

## The right to obscene thoughts

Stephen Guest Lunch-hour lecture UCL 1.00 pm Tuesday December 8<sup>th</sup> 2009

### *Two senses of respect*

If there is one thing that we value in ourselves, above all else, it seems to me that it is our awareness of things *and* that we can work in some way with that awareness; in other words, that we can *think*. The idea of a person who cannot think is, in fact, meaningless. That we have the ability to think is not just a way of understanding the certainty of our existence, as Descartes believed, but actually constitutes a value in itself: if you value anything, it must be this ability to think. Failing to value it means you really don't care whether you think at all, that you may be 'better off dead'.

That basic idea of thought carries with it, I think, a sense that we can 'do' something. We can manipulate our thoughts, and change them; our thinking makes us aware of our 'creative possibilities'. Although we can envisage odd neurological states where we can't move a limb, as in 'locked-in' syndrome, or living in solitary confinement, it is still possible to understand that in such states we have a degree of freedom in merely being able to think.

In fact, is very difficult to see what it would be like to have just one thought, perhaps a view of a non-moving flat perspective through an only eye that can see, or even just one thought, like Yossarian's 'Where are the Snowdens of yesteryear?' in Joseph Heller's *Catch-22*, or a tune that goes on endlessly. Confronted with such thoughts, we think of pathological difficulties: such thoughts are obsessive, perhaps maniacal, and the idea of becoming 'trapped by our thoughts' in this way is the very antithesis of freedom. On the other extreme, the idea of having completely uncontrolled thoughts is equally a nightmare, the scenario of hallucinations and freak imagery.

These brief neurophysiological observations show that what we value is the ability both to be creative with our thoughts, and to control them: to exercise freedom with them.

*Rationality.* Thinking is not the same as rationality. Thinking is a *wider* idea. Thinking is a primitive fact of human life in a way that rationality is not and it is clear that, while we value rationality, we do not only value rational *people*. The truth is that we value people as thinking beings, even when they make stupid or wicked decisions, or display abominable taste in art, or fashion, or sex, entertain wild hopes, have stupid love affairs, or nurse mean and bitter thoughts. Rationality often comes too late to all of this, but it is not a precondition for being valued as a thinking being. To preserve the idea that there is value in just thinking, it is preferable to see rationality as something to aspire towards, as a refinement of our thoughts. At its highest, it should lead us to better lives.

Contemplate why a frontal lobotomy, seriously disabling the power of thought, seems so wrong - so drastic - even though performed on someone who has largely lost the ability to be rational. Why, if rationality were all, would it seem at least a matter for regret to take away the power of thought from such a person? This surgical intervention penetrates the centre of human personality; it can be meant well as it prevents a person from doing themselves harm irrationally, and from the post-operative docility after the irrational storm it may seem a sensible and kind solution. But it eliminates a vital spark. Remember the horror of the

lobotomy performed in the film *One Flew Over the Cuckoo's Nest*; McMurphy lost his vital spark.

It is, of course, human to respect people who are pretty well incapable of rational thought. We might also think how we should conceive of rational thought, as it seems too narrow a characterisation of the human mind. People are nasty, stupid, brilliant, self-deceiving, imaginative, dull, creative and mad; this array probably defies categorisation into the rational and irrational. I would rather suggest it is respect for the extraordinary range of 'things that go on in people's minds' that gets at it better. People are still to be valued and respected as human even when they think and say and do things that strike at the very roots of rationality, even the roots of understanding of what it is to be human.

*Equality.* Emphasising the value of thinking itself - whether rational or not - is a way of emphasising, I believe, the value of equality. This value has, at its root, the idea that we recognise in other people certain essential qualities, qualities we recognise in ourselves. It is not a mechanical principle that we should 'make everyone equal'. Rather, it is that we should recognise others *as* our equals. Introspection about what we value in ourselves, and our observance of those valuable characteristics in others, encourages us to see that in a very important sense the lives of others are as equally valuable as our own; we are all equally valuable as human beings.

Just think of the ways reflection on our own lives modifies the way we treat others. Think how recognition of the mistakes we ourselves make, encourages us to be more tolerant of the mistakes of others. Or how appreciation of 'how that would feel to us' slows the speed, or level, of condemnation, or the kind of approach to improving another, or the degree of punishment that we would be prepared to support, for curtailing anti-social activity. This seeing of others as ourselves is a powerful antidote to cruelty and unjust treatment of others. It expresses, for example, the so-called 'principle of reciprocity' at the heart of many religions, saying: you should not act towards another in a way that you would not want them to act towards you.

It follows from all this that we *must* be able to conclude that a person is a human being, which fact we must respect, and at the same time be able to *recognise their faults*, and, through doing so, have little or no respect for their *thoughts*. The question then becomes one of what is appropriate to do about those faults. And we **MUST** answer that question on the assumption that the person is a human being, equal to us, with that creative spark, and our understanding, that through their freedom of thought, are capable of mending their faults.

*Reciprocal freedom to correct.* Through transmitting our judgements into *others* in this way, I believe, we understand that *we ourselves* expect, and want, to be corrected, encouraged, led and educated by others into improving and sharpening our own judgements. And so to use the idea of 'bad thoughts', it must be permissible for human beings to disapprove of 'what goes on in the mind' of other people. In fact, it can go further. In some cases, there is a positive duty on us to disapprove, and, perhaps, express it; that is most clearly the case when we consider how particularly important the education of young people is.

And it may go further than that. In some cases, you must show your disrespect, even outrage, for another's views. Perhaps this will, rightly, take the form of remonstrating, or provoking, insulting or even offending them very deeply. These ideas depend on their being able to take, appreciate and either absorb or reject the criticism. It is here that I find the clue to the sorts of

consideration relevant to determining respect for another person's being a human being. What in another person we regard as an absolutely necessary condition for our being critical of them, namely, the recognition that they are free, is that they are human beings with the capacity to choose to think and to act, and to be otherwise.

*No place for coercion in all this.* However, when it comes to *forcing* people out of their thoughts, by punishment, or by coercive manipulation in the form of heavy-handed regulation, an extremely significant line is crossed. To force a person not to have particular thoughts, violates their right to the equality of respect that is due for their innate capability to think their *own* thoughts for *themselves*.

Explaining, persuading, correcting and educating are *not* the same as conditioning a person, or forcing or coercing or punishing them, to make them change their behaviour. To correct a mistaken thought requires that the person being corrected understands *from within* how the process has gone wrong. I cannot endorse my new way of thinking if I have been forced into it. Take the aversion therapy that Alex underwent in *A Clockwork Orange*. Ghastly as Alex was, as soon as we saw what was done to him, we saw a great deal about what was wrong with the way his thoughts were changed. We saw it happen with Winston Smith, in George Orwell's novel *1984*. And what is important about these two examples, is that we can see the danger in taking a person's thoughts away, and replacing them with something else. And, contemplate this: if your thoughts are not your own, then whose thoughts are they? The connection between the control of thoughts, and the endless possibilities of political manipulation are close, a fact brought out well in *A Clockwork Orange*.

So while we may explain, persuade, correct and educate, to make a person see, what we believe, to be sense, we must stop short of taking that person's judgement away from them. We cannot take away someone's right to think whatever they like. I think it is in this context of deep respect for a person's being *human*, that we should see why it seems so odd to say that any person would have a right not to be insulted or offended by another's thoughts even though they are not harmed by them.

The crux is that there is a crucial sense in which we respect another person yet rightly have absolutely no respect for that other's thoughts and dispositions. It does not follow from respect for our capacity for thought that we need respect any of the thoughts thereby created. These are two distinct things. Respect for the ability to think remains static; it is the fundamental – the primitive – value. People have grimy, obscene, silly and vicious thoughts, and we don't have to respect those.

I therefore conclude that each human being has the fundamental right to have 'bad thoughts'.

### ***Having genuinely bad thoughts***

Let us now concentrate on the truly bad thoughts. Decisions and intentions are clearly bad if bad consequences are contemplated. Awareness of a risk of bad consequences - recklessness, intentional inadvertence, not caring, 'turning a blind eye,' or shirking responsibility - are likewise bad and exist within the shade of intention. There are less clearly consequential bad thoughts, however, such as controlled fantasies that a person will intentionally produce involving creativity, imagination, sexual arousal, greed and much besides. Uncontrolled fantasies are those we have in dreams. The full gamut of our mental states is the stuff of psychologists and novelists, as well as exists in our daily life. There are thoughts that offend

the dignity of the person who has them – they ‘lower’ him - or they encourage or manifest a disposition in that person to act wrongly towards others. We know the person who consistently prefers certain sorts of mental activity of, say, an undisciplined and self-indulgent or other sort, and we *disapprove* of them.

*Not an instrumental argument.* I need to make it very clear what I’m saying. I think people have a right to their thoughts, however bad they are. I don’t mean by that, that we ought to respect the right to bad thoughts only because we might make a mistake as to whether those thoughts are really bad.

People once thought that a novel such as *Lady Chatterley’s Lover* couldn’t be obscene because it was a work of art, and the issue in the Lady Chatterley court case in the early sixties was on that precise point. I think that is mistaken thinking. A person does not have a right to obscene thoughts merely because it might turn out to have artistic merit and so we might accidentally prevent a D.H. Lawrence, or a James Joyce, or a Shakespeare from engaging in a beneficial artistic project.

It is, rather, that he or she has that right because those thoughts are their own, and this has, as I’ve argued, nothing at all to do with content. I think it was failure to appreciate this point that was lost in the not so much later trial of the obscene magazine, *Oz*. There wasn’t artistic merit there; no one could claim that. The point was that it was genuinely obscene. In fact, it was *Oz*’s obscenity that made it so very funny.

I also think it is irrelevant that we should ‘keep off’ other people’s thought because we couldn’t prevent them however hard we tried, or if we could do it, it would be too inefficient to do so. These arguments, that we can’t define obscenity, or that banning it is impossible or inefficient, are vapid, because they miss the point that obscenity is a person’s *right*.

*The extreme case.* Let us take the distinction between respecting human beings and respecting their thoughts and actions to its absolute extreme by considering a human being we despise as far as we can almost possibly imagine, namely, Adolf Hitler. He was an evil person in the most uncontroversial sense of that term. He was not insane, although he was clearly unhinged. His life on Earth had ‘murderous impact’. He was responsible, in exercising his formidable talent, for human suffering on a gigantic scale; some fifty million dead and many more maimed, psychologically destroyed and so on. It was all intentional.

Yet our respect for Hitler’s status as a human being does and should not alter, and should not alter from that of any other human being. One simple reason for this is that, however much we’d like to, we cannot detach ourselves from his condition. We see elements of ourselves in him. He is in a very important sense ‘one of us’ and, in being ‘one of us’, he is of course, a horrifyingly flawed example. He should arrest our moral attention, as should the full horror of the concentration camps; this is what people *like us* are capable of getting up to.

And exactly the same goes for the paedophile; he is not an ‘outlaw’, someone who may be hounded, treated appallingly in prison, and made the subject of lynch mobs. In full knowledge of what he has done, we would nonetheless suppose it a failing of our community if we did not accord to him the same respect in the court system as any other person. If he fell ill while awaiting trial, we would not think that because he had lost all respect as a human being - which in only the less deep sense is true - there was no need to provide medical treatment. I believe our ‘common humanity’ – our equality - denies us that possibility.

### *The merger of thought and action*

You might at this stage be willing to accept that thoughts should be protected - they are clearly *ours* - but that as soon as thoughts become *actions* things change dramatically. You may have been inclined in that direction by my examples of Hitler and the paedophile. But I'm not sure that the distinction between thought and action is sufficiently clear to do much for us. It suggests – perhaps because of Descartes – a mental life ‘inside’ one’s mind and a physical counterpart ‘outside’. But this does not help. We can read another’s thoughts, in many cases easily, from a facial gesture (or omission), a raised eyebrow, a shrug, or a failure to put out a hand. In fact, to say it like that - ‘to *read* another’s thoughts’ - shows something less than an ordinary inference from action to thought is going on.

The thought, instead, confronts you directly. Po-faced silence to the anguished question ‘does my bottom look too big in these jeans?’ is as much a statement that it looks huge, as the uttered ‘it looks *huge!*’ And in those cases where the thought reveals a disposition to act, knowledge of that disposition is knowledge of a possible act, and so I carefully avoid someone who has a disposition to steal my wallet.

Stillness and silence, and the presence of hidden thought, can be just as chilling as violent action. Think, for example, of the use of silence in a Pinter play or the ominous background bureaucracy in Kafka novels. Or silence can be as comforting as the quiet of home. Human relationships, particularly intimate ones, flow in a seamless medium between thought and action.

Many think that once you express your thoughts, the situation becomes fundamentally different, and that this somehow strengthens the case for suppression. That belief primarily arises because when people express their hurtful thoughts, we will know of them. If they keep them to themselves, on the other hand, we may not know of them. Yet it is not difficult or even unusual to dislike a person for their thoughts and, actually, not difficult to imagine a world where our thoughts are so completely transparent that anyone who cares can find out what other people think.

That interflow between thought and expression of them is, I think, very important to bear in mind in considering suppression of thoughts. Suppressing expressions on faces, suppressing expressions of opinion, are all suppressions of ways of thinking. If we take seriously my suggestion that we have a duty to educate, a duty that arises from our understanding of the likeness of others to ourself, then the suppression of criticism itself is a suppression of a permissible extension of thought. I don't think that we should take the distinction between thought and action too seriously.

*The ‘chilling effect’ of the criminal law.* I do, however, want to say a short word on the ‘chilling effect’ of the criminal law. Sometimes the law prohibits in a way that suppresses beyond the letter of the law; we are all fairly risk-averse. I, a professor of law, feel a little uneasy when I talk about religion and morality with my classes in the light of the newly created offence of ‘using threatening words, intending to stir up religious hatred’, which is punishable by seven years in prison.<sup>1</sup> If ‘threatening’ is interpreted as ‘threatening from the point of view’ of the listener, and if ‘intending’ means no more than I ‘intended to say

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<sup>1</sup> Racial and Religious Hatred Act 2006 s.29B

something about religion’, and ‘hatred’ means ‘the subjective feelings stirred up’ as a result of what I say, then I could get pretty close to the bone by saying almost anything about religion that was critical, just given a suitable audience. My point is that the *hint* of seven years in prison for venturing an opinion about the stupidity of religion in a lecture theatre is chilling in the sense that it provides a motive for not discussing.

I’m not particularly made happy by the insertion in that Act of a ‘Protection of freedom of expression’ section that, sensing the sort of disquiet I am expressing now, was put in.<sup>2</sup> It says, rightly, that the Act should be interpreted to be consistent with our right to freedom of expression. But it looks odd where it is. The substantive offence remains as a separate section, and the ‘freedom of expression’ section is isolated. If you run the two together, you really do wonder what the offence says.

However, I can’t leave it there. There is now a new offence proposed, that of ‘stirring up homophobic hatred’, identical in most respects to the ‘stirring up racial hatred’ offence but the equivalent ‘freedom of speech’ section – which was known in the House as the ‘Waddington amendment’ – did not succeed in getting through the Commons.

I watched the live debate four weeks ago, and I found it a little scary. Dominic Grieve, the shadow Justice Minister, had given an example of the chilling effect of the criminal law, that of a couple of old-age pensioners in Blackpool writing to their local authority to say that they did not approve of its giving money to a gay organisation. Instead of getting a polite reply to say something along the lines of ‘we were voted in to represent our constituents and I’m afraid we disagree with you’, they received a visit from two police officers telling them if they wrote such letters again, they might be prosecuted. They got an apology, after some time, I’m happy to report, but the fact is, this *actually happened*.

On behalf of the government, opposing the freedom of speech clause, was a Justice minister called Claire Ward, who actually said - I could not at the time, and still cannot believe it - that the problem with having such a clause was that people would *use* that ‘freedom of speech’ clause to attack gays. It was clear she had no grasp of the fundamental importance of freedom. That stance, that freedom of speech was a hindrance to freedom, will eventually backfire. If you are claiming legitimacy for your view that the rights to freedom of gays, of minority religions, and of racial minorities is fundamental, as I do, it is not in your interest to try to achieve this by attacking the idea of freedom in general.

It is precisely Claire Ward’s cavalier way of attacking freedom that I am attacking in this lecture.

### **The example of extreme pornography**

I now want to look at extreme pornography. ‘Obscenity’ used to be confined, at least in popular speech, to sexual thoughts and expression; but now it can refer to violence. The mixture of the sexually perverse and violence, is about as bad as it can get. It is all in *120 Days in Sodom* by the Marquis de Sade, and in Brett Easton’s *American Psycho*; but now you can make your own images of these things on your computer. If you have an image of such horror, including such things as knifing and worse, and it was produced for ‘sexual arousal’, then you have committed the new offence of ‘possessing extreme pornography’.

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<sup>2</sup> s.29J

Let us say you are sexually aroused by the thought of a man raping a small child. You doodle, with PhotoShop and create a computer-generated image on your laptop, or perhaps, shortly, on your e-book, altering, stretching, adding different photos, plus a lot of red pixels to give the illusion of blood. Because it is done with real images, disguised and altered, it looks real, which is one of the tests of the legislation. You are now liable to three years' imprisonment under s.63 of the Criminal Justice and Immigration Act 2008. There is no need for proof of the risk of harm to anyone. Merely to possess this 'extreme pornographic image' constitutes the offence.

It is difficult to see a significant difference between having this thought and computer-generating it. I believe it is pedantic to argue that the offence lies only in the fact of possession, and not the thought. In any case somewhere along the line the person who produces the image must do so with the principal intention of sexual arousal. Of course, one supposes the purpose of the offence is to enable the conviction of paedophiles who do a lot of this sort of thing and do a lot of harm. But the *reality* is that this offence creates a right in the state to punish people for merely having a thought, bad though that thought is.

I don't think one should assume that the thought *need* be terrible. Is constructing an image on PhotoShop to be sexually aroused *so* bad a thing? I might be an artist developing a Leda and the Swan theme – or, as it would be called nowadays, brutal 'farmyard sex' - but also motivated by sexual interest. Less obvious is where I have produced the image in order to be aroused as part of a well-meant attempt at empathising with a paedophile's motivation. And, what about this? The policeman who gets hold of this image has it for an entirely innocent reason, which is to prosecute on the basis of it.

But we can agree that the usual scenario would be one in which this is a disgusting thought to have.

What is the proper reason for this offence? It is not clear from its wording, and the offence will remain for decades, since no politician will have the courage to stand up in Parliament to say it should be abolished. They would immediately, and cheaply, be accused of 'being in favour' of nasty pornography. As indeed I may be thought to be, for arguing that I don't think there should be such an offence.

We can, of course, infer reasonable concern behind the legislation, in the possible harm to children. There are two ways this may be explained. First, the practical one of what is called 'fishing'. The offence is created to enable police to 'fish' for potential paedophiles, or at any rate those with a disposition to cause harm to children. The fishing argument is one that can create a lot of injustice. You can see it from the policeman's point of view; he will say, 'whenever I arrest a someone for a suspected paedophilic offence, and go back to his flat, I will find an image of child pornography'. The logic of this is not right of course: whenever you arrest such a person you will find that there is a jar of coffee in his flat. To make the argument work, you need a statistical account that shows not just a significant conjunction between the commission of paedophilic offences, and the possession of nasty paedophilic images - because that argument works with jars of coffee. You also have to prove that people who *don't* commit paedophilic offences *don't* possess such images: that is almost impossible to do because it means proving a negative.

The other, second, way of explaining the offence is just that of *direct* harm. The rationale for the well-known offence of possessing indecent photographs of children was that it created a harmful market in creating such photographs, which were created by *using* children.<sup>3</sup>

The difference with the sort of case I have outlined is that the extreme pornography is self-generated, involving no other people, and involving no market. I am just daydreaming very nasty thoughts, give or take some experiments in empathetic understanding, or artistic wanderings, or, of course, contemplating arrest. Except for this last, I don't see the harm in this to anyone.<sup>4</sup>

It is interesting to note the evidence of harm that the Home Office produced for introducing the offence of extreme pornography. It is in a report entitled a 'rapid evidence assessment' and consists of a 'meta-analysis' summarising the findings of many studies, in this case, going back to the sixties; it includes evidence given, for example, by Linda Lovelace, the 'Deep Throat' of Watergate.

I can just read to you from it, the summary of the two main findings. It is pretty mild, and the research of the past two or three decades is fairly well known to be on the tenuous side, no doubt to the disappointment of some.

It strengthens the mildness of the results of this research that it was the work of an all-women team of nine researchers centred between the Home Office, that time under Jackie Smith, and South Bank University. The research found, I quote, reading it to you, that:

- a. '... the existence of *some* harmful effects from extreme pornography on *some* who access it. These included *increased risk* of developing pro-rape attitudes, belief and behaviours, and committing sexual offences'; and
- b. 'Men who are predisposed to aggression, or have a history of sexual or other aggression were *more susceptible* to the influence of extreme pornographic material.'

At no point is the level of risk specified.

What sort of evidence is this? Everything we do carries some risk, and we are messing here with something as fundamental as freedom of thought. Many activities we engage in raise the risk of some harmful 'behaviours', particularly in predisposed individuals. On the same ground, we should therefore make it an offence to 'possess extremely strong lager'. Lager drinking, particularly by men who are 'predisposed to aggression', can create the 'increased risk' of committing all sorts of offences. We might also make it an offence to possess 'extreme sports equipment', or even, of course, to make it an offence to possess a *car*.

Why, then, is it that the possession of extreme pornography is made criminal? I believe it is merely because of prurience; most people find these sorts of thoughts disgusting, and for that unexamined reason alone our Government introduces criminal prohibition.

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<sup>3</sup> The Protection of Children Act 1978 s.1 makes it an offence to possess 'indecent photographs ... with a view to their being distributed'. It is important to note the concept of 'pseudo-photographs' in this Act.

<sup>4</sup> In fact, the reasons the Home Office gives are not so very clear. In an 'FAQ' sheet on its website, they ask the question 'why are you criminalising the people who access this material, rather those who produce it?' and they reply that those who produce it mainly operate outside of the jurisdiction of English law, from Eastern Europe and the United States.



If you are still not convinced. Compare the daydreaming with extreme pornography with the following nasty thought: I form the *intention to kill* someone; I'm very specific. I load a rifle, I hire a hotel room, I practise looking down the sight of the rifle at the point at which my victim will appear, in a motorcade, in five minutes. There is absolutely no doubt whatsoever that in this country, in North America, in Scotland, on the Continent, in Australasia, in South Africa, and elsewhere, there is no criminal offence committed until at the very least I've put the rifle to my shoulder, actually aimed at my intended victim and put my finger on the trigger. All the other actions are clearly regarded as 'preparatory only', and that would include possessing drawings of the street, timetables for Presidential motorcades, cartridges and a rifle.

And, of course, I can even improve on that example. To be consistent with the remainder of the criminal law, it would not be an offence to intend to *act out the scenario*, like the one I doodled on my laptop. If we regard the computer-created image a mere doodle, and expression of my thought, then, of course, possession of this image should not be a criminal offence.

One can, of course, say that there is a world of difference between the case of intending to murder, and the case of having the thoughts described by the offence of extreme pornography. But, for the life of me, I can't see what the difference is.

So I've produced a sort of legal argument, in effect, that the legislature wasn't doing its job properly. That happens so much these days, this should not come as a surprise. But you may feel that there is something else about the possessing of extreme pornography, that the material of it is just so horrible. And, all I can say to that is, *many* things are horrible, and one of them is the thoughts that some people have. But these thoughts are their *own* thoughts, and ones they produced *themselves*. If we really value what I've called the 'human spark' we must genuinely value it; we can't pick and choose. We can't say that freedom is both a great thing, but not certain kinds of freedoms, especially, I think, when it is to form thoughts.

*Conclusion.* Let me end by saying this. Banishing thoughts is the beginning of evil. It contains the essence of torture: the destruction of the human person by mocking and condemning their thoughts and who they are. Think of the horror of people burning books. Because merely *having* thoughts is fundamental to being human, no thought is so bad that it should be banned. I believe that principle, which is fundamentally a principle of respect for humanity, is worryingly little understood, and too infrequently stated.