

## Liberalism and Mental Mediation

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Liberals agree that free speech should be protected. A surprising view about free speech in some liberal and legal circles is that communications should be protected on free-speech grounds only if those communications are *mentally mediated*. By "mentally mediated" communication we mean speech which communicates its message in such a way that the message can be rationally evaluated by hearers, and causes the hearers to believe it, when it does, through the mechanism of those hearers employing their rational capacity to judge that it is correct. Similarly, if the speech influences the preferences or desires of hearers, it can do so through the mechanism of the hearers' rational evaluation. Speech that is not mentally mediated may cause its hearers to believe it (or change their preferences) for other reasons, or through a causal process other than the exercise of the hearer's rational capacity to judge the truth or acceptability of the claim made. [1] The mental-mediation or 'persuasion' principle (as it is sometimes called) has some important legal and public policy implications. It has been applied to argue that certain forms of expression (viz., non-mentally mediated ones), despite being forms of speech or expression, lack even a *prima facie* claim to protection on free speech grounds.

Our central aim in this paper is to show why the mental mediation principle is mistaken. Liberals should think that some speech which is not mentally mediated deserves protection for the very same reasons that speech which is mentally mediated is often thought to deserve protection. But before we can explain why, we first need to say more about precisely what mental mediation involves.

***What is mental mediation?***

Examples of non-mentally mediated speech lie on a continuum, from extreme cases where no rational evaluation takes place to cases where whether or not the hearer decides to believe what is said depends mostly on the hearer's exercise of their rational capacity to judge, but there are other influences at work as well. [2] An extreme case of non-mentally mediated speech is brainwashing. Through a mixture of torture, sleep deprivation, drugs, and other methods, it is possible to get someone to believe just about anything, regardless of the evidence or the person's previous disposition to agree. Few liberals will wish to defend the brainwashing carried out by some totalitarian regimes and some religious cults on the grounds of free speech. Another extreme case would be hypnosis. If through lights, sounds and tone of voice, I were able to directly alter a person's beliefs, my ability to go around hypnotising people to, for instance, agree with my political convictions, is also something that liberals are unlikely to protect. (Actually so-called hypnosis may not be this effective—the hypnosis practiced by stage magicians is notoriously unreliable at getting people to do things they are opposed to doing). Yet another case is that of subliminal advertising. If including advertisements in film which are not consciously noticed (say, by having them appear for only one or two frames in a second) causes viewers to be influenced in a way they are powerless to rationally criticise or evaluate, then this is normally objectionable: and indeed subliminal advertising of this sort is banned for just such a reason.

Less extreme cases might include depictions in film or television of violence, including sexual violence, and non-violent but disapproved of sexual activity: arguably in these cases, audience's attitudes are influenced, but in ways more analogous to conditioning than rational persuasion. Indeed, a teenager who leaves the cinema convinced that violence is a good way to solve problems is unlikely to have based this judgement on the inductive evidence that it always worked for John Claude van Damme's character... And the consumer of pornography who comes to believe that women in general want to be degraded in sexual encounters, or who comes to believe that pre-pubescent children want to have sexual relations with adults, is

unlikely to have come to these beliefs through a cool weighing up of the evidence presented. These cases are controversial in at least three ways: it is controversial that beliefs are changed by consumption [3]; it is controversial that the beliefs are altered at all through mechanisms other than mentally mediated ones [4]; and it is controversial that if consumers' beliefs are influenced through non-rational means, that this is serious enough for the speech involved in such portrayals to fail to count as mentally mediated as a whole.

Even more marginal cases are cases of emotive language and rhetoric. It is a regrettable fact that appeals to emotion and rhetorical devices can convince hearers of positions even when evidence and argument are lacking. When hearers are convinced through these mechanisms, or partly through these non-rational mechanisms, it is not clear that the speech is suitably mentally mediated. Of course, if any speech that did anything more than make sober presentations of evidence and argument was to fail to deserve the protection reserved for free speech, most political debate and ordinary expression of opinion would lack liberal protection. Obviously a taint of non-rational persuasion will not be enough to destroy the mentally mediated status of communication.

Closer attention to the definition of mental mediation shows why non-rational persuasion does not destroy the mentally mediated status of speech (in the sense in which we are using the expression 'mentally mediated'). [5 ] For speech to fall into the "mentally mediated" category, it is enough that the message *can* be rationally evaluated by the hearer, and the mechanism for the hearer to come to believe it *can* be the hearer's rational capacity for judgement. If the non-rational force of a message can be resisted by a thoughtful hearer, or if the hearer could have exercised their critical faculties but chose not to, this need not remove the communication's status. Perhaps "mentally mediatable" would be a better label for the relevant class of speech, then: but as it is an (even more) ugly expression, we shall stick with our

previous usage. [6] The third topic of controversy about violent and pornographic film can thus be recast: even given that they give rise to non-rational belief formation, it is (or should be) controversial whether the non-rational belief formation caused by such depictions can be resisted by a thoughtful and rational consumer.

Defining mental mediation in this way has one limitation. Some philosophers, including some liberals, wish to argue that so-called “hate-speech” is a form of speech which does not have a claim to be protected on free speech grounds. One way to make such a case is to appeal to the mental-mediation principle, and to claim that hate speech is not mentally-mediated speech. However defining mental mediation in the way we suggest makes it harder for liberals to argue that so-called "hate speech" fails to be mentally mediated. Speech designed to stir up hatred against certain ethnicities, or people of a given religious affiliation, or against people with given sexual orientations, often influences its hearers in ways other than the influence which the sober evaluation of the evidence and arguments contained in such speech would produce. However, it is a long bow to suggest that listeners are incapable of rationally assessing such speech (indeed, we sometimes flatter ourselves that we are not persuaded by such speech!). Liberals will thus need to find other grounds on which to object to "hate speech", if they wish to justify legislation against it. [7]

The proposition that communication has a claim to be protected only if it is mentally mediated is one asserted by several prominent liberals. According to Danny Scoccia, liberal principle 'does not protect speech insofar as it non-rationally affects its hearers' mental states'. [8] Scoccia terms this principle the 'persuasion principle' (rather than our “mental mediation”) and claims that liberals such as Ronald Dworkin, David Strauss and Thomas Scanlon are (or, in the case of Scanlon, have been) committed to it. [9] The principle has been employed by liberals in a number of cases: to justify legislation against subliminal advertising and to ground a liberal case for

anti-pornography legislation, to name two prominent ones. Scoccia, for example, uses the principle, together with the claim that violent pornography is in fact non-mentally mediated speech (affecting consumers' mental states, rather, through a Pavlovian process of 'operant conditioning'), to establish the conclusion that liberals can support a ban on violent pornography. [10] According to Scoccia, only speech which is mentally mediated deserves liberal protection on free speech grounds; and violent pornography is not mentally mediated speech.

Let us stress explicitly that this is not, and need not be, the only limitation liberals would wish to put on the right of free speech: that communication is mentally mediated is thought to be a necessary condition for its protection, not a sufficient one. However, we think this view is mistaken. Liberals should be committed to defending, on free speech grounds, many sorts of speech that are not mentally mediated. For the same reasons that are often taken to show that speech in general should be protected also show that speech which is not mentally mediated should sometimes be protected. Hence, free speech considerations protect some non-mentally mediated speech, as well as mentally mediated speech. This means that demonstrating that a certain class of speech is not mentally mediated in the right sort of way is not by itself enough to show that the speech does not merit the protection provided to free speech.

***Is mental mediation necessary for protection of speech on free speech grounds?***

The first class of speech that liberals sometimes wish to protect, but which is not mentally mediated, is speech directed to those who lack the rational capacities to properly evaluate and judge the content of such speech. Small children, for example, are often thought by liberals to lack this capacity, or to possess it only partially. However, liberals are unlikely to think that parents or other care-givers have no right to talk to their children which should be recognized by a liberal state! Perhaps there should be limitations on what one is permitted to communicate to children: and

certainly a state may be more permitted to interfere in the interactions between adults and children than between adults. But to think that freedom of speech ought to provide no protection to any communication with children is, on the face of it, neither plausible nor a natural part of the liberal position. Likewise with communications with the ill and the mentally impaired. It is, of course, consistent to deny that any speech to those with impaired rational capacities is deserving of protection on free speech grounds: but it is not plausible.

Liberals can alter their position so as to avoid this problem without sacrificing the spirit of the view. Something slightly more complicated needs to be said about speech involving people other than the fully rational adults that tend to be the focus of liberalism, but liberals may at least wish to continue to urge that when both participants have the appropriate rational capacities, communications are to be protected on free speech grounds only if those communications are appropriately mentally mediated. Even this condition is too strong, we believe.

To see why, we will need to explore what justification liberals might offer for protecting free speech in the first place. Of course, it is possible to hold that the right to free speech is basic, in the sense of not being able to be explained or justified further, but most liberals have something to say about *why* free speech should be valued and protected. A wide array of arguments for the importance of free speech have been offered by liberals. [11] However, common to many of these (and a justification in its own right) is the view that freedom of speech is important because it helps put agents in a position to best exercise their freedom of thought: for one is best positioned to make up one's own mind and formulate one's own opinions, only when the range of views available are not restricted by censorship, and only when free conversation and debate is possible. The concern to protect individuals' freedom of thought lies at the heart of the familiar autonomy defence of free speech and plays a central role in the classic Millian 'marketplace of ideas' defence of free speech. [12] Freedom of thought is also a necessary condition for free speech to be useful: a government that could control all the thoughts and desires of its citizens but which

allowed them free reign to express the resulting opinions would hardly be any better than a government that controlled all the thoughts and desires of its populace and in addition restricted their freedom of expression.

If a significant reason for thinking that free speech in general is valuable is that it enables or promotes freedom of thought, then certain forms of communication which are not mentally mediated arguably merit protection on the very same grounds. The archetype of non-mentally mediated speech is brainwashing, or other such brute methods as this. Notice crucially, however, that as well as being non-mentally mediated, such procedures are also normally thought of as being undergone involuntarily. But what of cases where people give permission to receive non-mentally mediated communications? The example of a quite different case of non-mentally mediated communication suggests that this may not be objectionable. Suppose Bill wants to lose weight, and purchases some self-help tapes to assist him. These tapes are meant to be played through earphones while Bill is asleep, and if they work as advertised, he will wake up wanting to do exercise, and really believing that such things as cheesecake and deep-fried snacks are bad for his health and undesirable. He may even have new beliefs about nutrition, and what he needs to eat for a low-fat low-kilojoule diet. Let us suppose further that these tapes work by repeatedly saying the desired messages, and that they work by bypassing his critical faculties. [13] This is all explained in the booklet which comes with the tapes, which Bill has read and understands.

Would a liberal state be permitted to employ coercion to stop Bill acquiring and using these tapes, or to prevent Kwik-Slim™ from selling them (or even giving them out, if they are a pro-weightloss non-profit organisation)? Arguably not. Bill's freedom of thought is to be respected, and if he wants to change his beliefs and desires in such a way so as to ensure his diet changes and he loses weight, what business is it of anyone else's? Certainly there does not seem to be anything for a liberal to object to about Bill wanting to change his beliefs and desires, and taking steps to do so: and while listening to such tapes might not be the liberal's preferred

method for Bill to change his mind, *prima facie* Bill's right to change his mind is a reason for the liberal to not interfere, and further to stop others from interfering. However, this is also a case of communication that is not mentally mediated. Kwik-Slim™ has various messages about nutrition and the desirability of avoiding high-fat foods that they wish to make available, and which they would like Bill to consume. Bill comes to acquire the relevant beliefs and preferences in a non-mentally mediated way, but this process appears to be worthy of protection for the same reason that Bill's right to hear mentally mediated communications is protected: to preserve Bill's freedom to determine his own beliefs and preferences.

There are many less extreme cases when non-mentally mediated communications are arguably consumed, but where this consumption is voluntary. If I wish to view a film that has subliminal advertisements for Koky-Fizz (say, because I am curious about the effects such advertisements will have), then, provided my informed consent is given and I know the risks that I shall come to desire Koky-Fizz, it is unclear why liberals should ban me from doing so by censoring such films. Likewise, if Mary-Sue wishes to go on a religious retreat where the amount of haranguing, rituals, chanting, and such make for a risk that she shall come to form religious beliefs in a non-mentally mediated way, then provided she knows the risks and is aware of that possibility, it is hard to see why her right to determine her own beliefs on religious questions would not permit her to participate. Again, it is hard to know when religious instruction ceases to be mentally mediated, but paternalistic intervention by others against the wishes of properly informed participants should be resisted by liberals here as in other cases when people seek to control other's religious beliefs (and likewise for those who wish to consume the messages of the diet industry or the messages of the advertisers for multi-national cola companies, even if the liberal thinks that these will do harm). Harm alone is not a conclusive reason for liberals to intervene—all the more so in cases where the harm is consented to.

If freedom of thought is valuable and to be protected, then informed, adult, rational people who wish to shape their beliefs by receiving non-mentally mediated

communications should *prima facie* have the right to do so, and for the same sort of reason that they have the right to participate in other forms of communication. This is not, of course, to say that liberals need to be happy about people forming their beliefs in these ways: liberals may prefer that people form their beliefs as much as possible through rational and critical reflection on the evidence available. There is a gap between what liberals would prefer and what they think they are entitled to enforce, however, and just as a liberal will defend the right to speak of their illiberal opponents, they should defend the right of non-liberals to form their beliefs in ways that a liberal would not. So, if we are right, liberals should be committed to defending some cases of non-mentally mediated speech on the same grounds that they are committed to defending mentally mediated speech.

Incidentally, to avoid possible misunderstanding, it is worth noting that the question we have been addressing here is not at all the same issue as the old liberal quandary of whether individuals should be permitted to make free choices which permanently restrict their future freedom—to sell themselves into slavery, for example—although it may have the same slightly paradoxical air. [14] For beliefs initially formed by non-rational means are not necessarily irreversible, nor are they necessarily immune to future revision by rational means. Indeed, the cases we discuss above are almost all cases where the non-rationally caused beliefs are perfectly reversible by the recipient, either through rational means or deliberate application of other non-rational methods, or both.

### ***One Practical Implication***

As well as the general point about the need for liberals to do more than merely show that speech is not mentally mediated before concluding that it has no right to protection, our argument has specific applications to some liberals' attempts to employ this move against speech they wish to censor. As we foreshadowed earlier, one case of this is an attempt to show that some forms of pornographic

representations are not protected by the right of free speech, on the grounds that they cause consumers to have beliefs in non-mentally mediated ways. [15 ] As previously mentioned, it is controversial that these representations do indeed cause consumers to have these beliefs in non-mentally mediated ways. Even if they did, however, this would not establish that this pornography should not count as defensible on free-speech grounds. There would perhaps still be an argument for interfering if consumers were not suitably aware of the risks of consumption— and arguably the average consumers of pornography have not thought very much about its effects on their beliefs. However, if the problem is only one of lack of awareness of the non-mentally-mediated character of these representations, the best a liberal may be able to do is require that potential consumers be made aware of the non-mentally-mediated messages contained in them: say, through education campaigns, or through warning labels ("Warning: this movie may cause you to be conditioned to enjoy sexual violence", or some such). Liberal opponents of pornography will doubtless be unhappy with this conclusion, since liberal opponents of pornography are typically searching for a reason to ban many of the more extreme forms outright. There are other arguments liberals can employ to justify banning some or all of the material they wish to ban [16]: however, liberals will have to find reasons for banning such material other than the lack of mental mediation of its messages.

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[1] Sometimes the term used is 'mental intermediation', but we prefer our shorter and less ugly expression. We mean 'speech' here to cover all forms of intentional communication, including actions and pictorial representations and the like, not merely the spoken or written word.

[2] Danny Scoccia also employs the idea of a continuum in this context. See DANNY SCOCCIA (1996), Can Liberals Support a Ban on Violent Pornography?, *Ethics* 106, 776-799, p. 785.

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[3] Though this is fairly well established. See E. DONNERSTEIN, D. LINZ and S. PENROD (1987), *The Question of Pornography: Research Findings and Policy Implications* (New York, Free Press, London, Collier Macmillan).

[4] While many find it plausible that this is so (see, for example, SCOCCIA *op. cit.*; CASS SUNSTEIN (1986), Pornography and the First Amendment, *Duke Law Journal*, September, 589-627; CATHERINE MACKINNON (1995) *Only Words* (London, Harper Collins)), the extant psychological evidence has comparatively little to say on the mechanism of belief change in these cases (see EDNA F. EINSIEDEL, The Experimental Research Evidence: Effects of Pornography on the 'Average Individual' and JAMES WEAVER, The Social Science and Psychological Research Evidence: Perceptual and Behavioural Consequences of Exposure to Pornography, both in CATHERINE ITZIN (ed.) (1992) *Pornography: Women, Violence and Civil Liberties* (New York: Oxford University Press), 248-283 and 284-309).

[5] For those interested in the U.S. First Amendment right of free speech, Judge Easterbrook, writing the majority decision in *American Booksellers ASSN. v. Hudnut* 771 F.2d 323 (1985), p. 330, holds that the first amendment right protects even speech that alters beliefs through 'conditioning'. This, however, may not necessarily mean that Easterbrook would not accept our mental-mediation principle, since all the instances of 'conditioning' he mentions are ones in which the belief formed is rationally revisable.

[6] There may be some factors which prevent the hearer from rationally evaluating the speech which do not interfere with its nature as free speech. A lecture in pure maths, for example, may be presented to an audience that cannot understand it, and so cannot rationally evaluate its content. Similarly, should someone wish to speak to us in Urdu, or Estonian, or Khmer, we will not be able to rationally evaluate its content because of the language barrier: these barriers to understanding are not the sort of barriers to rational evaluation our definition (or better, partial definition) envisages.

[7] And, indeed, some liberals already have, arguing for legislation against hate speech on the grounds that, though mentally-mediated, such speech poses a sufficiently great, 'clear and present' danger to the maligned group to warrant its outlaw.

[8] SCOCCIA *op. cit.*, p. 777. Elsewhere, however, Scoccia seems to be suggesting something more like the standard we suggest for specifying the relevant class of speech. For instance, on p. 785: "If the speech causes the listener to have a certain mental state, and it either does not allow him to weight

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reasons for and against having the state, or allows such deliberation to occur but renders it impotent... , then the speech is substantially nonpersuasive [non-mentally mediated, in our terminology]." Scoccia is not explicit on whether he intends the reading that speech is not to be protected if in fact it alters hearer's states through a non-rational mechanism (as suggested by the quote in the text), or the stronger requirement that the speech is not protected only if the speech does not even allow effective rational scrutiny of the alteration. Whatever Scoccia's own considered view would be, our discussion will assume something more like the latter is the right way to characterise the principle, for the reasons given above.

[9] SCOCCIA *op. cit.*, p. 780.

[10] If we are right, then Scoccia's argument fails. For even if pornography is non-persuasive (or non-mentally mediated) speech, liberals should not be committed to the persuasion (mental mediation) principle. We return to this point in the final section.

[11] See FREDERICK SCHAUER (1982) *Free Speech: a philosophical enquiry* (New York: Cambridge University Press).

[12] See THOMAS SCANLON (1972) A Theory of Freedom of Expression, *Philosophy & Public Affairs* 1, no. 2, 204-26, for a statement of the autonomy defence. The classic statement of the 'marketplace of ideas' defence is to be found in Chapter II of JOHN STUART MILL's *On Liberty*.

[13] The authors do not know whether there are any tapes that are supposed to work in quite this way, nor whether, if there are any, they are effective. But the thought-experiment is hardly far-fetched.

[14] For the classic discussion of this question see chapter five of Mill's *On Liberty*. JOHN STUART MILL (1975) *On Liberty in Three Essays* (Oxford, Oxford University Press), pp. 125-126.

[15] See SCOCCIA *op. cit.*, and MACKINNON *op. cit.*, pp.11-12.

[16] It will be easy to justify banning some forms of pornography on liberal grounds: pornography which is produced through serious violations of rights, such as "snuff movies", or films of sexual abuse of children, for example.