, say, might be ineffective in that it results in the male's arousal and not in his ceasing his sexual advances. Thus, by

eroticizing refusal, in making rejection qua rejection a turn-on, the pornography can (and probably does) silence some women; it constitutes perlocutionary frustration. Rejection or refusal has not been made unspeakable here any more than my convincing persons of the dullness of Smith's parties makes it impossible for her to successfully issue an invitation. Rather, in both cases, the effects that are typically produced by and intended in speaking have been prevented; rejection and invitation occur while their expected and intended effects do not.

In contributing to the arrangement of conditions under which certain acts of expression have illocutionary force or in undermining the ways in which women might satisfy these conditions in certain contexts, pornography also silences women by creating illocutionary disablement. One of the more obvious instances in which such silencing occurs is when a woman cannot use a word like 'no' to refuse or prohibit sexual advances. One of the conditions for an act of expression to count as a prohibition is that the speaker have some degree of authority in a relevant domain. The parent who says "No!" to the child has been given such authority over his children by the social convention present in the institution of the family and uses this authority in the proper domain. The woman, too, must have authority over her life or, more precisely, over her own body if she is to successfully prohibit or refuse sexual advances. Yet, if pornography (as a speech act and as an entire industry) degrades women, if it estimates their worth in terms of the sexual pleasure

they can provide to men, if it values them only in terms of their body and its features and, in the end, if it creates and enforces their status as sexual slaves, as whores, then this authority is, to some extent, undermined and prohibition will be, to that degree, unspeakable for women in certain contexts (i.e. in sexual relations with men). (The very notion of a "sexual slave" implies this diminution in authority.)

Langton provides other illustrations of and insights into pornography's ability to silence women in this third way. (47) Her argument, however, is complicated and, as she, herself, admits, incomplete so that I put it aside for now. My claim is that those proponents of Mill's doctrine who wish to enforce fuller and more regular discussion as a replacement for censorship may be silencing persons in some of the ways just mentioned. Suppose that legislation were passed stating that persons could criticize any broadcast (or anyone contributing to that broadcast) to any extent they saw fit but that they could not perform acts that did significant damage to media organizations or their supporters. Thus, for example, parents could discuss "Beavis & Butt-head" with those responsible for its creation and production but they could not, say, blockade MTV's studios. Again, they could try to persuade sponsors that "Beavis & Butt-head" was a repulsive show that ought not to be financed but they could not establish boycotts of these sponsors that seriously jeopardized their commercial endeavors. Given such legislation, parents would, for

Langton, be silenced. Their ability to threaten, warn, or protest would be seriously impaired because the occurrence of effects typically intended in and resulting from serious protest (e.g. acute awareness of a problem, alarm, anxiety, or change in policy) would, under such circumstances, be inhibited or completely prevented; parents would be suffering perlocutionary frustration.

Similar legislation might also result in illocutionary disablement. For example, many state and local governments are currently debating legislation that would permit companies to fire striking workers and to permanently replace these workers with other individuals. Proponents of such legislation often argue that it forces workers into negotiations, which are more beneficial than a strike for everyone involved in the conflict. In striking or picketing, workers are, given our current social and legal conventions, vigorously protesting the policies and procedures of management; such strong protest is the illocutionary force of the strike. By allowing companies to permanently replace striking workers, such legislation would, of course, significantly impair the workers' ability to protest by forestalling the typical effects of the strike (e.g. decreased productivity and profits). In this way, such laws result in the perlocutionary frustration of the workers.

Yet, let us suppose that such legislation is, in fact, adopted throughout society and that management regularly takes advantage of the privileges it provides. Striking workers who refuse to negotiate

are continually replaced with others who are seen as more cooperative and congenial. After some time (during which, let us say, no progress is made in repealing the legislation at hand), the fact that a large number of workers leave their posts may no longer be seen as a strike or as a protest. Such measures are fruitless and the response to them is now habit. In leaving their positions, then, workers are simply seen as resigning and not as protesting. Such persons suffer illocutionary disablement. They can no longer do with the strike what was once done; vehement protest has been made unspeakable for workers in this context.

Mill's theory cannot adequately account for our hesitation in adopting such legislation and, more precisely, for our sense that such laws would, to some extent, violate any serious liberty of speech. Proponents of Mill's view might urge that such laws and conventions would be unacceptable because they would prevent persons from saying what they wish to say and because certain propositions would be excluded from public discourse. While such individuals would be correct in their conclusion, I believe that their argument is inadequate. Most (if not all) actions and practices "speak" or, in other words, can be interpreted as expressing propositions. Still, many of these actions and practices (e.g. murders and child abuse) are prohibited without raising any First Amendment concerns and many more are permitted or required though they have nothing to do with the First Amendment. Thus, when we argue against the legislation or

conventions in question in this way, there is no nonarbitrary method to distinguish between that activity which merits and that which does not merit First Amendment protection. Put another way, if the only objection that can be raised by Mill to laws or conventions against massive boycotts and vehement protests is that such activities are expressive (or that they can be interpreted as "speaking"), then we may be forced to accept many other actions and practices that do not seem to warrant protection such as bribes or threats.

Following Langton, however, I think we can produce plausible arguments against such legislation and conventions and still capture some of the distinctions regarding First Amendment protection that we wish to make. On this view, enacting such legislation or adopting such conventions would be unacceptable not because it would hinder the expression or promulgation of ideas (which it would) but, more importantly, because it would render some of the acts we want to perform undoable, some of our actions unspeakable. A strong protest in the form of a boycott or strike seems to warrant protection not because of what it says or due to its contribution to some important public issue but because of the act that it is and because of what it does for the speaker. Threats, bribes, and exchanges of military secrets, on the other hand, do not merit protection for similar reasons. "The important point," writes Langton, "is that actions, whether speech or conduct, can be protected or unprotected by law. Whether they are protected should depend, in general, on the effects

they have and the actions they are." (48) Vigorous protest is a speech act akin to those protected by the First Amendment, threats are speech acts that are akin to assaults. Each ought to be evaluated in this way. Indeed, one of the most important questions we might ask about the First Amendment is not what sort of *speech* but, rather, what sort of *action* merits protection. Because Mill considers neither the ways in which persons may be silenced nor how speech acts might bring about such silencing, these concerns and questions cannot be articulated or addressed using his model.

Speech, Television, and
Public Discourse

The distinction between political, private, and social censorship, the different degrees to which each of these seems justifiable, and the ability of speech to silence persons may or may not alter the arguments supporting the protection of television programs containing blatant violence or explicit sex, although they remain important and relevant to the issues at hand. The problem I will discuss in the remainder of this chapter, however, will, if valid, present a direct challenge to the defense of television programs that rests upon Mill's theory. I want to show that Mill's model of free and open discourse employs a notion of "speech" or "discussion" that is similar to that which arose in the centuries that followed the invention of the printing press. This notion of public discourse can, with the help of Neil Postman (49), be contrasted with that which is inherent to and perpetuated by the television program. Once this contrast is made, it will be obvious that Mill's theory of free speech can support television programming only to a very limited extent and that such a theory yields an especially weak defense for the protection of television programs containing blatantly violent or sexually explicit material.

Let us consider the notion of "speech" or "discussion" that is offered in Mill's theory of free speech. This notion can be

characterized if we turn, once again, to the benefits that are to be expected from free and open discussion or, more precisely, to what such discussion must be like if these benefits are to be procured. Recall that, according to Mill, free and open discussion provides opportunities for rendering beliefs and opinions more plausible, true, or correct, for affirming their utility in or applicability to certain situations, and for increasing our certainty with regard to them. Thus, discussion centers around the opinion or belief and, in particular, those opinions of which it makes sense to say that they are plausible or implausible, applicable or inapplicable, true or false. Discussion, in short, centers around a proposition. (50)

Moreover, if discussion is to provide an opportunity for rendering our opinions more plausible or acceptable, it must facilitate the clarification, modification, defense, and refutation of propositions, for it is only through such processes that opinions and beliefs can be made more plausible or correct or useful. There are many ways to facilitate such processes or, more generally, to influence and alter beliefs. The method emphasized by Mill and by much First Amendment adjudication (51) is argumentation or exposition or what Martin Benjamin and Joy Curtis, in their Ethics and Nursing, call rational persuasion. In rational persuasion, Benjamin and Curtis write, "Reasons and information are provided for or against various courses of action with a view towards changing the other person's beliefs or conduct in some specific way. Ideally, rational persuasion

is conceived as a dialogue in which the persons attempting to do the persuading recognize that those to whom they direct their arguments are their equals as persons." (52) A similar notion is clearly at the heart of Mill's theory of free speech. As we have seen, this liberty is, for Mill, defended by identifying the advantages that can be obtained through free and open discussion, by allowing the presentation and exchange of reasons and information in the context of a dialogue between persons who consciously offer and accept or reject these reasons. Of course, rational persuasion is, itself, comprised of propositions so that, in the end, the content of free and open discussion, on Mill's view, is propositional or proposition-centered.

At this point, it might sound as if Mill is offering a model for constructing the publishable essay or academic article rather than for free and open debate. This observation is not off the mark, for the notion of "discourse" to which Mill would have been most accustomed resembles those patterns of thought and expression most forcefully initiated by (and developed and reenforced in the centuries that followed) the introduction of the printing press. By exploring further the notion of discussion embodied by Mill's theory of free speech and by noting some of the features of the notion of discourse that resulted from the invention of the printing press (53), the kinship of these notions will become readily apparent.

Because discussion, according to Mill's model, primarily consists of rational persuasion, it is both presented and encountered

in a linear or sequential fashion. The speaker (or writer) must carefully and systematically proceed from one proposition to the next so as to maintain a coherent line of thought while the listener (or reader) must reflect upon and evaluate each step of this process. In the same way, to engage in the sort of discourse made common in the centuries that followed the printing press is, Postman notes, to "follow a line of thought, which requires considerable powers of classifying, inference-making, and reasoning," to "uncover lies, confusions, and overgeneralizations, to detect abuses of logic and common sense," and to "weigh ideas, compare and contrast assertions, to connect one generalization to another." (54) In short, discourse, whether as understood by Mill or as shaped by the printing press, demands much patience and effort from those who participate in it, making it a slow and, at times, arduous task.

As portrayed by either model, discussion is also sequential in that its content will be ordered according to both the difficulty of the syntax and language in which this content is expressed and the experience necessary to appreciate its significance. One must not only progress from one part of a single debate to the next but, also, from one sort of debate to another. A discussion of how to most efficiently wash dishes could, it seems, be had with a very young child whereas the same child could not reasonably participate in a debate about the most appropriate response to crime or the consequences of civil disobedience. Such topics require a certain

amount of experience, an extended vocabulary, and moderate understanding of the methods of argumentation and exposition. Those more complex issues mentioned by Mill such as religion or politics as well as others like the nature of liberty or the scope and limits of knowledge would, no doubt, be inaccessible to children and, perhaps, to many older persons. The point is that Millian discourse (like the kind of discourse that developed after the invention of the printing press) differentiates content and segregates individuals; topics or issues or subjects are made more or less accessible according to the complexity of the lines of thought they invoke and the vocabulary, understanding, capacities, and experience they require.(55)

Thus, if we are to enjoy the benefits of free and open discussion, if we are to take advantage of the corrigibility of our opinions, to affirm their utility or feasibility, and to increase our confidence in them, discussion must focus upon the clarification, modification, defense, and refutation of propositions. Such processes are, for Mill, achieved through methods like rational persuasion, through the careful consideration and evaluation of each proposition in a series of propositions that comprise the discussion. Summarizing the chief effects of the printing press in the centuries that followed its introduction, Postman writes, "Individuality, an enriched capacity for conceptual thought, intellectual vigor..., a passion for clarity, sequence, and reason -- all of this moved into the forefront...What had happened, simply, is that the literate man had been

created..."(56) It is just such literate persons that are able to participate in and enjoy the benefits of free and open discussion as it is understood by Mill.

Although these features are identified by Postman in order to describe the notion of public discourse that arose after the introduction of the printing press, they seem readily attributable to the notion of discussion embraced by Mill. The most striking contrast between this notion and that which is inherent to the television program is that the content of public discourse on television is centered around the image rather than the proposition. Television is watched, it has viewers. There is, of course, abundant oral speech on television. Yet, the central role of the image can be discerned when we turn to those programs that seem to rely most heavily upon the spoken word or of which it seems most appropriate to expect a speech-centered rather than an image-centered approach.

For example, let us turn to the television newscast, which, as the primary source of information for most persons, might be thought to be less apt to rely upon the image than most other television programs. This, of course, is not the case. While news anchors and reporters typically present their material orally, these presentations are almost always accompanied by pictures and film clips. These clips and images are essential to the "story." This was evident, for instance, in reports of famine in Somalia in the early 1990s that included images of malnourished children or, again, in coverage of

"Operation Desert Storm" (a multinational military campaign to free Kuwait from an Iraqi invasion) in early 1991, which regularly included long segments of film showing the bombing of cities and anti-aircraft fire. It is difficult to imagine television coverage of such momentous international events (or even of minor local occurrences such as a county festival or murder) without pictures or film clips.

Furthermore, the anchors, co-anchors, and reporters, themselves, Postman notes, must each have "a face that is both likable and credible." (57) Television newsmen must not only be physically attractive but must, in addition, be capable of conveying their sincerity and trustworthiness. "Credibility," Postman contends, "...refers only to the *impression* of sincerity, authenticity, vulnerability, or attractiveness conveyed by the actor/reporter." (58) The newscast, then, depends upon images and impressions as much as (or more than) upon the proposition. (Even the speech that is a part of newscasts is, as I shall show momentarily, not propositional in the sense discussed earlier.)

The fundamental role of the image in the public discourse offered by television is also evident in much current political discourse, another area in which it seems most reasonable to expect propositional rather than image-centered content. Writing of the Lincoln-Douglas debates of the 1850s, Postman notes that "speakers had little to offer and audiences little to expect but language." (59) Today, Postman maintains, "political knowledge means having pictures in your head

more than having words." (60) This point, I take it, need not be belabored. We need only call to mind, say, the political campaign ad of the 1988 Republican Presidential candidate, George Bush, in which the photo of Willie Horton, a young, black male who had committed a murder after an early parole, was used to attack the Democratic candidate, Michael Dukakis, who had initiated such an early parole program in his own state. More interesting examples of the use of images occurred in the 1994 mid-term elections when, for example, candidates whose views were thought to be indistinguishable from those of the then unpopular President, Bill Clinton, had their faces slowly altered (through a technique known as "morphing") so that they were transformed into that of Clinton. Again, today's citizens are much more likely to recognize the face of a major political figure than to be aware of her/his writings or major speeches. These images will remain in the minds of most persons much longer than any words that were spoken during these ads or addresses.

As in the newscast, however, speech and oral communication does occur within the political television ad or address and it is serving one of two functions. First, speech may perform a narrative function. . The story or narrative is, without doubt, the chief form of the television program. The situation comedy, the soap opera, the movie, the drama, the news update, and the television commercial all take the form of narratives. In such programs, speech and images work together to narrate, not to argue, explicate, or rationally persuade; the

speaker is a narrator rather than a defender or instructor.(61)

Nowhere is the narrative form of the television program more vividly illustrated than in the television commercial. In his intriguing analysis of this particular genre of programs (62), Postman notes that the typical television commercial begins with a problem, by drawing attention to the discord or unhappiness in the life of the main character(s) of the commercial. Standard methods for resolving such difficulties are invoked to no avail. The resolution of the problem is achieved only via the product or service being advertised, which is portrayed as eradicating all discord and discontent from the life of the main character(s). The final seconds of the commercial are used to emphasize the newly discovered bliss.

The television commercial is, in fact, a special kind of story, a moral tale or what Postman calls a "religious parable." (63) In these programs, speech is neither argumentative nor expository. Rather, the oral communication that is present in commercials is merely helping the audience to understand the context in which various portions of the story take place. The potency of the commercial is not found in its spoken language but, rather, in its images and in the narrative form in which it is presented. The spoken word plays only a supporting role, serving only to amplify what is being shown or the story that is being told.

In addition to its narrative function, speech also serves what might be called a "semi-propositional" role in some television

programs. This function of speech is best illustrated by, say, a news update regarding a matter before a local legislative body or, better still, by those programs that make a serious effort to provide an analysis of or debate about a complex and important public concern. By "serious effort," here, I am referring to those programs that do not employ music, images, cheering crowds, or special effects; as in the case of the Lincoln-Douglas debates, "the speakers have little to offer and audiences little to expect but language" in the programs I have in mind. The speech in programs like "Face the Nation," "Meet the Press," or "The McNeill-Lehrer News Hour" is often used to convey series of propositions or statements that form arguments or explications and, in turn, that contribute to the clarification, modification, defense, or refutation of opinions and beliefs. Like the discussions imagined by Mill, the content of the communication on such programs is propositional.

Yet, even programs like "Meet the Press" fall short of Mill's model of discussion. Time constraints, commercial interruptions, and other factors work together to diminish the extent to which the discussion is linear or sequential and, in turn, to which it can be seen as rational persuasion.⁽⁶⁴⁾ Discourse, given these factors, can be, to a certain degree, "fragmented and discontinuous."⁽⁶⁵⁾ This feature of discourse is especially pronounced during the newscast in which, "There is no murder so brutal, no earthquake so devastating, no political blunder so costly, for that matter, no ball score so

tantilizing or weather report so threatening that it cannot be erased from our minds by a newscaster saying, 'Now...this.'"(66) Careful scrutiny of or reflection upon the points being made or the conclusions being drawn is made difficult (or, in the case of a newscast, rendered impossible) given the form and speed of the information being offered.

Thus, the television program, whether in the form of an image-centered narrative or semi-propositional discussion (and this form is infrequent), requires little effort, attention, or energy. Unlike the tedious and burdensome task of discussion as it is understood by Mill, the discussion found in the television program is straightforward, readily comprehensible, and easily accessible. In Postman's words, "Television offers a fairly primitive but irresistible alternative to the linear and sequential logic of the printed word and tends to make the rigors of a literate education irrelevant."(67) This holds not only for individual programs or portions of programs but, for the most part, for the daily series of programming that television offers. Television weaves a world in which that which is presented during one 30- or 60-minute segment has nothing to do with that which is offered in any other, in which all order and progression is sacrificed for the unordered, unorganized, and incoherent. Obviously, then, there is no way (nor any reason) to rank or order the content of television programs according to their difficulty or complexity.

One final feature of the discourse of television programs is

noteworthy and it is implied by all that has been said. Because the television program is an image-centered narrative or semi-propositional program, because, in either form, it is nonlinear and unordered, and because it is so readily grasped and easily accessed, its content is open to all those who are exposed to it. "One must qualify," writes Postman, "for the deeper mysteries of the printed page by submitting oneself to the rigors of a scholastic education.... Television, by contrast, is an open-admission technology to which there are no physical, economic, cognitive, or imaginative restraints." (68) Whether literate or illiterate, mentally competent or mentally impaired, very young or very old, one may participate in and enjoy the benefits of television's version of public discourse; unlike discussion on Mill's view, it is not open solely to the "literate man."

In the first section of this chapter, I claimed that a defense of television programs could, following Mill, be mounted by appealing to the various benefits to be expected from free and open discussion. I have also argued that, in order to procure this particular set of benefits, a certain sort of discussion must be practiced. The clarification, modification, and refutation of opinions are the processes through which these opinions are made more plausible or true or useful and via which we might increase our certainty with regard to them and experience individual and social development. These processes are made possible by debate and discussion, the content of

which is almost wholly (if not entirely) propositional and the form of which is argumentative and expository. Such discourse (which exemplifies the intellectually rigorous discourse that developed in the centuries following the invention of the printing press) differentiates or segregates its potential subject matters according to their complexity and, in turn, expands or limits the range of persons that can participate in it and enjoy its benefits.

Television, on the other hand, offers a primarily image-centered, narrative discourse that leads neither to a differentiation or ordering of content nor to a limitation to the range of persons who might enjoy its benefits. Its lack of propositional (or, at best, its semi-propositional) content makes viewing television a nearly effortless task, not requiring the arduous activity involved in the sequential or linear approach demanded by proposition-centered speech and debate. In short, the "discussion" offered by the television program does not exhibit the characteristics of Millian discourse that ensure that such discourse yields the benefits that are to support the liberties of speech and discussion. Put another way, we cannot defend the television program by appealing to the benefits of free and open discussion set forth by Mill if, in fact, no (or very little) television discourse takes the form of discussion that makes these benefits possible. Indeed, because the features of the "discourse" most frequently provided by the television program stand in such sharp contrast to those of Mill's conception of discussion, it is highly

unlikely that the benefits identified by Mill could be expected from exposure to television programs.

The inability of Mill's theory to support the protection of the vast majority of television programs seems especially pronounced when we consider those programs that contain blatant violence or explicit sex. Pornography, violent cartoons, films like *Terminator* and *Rambo*, and many music videos are objectionable precisely because they offer some of the most striking and sharp images of sex and violence. Without such images, most of these programs would (if they could exist at all without such images) be, for the most part, acceptable to most persons. Moreover, such programming is as easily accessible and readily comprehensible to young children as would be almost any other broadcast. Finally, what little speech is present in these programs is performing a primarily narrative function, emphasizing the machismo of the hero or the thrill of the sexual encounter (that is, the images). Thus, the programs that I have made the focal point of this dissertation most emphatically exhibit those characteristics of the discourse offered by television that force such a sharp contrast to be drawn between such discourse and that conception of discussion utilized by Mill.

I am not claiming, of course, that television programs do not "speak" or that they ought to speak in a different manner. As I have stressed, most (if not all) actions and practices "speak" to someone or "say" something and television programs are not exceptions to this

general rule. Furthermore, it would be ridiculous to suggest that such programs can be improved by, say, forcing broadcasters or producers to fashion their products after the sort of discourse produced by the printing press. Television programs are the products of television, not the printing press. They have their own features and form and this cannot be changed.(69) What is needed is not a way to change television programs but, rather, a theory of free speech that can articulate and contribute to the resolution of the questions and problems introduced by them.

As with the conceptual limitations described in the previous section, Mill cannot be condemned for utilizing the conception of discourse that I have outlined here. Indeed, the telegraph and photograph, which were to give birth to television and its form of discourse (70), were only being invented and formally introduced at the time Mill was writing On Liberty. The problem, here, is not the introduction of considerations that might or might not be amenable to Mill's theory but, rather, the introduction of a form of discourse for which Mill's theory, in my view, is not fully adequate. In other words, it is not that interesting or important conceptions or distinctions are absent from Mill's theory but that the theory, itself, presupposes a conception of discussion that is quite distinct from that which is necessary here, that which is inherent to the television program.

Mill's reliance upon a conception of discussion that resembles that which developed in the centuries that followed the invention of

the printing press (and, hence, the inability of his theory to support the protection of most television programs) is not unrelated to the conceptual limitations described in the previous section. One of the more dramatic effects of the advent of writing was what might be termed the "decontextualization" of speech.(71) In a purely oral culture, the word is always spoken by one person to another person in a particular setting, at a particular time, and with a particular intonation and set of movements or gestures. Spoken words, in such cultures, are sounds or, more precisely, events and, according to Walter Ong, they are "always modifications of a total situation which is more than verbal."(72) Speech, when delivered via the spoken word, "takes place" in a particular context in which both speaker and listener find themselves.

With the introduction of writing (and even more so with that of printed text (73)), however, the word becomes separated from an overall context or setting. Its only setting is the printed page, that is, other words positioned in a designated area and in rigidly defined spaces. The time at or place in which the writer writes, the particular circumstances under which the page is written, the events that surround the writer, and, indeed, whether the writer is alive or dead is not (and, to some extent, need not be) in the forefront of the mind of the reader. Likewise, the particular readers that will encounter the text, their circumstances or the time at which the text is read are all, to a moderate degree, absent from and irrelevant to

the concerns of the writer. The context in which language is found is, in other words, less apparent and, to a certain degree, less relevant when speaker and listener become writer and reader.

This decontextualization of speech is evident in Mill's view, especially when we turn, once again, to the conceptual limitations that I have discussed. To take the most obvious instance, recall that the second limitation described in the previous section concerned the illocutionary force of speech acts and their ability to silence individuals in various ways. This aspect of acts of expression cannot, as I have noted, be adequately understood without considering the context of such acts and it is this failure to attend to context (in part) that prevents Mill from addressing the illocutionary force of speech acts and, in turn, the silencing they can accomplish. The decontextualization of speech that developed in the centuries following the advent of writing and that was reenforced after the printing press could account for this lack of attention to context. If the context of language is, at best, the printed page or the book (as it would have been given the print-centered conception of discourse employed by Mill), it would be difficult to attend to considerations that contribute to the illocutionary force of acts of expression such as legal or social conventions and the social status of both speaker and listener.

The other conceptual limitation I described concerned the notion of censorship. Political, private, and social censorship and the

different degrees to which they seemed justifiable were explained in terms of the sources and mechanics of the censoring act. For Mill, censorship meant restricting or prohibiting the flow of speech or discussion or, what is the same at this point, interfering with the exchange of words and propositions; censorship, in other words, inhibits the processes through which opinions and beliefs are clarified, modified, or refuted and, too, through which the benefits of discussion are realized. On such a view, there is no consideration of the source of these propositions (e.g. a citizen's group or the local legislative body) or of the mechanics by which these restrictions are to occur (e.g. boycott or legislation). Again, it is the tendency to regard speech as that which is (or can be) found on the printed page that might partially account for such a view.

None of what I have said thus far calls into question the ability of Mill's view to eloquently and powerfully defend the protection of speech and discussion that exhibits the characteristics needed to procure the benefits he identifies. Research journals, public debates and addresses of many sorts, newspapers, books and articles of many varieties, and even some semi-propositional television programs such as "Meet the Press" or live coverage of local town meetings will be guaranteed the strongest protection under Mill's approach. However, if the criticism I will raise in the next chapter holds, we must put aside Mill's approach. This criticism will, I believe, not only undermine the basis of Mill's theory of free speech but, more

importantly, offer a starting point for the development of a view that may be more able to provide a more appropriate and powerful defense for television programs.

Notes

1. On Liberty and Other Writings by J. S. Mill, edited by Stephen Collini, Cambridge University Press, c. 1991.
2. I shall have much more to say about nonutilitarian accounts of free speech in Chapter 3. They are, for the most part, derived from either John Rawls' doctrine of "justice as fairness" in A Theory of Justice (Harvard University Press, c. 1971) or from a conception of individual autonomy (e.g. T. M. Scanlon, "A Theory of Freedom of Expression," Philosophy and Public Affairs, Vol. 1, 1973, pp. 204-226). These sources need not be unrelated or wholly distinct.
3. I use this term in the sense that Ronald Dworkin gives it in Taking Rights Seriously, Harvard University Press, c. 1978, pp. 198-204. I will return to Dworkin's position in the next chapter.
4. On Liberty, p. 94
5. *ibid.*, p. 19
6. *ibid.*, p. 37
7. *ibid.*, p. 56
8. As mentioned in the previous chapter, we have yet to discuss the sense in which television news and similar programs might "inform" us. I shall return to this matter in the final section of this chapter.
9. Such arguments are not uncommon and, as I note later, they become quite powerful when adopted by legal and social conventions. This occurs, for example, in *Whitney v. California*. Justice Brandeis there writes, "If there be time to expose, through discussion, the falsehood

and fallacies, to avert the evil through the processes of education, the remedy to be applied is more speech, not enforced silence." (274 U.S. @377) Also see note 40 below.

10. On Liberty, p. 14

11. It has been suggested to me that, besides fulfilling one of the following conditions, it must be shown that the implementation of the proposed intervention must not produce more harm than good. This is reasonable given Mill's adherence to the principle of utility. I will, however, ignore this condition because the question of its satisfaction will only arise if one of the conditions I am about to discuss is met. In other words, it would be pointless to discuss the implementation of a suggested intervention before considering whether or not such intervention is, indeed, warranted.

12. Similar considerations may have led to the well-known rule of "clear and present danger," first formulated by Justice Holmes in *Schenck v. United States* (249 U.S. 47, 1919). "The question in every case is," writes Holmes, "whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree." (@52) The cases I consider here seem to indicate the same concerns of overwhelming physical danger that are evident in Holmes' own example of someone falsely shouting "Fire!" in a crowded theater. By explicitly calling attention to the "proximity and degree" of these

dangers, Holmes makes it difficult to resist thinking of these cases in utilitarian terms.

13. This may be the view of Justice Brandeis in *Whitney* when he proclaims that, "...no danger flowing from speech can be deemed clear and present unless the incidents of the evil apprehended is so imminent that it may fall before there is an opportunity for free discussion." (@377) According to Alexander Meiklejohn's interpretation of this opinion, "...only an emergency can justify suppression," a "emergency" being, as Meiklejohn understands Brandeis, "a situation in which there is no opportunity for full discussion, in which there is no time 'to expose through discussion the falsehood and fallacies, to avert the evil by the process of education.'" (@377)" In short, then, it is an emergency, a situation in which the benefits of discussion cannot be realized, that, on Meiklejohn's view of Brandeis, constitutes a clear and present danger and, in turn, a sufficient reason for restricting speech. See "Free Speech and Its Relation to Self- Government" in Political Freedom: The Constitutional Powers of the People by Alexander Meiklejohn, Harper Publishing Co., New York, c. 1960, pp. 48-49.

14. On Liberty, p. 14

15. See, for example, Moral Thinking: Its Level, Method, and Point by R. M. Hare, Oxford University Press, c. 1981, pp. 124-127. Hare is especially concerned with some of the difficulties raised by interpersonal comparison of preferences. He argues that the problem

of understanding the preferences of others is only a special case of the general difficulties we might encounter in deciding what to do when at least one of our options is an experience or situation yet to be encountered. He writes, "...our whole governance of our lives depends on the solution of a problem of which knowledge of other people's preferences is a special case, the problem of truly (and with confidence) representing to ourselves experiences which are now absent, for all (or nearly all) preferences are between experiences...at least one of which is absent." (p. 126) In the end, then, the actual quantification or measurement of benefits (or preferences) is not required in the utilitarian scheme any more than it might be required for our everyday decisions.

16. *ibid.*, pp. 127-128. Because nearly all preferences are "between experiences" and because the problem of interpersonal comparison is no more (or no less) complicated than that of comparing our own preferences, we can, according to Hare, make comparisons between any number of persons and parties with regard to any sort of experience.

17. "Television Violence: The Scale of the Problem and Where to Go From Here" by Dr. Brandon Centerwall, Journal of the American Medical Association, Vol. 267, No. 22, 1992, pp. 3059-3064.

18. *ibid.*, p. 3061

19. Centerwall, himself, does not advocate censorship or any other serious intervention into the media. Rather, his suggestions include measures to be taken by parents and health care specialists such as

pediatricians providing guidelines for parents regarding the amount of television to be watched by a child, "television free" areas and times in the home and in public, and electronic time-channel locks that automatically control when television is available to children and what channels can be selected during those times. (pp. 3063-3064)

20. "The Television Time Bomb," New York Times, July 27, 1992.

21. Besides the obvious impracticality of such a move, this action would violate the third condition for intervention described above in note 11.

22. Pornography: Men Possessing Women by Andrea Dworkin, G. P. Putnam & Sons, c. 1981, p. vii.

23. Libel and the First Amendment by Richard Labunski, Transaction Books, New Brunswick, NJ, c. 1987, p. 35.

24. On Liberty, p. 6

25. *ibid.*, p. 8

26. *ibid.*, pp. 7-8

27. This is Scanlon's tactic in the article cited in note 2 of this chapter. It should be noted that this is his initial attempt regarding these matters. Much of what is done here is rejected by Scanlon, himself, in a later article. See "Freedom of Expression and Categories of Expression" in University of Pittsburgh Law Review, Vol. 40, 1979, pp. 519-551.

28. *ibid.*, p. 213

29. *ibid.*, pp. 214-215

30. Free Speech: A Philosophical Inquiry by Frederick Schauer, Cambridge University Press, New York, c. 1982, pp. 117-119.
31. My notion of "private censorship" is narrower than that given by Schauer. Schauer does not distinguish between this form of censorship and what I shall call "social censorship." Rather, he seems to suggest that anything that does not count as political censorship is to be recognized as private censorship. My reasons for making a three-fold rather than a two-fold distinction will be given shortly.
32. "Cleaning Up Television Violence," New York Times, Dec. 11, 1993.
33. Free Speech, pp. 122-123
34. On Liberty, p. 8
35. Libel and the First Amendment, p. 36
36. Free Speech, p. 122
37. On Liberty, p. 78
38. *ibid.*, p. 94
39. For a brief summary of the activities of Wildmon and his group, see the biography of Wildmon in Current Biography, Vol. 53, No. 1, 1992, pp. 607-613. More recently, Wildmon and his followers placed an advertisement in the New York Times Magazine (March 6, 1994) advocating the boycott of companies sponsoring NBC's "NYPD Blue" due to the sex and violence depicted in some episodes of this program.
40. "Speech Acts and Unspeakable Acts" by Rae Langton, Philosophy and Public Affairs, Vol. 23, 1993, pp. 315-320. Also, see note 9 above.
41. *ibid.*, p. 314

42. *ibid.*, p. 317

43. *ibid.*, p. 319

44. I am, for now, only concerned with the notion of silencing in so far as it is absent from Mill's theory. I shall have much more to say about this notion and its relation to television in the next chapters.

45. "Speech Acts and Unspeakable Acts," p. 323

46. *ibid.*, pp. 323-324. This effect should not be confused with desensitization, although it is a form of conditioning.

47. *ibid.*, pp. 320-322. Especially intriguing is Langton's discussion of the appearance of Linda Marchiano's book, Ordeal, in a mail order catalog of pornographic material. Ordeal is Marchiano's account of her exploitation and physical and emotional suffering during her involvement in the pornographic film, *Deep Throat*. The book is obviously meant as a protest but its appearance in such a context shows that many see it as just more pornography. Langton writes, "If you are a woman using sexually explicit speech, describing in some detail the savage sexual violence you have suffered (and especially if you are already a famous pornography star), what you say simply counts as pornography." (p. 326) I will return to this example of silencing in Chapter 4.

48. *ibid.*, pp. 296-297

49. Many of the features of the print-centered notion of public discourse and of the image-centered conception resulting from television are described by Neil Postman. The two works upon which I

shall rely most heavily are The Disappearance of Childhood, Delacorte Press, c. 1982, and Amusing Ourselves to Death: Public Discourse In the Age of Show Business, Penguin Books, New York, c. 1985. Postman, himself, provides an extensive bibliography on these matters from which he draws regularly in his own work.

50. One might wish to add, here, that discussion also includes that "symbolic conduct" that is readily converted or translated into a particular proposition (e.g. American Sign Language). The main contrast that I want to make at this point will not depend on such subtle distinctions.

51. See, for example, the passages from Whitney cited in notes 9 and 13 above.

52. Ethics and Nursing by Martin Benjamin and Joy Curtis, Oxford University Press, 3rd ed., c. 1992, p. 63.

53. These features are most thoroughly described in Amusing Ourselves to Death, Chapter 4 and Disappearance of Childhood, Chapters 2 and 5.

54. Amusing Ourselves to Death, p. 51

55. Disappearance of Childhood, pp. 76-77. The differentiation of content initiated by the printing press together with the systematic enforcement of such differentiation through the proliferation of schools in the centuries following the printing press substantially contributed, according to Postman and others, to the emergence of the modern notions of "child" and "adult." The theme of Postman's book is, as the title suggests, how these notions are being undermined by

the introduction of television. If Postman is correct, this makes legislation like the Children's Protection from Violent Programming Act (discussed earlier in this chapter) especially ironic since television, itself, is eroding the boundaries that define the class of persons that are to be protected by such legislation.

56. *ibid.*, p. 36

57. Amusing Ourselves to Death, p. 100

58. *ibid.*, p. 102, my emphasis.

59. *ibid.*, p. 48. It is also worth noting that the language of these debates was, in the fullest sense of the term, propositional. This is evident from Postman's analysis of these debates. (cf p. 49-) Also, compare Disappearance of Childhood, pp. 101-102.

60. *ibid.*, p. 130

61. It is tempting to argue, here, that narratives and stories are mere instances of rational persuasion in that they contribute to the clarification, modification, and formulation of beliefs. This is misleading because, while narration does influence belief, it should not be confused with rational persuasion. I shall pursue this claim in Chapter 4 and argue that narration, as a way of influencing beliefs and behavior, has not received the attention it deserves in theories of free speech. Furthermore, I shall claim that most television programming, if it is to enjoy any kind of First Amendment protection, must be treated in this light.

62. Disappearance of Childhood, pp. 108-111. Also, compare Amusing

Ourselves to Death, pp. 124-130.

63. *ibid.*, pp. 108-109

64. One such factor concerns the environment of television itself. Viewers of televised debates or discourse are not actually present at such debates and, hence, not subjected to the rigid codes of behavior that are associated with these debates. The typical television is situated in the main living room or family room of the home, which is a more relaxed environment than the lecture hall or auditorium. See Postman's contrast between a television environment and the classroom in Teaching As A Conserving Activity, Dale Publishing Co., New York, c. 1979, pp. 50-52. Compare Disappearance of Childhood, p. 113.

65. Amusing Ourselves to Death, p. 90. Postman provides what is, perhaps, one of the best examples of what I have been calling a "semi-propositional" role for speech. The analysis is of the panel discussion following the controversial movie, *The Day After*, which concerned nuclear warfare and its prevention. (pp. 87-91)

66. *ibid.*, p. 99

67. Disappearance of Childhood, pp. 79-80

68. *ibid.*, pp. 83-84

69. *ibid.*, p. 113

70. Amusing Ourselves to Death, Chapter 5.

71. Orality and Literacy: The Technologizing of the Word by Walter Ong, Methuen & Co., c. 1982, pp. 101-103.

72. *ibid.*, p. 101

73. *ibid.*, Chapter 5 and Amusing Ourselves to Death, pp. 22-28.

Taking Free Speech Seriously

Proponents of Mill may be able to modify his theory of free speech so as to accommodate the different levels of justifiability that seem appropriate to political, private, and social censorship. Also, it might turn out that Mill's theory can make contributions to the articulation and resolution of problems arising from the perlocutionary and illocutionary aspects of acts of expression and from the silencing of persons that can and does result from such acts. All of this may be possible even though, as I have suggested, these conceptual limitations may be related to the notion of discussion that is essential to Mill's view, a notion that exhibits many of the features of the conception of discourse that developed in the centuries that followed the introduction of the printing press. Of course, given the sharp contrasts between this notion and the sort of discourse that is, according to the analysis at the end of Chapter 2, inherent to television programs, it seems unlikely that Mill's theory of free speech could offer a plausible defense of such programs (especially those containing blatantly violent or sexually explicit material) even if the matters surrounding censorship and the silencing of individuals were adequately addressed.

Nonetheless, let us suppose that defenders of the Millian approach to free speech are able to answer the difficulties surrounding the various forms of censorship and the silencing of individuals that can take place via television programming. Let us

also suppose that the image-centered, nonlinear, narrative discourse that is inherent to the television program exhibits a number of the features of some genre of literature that could be regarded as "propositional" in the sense described in the previous chapter. Thus, if television programming were to resemble, say, a novel or a play (forms of discourse that would likely be regarded as propositional) in the relevant respects, we might, indeed, expect benefits from such programming akin to those imagined by Mill. Better still, we might suppose that the discourse inherent to the television program yields its own unique class of benefits not anticipated by Mill, yet capable of supporting free and open discourse on television in the same way that the benefits identified by Mill support his own version of free and open discussion.

Given such suppositions, forceful arguments against restrictions upon television programming can be developed. Not only does television promise numerous benefits but, in addition, the conditions for rendering restrictions upon programming justifiable seem not to be met by the more common arguments given for such restrictions. Either these arguments rely upon questionable assumptions about the quantification and comparison of benefits and harms (and upon the calculations based on such assumptions) or the restrictions that can legitimately be derived from these arguments are too broad or general to be feasible or acceptable. This is especially so, I suggested, in those arguments that attempt to demonstrate that one or more of the

conditions required for enjoying the benefits of free and open discussion have not been realized or are in some way threatened by television. Thus, even given the harms and wrongs that can and do result from television programs containing sex and violence, it seems best, on this Millian approach, to afford strong protection to such programming and guard against attempts to restrict it.

Yet, a serious problem with Mill's theory of free speech still remains. This difficulty stems not from concerns about the extent to which this theory can be applied to television but, more significantly, from Mill's utilitarian approach to the explication and defense of free speech. One of the themes of Ronald Dworkin's Taking Rights Seriously is that no goal-based theory (i.e. a moral or political theory that justifies all social decisions, ultimately, by referring to the advancement or protection of a single goal) can, in his words, "take rights seriously."⁽¹⁾ My claim is that Mill's theory, as a goal-based theory that treats individual rights as mere instruments in the pursuit of one social goal (general utility), cannot take the right to free speech seriously. Following Dworkin and employing certain conceptions introduced by John Rawls ⁽²⁾, I argue that, in order to take rights seriously, one must view them as embodying a particular conception of equality that is understood in terms of a certain conception of the person. On this view, a person is a being who is capable of forming, revising, and pursuing a determinant conception of the good or way of life and of participating

in the deliberation and implementation of principles of social justice that regulate public interaction and cooperation between such beings. The notion of equality to be sketched claims that persons are to be treated as equals, that is, that they are treated rightly or justly when they are recognized and respected in ways that are dictated by their possessing these capacities.

This conception of equality and its corresponding conception of the person are captured in the individual right to equal concern and respect as understood by Dworkin. I argue that the right to free speech, if taken seriously, must be explained and grounded in terms of this right to equality and that explaining and defending the right to free speech in this way has various implications for the common understanding of this liberty in current social and legal debates. In particular, I consider the implications of such a conception of free speech for the familiar model of the "marketplace of ideas," which has been explicitly invoked in many important First Amendment cases.⁽³⁾ When properly understood, the marketplace model is, to a limited degree, capable of reflecting a conception of equality that permits it to take the right to free speech seriously. Nevertheless, I shall contend that it must be regulated by other principles, in addition to that of the principle of neutrality in terms of which it is traditionally conceived. The need for such additional principles will be especially evident when this model is employed in the context of television, which, as a medium, introduces considerations into debates

about free speech that are not anticipated by the marketplace model in its conventional form. I claim that, without at least one such principle (what I shall label the "principle of equity"), this model contains an inadequate conception of equality, a conception that does not allow it to take the right to free speech seriously. Hence, the aim is not to utterly reject or refute the marketplace of ideas model but, rather, to develop and modify it so that it can most fully reflect the right to equal concern and respect and, in turn, take the right to free speech seriously.

Rights, Goals,
and Equality

The objection to Mill's doctrine of free speech that I have in mind is an instance of an objection to utilitarian theories in general that has been made by many moral and political philosophers. This objection contends that utilitarian theories, as goal-based theories, cannot give a plausible account of the intrinsic value of an individual right or of the unique role that this notion plays in our social institutions and practices; in short, the claim is that goal-based theories cannot take rights seriously. To understand this objection, let us begin with the notion of a "goal-based theory."

A goal-based theory is a moral or political theory that attempts to explain or justify all moral judgments and political decisions (whether made about individual conduct or social institutions and

practices), ultimately, in terms of the protection or advancement of a single goal. Mill's theory is a goal-based theory that centers around the promotion of the goal of general utility, a state of affairs in which there is a maximum overall net benefit. Mill is explicit about this matter. In Utilitarianism, he writes, "According to the greatest happiness principle..., the ultimate end...whether we are considering our own good or that of other people, is an existence exempt, as far as possible, from pain and as rich as possible in enjoyments both in point of quantity and quality....This being, according to the utilitarian opinion, the end of human action, is necessarily also the standard of morality..."(4) Hence, we refer to Mill's theory as a goal-based theory because all moral and political decisions must be ultimately grounded upon (and all institutions and practices evaluated in terms of) their ability to protect or promote this goal.

This goal-based strategy is quite evident in Mill's treatment of the notion of an individual right. For Mill, justice and the set of individual rights that partially comprise this "branch" of morality are central to utilitarianism. He writes, "Justice is the name for certain classes of moral rules which concern the essentials of human well-being more nearly (and are, therefore, of more absolute obligation) than any other rules for the guidance of life." He adds, "And, the notion which we have found to be of the essence of the idea of justice, that of a right residing in an individual, implies and testifies to this more binding obligation."(5) Mill's insistence upon

justice and the individual rights that stem from this central moral concept is affirmed in his defense of the rights of women. In On the Subjection of Women, he writes that the most important benefit of sexual equality in public life is that of "having the most universal and prevading of all human relations regulated by justice rather than injustice." (6) For Mill, then, individual rights are especially useful instruments for promoting and protecting general utility and their unique value stems from their ability to advance this goal.

Compare this notion of an individual right with that offered by Ronald Dworkin. "An individual has a right to some opportunity or resource or liberty," Dworkin claims, "if it counts in favor of a political decision that the decision is likely to advance or protect the state of affairs in which he enjoys the right even when no other political aim is served and some political aim is disserved thereby and counts against that decision that it will retard or endanger that state of affairs even when some other political aim is thereby served." (7) Here, a "political aim" is any state of affairs, the protection or advancement (or inhibition or endangerment) of which counts, according to a political theory, as a good reason for or against adopting some political decision. General utility is, in Mill's theory, a political aim because the fact that some decision will contribute to the promotion or protection of this state of affairs always counts as a good reason (indeed, the best reason) for adopting that decision.

One immediately evident contrast between this view of individual rights and that offered by Mill is that the state of affairs considered in Dworkin's definition of an individual right is not one in which there need be a maximum overall or average benefit. Rather, the fact that a decision promises to advance or protect a state of affairs in which a particular individual enjoys certain benefits is to count as a good reason for adopting that decision regardless of the overall or general benefit generated in that state of affairs.(8)

Notice that attending to the consideration at hand (namely, the fact that a decision is likely to protect or advance a state of affairs in which a particular individual enjoys some benefit) might be rather burdensome. Such considerations are especially burdensome when we realize that they may, on Dworkin's view, dictate decisions that are ineffective in (or even counterproductive to) advancing other political aims, including general utility. Dworkin writes, "The institution of rights against the government...is a complex and troublesome practice that makes the government's job of securing the general benefit more difficult and more expensive and it would be a frivolous and wrongful practice unless it served some point."(9) Thus, individual rights are to be regarded as introducing considerations that may lead to constraints upon the pursuit of goals rather than as especially useful tools for their advancement. Indeed, because Mill sees individual rights as instrumental to an effective pursuit of general utility whereas Dworkin views them as introducing

considerations that may lead to decisions that are ineffective in or even counterproductive to such a pursuit, I shall argue that Mill sees individual rights (and moral and political reasoning in general) as entirely rational whereas Dworkin views them, to appeal to a distinction that is emphasized by Rawls, as both rational and reasonable.⁽¹⁰⁾ Furthermore, I shall maintain that these two views of individual rights embody different conceptions of equality and that the conception of equality embodied in the Millian view of reasoning about rights is inadequate. In the end, I want to base a conception of an individual right to free speech not only upon rationality but, also, upon reasonableness. Such a conception will, I will argue, most adequately and fully reflect the status of persons as equals.⁽¹¹⁾

In claiming that, for Mill, the reasoning that leads to the institution of individual rights is entirely "rational," I am asserting that it is fully consistent with the principles of rational choice enumerated in Rawls' A Theory of Justice.⁽¹²⁾ These principles are those regularly employed by us in choosing means to our ends and in selecting and ordering these ends. More recently, Rawls sums up the "rational" in this way: "The rational...applies to a single, unified agent (either an individual or corporate person) with the powers of judgment and deliberation in seeking ends and interests peculiarly its own. The rational applies to how these ends and interests are adopted and affirmed as well as to how they are given priority. It also applies to the choice of means in which case it is

guided by such familiar principles as to adopt the most effective means to ends or to select the more probable alternative (other things equal)." (13) Thus, in claiming that rights are to be viewed as considerations that may lead to constraints upon the rational pursuit of goals, I am claiming that they will, at times, force us to make decisions that are inconsistent with the principles just mentioned. Our moral and political reasoning, especially when it involves appeals to individual rights, may dictate decisions that, say, are less effective than other decisions in bringing about some end or that do not further as many aims as might be promoted by some other decision.

More generally, Mill's theory, as a utilitarian theory, can be seen as understanding our moral and political reasoning entirely in terms of the rational. In Theory, Rawls notes that, "The most natural way...of arriving at utilitarianism...is to adopt for society as a whole the principle[s] of rational choice for one man." Such a move can be imagined via the device of the "impartial sympathetic spectator...who is conceived as carrying out the required organization of the desires of all persons into one coherent system of desires" and through which "many persons are fused into one." (14) On this view, political and social decision-making is a matter of efficient coordination governed only by the principles of rational choice and it is seen as being performed by a single agent who adheres to these principles. In this way, we can model the reasoning that leads Mill to the principle of liberty or to the institution of individual rights

(which includes the right to free speech).(15) In a word, embracing the institution of rights and the principle of liberty is, on Mill's view, entirely rational.

The conception of equality that underlies this view is apparent when we consider a simple example of its application.(16) Suppose that someone proposes that a community is to be governed by the principle of utility but that the preferences and desires had by a particular member, Sarah, are not to be counted when making political and social decisions. Mill would clearly find such a community unacceptable. He asserts that equality is the "highest abstract standard of social and distributive justice" and that the principle of utility "is a mere form of words without rational signification unless one person's happiness, supposed equal in degree..., is counted for exactly as much as another's."(17) Equality, here, means impartiality in calculating utility and to ignore Sarah's preferences (or those of any other individual) is to disregard an essential element of any acceptable form of utilitarianism. This is why utilitarian reasoning is modeled by the deliberations of both a *rational* and an *impartial* sympathetic spectator, an agent who weighs all preferences on the same scale and who counts preferences of equal strength equally.

Now, suppose that Sarah belongs to a community that adopts Mill's version of utilitarianism and that she is disliked very much by nearly all members of the community because she leads a life that is overwhelmingly regarded as disgusting. For these reasons, persons

demand that Sarah's preferences be ignored in the decision-making process. Members of the community are quite content when these demands are honored and very disappointed when they are not. Even supposing that Sarah has done no harm to the community as a whole or to any member of it, we cannot simply invoke the principle of liberty in order to defend her. This principle, itself, is based upon utilitarian reasoning which might, in certain circumstances, yield the same result, namely, the elimination of Sarah's preferences from the decision-making process.

We would, without doubt, demand equal treatment for Sarah. However, "equal treatment" cannot, here, simply mean impartial treatment, for it is the impartial consideration of preferences that would lead to Sarah's preferences being ignored; impartial consideration, in this case, would undermine itself.⁽¹⁹⁾ Here, demanding equality for Sarah must entail the following:

1. First, we are insisting that Sarah's preferences be counted even though general utility might be advanced by not counting them. The fact that Sarah's preferences would not be counted were the decision at hand to be adopted is a good reason for not adopting it even though that decision would promote general utility. In short, we are, in Dworkin's words, demanding that equality (in some stronger sense than that incorporated into utilitarianism) "trump" utility, that it be viewed as a right as earlier defined by Dworkin.

2. If we are, in fact, to count the above consideration as a

good reason for rejecting the decision at hand, moral and political reasoning can no longer be seen as based only on rationality and impartiality. Treating Sarah "equally" (in the sense under scrutiny) involves taking steps that are obviously counterproductive to the advancement of general utility, steps that would not be regarded as rational. Moreover, the "equal treatment" of Sarah implies that all preferences need not be considered impartially. In insisting upon equal treatment for Sarah, we are asking that, for example, the preferences of members of the community concerning how Sarah's preferences are to be considered be given less significance in (or, perhaps, eliminated from) our moral deliberation; preferences of equal strength need not be counted equally. In short, the kind of equality being advocated here, the kind of equality that "trumps" utility, cannot be seen as mere impartiality or neutrality.

A utilitarian might concede that moral and political reasoning must be amended so as to accommodate the importance of considerations like that underscored by the situation just described. Nonetheless, she might argue that we can model this accommodation in the device of the impartial sympathetic spectator by simply demanding that general utility is to be protected and advanced except in cases in which impartiality is threatened. In the given example, then, the impartial sympathetic spectator would be seen as rejecting the demands of the majority. Neither Sarah's preferences nor those of any other member of the imagined community can be discounted in the utilitarian

calculation in order to advance general utility. (20)

We need only modify the illustration slightly to see the inadequacy of this response. Suppose that members of the community no longer demand that Sarah's preferences be ignored but, rather, that institutions and practices be fashioned so as to further their own way of life or, at least, so as to make Sarah's way of life impossible or impractical. Sarah would, no doubt, object to this plan and her preferences would be impartially considered. The situation resulting from the modified utilitarian reasoning would not be one in which Sarah's preferences are ignored but, rather, one in which they cannot be (or are unlikely to be) satisfied and in which she cannot effectively lead and govern her own life. This result, it seems to me, would be as generally unacceptable as that reached when fully impartial and rational deliberations are practiced. We must, then, add one final element to the notion of equality being developed:

3. The fact that a state of affairs in which Sarah is able to govern and pursue her own way of life is likely to be threatened or inhibited by a certain decision should count as a good reason for rejecting that decision even though general utility is likely to be advanced by it. It is just such a consideration that most forcefully captures what demands for Sarah's equality must entail. In turn, the purely rational and impartial character (that is, the utilitarian character) of moral and political reasoning seems even more questionable than had been suggested in earlier interpretations of

equality. For instance, in the example just discussed, many sorts of preferences and desires (indeed, many more than simply those concerning how Sarah's preferences are to be counted) are likely to be given less weight in (or, perhaps, eliminated from) the decision-making process. Such preferences might include, for instance, those preferences of individuals regarding what Sarah ought to have or do. (21) Also, because the state of affairs now at issue is one in which Sarah can formulate and pursue her own way of life rather than one in which impartial consideration of her preferences is secured, even more significant constraints upon the pursuit of utility are likely to be necessary; the rational pursuit of general utility (or of any other goal) is likely to be severely compromised.

This series of examples constitutes not a demonstration but, rather, an illustration of an intuition or conviction about our moral and political reasoning. Such reasoning must, whatever else it does, make room for a consideration that, to a significant degree, must carry substantial weight in and of itself in moral and political argument. This consideration is the fact that a particular state of affairs is protected or promoted, namely, a state of affairs in which a particular individual has her/his preferences (especially those concerning the conditions under which one will formulate, revise, and pursue a way of life) considered in the process for making political decisions. In short, moral and political reasoning must embody an individual right to equal concern and respect. Moreover, as seen in

the given examples, moral and political reasoning that accommodates such a consideration, that embodies the right to equal concern and respect, cannot be based solely on rationality and impartiality. Utilitarian reasoning, in so far as it can accurately be modeled via the device of the rational and impartial sympathetic spectator, cannot accommodate the consideration just noted (nor the right to equal concern and respect that it embodies when invoked in moral and political argument) and, hence, must be substantially altered or rejected. (22)

Rawls' original position is a device that adequately models a form of moral and political reasoning that can accommodate the consideration just noted. To see this, let us briefly consider the way in which the original position embodies each of the three elements of the right to equal concern and respect. The original position is composed of three key elements: 1) the portrayal of the parties as "rationally autonomous" agents, 2) the "veil of ignorance," and 3) the "formal constraints" upon principles of right. (23) The second and third of these elements are, in effect, two sets of constraints upon the deliberations of the parties as rationally autonomous agents.

Under the veil of ignorance, the parties are not aware of their conceptions of the good nor are they aware of their talents and abilities or of their position or status in society. This condition, however, does not preclude the parties from having certain "highest-order interests," interests that stem from their having an ability to

form, revise, and pursue a conception of the good and an awareness of the need to offer acceptable and practical rules governing the cooperation that must exist between members of a society that have such an ability. (24) Each party has an interest in understanding and complying with a public conception of justice, which includes rules specifying the fair terms of social cooperation that regulate interaction and agreement between persons. Also, given their ability to form, alter, and pursue a particular conception of the good, each representative has an interest in securing conditions under which he/she can form, revise, and modify his/her conception of the good as well as those under which he/she can maintain and pursue a determinant conception of the good (although the details of the particular conception will be unknown to each party). In the end, then, the principles and positions to which the parties agree are wholly derived from the recognition, by each party, of the importance of each other party's highest-order interests and from the deliberations resulting from the rational pursuit of these (and only these) interests.

Earlier, I claimed that demands for Sarah's equality meant not only that her preferences ought to be considered, but that certain kinds of preferences ought to be given less weight in (or eliminated from) the decision-making procedure. These included preferences concerning how Sarah's preferences are to be considered or weighed and those concerning what Sarah ought to have or do or the way in which she ought to live. Given the veil of ignorance and the emphasis upon

the highest-order interests of the parties, our intuitions about such a distinction among preferences can be developed and justified. The original position utilizes a particular conception of the person as a being who can (and does) form, revise, and pursue a determinant conception of the good according to his/her own tastes, interests, and abilities and also according to principles that make living and cooperating with other such beings possible. Given this conception of the person, there are certain interests that will be pursued whatever other interests are pursued (namely, the highest-order interests) and the goods that help to satisfy these are what Rawls calls "primary goods." (25) These include basic liberties, opportunities, income, wealth, and a social basis for self-worth. To treat these goods as any other goods or the interests that they satisfy as any other interest or preference is to ignore the view of the person as a being who can (and does) form, revise, and pursue a determinant conception of the good according to his/her own interests and abilities and also according to principles that make living and cooperating with other such beings possible. In the end, this will entail a failure to treat persons as equals, for it is a feature of the original position that it model a form of reasoning that embodies the right to equal concern and respect as described earlier. (Of course, this can only be clear when I have finished the description of the original position in terms of the three elements given above.) To engage in reasoning that ignores or overlooks the importance of highest-order interests and the

primary goods that satisfy these interests is to engage in reasoning that does not reflect a view of the person as a being who can (and does) form, revise, and pursue a determinant conception of the good according to his/her own interests and abilities and also according to principles that make living and cooperating with other such beings possible. This denial constitutes an abandonment of the original position and, hence, if this position sufficiently embodies the right to equal concern and respect, an abandonment of this right as well.

The other set of constraints are the so-called "formal constraints" upon principles of right. According to these limitations, the parties must, when deciding upon a conception of justice, settle upon general and universal principles that are capable, to some extent, of yielding final judgments about the ordering of claims. One other especially important constraint is the publicity condition, which demands that the adopted principles of justice must be readily comprehensible by and justifiable to every citizen. (26) These constraints along with the veil of ignorance are included in what Rawls calls the reasonable. "The reasonable," he writes, "subordinates the rational because its principles limit...the final ends that can be pursued....In the original position, we view the reasonable as expressed by the framework of constraints within which the deliberations of the parties as rationally autonomous agents of construction take place." (27) As just noted, these constraints include the veil of ignorance (with its effect of emphasizing the

importance of the highest-order interests of the parties) and the formal constraints upon principles of right. At bottom, the effect of such constraints (or, what is the same, of demanding reasonableness) is to insure that the reasons and arguments that are offered are, in fact, reasons and arguments to and for each person. In turn, in reasoning according to such a model, we inevitably acknowledge persons as beings who can (and do) form, revise, and pursue determinant conceptions of the good according to their own interests and abilities and also according to principles that make living and cooperating with each other possible; in short, we acknowledge persons as equals.

It is at this point that the character of moral and political reasoning, as modeled by the original position, can be seen as based on more than mere rationality and impartiality. The series of examples I have been discussing point to an aspect of our moral and political reasoning that is not entirely based on rationality, an aspect that is captured by the constraints within which the rational deliberations of the parties take place. If we understand our moral and political reasoning as it is depicted in the original position, the decisions that will be reached can be viewed as both rational and reasonable. They are *rational* because they can be seen as consistent with the principles of rational choice as these are employed by each party in pursuing their highest-order interests and they are *reasonable* in that they reflect some of our convictions about the most basic rules that govern moral and political reasoning, especially

those that help insure that such reasons are comprehensible and justifiable to all. Thus, for instance, the reasoning that leads to Rawls' principle of equal liberty is viewed as both rational and reasonable as opposed to that leading to Mill's principle of liberty, which, as noted earlier, is only rational.

In addition, we can now clarify the way in which this notion of equality moves beyond mere impartiality. The parties must do more than impartially consider all of the other interests had by each other party in making a decision or proposal. In addition, they are to make proposals that respect the constraints imposed by the veil of ignorance and the formal constraints upon principles of right. In particular, the veil of ignorance forces persons to recognize and consider only their most relevant features (and, hence, the most relevant features of each other) when offering principles. Also, the publicity condition demands that decisions be justifiable to each other party. The fact that persons are forced to recognize only the most relevant features of one another (especially the importance of highest-order interests) and that they must offer proposals that can be justifiable to one another comprises Rawls' notion of reciprocity. He writes, "...the idea of reciprocity lies between the idea of impartiality, which is altruistic, being moved by the general good, and the idea of mutual advantage understood as everyone's being advantaged with respect to each person's present or expected future situation as things are." (28) The parties are not to be regarded as

mere repositories for the preferences and aversions to be submitted to an impartial sympathetic spectator nor are they to attempt to imitate the decision-making process of such an agent. Rather, they are to submit proposals and positions to one another on the basis of their own highest-order interests that will be fully comprehensible and justifiable to each; they are subjects of cooperation, not objects of coordination. Equality, in short, implies reciprocity, not mere impartiality; equal treatment does not simply mean impartial treatment, but treating persons as equals.

Finally, the fact that, on this view, equality is seen as a "trump" over utility is obvious once we note that the original position is a form of the more general device of the social contract. When we view moral and political reasoning according to this device rather than that of the impartial sympathetic spectator, moral and political reasoning is portrayed as embodying the notion that each person has a veto over any decision proposed. (29) Such a veto would be impossible given the model of reasoning provided by the impartial sympathetic spectator. It is equality as understood by the original position, equality that is not seen as mere impartiality, that can explain and justify the legitimacy of such a veto power. In turn, it is the social contract in general (and Rawls' original position in particular) that allows us to give an adequate account of why we must reject the utilitarian notion of equality as impartiality and the unacceptable conclusions to which it may lead.

To take rights seriously, then, is to view them as based not merely on rationality but, rather, as based on both rationality and reasonableness. We take rights seriously, in other words, when we explain and defend them in terms of the fundamental individual right to equal concern and respect, which, I have argued, is sufficiently embodied by the original position. More specifically, we take rights seriously and uphold the right to equal concern and respect when we explain and defend them with regard to three essential ideas: 1) the conception of the person as a being who is capable of formulating, revising, and pursuing a determinant conception of the good and way of life according to her/his own tastes, abilities, and interests and according to principles that can regulate social interaction and cooperation between her/himself and other such beings, 2) the distinction between interests that, when respected, best reflect the view of persons as set out by this conception and those interests that, when acknowledged, least reflect this view, and 3) the derivative idea of equality as a trump over utility, which, in itself, reflects the first two ideas by giving each a veto over decisions that most profoundly effect one's capacities to form, revise, or pursue a conception of the good or conception of justice. This conception of equality is, as we have seen, recognized in moral and political argument when the fact that a decision that promises to promote a state of affairs in which some particular individual has certain basic interests satisfied or enjoys certain primary goods (i.e. is able to

form, revise, and pursue her own conceptions of the good and of justice within the framework provided by the principles of justice) counts as a good reason for adopting that decision even when that decision might threaten or inhibit the promotion of other social goals. Rawls' original position may not be the only model of moral and political reasoning that embodies such a right but I shall rely upon it in the remainder of this dissertation. The important point is that utilitarianism, as understood here, does not embody this richer conception of equality and, hence, cannot take rights seriously. In turn, the doctrine of free speech that stems from it may be based upon rationality, but it is hardly reasonable.

Speech, Equality, and
the Marketplace of Ideas

Initially, I introduced Mill's theory of free speech in order to consider whether or not (and to what extent) television programs containing blatant violence and explicit sex might be protected as free speech. I also introduced this theory in order to respond to some of the harms and wrongs that result from such programs that I discussed in the first chapter. Given the limitations of Mill's approach described in Chapter 2 and, even more importantly, the inadequacy of the conception of equality (and, more generally, of the scheme of moral and political reasoning) that form the basis of this approach, it seems best to put aside Mill's account of free speech. We require an account of free speech that takes this right seriously, that explains and defends this right in terms of the fundamental individual right to equal concern and respect, and that is based both on rationality and on reasonableness. Only once such a theory is given can we turn, once again, to the problems surrounding television programs containing blatantly violent and sexually explicit material.

In the remainder of this chapter, I wish to provide such a theory by developing and modifying a model of free speech that will be familiar to most of those who participate in philosophical and legal debate about this liberty, the model of the marketplace of ideas. In doing so, I shall point to various features of television that

demonstrate the need to reevaluate and alter this model in the light of the conception of equality sketched in the previous section. At the same time, I will show ways in which this model already exhibits and embodies the right to equal concern and respect and how viewing the marketplace model in this way has certain implications for television programming. Thus, I shall be interested in how the marketplace of ideas model (in so far as it reflects the right to equal concern and respect) aids us in understanding and resolving difficulties that stem from television programming. However, I shall also be interested in how the conception of equality developed earlier might strengthen this model so that it might handle other features of the television market that it has not confronted in its original form. It is at this point that we will be prepared to return to sex and violence on television in Chapter 4 and to consider how the problems described in Chapter 1 might be addressed in light of this alternative theory of free speech.

In order to construct a theory that takes the right to free speech seriously, we must construct a theory that explains and defends the right to free speech in terms of the right to equal concern and respect. This might be achieved by beginning with a detailed consideration of the view of the person as a being who is capable of formulating, revising, and pursuing a determinant conception of the good according to her/his own talents and abilities and according to principles that facilitate public interaction and cooperation between

such beings. Such reasoning would appeal to, among other considerations, the features and capacities of persons in this sense that would be dependent upon and served by language and to the individual interests that, when respected and protected, best reflect this view of the person.

This is the approach taken by David A. J. Richards, who uses Rawls' theory to articulate, defend, and criticize the religion, speech, and press clauses of the First Amendment and the body of law that has enriched and developed them.(30) Richards emphasizes the essential role that speech and writing play in the lives of the persons that inhabit Rawls' theory and in our own lives in so far as we are accurately and appropriately represented by this conception of the person. Given this connection between speech and writing and the conception of the person offered here and, also, given that it is this conception that is at the center of a strong individual right to equal concern and respect, a restriction upon speech may, Richards argues, constitute a partial denial of the rationality or reasonableness of persons; it may fail to treat persons as equals. This is especially true if the restriction is based upon judgments about the truth, worth, or appropriateness of the speech in question, for such restrictions usurp persons' powers of rationality and reasonableness, the powers that enable one to form, revise, and pursue a particular conception of the good and of justice and that are most evident when they are put to such ends. A right to free speech that is based on

both rationality and reasonableness, therefore, would guard against such usurpation and is grounded in the right to equal concern and respect. "Such protections," Richards concludes, "aim to disperse control of belief formation to all persons in the society and, therefore, to extend to every aspect of communication (including their media) through which persons as equals may express or realize their communicative integrity in conscience formation, exercise, and revision....Such communicative integrity, consistent with its background right, protects decisions whether, with whom, and how to communicate (both as speaker and as audience) about the issues central to our dual moral powers of rationality and reasonableness." (31) Free speech, then, is not justified according to the benefits that are likely to be obtained by its promotion or protection or, more generally, by its potential to advance or preserve some general social goal like general utility. Rather, it is grounded in an individual right, the right to equal concern and respect, which embodies a conception of equality that is most appropriate for a view of persons as beings who are capable of forming, revising, and pursuing a conception of the good and of participating in the formation, revision, and implementation of principles that make cooperation with such persons both possible and acceptable.

There is a pitfall to be avoided in Richards' approach. It would be a mistake, on Rawls' theory, to treat the conception of the person at hand (and, more generally, the original position which, by using

this conception, yields a model of reasoning that sufficiently embodies a right to equal concern and respect) as a starting point or foundation for a theory of free speech. This conception of the person and the model of moral and political reasoning that employs it, the original position, are just two of the many tools to be used in moral and political deliberation. The aim of such deliberation, for Rawls, is not to derive basic principles from fundamental premises about the person and moral and political reasoning. Rather, the aim is to reach what he calls "wide reflective equilibrium" among basic moral principles (e.g. the principle of equal liberty), considered intuitions and judgments (e.g. those intuitions about equality underscored by the series of examples in the previous section), and background theories concerning various aspects of the individual and society.⁽³²⁾ I am not claiming that Richards makes such a mistake. Indeed, his overall project is to provide a theory of constitutional interpretation that takes seriously the roles of political and legal theory, history, and the legal principles and considerations that have been emphasized and developed via the jurisprudence of various clauses of the U. S. Constitution. I am claiming, however, that to begin a defense of free speech with this conception of the person (or to initiate it from the standpoint of the original position), as Richards does, is to flirt with the possibility of making this error.

To avoid this pitfall and, at the same time, to tread on territory that is, in all likelihood, more familiar to most involved

in free speech debate, I urge that we begin not with a philosophical conception but, rather, with an existing model that has gained legal recognition and widespread support. This is the model of the *marketplace of ideas*. The aim will not be to derive a right to free speech from a philosophical conception of the person or of equality or of moral and political reasoning itself but, rather, to use such conceptions to articulate and evaluate a particular model of legal reasoning about free speech. We will consider both the extent to which such a model is capable of yielding a doctrine of free speech that is based both on rationality and reasonableness and how this model can be modified so that it more fully reflects such a doctrine. (This does not mean, of course, that Richards' approach is useless and I shall, in fact, draw upon it several times throughout this chapter.)

Beginning with the marketplace model has an additional advantage over Richards' approach. It allows us to shed light on one of the most popular responses to those harms and wrongs that result from television programming described in Chapter 1. If people find certain television programs distasteful or offensive or if they are concerned about the effects of certain programs upon themselves or their children, this objection contends, they should simply turn off such programs. Rather than arranging boycotts of certain programs or asking the government to restrict such programs, persons can tune out such programming and, perhaps, persuade others to do the same. Eventually, the television market will respond by canceling the

offensive program or by altering its content according to the desires of viewers. In the end, only the most acceptable and desirable programs will be offered and there will be no need for censorship. We can more fully and accurately evaluate this response once we understand the market model upon which it rests.

As I have said, I want to consider the extent to which the model of the marketplace of ideas, as traditionally understood, is capable of reflecting a doctrine of free speech that takes this liberty seriously and, too, how this model can be modified so as to more fully reflect such a doctrine. To avoid confusion, then, it will be best to distinguish between a *limited* and an *expanded* model of the marketplace of ideas. The limited model (that is, the model as it is traditionally understood) has two basic elements:

1. First, the marketplace of ideas , like the marketplace of goods and services, is thought to be driven by the preferences and aversions of the consumer. In the marketplace of ideas, the "consumer" is the rational and reasonable agent who selects or rejects ideas, beliefs, and values according to his/her conception of the good and sense of justice. By purchasing certain goods and services and avoiding others, the consumer plays a role in ultimately determining which goods and services will be available and, to some extent, what the value of these commodities will be. In the same way, the "consumer of ideas," in favoring some ideas and rejecting others, helps determine which ideas are acceptable and unacceptable and the

worth of these ideas.

2. The second element of the marketplace of ideas model is the principle of neutrality, which demands that the preferences and aversions of rational and reasonable agents are to be the only factors that determine the success or failure, value or worthlessness of any particular idea. This principle implies that no judgment by government (or, perhaps, by any individual or agency whatsoever) regarding the truth or worth of an idea is to be given prior to the entrance of that idea into the market. As summarized by Cass Sunstein, the principle of neutrality demands that, "All speech stands on the same footing. Thus, the protection accorded to speech extends equally to communists and Nazis, the Klu Klux Klan and the Black Panthers, Martin Luther King, Jr. and George Wallace." (33) Ideas are to be treated as equals (i.e. neutrally) in every respect before their entrance into the market.

The principle of neutrality also implies that one of the chief tasks of government is to enforce this principle in the operation of the marketplace of ideas. In other words, government is responsible for facilitating (and not regulating or manipulating) the exchange of ideas. The primary test of government's fidelity to this principle is whether or not it respects the resulting distribution of ideas (the distribution that, at any one time, makes some ideas most popular and others scarce). Such distributions are thought to be fair when the preferences and aversions of rational and reasonable consumers of

ideas are neutrally considered in the way just described. Thus, any attempt to manipulate the resulting distributions of ideas is viewed as a partisan (and, therefore, as an unjust) exercise of state power in the same way that the imposition of minimum wage or maximum working hour regulations were seen, in the 1920s, as unjust attempts to alter the distributions of benefits resulting from the marketplace of commodities in which similar rational and reasonable consumers have their preferences neutrally considered.(34) It is this aspect of neutrality that formed the basis of the Supreme Court's proclamation in *Buckley v. Valeo* that, "The concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment, which was designed to secure the widest possible dissemination of information from diverse and antagonistic sources." (35) To diminish or regulate the speech of some in order to enhance the speech of others is to engage in the kind of partisanship that is prohibited by the principle of neutrality.

According to this limited model of the marketplace of ideas, then, the right to free speech entails the right of a rational and reasonable "consumer of ideas" to have her/his ideas neutrally considered in the marketplace of ideas and to participate in and enjoy the benefits of the neutral consideration of the ideas of other such consumers. Yet, questions can be raised regarding the extent to which each component of this model, as realized in the context of today's

television market, reflects the various elements of a strong individual right to equal concern and respect. In other words, we can inquire into the extent to which the television market reveals these two components of the marketplace model and, in turn, the extent to which it reflects and embodies the right to equal concern and respect. We shall thus explore the degree to which the limited marketplace model reflects a right to free speech that is based on both rationality and reasonableness and, too, the degree to which the television market reveals this limited model. In the end, I shall offer an additional principle for regulating the marketplace of ideas, a principle that, given certain features of the television market and of the medium of television itself, is necessary if a doctrine of free speech that takes this right seriously is to be achieved.

Consider, first, the supposition that the television market is driven by the preferences and aversions of the rational and reasonable consumer of ideas, the television viewer. These preferences and desires, it might be thought, are generated by one's own conception of the good and sense of justice. They are the result of the sort of planning and reasoning characteristic of the persons imagined by Rawls' theory and, hence, the expression and pursuit of such preferences contribute to the formulation, revision, and pursuit of one's conception of the good and sense of justice. Were such suppositions not made, the marketplace of ideas model could not purport to be a model of free speech that adequately and appropriately

embodies the right to equal concern and respect, a right that must underlie any significant right to free speech.

It is this element of the model, perhaps, that makes it seem most readily applicable to television. The ideas that compete in television's marketplace of ideas are those that are conveyed by television programs and advertisements. Thus, the preferences and aversions that drive this market stem from two sources. First, television programs could not be created and distributed without substantial financial support from commercial sponsors who express their taste or distaste for a program through such support. Thus, for example, a determination by a large number of potential advertisers that a program is undesirable or inappropriate will mean its absence in the market.(36) The other source, as already noted, is the television viewer who has, in recent years, become even more like a traditional consumer in that he/she now directly "purchases" programs (or packages of programs) from cable television companies or via satellite dishes much like he/she might purchase any other product or service. This fact is regularly noted in cases concerning attempts to manipulate or regulate resulting distributions of ideas in the television market.(37)

The description of the preferences of the rational and reasonable consumer just given, however, may not be fully suitable for the preferences of the television viewer (i.e. the preferences that are to guide the television market). In Chapter 1, we saw that theories of

behavioral modification describe ways in which beliefs and behavior may be influenced with little (if any) conscious effort on the part of those exposed to certain forms of programming. Desensitization and disinhibition, for example, create, modify, or eliminate preferences for violence without our having to exercise the powers of rationality or reasonableness or our referring to a conception of the good or sense of justice. Other studies demonstrated that those individuals who are regularly exposed to sexually explicit films may become conditioned to react favoritively to such material so that, to a certain extent, such material perpetuates its own success.

Again, consider the television commercial as described in the previous chapter. There, following Neil Postman, I argued that the typical television advertisement takes the form of a religious parable, using music, vivid imagery, and other effects to show how lives are dramatically and instantly improved by technology and technique. "A McDonald's commercial, for example," Postman writes, "is not a series of testable, logically ordered assertions. It is a drama, a mythology, if you will, of handsome people selling, buying, and eating hamburgers and being driven to near ecstasy by their good fortune." (38) Here, preferences are not formed via reason but, rather, by emotional appeal; the television commercial does not address itself to our rationality or reasonableness but, rather, to our hopes, fears, and fancies. Its aim is to make us angry, ecstatic, sad, or frightened, not informed or persuaded. This is why Postman,

after noting the reliance of capitalist theories upon a marketplace model guided by principles similar to those just enumerated, asserts, "...the television commercial has mounted the most serious assault on capitalist ideology since the publication of Das Kapital." (39)

The problem, here, is that the marketplace of ideas model assumes that the market will be driven by the preferences and aversions of rational and reasonable consumers while the television market is, in fact, often driven by those of what we might call "manipulated" consumers. "Manipulation," write Martin Benjamin and Joy Curtis, "...puts a premium on the results of one's intervention...It is a mode of altering another's beliefs or behavior by subverting or bypassing his/her rational capacities." Manipulation is to be contrasted with rational persuasion, which "consists of appealing to another person's rational capacities in order to influence his/her behavior....Ideally, rational persuasion is conceived of as a dialogue in which the persons attempting to do the persuading recognize that those to whom they direct their arguments are their equals as persons." (40) Underlying the marketplace of ideas model is the assumption that the preferences and aversions of persons are shaped by rational persuasion (or some method similar to it), by a method that reflects and embodies the conception of the person essential to upholding the right to equal concern and respect. However, in practice, the television market makes at least some use (intentionally or unintentionally) of the technique of manipulation (whether it take the form of behavioral

modification or manipulative advertising), thus partially denying the status of viewers as persons. To the extent that this is so, the television market is not a genuine marketplace of ideas. In other words, the marketplace of ideas model, when applied to television, does not yield an account of the right to free speech that fully reflects the individual right to equal concern and respect.(41)

A variety of methods might be used to correct these "imperfections" in the marketplace of ideas. Television manufacturers might be encouraged to utilize technologies that enable viewers to block out programming that is, say, violent in nature, thus protecting individuals (and especially children) from the effects described by theories of behavioral modification.(42) Others might propose legislation that attempts to curb these effects by limiting advertising time during certain kinds of programming or the amount of violent scenes that can be shown during any one period.(43) Many will insist that such measures constitute censorship. Yet, it is important to note that such steps are taken to promote (rather than limit) free speech when this right is understood as explained and supported by a right to equal concern and respect and its corresponding conception of the person. The aim, on my view, is not to protect an unrestrained marketplace of ideas for its own sake but, rather, to aid the television market in reflecting a marketplace of ideas that takes free speech seriously. (I will say more about such measures in the next chapter when we return to the questions and problems surrounding sex

and violence on television.)

Speech and Power

Let us suppose that manipulation in the television market is substantially reduced so that, for the most part, this market is driven by the preferences of rational and reasonable viewers. Whether or not the limited model of the marketplace of ideas, as realized by the television market, embodies a right to free speech that is based on rationality and reasonableness will now depend upon whether or not a marketplace of ideas guided only by the principle of neutrality sufficiently reflects a right to equal concern and respect as described earlier. I shall argue that it does not fully reflect such a right and that the television market must be regulated by at least one additional principle, what I shall call a "principle of equity." While this expanded model of the marketplace of ideas may still be inadequate, it will, I think, be more acceptable than the limited marketplace model considered earlier, a model that conceives of the market as being governed solely by the principle of neutrality.

As a general rule, a marketplace of ideas governed only by the principle of neutrality does, indeed, reflect the right to free speech as explained and defended by the right to equal concern and respect. For example, we might appeal to the principle of neutrality in order to prevent government from censoring broadcasters who, through their programming, are conveying ideas that it views as false or to prevent

it from subsidizing those media enterprises disseminating ideas that it sees as correct. This appeal to neutrality, on the view I am defending, would not be for the sake of merely insuring the fairest market procedure but, rather, would be made in order to, as Richards put the point earlier, guard against the usurpation of the powers of viewers to determine and pursue their own conceptions of the good and of justice. Persons cannot accept such interference with the market and, at the same time, regard themselves as being treated as equals, as individuals who are capable of formulating, revising, and pursuing their own conception of the good according to their own interests, reasons, and abilities and according to principles that might facilitate cooperation between such individuals.(44) Such attempts by government to so blatantly manipulate the result of the marketplace of ideas are not unacceptable merely because they are partisan (which they are) but, more importantly, because they fail to uphold the right of each to equal concern and respect as earlier described. In other words, the marketplace of ideas is fair not because it treats ideas as equals but because it treats persons as equals.

Although, as a general rule, a marketplace of ideas governed only by the principle of neutrality (that is, the market as conceived by the limited marketplace model) reflects a doctrine of free speech that is based on both rationality and reasonableness, there are many instances in which this model fails to reflect such a view. Suppose that Smith, a staunch advocate of strict gun control, walks along a

busy city street trumpeting his beliefs through a powerful megaphone. He claims to be exercising his right to free speech. Upon being approached by individuals who wish to debate the matter with him and by others who merely want to persuade him to refrain from his insensitive and intrusive mode of communication, Smith continues to forcefully and loudly defend his beliefs, ignoring (or, perhaps, not hearing) the speech of others.

Proponents of the marketplace model may attempt to defend Smith's activity by suggesting that any measures that might be used to prevent him from speaking violate the principle of neutrality. They would argue that persons who disagree with him ought to subject their own views as well as the opinions held by Smith to the marketplace of ideas for consideration and evaluation and that any judgments prior to this procedure would be unjust. They would also maintain that objections to Smith's use of a megaphone are grounded in complaints about the relative power or force of his speech. To address such complaints would be to violate the *Buckley* maxim, which prohibits limitations on the speech of some in order to enhance the speech of others. Smith's action, on this view, would be an exercise of his right to free speech and be fully protected by the First Amendment.

One problem with this analysis is that neutrality, as understood here, is likely to undermine itself. Recall that the marketplace of ideas model depends upon the participation of rational and reasonable consumers of ideas alone for its results. Indeed, this is why

judgments about the truth or worth of an idea before the operations of the market commence and interference with these operations are prohibited by the principle of neutrality. Nonetheless, the use of a megaphone, in the current example, is inhibiting the participation upon which this model depends. Persons are prevented from affirming or rejecting the ideas being offered by Smith by the very power (i.e. the force and range) of his speech. In the end, we might even say that it is the power (and, in this case, the mechanical or acoustical power) of Smith's speech rather than the operations of the market that determine the success of his ideas. The measures that are meant to insure neutrality, those steps taken to shield the market from external (and possibly corrupting) forces, also permit those operations that define neutrality for this view to be extinguished.

Similar reasoning may have guided the Supreme Court's decision in *Red Lion Broadcasting Co. v. FCC*, which upheld various FCC regulations that formed part of the so-called "fairness doctrine."⁽⁴⁵⁾ In that case, Justice White wrote, "Just as the government may limit the use of sound amplifying equipment, potentially so noisy that it drowns out civilized private speech, so may the government limit the use of broadcast equipment. The right of free speech of a broadcaster, the user of a sound truck, or any other individual does not embrace the right to snuff out the free speech of others."⁽⁴⁶⁾ He added, "It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail rather

than to countenance monopolization of that market..."(47) Those who wish to salvage the marketplace model might urge that to "snuff out the speech of others" is to prevent individuals from offering, selecting, or rejecting ideas in the competition of the market. By engaging in such behavior, then, Smith is threatening that which shapes the neutrality of the market, namely, the participation of rational and reasonable consumers of ideas in the market and, in particular, their submission, selection, and rejection of ideas. In other words, Smith's speech (or, more precisely, its mode or medium) undermines or "snuffs out" free speech as it is understood on this view. Thus, proponents of the marketplace model might concede that certain regulations are needed in order to insure the most efficient, fruitful, and neutral competition in the marketplace of ideas. These might include, for example, permits for the use of megaphones or other amplification devices or guidelines describing when and where such speech is appropriate. Of course, such regulations must remain "content-neutral" so as to adhere to both aspects of the principle of neutrality as described earlier.(48)

If it is the principle of neutrality that enables the marketplace of ideas model, in general, to reflect the status of persons as equals, then this principle must be modified so that neutrality can, in fact, be preserved. Diminishing or restricting the speech of some in order to enhance the speech of others is not, contrary to the Buckley decision, "wholly foreign to the First Amendment." Indeed, if

the right to free speech guaranteed by the First Amendment is understood in terms of a marketplace of ideas governed solely by a principle of neutrality, then such manipulation may be necessary in order to uphold this right and, more precisely, to prevent this principle (or its enforcement) from undermining itself. Hence, the principle of neutrality does not merely require that government facilitate the operations of the marketplace by refraining from interfering in these operations. More generally, this principle requires it to guard against those institutions and practices that threaten the integrity and neutrality of the market, even when this means direct interference with the operations of the market or intervening in the activities of particular individuals involved in the exchange of ideas.

There is, however, another problem with defending Smith's speech in terms of the marketplace model. The concern, here, is not so much with the preservation of the market itself but, more directly, with the respect due to the individuals who are ignored or disregarded by Smith. Thus far, the problem with a defense of Smith in terms of the marketplace model has been expressed only with regard to the ideas that are or are not subjected to the scrutiny of the market and to the process via which such scrutiny takes place. However, this second difficulty turns our attention from the treatment of ideas to the treatment of individuals and, in the end, will point to considerations that remain unacknowledged by a marketplace of ideas governed only by

the principle of neutrality.

Let us consider the example at hand simply in terms of the three-fold conception of equality developed earlier in this chapter. Consider, first, the view of the person that is at the center of this conception. In the present case, a difficulty arises because the capacities of individuals as *listeners* are ignored by Smith. A "listener" (and, too, a "speaker"), here, is not merely one who can participate in the marketplace by offering and selecting ideas. More importantly, speakers and listeners are those agents who can, via their rationality and reasonableness, form, revise, and pursue a determinant conception of the good according to their own abilities and interests and according to principles that facilitate cooperation between them; speakers and listeners are persons.

There are a variety of implications for a doctrine of free speech that is to treat individuals as speakers and listeners (and, ultimately, as persons). For example, listeners not only receive, select, and reject ideas, they understand, evaluate, and criticize them and this understanding and evaluation occurs with reference to their own conception of the good and sense of justice. Upon completing the understanding and evaluation of an idea, listeners are also respondents in that they react to the idea by questioning, challenging, or defending it (though, of course, the response need not be overt). In short, listeners must be treated not merely as rational and reasonable consumers of ideas but, more significantly, as rational

and reasonable participants in meaningful dialogue.

Some of the conditions that must be satisfied in order to treat individuals as speakers and listeners may differ from those that must be fulfilled when individuals are to be treated as participants in a neutral marketplace of ideas (though there will, without doubt, be some overlap between these two sets of conditions). For example, I have suggested that to treat persons as listeners is, in part, to treat them as respondents. The limited model of the marketplace of ideas treats persons in this fashion simply by permitting them to offer their own ideas about issues to the market. Nonetheless, if we understand some of the conditions under which an individual is most likely to respond (e.g. when a matter concerns him directly or severely challenges his way of life), there may be situations in which such conditions are met and in which it would, therefore, be a violation of that individual's right to free speech to refuse to grant him a right to reply.⁽⁴⁹⁾ We might, in this vein, also discuss the conditions that must be met if a person as listener is to understand ideas and argue, say, that avoidable illiteracy is a violation of one's free speech right. These conclusions might seem odd to some, but they are the result of an account of the right to free speech that takes this right seriously.

Smith's speech is unacceptable because it fails to treat individuals as listeners, as persons with the features and capacities just mentioned. Like the technique of manipulation, Smith's speech

forecloses (or, at least, inhibits) dialogue, dismissing this view of the person. However, rather than bypassing or subverting the capacities essential to this conception of the person (and especially to the person as listener), Smith's speech simply ignores or denies these capacities. Moreover, the conditions that must be met in order to treat individuals as listeners are not satisfied as a result of Smith's behavior. These conditions include many of those already discussed when considering the maintenance of a neutral marketplace of ideas. After all, if the market is not neutral from the outset, then the view of the person at the center of the right to free speech as I understand it is not reflected in this model. This account explains our intuition that, even if neutrality were not undermined by Smith's action, his behavior would remain unreasonable. At bottom, his behavior fails to treat persons as equals by ignoring the capacities that help define persons as listeners and by threatening the conditions under which persons can be recognized as such. Once again, we must be attentive to both the treatment of ideas and of persons.

It is the power of Smith's speech (determined, in part, by the resources that facilitate his communication and the mode of this communication) that enables him to overlook or ignore individuals as persons. Yet, a marketplace of ideas governed only by a principle of neutrality fails to reflect equal concern and respect in another way. This principle urges, as we have seen, that all speech "stands on the same footing." It is to be upheld regardless of the power of the

speech as determined by the context, mode, and resources that support speech. However, protecting all speech without regard to its power is, in some cases, to ignore the distinctions between those interests that most and those that least reflect the view of persons at the center of the individual right to equal concern and respect.

For example, let us suppose that Smith has not a megaphone, but a sophisticated communications system that allows him to convey ideas and information in a variety of forms and to mass audiences. Smith's speech is, due to the variety of forms of communication he may utilize, the material and financial resources at his disposal, and the potential range of his communications, quite powerful. It is powerful, once again, not because of its content but, rather, due to the circumstances that define the way in which it is conveyed. To protect his speech is to protect not only the interests traditionally supporting a right to free speech but, in addition, many of his financial, property, and other interests. Affording the same degree of protection to some (or, perhaps, most) of these interests as is given to traditional speech interests may blatantly ignore the distinction between interests that must exist if a right to equal concern and respect is to be acknowledged. This may be why the Supreme Court, in *Red Lion*, states, "It is the right of viewers and listeners, not the right of the broadcasters, which is paramount." (50) In other words, it is the traditional speech interests of individuals *qua* speakers and listeners rather than any additional interests of

individuals qua broadcasters (e.g. an interest in turning a large profit or in utilizing one's property) that deserve significant protection. To protect powerful speech may be, in effect, to treat all of these interests with the same degree of consideration.

Powerful speech in the marketplace of ideas, then, may yield concerns and questions about the extent to which such a market, governed only by the principle of neutrality, is capable of reflecting a strong individual right to equal concern and respect. The presence of powerful speech in a neutral marketplace of ideas may raise concerns about the maintenance of this market with regard to its efficiency or neutrality. Also, the presence of such speech might give rise to questions about the extent to which individuals are treated as speakers and listeners and to which the conditions for treating persons in this way are satisfied. Power is, perhaps, only one of the features of speech (or of speakers) that leads to such issues but, given the power of speech when conveyed via television, it is a factor that must be considered in any doctrine of free speech that is to be applied to this medium.

Several features of television and its market render speech on television quite powerful. Three of these features are especially noteworthy. First, television, as a medium, has a substantial range, especially in the United States. Nearly every home has a television set and many homes have several; television reaches mass numbers of individuals. Also, as discussed in the previous chapter, television

programming reaches people of all levels of intelligence and experience, children as well as adults, the mentally impaired as well as the intellectually gifted, the poor as well as the rich. It is a medium that does not differentiate into categories or classes the individuals that partake in its offerings.

Second, communication via television is costly given the technology and skills involved in the production and distribution of television programs. Due to this direct relationship between speech and capital, it is possible to "snuff out" the speech of others merely by outspending them, whether one is a political candidate seeking a public office or a commercial sponsor attempting to alter television programming.(51) The power of speech on television is determined, in part, by the financial resources invested in it. The sound truck or megaphone, in such cases, is the pocketbook.

The final feature of television that contributes to the power of speech when it is conveyed via this medium is, in fact, a set of characteristics that describe the way in which information is conveyed by this medium. Television has changed the form, speed, and direction (e.g. whether information flows from a single source to many people or, say, between many persons simultaneously) more radically than at any other time in history.(52) In the previous chapter, we saw how such a change has effected various kinds of discourse such as political discourse and discussion of important social issues. In these areas, I argued, using the work of Neil Postman and others, that

the speed and form of information in a television newscast, for example, has transformed what most people take to be serious public discourse, that the current view of serious discourse is instant, eye-catching, straightforward communication. In short, we might simply say that television amplifies discourse because it simplifies it; the medium of television, itself, is a very powerful (that is, a technologically powerful) megaphone.

The range of television as a medium, the strong relation that is established between speech and economic and material resources by the television market, and the characteristics of television as a medium (e.g. the form, speed, and direction of its information) work together to make speech on television quite powerful. Television is, as already suggested, very much like a powerful megaphone and, therefore, gives rise to many of the questions and concerns introduced in the example involving Smith. If we take the television market (that is, the marketplace of ideas in so far as it is produced and sustained by television) as an element of the marketplace of ideas in general, these questions and concerns can be put into three classes: 1) those concerning the efficiency and neutrality of the marketplace of ideas, 2) those concerning the extent to which individuals who participate in the marketplace are recognized as speakers and listeners and to which the conditions that must be met for such recognition are satisfied, and 3) those concerning the interests that are at stake in issues arising from interactions between the television market and the

marketplace of ideas in general, especially when these interactions are gauged with regard to the power of speech on television. Notice that, because the second class of concerns are those regarding the extent to which individuals are treated as persons, we can include those problems surrounding the presence of manipulation in the television market discussed in the previous section under this head.

Questions and concerns surrounding the efficiency and neutrality of the market can, as we have seen, be addressed without resorting to any additional principles other than that of neutrality itself. The problem, in such instances, is not that the principle of neutrality is inadequate but, rather, that this principle (or its enforcement when understood in the most narrow sense) risks undermining itself. Permits, time and place regulations, and other such measures might be implemented in order to resolve many of the difficulties cited by the first class of concerns just noted. The creation of the Federal Communications Commission and the regulations at issue in *Buckley* also aid in resolving such difficulties. (53)

It is the second and third class of concerns (those regarding the extent to which individuals are treated as speakers and listeners and those concerning the individual interests at stake when the television market is seen as part of the marketplace of ideas in general) that call for a *principle of equity* in addition to the principle of neutrality. The aim of this principle is to insure that the marketplace of ideas model, as an account of the right to free speech,

captures the three-fold conception of equality set out at the beginning of this chapter. Such a principle would dictate, among other measures, steps to fulfill the conditions under which individuals are treated as speakers and listeners, including those discussed in the previous section that reduce the occurrence of manipulation in the television market. It would also demand consideration of the individual interests involved when powerful speech is present in the market. The aim, here, would not be to weigh individual interests against one another but, rather, to respect the distinction between those interests that best reflect and those that least reflect the conception of the person that is essential to the right to equal concern and respect.

I will not work out, in detail, the variety of implications for the television market yielded by a marketplace of ideas governed by both the principle of neutrality and the principle of equity. Rather, in the next chapter, I want to use this model in order to address some of the harms and wrongs cited in Chapter 1. We shall see, in the next chapter, how television programs containing sex and violence precipitate the sorts of questions just enumerated. I want to use the marketplace of ideas model, as it has been modified here, to consider whether or not the right to free speech can and should be extended to television programming that contains blatant violence and explicit sex and, also, how this expanded marketplace model might be used to respond to the harms and wrongs brought about by such programming.

Notes

1. Taking Rights Seriously by Ronald Dworkin, Harvard University Press, c. 1978.
2. I shall be drawing primarily from A Theory of Justice, Harvard University Press, c. 1971, and Political Liberalism, Columbia University Press, c. 1993.
3. This model was first given legal precedence in Justice Holmes' famous dissent in *Abrams v. United States* (250 U. S. 616, 1919). Holmes writes, "But when men realize that time has upset many fighting faiths, they may come to believe (even more than they believe the very foundation of their own conduct) that the ultimate good desired is better reached by free trade in ideas, that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That, at any rate, is the theory of our constitution." (@630)

Other cases explicitly invoke this model. For example, Justice Powell, writing the majority opinion in *Gertz v. Robert Welsh, Inc.*, states, "We begin with the common ground. Under the First Amendment, there is no such thing as a false idea. However pernicious an opinion may be, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas." (418 U. S. 323, 1974, @339) Later, when I more fully examine the elements of this model, other illustrations of its prominence will be offered.

4. Utilitarianism by J. S. Mill, edited by Oskar Piest, Bobbs-Merrill Co., c. 1957, p. 16.
5. *ibid.*, pp. 72-73
6. On Liberty and Other Writings by J. S. Mill, edited by Stephen Collini, Cambridge University Press, New York, c. 1989, p. 196.
7. Taking Rights Seriously, p. 91
8. Dworkin distinguishes between a right and a goal by referring to the "distributional character" of the justification that refers to the state of affairs that is to serve as the political aim. When the benefits and burdens generated by this state of affairs are discussed in general terms (i.e. without reference to the benefits and burdens received by or assigned to particular individuals), the state of affairs is a goal. Although I find this way of putting the matter intriguing, I avoid this explanation here because it can be rather cumbersome for both reader and writer. See *ibid.*, pp. 89-93.
9. *ibid.*, p. 198. Dworkin is not, of course, the only writer to discuss individual rights as constraints upon the pursuit of social goals. For example, Charles Fried has stated, "The right to a fair trial implies, in the case of indigency, the right to a lawyer and, even without implying such a right, a fair trial is clearly a costly procedure in terms of time and resources. But, more dramatically, my right to freedom of speech and of conscience only has bite if respecting those rights is a real constraint on the pursuit of some other social goals. To say that a right is a right only when its

recognition puts a spoke in no one else's wheel at all is just to say that there is no such thing as rights." See Medical Experimentation: Personal Integrity and Social Policy, North Holland Publishing Co., Amsterdam, c. 1974, p. 93.

10. Rawls first set forth this distinction in "Kantian Constructivism in Moral Theory," Journal of Philosophy, Vol. 67, 1980, pp. 527-530. He provides a clearer and fuller explanation of this distinction in Political Liberalism, pp. 48-58.

11. The view at which we shall arrive will also agree with the defense of individual rights suggested by Dworkin. He asserts, "Anyone who professes to take rights seriously and who praises our government for respecting them must...accept, at the minimum, one or both of two important ideas. The first is the vague but powerful idea of human dignity....The second is the more familiar idea of political equality..." See Taking Rights Seriously, pp. 198-199.

12. See, especially, pp. 411-415.

13. Political Liberalism, p. 50

14. Theory, pp. 26-27

15. It might be objected that I have oversimplified Mill's position by attempting to model it via the device of the impartial (and rational) sympathetic spectator. Mill is not, it might be urged, merely concerned with the coordination and manipulation of pleasures and pains, benefits and harms, or preferences and aversions. Rather, the life, conduct, and development of each individual is most important to

his theory. The principle of liberty, after all, is a principle of individual liberty, demanding that persons be permitted to live their lives as they see fit so long as their conduct or way of life does not harm others. Also, the eloquent and vigorous defense of individuality in Chapter 3 of On Liberty should serve as further evidence of Mill's concern for the individual.

Finally, the objection might continue, in his Considerations On Representative Government (a work that might be regarded as the climax of Mill's political thought), Mill insists that the merit and legitimacy of a government is to be evaluated, primarily, in terms of the tendency of that government to utilize and contribute to the development of the abilities, capacities, and talents of those it is to govern. The foundation of the merit of government, asserts Mill, "...consists, partly, of the degree in which they [the political institutions that comprise the government] promote the general mental advancement of the community...and, partly, of the degree of perfection with which they organize the moral, intellectual, and active worth already existing so as to operate with the greatest effect upon public affairs. A government is to be judged...by what it makes of the citizens and what it does with them." (See Considerations On Representative Government edited by K. Shields, Bobbs-Merrill Co., Liberal Arts Press, c. 1958, pp. 27-28.) Thus, the objection concludes, both in the defense of the principle of liberty and in the evaluation of government, it is the abilities, capacities,

and other qualities of individuals and the development of these abilities and qualities (rather than mere overall net benefit) to which Mill ultimately appeals.

A refutation of this objection will become clearer in the pages that follow. For now, it is sufficient to note that I do, indeed, concede that I have oversimplified Mill's position. Yet, it is the goal of general utility itself rather than utilitarian reasoning (and, in particular, its wholly rational character) that I might be accused of misrepresenting. In On Liberty, Mill notes that individual character and development is the "chief ingredient of human happiness." He adds, "If it were thought that the free development of individuality is one of the leading essentials of well-being, that it is not only a coordinate element with all that is designated by the term 'civilization' -- instruction, education, and culture -- but that it is, itself, a necessary part and condition of all those things, there would be no danger that liberty should be undervalued..." (p. 57) Thus, maximum overall net benefit or the general happiness may be, on Mill's view, more complex than I have indicated in the text. However, it would be wrong, I think, to conclude that individual development or the individual's ability to pursue her/his own good in her/his own way is prior to or more fundamental than these goals; such considerations may enrich or give shape to the goal of general utility but they do not override or supersede it. (cf below, note 21.)

16. Here, I slightly alter a pair of examples given by Dworkin in "Do

We Have a Right to Pornography" in A Matter of Principle, Harvard University Press, c. 1985, pp. 360-361.

17. Utilitarianism, p. 76

18. Some writers have argued that this way of interpreting the principle of liberty is too simplistic. To understand the principle of liberty as demanding an impartial view of all individual interests is to ignore some of its more intriguing applications as these are made by Mill himself. For example, David Dyzenhaus, in an illuminating interpretation of On the Subjection of Women, argues that this principle must be seen as protecting not only mere injury to individuals but, also, as securing very basic interests for each individual. Thus, he writes, "...On Liberty is written in order to combat a predominant, growing, and false conception of interest....Mill's understanding of harm is normative in so far as one of the harms he is concerned about is harm to the interest individuals have in autonomy." In this way, On the Subjection of Women is to be viewed not as a plan for the liberation of women based upon the overall net benefit such liberation promises but, rather, as a documentation and rejection of the suppression of women by men via a systematic social coercion that is wrong in itself because it inhibits the pursuit by women of their interest in autonomy. See "John Stuart Mill and the Harm of Pornography" by David Dyzenhaus, Ethics, Vol. 102, 1991, p. 545. As shall become clear soon, if Dyzenhaus is correct, this would constitute a serious modification of

utilitarianism and, indeed, may not be a form of utilitarianism at all as I have characterized it thus far.

19. Compare A Matter of Principle, pp. 361-362.

20. It might be argued that Mill, himself, would be willing to concede this point. As already noted, Mill insists that equality as impartiality is the "highest abstract standard" of justice and acknowledges that the principle of utility would be an unacceptable principle without a corresponding principle of impartiality. Also, in the Considerations On Representative Government, he makes a distinction between "true" and "false" democracy, conceptions of democracy that insure representation of all and representation of the majority only, respectively. Mill favors "true" democracy, arguing that, unless the minority receives a fair share of representation in the government, "there is not equal government but a government of inequality and privilege. One part of the people rules over the rest," which is "contrary to the principle of democracy, which professes equality as its very root and foundation." (pp. 103-104) Later, Mill writes, "Democracy is not the ideally best form of government...unless it can be so organized that no class, not even the most numerous, shall be able to reduce all but itself to political insignificance and direct the course of legislation and administration by its exclusive class interests." (p. 128) Through proportional representation and a procedure for insuring that all interests and claims are heard in the popular assembly, such equality, Mill claims,

can be guaranteed.

Yet, there are two important qualifications to Mill's demand for equality here. First, there is a qualification based upon the simple appeal to the principle of utility. Mill writes, "...it is a personal injustice to withhold from anyone, *unless for the prevention of greater evils*, the ordinary privilege of having his voice reckoned in the disposal of affairs in which he has the same interest of other people." (p. 131, my emphasis) More importantly, however, those who are illiterate (pp. 131-133) or who might show a lack of fiscal responsibility (due to, say, failure to pay taxes or receipt of charity, pp. 133-134) are excluded from the suffrage. Also, plural voting is to be given to those with more extensive education or who have demonstrated significant intellectual ability. (pp. 136-139) These exceptions are important because they illustrate the modified goal of general utility mentioned earlier. (See note 15.) In the end, the goal that is to be pursued, perhaps, is one that might be described by what Dworkin calls the "virtuous society." On this view, persons are treated equally not merely by being impartially considered in the utilitarian calculation but, in addition, when they are given equal concern and respect in proportion to the extent to which they exhibit (or promise to exhibit) the virtues and attributes essential to a certain conception of the "good person" or the "good life." Indeed, it is remarkable to note the number of parallels between Dworkin's description of this notion of equal concern and respect

(what he terms a "conservative" conception of equality) and Mill's doctrine as it is set forth in the Considerations. (cf Matter of Principle, p. 198.)

21. Such preferences are labeled "external preferences" by Dworkin.
22. One might argue that Dyzenhaus provides just such a modification with his interpretation of On the Subjection of Women. Yet, given the rejection of impartiality and the richer conception of the person implicit in his discussion, the version of utilitarianism he offers looks more nonutilitarian than utilitarian. I will not pursue this argument here.
23. These elements are discussed in Theory, pp. 130-150.
24. Political Liberalism, pp. 71-74
25. *ibid.*, pp. 187-190
26. *ibid.*, pp. 66-72
27. *ibid.*, pp. 49-50
28. *ibid.*, p. 17
29. Taking Rights Seriously, p. 174
30. Toleration and the Constitution by David A. J. Richards, Oxford University Press, New York, c. 1986.
31. *ibid.*, pp. 169-170
32. See Theory, pp. 46-50.
33. "Free Speech Now," p. 259
34. The connection between government as a mere facilitator of commercial interaction in the marketplace of goods and services and

its role in the marketplace of ideas as I have described this model here is pursued by Cass R. Sunstein in "Free Speech Now," University of Chicago Law Review, Vol. 59, 1992, pp. 263-267. For a more general discussion, see his "Neutrality and Constitutional Law with Special Reference to Pornography, Abortion, and Surrogacy," Columbia Law Review, Vol. 92, 1992, pp. 1-12. For more recent discussion and important elaboration, see his Democracy and the Problem of Free Speech, McMillan, the Free Press, c. 1993, especially Chapter 2.

35. *Buckley v. Valeo*, 428 U. S. 1, 1976, @48-49.

36. Some examples are given in "Free Speech Now," pp. 282-283.

37. For example, in *Turner Broadcasting Systems, Inc. v. FCC*, in which the Court considered the "must carry" provisions of recent legislation governing the operations of the cable industry, the Court writes, "At the heart of the First Amendment lies the principle that each person should decide for him/herself the ideas and beliefs deserving of expression, consideration, and adherence. Our political system and cultural life rest upon this ideal." The Court adds that the provisions at issue "raise the specter that the government may effectively drive certain ideas or viewpoints from the marketplace."

38. Amusing Ourselves to Death: Public Discourse in the Age of Show Business by Neil Postman, Penguin Books, New York, c. 1985, p. 125.

39. *ibid.*, pp. 127-128. Sunstein documents other ways in which the preferences and aversions of viewers are regularly manipulated by advertising and news programming in Democracy and the Problem of Free

Speech, pp. 59-60, 73-74.

40. Ethics In Nursing by Martin Benjamin and Joy Curtis, Oxford University Press, 3rd ed., c. 1993, pp. 63-64.

41. It should be noted that Rawls is not unaware of the ways in which preferences are shaped by manipulation in the marketplace of ideas. For example, in the realm of advertising, he distinguishes between advertising that informs consumers about prices and features of products and what he calls "market strategic advertising." This second kind of advertising mirrors the technique of manipulation described by Benjamin and Curtis because its primary aim is to expand market shares or to preserve one's hold on or position in an industry; in short, it puts a premium on consequences. In these cases, "Advertising tries to influence consumers' preferences by presenting the firm as trustworthy through the use of slogans, eye-catching photographs, and so on, all designed to form and strengthen the habit of buying the firm's product." Rawls concludes, "Much of this kind of advertising is socially wasteful and a well-ordered society that tries to preserve competition and to remove market imperfections would seek reasonable ways to limit it." See Political Liberalism, pp. 364-365. Of course, such arguments need not be restricted to the television market. Manipulative advertising anywhere in the marketplace of ideas will, on this view, be unacceptable.

42. Brandon Centerwall, in a study cited in the previous chapter, favors just such measures. See "Television Violence: The Scope of the

Problem and Where to Go from Here" in Journal of the American Medical Association, Vol. 267, 1992, pp. 3062-3064. Similar measures are summarized by a front page story, "Television Violence: A Closer Look," in the New York Times, Dec. 15, 1994.

43. Such legislation includes, for example, the Children's Protection Against Violent Television Act of 1993, defended in "The Television Time Bomb," New York Times, July 27, 1992. Also, see Sunstein's discussion of the Children's Television Act of 1990 in "Free Speech Now," pp. 257-258.

44. T. M. Scanlon advocates governmental neutrality with regard to ideas in a similar manner. For Scanlon, this neutrality is supported by a principle of legitimate governmental authority which states that, "a legitimate government is one whose authority citizens can recognize while still regarding themselves as equal, autonomous, rational agents." When government favors ideas because it sees them as true or attempts to censor them because they appear to be false, it violates this principle and, in my words, the right to equal concern and respect. See "A Theory of Freedom of Expression," Philosophy and Public Affairs, Vol. 1, 1972, pp. 214-216.

45. 395 U. S. 367, 1969

46. *ibid.*, @387. It is this passage that spawned the example I have been considering.

47. *ibid.*, @390 citing (with approval) *Associated Press v. United States*, 326 U. S. 1, 1945, @20.

48. Such reasoning may have also led, in part, to the creation of the Federal Radio Commission and its predecessor, the Federal Communications Commission. Compare *ibid.*, @379-383. For fuller discussion of these matters, see "Liberal Constraints on Private Power: Reflection on the Origins and Rationale of Access Regulation" by Stephen Holmes in Democracy and the Mass Media edited by Judith Lichtenberg, Cambridge University Press, c. 1989, pp.22-55 and compare Toleration and the Constitution, pp. 216-217.

Other regulations regarding the use of "public forums" has been regularly upheld by the Supreme Court in order to maintain the efficient and productive use of such areas for speech. For example, in *Forsyth County, GA v. Nationalist Movement*, the Court affirms its commitment to the use of permits for regulating the uses of such areas given the satisfaction of various conditions, including that the regulation in question not discriminate on the basis of content. (111 S. Ct. 2395, 1992, @2401 citing *Cox v. New Hampshire*, 312 U. S. 569, 1941, @574-576.)

49. The issue of equal reply time for one who has been personally attacked on a radio broadcast is at the center of the *Red Lion* case.

50. 395 U. S. 367, @387

51. I have already cited information regarding the influence of advertisers in previous notes. We need only look at the success of Ross Perot in the 1992 Presidential campaign who spent \$60 million of his own money, mostly on television advertising.

52. Postman refers to these features collectively as describing the "information environment" of a given medium. See Teaching As a Conserving Activity, Dale Publishing Co., New York, c. 1979, especially Chapter 2.

53. See note 48 above.

Some Applications:

Justifiable Restriction and Prevention

A theory of free speech must include at least two elements if it is to be complete. First, it must explain and justify freedom of speech in terms of the goals to be advanced, the values and purposes to be served, and/or the individual interests to be protected by this liberty. We must know, in other words, what privileges, opportunities, and claims are entailed by this liberty and why it deserves to be protected and promoted. Second, a complete theory of free speech must identify and describe the conditions under which speech can be legitimately restricted or prohibited and give some indication as to why these conditions (and not others) are to serve as the criteria for determining the legitimacy of restrictions. Threats, bribes, conspiracy, coercion, perjury, and many other speech acts are restricted without raising any questions or concerns about free speech. A theory of free speech must be capable of justifying such restrictions. Moreover, criteria for determining when (and if) other restrictions might be appropriate or necessary must be offered.

In this dissertation, I have considered two theories of free speech, Mill's theory of free and open discussion and the theory of free speech that is based upon both the limited and the expanded model of the marketplace of ideas. I introduced these theories for two reasons. First, I wished to consider whether or not a right to free speech, as explained and justified by some of the more traditional

political theories that celebrate this liberty, could be extended to protect television programs, especially those containing blatantly violent or sexually explicit material. I also wanted to explore the extent to which restrictions upon such programming, given the harms and wrongs that can and do result from it, might be justified by these theories. These harms include the injurious and destructive behavior that can and does result from the psychological effects of such programming upon those individuals who are exposed to it. We should also be concerned, I urged, with the harms and wrongs that stem from the illocutionary force of acts of expression, with the speech act that might, in and of itself, constitute a harmful or wrongful act given the appropriate content and context. Most important among such speech acts were those that ranked persons or groups of persons as inferior and those that silenced individuals in one of the ways discussed in Chapter 2.

In Chapter 2, we saw that Mill provides a complete theory of free speech in the sense just mentioned. According to Mill, free and open discussion is to be explained and justified with regard to the benefits that are likely to be obtained by (and those that have been realized in) those societies that protect and promote it. Such benefits include the opportunity to render opinions more plausible or acceptable, to affirm their utility, to increase our confidence with regard to them, and to foster individual development. Mill's theory of free speech also provides criteria for determining when

restrictions upon speech are justified. Speech or discussion may be restricted, first, when it promises to decrease overall net benefit or, second, when it is likely to threaten or extinguish the conditions under which the benefits of free speech can be enjoyed. Given the inability of some of the more popular arguments for restricting television programs containing sex and violence to meet these criteria and, too, given that such programs (like most television programs) are likely to lead to benefits akin to those promised by free and open discussion in general, I argued that, on Mill's view, such programming must be protected and that efforts to restrict it must be resisted.

Yet, as I also argued in Chapter 2, there are many problems with Mill's theory of free speech, especially when it is applied to television. Among the more serious difficulties with Mill's approach are its inability to account for the silencing of individuals that can be brought about by some speech acts and the reliance of this theory upon a form of discourse that is not revealed by the typical television program. More significantly, I argued that, in conceiving the right to free speech as instrumental to the pursuit of the goal of general utility rather than as a possible constraint upon this pursuit, Mill's theory does not reflect the intrinsic value of this right nor the fundamental role that it plays in our institutions and practices. In particular, I maintained that the conception of equality (and, more generally, the scheme of moral and political reasoning) upon which Mill's theory is based does not sufficiently

reflect the status of persons as beings who are capable of forming, revising, and pursuing a determinant conception of the good according to their own abilities and interests and according to principles that facilitate cooperation between them. I also urged that this conception of equality ignored the distinction between interests that, when respected, best reflect this view of the person and those that, when respected or protected, do not (e.g. the distinction between one's interest in being able to determine one's own conception of the good and in having a say in what conception of the good others ought to adopt, respectively). In short, I claimed that Mill's theory does not take rights (including the right to free speech) seriously.

A moral or political theory that takes the right to free speech seriously would describe, develop, and justify this right in terms of a strong individual right to equal concern and respect. More specifically, it would reflect the conception of the person just noted and the distinction between interests that best reflect this conception and those that do not. In turn, such a theory would be a theory of free speech that is, in Rawls' words, based on both rationality and reasonableness. Initially, I proposed a *limited* model of the marketplace of ideas as a starting point for such a theory. This model imagined a procedure governed solely by a principle of neutrality in which rational and reasonable consumers of ideas determined the truth, merit, and worth of an idea. It became apparent, however, that modifications to the principle of neutrality

as well as an additional principle, the principle of equity, would be necessary in order to permit the marketplace model to more fully embody a strong individual right to equal concern and respect (and the conception of the person at the heart of this right).⁽¹⁾ The need for such an *expanded* model of the marketplace of ideas was especially evident in the light of certain features of television (and of the television market) that dramatically enhance what I called the "technological" power of speech on television.

What remains, then, is to consider the restrictions upon speech that might be justified by this theory and the criteria according to which these restrictions are to be assessed. Although some suggested restrictions were given towards the end of the previous chapter, many of these were mentioned in passing and most were not specifically aimed at television programs containing blatant violence and explicit sex. In this chapter, then, I want to consider the kinds of restrictions (as well as other measures) that might be justified by the theory of free speech developed in the previous chapter (which I shall now refer to as the theory of *free and equal speech*) by exploring the ways in which this theory might respond to the harms and wrongs described in Chapter 1. I shall also show why some of the more popular arguments for restricting television programs (those primarily grounded in concerns about behavioral modification) *cannot* be justified on my view. In place of such restrictions, I will propose certain "preventative measures" that can be implemented by

individuals in their homes and elsewhere that may reduce the harms that may result from behavioral modification. I will also use this chapter to anticipate and respond to an objection that might be made to the application of the theory of free and equal speech as I have developed it thus far to television programs that contain explicit sex or blatant violence.

Justifiable Restrictions and Preventative Measures

In Chapter 1, I placed the harms and wrongs that can and do result from television programs that contain blatant violence and explicit sex into two classes. These classes include those harms resulting from the effects described and predicted by psychological theories of behavioral modification and those that stem from the illocutionary force of television programs as speech acts. Hence, I want to treat these two classes separately here. In each case, I will review the kinds of harms and wrongs that fall into the class at issue and the relation between these harms and wrongs and the programs under scrutiny. I will also make some additional remarks about each type of harm in light of the discussion that has taken place since they were introduced in Chapter 1. I shall be particularly interested in showing how certain features of television are related to (and, in some cases, how they intensify the influence of) the processes through which such harms and wrongs arise. Finally, I will consider some of

the ways in which the theory of free and equal speech might respond to these harms and wrongs and what steps can be taken, on this view, to mitigate or eliminate them.

Before turning to restrictions upon programs containing blatant violence and explicit sex, however, it is worth noting some similarities between the way in which free speech is conceived by my theory and by Mill's theory and, too, between the kinds of restrictions that are justifiable according to each view. On both views, freedom of speech entails (at the very least) the liberty to participate in a procedure that, when appropriately regulated and maintained, is to determine the truth, merit, and worth of an idea. This procedure is, for Mill, the process of free and open discussion while, on my account, it is described in terms of a neutral and equitable marketplace of ideas. Thus, free speech may well depend upon the possibility of interaction and cooperation with others and upon facilitating such cooperation. It might be more profitably compared, then, to, say, the right to a fair trial (which, it seems, must also be understood in terms of participation in a procedure) than to other liberties such as the right to keep and bear arms or the right to travel. This is an important point because free speech is often compared to such liberties and, in turn, described as a so-called "negative right," a liberty that demands mere noninterference with the activities and privileges protected by it. In other words, free speech does not entail merely the liberty to speak freely.

Rather, it includes (at the very least) the liberty to participate, as a certain kind of being (e.g. a being with certain capacities, abilities, and interests), in a process with other such beings, a process that might, at times, depend upon either significant intervention or simple inaction for its fair or effective operation.

Given an explanation of free speech in terms of a liberty to participate in a certain kind of procedure, then, it is no surprise that the theories of free speech that I have been discussing recognize the legitimacy of restrictions upon speech that attempt to preserve order in the procedures they advocate. On Mill's view, such measures are justified by the second criterion for restricting speech, which demands that speech be restricted when it is likely to erode or extinguish the conditions under which the benefits of free and open discussion can be enjoyed. One of these conditions, as noted in Chapter 2, is order. My theory captures the legitimacy of such restrictions by emphasizing the importance of preserving the neutrality of the market, which can be undermined, for example, by new modes of communication that might jeopardize the extent to which the preferences and aversions of rational and reasonable consumers of ideas are the sole factors in determining the truth and worth of an idea. Therefore, both theories would applaud the creation of agencies (like the Federal Communications Commission) and the implementation of practices (like the granting of licenses to broadcasters or cable television operators) that enhance the order or efficiency of the

procedure that, in practice, is to help maintain freedom of speech.(2)

Unlike the conclusions just noted, which are supported by quite similar considerations, other conclusions about the legitimacy of restrictions upon speech may be acceptable to both my view and that offered by Mill but they will be supported by very different arguments. For example, consider the Supreme Court's prohibition on "fighting words" given in *Chaplinsky v. New Hampshire*.(3) Writing for the Court, Justice Murphy states, "There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any constitutional problem." Such classes of speech include "the insulting or fighting words, those which, by their very utterance, inflict injury or tend to incite an immediate breach of the peace."(4) As an example, consider an individual who, after positioning himself directly in front of a gay participant in a demonstration supporting civil rights protection for gays and lesbians, loudly and fiercely screams at the protestor, "Burn fuckin' faggot." Today, such speech is, perhaps, a better illustration of "fighting words," the words that "by their very utterance, inflict injury," than those to which the Court was responding in *Chaplinsky*.(5)

Mill would, it seems, clearly be willing to impose restrictions upon such speech. Indeed, the Court's own argument for prohibiting the use of fighting words seems to appeal (at least implicitly) to the first criterion for restriction in Mill's theory. Justice Murphy

writes, "It has been well observed that such utterances are no essential part of any exposition of ideas and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality." (6) On the other hand, I would argue that, given a theory that explains and defends the right to free speech in terms of the right to equal concern and respect, the primary problem, in this instance, is that this situation is not one in which individuals are regarded as speakers and listeners. Persons (and, in particular, gay persons) are being assaulted or attacked, they are being confronted, not addressed, approached as combatants, not as respondents. In this case, the capacities of individuals as speakers and listeners, those capacities that are directly related to their status as persons, are being denied or ignored by the speaker. Thus, on my view, restrictions upon fighting words do not promote general utility, but protect persons as equals.

These similarities in application between the theory I have developed and that offered by Mill are meant to illuminate each view and, more generally, the concept of free speech. I am not arguing, of course, that Mill's theory might be salvaged if it were understood in terms of the view I have been defending. Indeed, a proper understanding of the conception of equality and the scheme of moral and political reasoning that is essential to each view would show that such a reconciliation is impossible. Nevertheless, such a comparison

is useful in gaining an initial understanding of the kinds of restrictions that will be justifiable according to the theory of free and equal speech and of the considerations that count in arguing for such restrictions.

1. Justifiable Restrictions: Responding to Ranking and Silencing

The theory of free and equal speech that I have proposed explains and defends the right to free speech in terms of a neutral and equitable marketplace of ideas, a procedure governed by both the principle of neutrality and that of equity in which persons engage in the orderly exchange of ideas according to their own conceptions of the good and of justice. In this way, the theory of free and equal speech is able to embody the fundamental individual right to equal concern and respect. On this view, there will be four conditions under which restrictions upon speech are fully justified:

1. Because the neutral and equitable marketplace of ideas is, at bottom, a procedure, speech that fails to satisfy or that seriously threatens the conditions for preserving and maintaining the order and integrity of this procedure may be restricted. Persons cannot all speak simultaneously nor can technological innovations or social improvements in communication be permitted to hinder fruitful or productive dialogue. In such cases, the market procedure is undermined from the outset and free speech is, on this view,

impossible. Let us refer to this condition as the order condition.

2. Speech may be restricted if it enforces or institutes a judgment regarding the truth, merit, worth, or appropriateness of an idea prior to the operation of the market. Thus, laws that prohibit discussion of a particular issue based on the supposed inappropriateness of the topic or social organizations or associations that, through coercion, prevent particular views from being heard violate this condition, which stems directly from the demands of the principle of neutrality. I shall call this condition the first neutrality condition.

3. The principle of neutrality not only places demands upon the activity prior to the operations of the market but, in addition, requires that activity within this procedure conform to a certain standard. In particular, techniques like manipulation that bypass or subvert individuals' capacities of rationality and reasonableness or speech that wins approval merely by relying upon the technological power provided it by, say, media of communication must be, so far as possible, eliminated from the market. Such speech or techniques of speaking deny the status of persons as equals by systematically rejecting or ignoring persons' capacities of rationality and reasonableness. In turn, such activity undermines the chief ground upon which demands for neutrality rest. Recall that neutrality is not desirable in and of itself or merely in order to insure a fair market procedure but, rather, to assist the model of the marketplace of ideas

in sufficiently reflecting the right to equal concern and respect. I shall label this condition the second neutrality condition.

4. Finally, because the principle of equity demands that individuals be treated as speakers and listeners and that the conditions under which individuals are seen in this way be fulfilled and maintained, speech that seriously threatens or extinguishes these conditions may be restricted. The phrase, "Burn fuckin' faggot," as employed by the counter-protestor in an earlier situation, is an excellent example of such speech. We shall have several occasions to expand upon and apply this equity condition in the pages that follow.

These four conditions for rendering restrictions upon speech justifiable play the same role in the theory of free and equal speech that the two criteria offered by Mill for evaluating the legitimacy of restrictions upon speech played in his own theory. Such criteria suggest, in general, when restrictions upon speech are justified and why such restrictions are justified according to the theory of free speech being considered. We shall see that, in fact, very few television programs can be legitimately prohibited or censored according to the criteria provided by the theory of free and equal speech. Indeed, it shall turn out that those programs that make the most plausible candidates for severe restriction on my view are rarely the subjects of controversy in popular debate about television programming. In the next section, I show how my theory might respond to these more controversial programs. Although this response will not

consist in restricting these programs in any significant way, my theory does not leave the concerns of the more traditional and popular discussions entirely unaddressed.

Let us begin by considering the harms and wrongs produced by television programming that are likely to be taken most seriously by my theory. Like threats, slander, or sexual harassment, television programs that contain blatant violence or explicit sex might, as acts of expression with a certain content and conveyed under specific circumstances, constitute harmful or wrongful activity and it is such activity that belongs to the first class of harms and wrongs that I want to discuss. As noted in Chapter 1, it is the philosophy of language provided by J. L. Austin that provides the framework within which such harms and wrongs can be explained and critiqued.

Austin's chief contention, I said, is that an act of expression or speech act is, at bottom, an action, that to say something is always to do something, and that any distinction between speech and conduct is blurred and, at times, misleading. In this vein, Austin offers a three-fold analysis of speech acts. Acts of expression are actions, first, in that they involve the utterance or communication of a proposition or message; they entail the formation of semantically significant vocables and, in doing so, involve physical motions and sensory-motor coordinations. Second, the issuing of a speech act has intended and unintended consequences or effects upon others who encounter it and upon the environment in which it is issued. Indeed,

I claimed that psychological theories of behavioral modification, on Austin's view, describe just such effects when television programs are taken as speech acts. Such effects or consequences are said to be the perlocutions of the speech act.

The most interesting and important aspect of a speech act, the aspect that identifies the most significant way in which to say something is to do something, is what Austin calls the illocutionary force of an act of expression. When speech acts of a certain content are issued under very specific conditions, these acts may constitute other acts, acts more significant than, say, a mere communication or assertion. (Of course, communications, assertions, denials, proposals, and the like may be among the illocutions of a speech act given the right circumstances.) Thus, the statement, "Guilty as charged," when uttered by the foreperson of a jury during the course of a criminal trial, does not merely communicate or convey or describe a conviction -- it *is* a conviction, it *convicts*. The conditions under which a speech act constitutes a particular action (e.g. a conviction, threat, assertion, etc.) are what Austin calls felicity conditions.

This philosophy of language was expanded in Chapter 2 by Rae Langton, who described three ways in which individuals might be silenced by speech acts. Individuals are *silenced*, in Langton's sense, when they are prevented from saying with their words what they want to say or from doing with their words what they wish to do. For example, then, a threat might silence an individual if the one issuing

the threat says something like, "Not a peep" while holding a gun to the head of his victim during a kidnapping. In this case, the victim is prevented even from uttering a word and, therefore, from performing even the most basic activities involved in a speech act. Again, consider the act of stating one's beliefs. If one's character has been severely slandered or if one's critics have successfully challenged one's honesty, the assertion of beliefs will not be taken seriously; it will be evaluated as empty and the words of the speaker will have little or no effect upon the audience. Here, too, silencing, on Langton's view, has taken place because the desired effects of a speech act (e.g. making another aware or persuading another of the correctness of one's belief) cannot be realized.

Finally, there is a form of silencing that corresponds to the illocutionary aspect of speech acts. This sort of silencing is exemplified, for example, by laws (speech acts) that prohibit homosexual marriages, for such laws prevent some citizens from using the phrase 'I do' to do what others use it to do or from doing what it would normally do under the right circumstances. Such cases illustrate the way in which speech acts, themselves, render other acts unspeakable. They do so by altering the felicity conditions for a particular speech act (e.g. a marriage) or by limiting the ways in which these conditions might be satisfied by those who try to perform such speech acts.

After setting out Austin's theory of speech acts in Chapter 1, I

showed how Catharine MacKinnon and Andrea Dworkin use it in order to develop a critique of pornography. In Chapter 1, I said that, on this view, much pornography constitutes sexual activity, that it ranks women as inferior, and that it sexualizes this inequality by instituting this ranking in the sex act of pornography, thus making it seem a part of sexuality itself. In Chapter 2, I discussed how Langton expands upon this critique by demonstrating ways in which pornography silences women. Again, it is important to stress that these writers are claiming more than that pornography depicts or conveys the ranking or silencing of women or that pornography sends a disturbing message about the status of women in our society. More importantly, some pornography, in and of itself, given its content and various features of the context in which it is produced and distributed, ranks and silences women. I also tried to show how this view might be employed in order to explain the wrongfulness of other displays, films, and television programs. Thus, I argued that certain displays constitute the degradation of African Americans and that some television programs or advertisements might, in the same way, rank or degrade such persons. In addition, I suggested how one might see programs like the Jerry Lewis telethon as a speech act that degrades or denigrates persons with disabilities.

Let us consider, first, the restrictions that, according to my view of free speech, might be placed upon television programs that, given their content and context, rank individuals or groups of

individuals as inferior or as less than human, as non-persons. For a speech act to constitute a ranking, I noted that at least two felicity conditions must be fulfilled, namely, the authority and the evidence conditions. These conditions require, first, that the person or agency issuing the speech act be in a position of authority or occupy an important and widely recognized social position or status and, second, that the evidence or reasons supporting the finding are regarded as true or accurate and that the conditions under which the evidence or reasons are gathered are acceptable. In general, speech acts that, given their specific content and a context in which these two conditions are fulfilled, rank persons or groups of persons as less than persons or as non-persons are clearly wrong and ought to be prohibited on the theory of free speech I am defending. The argument is straightforward. Most significantly, such speech acts would be wrong in and of themselves, for they would blatantly deny or ignore the conception of the person that is at the heart of a strong individual right to equal concern and respect or, what is the same, the status of persons as equals as determined by this conception. Put another way, ranking of the sort I am here considering (whether it is achieved through a speech act or any other action or practice) constitutes a rejection of the status of persons as equals and a moral or political theory that purports to take the right to equal concern and respect (and the conception of the person that determines the status of persons as equals) seriously cannot permit such ranking.

Furthermore, speech acts that rank persons or groups of persons undermine the basis of a right to free speech as I understand it, for this right, on the theory I propose, is to be understood and justified in terms of a strong individual right to equal concern and respect. Thus, to allow into the marketplace of ideas those speech acts that rank individuals is to put the grounds upon which this model rests (and, hence, the right to free speech itself) at risk. This point can also be pressed in terms of the equity condition, which prohibits speech that threatens or undermines the conditions necessary for treating individuals as speakers and listeners. Speakers and listeners are, in fact, persons and, therefore, to rank individuals as less than persons or as non-persons is to fail to meet the demands of the principle of equity; individuals, in short, cannot be treated as speakers or listeners if they are not first treated as persons. It is this explanation and justification of the right to free speech in terms of the fundamental individual right to equal concern and respect that leads me to refer to my theory as not a theory of free speech, but a theory of free and equal speech.

There are certain features of television programs that enhance the ability of such programs, when taken as speech acts, to rank individuals as inferior or as less than persons. The ranking ability of such programs is enhanced because these features often make it easier for such programs to satisfy the evidence condition. In discussing the feminists' claim that pornography ranks women, for

example, I said that the evidence condition could be most readily satisfied by pornographic movies because the truth of the evidence for women's status as sexual slaves (and for their desire to be seen and treated as such) is right in front of our eyes; seeing is believing in the world of television. Indeed, it is the image-centered nature of the discourse of television that, more generally, makes it so easy for such programs to satisfy the evidence condition. Put simply, televised evidence is, in many cases, usually (and understandably) regarded as true or credible evidence. (7)

The evidence condition not only requires that accumulated evidence be regarded as true but, in addition, that the conditions under which evidence is gathered be acceptable. Again, television is especially accommodating in this regard. There are numerous and complicated conditions for accepting, say, the evidence given in a court of law, the support for an argument in a scholarly work, or the empirical evidence utilized by a scientific study. These conditions might govern the nature and source of the evidence to be presented, the methods utilized in gathering evidence, or the ways in which evidence may be legitimately questioned or considered. Such conditions help to guarantee, to a certain degree, that the evidence or reasons offered are not wholly devoid of truth or merit. Televised evidence is not subject to such standards and, indeed, to very few standards whatsoever. Televised evidence is not only typically regarded as true or credible evidence, but as acceptable evidence, as

evidence that is gathered in a legitimate and satisfactory manner. "I saw it on TV" is slowly emerging as the most common and widely accepted footnote in current public discourse. (8)

In discussing the ability of pornography to rank women, it is also important to consider the social and legal power assigned to pornographers as discussed in Chapter 1. This power, assigned to pornographers via their supposed expertise in sexual matters and enhanced in the legal protection granted to them on the basis of their "discussions" of these matters in pornography, helps pornography to satisfy the authority condition. More generally, this authority is increased simply given the fact that so many pornographers are men and that men enjoy a superior social status when compared to that of women (in so far as this status is determined by the economic standing and education of as well as the abuse and sexual and reproductive barriers encountered by each group). (These features are not, of course, exclusive to the pornography produced and distributed within the electronic media.)

If there is pornography that does, in fact, rank women, then this fact is, in itself, an excellent reason to severely restrict or prohibit such pornography on the view I am defending. Prime candidates for such restrictions would, I think, include those sexually explicit videos, films, movies, and television programs that have content very similar to that detailed in the Dworkin-MacKinnon ordinance accepted by the city of Minneapolis in 1983. (9) The content

of such material would, given the satisfaction of the evidence and authority conditions, help comprise a speech act that is most likely to rank women. In addition, we focus upon videos, films, movies, and television programs having such content because of their enhanced ability to meet the evidence condition.⁽¹⁰⁾ Such restrictions and prohibitions are the results of a theory of free speech that attempts to most fully reflect and embody a strong individual right to equal concern and respect. They are the result of realizing that the ranking of women that is most likely via the pornography targeted by Dworkin and MacKinnon not only blatantly denies the status of women as equals, but undermines one of the conditions for treating women as speakers and listeners, namely, that they be treated as persons.

Also, consider, once again, the Muscular Dystrophy Association's Labor Day Telethon hosted by Jerry Lewis discussed in Chapter 1. Given the features of television that enhance the ability of the typical television program to satisfy the evidence condition mentioned earlier together with the significant degree to which the authority condition might be satisfied by this show (see Chapter 1), the telethon risks ranking persons with disabilities as inferior depending upon the particular scenes shown during the course of the program. This was illustrated by one of the most disturbing scenes in which a girl was shown walking across the stage without using her crutches and then falling face down upon it.⁽¹¹⁾ Other scenes that might constitute ranking of such persons might exhibit, for instance, a

child being completely guided or aided by an adult in performing many of his/her everyday activities or show work or advocacy being done only by fully able-bodied adults. I am not, of course, urging that the program be cancelled, though I believe serious scrutiny of its content by both its producers and groups advocating for persons with disabilities is in order. (Notice that the scenes at issue here are likely to have no violent or sexual content at all.)

It might be thought that the restrictions upon pornography (especially given their specific content requirements) or the scrutiny of the content of the Jerry Lewis telethon are clear violations of the principle of neutrality. Such restrictions and scrutiny are obviously directed at the content of the programs at issue and seem to involve judgments regarding the appropriateness of an idea prior to the operations of the market. There are two responses to this objection. First and foremost, the restrictions upon pornography and the scrutiny of content I have recommended receive their justification from the equity condition, which requires that speech that threatens or undermines the conditions under which individuals can be treated as speakers and listeners must be prohibited. One of these conditions, as already noted, is that individuals be treated as persons. Speech acts that rank individuals as less than persons or as non-persons clearly ignore this condition and, hence, must be prevented. This way of rendering the restrictions at issue justifiable merely reflects that the marketplace of ideas that is at the center of the theory of

free and equal speech is governed by both a principle of neutrality and a principle of equity. The aim of such a model is not to protect neutrality or equity in and of themselves but, rather, to most adequately reflect the fundamental individual right to equal concern and respect. The force of each of these principles in a particular situation is, therefore, to be considered with respect to this right.

Furthermore, to suggest that restrictions based upon the ability of some speech to rank persons are illegitimate because they involve judgments about the appropriateness of ideas prior to the operations of the market is to miss one of the chief themes of this dissertation. The problem, here, is not the appropriateness of an idea, but the wrongness of an action. Ideas do not rank individuals; people, using speech, rank individuals. Restrictions upon certain sorts of pornography or scrutiny of the content of Jerry Lewis' program are not based upon judgments about ideas prior to their entrance into the market. Rather, such restrictions and scrutiny stem from concerns about what happens when the content of certain ideas is presented or issued in a particular context. To focus upon neutrality, in such cases, is, in effect, to emphasize the content of these ideas at the expense of what these ideas do (or what people do with them) in certain situations.

Content and context are each of great importance in considering what activity is constituted by a given speech act, as emphasized in Chapter 1. For instance, I argued that some episodes of MTV's "Beavis

and Butt-head" might be seen as constituting the ranking of women when we consider the content of a particular episode along with some of the advertisements that are aired during its broadcast. Thus, the wrong at issue might be eliminated, here, by simply changing or modifying the advertisements being shown rather than the content of MTV's program. The point, once again, is that the content of such programs and advertisements must be assessed within the context in which it is issued; we should not be concerned with ideas in themselves, but with what they do and with how persons use them in particular situations.

The theory of free and equal speech takes seriously not only the ranking of individuals accomplished via speech, but, too, the silencing of persons that can be brought about by speech. Rather than consider particular examples of silencing or try to examine whether or not particular television programs silence individuals, I want to make a few general remarks about silencing that seem most appropriate given the theory of free and equal speech as it has been developed thus far. First, there is a relation between the technologically powerful speech of television and the ability of speech to silence individuals. In Chapter 3, we saw that one of the chief considerations that leads to the need for and legitimacy of the principle of equity is the power that can be given to speech when it is conveyed through certain media. I illustrated such power and the need for the principle of equity in a rather simplistic fashion by introducing the example involving Smith and his megaphone. The primary purpose of that illustration was to

show the ways in which the status of persons as equals can be denied or ignored by speech when its power is enhanced by certain features of a given medium and by the legal and social conventions that govern the operations of that medium. In particular, I urged that Smith's expressive activity does not respect persons as equals because, at bottom, it does not treat them as speakers and listeners. Television raises similar concerns in certain contexts, I said, because it is, given various features of this medium, akin to a very powerful megaphone. These features include its range, ease of access, simplistic discourse, and the importance the television market assigns to wealth and material resources.

At the same time, we might, following Langton, claim that the persons encountering Smith in my example are being silenced. They are not able to do with their words what they wish to do, namely, convince Smith of some other position regarding gun control (the issue upon which Smith is supposed to be speaking) or protest his intrusive and obnoxious behavior. Langton refers to this form of silencing as perlocutionary frustration because it prevents individuals from producing the desired effects of their speech or the effects that would normally be produced by it (e.g. Smith's conversion to some other belief or his ceasing to use the megaphone). In this instance, then, it is the technological power of Smith's speech that inhibits the production of such effects or that, in a word, silences individuals. Given the features of television and of the television

market just summarized that make speech on television technologically powerful, then, such silencing can occur in our society as well. Such an observation is not a condemnation of television but, rather, a warning of its potential.

Speech that silences individuals by way of its technological power can be justifiably restricted by appealing to the second neutrality condition given earlier. This condition is meant to insure that speech that is injected into the market does not undermine the feature of the market that helps define its neutrality, that is, the fact that it is the preferences and aversions of rational and reasonable consumers of ideas alone that determine the truth, worth, or merit of an idea. The technique of manipulation bypasses or subverts these capacities of persons and, therefore, must be restricted according to this condition. In a similar way, the use of technologically powerful speech bypasses or ignores such capacities when employed in certain ways, for it prevents the kind of selection, rejection, and provision of ideas by rational and reasonable consumers of ideas necessary for a neutral and just market. We will never completely eliminate technologically powerful speech or manipulation from the market (a point to which I will return in the next section). Yet, we can try to prevent uses of the kind of speech or techniques that promise to severely or irreversibly destroy the defining features of a neutral marketplace of ideas. (12)

The silencing that stems from technologically powerful speech, as

I said, is a form of silencing that Langton called "perlocutionary frustration." Yet, speech might also constitute a form of silencing that she labels "illocutionary disablement." Here, speech acts, through their illocutionary force, alter the felicity conditions that determine when a particular utterance constitutes a particular action or hinder the ability of persons to satisfy these conditions. In Chapter 2, we saw, for instance, that pornography effects the felicity conditions according to which uttering the word 'no' counts as a refusal. Pornography portrays women as not wanting or not needing control over their own bodies, as willing to yield such control to men. It also depicts (and, perhaps, ranks) women as sexual slaves. Through such depictions, portrayals, and the ranking of women that may be constituted by some forms of pornography, the authority women have over their own bodies, the authority that is necessary for a refusal in the domain of sexual relations, is threatened or undermined. If this challenge to women's authority is successful, uttering the word 'no' will not constitute a refusal for women in this context; women will be silenced in this context.

Langton offers an even more intriguing example for my purposes here. She describes the case in which the book, Ordeal, written by the former pornography star of the film *Deep Throat*, Linda Marchiano, is listed in an adult mail order catalog as if it were just another pornographic item for sale. Ordeal is Marchiano's story of the subordination, degradation, exploitation, and physical and mental

suffering that she experienced during the time she was involved in the making of *Deep Throat*. Yet, it is listed in a catalog as just more porn. Marchiano's protest is not only unheard; it is not recognized as a protest by some individuals at all. Langton writes, "Marchiano says the words appropriate for an act of protest....She intends to protest but her speech misfires. Something about who she is, something about the role she occupies prevents her from satisfying protest felicity conditions (at least here)....Protest is unspeakable for her." (13) Marchiano's speech "misfires" because, although she describes her experiences of subordination, pain, and exploitation, she is not protesting as most of us would be were we to sincerely offer such a description. Something about the way pornography effects the felicity conditions for protest or Marchiano's ability to satisfy these conditions renders protest unspeakable for her. (14)

I think that the equity condition justifies restricting the kind of pornography (perhaps, again, that targeted by the Dworkin-MacKinnon ordinance) that silences women in this way. This condition, I said, demands that speech not seriously threaten or extinguish the conditions under which individuals can be treated as speakers and listeners. Yet, as should be clear at this point, we are rarely (if ever) merely "speaking." We use our words in a variety of situations to affirm, deny, criticize, argue, reject, challenge, question, protest, refuse, and to perform many other actions. Marchiano must not merely be treated as a speaker; she must be engaged as a

protestor, as protesting and warning against (rather than as merely speaking about) the sort of practices that seem to lie behind some elements of the pornography industry. Put another way, the only meaningful way to treat Marchiano as a speaker in this instance is to engage her as a protestor. The problem, then, is not merely that she cannot speak; it is that she cannot protest. If there is something about Marchiano or the role she occupies that prevents her from satisfying the felicity conditions for protest, then, more generally, the conditions under which she can be regarded as a protestor, as a speaker who uses her speech to protest, have been extinguished or undermined. The speech that led to this situation must, then, be restricted according to the implications of the equity condition.

This brings us around to a point at which I could only hint in Chapter 2. My contention there was that the speech and press clauses of the First Amendment ought, perhaps, not to be seen as protecting certain kinds of speech (e.g. political, social, commercial, etc.) or even as protecting speech at all. Rather, these clauses might more profitably be seen as protecting certain actions of individuals such as protesting, asserting, questioning, denying, challenging, petitioning, criticizing, and the like.⁽¹⁵⁾ To say that the relevant clauses of the First Amendment protect only *speech* (or *speakers*) is to disregard the uses to which persons put speech and, in turn, the kinds of action or practices that thwart the ability of individuals to employ speech in these ways. In the end, then, to violate an

individual's right to free speech will be not merely to forbid speech but, depending upon the circumstances, to prevent that individual from protesting, arguing, criticizing, or asserting.

Appealing to the equity condition to justify restrictions upon speech acts that, in and of themselves, rank or silence individuals suggests a more general point about the notion of a "marketplace of ideas." This notion, given the interpretation of the equity condition I have been considering, may be somewhat misleading, for it is not merely the neutral and equal exchange of ideas that is at issue in free speech. Rather, what the equity condition reveals is not merely a marketplace of ideas, but a community of free and equal speakers and listeners and, more precisely, of persons who assert, reject, defend, respond, question, criticize, protest, and challenge one another. Attending to the equity condition means attending not merely to the content of speech, but to what persons do with speech in particular situations; it implies a focus not merely upon the ideas, but upon the actions of persons. Thus, we may want to consider discussing not merely the neutrality of a marketplace of ideas but, also, the equity in a community of speakers and listeners.

2. Preventative Measures: Responding to Behavioral Modification

Let us now turn to the second class of harms that can be brought about by television programs containing blatant violence or explicit sex, the harms that arise from behavioral modification. Recall that psychologists employ theories of behavioral modification in order to describe and predict the behavior of individuals in much the same way that, say, a physicist might use the theory of Newtonian mechanics in order to explain and predict the motion of a physical object. Imitation, disinhibition, and desensitization are three of the most common effects identified and predicted by theories of behavioral modification used to account for the injurious and destructive behavior that can and does result from exposure to the programming at hand. In some instances (such as when a child imitates the moves of a famous basketball player or the inappropriate activity of a cartoon character), minimal exposure is all that is required for some of the predicted effects to occur. Other effects, like desensitization to violence, require prolonged and regular exposure to scenes or clips of violence under specific conditions (e.g. that the exposed individual be relaxed at each stage of a series of scenes that is progressively more violent or disturbing). Thus, although it is the sexual or violent content of television programs that is most often cited by those who use the occurrence of these effects to defend restrictions

upon such programs, the context in which individuals are exposed to these programs is important as well.

We are now in a better position to identify some of the features of the context surrounding the distribution and viewing of television programs that enhance their ability to produce the effects predicted by theories of behavioral modification. First and foremost, those programs that contain the most sex and violence are also, in all likelihood, those programs that best exhibit the sort of discourse that is inherent to the television program. This discourse, as described in Chapter 2, is an image-centered discourse that does not require one to follow a line of thought or to reflect upon or evaluate a series of propositions. It is a primarily narrative (as opposed to an argumentative or expository) discourse that, together with its other features, makes it readily accessible to individuals of all backgrounds, mental capacities, and ages.

More importantly for theories of behavioral modification, however, is the fact that the discourse inherent to the television program is, given the features just mentioned, simple, straightforward, and, hence, quite influential and effective at producing whatever effects upon individuals it happens (or is intended) to produce. Programs containing sex and violence, with their emphasis upon vivid imagery, bright colors, exciting music, attractive and captivating personalities, and continuous action most pronouncedly exhibit these features and, in turn, are able to most forcefully

affect individuals in the ways described by theories of behavioral modification. Indeed, as I put the point in Chapter 3, the discourse of television programs containing sex and violence is, given the features just discussed, technologically powerful speech. It is the simplistic and straightforward discourse, the technologically powerful speech of television, I think, that most sharply distinguishes its ability to produce the effects in question from that of novels, plays, poems, magazines, and other text-based material that, in fact, are less frequently thought to bring about these effects. The fact that research concerning these effects began in the 1950s, just after the introduction of television, serves as testimony to this claim.

Other features of the context in which television programs are distributed and viewed point to characteristics of the typical "viewing situation," the situation in which average viewers enjoy television programs containing sex and violence. For example, the relaxation that is required for effective desensitization is assured in the typical viewing situation. One is often seated in an easy chair or lying comfortably on a sofa in a room (most likely, one's living area or bedroom) which is conducive to relaxation and enveloped by a fully controlled physical climate. Also, effects like desensitization and disinhibition depend upon regular exposure to the programming at issue. The television market can accommodate this requirement by offering the most popular (and, hence, some of the most violent and sexually oriented) programs on a weekly (or even daily)

basis. All of these features of the typical viewing situation work together to intensify the effects of programs that contain blatant violence and explicit sex that are identified by psychological theories of behavioral modification.

The theory of free and equal speech responds to behavioral modification in a more limited fashion than it does to the ranking and silencing of individuals. Indeed, I shall argue that very few restrictions upon (and that no prohibitions of) television programming based on concerns about behavioral modification can be justified by this theory. There are two reasons for this limited response. First, the psychological effects described by theories of behavioral modification are, to some extent, inevitable. These effects are, in essence, some of the typical or normal (some might even say natural) reactions we, as human beings with a particular physical and psychological composition, have to the events, conduct, and practices that we encounter.⁽¹⁶⁾ According to the theories at issue, a child's imitation of a violent act or one's desensitization to murders is, to a certain degree, as unavoidable (given the appropriate circumstances) as the acceleration of a billiard ball when it is struck by another ball. Moreover, according to these theories, such imitation or desensitization can take place regardless of whether or not the violence or murders in question are encountered via television or in our own everyday experience. Hence, to completely eliminate the effects at issue, one must eliminate most or all of the conduct and

practices that give rise to them, including television.(17)

It is also important to keep in mind that the psychological effects under scrutiny may be positive as well as negative. We imitate appropriate as well as inappropriate behavior, we have desirable and undesirable inhibitions, and the fears or aversions that might be eliminated through the process of desensitization may be legitimate or illegitimate. Hence, the psychological effects at issue are not, in and of themselves, problematic. In turn, any argument that television, as one of the practices primarily responsible for the occurrence of such effects, is inherently evil or undesirable seems unwarranted. More generally, given that imitation, disinhibition, and desensitization are, to some extent, inevitable (and, at times, desirable), restrictions that seek to significantly limit (or eliminate) their occurrence seem fruitless and somewhat unjustified.

Proponents of restrictions based upon psychological theories of behavioral modification might concede that the kinds of effects identified by these theories are inevitable and, at times, desirable. Nonetheless, they might also contend that the aim is not to eliminate these sorts of effects but only to prevent certain negative instances of them. The goal, they might argue, is to eliminate imitation of inappropriate (not appropriate) actions or to prevent the extinction, through desensitization, of legitimate (rather than illegitimate) fears. Given that programs containing blatant violence or explicit sex are also those that depict behavior that is most likely to lead to

instances of, say, inappropriate imitation or of undesirable desensitization and, also, given the technological power of the messages conveyed by such programming, these programs ought to be severely restricted or prohibited.

This argument points to the second reason for the limited response of my view to concerns about behavioral modification. As we have seen, the occurrence of the effects described by theories of behavioral modification primarily depend upon three factors: 1) the content of television programs, 2) the form given to this content by the medium of television (that is, its image-centered, nonlinear, narrative form), and 3) the overall viewing situation. Those who wish to make distinctions between appropriate and inappropriate imitation or between desirable and undesirable disinhibition or desensitization must, it seems, be addressing the first of these factors, namely, the content of television programs. For example, whether or not a given instance of imitation is appropriate will depend upon whether or not the behavior that is imitated (that is, the behavior shown in the television program) is regarded as appropriate. Again, whether or not a case of desensitization is desirable will depend upon whether or not the reactions that were eliminated by it are desirable and, in turn, upon whether or not the activity to which one initially reacted (once again, the activity depicted on the screen) is regarded as desirable.

Restrictions upon television programs based on such judgments are, on the view I am defending, a violation of the principle of

neutrality. This principle, as an element of a theory of free speech that is based on rationality and reasonableness, demands that no judgments by government (and, perhaps, by any other individual or agency) regarding the truth, merit, or worth of an idea be made prior to the operations of the marketplace of ideas. Such a market, driven by the preferences and aversions of rational and reasonable consumers of ideas, yields the final word on such matters. By adhering to the principle of neutrality in this market, we prevent the usurpation of the powers of individuals to determine their own conceptions of the good and of justice and, more generally, of their powers of rationality and reasonableness; in short, we insure that the marketplace recognizes and respects individuals as persons.

It is important to understand why the content-based restrictions proposed here cannot be justified by my view whereas the content-based restrictions proposed in the previous section are justifiable on this same view. The difference, once again, is that, when we address concerns about the ability of speech to rank or silence individuals, we consider the content of speech in order to understand what that speech does in a particular situation; what is at issue is the rightness or wrongness of an act, a speech act. On the other hand, the restrictions under scrutiny here are based on judgments about the appropriateness or inappropriateness, desirability or undesirability of content itself; they focus upon the worth or worthlessness of ideas, not upon the rightness or wrongness of action. My claim is

that restrictions grounded in concerns about behavioral modification tend to address content (and *only* content) and, hence, cannot be justified by my view.

To avoid violating the principle of neutrality, then, we must forgo many attempts to restrict programming that are based on concerns about behavioral modification. This does not mean, however, that we are powerless in responding to behavioral modification. Rather than legal measures, I propose certain preventative measures that address the typical situation in which individuals view the programming at issue and the form given to such programming by television; I consider context rather than content.

Let us begin with measures that might be taken with regard to the typical viewing situation. The aim, here, must be to alter this situation so that it is less conducive to undesirable psychological effects. We might begin with the very positioning of the television set itself. Typically, television sets are found in homes and, for the most part, positioned as centerpieces in the most comfortable rooms in the home such as the living room, bedroom, or family room. The television is situated so as to insure that viewing is convenient and unobstructed from nearly any point in the room. To counter processes like desensitization, people might simply place their sets in a room in which viewing is less comfortable and convenient. Parents may put the television set, for example, in a laundry room, basement, or walk-in closet. These areas normally have few (if any)

comfortable furnishings, a less than desirable physical environment (e.g. they may be cold, damp, cramped, etc.), and rarely afford a position for the set that is either convenient or feasible.

Other adjustments in the typical viewing situation might be made in order to minimize the regularity of exposure that is necessary for the occurrence of many of the effects I have discussed. Parents might purchase television sets with time-channel locks that allow them to automatically control the periods of time that television will be available to their children and the channels that can be selected by children during these periods. The frequency of exposure might also be minimized by so-called "television free" zones that are declared by owners or proprietors of restaurants, bars, business reception areas, or in other areas outside the home.(18) Finally, incentives might be offered to broadcasters or cable operators who provide the most variety in programming rather than weekly or daily doses of the same selection of shows. Notice that issues surrounding violations of the principle of neutrality are avoided by encouraging variety rather than, say, the cancellation of programs containing sex and violence.

More generally, neutrality is likely to be enhanced not only with this increase in variety but, in addition, by all of these preventative steps that, when taken together, work to reduce the psychological effects identified and predicted by theories of behavioral modification. These effects, as noted in the previous chapter, manifest instances of manipulation rather than of rational

persuasion. In turn, they limit the extent to which the marketplace of ideas is driven by the preferences and aversions of rational and reasonable consumers of ideas, which is the defining characteristic of neutrality on this view. In the end, then, the preventative measures I have proposed regarding concerns about behavioral modification are not only neutral themselves, but also work to protect and promote neutrality and, therefore, a marketplace of ideas that takes free speech seriously.

Let us now turn to preventative measures that might be taken with regard to the form of television programs containing sex and violence. It is more difficult to imagine the measures that might be recommended in this regard than with respect to the typical viewing situation because, as I argued in Chapter 2, the form of television programs is *inherent* to the medium and not one of many equally successful or feasible options. Put another way, we are discussing television, which has viewers. Given the nature of the medium, then, there is a limit to the ways in which television might address us so that those who demand that we be addressed "as students rather than as spectators" may be asking too much of the medium. (19)

Indeed, I think that one of the few significant measures that can be taken with regard to the form of television programs containing sex and violence involves the provision of other programming of different forms. The presentation of blatant violence and explicit sex need not be restricted to their graphic depiction. Such matters can be

discussed as issues of public health and policy by news programs or talk shows, debated in Congress, or observed for their motives and consequences in a documentary (even if such programs retain some of the objectionable graphic depictions). Publicly subsidized networks like the Public Broadcasting System and C-SPAN and private enterprises such as the Cable News Network and National Empowerment Television provide just such alternative formats. The emphasis, in this regard, then, is not upon a variety of programming, but a variety of the forms that programs might take. Once again, we can defend these alternative formats without any risk of violating the principle of neutrality.

Rational Persuasion and
Edifying Discourse

In Chapter 2, I argued that, in defending free speech by appealing to the numerous benefits to be expected from its protection and promotion, Mill's theory rested upon a particular notion of speech or discourse as propositional in content, argumentative or expository in form, and linear or sequential in its presentation of content. The discourse inherent to the television program, on the other hand, is, I claimed, image-centered rather than propositional, narrative rather than argumentative in form, and nonlinear and, perhaps, somewhat disorderly or chaotic in its presentation. Given the sharp contrast between these notions of discourse, I claimed that Mill's theory of free speech could not be used to support television programming, for

the benefits that are, on his view, to be expected as a result of such programming depended upon a particular sort of discourse that is simply not exhibited by television programming.

One might contend that the theory of free and equal speech assumes a notion of discourse similar to that presupposed by Mill's view. The aim of the principle of neutrality, which partially regulates the marketplace of ideas, is to insure that the truth, worth, or merit of an idea is determined solely by the preferences and aversions, the selections, rejections, and proposals of rational and reasonable consumers. Yet, the truth or worth of an idea is, it might be contended, determined by the same sort of discourse that is at the center of Mill's view. INdeed, I said that some of the benefits of free and open discussion for Mill include the opportunity to render our opinions more plausible or true or correct and to affirm the utility or value these opinions have for us and for others. My argument, in Chapter 2, was that such benefits could only be obtained via the propositional, argumentative, linear discourse supposed by Mill. Thus, if the marketplace of ideas is to be a procedure for determining the truth or worth of an idea, it, too, must rely upon a similar form of discourse. In turn, like Mill's theory, my theory cannot be applied to television programs, which do not exhibit the requisite form of speech or discourse; television, in short, does not reveal a genuine marketplace of ideas, a procedure in which the determination of the truth or worth of an idea is achieved through

processes that cannot be facilitated by the discourse inherent to the television program.

There is another reason to suppose that my theory of free speech utilizes a notion of discourse similar to that at the heart of Mill's theory. I have been describing those who, during the course of the market procedure, propose, select, and reject ideas as rational and reasonable consumers of ideas. Rationality and reasonableness are powers of persons that are best exhibited in the capacities of persons to form, revise, and pursue a determinant conception of the good and conception of justice. Forming and revising such conceptions, however, would be difficult (if not impossible) without the kind of discourse that I have described as propositional and argumentative. An extended vocabulary together with sophisticated linguistic abilities (e.g. argumentation, analysis, etc.) are necessary in order to prioritize ends and purposes, decide upon means to the formulated ends, and to formulate complex principles of justice that meet the formal constraints set upon them. The essential role of language is acknowledged by Rawls when he refers to an individual's conception of the good as that individual's "rational plan of life," that is, as something to be "drawn up" or "laid out" before our eyes and analyzed.(20) The essential role of language in the exercise of our powers of rationality and reasonableness is explicitly understood by David Richards when he writes, "For us, rationality itself flows from our capacities for speech and writing and from an appropriately

supported material and cultural environment for their cultivation and exercise." He adds that rationality and reasonableness "are expressed through speech and writing, which make possible reflection about our ends, reasoning about our beliefs, and, in general, the imaginative constructions of reality that in art, science, and religion are literally our ways of world making." (21) In short, the problem of detaching the conception of free speech (whether as described by my view or Mill's view) from the conception of discourse that emerged after the introduction of the printing press (e.g. propositional, linear, consistent, argumentation and exposition) remains. In turn, it will be difficult to maintain that the television viewer, who "participates" in the discourse inherent to the television program, is, in this context, a rational and reasonable consumer of ideas. Once again, then, we see that television does not contribute to a genuine marketplace of ideas as described by my theory and, hence, that its programming cannot be treated by this theory as free speech.

I want to conclude this dissertation by responding to this objection. To do so, let me first more clearly articulate the objection at hand by expanding upon the notion of "rationality" or of the "rational." In Chapter 3, I described the manner in which Rawls uses this term. When we describe a person as rational, we are, in Rawls' sense, referring to her scheme of reasoning, to reasoning that is governed by the principles of rational choice that determine how she will order her ends and purposes and select means for pursuing

these ends. For Rawls, persons are rational, for example, when they adopt the most efficient means to their ends or when they adopt ends that are most likely to satisfy more of their interests or desires than other ends that might be adopted. Rational deliberation, then, is ordered, systematic deliberation guided by principles that organize and systematize the questions that are posed, the considerations that are utilized, and the conclusions that are generated.

The term, 'rational', can be applied in a more general way to other practices, practices not necessarily connected with our own determination of our ends and purposes or of the means to these ends. Thus, for instance, we can speak of rational discourse, understood as discourse "which is conducted within an agreed upon set of conventions about what counts as a relevant contribution, what counts as answering a question, what counts as having a good argument for that answer or a good criticism of it." (22) In other words, rational discourse is ordered, systematic discourse governed by certain conventions or rules that direct and organize it. These conventions and rules, I suggest, are precisely those that began to take hold of discourse in the centuries that followed the invention of the printing press. Such rules and conventions helped define clarity of exposition, validity of argument, and legitimacy of questions and criticisms. Wholly propositional, linear, consistent exposition or argument was not only the form of discourse that happened to emerge after the introduction of print (see Chapter 2), but it became the standard for discourse

following this innovation; how people, in fact, began to think, speak, and write eventually became the standard for how people ought to think, speak, and write. (23) This connection between rational and print-centered discourse is, perhaps, what led Richards to claim that rationality "flows from our capacities for speech and writing."

Now, one example of rational discourse is rational persuasion, which I discussed in the previous chapter. There, I noted that rational persuasion is a way of influencing the beliefs or behavior of individuals by directly appealing to their capacities for argumentation, reasoning, and judgment. In this way, rational persuasion can be seen, I claimed, as a technique that respects persons as equals, as beings who are capable of using such capacities to determine and pursue their own conceptions of the good and of justice. The question is whether or not rational persuasion (or, more generally, rational discourse) is the only discourse in which we can engage that respects persons in this way, that is, as equals. The objection at hand contends that the theory of free and equal speech must rely upon some form of rational discourse, for such discourse is the best and only sort of discourse in which we can engage that respects persons as equals. Moreover, rational discourse is not the sort of discourse that is inherent to television programs, for such programs do not respect the rules that govern rational discourse, rules that developed as a result of the introduction of print. Hence, the objection concludes, the theory of free and equal speech cannot

protect television programming as free speech.

What must be shown, then, is that there is an alternative form of discourse to rational discourse that merits protection. This form of discourse must, when practiced, respect the status of persons as equals and, at the same time, it must not be connected with the propositional, linear, argumentative discourse of the medium of print. Also, this alternative discourse must reflect, to some degree, the kind of discourse that I have argued is inherent to television programs if the theory of free and equal speech is to be applied to such programs. I believe that edifying discourse, as defined and developed by Rorty, meets these demands. In describing and supporting this form of discourse, I am not advocating that it replace rational discourse (or, in particular, rational persuasion) as the form of discourse in terms of which the theory of free and equal speech can be understood. Rather, it is another form of discourse that can be used by this theory in order to broaden its scope and, hence, expand its application to other speech acts, like television programs, and to other media, such as television.

We might begin to understand Rorty's notion of edifying discourse by contrasting its aim with that of rational discourse and, especially, of rational persuasion. The primary purpose of rational persuasion, as it is typically understood and employed, is to convert another to a point of view or belief, to bring one around or convince one of the truth, value, or correctness of a belief. The aim of

edifying discourse, on the other hand, is, more generally, to educate or improve another; its purpose is to build another up, not to bring one around, to contribute to the ways in which persons form or create their own identity rather than to convince them of the rightness or wrongness of their identity. Put more generally, we might say that the purpose of speech, when understood as edifying rather than as rational discourse, is not to be persuasive, but to "find new, better, more interesting, more fruitful ways of speaking." (24) Hence, while the aim of rational persuasion (and, perhaps, of rational discourse generally) might be seen as to close off routes of conversation based upon their wrongness or falsity, the aim of edifying discourse is to point to new avenues of conversation or channels of communication.

We can also contrast edifying and rational discourse with regard to their form or the manner in which they proceed. As just noted, the chief aim of edifying discourse is to offer new and interesting ways of speaking and, hence, to provide us with novel and interesting ways of describing ourselves and our world. Thus, edifying discourse must be reactive or revolutionary in that it must continuously move beyond the conventions and rules that govern rational discourse. Those who participate in edifying discourse are always suspicious of such conventions, always questioning their legitimacy, appropriateness, and utility. Yet, the aim of such persons is not to replace such conventions with others, but merely to warn us or to keep our guard up against taking these conventions too seriously.

Given these features of edifying discourse and the aims of those who engage in it, it should come as no surprise that some of the primary tools of such discourse include satire, parity, and metaphor. Furthermore, edifying discourse need not be linguistic or propositional discourse; indeed, it is likely to be more interesting and novel if it is not propositional. The work of sculptors, painters, and musicians can, then, be as edifying as that of poets and novelists. Such persons, once again, strive to reconstruct, remake, or redescribe us and our world and, in doing so, question the traditional standards or conventions of construction, creation, and description.(25) This is not to say that edifying discourse is superior to or more appropriate than rational discourse. The point is only that it is an alternative form of discourse, another way of seeing, fashioning, and constructing ourselves. (I shall return to this point later in this section.)

It is very important to stress the reactive or revolutionary character of edifying discourse, which is not unconventional simply for the sake of being unconventional. Edifying discourse is a response and, in fact, a particular kind of response, an educated, reflective, self-conscious response to rational discourse. "The caution amounts to saying," Rorty writes, "that abnormal or existential [or edifying] discourse is always parasitic upon normal [i.e. rational] discourse...and that edification always employs materials provided by the culture of the day."(26) In other words,

the fact that discourse is unconventional or nonconforming does not, in itself, make it edifying. One who, say, murders another and claims that such an act constitutes edifying discourse because he is reacting to the victim's way of life is asserting as ridiculous a claim as one who, upon engaging in a single scientific experiment that demonstrates a particular anomaly, claims to have brought about a scientific revolution. (27) We must always bear in mind the sort of response given and that to which one is responding in edifying discourse.

Persons who engage in edifying discourse can certainly respect each other as equals. Edifying discourse, after all, strives to redescribe, reconstruct, and, therefore, to remake us and our ways of life. It reflects a view of persons that Rawls would certainly find compatible with his own theory. This view of persons, at bottom, is that, as rational and reasonable agents, we are made, not found; we are created, not assumed or given from the outset. It is this conception of persons, in fact, that leads Rawls to focus upon the basic structure of society as the primary subject of his theory of justice. The basic structure includes those social institutions and practices that profoundly and persistently effect us from birth. He writes, "Taken together as one scheme, the major institutions define men's rights and duties and influence their life prospects, what they can expect to be and how well they can hope to do. The basic structure is the primary subject of justice because its effects are so profound and present from the start." (28)

This view of the person as made and not found is also supported by noting that Rawls emphasizes what he calls a *political conception* of the person rather than, say, a metaphysical conception. A political conception of the person does not focus upon the "essence" of persons or upon what, ultimately, gives intrinsic value to the life of each individual. Rather, such a conception stresses persons' "public" or "institutional" identity (their identity from the perspective of the basic structure), the fact that persons can and do make "self- authenticating" claims upon the institutions that comprise the basic structure, and the responsibility persons can take for their own ends, the fact that "they can adjust their ends so that those ends can be pursued by the means they can reasonably expect to acquire in return for what they can reasonably expect to contribute." (29) These three aspects of the political conception of the person describe our freedom as it is formed, acknowledged, and realized within the basic structure of a given society and not, for example, as an aspect of a transcendental ego or as a component of the soul. This freedom is represented by (but not ultimately grounded in or reduced to) the portrayal of the parties in the original position as rational agents deliberating under reasonable constraints.

Given that we can engage in edifying discourse and, at the same time, respect one another as equals, my theory of free and equal speech, a theory that explains and justifies the right to free speech in terms of the fundamental right to equal concern and respect, can

consistently and legitimately employ this notion of discourse. A neutral and equitable marketplace of ideas, whether its participants practice rational or edifying discourse (or both), acknowledges the individual right to equal concern and respect and can thus serve as a model for a theory that takes free speech seriously. Moreover, the inclusion of edifying discourse in this model permits it to more adequately accommodate poetry, novels, paintings, musical works, political satire, and a host of other forms of conversation that might not be as easily included by a model that is understood only in terms of rational discourse. Such works are capable of contributing to the determination of the truth or worth of an idea. (30)

There is no doubt, then, that the discourse inherent to television programs can be accommodated by a marketplace model that incorporates both rational and edifying discourse. The image-centered, narrative, nonlinear discourse of television programming can, it seems, be seen as edifying in the sense under consideration. Indeed, it will be difficult, as I have tried to make evident, for a theory of free speech that does not make room for a notion like edifying discourse to purport to protect television programming. Traditional theories of free speech are too firmly grounded in rational discourse, a discourse that is tightly connected to print-centered discourse, to have any hope of protecting television programming as free speech.

There is, however, one serious difficulty with this approach to

television. I said that edifying discourse must be seen as an educated, reflective response to rational discourse. It is hard to imagine most television programs as revealing this sort of response. They are, at best, responding to other television programs or, perhaps, to the tastes and desires of television viewers. Such programs have the form of edifying discourse but lack its reactive or revolutionary character.

What this problem shows, I think, is that television programs do not enjoy the significant protection enjoyed by other forms of discourse. We might, in fact, consider classifying television programs according to the degree of protection that seems appropriate given the theory of free speech I have offered. Three classes seem in order: 1) those programs that are almost wholly propositional and argumentative (e.g. political debates, conferences, in depth news analyses) and, hence, most likely to be strongly protected by more traditional theories of free speech, 2) those "semi-propositional" programs such as typical newscasts, some talk shows, and some documentaries, and 3) those programs that might be seen as reflective responses to rational discourse (e.g. documentaries, political cartoons and satire, and many films or movies). Other programs that cannot be defended in one of the ways described (e.g. game shows, soaps, situation comedies, etc.) may remain without protection but need not be censored or restricted so long as controversy is not sparked by them. Moreover, if questions about such programs do arise,

proposed restrictions must conform to one of the four conditions laid out at the beginning of this chapter.

Notes

1. Thus, in referring to the marketplace model in the future, I shall be referring to the expanded model of the marketplace of ideas, which includes both the principle of neutrality and that of equity.
2. For fuller discussion of such arguments, see "Liberal Constraints On Private Power: Reflections On the Origins and Rationale of Access Regulation" by Stephen Holmes in Democracy and the Mass Media edited by Judith Lichtenberg, Cambridge University Press, c. 1989, pp. 22-55. Some of the arguments discussed by Holmes are also given in *Red Lion Broadcasting Co. v. FCC*, 395 U. S. 367, 1969. I discuss this opinion in Chapter 3 as well.
3. 315 U. S. 568, 1942
4. *ibid.*, @571-572
5. The words at issue in *Chaplinsky* were "damned racketeer" and "damned fascist," which hardly seem insulting today.
6. *ibid.*, @572
7. It is just such considerations that lead Neil Postman to consider the ways in which the current conception of truth is being shaped by television and image-centered discourse. See Amusing Ourselves to Death: Public Discourse in the Age of Show Business by Neil Postman, Penguin Books, New York, c. 1985, especially Chapter 2. Particular implications of the formation of truth through the use of image-centered discourse are considered in the context of the television newscast. (pp. 99-105)

8. Examples seem to abound. Persons regularly refer to the individuals, events, or circumstances depicted on talk shows and tabloid journalism programs to support a claim they wish to make. Newscasts are regularly identified as indisputable fountains of truthful and reliable information and even advertise themselves in this way. Finally, as if to make a mockery of the more sophisticated methods of gathering evidence, the slow-speed chase of former football star, O. J. Simpson, on June 17, 1994, which was shown throughout the nation on television, gave rise to nearly every American playing juror and judge in the subsequent trial.

9. "We define pornography as the graphic, sexually explicit subordination of women through pictures or words that also includes women dehumanized as sexual objects, things, or commodities, enjoying pain or humiliation or rape, being tied up, cut up, mutilated, bruised, or physically hurt, in postures of sexual submission or servility or display, reduced to body parts, penetrated by objects or animals, or presented in scenarios of degradation, injury, torture, shown as filthy or inferior, bleeding, bruised, or hurt in a context that makes these conditions sexual." Feminism Unmodified: Discourses On Life and Law by Catharine MacKinnon, Harvard University Press, c. 1987, p. 176. The specific content requirements are echoed by MacKinnon. She writes, "The definition does not include all sexually explicit depictions of the subordination of women....To capture what pornography does, the definition adds a list of what it must also

contain. This list, from our analysis, is an exhaustive description of what must be in the pornography for it to do what it does behaviorally."

10. I include film, here, because pornographic videos are most frequently viewed on a television set and, hence, all of the features I have discussed that enhance the technological power of speech apply to these videos as well as to television programs. As noted in Chapter 1, however, television is not without its own brand of pornography as illustrated by Home Box Office's "Real Sex" and by cable channels such as *Escapades* and *The Playboy Channel*. With the use of satellite dishes and the promise of hundreds of cable channels via fiber optic technology, such channels are likely to proliferate in the future.

11. No Pity: People With Disabilities Forging A New Civil Rights Movement by Joseph Shapiro, Times Books, New York, c. 1993, p. 21.

The discussion of the MDA Labor Day Telethon offered by Shapiro (which I shall be considering momentarily) has been quite useful throughout this dissertation. (pp. 21-25)

12. An example of when this reasoning might be applicable to television today is the extensive use made of this medium by so many persons seeking public office. Substantial portions of H. Ross Perot's \$60 million campaign for the 1992 Presidency and of Michael Huffington's \$23 million campaign for a U. S. Senate seat were used for television air time. This access to television, no doubt, gave the

speech of these candidates immense technological power and such speech likely silenced the participation of other candidates.

13. "Speech Acts and Unspeakable Acts" by Rae Langton, Philosophy and Public Affairs, Vol. 22, 1993, pp. 321-322.

14. If it is not pornography that is responsible for this kind of silencing in Marchiano's case, it is difficult to think of an alternative. I admit that pornography might be seen as only one of a host of institutions and practices that, when taken together, silence women in this way. However, I will not deal here with the implications of this admission.

15. The list given is, of course, incomplete. If we turn to Austin, a more thorough account of the speech acts that might be protected by the speech and press clauses of the First Amendment might be made. We would, I believe, want to include those acts that Austin classifies as expositives, which "are used in acts of exposition involving the expounding of views, the conducting of arguments, and the clarifying of usages and of references." We might also include what he calls behavitives. "Behavitives," Austin writes, "include the notion of reaction to other people's behavior and fortunes and of attitudes and expressions of attitudes to someone else's past conduct or imminent conduct." For discussion of both groups, see his How To Do Things With Words, Oxford University Press, 2nd ed., c. 1975, pp. 160-163.

16. Imitation is one of the first ways in which we learn new behavior. As Dr. Brandon Centerwall points out, "Neonates are born with a

instinctive capacity and desire to imitate adult human behavior." He cites studies in which new-borns, within a few hours of their birth, imitate facial expressions (without, of course, cognitive awareness of their actions). He adds, "Whereas infants have an instinctive desire to imitate observed human behavior, they do not possess any instinct for gauging a priori whether a behavior ought to be imitated. They will imitate anything, including behaviors that most adults would regard as destructive and anti-social." See "Television Violence: The Scale of the Problem and Where to Go From Here," Journal of the American Medical Association, Vol. 267, 1992, p. 3059.

17. This option, as noted in Chapter 2, is not feasible because, like many restrictions proposed for television sex and violence, it is far too broad or vague.

18. See Centerwall, pp. 3063-3064.

19. This is a suggestion made, for example, by Robert Hughes in his "Why Watch It Anyway?" New York Review of Books, Feb. 16, 1995, p. 42.

20. A Theory of Justice by John Rawls, Harvard University Press, c. 1971, pp. 408-411.

21. Toleration and the Constitution by David A. J. Richards, Oxford University Press, New York, c. 1986, p. 167.

22. Philosophy and the Mirror of Nature by Richard Rorty, Princeton University Press, c. 1979, p. 320. This is actually Rorty's definition of what he calls "normal discourse." The term stems from its relation to Thomas Kuhn's conception of "normal science," which,

in Rorty's words, "is the practice of solving problems against the background of a consensus about what counts as a good explanation of the phenomena and about what it would take for a problem to be solved." Normal science, then, is an instance of normal discourse, for both are practices guided by conventions that direct discussion and interaction. (Compare The Structure of Scientific Revolution by Thomas Kuhn, University of Chicago Press, 2nd ed., c. 1970, p. 10.)

I am equating "normal" and "rational" discourse, though Rorty does not use the terms in this fashion. For him, rational discourse is discourse that assures certain and indisputable agreement among everyone about everything. It does so by assuming that all discourse is commensurable, that is, "able to be brought under a set of rules which will tell us how rational agreement can be reached on what would settle the issue on every point where statement seem to conflict." For Rorty, commensurability is the chief assumption of epistemology and rational discourse is the discourse of epistemology that attempts to reflect and exploit this assumption. Rorty employs the notion of *normal* discourse in order to show how interesting, important, and useful agreement can be reached without the epistemological baggage carried by rational discourse. Thus, for example, he contrasts the "rational" and the "normal" when he writes, "Normal science is as close as real life comes to the epistemologist's notion of what it is to be rational." I think that I am safe in equating normal and rational discourse so long as the assumption of commensurability (and

other epistemological baggage) is avoided. For general discussion, see Philosophy and the Mirror of Nature, pp. 316-322.

23. In this way, rational discourse, as I have described it here, might turn out to be the normal discourse that emerged from a print-centered culture (if we continue with the parallels between normal science and normal discourse began in note 22).

24. *ibid.*, p. 360

25. The contrasts that have been made here between edifying and rational discourse are taken from Rorty's distinction between the "systematic" and "edifying" philosopher. (pp. 369-370)

26. *ibid.*, pp. 365-366

27. I choose this analogy because it reflects some of the chief concerns about objectivity that, Rorty notes, were leveled against Kuhn's work. One of Kuhn's chief contentions was that no algorithm for choosing between scientific theories is available and that scientific theories are, at best, the codification of the rules and conventions that govern some particular period of normal science. Rorty writes, "This led his critics to claim that he was licensing every scientist to set up his own paradigm and then define objectivity and rationality in terms of that paradigm..." (pp. 325-326)

Revolutionary science, for Kuhn, must be understood in terms of (and achieved through) a response to the intractable problems of normal science. In the same way, edifying discourse must be seen as a response to the lingering limitations of rational discourse, as a

self-conscious reflection or response to such discourse and its problems and limitations.

28. Theory of Justice, p. 7

29. Political Liberalism by John Rawls, Columbia University Press, New York, c. 1993, pp. 30-34.

30. One might object that the discourse of poetry or novels, say, is not the kind of discourse most likely to reveal truth. It is the epistemological assumptions underlying such a view that Rorty wants to reject. He writes, "The contrast between the desire for edification and the desire for truth is...not an expression of a tension which needs to be resolved or compromised. If there is a conflict, it is between the Platonic-Aristotelian view that the only way to be edified is to know what is out there, to reflect the facts accurately, to realize our essence by knowing essences and the view that the quest for truth is just one among many ways in which we might be edified." (p. 360) I will not, of course, defend this claim here.

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