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## Editorial Note

*The Journal of Applied Ethics and Philosophy* is an interdisciplinary periodical covering diverse areas of applied ethics. It is the official journal of the Center for Applied Ethics and Philosophy (CAEP), Hokkaido University. The aim of the *Journal of Applied Ethics and Philosophy* is to contribute to a better understanding of ethical issues by promoting research into various areas of applied ethics and philosophy, and by providing researchers, scholars and students with a forum for dialogue and discussion on ethical issues raised in contemporary society.

The journal welcomes papers from scholars and disciplines traditionally and newly associated with the study of applied ethics and philosophy, as well as papers from those in related disciplines or fields of inquiry.

Shunzo Majima  
Editor-in-Chief

# The Right to an Unsafe Car?

## Consumer Choice and Three Types of Autonomy<sup>1</sup>

Eugene Schlossberger

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### Abstract

The Ford Pinto's fuel tank was prone to rupture in collisions above 20 mph, sometimes resulting in burn deaths. An infamous Ford memo estimated the cost of a shield correcting the problem at \$11. Should Ford have installed the shield, holding public safety paramount, or, respecting consumer autonomy, have made the shield an option?

Answering this question requires distinguishing between three kinds of autonomy: mere-choice autonomy (deciding something for oneself, regardless of the content of the choice), proclamative autonomy (making a choice that holds up a value or standard, commitment to which is partly definitive of who one is), and high-impact autonomy (making a choice that profoundly affects one's ability to make proclamative choices). (This is not a formal distinction, that is, a distinction meant to be clear, rigorous, and neutral). Autonomy is thus asymmetric: choosing to do *x* may be highly proclamative while choosing not to do *x* is not. In the Pinto case, not giving consumers the option of declining the shield undercuts only mere-choice autonomy.

Several arguments are provided (including an argument based on the nature of moral agency) that proclamative autonomy (and, derivatively, high-impact autonomy), rather than mere-choice autonomy, has significant positive value. More precisely, it is argued that, as a rule, the more proclamative a choice is, other things being equal, the more weight autonomy claims about that choice possess.

The paper concludes that common sense is correct about the Pinto case. In some instances, consumer choice may legitimately count more than the engineer's commitment to public safety (particularly when proclamative choice is involved). However, losing the opportunity to save \$11 is not too large a price to pay in order to counter market pressures against safety by inducing in engineers a professional commitment to put safety first.

Key words: Autonomy, Safety, Moral agency, Pinto

### The Problem

While the Ford Pinto Case is often cited as a reminder that human life outweighs profit,<sup>2</sup> the case also highlights

two important points about autonomy<sup>3</sup> that have wide-

ever, as noted by many, including (Schlossberger 1993), the dictum that one cannot put a price on human life is simply false.

- 3 The term "autonomy" is used, rather than "liberty," because "autonomy" is the standard term employed in many fields, such as medical and nursing ethics, psychology, education, and business ethics. The distinction between mere-choice and proclamative choice has major implications for a wide range of issues in these fields, e.g., the extensive debates about respecting patient autonomy in medicine and therapy,

1 An earlier version of this paper was presented at the Seventh International Conference on Applied Ethics: Risk, Justice, and Liberty (2012), University of Hokkaido, Sapporo. I would like to thank Michael Davis for his helpful comments.

2 See, for example, (Dowie 1977) and (Epstein 1980). How-

ranging implications. First, autonomy is often treated simply as the ability to choose, so that choosing to devote one's life to a cause and choosing strawberry over raspberry jam on one's morning toast are equally exercises of autonomy. Concomitantly, autonomy is often assumed to be symmetric, so that ethicists may speak of the importance of A's autonomously choosing whether or not to do P, without separately assessing the importance of A's choice to do P and the importance of A's choice not to do P. Both these assumptions about autonomy, this paper suggests, are incorrect.

Second, the importance placed on respecting autonomy vacillates in contemporary ethical thought. It is sometimes taken for granted that significant harms or wrongs must be borne to avoid infringing on exercises of autonomy whose importance is arguable. For example, it is generally accepted in the United States that an organ removed from a patient *post mortem* or as the result of ordinary treatment must, absent the patient's consent, be discarded rather than used to save a life (Truog 2008). Yet it is not obvious enough to render discussion otiose that autonomous control over discarded tissue or tissue from one's corpse outweighs another person's life. In particular, the nature and role of autonomy do not play a clearly consistent role in discussions of safety and consumer autonomy. The issue of consumer autonomy, as treated in this paper, focuses on weighing, on one hand, respecting the autonomy of a consumer, A, regarding the purchase and use of a product, against, on the other hand, safety risks to A (not others) posed by the use of that product. In many cases, it is assumed without question that consumer autonomy trumps protecting that consumer's safety. For example, few would insist that it is unethical to sell recreational mountain-climbing gear, despite the fact that mountain climbing is both high-risk and non-essential. Similarly, sky-diving and bungee jumping have resulted in deaths and injuries, yet manufacturers of parachutes or bungee cords are rarely excoriated by ethicists. On the other hand, engineering codes of ethics rarely give much attention to consumer autonomy. Rather, most engineering codes of ethics highlight what is often called the "paramouncy clause," maintaining that engineers must hold paramount public safety, health, and welfare.<sup>4</sup> (Presumably, autonomy *per se* is not so large a constituent of welfare that speaking

of conflicts between autonomy and welfare becomes a confusion.) The implicit suggestion is that engineers should strive to reduce public risk even at the cost of reducing liberty. Similarly, governmental requirements that automobiles be equipped with seatbelts are rarely questioned nowadays, even though they curtail consumer autonomy as ordinarily understood.

This conflict between consumer autonomy and engineering's commitment to safety<sup>5</sup> emerges clearly in the Ford Pinto Case, which may well be the poster-child case for the paramouncy of safety. The story of the Pinto is well known. The Pinto's fuel tank was subject to rupture and leak after rear end collisions at as low as 19.5 mph, resulting in possible burn death or serious injury.<sup>6</sup> A variety of redesign options, ranging from \$1.80 to \$15.30, would have decreased the tendency of the fuel tank to rupture (West's 1994, 57 and Baura 2006). The cost of a protective shield over the tank was estimated, in an infamous internal Ford memo, at \$11 (Ford 1994).

Few would deny that Ford's lack of candor in alerting the public to the problem was culpable, or, generally, that corporations may prioritize marketing considerations over ethics. It has also seemed obvious to many that Ford was morally remiss for not instituting one or more of these safety measures. (I will focus on the \$11 shield.) Commentators rarely mention, much less recommend, the alternative that focuses on maximizing consumer autonomy: Ford could have announced the problem with the fuel tank and made the \$11 shield an available option.<sup>7</sup> After all, 2 million Pintos were manufactured from 1971 through 1976, while fewer than 900 people died because of the faulty gas tank design.<sup>8</sup> Even if we assume the higher number of fatalities and assume that each of the 900 deaths involved a different Pinto, the odds that a given Pinto would result in a burn death

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autonomous learning in education, and respecting client autonomy in law. In addition, the term "liberty" often has a special meaning not intended here. For example, (Schlossberger 2008) defines a "liberty" as a permission worthy of public support.

4 See, for example, (Michelfelder & Sharon 2011) and (Kipnis 1981). Codes with paramouncy clauses include those of the ASCE, NSPE, ASME, NIEE, and AIChe. For example, The NSPE code of ethics says "Engineers shall hold paramount the safety, health, and welfare of the public." (II.1)

5 Of course, if "safe" is defined, as various writers have suggested, as "of an acceptable risk," the appropriate balance is build into the notion of safety. Thus holding public safety paramount amounts to refusing to fall below an acceptable level of risk. Notice, however, that this approach makes safety an "all or nothing" concept. Speaking of aiming for "greater safety" is as confused as calling someone "more pregnant." If, instead, "safe" is a degree term indicating the degree of acceptability of the risk, the problem of balance, of how safe is safe enough, remains. Either way, the question "acceptable to whom?" shows that the problem at issue in this paper remains.

6 In 1970, a barrier moving at 19.5 mph that struck a Pinto from the rear caused the left door to jam and gasoline to leak out (Baura 2006, 50).

7 An exception is (Friedman 1977-78).

8 The exact number of Pinto burn deaths remains controversial. (Dowie 1977) put the number of Pinto burn deaths between 500 and 900, a figure called "too high" in the Introduction to (Birsch & Fielder 1994, 10).

amount to .045 %, or less than one in 2000. Arguably, this level of risk failed to meet consumers' reasonable safety expectations (although it fell within the bounds of what the law required at that time).<sup>9</sup> But people often choose to risk a remote chance of death for a small gain. A continuum stretches from the Pinto gas tank shield to expensive safety mechanisms. ABS systems (anti-lock brakes) with ESC (electronic stability control) are available as part of an optional \$750 package for the Ford Explorer and tire pressure monitors are a \$390 option for the Audi Allroad Quattro. U.S. law has mandated some safety devices, such as, since 1998, front airbags,<sup>10</sup> though side airbags are not, as such, required.<sup>11</sup> Other potentially life-saving devices not (yet) legally required in the United States include 4-wheel drive (\$1300 for the BMW 550i), lane departure warning systems at (\$1000-\$2000)<sup>12</sup> and blind spot monitors (generally about \$250). Are engineers ethically required to make those choices for consumers, or should consumers be given the opportunity to make those choices for themselves?

## Types of Autonomy

It seems obvious both that engineers should avoid unnecessarily dangerous projects and that consumers should have some opportunities to decide for themselves the appropriate balance between higher risk and lower cost and/or greater convenience. How should the commitment to safety be weighed against respect for autonomy? Many factors enter into the equation. For instance, risks are more acceptable when those taking the risks are also the ones reaping the benefits (Schlossberger, 1993). One factor that is generally significant but is rarely if ever bruited focuses on the type of autonomy involved. Autonomy, in other words, is not a univocal concept.

A given exercise of autonomy may be understood as having negative importance (as something others lack standing to constrain) or positive importance (as something of intrinsic value).<sup>13</sup> In addition to positive

and negative autonomy, three sorts of autonomous choice can be distinguished. Mere-choice autonomy focuses on deciding something for oneself, regardless of the content of the choice. Choosing chocolate over vanilla ice cream is an example of mere-choice. Proclamative choices hold up a value or standard to which one is committed; they proclaim who one is and what one stands for. Choosing to die rather than betray one's country is a proclamative choice. Finally, high-impact choices are choices that profoundly affect the ability to make proclamative choices. Since death generally ends the ability to make proclamative choices, consenting to potentially fatal surgery is a high-impact choice. High-impact choices are generally mere-choices that possess additional instrumental value derived from their ability to enhance/facilitate or avoid hampering proclamative choices. Generally, it will be argued, respecting proclamative and high-impact autonomy carries more moral weight than respecting mere-choice autonomy and,<sup>14</sup> as a rule, choices the exercise of which carries positive value bear more moral importance than choices the exercise of which is only of negative value.

It should be noted that the distinctions between varieties of autonomy invoked in this paper are not formal ones. A formal distinction between x and y, invoked to perform job z, must have three key features: it should be sharp, clear, and neutral. It is being employed to draw a (more or less) sharp (universal and counterexample free) line in a relatively rigorous way (in a clear and non-question begging manner that is neutral between the relevant competing conceptions). For instance, some understand Mill as suggesting that the harm principle protects self-regarding but not other-regarding interests. They regard Mill as intending this distinction to be a formal distinction, drawing the line between setbacks to interests that fall under the *aegis* of the harm principle and setbacks to interest that do not.<sup>15</sup> The distinction is deemed to draw a sharp line in that, it is claimed, for purposes of the harm principle, all and only instances of setting back another person's self-regarding interest count as harms to others, while instances of setting back another person's other-regarding interest never count as harms to another. The distinction is deemed rigorous (clear) in the sense that determining whether an interest is self or other-regarding, it is claimed, is relatively straightforward.

9 (Birsch 1994) suggests that (despite the lack of such a legal requirement) consumers expected to survive rear-end collisions in the 21-30 mph range.

10 <http://www.dmv.org/how-to-guides/side-air-bags.php>

11 Cf <http://www.iihs.org/research/qanda/airbags.aspx>: "The government doesn't mandate side airbags specifically but does require a certain level of head and torso protection for all occupants in side impact crashes...."

12 <http://www.fmcsa.dot.gov/facts-research/systems-technology/product-guides/lane-departure.htm>

13 These are not, of course, mutually exclusive options: an exercise of autonomy could have both positive and negative importance.

14 Speaking precisely, proclamative and high-impact choices are subsets of mere-choices. However, it is often simpler, when contrasting proclamative, high-impact, and mere-choices, to use the term "mere-choice" to designate the narrower category of mere-choices that are not also proclamative or high-impact. Context generally clarifies which use of "mere-choice" is being employed.

15 The interpretation of Mill on this point is a matter of some controversy. See, for instance, (Rees 1960).

Finally, it is held that categorizing an interest as self-regarding or other-regarding, as well as protecting only the former, are reasonably neutral between different conceptions of the good. Thus, it is urged, the limits of the legitimate interest of the criminal law can be formally demarcated, that is, clearly and sharply limned in a way that is non-question-begging and neutral between competing conceptions of the good. To the extent that any of these claims fail, the distinction fails to do its job. For example, it is argued in (Schlossberger 2008) that the distinction fails to be rigorous in the required sense: what appears to be an other-regarding interest can generally be recast as a self-regarding interest. If that argument is correct, the distinction fails to do the job it is intended to do.

By contrast, the distinction between mere-choices and proclamative choices is not proffered as a formal one. I am claiming neither that the distinction is rigorous and neutral nor that proclamative choices are always more important than mere-choices. Other distinctions may play a role. There may be reasons why, in a particular case, the distinction plays a very minor role and is of little or even no importance. My claim is simply that the fact that a choice is more significantly proclamative tends, as a rule (though not without exception), to be a more powerful importance-conferring factor than the fact that a choice is largely a mere-choice. The distinction is not rigorous, though one can often enough speak, in a particular case, of a choice's being largely proclamative or largely a mere-choice with sufficient confidence to shed some light on the situation. It is not being used as a neutral line-drawing tool. The distinction is to be used as one among several helpful tools in making a defensible decision, not as a sharp criterion. I am not claiming, for example, that all and only proclamative choices deserve legal protection. I am making the less ambitious claim that, in the preponderance of cases, proclamativity is a weight-enhancing feature of choices. As a rule, the more proclamative a choice is, other things being equal, the more weight autonomy claims about that choice possess. Thus lack of rigor in the indicated ways need not pose an undue problem, provided they are not generally so severe as to make common-sense judgments about proclamativity impossible in the majority of cases when such judgments would be helpful. A tool need not be able to perform every job. In cases where the degree of proclamativity (or the relevance of proclamativity) is problematic, moral evaluators must turn to other tools.

It is, therefore, not unduly problematic that what counts as a proclamative choice is to some extent a matter of degree. Most of our choices have at least some proclamative import, even if minor or trivial. While it is often convenient to speak of a choice as a proclamative choice or as a mere-choice, it may be more accurate and precise to speak of the degree to which a

choice is proclamative. The extent to which a choice is proclamative depends significantly upon both the circumstances and the individual. Put more precisely, two choices both falling under a general description of a choice-type may differ significantly in degree of proclamativity. In addition, incomplete descriptions of a particular choice may lack sufficient information to indicate the degree of proclamativity of the choice. How proclamative is proclamative? For choices made by an individual, two elements play a role in assessing the degree of proclamativity: the centrality of and strength of the commitment to the value or ideal being proclaimed and the extent to which the choice serves to proclaim that ideal or value.<sup>16</sup>

In some cases, context may become a critical factor in determining a choice's degree of proclamativity. Choosing to wear a yellow star on one's sleeve is, in most times and places, an expression of fashion whimsy and so, typically, a mere-choice. However, in a widely circulated apocryphal story, in 1940 the occupying Nazis ordered Danish Jews to wear an identifying yellow star. King Christian X, the legend goes, donned the yellow star himself, followed by all of Denmark.<sup>17</sup> In that context, the wearing of a yellow star would generally be a proclamative choice of deep moral significance.

Moreover, individuals may have eccentric beliefs and values, turning what would ordinarily be mere-choices into proclamations of their values. Generally, rather than investigating the subjective meaning of a choice for each particular person involved, an objective/reasonable person standard must be employed. The reasonable person standard is, in some ways, a legal fiction, like the driving age. The rationale behind a driving age is that one should not drive until one is sufficiently mature. It is not feasible, however, to investigate prospective license holders for their level of maturity. Such an investigation would be unduly intrusive. Moreover, we lack accurate and widely accepted objective measures of maturity level. So the law employs the legal fiction that people suddenly become sufficiently mature on their 17<sup>th</sup> (or 18<sup>th</sup>, or 16<sup>th</sup>, depending on the jurisdiction) birthday. That fiction imperfectly but sufficiently well divides drivers into the categories of those who are sufficiently and those who are insufficiently mature. The legal fiction's combination of ease of applicability, freedom from objectionable discrimination, and reliability of

<sup>16</sup> In the case of societal choices, two additional factors emerge: the number or percentage of individuals as well as the effects of encouraging/permitting/obstructing that manner of proclaiming those values or ideals. Some of those effects may, in turn, affect the factors mentioned earlier, creating a feedback loop.

<sup>17</sup> See, for instance, (Guttenplan 2002, 11) and (Gutman 1995, 142).

tracking are, overall, acceptable. More reliable methods do poorly on one or more of these grounds, so that the amount of gain in reliability is not worth, for example, the amount of loss of ease of applicability. Similar considerations apply to using the reasonable person standard. In general, thus, it is acceptable to use the reasonable person standard, although, when feasible, it is preferable to create some wiggle room for eccentric or less than ideally rational beliefs. In some cases, the degree of accommodation necessary to accommodate a subjective standard might be light while the loss of respect for proclamative choices some individuals would actually make, were they accommodated, is great, considering the number of individuals involved, the strength of their commitment, and the public proclamative force of the choice in its circumstances. In such cases, a subjective standard may be more appropriate.<sup>18</sup>

In general, then, reasonable limits apply: unreasonable proclamations, proclamations that adversely affect legitimate state interests, and proclamations that are not reasonably feasible to respect may be easily overridden, though they may still carry some weight. In most cases, especially when formulating a general policy, it is reasonable to make moral decisions on the basis of an objective (normal, reasonable person) determination of the proclamativity of a choice, without having to inquire about the exact subjective proclamative weight a choice bears for each person affected.

Proclamative and high-impact choices are often asymmetric. Generally, forcing someone to wear a religious icon significantly violates freedom of proclamative choice while forbidding the wearing of that icon frequently does not. The asymmetry is due not to some difference between acts and omissions or between negative and positive freedoms, but to a difference of proclamative import: wearing the icon normally makes a strong proclamation while not wearing it normally does not. (While there are significant exceptions, in most circumstances, the absence of the icon is neutral or silent, consistent with almost the entire range of relevant views.)<sup>19</sup> Similarly, not wearing seatbelts

significantly increases the risk of death or serious injury. Wearing seatbelts may result in minor discomfort or inconvenience<sup>20</sup> but does not, generally, significantly impair the ability to make proclamative choices. Thus, hampering the choice to wear seatbelts restricts a high-impact choice but requiring the use of seat belts generally does not.<sup>21</sup> It is, thus, a common mistake to evaluate the importance of autonomously deciding whether or not to *x*, since deciding to *x* may have more proclamative import or greater impact on proclamative choice than deciding not to *x*, or vice versa.<sup>22</sup>

## The Greater Importance of Proclamative Choice

These distinctions are relevant because making a bad safety decision is not, generally, a proclamative choice.<sup>23</sup>

explicitly anti-Semitic law forbidding the wearing of Jewish symbols or images. The proclamative import of not wearing religious images in the former case amounts to acknowledging the importance that the school places on learning math and so forth, which is hardly controversial. The proclamative import of not wearing religious icons in the latter case constitutes implicit acceptance of anti-Semitism and/or bowing to persecution.

18 For example, it is appropriate for a university, only a handful of whose students are vegans, to provide a vegan dining alternative, despite the fact that the vast majority of students attending view eating tofu instead of steak as a mere-choice. The facts that vegan arguments have some merit and that providing a vegan option is usually not unduly difficult are both relevant.

19 A school rule, imposed during a period of intense religious conflict, that forbids wearing any religious symbols or images during school hours, which is explicitly meant to cool down religious strife and facilitate focusing on academic subjects during school hours by creating a strife-free zone, has much less impact on proclamative choice than does an

20 Even were someone to argue that the cumulative disutility of millions of drivers buckling and unbuckling seatbelts over the course of their driving lives is large, the impact on any given driver's ability to make proclamative choices remains small.

21 Note that in the religious icon case the asymmetry favors the omission over the act, while in the seat belt case the asymmetry favors the act over the omission. Again, requiring students to wear a neutral school uniform is less of an incursion into proclamative autonomy than requiring students to wear a Romney blazer, though both require positive actions.

22 Of course, when this is not the case, one may speak simply of the importance of the decision. Normally, one may simply ask how much A's autonomy is infringed when he is prevented from choosing whether to paint his kitchen white or beige, as there is no asymmetry between these options in proclamative content or proclamative import.

23 One might further argue that it is a value choice to prefer seeing a movie with those 11 dollars instead of eliminating a remote chance of death. However, such a choice would not generally be a proclamative choice as defined below. Nonetheless, there might be a given individual who has devoted his life to risk-taking, and so regards spending any money at all on safety as violating the value to which he has devoted his (presumably very short) life. But that is a highly eccentric view of an \$11 safety device. A reasonable person would not normally view buying a car with that device as making a proclamative choice about the supreme value of risk-taking, and, as noted earlier, an objective rather than subjective standard of proclamativity seems appropriate



In contrast, while preventing customers from obtaining the \$11 fix has significant impact on proclamative choice, since death or serious injury may result, forcing consumers to pay \$11 for the safety fix generally has a negligible impact on future proclamative choices. (For the vast majority of Pinto purchasers, \$11 does not dramatically affect their circumstances.) Moreover, simply failing to produce a car lacking the fuel tank shield does not seem like an undue constraint on consumers' negative autonomy. If I make and sell red shirts, I violate no one's rights because I don't also make blue shirts. Thus, autonomy mounts a serious challenge to safety in this case only if the exercise of mere-choice is of fundamental importance and positive value.

Several arguments suggest that it is proclamative choice, not mere-choice, that is of great moral importance and carries significant positive value.<sup>24</sup> Autonomy as mere choice is of some value, but hardly pre-eminent value. For example, U.S. regulations concerning the water content of imported meat have prevented residents from enjoying some traditional versions of foreign foods, such as Munich Weiss Wurst, with an average water content of 59% (FDDDB 2012). Ordinarily, within reasonable limits, individuals have the right to decide what clothing to wear. However it is generally accepted that school dress codes may override autonomy of clothing choice, a mere-choice, even though no one will suffer grievous harm if a teenager wears a swimsuit to biology class, much less torn jeans or a dress slightly shorter than the student's extended fingertips, and wearing caps in certain fashions poses no harm itself (though it was a symbol of adherence to group practices that did cause harm). Important choices matter more, but importance here must not be subjectively defined. As noted above, some people have eccentric priorities. I am not immune from school dress codes because wearing a bathing suit to algebra matters more to me than life itself. Yet eccentric priorities and common priorities are equally chosen and may be of equal importance to the chooser. What makes one large class of choices carry more weight is the normative importance of those choices, judged by some reasonable standard (not just the normative importance the agent in question accords them). One reason that choice of a spouse matters more than choice of an appetizer is that a person's marriage (and how that person conducts it) is intimately involved in so many of his or her proclamative stances and choices. My choice of spouse, stance toward marriage, and how I relate to

my spouse forms an important part of who I am. My spouse and how we relate are very much involved in the kind of parent I am, my relation to my children, and much else in my life that proclaims my values and who I am as a person. To take away the right to choose one's own spouse and revert to forced arranged marriages is thus profoundly to undercut the proclamative dimension of a life. Normally, no such argument can be mounted about restricting the ability to order chocolate sauce. The importance, thus, of our pure choices is in large measure determined by their proclamative import. We are thus forced to acknowledge that proclamative choices, choices that by some reasonable standard take an important moral stand, generally carry much more weight than mere-choices.

In addition, a proclamative choice, whatever else it does, serves to uphold publicly a standard as proper and worthy of commitment, as a banner of what one stands for. "This stance," a proclamative choice announces, "I am willing to fight for and be judged by." It is thus self-defining in a special respect that is of central importance to anyone who regards himself or herself as a moral agent. This is particularly true if, as (Schlossberger 1992) argues, to be a moral agent (a moral person), in this sense, is to be a worldview in operation. Hence, not respecting a deeply proclamative moral choice means forcing a person to be a moral hypocrite. That is, instead of proclaiming one's deepest commitments, which characterize who one is as a moral being and what one stands for, one is forced either to keep silent or, worse, to proclaim that to which one is opposed. So there is a special importance in respecting proclamative moral autonomy. The most fundamental sort of personal integrity is at stake.

For these reasons it seems plausible to claim that proclamative choice has significant positive value, that is, that the exercise itself of proclamative choice has intrinsic value. By contrast, a negative conception of autonomy protects autonomy not because of the intrinsic value of choice but because others lack standing to interfere. You are not entitled to force me to choose chocolate ice cream over vanilla, on a negative conception of autonomy, because it is not your business, rather than because my choosing vanilla is itself of great value.

Does mere-choice have, like, the exercise of the right to vote, significant positive value? The question is relevant because, if mere-choice has great positive value, then not offering Ford customers the choice of saving \$11 and taking the extra risk is akin to making it harder for eligible citizens to vote. If autonomous choice is an important intrinsic good, we should not unnecessarily put up roadblocks to its exercise, and so there is a significant (though potentially overrideable) reason to opt for making the gas tank fix an available option. At the very

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here. Normally, thus, not having the option of refusing to pay \$11 for a gas tank cover is not considered to have a significant impact on proclamative choice.

24 To the extent that pure choice has some value, so does proclamative choice, since a proclamative choice is, after all, a choice.

least, the issue is cloudy.

Does mere-choice have great positive value—does choosing itself, regardless of what is chosen, have considerable intrinsic value? Clearly, the exercise of mere-choice autonomy is generally of some value. The exercise of mere-choice can be of instrumental value. It is generally of some psychological value to the person who has it, and constraints on the exercise of mere-choice are usually experienced as disvalues. In some instances, the disvalue involved comes from a perceived violation of negative value: I may perceive your ordering me (backed by sanctions) not to eat stale bread as an assumption of power over me to which you are not entitled and/or as contempt for my status as an equal being, even though, before you issued your order, I had no desire to eat and no intention of eating stale bread (Schlossberger 2001). However, according mere-choice as much intrinsic value as proclamative choice amounts to viewing human beings as essentially preferencers and human life as about satisfying whatever preferences we happen to have. From a moral perspective, we are not qualitatively different from other preferencers, such as fruit flies. It is not clear, on this view, why human choice should be sufficiently important ever to trump utility.

An argument driving this point home is articulated in (Schlossberger 1992) and (Schlossberger 2008).<sup>25</sup> Assume we discover an organism with free will, Willy the Willer, whose choice repertoire consists entirely of pressing or not pressing a red button at any given moment. The button is not connected to anything and Willy has no strong moral or proclamative beliefs about the button pressing (e.g., he does not believe that pressing the button every 30 seconds is a moral good). His choice at any moment to press or not press the button, however, is fully autonomous, in the same way that, under normal circumstances, we can autonomously choose to wave with the right hand or wave with the left hand. Now, granted, there is some value in not frustrating the Willer's choice. Other things being equal, there may even be some slight positive value in Willy's exercising his choice. But, suppose that there is some urgent reason for us briefly to appropriate Willy's button and that we can do so in a manner that poses no risk to Willy and causes Willy neither pain nor frustration, nor any other negative affect (e.g., briefly hypnotizing Willy so he remains unaware of our brief appropriation of his button). Does morality forbid us from briefly appropriating Willy's button? Do we wrong Willy if we do so? Divorced of any proclamative content and divorced of either frustration or risk of harm, how much moral importance does Willy's autonomous choice to

push the button carry? By contrast, it is at least *prima facie* objectionable to deprive a competent adult in even this trivial way so as to gain some advantage for oneself. We can readily imagine, in other words, an act that would *prima facie* count as improper interference with Socrates but would not count as improper when done to Willy. This disparity results not from the fact that Socrates belongs to our species and Willy does not, but from the fact that Socrates, unlike Willy, has standards he wishes the world to meet. Socrates' actions, perceptions, beliefs, and propensities make full sense only in the context of his commitment to values and attitudes. Willy's do not. Socrates, in other words, makes proclamative choices. Willy makes only mere-choices.

This difference between Socrates and Willy is crucial because proclamative choice brings together the idea of a moral outlook, without which reality lacks a moral dimension altogether, and agency, expressing that moral outlook through activities and commitments (realizing that outlook in a life). Numerous arguments for this conception of moral agency can be found in (Schlossberger 1992).<sup>26</sup> The root idea is that, without proclamative choice, we would either still be able to judge, hope, prefer, wish, and evaluate, perhaps, but we would be passive onlookers, or, though we would be able to reflect our choices in our activities, our choices would be at best mere preferences. So proclamative choice is grounded in a conception of human beings as imparters of meaning and standards.<sup>27</sup> Human life, on this view, is about commitment to a framework of what is intrinsically worthwhile. Electron states and other quantum phenomena are, as such, morally indifferent. But, by living a life, human beings proclaim (through their choices, words, etc.) a set of standards and meanings that transform the world in which they live from a world of random events to a world of significance. The death of Caesar becomes not just a bit of steel moving so many inches but an act of betrayal and/or patriotism. Being a moral agent, in other words, amounts to giving meaning and value to a world of random quantum fluctuations by proclaiming commitment to a meaningful network of standards through the life one lives, that is, through one's choices, thoughts, perceptions, actions, relationships, feelings, etc.<sup>28</sup> “So the moral outlooks [expressed in

25 Willy, in those volumes, is referred to as “The Wanter.” Both volumes contain additional arguments against the overriding importance of autonomy as pure choice.

26 The link between this account of agency and moral responsibility is of particular importance in answering certain objections raised by (Levy 2005) against some publications written after (Schlossberger 1992), such as (Scanlon 1998), (Smith 2007), and (Smith 2008), that also advocate what has come to be known as “attributionism.”

27 Of course, intelligent aliens with fully developed worldviews could also be full moral agents in this sense. Small children and animals count as partial persons, by virtue of possessing a rudimentary worldview. Cf. (Schlossberger 1992).

28 The status and nature of that network of standards, that is,

proclamative choices] that constitute moral personhood are not only valuable, but the very source of value” (Schlossberger 1992, 72). Thus proclamative choice is at the heart of what gives morality purchase. In short, (worldviews expressed in) proclamative choices are both what makes the world morally meaningful and the fundament of moral agency. Moreover, proclamative choice is not just essential to but a primary constituent of morality and agency. So it seems at least difficult to see how it could plausibly be maintained that, while morality and agency are valuable, proclamative choice is not valuable. Absent some unusual but compelling contrary analysis, to the extent that morality and the existence of human moral agency have some intrinsic value, proclamative choice has some intrinsic value.<sup>29</sup>

## Conclusion

Common sense appears to be correct about the Pinto case. In some cases proclamative choice and high-impact choice may temper or override engineering’s paramountcy clause. Mere-choice autonomy, the type of autonomy conflicting with the paramountcy of safety in the Pinto case, may have some instrumental value and some limited intrinsic value, but lacks much intrinsic value. Utility favors going ahead with the fix. Whatever minor distress I might feel about not being given the choice of saving \$11 and taking the risk is outweighed by hundreds of burn deaths.<sup>30</sup> In addition, there is an important rhetorical dimension to the paramountcy clause. Given the pressures on business enterprises generally to cut corners and engage in devious or irresponsible conduct, to the detriment of public safety, there is much to be said for having engineers as a group and engineering as an institution be special advocates for public safety. Much corporate behavior is a response to a competitive environment of manipulation and half-truths encapsulated in immensely expensive, tightly focused messages that need to cut across incessant advertising chatter to millions of sensorily overloaded, reasonably lazy consumers with short attention spans. Ford can hardly be expected to spend vast sums diluting the focus of their message by explaining in detail the information that consumers need to make reasonable decisions about paying extra for a fuel-tank fix, particularly since, in

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whether it is objectively valid, arbitrarily chosen, universal, best understood as a set of truths or as a set of sentiments, and so forth, is a further and separate issue.

29 That is, it is generally a good-making quality *per se*.

30 The invisible hand argument is not very convincing here: other than blind religious faith in the sanctity of free markets, there appears to be little reason to think that society generally or even individual consumers are better served by making the protective shields an option.

the American corporate milieu, rival advertising can be manipulative or misleading. In such an environment, where truly autonomous choice is hard to come by, losing the opportunity to save \$11 by taking a remote but serious risk does not seem too large a price to pay in order to counter these market pressures by inducing in engineers a professional commitment to put safety first.

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# Can there be a Just Cyber War?

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## Abstract

Cyber warfare is challenging traditional paradigms about what constitutes a just war. It is an emerging phenomenon that needs to be addressed separately in order to create reasonable regulations on its use and proper responses to the same. Some of these challenges refer to first what might constitute an act of war as opposed to a case of criminal sabotage. Other difficulties concern issues of sovereignty, the right to remain neutral, and proportionate responses to attack. Several recent examples of cyber-attack are brought forth and analyzed within this framework. The paper proposes that the traditional just war paradigm needs to be expanded to account for the anomalies created by this new mechanism of warfare. This essay will raise some critical questions about this changing paradigm with intent to suggest alterations to the way we think about war that can include cyber warfare as part of the traditional just war paradigm.

**Key Words:** Just war theory, Cyber warfare

What would happen if Heathrow's air traffic control system suddenly went down? One of the busiest airports in the world would be in sudden chaos. What would be the loss of civilian life as the scores of circling airplanes carrying hundreds of passengers each began to run into each other?<sup>1</sup> And what would happen if the New York

Stock Exchange's computers were hit with a worm that created bogus trades on a large scale involving the trading of securities that created such a jumble that billions of dollars internationally were suddenly lost? And on a lesser scale, what if the London Eye were suddenly put into reverse mode at three times the normal pace due to a computer malfunction: a tourism disaster?

Because so much of modern life in the West is computer driven and maintained, an attack against this cyber infrastructure can have regional and international effects. It is important to examine this potentiality and how the rules of just war theory can be extended to incorporate these new dynamics.

## The Traditional Paradigm

Traditionally, talk of war has been explained under the canons of "just war theory." This paradigm generally

can speculate what a carefully designed attack might do to a marquee ride or a general attack against ordinary rides at a given time across a country.

<sup>1</sup> Of course these scenarios are speculative since there has never been such a catastrophe before, but they were and are the fodder of security briefings. When I was with the Center for American Progress, I listened to many such scenarios from Defense experts. At the present state of the art, they are impossible completely to guard against. Various airports have had part of their systems malfunction (such as the Dublin Airport on July 9, 2008) but communications were up and they shut down the airport. The New York Stock Exchange almost yearly has some major computer failure (the latest at the writing of this essay was November 12, 2012). However, a clever cyber-attack would disguise itself and could potentially cause major chaos in world markets (creating a cascading effect). And though amusement park rides are engineered to high standards, several people die every year in the United States during mechanical malfunctions (<http://www.rideaccidents.com/coasters.html>). One

envisions inter-state conflicts among sovereign nations. Since the end of World War II, this paradigm has been stretched considerably until, perhaps, it is no longer accurate to describe intra-state warfare and the new technological venue of cyber warfare. We should be clear that acts of cyber sabotage occur internationally on a regular basis. The difference between sabotage and cyber warfare is a matter of degree. When you shut down a particular company for a short period of time or steal some corporate secrets or social security numbers, then we are talking about a criminal action of a minor nature. If a foreign country disabled the U.S. Navy's Seventh Fleet in such a way that it was put out of commission for an extended period of time while some other nefarious events took place that were in the jurisdiction of the Seventh Fleet, then the cyber-attack would constitute an act of war. This essay will raise some critical questions about this changing paradigm with intent to suggest alterations to the way we think about this new dimension of war.

Under the traditional paradigm war is thought to be an aggressive act by one state against the territory or sovereignty of another state for the purposes of gaining land, resources, or strategic tactical advantage according to internationally recognized rules and constraints governing such action both *ad bellum* and *in bello*.<sup>2</sup> The attacking state acts immorally because it *caused* the conflict. This is an important feature of the traditional paradigm respecting *ad bellum*. Of course it is often part of the public relations campaign of nation states to say that "historical aggression" or "threat" creates a compelling reason to act preemptively. These arguments were used by Hitler and George W. Bush, respectively in justifying their offensive wars to their own people. However, the principle still holds (despite those who try to employ rhetorical fallacies and lies to justify what they are doing).

Attacking states who act aggressively with their military personnel out of their own interest in a "might-makes-right" agenda can be termed *belligerent kraterists*.<sup>3</sup> Kraterists are those who espouse a theory of justice such that the successful exercise of power is self-justifying. I have termed this sort of distributive justice slogan, "to each according to his ability to snatch it for himself."<sup>4</sup> I have argued elsewhere that such a worldview is unethical.<sup>5</sup> But how far does one go with

this assessment? General Sherman in the United States' Civil War believed that once one party violated the *ad bellum* provisions, that any *in bello* options were open to him (the one attacked unfairly).<sup>6</sup> But this is to mistake the difference between the reasons to *go to war* versus *the way one conducts a war*. In the traditional model these are important distinctions. Walzer, for example cites the Nazi general Rommel as doing a better job at *in bello* than the Allies' general Eisenhower (even though the Nazis fail terribly in the *ad bellum* test).<sup>7</sup> Thus, under the traditional paradigm there are two moral judgments to be made about the states participating in a war: (a) a judgment about origins, and (b) a judgment about how the action is carried out. War is thus constrained by rules. These rules confound the belligerent kraterist (who obeys only the rule of self-interest—hardly a moral rule at all).<sup>8</sup>

The traditional just war paradigm has been created over many centuries. It principally describes warfare that is between sovereign states (which have themselves evolved over time from a decentralized city-oriented structure that was based upon tribute-taxation to a more powerful roving army as a titular central authority to the modern state based upon advanced communications and ability to rapidly travel).<sup>9</sup> It can be tweaked to also describe civil war and guerilla war (one state which is a pretender to becoming a separate state). When we come to instances of non-state sponsored terrorism, the model is shakier. The line between criminal activity and non-state sponsored terrorism is blurry at best.<sup>10</sup>

Another set of key understandings in the traditional paradigm concerns what war consists of in practice. Certainly in the earliest times war was a gang fest in which the well-conditioned warriors won the day. This does not mean that tactics (such as the phalanx in the Battle of Marathon) and weapons (such as Alexander's long spears) were not important, but the most critical element was well-conditioned *arête* soldiers.<sup>11</sup> Aristotle certainly thought about it in this way in his depiction

6 Walzer (1977): 32-33.

7 Walzer (1977): 37-38.

8 One critic of the traditional model as set out by Walzer is Jeff McMahan, "The Ethics of Killing in War" *Ethics* 114.4 (2004): 693-733. McMahan characterizes the issue as: "Let us say that those who fight in a just war are 'just combatants,' while those who fight in a war that is unjust because it lacks a just cause are 'unjust combatants'" (693).

9 For a good description of the ancient polity see: James Romm, *Ghost on the Throne: The Death of Alexander the Great and the War for the Crown and Empire*. (N.Y.: Knopf, 2011).

10 Boylan (2011): ch. 13.

11 On the use of the phalanx see Peter Krentz, *The Battle of Marathon* (New Haven, CT: Yale University Press, 2011). Discussion of Alexander's weapons can be found in Romm, *op.cit.*

2 There are, of course, various sources of just war theory. One good overview of these can be found in Gregory M. Reichberg, Henrik Syse, and Endre Begby. Here and elsewhere I also use Michael Walzer as a representative of the traditional paradigm cannon.

3 Boylan (2011): 177.

4 Boylan (2004): 145.

5 Boylan (2004): 151-153.

of slavery in the *Politics*.<sup>12</sup> Though the argument is proximately about slavery, the underlying background conditions address what he felt war was about.

1. War may be just or unjust—Fact
2. In just wars virtue and excellence make for winning—Assertion
3. Virtue and excellence are marks of masters—Assertion
4. In just wars, losers are properly slaves—2, 3
5. In unjust wars virtue and excellence may not account for winning—1, 2
6. In unjust wars slavery may also be unjust—4, 5

Aristotle thought that *arête* for warriors consisted in being the strongest and endowed with the most fortitude. Thus the winning side *deserved* to win. Those on the losing side *deserved* to be subjugated (so long as there was no trickery and the outcome was decided by strength and conditioning).

But technology and innovation had a way of changing this rather athletic depiction of warfare. Various advances in armor, cavalry, long bows and cross bows, gun powder, the confluence of WWI alterations (airplanes, poisonous gas, accurate heavy artillery, et al), and the fine tuning of these alterations with new addition of the ultimate technical innovation—the atomic bomb in WWII. The result of all of this is a permanent alteration of the traditional paradigm in significant ways. Though it is still a contest, the technology of today allows the side with the most powerful weapons to possess a tremendous advantage *ceteris paribus* over an opponent who is more physically fit, but less well armed.

### Cyber Warfare

The most modern technological advancements in warfare include robotic warfare and cyber warfare. This essay will concentrate upon the latter as it stretches the traditional paradigm significantly. This is because: (a) The role of killing—in the traditional paradigm this is part of the deal, but in cyber warfare killing (though it may occur) is not primary, (b) Attribution—it is not always clear who committed the act (cf. Duqu, Stuxnet, and Flame), (c) Territoriality and neutrality are blurred as internet hubs go everywhere, (d) The conceptualization of the attack and response need new clarification. Let's address these in order.

### Alterations to the Traditional Paradigm

First, there is the change to the normal way we think of what constitutes an *act of war*.<sup>13</sup> Earlier I suggested that it was an aggressive act by one state against the

territory or sovereignty of another state for the purposes of gaining land, resources, or strategic advantage according to internationally recognized rules and constraints governing such action both *ad bellum* and *in bello*. Well, this traditional understanding requires at least two components: 1. An aggressive act by one state against another against its territory or sovereignty, and 2. A *telos* of gaining land, resources, or strategic advantage. A traditional understanding of the first point envisions military personnel moving into a region to take control—involving almost universally the loss of life (preferably military only).<sup>14</sup> In a cyber-attack there are no ground troops. The delivery mechanism is either via the Internet or by the agency of a fifth column person who has malware on a flash drive (the probable launch of Stuxnet).

Among the sorts of attacks there is the *virus* (malware that attaches itself to another file, program, or e-mail) and it replicates (as in Duqu and Flame). This sort of attack is so general in scale that it would affect not only the target country but any other country connected by the Internet (presuming that the attack is not Intranet). Because of this widespread feature of the virus, it is impossible to preserve the military v. civilian distinction common to just war theory.<sup>15</sup>

A second sort of attack is a *worm*. It is a free standing program that can be more targeted (like the Stuxnet worm). This might be the malware of choice for the near-term cyber war arsenal. Because there can be firewalls established against worms, the best delivery device is via a flash drive inserted into the Inter- or Intranet system by a spy or fifth column individual. This requires subterfuge entry into the sovereignty of another country to perform the act. (The “entry” may only be the flash drive into a computer linked to the target system as the fifth column individual is probably a citizen in the country with security clearance.)

A third sort of malware is the Trojan Horse. Like the worm it is not self-replicating. It is not easily detectable at first and then attacks at a delayed interval. This weapon has the advantage of slipping under the firewall protection systems. However, it cannot be delivered to Intranet systems.

For the most part, these three sorts of malware will disable the operations of some computer driven facility within the country: electricity, sewage, water-treatment,

14 Though this is generally the case, there are extenuating cases where sovereignty is breached by attacks upon a surrogate—such as in the Bay of Tonkin (Vietnam War) or the USS Maine (Spanish-American War). However, the general pattern still holds.

15 Of course there have been many other instances in which civilians have been targets during warfare (such as biological and chemical agents), but the point here is that these instances violate traditional just war theory.

12 Aristotle, 1255a 20, ff.

13 See Geers, Dipert, Kelsey, and Harris.

air traffic control, et al. For example in 2000 the Israelis disabled the public websites of Hezbollah and the Palestinian National Authority.<sup>16</sup> In 2001 because of a maritime dispute, China launched an attack against a California electric plant that almost caused the grid to shut down.<sup>17</sup> Though an egregious loss of property or life would constitute grounds for retaliatory war, the question still remains: what constitutes ‘egregious’? Our assessment of this leads us back to the distinction between sabotage and an act of war mentioned at the beginning of this essay. The answer must take into account a cost/benefit assessment of outcomes. Our tolerance for damage caused by China would certainly be higher than that caused by a small country such as Grenada. Our grounds would be the same in each case, but the practical consequences of a retaliatory war against China are echelons higher than an attack on Grenada.

An interesting example of a coordinated cyber campaign was the launching of Duqu, Flame, and Stuxnet. The military objective was to: (a) obtain information on Iran’s nuclear weapons program, and (b) to slow or disable said program. The program began with Duqu, a computer virus that was designed to copy the blueprints of Iran’s nuclear program and to provide general information from a wide variety of sources that were infected as per the mission of viruses. Some believe that this attack was begun in Israel because the working hours of Duqu’s operators corresponded with local time in Jerusalem (along with other cities in that time zone).<sup>18</sup> But this attribution has never been proven to everyone’s satisfaction. Apparently, Duqu’s mission was successfully achieved. It allowed the next step in the recognizance, Flame.

Flame was another virus that was launched in 2007. It was a reconnaissance tool to track the widespread activity of scientists and the operations of uranium enrichment centrifuges.<sup>19</sup> Again, because the malware attack was in the form of a virus, its effects were widespread. It was remarkable in its effectiveness because it delivered high yield information that gave an accurate picture not only of the activities of the scientists, engineers, and politicians involved in the project (personally), but also it described the activities of the centrifuge development and its ongoing operations. This virus went undetected for five years. The attribution is generally thought to be the United States, but nothing can convincingly be proven. In this case these two instances were examples of recognizance that is a stage in going to war.

Duqu and Flame set the stage for a response: the Stuxnet worm. In the case of the Stuxnet worm, the target was a nuclear power plant that intelligence (as per Duqu and Flame) said was being converted into a center to create nuclear grade material that could be used in a weapon. Iran had claimed that it only wanted to enrich uranium for use in power plants (a legitimate civilian use). However, that level of enrichment is only 3% to 5%. The plant had enriched uranium over 20x—possibly on the way to the 80%-90% level necessary for a weapon.<sup>20</sup> The goal for Stuxnet was to disable the site and create havoc so that the deployment phase of enrichment was pushed back by three to five years. The actual result was a 24 month disruption. This attack worked effectively and involved no loss of life.

However, in other cases conventional warfare mixes with cyber warfare. In September 2007 the Israelis launched a cyber-attack against the radar and anti-aircraft devices in Syria. This maneuver aided the Israelis to successfully bomb a nuclear facility that also might have been on the verge of creating nuclear weapons.<sup>21</sup> Because Syria felt the cost of going to war with Israel to be excessive, there was no retaliation.

One can imagine that attacks upon air traffic control systems could also have the consequence of civilian aircraft crashes and the loss of life. Attacks on an electric grid<sup>22</sup> could have the consequence of stopping electricity to hospitals and causing deaths (assuming there is no comprehensive back-up system that is only available at a very select number of hospitals around the world). Or electric grid failures could severely disrupt fire, police, and other emergency personnel from being able to save lives and avoid domestic havoc. Food stores, sewage plants, water purification facilities would all be affected. What if there were a cyber-attack on the New York Stock Exchange? If the attack were sophisticated enough, bogus trades could be made and markets manipulated in such a way that the entire system would be at risk—and possibly not distinguishable from ordinary “legitimate” trades.<sup>23</sup> Since trading programs are so interconnected through programmed algorithms, it might be possible to create a crash (a one-day event until the automatic shut-off is activated) and then be subject to follow-up attacks. The stock exchanges have automatic systems for trading irregularities but are less well-prepared for cyber-

20 Anonymous, *New York Times* (2011).

21 Eshel: <http://www.military.com/features/0,15240,210486,00.html>. Accessed October 15, 2011.

22 Harris: 70.

23 Of course, Internet Security experts have long understood this problem. I was present at one such mock session at Marymount’s graduate Computer Security Program. Though the technical details were beyond my ken, I was made keenly aware of how much damage might be irretrievably caused by a clever black hat attack.

16 Hughes: 528.

17 Geers, 2008 & 2010.

18 Perloth (2012).

19 Anonymous, *New York Times* (2012).



attacks.<sup>24</sup> This could cause untold international economic havoc.

No matter the delivery device, attacks upon airports, electric grids, or stock markets could have wide-ranging effects that would blur the classic distinction between military and civilian (non-combatant) targets. This could be an instance of a stretch upon the traditional categories of just war.

Of course, a final telos for malware would be *espionage* (as per Duqu and Flame). Traditionally, espionage is not a cause for war. However, *spyware* is another popular form of malware. It is not the same as the destructive genus, but like the Trojan Horse, it tries to be undetectable and deliver important classified information for foreign intelligence agencies. Spyware can be employed as either a virus or a Trojan Horse. Since spyware is really very similar to other espionage strategies in times past, it does *not* offer a challenge to traditional just war theory.

### Attribution and Target Distinction

One of the pivotal differences that cyber warfare poses from the traditional paradigm is attribution.<sup>25</sup> The question of “who did what to whom?” was generally easily answered when there were physical events of individuals crossing territorial lines and occupying land and strategic positions in the opposing country. However, when the battlefield is really fiber optic cable, phone lines, and cell phone relay stations, the place of interest is largely inscrutable. Privacy has long been a part of the architecture of the Internet. Messages generally begin on one relay network and then are routed through the most efficient set of relay networks until they reach their destination. Each relay network has identifiable origin and terminus points. These can be exploited by the black-hat hacker or cyber attacker to hide the identity of the perpetrator. For example, if Russia wanted to attack Estonia or Georgia, they could first send out a foray to Nigeria in Africa and then back to Estonia to make it appear that Nigeria was attacking them.<sup>26</sup> Without further protocols, what appears at first glance to be an attack by Nigeria against Estonia or Georgia could instigate a counter-attack (see below). This counter-attack would be mistaken because the real culprit (here assumed to be Russia) was not known and another innocent party was blamed. As the Internet has grown more ubiquitous, a

careful rogue can literally make himself invisible.

A simple fix for this problem would be to change the Internet by creating an identification trail so that all traffic could always be tracked to its source. This would require international cooperation since if only one country went forward, counterfeiting would be easy. However, this would not solve the problem with the Stuxnet worm that was allegedly inserted into the closed computer system of Iran’s main nuclear power facility. In this situation we have a sabotage situation not unlike the traditional blowing up of a bridge or other tangible target. (As mentioned earlier the extent of property damage or subsequent loss of human life would determine whether such aggressive actions constituted a ground for going to war.)

Without a new international protocol to change the architecture of the Internet (by requiring identification of all traffic) it is very possible that we will devolve into an attitude of continual war. This is because each major player will consider himself involved in *bellum omnium contra omnes*—a war of all against all.<sup>27</sup> This would be an unfortunate outcome because the various advances in cooperation—particularly in international commerce—would be set back and the plight of humankind would be more perilous.

Target distinction is another critical part of just war theory. In *ius in bello* rules, the warring factions may attack military targets or civilian/non-combatant targets that are enabling the military to fulfill its mission. However, because most infrastructure that might be attacked in cyber warfare is *dual use*, this distinction can become lame. For example, if the air traffic control system is deployed by a dual use GPS/radar system, the disabling of such a system for military use might also cause airplane crashes of civilian planes. (The same thing could also occur on rail traffic that is also a dual use system that is heavily computer driven.)

Or if the electric grid were the target, and it was dual use with military and civilian customers (such as hospitals), then an attack on the electric grid to harm the military might have considerable collateral damage on hospitals and operating theaters with the resultant loss of non-combatant human life.

Other cases involving water, sanitation, or communications facilities (that might also take out civilian police) could have considerable civilian casualties. This is due to the fact that there are so many dual use facilities in most countries in the world.

### Territoriality and Neutrality

The next category relates to what we discussed in the last section. The traditional definition of war cites the territorial sovereignty of each nation. Since the Internet

24 Roberto Baldoni and Gregory Chockler eds. have set out analysis and strategies for financial market defenses. The editors claim that the major financial markets and other financial institutions are not well-prepared for a sophisticated cyber-attack.

25 Cowan: 25.

26 Though there were real attacks on Estonia and Georgia, this scenario is rather fanciful: see Dipert: 384.

27 This is also a concern of Hughes: 525.

goes through almost every nation on earth in some way (hard wired or broadband through the wireless air) and since there is no protocol for identification, the traffic on the Internet is largely anonymous (to anyone who wants to cover her trail), the traditional attachment to or infringement upon territoriality is difficult or impossible to determine. This would still be the case if the identification protocol mentioned above were adopted unless there were additional markers of data packets that went through virtual customs agents that would subject each packet to some sort of quick cyber check. Presumably, this might go part of the way toward maintaining territoriality. It is true that data packets could be disguised, but this would be analogous to those at border crossings who attempted entry under disguise (though the time involved would be much less—probably less than a second).

However, since the Internet has been built upon the admiration of speed and efficiency, even a second or so at each international boundary might add several seconds in the delivery of searches and downloading of messages and data. In our present climate, this would be seen practically as a large hurdle to clear.

With respect to just war theory, territoriality becomes important as it impinges upon the right to neutrality. The prime example of the exercise of the right of neutrality is Switzerland which was granted this right in 1815 under the Congress of Vienna. This right has been re-affirmed time and again internationally and most recently by the Treaty of Lisbon that came into effect in 2009.<sup>28</sup> If a country wishes to remain neutral, then it does not want to help either side in a war. Since the present architecture of the Internet does not allow for identification of *who* is sending *what* to *whom* maintaining the sovereignty of one's territory (physical optic cable) or one's air space (wireless broadband) is impossible under our current IT structure. In cyber warfare, everyone can be brought into the picture—even unwittingly. This reality leads to the unacceptable consequence of *bellum omnium contra omnes* — a war of all against all. Such an outcome would render the entire world to be in constant and perpetual war.

### Attack and Response

The final category to be examined in this section is the difference this all makes. What if country X engages in a cyber-attack against country Y? What would the appropriate responses be? Consider the following:

1. Country X engages in a cyber-attack against country Y, and Y decides to engage in a counter cyber-attack against X.

2. Country X engages in a cyber-attack against country Y, and Y decides to engage in a conventional counter attack against X.

In situation one, the traditional just war theory is not in too bad of shape. The principle of proportionality would seem to be most relevant. If X's attack against Y cost \$Z amount of money and no loss of human life, then a counter-response in the Z-range would be justified.<sup>29</sup> This, of course, assumes that the attribution issues have been resolved. (I believe that unless my suggestions are adopted, there will always be inaccuracy here—largely driven by prejudice and ethnocentrism.) If one does not know who did it, then how can one respond? Social prejudice may well rule the day, but that would be no better than a “lynching.”<sup>30</sup> If we get the attribution wrong, then there is no proper defensive response, but instead another offensive act. The doomsday model of *‘bellum omnium contra omnes—*a war of all against all’ would be ever closer.

But what of option #2? This is more difficult because it involves goods of a different type. On the one hand we have an economic loss and on the other we have a response that will involve the loss of lives on both sides. Going into conventional war against another nation is no small event. How much economic disturbance would justify it? These sorts of calculations need to be made in an international forum: a new Geneva Convention.<sup>31</sup> If some foreign country were to shut down *Amazon.com*, would that be enough to respond with conventional war? What about disabling Hoover Dam? What about shutting down the power grid from Boston to Washington, DC? Where do we draw the line so that the general

29 Of course we must also view the real “cost” of an attack in the context of one country's ability to restore itself. For example a one billion dollar damage to the United States is far different than a one billion dollar damage to Haiti. The traditional criterion of *proportionality* can take this into account.

30 The manner in which prejudice is often the first response in times of uncertainty was demonstrated in the Mura Office Building bombing. In the days just after the attack, the public view was that it was an act of terrorism perpetrated by foreign Muslim extremists. This, of course, was wrong. It was a domestic terrorist with ties to non-denominational Christianity. The same dynamics occurred during the run-up to the Spanish American War after the publicity over the explosion and sinking of the U.S.S. Maine in Havana Harbor that killed almost three-quarters of the crew. Though the cause was unclear, the yellow journalism of the time using some underlying racist background assumptions stirred up public sentiment that led to war.

31 Perhaps the US National Research Council's 2009 report on cyber-attack would be a good starting point for a new international protocol.

28 [http://ec.europa.eu/news/eu\\_explained/091201\\_en.htm](http://ec.europa.eu/news/eu_explained/091201_en.htm). Accessed October 1, 2012.

intuition of proportionality is met? This is a gap in the present understanding of the base-line justification for conventional war in response to cyber-attack. This is not an insurmountable task, but at present the boundary conditions are not well-defined. It would be better if an international discussion were to take place in order to address these issues—perhaps involving the International Court of Justice and the World Trade Organization for adjudication of economic tort.

One way to move in this direction would be to come to some sort of agreement about historical attacks that resulted in loss of life and/or property that all agree were acts of war. These could be viewed as percentages of local or national economies. Up to this point, the acts would be viewed as sabotage and fines would be leveled against the offending country. Past the point, the action would be referred to the U.N. Security Council and to regional military pacts such as NATO.

## New Ways to Think about War after Cyber Attacks

This essay has *not* suggested that the traditional categories of just war theory be jettisoned. Rather, what has been argued is that they need to be expanded to include the new dynamics of warfare that include recognition of cyber warfare (though other issues such as the overwhelming reality of intra-state warfare, non-state sponsored terrorism, and ever expanding robotic warfare should also be addressed).

1. Regarding cyber, warfare new rules must be drawn up. Rules governing *anything* only work when the participating parties agree to the rules and the mechanisms for enforcement. In my two years at the Center for American Progress (a Washington, D.C. public policy think tank) it became apparent to me that both of these proposals will not be easy to accomplish. The most useful suggestion that I would put forth that might bring this about is that in the case of cyber-warfare we should move away from the *at-fault liability* mindset that presently exists in just war theory to one of *strict liability*. This new mindset would look at the damage caused by some actor and move it into international civil law. This would permit monetary compensation based upon strict liability tort. The top 75 economies in the world have assets spread around the world in major G-6 countries that could be frozen should the fines not be readily paid.

2. Cyber-warfare requires a set of internationally recognized compensation categories for loss of property and life—though this can be contentious (as we found out when the United States tried to compensate the families of victims in the 9/11 attacks). To avoid this, monetary disbursement levels need to be established.

These would be on the line that international insurance policies already adopt when creating their policies for large international players. This is especially important for errant attacks or unforeseen consequences.

3. A fifth Geneva Convention. The last four: 1864, 1906, 1929, and 1949 served their eras well, but issues raised in this essay (particularly the adoption of a civil compensation system) would allow for another source of counter-attack—not on the battlefield but in the courts of international justice. Among other updates one prominent area for new regulations concerns cyber warfare.<sup>32</sup>

Wouldn't it be a blessing in disguise if the contemporary challenges to the just war theory of international conflict actually resulted in a new mechanism (rooted in recognized law and backed up by the global banking system) that was actually able to find an original way to settle acts of aggression on the territory and sovereignty of another nation through recognized legal protocols instead of the shedding of blood in the traditional way or via cyber destruction?<sup>33</sup>

The integration of an updated rule of international law, that is enforceable, would bring just war theory up-to-date, and allow cyber warfare to be included within a revised cannon of just war theory. The world would be the better for it.

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32 I would also add regulations concerning robotic warfare at the same gathering.

33 Of course, these proposals will work best with the network outside the G-8 countries (the eight largest economies in the world). These countries have a history of ignoring rulings from the United Nations. The result with these nations will probably be handled diplomatically on a case-by-case basis. However, having an agreed upon structure will still help with these negotiations.

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# Liberty and Pornography

## An Examination of the Use of John Stuart Mill in Pro-Censorship Feminist Arguments

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### Abstract

The freedom to create and disseminate pornography has often been defended based on a liberal claim that the free speech of pornographers would be violated if pornography were censored. The classic defense of free speech, given by John Stuart Mill, is often invoked to defend this position. In opposition, many feminist theorists have advocated arguments for regulatory measures against pornography. Some of these authors have also utilized the writings of Mill. They have argued that, contrary to the liberal defense of free speech, Mill's arguments are compatible with, or even require, the forced regulation of pornography. Logically, unless Mill's writings are contradictory, they should not be invoked to support diametrically opposed positions. This paper investigates this apparent dilemma and argues that, contrary to the anti-pornography feminist position, Mill's writings do not support pornography regulation. In fact, in a surprising twist, the arguments of anti-pornography feminists can, using the writings of Mill, be seen as strongly supporting the liberal anti-censorship position.

Key words: Pornography, Liberty, Censorship, Feminism, John Stuart Mill

### Introduction

The freedom to create and disseminate pornography has often been defended based on a liberal claim that the free speech of pornographers would be violated if pornography were censored. The classic defense of free speech, given by John Stuart Mill, is often invoked to defend this position. In opposition, many feminist theorists have advocated regulatory measures against pornography. Some of these authors have also sought to utilize the writings of Mill in support of arguments that favor the regulation of pornography. They have argued that, contrary to the liberal defense of free speech, Mill's arguments are compatible with the prohibition of most pornography. Many of these arguments are focused on Mill's writings involving harm, feminism and equality. Logically, unless Mill's writings are contradictory, they should not be invoked to support diametrically opposed positions regarding pornography. This paper attempts to resolve this apparent dilemma. Mill's writings are misapplied in the feminist arguments. In fact, they strongly support the liberal, antiregulatory position.

### The Feminist Arguments

The most promising method by which to argue that the regulation of pornography is consistent with Mill's position in *On Liberty* is to assert that pornography is an other-regarding harmful action. This, in fact, is the approach some feminist writers have taken. This approach is contrary to the liberal defense of pornography that has usually assumed that viewing pornography is, generally, a self-regarding action. However, what kind of harm pornography may or may not cause is subject to dispute. Anti-pornography feminist arguments that appeal to Mill's writings usually claim that one or several of the following harms follow from pornography: a) women are directly physically harmed as a result of pornography; b) pornography silences women and causes their right to free speech to be violated; c) pornography subjugates women and denies their equal rights and d) pornography is a type of harmful hate speech that damages the social status of women. In this section I will briefly outline each of these claims.

Some anti-pornography advocates, most notably, Catharine MacKinnon and Andrea Dworkin, argue that pornography causes sexual violence against women. In support they often cite studies that seem to reach the conclusion that viewing pornography causes attitudes in men and makes them likely to perpetrate sexual violence. I have discussed these studies at length elsewhere (White 2006). While most authors of arguments of this type acknowledge that the evidence concerning this causal relationship is uncertain, they maintain that it is likely that pornography greatly contributes to sexual violence.

Other approaches which attempt to utilize Mill's writings in support of the prohibition of pornography appeal to Mill's clear emphasis on equality and the right to free speech. Some feminist authors have claimed that pornography is an act of subordination that sexualizes inequality and causes women to remain in inferior social positions. It has also been argued that pornography silences women and may act as a form of hate speech against them. Because of this subordination, silencing and promotion of inaccurate information about women, it has been claimed that the equality of women is compromised by the production, distribution and consumption of pornography.

Catherine MacKinnon built the concern that pornography subordinates women into the definition of pornography used by MacKinnon and Andrea Dworkin while drafting the Minneapolis and Indianapolis anti-pornography ordinances. The definition of pornography given claimed that pornography is sexually explicit material that subordinates women (MacKinnon and Dworkin, 1988). This is not to be confused with the depiction of subordination. MacKinnon claims that pornography is the active practice of subordination (MacKinnon 1996). This subordination, Rae Langton argues, can silence the speech acts of women and contribute to the subordinate status of women (Langton 1990). MacKinnon also stresses that pornography contributes to the silencing of women in at least three ways: a) it shapes a hostile environment where women are reluctant to speak at all; b) it creates a social climate where when women do speak their speech is counted for little and c) it may silence women by making their speech unable to be understood. In an effort to explain this type of silencing, Jennifer Hornsby claims that when a person is silenced they are "deprived of illocutionary potential." She claims that the silenced person does not have it in her power to do with language what she might want (Hornsby 1995).

How this subordination and silencing works has been the subject of some debate. Rae Langton and Jennifer Hornsby have built upon the work of MacKinnon and Andrea Dworkin to explain the process of subordination. By expounding upon the illocutionary aspects of pornography, Langton and Hornsby add plausibility

to MacKinnon's assertion that pornography is an act of subordination against women. Langton argues that speech is more than "only words." Following the framework set by J.L. Austin, Langton argues that pornography is a speech act. Speech can be an action, according to Langton, because it involves more than a mere locutionary act. Speech involves, according to Austin and Langton, more than locutionary and perlocutionary dimensions. We often do things with our speech. We can urge someone to do something, we can warn, we can marry and we can refuse. In such cases Langton claims that speech is an illocutionary act. A perlocutionary act is an act performed by saying something (for example, "you are now married") However, an illocutionary act is an act performed simply in saying something. Langton claims that pornography is an illocutionary act that subordinates women. She claims that, like other illocutionary acts of subordination, pornography does three things. She claims pornography: a) unfairly ranks persons as having inferior worth, b) legitimates discriminatory behavior towards persons and c) unjustly deprives persons of some important powers (Langton 2009).

Concerning silencing, Langton asserts that the powerful can prevent the speech acts of the powerless from counting as speech. Langton argues that pornography, being an illocutionary act, may make some potential speech "unspeakable" for women. In general, the intention to perform an illocution of a certain kind is not the only felicity condition that needs to be met for that illocution to occur. Speech can, in Langton's words "misfire." To illustrate this Langton claims that pornography silences the refusals made by women to unwanted sexual advances. It makes refusals unspeakable. Langton argues that if pornography is an illocutionary act that silences women, a conflict occurs between the liberty of women to speak and the liberty of pornographers (Langton 2009). If pornography silences women, as MacKinnon and Langton claim, it is clearly a violation of the free speech of women. This silencing may also make it impossible for women to fight the speech of pornography with more speech.

In addition to pornography's ability to subordinate and silence women, it may also act as a type of hate speech. Following this possibility, several anti-pornography feminist writers suggest that pornography causes harm by endorsing or advocating certain negative attitudes against women. For example, Helen Longino suggests that pornography constitutes an endorsement of negative attitudes and views because pornography represents the degradation of women for the pleasure of men and that there is no content in pornography to suggest that this is an improper way to treat a person (Longino 1995). MacKinnon also claims that pornography represents abusive and degrading sexual behavior in a way that

endorses the degradation (MacKinnon 1987). If these authors are correct, pornography may best be seen as hate speech or even group libel. This “hate speech” may help to form and reinforce the view that women are merely sex objects. Such speech may cause negative attitudes concerning women and, when combined with pornography’s silencing effect, cause a loss in equality. As Susan Easton claims, pornography, with its anti-women propaganda may be strengthening patriarchal ideology and have an adverse impact on sexual equality (Easton 1994).

### Possible Support from Mill

If pornography, as some authors claim, does indeed cause substantial and immediate harm to women, Mill, would have little difficulty endorsing regulation. In support of this consider Mill’s famous Principle of Liberty. Of the principle Mill writes, “the principle requires liberty of tastes and pursuits; of framing the plan of our life to suit our own character; of doing as we like, subject to such consequences as may follow: without impediment from our fellow creatures, so long as what we do does not harm them” (Mill 1869, 17). If harm occurs Mill opens the door for limits on liberty and there may be justified regulation. As Mill famously states, “the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others”(Mill 1869, 14). Following Mill’s commitment to Utilitarianism, we can also safely assume that once harm is probable, a balancing act must take place. Simply put, if more harm is caused to humans’ overall flourishing from pornography than good, Mill should favor its regulation.

In *On Liberty*, it is obvious that Mill advocates freedom of discussion and freedom of opinion. In fact, the second chapter of *On Liberty* is titled, “The Liberty of Thought and Discussion” (Mill 1869). This liberty of opinion and discussion is, however, different than freedom of expression. Something can be expressed that doesn’t contribute to a discussion or advance the truth. Nevertheless, Mill advocated free speech for several reasons. Perhaps the most predominant and historically significant argument by Mill for affording speech a special protected status is that speech leads to the discovery of truth. In other words, a free and open discussion is the best way to arrive at truth. In *On Liberty* Mill attempts to establish a causal link between the free market of ideas and epistemic advance. Only if we have the complete liberty to contradict a position are we justified in accepting its truth (Mill 1869). If we were to hold that any of our beliefs were absolutely true, we would be assuming infallibility. Clearly no human is infallible. Given this fallibility, there is a possibility

that, if any belief is suppressed, it may be true. Because any belief may be false, suppressing any opposing belief entails suppressing a possibly true belief or suppressing a belief that is partially true. Only by allowing an open discussion, Mill claims, do we allow for the possibility that these true beliefs will be expressed. Thus, Mill argues that a policy of suppressing beliefs will, in fact, suppress some true ones and impede the search for truth. If women are silenced, they may not be able to express their opinions and this will hinder the pursuit of truth. It may also be possible that pornography hinders the advance of truth in other ways. Perhaps the images projected in pornography cause untrue attitudes to be commonplace about women. As Susan Easton writes, “because of the quantity of pornographic material and its wide circulation, the pornography industry may actually prevent the discovery of the truth about women’s nature and abilities”(Easton 1994, 7).

While Mill relies heavily on the argument from truth, more than truth is involved in his argument for freedom of speech. Mill claims that if people fail to engage in thought and discussion and understand why their beliefs are justified, they will merely be dogmatic (Mill 1869). Freedom of speech may also be a necessary condition for person building. Engaging in discussion allows individuals to be exposed to a variety of views and decide what they believe, not just what they have been told to believe. This is the foundation for making autonomous decisions. Therefore, according to Mill, for a person to build character and become an autonomous agent, he or she must have access to free speech. Given the importance Mill attaches to free speech, if pornography does significantly silence women, support may be gained for the anti-pornography arguments from Mill’s defense of free speech. This is especially true if pornography limits discussion that may lead to the truth and is, in itself, expression that is unlikely to lead to the truth.

Besides the value of free speech, there are other reasons to suspect that Mill would have been opposed to pornography. If pornography is an act of subordination and threatens equality, there is strong evidence that Mill might have supported its regulation. Much of this support can be found in *The Subjection of Women*, which David Dyzenhaus claims is “Mill’s curiously neglected essay” (Dyzenhaus 1997, 33). Dyzenhaus argues that if *The Subjection of Women* is read properly, it is clear that Mill would have been “surprisingly sympathetic” to anti-pornography feminist arguments. In *The Subjection of Women*, Mill elegantly expresses surprisingly modern feminist ideals. This essay contains detailed argumentation in opposition to the social and legal inequalities commonly imposed upon women by a patriarchal culture. Mill’s passion for equality is unmistakably expressed when he writes, “The true

virtue of human beings is to live together as equals” (Mill 1869, 224). Mill also recognized that prevailing social attitudes concerning women could hinder equality. In the *Subjection of Women* Mill claims that it may be difficult to really understand women because of the socially constructed idea that they have a servile nature (Mill 1869). Given Mill’s commitment to equality, if pornography subordinates women and promotes inequality, Dyzenhaus’s argument may be supported.

Another possibility for consideration is that a loss of equality may translate into a loss of autonomy. If women are placed in a subordinate position and considered unequal, their autonomy may be severely limited and they will not be free to advance in the ways they may wish. Given this, if pornography causes a loss of equality and a corresponding drop in autonomy, there is further support to be gained in the writings of Mill for regulatory measures. Mill placed great value on freedom to conduct experiments of living and some authors have suggested that pornography impedes the autonomy of women and limits such experiments. As Susan Easton writes, “part of the feminist argument for regulation is that pornography stifles women’s development by expressing and perpetuating negative ideas and images”(Easton 1994, 24).

The final argument that may gain support from Mill’s writing is that pornography should be regulated because it is a type of hate speech. In *On Liberty* Mill addresses hateful speech briefly and concludes that time and place restrictions are appropriate when hate speech is likely to cause an imminent and immediate danger (Mill 1869). Mill uses the famous example of expressing the opinion that corn dealers are starvers of the poor to an angry mob outside the home of a corn dealer to show that some restrictions on how and where speech can be expressed are appropriate. Some authors have taken Mill’s discussion further and claimed that Mill would be sympathetic to many restrictions on hateful speech. Jonathan Riley claims that Mill would support “measures that would serve to marginalize, if not stamp out altogether, the expression and publication of opinions that force others to endure a risk of severe and immediate harm merely because of their ethnicity, religion, race, gender, or sexual orientation”(Riley 2009, 66).

If pornography functions as a type of hate speech and causes men to view women as unequal, there may be harm to men as well as women to consider. In *The Subjection of Women*, Mill is concerned with the effect that the subordinate status of women may have on the character of men. He claims that men, believing they are superior, may “pervert the whole manner of existence of a man”(Mill 1869, 559). Mill also expresses concern that if women are considered inferiors, men will lose the opportunity to truly enjoy partnerships with women (Mill 1869). It’s also possible that pornographic hate speech

may prevent men from joining with women and uniting on causes. This would most certainly hinder equality according to Mill. In *The Subjection of Women* Mill writes, “Women cannot be expected to devote themselves to the emancipation of women until men in considerable number are prepared to join with them in the undertaking” (Mill 1869, 556). Thus, if the hate speech of pornography prevents men from seeing women as equals and causes them to refrain from assisting women in emancipation, there may be a Millian argument for overall utility against pornography.

## Responses

Given the aforementioned arguments, it is apparent that if pornography silences women, is an act of subordination, is hate speech and causes harm there are may be substantial support for the anti-pornography position in Mill’s writing. Of course, if pornography doesn’t harm women or work in the ways that anti-pornography feminists claim, Mill’s writings will not support the anti-pornography arguments. It is the later position that I will argue in this section.

While it is reasonable to assert that Mill would recommend regulation if pornography caused direct physical harm to women, there is little evidence to support the claim that pornography does cause such harm. For every study that indicates an effect produced by pornography, there is another that shows that there is not an effect. Thus, a causal connection between pornography and sexual violence has not been proven. In fact, the fact that accessibility to pornography is at an all-time high and sexual violence is in decline indicates an uphill battle for this feminist argument.

Even if a correlation could be found between pornography consumption and sexual violence, it is not clear that Mill would advocate censorship. In support of this consider Mill’s discussion of the selling of poisons in *On Liberty*. In this discussion, Mill concludes that although it is possible that murders involving poison may be prevented by prohibiting the sale of poison, selling poison should not be prohibited. The reason Mill offers is that it would violate the liberty of those who use poisons for innocent purposes (Mill 1869). This argument would also seem to apply in the case of pornography. While it may be true that some sexual deviants like pornography and pornography may be involved in a few select crimes, most people who use pornography never become criminals or sexually assault anyone. Thus, just a correlation between pornography and sexual violence may not be enough for Mill to endorse censorship. This is especially true in the case of publications. Of speech or expression in the form of publications Mill claims that they are almost as important as the liberty of thought



itself and nearly inseparable from it (Mill 1869).

The claim that pornography is an act of subordination that silences women is also suspect. Rae Langton offers what is, perhaps, the clearest articulation of the argument that pornography is an act of subordination. Langton acknowledges that, in order for pornography to be such an act, several conditions need to be met. The first condition is that the pornographer is in a position of authority. The second condition is that the speech acts under consideration are understood as verdictive and exercitive acts. Finally, pornography has to have certain perlocutionary effects on the beliefs and behavior of the population (Langton 2009). All three of these claims are improbable. It is especially unlikely that pornography is an authoritative voice about reality. Pornography is fantasy. Also, pornography certainly doesn't present a unified message. In order to give an authoritative statement on anything there would have to be a statement to give. Pornography is simply too diverse. There is common heterosexual soft pornography, violent pornography, lesbian pornography, gay pornography, erotic and loving pornography and even pornography that portrays women in dominant roles. It is unlikely that, given this variety, there is a unified message. Pornographers are usually seeking to sell a product, not make a statement. Pornographers make the pornography they produce because there is a market for it in a society whose ideas about sexuality are influenced by multiple sources.

For pornography to be an illocutionary act of subordination, the empirical evidence concerning its perlocutionary effects should be solid. Langton claims that pornography legitimizes sexual violence and deprives women of certain liberties; however, there is little empirical evidence that pornography does either of these things. Following MacKinnon, Langton argues that by viewing pornography, men have their attitudes towards women changed and are more likely to treat them as inferior and more likely to commit rape (Langton 2009). These empirical claims are dubious at best. The evidence Langton cites is rather old and much has been discredited. Many studies have found that there is no correlation between viewing pornography, men's attitudes and rape (Daviers 1997). I have reviewed this "evidence" in detail in previous work (White 2006).

For pornography to subordinate and threaten the equality of women, the authority that some feminist writers claim pornography possesses would have to be much stronger in constructing reality than other authorities. This seems highly unlikely. Usually, one of the first authoritative figures a person encounters is his or her own mother. Being a woman, a mother has both the authority over a child and can offer a view of what females are like. As a child advances they encounter teachers who are female and other women in

authoritative roles. It is improbable that pornography has such an impact that it can negate all positive representatives of the female gender. Anyone who has interacted with women can readily see that pornography is fantasy. Women are not mere objects; they are mothers, sisters, trusted teachers and friends.

Even if pornography is not an act of subordination, it could still have a silencing effect. Given Mill's commitment to free speech, the silencing effect of pornography would need to be strong to justify breaching the free speech of the producers of pornography. However, the argument that pornography silences women is rather feeble. One of the most common examples in feminist literature of silencing taking place is during rape. Rae Langton claims that pornography causes illocutionary disablement during sexual assault and silences the refusals of women (Langton 2009). If this were the case we would expect more rapes to take place in sufficiently similar areas where more pornography is available. This is not what research findings show (White, 2006.) In fact in countries where pornography regulations were lifted, there was not an increase in violent sexual crime. It may also be the case that it's not the refusal that doesn't work as speech. It may be that a rapist simply chooses to ignore the refusal. Other examples often given to illustrate the silencing effect of pornography are also questionable.

To further illustrate her claim that pornography silences women, Langton uses the example of the book *Ordeal* by Linda Lovelace. In *Ordeal*, Lovelace speaks out about the treatment she endured while working in the pornography industry. Langton claims that Lovelace's protest is silenced. She asserts that *Ordeal* has been turned into pornography and fails to be an act of protest because it is available in adult catalogues (Langton 2009). This hardly seems true. If there is one thing that most writings by anti-pornography feminists share, it is a reference to Lovelace's work. Lovelace has spoken at press conferences, testified before the Attorney General's Commission on Pornography and has given lectures at numerous venues about the exploitative practices of the pornography industry. Her story has influenced many writers and policy decisions concerning pornography. This hardly sounds like someone whose speech has been silenced!

Finally the argument that pornography is, essentially, hate speech and acts as propaganda that endorses negative views about women should be considered. This claim seems to be singling out pornography from every other anti-women form of propaganda available. Consider advertisements for cleaning products that present a traditional image of a subservient woman cleaning the house and waiting for her husband to return from work, certainly this could be seen as sending an anti-feminist message. There are also romance novels

that seem to advocate a type of female submission. One of the most egregious examples of anti-women propaganda is in the form of women's magazines. Magazines like *Cosmopolitan* and *Glamour* often contain articles with titles like "how to keep your man happy" and are filled with pages of malnourished women applying cosmetics. With all this anti-woman propaganda around, if pornography were to be treated as a special case of speech it would certainly be denying pornographers the law's equal protection. This is what rights, like those to free speech, are specifically supposed to protect. To single out pornography as deserving of less respect than commercial advertising and other media is not treating pornography with equal concern.

Further support that Mill would reject censorship of pornography on the grounds that it is hate speech can be found in his essay *Principles of a Political Economy*. In this work Mill claims that there should be a "space in human existence" free from authoritative intrusion. Mill claims that this space "ought to include all that part which concerns only the life, whether inward or outward, of the individual, and does not affect the interests of others, or affects them only through the moral influence of example" (Mill 1965, 938). Thus, even if speech is hateful and may morally influence others, it is well within Mill's protective space. In fact, there is evidence that Mill would welcome hateful speech as long as it isn't forced upon a viewer or likely to cause imminent and immediate harm. Consider again Mill's example of calling corn dealers starvers of the poor. Mill claims that expressing this opinion to an angry mob outside the house of a corn-dealer is punishable because it is likely to cause immediate and serious harm. However, he writes, "such an opinion ought to be unmolested when simply circulated in the press" (Mill 1896, 63). Thus, even if an opinion is hateful, it is still protected in the press. In fact Mill claimed that no society where freedom of expression does not "exist absolutely and unqualified" can be said to be free (Mill 1896, 17).

Knowledge is not the only reason Mill argued for free speech. Even a clearly false opinion or hateful opinion has value. In *On Liberty* Mill writes, "If the opinion is right, they are deprived of the opportunity of exchanging error for truth: if wrong, they lose, what is almost as great a benefit, the clearer perception and livelier impression of truth, produced by its collision with error" (Mill 1896, 21). It is often false speech that helps clarify a true opinion. By confronting offensive and false beliefs we are sometimes forced to offer justifications for our beliefs. In doing this, the beliefs we hold will become, in Mill's words, "a living truth." Uncontested beliefs become simply dogma (Mill 1896, 40). Mill seems to particularly value dissenting expression. In fact, he asserted that the greatest evil in censorship was that it robbed the human race from hearing dissenting

arguments. Without these dissenting opinions, sometimes in the form of hateful dissent, our beliefs will cease to be "living beliefs." As Mill writes, "instead of a living belief, there remains only a few phrases retained by rote; or, if any part, the shell and husk only of the meaning is retained" (Mill 1896, 45).

I have personally witnessed the power of dissenting and vulgar expression to reignite a living belief. Every time I teach an introductory philosophy course I cover a section on feminist philosophy. For the past several years, my students have questioned the inclusion of this section on the grounds that "everyone knows we are all equal now." In fact, my students often express surprise that there are any controversial feminist issues of importance anymore. Many of these students have a very basic and limited understanding of feminist ideas; however, they are ignorant of the reasons behind these concerns. This changed a few semesters ago when I had a nontraditional student in my class that vehemently expressed the view that women were only qualified to be at home and look after children. Because of the frankly disgusting views expressed by this student, something started to happen to my class. The discussion throughout my section on feminist philosophy was lively, my students were certainly not bored, they engaged fully in the class material and learned how to express their belief in equality and defend it against opposing views. Furthermore, they talked about feminism with a passion I have never seen from a class before or since. Their beliefs were no longer simply dead dogma. Pornography may perform a function similar to my outspoken student.

Thus, the feminist argument against pornography can, ironically enough, be seen as a justification for the free speech of pornography from a Millian perspective. Mill thought that speech was best when it inspired more speech and debate. This is exactly what pornography has done. The work of anti-pornography feminists illustrates that pornography has contributed greatly to a discussion focused on the equality of women. Of this, Mill would approve. Lacking any evidence of harm, pornography also creates utility in the world. Richard Vernon writes, "If there is a serious positive argument for pornography in terms of general utility, it has yet to be constructed" (Vernon 1996, 628). However, clearly some persons enjoy pornography, and while this surely should not be considered one of Mill's higher pleasures, it still increases utility barring any disutility caused. Also, some couples use pornography to deepen sexual bonds and in the course of therapy and there are many other potential uses for pornography. Thus, given the lack of harm and pornography's contribution to discussion, it's clear that Mill should not be invoked as an ally to the anti-pornography feminist position.

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