

Caveat Censor

Review of J.P. Messina's *Private Censorship*, (Oxford University Press).

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[Penultimate draft published in *Philosophy of Management*]

Private Censorship, by J.P. Messina, Associate Professor of Philosophy at Purdue, grapples with many of the moral problems stemming from the fact that businesses are largely free – in the US at least – to “censor” their workers' speech or the content they provide in both traditional and new media environments. It's the first book-length treatise I've seen on this important subject, and Messina should be applauded for staking out what had remained until now a largely uncharted field. Furthermore, each chapter offers up a fair number of engaging real-world scenarios that instructors may find fruitful for class discussion and philosophical analysis. A challenge, however, is that many will want to supply their own theoretical toolboxes for framing debates and drawing compelling policy recommendations. This is because, while the text often reads as a self-conscious extension of the great utilitarian John Stuart Mill's public-sector analysis in *On Liberty*, it is couched in a classical liberalist framing that holds private organizational agents to precious few moral standards beyond the ones legal precedent happens to already have set forth. Through such a lens, should businesses choose to take the high road by granting their employees a measure of free speech or by dispelling dangerous yet revenue-generating misinformation, those prerogatives would seem to remain in an entirely supererogatory realm. While many of the cases under examination will strike readers as eminently urgent disputes opposing cherished rights to freedom – including to democracy itself – those hoping to find formal imperatives by which to hold business accountable or even best practices for curbing managerial overreach will have to make due with sanguine calls for magnanimity. Ultimately, it's more a bird's eye view of moral hazards below than a field guide to overcoming them on the ground. *Caveat censor* might be an apt subtitle.

Philosophers naturally tend to preference reflecting over acting and the approach will undoubtedly be well suited for topical courses in moral or political philosophy. Business students, however, are likely to leave somewhat more confused than they were to start with. That said, chapter three on Censorship and the Workplace could work as a fun stand-alone excerpt to assign them as grist for discussion in a module on employee privacy. Messina also sprinkles helpful cautionary questions here and there for individual instances in which a censoring party might be "contributing to or detracting from a healthy speech environment" (27). For example, in chapter one Free Speech and Non-State Censors (27):

1. Is the censoring party pursuing a legitimate fiduciary duty, creative vision, or giving voice to the vulnerable?
2. Is the censoring party pursuing the aim transparently or covertly?
3. Does the censoring party enjoy de facto monopoly power?
4. Are the sanctions for undesired speech proportionate, where they exist?
5. Is the censoring party acting in a way that promotes or maintains an atmosphere in which people feel free to express their unpopular views or an atmosphere of uniformity?

While these seem like perfectly reasonable considerations, Messina appears to take as first premise that business leaders should already care about such things as maintaining a free expressive atmosphere. What he provides in the way of buttressing the claim is rooted in his way of conceptualizing censorship as an activity which is essentially morally dubious to start with. He defines it as “*the attempted suppression of expressive content on the grounds that it is dangerous, threatening to (moral, political, or religious) orthodoxy or inimical to the material interests of the agent attempting to suppress it*” (7). The main purpose of this definition, as one can sense immediately, is to caution would-be private censors with the reminder that it is usually best to err on the side of allowing more speech -not less. This is for three main Millian reasons (12):

1. One could be factually wrong.
2. The warrant to continue in one's belief stems from remaining open to criticism from others, otherwise we are only reasoning in darkness.
3. Thought experiments on new and different approaches to living are necessary to maintain the autonomy to make decisions for ourselves.

These points are worth remembering and Messina applies them in every chapter to apt real-world scenarios, often taken from actual business cases. Much of the purpose of the chapter itself is to impress upon the reader how important the free speech of private organizations, including for-profit ones, is for fostering a healthy society. This includes the right to censor and/or disassociate from those whose views they abhor or that would conflict with their fiduciary obligations to maintain a profitable business. A thought experiment Messina returns to in chapter three, inspired by one of Robert Nozick's, is that of a small business owner who discovers that one of her otherwise valued employees appears to be advocating White supremacy in social media. After discussing the issue with the employee face-to-face, they come to understand that they have a strong difference of opinion, and so the employee is fired. The only justification Messina provides in this case is that the action is perfectly legal and this is as it should be given an assumption that it would be harmful to force business owners to continue working with those whose views they abhor. The possibility that magnanimity might extend beneficially to keeping this good employee on is never considered. Messina goes on to support the view by reminding us that the owner can also simply close the business permanently at any time which would be just as unfortunate to the employee. As such, both actions are taken to be perfectly personal prerogatives.

Unfortunately, no ethical, justice, or organizational theory is provided to support this argument besides a cavalier classical liberalism, which does not supply the grounding of a full-blown justice theory. As Messina well knows given his earlier work in a volume on classical liberalism (2022), other developed nations forbid employers to hire and fire based on political, religious, or philosophical beliefs. In France for instance, bosses must simply continue working peacefully with employees whose views they may well abhor. An additional benefit is that they also don't have to bear the brunt of potential customer boycotts for keeping such employees on as they cannot legally terminate them. Messina seems to believe that all which is required to reject such policies given their "uncertain benefits" is to recognize that they "certainly impinge on employer rights to freedom of association" (2022). Yet it's not clear that a utilitarian such as the one who penned *On Liberty* wouldn't find the French system preferable, since it would seem to foster a more open speech environment for

all, while giving voice to vulnerable employees. It's difficult to imagine how free association is unreasonably impinged as there is no evidence that business owners there are less apt to open or maintain commercial enterprises of any kind. Readers might also find that comparing such cases to deciding to simply close down the business entirely, which is also legal in France, is rather specious given that the decision would impact one's livelihood as opposed to the incomparably insignificant trouble of seeking and training a new employee. Ignoring such tensions between utilitarianism and classical liberalism is to court contradiction.

Ultimately, the book's Achilles heel is its glaring dearth of theory on which to ground its arguments and defend them against reasonable criticism. What theory is provided appears mainly in chapter two, Self-Censorship, Self-Restraint, and the Ethics of Conversation, which is essentially an appeal to civility, and especially on the importance of guarding against the discriminatory impulses of what he calls "strategic incivility," namely, de-platforming in all its forms, because it can (51):

1. Promote strong convictions at the expense of understanding.
2. May not be particularly likely to change what people believe.
3. Increase polarization by leading others to disengage, thereby reducing political autonomy and compromising democratic legitimacy.
4. Be strategically wielded by those in possession of the truth as well as by those peddling falsehood, and if it is effective, we take advantage of the risk of encouraging those who are wrong to do so as well.

Unfortunately, such lofty notions are offered with virtually no conceptual framework by which to compel business leaders to care. It's as if Messina assumes them to be philosopher kings already sophisticated and magnanimous enough to value the importance of fostering healthy critical speech environments. This is of course also one of the classic problems with utilitarianism; it avoids providing arguments for why we should act in certain ways by assuming that we already want to do so. Which is to say, it derives the *ought* from the *is*, also known as committing the naturalistic fallacy. The absence of theoretical heft also fails to supply the tools needed to flesh out – even hedonically – the various scenarios under examination.

The fog rolls in again and again, as in chapter three, Censorship in the Workplace, when the author relies on legal precedent to buttress another defense of the right to free (dis)association of employers from their employees. He reminds us that such rights thankfully still have reasonable limits in order to protect workers from sexual harassment or discrimination on the basis of race, sex, or other protected categories (69). Conveniently left out is the fact that the classical liberalism he defers to throughout the book might also provide good arguments *against* many of these protections, given that the construct only accepts *negative* rights against harm. Since there are no *positive* rights to receive goods from other private parties, there can be no rights to receive equal – or any – consideration in employment and all parties are free to accept or reject the terms of any relationship, whatever they may be. If he disagrees with this libertarian extension of classical liberalism, it's not clear how since the word "libertarianism" appears nowhere in the text.

Messina muddies the waters further down the page by arguing that such rights to censorious (dis)association allow each of us to "live in accordance with the values (one) deeply holds and to build a corner of the world where those values reign supreme" (69). This sounds strikingly like conservative U.S. Supreme Court Justice Neil Gorsuch admonishing Colorado's legal counsel for suggesting that civil rights to non-discrimination should trump the freedom to follow one's sincerely held religious beliefs, when say, deciding to discriminate against customers in a same-sex couple (303 Creative, LLC v. Elenis, 2022). The elephant in the room of course is the question of just which values should be allowed to reign supreme. This is where one would usually rely on some fully articulated normative theory. Otherwise, as Gorsuch's colleague Ketanji Brown Jackson retorted in the hearing, the door opens to any kind of discrimination needed to preserve one's holy nest. She asks us to imagine for example a photographer who offers historical period-style portraits and decides to exclude same-sex couples or inter-racial families in order to preserve a creative vision. It should be relatively easy to understand why this might be a dangerous precedent to invite concerning vulnerable groups, and so the lack of any normative framework to block such potential regress emits a deafening silence.

The only moral obligation ever defended in these pages is the exercise of caution. So long as executive decisions are made with caution, that seems to be all we can ask for. Messina makes this clear at the end of chapter three where he concludes that firing a Civis Analytics employee for his indelicate reminder during the Black Lives Matter riots that similar unrest after the MLK assassination seemed to have lost Humphrey the election to Nixon. For as Messina says, "when we fail to exercise caution, we too will be guilty of wrongdoing, just like Civis Analytics" (86). Evidently, it wasn't so much the firing that was wrong; it was doing so with insufficient caution. Messina offers good reasons in the chapter for why the company might have done better by keeping the employee on, essentially to foster a healthy atmosphere of viewpoint diversity. But in the face of competing demands, including the threat of boycotts, so long as a decision is made with "caution" – one way or the other – no wrongdoing occurs. It's as if Messina takes for granted that business leaders are latent deontologists concerned about the wider cultural atmosphere that their actions help to normalize. A typical passage on p. 82 says "we all have an interest in ensuring that we do not cultivate norms according to which productive relationships can be terminated for past mistakes for which persons have already atoned. The social world is perilous enough without its being the case that human enough missteps can cause irrevocable reputational damage." The book is chock full of such elegantly stated platitudes which never culminate into any kind of conceptual or situational methodology to apply in difficult cases so as to come up with the best option. Evidently, the ethics of private censorship amount to little more than managers and executives keeping in mind some very general rules of thumb.

Another particularly timely section arrives in chapter six, Search and Monopoly, in which Messina argues that Google is abusing its monopoly power in the way it markets its internet search function and text advertising, namely, by muscling out the competition. He certainly deserves credit here given that this view was just reified in U.S. federal court post publication. He offers little in the way of solutions however, assuming as usual that any attempt at regulation will only end up launching an endless game of whack-a-mole. Instead, he makes a passing suggestion that the government may do well to provide an ad-free public search tool to compete with the private sector. This is a compelling notion that would seem applicable to other spheres including social media, though the connection is not explicitly made.

A central bias of the book which becomes most glaring in this second-to-last chapter is that all judicious restraints seem to err on the side of allowing speech as opposed to disallowing it. Scarce attention is given to compelling arguments for a duty to censor in order to stem the spread of misinformation, which is now metastasizing at pandemic proportions. Though Messina does cite Brian Leiter's law review article "The Case Against Free Speech" (2014), no serious counterargument is offered besides a cursory overview of the Fairness Doctrine and a blithe assumption that it couldn't be effectively applied in the internet age, and that it never really was even in the radio age, given how difficult fairness is to police. No lines are spent on the possibility that regulation may actually be effectively written and enforced in ways Leiter or others have argued, such as Victor Pickard's book *Democracy Without Journalism? Confronting the Misinformation Society* (2019) calling for a publicly-owned and democratically-controlled media sphere, which might seem compatible with his public search option.

Messina casts but a deflating glance at the notion of repealing or reforming article 230 of the Communications and Decency Act in the U.S., absolving social media platforms from most user content liability which many prominent policymakers have called for including Barack Obama. Inexorably throughout the book, one gets the impression that nothing governmental can be done about such things from his default assumption that regulations are ineffectual at best and aggravating at worst. No effort is taken to look beyond the U.S. to see if other nations might be doing a better job, much the way defenders of the second amendment systematically ignore how other nations have managed to implement more effective gun control regulations.

Still, *Private Censorship* provides much food for thought, whetting our appetites for further analysis especially in the realm of virtue theory, which is often touched upon and could use further development. Indeed, it might prove a valuable springboard for enterprising researchers in this domain. Other theoretically apt frameworks to apply include John Rawls' *Political Liberalism* (1993), Stephen Darwall's *The Second Person Standpoint: Morality, Respect, and Accountability* (2006), or T.M. Scanlon's *What We Owe to Each Other* (2000). Absent such conceptual scaffolds, all remains a matter of personal preference. In the end, Messina simply invites us to reconsider our reactionary urges "when we are in charge of intermediate institutions which have a role in setting the terms of engagement" (180). For as he summarizes in conclusion (building on a backhanded Scanlon swipe p. 139-40): "Once we see that exercising our rights in the ways we might be immediately inclined to can keep our fellows from developing as individuals, we might refrain from exercising them in those ways" (179). And then again, we might not. Such deferential intimations won't be ruffling any C-suite feathers.

On behalf of all authors, the corresponding author states that there is no conflict of interest.

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