

Hannah Lynch
Political Philosophy
May 10th, 2019

Values at Odds:

The Tension between Others' Speech and Individual Liberty at Abortion Clinics and CPCs, too

"I'm actually glad that I didn't know they'd be here...I don't know if I could've dragged myself out of the car otherwise," a rattled woman told me after facing throngs of pro-life protesters. Sadly, such clashes between demonstrators' speech and patients' privacy did not just mark my experience as an abortion clinic escort—they practically defined it. In the first place anyways, this tension necessitated the presence of volunteers like myself to deflect intrusive petitions.

Beyond debate about the morality of abortion itself, battles brew between access to and protest of abortion on the plane of advocacy conduct as well. On both sides of the opinion coin, abortion clinics complain that petitioners' speech impedes their clients' privacy, but anti-choice clinics complain that informed-consent mandates force them to speak against their religious values. Though seemingly immaterial, speech clearly carries concrete implications for abortion access in America today: The presence of derogatory words about abortion can intimidate women from seeking this service, and the absence of educational words about abortion can blind women from their opportunities to this service, too. Across these instances, I will weigh arguments for and against speech regulation from advocates, lawyers, judges, and philosophers alike. Ultimately, I argue, America must complicate its absolute defense of free speech to uphold individual liberty and enable personal pursuits of happiness.

First, however, I must establish the weight language carries to justify argument over it let alone regulation of it. Beyond my aforementioned anecdotal evidence of intimidation, derogatory speech has been elsewhere shown to demonize groups and even incite targeted violence. For example, as Tirrell traces in “Genocidal Language Games,” anti-Tutsi slurs predisposed calls for discrimination against the Tutsi, and ultimately, genocide of them. While Tirrell does not conflate speech with discrimination (let alone violence,) she establishes the connection between them. Namely, “licensing or granting permission to derogatory speech acts is permitting action” on those expressed sentiments (Tirrell, 206).

While few fear (despite clinic bombings) such a violent end to pro-life protests, Tirrell’s example establishes how influential (rather than inconsequential) speech acts can be. Further, it motivates this debate about which speech acts we should delimit just as we would regulate any other class of actions impeding others’ equality and pursuits of happiness.

Biasing our imagination, however, are existing laws on speech regulation. Most notably, the First Amendment strikes many Americans as an absolute defense of free speech, and it does, in fact, condone even hate speech in public spaces. This said, our legislation has criminalized “fighting words,” or language that is likely to incite immediate violence, and we allow for content-neutral “place and time restrictions” by which our government can relocate protests that interfere with public safety. Lastly, libel and slander are exempt from First Amendment protection, but our stringent protection of religious freedom allows protesters to voice religious accusations of sinning, for example. Not to mention anarchist thought about state illegitimacy, common divergence between different courts’ allowance or rejection of the same policies

demands that we look beyond existing law to determine the justness of speech restrictions, however.

On this account, I weigh the following arguments for and against speech restriction specific to abortion clinic protests and anti-choice clinic disclosures of abortion legality. Testing the former, the 2014 “McCullen v. Coakley” Supreme Court case questioned the constitutionality of a no-protest buffer zone around abortion clinics. Ratified in 2007, this amendment to Massachusetts’ “Reproductive Health Care Facilities Act” prevented non-patients and non-employees from loitering, protesting, or petitioning within a 35-foot radius of abortion-providers. This policy developed in response to complaints that protesters intimidated patients *and* clogged foot traffic on public sidewalks.

To convey my counterargument on a clean slate, the critique of this policy prevailed in its Supreme Court hearing, despite initial losses at the state-judiciary level. Not surprisingly, these challenges to the constitutionality of clinic buffer zones relied heavily on reference to the First Amendment. Prohibiting protesters’ persuasion within a specific area *does* restrict their ability to speak freely there. Moreover, anti-choice counselors (who define themselves in contrast to more aggressive protesters) complained that buffer zones completely eliminate their chosen method of expression: intimate conversations with clinic patients. Whereas protest can continue outside the buffer zone, they differentiated, counselling could not, for their persuasion tactics relied on solemn conversation rather than impassioned yelling (which, admittedly, *could* be heard from 35 feet away).

More convincing to Supreme Court judges, however, were the broader implications of buffer zone policies. Protester satisfaction aside, the court worried, this case could have set a

precedent for content-based restrictions of speech. The argument in this direction cited clinic employees' exemption from buffer zone occupation, along with the policy's disproportionate effect on pro-life messaging. Lawyers' citations that public sidewalks historically represented a cornerstone of the public sphere, and their emphasis on the historical role of public debate in education successfully appealed to the precedent of protecting free speech even at the cost of enabling public conflict. Lastly, and affirmed by the Supreme Court, protesters argued that alternative policies could fulfill the state's (alleged) mission of ensuring public safety and sidewalk access without restricting as much speech. More specifically, the court hypothesized a policy could enable local police officers to disband disruptive protests, but only for a finite amount of time. Or, it offered as consolation, Massachusetts could model a policy off of New York's, which criminalizes following clinic patients against their will. Importantly, the court underscored the existence of policies (like traffic rules) that already criminalized the physical obstruction of clinic entrances.

The other side of this argument was largely voiced by those allowed *in* Massachusetts' buffer zones. In defense of their protection, these activists maintained that abortion protesters could still audibly and visually communicate their opinions from outside of the buffer zone, and even if exclusion from the buffer zone did inhibit their speech within it, they argued that precisely that intimate speech within the buffer zone infringed on the following—more pressing—needs of patients, employees, and police officers. The targeted nature of anti-choice counselors' speech renders its arguably harassment under U.S. criminal code, for it is unwarranted by patients, targeted toward particular groups of people, and consistently repeated (if we understand its subject to include rotating patients rather than one individual). Moreover, as

U.S. criminal code language describes, petitioners' speech *does* aim to cause "alarm" among patients, and in effect, it *does* cause employees "annoyance" and visitors "distress."

Pragmatically, too, Massachusetts law enforcement (including even Boston's police chief) explained that clinic sidewalks grew so crowded with protesters and other citizens that officers monitoring these areas could rarely see whether interactions were consensual or whether they toed the line between delay and obstruction of clinic entrance. Attorney General Martha Coakley thus deemed general non-obstruction laws "unenforceable" around abortion clinics, evidently necessitating stronger reference points for law enforcement in these contexts. The state thus argued that its buffer zones were content-neutral, seeing as they developed to protect public access to sidewalks and clinics alike, and in effect, prohibited loitering of all persons—not just protesters—from the typically crowded areas of clinic sidewalks.

Through a theoretical lens, I would even argue that judgmental speech in these spaces does constitute obstruction of clinic access, seeing as it psychologically compromises patients' ease of attending such facilities. In this same sense, basic civil rights philosophy (like that of even free speech advocate Mill) may justify buffer zones. For example, most Americans reject an "offense principle," or criteria justifying regulation of offensive behavior. However, our legislation typically honors Mill's "harm principle," or threshold for government interference upon threat of harm to others. If understood to include emotional harm, a rule as basic as Mill's harm principle could justify suppression of anti-choice speech in sensitive areas like clinic sidewalks. Affirming these effects of speech, Tirrell offers an additional distinction for qualifying dangerous speech: ties to systems of oppression. In this context, protesters' intrusion

into each patient's "right to choose" compounds existing intrusion from the patriarchy and other social hierarchies that subordinate women.

Another defense of buffer zones can be gleaned from the widely accepted philosophy of Locke. Despite his relatively wide support for free speech, in "Toleration," Locke makes the caveat that we cannot tolerate intolerance. Though self-evident, such commonsense exemptions seem to be missing from our First Amendment. In other words, while we should tolerate abortion opponents' personal abstention from abortion, the principle of toleration implies that they should respect advocates' (and often apolitical clinic patients') choices to pursue such a service. Lastly, recalling the winning logic of *Roe v. Wade*, if American law chose to respect abortion as an intimate activity of one's personal sphere, our government should also uphold privacy (particularly from intrusive petitioners) to pursue this service.

Such dispute about the government's role in controlling our speech reached similar intensity in a thematically inverted case as well. California's 2015 "Freedom, Accountability, Comprehensive Care, and Transparency" (or FACT) Act came under fire and Supreme Court scrutiny for its alleged attack on religious freedom. More specifically, the state tried to require all licensed health centers (including pro-life crisis pregnancy centers) to notify patients of California's abortion legality and accessibility. Representatives of religiously-oriented clinics decried that this law would violate their constitutional right to religious freedom by mandating action (though simple as notification of abortion services) at odds with their beliefs.

Though unconvincing to the Supreme Court, defendants of the FACT Act illuminated important considerations to weigh in contrast with free speech. Recalling Mill's harm principle, the government seems justified in mandating healthcare providers at least *disclose* the legality of

abortion, seeing as from a physical health standpoint alone, abortion presents less danger of death to pregnant women than does childbirth. Lastly (beside defending that such a mandate is not viewpoint biased, but rather, all-viewpoint-inclusive), it is important to differentiate between provision of information and active encouragement of an option. Of course it would undermine religious integrity to *recommend* a contrary course of action, but to objectively *convey the fact* that (like it or not) the state of California *does* provide abortion services seems not to violate religious doctrine.

Though a right to free speech sounds simple on its surface, toleration of all speech clearly comes at a cost: the integrity of our other liberties, like unimpeded liberty to pursue an abortion or make an informed decision to or to not abort, aware of all our options. Thus, we must decide which values take priority over others, and accordingly, delimit freedom of speech at some point or another. Speech restriction makes no easy task in America considering conservative and constitutionalist defense of absolute interpretations. Alternative policy in otherwise comparable countries, however, sheds a light of hope that speech regulation *is* possible in this day and age. Thus, it seems time to admit that even “free speech” has its limits (where safety, autonomy, and other liberties begin).